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

[2022] SGHC 25

Suit No 143 of 2020

Between

Koh Chew Chee

… *Plaintiff*

And

(1) Liu Shu Ming
(2) Tong Xin

… *Defendants*

JUDGMENT

[Contract — Breach]
[Contract — Formation — Oral contracts]
[Contract — Misrepresentation — Fraudulent]
[Contract — Remedies — Damages — Measure of damages]
[Contract — Remedies — Account of profits — *AG v Blake*]
[Damages — Measure of damages — Contract — Expectation damages]
[Damages — Measure of damages — Contract — Reliance damages]

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v
Liu Shu Ming and another

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19, 20, 24–27 August, 29 October 2021

28 January 2022 Judgment reserved.

Lee Seiu Kin J:

Introduction

1 On 30 May 2017, the Plaintiff entered multiple contracts to purchase, from the Defendants, five condominium units in the Philippines (the "Units"). By these contracts, the parties also agreed that the Defendants would lease the Units back from the Plaintiff for an initial period of three years. Although, as I will set out, the same documents evidence both the sale and leaseback together, I will refer to them separately as the "Sales" and "Leaseback Agreements", and where necessary, collectively as the "Contracts".

2 The Plaintiff did not enter into the Contracts for residential purposes, but as an investor. For context, the Defendants operate a business in the Philippines which provides condominium units to travellers for short-term accommodation; they describe this business using the portmanteau, "condotel". Around 2016, it

appears that they were looking to expand. They thus sought out investors – such as the Plaintiff eventually came to be – to purchase such condominium units, and lease them back at a rate which amounted, approximately, to a 6–7% annual return on the principal purchase price.

3 The Plaintiff found this rate of interest attractive and, as already stated, she became an investor, putting in almost S$1.5m to purchase the five Units. Beyond the hook of the interest rate, however, the Plaintiff avers that the Defendants also agreed to repurchase the Units at the end of the three-year leaseback period, for a sum no less than the principal purchase price she paid (the "Alleged Buyback Term"). Put simply, the Plaintiff is saying that the Defendants promised capital protection.

4 Unfortunately for the Plaintiff, all investments, even those that purport to protect one's principal investment, come with risks. Here, the risk was failure of performance on the part of her counterparties. On the Plaintiff's account, after she completed payment for the Units in August 2018 pursuant to the Sales, the Defendants failed to transfer title to her. Further, from September 2019, they also fell behind on the rental payments. These failings culminated in October 2019, when the Plaintiff discovered that the Defendants' condotel business was in bad financial shape, and more jarringly, that they had taken out multiple loans secured by mortgages over the Units for which she had paid.

5 An attempt at resolution was made in November 2019, but that was not successful. Therefore, the Plaintiff terminated the Contracts in December 2019, and by March 2020, her cause papers had been served on the Defendants. She advances two alternative causes of action. The first is for the Defendants' breach of the Contracts. That is, their failure to transfer title to the Units in accordance

with the Sales;[1] and their non-payment of rent under the Leaseback Agreements.[2] For these breaches, she seeks to recover damages representing two heads of loss. One, the sum she would have regained had the Defendants not acted in breach of contract and thus been obliged to pay to repurchase the Units;[3] and two, the rental she would have earned if the Leaseback Agreements had continued.[4] She additionally seeks an account of profits made by the Defendants, if any, "as a consequence of their diversion and wrongful utilisation" of the money paid in satisfaction of the purchase price of the Units.[5]

6 The Plaintiff's alternative cause is for fraudulent misrepresentation. She avers that the Defendants made *many* false representations to induce her to enter the Contracts.[6] The most salient of these is that they would repurchase the Units (the "Buyback Representation"). Had the Defendants not given such assurance, the Plaintiff avers, she "would not [have been] interested" in the Contracts as it is simply not her "investment philosophy to purchase properties as investments".[7] In respect of this cause of action, the Plaintiff seeks to recover the sum of money she paid, less payments she received from the Defendants under the Leaseback Agreements, *ie*, the money required to restore her to the position in which she would have been, had the misrepresentations not been made.[8]

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1 Statement of Claim (Amendment No 1) (25 Jun 2020) ("SOC") at para 19.

2 SOC at paras 18 and 20.

3 SOC at p 33 (Claims), head 1(a) read with Plaintiff's Written Submissions (1 Oct 2021) ("PWS") at para 364(a).

4 SOC at p 33 (Claims), head 1(a) read with PWS at para 364(b).

5 SOC at p 33 (Claims), head 1(b) and (c).

6 SOC at paras 4 and 19(d)–(g), read with para 28.

7 Koh Chew Chee's Affidavit of Evidence-in-Chief (8 Jul 2021) ("PAEIC") at para 137.

8 SOC at p 33 (Claims), head 2(a).

7 The defence to the claim for misrepresentation is straightforward. The Defendants have simply put the Plaintiff to proof of the representations and their alleged fraud.[9] That in respect of the claim for breach of contract, however, is more particular. The Defendants advance two positive defences. First, that the Plaintiff did not make full payment of the purchase price for the Units, and therefore, she was not entitled to receive title.[10] Second, even if the Plaintiff is found to have had made full payment, she dragged her feet and ultimately never gave them instructions as to whom title should be transferred. It therefore was not the case that the Defendants failed to transfer title in breach of contract, but rather, that her own inaction prevented them from executing a transfer.[11]

8 I heard the parties' evidence in support of their cases in August 2021, and on 1 and 29 October 2021, respectively, they tendered their written closing and reply submissions. I did not hear further oral replies. Having considered all of the material put before me, I allow the Plaintiff's primary claim in contract and dismiss her alternative claim for fraudulent misrepresentation. Remedially, however, there are difficulties which arise in respect of the Plaintiff's claim for damages. These stem from the manner in which her case is pleaded, coupled with certain findings of fact I make, and engage a few interesting questions of law. I discuss these from [99] below. As to the Plaintiff's prayer for an account of profits, I find that neither the law nor facts justify such an order. As I address a number of substantive issues in arriving at my decision on the remedies, the specific orders I make are set out after my reasoning, at [183] below.

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9 Defence (Amendment No 1) (14 Jul 2020) ("Defence") at paras 5–15 and 40.

10 Defence at paras 24A–25.

11 Defence at paras 12 and 42–47.

9 I now give the reasons for my decision, beginning with the facts as well as my findings, where necessary, on the relevant facts in dispute. Thereafter, I will set out my decision on the Plaintiff's primary claim for breach of contract, and lastly, that in respect of her claim for misrepresentation.

Background

10 The Plaintiff is an accountant by training, and has been in the business of providing consultancy services in the education industry since 1995.[12] Her husband, Vincent Lim Hui Eng ("Mr Lim"), is also a businessperson.[13]

11 The Defendants, Liu Shu Ming[14] (the "First Defendant") and Tong Xin[15] (the "Second Defendant"), are married, and together, they operate a number of companies, including one in the Philippines – as mentioned above – which rents out condominium units as hotel rooms (the "Business"). The company through which they operate this business is MaxStays (Philippines) Inc ("MaxStays"). The Defendants are both directors of MaxStays, as well as majority and minority shareholders, respectively.[16] As I will explain momentarily, the operation of the Business underlies the Contracts which form the subject of this suit.

12 The First Defendant also gave evidence that he teaches classes relating to business and public management.[17] These appear to be conducted within the

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12 PAEIC at para 4.

13 Vincent Lim Hui Eng's AEIC (8 Jul 2021) ("PWAEIC") at para 7.

14 Liu Shu Ming's AEIC (7 Jul 2021) ("1DAEIC") at para 1.

15 Tong Xin's AEIC (7 Jul 2021) ("2DAEIC") at para 1.

16 1DAEIC at para 3 and 2DAEIC at para 3, read with PAEIC at para 11.

17 1DAEIC at para 1.

ambit of Masters' programmes offered by Nanyang Technological University,[18] as well as by the First Defendant independently.[19] It was in the context of the latter, sometime in June 2016, that Mr Lim first came to meet the Defendants.[20]

13 After attending the First Defendant's class, Mr Lim kept in touch with him, and they would occasionally meet. During one of these meetings, Mr Lim avers, the First Defendant informed him about the bullish demand for short-term accommodation in the Philippines. Specifically, that he had been operating the Business, and was looking for investors to buy and lease back condominium units so that the Business could expand. Mr Lim shared this opportunity with the Plaintiff, though they were both sceptical.[21]

14 The Plaintiff subsequently met the Defendants in late August 2016, during an annual dinner in which her husband's company participates.[22] At this event, the Plaintiff says, the Second Defendant gave some details about the operation of the Business, and the returns which investors received. Essentially, she said that investors would purchase properties in the Philippines, and thus incur the upfront principal purchase price. Thereafter, they would lease the units back to the Defendants for a sum which would amount, approximately, to a 6–7% annual return on that price.[23] With these units in hand, the Defendants would then go about running the Business.[24] Pertinently, the Plaintiff does not aver that the Second Defendant raised the possibility of a buyback at this stage.

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18 PWAEIC at paras 9, 11 and 13, read with and pp 36–41.

19 PWAEIC at para 10.

20 PWAEIC at paras 9–14; 1DAEIC at para 4.

21 PWAEIC at paras 16–17.

22 PAEIC at paras 9–10; PWAEIC at paras 18–19; 2DAEIC at para 5.

23 PAEIC at para 11.

24 1DAEIC at para 3; 2DAEIC at para 3.

15 At this point, the Plaintiff expressed interest, and on her and Mr Lim's evidence, the Defendants later extended an invitation to their office, where they put up a detailed proposal.[25] The Plaintiff and Mr Lim attended this meeting at the Defendants' office on 29 November 2016.[26] They both allege that the First Defendant made *numerous* misrepresentations at this meeting.[27] However, I will only return to this aspect of the parties' dispute at [175] below.

16 The alleged content of this meeting aside, its salient outcome is, in fact, quite straightforward. Whatever it was that was said there, the Plaintiff and Mr Lim were sufficiently convinced by the Defendants' presentation to make a trip to the Philippines to view the properties used in the Business. They did so on 29 May 2017,[28] and on the next day, having viewed the properties, the Plaintiff (in her sole name) agreed to purchase and lease back five condominium units: two in a development called "Venice Luxury Residences", and another three in "Fort Victoria".[29] These are the "Units" mentioned at [1] above.

Terms of the Contracts

17 The Plaintiff avers that the Contracts were entered, orally, pursuant to three key terms: (a) that the Defendants would sell her each of the Units for a certain price (the Sale); (b) that they would lease the Units from her for three years initially (the Leaseback Agreement); and (c) upon the expiry of the leaseback period, (i) if the market price of the Units had fallen, that they would buy back the Units from her at the principal purchase price paid, but (ii) if their

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25 PAEIC at para 12; PWAEIC at para 20.

26 PAEIC at para 13; PWAEIC at para 22; 1DAEIC at para 5; 2DAEIC at para 6.

27 PAEIC at para 14; PWAEIC at para 22; PWS at paras 45–95.

28 PAEIC at para 20; PWAEIC at para 26; 1DAEIC at paras 7–8; 2DAEIC at paras 8–9.

29 PAEIC at para 21(a) and (b).

market price had gone up, that they would permit her to sell the Units on the open market (the Alleged Buyback Term).

18 The first two terms are not seriously in dispute as they were captured in writing signed on 30 May 2017. Such writing takes the form of a "leaseback guarantee" and a "receipt", a sample of which I set out here:[30]

> Lease Back Guarantee
>
> LIU SHU MING [NRIC redacted] & TONG XIN [NRIC redacted] hereby offer to lease back the Studio unit of Venice Luxury Residences at McKinley Hill, Taguig City, Manila, Philippines, unit no: 18B, size: 41.4 SQM from the buyer for 3 years at the lease of 6% per annum based on the all-in purchase price.
>
> All-in Purchase Price S$290,850.00
> (Two Hundred Ninety Thousand Eight Hundred and Fifty Only)
>
> Monthly Lease Back Payment S$1,454.00
> (Inclusive of Maintenance Fees)
>
> Lease Back Period commence on 20th July 2017
>
> Lease is renewable every three years at the market rate.
>
> [Signature] 30/05/2017
>
> _____ _____
>
> Buyer Name: Date:
>
> KOH CHEW CHEE [NRIC redacted]
>
> [Signatures] 30/05/2017
>
> _____ _____
>
> Seller Name: Date:
>
> LIU SHU MING [NRIC redacted]
>
> & TONG XIN [NRIC redacted]

[30] Agreed Bundle of Documents (Vol 2) (11 Aug 2021) ("2AB") at pp 92–93.

[*next page*]

Receipt

RECEIVED FROM: KOH CHEW CHEE [NRIC redacted] and / or Nominee

The sum of Singapore Dollars: Twenty Nine Thousand Fifty Eight [*sic*] only (S$29,085.00)

Being 10% of the All-In Purchases Price for one Studio unit of Venice Luxury Residences at McKinley Hill, Taguig City, Manila, Philippines, unit no: 18B, size: 41.4 SQM

Deposited to LIU SHU MING AOB AC No: [Redacted]

Buyer should make 30% of all-in purchase price of S$87,255.00 on 8th June 2017 and the remaining balance of S$174,510.00 on 20th June 2017.

[Signatures]

Seller Name:

LIU SHU MING [NRIC redacted]

& TONG XIN [NRIC redacted]

Date: 30/05/2017

19 There are two important observations which need to be made about this document. First, I am cognisant that it does not reflect an agreement to purchase *per se*. However, the Defendants do not dispute that they contracted with the Plaintiff to sell the Units to her, and lease them back.[31]

20 Second, the documents which evidence the other four Contracts are substantially the same, save for differences in description and price.[32] However, there is a salient distinction between the "Receipt" component of the two Venice

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31 Defence at paras 12 and 24; Defendants' Written Submissions (1 Oct 2021) ("DWS") at para 2.1.

32 See 2AB at pp 94–101.

Luxury Residences units and the three Fort Victoria units. As can be seen from [18] above, the "Receipts" for the Venice Luxury Residences units acknowledge the receipt of 10% of the "all-in purchase price", and state that the balance 90% is to be paid in two tranches in *Singapore dollars*. Though no payees are named, the context plainly implies that the payees are the Defendants.

21 By contrast, the "Receipts" for the three Fort Victoria units provide that the final tranche of payment is to be made in Philippine Pesos (₱) directly to the developer.[33] On this, the Defendants had fully paid for the two Venice Luxury Residences units, but had only paid the deposit for the three Fort Victoria units.[34]

> [Fort Victoria, Unit no: 6A14] Buyer should make S$128,082.00 on 8th June 2017 to the seller and *the balance of all-in purchase price of* ***Php 5,489,643.17*** *to the developer of the unit on 1st Aug 2018.*
>
> …
>
> [Fort Victoria, Unit no: 6A15] Buyer should make S$120,807.00 on 8th June 2017 to the seller and *the balance of all-in purchase price of* ***Php 5,119,304.41*** *to the developer of the unit on 1st Aug 2018.*
>
> …
>
> [Fort Victoria, Unit no: 8A06] Buyer should make S$127,973.00 on 8th June 2017 to the seller and *the balance of all-in purchase price of* ***Php 5,484,088.21*** *to the developer of the unit on 1st Aug 2018.*
>
> [Emphasis added]

22 This difference is important because, on the Plaintiff's case, from around May 2017 to August 2018, she made a series of payments to the Defendants to the order of around S$1.469m (the details of which I will describe from [36] below). She claims that this constituted the full purchase price of the Units and

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33 2AB at pp 97, 99, and 101.

34 PAEIC at para 23(b).

thus, upon completing payment, the Defendants were obliged to transfer her title to the Units.[35] The Defendants do not deny that such payments were made,[36] and they admit the Plaintiff's claim that, upon "full settlement of the [purchase price] for a unit", they were obliged to transfer title to her.[37] However, they aver that there was a shortfall of S$51,824.28 between the sum paid by the Plaintiff, and the actual purchase price the Plaintiff was obliged to pay as stipulated by the Contracts. Accordingly, as stated at [7], they claim that the Plaintiff *did not* make "full settlement" of the purchase price, and therefore, that they were under no obligation to transfer title.[38]

23 Their dispute, in essence, arises from a difference as regards what they each say is the conversion rate which should be applied to the final tranche of ₱16,093,035.80 payable for the three Fort Victoria units (this being the sum of ₱5,489,643.17, ₱5,119,304.41 and ₱5,484,088.21). On the Plaintiff's part, she claims merely to have followed the First Defendant's instructions to transfer the sum of S$407,979.55, which was calculated by the First Defendant himself to be the equivalent of ₱16,093,035.80, based on the prevailing exchange rate of around S$1 is to ₱39.45 on 9 July 2018.[39] The Defendants, in opposition, claim that this rate was used "erroneously", and aver that the parties had orally agreed to fix an exchange rate of S$1 to ₱35,[40] which would account for the shortfall of around S$51,000. I will set out the evidence in support of their cases from [38] below. For now, I return to the last (alleged) term of the Contracts, the buyback.

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35 SOC at paras 4(g) and 12.

36 Defence at para 24; DWS at para 2.1.

37 Defence at para 12; Agreed Bundle of Documents (Vol 1) (11 Aug 2021) ("1AB") at p 225 read with Notes of Evidence ("NEs") 25 Aug 2021 at p 38 lines 11–25.

38 Defence at paras 24A–25.

39 PAEIC at para 46 and pp 258–263.

40 Defence at para 24A; 1DAEIC at paras 9 and 30; 2DAEIC at para 10.

24 By the Alleged Buyback Term, the Plaintiff is effectively saying that the Defendants agreed not only to provide her a comfortable 6–7% annual return, but also to protect her principal investment. This alleged aspect of the Contracts was not recorded in writing, and it is rigorously disputed by the Defendants. Specifically, they submit that such a significant term would have been included in the written evidence of the Contracts (see [18] above),[41] and that the Plaintiff lacks evidence to prove that the term was agreed upon orally.

25 The starting point for this issue is, naturally, the Plaintiff's burden of proof. In this regard, I begin by pointing to the Court of Appeal's decision in *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206, where the importance of documentary evidence in proving an oral agreement was firmly emphasised:

> 41 … [T]he first port of call for any court in determining the *existence* of an *alleged contract and/or its terms* would be the relevant *documentary* evidence. Where (as in the present case) the issue is whether or not a binding contract *exists* between the parties, a contemporaneous written record of the evidence is obviously more reliable than a witness's oral testimony given well after the fact, recollecting what has transpired. Such evidence may be coloured by the onset of subsequent events and the very factual dispute between the parties. … Much would depend on the precise factual matrix before the court. However, it bears reiterating that the court would always look first to the most reliable and objective evidence as to whether or not a binding contract was entered into between the parties and such evidence would tend to be *documentary* in nature.
>
> [Emphasis in original]

26 With this in mind, I turn to the pieces of evidence on which the Plaintiff relies to establish that the Alleged Buyback Term formed part of the Contracts. By way of *positive* proof, she has the following.[42]

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41 DWS at paras 2.5 and 2.10.

42 PWS at paras 66–69 and 85–91.

(a) First, the First Defendant's admission at trial that he may have raised the matter of a buy back on 29 November 2016 meeting, but only as "general information".[43]

(b) Second, the First Defendant's admission that, in November 2016, they, *ie*, the Defendants, intended to expand the Business by purchasing more units if the opportunity were to arise.[44] Furthermore, the Plaintiff submits that in order to "*acquire* up to 200 units in 1 year and up to 2,400 units in 5 years" – which the First Defendant states in a Facebook post is the goal of the Business[45] – they must have secured rights to buy back the Units from the Plaintiff. Otherwise, she says, the "Defendants would never have been able to attain their goals".[46]

(c) Third, a WeChat message sent from the First Defendant to Mr Lim, on 14 January 2019. In this message, he responded to a query made by Mr Lim on the market value of the Units. The Plaintiff submits that the "only reason" which can explain this exchange, is the existence of the Alleged Buyback Term.[47]

(d) Fourth, another WeChat message sent on 12 August 2019 by the First Defendant in which he thanked the Plaintiff for her "support and understanding" in response to her instructions to sell off the five Units to willing buyers.[48] The Plaintiff avers that she permitted such sale out

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43 PWS at para 91, read with NEs 27 Aug 2021 at p 25 line 4 – p 26 line 10.

44 PWS paras 66–69, 87(a)(iii), and 88, read with NEs 26 Aug 2021 at p 54 lines 3–20.

45 2AB at pp 335 and 337.

46 PWS at para 87(a)(iv).

47 PWS at para 86, read with 1AB at p 486.

48 1AB pp 524 and 526.

of goodwill because the Defendants were facing financial difficulties, and submits that the fact that the First Defendant thanked her in response, "reveals his acknowledgment that [her] request to sell the Units was a kind offer to alleviate his financial difficulties" and served as a "way out of his obligation" to buy back the Units.[49]

(e) Last, her own averment that she would not have entered into the Contracts without the Defendants' Buyback Representation because she does not believe in purchasing properties as investments, and also has no friends, family, or business in the Philippines.[50]

27 The Plaintiff also relied on a few pieces of evidence which, in my view, did not prove her case, but rather negatived the Defendants'.[51] Although I appreciate the utility of this type of negative proof in some cases, it does not assist me here. The Plaintiff is asking that I find an oral contract *which includes the Alleged Buyback Term*. This requires that I identify a statement by which the Defendants can be said to have been offering to enter, not only to the Sale and the Leaseback Agreement, *but also*, the Alleged Buyback Term. Even if the Plaintiff is right in attacking the Defendants' credit, this does not aid my task.

28 I therefore return to the *positive* evidence set out above. In light of [26(a)], I accept that the Defendants mentioned *something* about the potential buyback of the Units. The question is whether they had raised it as a possibility to be discussed, or whether they had *guaranteed* such repurchase. In my view, the evidence does not show that the Defendants guaranteed repurchase. There

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49 PWS at para 87(d), particularly, para 87(d)(iii).

50 PWS at para 89, read with PAEIC at para 137.

51 PWS at paras 87(a), (b), (c), and 90.

are notable difficulties with the evidence on which the Plaintiff relies (set out at [26(b)]–[26(e)] above).

29 In respect of that set out at [26(b)], the Plaintiff's usage of the word "acquire" is inaccurate. In the First Defendant's Facebook post,[52] he wrote that the goal for the Business was to "*operate* 200 guest rooms within one year and 2,400 guest rooms within five years". It is feasible for the Defendants to have *operated* this number of units, by leasing them from investors, without needing to *acquire* them through buyback agreements.

30 I turn to [26(c)]. The WeChat exchange between Mr Lim and the First Defendant is equivocal, and I do not think it *only* has one explanation. The actual text of the First Defendant's message is significant in this regard. Mr Lim first queried whether there had been any appreciation in the value of the Units. The First Defendant then responded: "the property prices remain stable and some are even weakening. The company plans to go public before the end of next year. By then, it ***may*** buy back the previously sold properties. If you plan to divest, you can consider selling them back to us then" [emphasis added].[53] The link the First Defendant draws between "the company" (presumably MaxStays) going public, and the buyback, suggests that he did not understand it to be an obligation. This is consistent with the position the Defendants take in this suit,[54] and could reasonably account for the mention of a "buyback" during the parties' meeting on 29 November 2016.

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52 2AB at p 337.

53 1AB at p 486.

54 Defence at paras 8 and 34(d); DWS at para 2.12.

31 Next, the inference which the Plaintiff seeks to draw in respect of the First Defendant's response set out at [26(d)] does not account for another real plausibility. Apart from the Alleged Buyback Term, the Leaseback Agreements were also potential sources of financial stress if the Business was performing poorly. A 6–7% annual return on a principal sum of around S$1.5m is not a trifling sum. It amounts to around S$90,000 annually, which in turn means that the Defendants needed at least to make this amount of *profit* using the Units in their condotel Business, just to stay in the black. Offering to sell the Units to buyers who would not be party to leaseback agreements would, in my view, also have been an alleviation of the Defendants' financial difficulties.

32 Lastly, I am not convinced that the Plaintiff's assertion set out at [26(e)] carries much weight. I accept that, without a buyback agreement, the Contracts entailed greater risk, which was likely exacerbated by the fact that the Plaintiff had no familiarity with the Philippine real property market. However, without any evidence relating to how she *actually* invests, there is little I can make of her claim that she would not have undertaken such risk. Investors' appetite for risk varies with their experience, and her *present* statement may not reflect how she viewed the opportunity at the material time. Indeed, as stated at [14] above, when the Second Defendant first described to the Plaintiff how the Business operated, and the returns she could expect to receive should she choose to invest, it does not appear that anything was said about a buyback or capital protection. Yet, this was sufficient to attract the Plaintiff's interest in the opportunity, such that she attended the meeting on 29 November 2016. This suggests that capital protection might not have been the "hook", so to speak.

33 In any event, beyond the foregoing evidential issues, the Plaintiff – on her pleaded case – faces another, greater difficulty in proving that the Contracts included the Alleged Buyback Term. Even if I accept her characterisation of the

evidence in its entirety, the most that this would show is that the Defendants, ***on 29 November 2016***, made the Buyback Representation and thus guaranteed that the Plaintiff's capital would be protected. The Plaintiff does not aver that the Defendants repeated this representation before she orally agreed to enter the Contracts on 30 May 2017. She simply asserts, without particularity, that she relied on the representations made on 29 November 2016, in deciding to enter the Contracts. The substantial time gap already calls into question how far she could have been relying on those representations. However, *even if* we put this aside, her assertion is still difficult to accept for one key reason.

34 It is the Plaintiff's case that, after she orally accepted the Contracts, the Defendants immediately pulled out written documents for her to sign (*ie*, five versions of that set out at [18] above). As I have shown, these documents did not contain the Alleged Buyback Term. If this term was so crucial to her entry into the Contracts, one expects that – after seeing that the written documents did *not contain* such a term – the Plaintiff would at least have queried whether it remained on the table. She did not do so, and this leads me to the conclusion that the Buyback Representation was not operating on her mind *because* it had not been guaranteed in such terms. It could have been raised as a possibility (see [30] above), but the Plaintiff's inaction in the face of the documents she was being asked to sign makes it difficult to conclude that anything more certain had been promised. Indeed, the Plaintiff had only known the Defendants for a few *months* at this point in time, and they would have been dealing at relative arms-length. Given the amount of money involved, it is curious that she – a seasoned businesswoman – required so little documentation of them (also cross-reference [180] below in respect of the Plaintiff's misrepresentation claim).

35 I therefore find that the Plaintiff has not proven the Alleged Buyback Term. I address the performance of her payment obligations next.

Performance of the Sales

Plaintiff's payment of the purchase price

36 It will be recalled from [16] above, that the parties entered into the Contracts on 30 May 2017. It will also be seen from [18] and [20] that, in respect of the Venice Luxury Residences units, the Plaintiff was to make payment to the Defendant in two tranches, on 8 and 20 June 2017.[55] The evidence shows that the Plaintiff completed these payments, albeit a little late, on 13 June and 4 July 2017, respectively.[56] I note that the Defendants have not, in their pleadings or submissions, taken any issue with the delay in respect of the Venice Luxury Residences units. As such, I take it that they did not view such delay as being of any significance to their obligations under the Sales.

37 I turn then to the three Fort Victoria units. The portions of the "Receipts" evidencing the Plaintiff's payment obligations for these units are reproduced at [21] above. The Plaintiff was obliged to pay the Defendant a sum in Singapore dollars by 8 June 2017, and the balance in Pesos directly *to the developer* by 1 August 2018. The sum due on 8 June 2017 was paid on 13 June 2017, together with the sums due for the two Venice Luxury Residences units.

38 As regards the ₱16,093,035.80 owed directly to the developers of the Fort Victoria units, some confusion arose as to when the sum was actually due to the developers. On 9 July 2018, the First Defendant instructed her – through a WeChat message – to transfer *either* ₱16,093,035.80 *or* S$407,979.55 to his

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55 2AB at pp 93 and 95.

56 PAEIC at paras 44–45 and pp 240–246.

Philippine or Singapore bank account by 15 July 2018.[57] The First Defendant's message reads:[58]

> Mr. and Mrs Lim, please deposit Php 16,093,035.80 into my bank account in the Philippines on the 15th day this month, or an equivalent amount of SGD407979.546 to my Singapore bank account by cheque. The details are as follows:
>
> 8A06 php5,484,088.21,
>
> 6A14 [php]5,489,643.18,
>
> 6A15 [php]5,119,304.41
>
> Thank you!

39 The Plaintiff was surprised by this request because the "Receipts" for these units indicated that the deadline for payment was 1 August 2018, directly to the developer. The First Defendant's response was that he had mistakenly dated the "Receipts", and that the payment was in fact due to the developers on 1 July 2018.[59] He also informed the Plaintiff that the delays might result in late payment interest, though he would try to "secure a waiver" from the developer.[60] The Plaintiff had difficulty gathering the necessary funds, and eventually, was only able to remit S$407,979.55 on 7 August 2018.[61]

40 The Defendants have taken *some* issue with *this* delay, though it is not entirely clear what they wish for me to make of it. They aver that, "despite their request for the Plaintiff to pay the sum of [₱]16,093,035.80 by 15 July 2018, she only did so on 7 August 2018".[62] However, they do not further aver that the

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57 PAEIC at pp 259–260; PWAEIC at pp 121–122.

58 PAEIC at p 259; PWAEIC at p 121.

59 PAEIC at para 46 and p 265; PWAEIC at para 38 and p 127.

60 PAEIC at p 263; PWAEIC at p 125.

61 PAEIC at pp 270–271; PWAEIC at pp 132–133.

62 Defence at para 27.

developer required interest payments, nor is there evidence from the Defendants that they could not complete the purchase of the three units because of the delay. Quite to the contrary, in fact, the Defendants' position from 8 August 2018 was that they were ready, willing and able to transfer title to the Units to the Plaintiff or her nominee, but that she failed to provide the particulars needed to facilitate the transfer.[63] The implication of this must be that the Defendants did not face any issues in completing the purchase, for if they did, I do not see how they could have been ready, willing and *able* to transfer title.

41 The only outstanding issue then, in respect of whether the Plaintiff made *full* payment of the purchase price for the Fort Victoria units, is the applicable exchange rate between Singapore dollars and Philippine Pesos. As stated at [23] above, the Defendants' position is that the parties had agreed to use a fixed rate of S$1 is to ₱35,[64] and this is the reason that there is a shortfall of S$51,824.28 between the sum paid by the Plaintiff (S$1,468,895.69)[65] and the total purchase price (S$1,520,719.97).[66] Before I go on to examine the evidence, however, it is important to note that the figures in the parties' pleadings and submissions are not entirely consistent and have minor deviations within a few dollars. There are four notable inconsistencies.

42 First, the parties pleaded that the total purchase price of the Units was S$1,520,719.97. However, the figure derived from the writing which evidences the Contracts shows that the sum should have been S$1,520,717 (being the sum of S$290,850, S$300,241 (for the two Venice Luxury Residences units),

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63 Defence at paras 42–46.

64 Defence at para 24A; 1DAEIC at paras 9 and 30; 2DAEIC at para 10.

65 SOC at para 12(a) read with Defence at para 24.

66 SOC at para 12; PWS at para 286(a); Defence at paras 24–24A; DWS at para 2.30.

S$316,588, S$296,748, and S$316,290 (for the three Fort Victoria units)).[67] It is unclear how, and from where, the parties derived the extra S$2.97.

43 Second, the Defendant pleads that the shortfall between the sum that the Plaintiff paid, and the total purchase price is S$51,824.28. However, if the total purchase price, is – as I have stated – S$1,520,717, the shortfall should only be S$51,821.31 (*ie*, S$1,520,717 less S$1,468,895.69). The same S$2.97 remains unaccounted for, though it seems likely that the Defendants simply deducted S$1,468,895.69 from S$1,520,719.97 without actually calculating the shortfall using the alleged exchange rate of S$1 to ₱35.

44 Third, if the Defendants had actually calculated the shortfall by applying the rate of S$1 is to ₱35 in respect of the final ₱16,093,035.80 payment due to the developer of the Fort Victoria units,[68] they would have obtained S$51,821.47 (*ie*, ₱16,093,035.80 divided by 35 to convert the sum to Singapore dollars, and less S$407,979.55, which is the sum the Plaintiff was instructed to pay), not S$51,824.28. Even then, S$51,821.47 does not square off with the S$51,821.31 calculated in the paragraph above. Though S$0.16 may appear *de minimis*, there should be no balances or excesses if, as the Defendants aver, the parties were dealing with a *fixed* exchange rate.

45 Last, the Plaintiff pleads that the total sum she paid was S$1,468,895.69, but in her written closing submissions, S$1,468,897.60 is used.[69] I note that this was the figure pleaded in the Plaintiff's first statement of claim, prior to its

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67 2AB at pp 92, 94, 96, 98, and 100.

68 Defence at para 24A.

69 PWS at para 286(a).

amendment on 25 June 2020, but no explanation was given as to the discrepancy in the numbers between the two statements of claim.

46 There is little which I can make of these inconsistencies given that both parties have made errors. Accordingly, except for the sum of S$1,468,895.69, which the parties agree in their pleadings is the sum the Plaintiff *actually* paid,[70] I will, as far as possible, obtain the necessary figures from the primary materials rather than the parties' pleadings and written submissions.

47 I return then to the Defendants' allegation that the parties agreed to fix the exchange rate at S$1 is to ₱35. The key piece of evidence on which they rely to establish this agreement is a WeChat message sent by the First Defendant on 20 September 2017 to the Plaintiff.[71] It reads:

> Mrs. Lim, I can only see the last four digits of the account number online. I'll send it to you several days later when I'm in Manila. Or, you want to deposit it to my Singapore account at the exchange rate of 1:35 between S$ and Peso. My bank account number is UOB 3923713830.

48 I do not, however, accept this as evidence of an oral agreement between the parties that payment of the final tranche of ₱16,093,035.80 was to be fixed at a rate of S$1 is to ₱35. There are three main considerations which support my view. First, the First Defendant himself conceded, during cross-examination, that there was no *agreement*; he simply imposed the rate.[72]

49 Second, in the Defendants' written closing submissions, they submit that the parties' agreement was made *totally* in writing, and "no oral agreement exist

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70 SOC at para 12; Defence at para 24.

71 1AB at p 267.

72 NEs 24 Aug 2021 at p 98 line 7 – p 100 line 17.

at all".[73] They have taken this position to challenge the existence of the Alleged Buyback Term. However, by doing so, they have put the shoe on the other foot. If their case is that their entire agreement with the Plaintiff was captured by the documents titled "Lease Back Guarantee" and "Receipt" (see [18] above), and those documents do not include a fixed rate of exchange, it cannot also lie in their mouth to claim that the parties had orally agreed upon such rate.

50 Third, in her written closing submissions, the Plaintiff scrutinises the context of the First Defendant's message to make the point that the parties were discussing something else entirely.[74] In essence, she explains that the message pertains to payments due to one "Mr Renz". Mr Renz, on her[75] and Mr Lim's evidence,[76] is the Defendants' accountant, whom they introduced to the Plaintiff to assist her in the incorporation of a nominee company in the Philippines. This company was to receive title to the Units on behalf of the Plaintiff as there seems to have been some beneficial tax consequences from such an arrangement.[77] The nominee company was incorporated as LK Strategic Hub (Philippines) Inc ("LK (Philippines)") on 5 October 2017,[78] and on the Plaintiff's case, Mr Renz was to be paid for his services in this regard. The First Defendant was thus acting as an intermediary between the Plaintiff and Mr Renz.

51 It is in this context that the Plaintiff says the First Defendant sent the message on 20 September 2017 that mentions the S$1 to ₱35 exchange rate. Having considered the evidence, I accept her explanation. There are two points

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73 DWS at para 2.1.

74 PWS at para 152(c).

75 PAEIC at paras 35(d) and 62.

76 1AB at p 275 read with NEs 20 Aug 2021 at p 76 line 9 – p 77 line 12.

77 PAEIC at para 62 and pp 301–327, especially pp 318–322; PWAEIC at para 42(c).

78 PAEIC at paras 54, 61 and pp 297–299.

that support this. The first is the timing of the message. As far as payment of the purchase price for the Units are concerned, September and October 2017 are on no man's land. Full payment for the Venice Luxury Residences units and the first tranche of payment for the Fort Victoria units had been made in June 2017. The second tranche of the payment for the latter was not due until either July or August 2018 (see [38]–[39]). The Defendants offer no explanation as to why the parties might have been discussing this next tranche of payment some ten months in advance, and this substantially weakens their claim that the message is evidence of an oral agreement on exchange rate.

52 The second point in support of my finding are the subsequent messages exchanged between the Plaintiff and the First Defendant. Five days after the 20 September 2017 message, the First Defendant sent the Plaintiff his Philippine bank account details.[79] Then, on 30 September 2017, the Plaintiff responded that she had been "bus[y] these few days" and that she would "do internet transfer later".[80] Finally, on 18 October 2017, the First Defendant informed her that "Mr Renz ha[d] asked [him] for payments many times", and asked whether he – the First Defendant – should inform Mr Renz to contact the Plaintiff directly. In response, the Plaintiff stated: "He has given me his bank detail already[.] Will transfer to him[.] Don't worry".[81] The First Defendant acknowledged this with an "Ok".[82] These responses suggest to me that the earlier messages pertaining to payment were in fact connected to sums due to Mr Renz; and the fact that the parties' exchanges coincide closely with the incorporation of LK (Philippines) on 5 October 2017 further solidifies this.

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79 1AB at p 269.

80 1AB at p 271.

81 1AB at p 275.

82 1AB at p 277.

53 I therefore find that the parties did not have an oral agreement to apply a fixed S$1 is to ₱35 exchange rate on the ₱16,093,035.80 payment due for the three Fort Victoria units. Consequently, I also find that the Plaintiff completed payments for all five Units under the Contracts and that the Defendants were thus obliged to transfer title in them to her or her nominee.

54 Before moving on, however, I note that the written evidence captures the total purchase price of the Units in Singapore dollars.[83] Indeed, as stated, on the face of the documents, the Plaintiff seems obliged to pay S$1,520,717 (see [42] above); yet, the Plaintiff accepts that she only paid S$1,468,895.69. Thus, there is a *prima facie* shortfall. That said, I do not think that this detracts from my finding above that she completed full payment.

55 As can be seen from [21], although the total purchase price for each Fort Victoria unit is expressed in Singapore dollars, the last tranche of the payment obligation is reflected as a sum in Pesos owing *directly to the developer*. From this, we can glean that, what ultimately matters – insofar as completing the sale of the Units is concerned – is that the developer received the ₱16,093,035.80 it was owed. The *Philippine* developer would have had no concern or use for Singapore dollars, and the Plaintiff, conversely, would have had no reason to pay the Defendants a larger sum in Singapore dollars when it could have paid the developers directly in Pesos. Indeed, when cross-examined on whether the Plaintiff could simply have paid the developers directly using the prevailing exchange rate to get around the alleged fixed exchange rate agreement, the First Defendant agreed that she could.[84]

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83 2AB at pp 96, 98, and 100.

84 NEs 25 Aug 2021 at p 5 line 18 – p 6 line 1.

56 Therefore, the fact that the Plaintiff made the final tranche of payment in Singapore dollars, not Pesos, does not suggest that she failed to make full payment of the purchase price. Contrariwise, her act was in compliance with the First Defendant's instructions on 9 July 2018 (see [38] above), where he took on the role of intermediating payment. Accordingly, upon his receipt of the S$407,979.55, one can expect that he would have converted this sum to Pesos to make immediate payment to the developer. This expectation is particularly fair given that, on the First Defendant's own evidence, there was already a delay in the payment (see [39]). If the S$407,979.55 was insufficient, at that point, to satisfy the ₱16,093,035.80 owing, one expects that he would have informed the Plaintiff as such. However, there are *no* messages informing the Plaintiff that her payment was short. In fact, I reiterate [40]. If the Defendants were ready, willing and *able* to transfer title, I do not see how there could have been an issue regarding the Plaintiff's failure to make full payment.

57 With the above findings in mind, I now turn to whether the Plaintiff gave the Defendants adequate instructions to transfer title.

Defendants' failure to transfer title to the Units

58 Title to the Units was never transferred to the Plaintiff. In their Defence, the Defendants accept that they were obliged to transfer title once the Plaintiff "confirmed and informed" them of the nominee(s) to whom she wished for title to be transferred.[85] Having considered the evidence, I find that the Plaintiff had indeed confirmed her desired nominee and provided the Defendants with the information needed for transfer to be effected. Their failure to do so *to-date*, as such, was in breach of the Sale components of the Contracts.

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[85] Defence at para 12.

59 In my view, three questions are relevant. First, *who* was the Plaintiff's nominee; second, *when* did she confirm to the Defendants that such nominee is to be the title recipient; and *what* information she provided so as to effect the transfer. I address these three questions concurrently and, in light of the parties' fierce dispute over this issue, with detailed reference to their contemporaneous exchanges on WeChat.

60 As mentioned at [50] above, the Plaintiff incorporated LK (Philippines) on 5 October 2017 specifically to be her nominee in the Philippines. From this, it seems that she initially intended for the transfer of title to the Units to be made to this company. Indeed, she incurred not insubstantial costs to incorporate and maintain LK (Philippines).[86]

61 However, on 5 August 2018, in light of the fact that no steps had been taken to transfer title to LK (Philippines), she asked Mr Renz whether it would be possible for title to be transferred to a Singapore-registered company instead, to a company called Strategic Eduhub Pte Ltd ("SEPL").[87] Her change of mind is attributable to a desire for "more flexibility" in hers and Mr Lim's "growth plan".[88] I also note as an aside that, though payment for the Fort Victoria units had not yet been completed at this time (see [39] above), the Plaintiff's query was relevant to the Venice Luxury Residences units for which payment was completed more than a year earlier in July 2017 (see [36]).

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86 PAEIC at para 141(c) and pp 795–892 (various documents and receipts connected with the incorporation and subsequent operation of the company, including administrative fees, insurance, *etc*).

87 PAEIC at p 303.

88 PAEIC at p 320.

62 Mr Renz responded the next day that he would check with the First Defendant.[89] On 7 August 2018, the Plaintiff then came to understand that the First Defendant had some concerns with her change of mind, and thus she sent him a message on WeChat saying: "Understand that there is concern on putting property under a Singapore registered company. Appreciate your revert as soon [possible]. thx".[90]

63 The same day, the First Defendant responded that he would "check the procedures to transfer the properties to a foreign company", and asked for time to obtain information on the "advantages and disadvantages [of] register[ing] under Singapore company".[91] The Plaintiff's response was firm that she did not need more information. On the same day, she replied: "Think our decision is quite clear. To register all properties under a Singapore registered company. Thx". To this, the First Defendant said, "Ok, please provide the name of the company you want to transfer to". At this point, she indicated that that name of the company had been "[g]iven to the Corp sec", referring to Mr Renz,[92] but nevertheless restated that SEPL was her desired nominee.[93]

64 The First Defendant expressly accepted her instructions, but still tried to convince her to reconsider her election. That is, that there would be advantages to having title to the Units be transferred to LK (Philippines) rather than SEPL. Still on the same day, the parties then exchanged:[94]

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89 PAEIC at paras 62(a)–(b).

90 PAEIC at para 62(c) and p 301.

91 PAEIC at para 62(c) and pp 302–303.

92 NEs 20 Aug 2021 at p 75 line 18 – p 77 line 5.

93 PAEIC at para 62(d) and p 304.

94 PAEIC at pp 304–306.

> [First Defendant]: ***Noted, I will process with the registration***. But the rental will only pay to your Philippines company because payment to foreign company cannot claim VAT. But I think we should consider about the tax impact and the disposal of the properties in the future on alternative arrangements as well.
>
> [Plaintiff]: You have been making payment to our SG account. Pls continue to do so
>
> [First Defendant]: This is because the properties have not yet transferred to LK, once it is transferred to LK or your Singapore company we have to make the payment to LK only. Maybe we should meet to discuss all alternatives and find the best solution.
>
> [Plaintiff]: The LK will be closed Will not be operating LK
>
> [First Defendant]: Why you want to close the LK, it is not easy to open a company in Manila, if the properties in are registered under the LK, you may sell the properties in the future by transferring the shares, not the properties. What are you worry about?
>
> [Emphasis added]

65 The Plaintiff did not respond to this last message, and on the next day, 8 August 2018, she asked the First Defendant to provide an update on the transfer: "How is the step of transferring property to be under our SG company".[95] The First Defendant replied with, "We have asked the developers to advise us the documents required to register the properties under foreign company, once we got will revert to you".[96]

66 The First Defendant, however, seemed adamant that transfer ought to be made to LK (Philippines). On 14 August 2018, he reraised the issue, citing "a lot of differences" between a transfer to LK (Philippines) and to SEPL, tax being one of them.[97] The Plaintiff explained that she still wished for the transfer to be

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95 PAEIC at p 312.

96 PAEIC at p 313.

97 PAEIC at p 319.

made to SEPL.[98] Notwithstanding this, the First Defendant prepared and sent a document to the Plaintiff which compared the differences between a transfer to LK (Philippines) and to SEPL.[99]

67 On the Plaintiff's account, at this point, she "realised that the Defendants would only continue to ignore [her] instructions to transfer title [to] the Units to [SEPL]".[100] Thus, on 25 August 2018, the Plaintiff informed the First Defendant very definitively that transfer is to be made to LK (Philippines), and that she would be transferring ownership of this company "to a Singapore registered firm", seemingly to give indirect effect to her intention to hold title to the Units under a Singapore-registered company.[101] When she pressed him for an update on the same day, the First Defendant responded that he was "waiting for *her* final decision".[102] Leaving no room for any ambiguity, the Plaintiff replied that it was "*final*" that title was to be transferred to LK (Philippines). She then asked that he "liaise w[ith] Mr Renz direct[ly]", and stated her hope that the transfers will be completed within three months.[103] The First Defendant seems to accept in his affidavit evidence-in-chief that the Plaintiff's election on 25 August 2018 was final, but he avers that she asked for the transfer to be made to "LK EduHub Singapore", and that he was unable to do so because the particulars of this company were not provided.[104] He seems to have erroneously merged the two companies, and there is little that needs to be made of this.

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98 PAEIC at p 320.

99 PAEIC at pp 320–321.

100 PAEIC at para 62(i).

101 PAEIC at p 323.

102 PAEIC at p 324.

103 PAEIC at p 327.

104 1DAEIC at para 13.

68 Indeed, the foregoing shows quite clearly that the Plaintiff had, on 25 August 2018, instructed the transfer of title to *LK (Philippines)*. Further, given that Mr Renz was the corporate secretary for this company, it was in my view, sufficient for her to have asked the First Defendant to take up the technical requirements for the transfer with him. Thus, although the "*what*" question (see [59] above) was not addressed with much specificity, I do not think that this was necessary. If the Defendants had lacked the necessary documents or information to effect a transfer to LK (Philippines), and such documents or information could not be provided by Mr Renz, I expect that they would have sought the Plaintiff's input, but there is no evidence that they did.

69 This then takes me to the Defendants' contentions. They make two key factual points. First, that the First Defendant informed the Plaintiff on 14 August 2018 that a board resolution from the Plaintiff's nominee was required to initiate the transfer, but no resolution was ever provided. Second, that when asked to sign a "Buyer Information Sheet" in July 2021, the Plaintiff refused to do so.[105]

70 The first is not an accurate representation of the facts. Although the First Defendant did inform that a board resolution was required, the request was made before the Plaintiff's *final* election for title to be transferred to LK (Philippines). At this time, her operative election was still for the transfer to be made to SEPL, and the actual exchange between the parties demonstrates this:[106]

> [Plaintiff]: Mr Liu, how is status of documentation???
>
> [First Defendant]: Your company secretary hasn't sent us the board resolution and company certificate.

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105 DWS at para 2.32.

106 PAEIC at pp 315–318.

> [Plaintiff]: Has anyone ask her for it?? Your last text said that you will advise on what documentation needed?
>
> [First Defendant]: Please provide your company secretary email for us to contact directly.
>
> [Plaintiff]: Are you tapping on Mr Renz?? Any format on board resolution? What is the resolution about? Company certificate, suppose is ROC?
>
> [First Defendant]: No specific format for board resolution. Board Resolution from Strategic EduHub, nothing related to Mr Renz.
>
> [Plaintiff]: What is to be in the resolution? Resolution is a doc to doc down consensus among shareholders or director on some matter. What is the matter of concern to be reflected in the resolution?
>
> [First Defendant]: The board resolves to purchase 5 units of properties in Manila or just Investments in LK Strategic, up to your board. I hope we can meet to discuss your objectives so that you won't make a wrong resolution. I am going to Nanjing on Aug 16 and back to Singapore on 19, we may meet either before or after.
>
> [Plaintiff]: OK. A resolution to resolve on the joint investment into the 5 properties under staregic [*sic*] eduhub Pte ltd
>
> [First Defendant]: There will be different effects on accounting treatments, investment in LK, depreciation will be encoded in LK, purchase properties under Strategic EduHub, depreciation will be in Strategic EduHub. Which one do you prefer?
>
> …

71 It is plain from this exchange that the parties were, when the requirement for a board resolution was raised by the First Defendant, discussing the transfer to SEPL. In fact, it will be seen from the last of this series of messages that the First Defendant, at this point, reraised the issue of whether transfer should be made to SEPL or LK (Philippines). It was only after this, as stated at [67] above, that the Plaintiff – in response to his persistence – firmly and finally stated on 25 August 2018 that the transfer was to be made to LK (Philippines).

72 This exchange therefore does not support the Defendants' claim that the Plaintiff failed to provide a necessary resolution in respect of her eventual and

final election for title to be transferred to *LK (Philippines)*. In fact, an aspect of their exchange actively cuts against the Defendants' position. When the Plaintiff queried whether the Defendants had gotten in touch with her company secretary – seemingly of SEPL – the First Defendant said, "Please provide your company secretary email for us to contact directly". This supports my finding (at [68] above) that it was sufficient for the Defendants to be in contact with Mr Renz in respect of the transfer to LK (Philippines).

73 This brings me then to the Defendants' second point, that the Plaintiff wrongfully refused to sign a "Buyer Information Sheet" in July 2021.[107] I reject this roundly. By 27 December 2019, the Plaintiff terminated the Contracts,[108] and the parties were in the midst of preparing for trial, which commenced before me on 19 August 2021. This attempt at curing their failure to transfer title was, to say the least, a little late. In any event, it was hardly beneficial for the Plaintiff to allow title to the Units to be transferred to her at this late stage.

74 On 15 October 2019, she first discovered from the First Defendant (via a WeChat message)[109] that the Units had been mortgaged, and such mortgages remained undischarged. In 2020, through searches conducted by the Plaintiff's then-lawyers, she found out that there were *multiple* mortgages over the Units. Some had been created before the Contracts, in 2012 and 2015; but others had been created in late 2018, by which time, the Defendants should have been taking steps to transfer title to the Plaintiff.[110] When questioned about this at

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107 2AB at pp 417–420.

108 PAEIC at para 140 and pp 792–793.

109 PAEIC at paras 113–114, pp 553 and 555.

110 PAEIC at para 116 and pp 604–728.

trial, the First Defendant suggested that he would have been able to redeem the mortgages:[111]

> [Ms Li]: I put it to you, because of the encumbrances on the units, you were unable or unwilling to transfer clean title of the units to the plaintiff, agree or disagree?
>
> [First Defendant]: I disagree. I disagree because as long as I received official notification such as the board resolution from the plaintiff, I would proceed to redeem the properties, and in the absence of any such notification, I would not redeem the properties. I am entitled to mortgage the properties because I am not prohibited from doing that under the agreement. Under the law, before I assign my properties to the plaintiff, I have the right to decide what to do.

75 I am prepared to assume, for the Defendants' benefit, that the Contracts did not prohibit them from encumbering the Units. However, even on that basis, the First Defendant's assertion is unbelievable. In the same 15 October 2019 WeChat message,[112] the First Defendant also explained that he was facing great financial strain. He stated that he could not keep up with the rental payments because, if he did, "there [would not] be enough to settle the mortgage".[113] Since then, global events have restricted travel, and the Business would have been impacted accordingly. It therefore seems highly unlikely that, had the Plaintiff completed the "Buyer Information Sheet" in July 2021, that the Defendants would have been able to transfer to her *unencumbered* title to the Units.

76 I therefore reject the Defendants' contentions and reiterate my finding at [68] that they were obliged, from 25 August 2018, to take the necessary steps to transfer title to the Plaintiff. Having found that the Defendants did not comply with the terms of the Sale, I turn next to the Leaseback Agreements.

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111 NEs 27 Aug 2021 at p 30 lines 10–22.

112 PAEIC pp 553 and 555.

113 PAEIC at p 553.

Arrears under the Leaseback Agreements

Arrears for the initial three-year period

77 As can be seen at [18] above, the term under the Leaseback Agreement, at least initially, was three years (or 36 months). As to the two Venice Luxury Residences units, the Plaintiff pleads that ten of those 36 months, at a total rate of S$2,955 per month, remains unpaid. For the other three Fort Victoria units, she pleads that nine months, leased for a total of S$4,646 per month, is owing. This amounts to S$29,550 and S$41,814, respectively, or S$71,364 in total, and the Defendants admit in their Defence that such sums are owing.[114]

Alleged extensions of the Leaseback Agreements

78 I turn then to the contentious issue, which is whether the parties agreed orally to vary the Contracts to extend the leaseback period for a further two years. On the basis that such variation was made, the Plaintiff claims a further 23 and 24 months of rental respectively, for the Venice Luxury Residences units and the Fort Victoria units.[115] The Defendants deny such variation and therefore their liability for such additional rent payments.[116]

79 The Plaintiff alleges that this variation came about as follows. As stated at [74]–[75] above, the Plaintiff discovered in October 2019 that the Defendants mortgaged the Units, and were unable to continue making rent payments. The Plaintiff was displeased and called for a meeting. On 16 November 2019, she and Mr Lim met the First Defendant (the Second Defendant was not present)

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114 SOC at para 18; Defence at para 39.

115 SOC at paras 17–18.

116 Defence at paras 38–39.

(the "November 2019 Meeting").[117] The Plaintiff secretly recorded this meeting, and the recording as well as its transcript were adduced as evidence before me. This recording suggests that the First Defendant was agreeable to renting the Units for an additional period of two years.[118] For context, I set out the notable portions of their conversation:

> [First Defendant]: ***Firstly, as of today, the properties have been yours. There is no dispute. If they are not yours, why should I pay you rent***, because I rent the properties from you. It is a very simply reason, correct or not? … The properties are undoubtedly yours. But there is not title deed, that is not my fault. It takes time to get the title deed. If you are certain to transfer the properties to any person A, B, or C or whoever you want, please don't say it verbally but write it down in black and white to state "I want to transfer to which company", transfer to who? Which property to who, or all the properties to who? Give me a black and white, not just verbally. … ***After the black and white, then in 12 months after your submission, you will get the title deed. This is my promise to you***.
>
> [Plaintiff]: ***From now till then, how will you handle the leaseback guarantee?***
>
> [First Defendant]: ***I'll continue to rent from you***. I'll continue to rent from you, as the properties are yours. It's just the transfer, but let me make this clear to you, once you transfer the property, I won't but back the properties because we cannot buy -- our buybacks don't have transfers of title. ***If title is transferred, there will be no buyback***.
>
> [Plaintiff]: Then if no transfer, you will buy them back?
>
> [First Defendant]: ***If no transfer, another 3 years is required***. So, 5 years from when you started. Our terms are 5 years. ***Because you have had 2 years*** --
>
> [Plaintiff]: So, it starts from 2017 --
>
> [First Defendant]: ***5 years … I can buy them back from you***.
>
> [Plaintiff]: You can buy them back?
>
> [First Defendant]: I can buy them back.
>
> [Emphasis added]

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117 PAEIC at paras 120–121; 1DAEIC at para 23.

118 PAEIC at para 124 and p 512 line 16 – p 514 line 13.

80 The exact meaning of their exchange requires some interpretation. From the First Defendant's statements, it appears to me that he was agreeing to two alternative ways to move forward with their Contracts.

(a) First, he said the following: "after the black and white, then in 12 months after your submission, you will get the title deed … [until then] I'll continue to rent from you, [but] if title is transferred, there will be no buyback". By this, the First Defendant seems to be saying that, if the Plaintiff wished to have the title to the Units, she would need to indicate this to him, and within 12 months, he would effect a transfer. Whilst the transfer was being effected in these 12 months, he would continue to lease the Units from her, although, if she preferred this, the Units would not be bought back from her.

(b) Second, he then said: "if no transfer, another 3 years is required … you have had 2 years … [after] 5 years … I can buy them back from you". In my view, the reference to the need for a "transfer" is important because, in the first part of the conversation quoted, the First Defendant accepts that the Units belonged to the Plaintiff, which was why rent was being paid at all. On that basis, if she did not require title to be *formally* transferred, he was agreeable to extending the Leaseback Agreement by two years, and further, that he was also agreeable to buying the Units back from her at the end of the total five-year period.

81 The Plaintiff's pleaded case is that the parties agreed to extend the period of the leaseback period by two years, and that the Defendants would repurchase the Units at the end of the total five-year period.[119] There is no suggestion that they had agreed to extend the leaseback period for the purported 12 months it

[119] SOC at paras 15 and 17.

would take for the Defendants to effect a transfer of title. Her position therefore is that the parties agreed to the *second alternative*; and as such, I do not consider whether the parties varied the terms of the Contracts on the first alternative. As regards the second, however, I find that the alleged variation fails for want of valid consideration on the part of the Plaintiff.

82 Before turning to the issue of consideration, however, I first note that the Defendants' case is that the variations proposed were not genuine offers; they were false compromises made to placate the Plaintiff who had put on a "drama" for the purposes of her secret recording.[120] I do not accept this. The validity of offers is determined objectively. Here, the words plainly convey an objective intention to be bound, and the claim that he was trying to pacify the Plaintiff is not convincing. If he was in the wrong, and needed to propose a compromise, then that intention takes centre stage. Any ancillary intention to pacify would be just that, *ancillary*. If, however, he was not in the wrong, then it begs the question why he would need to pacify the Plaintiff at all.

83 I therefore find that the First Defendant's promises were real. On this basis, he proposed to: (a) extend the leaseback period by two years; and (b) buy back the Units at the end of the five-year lease period. Both of these promises are plainly valuable. I need not say anything about (a). As to (b), given my view that the Alleged Buyback Term did not exist, this would also be a new benefit to the Plaintiff. The question then, is what consideration she gave in exchange.

84 In the circumstances, as no additional money was paid by the Plaintiff, there seems only to be two forms of consideration that she could have given: (a) forbearance to sue on a valid claim; or (b) foregoing her right to receive legal

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120 DWS at paras 2.14 and 2.17.

title to the Units. It is trite that the former would be good consideration, and it is clear that the latter could also be valid. This is because, if the Plaintiff forgoes her right to receive *legal* title, she suffers the detriment of having her interest reduced to an equitable one.

85 In any event, notwithstanding the *legal* acceptability of these two forms of consideration, I find that the Plaintiff, *factually*, did not actually provide them in exchange. As regards (a), if no time for forbearance is specified, the court will infer that the undertaking was to do so for a *reasonable* time (David Foskett, *Foskett on Compromise* (Sweet & Maxwell, 9th Ed, 2019) at para 3-03, citing *Fullerton v Provincial Bank of Ireland* [1903] AC 309; also see *Projection Pte Ltd v The Tai Ping Insurance Company Ltd* [2000] SGHC 146 at [40], which cites an older edition of *Foskett* for the same purpose).

86 Reasonableness, of course, is open-ended. However, there is on the facts of this case, no need for any finely balanced analysis. On 27 December 2019, frustrated with the First Defendant's refusal to capture any alleged variation in writing,[121] the Plaintiff terminated the Contracts and demanded the payment of rental arrears as well as the purchase price of the Units.[122] By 9 March 2020, her writ and statement of claim had been served. Given the value of benefits which were proposed, particularly the buyback, these few months can scarcely be said to be a reasonable amount of forbearance.

87 This takes me then to possibility (b). The parties' conversation (see [79] above) does not show that the Plaintiff agreed to forgo the right to ask for legal title to be transferred to her. Indeed, the fact that she claims damages in this suit

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121 PAEIC at paras 125–13, 138, and 140.

122 PAEIC at pp 792–793.

for the Defendants' failure to transfer legal title suggest that such right was not compromised in exchange for the First Defendant's promises.

88 On these bases, I find that the parties did not effect a variation of the Contracts at the November 2019 Meeting to extend the Leaseback Agreements. Connectedly, the absence of an effective variation also means that no buyback agreement was subsequently added to the Contracts.

89 Before I leave these facts, however, I note that in the Plaintiff's written closing submissions she argues alternatively that, the First Defendant agreed to extend the Leaseback Agreements by two years following a meeting between the First Defendant and Mr Lim on 21 March 2019.[123] However, she only pleads that an extension arose from the November 2019 Meeting.[124]

90 Counsel for the Plaintiff will be well aware that "pleadings delineate the parameters of the case and shape the course of the trial. They define the issues before the court and ***inform the parties of the case that they have to meet***. They set out the allegations of fact which the party asserting has to prove to the satisfaction of the court and on which they are entitled to relief under the law" [emphasis added] (*V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 at [36]). By referring *only* to the November 2019 Meeting, the Defendants have not had a proper opportunity to respond in respect of the alleged March 2019 extension. This is particularly so given that they only had counsel at the stage of pleadings. They acted in-person during the preparation of their AEICs, and

123 PWS at paras 5(c), 24, and 192–201.

124 SOC at paras 15 and 17.

continued to do so at trial and for submissions. I therefore decline to consider the Plaintiff's newly furnished allegation.

Plaintiff's contractual claim

91 Having set out and resolved most of the relevant factual issues arising in this matter (save for some pertaining to other misrepresentations the Plaintiff alleges the Defendants made at their first formal meeting on 29 November 2016: see [15] above; which I return to at [175] below), I now turn to the legal issues. I begin with those arising from the Plaintiff's contractual claim.

92 For the Defendants' breach of contract – specifically, their failure to transfer title to the Units pursuant to the Sale and make rental payments under the Leaseback Agreements – the Plaintiff seeks two remedies:

(a) Damages of S$1,771,552.97 comprising: first, S$1,520,719.97, this being the price at which the Defendants were supposedly obliged to buyback the Units; and second, S$250,833 in rental arrears which would have been earned had the Defendants not acted in breach.[125]

(b) An "account of profits made by the Defendants as a consequence of their diversion and wrongful utilisation of the [purchase price] of the Units paid by the Plaintiff to the Defendants", and an order for payment of sums found to be due after taking such account.[126]

93 Before turning to the issues proper, however, there are two preliminary matters I should clarify and reiterate. First, although the Plaintiff pleads that the Defendants were obliged to repurchase the Units at S$1,520,719.97, the more

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125 SOC at p 33 (Claims), head 1(a) read with PWS at para 364.

126 SOC at p 33 (Claims), head 1(b) and (c).

relevant figure is S$1,468,895.69, this being the price she actually paid (see [54]–[56] above). Second, given my finding that the parties did not validly agree to extend the Leaseback Agreement (see [77] and [88]), the extent to which the Defendants can be held liable for rental arrears is only S$71,364.

94 With these points in mind, I now consider the two issues which must be answered in determining the Defendants' liability for damages. First, whether the Defendants' committed repudiatory breaches of the Contracts, such that the Plaintiff was justified in terminating the Contracts on 27 December 2019 to sue for damages. Second, the extent to which the Plaintiff has proven the losses she claims in respect of this cause of action.

Defendants' breach of the Contracts

95 The first question is relatively straightforward, though it requires some analysis of the character of the Contracts. Specifically, whether they should be understood as five composite contracts for the purpose of the Plaintiff's capital investment, just with sale and lease elements; or, whether they should be seen as five sales and, separately, five agreements to lease the Units.

96 This distinction is salient because, if the Contracts are seen as separate sales and leases, not only will the validity of the Plaintiff's termination of each need to be considered separately, such analysis will need to be undertaken with regard to the particular rules relating to these types of contracts. For example, the requirement that parties to the sale give notice demanding completion; or the requirement that the right to forfeit for non-payment of rent is expressly reserved (see, *eg*, *Alwee Alkaff v Syed Jafaralsadeg and others and another action* [1997] 3 SLR(R) 419 at [23]–[24]). Even more complicatedly, if the Contracts are understood as comprising distinct sales and leases, this begs the

question as to which law governs each of these components, the *lex situs* of the Units (Philippine law), or Singapore law.

97 Thus, it is more appropriate to characterise the two components of the Contracts as parts of a broader commercial investment. This is supported by the fact that: (a) the components of the Contracts are evidenced within single documents (see [18] above); and more pertinently, (b) these documents do not contain *any* of the terms or details ordinarily seen in contracts for the sale of real property, or leases. This stark lack of detail suggests strongly that the parties did not intend for the Contracts to operate within the usual, more rigid realm of these types of contracts. Instead, they appear to have understood the Contracts as loose collections of obligations which facilitated the Plaintiff's investment in the Business. I will therefore analyse them as such.

98 On this basis, I find that the Defendants' obligation to transfer *legal* title in the Units to the Plaintiff were conditions of the Contracts, the breach of which entitled her to terminate and sue for damages. I arrive at this view because the Plaintiff's obtainment of a proprietary interest in the Units forms an essential part of the Contracts' character. Without obtaining such interest, the Plaintiff's payment to the Defendants would be akin to an outright, unsecured loan, which is certainly not what the parties intended.

Measure of the Plaintiff's damages

99 This brings me then to the second, considerably more difficult question: the extent to which the Plaintiff has proven the damages she seeks to recover for the Defendants' breach of contract.

The standard expectation measure: Difficulties in this case

100 I alluded to such difficulty at [8] above, and it arises because the Plaintiff seeks to recover her principal investment of around S$1.5m on the *sole* basis that the Alleged Buyback Term existed, either upon the formation of the Contracts or arising out of the November 2019 Meeting. Relying on this factual premise, the Plaintiff submits that, applying the standard expectation measure of damages, she is entitled to recover the purchase price of the Units because this is the price the Defendants "would have [had to pay her] to buy back the Units".[127] In other words, if the Defendants had performed the Contracts, she would have obtained this sum. This is entirely orthodox.

101 Absent a buyback agreement, however – as I have found at [35] and [88] above – it is not clear whether the Plaintiff can directly recover the sum she paid on the basis of a breach of contract. Indeed, without the buyback agreement, we are simply dealing with the Defendants' failure to deliver title to real property. The normal measure of damages in respect of such a breach is to take the market value of the property at the time for completion (or some other suitable date), less the contract price if it has not already been paid (see *Engell v Fitch* (1869) LR 4 QB 659 at 665; *Min Hong Auto Supply Pte Ltd v Loh Chun Seng* [1993] 1 SLR(R) 642 at [82]).

102 The use of this measure in these cases is well-settled and orthodox in its protection of the innocent contracting party's interest in the *performance* of the contract (see James Edelman, *McGregor on Damages* (Sweet & Maxwell, 21st Ed, 2021) ("*McGregor*") at paras 27-005–27-006; Adam Kramer, *The Law of Contract Damages* (Hart Publishing, 2nd Ed, 2017) ("*Kramer*") at paras 4-02–

127 PWS at paras 361–365, particularly para 364(a).

4-03; *The Law of Damages* (Andrew Tettenborn gen ed) (LexisNexis, 2nd Ed, 2010) ("*Tettenborn*") at paras 23.02–23.03). It is difficult, however, to apply to the present case. It *could* technically be applied; but it requires the Plaintiff to prove the market value of the Units. However, as stated, her case hinges entirely on the existence of the Alleged Buyback Term, and so no valuation of the Units was prepared or tendered as evidence.

103 This puts the court in a difficult position. If the Contracts had been fully performed, it is clear the Plaintiff would have received: (a) unencumbered title to the Units (which she would have been free to sell); and (b) rent payments for the balance of the leaseback period. Liability in respect of (b) is conceded (see [77] above). As regards (a), however, counsel for the Plaintiff did not think it necessary as a contingency to demonstrate the value of the Units; nor have they alternatively pleaded restitution for unjust enrichment. On one hand, without evidence of the Units' value, I cannot state with any certainty the position the Plaintiff would be in had the Contracts been performed. Therefore, an award of expectation damages cannot be properly quantified. On the other, without a claim in unjust enrichment, it is questionable whether there is basis for me to order the direct reversal of the Plaintiff's payment of S$1,468,895.69. Her alternative claim for fraudulent misrepresentation *could have* been a basis to grant her such a quantum of damages, but as I will discuss from [175] below, this claim fails on the available evidence.

104 I could, in the face of this, nevertheless assume that the value of the Units is that which the Plaintiff paid, but that would be to coat a conceptual question with evidential veneer. In his chapter on damages in *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 34th Ed, 2021) ("*Chitty*"), Professor Beale observes that, though an innocent party has multiple interests which an award of damages for breach of contract *can* serve to protect – expectation, reliance,

and restitution interests, or in some instances, even an interest in disgorgement (which is also raised here) – the expectation of performance is the primary interest to be guarded. In his own words, "it must be emphasised that contract damages are normally assessed on the 'expectation' measure and do not protect the restitution interest or the reliance interest as such" (para 29-023). The issue of which of these interests can or should be protected in a given case is primarily a conceptual question which entails at least some thoughtful characterisation. If I were to assume without proof that the market value of the Units is that which the Plaintiff paid, I would be protecting her restitution interest under the guise of her expectation of performance. There are at least two issues with this.

105 One, a central principle of contract damages is that the innocent party should not be put in a better position than if the contract had been performed (*Robinson v Harman* (1848) 1 Exch 850 at 855). If I assume that the market value of the Units is that which the Plaintiff actually paid and award damages on that basis, when added to her earned rental as well as claim for rental arrears, she would be turning a profit. Therefore, such an assumption would not only unjustifiably relieve her of the burden of proving her expected profits, but do so at the risk that she might be overcompensated. This is because, given the lack of proof, it cannot be said with any certainty that the value of the Units has gone above, or at least maintained at the sum paid.

106 Two, the Plaintiff could have mounted an alternative claim for unjust enrichment. Indeed, in the circumstances, a claim grounded on failure of basis seems feasible. As such, if I were to assume the value of the Units, I would also effectively be granting the Plaintiff a restitutive remedy without holding her to demonstrate that there was indeed a total failure of basis (as well as the other elements for a claim in unjust enrichment).

107 As Professor Edwin Peel observes in *The Law of Contract* (Sweet & Maxwell, 15th Ed, 2020) ("*Trietel*"), a plaintiff's "right to claim restitution is limited, in particular by the rule that he can (in general) recover money paid under the contract only if there has been a total failure of [basis]" (para 20-035). Where a plaintiff has a claim for breach of contract, "to allow him to claim restitution in respect of any breach would cut across this principle, particularly where he had made a bad bargain by paying [the defendant ("D")] more than [D's] performance was worth" (para 22-008; also see *Chitty* at para 29-029). Further, given the UK Supreme Court's ("UKSC") firm decision in *One Step (Support) Ltd v Morris-Garnder* [2019] AC 649 ("*One Step*") re-characterising *Wrotham Park* damages as compensatory, not restitutionary (the position in Singapore is the same in this regard: see *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 ("*Turf Club Auto*") at [267] and [271]), any justification supporting the grant of a restitutionary remedy for breach of contract – even if indirectly – is arguably weaker than ever.

108 This thus leaves the Plaintiff in a bind. All she can prove, insofar as her expectation of performance is concerned, is that the Defendants would have had to pay her the rental arrears of S$71,364. She cannot prove that she would have been able to recoup the purchase price from selling the Units.

The alternative reliance measure: A conceptual overview

109 Having said the foregoing, I am aware that there are cases which have allowed innocent parties to recover the ***purchase price*** they paid as a form of "wasted expenditure" within the ambit of reliance damages. The oft-cited case is *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, where the High Court of Australia allowed the plaintiff to recover the price he had paid to purchase the wreck of a non-existent oil tanker, in addition to the other

expenditure he incurred in preparing for the salvage. Other examples include *Harling v Eddy* [1951] 2 KB 739 and *CCC Films (London) v Impact v Quadrant Films* [1985] QB 16 ("*CCC Films*"), amongst numerous others (see, *eg*, *Chitty* at para 29-029; *Trietel* at para 20-031).

110 Though Professor Beale observes that contract damages do not protect one's reliance ***interest*** *per se* (see statement quoted at [104] above), since the well-known decision of *Anglia Television Ltd v Reed* [1972] 1 QB 60 ("*Anglia Television*"), the availability of damages assessed using the reliance ***measure*** has been accepted to be available upon the "election" of the plaintiff (at 64, *per* Lord Denning MR). It is, in fact, generally understood as settled law that such a measure of damages may be applied (see, *eg*, *TCL Industries (Malaysia) Sdn Bhd v ICC Chemical Corp* [2007] SGHC 211 at [11]; *PT Panosonic Gobel Indonesia v Stratech Systems Ltd* [2010] 3 SLR 1017 at [6]). That said, I will return to a distinction between the protection of one's reliance ***interest*** and the reliance ***measure*** of damages at [124] below. First, it is important to appreciate the precise juridical basis on which the court awards "reliance damages".

111 Generally, the common law courts have rationalised the availability of "reliance damages" by aligning both the expectation and reliance measures with the core principle of contract damages set out in *Robinson v Harman*, *ie*, to place the plaintiff in the position he would have been had the contract been performed (see, *eg*, *Van Der Horst Engineering Pte Ltd v Rotol Singapore Ltd* [2006] 2 SLR(R) 586 at [54]–[55]). The object of such rationalisation has been to secure consistency and coherence within the area of contract damages.

112 The force of this rationale is especially evident from the penetrating and comprehensive analysis of Teare J in *Omak Maritime Ltd v Mamola Challenger*

Shipping Co [2011] 1 Lloyd's Rep 47 ("*Omak*") at [11]–[63]. After considering numerous authorities and arguments, Teare J concludes:

> 42 ***I consider that the weight of authority strongly suggests that reliance losses are a species of expectation losses and that they are neither, to use Mr Brenton's phrase, "fundamentally different" nor awarded on a different "juridical basis of claim"***. That they are a species of expectation losses is supported by the decision of the Court of Appeal in *C & P Haulage v Middleton* [[1983] 1 WLR 1461] and by very persuasive authorities in the United States, Canada and Australia.
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> …
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> 65 The tribunal's error was to regard a claim for wasted expenses and a claim for loss of profits as two separate and independent claims which could not be "mixed". ***But the weight of authority clearly shows that both claims are illustrations of, and governed by, the fundamental principle stated by Baron Parke in Robinson v Harman. That principle requires the court to make a comparison between the claimant's position and what it would have been had the contract been performed***. Where steps have been taken to mitigate the loss which would otherwise have been caused by a breach of contract that principle requires the benefits obtained by mitigation to be set against the loss which would otherwise have been sustained. To fail to do so would put the claimant in a better position than he would have been in had the contract been performed.
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> [Emphasis added]

113 Similarly strong authority exists elsewhere in the Commonwealth. In *Commonwealth of Australia v Amann Aviation Pty* (1991) 104 ALR 1 ("*Amann Aviation*"), Mason CJ and Dawson observed (at 9–10):

> The award of damages for breach of contract protects a plaintiff's expectation of receiving the defendant's performance. That expectation arises out of or is created by the contract. Hence, damages for breach of contract are often described as "expectation damages". The onus of proving damages sustained lies on a plaintiff and the amount of damages awarded will be commensurate with the plaintiff's expectation, objectively determined, rather than subjectively ascertained. That is to say, a plaintiff must prove, on the balance of probabilities, that his or her expectation of a certain outcome, as a result of

> performance of the contract, had a likelihood of attainment rather than being mere expectation.
>
> In the ordinary course of commercial dealings, a party supplying goods or rendering services will enter into a contract with a view to securing a profit, that is to say, that party will expect a certain margin of gain to be achieved in addition to the recouping of any expenses reasonably incurred by it in the discharge of its contractual obligations. It is for this reason that expectation damages are often described as damages for loss of profits. ***Damages recoverable as lost profits are constituted by the combination of expenses justifiably incurred by a plaintiff in the discharge of contractual obligations and any amount by which gross receipts would have exceeded those expenses***. This second amount is the net profit.
>
> The expression "damages for loss of profits" should not be understood as carrying with it the implication that no damages are recoverable either in the case of a contract in which no net profit would have been generated or in the case of a contract in which the amount of profit cannot be demonstrated. It would be an invitation to the repudiation of contractual obligations if the law were to deny to an innocent plaintiff the right to recoupment by an award of damages of expenditure justifiably incurred for the purpose of discharging contractual obligations simply on the ground that the contract breached would not have been or could not be shown to have been profitable. If the performance of a contract would have resulted in a plaintiff, while not making a profit, nevertheless recovering costs incurred in the course of performing contractual obligations, then that plaintiff is entitled to recover damages in an amount equal to those costs in accordance with *Robinson v Harman*, as those costs would have been recovered had the contract been fully performed. …
>
> [Emphasis added]

114 When distilled, the way in which these authorities have sought to align the expectation and reliance measures of damages can be understood in four relatively simple steps. First, the fundamental objective of contract damages is to put the plaintiff in the monetary position he would have been had the contract been performed. This requires the plaintiff to hypothesise and prove an alternate future. It does not involve him looking into the past to determine where he would be had he not contracted at all. The latter inquiry is more appropriately undertaken in an action for misrepresentation, and pursuing it in the field of

contract would, in the words of Learned Hand CJ in *Albert & Son v Armstrong Rubber Co* 178 F (2d) 182 (1949) ("*Albert & Son*"), unjustifiably make the defendant "an insurer of the [plaintiff's] venture" (at 189).

115 Second, though contracts are typically entered for the purpose of making profits, it cannot be taken that all contracts will be profitable. This is why Mason CJ and Dawson J say in *Amann Aviation*, "a plaintiff must prove, on the balance of probabilities, that his or her expectation of a certain outcome, as a result of performance of the contract, had a likelihood of attainment rather than being mere expectation" (see [113] above).

116 Third, in setting out to make profits from the contract, the plaintiff will almost certainly have incurred costs. This could include the sums it was obliged to pay the defendant to secure counter-performance, or preparatory works it had to undertake so as to be able to apply the defendant's expected performance to a profitable use. If the plaintiff manages to prove that the contract would have been profitable, and thus succeeds in recovering damages on this basis, inherent in these damages is the recoupment of his capital outlay or expenditure (this is what constitutes his "reliance damages"). After all, one must break even before one can turn a profit.

117 Lastly, there will invariably be cases where the plaintiff will not be able to prove the profitability of the contract; for example, the subject of the contract may simply be too speculative. In these cases, the plaintiff may still have put down capital or incurred expense in reliance of the contract. However, if he is unable to prove that he would have turned a profit, it is likely that he would also struggle to prove that he would have made enough revenue to cover his capital outlay and expenses (see also *CCC Films* at 40B–D). Should this then mean that

the plaintiff ought to be left without a means to recover payments made to the defendant, as well as reasonably incurred expenses?

118 In respect of the former, there is of course, the law of unjust enrichment. However, even within the field of contract, the law's answer to this question is a rebuttable 'no', and it has reached this position by relieving the plaintiff of the burden of proving that, had the contract be performed, sufficient revenue would have been earned *at least* to cover his reasonable capital outlay and expenses. The burden is then shifted to the defendant to prove that the contract would not only have been unprofitable, but that the plaintiff would not *even* have been able to recover what he put down in expectation of performance. Put simply, though the plaintiff may have entered a bad bargain, this is a matter *for the defendant* to prove. If the defendant is unable to discharge this burden, the plaintiff would be entitled to damages assessed on the reliance measure.

119 This shift of the burden of proof where reliance damages are claimed, is well-established by the authorities (see the line of cases starting with *Albert & Son* at 189, *per* Learned Hand CJ; *Albert & Son* was considered and applied in *CCC Films* at 39H–41A, *Bowlay Logging Ltd v Domtar Ltd* (1978) 87 DLR (3d) 325 at [35]–[37], *Amann Aviation* at 14–16, *per* Mason CJ and Dawson J, and *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 All ER (Comm) 1321 at [186]–[190]; in Singapore, see O*ut of the Box Pte Ltd v Wanin Industries Pte Ltd* [2012] 3 SLR 428 ("O*ut of the Box*") at [8] as well as cases cited by *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 1st Ed, 2012) at paras 21.051–21.053).

120 The basis on which the burden of proof is reversed is a presumption that a plaintiff would not enter a loss-making contract. As stated in *Amann Aviation*, "the placing of the onus of proof on a defendant in the manner described

amounts to the erection of a presumption that a party would not enter into a contract in which its costs were not recoverable" (at 15, *per* Mason CJ and Dawson J). At the very least, therefore, it can be taken that he would have been able to recover expenses reasonably incurred so as to put himself back in a nett zero position. As regards whether such a presumption is justified, Learned Hand CJ in *Albert & Son* suggests that it is because "it is often very hard to learn what the value of the performance would have been", and that it is "just … to put the peril of the answer upon that party who by his wrong has made the issue relevant to the rights of the other" (at 189). Elsewhere in *Amann Aviation*, Mason CJ and Dawson J suggest that the absence of such presumption "would be an invitation to the repudiation of contractual obligations" (at 10). I regard these comments as sound and an accurate representation of the law in Singapore.

121 When the character of "reliance damages" is spelt out in this way, it is clear why Teare J in *Omak* came to the firm conclusion that "reliance losses are a species of expectation losses" (see [112] above). Both measures of damages ask and answer the same basic question: Where would the plaintiff be had the contract been performed? The distinction between them is that they ask this question to slightly different ends, and of different sides of the dispute. The expectation measure asks the plaintiff, "if the contract had been performed, would you have profited, and if so, by how much", whilst the reliance measure asks the defendant, "if you had performed your part, on what basis do you say that the plaintiff would not even have been able to recoup his expenses".

122 Reliance damages are, as such, *not awarded on any basis distinct from ordinary expectation damages*. I emphasise this because it is easy to assume, erroneously, that the purpose of reliance damages is to restore the plaintiff to the position he would have been, had he not entered into or relied on the contract

at all. In fact, in *Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409 ("*Aero-Gate*"), Vinodh Coomaraswamy J remarked:

> 62 … ***[Reliance] damages protect the innocent party's reliance interest or, to put it another way, compensate it for its reliance loss***. By whatever name, this is the measure of damages which addresses the loss suffered by the innocent party due to his reliance on the counterparty's unfulfilled promise to perform his contractual obligations. ***It aims to restore the innocent party to the position he occupied before he entered the contract***: see *Halsbury's Laws of Singapore* vol 7 (LexisNexis, 2012 Reissue) at para 80.545, and see also the decision of Belinda Ang Saw Ean J in *Tan Chin Seng v Raffles Town Club Pte Ltd* [2005] 2 SLR(R) 302 at [27].
>
> [Emphasis added]

Based on my analysis above, I must respectfully apply a gloss to the learned judge's observation. Although the practical outcome of an award of reliance damages achieves what Coomaraswamy J suggests, the doctrinal basis by which it does so is the shifting of the burden of proof, not an underlying difference in the objective of the remedy.

123 Indeed, in *Tan Chin Seng*, though Belinda Ang J (as she was) suggested that "[t]he aim of damages in protecting the reliance interest is to put an innocent party in as good a position as he was in if no promise had been made", she immediately went on to say that "it is the breach of the contractual promise of a premier club that renders the defendant's conduct wrongful and not when the defendant induces the plaintiffs to enter into the contract" (at [27]).

124 Having set out the proper characterisation of "reliance damages" from the authorities, I now return to the point alluded to at [110] above, that there is a slight distinction between the protection of one's reliance ***interest*** and the application of the reliance ***measure*** of damages. I address this not as a separate matter, but as a conclusion to the foregoing discussion.

125 Given the substantial number of cases in which the courts have awarded reliance damages for breach of contract, Professor Beale's remark that "contract damages … do not protect the restitution interest or the reliance interest as such" (see [104] above), seems odd. However, in my view, what the learned Professor seems to have meant is that, even where damages are determined and awarded using the reliance measure, the plaintiff is still being compensated in connection with his *interest in (or expectation of) the defendant's performance* (see *Chitty* at para 29-024). This is consistent with the cases discussed above.

126 As such, a plaintiff's "reliance interest", confusingly, is not the juridical basis on which he is awarded "reliance damages". As explained, the true basis is his orthodox "expectation interest". Instead, the notion of "reliance" – or more specifically, "*reasonable* reliance" – is simply the filter through which the court determines which of the plaintiff's pleaded expenses were *properly* incurred in connection with the contract. Given the shift in the burden of proof, these are the expenses for which the defendant will be held liable unless he can prove the plaintiff's bad bargain; and if the plaintiff, like John Hammond, has a penchant for sparing no expense, it is of course not for the defendant to bear that which is unreasonable.

127 This may appear a fine distinction, but it is an important one. When one speaks of "reliance" as the underlying *interest* on which this type of damages is awarded, it risks confusion that object of the remedy is to put the plaintiff into the position he would have been *had he not relied*. As mentioned at [114] above, this inquiry is more accurately undertaken where the plaintiff's action is for misrepresentation, not breach of contract. The blending of contract and tortious measures of damages may be unavoidable in certain areas, but in the already-challenging area of private law remedies, where precision is possible, I would suggest that it should be preferred.

The alternative reliance measure: Problems and application

128 Having set out the conceptual basis of reliance damages, two questions arise in the present case. First, whether instead of granting the Plaintiff an award on the basis of her expectation of performance (which has not been proven), I can award her damages calculated on the basis of the expenditure she reasonably incurred in reliance of the Contracts. Second, if so, whether this award would be subject to the same objections set out at [105]–[107] above.

129 The first question is limited, though not straightforward. In the present case, the Plaintiff "elects" in her written closing submissions to pursue damages on the expectation measure.[128] In the face of this election, the question is whether I may nevertheless award her damages on the reliance measure.

130 Strong authority suggests that I may. The UKSC in *One Step* took the view that it is ultimately for the court to select the method of assessing damages most suitable for the facts before it (at [36]–[37] and [96], *per* Lord Reed), citing *Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson* 1914 SC (HL) 18, wherein Lord Shaw remarked, "[t]he restoration by way of compensation is … accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe" (at 29–30).

131 This is eminently sensible. Counsel will naturally submit that the court should accept the measure most advantageous to their client; but this may not be the most suitable, or, in this case, even workable on the available evidence. As Professor Beale suggests, "where it is clear that the claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence. The fact

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128 PWS at paras 361–365, particularly para 364(a).

that the amount of that loss cannot be precisely ascertained does not deprive the claimant of a remedy" (*Chitty* at para 29-019; affirmed by Lord Reed in *One Step* at [38]). I would agree with this. Indeed, it seems to abhor common sense to suggest that the court's ability to do justice to a plaintiff is hamstrung by an "election" made by or on the advice of counsel. This is especially so, when it is readily evident that the plaintiff has reasonably incurred expenditure in reliance of the breached contract.

132 However, that said, I would add that the court should not be too ready to re-characterise a claim for damages on the expectation measure, to one on the reliance measure. As discussed, assessing damages using this measure shifts the burden of proof from the plaintiff to the defendant. The bases on which this shift is justified are sound (see [120] above). However, even so, where the reliance measure is invoked late in the day, the shift creates an undesirable situation where the defendant is put in the position of having to prove something which he likely, at the beginning of trial, had put the plaintiff to proof of. Indeed, the Defendants in this case simply pleaded that the Plaintiff's losses are denied, and that she "is put to strict proof thereof".[129]

133 A similar issue arose in *Filobake Ltd v Rondo Ltd and another* [2005] EWCA Civ 563 ("*Filobake*"). The English Court of Appeal had to deal with an application made by the plaintiff to amend the particulars of its claim *during the appeal*. One proposed amendment was the insertion of a claim for "wasted expenditure" as an alternative to its original claim for lost profits. The plaintiff argued that this amendment would shift the burden of proof to the defendants to show that it would have been unable to recoup its expenditure. Such proof had not been furnished and so the plaintiff submitted that it was, *ipso facto*, entitled

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[129] SOC at para 25 read with Defence at para 62.

to reliance damages. Chadwick LJ, who delivered the judgment of the court, accepted that the burden of proof *would* shift. However, he went on:

> 62 … Filobake's attempt to deploy it here, by saying that the defendant had not essayed such proof, is forensically very unpromising. ***The defendant did not set about proving that issue at the trial because no-one told them that it had to. It is very unfair to try to place that burden on Rondo now, by amendment after the trial***. And, as we shall demonstrate when we address the substance of this application in paragraphs 66 and 67 below, on the facts as found by the judge that burden, even though not known of at the time, has in fact almost certainly been discharged by the defendant.
>
> 63 At best, therefore, this amended claim would have to go back for further hearing. When it did so, a series of problems would immediately present themselves.
>
> [Emphasis added]

134 I agree with the sentiment underlying Chadwick LJ's remarks. It is not satisfactory, procedurally, for a defendant not to know exactly what is expected of his defence. Yet, as Chadwick LJ goes on to observe, "there are formidable objections to running the two claims in the alternative, not the least being that, as we have seen, on the issue of the outturn of the contract the burden under a lost expenses claim rests with the defendant; whereas under a lost profits claim the claimant bears the burden of establishing his loss. That conjunction is at least potentially embarrassing for the defendant" (at [64]). This remark is *also* sound. It would be rather confusing – in a single trial – to hold the defendant to proof that the plaintiff "would not even have generated (x) in revenue" so as to recoup the expenses reasonably undertaken in reliance of the contract, whilst simultaneously holding the plaintiff to proof that it "would not only have generated (x) in revenue, it would have made ($x + y$)", with (y) representing the plaintiff's nett profits. Such a situation would make the fact-finding role of the court quite difficult.

135 Where then, does this leave us? On one hand, there are objections to allowing a plaintiff to hedge his bets at the outset of a suit. Yet, on the other, it is also undesirable, at the end of a trial, to allow that plaintiff to recover damages on a different basis which shifts the burden of proof. A possible solution might be to require plaintiffs to commit to a measure, and either succeed or fail by that measure. This would, however, effectively create a new rule requiring plaintiffs to specifically plead the measure of damages they intend to pursue. At present, there is no such rule (see *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at para 18/8), and without full arguments, I am not prepared to lay one down. Indeed, it would run counter to the observations I made at [130]–[131] above.

136 Accordingly, while I am cognisant of the tension raised by Chadwick LJ in *Filobake*, there is no general solution which I can appropriately offer, and I leave the matter to be resolved in another case. I would highlight, however, that there may not even be a need for a "general solution". After all, if the Plaintiff in *this* case had pleaded unjust enrichment and established her claim for the price paid on the ground that there was a total failure of basis, the foregoing and forthcoming discussions would probably have been unnecessary.

137 That said, I cannot go so far as to say that the difficulty raised in *Filobake* is of no general interest, and only arises in cases where a gap in the pleadings exists. This is because the prevailing – albeit open – position in Singapore is that, in order to establish a claim for unjust enrichment, the failure of basis must be *total* (see *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] 1 SLR 239 at [53]–[54]). It is thus possible, in cases where the defendant has rendered partial performance (though, see Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th Ed, 2016) at paras 12-16–12-32, where the authors discuss the ways in

which the requirement of *total* failure may be worked around), that the plaintiff may not have a claim in unjust enrichment, and is limited to his claim for breach of contract. In such cases, the plaintiff may well have to confront the tension in *Filobake* directly.

138 In any event, what I can suggest for the purposes of disposing of *this* case, however, is that it is not entirely novel for the court to determine the most suitable measure without much, if any, substantive assistance from counsel. For example, in *Aero-Gate*, Coomaraswamy J awarded reliance damages in respect of a pleaded claim which merely "assert[ed] that the sum of US$252,000 was recoverable 'being the deposit paid' *without more*" [emphasis added] (at [62]). This harks back to Professor Beale's statement (see [131] above) and, in my view, so long as the defendant is not prejudiced by the shift in the burden of proof, it is permissible to consider awarding reliance damages even where the plaintiff's claim is couched in the expectation measure.

139 On the present facts, I find that the Defendants would not be prejudiced. Even if the Defendants had been put on notice that they bear the burden of proof, it is highly unlikely they would have been able to discharge this burden. There are two key reasons which support of this conclusion.

140 First, had the Contracts been fully performed, the Plaintiff would have generated rental revenue from the Leaseback Agreements, totalling S$273,636. The main capital expense she needed to incur to earn such revenue is, of course, the purchase price of the Units. She also pleads and supports with evidence that, in order to receive title to the Units, she incurred ₱340,504.50 in connection with the incorporation of LK (Philippines).[130] Given the First Defendant's rather

130 PAEIC at para 141(c)(i)–(iii) read with SOC paras 13 and 25(b).

firm insistence that the Plaintiff use a Philippine company to receive title (see [63]–[67]), I find this was reasonably incurred. The Plaintiff also avers that she "incurred costs" of ₱12,000,000 in paid-up capital put into LK (Philippines).[131] I do not accept this. This company was set up as a nominee under the Plaintiff's control. Any capital placed into the company is still hers and realisable; it is not "wasted" expense in any sense.

141 Therefore, the total expenditure the Plaintiff incurred in reliance of the Contracts was the sum of S$1,468,895.69 and ₱340,504.50 (which I will denote "(*E*)" for "Expenditure"), and her *guaranteed* revenue of S$273,636 constitutes around 18.5% (using a rough conversion rate) of (*E*). This is significant because, if the Contracts had been performed, all the Plaintiff would have needed to do to get back to nett zero, would have been to sell the Units at 81.5% of (*E*). I am mindful that market value can vary, however, as we are concerned with property in the capital city of the Philippines (the Units are situated in Manila), it is not likely that their value would have dropped by a rather substantial 18.5%. I am also cognisant the Plaintiff would need to deal with fluctuations in the exchange rate, but even layered together, 18.5% is ample tolerance.

142 Second, ***in any event***, even if the Defendants could have shown a drop in market value, that does not alone show that the Plaintiff would not have been able to recoup her expenses. This is because, in the face of a weak market, the Plaintiff could have waited for an upswing, and in the meantime, continued leasing out the Units to generate revenue. It would have been difficult for the Defendants to prove that such an avenue of recoupment would not have been available had the Plaintiff been transferred unencumbered title to the Units. In fact, such a position would be contrary to the very premise of the Defendants'

131 PAEIC at para 141(c)(iv).

Business, and if they were to adopt such a stance, they would be giving grounds for the Plaintiff's misrepresentation claim to succeed.

143 For these reasons, I find it appropriate to assess the Plaintiff's claim for contract damages using the reliance measure, notwithstanding: (a) that she invoked the expectation measure; and (b) the difficulties identified by Chadwick LJ in *Filobake*. As regards (b), in particular, I reiterate that my finding on *these facts* is that the Defendants would not be prejudiced by my consideration of the Plaintiff's claim on the reliance measure. In another case, it may not have been appropriate to recast the assessment of damages in this way without calling for further evidence.

144 Therefore, although I find the Defendants liable to pay reliance damages *in this case* (the quantum of which is set out at [184] below), I do so whilst strongly urging counsel to take time, before the close of pleadings, to carefully parse through the components of their client's overall case. Alternative causes of action should be pleaded as fallbacks to weak, or at least uncertain aspects of the primary claim, and they should stand where the primary claim may fall. In this case, for example, the Plaintiff's action for misrepresentation not only turns on much of the same evidence on which she relies to prove the existence of the Alleged Buyback Term, such evidence is applied to fairly similar ends. Thus, in the event she fails to prove the latter, the former faces a high risk of failure on similar grounds. By contrast, an alternative claim in unjust enrichment would not run the same risk because its elements are analytically distinct.

145 This then brings me back to the second question I posed at [128] above. That is, whether my decision to award reliance damages can be objected to on the same two grounds that I declined to assume – to the benefit of the Plaintiff's

claim for expectation damages – that the market value of the Units is the sum she paid the Defendants.

146 Restated for present purposes, the two objections are as follows. First, reliance damages could equally result in the overcompensation of the Plaintiff because we still do not know the position in which the Plaintiff would have been had the Contracts been performed (see [107] above). Second, reliance damages also seem indirectly to protect the Plaintiff's restitution interest – rather than her expectation interest – and it also does so without requiring the establishment of a claim in unjust enrichment (see [108]). Indeed, by shifting the burden of proof, it may still appear that the underlying conceptual question as to which of the Plaintiff's interests are being protected is still coated by an evidential veneer, just of a different complexion.

147 Neither objection continues to hold because the law has developed in such a way as to justifiably shift the burden of proof to the defendants. As to the first objection, as stated at [118] above, once a claim is premised on the reliance measure, it is for the Defendants to prove overcompensation. Until proven, the uncertainty works to the favour of the Plaintiff and there is, as a finding of fact, no overcompensation. On the second objection, it will be seen from my detailed explanation of the juridical basis of reliance damages (see [111]–[127]), that reliance damages seek to protect the Plaintiff's interest in performance. The fact that it has a restitutive effect is not, in and of itself, an objection. Indeed, the only reason why I thought it objectionable in respect of the Plaintiff's claim for damages on the *expectation* measure, is that it entailed me making an evidential assumption without any legal basis. Once the claim is properly characterised as using the *reliance* measure, this concern falls away.

148 The more salient objection is the post-trial re-characterisation of a claim for expectation damages, to one for reliance damages. I have dealt with this on the facts of this case (at [132]–[143] above), and it was unfortunately required of me here because of gaps in the Plaintiff's pleaded case. I therefore reiterate my admonition at [144]. The role of counsel is to assist the court in delivering *justice* to the parties – justice, of course, is that *by law*. The law can be, and quite often is, a technical field. It is thus incumbent on counsel to ensure that the legal bases on which they advance their client's position are capable of bearing out their client's factual claim for justice.

149 I turn then, to the other remedy the Plaintiff seeks in respect of her claim for breach of contract, an account of profits.

Plaintiff's prayer for an account of profits

Authorities on which the Plaintiff relies

150 In connection with her claim for breach of *contract*, the Plaintiff prays for an account of profits (if any) made by the Defendants as a consequence of their misuse of the Purchase Price she paid to them.[132] For this, her counsel relies on *Teh Guek Ngor Engelin née Tan v Chia Ee Lin Evelyn* [2005] 2 SLR(R) 22 ("*Engelin Teh*") at [17], where the Court of Appeal referred to then-relatively recent decision of the House of Lords in *Attorney General v Blake* [2001] 1 AC 268 ("*AG v Blake*"). They submit that the facts of the present case constitute the "exceptional circumstances" necessary to justify the award of such a remedy.[133] Alternatively, they say that the Defendants were in a position closely akin to

132 SOC at "Claims", head 1(b) and (c) (see Set Down Bundle at p 64).

133 Plaintiff's Opening Statement at para 42; PWS at para 366.

that of a fiduciary, citing *Turf Club Auto* at [255] as the authority on which such individuals are liable to account.[134]

Discussion: Accounts of profit for breach of contract

151 First and foremost, I must emphasise that it has *not* been determined whether *AG v Blake* forms part of the Singapore law of contract (see *Turf Club Auto* at [250], [269] and [302]). The Court of Appeal in *Turf Club Auto* merely considered the Lords' decision *tentatively*, and ultimately did not rule on it given its finding that the facts of the case before it, in any event, would not attract the remedy upon application of the rather stringent guidelines and considerations proposed by the House of Lords. As such, its legal status as a remedy for breach of contract in Singapore, is uncertain.

152 I note that the Court of Appeal's earlier decision in *Engelin Teh*, which concerned the wrongful termination of legal consultancy contracts, stated the following after quoting key portions of Lord Nicholl's speech from *AG v Blake*:

> 18 We would prefer, therefore, not to extend the remedy of the taking of accounts into a case of wrongful termination generally. ***The only indication allowing an exception to be made here, was the unusual relationship between Evelyn Chia and the appellants***. Although the contract was referred to as a consultancy, Evelyn Chia had other duties and was entitled to a share of the profits. But this situation could, and therefore ought to, be analysed in the context of damages for breach. Counsel had also addressed us, in their written and oral submissions, on damages for breach of contract, rather than for an account of profits.
>
> [Emphasis added]

153 The emphasised text may give the impression that *AG v Blake* had been accepted. Indeed, in *Nanofilm Technologies International Pte Ltd v Semivac*

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134 PWS at para 367.

International Pte Ltd and others [2018] 5 SLR 956 ("*Nanofilm*"), George Wei J suggests at [211]: "… an account of profits (disgorgement of gains) may also be available in limited circumstances for breach of contractual obligations, as held by Choo Han Teck J for the Court of Appeal in *Engelin Teh*, citing *AG v Blake*". However, the decision in *Nanofilm* was handed down one week before that in *Turf Club Auto*, 26 July and 2 August 2018 respectively. Therefore, the remarks in *Engelin Teh* and *Nanofilm* must be read in the light of *Turf Club Auto*, which, in any event, was a far more comprehensive treatment of the issue, and for which *amicus curiae* had been appointed.

154 The Court of Appeal's mere reference to *AG v Blake* in *Engelin Teh*, therefore, should not have been so confidently read by counsel for the Plaintiff as accepting a fundamentally difficult and unique case into local jurisprudence. Indeed, in their submissions, they quite simply assert in the span of three short paragraphs that an account of profits should be awarded in this case.[135] No time or space is dedicated to demonstrating *why AG v Blake* should form part of the law in Singapore, particularly to remedy the wrong in *this* case.

155 Further, counsel should also not have read *Turf Club Auto* as making the suggestion that persons "akin to fiduciaries" are liable to account for profits (see *Turf Club Auto* at [255]). In this portion of its judgment, the Court of Appeal was musing the possible ways in which the award of an account of profits can be rationalised despite being an unorthodox remedy for breach of contract. This is quite evident when the passage is read fully:

> 255 Parenthetically, we observe that the remedy that the plaintiff obtained in *AG v Blake* was, in fact, labelled "an account of profits" (*per* Lord Nicholls at 284). However, an account of profits is quintessentially an equitable remedy that would typically follow from a breach of fiduciary duty.

[135] PWS at paras 366–368.

> Therefore, while the plaintiff's claim in *AG v Blake* was for breach of contract, it may be possible to rationalise the remedy on the basis that the undertaking by the defendant, though not a fiduciary obligation as such, "was closely akin to a fiduciary obligation" (*per* Lord Nicholls at 287). ***Again, this is only another possible rationalisation for the decision in AG v Blake***. …
>
> [Emphasis added]

156 By taking this passage as a basis on which an account of profits might be awarded, counsel for the Plaintiff got their analysis backwards. If one reads *AG v Blake*, it will be seen that Lord Nicholls first stated the considerations which should be taken into account in determining whether an account of profits ought to be awarded for a breach of contract (at 285–286):

> ***An account of profits will only be appropriate in exceptional circumstances***. … No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit.
>
> …
>
> Lord Woolf MR [1998] Ch 439, 457, 458, also suggested three facts which should not be a sufficient ground for departing from the normal basis on which damages are awarded: the fact that the breach was cynical and deliberate; the fact that the breach enabled the defendant to enter into a more profitable contract elsewhere; and the fact that by entering into a new and more profitable contract the defendant put it out of his power to perform his contract with the plaintiff. I agree that none of these facts would be, by itself, a good reason for ordering an account of profits.
>
> [Emphasis added]

157 He then went on to assess how these considerations applied to the facts before him. After stating in no uncertain terms that the facts were "exceptional"

(at 286), he then queried "what would be a just response to a breach of Blake's undertaking". It is in this context that Lord Nicholls suggested that Blake's undertaking, "[though] not a fiduciary obligation, was closely akin to a fiduciary obligation, where an account of profits is a standard remedy in the event of breach" (at 287). From the structure of this analysis, it can be seen that the core and operating premise which led Lord Nicholls to conclude that an account of profits was supportable, was the exceptional *factual* character of the case. Whether or not the facts also suggested that Blake was "akin to a fiduciary" was somewhat beside the point. Lord Nicholls was not suggesting that persons "akin to fiduciaries" *as a class of individuals* are accounting parties which may be rendered liable to account for profits. Put another way, his Lordship was not purporting to create a new head of persons liable to account, whether in equity or at law. Instead, he was saying that the exceptional facts of the case justified the award of an account of profits, and in any event, such an award is not entirely out of left field because Blake stood in a position quite close to that of an actual fiduciary, against whom the court would suffer no discomfort from ordering an account of profits for a breach of his fiduciary duties.

158 This coheres with the Court of Appeal's view in *Turf Club Auto*. After considering some ways in which departure from the compensatory principle in *AG v Blake* may be rationalised, the court remarked: "For now, it suffices for us to tentatively suggest that if *AG v Blake* damages are to be recognised, their availability should be confined to truly exceptional cases" (at [255]). This focus on the *factual* – as opposed to the taxonomical – justification for the remedy, if any, is indeed central to how almost all subsequent cases invited to apply *AG v Blake* have approached the issue: see, *eg*, *Esso Petroleum Co Ltd v Niad Ltd* [2001] EWHC 6 (Ch) ("*Esso v Niad*") at [56]–[64]; *Experience Hendrix LLC v PPX Enterprises Inc and another* [2003] 1 All ER (Comm) 830 at [36]–[44] (*per* Mance LJ) and [53]–[55] (*per* Peter Gibson LJ); *Vercoe v Rutland Fund*

Management Ltd [2010] EWHC 424 (Ch) at [341]; *Atlantic Lottery Corp Inc v Babstock* [2020] SCJ No 19 at [50]–[62], in particular [53] (*per* Brown J).

159 Seen in this light, whether or not we think that Blake was in a position akin to that of an actual fiduciary, is for the most part, *post hoc* rationalisation, and not in and of itself, sufficient anterior justification. It is the exceptional facts which justifies the remedy *at common law*, and without such facts the innocent party would need to point to a basis on which the court can assert its *equitable* jurisdiction to hold the defaulting party liable to account: *eg*, that the defaulting party was an *ad hoc* fiduciary (the *indicia* of which are discussed in *Tan Yok Koon v Tan Choo Suan* [2017] 1 SLR 654 at [190]–[194]); or where there has been a breach of equitable confidence (see *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 ("*The Spycatcher Case*")).

160 That being said, I do not mean that the *post hoc* rationalisation we choose to apply to *AG v Blake* is not meaningful. Far from it. The manner in which we rationalise the Lords' decision affects how narrowly or broadly the underlying search for "exceptional facts" is framed. As observed in *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150 (at [55]), Lord Nicholls does not really furnish concrete guidance as to when an account of profits for breach of contract should be awarded (also see [156] above). Given this lack of concrete guidance, the "primary difficulty" the court in *Turf Club Auto* saw with recognising *AG v Blake* as part of Singapore law, was the "uncertainty of legal criteria" to be applied (*Turf Club Auto* at [252]).

161 I agree with their observation. Such uncertainty is not only practically difficult to overcome in resolving individual cases, but also undesirable because it enables different judges and counsel to apply different lenses to the problem to different ends.

162 For example, the court in *Turf Club Auto* observed that an account of profits is "quintessentially an equitable remedy that would follow from a *breach of fiduciary duty*" [emphasis added] (at [255]). It bears noting that the remedy may also be awarded in cases involving passing off or other infringements of intellectual property rights, or as stated, where there is a breach of equitable confidence. Admittedly, the remedy is *most typically* seen in cases where a fiduciary relationship exists, and fiduciary duties are breached. This is because equity has, traditionally, left the least room for such individuals – reposed with trust, confidence and loyalty; and possessing the power to unilaterally alter their principals' legal positions – to benefit from their appointments, without the informed consent of their principals. This has been held to be the case even when the fiduciary acts in furtherance of his principal's interests, and where his own gain is merely by the by (see *Boardman v Phipps* [1967] 2 AC 46). Indeed, the connection between an account of profits and fiduciary status is so strong that some cases intuitively draw a connection between the two, even when it may not have been strictly necessary.

163 In *Forsyth-Grant v Allen and another* [2008] EWCA Civ 505 ("*Forsyth-Grant*"), whilst discussing whether an account of profits should be granted for the tort of nuisance, Toulson LJ begins by explaining why an account of profits is justifiably granted for a breach of fiduciary duty. He then goes on to say that:

> 43 *An account of profits may also be given where the parties are in a* ***quasi-fiduciary relationship, such as a relationship of confidence****. The Spycatcher Case* and [*AG v Blake*] are both cases where the wrongdoer abused his position of trust as a member of the security services by acting as a traitor, and thereby obtained a profit for which he was judged accountable to the state. In [*The Spycatcher Case*] there was no direct claim to account against the former agent, ***but his legal position formed a necessary part of the reasoning of the court in considering the liability of the newspapers against whom an account of profits was claimed****.*
>
> [Emphasis added]

164 Though I agree that the position of the former agent was important, the Lords in *The Spycatcher Case* were not concerned with his status as a "quasi-fiduciary" *per se*. The question they sought to answer was whether he acquired information in confidence, and consequently, whether the publishers did as well. This question can be answered without reference to one's status as a fiduciary or quasi-fiduciary. In fact, once it was determined that the information had the character of confidence, the Lords were clear that an account of profits was a remedy available to redress a breach of confidence, quite apart from any breach of fiduciary duty (see *The Spycatcher Case* at 262 *per* Lord Keith; 266 *per* Lord Brightman; and 286 *per* Lord Goff, especially Lord Goff's speech).

165 Toulson LJ's characterisation of a relationship of confidence as "quasi-fiduciary" is therefore, strictly speaking, unnecessary insofar as the availability of an account of profits is concerned. This then brings me back to the difficulty alluded to at [161], that different judges and counsel can apply different lenses in analysing when circumstances are "exceptional". If we rationalise *AG v Blake* as being justifiable on the basis that Blake was "akin to a fiduciary" – as Toulson LJ does, and counsel for the Plaintiff in this case seeks to do – the "exceptional" circumstances we look for, will naturally be filtered through the notions of trust, loyalty, honesty, good faith, and regard for the interests of the "principal". There will also be an element of deterrence, but predominantly directed at preserving the values of the fiduciary relationship rather than punishment.

166 By contrast, if we prefer a different rationalisation for *AG v Blake*, the considerations which would be relevant, and thus our analysis, would follow. In this regard, I note another potential rationalisation – one which is more broadly policy-focused – suggests that the remedy arises "where the law has a legitimate basis for punishing the defendant and/or deterring non-performance" (see *Turf*

Club Auto at [254]). This more open-textured rationalisation can be expected to give rise to less structured analyses.

167 Take for example, *Esso v Niad*, which *Chitty* cites as the only case to grant an account of profits in a commercial case (see para 29-072). Here, the parties entered into a contract by which the plaintiff, Esso, agreed to provide financial support to Niad, the defendant, in consideration for it keeping its petrol prices at a certain level. This agreement was entered pursuant to a larger scheme by Esso called "Pricewatch". By this scheme, Esso sought to maintain its prices at a competitive level. It did so by advertising its prices as "amongst the lowest", and entering into contracts with retailers such as Niad, who were obliged to provide daily reports of the prices being charged by competitors. Esso would then instruct them on the prices which they should charge. In exchange, the retailer would receive margin payments which depended on the prices in force. Esso provided the relevant financial support, but Niad repeatedly failed to abide by the prices set (see [2] and [29]–[30]).

168 Giving judgment for Esso for an account of profits, the Vice-Chancellor, Sir Andrew Morritt, reasoned as follows:

> 63 In my judgment the remedy of an account of profits should be available for breaches of contract such as these. First, damages is an inadequate remedy. It is almost impossible to attribute lost sales to a breach by one out of several hundred dealers who operated Pricewatch. Second, the obligation to implement and maintain the recommended pump prices was fundamental to Pricewatch. Failure to observe it gives the lie to the advertising campaign by which it was publicised and therefore undermines the effectiveness of Pricewatch in achieving the benefits intended for both Esso and all its dealers within Pricewatch. Third, complaint was made of Niad on four occasions. On all of them Niad appeared to comply without demur. It now appears that the breaches of its obligation were much more extensive than Esso at first thought. Fourth, ***Esso undoubtedly has a legitimate interest in preventing Niad from profiting from its breach of obligation***.

[Emphasis added]

169 This passage and the facts summarised above support my point that, if a more open-textured rationale is adopted for *AG v Blake*, different analyses set at different thresholds are bound to appear. Nothing about Niad's role *vis-à-vis* Esso's scheme suggests that it stood in a quasi-fiduciary position. Yet, the Vice-Chancellor found it appropriate to order an account of profits on the basis of other considerations such as the impossibility for Esso to prove damages; the fundamental nature of Niad's obligation to the functioning of the Pricewatch scheme; and Niad's repeated conduct, which could suggest that its breaches were "cynical and deliberate" (*AG v Blake* at 286).

170 Academic reception of this decision is tepid, though not particularly critical. *Chitty* does not seem to take issue with the outcome (see para 29-072), and merely remarks that "it is hard to gain much guidance from a class of cases that by definition are exceptional" (para 29-236). *McGregor* also does not seem to have an express objection to the decision (see paras 15-021–15-022), though the learned author does seem, impliedly, to think that the decision is likely to be overruled if reconsidered (see paras 15-027–15-028). *Trietel* suggests, though without arguing the point, that Morritt VC could and possibly should have made an award for *Wrotham Park* (or "negotiating") damages instead (see para 20-013). *Kramer* highlights the difficulty in quantifying damages on the facts of the case (see para 23-22) and emphasises that *AG v Blake* and *Esso v Niad* "have not been followed by a flurry of awards of accounts of profits in contract cases" and that an account of profits remains a "very exceptional remedy" (para 23-26). Finally, *Tettenborn*, like *Kramer*, picks up on the unique difficulty of proving damages on the facts despite Esso's clear interest in Niad's performance (see paras 19.45–19-46), though it is more generally remarked that the decision is "troublesome" (para 19.41).

171 On the whole, *even if* a more open-textured rationalisation of *AG v Blake* is adopted in favour of the Plaintiff's position (which I am not saying should be, assuming that the remedy is eventually accepted into Singapore law), the tenor of these observations nevertheless shows that *Esso v Niad* is not strong authority on which an account of profits should be awarded in a commercial case. Indeed, as the views expressed in *Trietel*, *Kramer*, and *Tettenborn* seem to suggest, the ordinary compensatory remedies should at least be unavailable before a gain-based remedy is even considered. As the damages the Plaintiff has suffered can plainly be quantified, this certainly cannot be said of the present case.

172 I therefore *firmly* dismiss the Plaintiff's prayer for an account of profits. In fact, I take this opportunity to state, for the purposes of Singapore law, that it took the fascinating and exceptional circumstances of *AG v Blake* for the House of Lords to accept that an account of profits could be granted for the breach of an undertaking. Alternative arguments by which the same outcome could have been reached were, by pure circumstance, unavailable on the facts. Indeed, had there been another, more usual way for the House of Lords to reach their ultimate decision, I venture to suggest that it is unlikely that they would have taken it upon themselves to depart from orthodoxy. Put simply, if ever we are to accept this remedy in Singapore, it must be for – as the House of Lords had – the *right and necessary* case. The present one before me is *not* such a case, and it behoves counsel to consider with slightly greater circumspection whether the case they intend to advance *might* be one.

Second Defendant's contractual liability

173 At trial, the Second Defendant took issue with the fact that the Plaintiff had sued both her and the First Defendant *in the High Court*.[136] It is not entirely clear what her precise objection is, but from what I can gather, it stems from the fact that she was not present at the November 2019 Meeting, and thus, could not have been a party to a buyback agreement, had one been formed at this meeting.[137] On this basis, she says, the dispute between her and the Plaintiff only concerns "a few months' worth of rental".[138]

174 I can understand the Second Defendant's submission. Indeed, had I found that a buyback agreement arose out of the November 2019 Meeting between the Plaintiff and the *First* Defendant and awarded the Plaintiff a remedy on that basis, her submission may have had some weight. However, I have found that the Defendants are liable under the Contracts as originally entered (to which both Defendants are signatories). It therefore does not appear that these arguments lead anywhere.

Plaintiff's claim for misrepresentation

175 The Plaintiff's claim for fraudulent misrepresentation can be dealt with briefly. As a starting point, I refer to the elements which she needs to establish. These have recently been restated in *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 ("*Broadley*"):

> 26 The elements of fraudulent misrepresentation are: (a) there must be a representation of fact by words or conduct; (b) the representation must be made with the intention that it should be acted on by the plaintiff; (c) the plaintiff had acted

136 NEs 20 Aug 2021 at p 44 line 1 – p 45 line 8.

137 Also see DWS at paras 2.16 and 2.19.

138 NEs 20 Aug 2021 at p 45 lines 4–5.

> upon the false statement; (d) the plaintiff suffered damage by so doing; and (e) the representation must be made with the knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true: see *Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435 at [14].

176 Having considered the Plaintiff's allegations and the evidence before me, I find that elements (c) and (e) have not been satisfied. In fact, in my view, much more is required in respect of element (e). A finding of fraud requires, necessarily, dishonesty. Even if the Defendants' representations were untruths, this does not alone import such a finding.

177 I turn then to the representations. As stated at [15] above, the Plaintiff's claim is premised on *numerous* representations allegedly made at the parties' meeting on 29 November 2016. Summarily, they were as follows.[139] First, that the Philippines is a good destination for real estate investment ("representation (a)"). Second, that the Defendants invested in properties in Manila and operated the Business ("representation (b)"). Third, that the First Defendant was responsible for the financial growth of the Business, that his son and the Second Defendant were in-charge of daily operations, and that they intended to take the Business public in three to five years' time ("representation (c)"). Fourth, that the Defendants had purchased 30 units in various condominium developments including Venice Luxury Residences and Fort Victoria ("representation (d)"). Fifth, that the Defendants were looking for investors to purchase units from them, and that they would, thereafter, lease back those units for a period of time before buying them back ("representation (e)"). Sixth, that the purchase price of units purchased would also cover the cost of renovating and outfitting those units to be used in the Business ("representation (f)"). Seventh, that, upon full payment of the purchase price for *the Units*, the Defendants would transfer title

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139 SOC at para 4, read with para 28; PWS at paras 50–95.

to the Plaintiff ("representation (g)"). Eighth, that the Defendants would lease the units for three years at a rate of around 6–7% interest on the purchase price ("representation (h)"). Ninth, that, upon the expiry of the leaseback period, if the market price of the units purchased had fallen, that the Defendants would buy them back from her at the principal purchase price paid, but if their market price had gone up, that they would permit her to sell the units on the open market ("representation (i)"). Tenth, that the Defendants were offering the opportunity to obtain higher interest payments than banks, with a guaranteed return of capital ("representation (j)").

178 Curiously, the Plaintiff also pleads – in relation to her misrepresentation claim – that the Defendants made other representations from 2018 to 2019.[140] However, even if these representations are proven, they were made after the Contracts were entered on 30 May 2017, and are thus plainly irrelevant. I will therefore only consider her claim on the basis of the ten alleged representations set out in the paragraph above, and on these, I make three findings.

179 First, it does not appear to me that the Plaintiff acted upon each and every one of these representations. On her case, it seems that the key and operative representation was the *Buyback Representation* (encompassed in representations (e), (i) and (j) above). However, as explained at [24]–[35], the Plaintiff did not satisfactorily prove that such representation was actually made. Absent the Buyback Representation, I am not convinced that the others alone would have caused the Plaintiff to enter into the Contracts.

180 Second, even if the Buyback Representation had been made at the meeting on 29 November 2016, as explained at [32]–[35], I am not convinced

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140 SOC at paras 19(d)–(g), read with para 28.

that it induced the Plaintiff to enter the Contracts on 30 May 2017. In this regard, it is worth quoting observations made by the Court of Appeal in *Broadley*:

> 36 … It is still the law that representees are not obliged to test the accuracy of the representations made to them, and it does not matter if they had the opportunity to discover the truth as long as they did not actually discover it (*Peekay* at [40]). ***But where the true position appears clearly from the terms of the very contract which the plaintiff says it was induced to enter into by the misrepresentation (Peekay at [43]), the position is quite different. After all, it is a corollary of the basic principle of contract law that a person is bound by the terms of the contract he signs, notwithstanding that he may be unaware of its precise legal effect. Such a claimant should be taken to have actually read the contract and known the falsity of the earlier representation***. To hold otherwise would undercut the basis of the conduct of commercial life – that businessmen with equal bargaining power would read their contracts and defend their own interests before entering into contractual obligations, and that they would rely on their counterparties to do the same.
>
> [Emphasis added]

181 Lastly, the Plaintiff has not, in any case, adduced adequate evidence of falsity of the other seven representations, much less to prove that the Defendants made these statements fraudulently. First, as regards representation (a), there is no evidence which might allow me to conclude that the Philippines is *not* a good destination for real estate investment. Second, there is also a paucity of evidence in respect of the falsity of representations (b), (c) and (d). Third, although the Defendants did not transfer title to the Units or complete rental payments for the full three years of the Leaseback Agreements, contrary to representations (g) and (h), there is also no evidence that these representations were false. In this regard, I emphasise that there is a distinction between a misrepresentation made to induce a plaintiff to enter into a contract, and a representation which becomes a term of the parties' contract that is later breached. The fact of the latter does not *ipso facto* suggest misrepresentation. More specific evidence demonstrating each of the elements quoted at [175] above, is required.

182 I therefore find, for want of proof, that the Plaintiff's claim for fraudulent misrepresentation fails.

Conclusion and orders

183 For the foregoing reasons, I allow in part, the Plaintiff's claim for breach of contract and dismiss her claim for fraudulent misrepresentation. My orders are as follows.

184 First, the Defendants are to pay the Plaintiff the sum representing the total of S$1,468,895.69 and ₱340,504.50 (denoted (*E*) at [141] above), *less* sums which the Plaintiff has already received in leaseback rental payments (*ie*, S$202,727: cross-reference [77]). Put simply, the Defendants owe a total of S$1,468,895.69 + ₱340,504.50 – S$202,727, but given the different currencies, I will denote this sum "(*P*)".

185 Second, the sum of ₱340,504.50 shall be converted to Singapore dollars on the date which execution is authorised (*Miliangos v George Frank (Textiles)* [1976] AC 443; applied in *Indo Commercial Society (Pte) Ltd v Ebrahim* [1992] SLR(R) 667). After the conversion, the Plaintiff may enforce payment for the full sum, *ie*, (*P*), in Singapore dollars.

186 Third, the Defendants shall pay interest at the rate of 5.33% as provided for by para 77(9) of the Practice Directions on (*P*), and interest shall run from 1 October 2019 to the date of full payment. I have two reasons for selecting this date. One, I found that the repudiatory breach which the Defendants committed, was their failure to transfer legal title to the Units to the Plaintiff despite having received full payment of the purchase price as well as her instructions for title to be transferred by ***25 August 2018*** (see [95]–[98] above). By 1 October 2019, the Plaintiff's cause of action arose would have arisen, and thus interest can be

awarded from this point: see s 12(1) of the Civil Law Act (Cap 43, 1999 Rev Ed). Two, the last leaseback rental payment which the Plaintiff received was in September 2019. Therefore, since October 2019, the Plaintiff has been deprived of the time-value of her money. As such, an order of interest from this date is necessary to ensure she is adequately compensated.

187 I will hear parties on costs.

Lee Seiu Kin
Judge of the High Court

Winston Kwek and Li Kun Hang
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Defendants in-person.