IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 48

Court of Appeal / Civil Appeal No 5 of 2024

Between

(1) Li Jialin
(2) Li Suinan

… *Appellants*

And

Wingcrown Investment Pte Ltd

… *Respondent*

In the matter of Originating Application No 423 of 2023

Between

(1) Li Jialin
(2) Li Suinan

… *Claimants*

And

Wingcrown Investment Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Contract — Remedies — Deposits]
[Contract — Remedies — Liquidated damages — Penalties]

TABLE OF CONTENTS

Li Jialin and another
v
Wingcrown Investment Pte Ltd

[2024] SGCA 48

Court of Appeal — Civil Appeal No 5 of 2024
Sundaresh Menon CJ, Tay Yong Kwang JCA and Steven Chong JCA
15 August 2024

6 November 2024

Steven Chong JCA (delivering the grounds of decision of the court):

Introduction

1 This is a case about a property developer, the respondent, who initially purported to forfeit a deposit which constituted about 63% of the purchase price upon the non-completion of a contract for the sale and purchase of an apartment by the appellants. In response to a letter of demand for the return of the entire deposit, the respondent changed its initial position and decided to forfeit a reduced sum amounting to 20% of the purchase price and to withhold a further sum for damages for breach of the agreement. The balance amount was refunded to the appellants some five years after the initial forfeiture.

2 In a situation where a party has purported to forfeit a deposit, the essential question before the court is whether that deposit can or cannot be forfeited and not whether that party is entitled to forfeit any part of the deposit.

The High Court judge below (the "Judge") was persuaded, *inter alia*, that the reference to the right of the respondent to "forfeit and keep any deposit paid by the [appellants]" under Condition 15.9(c)(i) of the Law Society of Singapore's Conditions of Sale 2012 (the "Conditions of Sale 2012") entitled the respondent to forfeit a part of the deposit amounting to 20% of the purchase price. The effect of the Judge's decision necessarily implied that the respondent had the discretion to decide on the amount of the deposit to be forfeited and consequently, the reasonableness of the deposit was to be assessed at the time of forfeiture and not at the time of contracting.

3 With respect to the Judge, we disagreed with his views on both scores and allowed the appeal following the oral hearing on 15 August 2024. In our view, in the context of a deposit which is subject to the right of forfeiture, implied or express, there is no room for the court to permit the forfeiture of a part of an unreasonable deposit because the reasonableness of the deposit must be assessed at the time of contracting and not at the time of the purported forfeiture. If it is not reasonable at the time of contracting, it is not a true deposit and therefore not subject to forfeiture. It does not become reasonable retrospectively by the relevant party purporting to forfeit a reduced sum. In short, the question is not how much one can forfeit, but whether one can forfeit at all.

4 In arriving at our decision, we were greatly assisted by the extremely helpful submissions of the independent counsel, Professor Yeo Tiong Min SC (honoris causa) ("Prof Yeo") of the Yong Pung How School of Law, Singapore Management University. His survey and perspective of this area of the law enabled us to identify and focus on the key issues and we take this opportunity to restate the principles of law governing deposits.

5 These are our detailed grounds.

The material background facts

6 The events leading up to the present dispute began in 2015, when the appellants first became interested to purchase an apartment unit in The Crest (the "Property"), a housing project then under development by the respondent. On 5 December 2015, the respondent issued to the appellants an option to purchase the Property (the "First Option to Purchase") in the form prescribed under the Housing Developers Rules ("HDR"). The purchase price was set at $1,785,000. The appellants exercised the option and entered into a sale and purchase agreement with the respondent (the "First Sale and Purchase Agreement"), also in the form prescribed under the HDR.

7 Pursuant to the terms of the First Sale and Purchase Agreement, the purchase price was to be paid in instalments according to a payment schedule, with each instalment becoming due upon the completion of stipulated milestones in the housing project. If the appellants failed to pay any instalment or amount of the purchase price (and any interest on such sum) for more than 14 days after the relevant due date, the respondent would be entitled to give 21 days' notice of its intention to treat the agreement as repudiated, and upon the expiry of such period, the agreement would be treated as "annulled". Upon such annulment, the respondent would then have the right, *inter alia*, to recover from the instalments and amounts previously paid various items of interest, taxes and expenses, and to forfeit 20% of the purchase price. Notwithstanding the use of the word "annulment", it is well established that this clause confers upon the developer a right of termination (see *Lim Lay Bee and another v Allgreen Properties Ltd* [1998] 3 SLR(R) 1028 at [14]).

8 The appellants began to default on their instalments from September 2016, after having paid a total of $1,217,550 to the respondent, leading the respondent to terminate the First Sale and Purchase Agreement in accordance with the contractual procedure. The respondent issued a notice purporting to deduct a sum of $379,195.58 from the instalments paid, consisting of $22,195.58 in interest, taxes and other expenses, and $357,000 representing 20% of the purchase price to be forfeited. The balance of $838,354.42 (the "Refund Amount") would be returned to the appellants.

9 The appellants, however, remained interested in purchasing the Property and entered into further negotiations with the respondent. Following these negotiations, the parties agreed to a second option to purchase (the "Second Option to Purchase"). The preamble of the Second Option to Purchase recorded the failed first attempt to purchase the Property, and set out the following terms of the new purchase:

(a) The respondent would issue the appellants a fresh option (*ie*, the Second Option to Purchase) to purchase the Property at the price of $1,900,000.

(b) Out of the sum of $379,195.58 forfeited or deducted as a result of the first attempt to purchase the Property, the respondent would not forfeit the sum of $357,000. Instead, that sum would be credited as the option fee payable under the Second Option to Purchase (the "Option Fee").

(c) Notwithstanding the terms of the First Sale and Purchase Agreement, the Refund Amount would not be refunded to the appellants but would instead be transferred and credited towards the deposit

payable under the Second Option to Purchase, in the event that this option was exercised by the appellants.

(d) Upon the appellants' exercise of the option, there would be a binding contract for the sale and purchase of the Property on further "Terms of Sale" set out in the Second Option to Purchase.

10 Thus, notwithstanding that this second transaction consisted only of one written document, *ie*, the Second Option to Purchase, it was clear that the transaction consisted of two contracts – the option and, upon exercise, the sale and purchase contract which was to be governed by the Terms of Sale. In essence, the present dispute was concerned with the latter.

11 We highlight only two aspects of the Terms of Sale which were relevant to the dispute. First, the terms expressly defined "Deposit" to mean the sum of $1,195,354.42, which would form part of the purchase price. This sum essentially comprised the Refund Amount and the Option Fee, and amounted to almost 63% of the purchase price of $1,900,000. The respondents did not dispute that this substantially exceeded the usual deposit for a conveyancing transaction. We return to this point below.

12 Second, the Conditions of Sale 2012 were incorporated into the agreement. These are widely used standard terms in the conveyancing of residential properties in Singapore. Condition 15 of the Conditions of Sale 2012 provides generally that a party may serve a "Notice to Complete" where the other party fails to complete the sale on the scheduled completion date. Upon such service, the parties must complete the sale within 21 days after the day of service. Materially, Condition 15.9(c)(i) provides that if the purchaser does not

comply with the terms of any effective Notice to Complete, the vendor may "forfeit and keep any deposit paid by the [p]urchaser".

13 The Second Option to Purchase was exercised by the appellants on 30 April 2018. However, the appellants failed to complete the sale notwithstanding multiple extensions. On 24 October 2018, the respondent served the appellants with a Notice to Complete, in accordance with Condition 15 of the Conditions of Sale 2012. The appellants did not complete before the expiry of the notice period. As such, the respondent gave notice on 20 November 2018 that the sale had been terminated, and asserting its entitlement to forfeit the stipulated deposit of $1,195,354.42:

> We note that your client has failed to complete the sale and purchase of the Property before the expiry of the said notice. In the premises, the Option to Purchase dated 17 April 2018 (the 'Option') in respect of the Property has been terminated and *our clients are entitled to exercise all their rights under Condition 15 of the Conditions (as defined in the Option), including but not limited to the forfeiture of the Deposit (as defined in the Option) i.e. S$1,195,354.42*. [emphasis added]

14 The appellants' solicitors subsequently wrote to the respondent on 1 March 2019 to request a refund of the full deposit. The respondent rejected this request in no uncertain terms through a letter from its solicitors on 29 April 2019:

> After careful consideration, our clients regret that they are unable to accede to your clients' request for the Deposit (as defined in the Option to Purchase dated 17 April 2018 ('Option')) to be returned to your clients.
>
> All our clients' rights are strictly reserved against your clients, including but not limited to our clients' rights under Conditions 15.9 and 15.10 of the Conditions (as defined in the Option).

15 The appellants' solicitors made a further appeal to the respondent but received the same response on 4 June 2019.

16 The respondent eventually resold the Property to another purchaser on 14 April 2021.

17 There were no further developments until 21 March 2023, when the appellants' solicitors issued a letter of demand to the respondent claiming repayment of the entire deposit of $1,195,354.42 with interest. The respondent replied through its solicitors on 10 April 2023. In its reply, the respondent changed its initial stance and purported to exercise its right to forfeit $380,000, representing 20% of the purchase price of $1,900,000. The respondent took the position that it was entitled to a further $326,397.38 as expenses incurred in relation to both abortive attempts to purchase the Property. The balance of $488,957.04 would be returned to the appellants. This balance sum was paid to the appellants on 19 April 2023.

18 Nevertheless, the appellants remained of the view that they were entitled to the full deposit. As such, the appellants commenced the originating application below, seeking declarations that the deposit of $1,195,354.42 was not a true deposit and amounted to an unenforceable penalty, and claiming a refund of the entire sum with interest.

The decision below

19 In the proceedings below, both parties agreed, and the Judge accepted, that the framework in *Hon Chin Kong v Yip Fook Mun and another* [2018] 3 SLR 534 ("*Hon Chin Kong*") was applicable to determine whether the deposit could be forfeited. At the heart of this framework – which we will elaborate in detail below – is the principle that for a sum to be a true deposit, it must be reasonable as an earnest. We refer to this as the "True Deposit Test".

Notwithstanding their agreement on the applicable test, the parties did not agree on which sum of money the True Deposit Test should be applied to.

20 The Judge accepted the respondent's position that the True Deposit Test should be applied only to the sum which was actually forfeited (*ie*, $380,000) as opposed to the contractually stipulated deposit of $1,195,354.42. This was because Condition 15.9(c)(i) was worded broadly enough to confer upon the respondent a discretion to forfeit a lesser part of any contractually stipulated deposit. On this basis, the Judge found that the sum of $380,000 was reasonable as an earnest and therefore a true deposit, the forfeiture of which was not subject to the penalty rule under the *Hon Chin Kong* framework.

21 The Judge also held that the respondent was entitled to an equitable set-off of its fees and expenses incurred in relation to the abortive transaction and directed that these claims be determined at an assessment of damages before an Assistant Registrar. The respondent was permitted to retain the further sum of $326,243.07 pending the conclusion of this assessment.

22 Finally, the Judge held that interest was payable on the sum of $488,957.04 for the period of 2 March 2019 to 18 April 2023, as well as for any sum determined to be payable to the appellants after the set-off for the period of 2 March 2019 to the date of payment. The Judge reserved decision on the applicable rate of interest to the Assistant Registrar having conduct of the assessment of damages.

The parties' submissions

23 Before us, the appellant submitted that the Judge had erred in applying the True Deposit Test to the forfeited sum of $380,000, instead of the contractually stipulated deposit of $1,195,354.42. The appellant argued that on

the plain words of Condition 15.9(c)(i), the respondent was entitled to forfeit "any deposit" paid. This did not mean "any part of the deposit". In essence, the only sum the respondent was entitled to forfeit as a matter of contract was the full deposit of $1,195,354.42 as defined in the Terms of Sale, and not any lesser sum. Applying the True Deposit Test to the full deposit, it was clear that the sum was not a true deposit, and was therefore subject to the penalty rule. Consequently, the appellants argued that the sum was not a genuine pre-estimate of the respondent's loss, and as such was an unenforceable penalty.

24 The appellants further disputed the Judge's finding that the respondent would in any event be entitled to the Option Fee of $357,000 as consideration for the grant of the Second Option to Purchase. The appellants argued that the Judge was procedurally barred from making this finding because the respondent had not asserted its entitlement to the Option Fee on this basis before the Judge. In this respect, the appellants relied on the principle stated by this court in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*V Nithia*") that parties are bound by their pleadings and that the court is precluded from deciding on a matter that the parties themselves have not put into issue. On the substance of the issue, the appellants argued that the Option Fee had "merged" into and become a non-severable part of the contractually stipulated deposit. It appeared that the upshot of this argument was that if the respondent could not retain the full deposit, it could not separately be entitled to the Option Fee.

25 Lastly, the appellants submitted that the Judge was wrong to reserve the decision on the applicable rate of interest to the Assistant Registrar having conduct of the assessment of damages.

26 The respondent submitted that the Judge's interpretation of Condition 15.9(c)(i) should be affirmed, to the effect that it was a "discretionary forfeiture clause" which conferred on the respondent a discretion to decide whether and when to exercise its right of forfeiture, as well as the quantum of the deposit to be forfeited. The respondent contended that in the case of a discretionary forfeiture clause such as this, the True Deposit Test under the *Hon Chin Kong* framework should be applied only at the time the discretion to forfeit is exercised, and only to the quantum of the forfeiture so fixed. To this end, the respondent argued that the Judge was correct to apply the True Deposit Test to the sum of $380,000 which was ultimately forfeited, and that the respondent had exercised its discretion reasonably in deciding to forfeit this amount, such that it was a reasonable deposit and thus excluded from the penalty rule.

27 The respondent raised a further argument that, in the event the quantum forfeited was found to be unreasonable, the doctrine of equitable relief should apply. Under this doctrine, the court was not bound to only allow or deny the forfeiture amount in full, but could grant relief against forfeiture only for the excess portion of the forfeiture amount that would be unconscionable, allowing the vendor to retain a smaller part of the sum.

28 In any event, the respondent contended that it was entitled to the Option Fee as consideration for the grant of the Second Option to Purchase.

29 Finally, the respondent submitted that it was within the Judge's discretion to decide that the applicable rate of interest should be determined at the assessment of damages hearing.

The appointment of the independent counsel and his views

30 While the crux of the present dispute was the proper application of the True Deposit Test, this was also a fitting occasion for this court to revisit the *Hon Chin Kong* framework. In our view, it was important to do so given the importance of deposits, which extended beyond the conveyancing context we were concerned with. For that reason, we invited Prof Yeo to act as the independent counsel for the appeal. We were greatly assisted by Prof Yeo's views on the matter.

31 Prof Yeo's assistance was sought on the following three questions:

(a) Should the True Deposit Test in *Hon Chin Kong* be affirmed?

(b) Where a contract stipulates for a sum of money to be forfeitable as a deposit, and the party to whom that sum is paid later purports to forfeit a lesser sum, which sum should be the reference point for the court to apply the True Deposit Test set out in *Hon Chin Kong*? In other words, is the True Deposit Test applied at the time of contracting or at the time the party purports to exercise its right of forfeiture?

(c) Where the sum identified is found not to be a true deposit, can the court nonetheless order that some lesser part of the sum would constitute a true deposit and is therefore forfeitable without being subject to the penalty rule?

32 Prof Yeo's views on each question, in summary, were as follows:

(a) The *Hon Chin Kong* framework should be affirmed with some modifications. Deposits were historically justified as serving an earnest function at the formation of the contract, which implied the deterrence

of breach being a legitimate interest of the non-defaulting party. Although the notion of a legitimate interest in contractual performance was rejected in favour of the compensatory principle in *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2021] 1 SLR 631 ("*Denka*"), the historical earnest function of a deposit should continue to be recognised in a limited fashion because of the useful private and economic functions which deposits serve. Pursuant to this, deposits should be regulated differently from other contractual remedies to which the penalty rule would apply. We explore Prof Yeo's proposals for modification in greater detail below.

(b) The True Deposit Test should be applied at the time of contracting, in line with the common law approach, and not at the time a party purports to exercise its right of forfeiture.

(c) If a sum is found not to be a true deposit, the court cannot order that some lesser part of the sum would constitute a true deposit and is therefore forfeitable without being subject to the penalty rule. This is also in line with the regulatory approach of the common law, which focuses on the validity of the parties' agreement.

The issues

33 Based on the submissions of the parties and Prof Yeo, the following issues arose for our determination:

(a) Did Condition 15.9(c)(i) entitle the respondent to forfeit a reduced sum of the deposit?

(b) Should the framework established in *Hon Chin Kong* be affirmed with or without revisions?

(c) If there was no right to forfeit the deposit, was the respondent entitled to set-off any claim against that deposit?

(d) In the event that any part of the deposit is ordered to be returned to the appellants, at what rate and from which period should the interest be calculated?

Our decision

The development of the law of deposits and penalties

34 Before unpacking the issue as to whether the respondent was entitled to forfeit the reduced sum of $380,000 from the deposit, it is useful in our view to understand the historical development of the law of deposits and the law of penalties. This understanding will also be useful in our examination of the *Hon Chin Kong* framework and the question of whether it should be affirmed with or without revisions.

35 The law of deposits and the law of penalties are of different lineages and have for much of history remained separate. In *Denka*, this court had previously discussed the historical development of the law on penalties. To briefly summarise, the penalty rule was an invention of equity, created to grant relief from the strict enforcement of penal bonds. The common law came to adopt the penalty rule around the 18th century, and it was the common law courts that developed it into the rule as it is known today – one which operates in the realm of remedies, and which prevents the imposition of a payment disproportionate to the amount of loss suffered upon a breach of contract (*Denka* at [74]–[77]).

36 The law of deposits is ancient by comparison – older than the law of penalties, and older than even the common law itself. The deposit can be traced back to the laws of ancient Greece, where a buyer in a contract of sale was required to hand over an *arrha* (or earnest) to the seller. The *arrha* would typically take the form of a ring or a sum of money. Both buyer and seller were bound by this: if the buyer failed to pay the purchase price, the *arrha* would be forfeited to the seller; conversely, if the seller defaulted on his obligation, he would have to return the *arrha* and pay *as much* in addition. In this form, the *arrha* was incorporated into the laws of Rome (see Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Clarendon Press, 1996) at 230–234). These principles continue to exist in this form in some civil law jurisdictions today (see, for example, Art 1590 of the French *Code Civil* and Art 1385 of the Italian *Codice Civile*).

37 The law of deposits found its way from Roman law into English common law, as observed in the classic case of *Howe v Smith* (1884) 27 Ch D 89 ("*Howe*"). Although the liability of the vendor to return to the purchaser twice the amount of the deposit had been abandoned by then, what remained was the *earnest* function of the deposit. As observed by Fry LJ, a deposit "is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract" (*Howe* at 101–102). That became firmly part of Singapore law with the case of *Mayson v Clouet* [1924] AC 980, a decision of the Privy Council on appeal from the Supreme Court of the Straits Settlements in Singapore.

38 Further developments in the law of deposits were made in subsequent decisions of the Privy Council, and it was in these decisions that the paths of deposits and penalties crossed. In *Linggi Plantations Ltd v Jagatheesan*

[1972] 1 MLJ 89, a case on appeal from Malaysia, the Privy Council had occasion to consider whether s 75 of the Contracts (Malay States) Ordinance 1950 (which was a statutory enactment of the penalty rule), was applicable to a clause providing for the forfeiture of a deposit. The Privy Council maintained the distinction between the law of deposits and the law of penalties, holding that the penalty rule was inapplicable. However, the Privy Council also established the requirement that a deposit must be *reasonable*, and in doing so, began to introduce the language of penalties into the law of deposits, albeit to make the point that a reasonable deposit would not be regarded as a penalty:

> It is also no doubt possible that in a particular contract the parties may use language normally appropriate to deposits properly so-called and even to forfeiture which turn out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition of a penalty, by purporting to render forfeit something which is in truth part payment. This no doubt explains why in some cases the irrecoverable nature of a deposit is qualified by the insertion of the adjective 'reasonable' before the noun. But the truth is that a reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage.

39 In *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] 2 WLR 702 ("*Workers Trust*"), a case on appeal from Jamaica, the Privy Council was concerned with the validity of a forfeiture clause in a contract for the sale of land which entitled the vendor to forfeit a deposit amounting to 25% of the purchase price upon the purchaser's failure to complete. The court at first instance rejected the purchaser's claim for relief from forfeiture of the deposit, but the Jamaican Court of Appeal granted relief from forfeiture to the extent that the deposit exceeded 10% of the purchase price. The matter came before the Privy Council. Lord Browne-Wilkinson, delivering the judgment of the court, appeared to meld the rationale for deposits and penalties, framing the

former as an exception to the latter and making the proposition that an unreasonable deposit was a penalty (*Workers Trust* at 705–706):

> In general, a contractual provision which requires one party in the event of his breach of the contract to pay or forfeit a sum of money to the other party is unlawful as being a penalty, unless such provision can be justified as being a payment of liquidated damages being a genuine pre-estimate of the loss which the innocent party will incur by reason of the breach. *One exception to this general rule is the provision for the payment of a deposit by the purchaser on a contract for the sale of land.* Ancient law has established that the forfeiture of such a deposit (customarily 10 per cent. of the contract price) does not fall within the general rule and can be validly forfeited even though the amount of the deposit bears no reference to the anticipated loss to the vendor flowing from the breach of contract.
>
> …
>
> … Even in the absence of express contractual provision, it is an earnest for the performance of the contract: in the event of completion of the contract the deposit is applicable towards payment of the purchase price; in the event of the purchaser's failure to complete in accordance with the terms of the contract, the deposit is forfeit, equity having no power to relieve against such forfeiture.
>
> …
>
> In the view of their Lordships these passages [in *Linggi*] accurately reflect the law. It is not possible for the parties to attach the incidents of a deposit to the payment of a sum of money unless such sum is reasonable as earnest money. *The question therefore is whether or not the deposit of 25 per cent. in this case was reasonable as being in line with the traditional concept of earnest money or was in truth a penalty intended to act in terrorem.*
>
> [emphasis added]

40 In the event, the Privy Council found the 25% deposit to be unreasonable and therefore not a true deposit, with the conclusion that forfeiture of the sum would amount to a penalty.

41 The position was the same in Singapore law, as made clear in *Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd* [2000] 3 SLR(R) 594 (at [12]):

> … the law relating to deposits in a sale and purchase contract differs from that governing liquidated damages. A reasonable deposit is regarded as earnest money given to guarantee the due performance of the contract and is not regarded as a penalty in English law or common English usage. The defaulting purchaser is not entitled at law or in equity to relief against forfeiture. Equitable relief applies only to penalty that is to say excessive liquidated damages. *If the deposit amount is excessive it will also be caught by the law of penalty. This is an instance where judges give legal effect to the ancient saying: Nothing too much. The magic number of 10% of the price has been regarded as a reasonable deposit in sale and purchase of immovable property and it is intended to encourage performance.*
>
> [emphasis added]

42 To summarise the historical developments discussed above, the law of deposits and the law of penalties have very different lineages, the former being a far older feature of Greek and Roman law which was later incorporated into the common law. It was in the common law courts that a requirement of reasonableness was introduced. This was the True Deposit Test, a mechanism to control against an abuse of the deposit. The law of penalties developed separately in the courts of equity and later in the common law. Given their different lineages, the courts have always strived to keep the two areas of law separate and distinct. Ironically, it was this very effort which led to suggestions of a melding of the two areas of law, as the former came to be defined in contradistinction to the latter, and later as an exception to the latter, using the language of *Workers Trust*. We emphasise, however, that while the Privy Council referred to the law of penalties in describing an unreasonable deposit, their Lordships did not purport to apply the classic test in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 ("*Dunlop*") of whether the sum paid was a genuine pre-estimate of loss.

Deposits in the modern law

43 Putting history aside, the broader question which arose was this: Does the law of deposits have a place in our law today, and if so, where should that be situated? This was a somewhat vexing question for several reasons. First, at a conceptual level, deposits arguably do not sit well with other parts of our law. Deterrence is not generally the function of contract law, but there is no escaping the fact that the effect of a forfeitable deposit is to deter breach on the part of the party who has paid the deposit. Secondly, at an economic level, there are similarities between deposits and liquidated damages clauses. A purchaser who loses a deposit amounting to 20% of the purchase price is in a similar position to a purchaser who is liable to pay liquidated damages amounting to 20% of the purchase price. One may ask why different legal principles should apply in these situations.

44 In our judgment, there was no question that the law of deposits *should* be retained. The function of the law is to serve society, and history has shown that society has use for deposits. As we have discussed above, deposits have been a part of commerce since ancient times and continue to be widely used today. That itself is testament to the continued relevance and utility of deposits. In our view, this would operate as the starting point of the analysis.

45 We also recognised that the function of a deposit as an *earnest* remains relevant in modern society. While the deposit is no longer a necessary ingredient for the formation of a contract in law in the way that it was in ancient Greece, there is no denying the fact that it continues to be an assurance of at least the purchaser's performance at a *practical* level. A deposit "shows the vendor that the purchaser is serious about the purchase and will not leave him high and dry … It is a sign of good faith and sieves out frivolous or fickle purchasers. At the

same time, it motivates the purchaser to follow through with the contract" (*Hon Chin Kong* at [124]). This last aspect of motivation is a very real one. Referring to our example above, while a purchaser who loses a 20% deposit may be in the same *economic* position as one who is liable to pay 20% in liquidated damages, the practical reality is that the former will likely have greater impetus to perform because he has already parted with his money.

46 Having determined that deposits must continue to have a place in our law, the question that followed was where that place should be. We noted Prof Yeo's observation that there have been recent movements in other jurisdictions in favour of a convergence of the law of deposits and the law of penalties. This has perhaps been motivated by the shift in the law of penalties in these jurisdictions away from the realm of compensation and towards the concept of legitimate interests. The primary driver behind this has been the decision of the UK Supreme Court in *Cavendish Square Holding BV v Makdessi; ParkingEye Ltd v Beavis (Consumers' Association intervening)* [2016] AC 1172 ("*Cavendish*"), where the court departed from the classic *Dunlop* formulation of the penalty rule and adopted the test of legitimate interests, *ie*, whether a secondary obligation imposes a detriment on the contract breaker that is out of proportion to the legitimate interest of the innocent party sought to be protected by a liquidated damages clause. The legitimate interest of an innocent party was not necessarily limited to compensation for his loss, with the result that a clause which did not provide for a pre-estimate of loss could nonetheless be upheld.

47 Materially, the applicability of the penalty rule to deposits was expressly acknowledged in the leading judgment of Lord Neuberger of Abbotsbury and Lord Sumption, and in the judgment of Lord Hodge (*Cavendish* at [16] and [238]). It is not difficult to see a natural alignment between deposits and

penalties if one accepts the penalty rule as reformulated in *Cavendish*. A deposit which deters a breach of contract can be justified on the basis that the innocent party has a legitimate interest in the performance of the contract. This rationalisation, however, rests upon an acceptance of the legitimate interests test.

48 The legitimate interests test has not been accepted in Singapore. In *Denka*, this court rejected the approach in *Cavendish* and held that the *Dunlop* test would remain the applicable test in Singapore. The fundamental basis for that decision was that the penalty rule operates only in the sphere of secondary obligations, specifically the obligation on the part of the defendant to pay damages to the plaintiff. We expressed our view that a contractual provision which stipulated for an amount of damages which was more than a pre-estimate of the likely loss would necessarily be penal as opposed to compensatory, notwithstanding that it might have been in the commercial interests of a party for such a clause to be included. We did not accept the proposition that a *commercial* interest could have any role to play at the level of legal principle. The only "legitimate interest" with which the penalty rule could be concerned with was that of compensation (*Denka* at [92], [152] and [185(b)]).

49 Deposits, however, do not operate in the sphere of secondary obligations. They are not meant to compensate, and their forfeiture is not, as a matter of principle, a substitute for damages. The true sting of the forfeiture comes not from any liability imposed on the purchaser, but by the fact that the nature of the payment as an earnest would prevent any claim for restitution of that sum in unjust enrichment. A vendor who has forfeited a deposit is not barred from suing separately for damages, subject to the requirement to give credit for the value of any deposit forfeited (*Hon Chin Kong* at [128]). The penalty rule therefore has no application to the law of deposits.

50 We observed that the Hong Kong Court of Final Appeal arrived at the same view in *Polyset Ltd v Pandahat Ltd* [2002] HKCFA 15 ("*Polyset*"), a case decided at a time when the *Dunlop* test was still the applicable test for penalties under Hong Kong law. The case concerned a contract for the sale of land for which deposits had been paid amounting to 35% of the purchase price. The purchaser failed to complete the sale, and the issue arose as to whether the deposits could be forfeited. A majority of the court concluded that the deposits were unreasonable and had to be refunded, without reliance on the penalty rule. We highlight the following pertinent remarks of Bohkary PJ (*Polyset* at [17]–[18]):

> 17. … Suppose in advance of completion of a contract for the sale of land, a sum is taken both as a deposit and as part payment, but turns out not to be a true deposit after all. If so, such sum must in the eyes of the law be treated merely as part payment in advance. In the normal way, such part payment in advance is, subject to [the vendor's right to damages], repayable in whole to the purchaser in the event of the sale falling through and nothing being conveyed. …
>
> 18. *This alternative analysis avoids the use of the words 'penalty' and 'penal'. It may be just as well to avoid those words.* I am conscious of the statement in Treitel, *The Law of Contract* (10th ed., 1999) at p.938 that 'the Privy Council held [in *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573] that the deposit was not a reasonable pre-estimate of the loss which the vendor was likely to suffer in consequence of the default, that the deposit was therefore penal, and that it must be paid back to the purchaser'. It is true, as we have seen, that Lord Browne-Wilkinson said that the provision for the forfeiture of the deposit of 25 per cent was a 'plain penalty'. But why? *His Lordship did not say that the forfeiture clause was a plain penalty because the 25 per cent deposit was not a genuine or reasonable pre-estimate of loss. As we have seen, his Lordship said that the forfeiture clause was a plain penalty because the 25 per cent deposit was not a 'true deposit by way of earnest'.*
>
> [emphasis added]

51 We agreed with the statements of Bokhary PJ and would similarly discourage the use of the language of penalties to describe even an unreasonable deposit. As we discuss below, while the fact that the quantum of a deposit is found to be unreasonable may mean that it is not truly a deposit, it does not follow that the law of penalties would be engaged.

52 To sum up our views, deposits serve a different purpose from damages (liquidated or otherwise). The earnest function remains at the core of a deposit. To that extent, the deposit is *sui generis*. Seen in this light, there is little reason in principle or pragmatism for the law of deposits to be subsumed within the law of penalties. The two should continue to be kept distinct.

53 With these principles in mind, we turned to the issues at hand.

The proper interpretation of Condition 15.9(c)(i)

54 We started with the question of whether Condition 15.9(c)(i) conferred a discretion on the respondent to decide whether and when to forfeit the deposit, as well as the amount to be forfeited. As stated above, the respondent's case was that the clause did confer such a discretion, with the result that the True Deposit Test should be applied only at the time this discretion was exercised and to the sum ultimately forfeited.

55 Condition 15.9(c)(i) provides:

> 15.9 If the Purchaser does not comply with the terms of any effective Notice to Complete served by the Vendor under this Condition, then the following terms apply:
>
> …
>
> (c) without prejudice to any other rights or remedies available to him at law or in equity, the Vendor may:

> i. forfeit and keep any deposit paid by the Purchaser; and …

56 We make a preliminary observation in relation to the respondent's case. It was clear to us on the evidence that the respondent had initially adopted the position that Condition 15.9(c)(i) entitled it to forfeit the *entire* deposit of $1,195,354.42. In its notice of 20 November 2018, the respondent asserted that it was entitled to exercise its right under Condition 15 to forfeit the entire deposit as contractually defined (see [13] above). The respondent thereafter rejected two appeals by the appellants for a refund on 1 March 2019 and 4 June 2019 and significantly *continued to retain* the entire deposit (see [14]–[15] above). The respondent's subsequent submission that it had only exercised its right to forfeiture on 10 April 2023 (after its receipt of the appellants' letter of demand) rang hollow against this backdrop. Notwithstanding this, the Judge appeared to accept the respondent's submission, stating at [39] of his grounds of decision (the "GD") that the respondent "did not take the position that it was forfeiting the entire sum of $1,195,354.42, either *prior* to the commencement of proceedings or in its written and oral submissions" [emphasis added]. With respect, this observation was plainly against the weight of the objective evidence as we have highlighted. The respondent's purported exercise of its right to forfeit on 10 April 2023 was clearly contrived. Therefore, even if we accepted that Condition 15.9(c)(i) was a discretionary forfeiture clause, we would have rejected the respondent's claim that this discretion was exercised only on 10 April 2023. The respondent had clearly purported to forfeit the entirety of the deposit at a much earlier stage.

57 That, however, was irrelevant because we did not think that Condition 15.9(c)(i) was a discretionary forfeiture clause to begin with. The plain language of the clause simply did not support such an interpretation. In

our view, the provision in Condition 15.9(c)(i) that the vendor may forfeit and keep "any deposit paid by the Purchaser" was clearly a reference to "any amount paid as a deposit" and not "any *part* of the amount paid as a deposit".

58 It was also difficult to see how a discretionary forfeiture clause would serve the earnest function of a deposit, or indeed any other legitimate commercial purpose. As we have stated above, the purpose of a deposit is to serve as an earnest at the formation of the contract and, in this context, to secure the buyer's performance of the sale and purchase contract. Such a purpose would surely be better served if the consequences of non-performance were clear to a buyer at the point of entering into the contract. By contrast, the buyer's performance would hardly be better secured by the prospect that the deposit it has paid may not be fully lost even in the event of non-performance, given the seller's discretion to forfeit some lesser amount. Indeed, the only conceivable benefit of a discretionary forfeiture clause would be the fact that it allows an unscrupulous vendor a chance at retrospectively saving what would otherwise be an unreasonable deposit. That forms no part of the function of a deposit.

59 Moreover, we doubted the workability of such a discretionary forfeiture clause to the extent that it purportedly gave the respondent a discretion to decide whether and when to forfeit. On the respondent's own case before us, it had exercised this discretion nearly *five years* after terminating the sale and purchase contract, and indeed only after the appellants had threatened legal action in their letter of demand. To argue that the parties had intended this in their agreement would be plainly untenable.

60 We therefore rejected the respondent's argument that Condition 15.9(c)(i) was a discretionary forfeiture clause. To be clear, this did not mean that the respondent was contractually *prohibited* from forfeiting a

lesser sum of the deposit. Such an act would simply be a matter of *goodwill* as opposed to contractual right. To that extent, the Judge was correct to say that the respondent could forfeit a lesser part of the deposit as contractually defined. This the respondent could do as a matter of goodwill, *provided* that it was otherwise entitled as a matter of contractual right to forfeit the entire deposit. What the respondent could not do was to forfeit a lesser sum in order to *retrospectively justify the deposit as reasonable*. To do so would be to put the cart before the horse.

61 The second limb of the respondent's case was that the True Deposit Test should be applied only at the point that the respondent's "discretion" to forfeit was exercised. It followed from our conclusion that Condition 15.9(c)(i) conferred no such discretion that this argument had lost its foundation. Similarly, the second question which we had invited Prof Yeo to address the court on did not arise for decision since it also assumed the existence of such a discretion. In short, the only sound answer to the question in the present case was that the reasonableness of the deposit had to be determined at the time of contracting.

The Hon Chin Kong framework

62 With that, we turn to consider *Hon Chin Kong*. The case involved an action to recover $300,000 which had been paid as a "down payment deposit" pursuant to an agreement for the plaintiff to purchase the defendants' shares in a company. The deposit served concurrently as the first of three tranches of payment agreed between the parties. The remaining two tranches, however, were never paid and the transaction fell through. The defendants rejected the plaintiff's demand for a return of the $300,000 deposit. The plaintiff then

commenced proceedings for recovery of the sum on the ground, *inter alia*, that the forfeiture of the $300,000 deposit was unenforceable as a penalty.

63 In his judgment, Kannan Ramesh J (as he then was) laid out a clear exposition of the law of deposits and the law of penalties, undertaking the commendable task of exploring and reconciling the divergent local case law and the decisions of other jurisdictions on the issue. With a view to assist the courts and the parties to navigate the cross-currents on these two areas of law, the learned judge developed a framework to determine whether a sum paid can be subject to forfeiture in the event of a breach of contract. We would add that Ramesh J did so without the assistance of independent counsel, as we have had in the present case.

64 The *Hon Chin Kong* framework applies where a plaintiff sues for the return of a deposit, and provides as follows (*Hon Chin Kong* at [143]):

> (a) The first question must be whether, on a proper construction of the contract, the vendor is contractually entitled to forfeit the so-called deposit. This will involve consideration of the parties' intentions and the terms of the contract, and may be express or inferred. The character of the payment depends on the parties' intentions, to be ascertained by construing their agreement. In particular, if the parties intended the payment to be a deposit, it may arguably be said that they have agreed that it is to be forfeited in the event that the payer fails to complete. The converse applies to a part payment.
>
> (b) If the sum was never intended to be forfeitable on a proper construction of the contract, it must be returned notwithstanding breach. This is subject to a right of set-off for damages.

(c) If there is a right to forfeit, the next question is whether the sum is a true deposit. The applicable test is whether the sum is reasonable as an earnest or is customary or moderate.

(d) Reasonableness involves a different enquiry from whether the sum is a genuine pre-estimate of loss. The focus is on whether the deposit is "so large that it cannot be objectively justified by reference to the functions which such a deposit properly serves". The customary or conventional deposit is only a starting point and "does not mean that a larger deposit can never be regarded as a true deposit". If the deposit is higher than customary, it is up to the vendor to show "special circumstances" to justify the amount. It should be noted that a 10% deposit, while conventional or customary in the context of sales of land, may not be the custom or convention in other types of contracts. There may also be some contracts of which it cannot be said that any particular percentage is customary or conventional as a deposit. Whether the contract is of such a type is for the court to decide, having regard to the parties' evidence and submissions. Where the contract is of a type in relation to which a customary or conventional deposit may be discerned, the approach set out in *Polyset* at [90] is useful guidance. Ultimately, the question of reasonableness is one for the court to assess on the facts of each case. It may have regard to any factors which are relevant to the effectiveness of the earnest, including any history of dealing between the parties, their financial means, and the commitment required on the vendor's part in keeping the subject-matter of the sale "off the market" for the duration of the sale.

(e) If the sum is reasonable as an earnest, it is a true deposit. It can be forfeited regardless of the actual loss occasioned to the vendor. The

> forfeiture of a true deposit cannot be regarded as a penalty, notwithstanding that it is disproportionate or has no reference to the vendor's loss. The purchaser's only option to prevent forfeiture is to invoke the court's equitable jurisdiction to relieve against forfeiture, assuming it is available. In this regard, it should be noted that relief against forfeiture has traditionally been available only to the forfeiture of interests in real property. Whether it is available in the context of forfeiture of deposits is a matter for another time.
>
> (f) On the other hand, if the sum is not reasonable as an earnest, it is not a true deposit. It ought to then be recharacterised as a part payment and the right to forfeit tested against the penalty rule.

65 In short, the framework contemplates first an inquiry into the existence of a contractual entitlement to forfeit the sum paid upon the payer's breach – that is the most fundamental characteristic of a deposit. If such an entitlement exists, the True Deposit Test is applied to determine if the sum is reasonable as an earnest. If the sum is not reasonable, then it is not a true deposit, and in that scenario the court is to apply the penalty rule (*ie*, the *Dunlop* test) to determine if the sum is forfeitable.

66 We highlight one key elaboration on sub-para (f) which had not been reduced into the framework. Ramesh J had expressed his view that the recharacterisation of a deposit as a part payment and the application of the penalty rule would only be relevant where there was an *express* forfeiture clause. Conversely, where there was no express clause, the vendor would rely on an implied term that the payment, being a deposit, would be forfeitable upon the purchaser's default. If the court, applying the test of reasonableness, found the sum not to be a true deposit but a part payment, that would then negate any

implication of a contractual entitlement to forfeit. The purchaser would then be able to sue for a return of the sum in unjust enrichment (*Hon Chin Kong* at [136]).

67 Prof Yeo provided his general view that the framework should be affirmed with some modifications (see [32(a)]). Prof Yeo expressed his agreement with sub-paras (a) to (e) of the framework but highlighted two conceptual issues with sub-para (f).

68 The first issue was that sub-para (f) drew an unprincipled distinction between express and implied forfeiture clauses. Both were conclusions as to the parties' intentions arising from the court's construction of the contract. If the parties had intended a deposit, and there was no express right of forfeiture, such a term would be implied into the contract as part of the meaning of a deposit. In Prof Yeo's submission, it was therefore not logical for the test of reasonableness to invalidate an implied forfeiture clause if it was not capable of invalidating an express one. Prof Yeo also highlighted that express forfeiture clauses had been found to be unenforceable in *Workers Trust* and *Polyset*, without any application of the penalty rule. We agreed with Prof Yeo's view that express and implied forfeiture clauses should be given the same treatment.

69 In our view, there was one further complication with the treatment of implied forfeiture clauses as contemplated in *Hon Chin Kong*. In a situation where the parties had agreed to the payment of a sum as a deposit which was expressed to be a deposit, with no express forfeiture clause, a court would determine in the first instance that there was an implied entitlement to forfeit by the character of the payment itself. If, however, the court determined in the next step that the sum was *not* reasonable, the court would negate the implication of a contractual entitlement to forfeit, and presumably its prior finding that the

parties had intended the sum to be a forfeitable deposit. We found this analysis to be slightly awkward and contrary to the true import of the test of reasonableness – not as a rule in construing the parties' intentions, but as a rule which *invalidates* the parties' intentions for a sum to be forfeitable upon breach.

70 The second issue was that sub-para (f) contemplated a cumulative application of the test of reasonableness and the penalty rule where there was an express forfeiture clause. This was artificial in so far as the penalty rule would be used to regulate something which was never intended to be compensatory. We fully endorsed Prof Yeo's views, which we reproduce here:

> Whether a payment is a deposit depends on the contractual intention of the parties. Whether the deposit is reasonable does not. The purposes served by a particular payment depends on the parties' intentions, but not the regulatory mechanism of the law. If a deposit is not compensatory when reasonable, it is also not compensatory when unreasonable. If a deposit is earnest money when reasonable, it is also earnest money when unreasonable. If the control of deposits is subject to a different test from the penalty rule because the function of the deposit is different from the function of liquidated damages, then there is no room for the penalty rule whether the deposit is reasonable or not.

71 To put it another way, because a deposit is not meant to be compensatory, an application of the penalty rule to an unreasonable deposit would take one no further than an application of the rule to a reasonable deposit. In either case, the court would be forced into a search for a function of compensation which did not otherwise exist.

72 Aside from the conceptual difficulties with sub-para (f), we also noted that some of the steps in the *Hon Chin Kong* framework were in fact elaborate explanations rather than analytical steps. These explanations, while necessary, rendered the framework rather unwieldy. In our view, the purpose of the

framework would be better served by a separation of explanation and instruction.

A revised framework for the recovery of a deposit

73 For the reasons explained above, we set out a revised version of the *Hon Chin Kong* framework. This framework features two sections – an explanatory preamble and a simplified three-step test:

> **Preamble**
>
> 1 The penalty rule operates in the sphere of secondary obligations, and in particular, the obligation on the part of the defendant to pay damages to the claimant (*Denka* at [92]). It is focused on *compensation*, which constitutes the broad policy underlying the award of contractual remedies (*Denka* at [93]). Thus, where an agreed remedies clause (most commonly, a liquidated damages clause) purports to operate as a substitute for the court's determination of the appropriate extent of compensation, such a clause is subject to judicial scrutiny (*Denka* at [93]). Consistent with the underlying rationale of compensation, the question asked is whether such a clause is a genuine pre-estimate of loss. If it is not, then it is not truly compensatory and is unenforceable as a penalty.
>
> 2 Deposits, however, are not intended to be compensatory. As the court in *Hon Chin Kong* observed, a deposit serves an important signalling function. It shows the vendor that the purchaser is serious about the purchase and will not leave him high and dry. It is a sign of good faith and sieves out frivolous or fickle purchasers. At the same time, it motivates the purchaser to follow through with the contract (*Hon*

Chin Kong at [124]). This motivation is inherent in the key feature of a deposit – that the vendor may forfeit it if the purchaser does not perform. In this light, it is clear that the policy considerations of compensation do not apply to deposits. Deposits do not operate in the sphere of secondary obligations and are not intended to be a substitute for damages. They are *sui generis* and operate outside the scope of the penalty rule.

3 This does not mean that parties are free to agree to excessive and extravagant deposits. The law places a limit on this freedom with the principle that the deposit must be reasonable as an earnest. Where a deposit is not reasonable as an earnest, the right to forfeiture is unenforceable, regardless of whether it is express or implied. It is not open to the court to recharacterise the right of forfeiture into a right to liquidated damages which remains enforceable subject to the penalty rule – to do so would be to impute an element of compensation which did not otherwise exist. As Prof Yeo has put it, if a deposit is not compensatory when reasonable, it is also not compensatory when unreasonable. The purchaser may therefore seek a recovery of the sum paid under the general law.

Revised framework

Thus, where the claimant sues for the return of a sum alleged to be a deposit, the proper framework to apply is as follows:

(a) First, the court determines whether there is a contractual right to forfeit the sum alleged to be a deposit upon the payer's breach. This will involve consideration of the parties' intentions and the terms of the contract, and may be *express or implied*. Where there is an express forfeiture clause to this effect, this will be sufficiently clear. Where there

is no such clause, the right of forfeiture may nonetheless be implied from the use of words such as "deposit". A reference to a sum described as a deposit being compensatory as liquidated damages could displace the inference that it is intended to be a deposit which is forfeitable upon breach. If there is no contractual right to forfeit, then there is no need to make any further inquiry as to the reasonableness of the sum. Its recoverability will be determined under the general law notwithstanding the payer's breach.

(b) Second, where there is a contractual right to forfeit, the court determines whether the sum is a true deposit. The test is whether the sum is reasonable as an earnest. The sum will be reasonable if it is customary or conventional. If it is higher than customary, it may nevertheless be reasonable if the vendor can show special circumstances to justify the deposit.

(c) Third, if the sum is reasonable as an earnest, it is a true deposit and can be forfeited. However, if the sum is not reasonable as an earnest, it is not a true deposit and cannot be forfeited. The right to forfeit, whether *express or implied*, is thus unenforceable and the claimant's right to recovery of the deposit will be left to be decided under the general law.

The deposit was unreasonable

74 Applying the revised framework to the present facts, we were satisfied that the deposit of $1,195,354.42, which amounted to 63% of the purchase price, was not reasonable as an earnest. The respondent made no attempt to justify the reasonableness of the sum. The very fact that the respondent, in response to the appellants' letter of demand, purported to forfeit a reduced sum of $380,000

despite having already elected to forfeit the entire deposit previously was, in our view, a clear acknowledgment by the respondent that the deposit would not have passed the test of reasonableness. The respondent offered no other reason for this about-turn.

75 We therefore had no difficulty in concluding that this sum was not a true deposit and could not be forfeited. The appellants were entitled to recover the sum in unjust enrichment.

Relief against forfeiture

76 In response to Prof Yeo's views, the respondent made a belated attempt to justify its partial forfeiture of the deposit through the invocation of the equitable doctrine of relief against forfeiture.

77 It was unclear whether the jurisdiction to grant relief against forfeiture existed in the context of deposits (*TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd and another* [2024] 1 SLR 690 at [102]). However, even if such a jurisdiction existed, it would not have been available to the respondent.

78 The jurisdiction to grant relief against forfeiture operated on the fundamental principle upon which equity acts – that a party having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscionable conduct (*Pacific Rim Investments Pte Ltd v Lam Seng Tiong and another* [1995] 2 SLR(R) 643 at [60]). Two points followed from this. First, the relief was to be granted against the exercise of a *valid and enforceable* legal right. Second, the relief was to be granted *in favour of* the party against whom the right was to be exercised. In the present case, it was for the appellants to seek relief against forfeiture of the deposit at the instance of the respondent. It was not for the respondent to ask the court to grant relief to allow it to partially

enforce what was otherwise an unenforceable right of forfeiture. Counsel for the respondent, Mr Tay Yong Seng, accepted that it was not for the respondent to seek such relief.

79 The respondent's reliance on relief against forfeiture was therefore a non-starter, and we had no hesitation in rejecting it.

What sum(s), if any, was the respondent entitled to withhold if there was no right of forfeiture

80 Having determined that the respondent could not forfeit the deposit of $1,195,354.42, the next question was whether the respondent was otherwise entitled to withhold any part of this sum. The starting point was that, pursuant to the revised *Hon Chin Kong* framework, the appellants would have to claim for a recovery of the deposit under the general law. In this context, the claim was in unjust enrichment on the ground of a failure of basis, given that the sale and purchase contract had not been carried out. To put it simply, the respondent would have to return any moneys received which it had not *earned*.

81 It will be recalled that the respondent had argued that it would be entitled to retain the Option Fee of $357,000 as consideration for the grant of the Second Option to Purchase. Conversely, the appellants had disputed such an entitlement on the ground that the appellants had failed to plead it, and that in any event the Option Fee had merged into and become an inseparable part of the deposit.

82 We found the issue to be a straightforward one. The pleading requirements set out in *V Nithia* do not apply to originating applications such as the case before us because such applications *do not involve pleadings at all*. A pleading is defined in O 3 r 1 of the Rules of Court 2021 (the "ROC 2021") to include a "statement of claim, defence, defence and counterclaim, reply and

reply to a defence and counterclaim". It should be obvious from this definition that pleadings are used in the context of *originating claims*. *V Nithia* itself concerned an action commenced by a writ of summons, which was the equivalent of an originating claim under the rules of court then applicable. Instead, an originating application is prosecuted by an exchange of affidavits. In this context, all that was required of the respondent was to include in its affidavit all the evidence that was necessary or material to its defence (O 6 r 13 of the ROC 2021). It was not in dispute that the relevant documents, including the Second Option to Purchase, were in evidence before the Judge. We therefore rejected this argument.

83 The substantive objection was equally unmeritorious. As we stated above, the transaction here involved *two* contracts – the option which was granted to the appellants, and the sale and purchase contract which came into effect upon the appellants' exercise of the option (at [10] above). The payment of the Option Fee was made in respect of the option contract, and the respondent had provided consideration for that fee by granting the option and holding the Property off the market for the duration of the option period. In other words, the respondent had *earned* the Option Fee because the option contract had been duly performed.

84 Putting this in the context of the appellants' claim in unjust enrichment, the Option Fee was paid *pursuant to the option contract*, and that basis had not failed. It was irrelevant that the parties had also agreed for the Option Fee to be credited towards the deposit *under the sale and purchase contract*.

85 In our judgment, the respondent was therefore entitled to retain the Option Fee of $357,000.

Interest on the refunded amounts

86 The final issue in this appeal related to the award of interest on the withheld sums. These sums consisted of (a) the balance sum of $488,957.04 which the respondent had paid to the appellants on 19 April 2023, and (b) any sum found payable to the appellants after the conclusion of the assessment of damages hearing. The Judge had decided that interest on the first sum would run from 2 March 2019 to 18 April 2023, and for interest on the second sum to run from 2 March 2019 to the date of payment. Curiously, the Judge also decided that the applicable rate of interest should be decided at the assessment of damages to allow the respondent "to develop its stance on the appropriate rate of interest at the assessment of damages" (GD at [76]–[77]). On this latter issue, the appellants argued that the Judge should have decided the applicable rate of pre-judgment interest instead of reserving it to the assessment of damages hearing, and submitted that this rate should be 5.33% per annum.

87 We first address the period of interest. With respect, it was not clear to us why the Judge had ordered for interest to run from 2 March 2019 when the respondent had purported to forfeit the entire deposit by its notice dated 20 November 2018. This was perhaps a consequence of his observation at [39] of the GD that "the respondent did not take the position that it was forfeiting the entire sum of $1,195,354.42 *prior* to the commencement of proceedings". In light of our observation that this was against the weight of the evidence (at [56] above), we found it more appropriate for interest to run from 20 November 2018 to the date of payment of the withheld sums.

88 As for the applicable rate of interest, we agreed with the appellants that this was an issue that the Judge should have decided. This rate of interest was ancillary to the Judge's primary decision, and was otherwise unconnected to the

assessment of damages. Save in exceptional circumstances, ancillary issues such as interest and costs should be decided by the same judge.

89 In our view, there was also no reason for any departure from the default rate of 5.33% per annum in this case. We noted that the "stance" which the Judge had given leave for the respondent to further develop was the respondent's argument that it could not have earned interest at the rate of 5.33% per annum on the moneys it had withheld. This position was entirely beside the point. An award of pre-judgment interest is meant to be compensation for the successful *claimant's* time value of money (*Grains and Industrial Products Trading Pte Ltd v Bank of India and another* [2016] 3 SLR 1308 at [137]). Any argument for a departure from the default interest rate would necessarily have to relate to what the claimant would have done with the moneys (*Baker, Michael A (executor of the estate of Chantal Burnison, deceased) v BCS Business Consulting Services Pte Ltd and others* [2022] 3 SLR 252 at [160]). The fact that the *respondent* might not have been able to earn interest on the withheld moneys at 5.33% per annum was simply irrelevant. We observed that the Assistant Registrar conducting the assessment of damages had come to the same view on this issue.

90 We therefore ordered that interest on both sums of money would run at the rate of 5.33% per annum from 20 November 2018 to the respective dates of payment.

Conclusion

91 By the time this appeal was heard, the respondent had already refunded the sum of $488,957.04 on 10 April 2023, and a further sum of $231,064.76 following the decision of the Assistant Registrar at the assessment of damages

hearing on 7 August 2024 that the respondent was entitled to $95,178.31 for its fees and expenses.

92 The balance sum that was withheld by the respondent was the sum of $380,000 being 20% of the purchase price which the respondent had purported to forfeit. In light of our decision that the respondent was entitled to retain the Option Fee of $357,000, the amount which we ordered to be refunded to the appellants was the balance sum of $23,000.

93 Although the eventual sum which was ordered by this court to be refunded to the appellants was only $23,000, this did not change the fact that the appellants had succeeded in their principal legal argument that, contrary to the Judge's holding below, there was no right to forfeit any part of the deposit. Taking into account the parties' costs submissions and to reflect the fact that the appellants did not succeed in obtaining a full recovery of the deposit, we awarded the appellants costs in the aggregate sum of $60,000 for the costs of the appeal and for costs below, inclusive of disbursements and with the usual consequential orders.

Sundaresh Menon
Chief Justice

Tay Yong Kwang
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Lee Ee Yang, Wong En Hui Charis, Benaiah Lim Oon Kuan and Teo Hui Yan Sarah (Covenant Chambers LLC) for the appellants;
Tay Yong Seng, Toh Jia Jing Vivian and Shjoneman Tan Sze Ern (Allen & Gledhill LLP) for the respondent;
Professor Yeo Tiong Min SC (Yong Pung How School of Law, Singapore Management University) as independent counsel.
