IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 316

Suit No 321 of 2021

Between

TG Master Pte Ltd

… *Plaintiff*

And

(1) Tung Kee Development (Singapore) Pte Ltd
(2) Yung, Man Tung

… *Defendants*

Counterclaim of 1st Defendant and 2nd Defendant

Between

(1) Tung Kee Development (Singapore) Pte Ltd
(2) Yung, Man Tung

… *Plaintiffs in Counterclaim*

And

TG Master Pte Ltd

… *Defendant in Counterclaim*

JUDGMENT

[Contract — Contractual terms — Rules of construction]
[Contract — Remedies — Penalties]
[Land — Sale of land — Contract]

TABLE OF CONTENTS

TG Master Pte Ltd
v
Tung Kee Development (Singapore) Pte Ltd and another

[2022] SGHC 316

General Division of the High Court — Suit No 321 of 2021
Goh Yihan JC
13, 14 September, 12 October, 2 November 2022

19 December 2022 Judgment reserved.

Goh Yihan JC:

Background

1 In this case, the plaintiff, TG Master Pte Ltd, is the developer of the leasehold condominium project Skies Miltonia, and the owner and landlord of the properties situated at 1, 3, 5, 7, 9, 11, 13 and 15 Miltonia Close, Skies Miltonia (the "Properties"). The first defendant, Tung Kee Development (Singapore) Pte Ltd, is a company incorporated in Singapore. It was also the tenant and occupier of the Properties until it delivered vacant possession to the plaintiff pursuant to the summary judgment entered against it. The second defendant, Mr Yung Man Tung, is a director of the first defendant.

2 As a result of various agreements the plaintiff had entered into with the defendants, the plaintiff claims against the defendants the sum of $863,147 for so-called "Extension Fees" and $620,000 as repayment of a loan with interest.

The plaintiff had originally also claimed for the vacant possession of the Properties. But this is no longer in issue as the plaintiff had obtained summary judgment for such vacant possession of the Properties on 5 August 2021 in HC/ORC 4601/2021, and the appeal by the defendants against this was dismissed by the High Court in HC/ORC 6621/2021 dated 9 September 2021.

3 The defendants counterclaim against the plaintiff for the following: (a) that the tenancy agreements and/or Options to Purchase ("OTPs") be set aside and/or be declared null and void; (b) refund of the Option Fee paid by the second defendant for each of the Properties ($59,375), or the total sum of $475,000 in Option Fees paid for the Properties; (c) refund of the Further Sum paid by the second defendant for each of the Properties ($500,000), or the total sum of $4,000,000 in Further Sum paid for the Properties; and (d) refund of $122,720, being the additional amount paid by the second defendant towards the purchase of the Properties as extension fees or other amounts, and further, damages to be assessed. The defendants had also claimed against a third party in misrepresentation. However, that action was discontinued on 19 August 2022 following the second defendant's breaches of two unless orders to furnish further security for costs in that action.

4 Having considered the parties' submissions and the evidence, I allow the plaintiff's claim against the defendants in part. I also allow the defendants' counterclaim against the plaintiff in part. The overall effect of my decision is that the defendants have a net claim against the plaintiff. I now explain my reasons for coming to this decision.

The second defendant's application to vacate the trial

5 However, before I consider the substantive merits of the case, I should state that, on the first day of trial, *ie*, 13 September 2022, the second defendant applied to vacate the trial dates that have been fixed since 31 May 2022. More specifically, the second defendant gave essentially two reasons for his application. First, he claimed that he was not feeling well but could not produce a medical certificate that complied with the Supreme Court Practice Directions 2013 ("PD"). Second, he claimed to have lost confidence in his solicitors and wished to change his legal representatives. He added that he had no real idea what his Singapore solicitors were doing all this while, as he was based in Hong Kong and corresponded with these solicitors through his Hong Kong solicitor.

6 Having considered the second defendant's application, as well as what I consider to be his disregard for this court's timelines, I dismissed his application. I directed that the trial shall continue as planned. I take this opportunity to provide my reasons for having done so.

The applicable principles on the vacation of trial dates

7 The applicable principles for the vacation of trial dates are clear. The Court of Appeal in *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR(R) 673 ("*Su Sh-Hsyu*") held (at [39]) that "*strong compelling grounds* must prevail before the court will consider the exercise of its discretion to vacate trial dates" [emphasis in original]. Further, the court explained that this strict judicial policy in relation to the "religious and punctilious observance of hearing dates and minimal tolerance for unmeritorious adjournments has not and will not be modified". In the more recent Court of Appeal decision of *PT Humpuss Intermoda Transportasi and another v Humpuss Sea Transport Pte Ltd (in compulsory*

liquidation) [2019] SGCA 8 ("*PT Humpuss*"), the court confirmed (at [1]) that the test in Singapore for the vacation of trial dates remained the need for *strong* compelling grounds. This is a stricter test than that established by the English Court of Appeal in *Unilever Computer Services Ltd v Tiger Leasing SA* [1983] 1 WLR 856 , where the test was stated to be merely the need for "compelling reasons".

8 The test of "strong compelling reasons" can only be sensibly applied with the proper understanding of the *rationale* behind the strict judicial policy against the vacation of trial dates in the absence of strong compelling reasons. In *Su Sh-Hsyu*, the Court of Appeal explained (at [39]) that this policy ensures that "the systematic administration of justice and maximises the optimisation of judicial resources to most advantageously serve the public interest". Further, the court emphasised that "[c]ourt hearing days and time, being scarce and expensive resources, should not be wasted". The Court of Appeal also expressed this sentiment in the earlier decision of *Chan Kern Miang v Kea Resources Pte Ltd* [1998] 2 SLR(R) 85 ("*Chan Kern Miang*"), where it said (at [13]) that "in the interest of prompt administration of justice and efficiency and to avoid wastage of judicial time, the High Court adopted a strict view on the question of vacating hearing dates".

9 Given this overarching rationale behind the strict judicial policy against the vacation of trial dates in the absence of strong compelling reasons, it is easy to understand why it will be difficult for such reasons to be found. Indeed, an examination of the relevant cases show this quite clearly.

10 First, in *Su Sh-Hsyu*, the appellant and her two witnesses were absent on the first day of trial. The appellant's counsel, who was present at trial, sought

an adjournment on the basis that the appellant and her witnesses were not able to be present for the duration of the trial. The trial judge refused the adjournment and proceeded in the appellant's absence. After judgment was entered against the appellant, the appellant applied to set aside the judgment. The trial judge dismissed this application as the appellant's decision not to attend trial was deliberate with no sufficient justificatory grounds. The Court of Appeal dismissed the appellant's appeal as it agreed with the trial judge that the appellant's decision not to attend trial was wholly deliberate in nature (at [63]). The Court of Appeal noted that the appellant was informed of the hearing well in advance and could have rearranged her other commitments accordingly. As such, *Su Sh-Hsyu* shows, albeit indirectly, that conflicting appointments with the trial date cannot amount to sufficiently "strong compelling reasons" for trial dates to be vacated.

11 Second, in *Chan Kern Miang*, the appellant had applied, *inter alia*, for fresh hearing dates for the continued hearing of the consolidated actions in light of his lead counsel's reservist training schedule. More specifically, on 14 November 1997, the parties were informed that trial dates were fixed between 30 March to 3 April 1998 and 24 to 30 April 1998 for the resumed hearing. The latter set of dates were later changed to 27 to 30 April and 6 May 1998. On 19 November 1997, the appellant's lead counsel was informed by the Ministry of Defence that his reservist training had been postponed to 30 March to 3 April 1998. Despite the lead counsel's appeals to the Ministry, his requests to postpone the reservist were twice denied. The latest denial came on 2 February 1998. On these facts, the High Court dismissed the appellant's application for the existing trial dates to be vacated. The Court of Appeal affirmed this decision. The court gave two reasons for its decision. First, although the appellant's lead counsel had written to the Ministry seeking a

postponement, that should not have prevented his firm from making provisional arrangements in case the postponement was not granted (at [14]). Second, and in any event, there was a period of eight weeks between the time the appeal was turned down a final time (on 2 February 1998) and the first day of trial (on 30 March 1998) (at [14]). There was thus ample time for someone else in the firm to take over. *Chan Kern Miang* thus shows that where a party has conflicting commitments on particular trial dates, the onus is on him to make alternative arrangements. That party cannot sit on his hands and seek a vacation of the trial dates at the eleventh hour.

12 Third, in *PT Humpuss*, the appellants were absent and unrepresented when the trial started on 10 April 2018. The trial dates had been fixed in September 2017. The appellants' former set of solicitors had applied on 22 March 2018, less than three weeks before the trial started, to discharge itself from acting for the appellants. The solicitors did so because they had not received a deposit they had requested from the appellants. The trial judge granted the application on 26 March 2018, which was two weeks away from the trial. In doing so, the trial judge conveyed to the appellants that they were to ensure that any new solicitors appointed would be ready for the trial as scheduled. However, the appellants then submitted to the trial judge that they had insufficient time to appoint new solicitors and even if appointed, the new solicitors would not be able to prepare for the trial at such short notice. The Court of Appeal affirmed the trial judge's refusal to vacate the trial dates. The court found that the appellants were in their predicament because they chose not to be serious about the trial dates in spite of the large claim against them (at [10]). Thus, *PT Humpuss* shows that while a party is free to appoint new solicitors at any time, that can never be at the expense of causing trial dates

fixed in advance to be moved. This is especially so if the party concerned chooses to appoint new solicitors at the doorstep of trial.

The trial dates should not be vacated in the present case

13 Applying the principles above to the present case, I dismissed the second defendant's application to vacate the trial dates so that he can appoint new solicitors to act for him and the first defendant. I did so for three reasons.

14 First, despite the second defendant's assertions that he was medically unwell to attend court, he had persistently failed to provide a medical certificate in compliance with paragraph 14 of the PD despite multiple reminders from the Registry to do so. This paragraph provides that for a medical certificate to be deemed acceptable for absence from Court (if not made in Form 1 of Appendix A), it must contain a statement to the effect that the person to whom the certificate is issued is medically unfit to attend court, and also specify the date(s) on which the person is unfit to attend court.

15 Second, the second defendant had ample opportunities to change his solicitors if he had wished to do so. Yet, he chose to do so on the very first day of trial. This had come too late in light of the trial dates which were set on 31 May 2022. Indeed, given that the second defendant had over three months before the trial to decide whether to change his solicitors or not, it is puzzling why he had chosen to do so at the eleventh hour. As such, I did not think that the second defendant's desire to change his solicitors by itself constitutes a strong compelling reason for the trial dates to be vacated (see *Chan Kern Miang* at [14] where the Court of Appeal noted that eight weeks was "ample time" to make the necessary arrangements for someone else to take over conduct of the case). In any event, I reject the second defendant's assertion that he had no real

idea what his Singapore solicitors were doing. This cannot be true given that he had signed off on the numerous affidavits filed not only for trial but also the various interlocutory applications.

16 Third, and more broadly, I do not find that the second defendant has provided a strong compelling reason for the trial to be vacated on the very first day. In summary, to adopt the words in *PT Humpuss* (at [10]), the second defendant is in this position because he was not serious about trial dates despite the important commercial implications of the claim. In view of the second defendant's conduct in these proceedings, I find that he has airily viewed court schedules and hearing dates as being elastic that can be adjusted at his whim and fancy.

17 As such, I did not find that the second defendant has offered any strong compelling reason for me to vacate the trial dates. I directed that the trial should proceed as planned.

The parties' overall cases

18 I return then to the substantive merits of the case. I begin by briefly describing the parties' overall cases to set the context for further elucidation.

The plaintiff's case

19 The plaintiff claims: (a) $863,147 in so-called "Extension Fees"; and (b) $620,000 as repayment of a loan with interest. It also says – in what is effectively its defence to the defendants' counterclaim – that it is entitled to retain the following sums paid over by the defendants: (a) the Option Fee for each Property consisting of $59,375 or the total sum of $475,000; (b) the Further

Sum paid for each Property of $500,000 or the total sum of $4,000,000; and (c) any other additional amounts paid over (in relation to renovation works, *etc*).

Retention of the Option Fee, the Further Sum and Renovation Costs

20 The plaintiff's case is that the second defendant entered into various OTPs in writing, all dated 3 January 2018, with the plaintiff in order to purchase the Properties. There were in total eight OTPs, one for each Property. There was an Option Fee payable in respect of each Property. The terms of each OTP were largely similar. The OTPs were to expire 24 months from the date of the Option, *ie*, 2 January 2020. The second defendant paid the Option Fees on 4 January 2018 and signed a confirmation letter attesting to his understanding and acceptance of the terms of the OTPs on 8 January 2018 in the presence of a lawyer in Hong Kong.

21 Later, by various Tenancy Agreements in writing between the plaintiff and the first defendant, the plaintiff leased the Properties to the first defendant. The individual tenancies commenced at various dates but were consistent in providing for a term of 2 years and 6 months. The consideration for the Tenancy Agreements was the Option Fee specified in the OTPs and a further payment of $500,000 in respect of each Property ("Further Sum"). In the alternative, the plaintiff says that the Option Fee was a condition precedent for the grant of the Tenancy Agreements, and the Further Sum was the consideration in respect of each Tenancy Agreement. In addition, the second defendant was also to reimburse the plaintiff for the costs of renovating units 1 and 9 of the Properties ("Renovation Costs"). The second defendant paid the Further Sum for the Properties between 30 April 2018 and 28 December 2018.

22 By this arrangement, if the OTPs were exercised, the Option Fee and Further Sum (amounting to 20% of the purchase price of each Property) will be accounted for as part-payment of the Property. However, if the OTPs were not exercised, the OTPs shall be null and void, and the Option Fee, Further Sum as well as any renovation costs paid to the plaintiff shall be forfeited absolutely pursuant to cl E(i) of the OTPs, which provides that "the Option shall be null and void and the Option Fee, renovation cost reimbursed to the Vendor and the Further Sum shall be forfeited to the Vendor absolutely".[1]

23 Relevantly, the OTPs dated 3 January 2018 all contained "bundling provisions". These provisions allowed the OTPs to be exercised separately only when all the Further Sum had been paid for the Properties. At trial, Mr Ong Kai Hoe ("Mr Ong"), the Project Manager of the plaintiff, testified that this arrangement was justified on the basis that the payment of the Further Sum by 30 April 2018 was longer than the usual time frame when immediate possession was granted. There was also a bulk discount if all the Properties were purchased together.[2]

24 In addition, pursuant to cl E(iii) of the OTPs, the second defendant is to immediately return vacant possession of the Properties in the same condition as at the date that the OTPs were entered into. Clause 4(a)(iv) of the Tenancy Agreement likewise provides that if its corresponding OTP is not exercised in accordance with its terms before its expiry, it shall be lawful for the plaintiff to re-enter/repossess the relevant property and the tenancy shall determine. As I have mentioned above, the plaintiff has since obtained summary judgment

[1] Agreed Bundle of Documents, Vol 1, at p 60.

[2] Transcript, 14 September 2022, p 7 at lines 18–21.

against the defendants for vacant possession of the Properties. As such, the issue of the delivery of vacant possession is not in issue before me.

25 The second defendant did not exercise the OTPs by 2 January 2020, which was when they were to first expire. The parties carried out extensive negotiations and the final deadline for the second defendant to exercise the OTPs was set at 30 March 2021. However, the second defendant has not exercised the OTPs till now. Consequently, leaving aside the plaintiff's claim for vacant possession, the plaintiff says that it is entitled by cll E(i) and (iii) of each Property's OTP to forfeit the Option Fee and the Further Sum paid for each Property, as well as the Renovation Costs which had been paid to the plaintiff.

Extension Fees

26 The plaintiff also claims for Extension Fees. The second defendant had requested for extensions of time to exercise the OTPs, as the initial expiry date of the OTPs was 2 January 2020. The plaintiff had granted numerous extensions to the second defendant in consideration of payment of Extension Fees as (allegedly) mutually agreed.

27 First, for an extension in respect of Units 3, 9, 11 and 15 to 3 March 2020, and in respect of Units 1, 5, 7 and 13 to 30 June 2020, the Extension Fees comprising $358,400 have not been paid. Pursuant to cl 4.3 of a Loan Agreement entered between the parties that I discuss below at [29], the Extension Fees are due to the plaintiff after the extensions of time are given, and the second defendant shall provide a personal guarantee for such payment.

28 Second, the second defendant then sought further extensions of time and agreed to pay further Extension Fees. This was pursuant to oral discussions

between the parties and an extension of time to exercise the OTPs in respect of Units 1, 3, 5, 7, 9, 11 and 13 of the Properties was granted to 17 November 2020 for an Extension Fee of $750,027, which included the earlier amount agreed as Extension Fees pertaining to these units. This amount was due by 13 November 2020. The deadline to exercise the OTP in respect of Unit 15 was extended to 4 December 2020 for an extension fee of $113,120, which likewise included the earlier amount agreed as Extension Fees for Unit 15. This amount was due by 13 November 2020. The total amount due for Extension Fees is thus $863,147.

Repayment of Loan Agreement with interest

29 The plaintiff finally claims for moneys paid to the defendant under a loan agreement. The plaintiff says that sometime in January 2020, as the defendants were facing cash-flow problems, they sought a loan from the plaintiff, wherein the plaintiff is the lender, the first defendant is the borrower and the second defendant is the guarantor of the first defendant ("the Loan Agreement").

30 In addition to the Loan Agreement, the first defendant signed a promissory note for the sum of $1,598,400 in favour of the plaintiff dated 16 January 2020 ("Promissory Note"). The second defendant also entered into a deed of guarantee and indemnity dated 16 January 2020 ("Deed of Guarantee"). While the original loan amount was to be $1,240,000, only $620,000 was disbursed to the first defendant on 22 January 2020. Pursuant to cl 2, the loan is evidenced by the Promissory Note attached as Schedule 1 of the Loan Agreement. Pursuant to cl 3.1, the loan amount with interest and the Extension Fees were to be repaid by 30 June 2020. Pursuant to cl 3.4 and the terms of the Deed of Guarantee, the second defendant guaranteed and indemnified the plaintiff for the final repayment of the loan and interest. By way

of a letter of demand dated 1 October 2020, the plaintiff demanded the repayment of the loan with interest but the defendants did not respond. As such, the sum of $620,000 with interest is due and owing.

The defendants' case

No legally enforceable agreements between the parties

31 The defence against the plaintiff's claim proceeded on a few grounds. On the broadest level, the defendants argue that there are simply no legally enforceable agreements between the parties. They advance two points in this regard. First, the second defendant says that being a Hong Kong national with very little or no knowledge of the English language, he operated under a unilateral and/or "total" mistake as to the exact terms and conditions of the OTPs and/or the alleged Tenancy Agreements. The second defendant says that he was given to understand that the parties had agreed that the Further Sum he paid for all the Properties would go into a pool of money from which he could potentially use to exercise the OTPs pertaining to one or two of the Properties individually at the appropriate juncture or when he deemed fit.

32 Second, the defendants say that cl E(i) of the OTPs and/or the forfeiture of the Option Fee, Further Sum as well as any Renovation Costs or other amounts paid to the plaintiff ("the Forfeiture Sums") if the OTPs were not exercised, is not a genuine pre-estimate of the plaintiff's loss and is thus a legally unenforceable penalty. Alternatively, the defendants say that, even if the Forfeiture Sum is entitled to be forfeited, the court should invoke its equitable jurisdiction to grant relief against forfeiture of the sum.

33 The defendants' arguments against the validity of the agreements between the parties also form the basis for their counterclaim in respect of: (a) the refund of the Option Fee paid by the second defendant for each of the Properties ($59,375), or the total sum of $475,000 in Option Fee paid for the Properties; (b) the refund of the Further Sum paid by the second defendant for each of the Properties ($500,000), or the total sum of $4,000,000 in Further Sum paid for the Properties; and (c) the refund of the sum of $122,720, being the additional amount paid by the second defendant towards the purchase of the Properties as Extension Fees or other amounts.

The Extension Fees

34 More specifically, for the Extension Fees, the defendants say that the plaintiff had repeatedly refused to address the amount of extension fees payable for *each* of the Properties up to a proposed extended expiry date of the OTP in question or the basis of the calculation of the lump sum extension fees demanded. The plaintiff also allegedly did not provide confirmation to the second defendant that the final deadline set by the plaintiff for the exercise of the OTPs was 30 March 2021 as alleged. The defendants also say that, apart from having made payment of the Option Fee and the Further Sum for all the Properties to the plaintiff, the second defendant had made a further payment of at least $122,720 to the plaintiff with the understanding that this amount comprises the Extension Fees payable.

35 The second defendant also avers that he had conveyed to the plaintiff that unless there is a formal agreement in writing detailing the amount of Extension Fees payable for the purchase of the Properties, he would like to forestall the payment of further lump-sum extension fees to the plaintiff until such time as each OTP or the OTPs are exercised.

Repayment of Loan Agreement with interest

36 Finally, for the Loan Agreement, Promissory Note and Deed of Guarantee, the defendants say that even if the alleged Loan Agreement and other agreements are valid, any loan pursuant to the agreements was not due or payable at the date of the Writ (pertaining to the present Suit) because the full sum has not been disbursed yet and/or the terms of the alleged Loan Agreements. In addition, the second defendant also says he entered into the Loan Agreement, Promissory Note and Deed of Guarantee under a unilateral or total mistake.

The relevant issues

37 Having set out the parties' overall cases, I come to the relevant issues that I need to determine. In this regard, I am grateful to the parties for working together on a list of agreed issues, which I will address with minimal refinement to take into account what transpired at trial.

38 In relation to the plaintiff's claim against the defendants, there are two overarching sets of issues to deal with: (a) the Extension Fees; and (b) the Loan Agreement.

39 First, for the plaintiff's claim for the Extension Fees, I will address the following issues:

(a) Whether the plaintiff can prove the underlying contract that entitles it to claim the Extension Fees.

(b) Even if the plaintiff has an underlying contractual claim to the Extension Fees, should its claim amount be set-off by $122,720, which

represents the sum the second defendant allegedly paid in satisfaction of the Extension Fees?

40 Second, for the plaintiff's claim for the amount due under the Loan Agreement with interest, I will address the following issue:

(a) Whether the plaintiff can prove the underlying contract for the loan, being the Loan Agreement.

41 In relation to the defendants' defence and counterclaim against the plaintiff, I will address the following issues:

(a) Even if the OTPs or Tenancy Agreements are validly formed, whether they should be set aside due to the second defendant's unilateral or total mistake.

(b) Further, even if the OTPs are validly formed, whether the forfeiture by the plaintiff of the Forfeiture Sums infringe the penalty rule and therefore should be returned to the defendants.

(c) Alternatively, should the court exercise its equitable jurisdiction to grant relief against forfeiture of the Forfeiture Sums by the plaintiff?

The plaintiff's claim for the Extension Fees

42 I turn now to consider the plaintiff's claim for the Extension Fees and the two underlying issues concerning: (a) the proof of the underlying contract which entitles the plaintiff to the Extension Fees; and (b) the potential set-off of $122,720 which the second defendant had allegedly paid for the Extension Fees.

Whether the plaintiff can prove the underlying contract that entitles it to claim the Extension Fees

The parties' arguments

43 To begin, the plaintiff's claim for the Extension Fees is pleaded at paragraphs 19, 20 and 21 of the Statement of Claim in the following manner:

> **Claim for extension fees**
>
> 19. The 2nd Defendant had also requested for extensions of time to exercise the OTPs, as the initial expiry date of the OTPs was 2 January 2020. Numerous extensions were granted to the 2nd Defendant in consideration of payment of extension fees mutually agreed.
>
> **Particulars**
>
> a) Pursuant to the Loan Agreement, parties agreed to extensions of time on the exercise of the OTPs.
>
> …
>
> 20. Subsequently the 2nd Defendant sought further extensions of time, and agreed to pay additional extension fees.
>
> **Particulars**
>
> a) Pursuant to oral discussions between parties, they agreed to further extensions of time on the exercise of the OTPs.
>
> …
>
> 21. To-date the extension fees have not been paid. The Plaintiff therefore claims the sum of S$863,147.00 for the extension fees.
>
> [bold in original]

44 As can be seen from the Statement of Claim, the plaintiff's claim for the Extension Fees is based on the Loan Agreement and subsequent oral discussions between the parties. The plaintiff's case is firstly that the Extension Fee due

under the Loan Agreement is uncontroversial as this was properly recorded in writing. The relevant clauses are cll 4.1 and 4.2 of the Loan Agreement: [3]

> 4.1 [The plaintiff] has agreed to grant an extension of time to 3 March 2020 for the option period in respect of 3, 9, 11 and 15 Miltonia Close Singapore, subject to payment to [the plaintiff] an extension fee of Singapore Dollars Eighty Nine Thousand and Six Hundred (S$89,600.00) on either:-
>
> > 4.1.1 together with the exercise of the Options to Purchase in respect of 1, 5, 7 and 13 Miltonia Close Singapore; or
> >
> > 4.1.2 30 June 2020, whichever is the earlier.
>
> 4.2 [The plaintiff] has also agreed to grant an extension of time to 30 June 2020 for the option period in respect of 1, 5, 7 and 13 Miltonia Close Singapore, subject to payment to [the plaintiff] of an extension fee of Singapore Dollars Two Hundred Sixty Eight Thousand and Eight Hundred Only (S$268,800.00) on either:-
>
> > 4.2.1 together with the exercise of the Options to Purchase in respect of 1, 5, 7 and 13 Miltonia Close Singapore; or
> >
> > 4.2.2 30 June 2020, whichever is earlier.

The plaintiff says that the defendants have raised nothing to impugn the Loan Agreement and the Extension Fee referred within.

45 As for the subsequent extensions of time, the plaintiff acknowledges that the parties did not execute any formal written agreements. However, the plaintiff's case is that these subsequent extensions had come about due to oral discussions between the second defendant and Mr Ong. Thereafter, the parties would exchange correspondence to confirm the oral agreement reached. The plaintiff has referred to these correspondences in its Closing Submissions.

[3] Reply Affidavit of Ong Kai Hoe dated 28 July 2021 at p 115.

46 The defendants make several arguments against the plaintiff's claim for the Extension Fees. First, in relation to the Extension Fee found within the Loan Agreement, the defendants submit that there was no agreement between the parties for the second defendant to pay the Extension Fees regardless of whether he exercised the OTPs. Rather, the agreement reached, if at all, was for the second defendant to pay the Extension Fees *if* he decided to exercise the OTPs. Second, in relation to the subsequent extensions of time supposedly agreed orally between the parties, the defendants submit that the plaintiff has not sufficiently pleaded these oral agreements. In any case, the plaintiff has also failed to identify the *precise* point in time when the necessary consensus *ad idem* was reached between the parties. Finally, the defendants argue that the plaintiff itself is unclear on the amount of Extension Fees allegedly owing. This therefore shows a lack of certainty as to the amount due which, being a fundamental term of the parties' alleged agreement, would render it void for uncertainty.

My decision: the plaintiff has not proved the underlying contract(s) that entitles it to claim the Extension Fees

47 In my judgment, the plaintiff has not proved the underlying contract(s) that entitles it to claim the Extension Fees. I have come to this conclusion for the following reasons.

(1) The agreement in the Loan Agreement was not that the second defendant agreed to pay the Extension Fees regardless of whether he exercised the OTPs

48 First, I agree with the defendants that the agreement in the Loan Agreement was *not* that the second defendant agreed to pay the Extension Fees regardless of whether he exercised the OTPs. Rather, a plain reading of the

contractual text, as the rightful first port-of-call (see the decision of the Court of Appeal in *Lucky Realty Co Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 at [2]), reveals that the agreement between the parties was for the Extension Fees to be paid *only* upon the exercise of the OTPs. For ease of explanation, I reproduce cll 4.1 and 4.2 of the Loan Agreement again:[4]

> 4.1 [The plaintiff] has agreed to grant an extension of time to 3 March 2020 for the option period in respect of 3, 9, 11 and 15 Miltonia Close Singapore, subject to payment to [the plaintiff] an extension fee of Singapore Dollars Eighty Nine Thousand and Six Hundred (S$89,600.00) on either:-
>
> > 4.1.1 together with the exercise of the Options to Purchase in respect of 1, 5, 7 and 13 Miltonia Close Singapore; or
> >
> > 4.1.2 30 June 2020, whichever is the earlier.
>
> 4.2 [The plaintiff] has also agreed to grant an extension of time to 30 June 2020 for the option period in respect of 1, 5, 7 and 13 Miltonia Close Singapore, subject to payment to [the plaintiff] of an extension fee of Singapore Dollars Two Hundred Sixty Eight Thousand and Eight Hundred Only (S$268,800.00) on either:-
>
> > 4.2.1 together with the exercise of the Options to Purchase in respect of 1, 5, 7 and 13 Miltonia Close Singapore; or
> >
> > 4.2.2 30 June 2020, whichever is earlier.

49 Therefore, pursuant to cl 4.1, the plaintiff agreed to "grant an extension of time", "*subject* to payment to [the plaintiff] of an extension fee" "*on either*" "together with the exercise of the Options to Purchase in respect of [the relevant Property] *or* 30 June 2020, whichever is earlier" [emphasis added]. I make four points about cl 4.1. First, the grant of the extension of time is conditional on two conditions, which are: (a) the payment of the Extension Fee; *and* (b) the payment of such Extension Fee either at the exercise of the OTPs for the

[4] Reply Affidavit of Ong Kai Hoe dated 28 July 2021 at p 115.

relevant Property *or* on 30 June 2020, whichever is earlier. Second, until the second defendant makes payment of the Extension Fees upon the exercise of the OTPs for the relevant Property or on 30 June 2020, the plaintiff is not obliged to grant the extension of time. Third, since the second defendant has not made payment of the Extension Fees, the plaintiff is not obliged to grant the extension of time. Indeed, on the facts, the plaintiff has not granted the extension of time and the second defendant has not taken advantage of any such grant of time. Fourth, the reference to "30 June 2020" in cll 4.1 and 4.2 as the latest date at which the second defendant can avail himself of the extension of time makes sense because the *latest* extension of time would have been until 30 June 2020 in respect of some of the Properties.

50 Accordingly, I agree with the defendants that cll 4.1 and 4.2 of the Loan Agreement do not, by themselves, oblige the second defendant to pay the Extension Fees without more. It is plain that the second defendant's obligation to pay the Extension Fees would only arise in the situations spelt out in cll 4.1.1 or 4.1.2 (and correspondingly, the situations in cll 4.2.1 or 4.2.2). While it might be argued that the entire premise of the Extension Fees is for the plaintiff to keep the OTPs open for the second defendant to exercise at a later date, this does not detract from the above interpretation of cll 4.1 and 4.2. In essence, the agreement between the parties is for the plaintiff to keep the OTPs open for acceptance *in exchange* for (or to use the expression in the clauses, "subject to") the payment of the Extension Fees. Thus, if the second defendant does not pay the Extension Fees, the plaintiff is not obliged to keep the OTPs open. These are *interdependent* obligations, one subject to the other. This is a longstanding principle and has been succinctly explained in *Kingston v Preston* (1773) 2 Doug KB 689 as such: "[t]here are covenants which are conditions and dependant, in which case the performance of one depends on the prior

performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on this covenant". Since the second defendant has not paid the Extension Fees provided for in the Loan Agreement, the plaintiff is not obliged to grant the extension of time provided within. This is the simple interpretation of the matter.

51 Put another way, given how cll 4.1 and 4.2 are phrased, the plaintiff cannot *impose* an obligation on the second defendant to pay the Extension Fees by *unilaterally* granting the extensions of time. If the plaintiff purported to do this, then it does so on its own volition and peril. But the plaintiff's own ill-advised move does not oblige the second defendant to pay. To put this in a very basic example, suppose a mechanic agrees to repair my car subject to me paying him $500. I do not pay him $500. Or I pay him $100. Regardless, he repairs my car which I have parked publicly anyway. I am grateful for his services even if I am annoyed by him touching my car without permission. But that does not, at least as a matter of contract law, entitle him to claim $500 (or what is unpaid) from me. There is simply no independent contractual obligation for me to pay the mechanic $500. This is what the plaintiff's claim for the Extension Fees, stripped of all the complex legalities, comes down to. It would all be different if cll 4.1 and 4.2 provided for *independent* obligations. One fairly common example of independent obligations arises in relation to a tenant's obligation to pay rent and the landlord's obligation to keep the leased premises in good repair. Accordingly, the tenant may not withhold payment of rent that has become due because of failures on the part of the landlord to keep the premises in good repair (see the decision of the English Court of Appeal in *Taylor v Webb* [1937] 2 KB 283). Here, the parties were free to frame the clauses differently to achieve that effect by creating an *independent* obligation on the second defendant to pay a

sum of money and another *independent* obligation on the plaintiff to grant the extensions of time. However, this is simply not how cll 4.1 and 4.2 are framed.

52 There is one additional point which the plaintiff does not expressly address. Clause 3.1 of the Loan Agreement provides that "[t]he full amount of the Loan with interest payable *and extension fees* in Clauses 4.1 and 4.2 shall be repayable by the Borrower in lump sum by 30 June 2020" [emphasis added].[5] Similarly, cl 4.3 provides that "the Borrower shall procure the Guarantor [*ie*, the second defendant] to provide a personal guaranteeing the payment of the extension fees referred to in Clauses 4.1 and 4.2 to the Lender".[6] While it might be argued that these Clauses give rise to an independent obligation on the part of the first defendant under the Loan Agreement (and the second defendant as a guarantor) to pay the Extension Fees, cll 3.1 and 4.3 are expressly made subject to cll 4.1 and 4.2 in so far as the Extension Fees are concerned. As such, the governing provisions in relation to the Extension Fees of the Loan Agreement remain cll 4.1 and 4.2. My reasons for rejecting the plaintiff's claim for the Extension Fees due under the Loan Agreement therefore remain.

53 Accordingly, I conclude that the plaintiff has failed to establish an agreement for the second defendant to pay the Extension Fees referred to in cll 4.1 and 4.2 of the Loan Agreement regardless of whether he exercised the OTPs of the relevant Properties. More specifically, I conclude that cll 4.1 and 4.2 do not create an independent obligation on the second defendant's part to pay the Extension Fees. Rather, the purport of these clauses is that the second defendant can elect not to pay the Extension Fees, in which case the plaintiff

[5] Reply Affidavit of Ong Kai Hoe dated 28 July 2021 at p 114.

[6] Reply Affidavit of Ong Kai Hoe dated 28 July 2021 at p 115.

does not need to provide the extensions of time specified within (and if any extension was provided by the plaintiff, that would be made out of pure goodwill and does not stem from a contractual obligation). As such, I reject the plaintiff's claim for the Extension Fees provided in the Loan Agreement.

(2) The oral agreements giving rise to some of the Extension Fees were not sufficiently pleaded

54 Second, I also agree with the defendants that the plaintiff has not pleaded or established with sufficient specificity the particulars of the oral agreements that purportedly gave rise to the Extension Fees other than those contained in the Loan Agreement.

55 To begin with, I do not think that the plaintiff has pleaded the particulars of the alleged oral agreements with sufficient detail. In fact, the plaintiff has not pleaded any particulars as to when these oral agreements were agreed. There are no particulars even as to a possible period of time when these oral agreements were supposedly concluded. In this regard, I had said in *Chan Tam Hoi (alias Paul Chan) v Wang Jian and other matters* [2022] SGHC 192 (at [47]) the following:

> In my view, pleadings are even more important in cases involving oral agreements. In the absence of a written document that proves the parties' agreement, it is important for the plaintiff to plead the material particulars of an alleged oral agreement so that the defendant knows the case it must meet. In saying this, I accept that a court is not required to adopt an overly formalistic and inflexibly rule-bound approach, and departure from the general rule is allowed where no prejudice is caused to the other party at trial or where it would clearly be unjust for the court not to do so (see the decision of the Court of Appeal in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithili ngam and another* [2015] 5 SLR 1422 at [39]–[40]). While I understand that it may not be possible to plead particulars of an oral agreement with the level of precision as in the case of a

> written agreement, it is still incumbent on the plaintiff to plead its case to a sufficient degree of certainty. For example, while it may not be possible to plead the *exact date* on which an oral agreement was reached, it is still necessary to plead the *precise range of dates* on which the contract was allegedly concluded.
>
> [emphasis in original]

56 Accordingly, for the reason of insufficiency in pleadings alone, I dismiss the plaintiff's claim for the Extension Fees in the oral agreements allegedly entered into between the parties after the Loan Agreement was concluded.

57 In any case, even if I were to overlook the insufficiency in the plaintiff's pleadings, I do not think that the documentary evidence which the plaintiff relies on to establish the alleged oral agreements establishes a basis for it to claim the remaining Extension Fees. At this point, it is helpful to refer to a table that the plaintiff has included in its Closing Submissions which sets out the documents that supposedly support the various oral agreements between the parties ("the Table"):[7]

[7] Plaintiff's Closing Submissions at pp 19-20.

2nd Extension	**Extension Date**	**Extension Fees**	**Agreement / Evidence**	**Running Total**
For units 3, 9, 11 and 15 Miltonia Close	03/04/2020	S$44,800	WNLEX LLC's letter of 03/03/2020	S$403,200
3rd Extension	**Extension Date**	**Extension Fees**	**Agreement / Evidence**	**Running Total**
For units 3, 9, 11 and 15 Miltonia Close	03/05/2020	S$44,800	Mr Yung's letter of 31/03/2020	S$448,000
4th Extension	**Extension Date**	**Extension Fees**	**Agreement / Evidence**	**Running Total**
For units 3, 9, 11 and 15 Miltonia Close	30/06/2020	S$62,720	Oral discussions and TG's email to Mr Yung dated 10/06/2020	S$510,720
Payment of S$62,720 received on or about 14/05/2020				S$448,000

Payment of S$60,000 received on or about 03/06/2020				S$388,000
5th Extension	**Extension Date**	**Extension Fees**	**Agreement / Evidence**	**Running Total**
For units 1, 3, 5, 7, 9, 11 and 13 Miltonia Close	03/11/2020	S$325,440	Oral discussions and WNLEX LLC's letter of 05/09/2020	S$713,440
6th Extension	**Extension Date**	**Extension Fees**	**Agreement / Evidence**	**Running Total**
For units 1, 3, 5, 7, 9, 11 and 13 Miltonia Close	17/11/2020	S$36,587	Oral discussions and WNLEX LLC's letter of 04/11/2020	S$750,027
For unit 15 Miltonia Close	04/12/2020	S$113,120	Oral discussions and WNLEX LLC's letter of 04/11/2020	**S$863,147**

58 In my judgment, none of the documentary evidence referred to in the plaintiff's own Table establishes its claim for the Extension Fees. As I will explain below, these documents mostly reveal the same arrangement in relation

to cll 4.1 and 4.2 of the Loan Agreement: in every alleged oral agreement between the plaintiff and the second defendant, the agreement is for the plaintiff to grant an extension of time *provided that* the second defendant pays the relevant Extension Fee. These are interdependent obligations. Thus, if the second defendant pays the relevant Extension Fees, as he has done to some extent, then the plaintiff's obligation to grant the extension of time arises in respect of those Extension Fees. For that matter, if the second defendant pays only a part of a relevant Extension Fee, then the plaintiff's obligation to grant the extension of time does not arise and the question arises whether the plaintiff can keep the sum paid. But, on the plaintiff's own case, these supposed oral agreements do not create an *independent* obligation on the second defendant to pay the Extension Fees.

(A) SECOND EXTENSION: WNLEX LLC'S LETTER DATED 3 MARCH 2020

59 I turn to the "2nd Extension" in the Table, with the clarification that the first extension is that found in the Loan Agreement. The document in support of this supposed oral agreement is a letter dated 3 March 2020 by WNLEX LLC (the plaintiff's solicitors) to Withers KhattarWong LLP ("WKW") (the defendants' then solicitors). By the plaintiff's own case, the relevant paragraphs are as follows:[8]

> 2. At [the second defendant]'s request, [the plaintiff] agrees to extend the option period for exercise of Options for 3, 9, 11 and 15 Miltonia Close Singapore to 3 April 2020 *provided the* extension fee $134,400.00 (including the extension fee of $89,600.00 owing) is paid to our clients by 31 March 2020.
>
> 3. At [the second defendant]'s request, our clients may consider further one-month extension *provided the* extension fee of $134,400.00 has been paid by the due date of 31 March 2020

[8] Reply Affidavit of Ong Kai Hoe dated 28 July 2021 at p 125.

> and notice is given by your client by 15 March 2020 and that further extension fee is paid forthwith.
>
> [emphasis added]

60 Quite plainly, even if I were to accept this letter as sufficient proof of the alleged oral agreement between the parties, the agreement is clearly that the plaintiff "agrees to extend the option period" for the relevant Properties "*provided the* extension fee" is paid [emphasis added]. As I have explained at length above (at [48]–[51]), this would have created interdependent obligations between the plaintiff and the second defendant: the plaintiff is not obliged to grant the extensions of time until the second defendant pays the relevant Extension Fee. There is no independent obligation on the second defendant to so pay. As such, I reject the plaintiff's claim for Extension Fees as part of the "2nd Extension" referred to in the Table.

(B) THIRD EXTENSION: THE SECOND DEFENDANT'S LETTER DATED 31 MARCH 2020

61 I turn then to the "3rd Extension" in the Table. The plaintiff relies on a letter signed by the second defendant dated 31 March 2020 as proof of the parties' supposed oral agreement in this respect. The relevant passages from the letter are as follows:[9]

> (2) the four Units will be given extension of time for the exercise of the Options to Purchase from 3 April 2020 to 3 May 2020, and I agree to pay you an interest sum of S$44,800.00 for the extension of time to 3 May 2020 for the exercise of the Options to Purchase for the four Units.
>
> (3) in future for any extension of time for the exercise of the Options to Purchase for [3, 9, 11 and 15 Miltonia Close] an interest sum of S$44,800.00 will be paid to you and every extension of time will be for a month …

[9] Plaintiff's Core Bundle of Documents at p 123.

62 In my view, the plaintiff is on slightly stronger ground provided that I accept this letter as proof of the parties' alleged oral agreement for the third extension. But in saying this, I am conscious that this letter is not a word-for-word record of the oral agreement. Otherwise, this would be a written agreement. That said, the plaintiff is on slightly stronger ground because the phrasing of the supposed agreement in paragraph (2) shows that the plaintiff's obligation to grant the extension of time, and the second defendant's obligation to pay, are independent. This may be discerned from the use of the word "and" as opposed to the previous agreements' use of the words "subject to" or "provided the". However, I still reject the plaintiff's claim for Extension Fees as part of the "3rd Extension" referred to in the Table because I do not think that the plaintiff has sufficiently pleaded the particulars of this particular oral agreement.

(C) FOURTH EXTENSION: MR ONG'S EMAIL TO THE SECOND DEFENDANT DATED 10 JUNE 2020

63 I come to the "4th Extension" in the Table. By the plaintiff's own case, this oral agreement was recorded in an email sent by Mr Ong to the second defendant on 10 June 2020. The salient part of the email is as follows:[10]

> After discussion with our management, we are prepared to *offer* you a 30% reduction in extension fee from 03 May 2020 to 30 June 2020 (2 months) at a reduced rate of $62,720.
>
> … In principle, we are agreeable to the extension request for the 8 units until 2 Jan 2021, *subject to* extension fees being paid in advance.
>
> [emphasis added]

[10] AEIC of Ong Kai Hoe dated 19 July 2022 at p 251.

64 Without intending to read this as a word-for-word record of the parties' agreement, there are two problems with this passage. First, while not put as clearly, this is framed as an "offer" to grant the extension period of two months until 30 June 2020 for a discounted Extension Fee of $62,720. It is trite law that an offer does not by itself create an agreement if it is not accepted. Second, in relation to the future extension until 2 January 2021, the (tentative) agreement is again framed as being "subject to" extension fees being paid. On either count, I do not think the plaintiff has proved an oral agreement in respect of the Extension Fees as part of the "4th Extension" referred to in the Table. I accordingly reject the plaintiff's claim in this regard.

65 For completeness, the plaintiff in its Closing Submissions submits that a relevant piece of circumstantial evidence is that the second defendant paid $62,720 on 14 May 2020 which matched the agreed extension fee in the email from Mr Ong. However, this is not probative of an underlying agreement for the second defendant to pay the Extension Fees *independently*. As I have explained above, given that the plaintiff's obligation to grant the extensions of time arises upon the second defendant's payment of the relevant Extension Fee, the second defendant's payment of $62,720 would oblige the plaintiff to grant the associated extension of time. But this payment does not show that the second defendant had taken on the obligation to pay the rest of the Extension Fees independently.

(D) FIFTH EXTENSION: WNLEX LLC'S LETTER DATED 5 SEPTEMBER 2020

66 I come to the "5th Extension" in the Table. By the plaintiff's own case, this oral agreement was recorded by a letter WNLEX LLC sent to WKW dated 5 September 2020. However, the plaintiff does not point out what the relevant passages are. Indeed, it cannot because the letter does not even refer to the figure

of $325,440, which is allegedly the extension fee agreed for this fifth extension. While the letter does record the *total* extension fee accumulated to date of $713,440, that is insufficient as it does not capture the parties' specific agreement with respect to the fifth extension. Also, this letter had sought confirmation of its contents from WKW; there is no record of any such confirmation. For these and other reasons I have given above, I reject the plaintiff's claim for Extension Fees as part of the "5th Extension" referred to in the Table.

(E) SIXTH EXTENSION: WNLEX LLC'S LETTER DATED 4 NOVEMBER 2020

67 I come finally to the "6th Extension" in the Table. By the plaintiff's own case, this oral agreement was recorded by a letter WNLEX LLC sent to WKW dated 4 November 2020. But, as with the "5th Extension", I see nothing in the letter that records the terms of any oral agreement with respect to *this* extension. But what is telling is that Mr Ong's evidence in his affidavit of evidence-in-chief about this letter is that "WNLEX LLC then wrote on [the plaintiff's] behalf on 4 November 2020 to *offer* another extension of time until 17 November 2020" [emphasis added].[11] This is clearly framed as an offer and, once again, an offer cannot impose an obligation on the second defendant to pay the Extension Fees. As such, for these and other reasons I have given above, I reject the plaintiff's claim for Extension Fees as part of the "6th Extension" referred to in the Table.

[11] AEIC of Ong Kai Hoe dated 19 July 2022 at para 49.

(3) Summary

68 Accordingly, for all the reasons above, I reject the plaintiff's claim for the Extension Fees of $863,147 in its entirety.

Even if the plaintiff has an underlying contractual claim to the Extension Fees, should its claim amount be set-off by $122,720?

69 There remains the issue of the $122,720 which the second defendant has paid to the plaintiff. The defendants do not refer to this in their Closing Submissions (save for some cursory reference for a different point). Be that as it may, I am of the view that the plaintiff need not return this amount to the second defendant. This is because upon the second defendant's payment of the relevant Extension Fees, that is, the $122,720, the plaintiff would be obliged to grant the relevant extensions of time. There has been no suggestion that the plaintiff has not done so. As such, the plaintiff need not return the $122,720 which has already been paid over.

Summary

70 To summarise, I reject the plaintiff's claim for the Extension Fees of $863,147 in its entirety. However, the plaintiff does not need to return the $122,720 which the second defendant has already paid over being part of the total Extension Fees claimed for by the plaintiff.

The plaintiff's claim for the amount due under the Loan Agreement with interest

71 The defendants had at the beginning of these proceedings raised four defences against their liability for the loan due with interest from the Loan Agreement. First, the defendants said that the Loan Agreement, along with the

Promissory Note and Deed of Guarantee, all constitute an illegal moneylending transaction by the plaintiff as an unlicensed moneylender pursuant to s 14 of the Moneylenders Act (Cap 188, 1985 Rev Ed). Second, the defendants said that the interest on the loan amount pursuant to the Loan Agreement, along with the Promissory Note and Deed of Guarantee, amount to an irrecoverable penalty. Third, the defendants said that since the full sum under the Loan Agreement had not been disbursed, the plaintiff's claim for the $620,000 already disbursed was premature and ought to be dismissed. Finally, the defendants said that the second defendant had entered into the Loan Agreement, the Promissory Note, and the Deed of Guarantee under a unilateral and/or "total" mistake.

72 From their Closing Submissions, the defendants have since abandoned all four defences against the plaintiff's claim for $620,000 as repayment of a loan with interest under the Loan Agreement. However, I still have to be satisfied that the plaintiff has made out its claim on a balance of probabilities. In this regard, it is undisputed that the plaintiff entered into a Loan Agreement with the first defendant to, among others, provide a loan of $1,240,000 to the first defendant. Pursuant to cl 3.4 of the Loan Agreement, the second defendant guaranteed and indemnified the plaintiff for the final repayment of the loan with interest. It is also undisputed that $620,000 of the total loan amount of $1,240,000 had been disbursed to the first defendant by a cheque dated 22 January 2020. Finally, cll 3.1 and 3.2 of the Loan Agreement provide as follows:[12]

> 3.1 The full amount of the Loan with interest payable and extension fees in Clauses 4.1 and 4.2 shall be repayable by the Borrower in lump sum by 30 June 2020.

[12] Reply Affidavit of Ong Kai Hoe dated 28 July 2021 at p 114.

> 3.2 The Borrower shall pay to the Lender interest at the rate of six per cent (6%) per annum on an accrued basis and compounded monthly.

73 It is plain from cll 3.1 and 3.2 that the first defendant, as a party to the Loan Agreement, is obliged to repay the loan amount with interest by 30 June 2020. I do not think it can be seriously argued, nor have the defendants tried to do so in their Closing Submissions, that this obligation does not fall due because the *full* loan amount was never disbursed. The fact remains that the first defendant is obliged to repay any loan amount disbursed. Also, pursuant to the Deed of Guarantee which the second defendant entered into in respect of the loan amounts under the Loan Agreement, the second defendant is also liable to repay any loan amount disbursed with interest.

74 Accordingly, I allow the plaintiff's claim against the defendants, on a joint and several basis, for the sum of $620,000 plus interest of 6% per annum on an accrued basis and compounded monthly, pursuant to the Loan Agreement.

The defendants' counterclaim against the plaintiff

75 Having considered the plaintiff's claim against the defendants, I come now to the defendants' counterclaim. As argued in their Closing Submissions, the defendants' counterclaim against the plaintiff is premised on three grounds. First, the defendants argue for the setting aside of the OTPs due to unilateral mistake. Second, even if the OTPs remain valid and binding, the defendants say that the forfeitures of (a) the Further Sum of $500,000 per Property and (b) the Renovation Cost of $550,000 offend the penalty rule and should be reversed. However, the defendants candidly suggest that the forfeiture of the Option Fee of $59,375 is not likely to offend the penalty rule. Finally, the defendants argue

that if the penalty rule does not apply, relief against forfeiture should be granted in respect of the Further Sum and Renovation Cost.

76 In essence, if the defendants succeed in their counterclaim, it would mean that the plaintiff has to return all or some of the following sums:

(a) the Option Fee paid by the second defendant for each of the Properties ($59,375), or the total sum of $475,000 in Option Fee paid for the Properties;

(b) the further sum paid by the second defendant for each of the Properties ($500,000), or the total sum of $4,000,000 in further sum paid for the Properties; and

(c) the sum of $550,000, being the Renovation Costs paid in respect of both units 1 and 9 of the Properties. In relation to this sum, I note that the plaintiff disputes whether the defendants had pleaded a claim for reimbursement of Renovation Costs. I will address this at the appropriate juncture below (at [91] and [107]).

77 I should note that even though the defendants had pleaded for the refund sum of $122,720, being "the additional amount paid by the second defendant towards the purchase of the Properties as Extension Fees or other amounts", this has not been pursued by way of their counterclaim in the Closing Submissions. In any case, this is the amount which I have already decided that the plaintiff can keep, being the sums which the second defendant paid over for certain extensions of time.

Whether the OTPs should be set aside due to the second defendant's alleged unilateral mistake

78 I begin by considering if the OTPs should be set aside due to the second defendant's alleged unilateral mistake. I should say at the outset that I do not prefer the term "total" mistake, which is not commonly referred to in the authorities. To be fair, the defendants' current solicitors only had conduct of the case sometime after the pleadings stage in the present case. I will therefore use the more commonly used expression "unilateral mistake" in this part of the judgment.

79 Having considered the parties' arguments, I conclude that the OTPs should not be set aside due to the second defendant's alleged unilateral mistake. I do so on a procedural point. While it is always unsatisfactory to dismiss a claim based on a procedural issue as procedure is not an end in itself, it is also axiomatic that procedural fairness and substantive justice interact with each other and cannot survive without the other. Therefore, when procedure is defective, "the very substance of the result may rightly be called into question" (see the decision of the Court of Appeal in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*V Nithia*") at [37] and [39]). I am of the view that the Defence and Counterclaim, which was drafted by the defendants' former and not current solicitors, do not plead the relevant unilateral mistake with sufficient clarity. This has clearly affected how the plaintiff has run its case. This is thus similar to how the plaintiff's failure to sufficiently plead the oral agreements leading to the Extension fees affected the defendants' ability to respond to the claim properly. It would therefore not be fair to allow the defendants to pursue their case on unilateral mistake with respect to the

"bundling provisions" when the plaintiff was not afforded a clear opportunity to meet the defendants' case in this regard. I expand on these points.

80 It is clear that the defendants bear the burden of proving mistake since they are the ones asserting that the second defendant was mistaken. The defendants' case is that the second defendant laboured under a unilateral mistake as to the exact terms of the OTPs, specifically, the "bundling provisions" in cl A of the OTPs. The bundling provision requires that the Further Sum must be paid for *all* the Properties, failing which none of the OTPs could be exercised. Before the defendants get to the substance of the mistake, they had to overcome a seeming insufficiency in their pleadings. This is because paragraph 13 of the Defence and Counterclaim, which refers to the second defendant's supposed unilateral mistake, does not expressly say that the mistake was in relation to the bundling provisions. Instead, the paragraph says that the mistake was about the so-called "pooling provisions". Paragraph 13 provides as follows:

> Further or in the alternative, the 2nd Defendant, being a Hong Kong national with very little or no knowledge of the English language, was under a unilateral and/or total mistake as to the exact terms and conditions of the OTPs and/or the alleged Tenancy Agreements. Among other things, the 2nd Defendant avers that based on his discussions with the Plaintiff and/or its representatives, he was given the understanding that parties had agreed that the Further Sum he paid for *all* the Properties would go into a pool of money from which he could potentially use to exercise 1 or 2 of the Properties individually at the appropriate juncture or when he deemed fit.

81 The defendants say that this paragraph is sufficiently wide to encompass a mistake as to the bundling provisions because it alludes to a mistake "as to the exact terms and conditions of the OTPs" and qualifies the reference to the "pooling provisions" by the expression "among other things". The defendants

therefore argue that they should be allowed to raise their case founded on the second defendant's alleged unilateral mistake on the bundling provisions. In any case, the defendants argue that the plaintiff would not be prejudiced since the evidence on the second defendant's knowledge of the bundling provisions is already before the court.

82 I disagree with the defendants for the following reasons. To begin with, it is well-established law that pleadings must contain all the necessary elements of the cause of action or defence. It is improper for the court to give effect to a new case which the party had not made out in its own pleadings (see the decision of the Court of Appeal in *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [21], citing *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196). The rationale behind this requirement is to enable the counterparty to know the case it has to meet. As explained in *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull SC gen ed) (Sweet & Maxwell, 2021) at para 18/12/2, the requirement to provide necessary particulars in any claim or defence reflects the overriding principle that litigation between the parties should be conducted fairly, openly, without surprises and, as far as possible, minimise costs. Thus, pleadings delineate the parameters of the case and shape the course of the trial, and they also help to define the issues before the court and inform the parties of the case that they have to meet (see *V Nithia* at [36]). Unfortunately, I do not think that this threshold has been met in the present case.

83 More specifically, I agree with the plaintiff that paragraph 13 of the Defence and Counterclaim does not make any reference to particulars concerning the knowledge of the mistake. It is pertinent to note that knowledge is a core element of a claim of unilateral mistake (see the decision of the Court of Appeal in *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [80], for unilateral

mistake at common law, the non-mistaken party must have had actual knowledge of the mistaken party's mistake, whereas in equity the non-mistaken party must have had at least constructive knowledge of the mistake). This defect would by itself render it difficult for the plaintiff to know the case it has to meet.

84 Moreover, paragraph 13 also does not refer to the particulars of the mistake. In this regard, I do not think the defendants' argument founded on the breadth of paragraph 13, such as the use of saving expressions like "among other things" and the reference to essentially all the terms within the OTPs, helps them. It cannot be that a party can escape insufficiency in its pleadings by pleading imprecisely and over-inclusively. That would likewise offend the rationale behind the need for sufficient pleadings since that would also not enable a counterparty to know the case it has to meet. This is especially necessary when we are in the realm of vitiating factors as the court is generally reluctant to unravel contracts which have been freely negotiated and the grant of relief on the basis of mistake is something "not lightly or commonly done" (see the High Court decision of *Ho Seng Lee Construction Pte Ltd v Nian Chuan Construction Pte Ltd* [2001] 3 SLR(R) 184 at [71]). Mistake is a ground of defence and it is for the defendant to sufficiently plead it and assert that the contract is not what it seems to be (see the English Court of Appeal decision of *Ingram and others v Little* [1960] 3 All ER 332 at 345). This is why criticism has been made of a party's inadequacy of pleading in mistake in past cases (see the House of Lords decision of *Bell v Lever Brothers Ltd* [1932] AC 161 at 190–191 and 198, *per* Lord Blanesburgh, who delivered a speech focusing on the deficiency of Lever Brothers Ltd's pleading on mutual mistake).

85 Indeed, I agree with the plaintiff that this defect in the defendants' pleading is most telling when one sees the detail that paragraph 13 devotes to

the "pooling provisions" but is otherwise silent on the bundling provisions. Instead, the pleadings of the bundling provisions appear only in relation to the penalty rule. This rightly has caused the plaintiff to run its case against mistake in relation to the pooling provisions, as opposed to the bundling provisions. I do not think it is satisfactory for the defendants to then say that Mr Ong had offered evidence on the bundling provisions from the stand. By this time, the plaintiff had cast its lot on mistake in relation to the pooling provisions. It would not be fair to expect the plaintiff to be able to meet the defendants' case of unilateral mistake founded on the bundling provisions.

86 Accordingly, for this reason, I reject the defendants' counterclaim for a refund of the relevant sums of moneys premised on a unilateral mistake as to the bundling provisions.

Whether the forfeiture by the plaintiff of the Forfeiture Sums infringe the penalty rule

87 I turn then to the defendants' final claim, which is that the plaintiff's forfeiture of the Forfeiture Sums (defined as the Option Fees, the Further Sum and the Renovation Costs) infringe the penalty rule. Hence, due to this infringement, the plaintiff should not be allowed to keep the Forfeiture Sums.

The parties' arguments

88 The defendants submit that while the Court of Appeal had dealt with the penalty rule in the context of liquidated damages most recently in *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2021] 1 SLR 631 ("*Denka*"), the governing case on forfeiture of sums paid and what amounts to a true deposit is the High Court decision of *Hon Chin Kong v Yip Fook Mun and another* [2018] 3 SLR 534 ("*Hon Chin Kong*"). I

agree with the defendants as the present case concerns the forfeiture of sums already paid, as opposed to liquidated damages stipulated to be paid after breach of contract. However, the Court of Appeal's instructive guidance on the penalty rule in *Denka* would still apply if, after applying the framework in *Hon Chin Kong*, I conclude that the sum paid is not a true deposit but a part payment. In that case, the right to forfeit the part payment must be tested against the penalty rule in accordance with the guidance in *Denka*, with the suitable modifications.

89 Applying the framework in *Hon Chin Kong*, the defendants submit first that the Option Fees of $59,375 per unit of the Properties is likely to be a true deposit. As such, the plaintiff's right to forfeit the Option Fees should be maintained. In essence, the defendants are no longer claiming the refund of the Option Fees. The plaintiff obviously agrees with this. It submits that under Singapore law, it is very well-established that option fees can be forfeited if the option is not exercised within the relevant deadline. Given the parties' common position in relation to the Option Fees, I reject the defendants' claim for a refund of the Option Fees. For completeness, I agree with the defendants that the Option Fees would rightly be regarded as a deposit.

90 However, still applying the framework in *Hon Chin Kong*, the defendants submit that the Further Sum of $500,000 per unit is not a deposit but a part payment towards the purchase price of a unit of the Properties. As such, this sum is subject to the penalty rule. Applying the penalty rule, the defendants submit that the bundling of the Further Sum by cl A of the OTPs – in that until the Further Sum for *all* the Properties are paid, the OTPs for all the Properties shall be deemed to have lapsed – is imposed *in terrorem* of the second defendant and offends the penalty rule. In response, the plaintiff submits that cl A is not relevant as it is cl E that confers the right of forfeiture on the plaintiff. In any

case, the plaintiff says that despite the language of cl A, it is not a penalty clause as the second defendant could freely decide whether to proceed with the transaction or not. The plaintiff also submits that because the second defendant had already paid the Further Sum, he is *in fact* able to exercise each of the OTPs separately. As such, as I understand the plaintiff's argument, the second defendant has no cause to complain as he actually able to exercise each of the OTPs separately, having paid the Further Sum for all of the Properties.

91 Finally, still applying the framework in *Hon Chin Kong*, the defendants submit that the Renovation Costs of $550,000 is not a deposit but a part payment towards the purchase price of a unit of the Properties. As such, this sum is also subject to the penalty rule. Applying the penalty rule, the defendants say that the Renovation Costs is not a genuine pre-estimate of the plaintiff's loss and was imposed *in terrorem* of the second defendant. Indeed, the plaintiff would be enriched by forfeiting the Renovation Costs and retaining the Properties, as it would take the benefit of the renovations done to units 1 and 9 at no cost. The plaintiff does not make any serious argument about the Renovation Costs. In its reply, the plaintiff says that the defendants have never pleaded a claim founded on the reimbursement of the Renovation Costs.[13] The plaintiff also argues that the second defendant has had the benefit of the renovation works for two-and-a-half years or more. Thus, the Renovation Costs are not a part-payment that is affected by the penalty rule.

[13] Plaintiff's Reply Submissions dated 2 November 2022 ("Plaintiff's Reply") at para 11.

My decision: the forfeiture of the Further Sum and the Renovation Costs infringe the penalty rule

92 Having considered the parties' submissions, I conclude that the forfeiture of the Further Sum and the Renovation Costs infringe the penalty rule. As such, I order that the plaintiff refund the Further Sum ($4,000,000) and the Renovation Costs ($550,000) to the defendants. I now explain why I have come to this conclusion.

(1) The applicable law

93 As I said earlier, I agree with the defendants that the governing case is the High Court decision of *Hon Chin Kong*, which laid down a framework for assessing if the forfeiture of sums paid offends the penalty rule. In essence, the framework comprises the following steps (at [143]):

(a) First, whether on a proper construction of the contract, the vendor is entitled to forfeit the sum of money paid over.

(b) Second, if the sum was not intended to be forfeitable, then it must be returned notwithstanding a breach of contract. However, if there is a right to forfeit, the court must consider if the sum is a true deposit.

(c) Third, in considering whether the sum is a true deposit, the applicable test is whether the sum is reasonable as an earnest or is customary or moderate. Reasonableness involves a different enquiry from whether the sum is a genuine pre-estimate of loss. The focus is on whether the deposit is "so large that it cannot be objectively justified by reference to the functions which such a deposit properly serves" (see *Polyset Ltd v Panhandat Ltd* [2002] HKCFA 15 at [165]). If the sum is

a true deposit on consideration of this test, it can be forfeited regardless of the vendor's actual loss.

(d) Fourth, if upon the application of the test above, the sum is not a true deposit, then it should be recharacterised as a part payment. The right to forfeit the part payment must then be tested against the penalty rule.

94 On the application of the penalty rule to part payments, the Court of Appeal in *Denka* declined to follow the legitimate interest approach in *Cavendish Square Holding BV v Makdessi* [2016] AC 1172. Instead, the court preferred the long-standing principles set out by Lord Dunedin in the House of Lords decision of *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 ("*Dunlop*"). In *Dunlop*, Lord Dunedin had laid down the following propositions, which must be modified to suit the present case involving the forfeiture of sums paid over (at 86–88):

> 1. Though the parties to the contract who use the words "penalty" or "liquidated damages" may *prima facie* be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. …
>
> 2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage …
>
> 3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of breach …
>
> 4. To assist this task of construction various tests have been suggested … Such are:
>
> (*a*) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in

> amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. …
>
> (*b*) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid … [this is] truly a corollary to the last test. …
>
> (*c*) There is a presumption (but no more) that it is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage" …
>
> On the other hand:
>
> (*d*) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties …

(2) Application of the law to the present case

95 With the applicable law in mind, I turn to the Further Sum and the Renovation Costs.

(A) THE FURTHER SUM

96 On the Further Sum, I agree with the defendants that, applying the first step of the *Hon Chin Kong* framework, they are not reasonable as earnest money and therefore not a true deposit. To begin with, the Further Sum comprises approximately 17.88% of the purchase price of each Property. This is not a low figure although the exact percentage is not determinative as to the true nature of the sum. In this regard, while I appreciate the plaintiff's submissions in its reply that 20% is "reasonable", I am afraid that it has conflated two distinct issues, namely: (a) whether the 20% is a true deposit or part payment, and (b) if it is a

part payment, whether it offends the penalty rule. At various points of its submissions on this issue, the plaintiff seems to mix the two issues together, arguing, for instance, that "could there be a situation whereby a deposit is so high … so as to render it a penalty"?[14] This, with respect, is wrong because a true deposit is not subject to the penalty rule.

97 In assessing whether the Further Sum is a deposit or part payment, it is important not to be *too* caught up in the numbers (though I do note *Ho Chin Kong* at [143(d)], which I rely upon below). Thus, I do not accept the plaintiff's submission that if a "1% deposit [in the form of the Option Fees] is acceptable for a 2 week-option, it is hard to see why 20% deposit is unacceptable for 104 weeks".[15] If the plaintiff is correct, then taken to its logical conclusion, a vendor could collect 50% of the purchase price in exchange for keeping the option open for 100 weeks, and yet the 50% would still be considered a deposit that can be forfeited if the purchaser does not proceed. This cannot be right. Instead, the circumstances in which the figure is imposed, as well as the historical figure used (without extrapolating this figure as the plaintiff has tried to do), should be considered in ascertaining if it is a true deposit or part payment.

98 To begin with, it bears remembering that a deposit is meant to be earnest money, meaning that it is meant to indicate a purchaser's interest and good faith in a transaction. In this regard, as Mr Ong testified at trial,[16] the plaintiff had structured the payments of the Option Fees and the Further Sum such that it would receive 20% of the total purchase price upfront. As such, the structure

[14] Plaintiff's Reply Submissions at para 18.

[15] Plaintiff's Reply Submissions at para 24.

[16] Transcript, 14 September 2022, p 29 at lines 27 to 28.

would oblige a potential purchaser to pay: (a) the Option Fee as earnest money (at about 2.12% of the total purchase price, this would be a true deposit); *and* (b) the Further Sum (at about 17.88% of the total purchase price). If a purchaser wanted to enter into the OTP, cl B of the OTP made it *mandatory* for him to pay the Further Sum through the use of word "shall":

> The Purchaser *shall* pay a further sum of … (S**$_500,000.00_**) equivalent to the balance of twenty per cent (20%) of the Sale Price by 30 April 2018 (the "Further Sum") … [emphasis in original in bold; emphasis added in italics]

99 In my judgment, the very circumstances which the plaintiff points out to show that the Further Sum are a deposit actually show that they are part payments. At the outset, I recognise that in *Hon Chin Kong* (at [143(d)]), it was noted that it is customary for a 10% deposit to be stipulated in the context of contracts for the sale of land, and this was also the position in cases such as *Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd* [2000] 3 SLR(R) 594 ("*Triangle Auto*") where it was stated (at [12]) that: "[t]he magic number of 10% of the price has been regarded as a reasonable deposit in sale and purchase of immovable property and it is intended to encourage performance". Conversely, if "the deposit amount is excessive [*ie*, not a true deposit in the sense of earnest money] it will … be caught by the law of penalty" (see *Triangle Auto* at [12]).

100 *Prima facie*, the fact that a 20% deposit was chosen, which is higher than the customary figure of 10%, would require the plaintiff to show "special circumstances" to justify this amount (see *Hon Chin Kong* at [143(d)]). However, the plaintiff was unable to explain what special circumstances were present, other than alluding to the fact that it was for allegedly keeping the option open for 104 weeks. It is apposite to refer to the Privy Council decision of *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC

573, where the contract for sale of property contained a forfeiture clause in respect of a deposit which was also above the customary deposit of 10% (and was instead, 25% of the price). The Privy Council held that the starting point was that a deposit for sale of land was customarily 10%, and a vendor who sought a larger amount "must show special circumstances which justify such a deposit" (at 580). As the appellant was unable to show such special circumstances, the Privy Council found that the sum was not a true deposit and eventually held that the provision for its forfeiture amounted to a "plain penalty" (at 582). The Privy Council then ordered repayment of the whole sum. Similarly, in the present case, a 20% deposit was chosen which is twice that of the customary 10% but no special circumstances were put forward by the plaintiff to justify this. Thus, the Further Sum is not reasonable as an earnest and not a true deposit. Consequently, this Sum ought to be characterised as a part payment, in accordance with the framework set out in *Hon Chin Kong* (at [143(f)]), which needs to be tested against the penalty rule.

101 Further, the defendants had immediate possession of the properties for two-and-a-half years upon paying the Further Sum. The fact that they had *physical possession* must mean that the parties have moved past indications of good faith but were seriously considering completing the transaction. Indeed, the defendants could even sublet the Properties, which further shows that the defendants were treated akin to an owner. This coheres with the Further Sum being made in part payment towards the purchase price. If the Further Sum was meant only to show the defendants' interest and good faith in the transaction, why would the defendants be given possession of the Properties to such a considerable extent? Accordingly, the Further Sum should be considered a part payment towards the total purchase price of the Properties. Whether the plaintiff

is entitled to forfeit the Further Sum would need to be tested against the penalty rule. Before doing so, I make two preliminary points.

102 First, I consider that in testing the right of forfeiture against the penalty rule, we need to construe the OTP as a whole, and not just the clause which gives rise to the right of forfeiture. I therefore disagree with the plaintiff that cl A, which is the bundling provision, is irrelevant. Indeed, it would be all too easy for parties to escape from the penalty rule if they could isolate the application of the rule to a clause that plainly provides the right of forfeiture but relegate the *context and content* of how that right is to be exercised to other clauses in the contract. That cannot be how the law works. Rather, in construing the reasonableness of the right of forfeiture, it is important to consider the entire contract, in particular with the provisions providing for the payment of the sum to begin with and giving rise to the right of forfeiture. In the present case, it is therefore important to pay heed to cll A, D and E of the OTPs, which provide as follows:

> A. … This Option is granted together with Options for the sale of the following units 1, 3, 5, 7, 9, 11, 13 and 15 (other than the unit stated above) Miltonia Close Skies Miltonia Singapore … In the event that the Further Sum for All Units is not paid, the Options for All Units shall be deemed to have lapsed and no longer valid for acceptance. …
>
> D. In the event that:
>
> (a) the Purchaser does not pay the Further Sum by 30 April 2018;
>
> (b) the Purchaser does not reimburse the renovation costs as determined by the Vendor by 15 May 2018;
>
> …
>
> the Vendor shall have the right (but shall not be obliged to) terminate this Option and in such an event:

> (i) the Option shall be null and void and the Option Fee that has been paid to the Vendor shall be forfeited to the Vendor absolutely.
>
> …
>
> E. After the Further Sum and the renovation cost is paid and reimbursed respectively to the Vendor, in the event:
>
> …
>
> (d) that this Option is not exercised in the manner stated herein; or
>
> …
>
> the Vendor shall have the right (but shall not be obliged to) terminate this Option and in such an event:
>
> (i) the Option shall be null and void and the Option Fee, renovation cost reimbursed to the Vendor and the Further Sum shall be forfeited to the Vendor absolutely.

103 Second, the question of whether a sum is a penalty is assessed *at the time of contracting* and not later at the breach (see *Dunlop* at 86–87). As such, I disagree with the plaintiff that it is relevant that the second defendant could exercise the OTPs separately after he had paid the Further Sum. That is beside the point. The material question is whether, at the time of contracting, the parties had intended for clause that turns out to be a penalty, which must then be unravelled by operation of the penalty rule.

104 With these preliminary points in mind, I explain why I decide that the forfeiture of the Further Sum infringed the penalty rule. First, by virtue of the bundling provision in cl A, the requirement that the second defendant pays the Further Sum for *all* the Properties before he could exercise the OTPs for *any* property is clearly penal. While Mr Ong explained at trial that the bundling was done to account for the greater discount in sale price,[17] the undoubted effect of

[17] Transcript, 14 September 2022, p 7 at lines 18 to 21.

the provision is to compel the second defendant to pay the Further Sum so that he could deal with each of the Properties individually, for which he had *already* paid over the Option Fees.

105 Second, and resultingly, the bundling of all eight sets of Further Sum would not be a genuine pre-estimate of the plaintiff's loss. Indeed, this arrangement was something that the plaintiff had unilaterally decided on based on its subjective belief of how the so-called "bulk purchase" should be implemented and its assumption that these arrangements would not present issues for the second defendant.[18] There was no proper reason why the plaintiff would need the Further Sum to account for any loss it had suffered.

106 Accordingly, I find that the forfeiture of the Further Sum infringes the penalty rule. I therefore allow the defendants' counterclaim for the Further Sum, which amount to a total of $4,000,000.

(B) RENOVATION COSTS

107 The same analysis would apply to the Renovation Costs. First, I dismiss the plaintiff's argument that the claim for the Renovation Costs was not pleaded or particularised. This is because the defendants did plead for damages to be assessed. Also, there is a proper basis to assessing such damages in respect of the Renovation Costs, given that it is known what the second defendant had spent.

108 Moving on to the substance of the claim, I find that the Renovation Costs are not a true deposit because the parties have always regarded these costs to be

[18] Transcript, 14 September 2022, p 9 at lines 1 to 6.

made on a "reimbursement" basis. This is evident from, among others, cl B of the OTPs: "[t]he Purchaser shall *reimburse* the cost of renovation of units 1 and 9 Miltonia Close Skies Miltonia Singapore for such sums as determined by the Vendor ('renovation cost') latest by 15 May 2018" [emphasis added].

109 The Renovation Costs should therefore be seen as part payments and the forfeiture of such costs would be subject to the penalty rule. In my view, on a plain reading of cl E of the OTPs, the forfeiture of the Renovation Cost would *not* be a genuine pre-estimate of the plaintiff's loss. This is because such a forfeiture entitles the plaintiff to: (a) terminate the OTPs and retake possession of the Properties; (b) retake vacant possession of the Properties in the same original state and condition as at the date of the Option; and (c) forfeit the Renovation Cost in any event. In other words, by being able to take over the *renovated* Properties, the plaintiff would have suffered *no* loss because the Properties are being returned in an even better state than when they were handed over to the defendants. Yet, the plaintiff is able to retain the benefit of the renovation and in effect keep the Renovation Costs despite not having suffered loss.

110 Accordingly, I find that the forfeiture of the Renovation Costs infringes the penalty rule. I therefore allow the defendants' counterclaim for the Renovation Costs, which I assess to amount to a total of $550,000.

111 Given my conclusion that the defendants succeed in their counterclaim for the Further Sum and the Renovation Costs, I do not need to consider whether I should exercise the court's equitable jurisdiction to grant relief against forfeiture of the Forfeiture Sums. But had it been necessary to decide the point, and I make these observations only as passing remarks, I would have thought

that this would have been an appropriate case to grant relief against forfeiture given that there are infringements of the penalty rule. For example, the Court of Appeal has said in *Pacific Rim Investments Pte Ltd v Lam Seng Tiong and another* [1995] 2 SLR(R) 643 (at [42]) that: "in respect of contracts for the sale of land relief against forfeiture has been granted in appropriate cases and in two main forms. First, relief has been granted against the forfeiture by the vendor of the deposit or instalments of the purchase price, or both, paid by the purchaser in the exercise of the courts' power to relieve against a penalty". But as this issue does not arise for determination, I say no more about it.

Conclusion

112 For all the reasons given above, I dismiss the plaintiff's claim for the Extension Fees of $863,147 in its entirety but I allow the plaintiff's claim for the repayment of the sum of $620,000 plus interest of 6% per annum on an accrued basis and compounded monthly, pursuant to the Loan Agreement.

113 As for the defendants' counterclaim, I reject their claim for the Option Fees of $59,375 per Property, or the total sum of $475,000. However, I allow their claim for the total Further Sum of $4,000,000 and the Renovation Costs of $550,000.

114 The result, as I said at the start of this judgment, is that the defendants have a net claim against the plaintiff.

115 Unless the parties are able to agree on the appropriate costs order, they are to write in with their brief submissions on costs (no more than ten pages) within 21 days of this judgment.

116 In closing, I should mention that the defendants' current solicitors (who did not have carriage of this case from the very beginning) had applied to discharge themselves on 25 August 2022. The second defendant had opposed this application. Eventually, the solicitors agreed to remain as the defendants' solicitors on record as the trial dates were two weeks away, out of what they perceived to be their overwhelming duty to the court. At the end of trial, the defendants' solicitors understandably wished to close orally and conclude the matter from their perspective. However, at my request, they (and the plaintiff's solicitors) agreed to tender written submissions given the complexity of the some of the issues raised at trial. Thus, I wish to place on record my gratitude to the defendants' solicitors, especially their lead counsel, Ms Dawn Tan, for doing so despite the circumstances they found themselves in. They have truly and ably discharged their overarching duty in assisting the court.

Goh Yihan
Judicial Commissioner

Lee Ming Hui Kelvin and Ong Xin Ying Samantha (WNLEX LLC) for the plaintiff;
Tan Ly-Ru Dawn, Teo Wei Jian Tristan (Zhang Weijian) and Cheyenne Low (ADTLaw LLC) for the defendants.