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

[2026] SGHC 126

District Court Appeal No 23 of 2025

Between

Equation Recycling Pte Ltd

… *Appellant*

And

Leading Bio-Energy (S) Pte Ltd

… *Respondent*

In the matter of District Court Originating Claim No 1343 of 2024

Between

Leading Bio-Energy (S) Pte Ltd

… *Claimant*

And

Equation Recycling Pte Ltd

… *Defendant*

JUDGMENT

[Civil Procedure — Pleadings — Objections — Whether the rule against penalties must be pleaded]

[Civil Procedure — Appeals — Construction of contract — Whether the court may raise a question of construction on its own accord]
[Contract — Contractual terms — Rules of construction]
[Contract — Remedies — Deposits — Functions of deposits]
[Damages — Liquidated damages or penalty — Whether a clause providing for the absolute forfeiture of a security deposit amounts to a penalty]
[Landlord and Tenant — Agreements for leases — Security deposits]
[Restitution — Unjust enrichment — Failure of basis — Recovery of deposits]
[Contract — Settlement agreements — Compromise of potential disputes]

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Equation Recycling Pte Ltd
v
Leading Bio-Energy (S) Pte Ltd

[2026] SGHC 126

General Division of the High Court — District Court Appeal No 23 of 2025
Sushil Nair JCA
9 February 2026, 21 May 2026

15 June 2026 Judgment reserved.

Sushil Nair JCA:

Introduction

1 The law of penalties and the law of deposits have long been recognised as having separate historical origins. The former originated from the Chancellor's jurisdiction at equity to grant relief against the strict enforcement of penal bonds at common law. The latter, being an import from the civil law, is older than the common law itself. The courts have therefore long strived to treat the two as "entirely distinct and separate" (*Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 ("*Linggi Plantations*") at 91B–E; see *Li Jialin v Wingcrown Investment Pte Ltd* [2024] 2 SLR 372 ("*Li Jialin*") at [35]–[36]).

2 The *locus classicus* on the law of penalties in Singapore is the House of Lords decision of *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited* [1915] AC 79 ("*Dunlop Pneumatic*"). Under Lord

Dunedin's classic formulation of the penalty rule, a clause imposing secondary obligations will be struck down as an unenforceable penalty if it does not, at the time of contracting, provide for a genuine pre-estimate of the likely losses that the innocent party will suffer on breach (*Dunlop Pneumatic* at 86, cited with approval in *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2021] 1 SLR 631 ("*Denka v Seraya*") at [151] and [185(b)]). The parties' freedom to agree on their remedial obligations is limited by the broad policy that "an award of contractual remedies must always be to compensate, and not to punish" (*Denka v Seraya* at [93]).

3 The *locus classicus* on the law of deposits in Singapore is the English and Wales Court of Appeal ("EWCA") decision of *Howe v Smith* (1884) 27 Ch D 89 ("*Howe v Smith*") (see *Li Jialin* at [37]). Indeed, that decision has been described as "the source of all modern learning as to the nature of deposits [which] has been followed again and again ever since" (*Linggi Plantations* at 91F). In what is almost a canonical statement of the law, Fry LJ recognised that a deposit functions as "an earnest to bind the bargain so entered into" (*Howe v Smith* at 101; *Li Jialin* at [37]). They are not intended to be compensatory; instead, they are meant to deter and disincentivise the payor of the deposit from falling into breach of the contract (*Li Jialin* at [43] and [49]).

4 In *Li Jialin*, the Court of Appeal ("CA"), following a detailed and instructive review of the relationship between the law of penalties and the law of deposits, held that the former had no application to the latter (at [43]–[52]). The law of penalties cannot be applied to what was never intended by the parties to be a substitute for damages (*Li Jialin* at [49]). However, *Li Jialin*, as well as virtually all of the authorities cited in its discussion on the law of deposits, concerned the forfeiture of purchase deposits paid under or pursuant to a sale

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agreement. It did not concern a security deposit paid by a tenant under a lease for the purpose of securing the due performance and observance of its obligations to the landlord.

5 A question that arises in this appeal is whether the law of penalties can apply to such a deposit, and if so, whether the clause providing for its forfeiture in fact amounts to an unenforceable penalty. The learned District Judge Chiah Kok Khun ("DJ") answered both questions in the affirmative in his judgment in *Leading Bio-Energy (S) Pte Ltd v Equation Recycling Pte Ltd* [2025] SGDC 250 ("Judgment"). The DJ also permitted the respondent to advance the argument that the clause providing for the forfeiture of security deposit constituted an unenforceable penalty, despite the fact that the respondent had failed to plead such a point in its statement of claim ("SOC").

6 Having considered the parties' submissions, I disagree with the DJ that the respondent should be permitted to advance this unpleaded argument. The appellant's victory on this point, however, is a pyrrhic one. That is because I find that the DJ erred in his interpretation of the appellant's right to forfeit the security deposit. In any case, while I agree with the DJ that the law of penalties may apply to a clause providing for the forfeiture of a security deposit paid under a lease, I find that the clause in this specific case does not amount to an unenforceable penalty. Given the relative novelty and importance of the legal issues raised in this appeal, I set out the reasons for my decision in full.

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Background facts

7 The appellant, Equation Recycling Pte Ltd, is a company incorporated in Singapore that carries on the business of recycling metal waste and scrap.[1] The respondent, Leading Bio-Energy (S) Pte Ltd ("LBE"), is a company incorporated in Singapore that carries on the business of waste collection.[2]

8 The appellant is the tenant of two lots of State land at 6A Jalan Papan Singapore 619402 and 6B Jalan Papan Singapore 610000 ("Premises") respectively, pursuant to a tenancy agreement with the Singapore Land Authority under the State Lands Act 1920 (2020 Rev Ed).[3]

The Handling Service Agreement

9 On 12 April 2021, the appellant and the respondent entered into a "Handling Service Agreement" ("Agreement") for the respondent to use an open area of the Premises ("Service Area") for a period of 30 months from 1 June 2021 to 31 December 2023 ("Term").[4] The respondent was to use the Service Area for its warehouse activities and storage of recyclable materials.[5]

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1 Joint Record of Appeal Volume III dated 18 November 2025 ("JROA–3") at p 5 (AEIC of Zhang Xiaofen dated 12 February 2025 ("ZX–1") at para 5).

2 JROA–3 at p 5 (ZX–1 at para 4) and p 27 (ZX–1 at p 24).

3 JROA–3 at p 40 (ZX–1 at p 37).

4 Joint Record of Appeal Volume II dated 18 November 2025 ("JROA–2") at pp 26–27 (Defence (Merits) dated 5 September 2024 ("Defence") at para 3); JROA–3 at pp 39–45 (ZX–1 at pp 36–42).

5 JROA–3 at p 6 (ZX–1 at p 7); JROA–3 at p 41 (ZX–1 at p 38 (clauses 1(a) and 1(b))).

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10 The terms of the Agreement, which the parties agreed is in the nature of a lease,[6] are preceded by five recitals. Two of them are relevant for the purposes of the appeal:[7]

(a) First, under recital three ("Recital 3"), the respondent agreed to pay the appellant a monthly "Handling Service Fee" of $40,000 (excluding GST) in consideration for its use of the Service Area.

(b) Second, under recital four ("Recital 4"), the respondent agreed to pay the appellant a refundable security deposit of $120,000, which would be held by the appellant for the respondent's due performance and observance of the terms of the Handling Service Agreement ("Security Deposit"). Given the centrality of Recital 4 to the issues arising in this appeal, I set it out in its entirety:

> The User agrees to pay to the Principal a refundable security deposit in the sum of S$120,000.00 (Singapore Dollars One Hundred Twenty Thousand Only) which is equivalent to three (3) months' rent and the first month's rental of S$40,000.00 on or before the signing of this Agreement or the handover of the Service Area whichever is earlier. The security deposit is to be held by the Principal for the due performance and observance of the stipulations and agreement hereinafter and cannot under any circumstances be used for any offset against rent due. Such deposit shall be repayable at the termination of the agreement within one month from the reinstatement works to be carried out by the User and subject to the Principal's acceptance of the reinstatement works. The Principal reserves all right to forfeit and deduct from the deposit should there be a breach of conditions or stipulation herein contained in respect of any such breach.

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6 Appellant's Case dated 18 November 2025 ("AC") at paras 14, 18 and 57; Respondent's Case dated 11 December 2025 ("RC") at paras 28 and 57.

7 JROA–3 at p 40 (ZX–1 at p 37).

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11 Turning to the terms of the Agreement proper, the respondent undertook, amongst others, the following obligations:[8]

(a) Under clause 1(c), the respondent agreed to pay the Handling Service Fee to the appellant's dedicated bank account on the first day of each month.

(b) Under clause 1(d), the respondent agreed to pay for the water and electricity charges that it used at the Service Area ("Utilities Obligation").

(c) Under clause 1(m), the respondent agreed that, prior to the expiry of the Term or the premature termination of the Agreement, it would at "its own cost" remove "all structural, alterations and additions" to the Service Area, as well as restore the Service Area "in all respects to its bare state and condition" ("Reinstatement Obligation").

(d) Under clause 1(o), the respondent agreed that, in the event of the premature termination of the Agreement, the appellant would have "all absolute right to claim" from the respondent, amongst others, "out of pocket expenses and agency fees" and the costs of reinstating the Service Area to lettable and tenantable condition.

12 Further, the Agreement made provisions for the contingency that the respondent defaulted on its obligations. These provisions, amongst others, are:[9]

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8 JROA–3 at pp 41–42 (ZX–1 at pp 38–39).

9 JROA–3 at p 43 (ZX–1 at p 40).

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(a) Under clause 3(a), the parties agreed that a default interest rate of 12% per annum would apply in the event the respondent fails or neglects to pay the Handling Service Fee or "any other due payment of the [appellant's] invoices" within seven days of the issuance of the relevant invoice. This interest would be applicable on the outstanding sum(s) until the date of actual payment of the same by the respondent to the appellant ("Late Interest").

(b) Under clause 3(b), the parties agreed that the appellant would have an express right to terminate ("discontinue") the Agreement in the event that: (i) the Handling Service Fee remains unpaid for 14 days after it became due (whether formally demanded or otherwise); and (ii) the respondent omits to perform or otherwise fails to observe any terms within 14 days of receiving the appellant's written notice specifying the non-performance or non-observance ("Termination Right").

The events giving rise to DC/OC 1343/2024

DC/OC 640/2022 and DC/OC 752/2023

13 Fissures began to form in the relationship between the parties in August 2022, when the respondent began defaulting on its obligation to pay the Handling Service Fee to the appellant. On 9 September 2022, the appellant commenced HC/OC 640/2022 ("OC 640") against the respondent to recover the

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sum of $87,031.15 – the aggregate sum owed by the respondent under four outstanding invoices that had been issued by the appellant.[10]

14 On 28 September 2022, the appellant obtained judgment in default against the respondent for its failure to file a notice of intention to contest or not contest. The terms of that judgment required the respondent to pay the appellant: (a) the sum of $87,031.15; (b) Late Interest on the sums due and owing from the date payment fell due until the date of full payment; and (c) costs in the sum of $1,800. The respondent paid the appellant the sum in (a), but not (b) and (c).[11]

15 The respondent began defaulting on its obligations under the Agreement again from April 2023. It failed to pay the Handling Service Fee, as well as the accompanying utilities charges, for the month of April 2023 on the first day of that month as required under Recital 3 read with clause 1(c) of the Agreement.[12] The appellant did not receive payment from the respondents despite the respondent having received a letter of demand from the appellant's solicitors for the same.[13]

16 Accordingly, on 28 April 2023, the appellant invoked its right under clause 3(b) of the Agreement and served on the respondent a written notice stating that the respondent would be given 14 days from the date of the notice (*ie*, 12 May 2023) to make payment of the Handling Service Fee, the utilities

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10 JROA–3 at pp 527–528 (Defendant's Opening Statement dated 22 April 2025 ("DOS") at paras 6–7); Joint Record of Appeal Volume I dated 18 November 2025 ("JROA–1") at p 12 (*Leading Bio-Energy (S) Pte Ltd v Equation Recycling Pte Ltd* [2025] SGDC 250 ("Judgment") at para9).

11 JROA–3 at p 528 (DOS at para 7); JROA–1 at p 12 (Judgment at para 9).

12 JROA–3 at pp 7–9 (ZX–1 at paras 9–18).

13 JROA–3 at pp 66–67 (ZX–1 at pp 63–64).

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charges for April 2023 and the Late Interest payable thereon ("Notice"). In the Notice, the appellant stated that it would be entitled to terminate the Agreement should the respondent fail to remedy its breaches.[14]

17 The appellant was of the view that the respondent had failed to comply with the terms of the Notice by the stipulated deadline of 12 May 2023. It also took the position that the respondent had failed to pay the Handling Service Fee and utilities charges for the month of May 2023 on the first day of that month.[15] Accordingly, on 18 May 2023, the appellant notified the respondent that it would be exercising its right to terminate the Agreement under clause 3(b) of the same.[16] At the same time, the appellant demanded that the respondent remove its stock and property at the Service Area by 25 May 2023.[17] The respondent did not do so, though it paid the Handling Service Fees and the accompanying utilities charges for the months of April and May 2023 (which came up to a total sum of $85,988.24) by way of a cheque.[18]

18 On 1 June 2023, the appellant commenced DC/OC 752/2023 ("OC 752") against the respondent for breaches of the Agreement.[19] On 20 June 2023, the appellant obtained judgment in default for failing to file a notice of intention

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14 JROA–3 at p 67 (ZX–1 at p 64).

15 JROA–3 at p 68 (ZX–1 at p 65).

16 JROA–2 at pp 27 and 39–40 (Defence at paras 3 and 6(7)–6(8)); JROA–3 at p 10 (ZX–1 at p 7).

17 JROA–3 at p 9 (ZX–1 at para 18); JROA–2 at p 33 (Defence at para 6(h)).

18 JROA–3 at pp 68–69 (ZX–1 at pp 65–66); JROA–2 at pp 15–16 (Defence at paras 6(a)–(g)).

19 JROA–3 at p 10 (ZX–1 at para 21).

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to contest or not contest against the respondent (*vide* DC/JUD 978/2023 ("JUD 978")), which required the respondent to:[20]

(a) deliver up to the appellant possession of the Service Area;

(b) pay to the appellant the sum of $111, being the utilities charges incurred by the appellant for the month of May 2023;

(c) pay to the appellant the sum of $847.77, being the Late Interest (at the rate of 12% per annum) on the sum of $85,988.24 calculated seven days after that sum had fallen due on 21 May 2023;

(d) pay to the appellant double value of $80,000 (plus GST) per month commencing from 19 May 2023 (inclusive) until possession of the Service Area is delivered up to the appellant; and

(e) pay to the appellant costs in the sum of $1,800.

19 The respondent was served with JUD 978 on 21 June 2023 by the appellant's solicitors,[21] but failed to comply with its terms.[22] As such, on 6 July 2023, the appellant applied for: (1) an enforcement order (DC/EO 86/2023) ("EO 86"); and (2) examination of enforcement respondent (DC/SUM 1652/2023) to enforce JUD 978 against the respondent.[23] In response, the respondent filed: (1) a summons for an order to release debts attached pursuant

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20 JROA–3 at pp 10–11 (ZX–1 at para 22); JROA–3 at pp 73–74 (ZX–1 at pp 70–71); JROA–1 at pp 13–14 (Judgment at para 12).

21 JROA–3 at p 11 (ZX–1 at para 23).

22 JROA–1 at p 14 (Judgment at para 13); JROA–3 at p 530 (DOS at para 12).

23 JROA–1 at p 14 (Judgment at para 13); JROA–3 at p 530 (DOS at para 12).

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to EO 86 (DC/SUM 1965/2023) ("SUM 1965") on 2 August 2023; and (2) a summons to set aside JUD 978 (DC/SUM 1898/2023) ("SUM 1898") on 11 August 2023.[24] For reasons that are unclear, SUM 1965 was subsequently withdrawn on 6 September 2023.[25]

The settlement agreement

20 On 4 October 2023, the parties entered into a settlement agreement in relation to JUD 978 ("Settlement").[26] This Settlement was entered into by way of telephone conversations and WhatsApp correspondence between the parties' solicitors. No formal written agreement appears to have existed. Its terms are set out in an email sent by the appellant's solicitors to the respondent's solicitors dated 4 October 2023.[27] These terms are that:[28]

(a) The respondent shall pay the sum of $84,956.12 by 5 October 2023.

(b) The respondent shall pay a further sum of $48,200 to the appellant by 23 October 2023.

(c) The respondent shall vacate the Service Area by 10 November 2023.

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24 JROA–3 at pp 11 (ZX–1 at para 24) and 530–531 (DOS at para 13); JROA–1 at p 15 (Judgment at para 14).

25 JROA–3 at p 531 (DOS at para 13).

26 JROA–3 at p 11 (ZX–1 at para 25).

27 JROA–3 at pp 81–82 (ZX–1 at pp 78–79).

28 JROA–3 at pp 81–82 (ZX–1 at pp 78–79); JROA–1 at pp 15–16 (Judgment at para 15); JROA–2 at pp 34–35 (Defence at para 6(l)).

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(d) The respondent shall pay 10 days of rent (on a pro-rated basis) for the period from 1 November 2023 to 10 November 2023. This payment shall be made by 1 November 2023.

(e) The respondent shall furnish documentary evidence of new premises it has leased or would be moving to by 9 October 2023.

(f) SUM 1898 shall be adjourned pending compliance with the payments set out above.

(g) In the event that the respondent fails to comply with any of the above obligations, the appellant shall be entitled to seek a dismissal of SUM 1898 with costs, and the respondent shall not object to the same. In the event that the respondent complies with the above obligations, SUM 1898 shall be withdrawn with no order as to costs.

(h) Should the respondent fail to comply with any of the above obligations, the appellant shall be entitled to enforce JUD 978 against the respondent.

(i) Pending compliance with the abovementioned obligations, all other enforcement proceedings commenced by the appellant shall be adjourned to monitor compliance. Should the respondent fail to comply with any of the above obligations, the appellant shall proceed with all other enforcement proceedings accordingly.

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21 The respondent did not furnish documentary evidence by 9 October 2023 of new premises it had leased or would be moving to.[29] This was a breach of the Settlement. At the hearing of SUM 1898 on 15 November 2023, the appellant took the position that the respondent was in breach of the Settlement and that the appellant was entitled to a withdrawal of SUM 1898 with costs. The respondent duly withdrew SUM 1898, and the court ordered the respondent to pay the appellant costs of $3,000.[30]

22 The respondent was also unable to vacate the Service Area by 10 November 2023 as required under the Settlement.[31] Instead, in breach of the settlement, the respondent only vacated by the Service Area on 11 December 2023 and informed the appellant of the same on 12 December 2023.[32] Further, the appellant asserted that the respondent had not, prior to vacating the Service Area, restored or reinstated the Service Area to a lettable and tenantable condition in accordance with the terms of the Agreement.[33]

23 On 14 December 2023, the appellant's solicitor sent a letter of demand to the respondent's solicitor, stating that:[34]

(a) the respondent had failed to comply with the terms of the Settlement, and that the appellant was at liberty to enforce JUD 978;

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29 JROA–1 at p 16 (Judgment at para 16).

30 JROA–3 at p 13 (ZX–1 at para 27); JROA–2 at pp 19 (Statement of Claim dated 15 August 2024 ("SOC") at para 6(m)) and 40 (Defence at para 6(9)).

31 JROA–3 at p 13 (ZX–1 at para 29).

32 JROA–2 at p 20 (SOC at para 6(n)); JROA–3 at p 14 (ZX–1 at para 30).

33 JROA–2 at pp 41–42 (Defence at paras 7(2)–7(3)).

34 JROA–3 at p 14 (ZX–1 at para 31) and pp 88–89; JROA–2 at p 20 (SOC at para 6(o)).

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(b) the respondent owed the appellant $266,250.52 under JUD 978 as at 14 December 2023;

(c) the respondent owed the appellant further sums of: (i) $3,006.71 for the utilities charges for October 2023 ("Oct 2023 Utility Charges"); and (ii) $3,000 for the costs of SUM 1898; and

(d) the respondent was to make payment of a sum of $272,257.23 (*ie*, the total of the three sums above) by 21 December 2023.

24 The respondent did not make the payments demanded by the appellant. As such, on 19 December 2023, the appellant commenced enforcement proceedings against the respondent.[35] On 22 January 2024, the appellant obtained an enforcement order (DC/EO 176/2023) ("EO 176") against the respondent,[36] pursuant to which it recovered the sums of $164,431.26 and $152,324.91 from the respondent's accounts with DBS and UOB (inclusive of the costs of the Bailiff and the appellant).[37] As the court had directed in EO 176 that the quantum of the total sums enforced are not to exceed $276,634.72, the appellant made a refund of the excess to the respondent on 26 March 2024.[38]

The forfeiture of the Security Deposit

25 By way of letters dated 14 March, 20 March, 1 April and 5 April 2024, the respondent requested that the appellant refund the Security Deposit which

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35 JROA–3 at pp 14–15 (ZX–1 at para 32), 530 and 533 (DOS at paras 12 and 20).

36 JROA–3 at pp 14–15 (ZX–1 at para 32) and pp 90–91 (ZX–1 at pp 87–88).

37 JROA–3 at p 15 (ZX–1 at paras 33–34) and pp 119–120 (ZX–1 at p 116–117).

38 JROA–3 at p 16 (ZX–1 at para 39).

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the former had paid over to the latter at the beginning of the Term.[39] In a reply dated 5 April 2024, the appellant refused to do so, citing various breaches of the Agreement on the part of the respondent, which had allegedly caused it loss and damage. In the same reply, the appellant also asserted its right to forfeit the Security Deposit under Recital 3 of the Agreement.[40]

26 On 15 August 2024, the respondent commenced DC/OC 1343/2024 ("OC 1343") with a view towards recovering the Security Deposit from the appellant. The essence of the respondent's claim was that the appellant had wrongly refused to repay the Security Deposit, even though: (a) the respondent had vacated the Service Area; (b) the appellant had been paid on JUD 978 pursuant to EO 176; and (c) there was no outstanding unremedied breaches of the Agreement.[41] The respondent, however, admitted that it had not paid $3,006.71 Oct 2023 Utility Charges, and agreed that it should be deducted from the Security Deposit of $120,000 which the appellant owed the respondent. Thus, the respondent's claim against the appellant for the recovery of the Security Deposit was in the sum of $116,993.29.[42]

27 In its defence filed on 5 September 2024, the appellant asserted that it was, pursuant to Recital 4, entitled to forfeit and deduct from the Security Deposit should there be a breach of the Agreement.[43] The appellant argued that there had been multiple breaches of the Agreement and the Settlement, causing

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39 JROA–3 at pp 15–16 (ZX–1 at paras 36, 38 and 40).

40 JROA–3 at p 16 (ZX–1 at para 41) and pp 126–127 (ZX–1 at pp 123–124).

41 JROA–2 at p 22 (SOC at para 11).

42 JROA–2 at p 22 (SOC at para 11).

43 JROA–2 at pp 43–44 (Defence at para 10(1)).

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it various heads of loss and damage.[44] Specifically, the appellant stated that it had suffered the following seven heads of loss and damage:

Item	Description	Amount
1	Legal costs incurred due to the respondent's repeated breaches of the Agreement since 2022 ("Legal Costs").	$29,581.46
2	Reimbursement of commission paid by the appellant with respect to the Agreement ("Commission").	$19,784.95
3	Oct 2023 Utility Charges (undisputed).	$3,006.71
4	Contractual interest at the rate of 12% per annum on the sum of $3,006.71 from 31 October 2023 to 5 September 2024 (both dates inclusive), with interest accruing thereon until the date of final payment ("Late Interest on the Oct 2023 Utility Charges").	$307.43
5	Payment for cement cubes (including the incidentals) to be deployed at the Service Area from May 2023 to July 2023.	$5,292.00
6	Payment for manpower for site inspection and surveying for the handover of the Service Area on 10 November 2023 ("Handover Costs").	$1,296.00
7	Loss of income/reputation ("Reputation Loss")	$60,000.00

28 Items 5 and 6 require elaboration. Following the appellant's termination of the Agreement on 18 May 2023 (see [17] above), the appellant had taken steps to re-enter and re-possess the Service Area. One of the steps taken by the appellant was to cordon off the accessible points at the Service Area with

[44] JROA–2 at pp 44–46 (Defence at paras 10(2)–10(9)).

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cement cubes for about three months.[45] The $5,292.00 claimed by the appellant under item 5 in the table above is for the costs of deploying those cement cubes. On the other hand, the losses incurred in item 6 relates to the manpower that the appellant had deployed to inspect and survey the Service Area for the purposes of the handover that was due to take place on 10 November 2023 pursuant to the terms of the Settlement (see [20(c)] above).[46]

Decision below

29 Following a day-long trial on 14 July 2025, the DJ issued the Judgment on 19 September 2025. He began by considering whether, on a proper construction of Recital 4, the appellant was entitled to forfeit the Security Deposit for any breaches of the terms of the Agreement on the respondent's part (Judgment at [7(a)] and [19]–[20]). The DJ answered this question in the affirmative based on a plain reading of Recital 4 (Judgment at [28]). There was no ambiguity on this point, and such an interpretation was consistent with the objective intentions of the parties (Judgment at [29]–[30]).

30 The next issue that the DJ was faced with was the argument that Recital 4 constituted an unenforceable penalty clause ("Penalty Argument"). The respondent, however, had not pleaded the Penalty Argument in its SOC. Instead, it had been "raised for the first time at trial" (Judgment at [32], [33] and [36]). Notwithstanding that, the DJ permitted the respondent to advance it for two main reasons.

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45 JROA–2 at p 40 (Defence at para 6(8)).

46 JROA–2 at p 44 (Defence at para 10(3)).

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(a) First, the DJ found that "the enforceability of the forfeiture clause in Recital 4 [was] a legal issue arising from the [appellant's] reliance on Recital 4". As such, there was no need for the respondent to have pleaded the Penalty Argument in its SOC (Judgment at [36]).

(b) Second, the DJ found that no prejudice had been occasioned to the appellant by the respondent's failure to plead the Penalty Argument. The appellant was relying on Recital 4 to justify the forfeiture of the Security Deposit which the respondent was demanding it to return. Hence, the appellant would have been aware that the enforceability of the forfeiture clause in Recital 4 was in issue since the commencement of OC 1343. It would therefore not have been taken by surprise by the Penalty Argument (Judgment at [36]).

31 The DJ then turned to the respondent's argument that Recital 4 of the Agreement amounted to an unenforceable penalty clause proper. For the law of penalties to even apply, however, Recital 4 had to be a clause that imposed secondary obligations. In undertaking this analysis, the DJ relied on the guidance provided by the CA in *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386 ("*Leiman Ricardo*"), which at [101] distinguished between clauses imposing primary and secondary obligations (Judgment at [38]–[42]; see [139] below). Moving to the analysis proper, the DJ began by noting that the "commercial purpose" of the Agreement was to "generate income" for the appellant. The respondent would "fulfil this commercial purpose" by making "payment of the Handling Service Fee on time". However, Recital 4 imposed "a requirement on the [respondent] to pay compensatory damages to remedy […] *any* breach of the Agreement" [emphasis in original]. As such breaches would not be limited to the respondent's obligation to pay the Handling Service

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Fee on time, the obligations imposed by Recital 4 went "beyond the essential purpose of the Agreement". This meant that Recital 4 imposed obligations which were "incident to the primary commercial interest of the [appellant] under the Agreement of being paid for letting out the Service Area". Consequently, the DJ held that "the obligations imposed on the [respondent] under Recital 4 would be defined as secondary obligations" (Judgment at [45]–[46]).

32 The question that followed was the application of the rule against penalties proper, *viz*, whether Recital 4 provided for a genuine pre-estimate of the likely loss that would be suffered by the appellant in the event of a breach of the Agreement by the respondent (Judgment at [47]). The DJ answered this in the negative. First, although the quantum of the Security Deposit represented three months of the Handling Service Fee, it could be forfeited "on the occasion of one or more of any breach of the Agreement", some of which might cause serious loss whilst others might not. Second, the appellant would be entitled under Recital 4 to forfeit the entire Security Deposit for the respondent's breaches of the Agreement which consisted solely of a failure to pay a sum that was smaller than the quantum of the Security Deposit (*eg*, Utility Charges and Late Interest). The DJ therefore found that Recital 4 offended the rule against penalties, and that the Security Deposit was not forfeitable (Judgment at [50]).

33 In reaching the conclusion that Recital 4 was an unenforceable penalty clause, the DJ rejected the appellant's reliance on the CA's decision in *Li Jialin* and Ramesh J's (as he then was) decision in *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 ("*Hon Chin Kong*"), holding that those cases had no application to the present case (Judgment at [51]). The appellant had relied on these two cases to argue, amongst others, that the law of penalties has no application to the forfeiture of the Security Deposit.

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34 The DJ then moved to consider the appellant's alternative contention that it was entitled to set off monies against the Security Deposit by reason of the respondent's repeated breaches of the Agreement (Judgment at [52]). Before doing so, the DJ examined the effect of the Settlement in respect of the respondent's breaches. The DJ found that the Settlement had compromised all of the respondent's breaches up to the time of the Settlement ("pre-Settlement breaches") (Judgment at [55]). The appellant having exercised its rights under the Settlement and recovered from the respondent what was due to it under the Agreement, the DJ held that it was not permitted to claim any set-off of the Security Deposit in respect of the pre-Settlement breaches (Judgment at [56]).

35 However, the DJ noted that the Settlement did not compromise the parties' rights post-settlement, given "the absence of the usual clause in the Settlement that one tends to see in settlement agreements that extinguishes all claims of the parties relating to the subject-matter of the dispute" (Judgment at [56]). In this regard, the appellant had pleaded seven heads of loss and damage which it had allegedly suffered owing to the respondent's breaches of the Agreement (see [27] above). The DJ, however, held that there was no legal and/or factual basis for it to claim a set-off of these alleged losses or damages against the Security Deposit. Accordingly, the DJ dismissed the appellant's alternative defence of set-off (Judgment at [65]). The DJ's reasons in relation to each specific head of loss are summarised as follows:

(a) In relation to the Legal Costs, the DJ found that these had been "subsumed" in JUD 978 and the Settlement. In any case, in so far as the appellant was attempting to set off solicitor and client costs against the Security Deposit, the DJ held that "short of an express agreement

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between parties, solicitor and client costs cannot be the subject matter of a claim for damages" (Judgment at [58]).

(b) In relation to the Commission, the DJ found that there was "no evidence" indicating that it had in fact been paid (Judgment at [59]).

(c) In relation to the Oct 2023 Utility Charges, the respondent had admitted its failure to pay the appellant the same (see [26] above).

(d) In relation to Late Interest on the Oct 2023 Utility Charges, the DJ found that such a head of loss would not have been incurred by the appellant at all if it had returned the Security Deposit to the respondent at the first instance (*ie*, when first requested by the respondent to do so). This was because the Oct 2023 Utility Charges would have been offset against the Security Deposit, resulting in there being no principal sum on which the Late Interest could have been charged (Judgment at [60]).

(e) In relation to the costs of the cement cubes (including the incidentals) deployed at the Service Area from May to July 2023, the DJ found that this had been "subsumed" in the Settlement. This was because the costs for the cement cubes had been incurred before the Settlement. However, it had not been included therein (Judgment at [61]).

(f) In relation to the Handover Costs, the DJ found that the appellant had incurred them despite having been informed by the respondent that it would not be able to vacate the Service Area by 10 November 2023. Accordingly, the DJ held that the respondent should not be held liable for such costs (Judgment at [62]).

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(g) In relation to the Reputation Loss, the DJ found that the appellant had not produced any evidence to substantiate its assertion that it had suffered such a loss (Judgment at [63]).

36 Having succeeded in substantially all of its arguments, the DJ entered judgment in the respondent's favour. The appellant was ordered to pay the respondent the sum of $116,993.29 (the quantum of the Security Deposit, minus the Oct 23 Utility Charges ($3,006.71)) with interest (Judgment at [67]).

The parties' cases

The appellant's case

37 The appellant advances four main challenges against the DJ's decision. First, the appellant submits that the DJ was wrong to have permitted the respondent to advance the Penalty Argument when it had not been specifically pleaded by the respondent.[47] Specifically, the appellant argues that the DJ erred in finding that: (a) the enforceability of the forfeiture clause in Recital 4 was a legal issue arising from the appellant's reliance on Recital 4; and (b) the respondent had pleaded the material facts necessary to advance the Penalty Argument.[48] The respondent's SOC was devoid of particulars as to why Recital 4 amounted to a penalty clause, and so was its opening statement and the affidavit of evidence-in-chief ("AEIC") of its sole witness.[49]

38 Additionally, the appellant argues that the DJ erred in finding that it would not be taken by surprise by the Penalty Argument and that there would

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47 AC at paras 8(a), 28 and 45.

48 AC at para 33.

49 AC at paras 34–38; Appellant's Reply dated 26 December 2025 ("AR") at para 25.

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be no prejudice occasioned to it.[50] As the respondent had not pleaded the material facts for the Penalty Argument, the appellant "never truly knew the case they had to meet to defend it properly and adequately".[51] Owing to the belated nature in which the respondent raised the Penalty Argument, the parties were unable to lead evidence to determine "whether the Security Deposit constituted a genuine pre-estimate of loss or otherwise".[52] Accordingly, the appellant argues that the DJ erred in permitting the respondent to advance the Penalty Argument when it had not been specifically pleaded in its SOC.

39 Second, the appellant submits that the DJ erred in finding that Recital 4 of the Agreement was an unenforceable penalty clause.[53] This argument has two broad limbs, the first of which is that the law of penalties is not applicable to the forfeiture of the Security Deposit. In this regard, the appellant argues that the DJ erred in finding that the CA's decision in *Li Jialin* did not apply to the present case.[54] Pointing to *Smart Glove International Pte Ltd v Full Support Healthcare Ltd* [2025] SGHC 168 ("*Smart Glove*"), where the principles in *Li Jialin* had been applied in "a factual matrix other than the conveyancing context", the appellant alleges that the DJ had placed "undue emphasis" on the conveyancing context in *Li Jialin*.[55] The appellant also argues that *Hon Chin Kong*, a case that was substantially endorsed by the CA in *Li Jialin*, did not concern a deposit paid in the course of a conveyancing transaction.[56] Therefore, it argues that the

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50 AC at para 39.

51 AC at paras 35 and 44.

52 AC at paras 40 and 43.

53 AC at para 8(b).

54 AC at paras 12.

55 AC at paras 13–14 and 16–18.

56 AR at para 16.

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principles enunciated in *Li Jialin* (which will be set out in greater depth below) are not restricted to conveyancing transactions.[57]

40 The appellant additionally argues that the DJ had "failed to consider" whether the principles set out by the CA in *Li Jialin* could also apply to security deposits paid under a lease.[58] The appellant referred to Kwek Mean Luck J's decision in *Royal & Sons Organisation Pte Ltd v Hotel Calmo Chinatown Pte Ltd* [2024] SGHC 248 ("*Royal & Sons*"), where the learned judge found that the landlord in that case was entitled to forfeit a security deposit for breaches of the relevant tenancy agreement (*Royal & Sons* at [56]).[59]

41 The appellant also argues that the DJ erred in finding that the Security Deposit had not been paid to the appellant "in the form of an earnest".[60] The appellant argues that, contrary to the DJ's reasoning, a deposit that takes the form of an earnest payment "need not be made pending the execution of the [relevant] agreement".[61] Instead, it suggests that so long as the relevant sum has been paid over as "a guarantee that the [relevant] contract be performed", the deposit takes on an "earnest" character such that the law of penalties is no longer applicable. As the Security Deposit had been paid to secure the respondent's performance of its obligations, the appellant asserts that it has an earnest function and that the law of penalties has no application to it.[62]

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57 AC at paras 16–18 and 22; AR at paras 17–18.

58 AC at paras 13–14 and 23.

59 AC at para 18.

60 AC at paras 19–20 and 24.

61 AC at para 24.

62 AC at paras 19–20 and 24–25.

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42 The second limb of the appellant's argument that the DJ erred in finding that Recital 4 is an unenforceable penalty clause is an alternative to the first. The appellant argues that, even if the law of penalties is applicable to the forfeiture of the Security Deposit, the DJ erred in his application of the penalty doctrine to the Security Deposit. Specifically, the DJ is said to have erred in finding that Recital 4 imposed a secondary obligation on the respondent.[63] Instead, Recital 4 imposed a primary obligation on the respondent to make payment of the Security Deposit, which would be forfeitable upon the breach of the Agreement.[64] This would be consistent with the CA's statement in *Li Jialin* that deposits "do not operate in the sphere of secondary obligations" (at [49]).[65]

43 Next, the appellant also argues that the DJ erred in finding that the Security Deposit was not "a genuine pre-estimate of the loss a landlord would suffer". It contends that the quantum of the Security Deposit was reasonable since it amounted to 10% of the total rent for the term of the tenancy. Industry practice, as shown by the Singapore Business Federation's Code of Conduct for the Leasing of Retail Premises dated 15 March 2022, is that the quantum of security deposits for commercial premises with a floor area of up to 5,000 square feet and with a lease term of up to three years shall not exceed an amount equal to three months' gross equal rent. Given that the Security Deposit was equivalent to three months of the Handling Service Fee for a floor area of approximately 16,159.50 square meters and a Term of 30 months, the appellant submits that the quantum of the Security Deposit was eminently reasonable.[66]

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63 AC at paras 51–56.

64 AC at para 57.

65 AC at paras 49–50.

66 AC at para 59; JROA–3 at p 601 (Defendant's Closing Submissions dated 25 August 2025 at para 44).

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Further, the appellant argued that there was "a probability" that the greatest loss that could conceivably have followed from a breach of the Agreement would exceed the quantum of the Security Deposit – a possibility that turned into reality in the present case, as the damages that the appellant had claimed by way of EO 176 far exceeded the quantum of the Security Deposit.[67]

44 Lastly, the appellant argues that the DJ erred in finding that the appellant was not entitled to the Late Interest on the Oct 2023 Utility Charges, on the ground that it would not have been incurred if the Security Deposit had been returned to the respondent.[68] The appellant asserts that it is entitled to charge such a sum based on clause 3(a) of the Agreement (see [12(a)] above).[69] The DJ's conclusion on this point was premised on his earlier finding that the Security Deposit was not forfeitable. Given the appellant's position that the DJ erred in finding that the Security Deposit was an unenforceable penalty clause, it submits that, were the court to be with it on that point, the DJ's basis for deciding this issue in favour of the respondent would disappear.[70] Accordingly, the appellant submits that it is entitled to the Late Interest of 12% per annum on the Oct 2023 Utility Charges from 7 November 2023 to the date of actual payment.[71]

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67 AC at para 59.

68 AC at paras 60–61.

69 AC at paras 62–63.

70 AC at para 64.

71 AC at para 68.

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The respondent's case

45 The respondent rejects all four grounds of appeal advanced by the appellant. First, respondent submits that the DJ was correct in permitting it to advance the Penalty Argument notwithstanding its failure to specifically plead it.[72] It argues that it is unnecessary for "the precise legal label ("penalty") to be pleaded, provided that the material facts are known and contested at trial".[73] Given that the DJ's findings that the material facts had been sufficiently pleaded by the respondent and that there was no prejudice occasioned to the appellant are consistent with the authorities and the evidence, the respondent argues that the appeal on this point should be dismissed.[74]

46 Second, the respondent submits that the DJ was correct in declining to apply the CA's decision in *Li Jialin*.[75] It rejects the appellant's reliance on *Smart Glove*, on the basis that that case concerned "refundable advance payments" made under a supply agreement, as opposed to security deposits paid "to secure compliance under a tenancy".[76] It also argues that the appellant's reliance on *Royal & Sons* is misplaced, given that the question as to whether the forfeiture clause in that case was unenforceable as a penalty had not been argued before Kwek J.[77] In any case, the DJ's decision was based on a reasoned distinction between purchase deposits and security deposits. Unlike the former, which is paid as an "earnest pending contract execution", the latter is paid to "secure

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72 RC at para 36.

73 RC at para 43.

74 RC at paras 43–45.

75 RC at paras 25, 56 and 59.

76 RC at para 30.

77 RC at para 34.

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ongoing compliance with the Agreement".[78] As such, the respondent argues that the DJ was right to distinguish *Li Jialin* on the facts, and that the appellant's appeal on this ground should be rejected.[79]

47 Third, the respondent submits that the DJ was correct in finding that Recital 4 amounted to an unenforceable penalty clause.[80] The respondent's submissions on this front mostly rehash the DJ's reasoning in his Judgment.[81] Hence, it suffices to say that the respondent asserts that the DJ was correct in finding that Recital 4 imposes secondary obligations on the respondent and that the Security Deposit was not a genuine pre-estimate of loss.[82]

48 Fourth, the respondent asserts that the DJ was correct in holding that the appellant is not entitled to Late Interest on the Oct 2023 Utility Charges.[83] If the Security Deposit had been returned to the respondent at first instance (as the DJ found the appellant ought to have), the Oct 2023 Utility Charges would have been offset against the Security Deposit, resulting in there being no outstanding sum on which Late Interest could be chargeable under clause 3(a).[84]

Issues to be determined

49 Three main issues arise for my determination:

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78 RC at paras 31–32 and 57.

79 RC at para 35.

80 RC at paras 46–47.

81 RC at paras 46–59.

82 RC at para 59.

83 RC at paras 61–62.

84 RC at para 67.

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(a) First, whether the DJ erred in permitting the respondent to advance the Penalty Argument when it had not been pleaded in its SOC.

(b) Second, whether the DJ erred in his interpretation of the forfeiture clause in Recital 4. The relevance and significance of this issue will be explained below.

(c) Third, if the DJ had not erred in permitting the respondent to advance the unpleaded Penalty Argument, whether the DJ erred in finding that Recital 4 is in the nature of an unenforceable penalty. This requires the resolution of two separate issues, which I will approach sequentially:

(i) Whether the DJ erred in finding that the CA's decision in *Li Jialin* was inapplicable to determine the validity of Recital 4.

(ii) If not, whether the law of penalties is applicable to determine the validity of Recital 4. If it does, whether Recital 4 is in fact in the nature of an unenforceable penalty.

Preliminary issue: The legal nature of recitals

50 Before I set out my decision on the issues that arise in this appeal, I will, for completeness' sake, set out a preliminary issue that appears to have been missed by the DJ and the parties. That issue stems from the fact that the "clause" which purportedly gave the appellant the right to forfeit the Security Deposit was in the nature of a recital.

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51 Ordinarily, recitals set out the background to a transaction and the purpose for which the parties are entering into the transaction (Richard Christou, *Boilerplate: Practical Clauses* (Sweet & Maxwell, 8th Ed, 2020) ("*Practical Clauses*") at para 1–010; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 264 ALR 15 ("*Metcash Trading*") at [379]). Broadly speaking, recitals do form part of the contract in which they are found and may be used to assist in its construction. However, the common law, since at least 1693, has drawn a distinction between the operative terms of a contract and its recitals. Save for those situations where there are express words to the contrary, the general position at law is that recitals are usually not regarded as operative terms of a contract (*Bath & Mountague's Case* (1693) 3 Cas in Ch 55 at 101; *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 201 at [68]; *The Commissioners of Inland Revenue v Raphael* [1935] AC 96 at 143–144; *Metcash Trading* at [380(2)]; see also *Practical Clauses* at para 1–010).

52 The Agreement draws a clear distinction between its recitals and its terms. Its recitals, found at the second page of the Agreement, is preceded by the header "WHEREAS".[85] Its terms, found at pages three to six of the Agreement, is preceded by the header "WHEREBY IT IS AGREED AS FOLLOWS".[86] In light of this, during the hearing of this appeal, I queried the appellant on the legal significance of the fact that Recital 4 was in the nature of a recital, as opposed to a term of the contract.[87] In response, the appellant confirmed that both parties have proceeded, and will be proceeding, "on the

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85 JROA–3 at p 40 (ZX–1 at p 37).

86 JROA–3 at pp 41–44 (ZX–1 at pp 38–41).

87 Transcript of hearing on 9 February 2026 ("Transcript") at p 4 line 6 to p 5 line 3.

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basis that [Recital 4] is a term of the [Agreement]".[88] The respondent did not argue otherwise. Accordingly, notwithstanding my reservations on this point, I will proceed – as the parties and the DJ have – on the basis that Recital 4 is an operative term of the Agreement.

Issue 1: Whether the DJ erred in permitting the respondent to raise the unpleaded Penalty Argument

The law on pleadings

53 Antecedent to the substantive question of whether the DJ erred in finding that Recital 4 amounted to an unenforceable penalty is the procedural question of whether the respondent ought to be permitted to advance the Penalty Argument, when such an argument had not in fact been pleaded in its SOC. That requires me to set out the law on pleadings, a subject on which the CA has provided authoritative guidance in various cases.

54 In an adversarial system of justice like ours, pleadings serve at least two functions: they define the issues to be decided by the court and inform the parties of the case they have to meet (*V Nithia v Buthmanaban s/o Vaithilingam* [2015] 5 SLR 1422 ("*V Nithia*") at [36]; *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 ("*Belfield International*") at [94]). But more than that, pleadings furnish the entire factual substratum on which the parties' cases, as well as their subsequent conduct of the litigation, rest. They feature in all stages of the trial process; their role in the civil litigation process is pervasive (see generally *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [35]).

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88 Transcript at p 5, lines 4–5.

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55 An important purpose of pleadings is to "enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it" (*British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 45 ConLR 1 at 4–5 (*per* Saville LJ), cited with approval in *Sharikat Logistics Pte Ltd v Ong Boon Chuan* [2011] SGHC 196 at [7]). As a matter of natural justice, every litigant has a right to be given fair and proper notice of their opponent's case in advance, so that they will not be left in the dark as to the case they will have to meet at trial. That right is vindicated by the correlative duty of every litigant to plead the material facts in support of their claims or defences, which is the *means* by which parties are informed of their opponent's case (*V Nithia* at [37]–[43]; *Belfield International* at [94]). Indeed, it has been said that the principal consideration underlying the law of pleadings is "to prevent surprises arising at trial" (*SIC College of Business and Technology Pte Ltd v Yeo Poh Siah* [2016] 2 SLR 118 at [46]; *Liberty Sky Investments Ltd v Aesthetic Medical Partners Pte Ltd* [2020] 1 SLR 606 at [16]). As procedural fairness is a *sine qua non* for the achievement of substantive justice, the law does not countenance trials "by ambush" (*V Nithia* at [37], citing *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 at [8]).

56 The general rule is therefore that parties are bound by their pleadings and the court is precluded from deciding on a matter that the parties themselves have decided not to put into issue (*Noor Azlin bte Abdul Rahman v Changi General Hospital* [2022] 1 SLR 689 ("*Noor Azlin*") at [272], citing *V Nithia* at [38]). Consistent with the very purpose of pleadings themselves, the rationale underpinning a court's refusal to permit an unpleaded claim or defence is to "prevent injustice from being occasioned to the party who, because of the failure of the opposing party to plead, did not have a chance to respond to the claim or

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defence in question" (*How Weng Fan v Sengkang Town Council* [2023] 2 SLR 235 ("*How Weng Fan*") at [18], citing *Ma Hongjin v SCP Holdings Pte Ltd* [2021] 1 SLR 304 at [34]–[35]).

57 As the CA stated in *How Weng Fan*, however, there are two important principles that qualify this "general rule". First, the court may permit an unpleaded point to be raised and to be determined if no irreparable prejudice (that cannot be compensated by costs) will be occasioned to the other party, or if "it would be clearly unjust for the court not to do so" (*How Weng Fan* at [20], citing *V Nithia* at [40]). For example, evidence given at trial may, where appropriate, overcome defects in pleadings provided that the other party is not taken by surprise or irreparably prejudiced (*OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [18]; *BOM v BOK* [2019] 1 SLR 349 at [40]; see also *How Weng Fan* at [29(b)]). The rationale for this limited exception is that procedure is "not an end in itself, but a means to the end of attaining a fair trial". As such, the court should not adopt "an overly formalistic and inflexibly rule-bound approach" that might result in substantive injustice (*V Nithia* at [39]; *Noor Azlin* at [274]). This does not, however, confer upon the courts a licence to depart liberally from the parties' pleadings. Any court contemplating the invocation of such an exception should bear in mind the CA's admonition that "cases where it is clear that no prejudice will be caused by the reliance on an unpleaded cause of action or issue that has not been examined at the trial are likely to be uncommon" (*V Nithia* at [41]; *How Weng Fan* at [20]).

58 Second, it is only the material facts – the facts which are necessary for the purpose of formulating a complete cause of action or defence – that must be pleaded (*Bruce v Odhams Press Ltd* [1936] 1 KB 697 at 712, cited with approval in *Multi-Pak Singapore Pte Ltd v Intraco Ltd* [1992] 2 SLR(R) 382 at [29]). Put

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another way, the facts supporting each element of a cause of action or defence which a litigant seeks to rely upon must be specifically pleaded, so that the opponent is given "fair notice of the *substance* of such a case" [emphasis in original] (*V Nithia* at [43]–[44]). A corollary of the principle that only material facts should be pleaded is that matters of law should not be stated as facts or pleaded at all (Sir Jack Jacob and Ian Goldrein, *Pleadings: Principles and Practice* (Sweet & Maxwell, 1990) at 51). Hence, the particular legal consequence or result that is alleged to flow from the material facts need not be pleaded (*How Weng Fan* at [19]; *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936 at 941).

59 The question of whether a clause in a contract is in the nature of a penalty or liquidated damages is one that does not fit neatly within the categories of material facts or points of law. Instead, in *Banner Investments Pte Ltd v Hoe Seng Metal Fabrication & Engineers (S) Pte Ltd* [1996] 3 SLR(R) 244 ("*Banner Investments*"), S Rajendran J took the position that such a question is one of mixed fact *and* law, which must be pleaded by the party that is seeking to rely on it (*Banner Investments* at [14]–[18]). In that case, the appellants had entered into a factoring agreement with the respondent, where the latter undertook not to assign or otherwise dispose of any debts owed to it to anyone but the appellant. The respondent entered into another factoring agreement with a third party in breach of this obligation. In proceedings that subsequently arose between the parties, the appellant counterclaimed for a sum of $56,759.36 against the respondent as "agreed liquidated damages". A defence that the respondent had relied on in response to this counterclaim was that the clauses on which the claim for liquidated damages was based were in fact penalties. Such a defence, however, had not been pleaded (*Banner Investments* at [1]–[5]).

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60 At first instance, the trial judge found that the sums claimed by the appellant against the respondent were penalties and not genuine pre-estimates of damages. She therefore dismissed the appellant's counterclaim. The trial judge rejected the appellant's contention that the respondent should not be permitted to raise a defence that "the sums claimed were penalties" when such an argument had not been pleaded by the respondent. The appellant, dissatisfied with the trial judge's finding on this point, appealed against her decision on the basis that she had misdirected herself in law by permitting the respondent to raise the unpleaded point (*Banner Investments* at [6]–[7]).

61 Rajendran J allowed the appeal and set aside the decision of the trial judge in respect of the counterclaim. The learned judge began by noting what is now the well-established proposition that where a party asserts that a clause is in the nature of a penalty, the legal burden is on that party to prove that claim (*Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 ("*Robophone Facilities*") at 1447E; *Ethoz Capital Ltd v Im8ex Pte Ltd* [2023] 1 SLR 922 ("*Ethoz Capital*") at [68]–[69]; see also *Denka v Seraya* at [287]). To decide on such a claim, Rajendran J reasoned, the court is required to consider "the surrounding facts, the terms of the contract and the intention of the parties". For example, in *Dunlop Pneumatic*, which as noted above is the *locus classicus* on the law of penalties, the defendants had specifically pleaded that the relevant sum was a penalty, and evidence had been led at the trial by the claimants as to why it had required the relevant clause (see *Dunlop Pneumatic* at 81–82). It was only after "a detailed consideration of the evidence that the court came to a decision on the plea of penalty" (*Banner Investments* at [9]).

62 Following that analysis, Rajendran J proceeded to hold that the question of whether the relevant agreed damages clauses in the factoring agreement are

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in the nature of penalties is "a question of fact and law". This was because the court would have to "consider the clauses in the factoring agreement in light of the surrounding facts of the factoring business before arriving at a decision on the issue". To make good its defence, the respondent had to establish that the amounts stipulated as damages in the relevant clauses of the factoring agreement "were in fact not genuine pre-estimates of damages" but amounts fixed "*in terrorem*". Those, however, were "matters of fact that clearly ought [to have been] pleaded if [the respondent] wished to raise them" (*Banner Investments* at [14]–[15]). Given that the respondent had not done so, it was not open for the trial judge to have decided the appellant's counterclaim on the basis of a defence which had not been pleaded (*Banner Investments* at [18]).

63 The premise of Rajendran J's decision in *Banner Investments* is that a plea that a contractual clause is an unenforceable penalty is one of mixed fact and law. Such a plea is said to be "a material fact which raises a point of law" (see *Singapore Court Practice 2024* (Jeffrey Pinsler gen ed) (LexisNexis, 2024) at para 6.5.25). It raises, as Lord Dunedin put it, "a *question of construction* to be decided upon *the terms and inherent circumstances of each particular contract*, judged of as at the time of the making of the contract, not as at the time of the breach" [emphasis added] (*Dunlop Pneumatic* at 86–87; *Denka v Seraya* at [281]). The ultimate aim of that process is to determine whether the relevant clause provides for a payment of money stipulated *in terrorem* of the offending party, or as a genuine pre-estimate of loss (*Dunlop Pneumatic* at 86). In so far as this is a question of contractual construction, the relevant facts that each party wishes to rely on in support of their advanced construction must be pleaded "with specificity", as well as the effect such facts will have on their intended construction (*Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4

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SLR 193 ("*Sembcorp Marine*") at [73]). Examples of such facts that may be relied on include:

(a) The party seeking to impugn the relevant clause as an unenforceable penalty may wish to adduce evidence on the greatest loss that may be expected to follow from breach, in order to show that the sum stipulated for in the clause is "extravagant and unconscionable" compared to such loss (*Dunlop Pneumatic* at 87). In this regard, it has been held that, notwithstanding that the question of whether a clause is an unenforceable penalty is determined objectively by reference to the date the contract was made, it is permissible to have regard to subsequent events for the limited purpose of showing "what could reasonably [have been] expected to be the loss at the time the contract was made" (*Philips Hong Kong Ltd v Attorney-General of Hong Kong* [1993] 1 LRC 775 ("*Philips Hong Kong*") at 786).

(b) The party seeking to argue that the impugned clause is not an unenforceable penalty may seek to provide reasons as to why the parties had chosen to quantify their loss in the manner set out in the contract (*Philips Hong Kong* at 786). For example, owing to the existence of "special circumstances" known to both parties but not expressly provided for in the contract, it may be shown by the party seeking to rely on the impugned clause that a breach would have caused him greater losses than in the ordinary course of events (*Robophone Facilities* at 1447). The question of whether a clause is an unenforceable penalty being an objective one rooted in public policy, the parties' intentions or the language they employ in the relevant clause (*eg*, as a "penalty" or "liquidated damages") are not determinative. This is a principle of a very

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> ancient vintage and is based on the principle that the court "must proceed according to what is the real nature of the transaction" (*Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo Y Castaneda* [1905] AC 6 at 9; *Kemble v Farren* (1829) 130 ER 1234 at 1237). That, however, does not preclude the courts from evaluating, or taking into account, the parties' reasons for the inclusion of the impugned clause in their agreement (*Philips Hong Kong* at 786).

64 As a matter of principle, I would therefore agree with Rajendran J's decision in *Banner Investments* that an argument that a clause in a contract is an unenforceable penalty is a point of mixed fact and law that has to be pleaded by the party seeking to rely on such an argument. Additionally, as a matter of precedent, Rajendran J's decision has been endorsed and applied in various subsequent cases, including those of the CA by which I am bound (*Beihai Zingong Property Development Co v Ng Choon Meng* [1999] 1 SLR(R) 527 (CA) ("*Beihai Zingong*") at [17]; *New Civilbuild Pte Ltd v Guobena Sdn Bhd* [2000] 1 SLR(R) 368 (HC) at [68]; *Development Bank of Singapore Ltd v Bob Chee Seng Construction Pte Ltd* [2002] 2 SLR(R) 693 (CA) at [28]).

65 I also note the CA's decision in *Phoenixfin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23 ("*Phoenixfin*"), which concerned an application to set aside an arbitration award on, amongst others, the ground of a breach of natural justice. The relevant arbitration concerned the first appellant's alleged breach of a consulting agreement which it had entered into with the respondent. During the course of the arbitration, the first appellant had applied to amend its pleadings to aver that the certain provisions of the agreement on which the respondent had based its claims for damages were unenforceable penalties ("Penalty Issue"). The tribunal disallowed the proposed amendment. Despite that, the tribunal

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proceeded to find in its award that the relevant clauses were unenforceable penalties. The CA affirmed the decision below to set aside the award on the ground that a breach of natural justice had been occasioned to the respondent. What is notable about that case was the fact that the CA had repeated, at least four separate times in its judgment, that "whether a particular provision is or is not a proscribed penalty… is an issue of mixed law and fact" (*Phoenixfin* at [46], [54], [64] and [68]). The approach that a supervisory court should take *vis-à-vis* such issues in the context of a setting aside application was said by the CA to be as such (*Phoenixfin* at [52]):

> The extent of the opportunity needed to be given depends on the nature of the issue. If the issue is a legal one, then sufficient time to make legal submissions is all that is required. But *if the issue is a factual one or a mixed fact and law question then, apart from submitting on the law, a party needs to be able to question the evidence produced in support of the issue as well as have the chance to itself introduce relevant rebuttal evidence.* And in order to do all this, *there has to be clarity and precision regarding what issue is being raised and what evidence will be relied on to support it.* It is in situations like this that *the pleadings will assume a more significant role in indicating the kind of opportunity that natural justice requires to be given* and in preventing "unexpected surprises"…
>
> [emphasis added]

66 Given that the first appellant had not pleaded the Penalty Issue in its defence and counterclaim, and the tribunal had dismissed its amendment application, the Penalty Issue was "not in play" in the arbitration. Specifically, the tribunal was not entitled to raise and determine such an issue when its inclusion had been specifically contemplated and rejected. The parties had in fact proceeded on such a basis, as evidenced by the fact that the first appellant had not led any evidence on the Penalty Issue. By unilaterally reintroducing it in the proceedings, the respondent was not only taken by surprise but was also faced with the unenviable task of responding to a case which had never been

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established by its proponent. It followed that the respondent had not been given a proper opportunity to present its case on the Penalty Issue. The CA accordingly set aside the sections of the award dealing with the Penalty Issue (*Phoenixfin* at [53]–[70]).

67 I am aware that Rajendran J's decision in *Banner Investments* should be read in light of the CA's authoritative guidance in *How Weng Fan* and *V Nithia* on when it is permissible to allow a party to advance a point that has not been pleaded. I am also cognisant that, in arbitration proceedings generally, pleadings are not determinative in the same way as they might be in court litigation (*Phoenixfin* at [50], noting *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [52]). I am, nevertheless, of the view that the CA's decision in *Phoenixfin* is consistent with the tenor of Rajendran J's decision in *Banner Investments*, which is that the question of whether a contractual provision is an unenforceable penalty is a question of mixed fact and law that must be pleaded.

The respondent ought not to be permitted to advance the unpleaded Penalty Argument

(1) The DJ erred in finding that the Penalty Argument is a point of law

68 With those principles in mind, I turn to the present facts. In my judgment, the DJ erred in permitting the respondent to advance the Penalty Argument. It is not disputed that such a point had not been pleaded in the respondent's SOC, nor raised in its opening statement, or even alluded to it in the AEIC of the respondent's sole witness, Mr Zhang Xiaofen ("Zhang"), who is its director. The Penalty Argument had in fact been raised by the respondent's counsel (Mr Sankar) in passing for the first time at trial (see [30] above), in

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response to the DJ's questions to the parties as to the issues that fell for his determination in OC 1343.[89] The appellant's counsel (Mr Wang) objected to the respondent raising the Penalty Argument on the ground that it had not been pleaded in its SOC.[90] The DJ noted Mr Wang's objections, and informed the parties that the issue of Recital 4 being a penalty clause is "a matter of law" which should be dealt with in the parties' closing submissions (see also Judgment at [36]).[91]

69 As noted above at [30], there were two principal limbs to the DJ's decision to permit the respondent to advance the Penalty Argument. First, the question of whether Recital 4 constitutes a penalty clause is "a legal question that arises from the facts pleaded" (Judgment at [36]). In my judgment, the DJ misdirected himself as a matter of law in holding so. The authorities speak with one voice in stating that the question of whether a clause is an unenforceable penalty is one of mixed fact and law that must, as a starting point, be pleaded by the party seeking to rely on such an argument (see *Banner Investments* at [18] and the authorities discussed above at [59]–[66]).

(2) The DJ erred in finding that the appellant had not been irreparably prejudiced

70 The second limb of the DJ's reasoning was that no prejudice had been occasioned to the appellant by the respondent's failure to plead the Penalty Argument. To recapitulate, the DJ explained that the respondent's demand for the return for the return of the Security Deposit and the appellant's reliance on

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89 JROA–3 at pp 403–404 (Certified Transcript of the hearing of DC/OC 1343/2024 on 14 July 2025 ("Trial Transcript") at p 7, line 21 to p 8, line 3).

90 JROA–3 at pp 407–408 (Trial Transcript at p 11, line 28 to p 12, line 5).

91 JROA–3 at p 408 (Trial Transcript at p 12, lines 6–17).

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Recital 4 to justify its forfeiture had placed the enforceability of the forfeiture clause in issue. Thus, the appellant would have been aware that the enforceability of the forfeiture clause had been in issue since the commencement of OC 1343. It would therefore not have been taken by surprise by the unpleaded argument. In any case, no new facts or evidence had been adduced at trial to support the respondent's argument that Recital 4 was unenforceable as a penalty clause (Judgment at [36]).

71 With respect, I am unable to agree. First, the fact that the enforceability of the forfeiture clause in Recital 4 was placed in issue did not mean that the respondent was at liberty to raise any argument to impugn its enforceability untethered from the averments made in its pleadings. In any case, I disagree that the respondent's claim for the return of the Security Deposit (less the Oct 2023 Utility Charges) necessarily placed the *enforceability* of Recital 4 of the Agreement (or lack thereof) in issue. The respondent's claim was based on the appellant having refused to refund the Security Deposit even though: (a) the respondent had vacated the Service Area; (b) the respondent had paid the appellant the sums due under JUD 978 pursuant to EO 176; and (c) there were no outstanding unremedied breaches of the Agreement.[92]

72 Under Recital 4, the appellant had the obligation to refund the Security Deposit once the respondent had carried out the requisite "reinstatement works" to the satisfaction of the appellant (see [10(b)] above). It is in this context that the respondent's claim in OC 1343 must be understood. By asserting that it had vacated the Service Area "with all reinstatement work completed", none of

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92 JROA–2 at pp 21–22 (SOC at paras 7–11); JROA–3 at pp 521–522 (Claimant's Opening Statement dated 16 April 2025 ("COS") at para 26); AC at para 38.

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which had allegedly been disputed by the appellant,[93] it was essentially arguing that it had an accrued contractual right to be refunded the Security Deposit, and that the appellant's repeated refusal to refund the Security Deposit amounted to a continuing breach of the contract. In asserting that there had allegedly been no outstanding breaches of the Agreement and that the appellant had been paid the sums due under JUD 978, the respondent was also arguing that the appellant had no entitlement to retain the Security Deposit. All this is consistent with the position that Mr Sankar took before me during the hearing of this appeal.[94] But more importantly, it is also consistent with the evidence that was given by Mr Zhang in his AEIC,[95] and what the appellant had understood the respondent's case to be.[96]

73 It was in response to the contention of the respondent that it had an accrued contractual right to be refunded the Security Deposit that the appellant asserted its contractual entitlement to forfeit the sum for outstanding breaches of the Agreement under Recital 4. It was with a view towards making good such an assertion that the appellant had produced Mr Yap Wui Han ("Mr Yap") as its sole witness for the purposes of its defence. Mr Yap is the sole director and a shareholder of MAPLE87 Pte Ltd (known at the material time as Ruo C & E Pte Ltd ("RC&E")), a company engaged by the appellant to provide monthly maintenance services for the Service Area.[97] Mr Yap would receive instructions from Mr Chng Weng Huat ("Mr Chng"), the former director of the appellant, to

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93 JROA–2 at p 41 (Defence at para 7).

94 Transcript at p 42, line 4 to p 43, line 14.

95 JROA–3 at pp 17–24 (ZX–1 at pp 14–21).

96 JROA–3 at p 454 (Trial Transcript at p 58, lines 25–31).

97 JROA–3 at p 148 (AEIC of Yap Wui Han dated 12 February 2025 ("YW–1") at para 4).

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provide *ad hoc* services in relation to the Service Area.[98] Mr Yap's evidence in his AEIC was principally directed towards how the respondent had been in breach of various terms of the Agreement since 2023 (and how the appellant had suffered loss and/or damage therefrom), based on his personal visits to the Service Area on an almost monthly basis which were for the purposes of providing maintenance services.[99]

74 Therefore, I respectfully disagree with the DJ that the appellant had been aware that the enforceability of the forfeiture clause in Recital 4 had been placed in issue since the start of the trial. In holding so, the DJ attributed to the appellant knowledge of an erroneous picture of the parties' cases that was not supported by any of their pleadings, AEICs or opening statements. The respondent's case was that it had an accrued contractual entitlement to be refunded the Security Deposit, since it had discharged its obligation to complete reinstatement works and had remedied its breaches of the Agreement. The appellant's case was that the respondent did not have such an entitlement because the respondent remained in breach of the Agreement, and that it had suffered loss and/or damage therefrom, for which it was entitled to forfeit the Security Deposit. The parties' cases, especially the respondent's, as reflected in their pleadings, contained not even a scintilla of an indication that the Security Deposit ought to be refunded on the basis that the forfeiture clause in Recital 4 was *unenforceable*. Therefore, I accept the appellant's argument that it had truly been taken by surprise when the Penalty Argument was raised by the respondent for the first time at trial.

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98 JROA–3 at p 148 (YW–1 at para 4).

99 JROA–3 at pp 150–160 (YW–1 at paras 10–36).

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75 In my judgment, the appellant was irreparably prejudiced by the DJ's decision to permit the respondent to raise the unpleaded Penalty Argument. First, the legal burden of showing that the forfeiture clause in Recital 4 constituted an unenforceable penalty was on the respondent as the party asserting such a claim (see [61] above). Being a question of mixed fact and law, the evidential burden was on the respondent to adduce sufficient evidence to show that the forfeiture clause in Recital 4 constituted an unenforceable penalty (*Ethoz Capital* at [74]–[77]). However, no evidence whatsoever had been adduced in Mr Zhang's AEIC (and for that matter, Mr Yap's AEIC) to show even a *prima facie* case that the clause in question is an unenforceable penalty. As the DJ himself noted, "[n]o new facts or evidence" had been adduced at trial to support the respondent's contention on the enforceability of Recital 4 (Judgment at [36]). By resolving the issue of penalties in favour of the respondent in spite of the dearth of evidence adduced on the same, the DJ effectively discharged the respondent's legal and evidential burden of showing that Recital 4 is an unenforceable penalty on its behalf.

76 Second, the respondent having adduced no evidence on showing that Recital 4 constitutes an unenforceable penalty, the appellant was faced with the Sisyphean task of having to respond to a case that had never been established by the respondent. In this narrow sense, the appellant's position in OC 1343 was similar to that which the respondent in *Phoenixfin* found itself in before the tribunal (see [66] above). In any case, Mr Yap, the sole witness produced by the appellant, was never in any position to testify as to whether the forfeiture clause is an unenforceable penalty. As the director of RC&E, which the appellant had outsourced the maintenance of the Service Area to, Mr Yap would simply have been in no position to testify to the parties' (or at the very least, the appellant's) intentions for the inclusion of Recital 4 in the Agreement. More crucially, being

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an outsider of the appellant, Mr Yap would have been in no position to testify to the likely losses that the appellant would have suffered in the event the respondent breached the terms of the Agreement – which is the comparator against the stipulated sum for the purposes of determining whether the clause is an unenforceable penalty or not. It cannot be gainsaid that the appellant could have produced a different, or perhaps an additional, witness in the form of Mr Chng – who had signed the Agreement on the appellant's behalf – to testify as to the parties' reasons for agreeing to Recital 4 of the Agreement (see [63(b)] above).[100] The appellant had conceivably not called Mr Chng as a witness in light of what it had (reasonably) understood the respondent's pleaded case to be. That, however, left the appellant in the invidious position of being unable to adduce any evidence to rebut any *prima facie* case that Recital 4 constituted an unenforceable penalty – a case that was, in any event, non-existent.

77 In the premises, I permit the appellant's appeal on this issue and set aside the DJ's decision to permit the respondent to advance the unpleaded Penalty Argument.

Issue 2: Whether the DJ erred in his interpretation of the forfeiture clause in Recital 4 of the Agreement

78 The next ground of appeal raised by the appellant is that the DJ erred in finding that the forfeiture clause in Recital 4 is an unenforceable penalty clause. A preliminary issue that I believe is necessary to consider, however, is whether the DJ had been correct in his interpretation of the appellant's right of forfeiture under Recital 4 of the Agreement. To recall, the DJ held that Recital 4 unambiguously gave rise to a right on the part of the appellant to forfeit the

[100] JROA–3 at p 45 (ZX–1 at p 42).

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Security Deposit "for breaches of the terms of the Agreement on the [respondent's] part" (Judgment at [29]). Specifically, the DJ appears to have taken the view that, questions of validity aside, this right of forfeiture held by the appellant permitted it to forfeit the *entire* Security Deposit for *any* breach of the terms of the Agreement (Judgment at [28]–[29], [45]–[46] and [50]). Having reached such an interpretation, the DJ's conclusion that the forfeiture clause in Recital 4 is an unenforceable penalty was perhaps inevitable. Having considered the matter afresh, I hold that the DJ erred in arriving at such an interpretation.

It would not be procedurally improper to make a determination on this issue

79 In my judgment, in so far as the DJ came to the position that Recital 4 allowed the appellant to forfeit the entirety of the Security Deposit upon establishing that a breach of the Agreement had occurred, I am unable to agree. Properly interpreted, Recital 4 only permits the appellant to forfeit and *deduct* from the Security Deposit the actual losses it suffered by virtue of the respondent's breaches. Before I set out my reasons for arriving at such a conclusion, I note a preliminary point on procedure, which is that the DJ's interpretation of Recital 4 does not appear to have been specifically challenged by the parties on appeal. Both parties are *ad idem* on the view that Recital 4 contains a "forfeiture clause" that entitles the appellant to forfeit the Security Deposit for breaches of the Agreement by the respondent, and they have confirmed that they are not challenging the DJ's decision on this point.[101]

80 I do not, however, think that this precludes this court from taking a different view on the proper interpretation of the forfeiture clause on Recital 4. First, an appellate court is not bound to decide a controversy upon an erroneous

[101] AC at para 9(a); RC at para 5.

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concession of law made by the disputants before it. The court retains the residual power to raise the issue on its own accord and rule otherwise in the interests of justice – the critical question is whether the parties (or a party) would be prejudiced if such a point is to be raised at this stage of the proceedings (see *Yong Kheng Leong v Panweld Trading Pte Ltd* [2013] 1 SLR 173 at [32], citing *NV Multi Corp Bhd v Suruhanjaya Syarikat Malaysia* [2010] 5 MLJ 573 at [16]).

81 Second, under O 19 r 7(4) of the Rules of Court 2021 ("ROC"), an appellate court "may make any order relating to any part of the decision of the lower Court and for any reason although that part is not the subject of any appeal and that reason is not stated by anyone in the appeal". This rule clearly applies in the present case, being an appeal against a judgment of the District Court given in a trial of an originating claim (O 19 r 1(*a*)(i) of the ROC). Hence, this court, in exercising its appellate civil jurisdiction, is not restricted by the parties' appeal submissions and may make orders in respect of parts of the lower court's decision not subject to any appeal (*Singapore Civil Procedure 2024* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2023) ("*White Book*") at para 19/7/4). *A fortiori*, this court may apply a reason that is not stated in the parties' appeal submissions in coming to a decision on "an issue which is in fact the subject of an appeal" (*Ong Han Nam v Borneo Ventures Pte Ltd* [2023] SGHC(A) 30 ("*Borneo Ventures*") at [34]).

82 Third, in the different context of parties attempting to raise a new point on appeal that was not taken at trial, it has been held that where the relevant point is a question of law pertaining to the construction of a document, "it is not only competent but expedient, in the interests of justice, to entertain the plea" (*Connecticut Fire Insurance Company v Kavanagh* [1892] AC 473 at 480, cited

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with approval in *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR(R) 571 ("*Panwah Steel*") at [16]). The principles that constrain the parties from raising new points on appeal apply equally where it is the court *itself* that seeks to introduce the new legal issue (*Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404 at 408–409 ("*Hoecheong Products*"), cited with approval in *Townsing Henry George v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 ("*Townsing Henry*") at [80]). In *Panwah Steel*, the CA was faced with the appellant's attempt to rely on a new argument based on a purposive construction of the relevant contract, when it had in fact relied on an argument based on the existence of an implied term in the court below. Notwithstanding the jealous scrutiny with which the courts examine such attempts (see Lord Herschell's comments in *The Tasmania* (1890) 15 App Cas 223 at 225; see also *Panwah Steel* at [20]), the CA allowed the appellant to raise the new point, reasoning that (*Panwah Steel* at [17]):

> [I]t is clear, in our view, that the purposive argument is one, relating as it does to the interpretation of the material terms of the contract between the parties, primarily of law. More importantly, *this court is in just as advantageous a position as the court below (with regard to the evidence as well as other matters which may have arisen if the point had been raised in the court below) to adjudicate upon this particular issue.* As [counsel for the appellant] correctly pointed out, ***no new evidence needs to be adduced simply because, as we have just mentioned, the issue at hand relates to a point of interpretation or construction.*** *And it bears emphasising that* ***cases such as the present, which involve pure questions of construction, are especially appropriate for the exercise of the court's exceptional jurisdiction to consider new points on appeal*** …
>
> [emphasis added in italics and bold italics]

83 Returning to the present case, I am of the view that it would be appropriate for me to make a determination on the issue of the proper

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interpretation of Recital 4, notwithstanding the fact that it has not been challenged by the parties on appeal. First, given the centrality of the appellant's right of forfeiture to the determination of the issue of whether Recital 4 constitutes an unenforceable penalty, it would be inappropriate for the court to proceed on a false premise in resolving the same (see, for example, the approach taken by the CA in *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [66]). Indeed, the appellant itself recognised that the "interpretation and/or construction of Recital 4 of the Agreement […] is the crux of the dispute".[102] As such, and in light of the holding of the Appellate Division of the High Court ("ADHC") in *Borneo Ventures* in relation to O 19 r 7(4) of the ROC, I do not think that this court is constrained by the concession made in the parties' submissions in determining the issues that arise in this appeal.

84 Second, the parties would not be prejudiced by this court taking a different view from the DJ on the interpretation of the forfeiture clause in Recital 4 (see [10(b)] above). The question on its proper interpretation being a question of law as to the meaning of the words used by the parties in the Agreement, it is a question on which this court is "in just as advantageous a position as the court below" to determine (*Panwah Steel* at [17]; see also *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 at [63]). No evidence, beyond that which is already reflected by the record, is required for the resolution of such a question.

85 Third, during the hearing of the trial itself, the DJ had drawn Mr Wang's attention to the issue as to whether Recital 4 permitted the appellant to forfeit

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102 AC at para 3.

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the *entire* Security Deposit for *any* breaches of the Agreement. I set out the relevant exchange between the DJ and Mr Wang below:[103]

> Court: [L]et's say I'm with you, it says it should not be included refunded, you know, there should be deduction, you still have to prove the deduction.
>
> Wang: No, if it's not to be refunded, then there's no refund.
>
> Court: The whole—
>
> Wang: That's my case.
>
> Court: The whole sum to be forfeited.
>
> Wang: Yes, that's right.
>
> Court: Okay, you'd better give me authorities on that one. Yes.
>
> Wang: Sure, Your Honour. It's—
>
> Court: It's rather draconian. I know there are some debate on this, and it's a matter of jurisdiction.
>
> Wang: There is some debate.
>
> Court: Correct.
>
> Wang: Your Honour, *it's also about contractual interpretation.*
>
> Court: *Correct.* So, you got to be careful with that one.
>
> …
>
> Court: So, there are two things, you know, Mr Wang, you have said that, so the whole sum to be forfeited. Yes, that's the other question I have […] You seem to be saying that the whole amount is to be forfeited, and yet you have this table here that is set out.
>
> Wang: That's in the event I fail on the first issue. So, if my first issue, Your Honour feels that I cannot forfeit the entire—
>
> Court: In total.
>
> Wang: --in total, then what are the things I can set off. Yes.
>
> [emphasis added]

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[103] JROA–3 at pp 455–456 (Trial Transcript at p 59, line 28 to p 60, line 22).

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86 It is clear, from the face of the transcript, that the issue as to the proper interpretation of Recital 4, and the extent to which the appellant was entitled to forfeit the Security Deposit had been brought to the parties' attention by the DJ during the trial itself. Consistent with that, the parties had made submissions on the issue as to the proper interpretation of Recital 4 in their closing submissions based on the evidence adduced and the events that had transpired at trial.[104] Additionally, it is also evident from the exchange between the DJ and Mr Wang that the appellant had pleaded the various heads of losses and/or damage as summarised in the table set out at [27] above in the event that the DJ was not with the appellant's argument that Recital 4 gave it a right to forfeit the entire Security Deposit for a breach of the terms of the Agreement. The appellant had therefore been cognisant of, and in fact prepared for, the possibility that the DJ would disagree with it on its interpretation of Recital 4.

87 Additionally, during the hearing of the appeal itself, I had invited Mr Wang to submit on the significance of the fact that the appellant reserved the right to forfeit *and deduct* from the Security Deposit, and whether this meant that the appellant was entitled to forfeit the Security Deposit absolutely or merely to make deductions for its losses arising from the respondent's breaches of the Agreement.[105] Unsurprisingly, Mr Wang reaffirmed the position he had taken below, which was that the appellant is entitled to *absolutely* forfeit the *entire* Security Deposit for *any* breaches of the Agreement, as it had not been

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104 JROA–3 at pp 554–570 (Claimant's Closing Submissions dated 25 August 2025 ("CCS") at paras 20–69) and pp 598–600 (Defendant's Closing Submissions dated 25 August 2025 ("DCS") at paras 37–39).

105 Transcript at p 7, line 18 to p 8, line 7.

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"expressly stated" that the appellant could deduct the losses it suffered by reason of the respondent's breaches of the Agreement from the Security Deposit.[106]

88 Lastly, to ensure that the parties had every opportunity to be heard on the proper interpretation of Recital 4, I directed the parties to file further submissions on the following question, while drawing their attention to the exchange that had taken place between the courts and Mr Wang both before the DJ below and before myself on appeal (set out at [85] and [87] above):[107]

> On a proper interpretation of the Handling Service Agreement ("HSA"), does Recital 4 entitle the appellant to forfeit and retain the entire security deposit for any breaches of the HSA by the respondent? Or, does Recital 4 only entitle the appellant to forfeit and deduct from the security deposit sums representing the actual losses which it has suffered by reason of the respondent's breaches of the HSA?

89 In the premises, I am of the judgment that the parties (or, specifically, the appellant) would not be prejudiced by this court deciding to raise the issue as to the proper interpretation of the forfeiture clause in Recital 4 on its own accord and making a determination on the same, notwithstanding the fact that the parties have not challenged it by way of their submissions. With this procedural issue out of the way, I will now set out my reasons as to why, in my judgment, the DJ had erred in his interpretation of Recital 4.

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106 Transcript at p 7, line 27 to p 8, line 8.

107 Correspondence from Courts dated 7 May 2026 at para 2.

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The appellant is only entitled to forfeit and deduct from the Security Deposit for losses caused by the respondent's breaches

(1) The law on the construction of contracts

90 It is well-established that the purpose of contractual interpretation is to give effect to the expressed intentions of the contracting parties as objectively ascertained from the contextual meaning of the relevant contractual language (*Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 ("*Yap Son On*") at [30]). To that end, the court seeks to ascertain the meaning the contract would convey to a reasonable business person by reference to the objectively expressed intention of the parties, as opposed to their actual or subjective intentions (*Master Marine AS v Labroy Offshore Ltd* [2012] 3 SLR 125 ("*Master Marine*") at [41(a)–[41(b)], citing *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [131]). The principles governing the exercise of contractual interpretation were summarised succinctly in *CIFG Special Assets Capital I Ltd v Ong Puay Koon* [2018] 1 SLR 170 ("*CIFG*"), which the DJ adopted below. These are:

(a) The starting point in the exercise of contractual interpretation is to look at the text that the parties have used (*CIFG* at [19(a)]; *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 at [2]). If the text is found to be clear and unambiguous "inasmuch as it admits of one clear meaning", the court will generally give effect to it provided that it does not engender an absurd result (*HSBC Institutional Trust Services (Singapore) Ltd v DNKH Logistics Pte Ltd* [2022] SGHC 248 at [26], citing *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd* [2015] 5 SLR 1187 ("*Soup Restaurant*") at [31]).

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(b) At the same time, it is permissible to have regard to the relevant context as long as the relevant contextual points are clear, obvious and known to both parties (*CIFG* at [19(b)], citing *Zurich Insurance* at [125], [128] and [129]). The rationale for having regard to the relevant context is that it places the court in "the best possible position to ascertain the parties' objective intentions by interpreting the expressions used by [them] in their proper context" (*CIFG* at [19(c)], citing *Sembcorp Marine* at [72]).

91 Further, various "canons of interpretation" are also relevant in the interpretation exercise, albeit bearing in mind that these are merely "signposts" that provide guidance and not "rules to be applied rigidly in every case". In utilising these canons of interpretation, it should not be forgotten that the ultimate aim of the court is to give effect to the objectively expressed intentions of the parties (see *Master Marine* at [41]; *Zurich Insurance* at [131]). I elaborate on some of these canons of interpretation below:

(a) First, even though the immediate object of inquiry may the meaning of an isolated word or clause, the whole contract must be considered in interpreting a contract (*Master Marine* at [41(c)]; *Zurich Insurance* at [131]). Every contract must be interpreted with reference to, and be consistent with, its purpose and the whole of its terms. This is a well-established principle, embodied in the maxim that the meaning of a particular part of a contract is to be collected *ex antecedentibus et consequentibus* – "every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done" (*Barton v Fitzgerald* (1812) 104 ER 944 at 948 (*per* Lord

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Ellenborough CJ); *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 36th Ed, 2025) ("*Chitty on Contracts*") at para 16–074).

(b) Second, due consideration is given to the commercial purpose of the transaction or provision in interpreting a contract. The courts may have regard to "the overall purpose of the parties with respect to a particular transaction", or "the reason why a particular obligation was undertaken" (*Zurich Insurance* at [131]; *Master Marine* at [41(e)]). In particular, the law "generally favours a commercially sensible construction" of a commercial contract that is consistent with its purposes, on the premise that a commercial construction is more likely to have been intended by the parties (*Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 771, cited with approval in *Ang Tin Yong v Ang Boon Chye* [2012] 1 SLR 447 at [12]). It follows that where the objective evidence clearly demonstrates that the parties had intended for a commercially nonsensical or absurd result, the court is not free to disregard this to "reach what may seem to it to be a more commercially sensible interpretation of the contract" (*Soup Restaurant* at [32]; see also *Arnold v Britton* [2015] 2 WLR 1593 at [20]). Nonetheless, where a term of a contract is ambiguous and is open to more than one interpretation, it is open to the court to favour the interpretation that is most consistent with business common sense (*Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at [30], cited with approval in *Soup Restaurant* at [46]–[49]).

(c) Third, an interpretation that makes the contract and its performance "lawful and effective" is to be preferred (*Zurich Insurance* at [131]; *Master Marine* at [41(f)]). Hence, in circumstances where a

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clause in a contract is capable of two meanings, one which would result in it being invalid and the other which would result in it being valid, the latter should be preferred (*Tillman v Egon Zehnder Ltd* [2019] 3 WLR 245 ("*Tillman*") at [38]; *AstraZeneca UK Ltd v Tesaro, Inc* [2024] EWCA Civ 78 at [36]). This principle, however, should not be applied slavishly without regard to its underlying rationale; the contract or clause under review cannot pull itself up by its bootstraps. As noted by Lord Wilson in *Tillman* at [38], the principle proceeds on the premise that the parties to a contract will have intended for it to be valid. It therefore cannot prayed in aid by a party to rescue what is an invalid contract or clause in a situation where there is objective evidence demonstrating that the parties had intended for a result that would result in the contract or clause being invalid (see also *Soup Restaurant* at [32]).

(d) Fourth, an interpretation which leads to an absurd, unfair or a "very unreasonable" result should be avoided (*Zurich Insurance* at [131]; *Master Marine* at [41(h)]; though, see Lord Hoffmann's comments in *Bank of Credit and Commerce International SA v Ali* [2001] 2 WLR 735 ("*BCCI v Ali*") at [61] (critiquing the rule as "artificial")). For example, it has been said that there is a "presumption" to the effect that, in the absence of clear words, parties who have agreed to an agreed damages clause do not intend for it to "operate arbitrarily, for example by producing a result unrelated to anything which the parties can reasonably have expected to approximate to the true loss" (*Bunge SA v Nidera BV* [2015] 3 All ER 1082 at [26]). This, however, is merely a starting point premised on the assumption that parties do not contract with a view towards achieving an absurd or unreasonable result. Where the text of the contract is clear, and there is objective evidence

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demonstrating that the parties had intended the absurd result, the court can do little but give effect to the absurd result that had been intended by the parties (*Soup Restaurant* at [32]).

(e) Fifth, in interpreting a contract, "all parts of it must be given effect where possible and no part of it should be treated as inoperative or surplus". This means that, in general, "each part of the document is taken to have been deliberately inserted, having regard to all the other parts of the document, with the result that there is a presumption against redundant words" (*Travista Development Pte Ltd v Tan Kim Swee Augustine* [2008] 2 SLR(R) 474 ("*Travista Development*") at [20]; Sir Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 8th Ed, 2023) at para 7.24; see also *Zurich Insurance* at [65]). In *Renault SAS v Liberty Engineering Group Pte Ltd* [2023] 4 SLR 152 ("*Liberty Engineering*"), Roger Giles IJ noted that the value of this principle, often noted as the presumption against surplusage, has been doubted in England (see the authorities cited by Giles IJ in *Liberty Engineering* at [46]; see also Lord Neuberger's comments in *Antigua Power Co Ltd v A-G of Antigua and Barbuda* [2014] 2 LRC 33 at [38] ("on issues of interpretation, arguments based on surplusage are rarely of much force")). Specifically relevant to the present context is Hoffmann J's (as he then was) comments in *Tea Trade Properties Ltd v CIN Properties Ltd* [1990] 1 EGLR 155 at 158:

> *I have never found the presumption against superfluous language particularly useful in the construction of leases.* The draftsmen traditionally employ linguistic overkill and try to obliterate the conceptual target by using a number of words or phrases expressing more or less the same idea. I cannot, therefore, rely upon the language alone but must, as it seems to me, construe the words also by reference to the commercial

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> effect which would be produced by one construction or the other.
>
> [emphasis added]

The applicability of these observations in Singapore law have yet to be considered. In any case, they need not be resolved in the present case. No intractable difficulties arise, so long as it is borne in mind that the presumption against redundancy is merely "an aid to construction" and that its strength can vary according to the circumstances of the given case (see *Liberty Engineering* at [46]). The focus is ultimately on the intentions of the parties as objectively ascertained from the contextual meaning of the relevant contractual language (*Yap Son On* at [30]).

(2) The proper interpretation of Recital 4

92 Having set out the law on the interpretation of contracts, I turn now to Recital 4 proper, the wording of which is set out in full at [10(b)] above. As noted above at [79], in so far as the DJ had found that the parties had clearly intended for the appellant to have the right to forfeit the entire Security Deposit upon the respondent breaching any of the terms of the Agreement ("DJ's Interpretation"), I respectfully disagree. Instead, in my judgment, Recital 4 only confers on the appellant a right to forfeit and *deduct* from the Security Deposit the actual losses it has suffered by virtue of the respondent's breaches of the terms of the Agreement.

93 The first port of call in the interpretation of Recital 4 is its text. The last sentence of Recital 4 states that the appellant "reserves all right to forfeit *and deduct from* the deposit should there be a breach of conditions or stipulation herein contained in respect of any such breach" [emphasis added] (see [10(b)] above). The dictionary meaning of "deduct" means to take away or subtract

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from a total sum or amount (J.A. Simpson and E.S.C. Weiner, *The Oxford English Dictionary* Vol IV (Clarendon Press, Oxford, 2nd Ed, 1989) at 358; see also *Black's Law Dictionary* (Bryan A Garner ed) (Thomson Reuters, 12th Ed, 2024) at 519). Based on the ordinary and natural meaning of the word "deduct", the DJ's Interpretation (which allows for the forfeiture of the entire Security Deposit) would render the entire phrase "and deduct from" superfluous. Had the parties intended for the entire Security Deposit to be *absolutely* forfeited for breach of any of the terms of the Agreement, there would have been no need to include such a phrase in the last sentence of Recital 4. The Agreement, which is a commercial document that is likely to have been professionally drafted, could have provided for clearer words to achieve such an effect, especially considering the existence of leases in earlier cases which contained such a clause. For example, the relevant clause of the tenancy agreement in question in the well-known case of *Hua Chiao Commercial Bank Ltd v Chiaphua Industries Ltd* [1987] 2 WLR 179 at 181E–G stated that the security deposit would be "*absolutely* forfeited to the landlord as liquidated damages" if there were to be "*any*" breaches of its terms or conditions on the part of the tenant [emphasis added]. By way of another example, in *Lee Tat Realty Pte Ltd v Limco Products Manufacturing Pte Ltd* [1998] 2 SLR(R) 258 ("*Lee Tat*") at [57], the relevant clause of the tenancy agreement in question provided that the *whole* of the deposit would be forfeited "if for any reason whatsoever the lessee commits a breach of *any* of the terms[,] conditions or covenants herein contained" [emphasis added]. As such, I do not think that the phrase "and deduct from" can be regarded as mere surplusage which should be disregarded – especially in light of the presumption against redundancy endorsed by the CA in *Travista Developments* (see [91(e)] above).

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94 I am, of course, cognisant that the precedential value of case law involving the interpretation of different provisions of a differently worded contract entered into in a different factual context is generally low (see Leggatt J's (as he then was) comments in *Tartsinis v Navona Management Company* [2015] All ER (D) 110 at [62]). I am also aware that the process of interpretation is not merely "a matter of dictionaries and grammars" – the focus is not on the meaning of words *per se*, but on the meaning which a document would convey to a reasonable person against the relevant and permissible factual background (*Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 913C, noted in *Zurich Insurance* at [56]). I therefore turn to the relevant context to see what the parties had understood the last sentence of Recital 4 to mean.

95 The purpose of the Security Deposit in Recital 4 was to secure the respondent's "due performance and observance" of the terms of the Agreement. It could not be "used for any offset against rent due", *ie*, the monthly Handling Service Fee. Therefore, I disagree with the DJ that Recital 4 had been clearly intended to "give effect to the intention of the parties for the [respondent] to use the Service Area in exchange for *timely payment of the Handling Service Fee*" [emphasis added] (Judgment at [45]). Instead, the specific carve-out provided for the Handling Service Fee (denoted by the word "rent") meant that the Security Deposit was intended to serve as a guarantee that the respondent would comply with all other stipulations in the Agreement, such as the respondent's Utilities Obligation, Reinstatement Obligation (see [11] above), and the host of other obligations the respondent had undertaken to perform *vis-à-vis* the

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appellant in clause 1 of the Agreement. Some of these other obligations include:[108]

(a) Under clause 1(g), the respondent undertook not to dump or store any rubbish or goods in any form on the common driveway and to clear any unwanted waste material in the Service Area at its own cost and expense. If such waste were found to be obstructing the way of the service road, the Service Area or the common driveway, the respondent would have to pay a "clearance fee" of $200 per day per bin, until the respondent's clearance of the same.

(b) Under clause 1(j), the respondent undertook not to make structural or other alterations or additions to the Service Area without the appellant's prior consent. Consistent with this, the respondent undertook the Reinstatement Obligation under clause 1(m) of the Agreement (see [11(c)] above).

(c) Under clause 1(k), the respondent undertook not to do or suffer to be done in the Service Area anything whereby the insurance of the same (or part thereof) may be rendered void or voidable or whereby the premium thereon may be increased. In this respect, the respondent undertook to pay to the appellant on demand "all sums paid by [the appellant] by way of increased premiums and all expenses incurred by [the appellant] in connection with the insurance necessary by a breach or non-observance of this [clause]".

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108 JROA–3 at pp 40–42 (ZX–1 at pp 37–39).

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96 These obligations were undertaken in the context of a lease,[109] the nature of which is always "partly executory: rights and obligations remain outstanding on both sides throughout its currency" (*National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 705H). The expressed intentions of the parties for the Security Deposit to secure the performance of the respondent's obligations under the Agreement made good sense in the context of this continuing commercial relationship between the parties. That security of performance was to be provided by the provision of the Security Deposit – a fund which the appellant could have resort to, and *deduct* from, in order to recoup any losses it would suffer by virtue of a breach of any of the respondent's obligations under the Agreement. The rationale for such a fund would stem from the fact that the appellant was entering into an arms' length commercial transaction with the respondent where the latter's solvency and financial ability to comply with the terms of the Agreement were unknown. To deal with this uncertainty, and to avoid the inconvenience of having to enforce the terms of the Agreement by suit (which might be a disproportionate course of action if the sum of money at stake is relatively minor in quantum) if and when a breach arose, the appellant had demanded the payment of the Security Deposit to guarantee the respondent's obligations before the handover of the Service Area.

97 In contrast, if the DJ's Interpretation were to be correct, a single breach of the Agreement *eg*, a failure to pay utility charges for a given month or a day's worth of "clearance fees", would suffice for the appellant to forfeit the entire Security Deposit. Such an interpretation would leave the appellant with a windfall in the event that the respondent committed a breach of the terms of the

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109 I should note that both parties proceeded on the Agreement was in the nature of a lease, as opposed to a licence.

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Agreement and leave the entire Security Deposit exhausted. That would consequently result in an outcome whereby the respondent's obligations under the Agreement would no longer be secured. The entire purpose of Recital 4, which is to secure the respondent's due performance and observance of the terms of the Agreement, would be defeated by such an interpretation. Quite apart from the absurd and uncommercial result that this would entail, it would be a highly disproportionate and unfair result to the respondent which I would be loathe to accept in the absence of clear wording to the contrary (see [91(d)] above).

98 Further, Recital 4 stated that the Security Deposit "shall be repayable at the *termination* of the [Agreement] within one month from the reinstatement works to be carried out by the [respondent] and subject to the [appellant's] acceptance of the reinstatement works" [emphasis added]. The appellant's obligation to refund the Security Deposit was therefore expressly linked to the termination of the Agreement (and subject to the appellant's acceptance of the reinstatement works to be carried out by the respondent), and not the expiry of the Term of the Agreement. The Agreement could be terminated at the election of the appellant for multiple reasons, most of which are linked to a breach of the terms of the Agreement:[110]

> (a) Under clause 1(h), the respondent undertook not to hire or employ "illegal workers" at the Service Area. The respondent also agreed that the appellant reserved the right to terminate the Agreement immediately if the respondent's workers were "found using the Service Area as [a] residence or dwelling place".

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110 JROA–3 at pp 41–44 (ZX–1 at pp 38–41).

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(b) Under clause 3(b), set out at [12(b)] as the Termination Right, the appellant had a general right to terminate the Agreement if: (i) the Handling Service Fee remained unpaid for 14 days after it became due; and/or (ii) the respondent failed to "observe any agreement, conditions, or stipulations on their part herein contained".

(c) Under clause 3(e), the parties agreed that if the Singapore Land Authority, Jurong Town Corporation or any government agency were to "disallow or discontinue the handling of this service agreement and/or use of the Service Area" by the respondent, the Agreement would be "deemed to be terminated".

99 The upshot of linking the appellant's obligation to repay the Security Deposit to the respondent to the termination of the Agreement was that the DJ's Interpretation of Recital 4 contradicted the wording of Recital 4, as well as the rest of the Agreement itself. If the Security Deposit had to be repaid at the *termination* of the Agreement, it would follow that it had to be repaid regardless of whether said termination came about by reason of the respondent's breaches of the Agreement, or otherwise (assuming the respondent complied with its Reinstatement Obligations as required under Recital 4). This was because the appellant's obligation to repay the Security Deposit to the respondent upon the termination of the Agreement (contingent on the respondent complying with his Reinstatement Obligations) was not limited to the situations where the relevant termination came about for reasons other than the respondent's breaches of the Agreement. Yet, this was inconsistent with the DJ's Interpretation, which was to the effect that the *entire* Security Deposit would fall to be forfeited by reason of a breach of any of the terms of the Agreement by the respondent. If that was truly the case, the appellant's obligation to repay the Security Deposit on the

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termination of the Agreement would be rendered redundant. In fact, if that was truly the outcome that had been intended by the parties, such an intention would have been more consistently served by stipulating that the appellant's obligation to repay the Security Deposit arose upon the expiry of the Term of the Agreement. In contrast, interpreting the appellant's right of forfeiture and deduction under Recital 4 in a limited way – as a means of recouping compensation for the respondent's breaches of contract – made the connection between the appellant's obligation to repay the Security Deposit with the termination of the Agreement eminently sensible. Upon the termination of the Agreement, the appellant would come under an obligation to return the entire or a part of the Security Deposit after having made the necessary deductions for the expenses it had incurred in remedying the respondent's breaches of the terms of the Agreement.

100 In its further written submissions, the appellant appeared to suggest that Lai Siu Chiu J's decision in *Apollo Enterprises Ltd v Dynasty Theatre Nite-Club KTV & Lounge Pte Ltd* [1995] SGHC 72 ("*Apollo Enterprises*") stands for the proposition that a tenant who finds himself in breach of his tenancy agreement is not entitled to seek a refund of his security deposit.[111] In my judgment, *Apollo Enterprises* does not stand for such a proposition. In that case, the defendant was the tenant of a building who had failed to make punctual payment of the monthly rent and refuse charges to the claimant-landlord. The claimant claimed a sum of $95,283.59 from the defendant, representing the balance of the arrears of rent, refuse and other charges due under the tenancy agreement *after deducting*, amongst others, the security deposit of $1,059,777 that had been paid by the defendant at the start of the tenancy. In granting judgment to the claimant

[111] Applicant's Further Written Submissions dated 20 May 2026 at paras 19–25.

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and dismissing the defendant's counterclaim for the return of the security deposit, Lai J reasoned that as the purpose of the security deposit (as set out in clause 5 of the parties' tenancy agreement) was to "secure the due observance and performance by the defendants of the covenants and conditions contained therein", the defendants – having been in breach of the lease – were "not entitled to be refunded the deposit, without more".

101 This reasoning, however, had to be viewed in light of the fact that the quantum of the claimant's claim in *Apollo Enterprises* (which Lai J found to be established on the facts) was greater than the quantum of the security deposit which the defendant was seeking a refund of (which had been deducted from the value of the claimant's claim). It was in those circumstances that Lai J held that the defendant did not have a right to be refunded its security deposit. There was no indication that Lai J had intended to lay out, as a general legal principle, that a tenant in breach of his tenancy agreement is not entitled to the return of his security deposit, or liable to suffer its absolute forfeiture. For these reasons, in so far as the learned District Judge in *Janny Sulaiman v Sadegh Mortazavy* [2006] SGDC 144 at [25]–[26] appeared to read Lai J's decision in *Apollo Enterprises* for the "general principle that a tenant in breach is not entitled to a refund of the security deposit", I would respectfully disagree.

102 In the premises, having considered the text and the context of the entire contract, it was clear to me that the appellant's right to forfeit the Security Deposit was not as draconian as the DJ interpreted it to be. Instead, properly interpreted, the appellant only had a right to forfeit and deduct from the Security Deposit the actual losses it had sustained by virtue of the respondent's breaches of the terms of the Agreement. Such a conclusion coheres with the purpose of a "security deposit" as that term has been commonly understood in practice across

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the commonwealth (see *Ng v Ashley King (Developments) Ltd* [2010] 3 WLR 911 ("*Ashley King*") at [23] (England & Wales); *Asia Times Sdn Bhd v The New Straits Times Press (M) Bhd* [2020] MLJU 1726 at [24]–[25] (Malaysia); *Chow Kwong Wah Oliver v Pasche Hans-Joachim* [2010] HKCU 842 at [33] (Hong Kong); see also Lye Lin Heng, Koh Swee Yen & Elaine Chew, *Lye Lin Heng's Landlord and Tenant Law in Singapore* (LexisNexis, 2nd Ed, 2020) at 149, cited with approval in *Sabah Inn Sdn Bhd v Fung Cheong Ming* [2005] 7 MLJ 536 at [26]).

Issue 3: Whether the DJ erred in finding that the CA's decision in *Li Jialin* was inapplicable

103 Having found that the respondent is not permitted to advance the Penalty Argument owing to its defective pleading, it follows that the question as to whether the forfeiture clause in Recital 4 amounts to an unenforceable penalty does not arise for my determination. Further, given my determination as to the meaning and effect of Recital 4, the issue of whether it is in fact a penalty does not arise. However, in the event that I am wrong on both of these issues pertaining to pleading and interpretation, I will consider the arguments relating to the penalty issue. The parties have devoted a significant amount of their submissions on this point. Further, this point is not without significance in the context of the tenancy market (whether residential or commercial), where the practice of landlords taking security deposits is common. To the best of my knowledge, the question as to whether the law of penalties applies to a clause providing for the forfeiture of a security deposit in a lease by a landlord has not received much judicial attention locally (see *Lee Tat*, where the point does not appear to have been argued). It is to this question that I now turn.

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The CA's decision in Li Jialin

104 I will begin by considering the appellant's first argument. That argument was to the effect that the DJ had erred in finding that the CA's decision in *Li Jialin*, and Ramesh J's decision in *Hon Chin Kong*, does not apply to the present case (see [39] above). To answer this, it is necessary to study the facts and reasoning of those cases in some detail.

105 In *Li Jialin*, the appellants wished to purchase an apartment unit ("Unit") in a housing project that was under development by the respondent. They entered into a sale and purchase agreement, under which the purchase price was to be paid in instalments according to a payment schedule. The first sale and purchase agreement that had been entered into between the parties was terminated by the respondent owing to the continued defaults of the appellants on their instalments. Undeterred by this failure, the parties entered into a second sale and purchase agreement ("SPA") which provided for a deposit amounting to almost 63% of the purchase price of the Unit. A term in the SPA provided that the entire deposit may be forfeited and kept by the respondent *qua* vendor if the appellants failed to complete the sale within the requisite notice period.

106 As it transpired, the appellants failed to complete the sale before the requisite notice period notwithstanding multiple extensions granted by the respondent. The respondent proceeded to terminate the SPA and asserted its right to forfeit the deposit in response to the appellants' requests for a refund of the deposit. The appellants commenced proceedings, claiming a refund of the entire deposit with interest and seeking declarations that the deposit amounted to an unenforceable penalty.

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107 The CA, following an instructive discussion on the historical relationship between the law of penalties and deposits, held that the law of penalties has "no application to the law of deposits" (*Li Jialin* at [49]). Two main reasons were given by the CA for its decision. The first was that it would be conceptually erroneous to apply the law of penalties, which is concerned exclusively with secondary obligations that arise upon a breach of contract, to deposits. In a passage that was heavily relied on by the appellant, the CA reasoned (*Li Jialin* at [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.*
>
> [emphasis added]

108 The second reason, which is alluded to in the paragraph above, is that deposits do not serve a compensatory function. Instead, they serve the important purpose of serving as an *earnest* of performance (*Li Jialin* at [37] and [45]). 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". Simultaneously, the prospect of its forfeiture *deters* the purchaser from breach and motivates it to "follow through with the contract" (*Li Jialin* at [43], [45] and [73(2)], citing *Hon Chin Kong* at [124]). This earnest function "remains at the core of a deposit". Unlike an agreed damages clause, a deposit is not intended to be a substitute for damages to

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compensate an innocent party for breach. It follows that they fall outside the scope of the penalty rule (*Li Jialin* at [52] and [73(2)]).

109 The CA, however, noted that the parties are not free to agree to excessive and extravagant deposits. The relevant restriction on the parties' autonomy in this context was that the relevant deposit "must be reasonable as an earnest". Where this is not the case, the right to forfeit the deposit would be unenforceable (*Li Jialin* at [73(3]). The CA proceeded to set out a framework for the situation where a claimant sues for the return of a sum alleged to be a deposit. This framework was a revised version of a similar framework that Ramesh J had set out in his decision of *Hon Chin Kong*, and proceeds along the following lines (*Li Jialin* at [73] and [73(a)]–[73(c)]):

> (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.
>
> (b) Second, where there is a contractual right to forfeit, the court determines whether the sum is a "true deposit" by asking whether the sum is reasonable as an earnest.
>
> (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 is unenforceable and the claimant's right to recovery of the deposit, if any, must be found at general law.

110 Applying this framework, the CA found that the SPA was clear in granting the respondent an express right to "forfeit and keep any deposit paid by the [appellant]" (*Li Jialin* at [57]). However, it was held that the deposit,

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which amounted to 63% of the purchase price, was not reasonable as an earnest. It followed that the sum was not a "true deposit" that could be forfeited by the respondent, and the appellant was entitled to recover it by way of a claim in unjust enrichment (*Li Jialin* at [74]–[75]).

The CA's decision in Li Jialin *does not apply*

111 In my judgment, the DJ was correct to hold that the CA's decision in *Li Jialin* has no application to the present case, though I do not entirely agree with his reasons for reaching such a conclusion. I set out the DJ's reasons for holding that the CA's decision in *Li Jialin* (as well as Ramesh J's decision in *Hon Chin Kong*) was inapplicable to the facts of the present case (Judgment at [51]):

> (a) First, those cases concerned "deposits paid in the course of sale and purchase of land". The forfeitability of such deposits, or "earnest money", are "founded on considerations peculiar to sale and purchase of land and the conveyancing process", which are "not applicable to tenancies".
>
> (b) Second, there was no clear authority supporting the extension of the holding and reasoning in those cases to tenancies.
>
> (c) Third, unlike purchase deposits in the conveyancing context which *Li Jialin* and *Hon Chin Kong* were concerned with, the Security Deposit in the present case was "not a deposit made by the [respondent] pending the execution of the Agreement". Put differently, the respondent had not paid the Security Deposit to the appellant "in the form of an earnest"; instead, it was paid to "secure the [respondent's] compliance with the terms of the Agreement".

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(1) *Li Jialin* is not confined to the conveyancing context

112 The DJ's first reason was that the decisions in *Li Jialin* and *Hon Chin Kong* are confined to purchase deposits paid in the conveyancing context. The "considerations peculiar" to such a context were not articulated by the DJ, though one may be the common law's longstanding view that each piece of land is treated as unique, such that damages are not considered an adequate remedy for breach (see *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2012] 1 SLR 32 ("*E C Investment*") at [78]). In England, this view, which has traditionally justified the law granting specific performance of a contract for the sale of land, has been asserted to furnish a "legitimate interest" for the purposes of the law of penalties (see *Chitty on Contracts* at para 30–270).

113 I reject the DJ's first reason, which I find to be contrary to precedent and principle. As a matter of principle, the view in *Chitty on Contracts* is premised on a different formulation of the rule against penalties as formulated by the United Kingdom Supreme Court ("UKSC") in *Cavendish Square Holding BV v Makdessi* [2016] AC 1172 ("*Cavendish v Makdessi*"), under which the relevant inquiry is whether the clause under review imposes a secondary obligation that imposes a detriment on the contract-breaker out of all proportion to any "legitimate interest" of the innocent party in the enforcement of the primary obligation. To that end, compensation is "not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter's primary obligations" (*Cavendish v Makdessi* at [32]). This reformulation of the penalty rule was rejected in no uncertain terms by the CA in *Denka v Seraya*, as the only "legitimate interest" that an innocent party has in the face of a breach of contract is to be adequately compensated for its losses (*Denka v Seraya* at [152] and [185(b)]). Whatever the merits of the legal proposition that each piece

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of land is unique and without substitutes – a view that remains contested notwithstanding its pedigree (see *E C Investment* at [80]–[87] and [103]) – I was of the view that the consideration advanced in *Chitty on Contracts* had no application in Singapore law, where the law of penalties is based firmly on the speech of Lord Dunedin in *Dunlop Pneumatic*.

114 As a matter of precedent, the position taken by the DJ appears to be inconsistent with the facts and outcome of multiple decisions of this court. That includes Ramesh J's decision in *Hon Chin Kong* itself, which was cited largely with approval by the CA in *Li Jialin*. That was a case which involved an aborted sale and purchase agreement for the claimant to purchase the defendant's *shares* in a company. The claimant in that case had paid the defendant a sum of $300,000 as a "down payment deposit", which was to concurrently serve as the first out of three tranches by which the purchase price for the shares was to be paid. The defendant refused to return the deposit when the sale fell through. Ramesh J dismissed the claimant's claim for the recovery of the deposit, finding that the deposit of $300,000 was reasonable in the circumstances as an earnest of performance (*Hon Chin Kong* at [145]–[146]).

115 Similarly, in *Smart Glove*, payments totalling US$64,782,300 had been made by the defendant to the claimant under an agreement that provided for the tentative sale and purchase of a large quantity of *gloves*. The defendant asserted that the payments were "refundable advance payments" for the purchase price of the gloves, for which it was entitled to restitution. The claimant contended that they were deposits forfeitable on breach of contract. In agreeing with the defendant that the payments were advance payments and not "forfeitable deposits", Hoo Sheau Peng J applied the framework in *Li Jialin* notwithstanding

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the fact that the facts of the case did not concern a conveyancing context (*Smart Glove* at [450]–[463]).

116 Finally, in *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] 1 SLR 690 ("*TG Master*"), the appellant had granted the second respondent eight options to purchase eight properties ("OTPs"), the terms of which were substantially the same. Pursuant to the terms of the OTPs, the second respondent paid the appellant an "Option Fee" and a "Further Sum" which totalled 20 per cent of the purchase price of each of the properties. The ADHC found that these two sums paid for each option essentially formed parts of a larger option fee (referred to as the "True Option Fee"), which had been paid by the second respondent to the appellant in consideration for the grant of the OTPs (*TG Master* at [70]–[74]). The OTPs were not exercised and the envisioned sale contracts never materialised. In the suit commenced against it by the appellant, the second respondent counterclaimed for the return of the True Option Fee. In response, the appellant asserted its entitlement to forfeit those fees absolutely based on a clause in the OTPs. The second respondent's rejoinder was that, applying the framework in *Hon Chin Kong*, the fees were not reasonable as earnest money and therefore not "true deposits" that could be forfeited by the appellant. For brevity's sake, it suffices to say Goh Yihan JC (as he then was), the trial judge, agreed with this argument and held that the appellant was not entitled to retain the True Option Fee (*TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2022] SGHC 316 at [96]–[100]).

117 On appeal, the ADHC held that the *Hon Chin Kong* framework is not applicable to an ordinary option to purchase or an option fee paid under the same. The ADHC also held that Goh JC was wrong to have applied the *Hon Chin Kong* framework to the True Option Fee "without considering the nature

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of the payments" (*TG Master* at [93]–[98]). The ADHC's reasoning on the nature of the *Hon Chin Kong* framework is worth setting out in full:

> [92] The *Hon Chin Kong* framework [is] concerned with the forfeiture of sums paid under a *sale and purchase agreement*, where the sums were paid *pursuant to the purchaser's obligation to complete the purchase*, but the purchaser subsequently failed to do so. More specifically, the *Hon Chin Kong* framework dealt with sums that were intended to be paid as a deposit or at least as a partial payment towards the purchase price, and governed whether that sum was forfeitable as a *true* deposit…
>
> [94] The *Hon Chin Kong* framework applied only to a sum that could properly be classified as a *deposit* or as a *part payment* towards the acquisition of the subject matter of a *sale*. The binary characterisation of a sum as being *either* a true deposit or a part payment presupposed an obligation to complete a *purchase*. A deposit secures the obligation to complete the purchase, and a payment is partial because it is made towards the whole purchase price. The *Hon Chin Kong* framework therefore did not apply to a sum that was *neither* a deposit *nor* a part payment, such as where the payment constituted a full payment made in consideration of the transaction. This must be so *a fortiori* where the sum was paid for an entirely distinct contractual objective from completing a purchase and where there was no obligation to complete any purchase at all, as such payments cannot meaningfully be described as either a deposit or a part payment *towards a purchase*.
>
> [emphasis in original]

118 On the facts, as the OTPs were not sale and purchase agreements, and the True Option Fee not being sums that had been paid under such an agreement, the ADHC held that the framework in *Hon Chin Kong* had no application to the purported forfeiture of the True Option Fee. Those fees had been paid in consideration for the grant of the OTPs; they had not been paid pursuant to, or to secure, any obligation to complete a purchase. Having obtained precisely what he had bargained for in paying the True Option Fee (*ie*, the OTPs), the second respondent was not entitled to their return (*TG Master* at [95]–[98]).

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119 Based on the brief survey of the authorities above, in my view, it is clear that framework in *Li Jialin* is not confined to the sale and purchase of land (Judgment at [51]). As GP Selvam J noted in *Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd* [2000] 3 SLR(R) 594 ("*Triangle Auto*") at [13], the principles pertaining to the forfeiture of purchase deposits in the context of the sale of land "apply with the same force and effect to sale of goods". I therefore find that the DJ was wrong to have found that the framework in *Li Jialin* is confined to the conveyancing context.

120 This, however, does not dispose of the question in the present case, which is whether the framework in *Li Jialin* applies to security deposits paid under a lease. Based on the ADHC's reasoning in *TG Master*, it appears that the framework in *Li Jialin* (which is itself a revised version of the framework in *Hon Chin Kong*), if limited at all, would be limited to the context of sale and purchase agreements. Indeed, I note that almost all the authorities cited in the discussions leading up to the formulation of the framework in *Li Jialin* and *Hon Chin Kong* concerned the payment of a sum under a sale and purchase agreement, whether it be for real or personal property (see the authorities discussed in *Hon Chin Kong* at [63]–[142] and *Li Jialin* at [34]–[52]).

121 Before I turn to explain the *legal* significance of the existence of a sale and purchase agreement, I note that the decision of the ADHC in *TG Master* pre-dated the decision of the CA in *Li Jialin*. Nonetheless, I am of the view that the revisions made by the CA in the latter case to the framework in *Hon Chin Kong* do not substantially impugn the ADHC's reasoning at [92]–[98] in *TG Master*, save for an important caveat. In so far as the ADHC was suggesting at [92] of *TG Master* that the forfeiture of a part payment "could be subject to the penalty doctrine" based on [143(f)] of the framework in *Hon Chin Kong*, it is

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clear that that is no longer good law in Singapore in light of the CA's reasoning in *Li Jialin*. That is because it is not open to the courts to recharacterise a right of forfeiture into a right to liquidated damages which remains enforceable subject to the penalty rule – that would be an attempt to regulate something that the parties had "never intended to be compensatory" (*Li Jialin* at [70]–[71] and [73(3)]).

(2) The applicability of the framework in *Li Jialin* depends on whether the deposit in question has an earnest function

122 In my judgment, the *legal* significance of the existence of a sale and purchase agreement, and the true reason as to why the ADHC limited the application of the *Hon Chin Kong* framework thereto, is that deposits paid pursuant to such agreements have long been recognised as having an *earnest* function (*Howe v Smith* at 101–102; *Waugh v Pioneer Logging Co Limited* [1949] SCR 299 ("*Pioneer Logging*") at 302, *per* Rand J; see also Neil Andrews, Andrew Tettenborn & Graham Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (Sweet & Maxwell, 4th Ed, 2023) at para 25–057). The question of whether the deposit in question serves an earnest function, or has been paid as an earnest, is therefore the crucial factor in determining whether the framework in *Li Jialin* (which builds upon the framework in *Hon Chin Kong*) applies. Though Lord Hailsham LC observed in *Linggi Plantations* at 93I that the words "deposit" and "earnest money" are "two words for the same thing", the fact that the mechanism of paying over a sum of money around the time that a binding contract is entered into has been fielded in a wide variety of situations means that it would not, strictly speaking, be accurate to treat them synonymously. The word "deposit" is a protean one, and the functions that it serves depends on the context or commercial arrangement

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in which the relevant sum of money has been paid. I will explain this claim in the paragraphs that follow.

123 At its broadest description, an earnest is a sum of money or property transferred to demonstrate one's seriousness and commitment towards performing his obligations under a contract (*Li Jialin* at [73(2)], citing *Hon Chin Kong* at [124]). In the context of a sale, the thing of value is given by the purchaser as "a guarantee that [he] means business" (*Soper v Arnold* (1889) 14 App Cas 429 at 435). It is this demonstration of serious intent by the purchaser which leads the vendor to make "the necessary commercial act of faith" by taking the relevant property off the market and committing to sell to the purchaser (*Polyset Ltd v Panhandat Ltd* (2002) 5 HKCFAR 234("*Polyset v Panhandat*") at [69]).

124 Quite apart from the abovementioned *signalling* effect, a deposit which is paid as earnest money also has a *deterrent* effect. In the classic words of Fry LJ in *Howe v Smith* at 101, the deposit "creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract". Put differently, it serves as "a disincentive (by the mechanism of forfeiture or retention of the deposit) to the payor's breach" (*Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] 1 SLR 239 ("*Benzline Auto*") at [55]; see also *Li Jialin* at [43]). In the context of a sale contract, a deposit that is paid by the purchaser to the vendor often has the dual purpose of being an earnest and a part payment (*Potters v Loppert* [1973] Ch 399 ("*Potters v Loppert*") at 405; *Howe v Smith* at 101). The sum is transferred on an all-or-nothing basis. If the purchaser fails to complete or otherwise perform its obligations under the contract, he loses his deposit (*Howe v Smith* at 102; *Li Jialin* at [73]). If the purchaser performs his obligations, he is entitled to have the sum paid be brought into account as part payment towards

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the purchase price of the relevant subject-matter (*Howe v Smith* at 101–102; *Workers Trust & Merchant Bank Ltd v Dojap Investments* [1993] AC 573 at 578H–579A). Assuming that the deposit is reasonable as an earnest, there is nothing penal or unjust about the purchaser losing his deposit in the first-mentioned scenario. The purchaser pays the deposit on the basis that he would not be entitled to its return if it fails to complete the contract. Having failed to so complete, it is not entitled to seek restitution of the sum by way of a claim in unjust enrichment on the ground of failure of basis (see *Li Jialin* at [49]; *Benzline Auto* at [55]).

125 It is for this reason that the ADHC in *TG Master* limited the applicability of the framework in *Hon Chin Kong* to the forfeiture of deposits paid pursuant to a sale and purchase agreement. The key lies not so much in the *fact* of the existence of the sale and purchase agreement itself, but in the law's recognition that deposits paid pursuant to those agreements have an earnest function. This principle, which has been recognised since at least the 19th century by the EWCA in *Howe v Smith*, was affirmed in *Li Jialin* (at [37] and [52]). It is precisely this reason, quite apart from the numerous authorities indicating otherwise, that the DJ was wrong to draw a distinction between the conveyancing and the non-conveyancing context. If the relevant deposit serves an earnest function and is reasonable in that regard, it can be forfeited regardless of the nature of the relevant subject-matter that is being sold.

126 Importantly, a deposit which is paid as an earnest is not intended to provide *compensation* for loss resulting from a breach of contract (*Li Jialin* at [49]). That is because, as Ribeiro PJ explained in *Polyset v Panhandat*, the payee (of the deposit) is open to pursue a claim for damages to be compensated for the payor's breach of contract, albeit having to give credit for the forfeited

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deposit where such damages exceed its amount (*Polyset v Panhandat* at [68], citing *Shuttleworth v Clews* [1910] 1 Ch 176 at 178; *Li Jialin* at [49]; see also *Hon Chin Kong* at [121]). As noted above at [108], that was one of the crucial reasons as to why the CA in *Li Jialin* had held that the law of penalties does not apply to the forfeiture of deposits.

127 Yet, it would be wrong to say, as the appellant did, that every sum or property paid or transferred as a "deposit" has an earnest function merely by dint of its label regardless of the underlying transaction or arrangement. That is an association fallacy and a position which is not reflective of the variegated ways in which a deposit has been utilised in practice. As Lewison J (as he then was) noted in *Ashley King* at [23]:

> A deposit can also serve another function. For example in the case of a residential tenancy, the tenant is often required to pay a deposit (typically one month's rent). *The primary function of this kind of deposit, sometimes called a security deposit, is to provide the landlord with a fund from which he can recoup compensation for any breach of contract by the tenant. Any surplus will be returned to the tenant at the end of the tenancy.* A deposit paid on, say, booking a hotel room or hiring a car also serves this function as well as being an earnest of performance. Thus in my judgment *there is no intrinsic reason why something called a deposit should not be the (or a) source of compensation to the injured party.*
>
> [emphasis added]

128 The purpose of a "security deposit", as that term is commonly understood, is to secure the payor's performance of its contractual obligations. This is achieved by the relevant sum of money serving as a fund which the payee may look to in order to compensate himself for the actual losses that he has sustained by virtue of the payor's breaches (see the authorities cited above at [102] in the context of leases; more generally, see Lee Eng Beng, "Security Deposit Arrangements in Insolvency" (1996) 8 SAcLJ 458 at 458; Soh Kee Bun,

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"Deposits and Reasonable Penalties" [1997] SJLS 50 at 64; Carmine Conte, "Deposit Clauses" in Graham Virgo and Sarah Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge University Press, 2017) ("*Deposit Clauses*") at 408). It is not an earnest, which can be forfeited regardless of whether non-performance of the purchaser has caused the vendor any loss (*Triangle Auto* at [9], cited with approval in *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [83]; *Benzline Auto* at [55]; *Polyset v Panhandat* at [67]). In *Howe v Smith*, for example, the vendor was entitled to forfeit the purchase deposit despite the fact that he had managed to re-sell the property at its original price, and the purchaser's breach in failing to complete had therefore caused it no loss. This is in sharp contrast to security deposits, under which a payee cannot purport to forfeit and deduct from the deposited sum a sum that exceeds the quantum of the actual losses it has suffered. The payor is ordinarily entitled to be refunded the deposited sum to the extent by which it exceeds the quantum of the payee's actual losses, even if deductions have been made for the payor's breaches. A payor who is faced with an unscrupulous payee adamant on forfeiting a sum in excess of his actual losses lies may enforce his rights by way of an action in contract or unjust enrichment.

129 At this juncture, I reject the appellant's argument that the question as to whether a payment functions as an earnest depends on whether the specific payment was intended to guarantee the performance of a party's obligations under a contract (see [41] above). While that may be true in fact, it is too broad and general a formulation of principle to be of any assistance. As Lord Radcliffe noted in *Bridge v Campbell Discount Co Ltd* [1962] AC 600 ("*Campbell Discount*") at 624, "every penalty, even a penal bond, is in some sense a guarantee for the due performance of the contract". Similarly, a security deposit also serves to secure the performance of the payee's contractual obligations. As

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explained above, however, that does not mean that the security deposit has an earnest function – its function, instead, is eminently compensatory. Instead, the true nature and purpose of the sum that has been paid as a "deposit" falls to be determined by reference to the parties' intentions through a process of contractual interpretation (*Mayson v Clouet* [1924] AC 980 ("*Mayson v Clouet*") at 985; *Polyset v Panhandat* at [57]; see also *Li Jialin* at [70]). Similarly, the right of a payee to forfeit or retain the deposit that has been paid to it by the payor "depends in each case upon the construction of the document under which that deposit is made" (*Chillingworth v Esche* [1924] 1 Ch 97 ("*Chillingworth*") at 111; *Howe v Smith* at 97).

130 That proposition, along with the view that not all deposits serve an earnest function, is also borne out by the authorities on pre-contract deposits. These deposits are generally paid before any binding contract has been entered into and are ordinarily "an expression of seriousness of intention on the part of the prospective purchaser" (*Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 ("*Simpson Marine*") at [46]; *Goff & Jones on Unjust Enrichment* (Sweet & Maxwell, 10th Ed, 2023) ("*Goff & Jones*") at para 14–06). They are to be distinguished from contract deposits, which are generally paid upon or after entry into a binding contract (*United Artists Singapore Theatres Pte Ltd v Parkway Properties Ltd* [2003] 1 SLR(R) 791 ("*United Artists*") at [72]; see *Potters v Loppert* at 405E–H). There being no contract, the recovery of pre-contract deposits falls to be determined by reference to the general principles governing restitutionary claims for unjust enrichment on the ground of failure of basis (*Simpson Marine* at [47]). Identifying the basis on which such a payment has been made is a matter for objective interpretation and therefore depends on the facts of each case (*Simpson Marine* at [49]; *Barton v Morris* [2023] 2 WLR 269 at [232]). Notwithstanding the various possibilities

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of the basis on which the payment has been made, it is clear that a pre-contract deposit is not paid on the basis that it is an earnest of performance (*Goff & Jones* at para 14–08). A pre-contract deposit may, however, subsequently take on the function of an earnest when the contemplated contract is subsequently entered into, and the pre-contract deposit is brought into account and serves as an ordinary contract deposit for the underlying sale contract (*Chillingworth* at 114).

131 A well-known authority in this area of the law is *Chillingworth*. There, the purchaser had agreed to purchase certain land and a nursery from the vendor "subject to a proper contract to be prepared by the vendor's solicitors", and paid 240*l* as "deposit and in part payment of the said purchase money". The purchaser subsequently refused to sign the contract that had been prepared by the vendor and claimed for the return of the deposit. Before the EWCA, the vendor argued that the deposit was in the form of an earnest which it was entitled to forfeit following the purchaser's default, arguing that the principles in *Howe v Smith* were equally applicable to situations where no binding contract had yet been formed (*Chillingworth* at 101). The EWCA unanimously held that there had been no contract entered into by the parties and that the purchaser was entitled to restitution of the 240*l* paid. The court had no hesitation in rejecting the vendor's argument that the deposit had been paid as an earnest (*Chillingworth* at 106–107 (*per* Pollock MR), 115 (*per* Sargant LJ)). Warrington LJ, in a passage cited with approval by Belinda Ang JC (as she then was) in *United Artists* at [82], said (at 112):

> But where, as here, there is no binding contract, where the whole matter is left indefinite, *it seems impossible to say that the purchasers pay the deposit as a guarantee to carry out the bargain, when by the document they have entered into they have not bound themselves to carry out any bargain*... it is said that unless the consequence of the payment of a deposit amounts to a guarantee to complete the purchase the payment of it is

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> perfectly futile. I do not agree, because the purchaser by payment of a deposit shows that he means business. *The purchaser has not bound himself, but in order to show a definite intention he is willing to part with money, and run the risk of the vendor spending the money and being unable to return it if negotiations are broken off.* The purchasers contend that *this is a deposit paid in anticipation of a final contract and nothing more*. That seems to be the true view.
>
> [emphasis added]

132 In *United Artists*, negotiations for the claimant to lease a cineplex from the defendant had broken down. In the midst of those negotiations, four payments totalling $1,846,900 had been made by the claimants to the defendants ("Sum"). Those payments had been made partly towards rental and partly towards the differential premium payable to the Land Office. The lease having failed to come into fruition, the claimants asserted that they were entitled to restitution of the Sum for failure of basis. Ang JC held that the Sum had been paid in anticipation of the lease and on the basis that it would come into fruition, and not "outright payments equivalent to gifts" (*United Artists* at [187]). They were pre-contractual deposits which "served as an indication of the [claimants'] confidence with funding, genuine interest and seriousness in being the cinema operator of the cineplex" (*United Artists* at [186]). As the CA noted in a subsequent review of the case, the Sum had been paid "to *demonstrate* that the [claimants] were willing and able to perform the contemplated agreement, rather than to serve as an earnest of performance" [emphasis in original] (*Benzline Auto* at [57]). Since the lease had never been entered into by the parties, the basis on which the payment had been made had failed, and the claimants were held to be entitled to restitution of the Sum.

133 Though this line of authorities on pre-contract deposits are not strictly relevant to the facts of the present dispute, I highlight them in the context of the

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present discussion to underscore the point that, contrary to the suggestions of the appellant, not every "deposit" has the purpose of being an earnest and is therefore subject to the framework in *Li Jialin*. There is no magic in the word "deposit", and it is important in this context to bear in mind the principle that the legal result in a given case does not turn on an exegesis of the words and phrases of a judgment as if they were the words of a statute (*Natixis, Singapore Branch v Seshadri Rajagopalan* [2025] 1 SLR 1020 at [74]; *Re Fullerton Capital Ltd* [2025] 1 SLR 432 at [51]). As the ADHC was at pains to stress in *TG Master*, the nature of the payments made, and the context in which they had been paid, is of the first importance (*TG Master* at [8] and [94]–[96]).

134 For these reasons, I would also respectfully disagree with the decisions of the Hong Kong Court of Appeal which have held that the principles applying to the forfeiture of purchase deposits in sale agreements apply *mutatis mutandis* to security deposits in tenancy agreements (*Wong Kam Kong v Intercontinent Mercantile Co* [1968] HKLR 331 at 339–344; *Orient Bright International Ltd v Hiang Kie Hong Kong Ltd* [2005] 2 HKC 663 at [16]; see also *Yeung & Young Medicare Centre Ltd v Pan Zan Sheng* [2018] HKCU 494 ("*Yeung & Young*") at [25]–[31]). In any case, subsequent first instance decisions in Hong Kong appear to have retreated from such an absolute position by taking the view that the forfeiture of security deposits in tenancy agreements may be subject to review under the law of penalties – this being a question of construction that "depends on the facts of each individual case" (*The Centre (76) Ltd v Victory Serviced Office (HK) Ltd* [2020] HKCU 4037 ("*Victory Serviced Office*") at [35]–[37]; *Power Plus Ltd v Fruit Design & Build Ltd* [2016] HKCU 2551 at [19]–[21]).

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135 On the facts, based on my interpretation of the forfeiture clause in Recital 4, I am of the view that the Security Deposit serves a compensatory function. As the DJ rightly held, it is not in the nature of an earnest. The framework in *Li Jialin* therefore has no application to the facts of the case. The appeal on this issue is accordingly dismissed.

136 Before moving onto the next question necessary for the resolution of this issue, I will express my tentative views on the observations made by Lewison J in *Ashley King* to the effect that it is possible for a deposit to have both a compensatory and an earnest function. The example that Lewison J gave is the example of a deposit paid on the booking of a hotel room. Such a deposit, for the purposes of a restitutionary claim in unjust enrichment for failure of basis, is paid on two bases (see the helpful analysis in *Deposit Clauses* at 409). It is, after all, well established in the law of restitution for unjust enrichment that a payment of money or transfer of property may have been made on multiple bases, and that the total failure of only one of those bases is sufficient to give rise to a claim (*Benzline Auto* at [52]; *Goff & Jones* at 13–15). First, the deposit is transferred on the basis that the guest will not be entitled to its return if he fails to take possession of the room. The deposit functions as an earnest of performance, and the hotelier is permitted to forfeit and retain the deposit on the ground that the basis for the payment has not failed. Accordingly, the framework in *Li Jialin* applies to determine the enforceability of the forfeiture clause owing to the earnest function of the deposit. Second, the deposit is also transferred on the basis that, upon the guest taking possession of the room, it will be brought into account to serve as a fund which the hotelier may have recourse to in the event that the guest is in breach of the terms of the booking contract (*eg*, damages to the room or fines). At this juncture, the deposit no longer serves as an earnest and takes on a predominantly compensatory

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function. It follows that the framework in *Li Jialin* is inapplicable to determine the enforceability of the forfeiture clause. Given that such a deposit was not in issue before me in the present case, however, I say no more on this point.

Whether the forfeiture clause in Recital 4 is in fact an unenforceable penalty clause

137 Having determined that the framework in *Li Jialin* does not apply to Recital 4, I turn to consider whether the law of penalties is applicable to Recital 4. The law of penalties in Singapore has been settled by the seminal decision of *Denka v Seraya*, where the CA affirmed the traditional principles propounded by Lord Dunedin in the House of Lords' decision of *Dunlop Pneumatic* (*Denka v Seraya* at [151] and [185(b)]). There, Lord Dunedin drew the famous distinction between an unenforceable penalty that is "a payment of money stipulated as *in terrorem* of the offending party", and liquidated damages that are "a genuine covenanted pre-estimate of damage" (*Dunlop Pneumatic* at 86). In more modern times, the inquiry entails asking whether the clause under review imposes a secondary obligation to pay damages for breach of contract which can be justified as a genuine pre-estimate of the losses that the innocent party will likely suffer as a result of the breach (*Denka v Seraya* at [185] and [235]; *VeriFone, Inc v Firemane Pte Ltd* [2024] SGHC 264 ("*VeriFone*") at [69]). This has been said to be a question of construction to be judged at the time of contracting (see [63] above).

138 Broadly, therefore, the inquiry as to whether a clause in a contract is an unenforceable penalty clause proceeds in two broad steps. The first is to ask whether the clause under review imposes a primary or a secondary obligation (*Leiman Ricardo* at [99]). The distinction between primary and secondary obligations was explained by Lord Diplock in *Photo Production Ltd v Securicor*

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Transport Ltd [1980] AC 827 at 848–849 and summarised by Goh Yihan J in *VeriFone* at [70] (see also *Ethoz Capital* at [51]):

> [P]rimary obligations are the promised performance that are determined and bargained-for by parties in their contract; whereas, secondary obligations are the "substituted" obligations that are triggered by a "failure to perform a primary obligation" in order to provide "concomitant relief" to the innocent party against the defaulting party. These can arise from common law or the express words of a contract.

139 The law of penalties is concerned only with secondary obligations that prescribe a detriment for the breach of a primary obligation (*VeriFone* at [70]). Ordinarily, this refers to "the obligation on the part of the defendant to *pay* ***damages*** to the plaintiff" that is triggered by a breach of contract [emphasis in original] (*Denka v Seraya* at [92], [152], [235]), though it has been held in England that an obligation to transfer property would also suffice (see *Jobson v Jobson* [1989] 1 WLR 1026 at 1042). In distinguishing between whether a clause imposes a primary or secondary obligation, the court approaches the issue as a matter of substance rather than form (*Leiman Ricardo* at [101]; *Ethoz Capital* at [53]; see also [63(b)] above). The courts do not countenance drafting attempts which are "intended to *obscure* the true nature of a provision by obfuscating its *substance* as a secondary obligation" (*Ethoz Capital* at [2], citing *Denka v Seraya* at [95]). In determining whether a clause imposes a secondary obligation in *substance*, the courts will embark on a process of contractual interpretation, having regard to the following factors: (a) the overall context in which the bargain was struck; (b) the reasons as to why the parties had agreed to the clause; and (c) "whether the clause was contemplated to form part of the parties' primary obligations to secure some independent commercial purpose, or was only intended to secure the affected party's compliance with his primary

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obligations" (*Ethoz Capital* at [52], citing *Denka v Seraya* at [242] and *Leiman Ricardo* at [101]).

140 Having determined that the clause under review imposes a secondary obligation, it is necessary to ask whether it is in the nature of a penalty or liquidated damages. This is done by asking whether the clause under review provides for a genuine pre-estimate of the likely loss that would flow from the breach of the relevant primary obligation (*Denka v Seraya* at [185(b)]). If it is not, then the clause is "not truly compensatory" and is unenforceable as a penalty (*Li Jialin* at [73(1)]). Put differently, a contractual provision which stipulates for an amount of damages to be paid in the event of breach that is "more than the pre-estimate of the likely loss must necessarily be (on a normative level) penal, as opposed to compensatory in nature" [emphasis in original removed] (*Denka v Seraya* at [152]). In answering such a question, the court is to have regard to the four classical principles set out by Lord Dunedin in *Dunlop Pneumatic* at 87 (cited with approval in *Denka v Seraya* at [66], [103] and [185(b)]; *Leiman Ricardo* at [97]):

> (a) First, the clause will be held to be penal if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach ("Greatest Loss Test").
>
> (b) Second, the clause will be held to be penal if the breach consisted only of the non-payment of a sum of money, and the sum stipulated for is a sum greater than the sum which ought to have been paid ("Greater Sum Test");

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(c) Third, there is a rebuttable presumption that the clause is penal when a single lump sum is made payable on the occurrence of a number of events of varying gravity ("Single Lump Sum Test"); and

(d) Fourth, the fact that it would be practically impossible to pre-estimate the losses which would flow from breach does not render the clause penal. Instead, that is the very situation where the parties are likely to have intended for the clause to operate as a genuine pre-estimate of the likely losses of the innocent party.

141 It should be borne in mind that these principles should not be applied mechanistically to the facts. The law does not expect commercial parties to be clairvoyants as to the consequences that flow from breach. Consistent with this, a clause does not become a penalty simply because "it results in overpayment in particular circumstances"; the parties are allowed "a generous margin" in determining the agreed damages to be payable upon breach (*iTronic Holdings Pte Ltd v Tan Swee Leon* [2016] 3 SLR 663 at [176], citing *Murray v Leisureplay plc* [2005] EWCA Civ 963 at [43]). In a similar spirit, in order to avoid undesirable uncertainty in commercial contracts, the courts should avoid setting "too stringent a standard" in classifying agreed remedies clauses as unenforceable penalties, bearing in mind that "what the parties have agreed should normally be upheld" (*Philips Hong Kong* at 785).

Recital 4 imposes secondary obligations on the respondent

142 The first question that must be answered in the determination of whether Recital 4 amounts to an unenforceable penalty clause is whether it imposes a primary or secondary obligation. In this regard, the appellant argues that the DJ

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had erred in finding that Recital 4 imposed a secondary obligation on the respondent (see [42] above).

143 Viewed formalistically, a clause providing for the payment of a security deposit (and its forfeiture on breach) clearly does not entail a secondary obligation "to *pay* ***damages*** to the plaintiff" [emphasis in original] (*Denka v Seraya* at [92]). A deposit is ordinarily paid at or around the time of contracting pursuant to a primary obligation in the relevant contract. Its payment precedes, and is independent of, any breach by the payor. Unlike an agreed damages clause that prescribes for a sum to be payable on breach, a forfeiture clause provides for the forfeiture of a sum that has already been paid over on breach. For this reason, it has been said that the law of penalties should have no application to deposits (*Amble Assets LLP v Longbenton Foods Ltd* [2012] 1 All ER (Comm) 764 at [75]; *Cadogan Petroleum Holdings Ltd v Global Process Systems LLC* [2013] 2 Lloyd's Rep 26 at [32]–[33]; *Havyn Pty Ltd v Webster* [2005] NSWCA 182 at [134]; see also Roger Halson, *Liquidated Damages and Penalty Clauses* (Oxford University Press, 2018) at para 5.22). Indeed, this was a reason cited in a decision by the Hong Kong Court of First Instance in rejecting the application of the law of penalties to a security deposit in a lease (*Yeung & Young* at [25]).

144 In my judgment, I do not think that this is a sufficient reason to exclude the application of the law of penalties to security deposits. The reason for this lies in the fact that the law takes a substance over form approach to determining whether a clause imposes a primary or secondary obligation (see [63(b)] and [139] above). The courts do not countenance drafting attempts which are "intended to *obscure* the true nature of a provision by obfuscating its *substance* as a secondary obligation" (*Ethoz Capital* at [2], citing *Denka v Seraya* at [95]).

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A clause that imposes an obligation on X to pay $100 in damages to Y is functionally and economically equivalent in effect to a clause that grants Y a right to forfeit a sum of $100 that has already been paid over by X. The detriment suffered by X is quantitatively identical, regardless of whether it is suffered by way of a legal obligation to pay damages, or the forfeiture of a sum already paid (or, more accurately, the forfeiture of a restitutionary or contractual right to the recovery of the deposit: *Hastingwood Property Ltd v Saunders Bearman Anselm* [1991] Ch 114 at 123). The right to forfeit a payee's deposit upon a breach of contract, one which the parties have agreed for the payor to have at the outset, is therefore in *substance* equivalent to a secondary obligation to pay damages upon a breach of contract.

145 That was a point noted by the CA in *Li Jialin* at [43], and is the reason why the formalistic distinction between agreed damages clauses and clauses providing for the forfeiture of a deposit has been subject to trenchant judicial and academic criticism (see the authorities cited in *Hon Chin Kong* at [133]; *McGregor on Damages* (James Edelman ed) (Sweet & Maxwell, 22nd Ed, 2024) at para 17–114; *Treitel on The Law of Contract* (Edwin Peel gen ed) (Sweet & Maxwell, 14th Ed, 2015) at para 20–148; see also *Cavendish v Makdessi* at [16], *Campbell Discount* at 624 and *Mayson v Clouet* at 987). The same point was made forcefully in an article by Prof Yeo Tiong Min, whose views as independent counsel the CA substantially agreed with in *Li Jialin* (Yeo Tiong Min, "The Law on Deposits in Singapore" (2025) 5 *Singapore Law Journal* 1 ("*The Law on Deposits*") at [44]; see also his earlier views in Yeo Tiong Min, "Deposits: At the Intersection of Contract, Restitution, Equity and Statute", Sixth Yong Pung How Professorship of Law Lecture, Singapore (16 May 2023) at [10]–[11]):

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> The pith and substance of the concern of the court is not whether forfeiture operates technically at the level of secondary obligations, but *whether the effect of the forfeiture will amount to a substitution of the court's determination under the general law of recoverable damages that are usually payable under a secondary obligation. That the forfeiture of deposit does not operate technically in the realm of secondary obligations is not in itself sufficient to insulate it from the law on penalties*. This must be so in principle, because although the law on penalties is only concerned with the regulation of secondary obligations to pay damages for breach of contract, *whether the court is dealing with a secondary obligation for this purpose is not a question of form but of substance*.
>
> [emphasis added; references omitted]

(1) Authorities where the law of penalties was applied to review a clause that did not formally impose an obligation to pay damages

146 Indeed, the fact that the relevant clause under review does not impose a secondary obligation to pay damages on breach has not been a barrier to the courts in their application of the law of penalties to review such clauses. The first of these cases is *Commissioner of Public Works v Hills* [1906] AC 368 ("*Hills*"), where the claimant had entered into three agreements with the defendant to construct three railways. Under clause 17 of two of those agreements, the defendant had a right to retain 10% of the sums that fell to be payable to the claimant as the railways were constructed. Those sums were intended to form a "guarantee fund", which was to be primarily applied to making goods any defects in the claimant's construction (*Hills* at 372). Additionally, a sum of 50,000*l* had been deposited by the claimant with a third party as "security" for the performance of its obligations. A clause in the contract provided that the security and the retained moneys "shall be forfeited to the [defendant] as and for liquidated damages sustained by the [defendant] for the non-completion" of the railway (*Hills* at 373). The claimant failed to complete the lines within the stipulated time. It sought to recover the security

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and the retained moneys ("Moneys"). The defendant asserted its right to forfeit them under the contracts.

147 Lord Dunedin, delivering the advice of the Privy Council, held that the Moneys were not "a genuine pre-estimate of loss". In his view, the "determining factor" was that the Moneys were "not a definite sum", and instead "liable to great fluctuation in amount dependent on events not connected with the fulfilment of this contract". Further, the Moneys had been intended to "make good deficiencies in [the] contract works". However, the quantum of the Moneys "depended entirely on the progress of those contracts". As such, the eventual sum of the Moneys to be dealt with under the contracts "could not in any way be estimated as a fixed sum" (*Hills* at 376). Lord Dunedin therefore advised that the claimant be entitled to the Moneys, save that the defendant would be entitled to prove and deduct from the judgment sum "such damages he may have actually suffered through the [claimant's] breach of contract" (*Hills* at 377).

148 The next case is *Pioneer Logging*. That was a decision of the Supreme Court of Canada ("SCC"), where the parties had entered into a contract for the appellant to grant licences to the Pedneaults for the logging of timber on Crown land. The respondent was the assignee of the Pedneaults' entire interest in the licence. Under the contract, it was agreed that the proceeds from the sale of the timber logged by the respondent would be paid to a firm of solicitors. Under paragraph 4 of the contract, it was agreed that a part of those proceeds (40 cents per thousand feet of timber logged) would be paid into a "special trust account" as "a guarantee of the complete logging of the said lands" and as a guarantee of "the due and proper logging by the [respondent]". If the land were "completely logged" by the respondent, it would be entitled to all of the moneys in the

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account. By contrast, it was agreed that "all moneys in the said account shall be forfeited to and shall belong absolutely to the vendor as liquidated damages" if: (a) the respondent failed to complete the logging of the land in accordance with the agreement; and/or (b) the appellant lawfully terminated the agreement by reason of the respondent's default in performing the terms of the agreement (*Pioneer Logging* at 306 and 309–310).

149 Some seven and a half years after the contract had been entered into, the respondent was found to have fallen into breach of the contract for having failed to log "some 8 million feet of merchantable timber". The respondent, however, took the view (which turned out to be erroneous) that there was no more timber that could be logged at a profit and considered the contract discharged by performance. It demanded payment of the proceeds in the account ("Fund"). The appellant refused (*Pioneer Logging* at 306–308). It cited authorities like *Howe v Smith* and *Mayson v Clouet* and asserted its right to forfeit the Fund as a "deposit". A majority of the SCC (*per* Kerwin, Estey and Rand JJ) rejected this argument and held that the clause providing for the forfeiture of the Fund constituted a penalty.

150 Estey J, who provided the most detailed reasoning out of the majority, held that the Fund was not a "deposit". Instead, it was a fund from which the appellant was entitled to have resort to for "such damages as [it] suffered". That was consistent with the word "guarantee" which the parties had used to describe the purpose of the trust account. Applying the Single Lump Sum Test as set out by Lord Dunedin in *Dunlop Pneumatic*, Kerwin J reasoned that the Fund in question was liable to be forfeited "upon the breach of any of a number of covenants in which consequent damages would in regard to some be relatively small and others substantial". Accordingly, the forfeiture clause was held to be

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a penalty. As the appellant had failed to prove any damages, judgment for the entire Fund was granted to the respondent (*Pioneer Logging* at 309–312). Kerwin and Rand JJ agreed, specifically noting that the Fund was not a "deposit" as that term had been used in *Howe v Smith*. The term "deposit" was one that was "employed almost exclusively in the simple case of the sale of property", where the relevant obligation of the purchaser is "the single act of paying the price". That was to be distinguished from the obligations here, which concerned a continuing obligation on the part of the respondent to log timber (*Pioneer Logging* at 302–303 (*per* Rand J) and at 300–301 (*per* Kerwin J)).

151 In contrast, the minority (*per* Taschereau and Locke JJ), held that the law of penalties had no application to a trust account that had been set up "as a guarantee for the fulfilment by the [respondent] of its obligations under the contract, which was to be forfeited if the [respondent] failed to complete their bargain". There was no distinction to be drawn between the trust account here, which was "a deposit thus established for a definite purpose during the course of the performance of the contract", and a deposit in the cases such as *Howe v Smith*, which is a deposit "paid in a lump sum at the time an agreement is negotiated" (*Pioneer Logging* at 324). On the facts, the respondent could not seek relief in the form of being repaid the Fund while being in wrongful repudiation of the contract. Accordingly, the minority held that the appellant was entitled to the Funds (*Pioneer Logging* at 327–328).

152 The third case is a decision of Chao Hick Tin J (as he then was) in *Lee Tat*. That case concerned two consolidated suits pertaining to a three-year lease of a seven-storey building that had been granted by the landlord to the tenant. In one of those suits, the tenant claimed against the landlord for the return of a $105,000 security deposit which it had paid at the commencement of the

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tenancy. The landlord refused, asserting its right to forfeit the deposit on the ground that the tenant had committed various breaches of the covenants in the lease. The landlord relied on clause 5(a)(i) of the tenancy agreement, which provided that the *whole* of the deposit "shall be forfeited if for any reason whatsoever the [tenant] commits a breach of any of the terms conditions or covenants herein contained" (*Lee Tat* at [52]–[57]). Applying the Single Lump Sum Test set out by Lord Dunedin in *Dunlop Pneumatic*, Chao J held that clause 5(a)(i) was "a penalty clause inserted *in terrorem* of the [tenant] to ensure compliance", and that the $105,000 deposit was "not a genuine pre-estimate of the damages which [the landlord] would suffer on account of breach" (*Lee Tat* at [58]). Having failed to prove any damage that was attributable to the tenant's breaches of the lease, Chao J ordered the landlord to refund the entire security deposit to the tenant (*Lee Tat* at [66]). As an aside, I note that an aspect of Chao J's decision in *Lee Tat* (pertaining to s 18(1) of the Conveyancing and Law of Property Act 1886 (2020 Rev Ed)) was recently overruled by the ADHC in *Campbell Hospitality Pte Ltd v Marchmont Pte Ltd* [2025] 1 SLR 816 at [27]–[29]. As the aspect of the judgment that was so overruled did not impact Chao J's conclusion on whether clause 5(a)(i) of the tenancy agreement in that case was an unenforceable penalty, that conclusion remains good law.

153 The last case is the House of Lords' decision in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 ("*Gilbert-Ash*"). The appellant in that case was the main contractor under a building contract and the respondent its nominated subcontractor. Under the building contract between the appellant and its employer, the appellant was under an obligation to pay the respondent sums representing the value of the latter's works as certified by the employer's architect. The architect had issued certificates for sums amounting to £14,532 in total. Only £10,000 was paid by the appellant to the respondent.

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The appellant asserted its right to retain the £4,532, alleging that the respondent had been in breach of the sub-contract for delay and bad workmanship. In doing so, the respondent relied on clause 14 of the sub-contract, which stated that "if the [respondent] fails to comply with any of the conditions of this sub-contract, the [appellant] reserves the right to suspend or withhold payment of any monies due or becoming due to the [respondent]".

154 Save for Lord Diplock (who expressed no views on the point), the House of Lords held that clause 14 of the sub-contract was an unenforceable penalty. Viscount Dilhorne reasoned that the quoted sentence in the paragraph above entitled the appellant to suspend or withhold payment of *any* moneys due or becoming due to the respondent, "however large", if the respondent was guilty of *any* breach, "however minor", of the sub-contract. It therefore provided for the imposition of a penalty which may be "wholly disproportionate to the damage suffered by the [appellant]". Viscount Dilhorne also suggested that if the sub-contract had only provided for "the suspension or withholding of the payment of moneys estimated to be the loss suffered by the contractor by reason of the breach", a different outcome might have been reached (*Gilbert-Ash* at 711D–E). Similarly, Lord Reid held that the clause entitled the appellant to "withhold sums far in excess of any fair estimate of the value of his claims". Additionally, clause 14, by permitting the appellant to withhold sums that would otherwise have been due to the respondent, could have "most damaging effects on the sub-contractor's business" by placing significant pressure on its cash-flow (*Gilbert-Ash* at 698C–F). Lords Morris and Salmon were of the same view (*Gilbert-Ash* at 703G–H (*per* Lord Morris) and at 723G–H (*per* Lord Salmon)).

155 I note that counsel for the appellants in *Gilbert-Ash* appeared to have conceded the point that clause 14 was an unenforceable penalty (see *Gilbert-*

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Ash at 693H). Nonetheless, the decision of the House of Lords in *Gilbert-Ash* has never been formally overruled in England, with many cases having subsequently endorsed it as standing for the proposition that a clause providing for the withholding of a payment may be subject to review under the court's penalty jurisdiction notwithstanding the fact that it does not, formally speaking, impose a secondary obligation to pay damages (*General Trading Co (Holdings) Ltd v Richmond Corp Ltd* [2008] EWHC 1479 (Comm) at [113]; *Firma C-Trade SA v Newcastle Protection and Indemnity Association, The Fanti* [1989] 1 Lloyd's Rep 239 at 262 and 265). Indeed, it was cited with approval by the UKSC in *Cavendish v Makdessi*, with Lords Neuberger and Sumption noting that clause 14 of the subcontract in *Gilbert-Ash* "was a good example of a secondary obligation operating upon a breach of the subcontractor's primary obligations" (*Cavendish v Makdessi* at [73]). Similarly, Lord Hodge noted that there was "no principled reason why the law on penalties should be confined to clauses that require the contract-breaker to pay money in the event of breach and not extend to clauses that in the same circumstance allow the innocent party to withhold moneys which are otherwise due" (*Cavendish v Makdessi* at [226], citing *Hills* and *Gilbert-Ash*). The unarticulated premise on which these learned judges have asserted that there is no principled distinction between the two types of clauses lies in the notion that the two clauses in *substance* have the same effect on the breaching party. By removing the subcontractor's accrued right to be paid if he committed any breach of contract, however minor, clause 14 in *Gilbert-Ash* was "functionally equivalent to a penalty payable upon breach of contract" (Ben McFarlane & Robert Stevens, "In Defence of *Sumpter v Hedges*" (2002) 118 LQR 569 at 581).

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(2) My decision

156 In my view, notwithstanding the differences in their facts, the authorities are clear that a technical characterisation of an obligation as one to pay damages for breach of contract does not suffice to immunise a clause from its review by the courts under its penalty jurisdiction. That is because the courts take a substance over form approach to the determination of whether a clause imposes secondary obligations on breach. The law of penalties does not regulate the content or fairness of the parties' primary obligations because of its "reluctance to intervene in the *contents* of the parties' contractual bargain" [emphasis in original] (*Denka v Seraya* at [92]–[93]). The secondary obligations that the parties have agreed should arise upon a party's breach of his primary obligations, however, are subject to greater judicial scrutiny notwithstanding the fact that they do also form part of the parties' bargain. That is because "secondary obligations, which are traditionally imposed by operation of law, are *the province of the courts*" [emphasis added] (*Denka v Seraya* at [93]–[94]).

157 It has always been the *courts'* function to resolve the consequences of breach; the parties cannot agree on a remedy which is of a nature that the law would never have permitted (*Denka* at [94], citing *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2019] 2 NZLR 790 at [40]; see Mary Arden & James Edelman "Mutual Borrowing and Judicial Dialogue between the Apex Courts of Australia and the United Kingdom" (2022) 138 LQR 217 at 220). The law imposes a limit on the parties' freedom to agree on their remedial obligations, as the only legitimate interest that an innocent party has in the face of a breach is to be adequately compensated for its losses (*Denka v Seraya* at [93], [152] and [185(b)]). Therefore, to the extent that the remedies that the parties have agreed to are "intended only as a convenient substitute for the court's

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determination for the appropriate extent of compensation, such clauses are necessarily subject to judicial scrutiny" (*Denka v Seraya* at [93]). It follows that the focus underlying the question as to whether a relevant clause should be subject to review under the law of penalties is whether the effect of its operation on breach "amount[s] to a substitution of the court's determination under the general law of recoverable damages that are usually payable under a secondary obligation" (*The Law on Deposits* at [51]).

158 Seen in that light, it is understandable why the courts in *Hills*, *Pioneer Logging*, *Lee Tat* and *Gilbert-Ash* had decided to apply the penalty doctrine to the relevant clauses under review notwithstanding the fact that clause in question did not concern a secondary obligation to *pay damages* (see also *Victory Serviced Office* at [36]). In all of those cases, the factual effect of forfeiture, retention or withholding of the relevant sum of money on breach could have been equally achieved by the parties making provision for the payment of the identical sum of money on breach. The only difference, in this regard, would have been the convenience to the innocent party in being able to forfeit, retain or withhold the relevant sums without the need to commence proceedings. More importantly, the relevant sum that had been paid or retained in each of those cases had not been intended to serve as an earnest of performance. Instead, they had been intended to form a fund to which the innocent party could look towards to compensate themselves in the event of the counterparty's breach – albeit providing for an exorbitant extent of compensation that was subsequently struck down by the courts. Therefore, to the extent that the parties had, by agreeing to the relevant clause in question, intended to substitute the court's determination of the appropriate extent of compensation with their own, those clauses were necessarily subject to review under the law of penalties:

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(a) In *Hill*, the forfeiture of the Moneys had been intended to serve as "liquidated damages" sustained by the defendant by virtue of the claimant's non-completion of the railway. Put differently, the guarantee fund and the security paid over had been intended to *compensate* the defendant in the event that the claimant fell in breach, albeit that this would operate by way of an exercise of a right of forfeiture by the defendant, as opposed to the imposition of an obligation on the claimant to pay damages for the relevant loss. That was clear from Lord Dunedin's view that the Moneys were "primarily liable to make good deficiencies in these contract works" (*Hill* at 376).

(b) In *Pioneer Logging*, the forfeiture of the Moneys in the trust account on breach had also been intended to serve as "liquidated damages" sustained by the appellant by virtue of the respondent's breaches of contract. The moneys in the trust account were akin to the "guarantee fund" in *Hills*, in that they served as a *compensatory* fund from which the appellant was entitled to look to for "such damages as [it] suffered" (*Pioneer Logging* at 309, *per* Estey J). In making provision for such a compensation fund that was liable to absolute forfeiture for breach, the parties had "intended the forfeiture to displace entirely the secondary obligation to pay damages and thereby oust the court's determination of compensable loss" (*The Law on Deposits* at [45]).

(c) In *Lee Tat*, notwithstanding its label as a "deposit", it was clear that the relevant sum of money was in the nature of an advance to secure the tenant's performance of its obligations under the lease. It formed a compensation fund which the landlord could have recourse to in the event that the tenant breached any of the covenants under the lease. This

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was evident from clause 3(46) of the lease in that case, which provided that the costs of reinstating the leased building to its original condition that had been incurred by the landlord could be deducted from the deposit (*Lee Tat* at [59]). In light of the fact that such an exorbitant security had been appropriated from the tenant as compensation for any potential losses that might be suffered by virtue of the tenant's breach, the deposit fell to be reviewed under the law of penalties.

(d) In *Gilbert-Ash*, clause 14 permitted the appellant to unilaterally withhold sums of *any* moneys that had fallen due to the respondent should the latter fall in breach of the subcontract. The sums paid to the appellant by its employer which it was obliged to pay to the respondent therefore formed a fund to which the appellant could have recourse in the event that the respondent failed to perform its obligations under the subcontract. As the appellant had purported to arrogate the determination of the appropriate extent of compensation by way of clause 14, it was necessarily subject to review under the court's penalty jurisdiction.

159 I turn to the facts of the present case. To recap, the DJ had held that Recital 4 imposed secondary obligations to pay damages for breach of the Agreement. In my judgment, it was open to the DJ to reach such a conclusion. A right to forfeit the Security Deposit under Recital 4 of the Agreement did not take the form of a secondary obligation to pay damages on breach. As explained above, however, I do not think that that suffices to immunise Recital 4 from review under the law of penalties.

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160 Applying the factors set out by the CA in *Leiman Ricardo* at [139] above, the overall background and context against which the deposit had been paid was in the context of a lease where the respondent had continuing obligations to fulfil throughout its currency (see [96] above). Against that context, it was amply clear why the parties had agreed for the payment of the deposit. It was to form a *compensatory* fund to which the appellant could have recourse in the event of the respondent falling in breach of the terms of the lease. That accorded with commercial sense. In most cases where a tenant falls in default of the terms of the tenancy agreement, it would be worth neither the time nor the money for the landlord to commence proceedings to seek compensatory damages for the tenant's breaches. To illustrate using the present facts, it would be disproportionate for the appellant to instruct solicitors and/or commence proceedings for the respondent's breach in failing to pay a month's worth of Utility Charges, Late Interest or clearance fees. The Security Deposit was therefore a convenient mechanism by which the appellant could secure himself against most defaults by the respondent.

161 Knowing that the appellant was at liberty to forfeit and deduct from the Deposit for losses that it sustained by virtue of its breaches, the respondent would be motivated to comply with his primary obligations under the Agreement. The forfeiture clause in Recital 4 therefore did not serve to "secure some independent commercial purpose" and was intended to secure the respondent's "compliance with his primary obligations" (see [139] above). In the premises, the obligation correlative to the appellant's right to forfeit and deduct from the Security Deposit is a secondary one that is amenable to review under the law of penalties.

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Recital 4 is not a penalty clause

162 I turn now to the DJ's decision that Recital 4 does not provide for a genuine pre-estimate of the likely loss that would be suffered by the appellant in the event of a breach of the Agreement by the respondent (see [32] above). I had found earlier that, on a proper interpretation of Recital 4, it does not permit the appellant to forfeit the entire security deposit for a breach of the terms of the Agreement (at [102]). Instead, the appellant only has a right to forfeit and deduct from the Security Deposit the actual losses it had suffered by virtue of the respondent's breaches of the terms of the Agreement. The nature of the forfeiture clause in Recital 4 was therefore very different from the forfeiture clauses in *Hills*, *Pioneer Logging* and *Lee Tat*, which provided that the entirety of the sum that had been retained or deposited was liable to be absolutely forfeited for any breach of the terms of the relevant agreement. It must follow that the issue of Recital 4 being a penalty does not arise, as each forfeiture and deduction by the appellant for a breach of the terms of the Agreement would (and must) be commensurate to the actual loss that has been suffered by the appellant. On the basis of my conclusions above, I therefore disagree with the DJ's holding that Recital 4 constitutes an unenforceable penalty.

163 If, however, I had been wrong in my interpretation of Recital 4, as well as my conclusion that the respondent is not entitled to plead the Penalty Argument without having pleaded the same, I would have been inclined to agree with the DJ that Recital 4 constituted an unenforceable penalty. If Recital 4 indeed permits the appellant to forfeit the entire Security Deposit for a breach of any of the terms of the Agreement, it would – as the DJ held – clearly fall afoul of the Single Lump Sum Test (Judgment at [50]). On that interpretation, the whole Security Deposit would fall to be forfeited by reason of a breach of

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any of the terms of the Agreement without any regard to the actual losses that would be suffered by the appellant, or the gravity of the consequences of the relevant breach to the appellant. The respondent, for example, stood to lose the entire Security Deposit of $120,000 if it failed to pay the appellant a month's worth of: (a) "clearance fees"; (b) water and electricity charges under the Utilities Obligation; or (c) Late Interest on any of these outstanding charges/fees (see [95(a)], [11(b)] and [12(a)] above). Such a forfeiture would clearly be disproportionate and extravagant when viewed against the relative triviality of the breaches committed by the respondent. Based on an application of the Single Lump Sum Test set out by Lord Dunedin in *Dunlop Pneumatic* (see [140(c)] above), I would therefore be inclined to agree with the DJ that Recital 4 is an unenforceable penalty in the event that I was wrong on both the issues pertaining to the pleading of the Penalty Argument and the interpretation of Recital 4.

164 The reasoning above is supported by Chao J's decision in *Lee Tat*. As summarised at [152] above, clause 5(a)(i) of the tenancy agreement in that case appeared to clearly stipulate that the whole of the security deposit would be forfeited in the event that the tenant committed a breach of "any of the terms conditions or covenants" of the agreement. Chao J, reasoning that the breaches of the various covenants under the tenancy agreement would be of "varying degrees of seriousness", held that clause 5(a)(i) of the tenancy agreement was "a penalty clause inserted *in terrorem* of the lessee to ensure compliance" (*Lee Tat* at [58]). In my view, assuming that the DJ's interpretation of Recital 4 was correct, the appellant's right to forfeit the Security Deposit thereunder would be substantively indistinguishable from that which clause 5(a)(i) of the tenancy agreement purported to confer on the landlord in *Lee Tat*.

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165 As the CA noted in *Denka v Seraya*, however, the Single Lump Sum Test simply gives rise to a rebuttable presumption that the clauses are penalties. Though the CA did not preclude the possibility that the Single Lump Sum Test may, by itself, point the court towards the conclusion that an agreed remedies clause may be a penalty, the principle which is of "overarching importance" was said to be that of the Greatest Loss Test (*Denka v Seraya* at [305]). That, in turn, would have required me to consider whether the forfeiture of the Security Deposit under Recital 4 would be extravagant or out of proportion to the greatest losses that could conceivably be proved to have followed from the breach.

166 In the absence of parties leading evidence on the greatest losses that the appellant would have conceivably suffered on the respondent's breach of the terms of the Agreement, I am not inclined to speculate as to the same. On a tentative view, however, I do think it likely that the forfeiture of the Security Deposit would be extravagant and disproportionate to the greatest losses that can conceivably be proved to have followed from a breach of the terms of the Agreement. Under clause 1(o) of the Agreement, the appellant retained "all absolute right to claim from the [respondent] rent for all unutilized and remaining period of the term of this Agreement including reinstatement, out of pocket expenses and agency fees, to reinstate the Service Area to lettable and tenantable condition" in the event that the Agreement was prematurely terminated.[112] Such "premature termination" would naturally encompass termination of the contract by way of the appellant accepting a repudiatory breach committed by the respondent. On a plain reading of clause 1(o), the appellant therefore expressly reserved its right to commence proceedings against the respondent in order to be compensated for its losses by way of a

[112] JROA–3 at p 42 (ZX–1 at p 39).

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claim for damages at common law. Since the appellant's right to forfeit the Security Deposit is without regard to the extent of the losses that it would likely suffer, it follows that (assuming the DJ's Interpretation was correct) the appellant retained the right to forfeit the Security Deposit even if it decides to exercise such its right in clause 1(o). If so, that begs the question as to precisely what purpose the parties had intended for the forfeiture of the Security Deposit to serve. That purpose, in my judgment, was likely to secure the respondent's compliance with its primary obligations under the Agreement by the threat of forfeiture.

167 The appellant argues that the quantum of the Security Deposit is reasonable by reference to prevailing industry practice. Specifically, it referred to a particular formula utilised in the Singapore Business Federation's Code of Conduct for the Leasing of Retail Premises ("Code") to show that a security deposit equivalent to three months' of the Handling Service Fee is reasonable (see [43] above). This argument does not persuade me for two reasons. First, a commercial practice, however widespread, does not have the force of law if it is contrary to legal principle (*The Royal Bank of Scotland NV v TT International Ltd* [2012] 4 SLR 1182 at [14]). Second, and more importantly, the Code only speaks to the question as to what the appropriate *quantum* of the security deposit should be in a lease of retail premises.[113] It is silent as to whether a landlord may forfeit the entirety of a security deposit for any breach of the terms of a tenancy agreement. In fact, based on the sample clause provided at Schedule 1 of the Code, it appears that the draughtsman of the Code contemplated that, in the event of a lease being terminated, a landlord is to refund the security deposit to the tenant "after proper *deductions* by the Landlord in accordance with the

[113] JROA–3 at p 630.

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provisions of [the] lease" [emphasis added].[114] Therefore, I did not think that the Code assisted the appellant.

168 The appellant also argues that there is "a probability" that the greatest loss that could conceivably have followed from a breach of the Agreement would exceed the quantum of the Security Deposit. That was a possibility which has turned into reality in the present case, as the damages that the appellant claimed by way of EO 176 far exceeded the quantum of the Security Deposit.[115] I am also not persuaded by such an argument.

169 As a matter of law, notwithstanding the general position that the penalty doctrine is to be applied by reference to the date the contract was entered into by the parties, subsequent events may be taken into account for the "limited purpose" of showing what could reasonably have been expected to be the loss at the time the contract was made (see [63(a)] above). Applying this principle, the sums that the appellant claimed by way of EO 176 are not helpful in illuminating the expectations of the parties as to the losses that they had anticipated to arise out of any breach of the Agreement at the date of contracting. That is because the bulk of the $276,634.72 that the appellant had obtained from the respondent by way of EO 176 was not by reference to the actual losses that the appellant had suffered from the respondent's breaches of the Agreement, but rather its entitlement to double rent (of $80,000) which it had obtained under JUD 978 pursuant to s 28(4) of the Civil Law Act (2020 Rev Ed) (see [18(d)] above).[116] The appellant's point on this argument therefore does not detract from

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114 JROA–3 at p 638.

115 AC at para 59.

116 JROA–3 at pp 561–562 (CCS at para 48); JROA–3 at pp 70 and 72 (ZX–1 at pp 67 and 69).

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my tentative views that Recital 4, on the DJ's Interpretation, is likely in the nature of a penalty.

170 Therefore, if I were to be wrong on both conclusions above in relation to the need for the respondent to plead the Penalty Argument and my interpretation of Recital 4 of the Agreement, I would agree with the DJ that Recital 4 is in the nature of a penalty stipulated *in terrorem* of the respondent.

The appellant has failed to show any actual losses sustained by reason of the respondent's breaches of the terms of the Agreement

171 I return now to the implications of my interpretation of Recital 4 of the Agreement, which as stated above at [102], only permits the appellant to forfeit and deduct from the Security Deposit the actual losses it sustained by virtue of the respondent's breaches of the Agreement. The legal validity of Recital 4 that such an interpretation would entail, however, does not suffice to conclude the matter. As the appellant has asserted its right to forfeit the entire Security Deposit, it would have to prove that it had suffered actual losses (due to the respondent's breaches of the terms of the Agreement) at least equivalent in quantum to the sum of the Security Deposit. As noted above at [27], the appellant pleaded seven heads of loss by virtue of the respondent's breaches of the Agreement. Save for the Oct 2023 Utility Charges which were admitted by the respondent, the DJ found that there was no evidential or legal basis for each and every head of loss that was alleged to have been suffered by the appellant (Judgment at [65]) (see [35] above).

172 Generally, an appellate court's power of review with respect to findings of fact made in the course of a trial is limited, as the trial judge is better placed to assess the veracity and credibility of witnesses, especially where oral

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evidence is concerned (*Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [41]; *Tan Meow Hiang v Ong Kay Yong* [2023] SGHC 218 at [21]). The DJ in the present case had the benefit of observing Mr Wang's cross-examination of Mr Zhang in relation to the seven heads of damage that the appellant allegedly suffered.[117] Following a consideration of Mr Zhang's evidence on this point, the DJ reached the conclusion that there was no evidence that the Commission had ever been paid or that the Reputation Loss had ever been suffered. In any case, save for the Late Interest on the Oct 2023 Utility Charges, the appellant has not argued that the DJ erred in finding that there is no evidential or legal basis for any of the seven heads of damages pleaded in its defence. I therefore find no reason to depart from the DJ's findings on the Commission or the Reputation Loss.

173 For good measure, I note also that the appellant does not contest the DJ's finding that the effect of the Settlement was to compromise all of the respondent's breaches of the Agreement that existed at the time that the parties entered into the Settlement, but did not compromise the rights of the parties post-settlement.[118] The DJ's reasoning on this point was based on "the absence of the usual clause in the Settlement that one tends to see in settlement agreements that extinguishes all claims of the parties relating to the subject matter of the dispute" (Judgment at [55]–[56]). At the hearing of this appeal, the respondent appeared to argue that any conceivable right that the appellant had to forfeit the Security Deposit has been compromised by the Settlement.[119] I

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117 JROA–3 at pp 474–480 (Trial Transcript at p 78, line 17 to p 84, line 12).

118 Transcript at p 36, line 3 to p 37, line 5.

119 Transcript at p 30, lines 1–14.

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reject this argument and agree with the DJ that the Settlement did not compromise the parties' rights *inter se* post-settlement.

174 A compromise is "the settlement of a dispute by mutual concession". Hence, it generally requires the existence of some dispute or difference in view between the parties which is to be settled by the agreement (*Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") at [41]–[45]; *Foskett on Compromise* (John Sorabji gen ed) (Sweet & Maxwell, 10th Ed, 2024) (*"Foskett*") at paras 1–01 and 2–01; *Chitty on Contracts* at para 26–003). The dispute in question may be an *actual* dispute, where a legal claim or right has in fact been asserted by one party against the other. The dispute in question may also be a *potential* dispute, where the issues between the parties have not yet been elevated to the status of an actual dispute (*Foskett* at para 2–08; *Gay Choon Ing* at [45]). As Lord Bingham explained in *BCCI v Ali* at [9], a party may "agree to release claims or rights of which he is unaware and of which he could not be aware", provided that clear and appropriate language is used to make such an intention clear. However, the law has long taken a position that, in the absence of clear language, the courts will be "very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware" (*BCCI v Ali* at [10], citing *Cole v Gibson* (1750) 1 Ves Sen 503 at 507).

175 In attempting to make clear such an intention, draughtsmen of settlement agreements have long employed terms in their settlement agreements to the effect that they enter into the agreement "in full and final settlement of all claims" arising from the relevant subject-matter in question. Such words make clear the parties' intention that the settlement agreement should compromise not only all claims that have already been advanced, but also claims that "might

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subsequently be advanced in connection with whatever incident or state of affairs had brought the parties into dispute". Put simply, such a phrase makes clear the parties' intention to resolve not only their actual disputes, but also any *potential* disputes that may arise in the future in relation to the same subject-matter (see *Ter Yin Wei v Lim Leet Fang* [2012] 3 SLR 172 at [16]–[18]; *Foskett* at para 2–08).

176 The general principles of contract law "apply with equal force to the law of compromise" (*Gay Choon Ing* at [46]). As such, a compromise agreement falls to be interpreted in accordance with the orthodox principles of contractual interpretation (*BCCI v Ali* at [8]; *Foskett* at paras 5–02 to 5–09; *Chitty on Contracts* at para 26–019). Based on a reading of the Settlement, which as noted at [20] above is embodied in an email between Mr Wang and Mr Sankar on 4 October 2023, I agree with the DJ that the Settlement only compromised all of the respondent's breaches of the Agreement that had been committed until the time of the Settlement. The Settlement was entered into against the backdrop of the appellant's claims against the respondent in OC 752 and the default judgment that the appellant had obtained against the respondent in JUD 978. As seen in the "Subject" line of the email which contained the Settlement, that was what the parties had in mind when they entered into it. In the absence of clear words to the contrary, I do not think that it is appropriate to conclude that the parties had intended for the Settlement to be a full and final settlement of any and all claims that could potentially arise from the Agreement.

177 On the facts, the DJ held that the Legal Costs and the costs of deploying the Cement Cubes had been incurred before the Settlement had been entered into. As such, they had been "subsumed in the Settlement" and could not be

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claimed (Judgment at [58] and [61]). I find no reason to disagree with the DJ on this, nor were any reasons to like effect advanced by the appellant.

178 The only heads of damage / loss which are left are therefore the Oct 2023 Utility Charges and the Late Interest thereon, as well as the Handover Costs. I note at this juncture that the DJ appeared to treat the failure to pay these sums as a *breach* of the terms of the Agreement which "took place *after* the Settlement" (Judgment at [56]). It is not immediately apparent whether this was an accurate representation of the state of affairs that existed after the parties had entered into the Settlement. That is because the Agreement had been terminated by the appellant on 18 May 2023 following the respondent's continued breaches of its terms. The fact that the Agreement had terminated for the respondent's breaches was not seriously contested by the parties, and in fact admitted to by Mr Zhang at trial.[120]

179 The Agreement having been terminated by the appellant's acceptance of the respondent's repudiatory breaches, both parties were discharged prospectively from the further performance of their contract – though existing rights and causes of action which had accrued by the point of termination remained unaffected (*McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476–477, cited with approval in *Hong Fok Realty Pte Ltd v Bima Investment Pte Ltd* [1992] 2 SLR(R) 834 at [20]). However, obligations may survive the termination of an agreement if a proper interpretation of the contract reveals that the parties had so intended (see *Lim Lay Bee v Allgreen Properties Ltd* [1998] 3 SLR(R) 1028 at [22]).

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120 JROA–3 at p 478 (Trial Transcript at p 82, lines 28–32); JROA–2 at pp 27 and 39–40 (Defence at paras 3 and 6(7)–6(8)).

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180 In the present case, clause 1(o) of the Agreement provided that, in the event of the premature termination of the Agreement, the appellant would have "all absolute right to claim" from the respondent "rent for all unutilized and remaining period of the term of this Agreement including reinstatement, out of pocket expenses and agency fees, to reinstate the Service Area to lettable and tenantable condition". Notwithstanding the ungrammatical way in which this clause has been phrased, I am of the view that clause 1(o) is sufficiently broad to permit the appellant to claim against the respondent for the Oct 2023 Utility Charges and the Handover Costs. I am also of the view that clause 3(a), the clause providing for Late Interest, survives the termination of the Agreement since the obligation it imposes on the respondent is of a remedial nature. In any case, the respondent has quite properly and fairly admitted that the Oct 2023 Utility Charges are owed and payable to the appellant.

181 In relation to the Late Interest on the Oct 2023 Utility Charges, the DJ found that the appellant was not entitled to its recovery, as it would not have been incurred if the appellant had returned the Security Deposit to the respondent instead of forfeiting it. The appellant argues that the DJ erred in finding so; it argues that it is entitled to the Late Interest as it had every right to forfeit the Security Deposit. It is evident that the appellant's challenge to the DJ's finding is premised on the validity of its argument that the DJ had erred in finding that the Security Deposit is not forfeitable.

182 In my judgment, the DJ's holding on this point was not entirely satisfactory. The DJ appeared to agree with the respondent's contention that, had the appellant refunded the Security Deposit when requested by the respondent "at the first instance when requested by [it] to do so", the Late Interest would not have been incurred at all as the Oct 2023 Utility Charges

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would have been deducted from the Security Deposit (Judgment at [61]). The first time that the respondent requested that the appellant return the Security Deposit, however, was on 14 March 2024 (see [25] above). Until 14 March 2024, the Oct 2023 Utility Charges, which fell due on 31 October 2023, had remained unpaid. On the DJ's reasoning, the appellant would be entitled to the Late Interest from 31 October 2023 to 14 March 2024.

183 Under Recital 4, the respondent is entitled to the repayment of the Security Deposit "at the termination of the agreement within one month from the reinstatement works to be carried out by the [respondent] and subject to the [appellant's] acceptance of the reinstatement works" (see [10(b)] above). On the facts, the respondent had vacated the Service Area on 11 December 2023. It allegedly did not restore or reinstate the Service Area to the satisfaction of the appellant.[121] This was because there were various debris, woodchips and a portable toilet that had been left at the Service Area.[122] However, on the appellant's own case, these items had been cleared from the Service Area on or around 13 December 2023, and the appellants "accepted the Service Area… in an attempt to mitigate [its] loss".[123] As such, the respondent was entitled to the repayment of its Security Deposit on 13 December 2023 when the appellant accepted the handover of the Service Area from the respondent.

184 In my view, however, that does not justify the appellant claiming Late Interest on the Oct 2023 Utility Charges from 31 October 2023 to 13 December 2023. Under clause 3(a) of the Agreement, the specific clause providing for the

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121 JROA–2 at pp 41–42 (Defence at para 7(2)).

122 JROA–3 at p 158 (YW–1 at para 33).

123 JROA–2 at p 42 (Defence at para 7(3)).

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payment of Late Interest, the Late Interest was chargeable in the event that the respondent failed or neglected to pay "the Handling Service Fee or any other due payment of the [appellant's] invoices within seven (7) days from the Invoice Date". The appellant only forwarded the invoice for the Oct 2023 Utility Charges and sought payment of the same from the respondent on 1 November 2023.[124] On 8 November 2023, the final day after which Late Interest would be chargeable on the Oct 2023 Utility Charges under clause 3(a), the appellant sent a chaser to the respondent stating that the Oct 2023 Utility Charges remained unpaid.[125]

185 In my judgment, the appellant was therefore entitled to charge Late Interest on the Oct 2023 Utility Charges from 9 November 2023 to 12 December 2023. Given that I have reached the same conclusion as the DJ that the appellant has no right to forfeit the entire Security Deposit (albeit for different reasons), the respondent was contractually entitled to the return of the Security Deposit on 13 December 2023 under Recital 4. If the Security Deposit had been duly returned on that date, the Oct 2023 Utility Charges could have been deducted from the Security Deposit and no Late Interest would have been incurred on the same. I will therefore allow the appeal on this point and find that it is entitled to forfeit and deduct $33.61 from the Security Deposit, that being the Late Interest of 12% applied to the Oct 2023 Utility Charges of $3006.71 from the period of 9 November 2023 (when the Late Interest became chargeable) to 12 December 2023 (the day before the respondent became entitled to the repayment of the Security Deposit) (both dates inclusive).

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124 AC at para 63.

125 JROA–3 at p 83 (ZX–1 at p 80).

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186 Lastly, in relation to the Handover Costs that the appellant had incurred in inspecting and surveying the Service Area on 10 November 2023, I agree with the DJ that the respondent should not be held liable for such costs. The appellant had incurred these costs despite having been informed by the respondent on 10 November 2023 that it would be unable to vacate the Service Area on the same date. The respondent's belated notice to the appellant in this regard might seem unsatisfactory, but I accept Mr Zhang's evidence that the appellant's staff had been present at the Service Area before the handover date of 10 November 2023 and would have known that the respondent would not have been in a position to move out by then.[126] That the appellant had known this to be the case is borne by out by an email sent by Mr Wang to Mr Sankar on 8 November 2023.[127] I therefore agree that it was unreasonable for the appellant to have incurred the Handover Costs despite having known that it was unable to vacate the Service Area on 10 November 2023. It is therefore not entitled to forfeit and deduct the Handover Costs from the Security Deposit.

187 In the premises, the only form of actual loss or damage which the appellant has suffered is the Oct 2023 Utility Charges (amounting to $3006.71) and the Late Interest thereon from 9 November 2023 to 12 December 2023 (both dates inclusive) (amounting to $33.61). The appellant is therefore only entitled to forfeit and deduct $3006.71 and $33.61 from the Security Deposit.

Conclusion

188 In summary, my conclusions on HC/DCA 23/2025 are as follows:

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126 JROA–3 at p 484 (Trial Transcript at p 88, lines 7–21).

127 JROA–3 at p 83 (ZX–1 at p 80).

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(a) I allow the appellant's appeal against the DJ's decision to permit the respondent to advance the Penalty Argument when it had not been pleaded. I also agree with the appellant's contention that Recital 4 is not an unenforceable penalty but reject its argument that the framework in *Li Jialin* applies to determine the validity of Recital 4.

(b) However, I find that the DJ had erred in his interpretation of Recital 4. The appellant does not have a right to forfeit the entire Security Deposit for any breach of the terms of the Agreement. Instead, it only has the right to forfeit and deduct from the Security Deposit to compensate himself for the losses that he has suffered by virtue of the respondent's breach. Having failed to prove that it has suffered any actual loss before the DJ, the appellant is not entitled to forfeit any part – much less the whole – of the Security Deposit (save for the Oct 2023 Utility Charges). I therefore dismiss the appellant's appeal against the DJ's decision that it was not entitled to forfeit the Security Deposit.

(c) I allow the appeal against the DJ's decision that the appellant was not entitled to the Late Interest on the Oct 2023 Utility Charges. However, the appellant is only entitled to charge such Late Interest from the period of 9 November 2023 to 12 December 2023 (both dates inclusive).

189 In the premises, HC/DCA 23/2025 is partially allowed. The DJ's order is to be amended such that the appellant is to pay the respondent the sum of $116,959.68 (*ie*, the Security Deposit less the Oct 2023 Utility Charges and the Late Interest thereon).

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190 I understand that parties have addressed the issue of costs in their written submissions. In light of the outcome of the appeal, however, I invite parties to reconsider their positions and file the necessary submissions on costs (limited to [5] pages) within 14 working days from the release of this judgment.

Sushil Nair
Justice of the Court of Appeal

Wang Liansheng and Ng Rui Wen (Bih Li & Lee LLP) for the appellant;
Sankar s/o Kailasa Thevar Saminathan and Tessa Low Wen Xin (Sterling Law Corporation) for the respondent.

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