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

[2022] SGHC 227

District Court Appeal No 9 of 2022

Between

JSD Corporation Pte Ltd

… *Appellant*

And

Tri-Line Express Pte Ltd

… *Respondent*

In the matter of Magistrate's Court Suit No 611 of 2019

Between

Tri-Line Express Pte Ltd

… *Plaintiff*

And

JSD Corporation Pte Ltd

… *Defendant*

JUDGMENT

[Contract — Remedies — Damages]
[Damages — Assessment — Cost of cure]
[Damages — Assessment — Diminution in value]

TABLE OF CONTENTS

JSD Corp Pte Ltd
v
Tri-Line Express Pte Ltd

[2022] SGHC 227

General Division of the High Court — District Court Appeal No 9 of 2022
Goh Yihan JC
27 July 2022

19 September 2022 Judgment reserved.

Goh Yihan JC:

Background

1 This is the appellant's appeal against the learned District Judge's ("the DJ") decision in *Tri-Line Express Pte Ltd v JSD Corporation Pte Ltd* [2022] SGMC 16 (the "GD") not to award it damages in respect of (a) outstanding repair costs, and (b) diminution in value of the vehicles which were damaged whilst being transported by the respondent. At the end of the hearing, I reserved judgment. Having considered the matter carefully, I allow the appeal in part and set out the reasons for my decision in this judgment.

2 The background facts can be stated simply. The appellant, JSD Corporation Pte Ltd, is in the business of renting, repairing, and servicing aircraft and air transport equipment. The respondent, Tri-Line Express Pte Ltd, is in the business of providing freight services. In October 2017, the appellant

and the respondent entered into an agreement ("the Agreement") for the respondent to deliver several vehicles and spare parts from Queensland, Australia to Singapore. These vehicles and spare parts are as follows:

(a) one used 1973 BMW 3.0Si Saloon ("1973 BMW")

(b) one used 1976 BMW 3.0L Saloon ("1976 BMW")

(c) one used 1977 BMW 3.0Si Saloon ("1977 BMW")

(d) one used 1968 Daimler Sedan ("Daimler")

(e) one tray of vehicle spare parts.

3 The respondent delivered the vehicles on 23 January 2018. However, the vehicles arrived damaged because they had not been properly secured in their containers during transportation. The respondent thereafter sued the appellant for eight unpaid invoices, two of which were for the transportation of the vehicles. The appellant filed a counterclaim in respect of the damage caused to the vehicles. The appellant claimed for:

(a) $12,960 for the costs incurred in repairing some of the damage to the vehicles ("the incurred repair costs");

(b) $21,271 for the cost of repairs for the outstanding damage to the vehicles ("the outstanding repair costs"); and

(c) $39,840 for the diminution in value of the vehicles, that is, the fall in value of the vehicles even after being fully repaired ("the diminution in value").

4 To arrive at the issue of remedies, the DJ agreed with the appellant that there is an implied term in the Agreement that the vehicles would be delivered in the same good order and condition as when the respondent received them. The DJ also found that the implied term additionally obliged the respondent to use reasonable care in stowing and transporting the vehicles. The DJ found that the respondent breached this implied term as it did not properly secure the vehicles with straps in the containers, which resulted in the vehicles being damaged during transportation.

5 Since the respondent has not cross-appealed on its liability for breach of this implied term, I proceed on the basis that such an implied term existed and was breached. However, despite not having cross-appealed on its liability, the respondent curiously submitted that it "views its agreement with [the appellant] for the carriage of the vehicles from Australia to Singapore as not subject to the implied term as decided by the [DJ]".[1] I ascribe no weight to the respondent's submission in this regard.

6 In relation to remedies, the DJ gave judgment in favour of the respondent in the sum of $10,607.87. He also allowed the appellant's counterclaim for the incurred repair costs of $12,960 but disallowed its claim for the outstanding repair costs and diminution in value. The sum of $10,607.87 is the result of setting off the award of $12,960 against the respondent's original claim of $23,567.87.

7 The appellant appealed against the DJ's decision not to award it (a) the outstanding repair costs, and (b) the diminution in value. The respondent has not cross-appealed any part of the DJ's decision.

---

[1] Respondent's Case at [6.1].

Whether the appellant is entitled to outstanding repair costs

Breakdown of the appellant's claims

8 I turn first to consider whether the appellant is entitled to the outstanding repair costs. The breakdown of this head of claim can be found in the column marked "outstanding repair costs" in the following table:

Vehicle	Incurred repair costs	Outstanding repair costs[2]	Total repair costs	Diminution in value (after repairs)	Total amount claimed	Market value
1973 BMW	--	$9,059	$9,059	$4,000	$13,059	$8,000
1976 BMW	$980	$1,315	$2,295	$11,970	$14,265	$23,940
1977 BMW	$3,980	$4,437	$8,417	$11,970	$20,387	$23,940
Daimler	$8,000	--	$8,000	$11,900	$27,900	$23,800
Spare parts	--	$6,460	$6,460	--	--	NA
Total	$12,960	$21,271	$34,231	$39,840	$74,071	NA

As the DJ noted, these figures for the outstanding repair costs are based on the figures provided by the single joint expert engaged by the parties.[3] The appellant has pleaded that the repairs have not been carried out because of its inability to obtain spare parts and the inhibitive costs.[4]

9 It is helpful to compare the outstanding repair costs with the total repair costs, total amount claimed, and the market value for each of the vehicles. This

---

2 Defendant's closing submissions at [51].

3 Defendant's closing submissions at [47], 1BAEIC5.

4 Defence and Counterclaim (Amendment No 1) at [11].

can be seen in the additional columns marked as "total repair costs", "total amount claimed" and "market value". The "total amount claimed" is derived from the sum of the appellant's claim for incurred repair costs, outstanding repair costs, and diminution in value (after repairs). The market value is derived from figures adduced from the single joint expert during cross-examination, which includes a 30% discount to approximate the market price at the time of purchase by the appellant.[5] The diminution in value after repairs is 50% of the market value. This figure is based on the single joint expert's opinion that the value of the vehicles would have decreased by 50% even after the repairs had been carried out because (a) spare parts may be rare and expensive to obtain; (b) a vehicle that has been damaged and then repaired cannot achieve the same aesthetics and mechanical quality as it had before it was damaged; and (c) potential buyers may still be deterred from purchasing a fully repaired vehicle because of the stigma associated with purchasing a damaged vehicle.[6]

10 For ease of exposition, I take it from the appellant's case that there are three states that the vehicles were/are in: (a) the undamaged (or pristine) state, which is the vehicles at the point of purchase; (b) the damaged state, which is the vehicles after they were damaged during transport but before being repaired; and (c) the repaired state, which is the vehicles after all the repairs, including the outstanding repairs, have been carried out. The single joint expert was only asked to assess the difference in value between an undamaged vehicle and a repaired vehicle. There was unfortunately no evidence led as to the value of the vehicles in their damaged states. This would have been helpful in assessing the difference in value between an undamaged vehicle and a damaged one, which

---

5 Defendant's Closing Submissions (Record of Appeal Vol III Part C at p 294).

6 Expert Report of Tan Lu Han (Record of Appeal Vol III Part B at p 8).

could be relevant in ascertaining if the decision to repair the vehicles was reasonable.

The DJ's decision

11 The DJ rejected the appellant's claim for the outstanding repair costs. The DJ reached this conclusion on two grounds. First, he disagreed with the appellant that the High Court's decision in *Lo Lee Len v Grand Interior Renovation Works Pte Ltd* [2004] 2 SLR(R) 1 ("*Lo Lee Len*") stood for the proposition that a plaintiff is entitled to the cost of repairs even if the repairs were never carried out. In his view, the High Court in *Lo Lee Len* had held that a court must be satisfied that the property concerned will be repaired. The DJ reached this conclusion by referring to this extract from Neill LJ in the English Court of Appeal decision of *Jones and another v Stroud District Council* [1986] 1 WLR 1141 ("*Jones*") (at [26] of the GD):

> It is true that as a general principle a plaintiff who seeks to recover damages must prove that he has suffered a loss, but if property belonging to him has been damaged to an extent which is proved and the court is satisfied that the property *has been or will be repaired* I do not consider that the court is further concerned with the question whether the owner has had to pay for the repairs out of his own pocket or whether the funds have come from some other source.
>
> [emphasis in original]

Accordingly, the DJ held that, as a proposition of law, if a plaintiff is claiming for outstanding repair costs when the damaged property has not been repaired, then the court must first be satisfied that the property "will be repaired" before awarding damages for the same. I should note that *Lo Lee Len* and *Jones* were both tort cases but were cited by the appellant for its claim in contract. As I will explain below, there is an uneasy inconsistency between tort and contract cases that discuss the relevance of the intention to effect the repair.

12 Second, on this summation of the law, the DJ rejected the appellant's explanation that the outstanding repairs were not carried out because of its inability to obtain spare parts and the inhibitive costs. The DJ did not accept this explanation because the appellant has had more than three years since the first repairs were carried out in March 2018 to source for the necessary spare parts and raise funds for the repairs. He was therefore not satisfied, on a balance of probabilities, that the appellant would in fact be carrying out the repairs for the relevant vehicles.

The parties' arguments on appeal

Parties' cases filed in May and June 2022

13 The appellant's case (filed on 11 May 2022) on this issue is to dispute the legal requirement that it must show that it will carry out the repairs. The appellant first argues that *Lo Lee Len* does not support the DJ's summation of the law. The appellant says, upon a careful reading of the case, *Lo Lee Len* makes clear that (a) the innocent party is entitled to damages for their loss, even if the repairs were never carried out; and (b) that even if the repairs were carried out at no costs to the innocent party, they would still be entitled to compensation.[7]

14 Following this, the appellant further argues that the decision in *Jones* only stands for the limited proposition that if a third party pays for the repairs, and the court is satisfied that the repairs have been carried out, this will not serve to deny the plaintiff of its right to compensation.[8] Accordingly, the appellant argues that there is "no further requirement for the appellant to repair the

---

7 Appellant's Case at 7–8.

8 Appellant's Case at 10.

outstanding damage to the vehicles in order to receive the [o]ustanding [r]epair [c]osts".[9] The appellant therefore claims that it should be awarded the outstanding repair costs of $21,271.

15 The respondent does not make any serious argument on the law in its respondent's case filed on 9 June 2022. Instead, it restricted its arguments on appeal to the correctness of the figure of $21,271. It argues that the appellant has not fully justified this figure with reference to any supporting evidence.

Additional issues

16 After going through the appellant's and respondent's cases, I invited the parties to address me on three further issues during the hearing in relation to the appellant's claim for the outstanding repair costs. These issues are as follows:

(a) Whether the appellant acted reasonably in choosing to repair the vehicles, as opposed to seeking a market replacement, given that the appellant had bought the vehicles at below market value, and that the outstanding repair costs of S$21,271 is close to the total price he paid for all the vehicles?

(b) Whether the authorities, such as the decision of the House of Lords in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 ("*Ruxley*"), oblige the appellant to show, on a balance of probabilities, that it intended to carry out the as-yet unperformed repairs in order to claim the outstanding repair costs?

(c) If the authorities do require the appellant to show, on a balance of probabilities, that it intended to carry out the as-yet unperformed

---

9 Appellant's Case at 10.

repairs in order to claim the outstanding repair costs, has the appellant shown this on the evidence?

17 On issue (a), the appellant submitted that it acted reasonably in choosing to repair the vehicle. It submits that on the facts of the present case, the original purchase price of the vehicles is not relevant to the quantum of damages being claimed, even as it admitted that the vehicles were purchased at a discount below market value. In support of this submission, the appellant cited, among others, the English Court of Appeal decision of *Dominion Mosaics and Tile Co v Trafalgar Trucking Co Ltd and another* [1990] 2 All ER 246. In that case, which (again) concerned a claim in tort, the plaintiffs had originally purchased the damaged carpet-holding machines at a special discounted price of £13,500. The defendants' negligence caused fire which destroyed those machines. At first instance, the trial judge held that the plaintiffs were limited to the price they had paid, *ie*, £13,500. The English Court of Appeal overruled the trial judge on this point. Taylor LJ held that the proper approach was to award the plaintiff the market value of the machines, which he valued at £65,000 in the absence of any contrary evidence.

18 On issue (b), the appellant submitted that authorities such as *Ruxley* do not oblige it to show that it intended to carry out the as-yet unperformed repairs to claim the outstanding repair costs in the present case. The appellant suggested that in *Ruxley*, the intention to repair is a factor that goes towards the reasonableness of whether to award damages as between a cost of cure or some other basis. The appellant then explained that the "reasonableness" approach in *Ruxley* does not apply in the present case because "the [a]pellant is seeking the cost of cure (in the form of the cost of outstanding repairs), **and** diminution in

value" [emphasis in original].[10] In other words, the appellant argues that because it is seeking *both* cost of cure *and* diminution in value, the reasonableness test in *Ruxley* does not apply since that test only applies to cases where a party is making an election *between* the cost of cure and diminution in value.

19 The appellant proceeded to cite several cases in which it said the Singapore courts have taken a position that the intention to repair is not relevant, such as the decisions of the Court of Appeal in *Chia Kok Leong and another v Prosperland Pte Ltd* [2005] 2 SLR(R) 484 ("*Chia Kok Leong*") and *Family Food Court (a firm) v Seah Boon Lock and another (trading as Boon Lock Duck and Noodle House)* [2008] 4 SLR(R) 272. These cases concern an altogether different situation involving a claim by a third party who is not a party to an original contract, but all tangentially raise the issue of an intention to repair.

20 Finally, as to issue (c), the appellant submitted that since the authorities do not require it to show an intention to carry out the outstanding repairs, it need not show on the evidence that it intended to carry out the as-yet performed repairs to claim the outstanding repair costs.

21 The respondent's case at the hearing before me was simply that I should award a "fair and reasonable" quantum of damages in consideration of the entire factual matrix. This included the fact that the freight charges were much less than the appellant's present claims. Otherwise, the respondent did not make any serious or useful submissions on the law.

---

[10] Appellant's Further Skeletal Submissions at 3.

My decision: the appellant is entitled to some of the outstanding repair costs

22 Having considered the DJ's reasoning, the parties' arguments on appeal, as well as the relevant law, I have concluded that the appellant is *not* entitled to claim the outstanding repair costs for the 1973 BMW, but the appellant *can* do so for the 1976 BMW, 1977 BMW and the spare parts.

23 As I will explain below, central to my conclusion is the case of *Ruxley*. In this regard, it is trite that the objective test of reasonableness laid down in *Ruxley* is meant to function as a legal constraint on recovery by the plaintiff for loss of the performance interest and to curb what would otherwise be a windfall accruing (see generally, Alexander Loke, "Damages to Protect Performance Interest and the Reasonableness Requirement" [2001] SJLS 259 ("Loke"), at 259–260 and 263–266). With that in mind, the question that lies at the heart of the present case is the relevance (if any) of the appellant's intention to carry out the outstanding repairs as analysed within the objective test of reasonableness set out in *Ruxley*.

24 At this point, however, I should deal with the appellant's submission that the cases of *Lo Lee Len* and *Jones* supported its argument that a party's intention to effect the outstanding repairs is not relevant. In short, I disagree. In my view, those cases dealt with a rather different situation where the principle of double recovery was at play. This paradigm situation is where the damaged car was repaired at no cost to the plaintiff by a third party (see *Lo Lee Len* at [36] and [37]) or where the costs of repair had already been paid by the third-party insurer. The principle of law in those cases is that it does not matter, if due to external agreements which are *res inter alios acta*, that the plaintiff is somewhat "better off" (in that the car is repaired on top of getting damages); the plaintiff would still be able to claim damages as against the defendant. The

reason for this is simple – the loss caused by the defendant remains unremedied by the defendant and the plaintiff is only "better off" from an external source. For example, it is no excuse to say that just because the plaintiff had fortuitously met a kind mechanic who repaired the car for free (an external source), that the secondary obligation owed by the defendant to pay damages disappears.

25 Having dealt with the appellant's submission on *Lo Lee Len* and *Jones*, I turn now to examine the relevance of a party's intention to carry out outstanding repairs (or the cure) in a claim for the costs of such repairs (or cure).

What is the relevance of a party's intention to carry out outstanding repairs in a claim for the costs of such repairs?

(1) The different measures of loss in damage cases

26 As a starting point, it bears mentioning that the present case is an example of a case where the plaintiff's existing property is damaged during transport by a carrier, which I shall term as "damage cases" for convenience. The basic measure of damages remains the same as in all contract cases: such damages should put the plaintiff in the position it would have been had the breach not taken place and the contract been properly performed (see *Robinson v Harmann* (1848) 1 Ex 850). Thus, in damage cases, the measure is such damages as would put the plaintiff in the position had the property been delivered undamaged. The loss that has crystallised upon damage is thus the difference in value between the undamaged property and the damaged property.

27 However, as the learned author, Adam Kramer ("Kramer"), explains, in damage cases, unlike in a case where the property was destroyed or simply not delivered, there is a common alternative means of avoiding losses, and that is, to repair rather than to replace. This is also known as the "cost of cure". In this

case, the plaintiff can claim damages in respect of expenditure spent on repairs, as well as any residual claim for temporary loss of use of the property during the period until the repairs are completed (see Adam Kramer, *The Law of Contract Damage*s (Hart Publishing, 3rd Ed, 2022) ("*Kramer 3rd Ed*") at para 4-09). It is in this second measure of loss that a party's intention to effect the cure (where it has not been carried out) becomes potentially relevant.

(2) The two ways in which a party's intention to effect the cure are relevant

28 Despite what one might think is an important issue, there has not been a definite answer in the case authorities as to the relevance of a party's intention to carry out outstanding repairs (or more generally, to effect the cure) in a claim for such costs. This much is evident from a learned article by Solène Rowan, "Cost of Cure Damages and the Relevance of the Injured Promisee's Intention to Cure" (2017) 76(3) CLJ 616 ("Rowan"). One reason for the uncertain state of the law is the well-known principle that a plaintiff can dispose freely of an award of damages. By this principle, the courts will not interfere in how the plaintiff spends the damages; the issue is *res inter alios acta* (see, *eg*, *Ruxley* at 359 and the English Court of Appeal decision in *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68 at 80). Thus, if the plaintiff cannot be called to account for how he spends the damages awarded, it is understandable why it has been unclear if the courts can maintain that his intention to effect the cure is relevant to whether damages should be awarded in the first place.

29 In her analysis, which is reflective of the authorities cited by the parties in this case, Rowan states that there are two divergent ways from the case law in which a party's intention to effect the cure are relevant: (a) it is relevant as a

prerequisite for claiming the cost of cure, and (b) it is relevant as a *factor* in considering the reasonableness of choosing the cost of cure over the diminution in value.

(A) INTENTION TO EFFECT THE CURE AS A PREREQUISITE FOR CLAIMING THE COST OF CURE

30 The first way in which a party's intention to effect the cure is relevant is as a prerequisite for claiming the cost of cure. This was the case before *Ruxley*. Thus, in the English Court of Appeal decision of *Tito v Waddell (No 2)* [1977] Ch 106 ("*Tito*"), the defendant had failed to replant trees and shrubs on an island after completing mining operations. Megarry VC decided against awarding the cost of replanting or specific performance. This is because the disproportionately high cost and the absence of any material benefit to the plaintiff, who had shown no intention of undertaking the work, would mean that either remedy would be "an order of futility and waste" (at 327). The learned judge then said this of the relevance of the plaintiff's intention to effect the cure: "if the plaintiff … has no intention of applying any damages towards carrying out the work contracted for, or its equivalent, I cannot see why he should recover the cost of doing the work which will never be done" (at 332–333). Accordingly, by this account, the plaintiff's intention to effect the cure is a prerequisite for claiming the cost of cure.

31 Similarly, in the English High Court decision of *Radford v De Frobervile* [1977] 1 WLR 1262 ("*Radford*"), the question was whether the plaintiff could recover damages representing the cost of building a wall, which the defendant had failed to do so in breach of contract. The value of the plaintiff's land would not have been enhanced in any way by the construction of the wall – so it could not be said that the defendant's failure to construct the wall would have caused the plaintiff to sustain any loss by reference to

fluctuations in the market value of his land. The plaintiff, nevertheless, maintained that he ought to be awarded damages for the defendant's breach by reference to the cost of constructing a wall in precise conformity with the contract description. Oliver J held that whether the plaintiff could so claim depended on whether the plaintiff "has a genuine and serious intention of doing the work" and, if so, the reasonableness of this course of action (at 1283). The learned judge was satisfied on the facts that the plaintiff intended to do so as he wanted to preserve the privacy of his land. Therefore, the breach was not being used to secure an uncovenanted benefit and damages for cost of cure were awarded. In this way, an intention to effect the cure was regarded as a prerequisite for the award of such damages (see Rowan at 620).

32 While *Tito* and *Radford* were both approved by the House of Lords in *Ruxley*, the role of an intention to effect the cure appears to have been slightly reduced. The intention to effect the cure was relegated to being merely a *factor* among others going to the reasonableness of an award of damages for cost of cure (see, *eg*, Lord Jauncey's statements in *Ruxley* at 359: "[i]ntention, or lack of it, to reinstate can have relevance only to the reasonableness and hence to the extent of the loss which has been sustained"; see also, Lord Lloyd's statements in *Ruxley* at 372). It is further unclear if the intention to effect the cure is a weightier factor compared with other factors or stands on equal terms with them.

33 This subtle departure was never satisfactorily explained by the House of Lords in *Ruxley*. Rowan suggests (at 620) that this may be because the focus in *Ruxley* was on the reasonableness of damages for cost of cure, and the relevant factors in the case did not include whether the plaintiff intended to effect the cure. As such, while Lord Jauncey and Lord Lloyd did discuss the relevance of such intention, they did not explain in detail the reasons for the apparent departure from *Tito* and *Radford*. Whatever the reason might be, the reduced

significance given to whether the plaintiff intends to effect the cure has been followed in many subsequent cases (see, *eg*, the English High Court decisions of *Birse Construction Ltd v Eastern Telegraph Company Ltd* [2004] All ER (D) 92 (Nov) and *London Fire and Emergency Planning Authority v Halcrow Gilbert Associates Ltd* [2007] EWHC 2456 ("*London Fire*")).

(B) INTENTION TO EFFECT THE CURE AS A FACTOR IN CONSIDERING THE REASONABLENESS OF CHOOSING THE COST OF CURE

34 It will be apparent from the above discussion that the second relevance of a party's intention to effect the cure is as a *factor* in the overall reasonableness test used to ascertain whether a plaintiff rightly chose the cost of cure rather than to claim the difference in value. The question, as Kramer explains, is whether the plaintiff made a reasonable choice (if the choice has been, or will be made (see *Kramer 3rd Ed* at para 4-10)).

35 Whether the plaintiff made a reasonable choice is governed by the reasonableness test, which was restated by the House of Lords in *Ruxley*. The House held that the proposed cost of £21,560 of turning a pool from 6 feet 9 inches deep (as built) to 7 feet 6 inches deep (as contracted for) was out of proportion to the plaintiff's loss. It was therefore not reasonable for the plaintiff to incur it. Instead, the plaintiff was confined to recovery of its loss absent the cost of cure, which was £2,500 loss of amenity and zero diminution in property value. The key factor in the reasonableness test as it was applied in *Ruxley* is that of proportionality: the courts will only award the cost of cure where it is "proportionate" (or not disproportionate) to the plaintiff's loss. In addition, as explained in *Kramer 3rd Ed* at para 4-166, it must be reasonable for the plaintiff not only to pay for *a* cure, but to pay for *the* cure for which the plaintiff now

claims. In this context, whether the plaintiff intended to effect the cure is a factor in the overall consideration of reasonableness.

36 It is also important to note that the reasonableness test (and consequently, the need to consider the intention to cure) only applies where the cost of repair is *greater* than the diminution in value and other losses that would be avoided by the repair. Kramer explains it as such: "[w]here … the cost of repair or another cure is greater than diminution in value and other losses that would be avoided by the cure, the court must ask whether the cure is nevertheless a *reasonable* cost to incur" [emphasis added] (see *Kramer 3rd Ed* at para 4-157 as well as para 4-237). It may therefore be unreasonable for a plaintiff to insist on repairs where the damaged property is unusable and it is simply cheaper to replace than to repair. In such cases, the court needs to be satisfied that the cost of repair is reasonably incurred. Otherwise, as Widgery LJ observed in the English Court of Appeal decision of *Harbutt's Plasticine Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447 (at 473), "[i]f the article damaged is a motor car of a popular make, the plaintiff cannot charge the defendant with the cost of repair when it is cheaper to buy a similar car on the market".

(3) Intention to carry out outstanding repairs should be a factor to be considered when claiming the cost of cure

37 For reasons that I will shortly explain, I hold that a party's intention to carry out the outstanding repairs (or to effect the cure) is a relevant factor as part of the objective reasonable test in *Ruxley* for claiming for such costs. I arrive at this conclusion for reasons based on precedent, principle, and policy.

(A) PRECEDENT

(I) THE SINGAPORE DECISIONS MENTIONING RUXLEY

38 I turn first to the Singapore decisions that have mentioned *Ruxley*. The closest that the Court of Appeal had come to discussing the relevance of an intention to cure can be found in two cases. First, in *Chia Kok Leong*, the court was concerned with the issue of whether the promisee (a condominium developer) was entitled to recover substantial damages quantified by reference to the cost of curing the defective works in the contractual performance provided by the promisor (the main contractor engaged to do the project), but on the land owned by a third party to the contract (the Management Corporation State Title Plan No 2201). It was commonly thought that in such cases, the claim might disappear into a "legal black hole" as the promisee did not suffer significant loss despite being privy to the contract, while the third party who suffered the actual losses was not privy to the contract. The Court of Appeal accepted that in such a case, the promisee had an interest in the due performance of the contract, even though the promisee would not have accrued any obvious benefit from such performance. The rationale underlying why a plaintiff in the promisee's position can claim for such substantial damages under the "broad ground" exception is that he did not receive what he had bargained and paid for (at [53]). This rationale was first espoused by Lord Griffiths in the House of Lords decision of *St Martins Property Corporation Ltd v Sir Robert McAlpine Ltd* [1994] 1 AC 85 (see *Chia Kok Leong* at [17]).

39 It was within this *specific* context that the Court of Appeal entertained the question raised on whether it must be shown by the promisee (the condominium developer) that it "has already carried out the repairs or intends to do so before he is entitled to claim for substantial damages" (at [57]). The answer was a "no" (at [57]):

> 57 … *On the basis of the broad ground* that a plaintiff recovers substantial damages for the loss in not getting what he contracted for, *that should not be a prerequisite* before such damages may be claimed. If, for example, an owner of a house were to engage a contractor to erect a koi pond and it was so badly done that it was of no use and the owner decided to abandon the project, *there is no reason why* he must have proceeded with the repairs, *or intended so to do*, before he may claim for substantial damages. At the end of the day, the entire circumstances of the case must be considered to determine whether the claim made was reasonable or was made with a view to obtaining an uncovenanted benefit.
>
> [emphasis added]

However, as is apparent from the passage quoted above, the Court of Appeal in *Chia Kok Leong* was careful in limiting its views to the "broad ground" exception that was relevant in three-party contract cases. Nevertheless, the court also held that there was evidence, in any event, that the condominium developer intended to use the damages obtained to repair the building and the MCST expected the condominium developer to carry out the rectifications (at [58]). At most, what can be discerned from this case is that in such *three-party cases*, the intention to cure is irrelevant when invoking the "broad ground" exception.

40 The next case is *Family Food Court*, which was also a *three-party* case. The Court of Appeal first noted that the objective test of reasonableness in *Ruxley* will apply to the performance interest claimed in a three-party scenario, and that "[t]here has hitherto been some controversy as to whether or not the plaintiff/promisee must demonstrate that it has an intention to utilise the damages sought to realise the performance interest which was the subject matter of the contract" (at [53]). It then went on to revisit the koi pond example that was mentioned in *Chia Kok Leong*, and endorsed the principles formulated therein by noting that the approach taken in that case was "calculated to arrive at a just and fair result between the parties" (at [53]). But again, these comments were made in the context of breaches of third-party beneficiary contracts.

41 The question then is whether those principles should *also* apply to a two-party case. There has been some suggestion by academics that it may not be too far of a stretch to do so. Indeed, the views in a local textbook are as such: "[i]n Singapore, however, it may be that such cure or intention to cure is irrelevant as having no bearing on the question of 'reasonableness' … this may be inferred from the acceptance of the 'broad ground' analysis in dealing with the 'black hole' problem that arises [in three-party cases]" (see Tham Chee Ho and Tan Zhong Xing, "Damages Based on Compensation I – Quantification of Loss" in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) ("*The Law of Contract in Singapore 2nd Ed*") at para 21.085). It could therefore be argued that there should be consistency reached between the two types of cases as they examine, in substance, the same question of whether the promisee's loss was the cost of remedying the breach (see Rowan at 630).

42 However, I do not derive any assistance from the three-party cases which were cited by the appellant. This is because these three-party cases are fundamentally different from the present two-party situation. Indeed, the Court of Appeal in *Chia Kok Leong* and *Family Food Court* was concerned with the protection of the performance interest of a promisee within the unique confines of breaches of third-party beneficiary contracts. Further, those cases did not touch upon the specific question of whether the intention to cure goes towards reasonableness in electing for damages to be assessed on a cost of cure basis over a diminution in value (when the cost of cure was higher).

43 This can also be discerned from the way the koi pond hypothetical was explained in *Chia Kok Leong*. The Court of Appeal noted (at [57]) that if the koi pond was "so badly done that it was of no use", then there is no reason why the owner must have "intended" to proceed with repairs before he may claim

for "substantial damages". But that observation was made only in relation to whether the plaintiff possessed a *right* to obtain substantial damages regardless of his intention, and not how the *extent* of those substantial damages should be ascertained (whether on a cost of cure basis or diminution in value) (see generally, *Chitty on Contracts* vol 1 (H G Beale gen ed) (Sweet & Maxwell, 34th Ed, 2021) ("*Chitty 34th Ed*") at para 18-069): "[t]his issue, however, arises, not for the purpose of determining the *existence* of a claim for substantial damages, but its *extent* …" [emphasis in original]).

44 Even during the reconsideration of the koi pond example in *Family Food Court* (at [53]), the Court of Appeal only noted that a claim for diminution in value of the pond to zero (and a loss of amenity award) could possibly be claimed when considering the *extent* of substantial damages, but not the specific scenario in the present case where the cost of cure *exceeds* the diminution in value:

> 53 … Suppose, in the example given in *Prosperland (CA)* at [57], the contract value of the koi pond is $50,000, but the koi pond is so badly built that it has to be abandoned. The owner will recover his $50,000 for total failure of consideration. Presumably, he can also recover damages for loss of the enjoyment of keeping koi, and need not ask another contractor to construct another koi pond in order to recover such damages; otherwise, the original contractor would have an unmerited windfall (*viz*, not having to pay damages for the owner's loss of enjoyment). …

As I have mentioned above at [36], it is only where the cost of repair is *greater* than the diminution in value, that the reasonableness test in *Ruxley* (and the need to consider intention to cure) would apply. That scenario did not arise in the koi pond hypothetical raised.

45 I am instead guided by the decision of G P Selvam J in the High Court decision of *Management Corporation Strata Title Plan No 1166 v Chubb*

Singapore Pte Ltd [1999] 2 SLR(R) 1035 ("*Chubb Singapore*"). In that case, the developer of a condominium complex entered into an agreement with the defendant contractor to supply, install, test, and commission a security and communication system to monitor the entry of people into the condominium. However, there was a slew of problems found with the system due to various defects. The defendant contractor was found in breach of its contractual obligations to supply a safe and efficient system (at [87]). The court held that the plaintiffs were essentially left without a working system and were entitled to claim in damages the "the amount of money required to place the plaintiffs in the same position as they would have been in if the contract had been performed according to description and specifications of the purpose the system was required for" (at [106]). *Ruxley* was discussed in this case (at [106]), but only to explain that the cost of cure will not be granted where it is "massively unreasonable" (*ie*, wholly disproportionate).

46 Of interest in *Chubb Singapore* is the point that the court rejected the estimated cost of replacement given at trial which totalled $1,624,500. The court noted that this repair cost was obtained ten years after the breach and held that it "would be unreasonable to award this amount because *it was not clear* that the plaintiffs would spend that amount and *embark on such a replacement project*" [emphasis added] (at [107]). Instead, the court awarded damages assessed with reference to the initial price paid at $1,024,769.70 with interests (at [108]) – essentially, awarding the diminution in value of the security system to zero. Whilst not stating the proposition explicitly, what the High Court did implicitly was to conclude that because the cost of cure/repair was higher than the initial value of the security system, then a genuine intention to use the damages awarded for reinstatement of the system must be shown, failing which,

the claimable measure of damages is limited to the diminution in value. This suggests that intention to cure is relevant in such a scenario.

47 A second case which is relevant to refer to, albeit not mentioning the relevance of intention, is the High Court decision of *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd and another* [2009] 1 SLR(R) 385 ("*Yap Boon Keng*"). In that case, the plaintiff homeowner commenced proceedings against the defendant contractors as there were defective works and undersized bedrooms which did not meet the plaintiff's requirements. The plaintiff had instructed for the bedrooms of the house (apart from the master bedroom) to be between 18m^2 to 19m^2, but the rooms were found to range between 12.4m^2 to 16.8m^2 instead (with only one bedroom meeting the requirement at 18m^2) (at [56]). The High Court found this to be in breach of contract. The plaintiff sought damages on a cost of cure basis to reconstruct the affected rooms, but the first defendant refuted this claim on the basis that the expenditure incurred to reconstruct the rooms would be wholly disproportionate to the loss suffered by the plaintiff, citing the case of *Ruxley* as being directly relevant (at [122]–[125]).

48 The High Court in *Yap Boon Keng* found that it was not appropriate to assess the plaintiff's loss by reference to a cost of cure basis as the contractual objective had been substantially achieved (at [127]): "[t]he entire objective was to construct a house that was suitable for the plaintiff's family to occupy. This objective has been achieved albeit three of the bedrooms are somewhat smaller than the plaintiff desired". The rooms were usable as bedrooms despite being slightly smaller. To effect reconstruction would mean the demolition of the rooms on the ground floor, second storey and third storey of the house, leading to substantial and excessive costs of reconstruction. Thus, the cost of cure basis of damages was rejected as "this would be unreasonable" (at [127]). Instead, the court was considering whether to assess damages on a diminution of value basis,

but no proof was provided that the value of the house had been adversely affected by the smaller size of the bedrooms (at [128]). Eventually, damages for the loss of amenity were granted in the sum of $50,000 (at [129]). This case, whilst not mentioning the role of intention to cure, is important in endorsing the view in *Ruxley* that one factor in assessing the reasonableness of a cost of cure is whether the contractual objective has been substantially achieved (at [126] citing *Ruxley* at 358). This case also shows that the intention to cure may not necessarily be treated as a prerequisite to be considered in every case (since it was not even considered at all) and is perhaps merely a factor in the overall reasonableness inquiry which may be overshadowed by other weightier factors.

49 Accordingly, from this survey of the Singapore cases, I am of the view that the Singapore courts, including the Court of Appeal, have not laid down any definitive proposition of law in relation to the relevance of a party's intention to effect the cure to a claim for damages for cost of cure (including for outstanding repairs). Accordingly, in the absence of any binding local authority, I am free to decide the relevance of an intention to cure by recourse to cases from other jurisdictions and first principles. On that premise, I now turn to the other authorities debating whether the *Ruxley* test of reasonableness applies beyond the construction context.

(II) THE AUTHORITIES CONCERNING NEGLIGENT DAMAGE CAUSED TO CHATTELS

50 Beyond Singapore, there are authorities which suggest that *Ruxley* might not be directly applicable to the case at hand as we are dealing with two very different scenarios. The case of *Ruxley* itself dealt with a contract for services resulting in a defective building, as did *Yap Boon Keng* (mentioned above at [48]). However, the present case deals with the different factual situation of negligent damage caused to chattels (specifically, the vehicles).

51 In a contract to perform services like *Ruxley*, it will ordinarily be assumed that the plaintiff is entitled to have the incomplete or defective performance completed or corrected and "damages may be assessed on the basis of what it will cost the plaintiff to obtain performance (or completion of performance) of the contractual undertaking by a third party" (see *Chitty 34th Ed* at para 26-039). The focus is on obtaining substitute performance. This is subject to the reasonableness in curing the defect and the need to show a "sufficient intention" to have the work done (see *Chitty 34th Ed* at para 26-039, citing *Tito* and *Radford*; see also, the English High Court decision of *Harrison v Shepard Homes Ltd* [2011] EWHC 1811 (TCC) at [263]).

52 In contrast, the present case concerns a distinct factual matrix relating to the proper measure of loss for a chattel that has been damaged by a negligent act. The authors of *Chitty 34th Ed* recognise this difference by caveating what was mentioned above about cases like *Ruxley* with a footnote (at footnote 236 to para 26-04):

> *In contrast*, in tort cases in which a property has been damaged through the defendant's negligence, the *true measure of the plaintiff's loss is the diminution in the value* of the property … the *cost of repairs is no more than evidence* of the diminution in value and mitigation is not relevant …
>
> [emphasis added]

The above footnote suggests that the true measure of loss for negligent damage to chattel cases is the diminution in value and the cost of cure/repair is no more than evidence of *that* fall in value. It follows that no election needs to be made between the diminution in value and the cost of cure, and the intention to cure becomes irrelevant. This may be why, despite this being a contract claim, the

appellant cited tort cases such as *Lo Lee Len* and *Jones*, but perhaps without making clear this important characteristic in its arguments.

53 While the present case is premised on the breach of an implied contractual term to take reasonable care instead of a pure tortious claim, there is no reason why the principles stated above should be applied any differently in so far as the award of damages are concerned. For one, generally speaking, the Court of Appeal pointed out in *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [20] that a contractual duty of care can, but not always, give rise to an identical duty of care in tort. Further, as was observed by the High Court in *Yip Holdings Pte Ltd v Asia Link Marine Industries Pte Ltd* [2012] 1 SLR 131 ("*Yip Holdings*") (at [12], citing Andrew Burrows ("Burrows"), *Remedies for Torts and Breach of Contract* (Oxford University Press, 3rd Ed, 2004) ("*Andrew Burrows 3rd Ed*") at p 232): "[w]hether for torts or breach of contract, the general compensatory aims dictate that the plaintiff should be put into as good a position as if its property had not been damaged". More specifically, Burrows' point is that, in tort, the aim of compensatory damages is to put the plaintiff in a position he would have been in had the tort not been committed. In contract, the aim of compensatory damages is to put the plaintiff in a position he would have been in had the contract been performed. These two aims can converge if property damage occurs in a case where there could potentially be liability in both tort and contract. Indeed, *Yip Holdings* was a case founded on an apparent breach of a contractual duty to take care when moving the crane concerned (see the High Court decision on liability in *Yip Holdings Pte Ltd v Asia Link Marine Industries Pte Ltd* [2009] SGHC 136 at [109]–[111]).

54 In this connection, the appellant had cited in its written submissions an extract which suggests how damages are to be assessed for tortious conduct

affecting goods and why the failure (or lack of intention) to effect repairs is not relevant (see James Edelman, *McGregor on Damages* (Sweet & Maxwell, 21st Ed, 2021) ("*McGregor on Damages 21st Ed*") at para 37-007).[11] While the appellant did not explain why this passage, which appears in the chapter on "Torts Affecting Goods: Damage and Destruction", applies to its claim for breach of contract, I accept that the principles are potentially applicable in the present case for the reasons I have given above (at [52]). The citation by the appellant was truncated, and thus I provide a fuller extract here:

> The fact that the repairs have not yet been executed before the hearing of the action, or will never be executed at all, does not prevent the normal recovery. Since damages may on general principles be given for prospective loss, it is immaterial that the repairs are not yet executed. Thus in *The Kingsway*, where only temporary repairs had been effected before the trial, and the permanent repairs had been postponed owing to the exigencies of wartime, the plaintiffs recovered, inter alia, a sum in respect of such permanent repairs on proving with reasonable certainty that they would have to be done. And, more importantly, since the cost of repair is adopted as being equivalent to the diminution in the ship's value, it is immaterial that, as circumstances turn out, the repairs will never be executed. Thus in *The Glenfinlas*, where the ship was lost from other causes before the claim for damages was heard, liability for the estimated cost of repairs was admitted. …

It therefore appears from *Chitty 34th Ed* and *McGregor on Damages 21st Ed* that a separate rule exists for negligent damage caused to chattels, and the lack of repairs (even in the future) is not fatal to the claim for the cost of repairs. Indeed, this formed the basis of the appellant's case in support of its claim for the outstanding repair costs although its case was a claim in contract.

55 The suggestion made above in *McGregor on Damages 21st Ed* is also supported by *Coles and others v Hetherton and others* [2015] 1 WLR 160

---

[11] Appellant's Case at para 9(2).

("*Coles v Hetherton*"). In *Coles v Hetherton*, 13 test cases arising out of minor road traffic accidents were brought before the English Court of Appeal. The insurers for the various owners of the negligently damaged vehicles indemnified them by having the vehicles repaired, and then brought subrogated claims in the names of these owners against the various defendants. One of the preliminary issues to be answered in that case was (at [27]): "[w]here a vehicle is damaged as a result of negligence and is reasonably repaired (rather than written off), is the measure of the plaintiff's loss taken to as the reasonable cost of repair?". The English Court of Appeal then proceeded to lay down some general principles (at [27]):

> 27 … (1) Where a chattel is damaged by the negligence of another that loss (the "direct" loss) is suffered as soon as the chattel is damaged. (2) The proper measure of that loss is the diminution in value that the chattel has suffered as a result of the negligence of the defendant. … (3) If the chattel can be economically repaired, the plaintiff is entitled to have it repaired at the cost of the wrongdoer, *although the plaintiff is not obliged to repair the chattel to recover the direct loss suffered*. … (5) Generally, the practical way that the courts have calculated this diminution in value is to ask how much would be the reasonable cost of repair so as to put the chattel back in the state it was in before it was damaged. …
>
> [emphasis added]

Thus, from this passage, where a chattel is damaged by the negligence of another, the measure of loss is the diminution in value that the chattel has suffered. The practical means of calculating that diminution in value is to ask how much the reasonable cost of repairs would be to put the chattel back into its original state. Importantly, the court held that the plaintiff is *not* obliged to repair the chattel to recover the direct loss suffered. It would follow from these propositions stated in *Coles v Hetherton* that the intention to effect repairs is thus irrelevant in relation to negligent damage to chattel cases.

56 More pertinently, the English Court of Appeal in *Cole v Hetherton* also held that the presence of documents such as an invoice for the cost of the repairs undertaken are "no more than *evidence* of the diminution in value suffered … [and] [s]trictly speaking, *the cost of the repairs is not itself the loss suffered*" [emphasis added] (at [28]). This further supports the view that, in negligent damage to chattel cases, the real loss lies in the diminution of value and not the cost of cure. Thus, the production of a repair invoice is said to be a reliable means of assessing the loss as the "recovery for damage done to a chattel is not dependent upon repairs being done or costs of repair being paid by the plaintiff since the compensation is for loss in value, not the cost of repair as such" (see *Koh Tiam Ting v Soon Li Heng Civil Engineering Pte Ltd* [2020] SGDC 172 ("*Koh Tiam Ting*") at [11]; see also *McGregor on Damages 21st Ed* at para 52-014).

57 In summary then, on one view at least, in negligent damage to chattel cases, the measure of damages is the fall in value of the chattel at the time and place of injury, plus any other consequential losses (see *Yip Holding*s at [13]). The amount by which the value of the chattel is diminished is usually equated with the cost of repair to restore the damaged chattel to its original condition in the case of damage to property (see *Yip Holdings* at [13]). The cost of repair is thus *prima facie* the correct measure of the plaintiff's loss (see *McGregor on Damages 21st Ed* at paras 4-051 and 37-003). Accordingly, the plaintiff's intention to repair, which is relevant to the cost of cure, does not factor in the analysis, which proceeds based on a diminution in value. Put another way, the intention to cure is not relevant because the plaintiff need not elect between the diminution in value and the cost of cure.

58 The critical question, then, is whether there should be a difference in the approaches between these two types of cases – defective works from a service

contract like *Ruxley* and negligent damage to chattels cases like *Coles v Hetherton*. In my view, it would be unprincipled to maintain such a distinction where the compensatory aims of contract and tort converge. The lodestar should then always be that of the *objective reasonableness* of the award of damages, in which the intention to cure is one relevant factor that must be considered. There should not be a special carve out rule for negligent damage to chattels. I elaborate on this below.

(III) RECONCILING THE DIFFERENT AUTHORITIES

59 At the outset, it is worth noting that the negligent damage to chattel cases from England do not speak with one voice, and there are other cases where the intention to cure was found to be *relevant* in deciding whether to award damages on a cost of cure basis.

60 In the English Court of Appeal decision of *Aerospace Publishing Ltd v Thames Water Utilities Ltd* [2007] Bus LR 726 ("*Aerospace Publishing*"), a private archive owned by the plaintiff (containing rare research works and historical collections) that was utilised in its business was damaged by flooding caused by a main water pipe which had burst. The plaintiff claimed the cost of replacing the archives in so far as it could be reinstated. This was about £3 million. The defendant in charge of operating the burst pipe contended that the plaintiff could only recover the diminution in value of the archives of about £300,000 (at [5]). The English Court of Appeal awarded the higher cost of restoration/cure rather than the lesser diminution in value since the plaintiff had, among other reasons, demonstrated a genuine and reasonable intention of reinstating the damaged collection (at [68]). *McGregor on Damages 21st Ed* (at para 37-004) cites this case for the proposition that in cases of damage caused to personal property, the test is whether it is reasonable to effect repairs, and if

it is not reasonable to do so, then only the diminution in value is to be awarded. Thus, *Aerospace Publishing* suggests that the presence of a genuine intention to cure is relevant in ascertaining the reasonableness of an award on a cost of cure basis (see *McGregor on Damages 21st Ed* at para 37-064).

61 For completeness, while *Aerospace Publishing* was about private archives and not cars, I do not think that the nature of the chattel changes the analysis materially. Indeed, as noted by the English Court of Appeal in *Darbishire v Warran* [1963] 1 WLR 1067 (at 1071) ("*Darbishire v Warran*"), this area of law in assessing damages was first developed from damage to ship cases by collision, but that was no obstacle to extending the principle to other situations:

> … The law of damages arising out of collisions on land has been developed out of the Admiralty rule on collisions at sea and the rule of liability is the same in Admiralty and common law cases: see Lord Dunedin's speech in *The Susquehanna (Admiralty Commissioners v. S.S. Susquehanna)*. The principle is that of restitutio in integrum, that is to say, to put the plaintiff in the same position as though the damage had not happened. It has come to be settled that in general the measure of damage is the cost of repairing the damaged article; but there is an exception if it can be proved that the cost of repairs greatly exceeds the value in the market of the damaged article. …

As such, the principles were said to be of universal application and no distinction should be made based on the type of chattel: "there is no special measure of damages applicable to a ship different from the measure of damages applicable to *any other chattel*. The nature of the thing damaged may give rise to more difficult questions in the assessment of damages, but it does not change the assessment in any way [emphasis added]". (see *McGregor on Damages 21st Ed* at para 37-002, citing *The Kingsway* [1918] P 344 at 356).

62 Indeed, quite apart from the fact that no distinction is made based on the type of chattel, even in the realm of negligent damage to land or real property (as opposed to chattels or personal property), the intention to repair or reinstate is once again relevant to the inquiry of whether those costs can be recovered (see *Ng Siok Poh (administratrix of the estate of Lim Lian Chiat, deceased) and another v Sim Lian-Koru Bena JV Pte Ltd* [2018] 4 SLR 731 at [27]–[28]). There is also the case of *Hole and Son (Sayers Common) Ltd v Harrisons of Thurnscoe Ltd* [1973] 1 Lloyd's Rep 345. In that case, the defendant's lorry demolished a terrace of three cottages belonging to the plaintiffs, causing the tenant inhabiting one of the cottages to move out. The plaintiffs sought the cost of reinstatement, but they had no actual intention of repairing the cottages as they wanted to demolish the cottages after the accident. The cost of cure was thus refused by the court and the plaintiffs' recovery was restricted to a small sum for repairs to a wall and loss of rent.

63 Yet another case is *CR Taylor (Wholesale) Ltd and others v Hepworths Ltd* [1977] 1 WLR 659, where a fire had destroyed the plaintiffs' billiard hall on a site which they held for its potential redevelopment value only. Cost of cure/reinstatement was sought, despite the venue being unoccupied for several years. However, as there was never an intention of using the venue as a billiard hall (and by inference, no intention to cure), the diminution in value was rightly held to win over the cost of cure/reinstatement as the appropriate measure of damages (see also, Andrew Phang, "Subjectivity, objectivity and policy – contractual damages in the House of Lords" (1996) JBL 362 ("Phang") at 368–369). The thrust of these cases demonstrates that the intention to cure was relevant in assessing the reasonableness of the award regardless of the nature of the property in question.

64 How then do we reconcile all the above cases? What I have found most useful was to refer to the views expressed in *Kramer 3rd Ed*. Under the heading "The Broad Application of this Test beyond Construction Cases", Kramer explains (at para 4-161) that the *Ruxley* test of reasonableness (which encompasses the need to discern whether there was an intention to cure as one factor) is applicable to a *broad range* of contexts, beyond the factual matrix of *Ruxley* involving a construction contract:

> The reasonableness test for determining whether the cost of repairs are recoverable, as exemplified by *Ruxley Electronics*, applies *wherever there is damaged or defective property* ***(not only in construction cases)****, and in both contract and tort.* Notably, the test applies to: cases of damage to goods, whether in contract or tort; cases of damage to buildings and land, whether in contract or tort; cases of damage to ships or aircraft, whether in contract or tort; cases to supply of defective goods …; cases of defective construction; cases of redelivery of chartered vessels; leased aircraft or rented land and buildings in an unsatisfactory sate at the end of the hire period.
>
> [references omitted; emphasis added in italics and bold italics]

Thus, the reasonableness test in *Ruxley* is generally applicable across the board to a myriad of cases (see also, the citations in the passage cited which have been omitted) and is not necessarily restricted to the construction context. There is no special standalone framework which applies to cases involving negligent damages to chattels such as vehicles, contrary to what the other authorities dealing with damage to chattels suggest (see above at [52]–[57]).

65 The view adopted by Kramer is also fortified by that of Burrows. I find that a particular extract from Andrew Burrows, *Remedies for Torts and Breach of Contract* (Oxford University Press, 4th Ed, 2019) ("*Andrew Burrows 4th Ed*") to be helpful in dispelling the myth that the cost of repair is the *prima facie* "correct measure" (see above at [54]) of valuing the plaintiff's loss in negligent

damage to chattel cases, such that the intention to repair is irrelevant as no election needs to be made (at p 213):

> … it was *misleading to say* … that the claimant suffers a diminution in value when her car is damaged *and that the prima facie measure of damages for that diminution is the cost of repairs*. The *true approach* is that the cause of action accrues when the claimant's car is damaged. The claimant's pecuniary loss as a consequence of that damage *may comprise either* the diminution in value of her car (ie the difference in its value before and after the damage) *or* the cost of repairs (or indeed the cost of replacement minus the car's present value) …
>
> [emphasis added]

Therefore, a true diminution in value claim would be measured by looking at the worth of the car in its damaged state against the present market value, which may not necessarily be the same as the cost of repairs (or even the replacement costs minus the scrap value of the damaged car). I thus do not think it is safe to assume that the cost of repairs is *prima facie* the sole and correct measure of the plaintiff's loss. Even in cases like *Yap Boon Keng* where no opposing figure for a diminution in value was placed before the court, the court may still find that the cost of repairs is not reflective of the actual loss suffered.

66 Burrows then goes on to bolster the point made above (at [64]) that the *Ruxley* test of reasonableness is applicable across a multitude of cases (whether concerning personal or real property, *etc*), where the intention to cure would be relevant to the analysis (see *Andrew Burrows 4th Ed* at p 213):

> … The distinction between the difference in value measure and the cost of repair/replacement measure is to be found *throughout the law of damages* (whether one is dealing with *personal or real property* and indeed whether the claim is one in contract or tort). The *central concepts* in deciding whether the courts will award the difference in value or the cost of repair are whether the claimant has had the repairs carried out – or whether the claimant *intends to do so – and reasonableness* …
>
> [emphasis added]

67 In this connection, I find that an analogy can be drawn from the destruction to goods or chattels cases, where the court will only award the cost of purchasing a replacement instead of the current market value of goods, where an intention to purchase a replacement good can be shown. I am fortified in my views that such an analogy can be drawn as a similar test of reasonableness is also applied, as explained by Kramer (see *Kramer 3rd Ed* at para 4-140):

> … in destruction cases the claiming is entitled to the market selling price, and is only entitled to displace that by the market replacement measure if it *does* intend to purchase a replacement and such a replacement is reasonable. The intention test forms part of the general reasonableness test which determines whether a market replacement is to be applied, especially where the market resale price (ie the value of the goods) plus consequential losses are lower than the replacement cost. ***This is broadly the same test as applies to determine whether the cost of cure by repair is recoverable***, as discussed in detail below in section 3.
>
> [emphasis in original; emphasis added in bold italics]

68 In such cases, intention must similarly be shown. For example, in *The Maersk Colombo* [2001] 2 Lloyd's Rep 275 ("*The Maersk Colombo*"), the English Court of Appeal found that it was not reasonable for the plaintiff to claim for £2.4m in replacement costs for its dock crane that had fallen over after the defendant's ship had struck it (which had to be modified in the US and shipped to Southampton at extra cost), as the plaintiff had no intention of purchasing such a replacement. The plaintiff had already ordered a new crane at the date of the destruction of the old crane, and thus the court affirmed that the market selling price of the crane at £665,000 was the proper measure of damages to be awarded. While the intention to reinstate is *not conclusive*, it is relevant to the question of reasonableness (at [56], citing *Ruxley*).

69 Thus, to reconcile the different categories of cases canvassed above, I find that the central thread running through all of them is no different from the

Ruxley test of reasonableness, specifically that the intention to cure is relevant as *a factor* for the court to consider in deciding whether to award the cost of cure. This is the case regardless of whether the claim is in contract or tort, or whether it deals with chattels or land. To the extent that some negligent damage to chattels cases suggest that the intention to cure the damage is irrelevant (referenced above at [52]–[57]), these authorities should be confined to their own specific circumstances and not regarded as laying down any general principle.

(IV) INTENTION TO CURE AS ONE FACTOR AS PART OF THE REASONABLENESS TEST

70 More specifically, I am of the view, from the weight of the prior cases, that the intention to cure should be treated as merely one factor in the analysis, instead of being a prerequisite to obtaining a cost of cure basis of damage (where it exceeds the diminution in value). Otherwise, it will be hard to explain many cases where, effectively, repair costs were claimed but without argument on whether the plaintiff intended to repair or not. This also coheres with the cases after *Ruxley* (see above at [33]), which understood that decision of the House of Lords as merely treating the intention to cure as a relevant factor out of a basket of others which is not conclusive (see, *eg*, *The Maersk Colombo* at [56]):

> 56 *Ruxley Electronics Ltd v Forsyth* [1996] 1 AC 344, [1995] 3 All ER 268 also supports the proposition that, although what a claimant does with any damages he receives is irrelevant, his intention to reinstate or not to reinstate, *while not conclusive, is relevant* to the question whether it would be reasonable to reinstate the property (see Lord Jauncey at page 359C-D and Lord Lloyd at pages 372-373 of the former report …
>
> [emphasis added]

71 To conclude, from the above discussion of the relevant authorities, I find that, from the perspective of *precedent*, the *Ruxley* test of reasonableness does apply to the present scenario involving negligent damage to chattels (such as

vehicles). As part of this reasonableness inquiry, the intention to cure is but one factor to be considered when deciding whether to award damages on a cost of cure basis or diminution in value (when the latter would result in a smaller award).

(B) PRINCIPLE

72 Buttressing my views above based on precedent, I turn to first principles. In this regard, it is true that the courts routinely state that they have no concern with the use to which a plaintiff puts an award of damages. However, that statement is to be understood in the context where the plaintiff has *already* incurred the loss. This can happen where the plaintiff is claiming for the difference in value between an undamaged property and a damaged property. That loss would have crystallised upon breach. Similarly, this can also happen where the plaintiff is claiming for *incurred* costs of cure. In that situation, the courts are not concerned with whether the plaintiff will use the damages it receives to pay for the cost of cure it has *already* incurred.

73 In contrast, where the cost of cure has not yet been incurred, it is not yet a loss, and if it is never incurred, it will never be a loss, in which case the only loss suffered by the plaintiff is the ordinary measure of the difference in value plus consequential losses. As such, as a matter of principle, the courts *should* be concerned with whether the plaintiff will use the damages to pay for the cost of cure *it says it will incur*. Indeed, Rowan suggests that the lack of an intention to effect the cure seems likely fatal to the claim (at 621). This is because, in the absence of such intention, the plaintiff will not suffer the cost of curing the breach as a loss. In this instance, only when the plaintiff genuinely intends to cure the breach will he suffer this loss.

74 This principle can be discerned from the judgment of Megarry VC in *Tito* (at 332–333) where he said: "if the plaintiff … has no intention of applying any damages towards carrying out the work contracted for, … [i]t would be a mere pretence to say that this cost was a loss and so should be recoverable as damages", as well as the statement by Lord Lloyd in *Ruxley* (at 373): "if … [the plaintiff] had no intention of rebuilding the pool, he has lost nothing except the difference in value, if any". Thus, where it is known that the plaintiff has not, and will never incur the cost of repair, "those costs do not constitute a loss to the claimant" and "[i]t is a fiction to pretend that the claimant has suffered such a loss" (see *Andrew Burrows 4th Ed* at p 213).

75 While the law of contract is at times thought to be very complex, it is, at its core, based on common sense and reasonable conduct. So, it is with the issue at hand. Consider a party who has already spent money on repairs. He is then awarded damages to compensate him for the money spent. He, however, decides to spend the damages on other things, rather than apply them to make up for the money spent on repairs. It is *in this context* that the courts have stated that they are not concerned with how the plaintiff uses an award of damages.

76 In contrast, consider a party who pleads that he will spend money on repairs in the future. He is then awarded damages to enable him to effect the repairs he says he will effect. He, however, spends the damages on other things, rather than apply them to effect the repairs he says he will effect. Intuitively, without reference to any case authority or learned academic article, it is obvious that the courts will have a problem with this. This is because that party had claimed on the basis that he will effect the repairs that have not been so effected. The singular purpose of damages was to enable him to effect those repairs, and not to do other things. Thus, awarding cost of cure damages in these

circumstances would have been incongruous and over-compensatory (see also the effect of an undertaking to effect the repairs at [84]).

77 Accordingly, as a matter of principle, I am also of the view that the intention to cure is but one factor to be considered when deciding whether to award damages on a cost of cure basis or diminution in value (when the latter would result in a smaller award). While some of the analysis above (at [72]–[76]) may suggest a preference for the intention to cure to be a prerequisite rather than a mere factor in deciding whether to award cost of cure damages, I think that it does less violence to the existing precedent (which is an equally weighty consideration) to hold that the intention to cure is just a factor in the analysis, albeit a weighty one for reasons I give below.

(C) POLICY

78 I turn finally to policy. In terms of policy in favour of making a party's intention to carry out the outstanding repairs (or to effect the cure) as a relevant factor for claiming for such costs, Loke writes that an intention requirement provides an assurance that the damages premised on the means to restore the performance interest do not get converted into a windfall on the plaintiff (see Loke at 264). In other words, the intention requirement ties the damages awarded to securing the performance interest and avoids the conferment of a windfall on the plaintiff. This was why Oliver J in *Radford* (at 1270) wanted to ensure that the plaintiff "is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit". Likewise, Rowan asks rhetorically, if the objective of cost of cure damages is to hold the plaintiff harmless against this cost, why should he recover on this basis where he does not intend to cure the breach and incur it (see Rowan at 631)?

79 However, as against this supporting policy, there is the countervailing policy that the consideration of a party's intention to effect the cure would be inconsistent with the principle that, once an award for damages has been made, how the plaintiff spends it is *res inter alios acta*. This tension is often cited as a reason as to why intention to use damages in a particular manner should have no relevance at all (see the English Court of Appeal decision in *Dean v Ainley* [1987] 1 WLR 1729 at 1737–1738). Therefore, the Australian courts have largely not considered the plaintiff's intention to effect the cure (see the Australian High Court decision of *Bellgrove v Eldridge* (1954) 90 CLR 613). Thus, it has been said that "the award of [damages for rectification of building defects] is not conditional upon the building owner having first done the necessary work, upon the building owner undertaking to the court to do so or upon the building owner proving that the building owner will do so" (see the Supreme Court of South Australia decision of *De Cesare v Deluxe Motors Pty Ltd* (1996) 67 SASR 28 at 30). This approach is seen as being neater and avoids a delicate examination of the plaintiff's intention to effect the cure, which may sometimes prove to be difficult on the facts.

80 In my view, this latter policy ground is unsatisfactory. It avoids the realities of the basis of the plaintiff's claim (which is premised on him effecting the cure), and the crystallisation of the loss (an unaffected cost of cure is not a loss until it is effected). The well-established policy reason, which lies at the heart of contractual damages, that the plaintiff is compensated only to such an extent as his true loss, weighs heavier against any other policy founded on reasons of convenience of not examining the plaintiff's intention to effect the cure.

81 Another perspective is that considering the subjective intention of the plaintiff is important to give effect to the concept of the consumer surplus –

which can be defined as the excess utility or *subjective value* obtained from a good over and above the utility associated with its market price (see Phang at 364–365). This policy is further elaborated upon by Rowan as such, with reference to the case of *Radford* (at 632):

> Taking account of the injured promisee's intention in assessing damages also has great force in that it enables the court to give effect to his "consumer surplus". This is the subjective value of the contract to him over and above its market price, reflecting the fact that contracts are not always entered into for profit. Consumers in particular often bargain for pleasure and utility. It achieves this by recognising the subjective value that he attaches to the promised performance. This is not necessarily reflected in the objective market value, where the focus is solely on the enhancement of his financial position.
>
> In *Radford*, for instance, Oliver J. recognised that the promisee subjectively valued the privacy that building a wall would bring, even though the market value of his land would remain the same. This subjective value would not be compensated by a difference in value award, which would be assessed objectively. Only a cost of cure award would give him full satisfaction.

Thus, as an additional policy reason, it becomes natural to consider the intention to effect the cure as part of the overall reasonableness inquiry, as it would enable one to give effect to the consumer surplus (though this point should not be overstated).

(D) SUMMARY

82 For all these reasons based on precedent, principle, and policy, I conclude that a party's intention to carry out the outstanding repairs (or to effect the cure) is a factor to be considered as part of the reasonableness test in *Ruxley* when claiming for such costs. Further, considering the principles and policy discussed above, the intention to cure is a weighty factor in the overall analysis. Indeed, I would go so far as to say that the failure to prove an intention to cure would, absent very special countervailing factors, result in a plaintiff's claim

for cost of cure damages to be dismissed. I derive support for treating the intention to cure as a weighty factor from *The Law of Damages* (Andrew Tettenborn, gen ed) (LexisNexis, 2nd ed, 2010) at p 343), where the learned author says:

> What happens where there is a claim for prospective repair costs, but on the evidence it appears that they will not in fact be carried out? … It is suggested that *prima facie* the owner in such a case should be limited to capital depreciation: there should be no claim for the cost of repairs which will not be carried out. [emphasis added]

The author's view, that the plaintiff who is unable to prove that prospective repairs will be carried out is *prima facie* limited to a claim for diminution in value as opposed to the cost of cure, supports my view that the intention to cure is a weighty factor in the overall analysis.

83 More specifically, when discerning whether there is an intention to cure by the plaintiff, various indicators would be relevant. For example, the amount of time that the plaintiff has left the damage or defect unremedied (see *London Fire* at [633]), and whether certain steps have been taken to seek any replacement (see the English High Court decision of *Nordic Holdings Ltd v Mott Macdonald Ltd* [2001] EWHC 455 (TCC) at [107]). This is ultimately a matter of judgment founded on the particular facts of each case.

84 As for the role of providing undertakings to demonstrate the genuineness of the intention to cure, there is some inconsistency in the cases as to whether such an undertaking would be accepted (see Rowan at 639). For example, Megarry VC in *Tito* (at 333) intimated that he was receptive to the idea: "the court might accept an undertaking by the plaintiff to do the work; … this … would surely 'compel fixity of intention'". However, none of the Law Lords in *Ruxley* thought it to be significant that the plaintiff had been prepared to provide

such an undertaking (see, *eg*, the speech of Lord Lloyd in *Ruxley* at 373). I am of the view that, in most cases, the granting of an undertaking by a plaintiff should not be given much weight in demonstrating an intention to cure. Apart from the fact that an undertaking given at the eleventh hour would be self-serving, this could lead to practical complications such as when the injured plaintiff dissipates the money and becomes impecunious, and that this could also introduce problems of enforcement and satellite litigation as well (see *Andrew Burrows 3rd Ed* at p 220).

85 For completeness, the other *non-exhaustive* factors which may be relevant to consider as part of the objective reasonableness inquiry in *Ruxley* include:

(a) The level of disproportionality between the cost of the cure and the benefit that will accrue to the injured promisee (see *Ruxley* at 353, 367 and 369; *Chubb Singapore* at [106]; *McGregor on Damages 21st Ed* at para 31-014). If the cost of cure is disproportionate to the end to be attained, then ordinarily, only a diminution in value can be claimed.

(b) The extent and seriousness of the damage or defect and its following consequences (see *Ruxley* at 357–358 and the English Court of Appeal decision in *Imodco Ltd v Wimpey Major Products Ltd* (1987) 40 BLR 1).

(c) The nature and purpose of the contract, and the degree to which the contractual objective has been substantially achieved (see *Ruxley* at 358; *Yap Boon Keng* at [127]; *The Law of Contract in Singapore 2nd Ed* at para 21.110).

(d) Any "consumer surplus" (see below at [81] for the definition) which would accrue to the promisee (see *Ruxley* at 360; *Andrew Burrows 3rd Ed* at p 223).

86 In sum, the principles from the above discussion are:

(a) The reasonableness test only applies if the cost of cure greatly exceeds the diminution in value (if any), such as in *Ruxley*. Otherwise, a plaintiff has the right to freely elect between obtaining damages based on cost of cure or diminution in value.

(b) The reasonableness test applies whether the claim is in contract or tort, or whether one is dealing with personal or real property. It applies beyond the construction context in *Ruxley*.

(c) When the authorities speak of the intention to cure as being relevant, they speak of it under the rubric of the *Ruxley* reasonableness test. The intention to cure is a factor in the overall inquiry, rather than being a prerequisite. But it is a weighty factor; absent very special countervailing factors, the failure to prove an intention to cure is likely to limit a plaintiff to a claim for diminution in value.

87 To put the above in practical terms, a plaintiff who wishes to claim for the cost of cure that he has not incurred must therefore do two things. First, he must show, on a balance of probabilities, that he intends to effect the outstanding cost of cure. If he fails to do this, then, in the absence of very special countervailing factors, the court is quite likely to reject his basis of assessing damages this way.

88 Second, even if a plaintiff can show such an intention to effect the cure, it must still be considered whether the choice to claim for cost of cure over the difference in value is reasonable. A variety of factors can be considered in this enquiry. For example, a plaintiff may be able to show that he genuinely intends to effect extensive repairs to his heavily damaged car. However, those repair costs greatly exceed the market value of the car, and there is a ready supply of such cars on the market. In this case, while the plaintiff may have a genuine intention to cure, a court may well find that it was unreasonable for him to choose the cost of cure (*ie*, to repair) rather than seek a replacement or the difference in value between an undamaged car and a damaged car.

89 I now turn to apply the law as concluded to the present case.

Application of the law as concluded to the present case

(1) The appellant has failed to show an intention to carry out the outstanding repairs

(A) THE 1973 BMW

90 Given my conclusion of the applicable law, it is necessary to consider whether the appellant intends to carry out the outstanding repairs as one (albeit weighty) factor within the *Ruxley* reasonableness inquiry to claim for outstanding repair costs which have yet to be incurred. To be clear, this issue only arises when examining the outstanding repair costs for the 1973 BMW as the repair costs of $9,059 greatly exceeds the diminution in value of the car after repairs at $4,000 (see table above at [8]). I also note that only the figures for the diminution in value *after* repairs were provided in the single joint expert engaged by the parties, and not the diminution in value *before* repairs. But given that the total market value of the car is only $8,000, even assuming *arguendo* that there was a maximum diminution of $8,000 in value *before* repairs, the

repair costs of $9,059 would still exceed this amount significantly. Hence, it is necessary to consider whether the appellant intends to carry out the outstanding repairs and a reasonable election to claim damages on a cost of cure basis must be made in relation to the 1973 BMW.

91 In my judgment, the appellant has not shown, on a balance of probabilities, that it will carry out the repairs. This is unsurprising because the appellant has run its case on the basis that the law does not require it to do so (see above at [20]). The appellant also confirmed in oral submissions that it was willing to rest its case on the sole premise that the intention to cure is legally irrelevant to the present case.

92 In any event, it is clear from the facts that the appellant has not shown an intention to carry out the repairs since 2018. Most importantly, as noted by the respondent in oral submissions, a period of more than three years has lapsed since when the vehicles were damaged, and the appellant has not done anything in relation to the outstanding repairs. While the appellant argues that the outstanding repairs would involve prohibitive costs and that it was unable to source for spare parts, these are not convincing.

93 First, I cannot see how the cost of outstanding repair totalling $9,059 can be said to be cost inhibitive in any way, considering that the appellant had already spent $12,960 on actual repairs. Surely, it must also have been possible to raise funds to undertake the repairs during these few years and there has been ample time to do so.

94 Second, more evidence must be shown to demonstrate what steps were taken to source for those spare parts and why they were difficult to obtain. Without that, it is hard to believe that these parts are so extraordinarily rare that

they cannot be found/sourced elsewhere. In this connection, I agree with the DJ's observation that the single joint expert had already provided links in his report to third party supplier websites where the relevant parts for repair could be obtained, but that no evidence was adduced by the appellant to show any attempts made to obtain these parts from the suppliers (see the GD at [30]).

95 I recognise that the appellant also made the rather unorthodox argument that the *Ruxley* test of reasonableness should not apply in the present case as it is seeking *both* the cost of cure *and* diminution in value after repairs (see above at [18]), and there is thus no election to be made. I disagree with this submission. As noted above at [90], it is precisely because the cost of repairs at $9,059 already *exceeds* the maximum possible diminution in value of the car at $8,000 (which would have included the diminution in value *after* repairs), that the appellant is *in effect* choosing and *electing* for the cost of repairs as opposed to any diminution in value claim. The *Ruxley* test of reasonableness is hence relevant, and the analysis above remains applicable.

96 For these reasons, I dismiss the appellant's appeal in relation to the outstanding repair costs for the 1973 BMW, and the damages to be claimed (if any) should only be limited to the lesser diminution in value amount.

(B) THE 1976 BMW AND 1977 BMW

97 Turning then to the 1976 BMW and 1977 BMW, given that the total repair costs for the 1976 BMW (at $2,295) and 1977 BMW (at $8,417) is less than the diminution in value *after* repairs (at $11,970 each for both cars, see table above at [8]), one can also safely assume that the total cost of repairs are also less than the diminution in value *before* repairs. In such a scenario, the *Ruxley* test of reasonableness does not apply as the cost of repairs is not greater

that the diminution in value (see above at [36]). The outstanding repair costs of $1,315 for the 1976 BMW and $4,437 for the 1977 BMW can be claimed as the appellant is free to make that election. The other issue which arises concerning whether the appellant can claim a diminution in value *on top* of the repair costs, will be examined later below (at [123]–[129]).

(C) SPARE PARTS

98 For completeness, in relation to the outstanding repair costs for the spare parts of $6,460, there is no comparison to be made between that cost and the diminution of value as no evidence of the latter value was tendered by the parties (see table above at [8]).[12] In the absence of contrary arguments by the respondent that the *Ruxley* test of reasonableness should apply here, these can also be claimed.

(2) Other factors to be considered apart from intention to carry out outstanding repairs

99 In any event, I would also not have awarded the outstanding repair costs claimed in respect of the 1973 BMW because those costs exceed the market value of the vehicle, making it wholly disproportionate. Thus, even if the appellant had shown it would have carried out the outstanding repairs for the 1973 BMW, its claim would also have failed because it would have been unreasonable for it to have chosen to repair the vehicles.

100 Given that the repair costs far exceeded the diminution in value, it would make more sense to replace the vehicle altogether than to repair it. The appellant was candid to accept in oral submissions that proportionality is important in the

[12] Appellant's skeletal submissions dated 13 July 2022 at para 8.

overall inquiry to ensure that a claimant will not be overly compensated. I also do not find that any significant consumer surplus would accrue to the appellant, as opposed to the situation in *Radford* where the claimant valued the privacy that building a wall would bring, even though the market value of his land would remain the same (see Rowan at 632).

101 The underlying principle for this conclusion is that a party cannot unreasonably claim for repair costs when those costs far exceed the true market value of the property. For example, in *Masterfox Connections Pte Ltd v N & I Transportation and Another* [2008] SGMC 5, the plaintiff sued to recover a repair bill more than the market value of the damaged property. A sum of $24,000 was spent on repairing a vehicle that was worth only $11,000 (with a net market value of $3,700 after accounting for the scrap value of $7,300). The court found that the plaintiff had unreasonably proceeded with the repair (at [24]):

> 24 What then is the proper measure and consequentially the proper award in damages? I find that given the circumstances in the present case, it would have been reasonable to expect the Plaintiffs to obtain a replacement vehicle at market value. The market value as the evidence have shown, would be considerably lower than the cost of repairs. Again as Defendant Counsel had submitted, it is well established that where the plaintiff has repaired the damaged property at a cost exceeding its market value then, the plaintiff is only entitled to claim against the defendant the lower market value but not the cost of repairs – see McGregor, *supra* at paragraph 32-005 where the learned author cited the case of *Darbishire v Warran* [1963] 1 WLR 1067.

102 The case of *Darbishire v Warran*, which I had alluded to above (at [61]), is relevant to mention in this context as well. It stands for the proposition that it is only economical to repair a property up to its market value. In that case, the plaintiff bought a used motor car for £330. The car was seriously damaged in a collision caused by the defendant. The plaintiff sued for the repair costs of £192.

The defendant pointed out that a replacement vehicle would have cost only £85 and sought to limit the damages that amount. The English Court of Appeal rejected the attempt to claim the cost of repairs at £192 as the undamaged value of the car was only £85 and the "car should be treated as a constructive total loss and the measure of damage is its value" (see *Darbishire v Warran* at 1073), *ie*, the total diminution in value of the car.

103 A plaintiff cannot therefore give the repairer a free reign to conduct repairs in the hope of recovering whatever repair costs it deems fit from the defendant – he would unreasonably enlarge the restoration cost at the expense of the defendant. He must instead have enquired the estimated repair costs against the cost of replacement, and if not, he takes the risk that it was not economical to repair the chattel (see *Koh Tiam Ting* at [17]). Thus, even if an intention to repair has been shown or that the car had already been repaired, there is also the further inquiry of proportionality (see also, the other factors mentioned above at [69]).

104 For these reasons, I would have dismissed the appellant's appeal in relation to the outstanding repair costs for the 1973 BMW, even if the appellant had shown an intention to carry out those repairs.

What would have been the relevant time to assess the outstanding repair costs?

105 Given that I have decided to award the appellant the outstanding repair costs in relation to the 1976 BMW, the 1977 BMW and the spare parts, there is a question of principle as to *when* the costs should be assessed: at the point when the damage to the vehicles occurred (that is, the date of breach), or later (such as the date when the repairs were eventually carried out)? Further, if the cost of repair had increased between the date of breach and the date of actual repair,

should the respondent be made liable for the increased cost, which has arisen due to the appellant's impecuniosity?

106 Generally, damages for compensation of loss are assessed at the time the loss is sustained, otherwise referred to as the "breach-date" rule. However, the Singapore courts retain a residual discretion to assess damages at such other date as may be appropriate (see the decision of the Court of Appeal in *Tay Joo Sing v Ku Yu Sang* [1994] 1 SLR(R) 765). Also, the Court of Appeal in *Ho Soo Fong and another v Standard Chartered Bank* [2007] 2 SLR(R) 181 (at [54]) cited the general tort principle that a tortfeasor must take his victim as he finds him (*talem qualem*) as part of the overall conclusion that the plaintiff should not be penalised for his impecuniosity. This applies with equal force here, as the duty in question is a relative contractual duty to take reasonable care.

107 The Court of Appeal also cited the Privy Council decision of *Alcoa Minerals of Jamaica Inc v Herbert Boderick* [2002] 1 AC 371. In that case, the House of Lords agreed that damage should be based upon the cost of repair at the time that this was effected rather than upon the much lower cost prevailing at the time that the nuisance was committed. The case concerned a nuisance caused by the dispersal of pollutants and gas from the defendant's smelting plant which damaged the roof of the plaintiff's nearby house and other property. The plaintiff was unable to pay for the roof repairs at the time the damage occurred and waited until the successful outcome of the litigation to do so, by which time, the cost of repairs had increased fourfold due to rapid inflation. Nevertheless, the plaintiff was not penalised for this and was not in breach of his duty to mitigate (at 383). The rationale for this rule is found in the citation by the Privy Council of the case of *Dodd Properties Ltd v Canterbury City Council* [1980] 1 WLR 433 ("*Dodd Properties*") at 451:

> The true rule is that, where there is a material difference between the cost of repair at the date of the wrongful act and the cost of repair when the repairs can, having regard to all relevant circumstances, first reasonably be undertaken, it is the latter time by reference to which the cost of repair is to be taken in assessing damages.

108 Thus, if it were only reasonable to repair later due to the impecuniosity of the plaintiff or due to other circumstances, then he cannot be faulted for that, and damages are assessed at the time of repair even if they were higher. Indeed, that was the case in *Dodd Properties* where the plaintiff was financially unable to effect repairs of the building that was damaged by the defendant's pile-driving operations and that it did not make commercial sense to repair the property before being sure of recovering the costs from the defendants – the court nevertheless held that it was entitled to damages based upon the much higher repair costs at the time of the hearing, some 10 years later.

109 In the present case, the appellant submitted before me that it would be content with the outstanding repair costs as assessed at the date of breach. Indeed, this is the basis upon which it arrived at the sums it is claiming for, which are tabulated above (at [8]). Therefore, the potential problems associated with the appellant claiming for the outstanding repair costs as assessed beyond the date of breach would not arise. I therefore see no basis in varying the outstanding repair costs that the appellant has claimed for in the present case, and award it the outstanding repair costs that it has claimed for in respect of the 1976 BMW, the 1977 BMW and the spare parts.

Whether the appellant is entitled to damages for diminution in value?

110 I turn now to consider whether the appellant is entitled to damages for diminution in value of the vehicles even after repair. The appellant claims $39,840 under this head of claim, which comprises of:

(a) $23,940 for the 1976 BMW and the 1977 BMW

(b) $11,900 for the Daimler

(c) $4,000 for the 1973 BMW

The DJ's decision

111 The DJ rejected the appellant's claim for damages for diminution in value. He did so not because of a principle of law but because of the evidence from the defendant's chief executive officer and director, Mr Kumar Balasingham ("Mr Balasingham"), that the vehicles were purchased by the defendant on behalf of Mr Balasingham for his personal collection.[13] I set out the DJ's consideration of the evidence below:

> 33 … When Kumar Balasingam was cross-examined on the basis for the defendant claiming the diminution in value of the Vehicles that were his personal collection, he initially sought to avoid answering the question by claiming that it was irrelevant. Subsequently, he explained that "the company is supposed to pay me a salary and a bonus and every one of these cars are debited to my account. So, I am not owing the company whatever monies that are used to purchase these cars."
>
> 34 Kumar Balasingam further explained that "When title is transferred, the cars will belong to me. Until the title is transferred the cars belonging to the company … until I pay for the … cost." In the light of Kumar Balasingam's earlier explanation that "I am not owing the company whatever monies that are used to purchase these cars", this effectively means that he has paid for the Vehicles and that they belong to him. Accordingly, any loss from the diminution in the value of the Vehicles would be suffered by Kumar Balasingam, not the defendant company.
>
> [Footnote references omitted]

[13] Transcript (10 November 2021) at 6, lines 1-4.

112 As such, the DJ reasoned that it was Mr Balasingham who suffered the loss from the diminution in value of the vehicles instead of the appellant. Accordingly, the appellant suffered no loss in this regard and cannot claim damages for diminution in value.

113 The DJ further disagreed with the appellant that the respondent never pleaded that the appellant is not the owner of the vehicles. He disagreed on the basis that it is for the appellant to prove that it suffered the loss it is claiming for, and the appellant's own chief executive officer and director contradicts this.

114 Accordingly, the DJ's decision to dismiss the appellant's claim for damages for diminution in value was based entirely on an evidentiary point. He did not have to consider the point of principle of whether the appellant could even claim such damages in the first place.

The parties' arguments on appeal

115 The appellant's case on this issue in the present appeal centres on two points. First, the appellant says that it was caught entirely by surprise by the respondent's argument that the defendant was not the true owner of the vehicles. This prejudiced the appellant because it was robbed of its right to properly respond to the respondent's argument. As such, the appellant argues that the respondent should not be allowed to rely on the argument that Mr Balasingham is the true owner of the vehicles.

116 Second, the appellant argues that it has met the legal requirements to be entitled to damages for diminution in value. It cites the Court of Appeal decision of *Salcon Ltd v United Cement Pte Ltd* [2004] 4 SLR(R) 353 ("*Salcon*"), which cited the English Court of Appeal decision of *Payton v Brooks* [1974] RTR 169

("*Payton v Brooks*") with approval. In *Payton v Brooks*, Roskill LJ explained as follows (at 176):

> [W]here the evidence justifies a finding that there has been, on top of the cost of repairs, some diminution in market value – or, to put the point another way, justifies the conclusion that the loss to the plaintiff has not been fully compensated by the receipt of the cost of complete and adequate repairs, because of a resultant diminution in market value – I can see no reason why the plaintiff should be deprived of recovery under that head of damage also.

The Court of Appeal in *Salcon* did not award damages for diminution in value because the plaintiff in that case obtained a new silo as opposed to a repaired silo with a lower value. Apart from *Salcon*, there does not appear to be any local case which discusses whether a plaintiff can claim damages for diminution in value in addition to the cost of cure, where the repairs effected by the damages for cost of cure do not restore the item in question to its original value.

117 The respondent does not make any serious argument on this point and was content to agree with the DJ's reasoning.

My decision: the appellant is not entitled to damages for diminution in value

118 Having considered the relevant materials, I have decided that the appellant is not entitled to damages for diminution in value. I therefore dismiss the appellant's appeal in relation to damages for diminution in value.

Whether the respondent should have been precluded from bringing up the issue of ownership of the vehicles?

119 In the first place, the appellant cannot say that it was caught entirely by surprise by the respondent's argument that the appellant was not the true owner of the vehicles. The reason for this is two-fold. First, the Court of Appeal decision in *Liberty Sky Investments Ltd v Aesthetic Medical Partners Pte Ltd*

and other appeals and another matter [2020] 1 SLR 606 at [16] (cited by the appellant) makes it clear that where the specific facts and circumstance germane to an argument were within one party's exclusive knowledge, then that party cannot be said to be taken by surprise. Here, whether the vehicles were for personal collection or whether it was meant for the appellant, would be exclusively within the knowledge of the appellant. In fact, one of the invoices in respect of the Daimler even states the buyer as Mr Balasingam, but for the vehicle to be sent to the address of the appellant instead.

120 Second, and in any event, it is for the appellant to satisfy the court that it has standing as the proper plaintiff to the dispute to claim for damages in the diminution in value of the vehicles.

The proper plaintiff to sue in contract

121 The consequence of the preceding point is that I agree with the DJ that the appellant is not the party who suffered the loss in respect of the Daimler. More specifically, the appellant is not the proper plaintiff to sue in contract as it is not a party to the underlying contract. The invoice clearly provides that the sale was to Mr Balasingam, who ought to have been the one to sue on the contract.[14] I therefore dismiss the appellant's claim for diminution in value for this vehicle. I also reject the appellant's argument that this is a situation where the "broad ground" exception discussed in *Chia Kok Leong* applies.

122 However, I disagree with the DJ that the same could be said of the remaining vehicles. This is because the relevant invoice clearly provides that the purchaser *is* the appellant.[15] The appellant is therefore the proper plaintiff to

---

14 Record of Appeal, Vol III Part A, at 140.

15 Record of Appeal, Vol III Part A, at 139.

sue in contract. Whether the appellant can so claim is dependent on a consideration of the relevant principles.

Whether a party is precluded from claiming for damages for diminution in value when it has already claimed for the cost of cure?

123 Generally, the court is cautious of unintentionally allowing for double recovery when a party tries to claim for both diminution in value and cost of cure (see, *eg*, the District Court decision in *A*Glasstech Pte Ltd v Full-Glass Pte Ltd* [2019] SGDC 75 at [59]). With that said, the Court of Appeal's decision in *Salcon* (citing *Payton v Brooks*), in what seems to be the only local case on the issue, stated that diminution in market value can be claimed "on top of the cost of repairs" where the plaintiff has not been fully compensated by receipt of the cost of cure. With respect, this is an eminently sensible principle. For example, in *Georgiana v Anglican* (1873) 21 WR 280, the plaintiff was held entitled to recover, in addition to the cost of partial repairs to a yacht which did not make her as strong and seaworthy as formerly, the amount by which the yacht had diminished in value after repairs. Conceptually, this must be the case for the plaintiff to be put into the same position as if the damage had not occurred. Practically, this echoes the single joint expert's view in this case that the repaired vehicles would still suffer a diminution in value because, among others, they would be less attractive to potential buyers due to the stigma of having been repaired before.

124 However, the Court of Appeal's citation of *Payton v Brooks* is incomplete as it misses out on an important qualification (which, to be fair, was not relevant in *Salcon*, which I now cite (at 176):

> I would only add one *word of caution*. This conclusion is not a charter under which infuriated plaintiffs, who have the misfortune to have their cars damaged by careless drivers,

> *acquire an unfettered right to recover diminution of value in every case in addition to the cost of repairs*. It is essential in such a case, in my judgment, *for appropriate evidence to be called to prove diminution in value*. I do not think in the ordinary case the burden of proof which rests on the plaintiff would be discharged merely by calling an individual to prove his idiosyncratic view of the particular loss in a particular case. The diminution in market value must be proved by appropriate evidence of the kind usually called when diminution in market value is sought to be proved as a head of damage. Subject to that qualification, it seems to me that this head of damage is recoverable
>
> [emphasis added]

It is thus important for "appropriate evidence" to be before the court. Where the evidence is scant in relation to important points such as whether the car was new or old, or where the diminution in value is based on sheer guesswork, this would ordinarily not suffice (see, *eg*, the Malaysian High Court decision of *Lim Seong Choon & Anor v R Rayaratnam* [1990] 3 MLJ 252).

Application of the law as concluded to the present case

125 Turning to the facts at hand, I accept the appellant's point on principle that it has suffered diminution in value in respect of the vehicles even after they have been repaired.

126 However, I am troubled by the evidence produced by the single joint expert. The expert was tasked to answer the question of what the drop in market value of the vehicles would be after repairs.[16] The expert stated in his original report that the value of all the vehicles would fall by 50% and gave some sample values. However, it appeared at trial that the expert did not actually physically inspect the cars in person even though he could have.[17] While it is true that the

---

16 See RA Vol III Part B at pp 8–9.

17 Transcripts Day 1, 9 Nov 2021, at pp 83 to 84.

expert was not in Queensland when the vehicles were loaded for their voyage to Singapore, he could have discerned the vehicles' original states by looking at the vehicles in person. As a result of not being to do this, he could not ascertain if the cars were in pristine condition or otherwise, which would have affected his valuation. For example, while a BMW in a reasonable condition would be valued at S$10,000,[18] a BMW in pristine condition would have fetched a higher market price.[19] Thus, at best, the expert could only *guess* the condition of the vehicles from the pictures that have been provided, and this is not entirely satisfactory.

127 In this regard, the appellant has submitted that Mr Balasingham has given evidence that the vehicles were in pristine condition, and since his evidence has not been refuted, this court should accept his evidence that the vehicles are pristine. I cannot accept this. Mr Balasingham is not the expert. Indeed, the reason for the need of an expert in the first place is so he can provide a specialist view of the subject-matter at hand. Thus, for a start, we do not have reliable evidence as to the original state of the vehicles before this court.

128 Further, the expert then had to go through a most curious "on-the-spot" valuation exercise during cross-examination where he had to estimate the value of the 1976 BMW and the 1977 BMW[20] before arriving at the conclusion that a fall in value of £9,000 would be appropriate.[21] Then, an *approximate* conversion rate of 1.9 – without any precise basis, I should add – to convert the dollar value from sterling pounds into Singapore dollars was used. The same *ad hoc*

---

18 See RA Vol III Part B at p 9, para 24 of expert report.

19 See RA Vol III Part B at p 75, para 17 of supplemental expert report.

20 See Transcripts Day 1, 9 Nov 2021, at pp 86 to 90.

21 See Transcripts Day 1, 9 Nov 2021, at p 91.

valuation exercise was also undertaken in relation to the Daimler.[22] This is wholly unsatisfactory as these figures were not obtained from the expert report itself but were generated without appropriate basis as the trial went along.

129 It is unfortunate that this was a single joint expert report and there was no other expert witness to assist the court in the valuation exercise. It is also unfortunate that the respondent did not raise any serious objections to the figures procured as a result. *Prima facie*, the values by the expert would reflect the diminution in value in addition to the cost of cure. However, given the important qualification in *Payton v Brooks* that it is important for "appropriate evidence" to be before the court before a plaintiff has discharged its burden of proving its entitlement to damages for diminution in value, I hold that the appellant has not so discharged its burden with respect to the vehicles.

130 Indeed, not only did the expert provide the figures from the stand without ever examining the vehicles in person, it is also unclear how he could have arrived at a diminution in value if the outstanding repairs remained undone. In other words, how could the expert have known of the diminution in value between the fully repaired vehicle and a new vehicle, when the vehicles concerned, by the appellant's case, have not been fully repaired? It appears that significant "guesswork" was involved which should be eschewed (see above at [124]).

Conclusion

131 For all these reasons, I allow the appellant's appeal in part. The appellant succeeds in claiming the outstanding repair costs in relation to the 1976 BMW,

---

22 See Transcripts Day 1, 9 Nov 2021, at p 94.

1977 BMW and the spare parts (see above at [97]–[98]). But the appellant fails in its other claims.

132 For completeness, the appellant also filed an appeal in RAS 15 of 2022 against the DJ's decision to award costs of $8,000 and disbursements of $7,625.20 to the respondent for the original action. Given my decision to dismiss the appellant's appeal on most points, I do not see it necessary to disturb the costs order made below. I therefore dismiss the appellant's appeal in RAS 15 of 2022.

133 Unless the parties can agree on costs, they are invited to write in with their very brief submissions on costs within 10 days from the delivery of this judgment.

Goh Yihan
Judicial Commissioner

Rajan Sanjiv Kumar and Mehaerun Simaa d/o Ravichandran @ Raqiib Chandra (Allen & Gledhill LLP) for the appellant;
Teo Guan Teck (Guan Teck & Lim) for the respondent.