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Hon Chin Kong
v
Yip Fook Mun and another

[2017] SGHC 286

High Court — Suit No 576 of 2015
Kannan Ramesh J
28–31 March; 9, 23 May; 27 June; 6 September 2017

Contract — Formation — Acceptance

Contract — Variation

Contract — Remedies — Deposits

Contract — Remedies — Part payments

Contract — Remedies — Penalties

9 November 2017

Kannan Ramesh J:

Introduction

1 In Suit No 576 of 2015, the plaintiff sought return of $300,000 that he had paid to the defendants in September 2013. The facts of the case were for the most part undisputed. The outcome turned on whether the parties' negotiations amounted in law to a binding contract, the terms of that contract, and the interesting legal question of whether a contractual deposit is subject to the rule

against penalties ("the penalty rule"). This is a question of law that has thus far not been fully explored in Singapore.

2 I issued brief oral grounds for my decision to dismiss the suit on 6 September 2017. I had indicated then that I would issue full grounds of decision. These are my full grounds.

Facts

3 The plaintiff is a Singapore citizen residing in Brunei. The first defendant, a Singapore citizen, is married to the second defendant, a Singapore Permanent Resident. The defendants reside in Thailand.

4 At the material time, the first defendant worked for Gallagher Security Management System ("Gallagher"). The defendants were the sole directors and shareholders of a company, CDX Singapore Pte Ltd ("CDX"), incorporated by the first defendant in Singapore on 3 July 2002 to supply and maintain Gallagher security products. The plaintiff operated two Brunei companies, one of which was an appointed Gallagher Access Control Sales, Installation & Service Partner in Brunei. The first defendant got to know the plaintiff in 2003 through his role as Gallagher's representative.

5 In 2008 or 2009, the plaintiff made overtures about acquiring the defendants' shareholding in CDX. He sent representatives to inspect CDX's books and records, but ultimately chose not to proceed with the transaction. On 7 May 2013, the plaintiff e-mailed the first defendant saying that he was considering buying CDX again because his children were moving back to Singapore for National Service in September. He also confirmed that he intended to acquire the mortgage-free property owned by CDX and used as its office, 7030 Ang Mo Kio Avenue 5, #02-41 Northstar, Singapore 569880 ("the

office property"). The plaintiff suggested that they "round up the deal by this month" (*ie*, May), which suggested an urgency on his part to complete the transaction.

6 On 10 May 2013, the first defendant sent the plaintiff an e-mail with the subject "Your offers". He stated:

> Hi Lawrence,
>
> Let's not waste time. [T]otal package sales including office will be S$850k nett.
>
> …
>
> I will let it to you and if you are keen at the figures I proposed, please let me know as this figures have a validated dates cause the property market is going up like crazy……

7 The plaintiff replied the next day. He amended the e-mail subject to "RE: Your offers (ACCEPTED)" and wrote:

> Kelvin,
>
> I am glad with your reply. Let's round up the figure ***at S$800k (Singapore Dollars : Eight Hundred Thousand only)*** and deemed this as done deal. Let's open a champagne to celebrate this occasion in Singapore…when is the best time to do the paperwork ?
>
> [emphasis in original]

8 The first defendant replied on 20 May 2013:

> Hi Lawrence,
>
> The price your offer is too far below my expectations …
>
> Let's not waste time, one final price, $828k. This is the very best that I can offer …
>
> CDX FY end on end June and me and my wife will be in Singapore during last week of June to settle the account, if you are interested, we can meet over in Singapore to clear at the transactions and please prepare cash or bank cheque or bank draft … and we can go to the secretary office and bank to do the transaction. Kindly note that we will only be Singapore for 4

> working days and need to settle very things [*sic*] for the whole FY account. … Let me know what's your thinking.
>
> Best Regards …

9 On 24 May 2013, the plaintiff sent the first defendant two text messages in succession stating:

> Ok. Confirned [*sic*] la. $828k. Please email me the audited acct for June 2012 last year and the old property purchase agreement for my perusal.
>
> I need to prepare alot of things for this payment. Thanks bro… at least we sealed this deal. Ended all happy. I m [*sic*] very glad.

10 The first defendant e-mailed the plaintiff on 25 May 2013, stating:

> Hi Lawrence.
>
> Happy with your acceptance to purchase at S$828K for the total office and company.
>
> …
>
> I will be departing to Brunei on 24th June and return to Singapore on 26th June … can you join me to Singapore for settling of all the documents as I will depart Singapore on 1st July. *We only have a few days to clear all important document's first where we need to go to the secretary office for the transaction (together with your payment)* and than [*sic*] follow by the bank to have your name & signature. Thereafter, I need to transfer all the E-filing name and passwords to you. You will need to get ready your Sinpass [*sic*] login name and password … CDX email account will also be transfers [*sic*] to you too. *To straighten all things, as mentioned by you, we will be clear of all dollars and cents during end of June where any balance for the amount billed base on work completions before 1st July 2013 will belongs to me and any new invoices starting from July'13 onwards will be yours. I will pay for CDX income tax for FY ending June 2013 to you first where you will pay to the government one year later.*
>
> …
>
> See you next month.
>
> [emphasis added]

CDX's unaudited accounts for financial year 2012 were attached to the e-mail. The targeted completion of the transaction was therefore end June 2013, during the defendants' visit to Singapore.

11 Thereafter, the parties began making arrangements to hand over CDX. As proposed in the first defendant's e-mail of 25 May 2013, the plaintiff met the defendants in Brunei from around 24 to 26 June 2013 and again in Singapore on or around 28 June 2013. On 27 and 28 June 2013, the first defendant told one Lorraine Lee ("Ms Lee") from BSP Management Pte Ltd, CDX's corporate secretarial service providers, that he and the second defendant would be resigning and transferring all the shares in CDX to the plaintiff. He asked Ms Lee to prepare the necessary documents, as well as "all FY ending documents", for them to sign on 28 June 2013. He also instructed Ms Lee to arrange for him to "clear off" the accounts receivable and accounts payable of CDX so that the company's financial accounts would be reset when the plaintiff took over as director. The parties signed the following documents, prepared by Ms Lee, on 28 June 2013:

(a) the plaintiff's consent to be appointed director of CDX;

(b) two directors' resolutions signed by the defendants, to appoint the plaintiff as sole director of CDX and authorising the transfer of their shares to the plaintiff;

(c) letters of resignation by the defendants as directors of the company;

(d) a directors' resolution signed by the plaintiff and defendants, accepting with immediate effect the defendants' resignation as directors;

(e) two share transfer forms, by which the defendants transferred their shares in CDX to the plaintiff; and

(f) a directors' resolution signed by the plaintiff authorising him as the sole mandate holder for CDX's bank account with UOB Bank.

These steps were consistent with the 25 May 2013 email.

12 However, payment was not forthcoming. The plaintiff apparently requested an extension of time to complete the sale by 12 July 2013, a Friday. On 3 July 2013, the first defendant sent the plaintiff a WhatsApp message saying, "Have your bank settled the transfer? Don't forget that it will takes [*sic*] 5 working days to clear large sum and the dead line is next Friday." He again asked for updates "[u]rgently" on 8 July 2013. The plaintiff replied that same day in a lengthy e-mail, in which he asked the first defendant to bear with him "for a little longer [than] that 14 days window as discussed". He assured the first defendant that he would "definitely" make the transfer "sometime these few days". On 19 July 2013, the plaintiff sought to defer payment to 1 October as he was still "waiting for the funds". Notably, there was no assertion by the plaintiff that he was *not* under a contractual obligation to make payment. The plaintiff was clearly seeking more time to pay.

13 On 20 July 2013, the plaintiff sent the first defendant the following WhatsApp messages:

> I m proposing to effect the payment into 3 times. 1 st 300, 2nd 300 and 3rd 228. [U]pon receiving your 1st payment, I also give u a letter to allow u to grand [*sic*] me the transfer of the signed cdx document for the property for the purpose of maximum re financing it. … The mortgage payment upon receiving shall be for your 3rd payment. After that, u pass the signed documents to me . The 2nd payment shall be anytime in between now to sept.

> The 1st and 2nd payments is the maximum I can stretch, shall be from my bank in brunei. This is my do able [*sic*] realistic option.

The first defendant replied some hours later, saying:

> Can email us your letter to read through the contents first? My wife indicate that the the [*sic*] first payment can be act as an [*sic*] *down payment deposit*, 2nd payment she will transfers all her shares to your name first and final payment will be all my shares to your name. … How does this sound?
>
> Also need a final letter to indicate the last payment schedule and time frame.
>
> [emphasis added]

Fifteen minutes later, the plaintiff replied, "*Can and accepted*. The letter should be ready not later than next week" [emphasis added].

14 On 29 July 2013, the first defendant received an e-mail from Ms Gina Fe A Maratas ("Ms Maratas"), the plaintiff's accountant, attaching what Ms Maratas described as a "letter for CDX purchase agreement". I hereafter refer to this as "the Purchase Letter". This was a two-page document, apparently drafted by the plaintiff himself, broadly setting out the process for taking over CDX. The document was divided into Part 1, Part 2 and Part 3, corresponding to the three payments to be made by the plaintiff, as follows:

(a) Upon payment of the first $300,000, the plaintiff would begin assigning his accounting and logistics staff to review and understand CDX's operations.

(b) Upon payment of the second $300,000, one of the defendants would transfer their shares in CDX to the plaintiff. The plaintiff would fully take over the entire operation of CDX, save for the office property.

The first defendant would remain on CDX's Board of Directors until the office property was transferred to the plaintiff.

(c) Upon payment of the remaining $228,000 (mistyped as $282,000 in the Purchase Letter), the remaining shares would be transferred to the plaintiff. The first defendant would remain an advisor to CDX for the next 12 months. The "full handover" would be no later than 31 December 2013.

The Purchase Letter ended with two lines for the signatures of the plaintiff and the first defendant.

15 On 5 August 2013, the first defendant e-mailed Ms Maratas, copying the plaintiff, with a revised version of the Purchase Letter containing his amendments. In the text of his e-mail, the first defendant explained that the Singapore property market was "moving upwards" and property prices had increased by 1.2% in the past month alone, and he had therefore "indicated a dead line dates for all 3 payments". He concluded, "Let me know how's this goes as I am a fast moving person where I like to settle things fast." The deadlines were as follows:

(a) Under Part 1, the first payment of $300,000 was to be made within 10 working days of 31 August 2013.

(b) Under Part 2, the second payment of $300,000 was to be made by 30 September 2013.

(c) The final payment of $228,000 was to be made by 31 December 2013.

16 The first defendant received the first payment of $300,000 on 4 September 2013. But the Purchase Letter was not taken further, nor were subsequent payments made. Instead, the plaintiff made repeated requests for extensions of time which, although granted, he did not comply with.

17 In January 2014, the plaintiff had still not made the second and third payments and had financial difficulty doing so. This was because he had planned to withdraw the necessary amounts from his companies in Brunei, but was prevented from doing so when he lost the confidence of the Boards of Directors of those companies. The plaintiff and the first defendant then tried to make other payment arrangements which the plaintiff would be able to comply with. The plaintiff also engaged lawyers to draft a written agreement, a first draft of which was sent to the first defendant in June 2014. However, the parties never signed the agreement and eventually the contemplated sale and purchase fell through.

18 On 10 October 2014, the plaintiff's solicitors wrote to the defendants demanding the return of the first $300,000 which he had paid in September 2013. The defendants did not return it but instead, by their solicitors' letter of 15 November 2014, gave the plaintiff seven days to complete the sale and purchase of the shares. The plaintiff did not do so.

19 The plaintiff commenced these proceedings on 12 June 2015, seeking return of the said $300,000.

Parties' cases

20 The plaintiff's case was that the $300,000 was recoverable as the parties had not entered into any contract, and there had been no transfer of shares from the defendants to the plaintiff. He took the position that the parties' negotiations

over the sale of CDX shares did not conclude in a binding agreement. They were merely tentative and subject to the plaintiff carrying out due diligence and further terms being discussed. The terms which had been agreed upon were unsettled, incomplete and/or uncertain. The papers which had been signed on 28 June 2013 were allegedly signed "on the understanding … that they were not to be released until a full and binding agreement had been made and signed between all the parties". The plaintiff further pointed out that he had only ever discussed the transaction with the first defendant and "could not be sure of [the second defendant's] agreement to the terms being discussed". Alternatively, even if there was a contract (which he disputed), it was not a term of the contract that any money paid pursuant to the contract would be forfeitable.

21 In the circumstances, the WhatsApp messages on 20 July 2013 (see [13] above) could not have constituted a variation, there being no contract to begin with. The $300,000 was paid "only as a partial payment for the Shares and was paid at a time when there was no contract made". Alternatively, even if there was a contract initially, it was not effectively varied as there was no agreement on the terms of variation.

22 In the further alternative, even if there was a contract which was varied, the plaintiff was entitled to recover the $300,000 for the following reasons:

(a) The variation was subject to three conditions subsequent – namely, that the plaintiff could successfully raise a loan from the bank by mortgaging the office property; that the defendants were not to be guarantors for the said loan; and that the parties were to agree on all the contents of a written agreement – which were not fulfilled.

(b) It was not a term of the varied contract that the $300,000 was forfeitable.

(c) The defendants refused to accept the payment arrangements under the varied contract and repudiated the contract by seeking to impose alternative payment terms.

(d) The forfeiture of the $300,000 was unenforceable as a penalty.

(e) As the CDX shares were never transferred, the consideration for the contract wholly failed and the plaintiff was entitled to return of the $300,000.

23 The defendants' case was that the parties had, around 25 May 2013, entered into a binding agreement for the sale of the shares in CDX for a sum of $828,000, to be completed by end June 2013. The plaintiff then sought to vary the payment of the purchase price into three instalments of $300,000, $300,000 and $228,000 between July and September 2013. The first defendant required the first payment to be a down payment deposit and the plaintiff agreed. The defendants maintained that they had a binding contract as varied and/or as set out in the Purchase Letter. It should be noted that the defendants did not bring a counterclaim for damages for breach of contract.

24 The plaintiff denied that the Purchase Letter was binding as it contained many contingencies and uncertainties.

Issues

25 The issues that arose for my decision were:

(a) whether the parties had entered into a binding contract for the sale of shares in CDX and the office property;

(b) whether that contract had been successfully varied;

(c) whether it was a term of the contract that the $300,000 would be forfeitable in the event of breach or repudiation on the plaintiff's part in not completing the transaction; and

(d) if so, whether the forfeiture of the $300,000 was unenforceable as a penalty.

Issue 1: Whether there was a contract

26 On the evidence before me, I determined that the parties entered into a contract on 24 May 2013 for the sale of the CDX shares and the office property for a lump sum payment of $828,000.

27 The correspondence that I set out at [6]–[10] above was evidence of this contract. The plaintiff showed genuine interest in purchasing CDX, saying he was "very serious" in his e-mail of 7 May 2013. On 10 May 2013, the first defendant offered to sell the CDX shares and office property to the plaintiff at a total price of $850,000 via an e-mail titled "Your offers". This was rejected by the plaintiff, who counter-offered a price of $800,000 in his email titled "RE: Your offers (ACCEPTED)" on 11 May. By inserting the word "accepted" into the e-mail subject, suggesting that they open a bottle of champagne to celebrate the occasion, and asking when was the best time to do the paperwork, the plaintiff showed an unequivocal intention to enter into a binding agreement albeit at the price he stated. This price was rejected by the first defendant, who counter-offered a "final price" of $828,000 on 20 May 2013. The plaintiff's

reply on 24 May 2013 ("Confirned [*sic*] la. $828k") could mean nothing else but that he accepted this counter-offer. The plaintiff expressed his gladness that "at last we sealed this deal" and said that he would have to "prepare alot of things for this payment" – comments he would not have made if he did not consider the agreement to constitute a binding contract. The plaintiff's message on 24 May 2013 was "a final and unqualified expression of assent to the terms of [the defendants'] offer" (*Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [47]).

28 The defendants took the position that the sale was to be completed by end June 2013. While the plaintiff did not expressly assent to this timeline specifically, I found that it was a term of the contract. The first defendant had cautioned the plaintiff that his offered price was only available for a limited time because property prices were on the increase (see [6] above) and the plaintiff also appeared to want to complete the transaction quickly (see [5] above). On 20 May 2013, the first defendant proposed to complete the sale in June 2013 as CDX's financial year ended in June and the defendants would be in Singapore to settle its accounts then (see [8] above). He asked the plaintiff for his thoughts. In his text messages on 24 May 2013, the plaintiff said, "Ok. Confirned [*sic*] la. $828k" without specifically agreeing or disagreeing with the timeline proposed by the first defendant. The most reasonable inference is that he assented to both the price and the timeline suggested by the first defendant. Otherwise, he would not have considered the deal "sealed" and "[e]nded", and would have instead attempted to re-negotiate the timeline.

29 This is borne out by the parties' conduct after 24 May 2013. The plaintiff joined the defendants in Singapore in end June 2013 to attend to administrative matters regarding handing over CDX (see [10] above). They signed the paperwork for the transfer of shares, the defendants' resignation and the

plaintiff's appointment as a director of CDX on 28 June 2013. This buttresses my conclusion that they considered themselves as having entered into a binding contract for the sale of the shares and the office property by end June. It would have been very risky, not to mention premature and unnecessary, for the defendants to pre-sign such papers if there was no binding agreement for the plaintiff to take over CDX.

30 The manner in which the plaintiff requested for more time to make payment also suggested to me that he regarded himself as bound to make payment by June 2013. His e-mail of 8 July 2013 stated as follows:

> Dear Kelvin,
>
> Seek your understanding that this transfer is a bit longer than I thought and bear with me for a little longer within that 14 days window as discussed. I am awaiting the instruction to HSBC and also the clearance from my Board of Director for the sum transfer. Rest be assured that this transaction is confirmed. I will update you shortly and asap upon confirmation of the transfer from the BOD.
>
> BTW. it will definitely be sometime these few days. I may need your side to take care of the CDX Singapore until the allowed among transfer is executed. …
>
> Also upon payment, to avoid delay and lagging in follow up, my account manager M/s Gina will need to discuss via emails directly with you and your misses to finalize these items …
>
> If there is slight delay, let it be for it is going to be a few weeks than I will take over as early as possible starting from partially July…August…to latest September 2013 and take this July, August and September 2013 as learning curve. For the 3 months, you need to promise to me to help me on everything concerning CDX Singapore. …
>
> You need to trust me and leave the transaction to me on the purchase of the CDX Singapore….after all we talking on this for years and I m not going to run away. will get it done for you as fast as possible to my ability. I will update you surely. The monies S$828K shall be to your personal account, I will definitely pay off. No worry.

> Just wait for the payment. Give and take Kelvin, please exercise some patience as this is a big purchases for me…seek your understanding as I do not want to mess up everything in a hurry. I will buy CDX confirmed and I know both of us want to see CDX to be success.
>
> …

31 The plaintiff's apologetic and reassuring tone ("[s]eek your understanding", "bear with me", "[n]o worry") and his assurances that he would complete the transaction promptly ("be assured that this transaction is confirmed", "it will definitely be sometime these few days", "slight delay", "trust me … I [a]m not going to run away", "I will update you surely", "I will definitely pay off") showed that he recognised he was in the wrong by deferring payment. There would have been no need to be apologetic if the parties had not agreed on when payment ought to be made in the first place.

32 On 19 July 2013 (see [12] above), the plaintiff sent the first defendant a WhatsApp message saying:

> Kelvin. I need your patience as I m waiting for the funds. Actually I m using mortgage as my alternative collateral and still waiting the doc to come out as the initial funds my partner doesn't allow me to withdraw big sum due to going concern the brunei operation. Please let us target 1st October instead which is more realistic timing for the cdx. 3rd quarter. I will get an answer soon. Please please please wait for me. I m shy to u.

33 As before, the plaintiff was so deeply apologetic precisely because he understood that a further extension of time was contrary to the agreement that he and the defendants had entered into. In imploring the first defendant to "wait" and "target 1st October instead", the plaintiff implicitly acknowledged that payment was already due. It is reasonable to assume that if there was no contractual obligation to pay, the plaintiff would have made that clear in both emails in the face of the first defendant's request for payment.

Issue 2: Variation of contract

Parties' correspondence and conduct

34 Before the first defendant could reply to the 19 July 2013 message, the plaintiff sent another message on 20 July 2013 (see [13] above) proposing to vary the existing agreement for lump sum payment into payment in three tranches of $300,000, $300,000 and $228,000. It is important to note that the defendants replied that the first payment should act as a "down payment deposit", and that the shares would be transferred to the plaintiff upon the second and third payments. The plaintiff replied, "Can and accepted", signifying his agreement to vary the original contract on these terms.

35 Counsel for the plaintiff submitted that no agreement arose from the 20 July 2013 WhatsApp messages because they did not set out timelines for the instalment payments. The plaintiff's 20 July 2013 message proposed to make the second payment by September. No timeline was stipulated for the first or third payments, although the first payment would presumably have to be made before the second. This prompted the first defendant to ask for a "final letter to indicate the last payment schedule and time frame". The Purchase Letter, sent on 29 July 2013, did not stipulate timelines for the payment of the instalments, save that it mandated a "full handover" by 31 December 2013 (see [14] above).

36 However, any uncertainty as to timelines was resolved by 19 August 2013, when the plaintiff communicated his acceptance of the timelines set out in the revised Purchase Letter. In response to the first defendant's request for updates regarding the Purchase Letter on 19 August 2013, the plaintiff replied:

> I m finalising my trip to Singapore . Don't anyhow increases price lay….u think I rich man …*I will follow strictly to stick to time line*. ..be flexible no increase la. Will update further to u later today.

> *I wouldn't delay. I want fast also.*
> 1st payment ready already.
> [emphasis added]

37 The mention of a price increase was a reference to the first defendant's message to the plaintiff two weeks prior, in which he pointed out that property prices had increased and said, "I am sure you don't want me to increase my price right." In saying that he would "follow strictly to stick to time line", the plaintiff must have meant the timelines stipulated in revised Purchase Letter, as no alternative timelines had been proposed by either party. The timelines for the second and third payments had emanated from the plaintiff himself: the first defendant had adopted these from the plaintiff's 20 July 2013 message (see [13] above) and the first draft of the Purchase Letter (see [14(c)] above) respectively. In the circumstances, it was reasonable to construe the plaintiff's assurance that he would "follow strictly to stick to time line" as an agreement to abide by the timelines inserted by the first defendant into the Purchase Letter. The contract was thus varied, not by the Purchase Letter *per se* (which was never signed), but by the communications passing between the parties, of which the Purchase Letter merely formed one part.

38 Moreover, following the first payment of $300,000, the parties continued to conduct themselves in a manner consistent with their intention to complete the sale. For instance, they agreed to meet in Singapore around end September and early October to clear CDX's quarterly accounts. The plaintiff "promise[d]" the first defendant that matters "will be settled in October". On 6 September 2013, the plaintiff assured the first defendant that he planned to make the second payment by the end of the month, and was even thinking about "jumping to phase 2 already with the 2nd payment". That was obviously

inconsistent with his alleged belief that the original contract had not been effectively varied: if there was no variation, there could be no Phase 2.

39 I also rejected the argument about conditions subsequent. The plaintiff was unable to show any evidential substratum for such conditions at trial and conceded that there was "presumably" no agreement as to the conditions subsequent.

Second defendant's involvement

40 The plaintiff also submitted that there could be no binding contract because the second defendant was not a party to the negotiations. He pleaded that all discussions were only held with the first defendant, and he therefore "could not be sure of [the second defendant's] agreement to the terms being discussed with [the first defendant]". The second defendant did not give evidence in the suit.

41 In my view, this submission was unmeritorious. The first defendant had made it clear in his messages of 19 and 20 July 2013 that he had to discuss the terms of the sale with his wife, and therefore professed to speak for both himself and his wife. At no point throughout the parties' protracted negotiations did the plaintiff ever question the validity or force of their agreement on this basis, or ask for proof of the second defendant's agreement. Indeed, the plaintiff admitted that he had ample opportunity to ask the second defendant in person when he met her on 28 June 2013, but did not do so because he "knew that Mr Yip speaks on behalf of Mrs Yip". That the first defendant had authority to contract on both his and the second defendant's part was therefore not in issue until the suit.

Issue 3: Whether the $300,000 was forfeitable

42 The contract was repudiated by the plaintiff in his solicitors' letter of 10 October 2014, which "withdr[ew] and revoke[d] all offers to purchase shares in CDX". This repudiation was accepted by the defendants on 11 July 2015. Although given additional time to complete the sale, the plaintiff declined to do so. That brings me to the question of whether the defendants were contractually entitled to forfeit the $300,000 in the event of the plaintiff's repudiation of the contract. This was a matter of contractual interpretation.

43 *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 ("*Lee Chee Wei*") is the seminal local case on deposits. The Court of Appeal stated at [83]–[84] that:

> 83 The law relating to deposits in a sale and purchase contract and its recoverability has been considered in some depth in *Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd* [2000] 3 SLR(R) 594 which held (at [9]) as follows:
>
> > … A deposit in a sale and purchase contract, if nothing more is said about it, is a security for damages for breach of contract. If the seller has not suffered any damage he must return it to the depositor. If, however, the contract provides that the deposit is to be forfeited to the seller upon breach by the purchaser, and provided the amount of deposit is customary or moderate, the seller is entitled to retain it even if he suffered no loss. …
>
> 84 The invariable judicial approach to forfeitable deposits at common law is that the deposit will be forfeited to the payee upon the discharge of the contract on the default of the payer, irrespective of whether it would have been deemed part-payment had the contract been completed. The payer cannot insist on abandoning the contract and yet expect to recover the deposit as this would enable him to take advantage of his own wrong (*Howe v Smith* (1884) 27 Ch D 89 at 98). An advance payment, on the other hand, does not fall within the category of forfeitable deposits and is neither designed nor intended to secure performance (*Lim Lay Bee v Allgreen Properties Ltd* [1998] 3 SLR(R) 1028 ("*Lim Lay Bee*")). This is underscored by the premise that the vendor is already amply protected by the

> recovery of damages he has sustained (*Dies v British and International Mining and Finance Corporation Limited* [1939] 1 KB 724).

44 The Court of Appeal also stated at [85] that whether a sum is intended to be a forfeitable deposit "depends upon the construction of the contract". In the absence of any specific provision, the recoverability of the sum:

> … hinges on the nature of the payment (*ie*, whether payment is construed as a deposit entitling forfeiture upon default, or as an advance payment, which is returnable) as evinced by the intention of the parties expressed in the [contract].

45 The agreement to forfeit may be implied as well as express. If the sum was paid as a deposit, it will normally be implied that it is forfeitable on the buyer's default unless the contract as a whole shows an intention to exclude forfeiture (*Damon Compania Naviera SA v Hapag-Lloyd International SA* [1985] 1 WLR 435 ("*The Blankenstein*") at 450H–451A).

46 In my view, the parties intended the first payment of $300,000 to be a deposit forfeitable by the defendants in the event that the plaintiff repudiated the contract as varied. This was evident from the context in which it was paid, the language which the parties used to denote the payment and the manner in which they discussed it after the event.

47 The analysis should first start with the reason for the defendants' insistence on payment of the $300,000. This has to be assessed against the backdrop of the plaintiff's difficulty in making payment of the consideration. The plaintiff could not afford to pay the full $828,000 and had already put off payment multiple times, all while the property market continued to rise. He had once before, in 2008 or 2009, shown interest in purchasing CDX, although this was not taken further (see [5] above). In the circumstances, the defendants understandably wanted some security for performance and for that reason

stipulated that the first tranche of $300,000 would be a "down payment deposit". There must surely be a reason why the defendants specifically chose this term. The phrase "deposit date" was also inserted by the first defendant into the Purchase Letter. It was quite clear therefore that the $300,000 was intended as a deposit to secure performance of the contract. This must also necessarily mean that the $300,000 would be forfeitable in the event of the plaintiff's breach; otherwise the payment of a deposit, no matter how small or large, would be toothless and incapable of achieving the end for which it was designed.

48 The plaintiff conceded during cross-examination that the purpose of the $300,000 payment was "to give confidence to [the first defendant]" that he was "serious" and "wanted to go through with this transaction", and also to serve as "security" for the first defendant. When I asked the plaintiff what he understood the first defendant's intentions to be, he said that the deposit was to show that "you must be serious … before … we talk" and to show commitment to the transaction. It is obvious to me, and it must have been obvious to the plaintiff, that the defendants intended the $300,000 to be a sign of the plaintiff's commitment to the transaction given the circumstances. If so, the plaintiff must have also understood that the defendants would retain the payment if the commitment was not followed through with.

49 This is supported by the defendants' description of the $300,000 as a "down payment deposit". While the use of the word "deposit" is not conclusive, it is nonetheless significant. The purpose of a deposit is to serve as security for performance by the purchaser. In *Howe v Smith* (1884) 27 Ch D 89, the *locus classicus* on the law of deposits, Cotton LJ described the nature of the deposit at 95 as follows:

> The deposit, as I understand it … is a guarantee that the contract shall be performed. If the sale goes on … it goes in part

> payment of the purchase money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then … he can have no right to recover the deposit.

Similarly Fry LJ said at 101–102:

> … It [*ie*, the deposit] is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the payment.
>
> …
>
> … [T]he earnest is lost by the party who fails to perform the contract. That earnest and part payment are two distinct things … [They are] separate acts … the deposit in the present case is the earnest or *arrha* of our earlier writers; that the expression used in the present contract that the money is paid "as a deposit and in part payment of the purchase-money," relates to the two alternatives, and declares that in the event of the purchaser making default the money is to be forfeited, and that in the event of the purchase being completed the sum is to be taken in part payment.

This was echoed by Lord MacNaghten in *Soper (Pauper) v Arnold and another* (1889) 14 App Cas 429 at 435:

> The deposit serves two purposes – if the purchase is carried out it goes against the purchase money – but its primary purpose is this, it is a *guarantee that the purchaser means business*; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not.
>
> [emphasis added]

50 Indeed, in *Stockloser v Johnson* [1954] 1 QB 476 ("*Stockloser*"), Denning LJ said that if money was expressly paid as a deposit, that was "equivalent to a forfeiture clause" (at 490). And in the Hong Kong Court of Final Appeal case of *Polyset Ltd v Panhandat Ltd* [2002] HKCFA 15 ("*Polyset*"), it was said at [66] *per* Ribeiro PJ that "if, on the true construction of the contract, the parties intend the advance payment as a deposit, they are

taken to have agreed that it is to be forfeited in the event that the payer fails to complete".

51 In *Lee Chee Wei*, the Court of Appeal stated at [86] that "[r]eferences to the nature of the payment in the contract are essential in construing the effect and consequences of the payment". In this case, the first defendant described the first payment as a "deposit" in his message of 20 July 2013 (at [13] above), and the plaintiff repeated this term in a WhatsApp message to the first defendant on 6 September 2013: "1st payment like your wife says is like deposit." As experienced businessmen, the plaintiff and the first defendant were most likely aware of the connotations of the word "deposit". The plaintiff in particular was a postgraduate degree holder and a managing director of two companies. The significance of the use of the term "deposit" would have been all the more apparent to the plaintiff against the background of his repeated failure to make prompt payment.

52 This was vindicated by how the plaintiff responded when the first defendant, frustrated with the plaintiff's repeated delays, began speaking of forfeiting the deposit. On 7 January 2014, following a disagreement, the following WhatsApp messages were exchanged:

Plaintiff:	Considering the complexity it will be good perhaps to call off this deal as it is fair for both of us.
…	
First defendant:	If you intent to call off this due. I will say thank you for your deposit.
Plaintiff:	Come on. Its [*sic*] all my saving.
…	
First defendant:	You have to know, I also invested in other property now. So how to return you?

Plaintiff:	Don't threaten like this.
	Banks already replied me.

53 If the plaintiff genuinely believed that the first payment of $300,000 was recoverable in the event that the sale did not go through, I would have expected him to object vehemently to the first defendant's threat on the basis that it contradicted the terms of their agreement. That was all the more so since, according to the plaintiff, they had on several occasions agreed that the money was refundable. Instead, he merely pleaded with the first defendant not to forfeit the sum as it represented his savings.

54 Later in the conversation, the first defendant requested the plaintiff to make the second payment before 15 January 2014, because payment on another of the first defendant's properties was falling due and he was in debt. The plaintiff replied:

Plaintiff:	Aiyo please stop. I give u 300k a I already trust u my commitment.
	Dont force me anymore kelvin
First defendant:	Deposit means confirmed buying. And honest business man know that *deposit cannot be refund* and I am already giving you many months for the 2nd payment.
Plaintiff:	I am al r e afy [*sic*] in trouble
	I don't have anymore. I [*sic*]

[emphasis added]

55 The exchange is telling. First, the plaintiff said that the payment of the $300,000 was an act of "trust" and "commitment". This suggested to me that the plaintiff recognised that the $300,000 was forfeitable if he failed to complete. After all, if the plaintiff could simply sue for its return, no risk and therefore no "trust" would have been required. Secondly, when the first

defendant insisted that honest businessmen know that deposits are non-refundable, the plaintiff did not deny this. He simply pleaded that he was already in trouble and had no more money.

56 On 3 June 2014, after yet further delays, the first defendant sent the following email to the plaintiff:

> Hi Lawrence,
>
> … [M]y notes to you for the sales of CDX Singapore Pte Ltd will still stand till end of June 2014, thereafter end of June 2014, the sales will be void and *your deposit will not be refundable* as I had been holding on to it for you for more than a year now. Not forgetting, I had informed you that I required to have at least 2 weeks to go through the draft and commends [*sic*] / amend. If the draft still cannot be ready within 3 working days as from today, I don't think so that your purchase agreement can get through by end of June 2014 and please do not blame me for calling off the sales due and *the deposit is non refundable*.
>
> …
>
> [emphasis added]

57 The plaintiff's reply on 8 June 2014 was brief: "Hi Lawrence, Appreciated for your replies. Best regards, Kelvin". There was no hint that the plaintiff was shocked by or took issue with the plaintiff's assertion that the deposit was non-refundable.

58 For these reasons it seems clear that the $300,000 was intended to be a deposit and understood to be forfeitable in the event of the plaintiff's default.

Issue 4: Whether the penalty rule applies

59 The plaintiff contended that notwithstanding the terms of the contract, the $300,000 could not be forfeited by reason of being a penalty. This raised the interesting question of whether the penalty rule applies to contractual deposits.

60 The penalty rule, as it is understood and applied in Singapore, is based on the principles articulated by Lord Dunedin in the House of Lords decision of *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 ("*Dunlop*") and endorsed by the Privy Council in *Philips Hong Kong Ltd v The Attorney-General of Hong Kong* (1993) 61 BLR 49. These principles have been repeatedly adopted in local decisions: see, for example, *Hong Leong Finance Ltd v Tan Gin Huay and another* [1999] 1 SLR(R) 755 ("*Hong Leong Finance*") at [18], *Beihai Zingong Property Development Co and another v Ng Choon Meng* [1999] 1 SLR(R) 527 at [14] and *Overseas Union Enterprise Ltd v Three Sixty Degree Pte Ltd and another suit* [2013] 3 SLR 1 at [116]. Most recently, the Court of Appeal in *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 affirmed at [78] that the penalty rule "is still basically embodied" in Lord Dunedin's formulation of the rule, as well as the four tests of construction that he set out, in *Dunlop* at 86–88.

61 Thus conceptualised, the penalty rule restricts what the parties may agree on as compensation for breach of contract in place of what would otherwise be awarded as common law damages, applying the principles in *Hadley v Baxendale* (1854) 9 Exch 341. In particular, "[t]he essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage" (*Dunlop* at 86). The question is whether the function of the provision is "penal or compensatory" (*Hong Leong Finance* at [27]). A sum that is not a genuine pre-estimate of loss is necessarily a penalty. Thus a sum will be held to be a penalty if it is "extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach", or if "the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid"

(*Hong Leong Finance* at [18]). It will be presumed a penalty when a single lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.

62 Recently, the penalty rule, while still accepted as relevant, underwent significant reformulation in the UK (see *Cavendish Square Holding BV v Makdessi and another appeal* [2016] AC 1172 ("*Cavendish*")). However, *Cavendish* has yet to be accepted in Singapore and I remain bound by the Court of Appeal's endorsements of the conception of the penalty rule propounded in *Dunlop*. I discuss *Cavendish* further at [114] below.

63 I will first address the local decisions which the parties brought to my attention, including cases which the plaintiff said were binding authority for the proposition that contractual deposits are subject to the penalty rule ([64]–[86] below). I will then examine important foreign decisions on the subject ([87]–[122] below) before setting out my analysis and conclusions ([123]–[144] below).

Local authorities

Indian Overseas Bank v Cheng Lai Geok [1993] 1 SLR(R) 32 ("Indian Overseas Bank (CA)")

64 The appellant was a bank that had auctioned off four properties to the respondent at the price of $2.6m. The sale was subject to special and general conditions. Clause 1 of the special conditions required the respondent to pay a deposit of 25% of the purchase price (*ie*, $650,000) to the auctioneers as agents for the appellants. The respondent accordingly handed a cheque for $650,000 to the auctioneers the very day that he won the bid. Completion was slated for

2 August 1981 but on 3 July 1981, the respondent countermanded payment of the cheque and informed the appellant that he had decided not to proceed with the purchase. The respondent thereafter failed to complete the purchase on 2 August. The appellant instituted proceedings seeking, *inter alia*, a declaration that it was entitled to the deposit of $650,000, and payment of the same.

65 At first instance, the High Court refused this. The Court held that it would be "inequitable and unconscionable to allow the plaintiffs to forfeit the said sum of $650,000" because it was "in effect a penalty" and not a genuine pre-estimate of the loss suffered (*Indian Overseas Bank v Cheng Lai Geok* [1991] 2 SLR(R) 574 ("*Indian Overseas Bank (HC)*") at [75]). Denning LJ's remarks in *Stockloser* at 489–490 were cited (see *Indian Overseas Bank (HC)* at [76]):

> It seems to me that the cases show the law to be this: … *[W]hen there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause)*, then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit. …
>
> The difficulty is to know what are the circumstances which give rise to this equity … Two things are necessary: first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damage, and, secondly, it must be unconscionable for the seller to retain the money. …
>
> [emphasis in original]

66 The Court of Appeal allowed the appeal, disagreeing that the 25% deposit amounted to a penalty on the facts. It ordered the respondent to pay the appellants the sum of $650,000. The Court of Appeal did not mention *Stockloser*. The relevance of *Indian Overseas Bank (CA)* to the present suit lies

in the Court of Appeal's apparent acceptance of the proposition that the penalty rule applies to deposits, at [32]:

> Another argument which was raised by the respondent and which was upheld by the court below was that the deposit amounted to a penalty and thus should not be recoverable. … The question whether a sum stipulated is a penalty or liquidated damages is a question 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 at the time of the breach: see *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 86–87. … In the instant case, there was simply no evidence to show what could have been the greatest loss that could be caused to the appellants if the respondent failed to proceed with the purchase. … There is no evidence before us at all to show the sort of range within which bids at auction do fluctuate. In the circumstances, there is no basis for the court below to find that the 25% deposit is a penalty.

67 It appears to me, however, that the Court of Appeal did not decide the applicability of the penalty rule to contractual deposits as a matter of *ratio*. It simply assumed that the rule applied, without considering the basis, and observed that there was no evidence to support a finding that the deposit was a penalty. The Court of Appeal did not cite any authorities on this point. Moreover, the Court did not order return of the sum on the basis that it was a penalty: rather the Court determined that the sum was *not* a penalty. Whether or not the penalty rule applied to contractual deposits therefore had no real bearing on the outcome of the case.

Hua Khian Co (Pte) Ltd v Lee Eng Kiat [1996] 2 SLR(R) 562 ("Hua Khian Co")

68 The appellant and respondent entered into a sale and purchase agreement for a property which was slated for completion on 28 March 1992. A deposit of $96,500, representing 10% of the purchase price, was paid to the respondent. Clause 10(a) of the agreement provided that if the Urban Redevelopment

Authority ("URA")'s approval for the construction of a pair of three-storey semi-detached houses was not obtained, the agreement would be "null and void". Clause 10(b) further provided that in such an event, the appellant's deposit would not be returned unless the appellant complied with certain conditions. On 25 March 1992, URA informed the appellant that approval was only granted for two-storey (rather than three-storey) houses. The appellant sought an extension of time from the respondent to complete, pending an appeal against URA's decision. The respondent refused and gave the appellant 21 days' notice on 28 March 1992 to complete the sale. The appellant took the position that completion could not take place due to the lack of URA's approval for three-storey houses, and demanded the return of the deposit. The appellant commenced an action against the respondent claiming damages for breach of contract or the refund of the deposit.

69 At first instance, the High Court found that the respondent vendor was entitled to forfeit the deposit. In dismissing the purchaser's argument that forfeiture of the deposit amounted to a penalty, the High Court stated (*Hua Khian Co (Pte) Ltd v Lee Eng Kiat* [1995] SGHC 252):

> …
>
> The short answer to that contention is that 10% of the price of a property is the standard deposit paid by purchasers in Singapore upon signing of the contract; forfeiting it cannot be said to be a penalty or unconscionable (see *Indian Overseas Bank v Cheng Lai Geok* [1993] 1 SLR 470 and *Workers Trust v Dojap Investments Ltd* [1993] 2 AER 370). I accept that our courts can grant relief against forfeiture (see *Pacific Rim Investments Pte Ltd v Lam Seng Tiong & Anor* [1995] 3 SLR 1). However … in order to invoke successfully the courts' jurisdiction, the circumstances of the case must reveal elements of unconscionability and injustice (per LP Thean JA at p 23). The circumstances of this case do not warrant granting to the plaintiffs relief against forfeiture bearing in mind that they rejected the defendant's demand for interest in the event of their late completion.

…

70 The Court of Appeal allowed the appeal on the ground that the appellant had complied with the conditions for return of the deposit in cl 10(b) of the contract, and the respondent was hence obliged to refund the deposit. It made no mention of the penalty argument save to acknowledge, at [16], the High Court's finding that the deposit was not a penalty.

71 Whether the penalty rule applied to a contractual deposit did not arise for decision in light of the Court of Appeal's finding that the terms of the contract did not permit forfeiture of the deposit. The question was not considered in any depth by the Court of Appeal, and did not form part of the *ratio* of its decision. The High Court did not cite any authorities for the view that the penalty rule applies to contractual deposits.

Zalco Marine Services Pte Ltd v Humboldt Shipping Co Ltd [1998] 2 SLR(R) 195 ("Zalco")

72 In *Zalco*, the appellant was interested in purchasing a ship from the respondent. The appellant and respondent were to negotiate the terms of the sale, following which they would sign an amended standard form memorandum of agreement reflecting the negotiated terms, and then perform the contract accordingly. However, after considerable negotiations by their respective brokers, the appellant aborted the sale and no memorandum was signed. The respondent sued the appellant for failing to complete the sale. The main issue was whether there was a binding contract between the parties. If there was, a secondary question arose of whether the respondent was entitled to claim, as compensation for the appellant's breach, the amount of a 10% deposit that would have had to be paid under the contract (but which was not paid). Clause 13 of the memorandum provided that, should the deposit not be paid, the

sellers would have the right to cancel the contract and would be "entitled to claim compensation for their losses". It further stated that in the event the buyers did not pay the purchase money, the sellers had the right to cancel the contract, "in which case the amount deposited together with interest earned, if any, shall be forfeited to the sellers".

73 At first instance, the High Court held that there was a binding contract between the parties, and that the respondent was entitled to sue for damages, including the unpaid deposit. The Court of Appeal agreed with the High Court that a binding contract had been concluded, but disagreed that the respondent was entitled to the unpaid deposit in its claim for damages. On a proper construction of the contract, payment of the deposit only fell due three banking days from fax copies of the memorandum being signed. As the deposit was not yet due, the respondent was not entitled to sue for the deposit. Its damages would be assessed based on the usual compensatory principles.

74 Whether forfeiture of the deposit was a penalty did not arise for decision given the Court of Appeal's finding that the respondent was not entitled to sue for the deposit under the terms of the contract. *Zalco*'s only relevance to the present suit consists in a remark by the Court of Appeal at [42]. Having cited [31] of *Indian Overseas Bank (CA)*, the Court stated:

> [F]orfeiture of the deposit as part of damages was permissible [in *Indian Overseas Bank*] because it seems to us to be implied that the parties had agreed that an amount in the sum of the deposit might be forfeited upon breach of a fundamental term of the contract. And failure to pay the deposit was in itself such a breach. Therefore, the deposit was recoverable as damages, *the only prohibition being that the amount to be forfeited must not be in the nature of a penalty*. This was why Chao Hick Tin J went on to confirm the nature of the deposit and its forfeiture as a form of liquidated damages and found that, in the case, the forfeiture of the deposit did not amount to a penalty.
>
> [emphasis added]

75 That is all that was said on the subject of whether the penalty rule could apply to a deposit. Like in *Indian Overseas Bank (CA)*, the Court of Appeal was content to assume that the penalty rule applied to deposits without questioning whether that was indeed the case. No authorities were cited for that proposition and it was not part of the Court's reasoning in coming to its decision.

Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd [2000] 3 SLR(R) 594 ("Triangle Auto")

76 The plaintiff relied on *Triangle Auto* for the proposition that the penalty rule applied to deposits. In *Triangle Auto*, the plaintiff seller was a dealer in motor vehicles who entered into a sale and purchase agreement with the defendant buyer. The contract provided for the payment of a $3,000 deposit (4% of the purchase price). Clause 3 of the Terms and Conditions stated that if the purchaser failed to take and pay for the goods within 14 days of being notified that they had been completed for delivery, the plaintiff was at liberty to forfeit the deposit. Clause 5 stated, "Deposits are not refundable, in the event of cancellation by the purchaser/hirer." The defendant subsequently repudiated the contract by cancelling its order for the motor vehicle. The repudiation was accepted by the plaintiff, who forfeited the deposit. The question which arose on appeal was whether the plaintiff could sue to recover additional damages over and above the sum forfeited.

77 G P Selvam J, who heard the appeal, held that the plaintiff could sue for additional damages. He stated at [9]:

> … A deposit in a sale and purchase contract, if nothing more is said about it, is a security for damages for breach of contract. If the seller has not suffered any damage he must return it to the depositor. If, however, the contract provides that the deposit is to be forfeited to the seller upon breach by the purchaser, and *provided the amount of deposit is customary or moderate*, the seller is entitled to retain it even if he suffered no loss. *The*

> *deposit is considered as earnest money. If his damages are greater he is entitled to recover the shortfall. This concept differs radically from the concept of liquidated damages. The two concepts are governed by separate legal constructs.*
>
> [emphasis added]

78 Selvam J thus took the view that a deposit would only be forfeitable upon breach of contract if the contract provided so, and if it was "customary or moderate". In that case, the deposit would be "earnest money", and the plaintiff would be entitled to sue for damages exceeding the amount of the deposit, subject to credit being given for the deposit (unlike liquidated damages, which preclude a claim for additional loss for that breach on the basis that they are a genuine pre-estimate of loss).

79 Selvam J referred to three Privy Council decisions which I will come to later – *Mayson v Clouet* [1924] AC 980 ("*Mayson*"), *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 ("*Linggi*") and *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 ("*Workers Trust*") – for the following propositions of law (at [12]):

> [These] cases sealed the propositions of the law: the law relating to deposits in a sale and purchase contract differs from that governing liquidated damages. *A reasonable deposit is regarded as earnest money given to guarantee the due performance of the contract and is not regarded as a penalty in English law or common English usage.* The defaulting purchaser is not entitled at law or in equity to relief against forfeiture. Equitable relief applies only to penalty that is to say excessive liquidated damages. *If the deposit amount is excessive it will also be caught by the law of penalty.* … The magic number of 10% of the price has been regarded as a reasonable deposit in sale and purchase of immovable property and it is intended to encourage performance.
>
> [emphasis added]

80 Applying the three Privy Council decisions, Selvam J concluded that the $3,000 was "a deposit with no right of refund" and "earnest money to ensure

performance". He observed that the figure "was eminently reasonable". The $3,000 was therefore forfeitable (at [16]).

81 On a proper reading, I do not think that *Triangle Auto* says that the penalty rule applies to deposits. I understand the judgment to mean that a sum which is excessive is not a true deposit in the sense of being earnest money, because it is neither customary nor moderate. If it was a true deposit, the penalty rule would not apply. If it was not a true deposit, the right to forfeit would be subject to the penalty rule. This, as will be seen, is supported by the Privy Council authorities that he cited. Indeed, Selvam J took pains to emphasise that the law relating to deposits differs from that governing liquidated damages in the passage I excerpted above. He noted that they came from different legal constructs. He further elaborated the differences between a forfeitable deposit and liquidated damages at [14]:

> A deposit with a forfeiture right is vastly different from liquidated damages. … Liquidated damages are agreed damages. The purpose here is to avoid difficulties relating to proof of actual loss. Subject to the law of penalty and exemption clause neither party may depart from the agreement. The contract breaker is barred from asserting that the seller suffered no loss or his loss is much less than what was agreed. The innocent party cannot ignore the liquidated damages clause and seek greater damages. … More importantly, unlike liquidated damages, a deposit with a right of forfeiture is a right *in rem*. The buyer places the money or its equivalent in the power and possession of the seller. Upon breach by the buyer, the deposit is transformed into the property of the seller by operation of the forfeiture clause. Liquidated damages constitute a chose in action; nothing is deposited with the innocent party.

82 Selvam J's careful analysis of these differences undermines any suggestion that he intended to graft the penalty rule onto the law of deposits wholesale. The plaintiff was therefore wrong to rely on *Triangle Auto* as authority for the proposition that deposits are subject to the penalty rule.

Other local decisions

83 For completeness, I note that the District Court decision in *Creek Bridge General Trading Co LLC v Cresdev Marketing Pte Ltd* [2012] SGDC 113 ("*Creek Bridge*") adopts the view that the penalty rule applies to deposits. The district judge noted that the "conventional position" was that "advance payments that are properly characterised as deposits are not subject to the penalty rules" (at [42]). However, she then went on to examine *Indian Overseas Bank (CA)* and *Zalco* and concluded at [48] that "the forfeiture of the deposits would not have been allowed had the court found them to be penalties on the facts of the respective cases". The appeal in *Creek Bridge* was heard and dismissed by the High Court without written grounds.

84 The High Court decision of *Allgreen Properties Ltd v Lim Lay Bee and another (administrators of the estate of Loh Siok Hong, deceased)* [1998] 1 SLR(R) 703 also contemplated that the penalty rule might apply to deposits, but the Court of Appeal did not take up this aspect of the decision. The High Court addressed the question, which was "not fully argued", of whether the test distinguishing a penalty from liquidated damages could apply to provide relief against forfeiture of a deposit. The High Court stated at [12]:

> English authorities have not equated the two categories of clauses, but the Privy Council had in *Worker's Trust & Merchant Bank Ltd v Dojab Investments Ltd* [1993] AC 573, suggests [*sic*] that the law relating to penalty clauses apply also to forfeiture clauses. That case held that a deposit was unreasonable and thus recoverable by the contract breaker.

85 The High Court did not go so far as to hold that the penalty rule applied to contractual deposits, finding it sufficient to say that the deposit was not so extravagant as to constitute a penalty "*even if* the test relating to penalty clauses is applied to forfeiture clauses" [emphasis added] (at [14]). On appeal, the Court

of Appeal took the view that the so-called deposit was in fact a part payment (*Lim Lay Bee and another v Allgreen Properties Ltd* [1998] 3 SLR(R) 1028 ("*Lim Lay Bee (CA)*") at [27]). It did not say anything about the penalty rule.

86 In the circumstances, there was no binding authority on whether the penalty rule applies to deposits. I turn now to the Privy Council authorities.

Privy Council authorities

Mayson v Clouet [1924] AC 980

87 The facts were as follows. The respondents, who were owners of premises in Singapore, entered into an agreement with a purchaser for the sale of the same. The contract provided a sale price of $250,000, to be paid in four tranches: a $25,000 deposit "immediately after the signing of this agreement", a second sum amounting to 10% of the balance to be paid within three months of the agreement, a third sum of 10% of the subsequent balance to be paid within six months of the agreement, and the balance to be paid within 10 days of the certificate of completion. Clause 13 of the contract stated:

> If the purchaser shall neglect or fail to comply with the above conditions *his deposit may be treated as forfeited* and the vendor shall be at liberty with or without notice, and notwithstanding any pending negotiation proceeding or litigation to re-sell the property either by public auction or private contract at such time and under such conditions as he may deem proper and all expenses attending any such re-sale or attempted re-sale and *any deficiency in the price obtained on a re-sale shall immediately thereafter be made good and paid to the vendor by the purchaser and shall be recoverable by the vendor as liquidated damages*.
>
> [emphasis added]

88 The purchaser paid the deposit and the two 10% instalments in due course, but refused to complete within 10 days of the certificate of completion

(4 November 1920). On 14 December, the vendors wrote to the purchaser requiring completion by 31 December on pain of forfeiture of the deposit, stating that "in this respect time is made of the essence of the contract". On 31 December, the purchaser not having completed, the vendors wrote to say that they considered the deposits forfeited. The purchaser then died and his executors sued for return of the instalments (they accepted that the $25,000 deposit must remain with the vendors as forfeited). The vendors, on the other hand, contended that the instalments were in fact additional deposits.

89 At first instance, Sir Walter Shaw CJ found that the instalments were not additional deposits, but that the plaintiff could not recover because he was himself in breach of contract. The matter was eventually appealed to the Privy Council, which found that the instalments were proper instalments and not additional deposits. Whether they could be recovered depended on the terms of the contract. In this regard, their Lordships referred to *Howe v Smith*, which distinguished between a part payment (which would have to be returned) and a deposit (which, being of the nature of a guarantee that the contract should be performed, need not be returned if the other party defaulted). Turning to the present case, their Lordships observed (at 987):

> [The contract] specially distinguishes in terms between deposit and instalments. It then specially deals in clause 13 with what is to happen if the purchaser is in default. The deposit is forfeited, and that is all. It would seem to their Lordships quite clear that the instalments are not to be forfeited. The truth is that the defendants' contention really amounts to a claim to keep the instalments as liquidated damages for the breach of contract for which they are entitled to sue. This was the proceeding unsuccessfully attempted in the case of *Harrison v Holland and Hannen and Cubitts Limited* [[1922] 1 KB 211].

90 Their Lordships thus allowed the appeal and ordered return of the instalments. Aside from the brief remark that retention of the instalments would be akin to liquidated damages, there was no allusion to the law of penalties.

Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89

91 The appellant was the vendor of an estate. It sold the land at a price of $3,775,000 to the respondent by a contract of sale dated 25 May 1962. The contract provided for the initial payment of $377,500 "by way of deposit and part payment", and further stated at cl 5 that if the purchase was not completed "due to any act or default of the purchaser", the vendor was entitled to terminate the agreement, in which case "the sum of $377,500 … shall be forfeited to the vendor to account of damages for breach of contract". The purchaser did not complete. The vendor gave notice on 27 August 1962 that the contract was at an end and purported to forfeit the deposit under the above clause. The purchaser sued for return of the deposit.

92 The purchaser argued that the vendor was not entitled to forfeit the deposit because it had suffered no damage as a result of the purchaser's default. The Privy Council took the view that "the first point to be considered in deciding the case is the construction of the agreement itself" (at 91E). Their Lordships interpreted cl 5 to mean that the vendors were entitled to forfeit the deposit upon the purchaser's failure to complete. The last phrase "to account of damages for breach of contract", while "a little unusual", meant simply that "the ordinary law applying to forfeiture of deposit which defines the consequences of the forfeiture of a deposit shall apply" (at 91H). In other words,

> [T]he contract means unambiguously that in the event of a failure by the purchaser to complete and notice to terminate being given under clause 5, the vendor is at liberty to forfeit the deposit and to claim for any damage which he has suffered over and above the amount of the deposit, after giving credit for the amount of the deposit.

93 The Privy Council also considered whether the penalty rule was applicable. Their Lordships emphasised the difference in pedigree between the

law of deposits and the penalty rule. Lord Hailsham LC (giving the advice of the Board) stated at 91B–F:

> It needs to be pointed out that the law relating to the forfeiture of deposits has always been treated as entirely distinct and separate from the learning introduced into English law by the distinction between liquidated damages based on a genuine pre-estimate of the loss likely to be suffered in event of a breach and a penalty where equity came to the rescue of the obligee on a bond or other contractual provision imposing a penalty under a contract where the penalty exceeded the actual damage. The latter combination of rules derives from the Chancellor's jurisdiction in equity to relieve an obligee from the harshness of the common law. But the law relating to deposits, as Fry L.J. pointed out in *Howe v. Smith*, has a much longer pedigree, being imported from the civil law at least as early as Bracton, and, *assuming the deposit or earnest to be reasonable*, forfeiture of a deposit was not normally the subject of equitable relief. This appears clearly from the judgment of Jessel M.R. in *Wallis v. Smith* at page 258 when he said:
>
> > I come now to the last class of cases. There is a class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the judges have held that this rule (that is the rule relating to relief against penalty) does not apply, and that the bargain of the parties is to be carried out.
>
> It is also implicit in the decision in *Howe v. Smith* which is the source of all modern learning as to the nature of deposits, and it has been followed again and again ever since. In particular Lord Dunedin in *Mayson v. Clouet* establishes the fundamental difference between part payments which are recoverable in certain circumstances and deposits which are not.
>
> [emphasis added]

94 Lord Hailsham LC concluded in an important passage at 94E–G:

> No doubt, as Cotton L.J. says in *Howe v. Smith* at page 95, there may be cases when equity would relieve a purchaser who has paid a deposit and then defaulted, although it is to be said that the last word is probably not yet spoken on this subject. See *Stockloser v. Johnson.* It is also no doubt possible that in a particular contract the parties may use language normally appropriate to deposits properly so-called and even to forfeiture

> which turned out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition of a penalty, *by purporting to render forfeit something which is in truth part payment.* This no doubt *explains why in some cases the irrecoverable nature of a deposit is qualified by the insertion of the adjective "reasonable" before the noun.* But the truth is that a reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage.
>
> [emphasis added]

95 Lord Hailsham LC identified two bases on which a purchaser could seek to recover a sum paid as a deposit. The first, the court's equitable jurisdiction to relieve against forfeiture, was suggested *obiter* in *Stockloser*. In that case, Denning and Somervell LJJ had taken the view that the court had equitable jurisdiction to relieve a buyer from the forfeiture of sums paid as instalments, notwithstanding that the contract expressly provided for forfeiture upon the purchaser's default. Romer LJ, on the other hand, took the view that there was no general right in equity to mend the parties' bargain, and even if there was jurisdiction to relieve from forfeiture, that could only take the form of granting the purchaser more time to perform the contract, as opposed to ordering a return of the money. But Lord Hailsham LC declined to take *Stockloser* further. He relied instead on a second basis, which has since been described as "common law recharacterisation" (Yeo Tiong Min, "Deposits: At the Intersection of Contract, Restitution, Equity and Statute", Sixth Yong Pung How Professorship of Law Lecture, Singapore (16 May 2013) ("*Yeo*") at paras 16–21). This approach starts from the concern that what is described as a "deposit" in a contract may, on investigation, turn out to be an advance or part payment in substance rather than a deposit in the legal sense. The purported deposit is then recharacterised as a part payment to reflect its true character. To guard against forfeiture of such sums, some courts had taken to stating that only "reasonable" deposits could be forfeited. But the true principle was that a sum would only be

a deposit in the legal sense – and thus by definition liable to forfeiture – if it was "reasonable", or customary or moderate, to begin with. A distinction should be drawn between a sum which was described as a deposit but which was "in truth part payment", and "a reasonable deposit". The forfeiture of a reasonable deposit could not be regarded as a penalty. These propositions were resoundingly affirmed twenty years later in *Workers Trust*.

Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd [1993] AC 573

96 The facts were as follows. Workers Trust & Merchant Bank Ltd (a second mortgagee and the appellant) sold certain premises at an auction to Dojap Investments Ltd (the respondent) at a price of 11,500,000 Jamaican dollars. Clause 4 of the contract provided for the payment of a deposit of 25% of the contract price. A deposit of 2,875,000 Jamaican dollars was duly paid by the purchaser to the bank's solicitors. The contract provided that the remainder of the purchase money should be paid within 14 days of the date of the auction. Clause 15 of the contract provided that time should be of the essence of all time limits contained in the contract. Clause 13 of the contract provided that if the purchaser should "fail to observe or comply with any of the foregoing stipulation on his part *his deposit shall be forfeited to the vendor*" [emphasis added], who would be at liberty to resell the property.

97 On the date of completion, the respondent's attorney sent the appellant a letter of undertaking from the Jamaica Citizens Bank Ltd to pay the balance of the purchase price subject to certain conditions. The appellant's attorney rejected this and gave the respondent 24 hours to provide a satisfactory undertaking. The respondent attempted to do so the next day but the appellant again rejected it. Three days later, the appellant wrote to the respondent rescinding the contract and purporting to forfeit the deposit. The respondent

refused to accept this and three days thereafter tendered to the appellant the balance of the purchase price with interest. The appellant returned the cheque the next day. The respondent then commenced proceedings claiming specific performance or, alternatively, relief from forfeiture of the deposit. It subsequently abandoned the claim for specific performance.

98 The matter was appealed to the Privy Council. Lord Browne-Wilkinson, giving the advice of the Board, stated at 578E–F:

> In general, a contractual provision which requires one party in the event of his breach of the contract to pay or forfeit a sum of money to the other party is unlawful as being a penalty, unless such provision can be justified as being a payment of liquidated damages being a genuine pre-estimate of the loss which the innocent party will incur by reason of the breach. *One exception to this general rule is the provision for the payment of a deposit by the purchaser on a contract for the sale of land.* Ancient law has established that the forfeiture of such a deposit (customarily 10 per cent. of the contract price) does not fall within the general rule and can be validly forfeited *even though the amount of the deposit bears no reference to the anticipated loss to the vendor flowing from the breach of contract.*
>
> [emphasis added]

In other words, a deposit was forfeitable notwithstanding that it exceeded the amount of loss actually arising or anticipated to arise from breach.

99 Lord Browne-Wilkinson went on to explain the different pedigrees of the penalty rule and the law of deposits at 578G–579A:

> … The special treatment afforded to such a deposit derives from the ancient custom of providing an earnest for the performance of a contract in the form of giving either some physical token of earnest (such as a ring) or earnest money. The history of the law of deposits can be traced to the Roman law of arra, and possibly further back still: see *Howe v. Smith* … 101–102, *per* Fry L.J. Ever since the decision in *Howe v. Smith*, the nature of such a deposit has been settled in English law. Even in the absence of express contractual provision, it is an earnest for the performance of the contract: in the event of completion of the

> contract the deposit is applicable towards payment of the purchase price; *in the event of the purchaser's failure to complete in accordance with the terms of the contract, the deposit is forfeit, equity having no power to relieve against such forfeiture*.
>
> [emphasis added]

100 Nevertheless, the Privy Council noted that the parties' designation of a sum as a "deposit" could not be conclusive. Lord Browne-Wilkinson stated at 579A–B:

> [T]he special treatment afforded to deposits is plainly capable of being abused if the parties to a contract, by attaching the label "deposit" to any penalty, could escape the general rule which renders penalties unenforceable.

He then cited Denning LJ's remarks in *Stockloser* at 491:

> [S]uppose that a vendor of property, in lieu of the usual 10 per cent deposit, stipulates for an initial payment of 50 per cent of the price as a deposit and part payment; and later, when the purchaser fails to complete, the vendor resells the property at a profit and in addition claims to forfeit the 50 per cent deposit. Surely the court will relieve against the forfeiture. The vendor cannot forestall this equity by describing an extravagant sum as a deposit, any more than he can recover a penalty by calling it liquidated damages.

101 This echoed the concern of the Privy Council in *Linggi* (see [94] above) that the contracting parties could escape the penalty rule by attaching the label "deposit" to any sum, no matter how extortionate. This naturally invited the question of what test a court should employ to determine if the sum was truly a deposit or not. In this regard, Lord Browne-Wilkinson cited Lord Hailsham LC's *dictum* on reasonableness in *Linggi* (see [94] above). He continued at 579G–H:

> In the view of their Lordships these passages accurately reflect the law. It is not possible for the parties to attach the incidents of a deposit to the payment of a sum of money unless such sum is reasonable as earnest money. The question therefore is whether or not the deposit of 25 per cent. in this case was

> reasonable as being line with the traditional concept of earnest money or was in truth a penalty intended to act in terrorem.

102 At first instance, Zacca CJ had tested the "reasonableness" of the sum against the common practice of Jamaican banks to demand deposits from 15% to 50% when auctioning property. He held that since the 25% deposit fell within this range, it was reasonable. The Privy Council rejected this reasoning at 580A–B: "To allow the test of reasonableness to depend upon the practice of one class of vendor, which exercises considerable financial muscle, would be to allow them to evade the law against penalties by adopting practices of their own."

103 Their Lordships took the view that the starting point was that a deposit was customarily 10%, and a vendor who sought a larger amount "must show special circumstances which justify such a deposit" (at 580C).

104 A 10% deposit used to be the norm in Jamaica. However, the Transfer Tax Act 1971 had introduced a 7.5% transfer tax on a transfer of land on sale. This tax had to be paid within 30 days of the date of contract, failing which interest would be payable by the vendor. In practice, vendors increased the contractual deposit to at least 17.5% of the purchase price to ensure that the transfer tax would be promptly paid. That was why the bank had imposed a 25% deposit in this case. However, the Privy Council noted that there was strictly no need for the bank to insist on a deposit inclusive of the transfer tax in this case because completion was supposed to take place within 14 days of the contract and before payment of the transfer tax was due. In any event, that was an illegitimate basis to fix the deposit (at 581C):

> [F]ar from the amount of the deposit having been fixed upon as a reasonable amount of earnest, the amount was substantially influenced by fiscal considerations having nothing to do with encouragement to perform the contract.

105 The appellant also submitted that the amount of the deposit was fixed by reference to the payments which would have had to be made on completion, *ie*, tax, stamp duty, auction costs and auctioneer's commission. But the amount of deposit far exceeded the maximum out-of-pocket expenses which would have attended completion. The bank therefore "[fell] far short of showing that it was reasonable to stipulate for a forfeitable deposit of 25 per cent" (at 581E).

106 In the circumstances, the Privy Council took the view that the sum of 2,875,000 Jamaican dollars was not a "true deposit by way of earnest" and the provision for its forfeiture was "a plain penalty" (at 582D). The Privy Council ordered repayment of the whole sum with interest.

107 The following propositions emerge from their Lordships' analysis:

(a) Whether a sum required to be paid as a contractual deposit is subject to the penalty rule depends on whether it is properly characterised as a true deposit or not.

(b) To determine this, the court must consider whether the quantum of the sum is "reasonable" as an earnest in the circumstances. In other words, is the deposit customary or moderate? The former may be determined with reference to the standard or customary rate for deposits for that particular type of transaction, with the onus on the vendor to show that there are special circumstances justifying a deposit higher than that rate. If the sum is reasonable as an earnest, it is a true deposit and hence forfeitable. That the deposit does not correspond to the anticipated loss or actual loss is not relevant.

(c) If the sum is not reasonable as an earnest, it is not a true deposit. In that case, forfeiture is subject to the penalty rule. If it turns out that

> the sum is a penalty, then the vendor is not entitled to any part of it (not even such part as would have been reasonable as an earnest). He can still sue for damages for actual loss in the usual way. The court will typically order return of the sum less any damage actually suffered, or (as was the case in *Workers Trust*) a substantial amount of the sum, leaving a fund out of which the vendor's damages (if any) might be satisfied.

108 The "reasonableness" test appears to have been implicitly acknowledged in the later Privy Council decision of *Union Eagle Ltd v Golden Achievement Ltd* [1997] UKPC 5, in which Lord Hoffmann (giving the judgment of the Board) stated at [8]:

> Mr. Lyndon-Stanford Q.C.'s third point was that the purchaser was in any event entitled to the return of his deposit because it was not a genuine pre-estimate of damage. *He accepted that, in the normal case of a reasonable deposit, no inquiry is made as to whether it is a pre-estimate of damage or not: [Howe v Smith; Workers Trust].* But he said that this deposit was not franked under that rule because clause 12 described it "as and for liquidated damages (and not a penalty)". Their Lordships do not think that these words deprived the deposit of its character as a deposit, an earnest of performance, which was liable to forfeiture on rescission.
>
> [emphasis added]

109 The "reasonableness" test was also adopted in *Triangle Auto*, in which the High Court stated at [9] that the vendor may forfeit a deposit "provided the amount of deposit is customary or moderate" (cited with approval in *Lee Chee Wei* at [83]) and at [12] that "[i]f the deposit amount is excessive it will also be caught by the law of penalty". *Triangle Auto* was in turn cited in *Goh Liang Yong Jonah and another v Heng Kuek Hoy and another* [2013] SGHC 203 at [35] as authority for the proposition that a sum has to be reasonable in order to take effect as a deposit.

Polyset Ltd v Panhandat Ltd [2002] HKCFA 15

110 I also found the analysis in the Hong Kong Court of Final Appeal case of *Polyset* helpful in coming to my view. That case concerned a contract for the sale of five shop premises for $115m. The contract was dated 23 May 1997 and completion was to take place on 2 March 1998. The contract provided for four successive deposits: (1) a payment of $11.5m "as deposit and part payment of the purchase price" upon signing of the agreement, (2) a further $5.75m "as further deposit and part payment" by 2 June 1997, (3) a further $11.5m "as further deposit and in part payment" by 3 July 1997, and (4) a further $11.5m "as further deposit and part payment" by 4 August 1997. These four deposits amounted to a total of $40.25m (35% of the purchase price); the balance was to be paid on completion. Clause 26 of the contract entitled the vendor to forfeit the whole $40.25m in the case of the purchaser's breach. The purchaser refused to complete, as a result of which the vendor suffered loss of $33m. The purchaser sued for return of $7.25m, *ie*, the difference between the deposits and the vendor's actual loss.

111 The Court of Appeal took the view that the law relating to the forfeiture of contractual deposits fell within the same broad principles as the penalty rule. It accepted the vendor's contention that the sum of $40.25m was reasonable in that it represented a genuine pre-estimate of loss. There was a long completion period of nine months and the property market was then very volatile, having risen dramatically in the months leading up to the agreement. These two factors meant there was "an unusually high risk of sharp market correction" in the period pending completion (*Polyset* at [24]).

112 The Court of Final Appeal unanimously agreed that the purchaser had wrongfully repudiated the contract. However, it held by a 4–1 majority (Litton

NPJ dissenting) that the vendor was *not* entitled to forfeit the deposit of $40.25m, because it was not reasonable. The majority, disagreeing with the Court of Appeal, observed that deposits and liquidated damages served different purposes and had different origins (see [7]–[9], [34]–[35], [68]–[69] and [76]). *Linggi* and *Workers Trust* were cited as authorities for the proposition that a true deposit must be reasonable as earnest money (see [22], [39]–[41] and [88]). A so-called deposit which was unreasonable as an earnest was not a true deposit but a part payment, which was generally recoverable by the purchaser (see [17] and [57]). Importantly, the test of reasonableness was different from the test of a genuine pre-estimate of loss and the Court of Appeal had erred in eliding the two (see [19] and [85]).

113 Applying these principles to the facts of the case, the majority took the view that the sum of $40.25m was unreasonable and not a true deposit. The starting point was that a deposit representing 10% of the purchase price of the land was conventional and exceptional circumstances had to be shown to justify a deposit higher than that (see [11]–[13] and [89]). This was a "question of degree" (at [107] *per* Ribeiro PJ). The factors raised by the vendor in this case, while they might justify the vendor demanding a larger *quid pro quo* for keeping his property off the market for a prolonged period in a volatile market, were insufficient to justify a deposit 3½ times the conventional percentage (see [25], [43] and [107]).

Cavendish Square Holding BV v Makdessi and another appeal [2016] AC 1172

114 As I noted above, *Cavendish* has recast the penalty rule in the UK. Their Lordships expressed dissatisfaction with the conventional formulation of the penalty rule (which continues to be law in Singapore), which is premised on the compensatory nature of the clause in question. Lord Mance JSC, for example,

stated at [145] that "commercial interests may justify the imposition on a breach of contract of a financial burden which cannot either be related directly to loss caused by the breach or justified by reference to the impossibility of assessing such loss". Lord Neuberger of Abbotsbury PSC and Lord Sumption JSC (with whom Lord Carnwath JSC agreed) likewise thought that a "damages clause may properly be justified by some other consideration than the desire to recover compensation for a breach" (at [28]). The test for a penalty, as stated in *Cavendish*, is whether the provision gives rise to a secondary obligation which 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 obligations. Since the legitimate interest in question is not limited to compensating the innocent party for loss arising from breach, the fact that a provision does not provide for a pre-estimate of loss, or that it is deterrent, does not necessarily mean that it is penal (see, *eg*, [28], [31]–[32] and [285]).

115 Lord Hodge JSC undertook the most in-depth analysis of whether the penalty rule applies to deposits. His Lordship started by citing *Howe v Smith* as authority that a non-refundable deposit is a guarantee by a purchaser that the contract will be performed (at [234]). Such a deposit would be retained by the vendor in the event the purchaser broke the contract. He then stated:

> Where the deposit was fixed *at a reasonable figure*, its forfeiture on breach of contract does not bring into play the rule against penalties, its purpose *not being related* to any loss that the vendor may have suffered and that he may seek to recover in damages: *Wallis v Smith* (1882) 21 ChD 243, 258, Jessel MR.
>
> [emphasis added]

116 His Lordship referred to *Linggi* and *Workers Trust*, which "made the validity of a deposit conditional on whether it was 'reasonable as earnest money'" (at [235]). He then referred to *Polyset* at [236]:

> In [*Polyset*] the Hong Kong Court of Final Appeal carried out a thorough review of the law relating to deposits. The court considered the cases which I have mentioned and concluded that the court would intervene to prevent forfeiture where parties abused the concept of deposit. The forfeiture of a deposit would be enforced only if it were "reasonable as earnest money". Where the deposit exceeded the conventional amount, the court would permit forfeiture only if the party seeking to forfeit could show that exceptional circumstances justified the higher amount … Because Bokhary PJ and Ribeiro PJ considered that the test of "genuine pre-estimate of loss" applied in the rule against penalties when considering whether a sum was liquidated damages, they did not view the "reasonable as earnest money" test as part of the law of penalties.

Finally, his Lordship concluded at [238] that in English law:

> … (a) a deposit which is not reasonable as earnest money may be challenged as a penalty and (b) where the stipulated deposit exceeds the percentage set by long-established practice the vendor must show special circumstances to justify that deposit if it is not to be treated as an unenforceable penalty.

117 Lord Hodge's analysis fits squarely with the analysis in *Workers Trust* and lends further support to the propositions I set out at [107] above.

118 On the other hand, Lord Neuberger of Abbotsbury PSC and Lord Sumption JSC (with both of whom Lord Carnwath JSC agreed) did not discuss the concept of a reasonable earnest in *Workers Trust* but nevertheless suggested that the penalty rule could apply to deposits (at [16]):

> … [T]he fact that a sum is paid over by one party to the other party as a deposit, in the sense of some sort of surety for the first party's contractual performance, does not prevent the sum being a penalty, if the second party in due course forfeits the deposit in accordance with the contractual terms, following the first party's breach of contract: see the Privy Council decisions in *Comr of Public Works v Hills* [1906] AC 368, 375–376, and *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573.

119 That said, they acknowledged that a contrary view had been taken in *Else (1982) Ltd v Parkland Holdings Ltd* [1994] 1 BCLC 130 ("*Else*") and *Stockloser*. Their Lordships also alluded to the possibility of relief from forfeiture, and acknowledged that it was not clear "whether a provision is capable of being both a penalty clause and a forfeiture clause", although they thought it possible "in some circumstances" (at [18]). In any event, their Lordships acknowledged that it was "inappropriate to consider [this] issue in any detail" as they had heard "very little argument on forfeitures" (at [18]).

120 Their Lordships did not discuss the concept of a reasonable earnest and made only passing reference to *Workers Trust*. Whereas Lord Hodge JSC took the view that the penalty rule would not apply to a true deposit (*ie*, a reasonable earnest), Lord Neuberger of Abbotsbury PSC and Lord Sumption JSC did not distinguish between true and so-called deposits. As neither of the appeals in *Cavendish* involved a deposit, these views were strictly *obiter*.

121 To the extent that their Lordships' opinion suggests that the penalty rule applies to the forfeiture of true deposits – which is debatable – I do not consider that to be persuasive in the Singapore context. The penalty rule which prevails in Singapore is premised on the sole purpose of the clause being to compensate for breach of contract. Since the purpose of a true deposit is not to compensate for breach of contract, it falls outside this paradigm: see [124]–[128] below. *Cavendish*, by contrast, recognises that a liquidated damages clause need not necessarily be just compensatory. Contractual purposes or objectives other than compensation – such as those which underlie a true deposit – may qualify as "legitimate interests" that can be protected and which do not fall foul of the penalty rule. It may be said that the vendor, by requiring the payment of a true deposit, seeks to protect his legitimate interest in securing performance of the contract. Thus, while the *Cavendish* reformulation of the penalty rule might

conceptually apply to true deposits, the penalty rule in Singapore would not, simply because the starting points are quite different. Any suggestion in *Cavendish* that the penalty rule can apply to true deposits ought to therefore be read in light of its broader conception of the rule.

122 Moreover, there is some debate about whether the *Cavendish* framework can in fact accommodate deposits. Carmine Conte, in his article "The Penalty Rule Revisited" (2016) 132 LQR 382, argues that the forfeiture of a deposit does not involve a "detriment" and therefore cannot fall within the *Cavendish* definition of a penalty. Whether or not he is correct, I noted that even if the *Cavendish* approach were to be adopted in Singapore and applied to deposits, the judicial treatment of deposits would remain largely the same as under the *Workers Trust* approach. Both approaches recognise that the forfeiture of a deposit is justified by reference to a contractual purpose other than compensation for breach. The question whether a so-called deposit is reasonable as an earnest requires the court to consider whether the sum is proportionate to the purpose which an earnest is intended to serve. The very same considerations would come into play in an application of the *Cavendish* test: a sum which was out of all proportion to the "legitimate interest" served by a deposit would constitute a penalty. However, simply because the outcome might not be different does not mean that it would be correct to conclude that the penalty rule applies to deposits. The philosophical underpinnings of the penalty rule must be re-aligned before that conclusion can be arrived at.

My analysis

The penalty rule does not apply to a true deposit

123 Having considered the submissions of the parties and the authorities I have mentioned (amongst others), I formed the view that the penalty rule does

not apply to a true deposit. As noted earlier, the law of deposits and the law of penalties have different legal geneses (see [79], [93] and [99] above). More importantly, a true deposit does not fall within the paradigm of liquidated damages as it serves a different purpose.

124 A liquidated damages clause is remedial, in the sense that it predetermines the damages to be paid in the event of breach. Its purpose is to "avoid difficulties relating to proof of actual loss" (*Triangle Auto* at [14]). By contrast, a deposit serves an important signalling function. It shows the vendor that the purchaser is serious about the purchase and will not leave him high and dry (see [49] above). It is a sign of good faith and sieves out frivolous or fickle purchasers. At the same time, it motivates the purchaser to follow through with the contract. It is hence irrelevant whether the deposit is proportionate to the vendor's losses upon breach of contract, since the purpose of the deposit is not to compensate for damage. The mechanism for such compensation is the claim for damages (see *Polyset* at [68]). To borrow Ribeiro PJ's remarks in *Polyset* at [69]:

> The focus of a deposit's operation is on the period elapsing between its payment and completion of the contract's performance. In entering into the contract, the vendor agrees to take his property off the market and to commit himself to the purchaser on the latter's promise that the acquisition will duly be completed and the vendor duly paid at the completion date. The forfeitable deposit is tendered to encourage the vendor to make the necessary commercial act of faith. It is … the *quid pro quo* for the vendor depriving himself of the ability to deal commercially with the property, and so of making any potentially greater profits, while awaiting completion. Unlike the vendor, the purchaser is able to profit by re-selling the property during this period, in reliance on the contract. …

125 By contrast, liquidated damages are determined with a view to breach. They "focus on the loss considered likely to result from foreseeable breaches and aim to quantify in advance the damages payable" (*Polyset* at [76]), thereby

avoiding difficulties in proof of loss and potential under-compensation (see *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 32nd ed, 2015) ("*Chitty*") at para 26–179). It is for this reason that liquidated damages must be a genuine pre-estimate of the anticipated loss in the event of breach. The efficacy of a deposit, on the other hand, is not assessed with regard to such considerations.

126 In fact, applying the penalty rule would nullify the deposit in many contracts in which one party's breach does not cause or is not expected to cause financial loss to the other. The sale of property in a rising market is one example. Another is the sale of artwork: even if the buyer fails to complete, the vendor may well profit by subsequently selling it to another at a higher price. But this ignores the vendor's intentions: the vendor chose to sell *at that point in time*, and the deposit was the means by which he discerned a serious buyer. As a result of non-completion the vendor's intention has been defeated, and he may have expended time and effort working towards completion for nothing. He should be entitled to retain the deposit which was paid to assure him of the expectation of sale.

127 Since liquidated damages serve to compensate for breach, they can give rise to a situation where it would be unconscionable to saddle one party with liquidated damages far exceeding the other's loss, particularly when there is inequality of bargaining power. Public policy therefore justifies ameliorating or departing from the parties' bargain as not to do so would be oppressive. A deposit, on the other hand, is usually paid at the commencement of contract and is deliberately calculated to dissuade parties who are unable to fulfil the contractual obligations from undertaking them in the first place. It sieves out the buyer who is not earnest. By paying the deposit, the buyer is demonstrating to the seller his commitment to perform the contract. There is thus nothing

unconscionable about forfeiting the deposit upon breach (provided it is customary or moderate), notwithstanding its disproportion to the vendor's loss. Forfeiture is not punitive. The policy considerations that apply to liquidated damages do not apply. To the contrary, disallowing forfeiture would enable the depositor, who has essentially communicated his ability to fulfil the contractual obligations by paying the deposit, to escape from the bargain. He has done the very thing which the deposit was intended to safeguard against, and should not be allowed to "take advantage of his own wrong" (*Howe v Smith* at 98, cited in *Lee Chee Wei* at [84]).

128 For these reasons, the law treats deposits and liquidated damages differently in one important respect. A forfeiture clause does not preclude the vendor from claiming damages in respect of any loss suffered over and above the value of the forfeited deposit, whereas a liquidated damages clause does. This is precisely because liquidated damages serve as a pre-agreed quantification of the damages to which the vendor is entitled in the event of the purchaser's breach. Deposits, on the other hand, are not compensatory. If it were law that only a deposit amounting to a genuine pre-estimate of loss could be forfeited, then forfeiture of such a deposit ought logically to preclude a claim for damages for actual loss. But that is not the case. The vendor is entitled to sue separately for damages after giving credit for the amount of the deposit (see, *eg*, *Triangle Auto* at [9], *Linggi* at 91H and *Polyset* at [77]).

129 For these reasons, I agree fully with Bokhary PJ's analysis in *Polyset* at [10]:

> Provided that what the vendor takes as a deposit is within the bounds of an earnest of performance, it will constitute a true deposit. As such, it will be forfeited to the vendor if the purchaser wrongfully fails to perform his part of the bargain. This is so even if the vendor's loss is less than the deposit. *It is so even if the vendor suffers no loss at all. Indeed, it is so even if*

> *the vendor makes a profit by selling the property to someone else at a higher price. If the vendor's loss exceeds the deposit, he is of course entitled to recover the full extent of his loss, giving credit for the deposit forfeited to him.*
>
> [emphasis added]

130 I also agree that the concern expressed by Denning LJ in *Stockloser* and by the Privy Council in *Linggi* and *Workers Trust* (see [94] and [100]–[101] above) is a valid one. In the hope of obtaining a windfall, a vendor might abuse the concept of a deposit to "secure the ability to forfeit amounts exceeding anything which may reasonably be required by way of an earnest or guarantee of performance or as compensation for the vendor's removal of the property from the market pending completion" (*Polyset* at [81]). I therefore agree that deposits are only exempt from the penalty rule insofar as they are true deposits, *ie*, deposits which are reasonable as earnest money.

131 Of course, if the *Cavendish* reformulation of the penalty rule does become part of the law in Singapore, the issue may need to be re-visited for the reasons cited earlier. Even then, difficult questions remain. I shall say no more.

The penalty rule applies to part payments

132 It follows from the approach in *Linggi* and *Workers Trust* that the penalty rule could apply to an attempt to forfeit a so-called deposit which is in substance a part payment because it far exceeds what would be reasonably necessary to serve the function of earnest money.

133 Whether the penalty rule can apply to part payments has been a matter of some controversy in the UK. On one hand, it has been said that the penalty rule cannot apply to the forfeiture of sums which are payable prior to, and not upon, breach (see, *eg*, *Chitty* at paras 26–195 and 26–208; *Stockloser* at 489 *per*

Denning LJ; *Amble Assets LLP (in administration) and another v Longbenton Foods Ltd (in administration)* [2011] EWHC 1943 (Ch) at [75]; *Cadogan Petroleum Holdings Ltd v Global Process Systems LLC* [2013] EWHC 214 (Comm) at [32] and [34]). On the other hand, the distinction between sums that are payable prior to and upon breach has drawn poignant criticism. The English Law Commission, writing in 1975, was "not persuaded" that the fact that a deposit (unlike liquidated damages) was paid or due prior to breach of contract could "justify the radically different treatment which the law afford[ed] to the two concepts" (United Kingdom, The Law Commission, *Penalty Clauses and Forfeiture of Monies Paid* (Working Paper No 61, 1975) at para 59). The Scottish Law Commission likewise remarked that "it should make no difference whether a penalty takes the form of a payment of a sum or of the forfeiture of a sum already paid" (Scotland, Scottish Law Commission, *Discussion Paper on Penalty Clauses* (Discussion Paper No 103, 1997) at para 5.3). Similarly, it has been stated in *Treitel: The Law of Contract* (Edwin Peel gen ed) (Sweet & Maxwell, 14th ed, 2015) at para 20–148 that the penalty rule can apply to deposits notwithstanding that they are payable before breach. Indeed there is some authority for applying the penalty rule to sums payable before breach (see the Privy Council's decision in *Commissioner of Public Works v Hills* [1906] AC 368). There is also authority for applying the penalty rule to clauses entitling the innocent party to withhold sums payable under contract to the party in breach (see *Cavendish* at [70]–[73] and *Chitty* at 26-180). This is arguably analogous to the forfeiture of part payments.

134 In my view, the fact that part payments are payable prior to breach is insufficient reason to exclude them from the scope of the penalty rule. The forfeiture of a part payment and the payment of liquidated damages are both contingent upon breach of contract. Although the former involves the retention

or withholding of a sum already paid while the latter involves the transfer of a sum yet unpaid, both arise as a secondary obligation or entitlement in the event of a breach of primary obligation to perform the contract. That is very much in the nature of a liquidated damages provision, which attracts the application of the penalty rule. I took guidance from the common-sense approach of Lord Neuberger of Abbotsbury PSC and Lord Sumption JSC, who cautioned that "the classification of terms for the purpose of the penalty rule depends on the substance of the term and not on its form or on the label which the parties have chosen to attach to it" (*Cavendish* at [15]). Their Lordships, as well as Lord Hodge JSC, did not consider the distinction between sums payable prior to breach and sums payable on breach to be sufficient basis to disapply the penalty rule. Lord Hailsham LC took the same view in *Linggi*: see [94] above. The local authorities which I have discussed above – *Indian Overseas Bank (HC)*, *Indian Overseas Bank (CA)*, *Hua Khian Co*, *Zalco* and *Triangle Auto* – also suggest that our courts have not conventionally regarded that distinction as a barrier to the application of the penalty rule. I agreed.

135 It has been said that the penalty rule does not apply to the retention of instalments because they become the absolute property of the vendor when paid (see *Else* at 146a–b *per* Hoffmann LJ and *Stockloser* at 489 *per* Denning LJ). On the other hand, it has also been said that title to the part payment does not vest absolutely but is "conditional upon the subsequent completion of the contract" (*McDonald v Dennys Lascelles Ltd* [1933] HCA 25 ("*McDonald*") *per* Dixon J). I have reservations about the former view but for the moment shall say no more. In any event, I did not consider that it provides normative justification to exclude the penalty rule. In my view, it is the difference in purpose between deposits and liquidated damages (rather than when the sum is

payable or whether title vests in the vendor) which justifies applying the penalty rule to the latter but not the former.

The characterisation of the deposit is only significant where there is no express forfeiture clause

136 It should be noted that recharacterising the sum as a part payment does not automatically give the purchaser a right in law to recover the payment if the contract expressly provides for forfeiture. Where there is no express forfeiture clause, the vendor relies on the nature of the payment *qua* deposit to persuade the court to infer a term that the payment will be forfeited upon the purchaser's default. (The vendor's entitlement to forfeiture is inherent in the nature of a deposit: see [45] and [49]–[50] above.) If the court, applying the test of reasonableness, finds that the sum is not a true deposit but a part payment, then there can be no such inference and the vendor is not contractually entitled to forfeit the payment. The purchaser can sue for return of the sum in unjust enrichment.

137 That was the case in *Dies and another v British and International Mining and Finance Corporation, Limited* [1939] KB 724, which concerned a contract for the sale of rifles and ammunition for a total sum of 270,000*l*. The contract contained no forfeiture clause. The purchaser had paid 100,000*l*. under the contract but did not complete payment and did not take delivery of any rifles or ammunition. Stable J observed at 736 that this was not a situation which either party had foreseen, and so the matter had to be decided:

> … not on any express or implied term contained in the contract, but on the principle of law applicable where the contract itself is silent, except in so far as the intention of the parties can be ascertained from the designation used to indicate the nature of the sum that was paid.

Stable J was referred to *Benjamin on Sale* (A R Kennedy, ed) (Sweet & Maxwell, 7th Ed, 1931) at p 989, which stated: "[I]n ordinary circumstances, unless the contract otherwise provides, the seller, on rescission following the buyer's default, becomes liable to repay the part of the price paid." He went on to say:

> If this passage accurately states the law *as, in my judgment, it does where the language used in a contract is neutral*, the general rule is that the law confers on the purchaser the right to recover his money, and that *to enable the seller to keep it he must be able to point to some language in the contract from which the inference to be drawn is that the parties intended and agreed that he should*.
>
> [emphasis added]

Stable J therefore found that the plaintiffs had a right of action for the recovery of the 100,000*l*.

138 Similarly, in *McDonald* (*supra* at [135]), the court considered a contract for the resale of land at a price of £23,462. This sum was payable in five tranches: a deposit of £6,000, three annual payments of £1,000 on 24 January 1928–1930, and a final payment of £14,462 on 24 January 1931. The purchasers failed to pay the £1,000 instalment due on 24 January 1930 as well as the balance of the purchase price on 24 January 1931. Dixon J had this to say:

> In the present case the contract of resale contains no provision for the retention or forfeiture of the instalments. If, therefore, the instalment originally due on 24th January, 1930, had been paid by the purchasers to the vendors they would, in my opinion, have been entitled to recover it from the vendors. *The right so to recover it is legal and not equitable. It arises out of the nature of the contract itself.* This would be so even if the [resale] contract was rescinded by the vendors upon the purchasers' default. If in the present case the purchasers' claim to rescind this contract were justified, an instalment already paid would have been recoverable as on an ordinary failure of consideration.
>
> [emphasis added]

139 The portion in italics was approved in *Polyset* at [59]. The purchaser's right to recover the part payments in this scenario has been explained on at least two bases: first, that advance payments are impliedly conditional on the contract being completed, and secondly, that the purchaser acquires a restitutionary claim upon a total failure of consideration where the contract is terminated before the vendor has performed any part of the contractual duties in respect of which payment was made (*Polyset* at [58] and [60]). The purchaser can recover the part payment without having to invoke the penalty rule.

140 On the other hand, where the contract expressly provides for forfeiture, the vendor's right to forfeit the sum arises directly from the terms of the contract. If the sum is a true deposit, the right to forfeit may be exercised, subject to relief against forfeiture where available (in this regard, see Lord Browne-Wilkinson's remarks in *Workers Trust* at 579A and 582C, and *Pacific Rim Investments Pte Ltd v Lam Seng Tiong and another* [1995] 2 SLR(R) 643 at [39]–[62]). However, the converse does not follow. If the court finds that the sum is not reasonable as an earnest and therefore not a true deposit, that does not necessarily make the sum recoverable; there is still a contractual right of forfeiture which must be considered. The clause must be treated like any other clause providing for the forfeiture of part payments or instalments. To prevent forfeiture, the plaintiff must invoke the penalty rule.

141 The distinction that I have drawn between contracts which expressly provide for forfeiture and those which do not was also recognised by Denning LJ in *Stockloser* at 489. He distinguished between two scenarios. Where there is no forfeiture clause, the buyer is "entitled to recover his money *by action at law*, subject to a cross-claim by the seller for damages" [emphasis added]. But where there is a forfeiture clause or the money is expressly paid as a deposit (which is "equivalent to a forfeiture clause"), the buyer "cannot recover the

money at law at all" subject, in Denning LJ's view, to the equitable jurisdiction to relieve from forfeiture. The distinction was also made by the Court of Appeal of Singapore in *Lim Lay Bee (CA)* (*supra* at [85]) at [25].

142 The foregoing analysis means that recharacterising the so-called deposit as a part payment will only give the purchaser a right in law to recover the payment in the absence of an express forfeiture clause. This mitigates, to some extent, *Yeo*'s concern that it expunges or rewrites terms of the contract (see *Yeo* at para 41).

The proper framework for forfeiture of a contractual deposit

143 Drawing these threads together, in my view, the proper framework to apply to a case in which the plaintiff sues for the return of a deposit is as follows.

(a) The first question must be whether, on a proper construction of the contract, the vendor is contractually entitled to forfeit the so-called deposit. This will involve consideration of the parties' intentions and the terms of the contract (*Lee Chee Wei* at [85]), and may be express or inferred (*Zalco* at [40]; *The Blankenstein* at 450H). The character of the payment depends on the parties' intentions, to be ascertained by construing their agreement (*Mayson* at 985). In particular, if the parties intended the payment to be a deposit, it may arguably be said that they have agreed that it is to be forfeited in the event that the payer fails to complete (*Polyset* at [66]). The converse applies to a part payment.

(b) If the sum was never intended to be forfeitable on a proper construction of the contract, it must be returned notwithstanding breach (see [139] above). This is subject to a right of set-off for damages.

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

(d) Reasonableness involves a different enquiry from whether the sum is a genuine pre-estimate of loss. The focus is on whether the deposit is "so large that it cannot be objectively justified by reference to the functions which such a deposit properly serves" (*Polyset* at [165]). The customary or conventional deposit is only a starting point and "does not mean that a larger deposit can never be regarded as a true deposit" (*Polyset* at [13]). If the deposit is higher than customary, it is up to the vendor to show "special circumstances" to justify the amount (see [103] above). It should be noted that a 10% deposit, while conventional or customary in the context of sales of land, may not be the custom or convention in other types of contracts. There may also be some contracts of which it cannot be said that any particular percentage is customary or conventional as a deposit. Whether the contract is of such a type is for the court to decide, having regard to the parties' evidence and submissions. Where the contract is of a type in relation to which a customary or conventional deposit may be discerned, the approach set out in *Polyset* at [90] is useful guidance. Ultimately, the question of reasonableness is one for the court to assess on the facts of each case. It may have regard to any factors which are relevant to the effectiveness of the earnest, including any history of dealing between the parties, their financial means, and the commitment required on the vendor's part in keeping the subject-matter of the sale "off the market" for the duration of the sale (see *Polyset* at [107]).

(e) If the sum is reasonable as an earnest, it is a true deposit. It can be forfeited regardless of the actual loss occasioned to the vendor. The forfeiture of a true deposit cannot be regarded as a penalty, notwithstanding that it is disproportionate or has no reference to the vendor's loss. The purchaser's only option to prevent forfeiture is to invoke the court's equitable jurisdiction to relieve against forfeiture, assuming it is available. In this regard, it should be noted that relief against forfeiture has traditionally been available only to the forfeiture of interests in real property. Whether it is available in the context of forfeiture of deposits is a matter for another time.

(f) On the other hand, if the sum is not reasonable as an earnest, it is not a true deposit. It ought to then be recharacterised as a part payment and the right to forfeit tested against the penalty rule.

144 In this case, the plaintiff did not plead or submit that the court should exercise its equitable jurisdiction to relieve against the forfeiture of the $300,000. In the circumstances, there was no need for me to consider whether relief against forfeiture was available.

Application to the present suit

145 In this case, there was no express agreement to forfeit the $300,000 in the event of the plaintiff's breach. The defendants relied solely on the characterisation of the payment of $300,000 as a "deposit" to justify forfeiture. I determined that it was indeed reasonable for the defendants to stipulate a sum of $300,000 as a deposit. I recognised that $300,000 was about 36% of the purchase price of $828,000, an even higher percentage than in *Workers Trust* (25%) and *Polyset* (35%) where the deposits were found to be unreasonable. However, the sums in those cases were much higher in absolute terms

($2,875,000 in *Workers Trust* and $40.25m in *Polyset*). More importantly, the plaintiff had already delayed payment multiple times when he proposed varying payment into three tranches. Although he claimed to be serious about the purchase, appeared to be eager to complete, and said that he would "definitely" make payment within a few days of 8 July, he did not even keep to the extended timelines that he himself suggested (see [12] above). This understandably caused the defendants considerable anxiety, since they had financial obligations in relation to other investments. They also had, in the meantime, to keep CDX and the office property off the market longer than was originally agreed, for what turned out to be an inordinately long time – more than a year – at a time when the property market was quickly rising (see [6] and [15] above). It was therefore, in my view, reasonable for them to stipulate a deposit of $300,000 to assure themselves of the plaintiff's earnestness and commitment and to encourage performance on his part.

Conclusion

146 I therefore found that the $300,000 was a true deposit, and not a part payment. The penalty rule accordingly did not apply and the defendants were entitled to forfeit the sum. I thus dismissed the suit with costs to the defendants.

Kannan Ramesh
Judge

Lee Chiat Jin Jeffrey and Yap Ee Lin Felicia (Lee Chai & Boon LLP) for the plaintiff;
Tan Teng Muan and Loh Li Qin (Mallal & Namazie) for the defendants.