Winjoy Investment Pte Ltd v Goh Boon Huat and Another
[2002] SGHC 71

Case Number : DA 600026/2001

Decision Date : 15 April 2002

Tribunal/Court : High Court

Coram : S Rajendran J

Counsel Name(s) : Lee Han Yang and Gabrielle Tan (Yeo-Leong & Peh) for the appellants/defendants; James Yu and Jemy Ong (Yu & Co) for the respondents/plaintiffs

Parties : Winjoy Investment Pte Ltd — Goh Boon Huat; Another

Building and Construction Law – Damages – Damages for defects – Sale of unit in building project – Purchasers complaining layout not in accordance with approved plan – Remedy for alleged breach – Whether developers liable for loss of rental in addition to remedial works

Courts and Jurisdiction – Jurisdiction – Appellate – Finding of fact by trial judge – Whether appellate judge ought to upset finding – Whether finding against weight of evidence

Land – Sale of land – Contract – Sale of unit in building project – Purchasers to sign letter consenting to proposed revision to layout – Two copies of initial layout plan attached to letter due to clerical mistake – Purchasers signing letter of consent – Delivery of unit with revised layout by contracted date – Purchasers complaining layout not in accordance with approved plan – Developers carrying out remedial works – Purchasers claiming liquidated damages for late completion or loss of rental during remedial works – Whether purchasers on notice of mistake – Whether developers in breach of contract – Whether claim for liquidated damages apposite – Whether developers liable for loss of rental in addition to remedial works

Judgment

GROUNDS OF DECISION

1. The appellants ("Winjoy") were the licensed housing developers of a building project at Upper Bukit Timah Road known as "The Blossomvale". On or about 25 March 1996, having obtained the necessary approvals from the relevant authorities, Winjoy commenced selling the units therein to the public. The property market at the time was at or close to its peak and demand was high. Winjoy launched its sales even before any show flat/s had been constructed or the sales brochures printed. As noted by the learned trial judge in her Grounds of Judgment, of the 220 units in the said project, 188 units were booked and options issued on the first day of the launch!

2. Winjoy at the time of the launch had plans to "improve" the layout of the units and common areas in the building project. The proposed revision did not affect the size or location of the units. I will refer to the layout plan of the units that had been approved by the Building Authority when the sales were launched as Plan 1 and the proposed revision to the layout that Winjoy was seeking as Plan 2. Purchasers acquiring units before the proposed revisions were approved were required to sign a letter of consent which read:

> "Dear Sirs
>
> RE: THE BLOSSOMVALE
>
> We confirm that we have no objections to your submission to the Building Authority for the following amendments :-

Amendment to Unit Layout Plan

1. General revision of unit layout as per attached plan.

Amendment to Common Areas

1. Revision of M&E service layout and rooms, lift lobbies and other common areas.

2. Revision of building external elevations, roof, planters, staircases, car park lots, voids, railings and landscape layout.

We understand that these amendments are subject to modifications as may be approved by the Building Authority.

Yours faithfully

……..……

(Purchasers) "

To show the extent of the proposed revision, Plan 1 and Plan 2 were to be attached to the letter of consent.

3. The respondents ("Goh" and "Lee") were amongst those who secured an option on 25 March 1996. Their option was in respect of unit #06-16. They intended to purchase the unit as tenants-in-common with equal shares. As the brochures and show flat were at that time not ready all that Goh and Lee knew of the building project and of the unit was what they gathered from copies of the site plan, an artist's impression of the building project, the option and the letter of consent.

4. Before the grant of the option, the letter of consent was given to Goh and Lee for signature. Plan 2 was, however, not attached thereto but, due to a clerical error, two copies of Plan 1 were attached. Lee noticed that the two plans attached to the letter of consent were identical and allegedly commented to Alexia Koh ("Alexia") – a young marketing representative employed by Winjoy who was attending to intending purchasers – that there seemed to be no change in the two plans. Alexia apparently responded to that comment by saying that the changes were "marginal". According to a letter dated 17 August 1998 written by the solicitors of Goh and Lee to Winjoy, Goh and Lee understood Alexia's response to mean "minor changes or adjustments to the floor area of the rooms, toilets and wiring which were not decipherable or discernible from the drawings" and proceeded to sign the letter of consent. Lee testified that he had purchased the unit because the "feng shui" of the layout of the unit appealed to him. Winjoy's case was that the layout of the unit did not concern Goh and Lee as they were essentially speculators in a bullish property market whose primary concern was to secure a unit.

5. Goh, although a co-plaintiff in this action, did not testify at the hearing and did not even file an affidavit of evidence-in-chief. Apparently at the date of hearing Goh was out of town on business. But Goh's sister, Evelyn Goh Kah Eem ("Evelyn"), who was with Goh and Lee when the option was granted, testified as a witness. Her testimony was in line with that of Lee. Although the documentation reflected Goh and Lee as the purchasers of unit #06-16, Evelyn too had a beneficial interest in the unit. The purchasers of the unit in effect were Goh, Lee and Evelyn. In addition, Goh and Lee had given Evelyn's name and address to Winjoy as their authorised representative to whom correspondences should be sent.

6. Evelyn was herself also a purchaser of a unit in the "Blossomvale". The unit (#01-13) that Evelyn purchased was identical in size and layout to unit #06-16, save that as Evelyn's unit was on the ground floor it had the benefit of an additional enclosed space. Evelyn obtained the option to purchase her ground floor unit on 26 March 1996, the day after Goh and Lee had obtained their option in respect of unit #06-16. Evelyn too had signed the letter of consent to the proposed revision in the layout but in her case there was no error in the two plans attached.

7. Alexia was also not called as a witness. Evidence was led in the court below by Winjoy that Alexia had left their employ and when contacted took the position that she (Alexia) had no recollection of the details of the sales that she handled when the "Blossomvale" was launched for sale. Winjoy therefore did not call Alexia as a witness.

8. On 11 April 1996, Goh and Lee, through their solicitors, exercised the option and entered into a Sale and Purchase Agreement ("S&P Agreement") with Winjoy. The S&P Agreement was in the form prescribed in the Housing & Developers Rules 1985. Apart from the alleged conversation with Alexia referred to above, Goh and Lee did not, even at that stage, question Winjoy about the fact that the layout of the unit in the two plans attached to the letter of consent were identical.

9. When the brochures for the building project (which incorporated the "Proposed Revision") were printed, copies were sent to all the purchasers. The brochure meant for Goh and Lee was, on 17 July 1996, sent to Evelyn. Lee did not dispute the fact that the brochure had been sent to him and Goh but claimed that he had paid no attention to its contents.

10. The approval of the relevant authority for the Proposed Revision to the Layout Plan (ie Plan 2) was in due course obtained and the units were constructed according to the layout in Plan 2. When the temporary occupation permit ("TOP") for the development was obtained, notice under cl 11(1) of the S&P Agreement was sent to all purchasers to take vacant possession of their respective units. Notice was given to Goh and Lee on 17 June 1998 and they took vacant possession of unit #06-16 pursuant to that notice on 2 July 1998.

11. On 10 July 1998, Goh and Lee's solicitors wrote to Winjoy's solicitors to say that the unit that Goh and Lee had contracted to purchase was different from that delivered. Enclosed with their letter was the letter of consent with the two identical plans attached. On 3 August 1998, Winjoy's solicitors replied apologising for the error in enclosing two copies of the same plan to the letter of consent. They claimed that Goh and Lee were aware of the correct post-revision plan.

12. On 17 August 1998, Goh and Lee's solicitors gave notice to Winjoy to take immediate steps to re-do the layout of unit #06-16 to that which Goh and Lee had contracted for (ie Plan 1) and compensate Goh and Lee for the loss of use of the unit during the time required to do the remedial works. The first of the many items listed as not complying with the agreed plan was that the main door was now facing "west" when it should be facing "east". This claim was found not to have any basis. Amongst the other complaints raised were that the door to the master bedroom opened into the living area (which resulted in less privacy); the change in size and layouts of the bedrooms and kitchen; and that the new family room created had no value added because of the absence of natural lighting.

13. Evelyn brought to the attention of her boss, James Liu ("Liu") – the then Chief Executive Officer of Arab Bank – the differences in layout between the unit as constructed and the plans attached to the letter of consent signed by Goh and Lee. Liu, a friend of Cheng Wai Keung ("Cheng"), a Director of Wing Tai Holdings Ltd (a company related to Winjoy) raised the matter with Cheng. Thereafter, the marketing manager of Winjoy, Len Siew Lian ("Len"), contacted Evelyn to say that she had been

directed to do what was necessary to resolve the matter.

14. Discussions then ensued, mainly between Len and Evelyn, and eventually agreement was reached on the extent of the remedial works to be done. Winjoy also agreed to reimburse property tax and maintenance fees incurred by Goh and Lee during the period of the renovation works. On 4 November 1998, Winjoy collected one set of keys to unit #06-16 for the purpose of carrying out the remedial works. Goh and Lee retained the other two sets of keys.

15. The remedial works agreed upon involved the obtaining of planning approval, the choice of materials and colours to be used and the choice of designs for the built-in furniture. Liaising and agreeing on these matters caused considerable delay. According to Winjoy, the remedial works were completed on 30 June 1999 when they returned the front door key to unit #06-16 to Goh and Lee but retained the rear door key in order to enable the authorities to inspect the unit and for Winjoy to attend to some minor work. Lee and Evelyn disputed that the remedial works had been completed by 30 June 1999. They claimed that completion of the remedial works only took place on 21 August 1999 when Winjoy returned the rear door key to them.

16. It was Winjoy's position that the agreement reached between them and the purchasers (Goh and Lee) constituted a settlement agreement and as that agreement had been complied with Goh and Lee had no further claims on Winjoy. Lee and Evelyn disputed that position. Their position was the agreement reached with Winjoy was without prejudice to Goh and Lee's claim for damages arising from Winjoy's breach of conduct. The learned trial judge accepted the evidence of Goh and Lee on this issue. I saw no grounds for interfering with that finding.

17. Meanwhile, on 26 July 1999, Winjoy's solicitors gave notice to complete the purchase on account of the fact that separate title to the unit had been issued. On 4 August 1999, Goh and Lee's solicitors replied that Winjoy had yet to deliver possession of the re-constructed unit and that liquidated damages, under cl 11(a) of the S&P Agreement, were running against Winjoy as Winjoy had failed to deliver vacant possession of the unit by 31 October 1998.

18. On 27 August 1998, Winjoy's solicitors wrote to say that Winjoy had settled Goh and Lee's claims and had agreed to reimburse Goh and Lee's property tax and maintenance on an ex gratia basis. They stated categorically that Goh and Lee were not entitled to liquidated damages. On 28 October 1999, the parties completed the sale and purchase on a without prejudice basis and on 29 December 1999 Goh and Lee instituted these proceedings in the District Court.

The claim

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19. Goh and Lee's claim against Winjoy was based on cll 8(1) and 11(3) of the S&P Agreement. It will be helpful to set the material provisions in cll 8 and 11 in full:

> "8. (1) The Vendor shall forthwith erect *in a good and workmanlike manner the building unit* and the housing project together with all the common property thereof in accordance with the specifications described in the Third Schedule and *in accordance with the plans approved by the Building Authority and other authorities, which specifications and plans have been accepted and approved by the Purchaser as the Purchaser hereby acknowledges*.
>
> (2) No changes or deviations shall be made to the specifications and plans except such changes or deviations as may be approved or required by the Building Authority or other authorities.

…

11. (1) The Vendor shall complete the building unit *so as to be fit for occupation* and remove all surplus material, plant and rubbish from the building unit and the housing project and *deliver vacant possession of the building unit to the Purchase on or before the 31st day of October 1998*.

(2) On delivery of vacant possession of the building unit to the Purchaser, the Vendor shall deliver to the Purchaser or his solicitors a copy of the temporary occupation permit or certificate of statutory completion for the occupation of the building unit issued by the Building Authority together with the certificate of the Vendor's architect that the building unit and the housing project and all roads and drainage and sewerage works of the housing project have been constructed in accordance with the plans and specifications approved by the Building Authority and that water, electricity and gas supplies have been duly connected to the building unit.

(3) *If the Vendor fails or is unable to deliver vacant possession of the building unit to the Purchaser on the date specified in paragraph (1) for any reason whatsoever, the Vendor shall pay to the Purchaser liquidated damages* calculated from day to day at the rate of 10% per annum on the total sum of all the instalments paid by the Purchaser towards the purchase price for the period commencing immediately after the date specified in paragraph (1) and ending on the date vacant possession of the building unit is delivered to the Purchaser.

(4) … "

(Emphasis added.)

It was Goh and Lee's pleaded case that, in breach of cl 8, Winjoy had built the unit so fundamentally and substantially different from the plans approved by the Building Authority that the unit was not fit for occupation. It was alleged that as a result the notice of 17 June 1998, to Goh and Lee, to take possession was not in compliance with cl 11(1) and Winjoy could only be said to have delivered possession of the unit to Goh and Lee, on 21 August 1999 when Winjoy completed the remedial works and handed the rear door key to Goh and Lee. Goh and Lee therefore claimed liquidated damages under cl 11(3) from Winjoy for the period 31 October 1998 to 21 August 1999.

20. In the alternative, Goh and Lee claimed that by reason of Winjoy's breaches they were unable to rent out the unit from 2 July 1998 to 21 August 1999 and thereby lost the profit they would otherwise have made if Winjoy had delivered possession of the property on 2 July 1998 in a condition that complied with the requirements of the S&P Agreement.

21. The learned trial judge summarised the defences raised by Winjoy and the Reply of Goh and Lee as follows:

"The defence was twofold: (1) the defence pleaded that the plaintiffs were aware of and approved of the post revision plan [Plan 2] although at trial, the defence did not pitch its case as high and merely said that the plaintiffs knew of the mistake in the plan; and (2) that it was pursuant to a settlement agreement entered into in late January 1999, that Winjoy carried out the works and offered to reimburse the plaintiffs for property tax and maintenance fees up to the completion of the works. Alternatively, the plaintiffs were estopped from making the claim against Winjoy.

In their reply, the plaintiffs denied knowledge of Plan 2 or of any mistake in the plans or the

existence of any settlement agreement."

In summarising of the defences the learned trial judge appears to have left out two further defences raised:

(a) That Winjoy had complied with cl 8 of the S&P Agreement. In the event the court held otherwise, the remedy available to Goh and Lee is under cl 18(1) of the S&P Agreement which remedy had already been accorded to Goh and Lee in that Winjoy has made good the layout to the satisfaction of Goh and Lee; and

(b) That Winjoy, in compliance with cl 11(1) of the S&P Agreement, had delivered vacant possession of the completed unit – in a condition "fit for occupation" – before 31 October 1998 as required under cl 11(1) and consequently Goh and Lee could not claim liquidated damages under cl 11(3).

I will first deal with the issue whether Goh and Lee were aware – at the time they signed the option or at any time before they signed the S&P Agreement – that two identical plans had been attached to the letter of consent by mistake.

22. On the issue of the "mistake" the learned trial judge held that there was nothing "bizarre or suspect" in the explanation given by Alexia that the changes were marginal and, accordingly, it was reasonable for Goh and Lee to trust that explanation and sign the letter of consent. The learned trial judge went on to find that Winjoy was in breach of cl 8 of the S&P Agreement in not having built the unit in accordance with the layout plan (Plan 1) approved by Goh and Lee. She found that Winjoy had not, by 31 October 1998, delivered a unit built in compliance with the S&P Agreement to Goh and Lee and that as a consequence liquidated damages under cl 11 was payable. She further found that Winjoy had handed possession of a unit that complied with the S&P Agreement only on 21 August 1999 and ordered that liquidated damages under cl 11(3) for the period 31 October 1998 to 21 August 1999 (less 33 days for delays attributable to Goh and Lee) be paid by Winjoy to Goh and Lee. In addition, she also ordered that Winjoy pay the property tax and service charges in respect of the unit up to 21 August 1999.

The mistake

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23. Winjoy enclosed two plans to the letter of consent – one marked "Approved Plan" (Plan 1) and the other marked "Proposed Revision" (the intended Plan 2) with a view to highlighting the differences in layout between Plan 1 and Plan 2 to the purchaser. However, the layout of the two plans annexed to the letter of consent signed by Goh and Lee were identical. By no stretch of the imagination could two identical copies to reflect the "general revision of unit layout" referred to in the letter of consent. There was no room even to say, in respect of the two plans attached, that the differences were "marginal" as Alexia was alleged to have said. On the face of the two plans attached, it must have been obvious to any looking at the plans that a clerical error had occurred and that one of the plans had been annexed in error.

24. That a clerical mistake had been made was obvious not only from the fact that the layouts in the two plans were identical; it was also apparent from the stamps that appeared on the two plans. At the bottom right of both the plans the words "Layout of Approved Plan" with the date "28/01/96" stamped: a clear indicator that both were copies of the layout plan approved on 28 January 1996 – ie Plan 1. Further, in one of the plans, consistent with the words "Layout of Approved Plan", there was

another stamp bearing the words "Approved Plan". Under the words "Approved Plan" the unit number to which the plan related was correctly stated as #06-16. In the other plan, the additional stamp read: "Proposed Revision". The same layout could not at the same time be the "Approved Layout" as well as the "Proposed Revision" to that layout. Further, under the words "Proposed Revision", the unit number stated was of another unit #06-15, and not #06-16 the unit purchased by Goh and Lee. It would have been obvious from all this that a clerical error had occurred and that the "Proposed Revision" plan in respect of unit #06-16 had not been attached to the letter of consent that Goh and Lee signed.

25. The learned trial judge does not appear to have given sufficient consideration to the fact that when Goh and Lee found two identical layout plans attached to the letter of consent they would have known that something was amiss. Even if Alexia did in fact say to Lee that the changes were marginal, that statement – in the light of the identical layouts in the two plans attached – just could not be correct. I therefore cannot agree with the learned trial judge that there was "nothing untoward" and "nothing suspect" in what Alexia said.

26. The learned trial judge also appears to have misdirected herself when she stated in her Grounds of Judgment:

> "If Winjoy wished to take the position that it was *impossible* for the plaintiffs not to have been aware of the mistake in the layout plan, Winjoy should have called [Alexia]."
>
> (Emphasis added.)

The identical nature of the layout in the two plans attached and the inconsistency between the words "Approved Layout Plan" and "Proposed Revision" stamped on one of the plans, are such that Goh and Lee would be on notice that there was a mistake in the plans attached. In those circumstances, I could not agree with the learned trial judge that it was "impossible" for Winjoy, without calling Alexia, to take the position that Goh and Lee were aware of the mistake in the layout plan. I was of the view that not only was such a conclusion possible but, in the circumstances, it was the proper conclusion to arrive at.

27. Sitting as an appellate judge I would, ordinarily, be reluctant to interfere with a finding of fact made by the trial judge. I would do so only for good reason. In this case, I found that the learned trial judge's finding went against the weight of the evidence. I was therefore unable to uphold her finding that it was "perfectly reasonable for Goh and Lee to repose trust in what Alexia said". It seemed to me that the truth of the matter was that when Goh and Lee signed the letter of consent on 25 March 1996, they were not particularly concerned with the layout of the unit and did not trouble themselves to have the obvious error of having two identical plans attached to the letter of consent corrected or properly clarified. There was therefore no question of their reposing trust in what Alexia said.

28. This finding that Goh and Lee were indifferent to the layout of the unit was further supported by the fact that Evelyn, a co-owner of unit #06-16, had, on 26 March 1996 – ie the very next day – signed a similar letter of consent in respect of another unit in the same development (#01-13) which Evelyn purchased. The layout of the plan stamped "Approved Layout" (Plan 1) attached thereto – save for an additional enclosed space by reason if it being a ground floor plan – was identical to the layout in the two plans attached to the letter that Goh and Lee signed. The layout of the other plan stamped "Proposed Revision" (Plan 2) was distinctly different from the "Approved Layout" plan (Plan 1). Given the closeness of the relationship between Evelyn, Goh and Lee, it goes against the grain that Evelyn did not draw the attention of Goh or Lee to the distinctly different layout plans.

29. Another unusual feature was the fact that before exercising the option and entering into a S&P Agreement, Goh and Lee had not, through their solicitors, asked Winjoy to explain – an explanation that other purchasers of units in the "Blossomvale" who had signed letters of consent with identical plans attached had sought – why the two plans were identical. The claim by Lee that he paid no attention at all to the brochure sent by Winjoy (which incorporated the Proposed Revision) was also surprising.

30. I accepted the submission of Winjoy that Goh and Lee were speculators and that the internal layout of the unit they purchased was not of particular concern to them. In signing the letter of consent with the knowledge that the plans annexed were in error, Goh and Lee were signifying their consent to whatever changes to the layout plan that the Building Authority might approve. Their prime concern – in the bullish property market then prevailing – was to secure a unit in the "Blossomvale". In those circumstances, I found that there was no breach of cl 8(1) when Winjoy constructed unit #06-16 in accordance with Plan 2. Reluctant though I was to upset a finding of fact by a trial judge, I formed the view that in this case it would be proper to do so.

31. The above finding is enough grounds on which to allow Winjoy's appeal and set aside the decision of the learned trial judge. However, Mr Lee Han Yang (counsel for Winjoy) had submitted at length on the issue of whether Goh and Lee, in the event Winjoy was in breach of their obligation under cl 8(1) to build unit #06-16 in accordance with Plan 1, were entitled – as the learned trial judge had held – to obtain liquidated damages under cl 11 and, if not, whether they could, besides requiring Winjoy to re-do the layout under cl 18(1) of the S&P Agreement (which Winjoy had done), obtain further damages from Winjoy. These issues, in view of the finding I made that Winjoy was not in breach of cl 8(1) of the S&P Agreement, are strictly irrelevant. I address them here only for the sake of completeness.

Liquidated damages

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32. Liquidated damages are payable by the vendor if, to trace the language used in cl 11(3) of the S&P Agreement, "the vendor is unable to deliver vacant possession of the building unit to the purchaser on the date specified in cl 11(1)". The date specified in cl 11(1) was "on or before the 31st day of October 1998". Clause 11(1) required that the vendor, inter alia, to complete the building unit "so as to be fit for occupation" before delivering vacant possession.

33. In this case, Winjoy had delivered, and Goh and Lee had accepted, vacant possession of unit #06-16 on 2 July 1998 – a date well within the delivery date of 31 October 1998 specified in cl 11(1). At the time of the delivery all the conditions stipulated in cll 11(1) and 11(2) had been met and there was no dispute that unit #06-16, when handed over to Goh and Lee on 2 July 1998, was "fit for occupation" in the ordinary sense of that expression. Goh and Lee's complaint relating to unit #06-16 was not that it was not "fit for occupation" but that its layout did not accord with the layout envisaged in their contract with Winjoy.

34. The learned trial judge in awarding liquidated damages under cl 11(3) for the alleged breach by Winjoy in not having built the unit in accordance with plans approved by Goh and Lee said:

> "Clause 11 provides that the vendor shall complete the building unit so as to be fit for occupation and remove all surplus material, plant and rubbish from the building unit and the housing project and deliver vacant possession by a specified date. *The purpose of Clause 11 would be defeated*

if the vendor could be treated as having delivered possession when works, inspection by authorities and handover of a key were pending. I found that Winjoy delivered possession only on 21 August 1999."

(Emphasis added.)

With respect, I do not think that that approach is tenable. The "works and inspection by the authorities" referred to by the learned trial judge were undertaken by Winjoy as a consequence of complaints from Goh and Lee after vacant possession under cl 11(1) had been delivered to Goh and Lee. These complaints – that the layout of the unit was not in accordance with the plans that had been agreed to by Goh and Lee – did not detract from the fact that the unit was "fit for occupation" and that vacant possession of the unit had been handed to Goh and Lee on 2 July 1998.

35. The remedy provided for in the S&P Agreement to cover complaints such as those raised by Goh and Lee is contained in cl 18(1) which reads:

"18. (1) *Any defect, shrinkage or other faults in the building* and in the housing project and all the common property thereto which shall become apparent within a period of 12 months from the date of notice to the Purchaser to take vacant possession and *which shall be due* to defective workmanship or materials or *to the building unit* and the housing project and all the common property thereto *not having been constructed in accordance with the specifications and plans* (amended or unamended, as the case may be) *shall be made good by the Vendor at its own cost and expense* within one month of its having received written notice thereof from the Purchaser and if the defects, shrinkage or other faults are not made good by the Vendor as aforesaid, the Purchaser and the management corporation of the housing project shall be entitled to recover from the Vendor the costs of making good the defects, shrinkage or other faults and the Purchaser may deduct such costs from any sum which has been held by the Purchaser's solicitors as stakeholder for the Vendor.

Provided that the Purchaser shall at any time after the expiry of the said period of one month notify the Vendor of the cost of carrying out any works to make good the defects, shrinkage and other faults before the commencement of the works and shall give the Vendor an opportunity to carry out the works himself within 14 days from the date the Purchaser has notified the Vendor of his intention to carry out the said works."

(Emphasis added.)

Insofar as is relevant to the issues in this case, cl 18(1) in effect provides that:

"Any defect, shrinkage or other faults in the building … which shall be due … to the building unit … not having been constructed in accordance with the specifications and plans … shall be made good by the Vendor at its own cost and expense …"

Goh and Lee's complaint, that unit #06-16 had not been built according to the agreed layout, had been attended to by Winjoy at its own cost and expense to the satisfaction of Goh and Lee. By so doing, Winjoy had complied with its obligations under cl 18(1).

36. The remedying of defects under cl 18(1) is, however, a separate regime from the claim for liquidated damages for late completion under cl 11(3). In the present case, a claim for liquidated damages under cl 11 of the S&P Agreement would have been well founded if, and only if, Winjoy had failed, by 31 October 1998, to hand over to Goh and Lee unit #06-16 in a condition "fit for

occupation". But that was not the claim here. The claim here was for a breach of cl 8(1) of the S&P Agreement, namely, the obligation of Winjoy to build the unit in accordance with plans approved by Goh and Lee. For such a breach, a claim for liquidated damages under cl 11(3) is not apposite.

37. There is support for the above proposition in the case of *Kassim Syed Ali & Ors v Grace Development Pte Ltd & Anor* [1998] 2 SLR 393. That was also a case involving a developer and a purchaser of a unit in the development. In that case, Grace Development was found to be in breach of the S&P Agreement for not having delivered to a purchaser (Kassim) a unit in a "hotel-cum-shopping complex" as envisaged in the S&P Agreement between the parties. Kassim sought to obtain liquidated damages from Grace Development under cl 14(2) of that S&P Agreement for the loss he suffered as a result of that breach. Clause 14(2) provided as follows:

> "The said notice to complete shall be given by the vendor on or before 31 December 1990. If the vendor shall fail to give the said notice to complete on the date fixed for completion the vendor shall pay to the purchaser liquidated damages calculated from day to day commencing from the date when such notice to complete should have been given at the rate of 9% per annum on a sum equal to 85% of the purchase price such interest may be deducted from any instalment due and payable to the vendor."

Kassim argued that, because of the breach of contract, Grace Development was unable to serve a valid notice to complete on Kassim and, until such time as the court orders completion to take place, Kassim was entitled to liquidated damages under cl 14(2). LP Thean JA, delivering the judgment of the Court of Appeal, rejected that argument as "wholly unsound" and went on to say at page 404E:

> "*The liquidated damages under cl 14(2) are payable only in the event that the notice to complete was not given by the first respondents on or before 31 December 1990*. The notice to complete was given by the first respondents on 15 April 1991 or thereabouts and liquidated damages computed in accordance with cl 14(2) had been deducted from the amounts payable to the first respondents as shown in the completion account. *Clause 14(2) is not applicable in assessing damages for the loss, if any, occasioned to the appellants by reason of the breach of contract on the part of the first respondents*. We can find no basis for applying this provision."
>
> (Emphasis added.)

In that passage, the Court of Appeal has, in effect, ruled that a clause such as cl 14(2) – a liquidated damages clause for late completion – is not applicable in assessing damages for the loss, if any, occasioned to the purchaser by reason of breaches of contract by the developer other than failure to deliver vacant possession of the unit by the contracted date.

38. Kassim's arguments in that case were analogous to Goh and Lee's arguments, in the present case, that the notice to take vacant possession under cl 11(1) was not valid because the building unit that Winjoy wished to deliver was not the building unit that Winjoy had contracted to build and, accordingly, vacant possession of unit #06-16 was not delivered to Goh and Lee by 31 October 1998. For the reasons given by the Court of Appeal, I rejected that argument.

39. In the case of Kassim, the Court of Appeal held that Kassim, in order to recover damages, would have to prove the loss he had in fact suffered by being given a unit in an "office-cum-shopping complex" instead of a "hotel-cum-shopping complex". To prove that loss Kassim would have had to adduce evidence that the unit delivered to him was inferior (in terms of market value) to the unit in a "hotel-cum-shopping complex" that should have been delivered to him. Kassim failed to adduce any such evidence and as a consequence he was not, at the trial, awarded any damages. In upholding

that decision, LP Thean JA stated at page 404A:

> "Damages" are compensatory, and one cannot seek compensation in vacuo. Compensation must be measured against the loss suffered. In our judgment, the appellants have not proved that what they got was less valuable than what they had contracted for".

Unlike Kassim, Goh and Lee in the present case were not claiming for any diminution in the market value of the unit but for the loss suffered as a result of their inability to rent the unit during the period of the remedial works. Even so, the burden of proving the rental loss was on Goh and Lee.

Damages

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40. I now turn to the question of the remedies available to Goh and Lee if Winjoy had in fact been in breach of cl 8 in having built unit #06-16 with a layout different from that agreed to with Goh and Lee. For such a breach, the solution provided for in the S&P Agreement was in cl 18(1). Winjoy had attended to this complaint of Goh and Lee and the requirements of cl 18(1) had, in effect, been adhered to. The question that arose was whether the purchaser, besides getting the vendor to make good the defects under cl 18(1), could hold the vendor liable for other losses sustained.

41. In the present case, the remedial works undertaken by Winjoy took a considerable amount of time and Goh and Lee had (during that time) been unable to rent out the unit. They had, during the period, also suffered losses by way of property tax and service charges for the unit. Could they recover such losses?

42. In principle, I did not see why a developer, in a case like this, should not, in addition to carrying out remedial works under cl 18(1), be liable to the purchaser for losses arising from the breach, including loss of rental income whilst the remedial works were being carried out. Mr Lee did not seriously seek to argue otherwise and limited his submission to pointing out that at the hearing below no evidence at all was adduced as to how rentable the units were, how long it would take to obtain a tenant and what rental the unit could reasonably fetch in the market.

43. I will deal briefly with the claim for the property tax and service charges before I deal with the claim for lost rental. Mr Lee pointed out that a considerable portion of the time taken to re-do the flat was attributable to delays on the part of Goh and Lee in responding in a timely way to matters that required their input and that Winjoy had, in any event, as a gesture of goodwill, reimbursed Goh and Lee the property tax and service charges up to 30 June 1999 when Winjoy returned the front door keys of the unit to Goh and Lee. He submitted that by that date the remedial works had, for all practical purposes, been completed and Winjoy should not be held responsible for property tax and service charges after that date. I accepted that submission.

44. The claim for lost rental had been argued, at the hearing below, on the basis of liquidated damages payable under cl 11(3) and as a consequence little or no attention had been paid to proving actual losses. Given the paucity/absence of evidence, the court, if it were to assess the rent lost, would be relying on hearsay and/or indulging in speculation. Mr Lee submitted that, as no evidence was adduced on the basis of which the court could determine the amount of rent that could reasonably be said to have been lost, no damages should be awarded. Mr James Yu (counsel for Goh and Lee) submitted that, at the very least, the court should award some nominal damages for the lost rent.

45. Goh and Lee, not having adduced evidence at the hearing below relating to the rental that could be said to have been lost during the period the unit was being renovated, it is very difficult for a court to assess what that loss should be. However, in view of the fact that Winjoy was, in the first place, not in breach of cl 8(1) of the S&P Agreement, the issue, even of awarding nominal damages, was academic as no damages would, in any event, be payable.

46. For the above reasons, I allowed the appeal with costs both here and below.

Sgd:

S. RAJENDRAN
Judge