IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 7

Civil Appeal No 233 of 2017

Between

Simpson Marine (SEA) Pte Ltd

… *Appellant*

And

Jiacipto Jiaravanon

… *Respondent*

In the matter of Suit No 888 of 2014

Between

Jiacipto Jiaravanon

… *Plaintiff*

And

Simpson Marine (SEA) Pte Ltd

… *Defendant*

JUDGMENT

[Restitution] — [Failure of consideration] — [Pre-contract deposits]
[Contract] — [Formation]

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Simpson Marine (SEA) Pte Ltd
v
Jiacipto Jiaravanon

[2019] SGCA 7

Court of Appeal — Civil Appeal No 233 of 2017
Andrew Phang Boon Leong JA, Judith Prakash JA and Tay Yong Kwang JA
24 September 2018

23 January 2019 Judgment reserved.

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

Introduction

1 In this appeal, the appellant, a yacht dealer, seeks to resist restitution of a deposit paid by the respondent, Jiacipto Jiaravanon (who is now deceased and whom we shall refer to as "Jiaravanon"), on the ground that the parties agreed that the deposit was paid for the purpose of holding two yachts off the market pending Jiaravanon's decision to purchase either of them and that this purpose did not fail notwithstanding Jiaravanon's decision not to proceed with a purchase.

2 The factual dispute may be briefly stated. In early 2013, Jiaravanon was in negotiations with the appellant to purchase one or two yachts from an Italian yacht maker, Azimut Benetti SpA ("Azimut"). In so far as the series of larger yachts was concerned, Jiaravanon was considering two models in Azimut's 100-

ft series, the 100 Leonardo ("100L") and the 100 Grande ("100G"). He was specifically interested in two hulls that were available for early delivery – the 100L hull number 15 ("100L #15") and the 100G hull number 12 ("100G #12").

3 On 26 April 2013, Jiaravanon signed an invoice agreeing to pay a deposit of €1m ("the Deposit") to the appellant to "secure [the 100L #15 and 100G #12] until 15th May 2013 at which time the deposit will be transferred to either yacht to become the initial down payment". Jiaravanon transferred the Deposit to the appellant on 29 April 2013. However, it transpired that one or two days before this, Azimut had sold the 100G #12 to another buyer. The appellant therefore did not remit the Deposit to Azimut, but retained it. The appellant informed Jiaravanon that hull number 15 for the same 100G model ("100G #15") was available for the next earliest delivery. Jiaravanon continued to discuss with the appellant's representatives whether to go ahead with a purchase.

4 On 8 May 2013, Jiaravanon met the appellant's and Azimut's representatives in Hong Kong and viewed a 100L yacht belonging to another of the appellant's clients. The appellant alleges that Jiaravanon had agreed at this particular meeting to use the Deposit he had paid to the appellant to secure the 100L #15 and 100G #15 until 31 May 2013 in order to enable him to choose between them, at which point the Deposit would be applied to the purchase price of the particular yacht chosen. Jiaravanon, on the other hand, denies that such an agreement was reached. On 9 May 2013, the appellant remitted the Deposit to Azimut.

5 As events panned out, Jiaravanon eventually refused to purchase an Azimut yacht in the 100-ft series. On 31 July 2013, a compromise was reached whereby half the Deposit was to be applied to the purchase price of another

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Azimut yacht that Jiaravanon had already purchased. The remaining €500,000 ("the Remainder") is the subject of dispute in this appeal.

6 After the trial, the High Court judge ("the Judge") held that the basis for the payment of the Deposit totally failed when Azimut sold the 100G #12 to another buyer. The Judge found that no agreement was reached on 8 May 2013 to use the Deposit as a non-refundable deposit to secure the 100L #15 and 100G #15 for Jiaravanon's choice by 31 May 2013. It was also not agreed on 31 July 2013 that the Remainder would be utilised to purchase another yacht, failing which the Remainder would be forfeited. Therefore, the Judge granted Jiaravanon restitution of the Remainder.

7 The appellant appeals against the Judge's finding that Jiaravanon did not agree on 8 May 2013 to pay the Deposit to Azimut as a non-refundable deposit to reserve the 100L #15 and 100G #15. Since the 100L #15 and 100G #15 were in fact reserved for Jiaravanon for the stipulated period, the appellant argues that Jiaravanon is not entitled to restitution of the Remainder.

Facts

8 Having stated the gist of the dispute, we now set out the facts more fully. The appellant is a Singapore-incorporated company in the business of dealing in luxury yachts. At the material time, the appellant dealt in yachts produced by Azimut, a company incorporated in Italy. Peter Mison ("Mison") was a yacht broker for the appellant, based in Singapore. Paul Grange ("Grange") was the appellant's Group Sales Manager and the brand representative for Azimut. Giordano Pellacani ("Pellacani") was Azimut's Sales Manager for Asia.

9 Jiaravanon was a male Indonesian national. He passed away at the age of 40 in 2015, after commencing the suit below. At the time of his death, he was

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the Vice President Commissioner of PT Charoen Pokphand Indonesia TBK, which formed part of the Charoen Pokphand Group Indonesia ("CP Group"). He was informally known as "Chip" or "Cip", as reflected in some of the correspondence discussed below. Jiaravanon's widow, Anita, has conduct of the proceedings as administratrix of Jiaravanon's estate. In his dealings with the appellant, Jiaravanon was assisted by Aina Taslim ("Taslim"), the Head of Purchasing (Commercial Division) of the CP Group.

Background

10 The parties' dealings began in January 2013, when Jiaravanon and Taslim met Mison as Jiaravanon was thinking of purchasing at least one yacht for use in Hong Kong or Southeast Asia. Jiaravanon initially decided to purchase an Azimut 62S but did not proceed with the purchase. On 28 February 2013, Jiaravanon informed Mison that he was considering a yacht in Azimut's 100-ft range. He was interested in either the Azimut 100L or 100G, whichever was available for an early delivery date and purchasable at a good price.

11 On 11 April 2013, Mison informed Jiaravanon that Azimut had only two yachts, one 100L and one 100G, available for delivery within the year. He recommended that Jiaravanon place a deposit to hold both boats until Jiaravanon made a trip to Italy to decide which of the two models he preferred.

The payment of the Deposit

12 On 26 April 2013, Mison met Jiaravanon at Jiaravanon's house. It is undisputed that on this occasion, Jiaravanon signed the following documents:

(a) A contract to purchase an Azimut 64 yacht (hull number 68) ("the Azimut 64 yacht") for €1,916,675 ("the Azimut 64 Contract")

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from the appellant. The claims in relation to this contract are not the subject of this appeal.

(b) An invoice ("the Deposit Invoice") for the payment of the sum of €1m (that is, the Deposit) by Jiaravanon to the appellant. The Deposit Invoice states that the Deposit is a "holding deposit" against two boats: the 100G #12 and the 100L #15. As mentioned, these were specific yachts being produced in the 100G and 100L model lines, identifiable by their hull numbers. They were already in production and were available for early delivery. The terms of the Deposit Invoice state that the Deposit is to "secure both yachts until 15th May 2013 at which time the deposit will be transferred to either yacht to become the initial down payment".

13 On 29 April 2013, one of Jiaravanon's assistants sent Mison a text message to say that Jiaravanon "would like to remit the Euro1,000,000. – for deposit of either 100Leornardo [*sic*] or Grande". She also sought clarification about the discount available on both boats. Mison explained that the pricing deal he offered on the 100G #12 was limited to this exact hull number. However, Mison said that Jiaravanon had "agreed that if he misses [the 100G #12] [because it is sold before he places a deposit on it] he could accept [the 100G #15] which is able to ship out in December". Mison also highlighted that "Azimut will only hold the 2 x 100's for [Jiaravanon] to choose from until May 15th." Mison forwarded the contents of his message to Jiaravanon via email.

14 On 29 April 2013, Jiaravanon paid the Deposit to the appellant. A receipt was issued by the appellant on 30 April 2013. However, it transpired

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that one of the boats that the Deposit was meant to secure, the 100G #12, had been sold to a Mexican buyer on 27 or 28 April 2013.

15 On 30 April 2013, Mison informed Jiaravanon that Azimut had already sold the 100G #12. Mison suggested that Jiaravanon consider the 100G #15 instead, which he said was available to be shipped out in November or December. At the same time, Mison noted that the "100 Leonardo is now reserved for [him] if [he would] prefer to go that way".

16 On 4 May 2013, Jiaravanon informed Mison in a text message that he now planned to get only one boat first and instructed him not to send the Deposit to Azimut for the boats in the Azimut 100-ft series. He said:

> Peter, I have decided that I will get 1 boat first only! Not the 64 but the 62S or 55S or 70! So don't send in the million euro as deposit for the 100! They can sell them if there is someone to buy before me. The delivery date is a big problem for me and the price a little on the high side! Quite different from what I was told or expected when I first met you and told [*sic*]. You told me that the boats will arrive in Singapore within a months [*sic*] time once I have confirmed and made a payment for them! …

17 Mison replied to say that he "will stop the transfer of the 100 deposit and return it to [Jiaravanon] right away". He reiterated his suggestion that Jiaravanon travel to Italy to view the boats. He also explained why he thought that the "100 #15" was a good choice for Jiaravanon.

18 By 6 May 2013, it appears that Jiaravanon was once again considering the purchase of a 100-ft yacht because he was making plans to travel to Hong Kong to view an Azimut 100L that was docked there for another client. On 6 May 2013, Mison emailed Jiaravanon and Anita to send them technical specifications for various boat models that Jiaravanon was still considering: the 72S, 100L and 100G models. As regards the Deposit, Mison said as follows:

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> Note that I have NOT sent your deposit to Azimut in Italy and have requested they wait a few more days, until you meet the managers in HK, before they sell the 100G # 15 to the American. They have not agreed yet but I'm pushing. I don't want you [to] miss out on the 100# 15 after what happened with # 12. But I also want to make sure you can get your Visa sorted before you commit to when you can get back there. Azimut has agreed that if you were to have us release the deposit to hold the 100 # 15 (and the 100L) that you could use the funds to buy a different Azimut such as an 84 or 88 or bigger. So please think again if you'd like to me [*sic*] to send the funds to Azimut. I'm hoping that once you see the Leonardo, and [Pellacani] and Paul Grange show you more information on the 100G, you will feel that it's worthwhile to go ahead again to transfer the deposit to lock in either the 100 L or 100G # 15. You can discuss this more with Paul and [Pellacani] when you meet with them. [emphasis in original]

The 8 May 2013 meeting

19 Two days later, on 8 May 2013, Jiaravanon met Grange and Pellacani in Hong Kong and viewed an Azimut 100L yacht. The parties dispute what was agreed during this meeting. The appellant contends that Jiaravanon agreed that the Deposit should be paid to Azimut as a non-refundable deposit to reserve the 100L #15 and the 100G #15 until 31 May 2013 in order for Jiaravanon to choose between them. Jiaravanon denies that any such agreement was reached.

20 On 9 May 2013, the appellant forwarded the Deposit to Azimut. The remittance record states as follows:

> May 9, 2013
>
> AZIMUT-BENETTI SPA 1,000,000.00
>
> …
>
> DEPOSIT REVERSE L100-15, G100-15
>
> UNTIL END OF MAY
>
> …

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21 On 27 May 2013, Mison sent Jiaravanon an email urging him to obtain an Italian visa so that he could make a trip to view the Azimut 100-ft boats in Italy and choose between the 100L and 100G models. This was evidently a matter of urgency from Mison's perspective, as he said:

> Alternatively, after seeing the Leonardo 100, if you now strongly feel the 100 Grande is what you really want, then you might as well forget about the Leonardo and just lock in the Grande. Once you have committed to the Grande the urgency to get back there will be off and you can go back later when you have more time.

22 On 29 May 2013, Mison informed Jiaravanon that Azimut had agreed to "hold the two Azimut 100's until this Friday the 31st" but that Mison had asked for an extension until 7 June 2013. Mison also inquired if Jiaravanon was prepared to make a choice between the boats being held for him without making a trip to Italy, so that he would not miss out on his preferred model.

23 On 31 May 2013, apparently the last day that the 100L #15 and 100G #15 would be reserved against the Deposit (as the appellant claims), Mison wrote to Jiaravanon as follows:

> Is there any chance of you choosing one now (either the 100 L or 100 G) instead of waiting to get a visa for you to go back to Italy? I expect the 100 Leonardo will not sell immediately but the 100 Grande has been receiving a lot of interest. Even just here in Asia we have clients that would like your hull number 15. Today is officially the last day for Azimut to hold both the 100's for you. **I will ask if they will continue the hold the 100's until June 17 / 18th (when you said you hope to get back there) but I cannot guarantee they will agree.** [emphasis in original]

24 Four days later, Mison again asked if Jiaravanon was still planning to visit Azimut in Italy on 17 or 18 June as earlier planned, and asked when he could decide between the two models if he did not make a trip to Italy. He also

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inquired if Azimut could be released from holding the 100L for him and sell it to someone else, since he seemed to be leaning towards the 100G.

25 It is unclear what transpired over the course of June 2013, but on 7 July 2013, Jiaravanon sent Mison a text message stating that he no longer wished to purchase a 100-ft yacht from the appellant.

The compromise arrangement

26 On 31 July 2013, Jiaravanon met Mison. According to Mison's text message to Taslim after the meeting, Jiaravanon and Mison agreed as a "compromise" that half of the Deposit would be applied to the purchase price of the Azimut 64 yacht (see [12(a)] above) ("Compromise Agreement"), while the other half would be applied to the purchase of either an Azimut 100L or an Azimut 76 yacht.

27 The next day, the appellant issued a revised payment invoice for the Azimut 64 yacht purchased under the Azimut 64 Contract. This invoice reflected the Compromise Agreement in its calculation of the balance payable for the Azimut 64 yacht. Mison explained the new position in the following terms in an email to Jiaravanon's assistant in which Jiaravanon was copied:

> … You had sent a separate 1,000,000 euro as a deposit to go towards the purchase of an Azimut 100. Azimut has agreed to allow ½ of that 1,000,000 to be used to help to pay down the 64. This is why this invoice now shows 2 x 500,000 euro being already paid as a deposit towards the 64.
>
> …
>
> Note also that I am currently working with Chip regarding the other 500,000 euro deposit that Azimut is holding to be used to buy another bigger Azimut (possibly still a 100).

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Dispute over the return of the Remainder

28 In August 2013, Jiaravanon demanded the return of the Remainder in three emails dated 11, 12 and 28 August 2013. On 11 August 2013, Jiaravanon wrote to Mison:

> Now are we clear on the deposit issue otherwise, there will be no more deals other than the 64 but lawsuits to get my money back! I will be speaking with my lawyer then about the deposit money that was given in good faith but not to taken advantage of [*sic*]! From the very beginning I have kept refusing to sign any documents or agreements on what prices I agreed or commitment of any sort about the 2nd and larger yacht before I get to go to Italy and see it for myself! Now that its [*sic*] is coming to HK, I can do the seeing for myself however, if the price is not right, I have the right to decline and pull out and have my money refunded, as to what You or Paul agreed and understood from way back when I first met you and told you about our interest in the larger yacht!

29 He reiterated on 12 August 2013 that "I want my deposit back! And I am saying RIGHT AWAY." Notwithstanding these misgivings, it appears that Jiaravanon met with the appellant's representatives in Hong Kong on 13 August 2013 to view a 100G-model yacht. By 28 August 2013, Jiaravanon had decided that he was not buying a 100G yacht and demanded that the Remainder be returned:

> I'm not going to say this again but I will not be buying another Azimuth [*sic*]! At least not anytime soon! So forget about the 100G or the 95 etc. ! However I DO NEED MY €500k deposit back ASAP! The funds are needed else where! … I will be getting a Ferreti or San Lorenzo so I need the €500k back immediately … This is also my 3rd or 4th time explaining my decision about the Azimuth [*sic*] 100G. I reserve the right to withdraw from a business transaction if we cannot come to an agreement on the price and again I did not even confirm any 100ft yacht from you because I have not even seen or sea trialled any of the 100 ft yachts! I do see the possibility of doing business with you or Simpson Marine again in the future but if you are going to insists [*sic*] on this type of ungentlemanly behaviour, withholding and not refunding the deposit that I put down only after you agreed that this deposit does not mean a guaranteed

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> sale of a 100ft yacht to me but only after visiting Italy and seeing the yachts for myself and se [*sic*] trials then I will have a definite answer for you whether I am going go [*sic*] bug or pass on the 100ft boats! This was made very clear in my email and sms when you kept bugging me for a deposit for the 100ft yachts because supposedly you Re [*sic*] holding it specially for me and rejecting other peoples [*sic*] offer to buy the boat!!

30 On 30 August 2013, Mison informed Jiaravanon that he had forwarded Jiaravanon's request for the return of the Remainder to the appellant's head office in Hong Kong. In this email, Mison stated that the Deposit "was given to Azimut to put a hold [on] two Azimut 100's for [Jiaravanon] until [he] had selected which one [he] preferred".

31 Grange responded to Jiaravanon on 3 September 2013, explaining that "[a]s agreed at the time, [his] deposit was forwarded in full to Azimut to reserve [his] choice of either the Leonardo 100-15 or Grande 100-15". Grange said that he had notified Azimut of Jiaravanon's request to have the deposit returned. Jiaravanon did not respond.

32 On 9 September 2013, Mison explained the situation concerning the deposit to Taslim, noting that Jiaravanon had agreed to transfer the Deposit to Azimut when he met with Grange and Pellacani to view the Azimut 100L in Hong Kong:

> I am continuing to work on finding a solution to the deposit problem. Azimut feels that they have already made a huge concession in agreeing to use half of the deposit to help pay for the Azimut 64. They did this with the understanding that the remaining 500,000 euro would be used to buy the bigger Azimut (and preferable [*sic*] one of the 100's). Note that Chip had agreed to have the 1,000,000 euro transferred from Simpson Marine to Azimut, Italy when he met with Paul Grange, our Simpson Marine Azimut Brand Manager, and [Pellacani], the Azimut Asian Sales Manager, when he was in HK to view the Azimut Leonardo 100. [Pellacani] is also the guy that contacted the embassy in HK to fast track a Visa for Chip and Anita to go to Italy. Azimut feels that they have made a sincere

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> effort to help Chip in the many special requests he has asked for and they have repeatedly agreed to extend the hold on the two 100' yachts while waiting for him to get a Visa. He has since been able to view both models in HK so he no longer needs to go to Italy. However, I am not giving up and please understand that I also want this issue resolved as quickly as possible.

33 Between November 2013 and August 2014, there were further discussions between Jiaravanon and the appellant's representatives because Jiaravanon wished to return the Azimut 64 yacht he had purchased. Jiaravanon sought to apply the price paid for the Azimut 64 yacht and the Remainder to the purchase of yet another yacht, initially an Azimut 70 and later an Azimut 77S. In the end, Jiaravanon did not purchase a second yacht from Azimut.

34 On 15 August 2014, Jiaravanon commenced the suit below to seek, among other things, the restitution of the Remainder.

Decision below

The agreement as at 26 April 2013

35 The Judge found that on 26 April 2013, Jiaravanon and the appellant orally agreed that Jiaravanon would pay the Deposit to the appellant as a holding deposit to secure the 100G #12 and 100L #15 yachts until 15 May 2013; and that the Deposit would become the initial down payment on either yacht once Jiaravanon made his choice between the yachts: *Jiacipto Jiaravanon v Simpson Marine (SEA) Pte Ltd* [2017] SGHC 288 ("Judgment") at [42]. This finding was based on the text of the Deposit Invoice and Mison's testimony: Judgment at [43]–[44].

36 The Judge rejected the contention that the Deposit was absolutely non-refundable: Judgment at [45]. However, the Judge qualified this by saying that the Deposit was refundable *only if the basis for its payment had failed*, *ie*, if the

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Deposit did not secure the 100L #15 and 100G #12 until 15 May 2013 for Jiaravanon to choose between them. If, however, the Deposit had secured the 100L #15 and 100G #12 until 15 May 2013, and Jiaravanon then decided not to purchase either yacht, Jiaravanon would not have been entitled to recover the Deposit: Judgment at [47], [48] and [50].

37 Since Azimut had sold one of the two yachts by 30 April 2013 (*ie*, on 27 or 28 April 2013), the Deposit did not secure the two Azimut 100 yachts for Jiaravanon's choice until 15 May 2013. Accordingly, there was a total failure of consideration and Jiaravanon was entitled to recover the Deposit after 30 April 2013: Judgment at [50] and [62]. The appellant does not challenge this position in this appeal.

The agreement as at 8 May 2013

38 The appellant's case below was that during the meeting on 8 May 2013, Jiaravanon had agreed that the Deposit should be paid to Azimut as a non-refundable deposit to reserve the 100L #15 and 100G #15 yachts. The Judge held that there was no such agreement or representation by Jiaravanon. The Judge's reasons for arriving at this holding may be summarised as follows:

> (a) First, there was no documentary evidence for the alleged agreement or representation: Judgment at [65]. There was no invoice or contemporaneous email or text message stating what Jiaravanon had agreed to. There was also no evidence of internal correspondence recording Jiaravanon's instruction to remit the money to Azimut. The Judge considered the lack of documentation to be critical because the appellant was a commercial party in the business of dealings in yachts, and because, on 4 May 2013, Jiaravanon had just asked for the Deposit to be returned.

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(b) Second, when Jiaravanon demanded a refund of the Remainder in August 2013, the appellant only responded to him on 3 September 2013 and, in its reply, did not state that Jiaravanon had agreed on 8 May 2013 that the Deposit should be paid as a *non-refundable* deposit. The Judge inferred that there was no such agreement because the appellant failed to mention it in the face of Jiaravanon's strongly worded demands: Judgment at [66].

(c) Third, the Compromise Agreement led the Judge to doubt that Jiaravanon had agreed on 8 May 2013 to forward the Deposit to Azimut as a non-refundable deposit: Judgment at [67]. The Judge thought that if Jiaravanon had agreed to this, the appellant would not have agreed to the Compromise Agreement. The appellant had not made it clear that it was offering to allow Jiaravanon to apply half of the Deposit to the price of the Azimut 64 yacht out of goodwill even though Jiaravanon was not entitled to that course of action.

(d) Fourth, the Judge accepted that the appellant's remittance of the Deposit to Azimut on 9 May 2013 appeared consistent with the appellant's case that Jiaravanon had instructed this remittance on 8 May 2013. However, the Judge was not prepared to infer from this fact alone that Jiaravanon had agreed on 8 May 2013 that the Deposit would be retained by the appellant and paid to Azimut as a non-refundable deposit. This was because the remittance from the appellant to Azimut was a matter between the appellant and Azimut and there could have been a gap in the agreements between the appellant and Azimut on the one hand, and between Jiaravanon and the appellant on the other: Judgment at [68]. Further, there was no internal correspondence

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between the appellant's Singapore and Hong Kong offices on the circumstances surrounding the remittance to Azimut on 9 May 2013.

The agreement as at 31 July 2013

39 The appellant contended below that at the 31 July 2013 meeting, apart from the Compromise Agreement (see [26] above), Jiaravanon had agreed to use the Remainder to buy another Azimut yacht which was to be larger than the Azimut 64 yacht ("larger yacht") before the end of August 2014, failing which the Remainder would be forfeited. The Judge rejected this contention and found instead that Jiaravanon had agreed that if he chose to purchase a larger yacht, the Remainder would be applied to its purchase price: Judgment at [71]–[72].

40 In conclusion, the Judge held that on 30 April 2013, Jiaravanon was entitled to recover the Deposit. It was undisputed that Jiaravanon agreed that half of the Deposit would be applied to the purchase price of the Azimut 64 yacht. However, the Judge found that Jiaravanon did not agree, during the 8 May or 31 July 2013 meetings, that the Deposit or the Remainder would be non-refundable in that it would be forfeited if Jiaravanon did not buy either the 100L #15 or the 100G #15 (in respect of the alleged agreement on 8 May 2013), or a larger yacht (in respect of the alleged agreement on 31 July 2013). Therefore, the Judge held that Jiaravanon was entitled to restitution of the Remainder.

Issues

41 The appellant appeals only against the Judge's finding that Jiaravanon did not agree or represent on 8 May 2013 that the Deposit should be paid to Azimut as a non-refundable deposit to reserve the 100L #15 and 100G #15 for Jiaravanon's choice. The issues raised are as follows:

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(a) What was the basis for the appellant's receipt and retention of the Deposit after 30 April 2013? Did the parties agree on 8 May 2013 that the Deposit would be applied to reserve the 100L #15 and 100G #15 for Jiaravanon to choose between them, and that the Deposit would not be refundable if, Azimut having reserved the two yachts for the agreed period, Jiaravanon decided not to proceed with a purchase?

(b) If there was a basis for the appellant's retention of the Deposit after 30 April 2013, did this basis fail?

Parties' cases

42 We now summarise the parties' respective cases on appeal. The appellant first argues that the surrounding circumstances, taken in totality, ought to have led the Judge to conclude that the parties agreed on 8 May 2013 that the Deposit would be remitted to Azimut as a holding deposit for the 100L #15 and 100G #15, and was not refundable if Jiaravanon subsequently declined to purchase either yacht. The circumstances showed that Jiaravanon understood that the Deposit, once remitted to Azimut, was not refundable; that the appellant was waiting for Jiaravanon's confirmation before remitting the Deposit to Azimut; that the 8 May 2013 meeting was arranged to help Jiaravanon decide whether to remit the Deposit to Azimut to "lock in either the 100L or 100G# 15"; and that the appellant transferred the Deposit to Azimut the next day after the 8 May 2013 meeting. The Judge also failed to place sufficient weight on Grange's clear and unequivocal testimony about what was agreed at the 8 May 2013 meeting, and two emails dated 3 and 9 September 2013 (see [31]–[32] above) that referred to an agreement on the terms as contended.

43 Second, the appellant argues that the Judge erred in finding that the appellant's purported delay in responding to Jiaravanon's demands for the

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return of the Remainder undermined the existence of the 8 May 2013 agreement.

44 Third, the appellant argues that the Judge further erred in finding that the entry into the Compromise Agreement made it less likely that an agreement was reached on 8 May 2013 on the terms alleged by the appellant.

45 In response, Jiaravanon argues that the Judge was correct in his analysis of the evidence because: (a) Mison had volunteered on 4 May 2013 to return the Deposit; (b) there was no independent evidence apart from the appellant's evidence that Azimut was prepared to hold the 100L #15 and 100G #15 against the Deposit given that the 100G #12 had been sold; (c) the real reason for the appellant's failure to refund the Deposit was the appellant's desire to sell Jiaravanon another yacht; (d) Grange's oral evidence regarding what was allegedly agreed during the 8 May 2013 meeting should not be relied upon given the lack of contemporaneous documentation of the alleged agreement; (e) Mison's emails did not refer to an agreement reached on 8 May 2013 and referred generally to the 100-ft yacht models without hull numbers; and (f) the appellant inexplicably failed to respond promptly to Jiaravanon's demands for the return of the Remainder in August 2013.

Principles governing recovery of pre-contract deposits

46 We first set out the applicable law. Ordinarily, pre-contract deposits, which are paid before any binding contract has been formed, are but an expression of seriousness of intention on the part of the prospective purchaser: Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th Ed, 2016) ("*Goff & Jones*") at para 14–06. Part of the basis of payment of a pre-contract deposit is that the

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contract will subsequently come into existence. If no contract materialises, the basis of the payment would have failed, and the deposit must be returned. The payor is not under any obligation to bring the contract into existence, and may reclaim the deposit at any time before a binding contract is entered: *Goff & Jones* at para 14–07.

47 However, not all pre-contract deposits are of this nature. Pre-contract deposits are governed by general principles of restitution for failure of consideration or basis: see *Goff & Jones* at para 14–12. Prof Peter Birks, in his revised edition of *An Introduction to the Law of Restitution* (Oxford University Press, 1989) at p 223, summarised the meaning of failure of consideration as follows:

> Failure of the consideration for a payment should be understood in that sense. It means that the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself.

48 In *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd and another* [2018] 1 SLR 239 ("*Benzline*"), this Court clarified (at [46]) that the inquiry into the unjust factor of failure of consideration or basis has two parts: first, what was the basis for the transfer in respect of which restitution is sought; and second, did that basis fail?

49 It is often the first stage of this inquiry that poses greater difficulty. In this context, "consideration" or "basis" refers to either (a) the performance of a counter-promise, as distinguished from the counter-promise itself; or (b) a non-promissory contingent condition, *ie*, an expected event or state of affairs which neither party is responsible for bringing about (*Benzline* at [49]–[50]). The transaction must be closely analysed to identify the basis on which the money is paid or the benefit conferred. The basis of the transfer must be objectively

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determined based on what is communicated between the parties, and must be jointly understood by both parties as such: *Benzline* at [51] and *Goff & Jones* at para 13–02. A basis may be expressed, but it may also be implied. The task of identifying the basis objectively is very similar to the approach taken in determining the formation and construction of contracts. It involves inquiring into what a reasonable person in the position of the parties would have understood the words and conduct of the parties to mean: see *Goff & Jones* at para 13–04.

50 The following cases illustrate how the courts have approached the task of identifying the basis for a payment that has been characterised as a deposit.

51 In the Singapore High Court decision of *United Artists Singapore Theatres Pte Ltd and another v Parkway Properties Pte Ltd and another* [2003] 1 SLR(R) 791 ("*United Artists*"), whilst negotiations were underway for the plaintiffs to lease a cineplex from the defendants, the plaintiffs paid a total of over $1.8m to the defendants partly towards rental and partly towards the differential premium payable to the Land Office. All draft agreements were expressly marked "subject to contract". Negotiations eventually ceased, with no lease ever being concluded. The plaintiffs claimed the $1.8m payment as money had and received by the defendants.

52 Belinda Ang Saw Ean JC (as she then was) acknowledged that a pre-contract deposit was *prima facie* recoverable by the payor if the contract that was envisioned ultimately did not materialise. She held that the onus was on the payee to displace the *prima facie* rule and show a right to retain the pre-contract payment on a construction of the document or correspondence under which that payment was made (at [76]). Considering all the facts, noting especially the defendants' request that the plaintiffs provide tangible assurance of their

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financial ability to undertake and complete the project, Ang JC characterised the payments in question as "pre-contract deposits which served as an indication of the plaintiffs' confidence with funding, genuine interest and seriousness in being the cinema operator" (at [186]). They served as a tangible assurance of genuine intent, and were made in anticipation of the lease that was being negotiated, and without any intention that they would be outright payments if a lease was not concluded (at [186]–[187]). Therefore, they were objectively recoverable in the event of failure to reach a final agreement.

53 In *Benzline*, the Court of Appeal highlighted (at [59]) three significant facts which grounded the decision in *United Artists*: the multiple references to "good faith payment" in the documentary evidence; the defendants' specific request for tangible assurance of the plaintiffs' financial ability to complete the deal; and the repeated emphasis that the arrangements were "subject to contract".

54 In *Benzline* itself, the respondents placed a purchase order for Lorinser cars with the appellant and transferred $300,000 to the appellant at the latter's request, all whilst they were negotiating an exclusive sub-dealership agreement. The payment of $300,000 was made after the respondents had received the first draft of the agreement between the appellant and Lorinser. The parties intended that this first draft would form the basis of the exclusive sub-dealership agreement between them. The appellant passed the $300,000 on to Lorinser and subsequently to Lorinser's car manufacturer. The appellant and the respondents ultimately failed to reach an exclusive sub-dealership agreement, because the respondents refused to agree to provide a stand-by letter of credit to Lorinser, among other reasons. The respondents sought to recover the payment on ground of failure of consideration.

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55 This Court found that the purpose of the payment was to enable Lorinser to pay its manufacturer the deposit and avoid future delay on the purchase order, not to show good faith and seriousness for the exclusive sub-dealership agreement (at [65]). There was at best an expectation or assumption on the respondents' part that the exclusive sub-dealership agreement would be entered into. There was no express communication about whether the payment was to be refunded if the exclusive sub-dealership agreement did not materialise (at [66]). It could not be expressly found or implied that entry into the exclusive sub-dealership agreement formed part of the basis of the payment, but it was implied that the appellant would *offer* the respondents the exclusive sub-dealership on terms which would correspond to the draft agreement (at [68]). This basis did not fail, because the appellant was in fact prepared to move forward with the deal but it was the respondents who threw a spanner in the works by proposing a different deal structure (at [69]). Therefore, the respondents could not recover the payment. *Benzline* illustrates the manner in which the basis of the payment should be objectively ascertained, in the light of all the evidence.

56 Third, it may be helpful to refer to an English case, *Sharma and another v Simposh Ltd* [2013] Ch 23 ("*Sharma*"), the facts of which bear some resemblance to the present case. In that case, the defendant was a property developer and the claimants were prospective purchasers of a building which was being converted into a block of flats by the defendant. The second claimant paid the defendant an initial sum of £1,600 in return for a promise not to market the property for two weeks. During these two weeks, the parties agreed orally that if the claimants paid a further sum of £53,400, the defendant would not offer the property for sale, or sell it to anyone else before completion of the redevelopment, when the defendant would sell it to the claimants at the price of

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£1.1m. The claimants paid the agreed amount, and the defendant duly took the property off the market and completed the works. However, the claimants decided not to proceed with the purchase and issued proceedings seeking repayment of £53,400.

57 The trial judge found that the parties had attempted to "create an option giving the claimants the right to buy phase one within the period leading to its completion for an agreed price in exchange for a non-refundable payment" (*Sharma* at [9]). There was no challenge to this description on appeal. The trial judge found that the claimants received what they had paid for; as agreed, the defendant took the property off the market pending its completion and kept open its offer to sell it to the claimants at a fixed price (*Sharma* at [26]). However, the trial judge found that the claimants were entitled to the return of their deposit as money paid under a void contract because the agreement pursuant to which £53,400 was paid was void for failing to conform to statutory formality requirements for contracts pertaining to land. The English Court of Appeal allowed the appeal. It found it irrelevant that the agreement did not amount to a legally valid and binding contract, because the issue was whether there was a failure in the fulfilment of the parties' expectations such that denial of repayment would leave the defendant unjustly enriched. On this issue, it was clear that the claimants' expectations were fulfilled and that the claimants had obtained the benefit for which the payment was made. There was thus no injustice in the defendant retaining the sums paid to it.

58 In the light of the discussion above, the question of whether a plaintiff is entitled to restitution of a pre-contract deposit should be answered in the same manner as any ordinary claim for restitution for unjust enrichment on the ground of failure of basis. The inquiry should consist of two parts: What was the basis of the payment, objectively ascertained? Did that basis fail?

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59 We are mindful that in examining the factual question of whether an agreement was reached on 8 May 2013 for the Deposit to be retained by the appellant and on what terms, our power of review as an appellate court is limited because the trial judge is generally better placed to assess the veracity and credibility of witnesses, especially where oral evidence is concerned: *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 ("*Tat Seng Machine Movers*") at [41]. However, where it can be established that the trial judge's assessment is plainly wrong or against the weight of the evidence, the appellate court can and should overturn any such finding. Furthermore, where a particular finding of fact is not based on the veracity or credibility of the witness, but instead is based on an inference drawn from the facts or an evaluation of primary facts, an appellate court is in as good a position as the trial judge to undertake that exercise: *Tat Seng Machine Movers* at [41]. In so doing, the appellate court will evaluate the cogency of the evidence given by the witnesses by testing it against inherent probabilities or against uncontroverted facts.

Analysis

60 The Judge found that the basis for the payment of the Deposit had failed by 30 April 2013 and therefore, Jiaravanon had established his entitlement to restitution as of 30 April 2013 (see [37] above). The appellant does not contest this on appeal. Thus, for the appellant to claim that it was entitled to retain the Deposit and pay it to Azimut, the burden falls on the appellant to establish that there was a fresh basis for the Deposit and that this fresh basis did not fail. The crucial inquiry, in our view, is not whether the parties had expressly agreed on 8 May 2013 that the Deposit would be *non-refundable*. Instead, it is whether, the original basis having failed by 30 April 2013, the parties had agreed on a *new* basis for the Deposit to be paid on 8 May 2013, *and* whether *this* basis had

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failed. As observed at [49] above, a basis in this context refers to (a) the performance of a counter-promise, as distinguished from the counter-promise itself; or (b) a non-promissory contingent condition, *ie*, an expected event or state of affairs which neither party is responsible for bringing about.

61 If the parties had agreed, as the appellant contends, that the Deposit would be used to secure the 100L #15 and 100G #15 for Jiaravanon's choice for a limited period, then Jiaravanon would not be entitled to restitution if Azimut had duly secured these two yachts for the agreed period of time but Jiaravanon had decided not to purchase either of the yachts. In this situation, the basis of the payment would not have failed. The question of whether the payment is refundable should be viewed with reference to the evidence of the basis for the payment.

What was the basis for the Deposit after 30 April 2013?

62 We therefore analyse what, if anything, the parties agreed to on 8 May 2013. The Judge found that no agreement was reached for the reasons summarised at [38] above. We respectfully disagree with the Judge's assessment. In our judgment, there is sufficiently cogent evidence in the appellant's favour that Jiaravanon had agreed on 8 May 2013 that the Deposit would be applied to hold the 100L #15 and 100G #15 until at least 31 May 2013 so that Jiaravanon could choose between them.

63 We begin by setting out Grange's account of the 8 May 2013 meeting in Hong Kong, when Jiaravanon met with Grange and Pellacani to view an Azimut 100L docked in Hong Kong for another client. Grange was personally present and had authorised the remittance of the Deposit to Azimut, purportedly

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on Jiaravanon's instructions. He recounts his discussions with Jiaravanon on 8 May 2013 as follows in his affidavit of evidence-in-chief:

> 13. [Jiaravanon] thereafter informed me that he was undecided between the 100L and 100G and still wished to view both yachts at the Azimut yard in Italy before making his final selection. However, [Jiaravanon] was adamant that he wished to purchase at least one of the two yachts and wanted to secure the production slots for quickest delivery of one of the yachts.
>
> 14. I informed [Jiaravanon] that the only way to secure the production slots for quick delivery of either the 100L or 100G yachts was to pay a non-refundable deposit to Azimut. To be clear, I recall explicitly stating that the deposit which had to be paid to Azimut would be "*non-refundable*" in the event that [Jiaravanon] did not purchase either of the two yachts. I would also add that prior to this, during the viewing of the 100L, I had informed [Jiaravanon] that a non-refundable deposit would have to be paid to reserve the 100L and 100G yachts in the presence of [Pellacani].
>
> 15. Additionally, I recall notifying [Jiaravanon] that he would have to purchase either of the two yachts or risk forfeiting the deposit paid. I informed [Jiaravanon] that Azimut would not be willing to reserve the 100L and 100G yachts for [Jiaravanon] unless the deposit was non-refundable.
>
> 16. I would also highlight that from my discussion with [Jiaravanon] in Hong Kong, it appeared to me that because [Jiaravanon] had decided definitively to purchase either the 100L or the 100G, he was far more concerned with securing the quick delivery of the 100G or the 100L yachts than on whether he would be able to recover the deposit he had to pay to secure the yachts. Nonetheless, the fact is that I had made it clear to [Jiaravanon], and [Jiaravanon] verbally acknowledged the fact that the EUR 1 million deposit which he subsequently paid to secure the 100L and 100G yachts was non-refundable in the event that he did not purchase either of the two yachts.
>
> [emphasis in original]

64 Grange therefore attests to three crucial facts:

(a) First, Jiaravanon intended to purchase at least one of the two yachts, the 100L #15 and 100G #15, and was concerned to secure the next available yacht. Under cross-examination, Grange clarified it was

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specifically the 100L #15 and 100G #15 that were in discussion on 8 May 2013. In our view, this is confirmed by Mison's correspondence with Jiaravanon leading up to and following 8 May 2013 (see [15]–[18] and [20]–[23] above). Grange reiterated on the stand that Jiaravanon's aim was to secure the next available Azimut 100L and Azimut 100G yachts, so that he would not "los[e] the next production slot" and Jiaravanon was "more interested in securing the boats than what would happen to the deposit" so that he would not lose out to another purchaser as he did with the 100G #12.

(b) Second, according to Grange, Jiaravanon was informed that paying a deposit was the only way to secure the two yachts while he was deciding between them. Concerned to secure the two yachts, Jiaravanon "authorised [Grange] to release the deposit to Azimut" to hold the two yachts for him for a period of time.

(c) Third, according to Grange, Jiaravanon was informed that the deposit, once paid to reserve the yachts, would be non-refundable.

65 Since Jiaravanon passed away before the trial commenced, we do not have the benefit of his evidence. Although Anita was present at the 8 May 2013 meeting, she could not recall what Grange and Jiaravanon discussed in relation to the Deposit or whether Jiaravanon had authorised Grange to remit the Deposit to Azimut. This does not mean, of course, that Grange's testimony should be accepted unequivocally. We now therefore turn to consider whether it is consistent with, and supported by, the surrounding evidence, including the relevant documentary evidence and the contemporaneous conduct of the parties.

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66 As the Judge observed, the alleged agreement on fresh terms for the appellant's receipt of the Deposit was not documented. There was no invoice or contemporaneous email stating what the parties had agreed or represented, or internal correspondence regarding the remittance instruction, save for the remittance record which we discuss below. We agree with the Judge that this is a significant weakness in the appellant's case, particularly considering that the appellant is a commercial entity and had been careful to document the original holding agreement in the Deposit Invoice (Judgment at [65]). This suggests that the alleged agreement was not reached on 8 May 2013. However, it is not insurmountable if the factual matrix clearly points towards the existence of the alleged agreement.

67 In our view, the strongest evidence in the appellant's favour is the fact that the appellant remitted the Deposit to Azimut the very next day, on 9 May 2013. We note that the Judge was not satisfied that it could be safely inferred from the fact of the immediate remittance that Jiaravanon had agreed on 8 May 2013 to forward the Deposit to Azimut as a holding deposit. This was principally because he found that the appellant's arrangements with Azimut were independent from its arrangements with Jiaravanon, and that no correspondence between the appellant and Azimut regarding the remittance had been adduced (see Judgment at [68]). In our judgment, however, when viewed in its proper context, the decision to remit the Deposit to Azimut must have followed from Jiaravanon's agreement to apply the Deposit to reserve the 100L #15 and 100G #15, on the understanding that the Deposit would be applied towards the purchase of either yacht once Jiaravanon had made his choice.

68 First, the appellant's remittance record, which the Judge did not discuss, is consistent with the appellant's case. It states "Deposit reverse L100-15,

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G100-15 until end of May" (see [20] above). During the trial, the appellant's counsel was instructed that the record should have read "reserve" instead of "reverse", but none of the appellant's witnesses gave evidence on this. In context, however, we think it is indisputable that the remittance record should have read "reserve" because it would have made no sense for the appellant to have sent €1m *to* Azimut to *reverse* a transaction in relation to two yachts. The remittance record specified the hull numbers in question as well as the period of reservation, consistent with the appellant's allegations.

69 In our view, it is significant that the terms stated on the remittance record mirror the structure of the abortive holding agreement concluded between the parties on 26 April 2013, which forms part of the context against which the 8 May 2013 meeting must be analysed. In respect of that abortive agreement, the Deposit Invoice stated that the Deposit was paid by Jiaravanon to the appellant as a holding deposit to secure the 100G #12 and 100L #15 yachts until 15 May 2013; and that the Deposit would become the initial down payment on either yacht once Jiaravanon made his choice between the yachts (Judgment at [42]). Even after this original agreement fell through, it is evident that the appellant and Jiaravanon continued to discuss the release of the Deposit to Azimut as a holding deposit on similar terms, save that it was to reserve the 100G #15 instead of the 100G #12 that had already been sold. Mison's email dated 6 May 2013 urged Jiaravanon to allow the release of the Deposit to Azimut to "hold" or "lock in" the 100L #15 and 100G #15 (see [18] above):

> *Note that I have NOT sent your deposit to Azimut in Italy and have requested they wait a few more days, until you meet the managers in HK, before they sell the 100G # 15 to the American.* … Azimut has agreed that if you were to have us *release the deposit to hold the 100 # 15 (and the 100L)* that you could use the funds to buy a different Azimut such as an 84 or 88 or bigger. So please think again if you'd like to me [*sic*] to send the funds to Azimut. I'm hoping that once you see the Leonardo, and [Pellacani] and Paul Grange show you more information on

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> the 100G, you will feel that it's worthwhile to go ahead again to *transfer the deposit to lock in either the 100 L or 100G #15.* [emphasis in underlining in original; emphasis added in italics]

70 The reference to "hold[ing]" or "lock[ing] in" these two yachts is consistent with the remittance record. Notably, Mison said that the Deposit, once released to Azimut, could be used to buy a yacht in a different range if Jiaravanon ultimately decided not to proceed with either of the 100-ft yachts; he did not state that Jiaravanon could be refunded the money. In our view, the abortive agreement and discussions preceding the 8 May 2013 meeting support the appellant's case on the terms on which the Deposit was remitted to Azimut on 9 May 2013.

71 Next, there is clear evidence that the appellant would only have remitted the Deposit to Azimut with Jiaravanon's authorisation:

(a) On 4 May 2013, after discovering that the 100G #12 he originally sought to reserve had been sold, Jiaravanon asked Mison not to send the Deposit to Azimut because he was still making up his mind. Mison replied that he would "stop the transfer of the 100 deposit and return it to [Jiaravanon] right away" (see [17] above). Counsel for Jiaravanon emphasised that Mison thereby acknowledged Jiaravanon's entitlement to have the Deposit returned to him, but this is immaterial because it precedes the alleged formation of a fresh basis for the Deposit on 8 May 2013. What it does show, in our view, is that the appellant would not have paid the Deposit on to Azimut without Jiaravanon's agreement.

(b) Importantly, on 6 May 2013, Mison informed Jiaravanon that he had "NOT sent [Jiaravanon's] deposit to Azimut in Italy" and asked Jiaravanon to "think again if [he would] like [Mison] to send the funds

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> to Azimut" (see [18] above). In his oral testimony, Mison explained that he asked Jiaravanon to reconsider because the funds, once sent to Azimut, were irrecoverable, and because Jiaravanon might lose the 100G #15 to another buyer if he failed to place a deposit. Whichever of these reasons was operative, Mison's conduct evinces that the appellant would only send the funds to Azimut if Jiaravanon instructed so.

72 This backdrop leads us to infer that the immediate remittance on 9 May 2013 followed from Jiaravanon's authorisation on 8 May 2013. This inference is strengthened by two further points. First, Jiaravanon has not offered any alternative explanation for the immediate remittance on 9 May 2013. One could imagine other reasons why the appellant might have sent the money to Azimut: Mison could have unilaterally sought to reserve the two hulls for Jiaravanon so as not to risk losing Jiaravanon's business; Grange could have been mistaken about Jiaravanon's authorisation; or the appellant might have needed to satisfy its own sales targets with Azimut. However, there was no evidence for these other possibilities, and Jiaravanon did not seek to proffer any of them. Second, and more importantly, there was no reason why the appellant would have taken such a significant business risk by remitting the Deposit to Azimut without Jiaravanon's instructions. As the Judge noted, the appellant had a practice of ensuring that its terms with its clients mirrored its terms with Azimut in a "back-to-back" manner (Judgment at [68]). The Judge found, however, that the remittance was strictly a matter between Azimut and the appellant and could shed no light on any agreement between the appellant and Jiaravanon because there could have been a gap in the agreements between both sets of parties. We respectfully disagree, because there was no evidence of what gap there could have been and how this gap arose. In our view, more weight should have been placed on the appellant's interest in ensuring that it could "cover its own

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position" and "no party [is] exposed", as Grange testified. For the above reasons, we find that the context of the 8 May 2013 meeting and the remittance on 9 May 2013 strongly support a finding that Jiaravanon agreed on 8 May 2013 to release the Deposit to Azimut to reserve the 100L #15 and 100G #15 until 31 May 2013.

73 Furthermore, we find, contrary to the Judge's finding, that the manner in which the parties conducted themselves was consistent with the agreement alleged by the appellant. First, their correspondence shows that Jiaravanon and Mison knew that Azimut was holding the two yachts off the market for Jiaravanon until 31 May 2013. And based on the parties' earlier exchanges, Jiaravanon was clearly aware that Azimut would only do so if a holding deposit had been paid to it.

(a) In his email dated 29 May 2013 (see [22] above), Mison reminded Jiaravanon that Azimut was holding the "two Azimut 100's until this Friday the 31st" and suggested that Jiaravanon make a choice between the two "now" in order that he would not miss having the option to choose the one he wanted. Jiaravanon did not challenge the position that Azimut was holding the yachts off the market for him for a limited period.

(b) Mison's email to Jiaravanon dated 31 May 2013 (see [23] above) makes it clear that it was the "last day for Azimut to hold both the 100's" for him, and Mison could not guarantee if Azimut would extend the reservation.

(c) In Jiaravanon's email to Mison dated 28 August 2013 (see [29] above), he acknowledges that Azimut was "holding [the 100-ft yachts] specially for [him] and rejecting other peoples [*sic*] offer to buy the

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boat" because he had put down the Deposit. In the same email, Jiaravanon denies that the deposit meant a "guaranteed sale", but this denial is not inconsistent with the Deposit having been paid to reserve the two yachts. The relevant portion of the email states as follows:

> I do see the possibility of doing business with you or Simpson Marine again in the future but if you are going to insists on this type of ungentlemanly behaviour, withholding and not refunding the deposit that I put down only after you agreed that this deposit does not mean a guaranteed sale of a 100ft yacht to me but only after visiting Italy and seeing the yachts for myself and se [*sic*] trials then I will have a definite answer for you whether I am going go bug or pass on the 100ft boats! This was made very clear in my email and sms when you kept bugging me for a deposit for the 100ft yachts *because supposedly you Re [sic] holding it specially for me and rejecting other peoples* [*sic*] *offer to buy the boat!!* [emphasis added]

74 Second, we find that the Compromise Agreement corroborates the appellant's case rather than undermines it (as the Judge found at [67] of the Judgment). The Judge reasoned that, if Jiaravanon had agreed that the Deposit would be non-refundable, the appellant would not have agreed to the Compromise Agreement and would have clarified that it was only out of goodwill that it was agreeing to apply half of the Deposit to the purchase price for the Azimut 64 yacht: see Judgment at [67]. In our judgment, however, it was entirely reasonable for the appellant to have refrained from insisting on its strict legal rights and to have searched for some flexible solution with Azimut in order to retain Jiaravanon's patronage. Moreover, we find that the appellant made it very clear that the Compromise Agreement was offered out of goodwill even though the Deposit ought to have been forfeited if Jiaravanon decided not to purchase either of the 100-ft yachts. This is based on the following correspondence:

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(a) Mison's text message to Taslim dated 31 July 2013 clearly characterises this arrangement as a "compromise" (see [26] above), suggesting it was a concession on the part of one or both of the parties.

(b) Mison's email to Jiaravanon's assistant on 1 August 2013, which was copied to Jiaravanon, suggests that Azimut had to be asked to "[agree] to allow" half of the Deposit paid for the Azimut 100's to be used for the Azimut 64 instead (see [27] above).

(c) Mison's email dated 9 September 2013 makes it abundantly clear that the Compromise Agreement was a "concession" (see [32] above). He stated:

> Azimut feels that they have already made a huge concession in agreeing to use half of the deposit to help pay for the Azimut 64. … Azimut feels that they have made a sincere effort to help Chip in the many special requests he has asked for and they have repeatedly agreed to extend the hold on the two 100' yachts while waiting for him to get a Visa.

75 These references to a concession corroborate the appellant's case that Jiaravanon was not entitled to apply the Deposit to an existing purchase and, but for the concession, stood to forfeit the Deposit if he decided not to purchase either the 100L #15 or the 100G #15. It also appears that Jiaravanon held the same understanding. On 1 August 2013, a revised payment invoice for the Azimut 64 Contract was issued, reflecting the Compromise Agreement in its calculation of the balance payable for the Azimut 64. Jiaravanon paid the balance sum by 5 August 2013, without accounting for the Remainder that was still in Azimut's hands. This is consistent with an agreement that the Deposit would be forfeited if, Azimut having reserved the two yachts for Jiaravanon, he decided not to purchase either of them.

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76 Third, Jiaravanon failed entirely to challenge the appellant's assertions that he had agreed to release the Deposit to Azimut as a holding deposit for the 100L #15 and 100G #15 for a limited period. The appellant had asserted as follows:

(a) On 30 August 2013, Mison told Jiaravanon that the Deposit "was given to Azimut to put a hold [on] two Azimut 100's for [Jiaravanon] until [he] had selected which one [he] preferred" (see [30] above).

(b) On 3 September 2013, Grange stated that Jiaravanon had "agreed at the time" for the Deposit to be "forwarded in full to Azimut to reserve [his] choice of either the Leonardo 100-15 or Grande 100-15" (see [31] above).

(c) On 9 September 2013, Mison told Taslim that "Chip had agreed to have the 1,000,000 euro transferred from Simpson Marine to Azimut" when he met with Grange and Pellacani to view the Azimut 100L in Hong Kong (see [32] above). Mison also detailed the appellant's efforts to arrange for Jiaravanon to view both yacht models before making a choice between the two.

77 Jiaravanon never responded to dispute whether he had authorised the appellant to pay the Deposit to Azimut to hold the 100L #15 and 100G #15 for his choice for a limited period. The Judge took a different view of this aspect of the evidence. He considered it significant that when Jiaravanon asserted several times in August 2013 that he was entitled to (the balance of) the Deposit, the appellant did not reply to these emails until 3 September 2013, and when Grange replied he did not state unequivocally that it was agreed that the Deposit would be non-refundable: Judgment at [66]. As to the earlier point about the timing of the appellant's response, we do not think that the delay was inordinate

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especially given the appellant's ongoing attempts to find an informal solution for Jiaravanon. In Mison's email to Jiaravanon's assistant on 1 August 2013, he said he was still "working with Chip regarding the [Remainder] that Azimut is holding to be used to buy another bigger Azimut (possibly still a 100)" (see [27] above). In respect of the latter point, there was indeed no express communication about whether the Deposit would be refunded if the anticipated contract of purchase did not materialise. Nonetheless, as this Court reasoned in *Benzline* ([55] above), this does not preclude a finding that the payment of the Deposit was made on a basis other than for the execution of the anticipated contract, namely as a holding deposit for the two yachts for a limited period.

78 We note that the evidence just discussed pertains, strictly speaking, to the parties' subsequent conduct, that is, their conduct after the formation of the alleged agreement that supplied the basis for the appellant's retention of the Deposit. The admissibility and relevance of subsequent conduct in the formation and interpretation of contracts has yet to receive detailed scrutiny by this Court. We have in the past opined that, while there is no absolute prohibition against evidence of subsequent conduct in interpreting a contract, such evidence is likely to be inadmissible in construing a written contract because it does not elucidate the parties' objective intentions or relate to a clear and obvious context: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [132(d)] (referring to [125] and [128]–[129]). Such evidence has been considered unprofitable for the purpose of discerning the parties' intentions at the time of entering into the contract and because such evidence can, with the benefit of hindsight, be shaped to suit each party's position: see, *eg*, *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd* [2015] 5 SLR 1187 at

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[74]; see also Goh Yihan, *Interpretation of Contracts in Singapore* (Sweet & Maxwell, 2018) ("*Interpretation of Contracts*") at paras 7.005–7.008. However, where the court is ascertaining whether a contract has been *formed*, evidence of subsequent conduct has traditionally been regarded as admissible and relevant, although there is some instability in this rule: see Goh Yihan, "Towards a Consistent Use of Subsequent Conduct in Singapore Contract Law" [2017] JBL 387 ("Goh") at pp 395–398. It may be argued that a distinction between the evidential rules applicable to the formation and interpretation of contracts is untenable: see Goh at pp 402–412; *Interpretation of Contracts* at para 7.025; and D W McLauchlan, "Contract Formation, Contract Interpretation, and Subsequent Conduct" (2006) 25 UQLJ 77. On this basis, a case could be made that the restrictive approach adopted in respect of contractual interpretation ought to be extended to contractual formation, though the case for consistency could equally lead to the opposite conclusion because the decision whether to adopt a consistently restrictive or consistently liberal approach depends on arguments of policy and principle: see *Interpretation of Contracts* at paras 7.039–7.048.

79 In the present case, the parties did not raise any objections to the admissibility of this evidence, nor did they argue that less weight should be attributed to this evidence purely because it was subsequent to the formation of the alleged agreement. In part, this was because the manner in which their cases were presented below necessitated an examination of the entire chronology of events. Nonetheless, no objections were made on appeal even after the appellant decided to confine its case on appeal to the basis allegedly agreed upon on 8 May 2013. The Judge, too, considered whether the Compromise Agreement and the parties' correspondence between May and September 2013 was consistent with the appellant's allegations. Since we have not heard argument

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on this issue, we decline to reach any firm views on the admissibility, relevance and probative value of subsequent conduct for the purpose of either contract formation or interpretation. We only add that we would be inclined to place less weight on the communications discussed at [76]–[77] above because, having been sent after the dispute over the Deposit had crystallised, they could have been crafted with the intention of buttressing either party's subjective position. The other communications and conduct discussed at [73]–[75] above do, in our view, aid us in objectively ascertaining whether an agreement was reached on 8 May 2013 especially since they involved both parties. There is no reason to doubt that they were candidly expressed and undertaken.

80 Leaving aside this issue, we are of the view that, in the light of our analysis above, there is sufficient evidence that the parties agreed on 8 May 2013 that the appellant would retain and apply the Deposit for the purpose of securing the 100L #15 and 100G #15 until 31 May 2013 for Jiaravanon to choose between them.

Did the basis for the Deposit fail?

81 This being, on our analysis, the basis of the Deposit, we find that this basis did *not* fail. The Deposit was applied to secure the 100L #15 and 100G #15, both of which were kept off the market for Jiaravanon until at least 31 May 2013 (see [22]–[24] above). Jiaravanon's decision not to purchase either yacht did *not* cause a total failure of basis because the payment was not made on the basis that a contract of purchase would be executed.

82 This is similar to *Benzline* ([55] above), where the court found that the basis of the pre-contractual payment – that the appellant would offer the respondents an exclusive sub-dealership on the draft terms – did not fail when

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the anticipated sub-dealership contract did not materialise, because the appellant was in fact prepared to move forward with the deal. Likewise, in *Sharma* ([57] above), the claimants received what they paid for – an option to buy phase one of the property within an agreed period for an agreed price – and the defendant was not unjustly enriched when no purchase materialised, because the defendant had taken the property off the market and kept its offer to the claimants open for the agreed period.

83 Therefore, we are satisfied that there was no failure of consideration. Accordingly, Jiaravanon is not entitled to restitution of the Deposit. Since the parties do not dispute their agreement for €500,000 out of the Deposit to be applied to the purchase of the Azimut 64 yacht and Jiaravanon's claim only concerned the Remainder, the appellant is not liable to return the Remainder to Jiaravanon.

Conclusion

84 For the foregoing reasons, we allow the appeal. For the avoidance of doubt, the appellant remains liable to pay €186,551.00 to Jiaravanon pursuant to [106] and [115] of the Judgment below because it did not appeal against this order. We award costs of the appeal to the appellant, fixed at $35,000 (all in). There will be the usual consequential orders.

Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal	Tay Yong Kwang Judge of Appeal

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Oei Ai Hoea Anna and Deannie Yap (Tan, Oei & Oei LLC) for the respondent.

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