Haslina bte Hj Mohd Taib & Anor … Appellants

AND

Ismaco Properties Sdn Bhd … Respondent

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 2 of 2010)

Before: Mortimer, P.; Davies and Rogers, JJ.A.
1st June, 2010.

Contract. Repudiation. General damages for breach by repudiation. Damages to be assessed as at date of acceptance of repudiation. Measure of damages. Assessment of present value of sums to be received in the future.

Mr. Lee Yew Choh of Messrs. YC Lee & Lee for the Appellants.
Mr. Kelvin Lim of Messrs. K. Lim & Co. for the Respondent.

Cases cited in the Judgment:

Chaplin v Hicks [1911] 2 KB 787
Golden Strait Corporation v Nippon Yusen Kubishka Kaisa [2007] UKHL 12 at 9, 29, 57.

Davies, J.A.:

This is an appeal against a judgment given in the High Court on the 18 February 2010 in favour of the plaintiff Ismaco against the defendants Haslina binti Hj Mohd Taib ("Haslina") and Hasmiron bin Hj Mohd Taib ("Hasmiron") for $38 special damages and $1.416 million general damages for breach of contract. The damages were awarded because the learned trial judge held that the defendants' predecessor in title, the late Hj Mohd Taib bin Hj Ibrahim had repudiated an agreement with the plaintiff made on 14 July 1998; that the plaintiff had accepted that repudiation; and that, in consequence, the plaintiff was entitled to the damages awarded.

The defendants appeal to this Court against the judgment. The grounds of appeal, as set out in the Petition of Appeal, contend that the learned judge was wrong in concluding that their predecessor in title repudiated the agreement; and, in the alternative, contended that he was wrong in awarding the damages which he did.

On 6 May, 2010, the plaintiff filed in this Court a notice pursuant to Order 57 rule 7 by which it contended that the learned trial judge should have awarded damages in a higher sum than that which he awarded in his judgment.

In his judgment the learned judge referred to Ismaco as the plaintiff and the late Hj Mohd Taib bin Hj Ibrahim as the defendant. It is convenient to adopt that terminology in this judgment. It is also worth noting at the outset that the plaintiff had two shareholders and directors, Teo Yik Chang (Teo), a Malaysian national, and Ismail bin Hj Abd Hamid, a

Brunei national, but that the latter took no active part in the events the subject of this appeal.

On 14 July 1998 the plaintiff, by Teo, and the defendant entered into several written agreements, the principal ones being one described merely as an agreement, but dated 14 July 1998 and one described as a deed of development, but left undated. Also on that date the defendant executed two documents described as powers of attorney in favour of the plaintiff. Only one of these may be relevant to this appeal.

The dated agreement recited that the defendant was the beneficiary of the estate of his late father and consequently the beneficial owner of certain land; that the document of title to that land had been lost and an application had been made for the issue of a new document of title; that that land had been the subject of compulsory acquisition by the government in which part had been acquired the purpose of construction of a highway and public roads leaving two sublots; and that in consideration of the payment of money by the plaintiff to the defendant, the defendant would appoint the plaintiff as developer for development of one of those proposed sublots then identified as proposed lot 38555 on an annexed plan. The agreement then provided for that appointment, more specifically, to develop and construct on that proposed sublot such number of units of commercial shophouses as may be approved by the authorities upon the terms of a development agreement to be executed simultaneously. By the agreement the defendant also undertook to obtain the transfer and transmission to himself as sole beneficial owner of the proposed lot.

The deed of development, executed at the same time, contained, amongst others, the following provisions:

- that in consideration of the plaintiff's agreement to carry out the development and construct shophouses on the proposed sublot at its sole cost and expense, the defendant agreed that the plaintiff would be entitled to 50% of the units of shophouses constructed for a term of 60 years;
- that the deed was subject to final government approval for change of title conditions to the land to commercial purposes and for construction of shophouses;
- that as soon as the parties had signed the agreement the plaintiff would with the cooperation of the defendant apply for change of title conditions to the land to commercial purposes;
- that within six months after the approval of the change of title conditions the plaintiff would instruct a firm of architects and engineers to prepare architectural and engineering plans for the development;
- that as soon as all necessary approvals have been obtained, the plaintiff would diligently proceed with and complete the shophouses;
- that in the event that the defendant would do anything which rendered performance of the agreement impossible the plaintiff would be entitled to terminate the agreement forthwith and the defendant would be obliged to reimburse and indemnify the plaintiff in respect of all costs and expenses incurred together with loss of profits;
- that the plaintiff should be entitled to assign its share, rights and liabilities under the deed to another party or parties with prior notice or consent of the defendant, such consent not to be unreasonably withheld.

By the relevant document described as "Power of Attorney" the defendant purported to appoint the plaintiff his attorney to, amongst other things:

- represent him in dealings with relevant Government authorities concerning the development of the sublot; and
- sign on his behalf all documents and application relating to the development.

This document was relied on at trial by the defendant, apparently for the purpose of arguing that it was the obligation of the plaintiff, not of the defendant, to make the application for change of title conditions in respect of the proposed sublot. To the extent that he relies on this document, this argument may be disposed of immediately. Section 2 of the *Powers of Attorney Act*, Cap 13 provides:

> *"2. No instrument purporting to create a power of attorney executed before or after the commencement of this Act shall have any validity to create such power within Brunei Darussalam unless the execution be verified by the attestation of one or more witnesses."*

This document was not so witnessed. It accordingly did not operate as a power of attorney. Much the same consequence followed from failure to deposit the document in the office of the Registrar: see section 3.

To be fair to Mr Lee, who appeared for the defendant on appeal, he did not rely on the document as a power of attorney. Whether, nevertheless it may have created or been evidence of the agency of the plaintiff to act in the above ways is another matter which may require consideration.

It is plain from the recitals to the dated agreement that on 14 July the defendant did not have legal title to the proposed sublot and that there were a number of impediments to the defendant's obtaining that title. For that reason it was agreed that the development deed would not be stamped until that sublot was registered in the defendant's name.

According to Teo's uncontradicted evidence, he discovered some time after 14 July, 1998 that there was to be another compulsory acquisition of land, which included part of the proposed sublot, for construction of a roundabout. Notification of this resumption was given on 4 July, 2000. In the event, title to the land thenceforth to be developed issued on 5 May, 2004. However it seems that this was title to the defendant as administrator of the estate of his late father. More importantly, it had a different description from former sublot 38555, lot 57087, a different area and different boundaries. On 24 May, according to Teo, he accompanied the defendant to the Land Office when the latter collected the title document.

In the light of these impediments to the obtaining of title to the proposed sublot, of the defendant's obligation under the dated agreement to obtain title to the proposed sublot and of the fact that title to a somewhat smaller parcel of land was not obtained until 5 May 2004, it is necessary to construe one of the terms of the development deed set out in summary form above. That term is as follows:

> *"2.2 As soon as the Parties have signed this agreement, the Developer shall with the co-operation of the Owner apply for change of title conditions to the said parcel of land to commercial purposes."*

Read literally, this required such an application by the plaintiff for change of title conditions on or shortly after 14 July, 1998. There is no evidence that the plaintiff did anything towards the making or advancement of any such application before 24 May, 2004. The defendant contended and contends that this was a breach by the plaintiff of this term. The learned primary judge held, in effect, it was not. He said in his judgment:

> *"It is also clear that in 1998, it was known that the land was likely to be subject to government acquisition, a fact which would blight the land until resolved. It could not therefore be known what land if any would be left available for development. The idea that Teo should have been taking any other steps is simply premature. It is inconceivable that an application for change of condition would have been entertained at that stage."*

The defendant contended and contends before this Court that it was not open to the judge to speculate whether the plaintiff's application to the Lands Office for change of title conditions, if one had been made before 24 May, 2004, would have been entertained. We will come to that contention later.

The learned trial judge's conclusion as to what occurred on and after 24 May, 2004 depended on his substantial acceptance of the evidence of Teo. There are a number of reasons why we would not interfere with that. In the first place, Teo's evidence on these matters was, in almost all material respects, uncontradicted. The following is the only material put forward to the contrary.

The defendant had died prior to trial. There was a document headed "EXECUTIVE SUMMARY", consisting partly of statements of fact and partly of argument, apparently prepared, according to Haslina, from notes which the defendant had made and from information which the defendant had given her brother Hasmiran. The notes were not in evidence and Hasmiron was not called as a witness despite his presence in court during the hearing. Haslina said in evidence, "I translated and checked with father" but it is unclear what this means.

No attempt appears to have been made to seek to make this document admissible pursuant to section 32 of the *Evidence Act* and it is difficult to see how any such application would have succeeded. If its admission had been objected to it would not appear to have been admissible as evidence of the facts contained in it. However it was admitted into evidence, apparently without objection. Nevertheless the judge said that, as it was not capable of being tested by cross-examination, it did not carry the weight it might otherwise have done. Presumably that meant that it was not accepted by him except to the extent that it was consistent with the evidence of Teo.

The defendant's daughter, Haslina, gave evidence of her recollection of events but was able to give little material evidence. She was living and working in England between 1997 and October 2006 and was in Brunei on holiday only twice a year. She was unable to give direct evidence of any conversations between Teo and the defendant.

Secondly, Teo's evidence was, in a number of important respects, supported by correspondence or other contemporaneous documents. We will refer to those. And thirdly the learned judge had the advantage, which we do not, of seeing and hearing that and other oral evidence.

It is true that there were several respects in which Teo's character was called into question but the learned judge properly took those matters into account in assessing Teo's credibility in respect of the questions in issue. Mr Lee wisely did not challenge the learned trial judge's findings in this respect. Accordingly, our description of events will be taken substantially from the judge's findings.

Before turning to the events on and after 24 May, 2004, we point to the fact that, even though it was the defendant's sole obligation to obtain title to the proposed sublot, from shortly after 14 July, 1998 Teo commenced making regular trips to the Land Office to make enquiries about the progress of the resumptions and subdivision. His evidence in this respect was supported by the uncontradicted evidence of an officer in that Office. Teo said that he had been told by someone at the Land Office that a change of title conditions could not be obtained until the title deed issued and these attendances were some evidence of attempts by Teo to accelerate this process.

We should also mention that, in October, 2003, when Teo visited the defendant in hospital, the defendant told Teo not to proceed with the development because the economy was bad, having an adverse effect on the property market and offered to refund the money which the plaintiff had already paid. Teo refused his offer. We mention this because of the plaintiff's contention that the defendant, for some time prior to his repudiation of the agreement, was attempting to terminate it in order, Teo contended, to take over the development himself.

Teo said that when he accompanied the defendant to the Land Office on 24 May, 2004 he handed the latter a form of application for change of title conditions from agriculture to commercial. He asked the defendant to sign it and return it to him so that he could submit it. After that date he repeatedly reminded the defendant to sign the form. The defendant's continued failure to do this strengthened Teo's belief that the defendant was thinking of, himself, taking over the development.

On 28 August, 2004, a meeting took place between Teo and his fellow shareholder of the plaintiff, on the one hand, and, on the other, the defendant and some of his family members. According to Teo, at that meeting the defendant, for the first time, raised concern about the plaintiff's willingness to proceed with the development. Teo replied that the plaintiff had spent time and money to secure the defendant's title and that all that was now necessary was for the defendant to make the application for change of title conditions.

Also at this meeting according to Teo, for the first time the defendant raised concern about the plaintiff's financial capacity to proceed and requested that the plaintiff pay a deposit of $4million into an account as a guarantee of performance. Teo refused this as it was not in the agreement and was not the custom in Brunei.

Haslina was not present at that meeting. What purports to be minutes of that meeting, said to have been prepared by the defendant, are in evidence. These seem to have been admitted without objection. There were present at this meeting, apparently, three other members of the defendant's family, described in the minutes document as witnesses. None of them gave evidence in this case notwithstanding the presence of each of them during the hearing.

Consequently the contents of the "minutes" document were not proved by any of the persons shown to be present and were in substantial respects contradicted by Teo who said that he had not seen them before this action. Although the learned judge recited these as part of the defendant's case it is unclear what weight he gave them. In view of what we have said they should not have been given any weight except to the extent that they were consistent with the evidence of Teo.

On 27 December, 2004, there was a telephone conversation between Haslina, purportedly on behalf of her father, and Teo. Teo said that in that conversation he told Haslina that the plaintiff was still waiting for the defendant to submit the form for change of title conditions to the Land Office. Notes of that conversation, prepared by Haslina, but sent to Teo only under cover of a letter dated 29 April, 2005, were in evidence. In two respects they appear to confirm Teo's evidence: first, that he had requested that the defendant to complete and sign the form for change of title conditions and that he thought that the defendant did not want to sign the form; and secondly that the defendant was seeking some form of written assurance of the plaintiff's financial capacity to develop the property.

The defendant, himself, made the application for change of use on 26 March, 2005 which was granted only on 12 January, 2006. The defendant contended and contends that the delay in the making of this application from 14 July, 1998 to 26 March, 2005, or at least from 24 May, 2004 to 26 March, 2005 was the fault of the plaintiff and a breach of contract by it.

We have already said that the Power of Attorney document could not operate as a valid power of attorney. If it nevertheless operated as an agency document it would operate only to permit the plaintiff to do such of those acts as could be done by an authorised agent. Whether that would include the making of an application for change of conditions of title depended on the legislative or administrative provisions relating to such applications.

Neither counsel was able to point us to any such legislative provisions and it seems that there are none. Section 7 of the *Land Code* provides that the Register must contain an entry of the special conditions, if any, imposed in respect of land. Section 8 provides that a document of title of land must be in Form C which requires inclusion of any special conditions. Section 9(4) provides that, in the absence of express conditions, land shall be used solely for agricultural purposes. And section 9(5) provides that any title issued may be issued subject to any special conditions which may be entered on the Register. Plainly none of these authorise the making of applications for change of special conditions or the grant of any such application.

We were, nevertheless provided with a copy of an extract from the website of the Land Department which sets out instructions about how to apply for change of special conditions to land. Presumably these emanate from some executive act. They provide, amongst other things, that such applications must be completed and signed by the land owner; and must attach a copy of the owner's identity card and a printout of all land currently registered to the applicant and to his spouse. The application form, also emanating from the Department, also requires the signature of the land owner.

To return to our statement of the relevant facts, on 29 April, 2005, the date of the above letter from Haslina, there was a meeting between Teo, together with an architect who had

done preliminary drawings for the proposed shophouses, and the defendant. Haslina was not present. At that meeting, according to Teo, the defendant again requested a deposit of $4 million by the plaintiff to secure performance. Teo raised the possibility, as a compromise, of the provision of a performance bond or banker's guarantee. The defendant requested that the plaintiff produce a local guarantor of good financial standing who would undertake to complete the development, at no additional cost to the defendant, if the plaintiff was unable to complete. In order to move the project along, Teo agreed to this. It was agreed that a new agreement would be drawn up to incorporate this change and the change in sublot number, size and description. The plaintiff confirmed this discussion and agreement by letter on the following day.

Some time after this a draft deed of development was prepared incorporating, in substance, the terms of the earlier agreement with one important addition: a term requiring the plaintiff to provide a local guarantor in good standing who would undertake to complete the development if the plaintiff was unable to do so. For reasons which will appear, this document was never executed.

On 10 October, 2005 Teo handed to the defendant a letter to which he attached a draft letter of guarantee by San Hin Welding and Construction Sdn Bhd offering a guarantee in terms of the above agreement. Also attached to the letter was a comprehensive, three page list of projects undertaken by that company. Teo described the company as a renowned developer in Brunei. The defendant rejected the proposed guarantor.

Notwithstanding that, on 8 November, 2005 the plaintiff wrote to the defendant enclosing preliminary drawings for the development, adding:

> *"Please let us know as soon as the change of land conditions to commercial purposes for the abovementioned land has been approved by the relevant authorities so as to enable us to expedite the process towards submission of the architectural drawings for approval."*

However on 22 November 2005 the defendant's solicitor wrote to the plaintiff in the following terms:

> *"**PROPOSED DEVELOPMENT OF EDR NO BD 48417 LOT 57087 KAMPONG KIARONG, MUKIM GADONG, BRUNEI LAND DISTRICT***
>
> *We act on the instructions of the Landowner, Haji Mohd Taib Hj Ibrahim in respect of the above-mentioned matter.*
>
> *Your letters dated the 10th October and the 8th November 2005 together with a draft development agreement have been referred to us with instructions to reply to you. Our instructions are that our client has in fact verbally indicated to you that he does not wish to proceed with you for the above matter.*
>
> *Our instructions are to and we do hereby formally notify you that our client declines your proposal for the above matter."*

The plaintiff construed this letter as a repudiation of the agreement between the parties as appears from its letter to the defendant of 30 November, 2005 in which it said:

> *"We received a letter dated 22 November 2005 from your lawyer, D F Abang Zen, and we are surprised that you have asked your lawyer to write to us to cancel the project.*
>
> *All these while we have not done anything wrong to make you cancel the agreement. We have compromised and complied with your various requests. Our company was set up just for the project. We have so far spent a lot of money, time and effort on it. We know that it is a viable and profitable venture and we are disappointed that you want to take it away from us.*
>
> *Before we see our lawyers, maybe you can tell us how you want to compensate us."*

Although this letter plainly treats the letter of 22 November as a repudiation of the agreement the parties, it is unclear whether it also accepts that repudiation as terminating the agreement.

The defendant's solicitor replied by letter dated 28 December, 2005 simply denying "the matters raised in Paragraph 2 of your said letter" and asserting that the defendant was not liable to compensate the plaintiff. It is significant, in view of the defendant's contention referred to below, that this letter does not deny the correctness of the plaintiff's interpretation of its letter of 22 November.

Nevertheless the learned trial judge said, and we agree, that there was room for argument about the correct interpretation of the letter of 22 November. On one view, the view that the plaintiff took, it expressed an intention to cancel the project contained in the dated agreement and the development deed. On another possible view, one for which the defendant later contended in its solicitor's letter of 26 May, 2006, it expressed an intention only to reject the draft agreement prepared after the discussion in which the defendant requested the guarantee.

The judge, rightly in our view, rejected the second of these possible interpretations. There are, we think, several reasons for justifying that rejection.

The first of these comes from the construction of the terms of the letter itself. The *"matter*" the subject of the letter is set out in the heading: see the first sentence of the letter. The letter then says that the defendant does not wish to proceed *"with you for the above matter".* Given that the letter was written by a lawyer, we think that the correct construction of it, without the need even to look at the context in which it was written, is that it expressed an intention to terminate the existing agreement between the parties for the development.

The second is the context in which the letter was written. The defendant had indicated that he wanted to add an additional term, for his own benefit only, to the existing agreement. In order to compromise and to move the project along, the plaintiff agreed to this. It seems in the highest unlikely, viewed objectively, that the defendant would have had his solicitor then write to say merely that he no longer insisted on this additional term. This context therefore supports the construction preferred by the judge.

And thirdly, the learned judge also relied on the letter which the defendant's solicitor wrote to Messrs Ho & Siong on 27 December, 2005. The undated deed of development had been in escrow and unstamped, in the hands of those solicitors, since 14 July, 1998, pending registration, in the defendant's name, of the land the subject of the deed. The plaintiff wrote to Messrs Ho & Siong on 22 December, 2005 asking for the deed of development to be stamped. Messrs Ho & Siong enquired of the defendant's solicitors who then wrote the letter of 27 December. It had the same heading as its letter to the plaintiff of 22 November and stated, amongst other things:

> *"Our instructions are that our client does not wish to proceed with the development with the Developer, Ismaco Properties Sdn Bhd."*

It is unclear how or when this letter came to the knowledge of the plaintiff. If it was before it wrote its letter of 16 May, 2006, referred to below, it could have relied on it also as indicating, unequivocally, the defendant's expressed intention, on 22 November 2005, to put an end to the agreement between the parties. And, in any event, it remains evidence of that.

We conclude, therefore, that on 22 November, 2005, the defendant expressed to the plaintiff an intention forthwith to terminate the agreement made on 14 July 1998. Before turning to the possible consequences of this, we should refer to two further letters written by the plaintiff's solicitor. The first, written to Messrs Ho & Siong on 10 January, said, amongst other things:

> *"Our clients had never indicated that they do not wish to proceed with the development. In fact, by their conduct of requesting your good office to stamp the deed of development, it is evident of their readiness and preparedness to proceed with the project."*

Two points should be made about the above passage. The first is that it appears inconsistent with an intention, at that time, to accept the defendant's purported termination as, in fact, terminating the agreement. It seems more consistent with an intention nevertheless to affirm the agreement.

But the second and more important point is that there is no evidence that this was communicated to the defendant at any material time. Messrs Ho & Siong were not then the defendant's solicitors; they were merely holders in escrow of the development deed. Consequently the letter could not have impeded the plaintiff from later accepting the defendant's wrongful repudiation as putting an end to the agreement and claiming damages for wrongful termination of the agreement.

The second letter to which reference should be made is one dated 16 May, 2006 from the plaintiff's solicitor to the defendant's solicitor in which it said, after referring to the defendant's solicitor's letters of 22 November, 2005 and 28 December, 2005:

> *"They constitute a repudiation of the Agreement, and which repudiation our client hereby accepts."*

Then followed a claim for damages on the basis that the agreement had been wrongly terminated.

We therefore conclude that the agreement was terminated, at the latest, on 16 May, 2006. This must have been in one of two ways. Either the defendant, on 22 November, 2005, rescinded that agreement for breach by the plaintiff entitling the defendant to do that. Or it repudiated it entitling the plaintiff to accept that repudiation, which the plaintiff did on 16 May, 2006.

Before considering the first of these possibilities, we should say that it was not advanced, either below or in this Court. Nevertheless, if it were correct, we would have been obliged to give effect to it. One difficulty which the defendant has in contending for this is that he seemed later to be contending that it was never his intention to terminate the agreement by the letter of 22 November. On 26 May, 2006, Messrs Ho & Siong wrote to the plaintiff's solicitor stating that they were now acting for the defendant and were responding to the letter of 16 May. They continued:

> *"Our client's instruction is that he has never repudiated the relevant agreements which were prepared by the firm of M/s Ho & Siong. We are informed that your client through Mr Francis Teo met our client and his family on several occasions to persuade them to execute another agreement in lieu. Notwithstanding the aforesaid, our client refused to sign the draft agreement prepared by your client.*
>
> *Your client not only had intended to repudiate the agreements but has delayed in the execution of work for which our client has suffered loss as a result."*

The draft agreement referred to must have been the draft agreement referred to earlier in this judgment, the only relevant change which it made having been the addition of a clause for the sole benefit of the defendant.

Then on 9 June, 2006 Messrs Ho & Siong wrote again saying:

> *"……your client is expected to proceed with the Development on terms as agreed"*

We pause here to say that these letters of 26 May and 9 June were relied on by Mr Lee as evidence of the defendant's intention on 22 November. However we do not think it even arguable that self serving statements made by the defendant, after the event, are admissible as evidence of his expressed intention on that date.

Nevertheless, if the defendant did, by its solicitor's express words, purport to terminate the agreement on 22 November, 2005 as we have held, whatever his subjective intention may have been, and if the plaintiff was then in breach of that agreement such as to justify rescission by the defendant, the plaintiff should not have succeeded in this action and the defendant would have been entitled to damages for that breach.

Breaches of the agreement by the plaintiff as alleged by the defendant's solicitors' letter of 13 June, 2006 were;

- delay in execution of the project;
- drafting and delivering a copy of a fresh agreement in lieu of the development deed;
- at the meeting of 28 August, 2004, demanding an extra unit of shophouses for the personal benefit of Teo;

- proposing to appoint another contractor to execute the project.

Plainly the second, third and fourth of these have no substance. We have already dealt with the fresh agreement; it was to accommodate the defendant's demand for security of performance of the project by the plaintiff, an accommodation which the plaintiff had no obligation to make.

The learned judge's acceptance of Teo's version of the meeting on 28 August and the failure of the defendant to call the witnesses who could contradict that if not true put an end to the third contention.

And even if the plaintiff did propose assignment of its rights under the agreement, there was an express term providing for that in the development deed. This put an end to the fourth contention.

This leaves the contention that the plaintiff delayed the project, presumably to such an extent as to justify the defendant in rescinding the agreement.

We do not think that the plaintiff can bear any blame for the delay in obtaining title, that is from July, 1998 to May, 2004. That was the sole responsibility of the defendant.

However the defendant contended and contends that an application for change of title conditions to the subject land should have been made by the plaintiff before 4 May, 2004. In order to sustain this ground the defendant relies on clause 2.2 of the development deed which placed an obligation on the plaintiff, with the co-operation of the defendant, to apply for the change of title conditions *"to the said parcel of land" "As soon as the Parties have signed this agreement".* The said parcel of land was defined in the deed as a sublot described as lot 38555. That lot did not exist at the time of the deed; it was then only a proposed lot. In fact it never came into existence because, before it could, there was a further compulsory acquisition of part of the land within that proposed lot. What issued to the defendant on 4 May after that acquisition was a new title to a new parcel of land consisting of the remainder of proposed lot 38555 after that resumption. Thereafter the parties continued to deal with one another as if the development deed applied to that parcel and that seemed plainly to be a sensible construction of the deed.

We have already set out the trial judge's view of the above contention, with which we agree. It was only by the issue of the title to him on 4 May that the defendant held land in respect of which an application for change of title conditions could be made. See section 8 of the *Land* Code. It is, we think, fanciful to suggest that such an application could have been made before then. This view is supported by the instructions from the Land Department about how to make such an application and the form of application which require a copy of the land title to accompany the application and refer to registered land. Consequently the phrase *"As soon as the Parties have signed this agreement"* must be construed, sensibly, to mean *"As soon as possible after the signing of this agreement".*

Mr Lee, for the appellant, contended that, if the failure of the plaintiff to make an application under clause 2.2 of the development deed before May, 2004 was not a breach of contract by it, then it frustrated the contract pursuant to clause 5(a) of the dated agreement. However, as pointed out during argument, that clause applied only if the government refused to grant the conversion of title condition, which was not this case. The contract was not, in our opinion, frustrated.

As to events after 4 May, both the above instructions and application require the application to be made by and signed by the registered owner. On the evidence which we set out earlier in this judgment, the delay after 4 May was caused by the failure of the defendant to cooperate in this respect by signing and returning the application for lodging, despite reminders from Teo.

We conclude therefore that, on 22 November, 2005, the defendant had no ground for terminating the agreement between the parties. It follows that, on that date, he wrongly repudiated the agreement and the plaintiff was entitled to and did accept that and claim damages for wrongful termination of the agreement: *Contracts Act*, section 40. It remains to consider damages.

Given the conclusion which we have reached, the plaintiff was entitled to damages. The measure of such damages is such sum as would put the plaintiff in the same financial position as if the contract had been performed: *Golden Strait Corporation v Nippon Yusen Kubishka Kaisa* [2007] UKHL 12 at 9, 29, 57. This was, in the present case, the loss of the profits which it would have made from the development. The plaintiff's claim, as set out in the statement of claim, was as follows:

> *"Particulars of Losses*
>
> *(I) Special damages*
>
> | | | |
> |---|---|---|
> | *a) Amount paid to the defendant pursuant to the Agreement* | | *$110,000.00* |
> | *b) Land tax paid by the Plaintiff* | | *$ 38.00* |
> | *c) Architects' and Consultants' fees* | | *$ 50,000.00* |
> | *d) Legal fees for preparation of the Agreement* | | *$ 5,000.00* |
> | *e) Costs of Procurement of guarantee* | | *$ 50,000.00* |
> | | *Total =* | *$215,038.00* |
>
> *(II) Loss of Profit*
>
> | | |
> |---|---|
> | *Sales proceeds of 8 intermediate units of shophouses @$550,000.00* | *$4,400,000.00* |
> | *Add sales proceeds of 2 corner units of shophouses @$580,000.00* | *$1,160,000.00* |
> | | *$5,560,000.00* |
> | *Less construction costs of 20 units of 3-storey shophouses @$315,000.00* | *$2,700,000.00* |
> | *Less costs of earthworks* | *$ 40,000.00* |
> | *Less survey fees* | *$ 7,500.00* |
> | *Total =* | *$2,812,500.00* |
>
> *25. In consequence of the matters pleaded above, the Plaintiff suffers loss and damages of $3,027,538.00 ($215,038.00 + $2,812,500.00) as particularised in paragraph 24 above."*

Of the sums claimed as special damages the judge awarded only the sum of $38. However he awarded $1.416 million as general damages. He arrived at this as follows:

> *"Having regard to the flimsy nature of the evidence, I think the correct approach is for me to take the average value of a unit at $500,000, producing a total price for the sale of the plaintiff's 10 units of $5 million. From this must be deducted the cost of construction which, given the time which has elapsed and the uncertainty concerning site conditions, I put at $3.2 million. To this must be added all associated expenses, including those items sought under special damage, which I will assess at 12% of the construction cost, being $384,000. Construction cost and expenses therefore total $3.584 million. This produces a loss of profit of $1.416 million."*

The defendant made a number of criticisms of this assessment. First he submitted that there was no evidential basis for arriving at the sum of $500,000 and that the only evidence of the value of a shophouse was the sale price of the one which the plaintiff had sold before even approval had been obtained for $200,000. He then contended that the judge was wrong in principle in accepting as the basis for the cost of construction a written estimate dated 16 March, 2006, produced only on the day of trial and wrong in his estimate from this. And finally he contended that fixing associated expenses at 12% of construction costs was arbitrary.

The defendant therefore contended that the proper course, in the circumstances, was to award only nominal damages.

On 6 May, 2010, and consequently out of time, the plaintiff filed a notice of contention pursuant to Order 57, rule 7 that , on the hearing of this appeal, the plaintiff will contend that the damages awarded by the judge should be increased. First, he submits that the judge should have included in the plaintiff's damages the sum of $50,000 paid to secure the guarantee required by the defendant. Secondly he submits that the judge should have fixed a higher average value for sale of the shophouses.

We should say, at the outset, with respect to the defendant's contention that, in the circumstances, the plaintiff should be awarded only nominal damages, that the fact that the damages cannot be assessed with certainty does not relieve a defendant from having to pay damages, provided that there is some evidence from which the amount of damages may be inferred. An extreme example of lack of certainty of loss is the loss of chance cases, of which *Chaplin v Hicks* [1911] 2 KB 787 is a leading example. But where the lack of certainty is, at least in part, caused by the failure of the plaintiff to adduce evidence which would have reduced that uncertainty, we think it appropriate to adopt a conservative approach to that assessment, having regard to that failure.

We turn to the evidence; first with respect to the estimated average sale price for the shophouses. A valuation of completed shophouses was obtained from Arta Surveyors, signed by Abdul Samat bin Mohamed Ali, on 4 February, 2010, only a few days before trial. It was admitted into evidence notwithstanding that the maker was not called to give evidence. Mr Lee, for the defendant, expressed concern about its lateness and that he was unable to cross-.examine its maker but apparently did not object to its admission. We say this in reliance on the judge's notes. Mr Lee said that he thought that he had objected to its admissibility. Mr Lim, for the respondent, had a contrary recollection.

The valuation valued a corner unit shop on the open market at $646,000, but on a forced sale at $549,000, and an intermediate unit shop on the open market at $599,000, but on a forced sale at $509,000. The learned judge commented on the facts that the report was last minute, that the maker was not called and that, consequently, the report could not be tested by cross-examination. He said that he could attribute very little weight to it. He said that, having regard to the flimsy nature of the evidence, the correct approach was to take an average value of a unit at $500,000 producing a total price for the sale of ten units of $5million.

On the other hand, there was no contradictory evidence and it would have been open to the defendant to obtain its own valuation. Nevertheless we think it was appropriate for the judge to discount the above estimates. One possible reason for doing so is that the valuation is at 4 February, 2010, whereas the correct date for assessment of the respondent's loss was 16 March, 2006, the date on which the repudiation was accepted: *Golden Strait Corporation*, supra at 11, 15, 16, 57, 60. Moreover, it would have been necessary to take into account that what was being assessed, as at 16 March, 2006 was the present value of amounts (the sale prices of the shophouses) which the plaintiff would not have received until some time in the future.

We should add that, though evidence would have been admissible as to what those prices would have been at the time when the shophouses would have been likely to come onto the market, that was not what the valuation here sought to give.

The plaintiff, himself, purported to give some evidence of valuation but he did not have any expertise in this and his evidence in this respect was rightly ignored.

Mr Lee sought to rely, in support of a lower valuation, on a sale by the respondent of a shophouse for $200,000 in October, 1998. There are a number of matters which make that sale wholly irrelevant. One is that it was made a very long time before, on the most optimistic estimate, the shophouses could be completed. Another is that the purchaser under that sale made an immediate payment of $160,000. These are only two of a number of odd aspects of this agreement. They are sufficient to enable us to conclude that this sale was of no relevance to this question.

The only evidence of the cost of construction of the shophouses was a quotation from Amberhigh Sdn Bhd, signed by Chung Chai Siew, its managing director, dated 16 March, 2006. It quoted $2,740,000 for earthworks and construction of twenty shophouses ($40,000 for earthworks, including piling, and $135,000 for construction of each of twenty shophouses). No criticism appears to have been made by the defendant of the failure of the maker of this document to give evidence though criticism was made of the document, including by the learned judge.

The judge said that the quotation was not based on any drawings or specifications. That is not strictly correct. It was based on architect's drawings but there were no engineering drawings and no specification. Rather, it was based on a traditional or average shophouse.

Two other criticisms of this quotation were made by the judge. The first was that it needed to be updated to 2010 costs. We have some difficulty with that view. On the contrary, we think that, like the valuation, it should have been estimated as at the date of termination of the contract, having regard to the fact that, at 16 March, 2006, it was likely that, had the contract continued, construction would not have commenced for some time.

In other words, what should have been assessed here was the present value, on 16 March, 2006, of the future cost of construction.

The second criticism by the judge was that some adjustment should be made for the uncertainty of site conditions; there was, for example, no evidence of how much piling would be required. He was correct to make some adjustment for this.

It was because of all of these uncertainties that the judge increased his estimate of the cost of construction to $3.2 million. It is not clear how he reached this figure. It is unlikely that he did so on the basis of any specific evidence for there does not appear to be any. For the reason we have given, we think that the judge's estimate of construction costs was, perhaps, a little high but nevertheless well within the bounds of a sound discretion.

To this cost it was necessary to add other costs associated with construction marketing and sale of the shophouses. These included architects, surveyors and engineers fees, legal fees and selling agent's fees. Teo had estimated surveyors', lawyers' and engineers' fees at 8% of the cost of construction. The plaintiff also agreed that there would also be costs associated with obtaining finance for the construction. The judge increased the above percentage to 12%, to include those associated costs not allowed for by Teo. He thereby arrived at a total cost of $384,000. We cannot say that this was unreasonable.

The plaintiff had claimed, as special damages, $50,000 for architects' and consultants' fees, $5,000 for legal fees for preparation of the agreement and $50,000 for the payment which it paid in order to obtain the guarantee. None of these were allowed. As to the first two of these, the judge said, rightly we think, these had to be taken into account as costs associated with construction. We discuss the third of these below.

It was in this way that the judge arrived at his final amount for general damages at $1.416 million. We think this to be a suitably conservative sum taking into account that, on the one hand, this was awarded as the present value of net income which would have been earned over some future time and, on the other, that if damages had been awarded as at 16 March, 2006, some allowance would need to have been made for the loss of use of that money between then and the date of judgment.

To that the judge added as special damages the sum of $38 paid for land tax. There does not appear to be any dispute about that sum.

In its notice of contention the plaintiff contends that the judge should also have allowed the sum of $50,000 which the plaintiff paid to secure the guarantee which the defendant required. However we think that the judge was right in refusing this claim. It was not a sum required to be paid under the contract but one incurred voluntarily because the plaintiff thought it more likely to ensure the defendant's performance of his obligations under the agreement. Its loss was not one caused by the defendant's ultimate breach of contract.

Orders

1. Dismiss the appeal

2. Unless application is made for some other order on or before Wednesday, 2 June, order that the appellant pay the respondent its costs of the appeal.

Mortimer, P.

Davies, J.A. **Rogers, J.A.**