Wishing Star Ltd v Jurong Town Corp
[2008] SGCA 17

Case Number : CA 107/2007

Decision Date : 09 April 2008

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Tan Liam Beng, Tan Kon Yeng Eugene, Ling Vey Hong and Sandra Tan Pei May (Drew & Napier LLC) for the appellant; Ho Chien Mien and Sheik Umar Bin Mohamed Bagushair (Allen & Gledhill LLP) for the respondent

Parties : Wishing Star Ltd — Jurong Town Corp

Contract – Misrepresentation – Fraudulent – Land developer entering into transaction in reliance upon fraudulent misrepresentations of contractor – Whether land developer furnishing sufficient proof or evidence of loss – Whether losses suffered by land developer recoverable – Scope of recovery of damages for fraudulent misrepresentation

Damages – Measure of damages – Contract and tort – Different objectives in awarding damages in contract and tort respectively – Possible coincidence in quantum between respective measures of damages more by way of factual coincidence

Tort – Misrepresentation – Fraud and deceit – Scope of recovery of damages for fraudulent misrepresentation – Loss flowing directly as a result of entry by land developer (in reliance upon fraudulent misrepresentation) into transaction in question, including all consequential loss – Loss recoverable even if not reasonably foreseeable

9 April 2008 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the award of damages made by the judge in the court below ("the Judge") in favour of the respondent, Jurong Town Corporation ("JTC"), for fraudulent misrepresentations on the part of the appellant, Wishing Star Limited ("WSL") (see *Wishing Star Ltd v Jurong Town Corp* [2007] SGHC 128). The Court of Appeal, in *Jurong Town Corp v Wishing Star Ltd (No 2)* [2005] 3 SLR 283 ("*Wishing Star (No 2)*"), had previously determined the issue of liability in favour of JTC and had ordered WSL to pay damages to be assessed. Pursuant to that decision, JTC proceeded to have its damages assessed. The Judge found largely in favour of JTC and allowed the bulk of its claims.

2 At the heart of this appeal lies a crucial question: What losses did JTC suffer as a result of the fraudulent misrepresentations by WSL? However, even before this question arises for determination, what is implicitly (and necessarily) assumed is that another more fundamental question – *viz*, whether JTC has sufficiently proved its losses – has *already* been answered in the affirmative. It is a cardinal requirement in the law of damages that the plaintiff must prove its loss before it may be awarded damages for the same.

Background

3 The facts giving rise to the appeal are not in dispute and can be briefly stated. JTC was to

develop a large research complex housing key biomedical research institutes and biotechnological companies ("the Biopolis"). The Biopolis was to comprise seven tower blocks as well as three basement levels, and the vision was for it, when completed, to be a world-class biomedical sciences research and development hub in Singapore. There was great urgency in this project ("the Project") as various other governments were vying at that time to promote their respective countries as such a hub. As a result, the Biopolis was to be developed on a fast-track basis. This meant that its development was to be completed within 19 months instead of the 30 months that a project of such a size would normally require.

4 The main contract was eventually awarded to Samsung Corporation (Engineering and Construction Group) ("Samsung"). One important facet of the construction works comprised the design, supply, delivery and installation of curtain walling and cladding systems for the seven tower blocks ("the façade works"). The façade works were to be awarded by JTC to a nominated subcontractor; this entailed JTC nominating or selecting a subcontractor, after which Samsung, as the main contractor, would be obliged to enter into a contract for the façade works with the nominated subcontractor and would be responsible for the latter's performance of that contract. There was, however, a caveat to this arrangement: Samsung could voice any valid objections to entering into such a contract.

5 JTC was assisted in the Project by its consultant, Jurong Consultants Pte Ltd ("JCPL"), which was a wholly-owned subsidiary of JTC. JCPL invited tenders for the façade works. The tenderers were required to meet certain evaluation criteria imposed by JTC ("the evaluation criteria") for the purposes of shortlisting and selecting potential subcontractors. This tender exercise ("the original tender exercise") drew a total of eight bids. Amongst these tenderers was WSL, which was a company registered in Hong Kong carrying on the business of a façade-cladding contractor.

6 WSL submitted its tender in April 2002 and its bid of $54m was the lowest. However, Samsung sought to dissuade JTC from awarding WSL the contract for the façade works as it (Samsung) was not familiar with WSL. Samsung was of the view that WSL had no experience in doing such works in Singapore. Notwithstanding Samsung's views, JTC awarded the contract for the façade works to WSL on 14 June 2002. However, Samsung resisted entering into any contract with WSL and, hence, the contract for the façade works was between JTC and WSL only. As it turned out, JTC did not make a wise decision.

7 In its bid, WSL made a number of representations of compliance with various items under the evaluation criteria. After the contract for the façade works was awarded, JCPL grew increasingly concerned about the truth of WSL's representations. After conducting further investigations and inspecting WSL's facilities in China, JCPL concluded that WSL's representations were false. It then immediately sounded the alarm to JTC.

8 On 9 September 2002, JTC terminated its contract with WSL ("the WSL Contract") for, *inter alia*, misrepresentation and breach of contract. JTC then engaged a new contractor, Bovis Lend Lease ("BLL"), to take over and complete the façade works. The total amount to be paid to BLL under this contract ("the BLL Contract"), which was awarded without any public tender, was $61.81m.

9 WSL subsequently commenced an action against JTC for various reliefs, including damages for wrongful termination. JTC counterclaimed for damages for fraudulent misrepresentation. The trial judge tried the issue of misrepresentation first and decided that although WSL was guilty of misrepresenting some facts, JTC had not relied on the misrepresentations to award WSL the WSL Contract (see *Wishing Star Ltd v Jurong Town Corp (No 2)* [2005] 1 SLR 339). The trial judge further found that JTC had affirmed the WSL Contract after it had knowledge of WSL's misrepresentations.

10 JTC appealed against the trial judge's decision and succeeded before the Court of Appeal (see *Wishing Star (No 2)* ([1] *supra*)). The Court of Appeal found that WSL had indeed made numerous fraudulent misrepresentations. The court also held that JTC had validly terminated the WSL Contract. It therefore followed that WSL's claim against JTC for wrongful rescission and/or termination necessarily failed. Accordingly, the Court of Appeal set aside the trial judge's decision and ordered WSL to pay JTC damages to be assessed.

11 In the assessment of damages, JTC claimed damages under the following heads:

(a) the sum of $7.81m, being the difference between the value of the WSL Contract and that of the BLL Contract ("item (a)");

(b) the sum of $1,036,983, being the expenses incurred by JTC as a result of JCPL administering the BLL Contract ("item (b)");

(c) the sum of $18,223.97, being the expenses incurred by JTC for JCPL's three trips to China to inspect WSL's facilities, which took place in the course of the WSL Contract ("item (c)");

(d) the sum of $313,600, being the expenses incurred by JTC as a result of JCPL having to attend to WSL in the course of the WSL Contract ("item (d)");

(e) the sum of $8,000, being the costs of engaging a surveyor for JTC's inspection of WSL's facilities in China on 3 September 2002 ("item (e)"); and

(f) the sum of $3,003, being the abortive costs for site occupational licences ("item (f)").

12 The Judge allowed all of the above claims, save for item (b) and item (f), *viz*, the claims for the sums of $1,036,983 and $3,003, respectively.

13 Being dissatisfied with the Judge's decision, WSL filed this appeal. It should be noted that JTC did not appeal against the Judge's decision.

The issues on appeal

14 There are two broad categories of damages which we have to deal with in this appeal. The first is in relation to the award of damages of $7.81m, being the difference between the value of the WSL Contract and that of the BLL Contract, to JTC under item (a); the second is in respect of what are, collectively, the additional expenses incurred by JTC as a result of WSL's fraudulent misrepresentations, *viz*, item (c), item (d) and item (e). Dealing with the latter category first, the only argument raised by WSL was that these expenses had not been sufficiently proved by JTC. We are unable to agree with WSL's contention, which we find to be a feeble, and ultimately vain, attempt to attack the Judge's decision. In our judgment, the Judge's decision in respect of this category of claims was both logical and persuasive. Consequently, we dismiss the appeal in relation to the Judge's award of damages for item (c), item (d) and item (e).

15 There is, therefore, only one issue that remains for determination in the present appeal, namely, the award of damages of $7.81m to JTC under item (a). In particular, what is in issue is whether the sum of $7.81m was the loss suffered by JTC as a result of the fraudulent misrepresentations of WSL. It will therefore be necessary to set out briefly the law relating to fraudulent misrepresentation first.

The law relating to fraudulent misrepresentation

16 The classic formulation of the tort of fraudulent misrepresentation or deceit is to be found in the judgment of Lord Herschell in the leading House of Lords decision of *Derry v Peek* (1889) 14 App Cas 337, where the learned law lord observed as follows (at 374):

> First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement [from] being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

17 The principles enunciated in *Derry v Peek* have, in fact, been adopted in the local context (see, for example, the Singapore High Court decisions of *Chop Ban Kheng v Chop Siang Huah and Latham & Co* (1925) 2 MC 69 at 71 (affirmed on appeal (*id* at 75–80), although the appeal did not involve the issue of fraud), *Baker v Asia Motor Co Ltd* [1962] MLJ 425 at 426, *Malayan Miners Co (M) Ltd v Lian Hock & Co* [1965-1968] SLR 481 at 482, [7] and 485, [22], and *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co* [2007] 1 SLR 196 at [38]; see also the decision of this court in *Panatron Pte Ltd v Lee Cheow Lee* [2001] 3 SLR 405 at [13]).

18 In the Singapore High Court decision of *Ng Buay Hock v Tan Keng Huat* [1997] 2 SLR 788, Warren L H Khoo J observed (at [26]) that "[t]he essence of fraud is dishonesty". As Lord Herschell put it in *Derry v Peek* at 375:

> In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds.

In a similar vein, the learned law lord later observed thus (*id* at 376):

> I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot be justly so designated.

In a similar vein, Bowen LJ, in the English Court of Appeal decision of *Angus v Clifford* [1891] 2 Ch 449, observed, in relation to Lord Herschell's statement in *Derry v Peek* (at 374) on false representations which are made "recklessly, careless whether [they] be true or false" (see [16] above), thus (at 471):

> It seems to me that a second cause from which a fallacious view arises is from the use of the word "reckless." Now, what is the old common law direction to juries? And it is not because I think that common law is better than equity that I go back to it – but it is because an action for deceit is a common law action – the old direction, time out of mind, was this, did he know that the statement was false, was he conscious when he made it that it was false, or if not, did he make it without knowing whether it was false, and without caring? *Not caring, in that context, did not mean not taking care, it meant indifference to the truth, the moral obliquity which*

consists [of] a wilful disregard of the importance of truth … [emphasis added]

19 Ascertaining the *nature* of fraudulent misrepresentation or deceit is, in fact, of the first importance. This is because a number of consequences flow from this, one of which is of direct relevance to the facts of the present appeal.

20 The first consequence, which is not relevant to the present appeal because fraudulent misrepresentation has already been proved and the only issue is that of the quantum of damages to be awarded, relates to the standard of proof. This is not an easy issue, straddling, as it does, the criminal as well as the civil standards of proof. There are, in fact, a number of cases taking a number of positions (for an overview as well as an analysis of the various cases and arguments, see the decision of this court in *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR 263 and the Singapore High Court decision of *Chua Kwee Chen*, *Lim Kah Nee and Lim Chah In v Koh Choon Chin* [2006] 3 SLR 469 at [11]–[39]). We are not required to deal with this particular issue in this appeal because, as just mentioned, it is not before us. We therefore proceed to consider the second consequence, which *is* of direct relevance to the present appeal.

21 The second consequence concerns *the scope or extent of damages that can be awarded in the context of fraudulent misrepresentation, assuming that both the misrepresentation(s) of this nature and the damage alleged can be proved.* Embedded in this question are two closely related matters. The first is embodied in the last part of the question. It relates to a requirement that is by no means peculiar only to claims based on fraudulent misrepresentation. Indeed, it is a *general* requirement that must be satisfied each time damages are sought by a plaintiff. And it is that *the plaintiff must prove its loss*. As mentioned in a recent decision of this court, this requirement is so obvious that it is rarely mentioned expressly (see *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] SGCA 8 at [27]). The second matter is embodied in the first part of the question – for which the leading authority is the House of Lords decision of *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 ("*Smith New Court*"). This particular decision reaffirmed the general principle that damages for fraudulent misrepresentation would include *all loss that flowed directly* as a result of the entry by the plaintiff (in reliance upon the fraudulent misrepresentation) into the transaction in question, *regardless of whether or not such loss was foreseeable, and would include all consequential loss as well*. We say "reaffirmed" because this principle is, in fact, not a radical one and is also embodied within the oft-cited English Court of Appeal decision of *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 ("*Doyle*"). In *Smith New Court* itself, Lord Browne-Wilkinson succinctly summarised the basic guidelines on damages for fraudulent misrepresentation (in the context of that particular case, which concerned the purchase of shares), as follows (at 266–267):

> In sum, in my judgment the following principles apply in assessing the damages payable where the plaintiff has been induced by a fraudulent misrepresentation to buy property: *(1) the defendant is bound to make reparation for all the damage directly flowing from the transaction; (2) although such damage need not have been foreseeable, it must have been directly caused by the transaction;* (3) in assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction; (4) as a general rule, the benefits received by [the plaintiff] include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him [from] obtaining full compensation for the wrong suffered; (5) although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property. *(6) In addition, the plaintiff is*

entitled to recover consequential losses caused by the transaction; (7) the plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud. [emphasis added]

22 Reference may, in a similar vein, also be made to the judgment of Lord Steyn in *Smith New Court*, as follows (at 281–282):

> The logic of the decision in *Doyle v. Olby (Ironmongers) Ltd.* justifies the following propositions. (1) *The plaintiff in an action for deceit is not entitled to be compensated in accordance with the contractual measure of damage, i.e. the benefit of the bargain measure. He is not entitled to be protected in respect of his positive interest in the bargain.* (2) *The plaintiff in an action for deceit is, however, entitled to be compensated in respect of his negative interest. The aim is to put the plaintiff into the position he would have been in if no false representation had been made.* (3) The practical difference between the two measures was lucidly explained in a contemporary case note on *Doyle v. Olby (Ironmongers) Ltd.*: G.H. Treitel, "Damages for Deceit" (1969) 32 M.L.R. 556, 558–559. The author said:
>
> > "If the plaintiff's bargain would have been a bad one, even on the assumption that the representation was true, he will do best under the tortious measure. If, on the assumption that the representation was true, his bargain would have been a good one, he will do best under the first contractual measure (under which he may recover something even if the actual value of what he has recovered is greater than the price)."
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> (4) Concentrating on the tort measure, the remoteness test [of] whether the loss was reasonably foreseeable had been authoritatively laid down in *The Wagon Mound* in respect of the tort of negligence a few years before *Doyle v. Olby (Ironmongers) Ltd*. was decided: *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound)* [1961] A.C. 388. *Doyle v. Olby (Ironmongers) Ltd*. settled that *a wider test applies in an action for deceit*. (5) The dicta in all three judgments, as well as the actual calculation of damages in *Doyle v. Olby (Ironmongers) Ltd*., make clear that *the victim of the fraud is entitled to compensation for all the actual loss directly flowing from the transaction induced by the wrongdoer. That includes heads of consequential loss.* (6) Significantly in the present context the rule in the previous paragraph is not tied to any process of valuation at the date of the transaction. It is squarely based on the overriding compensatory principle, widened in view of the fraud to cover all direct consequences. The legal measure is to compare the position of the plaintiff as it was before the fraudulent statement was made to him with his position as it became as a result of his reliance on the fraudulent statement.
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> [emphasis added]

23 The decision in *Smith New Court* was concerned, in fact, with the *nature* of fraudulent misrepresentation (in terms of the element of deceit which such misrepresentation necessarily involves). It will be immediately seen that the potential amount of damages awardable for a fraudulent misrepresentation exceeds even that awardable for a negligent misrepresentation (pursuant to the seminal House of Lords decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465). In particular, damages awarded with respect to a negligent misrepresentation are constrained by the doctrine of remoteness of damage (as manifested in the concept of reasonable foreseeability, as to which, see the leading Privy Council decision of *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388). However, as we have seen in the preceding paragraph, damages awarded with respect to a fraudulent misrepresentation are not subject to such a constraint, and are recoverable even if they are not reasonably foreseeable. The *reasons* for this were elaborated upon in some detail in *Smith New Court* itself.

24 In *Smith New Court*, Lord Steyn very helpfully elaborated upon the reasons for adopting a stricter approach (*vis-à-vis* the fraudster) with respect to fraudulent misrepresentation as follows: "[f]irst it serves a deterrent purpose in discouraging fraud" (at 279); and "[s]econdly, as between the fraudster and the innocent party, moral considerations militate in favour of requiring the fraudster to bear the risk of misfortunes directly caused by his fraud" (at 280). This last-mentioned reason is, of course, wholly consistent with the more general proposition that the court is, in the sphere of vitiating factors, pre-eminently concerned with arguments of fairness. Indeed, Lord Steyn proceeded to state thus (*ibid*):

> I make no apology for referring to moral considerations. The law and morality are inextricably interwoven. To a large extent the law is simply formulated and declared morality. And, as *Oliver Wendell Holmes, The Common Law* (ed. M. De W. Howe, p. 106) observed, the very notion of deceit with its overtones of wickedness is drawn from the moral world.

Reference may also be made, in this regard, to the observations of Bowen LJ in *Angus v Clifford* ([18] *supra*) as reproduced above at [18]. Finally, and in a related vein, it ought also to be noted that the (separate) requirement of mitigation of damage (see, for example, *Smith New Court* at 264, 267 and 285) likewise reflects the requirement of fairness – in this instance, to the defendant.

25 *Doyle* ([21] *supra*)has, in fact, been adopted in several local decisions (see, for example, the Singapore High Court decision of *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR 162 ("*Vita Health Laboratories*"), especially at [91]; see also the Malaysian decisions of *Letchemy Arumugan v N Annamalay* [1982] 2 MLJ 199 at 202, *Tay Tho Bok v Segar Oil Palm Estate Sdn Bhd* [1996] 3 MLJ 181 at 208 (reversed by the Malaysian Court of Appeal in *Segar Oil Palm Estate Sdn Bhd v Tay Tho Bok* [1997] 3 MLJ 211, but not, apparently, in respect of the lower court's adoption of the principles laid down in *Doyle*), *Magnum Finance Berhad v Tan Ah Poi* [1997] 3 AMR 2265 at 2282, and *Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim* [2003] 3 MLJ 460 at 468).

26 More importantly, perhaps, *Smith New Court* ([21] *supra*) has also been cited with approval in a number of Singapore decisions with regard to the issue of recovery of all direct (including consequential) loss flowing from the transaction that was entered into as a result of a fraudulent misrepresentation, even if such loss was not reasonably foreseeable (see, for example, the Singapore High Court decisions of *Vita Health Laboratories* at [91]–[93] and *CHS CPO GmbH v Vikas Goel* [2005] 3 SLR 202 at [60]). In particular, the following observations by V K Rajah JC bear noting (see *Vita Health Laboratories* at [91]–[93]):

> 91 Where fraud or deceit is exposed, the law pragmatically attempts to cut through the thicket of facts and remedy the wrong by restoration of the status quo. Fraud results in the tortfeasor being responsible for all the consequences that directly ensue in its wake: *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 ("*Doyle*"). In claims involving fraud, damages are not restrained by foreseeability *per se*. The intention to injure negatives this limiting factor. The tortfeasor is inexorably responsible for all losses that directly flow from the tort. Lord Denning MR tersely observed in *Doyle* (at 167), "it does not lie in the mouth of the fraudulent person to say that they could not have been foreseen." The legitimacy of this approach is clearly beyond reproach after the illuminating analysis undertaken by the House of Lords in *Smith New Court Securities v Citibank NA* [1997] AC 254 … The rationale for considering fraud differently was also helpfully summarised by Lord Steyn in [*Smith New Court*] at 279–280:
>
> > That brings me to the question of policy [as to] whether there is a justification for differentiating between the extent of liability for civil wrongs depending on where in the sliding scale from strict liability to *intentional wrongdoing*, the particular civil wrong fits in. …

> *[I]t is a rational and defensible strategy to impose wider liability on an intentional wrongdoer.* … Such a policy of imposing more stringent remedies on an intentional wrongdoer serves two purposes. First it serves a deterrent purpose in discouraging fraud. … And in the battle against fraud civil remedies can play a useful and beneficial role. Secondly, as between a fraudster and the innocent party, moral considerations militate in favour of requiring the fraudster to bear the risks of misfortunes directly caused by his fraud. … *The law and morality are inextricably interwoven. To a large extent the law is simply formulated and declared morality*. And, as *Oliver Wendell Holmes, The Common Law* (ed. M. De W. Howe), p. 106, observed, the very notion of deceit with its overtones or wickedness is drawn from the moral world ...

92 I respectfully agree with Lord Steyn's views, which also had the general endorsement of Lords Browne-Wilkinson, Mustill, Keith of Kinkel and Slynn of Hadley. He rejected as "far too narrow a view" the contention that the only purpose of the law of tort should be to compensate, by recognising and emphasising the intentional element in fraud. He took pains to stress the importance of deterrence as a policy consideration in assessing damages for fraud. Intentional torts are rightly singled out for special consideration.

93 It is therefore trite law that a claimant can recover all the direct losses from a fraudulently induced transaction. This encompasses consequential losses. The orthodox view that damages ought to be assessed by particular reference to *a* transaction date was also demolished in *Smith [New Court]* in favour of a flexible approach that recognises (at 284) that:

> … the court is entitled simply to assess the loss flowing directly from the transaction without any reference to … any particular date … wherever the overriding compensatory rule requires it.

The true principle is to justly compensate the claimant for all financial losses and/or damages flowing directly from the fraud. Valuation is one method. Adding up the immediate and consequential losses is another. In *Smith [New Court]*, Lord Browne-Wilkinson (at 266 and 267) postulated several considerations that could be taken into account in assessing losses or damages for fraudulent misrepresentation in the purchase of property. While these considerations are helpful, they should not be applied dogmatically. In assessing damages for fraud, a mechanical approach is to be eschewed in favour of flexibility. The multi-faceted dimensions of fraud require pragmatism and malleability from the court in fashioning the appropriate remedy. Creative accounting may require creative remedies. While the deterrent factor may sometimes be cloaked in an award of damages, it should not be forgotten.

[emphasis in original]

27 The scope of recovery of damages for fraudulent misrepresentation as set out in both *Doyle* and *Smith New Court* is very broad. The question we have to decide in this appeal is whether JTC has proved that the sum of $7.81m claimed under item (a) is loss flowing directly from WSL's fraudulent misrepresentations. For this purpose, we must turn to the relevant facts in the present case.

28 However, before proceeding to do so, one (more general) point needs to be noted because it will also figure in our application of the relevant law to the facts of this appeal. The point is a straightforward one and relates to the different objectives of awarding damages in contract and in tort, respectively. Indeed, it is yet another specific distinction underlying the more general difference between contract on the one hand and tort on the other. And it is effectively put in a leading textbook, as follows (see Edwin Peel, *Treitel on The Law of Contract* (Sweet & Maxwell, 12th Ed,

2007) at para 20|018):

> The object of damages for ***breach of contract*** is to put the victim "so far as money can do it … in the same situation … as if the contract had been performed" [citing the leading decision of *Robinson v Harman* (1848) 1 Ex 850 at 855; 154 ER 363 at 365]. ***In other words, the victim is entitled to be compensated for the loss of his bargain, so that his expectations arising out of or created by the contract are protected. This protection of the victim's expectations must be contrasted with the principle on which damages are awarded in tort: the purpose of such damages is simply to put the victim into the position in which he would have been, if the tort had not been committed.*** Of course, in many tort actions the victim can recover damages for loss of expectations: e.g. for loss of expected earnings suffered as a result of personal injury, or for loss of expected profits suffered as a result of damage to a profit-earning thing. But these expectations exist ***quite independently of*** the tortious conduct which impairs them: it is the nature of most torts to destroy or impair expectations of this kind, rather than to create new ones. ***Tortious misrepresentation does, indeed, create new expectations, but the purpose of damages even for that tort is to put the victim into the position in which he would have been, if the misrepresentation had not been made, and not to protect his expectations by putting him into the position in which he would have been, if the representation had been true.*** Such damages may be awarded in respect of losses which the victim could have avoided if he had been told the truth, and here again there is a sense in which the victim will recover damages for "loss of a chance", but it is the chance of avoiding loss rather than that of making a profit for which he will be compensated. He may even be compensated for loss of profit if the tort impairs expectations which exist independently of it. In *East v Maurer* [[1991] 1 WLR 461] the claimant was interested in buying a hairdressing salon and was induced to buy one belonging to the defendant by the latter's fraudulent representation. It was held that the claimant could recover (inter alia) damages in respect of *another* such business in which he would have invested his money if the representation had not been made, but not the profits which he would have made out of the defendant's business, if the representation relating to it had been true. In a contractual action, on the other hand, damages are recoverable as a matter of course for loss of the expectations created by the very contract for breach of which the action is brought. That is why damages of this kind are the distinctive feature of a contractual action. [emphasis added in bold italics]

See also, in a similar vein, Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) at paras 41|002–41|006; *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 29th Ed, 2004) at para 6|051; *Butterworths Common Law Series: The Law of Contract* (Michael Furmston gen ed) (LexisNexis UK, 2nd Ed, 2003) at para 4.62; *Clerk & Lindsell on Torts* (Anthony M Dugdale gen ed) (Sweet & Maxwell, 19th Ed, 2006) at paras 18|38–18|39; and John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (Sweet & Maxwell, 2nd Ed, 2007) at para 5.35. Reference may also be made to the observations of Lord Steyn in *Smith New Court* ([21] *supra*) at 281–282 (see the passage quoted above at [22], especially propositions (1) and (2) therein), as well as the observations of Lord Denning MR in *Doyle* ([21] *supra*), where the learned Master of the Rolls observed thus (at 167):

> On principle the distinction seems to be this: in contract, the defendant has made a promise and broken it. The object of damages is to put the plaintiff in as good a position, as far as money can do it, as if the promise had been performed. In fraud, the defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his detriment. The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it. In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make

reparation for all the actual damages directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say:

> "I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages."

All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen.

Our decision on the Judge's award of damages of $7.81m for item (a)

29 As we mentioned above (at [14]), we agree with the Judge with regard to the damages which he awarded in respect of item (c), item (d) and item (e). This leaves the claim under item (a) for the sum of $7.81m, which constituted the difference between the value of the WSL Contract and that of the BLL Contract. And it is to this particular head of damage that our attention must now turn. Indeed, for the reason just mentioned, it will be the principal focus of the present judgment. The rest of the judgment of the court below is consequently affirmed for the reasons stated therein.

30 Turning, first, to the question of whether or not JTC has furnished sufficient proof or evidence of the loss claimed under item (a), it is our view that it (unfortunately) has not. Let us elaborate.

31 JTC's case is that, as a result of WSL's fraudulent misrepresentations and the subsequent rescission of the WSL Contract, JTC had to take the necessary steps to engage BLL and this was done at a substantially higher price – $7.81m higher, to be precise. It will be recalled that the Judge agreed with JTC and awarded this sum to it. It is important, at this juncture, to ascertain how this amount was arrived at.

32 It will be recalled that the sum payable by JTC under the WSL Contract was $54m. The sum payable by JTC under the BLL Contract, on the other hand, was $61.81m; hence, the difference of $7.81m that formed the basis of JTC's claim under item (a).

33 Before proceeding to apply the general principles of law set out in the preceding part of this judgment, a further (and important) set of facts ought to be noted. This set of facts centres not only on the WSL Contract and the BLL Contract, but also on the *other* relevant bids which JTC could have accepted (instead of entering into the BLL Contract).

34 The WSL Contract was entered into by WSL and JTC on 14 June 2002 and was terminated by JTC on 9 September 2002. The BLL Contract was entered into by JTC and BLL on 9 October 2002.

35 The preceding paragraph reflects the relevant time frames in so far as the WSL Contract and the BLL Contract are concerned. As important is what happened during the period just before the award of the WSL Contract (on 14 June 2002) and just before the award of the BLL Contract (on 9 October 2002), respectively. Indeed, an understanding of the relevant facts (and, we might add, the respective bids submitted) during these two periods will, as we shall see, have a decisive impact on the issue of whether or not JTC has sufficiently proved that it had indeed suffered a loss of $7.81m as direct loss flowing from the WSL Contract which it entered into as a result of WSL's fraudulent misrepresentations.

36 Turning, then, to the relevant facts in question and, in particular, to the period just before

the award of the WSL Contract, it should be noted that, in the original tender exercise, there were (in addition to WSL's bid) other bids as well (WSL having submitted the lowest bid). Amongst these, the next lowest bid, which was submitted by SB Façade Pte Ltd ("SB Façade"), was in the sum of $54,071,488 (it will be recalled that the sum of $54m, as submitted in WSL's bid, ultimately constituted the contract price under the WSL Contract). What is of crucial significance, however, is the fact that JTC did not give any consideration to SB Façade's bid because of its past experience with the company (a point which counsel for JTC confirmed during the oral hearing before this court). Accordingly, SB Façade's bid was irrelevant for the purpose of determining JTC's losses. Hence, the next lowest bid after the bids submitted by WSL and by SB Façade was that submitted by Liang Huat Aluminium Industries Pte Ltd ("Liang Huat") in the value of $63,458,706. What this scenario meant was that if WSL had never tendered for the contract for the façade works in the original tender exercise, JTC would have been left with Liang Huat's bid as, in effect, the lowest bid that was available for acceptance, SB Façade's bid having been ruled out right at the outset. And, taking into account that the Project had to be completed on an urgent basis, it is reasonable to infer that JTC would have accepted Liang Huat's bid instead of calling for new bids (which, *ex hypothesi*, there would have been no reason to do).

37 Therefore, the long and short of it is that, on the evidence before the court, WSL's bid was the *lowest* overall. No other tenderer was shown to have submitted a bid at an amount that was even close to the value of WSL's bid (which bid was accepted by JTC, culminating in the WSL Contract). For the sake of completeness, and for the avoidance of doubt, we should deal briefly with another bid (or quotation, given that there was no consensus between the parties on how this figure was to be characterised) of approximately $57.5m by BLL.

38 On 23 August 2002 (even before terminating the WSL Contract), JTC had invited BLL, Samsung and Diethelm Industries Pte Ltd ("Diethelm") to submit quotations for the façade works ("the August 2002 exercise"). We pause to note that there was some disagreement between the parties as to whether this was an invitation to tender for the façade works or merely an invitation to the above contractors to provide quotations for the same. JTC's position, which it maintained up to the present appeal and during the course of the oral hearing before this court, was that it was the latter, *viz*, the August 2002 exercise was a preliminary quotation exercise. Either way, this disagreement as to the nature of the August 2002 exercise, which initially arose in the context of the issue of mitigation of loss, ultimately did not prove to be of any significance, as we shall explain shortly. On 28 August 2002, BLL submitted a quotation of $57,500,008, whilst Samsung submitted an indicative price of approximately $65m to $85m. Diethelm, on the other hand, only wanted to undertake either the first phase or the second phase of the façade works, and therefore submitted separate quotations for each phase (to the value of $23,439,109 and $34.5m, respectively). It should be noted that whilst BLL submitted an initial quotation of approximately $57.5m, it was ultimately awarded the new contract for the façade works (pursuant to the BLL Contract) for *$61.81m* (which was the amount stated in the bid *subsequently* submitted by BLL pursuant to *the invitation to tender of 13 September 2002* ("the 13 September 2002 tender exercise"), which invitation had also been sent to five other companies, including Samsung and Diethelm (see below at [39])). Whether the August 2002 exercise was for the purpose of inviting quotations or tenders, the incontrovertible fact is that BLL had itself subsequently put in a higher bid of $61.81m pursuant to the 13 September 2002 tender exercise (which, like the original tender exercise, related to the façade works), *and it was pursuant to that bid that BLL was ultimately awarded the new contract for the façade works* (via *the BLL Contract).* In other words, *even if* the August 2002 exercise had attracted proper bids which were capable of being accepted by JTC, JTC had not accepted any of those bids (and, in particular, the bid of approximately $57.5m submitted by BLL). The salient point to highlight is that this bid of approximately $57.5m, even if it were considered to be close to WSL's bid of $54m, clearly could not be held to be indicative of the prices of the bids that were being made at the relevant period of time (*ie*, at the time of the

original tender exercise).

39 As we have seen, JTC terminated the WSL Contract on 9 September 2002. Thereafter, on 13 September 2002, JTC (through JCPL) invited six companies, via the 13 September 2002 tender exercise, to bid for the façade works (these companies included (in addition to Samsung, Diethelm and BLL) MERO Asia Pte Ltd, FacadeMaster Pte Ltd/Compact Metal Industries Ltd and Permasteelisa Pacific Holdings Ltd). The tender period was for three days (from 13 September 2002 to 16 September 2002). Only BLL, Samsung and Diethelm had, in fact, received prior notice of the invitation to tender. And, ultimately, only BLL and Samsung tendered for the façade works with bids of $61.81m and $88m, respectively. As we have already noted, the new contract for the façade works was, on the recommendation of JCPL, awarded to *BLL* on 9 October 2002 for *$61.81m* (resulting in the formation of the BLL Contract).

40 Having regard to the entire backdrop against which both the WSL Contract and the BLL Contract were concluded, it is clear that:

(a) with respect to the original tender exercise, JTC could not in reality have accepted any bid below that of $63,458,706 submitted by Liang Huat; and

(b) with respect to the August 2002 exercise and the 13 September 2002 tender exercise (the former, as pointed out at [38] above, possibly being, in fact, a mere preliminary quotation exercise), the lowest bid (*ie*, that submitted by BLL) was below the aforementioned bid of $63,458,706.

Accordingly, it was not possible for JTC to maintain the argument that the difference between the value of the WSL Contract and that of the BLL Contract (which difference, as we have seen, amounted to $7.81m) was loss that flowed directly from the transaction entered into as a result of WSL's fraudulent misrepresentations. As Lord Hoffmann pertinently pointed out (albeit by way of *obiter dicta*) in the context of fraudulent misrepresentation in the House of Lords decision of *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 at 216, "[t]he defendant is clearly not liable for losses which the plaintiff would have suffered even if he had not entered into the transaction …".

41 As counsel for WSL, Mr Tan Liam Beng ("Mr Tan"), pointed out, BLL's bid of $61.81m (during the 13 September 2002 tender exercise) was, in fact, *lower* than the bid which constituted, *effectively*, the next lowest bid in the original tender exercise (compared to the bid submitted by WSL, which was accepted by JTC, thus resulting in the formation of the WSL Contract) – *viz*, the bid of $63,458,706 by Liang Huat (see above at [36]). As Mr Tan emphasised, if WSL had not made the fraudulent misrepresentations in question (*ie*, if WSL had not submitted its bid), JTC would, in any event, have had to accept a bid pitched at a sum higher than the value of the bid which resulted in the BLL Contract (*ie*, BLL's bid of $61.81m in the 13 September 2002 tender exercise) as JTC would have been left with no alternative but to accept Liang Huat's bid of $63,458,706 in the original tender exercise. In this regard, it bears repeating that the bid submitted by SB Façade (which was for a lower sum) in the original tender exercise was not even considered by JTC (see above at [36]).

42 It is important to emphasise that nothing that we have stated thus far detracts from the undesirable nature of fraud and the resulting legal principle (embodied in both *Doyle* ([21] *supra*) and, more recently, *Smith New Court* ([21] *supra*)) centring on the recoverability of all direct loss (including consequential loss) flowing from the transaction which was entered into in reliance upon the fraud (even if such loss was not foreseeable). However, on the *facts* of this particular appeal, JTC has not met the threshold requirement of furnishing sufficient proof or evidence, on a balance of

probabilities, of the loss claimed under item (a) in the first instance.

43 We also note that the damages awarded by the Judge under this head (*viz*, item (a)) was, literally, the difference between the value of the WSL Contract and that of the BLL Contract. In other words, the Judge applied what was, in substance, the *contractual measure* of damages in what was essentially a *tortious context* (here, that relating to fraudulent misrepresentation). As we have already noted above (at [28]), there ought *not* to be a conflation of the damages awarded in contract and in tort, respectively, as the award of damages in each of these spheres serves a *different purpose*. It is true that there could be a coincidence in quantum between the contractual and the tortious measures of damages, depending on the precise facts of the case concerned, although (as has been pointed out above at [28]), this would be more by way of a *factual* coincidence and does *not* signify any coincidence in the *purposes* that the law of contract and the law of tort, respectively, serve (*cf* the English Court of Appeal decision of *East v Maurer* [1991] 1 WLR 461, where there was, on the facts, a difference in quantum between the contractual and the tortious measures of damages, although damages were ultimately awarded by the court for the lost opportunity (which constituted the tortious measure on the facts) as opposed to the lost bargain (which was the contractual measure) as such (see also the (also) English Court of Appeal decision of *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] QB 488 at 513 *per* Ward LJ)). In any event, in the light of our findings on the facts of the present appeal, no coincidence between the quantum of damages recoverable in tort and that recoverable in contract (whether factual or otherwise) is present.

44 We should also observe that, in the light of our decision with respect to the issue of proof of loss, it follows that there is no need for us to consider WSL's alternative arguments to the effect that JTC had not mitigated its loss and that, in any event, JTC's claim had to be reduced to take into account alleged differences between the scope of work covered by the WSL Contract and that covered by the BLL Contract.

45 Finally, JTC had argued that it constituted an abuse of process for WSL to raise the point upon which the appeal on this particular issue (*ie*, the damages claimed under item (a)) has turned as the latter had accepted that the difference between the value of the WSL Contract and that of the BLL Contract was the basis, in principle, upon which damages would be awarded. However, what was involved here was the inappropriate application of a principle of law to the facts of the case. We see no reason why WSL could not raise an argument which would correct this. Indeed, it has been clearly established that, in exceptional situations, this court will even entertain a *new* point on appeal, provided that it is in as advantageous a situation as the court below to determine the point (see, for example, the decision of this court in *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR 571).

Conclusion

46 In the circumstances, therefore, we find that JTC has failed to furnish sufficient proof or evidence of loss in respect of its claim under item (a) and we therefore allow the appeal with regard to the award which the Judge made for this particular head of damages. In all other respects, however, as stated earlier at [14] and [29] above, we affirm the judgment of the court below.

47 In the light of our decision, WSL is entitled to receive from JTC three quarters of its costs both here and below. The usual consequential orders are to follow.