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

[2024] SGHC 314

Originating Application No 423 of 2023 (Registrar's Appeal No 160 of 2024)

Between

(1) Li Jialin
(2) Li Suinan

… *Appellants*

And

Wingcrown Investment Pte Ltd

… *Respondent*

JUDGMENT

[Damages — Assessment — The Law Society of Singapore's Conditions of Sale 2012]
[Damages — Assessment — Whether benefits arising from mitigatory steps must be credited against damages as assessed]

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Li Jialin and another
v
Wingcrown Investment Pte Ltd

[2024] SGHC 314

General Division of the High Court — Originating Application No 423 of 2023 (Registrar's Appeal No 160 of 2024)
Kwek Mean Luck J
16 October 2024, 18 November 2024

6 December 2024 Judgment reserved.

Kwek Mean Luck J:

1 In HC/AD 12/2023 ("AD 12"), the respondent, Wingcrown Investment Pte Ltd ("Wingcrown"), applied for assessment of damages ("AD") arising from two failed attempts by the appellants ("Purchasers") to purchase the property at 113 Prince Charles Crescent #05-33 The Crest, Singapore 159023 (the "Property") from Wingcrown. The learned Assistant Registrar ("AR") assessed that Wingcrown was entitled to damages in the sum of $95,178.31.

2 In HC/RA 160/2024 ("RA 160"), the Purchasers appeal against the decision of the AR in AD 12. They raise two grounds of appeal: (a) first, the AR failed to give due credit to an option fee of $357,000 retained by Wingcrown as required by Condition 15.10 of the Law Society of Singapore's Conditions of Sale 2012 ("LSC"); and (b) second, the AR failed to take into account the

gains made by Wingcrown, from the mitigatory steps it took after the Purchasers' breaches.

Background Facts and Procedural History

3 On 28 December 2015, the Purchasers entered into a sale and purchase agreement with Wingcrown for the Property at a purchase price of $1,785,000 ("SPA 1"). When the Purchasers failed to make the requisite progress payments, Wingcrown annulled SPA 1 on 12 March 2018. Wingcrown informed the Purchasers of its intent to forfeit the sum of $379,195.58 from the progress payments received. This included, amongst others, 20% of the purchase price under SPA 1, being $357,000.

4 The Purchasers requested to proceed again with the purchase. They asked that the amount of $357,000 not be forfeited but credited towards the new purchase price. The parties subsequently entered into an agreement to provide the Purchasers with an option to purchase the Property again. Wingcrown issued the fresh option to purchase on 17 April 2018 ("OTP 2"). By way of OTP 2, it was agreed that:

(a) the new purchase price would be $1.9m;

(b) the option fee for the grant of a fresh option shall be $357,000 (to be taken from the Purchasers' deposit of $357,000 under SPA 1, as a gesture of goodwill); and

(c) the amount payable on the exercise of the fresh option would be $838,354.42, taken from the progress payments under SPA 1 that Wingcrown was obliged to return.

Following from points (b) and (c) above, the total contractual deposit payable by the Purchasers upon the exercise of OTP 2 was $1,195,354.42.

5 The Purchasers subsequently exercised OTP 2 on 30 April 2018[1] but were unable to complete OTP 2 on the scheduled completion date. Wingcrown terminated OTP 2 on 20 November 2018 and sought to forfeit the contractual deposit of $1,195,354.42.

6 After the termination of OTP 2, Wingcrown attempted to resell the Property to another purchaser ("Purchaser A") for $1,995,000 ("OTP A"). However, Purchaser A failed to complete the transaction, and their deposit of $139,650 was forfeited. This $139,650 comprised of a $19,950 option fee and a $119,700 option exercise fee. The sale to Purchaser A was terminated on 11 March 2020. Wingcrown subsequently successfully sold the Property to another purchaser ("Purchaser B") at a purchase price of $1,980,000. The sale was completed on 14 April 2021.

7 In April 2023, the Purchasers commenced HC/OA 423/2023 ("OA 423") against Wingcrown, seeking repayment of the deposit paid under OTP 2 on the basis that it was an unenforceable penalty and thus not a true deposit[2]. Wingcrown submitted, in response, that it was contractually entitled to retain the OTP 2 deposit, and that in any event it was entitled to an equitable set-off of the fees and expenses incurred as a result of the Purchasers' abortive purchase

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1 Affidavit of Ms Li Jialin dated 25 March 2024 at para 34; Agreed Bundle of Documents ("ABOD") at p 463.

2 *Li Jialin and anor v Wingcrown Investment Pte Ltd* [2023] SGHC 256 ("OA 423 GD") at para 17.

attempts[3]. The court hearing OA 423 found that Wingcrown was entitled in principle to an equitable set-off but directed for this quantum to be assessed separately[4]. It was in this light that AD 12 was conducted. Of the $211,123.72[5] sought by Wingcrown as damages, the AR allowed a sum of $95,178.31.

8 The question of whether the OTP 2 deposit was a true deposit was subsequently reconsidered in CA/CA 5/2024 ("CA 5"). In *Li Jialin and another v Wingcrown Investment Pte Ltd* [2024] SGCA 48 ("*Li Jialin CA*"), the Court of Appeal ruled that the $1,195,354.42 was not reasonable as an earnest and thus could not be forfeited as a deposit. The Purchasers were entitled to recover this sum in unjust enrichment, subject to a set off in respect of the $357,000 option fee and damages as assessed[6].

Nature and scope of Wingcrown's claim to damages

9 The manner in which Wingcrown has run its case has resulted in a great lack of clarity, both in the proper basis for Wingcrown's claim to damages and in the precise scope of damages sought. It is these anterior issues that I first turn my attention to.

10 The first preliminary issue is whether Wingcrown's claim to damages in OA 423 and AD 12, was on a liquidated or unliquidated basis. As a matter of legal principle, these claims are fundamentally distinct; while the latter is loss-oriented, the former considers damages which parties have contractually agreed

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3 Wingcrown Written Submissions for OA 423 dated 28 June 2023 at paras 62–69, 81–88.

4 OA 423 GD at paras 54–56.

5 Wingcrown Closing Submissions for AD 12 dated 3 May 2024 at para 87.

6 *Li Jialin v Wingcrown Investment Pte Ltd* [2024] SGCA 48 ("CA 5 GD") at paras 74, 85; Notes of Evidence ("NE") for CA 5 Hearing dated 15 August 2024 at p 2.

to be payable in case of breach. Loss principles are not strictly relevant to a claim for liquidated damages: *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) ("*Phang*") at [20.065]–[20.071]. Wingcrown must elect between a claim for liquidated and unliquidated damages: *Talley and Anor v Wolsey-Neech* (1979) 38 P&CR 45 ("*Talley*"); *Wallace-Turner v Cole* (1983) 46 P&CR 164 ("*Wallace*"); *Harris Hakim v Allgreen Properties Ltd* [2001] 3 SLR(R) 148 ("*Allgreen*") at [27]. Wingcrown does not dispute that it is put to strict election between these remedies[7].

11 Both abortive sales to the Purchasers (*ie*, SPA 1 and OTP 2) were conducted subject to the terms of the LSC[8]. Conditions 15.10(*a*) and (*b*) of the LSC set out the parameters of Wingcrown's right to liquidated damages. In other words, it is the operative liquidated damages clause in SPA 1 and OTP 2. The full text of Condition 15 is reproduced as follows:

> 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:
>
> (a) on the expiry of the Notice to Complete or within such further period as the Vendor may allow, the Purchaser must immediately return all title deeds and documents in his possession that belong to the Vendor;
>
> (b) the Purchaser must at his own expense procure the cancellation of any entry relating to the Contract in any register; and
>
> (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

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7 Wingcrown Supplemental Written Submissions for RA 160 dated 8 November 2024 ("WWS-2") at para 11 and Wingcrown Further Supplemental Written Submissions for RA 160 dated 18 November 2024 ("WWS-3") at para 5.

8 ABOD at p 347, clause 3.1(b), p 458, clause 2.

> ii. resell the Property whether by auction or by private agreement without previously tendering a Conveyance to the Purchaser.
>
> 15.10 The following terms apply to the Vendor's right to re-sell the Property:
>
> (a) if on any re-sale contracted within one (1) year after the Scheduled Completion Date the Vendor incurs a loss, the **Purchaser must pay to the Vendor as liquidated damages the amount of such loss**;
>
> (b) the liquidated damages payable by the Purchaser will include **all costs and expenses reasonably incurred in any such re-sale or any attempted re-sale** but the Vendor must give credit for any deposit and any money paid on account of the purchase price; and
>
> (c) the Vendor will be entitled to retain any surplus money from the re-sale.
>
> [emphasis added in bold]

12 In RA 160, Wingcrown submits that it is not claiming for liquidated damages on the basis of Conditions 15.10(*a*) and (*b*). Instead, it is claiming against the Purchasers for unliquidated damages at general law[9].

13 This submission is inconsistent with the position taken by Wingcrown in other parts of these proceedings. In particular, Wingcrown had relied extensively on its rights contained in Condition 15, prior to the commencement of OA 423 as well as at various stages of these proceedings:

(a) The termination notice for OTP 2, sent by Wingcrown's then-solicitors to the Purchasers on 20 November 2018, states:

> We note that your client failed to complete the sale and purchase of the Property before the expiry of the said notice. **In the premises**, **[OTP 2]** … **has been terminated** and our clients **are entitled to exercise all their rights under Condition 15 of the Conditions** … including but not limited to the forfeiture of the Deposit

[9] WWS-2 at para 58.

[emphasis added in bold]

(b) Wingcrown sought to invoke LSC Condition 15.9(*c*)(i) as the basis for retaining the forfeited deposit paid by the Purchasers under OTP 2. It made this argument in OA 423[10], CA 5[11] and AD 12[12].

(c) Wingcrown relied on LSC Condition 15.10(*c*) to argue that it was entitled to retain the surplus money earned from the resale to Purchaser B, in AD 12[13] and RA 160[14].

(d) While Wingcrown did state in its written submissions for AD 12 that it was claiming for unliquidated damages at large[15], this was not the position originally taken by Wingcrown at the hearing of RA 160. Counsel for Wingcrown originally disavowed reliance on Conditions 15.10(*a*) and (*b*) for a different reason (see [32]–[33] below). This particular argument on unliquidated damages for breach of contract, only surfaced when Wingcrown filed its first set of supplemental written submissions in RA 160 on 8 November 2024.

14 Wingcrown attempts to escape this inconsistency by stating that it is legally entitled to exercise its rights under LSC Conditions 15.9(*c*)(i) and 15.10(*c*), while retaining the right to claim for unliquidated damages at large. In this regard, Wingcrown's argument appears to be twofold:

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10 Wingcrown Written Submissions for OA 423 dated 28 June 2023 at paras 62–69; see also Affidavit of Mr Koh Chin Beng dated 16 May 2024 at [72].

11 CA 5 GD at para 56.

12 Wingcrown's Closing Submissions for AD 12 dated 3 May 2024 at paras 45–49.

13 Wingcrown's Closing Submissions for AD 12 dated 3 May 2024 at para 43.

14 Wingcrown Written Submissions for RA 160 dated 13 September 2024 ("WWS-1") at paras 28–29, 31; NE (16 October 2024) at p 6.

15 Wingcrown's Closing Submissions for AD 12 dated 3 May 2024 at para 45.

(a) Condition 15.9(*c*) entitles Wingcrown to forfeit and keep any deposit paid by the Purchasers, "without prejudice to any other rights or remedies available to [it] at law or in equity" (the "without prejudice clause"). By operation of the without prejudice clause, Wingcrown's right to claim for unliquidated damages is preserved[16].

(b) While Conditions 15.10(*a*) and (*b*) only apply to resales contracted within one year after the original Scheduled Completion Date, this one-year limitation period is not stipulated in Condition 15.10(*c*). The final successful resale to Purchaser B was contracted more than a year after the Scheduled Completion Date for OTP 2. Therefore, Conditions 15.10(*a*) and (*b*) do not apply to Wingcrown's claim for damages, but Condition 15.10(*c*) continues to apply. Thus, Wingcrown remains entitled to retain the surplus money earned from the resale to Purchaser B[17].

15 I am unable to accept Wingcrown's interpretation of Condition 15. The English equivalent to this Condition, was considered and discussed in the case of *Talley*. This is clause 19(4) of the English Law Society's General Conditions of Sale 1973 ("English Conditions", as was in force at the material time), which provides:

> 19(4) If the purchaser does not comply with the terms of an effective notice served by the vendor under this condition, then:
>
> (b) without prejudice to any other rights or remedies available to him at law or in equity, the vendor may –
>
> (i) forfeit and retain for his own benefit the deposit paid by the purchaser, and

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16 WWS-1 at para 90.

17 WWS-1 at paras 28–29.

> (ii) resell the property whether by auction or by private treaty without previously tendering a conveyance to the purchaser,
>
> (c) if on any such re-sale contracted within one year from the date fixed for completion the vendor incurs a loss, the purchaser shall pay to the vendor as liquidated damages the amount of such loss, which shall include all costs and expenses reasonably incurred in any such re-sale or any attempted re-sale, subject to the vendor giving credit for any deposit and any money paid on account of the purchase price, but any surplus money shall be retained by the vendor.

16 The defendant in *Talley* failed to complete the purchase even after the plaintiff served on him the requisite notice to complete pursuant to clause 19(4). The plaintiff subsequently claimed against the defendant for heads of damage not contained in clause 19(4)(*c*) of the English Conditions. The English Court of Appeal rejected this claim on the following grounds (at 51–53):

> When a buyer defaults by failing to complete on the due date after time has been made of the essence of the contract, **the seller can choose between various rights and remedies** …
>
> In my view, the object and effect of the opening words of [clause] 19(4)(b) [*ie* "without prejudice to any other rights or remedies available to him at law or in equity"] **are to make it clear that these rights of choice are preserved to the seller**, but, **if he chooses to exercise his rights and remedies under condition 19(4)(c), he can, in my view, only do so in accordance with and within the limits of the provisions of this condition**.
>
> … If, as [counsel for the vendor] suggests, **the effect of [clause] 19(4)(c) were merely to provide machinery for the simple quantification of one element in the damages at common law, it could and would have been very differently worded**. It seems to me that the words 'liquidated damages' are conclusive.
>
> In my judgment, the plaintiffs, having chosen to exercise their rights and remedies under [clause] 19(4)(c), are only entitled to recover the 'liquidated damages' defined by that condition. …
>
> [emphasis added in bold]

17 Clause 19(4) of the English Conditions was subsequently considered by our Court of Appeal in *Allgreen* (at [26]):

> 26 … With the condition so structured, it is plain that, if and when [clause] 19(4) applies, the words "without prejudice to any other rights or remedies available to [the vendor] at law or in equity" operate to give the vendor the options available to him at law or in equity. Accordingly, the vendor has the option of (a) treating the contract as still subsisting and pursuing a claim for specific performance and damages in addition or in lieu thereof, **or (b) treating the contract as having been repudiated and (a) claiming unliquidated damages at large for loss of bargain and breach of contractor [*sic*], or (b) claiming the amounts under paras (b) and (c) of condition 19(4)**.
>
> [emphasis added in bold]

18 From the analysis in *Talley*, it is clear that the without prejudice clause as framed in the English Conditions, does not allow a vendor to pursue a common law claim for unliquidated damages while also exercising its rights under clause 19(4). Once a vendor has elected to exercise its rights in clause 19(4), it must do so within its strict confines. This finding is put beyond doubt by our Court of Appeal's observations in *Allgreen*. Consequently, a vendor who has accepted a purchaser's repudiatory breach, may either: (a) claim for unliquidated damages at large for loss of bargain and breach of contract; or (b) claim for the amounts stated in clauses 19(4)(*b*) and (*c*) (*ie*, to forfeit the contractual deposit and to claim for liquidated damages, respectively). More broadly, the rights under clause 19(4) come as a bundle or a set. A vendor cannot pick and choose certain rights in clause 19(4) while reserving its right to exercise inconsistent rights under general law. Put simply, once a vendor has elected to exercise any rights under this clause, its right to damages is confined to liquidated damages as stated at 19(4)(*c*) – it can no longer maintain a claim for unliquidated damages under general law.

19 Conditions 15.9 and 15.10 of the LSC are substantially similar to clause 19(4) of the English Conditions. Applying *Talley* and *Allgreen*, I find that the without prejudice clause in Condition 15.9(*c*) only provides Wingcrown with an initial choice between a common law claim for unliquidated damages arising from breach of contract and its rights under the LSC. Once Wingcrown has made an election, it will be accordingly bound.

20 As stated at [13] above, Wingcrown has expressly relied on its rights contained in LSC Conditions 15.9(*c*)(i) and 15.10(*c*) at various stages of these proceedings, and even prior to the commencement of OA 423. In light of this, I find that Wingcrown has made an election to pursue its rights under the LSC. It is no longer remains open to Wingcrown to claim for unliquidated damages for loss of bargain and breach of contract.

21 This analysis is sufficient to dispose of Wingcrown's arguments at [14(a)] and [14(b)] above. For completeness, I also reject Wingcrown's submission that the one-year limitation applies only to Conditions 15.10(*a*) and 15.10(*b*), and not to 15.10(*c*). Wingcrown's initial position in OA 423, was that the Conditions "do not regulate and are silent on re-sales that occur *after* a year from the relevant scheduled completion date [emphasis in original]"[18]. This contradicts Wingcrown's position now and is yet another instance of an inconsistency in their case. In any event, the plain wording of Condition 15.10 indicates that its three limbs are intended to be read harmoniously. While 15.10(*a*) refers to "any" re-sale, 15.10(*c*) refers to "*the*" re-sale. If the intention was for 15.10(*c*) to stand alone, the Conditions could easily have been drafted as such.

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[18] Wingcrown Written Submissions for OA 423 dated 28 June 2023 at para 85(c).

22 I turn to address the second preliminary issue, *ie*, the scope of Wingcrown's claim for damages. Again, Wingcrown's position has been inconsistent. At the hearing for RA 160, counsel for Wingcrown stated that it was claiming "in respect of OTP 2 / SPA 2 only"[19]. Wingcrown later changed tack, stating that it had "not given up its rights to claim for expenses under SPA 1" and that it was indeed claiming for wasted expenses arising from the breach of SPA 1[20].

23 I considered Wingcrown's claim for damages to arise from *both* abortive attempts to purchase the Properties (*ie*, for breaches of SPA 1 *and* OTP 2). This was the manner in which Wingcrown had originally framed its claim in OA 423[21] and AD 12[22]. The learned AR had also awarded Wingcrown damages arising from the Purchasers' breach of SPA 1[23]. As for the specific heads of damage in issue, Wingcrown particularised its claim as being for: (a) Downtime / Opportunity Cost (Maintenance Fees and Property Tax); (b) Conveyancing Fees; (c) Financial Loss (Shareholder's loan interest); and (d) Agent's Commission Fees[24].

24 With this in mind, I make two further observations about the nature of Wingcrown's damages claim.

25 The highest that Wingcrown can peg its case to, is that it is claiming for unliquidated damages pursuant to general law in relation to the breach of

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19 NE (16 October 2024) at p 6.

20 WWS-2 at paras 8, 84 and 107.

21 See: Wingcrown Written Submissions for OA 423 dated 28 June 2023 at para 89.

22 See: Wingcrown's Closing Submissions for AD 12 dated 3 May 2024 at paras 28–35.

23 Oral Grounds of Decision for AD 12 dated 7 August 2024 at para 41.

24 Oral Grounds of Decision for AD 12 dated 7 August 2024 at para 59.

SPA 1 (and not OTP 2). In the SPA 1 termination notice, Wingcrown stated that SPA 1 was annulled on the basis of clause 7.4 of SPA 1 and not on the terms of the LSC[25]. With that said, Wingcrown has never made any distinction between its claim for damages arising out of the breaches of SPA 1 and OTP 2. There is no mention of Wingcrown's rights under clause 7.4 of SPA 1, even in the parts of Wingcrown's submissions where it refers to an unliquidated damages claim at general law. Given that Wingcrown had relied on the terms of the LSC throughout the course of proceedings, without differentiating between its claim for breaches of SPA 1 and OTP 2, I find that they have elected to proceed pursuant to the LSC on both counts. Nevertheless, and for completeness, I have also separately considered Wingcrown's claim if it is made pursuant to its rights at general law. I consider this claim not just in relation to the SPA 1 breaches, but for Wingcrown's claim for damages as pursued in AD 12 as a whole.

26 Next, it is not clear whether the learned AR in AD 12 had characterised Wingcrown's claim as being on a liquidated or an unliquidated basis. While she had affirmed Wingcrown's reliance on Condition 15.9(*c*)[26], she had also considered principles relevant to a claim for damages at general law, such as Wingcrown's duty to mitigate[27]. It does not appear that the learned AR made distinction between these inconsistent remedies. Nevertheless, and as will become clear, this will have no bearing on the outcome of the present appeal (see [49] below).

27 With these preliminary findings, I turn to consider the Purchasers' two main grounds of appeal in RA 160. Folding these into my foregoing analysis,

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25 ABOD at pp 442–443.

26 Oral Grounds of Decision for AD 12 dated 7 August 2024 at para 15.

27 Oral Grounds of Decision for AD 12 dated 7 August 2024 at para 31.

the first ground of appeal considers Wingcrown's claim to liquidated damages pursuant to Condition 15 of the LSC (the "LSC Claim"). The second ground of appeal considers a scenario where Wingcrown has claimed for unliquidated damages at large and discusses the common law principles which would apply to that claim (the "Common Law Claim").

LSC Claim

Purchaser's case

28 The Purchasers' first ground of appeal is that the AR erred in not giving credit to the option fee of $357,000 for OTP 2 in arriving at the damages.

29 The Purchasers initially submitted, relying on *Ng and another v Ashley King (Developments) Ltd* [2011] Ch 115 ("*Ashley King*"), that a vendor must give credit to any forfeited deposit by way of reduction of damages payable by the purchaser for the latter's breach of contract. As the option fee of $357,000 for OTP 2 was a forfeited deposit, Wingcrown must give credit for it.

30 However, the Court of Appeal has held in *Li Jialin CA* that the payment of the OTP 2 option fee was made in respect of the option contract. Wingcrown provided consideration for the fee, by granting the option and holding the Property off the market for the duration of the option period. Wingcrown had earned the option fee because the option contract has been duly performed. Hence, the option fee would not be regarded as a forfeited deposit (at [83]). The Purchasers thus did not pursue this submission at the appeal hearing for RA 160.

31 At the appeal hearing, the Purchasers focused their submission on the applicability of LSC Condition 15.10. Their submission is set out as follows:

(a) As held in *Ashley King* at [21], a deposit serves dual functions. It is an earnest of performance of the contract and also a part performance in the sense that if the contract is completed, the deposit will go in reduction of the purchase price.

(b) In this case, clause C of OTP 2 states that where the option is exercised, the $357,000 option fee paid "will be credited to the Purchase Price"[28].

(c) Condition 15 of the LSC is relevant to this transaction; the sale in OTP 2 was made subject to the LSC by way of clause 2.1[29]. Condition 15.10(*a*) states that on any resale taking place within one year after the Scheduled Completion Date, where the vendor incurs a loss, the purchaser must pay the vendor liquidated damages in the amount of such loss. Condition 15.10(*b*) provides that the liquidated damages will include costs and expenses reasonably incurred, but that "the Vendor must give credit for any deposit and any money paid on account of the purchase price"[30].

(d) On the facts, the Scheduled Completion Date under SPA 1 was 30 June 2021[31]; OTP 2 was exercised on 30 April 2018[32]. This attempted re-sale of the Property to the same Purchasers, thus falls well within the one-year time period stipulated in LSC Conditions 15.10(*a*) and 15.10(*b*).

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28 Affidavit of Ms Li Jialin dated 25 April 2023 at p 130.

29 Affidavit of Ms Li Jialin dated 25 April 2023 at p 131.

30 Affidavit of Ms Li Jialin dated 25 April 2023 at p 199.

31 ABOD at p 360.

32 ABOD at p 463.

(e) Since the OTP 2 option fee (in the sum of $357,000) is "credited to the Purchase Price" under clause C of OTP 2, pursuant to Condition 15.10(*b*) of the LSC, it is "money paid on account of the purchase price" and Wingcrown must give credit for it. As the option monies of $357,000 significantly exceeds the amount assessed by the learned AR in AD 12 ($95,178.31), the damages assessed should be reduced to nil.

Wingcrown's case

32 Wingcrown submits that Condition 15.10 is not applicable, because that Condition deals only with claims for expenses on a "re-sale" or "any attempted re-sale" to a third party. Wingcrown is not claiming for expenses incurred on a "re-sale" or "any attempted re-sale". Rather, it seeks compensation for wasted expenses incurred as a result of the Purchasers' own breaches of SPA 1 and OTP 2.

33 In addition, Wingcrown relies on *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd and another* [2024] 1 SLR 690 ("*TG Master*"), where the court held (at [84]) that an option fee is paid in consideration for the grant of the option, rather than pursuant to an obligation to pay the purchase price under a sale and purchase agreement. Since the option fee arises under a different obligation source, it cannot be construed as being paid "on account of the purchase price" under LSC Condition 15.10(*b*). It is paid "on account" of a separate obligation which arises under the OTP 2 *option* contract, separate and distinct from the *sale and purchase agreement* (also contained in the OTP 2 document).

Decision

34 The key dispute here is whether LSC Conditions 15.10(*a*) and 15.10(*b*) apply to the $357,000 option fee paid under OTP 2.

35 The first issue is whether Conditions 15.10(*a*) and 15.10(*b*) apply to a situation where there is a re-sale and the option was exercised, but the sale was not eventually completed. I find that the Conditions apply in this situation, for the following reasons.

(a) "Completion" is defined in LSC Condition 1 as follows:

> **"Completion"** means the act of completing the sale of the Property for consideration pursuant to the Contract.

This contemplates that there is a sale which is not completed, but which constitutes a sale, nevertheless.

(b) "Contract" is defined in LSC Condition 1 as follows:

> "**Contract**" means a document evidencing the sale of a Property by way of private treaty, auction, tender or otherwise and includes an option that has been exercised.

As the sale of a Property can be evidenced by an option contract, it follows that a "re-sale contracted" as defined in Condition 15.10(*a*) would include the situation where the option has been exercised but the sale has not been completed.

(c) Condition 15.10(*a*) applies to "any re-sale contracted" as opposed to a re-sale "completed".

(d) Condition 15.10(*b*) states that liquidated damages payable, will include costs and expenses reasonably incurred in "any attempted

> re-sale". If "re-sale" refers only to a completed sale, the words "any attempted re-sale" in Condition 15.10(*b*) would be rendered otiose.

In view of the above, I find that LSC Conditions 15.10(*a*) and 15.10(*b*) can apply to re-sales which were contracted but not eventually completed. The fact that OTP 2 was not completed is thus no bar to the applicability of LSC Condition 15.

36 The second issue is whether Condition 15.10(*b*) is inapplicable, because the wasted expenses (which Wingcrown claims for) were incurred as a result of the Purchasers' own breaches of SPA 1 and OTP 2, and hence do not arise out of a "re-sale" or "any attempted re-sale".

37 This submission from Wingcrown, if correct, is fatal to Wingcrown's claim for damages under the LSC. This is because on Wingcrown's submission, the wasted expenses would not fall under LSC Condition 15.10(*a*) and (*b*). If that is so, there is then no contractual basis under the LSC, for Wingcrown to make its claim for damages for wasted expenses. As I have found above, on an election of its right to pursue damages pursuant to the LSC, Wingcrown can no longer claim for heads of damage not contemplated within Condition 15.10: *Talley* at 51–53, *Allgreen* at [26].

38 In my judgment, however, Conditions 15.10(*a*) and 15.10(*b*) are squarely applicable to Wingcrown's claim. OTP 2 was an attempted re-sale of the Property *to the Purchasers*, after SPA 1 failed to complete. To the extent that Wingcrown reads Conditions 15.10(*a*) and 15.10(*b*) to apply only to a *third*

party re-sale[33], this interpretation is not supported by the plain wording of the Conditions.

39 Even if wasted expenses do not fall under the phrase "costs and expenses reasonably incurred in any such re-sale or any attempted re-sale" as set out in LSC Condition 15.10(*b*), the condition only states that the liquidated damages payable "will include" such costs and expense from re-sale. Thus, the language of LSC Condition 15.10(*b*) does not confine it to such. The right to liquidated damages is created by Condition 15.10(*a*), and Condition 15.10(*b*) is merely illustrative of what may fall within the scope of "loss" in Condition 15.10(*a*). For example, and as a matter of contrast, it does not state that the liquidated damages payable "shall be" such costs and expenses from re-sale.

40 I note that the above interpretation was also the approach taken in *Bauer, Adam Godfrey and another v Wee Tien Liang, deceased* [2021] SGHCR 8 ("*Bauer*"). There, the High Court held that the liquidated damages payable under Condition 15.10(*b*) included legal fees incurred due to the abortive sale, *viz*, wasted expenses (see *Bauer* at [32]–[35], [47]).

41 Furthermore, the phrase "costs and expenses reasonably incurred in any such re-sale or any attempted re-sale" could be read to include the costs incurred *in the lead-up* to the attempted re-sale to Purchaser A. Indeed, Wingcrown had claimed (and the AR had allowed) Wingcrown's claims for Down Time / Opportunity Cost as well as Financial Loss in such a period[34]. For completeness, the one-year time period stipulated in LSC Conditions 15.10(*a*) and (*b*) is also satisfied when one considers the attempted re-sale to Purchaser

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33 Wingcrown's Closing Submissions for AD 12 dated 3 May 2024 at para 87.

34 Oral Grounds of Decision for AD 12 dated 7 August 2024 at paras 42, 55.

A. The Scheduled Completion Date under OTP 2 is 26 June 2018 and the re-sale to Purchaser A was contracted on 28 February 2019.

42 I summarise my findings on this second issue. If Wingcrown is correct that Conditions 15.10(*a*) and 15.10(*b*) do not apply to a claim for wasted expenses, then its entire claim for liquidated damages would fall away. Alternatively, if its claims do arise from a resale or attempted resale, this submission would not be a bar to the Purchasers' reliance on Condition 15.10.

43 The third and final issue is whether the $357,000 option fee cannot be construed as being paid "on account of the purchase price" under Condition 15.10(*b*), because it is paid "on account" of a separate obligation, which arises under the OTP 2 option contract.

44 Clearly, a payment can serve multiple purposes. Just as a deposit serves as an earnest as well as part payment of the purchase price (see *Ashley King* at [21]), an option serves to keep an offer open, but could also operate as part payment of the purchase price. It is plain from the terms of OTP 2 that upon exercise of the option, the option fee of $357,000 would serve the additional function of being part payment, as it will be credited to the Purchase Price and form part of it:

(a) Clause C of OTP 2 states that where the option is exercised, the option fee paid "will be credited to the Purchase Price".

(b) Clause 1 defines "Deposit" as meaning $1,195,354.42 and that this shall form part of the Purchase Price. This sum includes the option fee of $357,000.

45 Wingcrown relies on *TG Master* at [84], in particular, the following:

> 84 While an option fee will typically be credited as part of the payments made towards the purchase price if the Option is exercised and a sale and purchase agreement is constituted, it remains fundamentally distinct from other part payments because it is paid by the prospective purchaser as full payment in consideration for the grant of the Option, rather than by a purchaser pursuant to an obligation to pay the purchase price under a sale and purchase agreement. **If the prospective purchaser opts not to exercise the Option**, the option fee is not recoverable as it is paid as good and valuable consideration for the vendor's grant of the Option and the right to exercise contained therein … Before the Option is exercised, the option fee is not part payment towards the purchase. Unless otherwise agreed, an option fee operates as a non-returnable booking fee that the vendor is entitled to keep.
>
> [emphasis added in bold]

46 However, as is evident from the passage, it deals with the issue of whether the option fee can be retained by the vendor, if the purchaser *does not* opt to exercise the option. Nothing in this passage provides support for the proposition that an option fee would not be credited to the purchase price in the event that the option is exercised. In fact, the first sentence of this passage expressly contradicts this proposition since it recognises that the option fee would be credited to the purchase price after the option is exercised and the parties enter into a sale and purchase agreement.

47 On its plain language, "money paid on account of the purchase price" in Condition 15.10(*b*), simply means money paid *towards* the purchase price. It would strain the phrase to construe it as drawing a distinction between contractual sources of obligations on the purchaser's part to make payments that are all applied towards the purchase price. The fact of the matter is that the option fee is contractually treated as going towards the purchase price. Consequently, I find that the option fee of $357,000 is money paid "on account of the purchase price" within the meaning of that phrase in Condition 15.10(*b*)

and Wingcrown must give credit for it in the form of a corresponding reduction of its claim for liquidated damages under Condition 15.10(*a*).

48 Therefore, I find that the Purchasers succeed on the LSC Claim. By operation of LSC Conditions 15.10(*a*) and 15.10(*b*), Wingcrown must give credit for the $357,000 option fee as money paid on account of the Property purchase price, in assessing the quantum of liquidated damages payable by the Purchasers.

49 I earlier highlighted (at [26]) that it was not entirely certain whether the learned AR had assessed Wingcrown's entitlement to damages on a liquidated or unliquidated basis. Nevertheless, Wingcrown had claimed for damages in the sum of $211,123.72[35]. The learned AR had also awarded Wingcrown the sum of $95,178.31, against which Wingcrown did not appeal. Taking this submission as is, the total sum claimed for and the total sum awarded in AD 12, is less than the $357,000 option fee paid under OTP 2. Therefore, I find that the damages owing to Wingcrown should be reduced to nil.

50 I turn to address the second ground of appeal, in the event that I am wrong on any of the above.

Common Law Claim

Purchaser's case

51 The Purchasers' second ground of appeal arises in the event that Wingcrown's claim is a claim for unliquidated damages for breach of contract. The Purchasers submit that Wingcrown should not be entitled to any award of

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[35] Wingcrown's Closing Submissions for AD 12 dated 3 May 2024 at para 87.

damages, because the steps it took post-breach to mitigate its losses have more than fully compensated it for any loss incurred.

52 In assessing gains from mitigation, the basic rule at common law is that the benefit to the claimant, if it is to be taken into account in mitigation of damage, must arise out of the act of mitigation itself: see *McGregor on Damages* (James Edelman, Jason Varuhas & Andrew Higgins gen eds) (Sweet & Maxwell, 22nd Ed, 2024) ("*McGregor*") at para 10-121. In *British Westinghouse Electric and Manufacturing Company, Limited v Underground Electric Railways Company of London, Limited* [1912] AC 673 ("*British Westinghouse*"), Viscount Haldane held that the "subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business" (at 690).

53 The Purchasers rely on the following acts of mitigation by Wingcrown:

(a) First, Wingcrown's attempts to sell the Property to Purchaser A, which was taken in mitigation in response to the Purchasers' inability to complete. This led to the deposit forfeited from Purchaser A in the amount of $139,650.

(b) Second, Wingcrown's decision to grant OTP 2 to the Purchasers, which is an act of mitigation in response to the failure to complete SPA 1. The OTP 2 option monies amounted to $357,000. The Purchasers argue that contrary to Wingcrown's submission, there is no legal authority requiring that there be fresh monies due to Wingcrown. The option monies are a benefit that arise out of the breach of SPA 1 and credit should be given for them.

(c) The Purchasers further submit, in relation to the OTP 2 monies, that the monies are a forfeited deposit under SPA 1. Hence, under the established common law principle (see [29] above), Wingcrown must give credit for the forfeited deposit.

Wingcrown's case

54 Wingcrown submits that case law only stands for the proposition that forfeited deposits may be credited against the difference between the resale and original price, but not in relation to wasted expenses, which it is claiming for.

55 In relation to OTP A, Wingcrown submits that there is no causal link between the Purchasers' breach of OTP 2 and Wingcrown's gain through the deposit forfeited from Purchaser A ($139,650). In *Fulton Shipping Inc of Panama v Globalia Busines Travel SAU (formerly Travelplan SAU) of Spain* [2017] 1 WLR 2581 ("*The New Flamenco*") at [30], the United Kingdom ("UK") Supreme Court observed that the essential question was whether there was a sufficiently close link of causation between the benefit sought to be brought into account and the breach of the contract or by a successful act of mitigation. In *Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2010] 1 SLR 573 ("*Swiss Singapore*"), the High Court considered that because the subsequent transaction that gave rise to the buyers' profit was part of a continuous chain and not independent of or disconnected with the original breach, there was a need to take the subsequent gain into account in assessing the damages due to the buyers for the seller's breach (at [80]).

56 In this case, the resale to Purchaser A took place nine months after the Purchasers failure to complete on OTP 2. There is no evidence that there was a pool of ready buyers; this is not a case where the Property was oversubscribed

or where there were buyers competing for the Property. Instead, Wingcrown had to search for new buyers. This broke the causal link between the resale to Purchaser A and the Purchasers' breach of OTP 2, such that any benefits obtained by Wingcrown from OTP A is irrelevant to the damages it is entitled to from the Purchasers.

57 In relation to the OTP 2 option fee ($357,000), Wingcrown submits that this sum should not be taken into account because they do not constitute "fresh monies". As summarised at [3]–[4] above, the $357,000 was originally paid towards the purchase price in SPA 1. Wingcrown could have forfeited this sum under the terms of SPA 1 but agreed to treat it as going towards the OTP 2 option fee. There was thus no net gain to Wingcrown in the sum of a fresh option fee payment.

Decision

Applicable legal principles

58 The learned authors of *McGregor* state that "the basic rule is that the benefit to the claimant, if it is to be taken into account in mitigation of damage, must arise out of the act of mitigation itself" (at para 10-121). This is another way of expressing Viscount Haldane's requirement in *British Westinghouse*, that the "subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business" (at 690).

59 In *Swiss Singapore*, Justice Prakash provided further elaboration of Viscount Haldane's principle in *British Westinghouse*, when she held (at [80]), in the context of a breach of a contract for the sale of goods by a seller, that: (a) regard could be had to resales which took place within a reasonable period after

the breach; and (b) that the buyers' profit from a subsequent transaction after the breach could be taken into account as it was "part of a continuous chain and not independent of or disconnected with the original breach".

60 While these principles in *Swiss Singapore* were elucidated in the context of assessment of damages under s 50(2) of the Sales of Goods Act (Cap 393, 1999 Rev Ed) ("SOGA"), they are in my view, crafted in a manner that can provide general guidance to the question of mitigation of damage.

61 The analytical framing of a mitigating step in *Swiss Singapore* is similar to that in the English High Court decision of *Assetco plc v Grant Thornton UK LLP* [2019] EWHC 150 (Comm) ("*Assetco*"). There, it was held that "it is not sufficient for the defendant to prove a "but for" causal link between its negligence and the mitigating act" and that legal causation is also required. This has been expressed as "requiring the mitigating act to have "[arisen] out of the transaction [giving rise to the claim]" or to have flowed "as part of a continuous transaction from the negligence". Credit need not be given for acts arising out of the "independent decision of the innocent party" or for a benefit which is "collateral" (at [895]). This statement of principle was affirmed on appeal by the English Court of Appeal in *Assetco plc v Grant Thornton UK LLP* [2021] 3 All ER 517 (at [232]–[233]).

62 The nature of a causal link was also examined in the UK Supreme Court's decision in *The New Flamenco.* In that case, the charterers redelivered a vessel to the owners two years early (in 2007), in repudiatory breach of parties' agreement. The claimant proceeded to sell the vessel in 2007 at $23.7m. Had the vessel been returned two years later (in 2009), it would only have been valued at $7m. The claimant advanced its claim for damages by reference to the net loss of profits which they alleged that they would have earned during the

two-year period. The defendant argued that the claimant must give credit for the difference in value of the vessel in 2007 and in 2009. The UK Supreme Court rejected the defendant's argument. Lord Clarke held (at [32]–[33]):

> 32 That difference or loss was, in my opinion, not on the face of it caused by the repudiation of the charterparty. The repudiation resulted in a prospective loss of income for a period of about two years. Yet, there was nothing about the premature termination of the charterparty which made it necessary to sell the vessel, either at all or at any particular time. Indeed, it could have been sold during the term of the charterparty. If the owners decide to sell the vessel, whether before or after termination of the charterparty, they are making a commercial decision at their own risk about the disposal of an interest in the vessel which was no part of the subject matter of the charterparty and had nothing to do with the charterers.
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> 33 As I see it, the absence of a relevant causal link is the reason why they could not have claimed the difference in the market value of the vessel if the market value would have risen between the time of the sale in 2007 and the time when the charterparty would have terminated in November 2009. For the same reason, the owners cannot be required to bring into account the benefit gained by the fall in value. The analysis is the same even if the owners' commercial reason for selling is that there is no work for the vessel. At the most, that means that the premature termination is the occasion for selling the vessel. It is not the legal cause of it. There is equally no reason to assume that the relevant comparator is a sale in November 2009. A sale would not have followed from the lawful redelivery at the end of the charterparty term, any more than it followed from the premature termination in 2007. The causal link fails at both ends of the transaction.

63 In *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2005] 2 SLR(R) 302 ("*Tan Chin Seng*"), slightly different analytical language from that of *Swiss Singapore* and *Assetco* was used, although the thrust is in the same direction. There, the High Court held at [30] that "the compensating advantages to be deducted are those benefits that must arise directly from the breach of contract", and juxtaposed a "compensating advantage" against a "collateral benefit".

64 In summary, the Singapore and English courts have held that to establish a causal link, the mitigating act must have arisen out of the transaction giving rise to the claim or flowed as part of a continuous transaction from the wrongful act. Put another way, the benefits must arise directly from the breach of contract. Collateral benefits are not sufficient.

65 I will next examine cases that have applied these principles to related factual matrixes.

66 In *Supercars Lorinser Pte Ltd and another v Benzline Auto Pte Ltd* [2016] SGHC 281 ("*Supercars*"), the parties disputed the existence of an exclusive dealership agreement concerning modified cars. The plaintiff paid $300,000 to the defendant and argued that this was on the basis of a valid dealership agreement. The defendant's case was that this was part payment for an order of 30 cars, separate from the dealership agreement. It also counterclaimed for damages in respect of the plaintiff's failure to take delivery of the 30 cars. The court held that there was neither a dealership agreement nor an order for the 30 cars. Of relevance here is that the court observed, in *obiter*, that even if there was any agreement to purchase the 30 cars, the defendant would have mitigated its loss in respect of 19 of the cars by selling them, such that any loss arising from these 19 cars would not have been claimable (at [100]):

> 100 What is more, even if there had been any agreement to purchase the 30 cars, the price of the 30 cars did not represent the loss suffered by the Defendant. There was at the very least on this assumption, actual mitigation made by the Defendant through the sales to Regal, as even on the Defendant's own evidence, **19 of the 30 cards [sic] had been sold, and any losses avoided would not have been claimable**: *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673.
>
> [emphasis added in bold]

67 The UK case of *Hussey and another v Eels and another* [1990] 1 All ER 449 ("*Hussey*") dealt with the resale of property. In *Hussey*, the defendants contracted to sell a property to the plaintiffs. The plaintiff asked if the property had been subject to subsidence, and the defendants confirmed that it was not. It was later found that this statement was untrue. As a result, the plaintiff would have to vacate the house while repair works were carried out and would also have to pay for said repair works. The plaintiff did not have sufficient money for this. It stayed in the property for over two years and subsequently sold the property to developers. The plaintiffs subsequently claimed against the defendants for negligent misrepresentation. The court held that the subsequent resale was not part of a continuous transaction arising from the defendants' negligent misrepresentation (at 459). In one sense, there was a causal link between the inducement of the purchase by the defendants' misrepresentation and the plaintiffs' subsequent resale, as the plaintiffs had bought the property to live in and did so for a substantial period. However, it was only after two and a half years that the possibility of resale was explored. As such, the resale was not part of a continuous transaction stemming from the defendants' misrepresentation.

68 Two Canadian cases are also of note. In *Apeco of Canada, Ltd v Windmill Place* [1978] 2 SCR 385 ("*Apeco*"), the respondent landlord leased 2,526 square feet (of a 70,000 square foot building) to the appellant tenant. The appellant repudiated the tenancy agreement. The respondent then leased 17,000 square feet of the building to another tenant. This included the 2,526 square feet initially leased to the appellant. The court held that "the vacancy created by the appellant's breach did not have any bearing on the new tenant's decision to rent 17,000 square feet of accommodation … if the premises formerly reserved for [the appellant] had been the only available space suitable to the new tenant's

needs, different considerations would have applied, but the building was more than half empty" (at 388). As such, the eventual lease to a subsequent tenant was found to be an "independent transaction which in no way arose out of the consequences of the breach by the appellant" (at 389).

69 In *Vinland Holdings Ltd v Wisniowski (NSCA)* [1990] NSJ No 72 ("*Vinland*"), the respondent tenant entered into a one-year lease agreement with the appellant landlord, but abandoned the premises with seven months left on the lease. The landlord later moved another tenant into the vacated room. The landlord was awarded three months' rent at the initial ruling. On an appeal against that decision, the rent owing to the landlord was reduced to one month. The court held that the landlord was bound by a duty to mitigate and had done so (at [16]):

> 16 … In my view, the rental to Mr Cabrera could not have been concluded if the respondent had not breached the original agreement. It was a transaction which arose out of the consequence of the breach by the respondent. Contrary to the facts in [*Apeco*], the vacancy created by the respondent's breach did not only have a bearing on but was instrumental in the decision of both the landlord and Mr Cabrera in the rental.

70 With the above principles and decisions in mind, I next address the two instances of benefit relied on by the Purchasers: (a) first, the forfeited deposit from Purchaser A ($139,650); and (b) second, the option fee retained under OTP 2 ($357,000).

Forfeited deposit from Purchaser A ($139,650)

71 Wingcrown had three main responses to the Purchasers' submission that Wingcrown had to give credit for the forfeited deposit from Purchaser A.

72 Wingcrown's first response is that Condition 15.10(*c*) of the LSC entitles it to retain any surplus from the resale. However, this response does not address the issue. Condition 15.10(*c*) only entitles Wingcrown to retain *surplus* money from the re-sale, *ie*, any money above the quantum of loss suffered by Wingcrown as ascertained in its right to liquidated damages under Condition 15.10(*a*). The issue here is not whether Wingcrown is entitled to retain any surplus from the resale, but whether it must give credit for the forfeited deposit when claiming for damages. Wingcrown's first argument is hence rejected.

73 Wingcrown's second response is that the causal link between Wingcrown and the Purchasers was broken. This is because there is no evidence that there was a pool of ready buyers. Units in a condominium differ in size, floor and orientation. They may not be equally attractive to buyers. Wingcrown had to search for new buyers. This broke the chain of causation[36].

74 While I accept that units in a condominium may not be equally attractive to buyers, I do not consider that the appropriate legal test to establish a causal link is whether there is a ready pool of buyers, as Wingcrown submits. The above survey of legal authorities in England & Wales, Canada and Singapore show that the courts have approached the question of whether a subsequent resale could be considered as part of a "continuous chain of transactions" by taking on board factors such as: (a) whether the resale was conducted within a reasonable time; (b) the commercial impetus for sale; and (c) whether the seller was making a commercial decision at its own risk. They do not include whether there was a ready pool of buyers.

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[36] NE (16 October 2024) at pp 4, 9.

75 While these factors need not be exclusive, Wingcrown was also unable to point to any legal authority which supported its submission that a ready pool of buyers is a relevant factor to be considered. On the other hand, it was held in *Lazenby Garages Ltd v Wright* [1976] 1 WLR 459 ("*Lazenby*"), that after the initial breach of sale by the defendant, the sale of a second-hand car by the plaintiff to a subsequent purchaser six weeks later was held to have mitigated any loss suffered by the plaintiff from the defendant's breach, even though the court considered that there was no available market (and therefore no ready pool of buyers) for second-hand cars (at 462).

76 Nor do I find any principled basis to accept a ready pool of buyers as a relevant consideration. It does not flow from a step or decision taken by the seller, which the above factors relied on by the courts relate to. Furthermore, whether there is a ready pool of buyers would also be highly dependent on the nature of the sector, and the business environment at the material time. This would introduce unrelated vagaries and inconsistencies into the assessment.

77 Wingcrown also suggests that its act of having to search for new buyers broke the chain of causation. However, the test in *British Westinghouse* is whether the mitigating act is one that arises "out of the consequences of the breach and in the ordinary course of business" (at 690). It must be that a vendor of condominium units would be searching for buyers in the "ordinary course of business". If what Wingcrown advocates is to be the legal test, it would mean that most resales, even if taking place shortly after the initial breach, would not be considered a mitigating step since the vendor would inevitably be searching for buyers. I do not dismiss the possibility that certain searches may involve additional work or factors such that they cannot be taken as being in the "ordinary course of business". However, there is nothing in the evidence here that suggests that this case is one such example.

78 On the facts, there is evidence from Wingcrown itself, that following the Purchasers' breach, Wingcrown was under commercial pressure to look for another purchaser of the Property. This is in contrast to the facts in *The New Flamenco*, where the court found that the next step taken was a "commercial decision at [the vendor's] own risk". In Mr Koh's Reply Affidavit in OA 423, he stated[37]:

> 41 The Property **could not be left unsold** as Wingcrown, as a housing developer (consistent with the practice of other developers), wanted to sell all the residential units in the Development project.
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> 42 As I mentioned above, the Purchasers first initiated their purchase of the Property in end 2015 when the Property was under construction. **By February 2017, the Temporary Occupation Permit for the Property was ready, and by August 2018, the Certificate of Statutory Completion was issued.** Yet, the Purchasers failed to fulfil their payment obligations and/or complete the purchase of the Property even under the 2nd OTP …
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> 97 The Property was also one of the few remaining units left unsold in the Development and it is common practice for developers like Wingcrown to "*clear its inventory*". … Wingcrown **would continue to incur shareholder's loan interest at the rate of 3% per annum on the outstanding purchase price in relation to the Property, if Wingcrown could not complete the sale of the same as soon as possible.**
>
> 98 At the same time, there are other developments in the Development's vicinity, such as Principal Gardens, launched in end 2015, as well as the newer launches, Margaret Ville, Jervois Mansion and 38 Jervois. These developments would offer prospective buyers a longer leasehold tenure and would be relatively more attractive to prospective buyers as "*new launches*".
>
> 99 In this connection, there are various industry practices to "*clear inventory*", including an uplift on the agents' commissions in order to move competitive stock in various developments.
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> [emphasis added in bold]

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37 Affidavit of Mr Koh Chin Beng dated 16 May 2023 at paras 41–42, 97–99.

79 Mr Koh also exhibited an article in the Business Times, dated 10 August 2019, to his Reply Affidavit. The article stated: "Developers must develop and sell all units within five years to qualify for upfront remission of the 25 per cent additional buyer's stamp duty (ABSD) on the land purchase price"[38]. This was exhibited by Wingcrown to explain why it had applied an uplift to the agents' commission. After the COVID-19 pandemic, "the property market exponentially heated up"[39] and Wingcrown thus sought to "clear its inventory" as soon as practicable[40].

80 There is hence evidence that there was significant commercial pressure for Wingcrown to clear its inventory as soon as possible. As Mr Koh attests, by that time, "[t]he Property could not be left unsold"[41].

81 This is in contrast to the facts of *Hussey*, where the plaintiff stayed in the property for over two years and only thereafter explored the possibility of sale to developers. As such, the sale to the developers was not regarded there as part of a continuous transaction stemming from the defendants' misrepresentation that had induced the plaintiff's purchase of the property. The present case is also unlike the facts of *New Flamenco*, where there was no evidence of any commercial impetus or pressure on the ship owner to sell the vessel after the early repudiation of the charter agreement by the charterer.

82 The facts here are also unlike that in *Apeco*. In that case, the appellant's breach only involved part of the space that was subsequently leased. There was

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38 Affidavit of Mr Koh Chin Beng dated 16 May 2023 at Tab 19, p 175.

39 Affidavit of Mr Koh Chin Beng dated 16 May 2023 at para 95.

40 Affidavit of Mr Koh Chin Beng dated 16 May 2023 at para 97.

41 Affidavit of Mr Koh Chin Beng dated 16 May 2023 at para 41.

more than enough space in the building to have held both leases concurrently. It thus could not be said that the subsequent transaction was caused by the appellant's breach. In contrast, the sale here was for the entire space of the Property. Had the Purchasers completed the sale, Wingcrown could not and would not have issued OTP A.

83 While *Vinland* deals with a tenancy agreement and not a sale and purchase agreement, the facts relating to breach here are more similar to *Vinland*. In *Vinland*, the court considered that the vacancy that opened up following the respondent's repudiation of the earlier lease was instrumental to the subsequent tenancy agreement, such that the repudiation and the subsequent tenancy agreement was properly characterisable as parts of a continuous transaction. Since OTP A was only possible by reason of the Purchaser's failure to complete, there is little difficulty in this case in holding that the sale to Purchaser A was a transaction which arose directly out of the consequence of Purchasers' breach of OTP 2.

84 In addition, I consider it relevant that Wingcrown issued OTP A to Purchaser A less than three months after OTP 2 was terminated on 20 November 2018. I find this to be within a "reasonable period" for the attempted resale to take place. This is in contrast to the facts of *Hussey*, where the resale took place some two and a half years later.

85 I have also considered if Purchaser A's breach broke the causal link, but I find that it did not. Purchaser A's breach certainly forestalled Wingcrown's further receipt of any further purchase monies from Purchaser A. However, by the time of the breach, Wingcrown had already received the sum of $139,650 from Purchaser A. There was thus no break in causation between the

Purchasers' failure to complete OTP 2 and Wingcrown's receipt of the benefit of the $139,650 from Purchaser A.

86 Wingcrown's third response is that case law only supports the proposition that forfeited deposits may be credited against the difference between the resale and original price, but not in relation to wasted expenses, which it is claiming for. While Wingcrown did not initially take up this point at the appeal hearing, it subsequently advanced this submission in its supplemental submissions[42].

87 In making this argument, Wingcrown appears to suggest that it can escape the compensatory principle of damages by framing its claim as one for wasted expenses (*ie*, reliance loss). To the extent that this is Wingcrown's submission, I am unable to agree. The basis for awarding reliance loss is the assumption that were the contract performed, the claimant would have at least fully recovered the costs and expenditure incurred: *Alvin Nicholas Nathan v Raffles Assets (Singapore) Pte Ltd* [2016] 2 SLR 1056 ("*Alvin Nicholas*") at [24], citing with approval *Van Der Horst Engineering Pte Ltd v Rotol Singapore Ltd* [2006] 2 SLR(R) 586 at [54]–[55]. It is thus clear that the compensatory principle of damages equally undergirds a claim for reliance loss. This was affirmed by our Court of Appeal in *Alvin Nicholas*, where it stated at [24] that "the underlying principle, even in cases where reliance loss is awarded, is to place the innocent party in the position he would have been in *had the contract been performed* [emphasis in original]."

88 As a matter of fundamental legal principle, there is no reason why forfeited deposits should instantly not be creditable against a claim for wasted

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42 WWS-2 at paras 100–102.

expenses. Regardless of how a claim for damages is pleaded, it is inherent in the compensatory nature of the award that credit must be given for benefits arising from steps taken in mitigation.

89 I also find that the authorities have not ruled on this point as narrowly as submitted by Wingcrown. In *Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd* [2000] 3 SLR(R) 594 ("*Triangle Auto*"), the High Court held at [16] that, after forfeiting the deposit, the seller was entitled to sue for additional damages for breach of contract based on the losses it had suffered and was able to prove, but that credit should be given to the deposit amount of $3,000.

90 In the Hong Kong decision of *Polyset Ltd v Panhandat Ltd* (2002) 5 HKCFAR 234 ("*Polyset*"), it was held at [68]:

> 68 The object of a deposit is therefore not to provide compensation for loss resulting from the breach of a contract. The mechanism for such compensation is the claim for damages. Having forfeited the deposit for failure to complete, the vendor remains entitled at common law to sue for damages, **giving credit for the forfeited deposit where such damages exceed its amount**.
>
> [emphasis added in bold]

91 *Ashley King* applies this principle in the context of a sale and purchase of property. In deciding that forfeited deposits should be credited in assessing damages, the court highlighted the importance of balancing between losses incurred, and benefits received (at [17], [18] and [51]):

> 17 I begin with some general principles. The purpose of an award of damages is to compensate the injured party for the wrong he has received. Where that wrong is a breach of contract, the object of the award is to place the injured party in the position in which he would have been if the contract had been performed. **As a general principle, if the injured party has benefited as well as suffered as a result of the breach, he must give credit for the benefit against the loss he has suffered.** As Viscount Haldane LC put it in *British*

> *Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, 689:
>
> > "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James LJ in *Dunkirk Colliery Co v Lever* (1878) 9 Ch D 20, 25, 'The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business'. As James LJ indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. **But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act**."
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> 18 He summarised this principle by saying that **the court must "balance loss and gain"**. …
>
> 51 In my judgment Mr and Mrs Ng must give credit for the amount of the deposit in reduction of the damages that would otherwise be recoverable from Ashley King. My reasons are as follows: (i) **The overriding principle in any assessment of damages for breach of contract is to compensate the injured party rather than to punish the contract breaker. In assessing damages the court should balance loss and gain.** …
>
> [emphasis added in bold]

92 I agree with the principles elucidated in these cases. Arising from the compensatory nature of damages and the authorities surveyed above, a vendor must give credit to any forfeited deposit in reduction of damages. Such damages are not limited to the difference between the resale and original price and

includes a claim for wasted expenses. There is no principled basis to make such a distinction, neither did Wingcrown offer any.

93 Wingcrown raises two further cases in support of its argument that a forfeited deposit need not be set off against a claim for wasted expenditure. In my view, neither of these cases assist Wingcrown.

94 First, Wingcrown relied on *dicta* from this court's decision in *Ram*. At [64] of *Ram*, the court stated:

> 64 … Condition 15.10(b) of the [LSC] would not preclude the plaintiff's claim since the expenses were incurred and subsequently rendered unnecessary because of the defendant's failure to complete the sale and purchase.

95 The statement in *Ram* does not support Wingcrown's case, for two reasons:

(a) Clause 5.4 of the sale and purchase agreement in *Ram* operated to override Condition 15.10(*b*) of the LSC. This clause provided that "once this Agreement is terminated pursuant to this Clause 5.4, the [plaintiff] has the right to resell or otherwise dispose of the Property as if this Agreement had not been entered into and, without prejudice to any other rights or remedies available to the Plaintiff at law and in equity, forfeit the Deposit." By effect of this clause, the vendor was permitted to forfeit the deposit while preserving its other available rights or remedies in law or equity, including making a claim for wasted expenses. It is clear that the court's reading of clause 5.4 – and *not* Condition 15.10(*b*) of the LSC – underpinned its decision on this issue.

(b) In the sentence preceding the *dicta* cited above, the court in *Ram* affirmed the approach taken in *Bauer*. As I summarised at [40] above,

> the court in *Bauer* held that under LSC Conditions 15.9 and 15.10, the vendor would have to give credit to the forfeited deposit in reduction of damages, *including for wasted expenses incurred for the abortive sale*.

96 Second, Wingcrown cites *Essex v Daniell* (1875) LR 10 CP 538 ("*Essex*") in support of its argument that a forfeited deposit need not be credited against a claim for wasted expenses. The court in *Essex* stated, at 553:

> [U]nder ordinary circumstances, where the purchaser fails to complete, without any default on the part of the vendor, the latter is entitled to recover all the expenses he has incurred in preparing for the sale, and also the loss incurred upon a re-sale, that is, the difference of price, if any. Here, by the conditions of sale, the deposit is absolutely forfeited upon the purchaser's default, and the vendor is also entitled to recover the expenses he has incurred.

97 *Essex* similarly does not assist Wingcrown's case. The court in *Essex* affirmed the doctrine set out in *Ockenden v Henly* (1858) 120 ER 590 ("*Ockenden*"), which stated that where the conditions of sale provided for forfeiture of the deposit and recovery of deficiency in price together with expenses of resale, the deposit must be brought into account in assessing damages for the failed sale. However, the court in *Essex* distinguished the rule in *Ockenden*, on the basis that this doctrine only applies where the power of resale has been exercised. There was no resale in *Essex*. It was in this light, that the vendor in *Essex* was entitled to recover the expenses incurred in preparing for the abortive sale while also retaining the forfeited deposit (see *Essex* at 550–554).

98 In this case, Wingcrown did exercise its power of re-sale. Hence, even if *Essex* were to apply as Wingcrown submits, then following the rationale there, the doctrine in *Ockenden* applies. Wingcrown must thus give credit for the forfeited deposit, even on the authority of *Essex*.

99 As an aside, I note that the analysis in *Ockenden* and *Essex* was subsequently disapproved of in *Ashley King*. At [51] of *Ashley King*, Lewison J disagreed that a distinction should be drawn between cases where the power of re-sale was exercised, and where it was not. The learned authors of *McGregor* have also doubted the reasoning and decision in *Essex*, noting that it was difficult to see why whether the power of resale had been exercised should make any difference (at para 28-044).

100 I make no judgment on whether the analysis in *Essex* should be followed in Singapore; the facts of the present case are distinguishable and this question is thus not before me. To the extent that Wingcrown claims that *Essex* has been affirmed locally in *Ram*, and is thus good law[43], it does not appear from *Ram* that *Essex* was affirmed in so far as it stands for the proposition that a forfeited deposit does not have to be set off against a claim for wasted expenses. Instead, *Ram* merely cited *Essex* for the anterior proposition that a vendor is entitled to claim for wasted costs and the difference between resale and original price (at [61]). Nothing further was said in *Ram* on the issue of whether credit for the forfeited deposit had to be given in quantifying such a claim.

101 Wingcrown's fourth and final submission is that if the Purchasers take the forfeited deposit of $139,650 for OTP A into account, that they should also have to take into account the agent's commission fees paid by Wingcrown for OTP A, in the amount of $30,234.50. There are several difficulties with this submission.

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[43] WWS-2 at para 114.

102 First, the learned AR had dismissed Wingcrown's claim for the commission fees paid for OTP A. Wingcrown did not file any appeal against this decision. It is not before this Court in RA 160.

103 Second, Wingcrown's submission is premised on the fact that "Wingcrown had to pay the agent for OTP A in order to receive the deposit for OTP A"[44]. However, Wingcrown has only provided invoices dated 16 May 2019 for the sum of $21,346.50[45] and dated 23 May 2019 for the sum of $8,888.00[46]. Wingcrown has not provided proof that it "had to pay" the agent in the event that OTP A was entered into, and consequently that it "had to pay" the agent's commission in order to receive the corresponding deposit.

104 Third, Wingcrown's case is that its claim in AD 12 is based on the common law, *ie* a claim for unliquidated damages, and it has not appealed against the learned AR's award in AD 12 of $95,178.31. Even if the agent's commission for OTP A is taken into account, it would only reduce the benefit to Wingcrown from the forfeited deposit to $109,415.50. This would still be more than the amount awarded by the learned AR, which is $95,178.31. Hence, Wingcrown would still not be entitled to any damages[47].

Grant of OTP 2 as mitigation to Purchasers' breach of SPA 1

105 I turn next to the Purchasers' submission that Wingcrown must give credit for the OTP 2 option fee ($357,000) received by Wingcrown, because:

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44 WWS-2 at para 85.

45 Affidavit of Mr Koh Chin Beng dated 16 May 2023 at p 193.

46 Affidavit of Mr Koh Chin Beng dated 16 May 2023 at p 191.

47 Purchasers' Supplemental Submissions in RA 160 dated 18 November 2024 at para 49.

(a) it is a forfeited deposit under SPA 1; and (b) alternatively, because it is a mitigatory step taken by Wingcrown for the Purchasers' breach of SPA 1.

106 The sum of $357,000 could initially have been forfeited as a deposit under SPA 1. However, by virtue of OTP 2, the parties agreed to structure it as forming the OTP 2 option monies. Specifically, Clause IV.b in OTP 2 states that "The Purchaser has requested the Vendor to … out of the Forfeited Amount, not to forfeit the sum of … $357,000 …and to instead credit that sum towards the option fee payable under the fresh option to purchase…". Clause V then states: "The Vendor has agreed to issue, and the Purchaser has agreed to take, this Option to Purchase, pursuant to the Purchaser's aforesaid requests"[48].

107 As the parties have agreed not to treat the sum as a forfeited deposit under SPA 1, in my judgment, Wingcrown is not obliged to give credit to this sum on the basis that it is a forfeited deposit under SPA 1. Furthermore, the Court of Appeal has ruled in *Li Jialin CA* at [83] that Wingcrown had earned the option fee because the option contract has been duly performed. Hence, the option fee would not be regarded as a forfeited deposit.

108 I turn next to whether the sum of $357,000 arose from a mitigatory step taken by Wingcrown. This raises two sub-issues. First, whether there is a causal link between the Purchasers' breach of SPA 1 and the option fee ($357,000) received by Wingcrown for OTP 2. Second, whether Wingcrown did receive a benefit which arose from an act of mitigation.

109 I find in relation to the first sub-issue that there was a causal link. SPA 1 was terminated on 12 March 2018. The terms for the grant of OTP 2 indicate

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48 Affidavit of Ms Li Jialin dated 25 April 2023 at p 129.

that this was structured *as part of a continuous transaction* flowing from the Purchasers' breach in relation to SPA 1. In particular, parties agreed that: (a) Wingcrown would not forfeit the deposit of $357,000 under SPA 1 and would instead credit that sum towards the option fee payable to exercise OTP 2; and (b) the contractual deposit payable by the Purchasers upon the exercise of the option was $1,195,354.42, which would include the option fee of $357,000. The balance payment for the deposit would be taken from the sum that Wingcrown was due to refund the Purchasers under SPA 1.

110 The second sub-issue is whether it is material that, as structured, the OTP 2 option fee ($357,000) received by Wingcrown did not constitute fresh monies. As summarised above at [57], the $357,000 was originally made in part payment for the purchase price under SPA 1. By converting this to the option fee payable under OTP 2, Wingcrown did not receive a fresh or additional payment of an option fee.

111 The Purchasers submit that on the face of the transaction there was an actual gain. They also submit that fresh monies are not required for "benefit", although no authority was cited in support of this submission[49].

112 Wingcrown's submission is that it could have forfeited this sum under SPA 1, but agreed to treat it as going towards OTP 2 as a gesture of goodwill. It relied on *Thai Airways International Public Co Ltd v KI Holdings Co Ltd (formerly known as Koito Industries Ltd) and another* [2016] 1 All ER (Comm) ("*Thai Airways*"). There, the English Court held at [76] that "[w]here a claimant as a result of a step reasonably taken to mitigate its loss receives money *which*

[49] Purchasers' Supplemental Written Submissions for RA 160 dated 8 November 2024 at para 73.

it would not have received if the defendant had performed the contract, justice requires the sum received to be brought into account in the calculation of damages [emphasis added]". In this case, since Wingcrown could have already forfeited the sum of $357,000 upon the Purchasers' breach of SPA 1, that sum is not "money it would not have received".

113 In my view, it would be useful to return to the basic rule, which as stated in *McGregor*, is that "the benefit to the claimant", if it is to be taken into account in mitigation, "must arise out of the act of mitigation itself" (at para 10-121). In other words, there must be a benefit that arises out of the mitigatory act taking place after the breach of contract. I find the reasoning in *Thai Airways* to be consistent with the established principles of mitigation and therefore persuasive. Following the reasoning in *Thai Airways*, the OTP 2 option fee ($357,000) could not be construed as a benefit to Wingcrown that arose out of a mitigatory act following the Purchasers' breach of SPA 1, since it is not "money it would not have received" if the Purchasers had completed SPA 1. Hence, I find that Wingcrown need not give credit for this sum.

Conclusion

114 In conclusion, Wingcrown must give credit for the OTP 2 option fee ($357,000) as a result of LSC Conditions 15.10(*a*) and 15.10(*b*). On this basis alone, the liquidated damages that Wingcrown is entitled to under Condition 15.10(*a*), should be reduced to nil. Even if Wingcrown's claim is a claim for unliquidated damages, it must give credit for the forfeited deposit received under OTP A ($139,650). Hence, regardless of how Wingcrown's claim is framed, Wingcrown is not entitled to any award of damages. The Purchasers' appeal is consequently allowed.

115 I will hear parties on the issue of costs.

Kwek Mean Luck
Judge of the High Court

Lee Ee Yang and Charis Wong (Covenant Chambers LLC) for the appellants;
Tay Yong Seng, Toh Jia Jing Vivian and Kheshin Cheong Rui Pin (Allen & Gledhill LLP) for the respondent.