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

[2023] SGHC(A) 15

Civil Appeal No 23 of 2022

Between

(1) Liu Shu Ming
(2) Tong Xin

… *Appellants*

And

Koh Chew Chee

… *Respondent*

Summons No 28 of 2022

Between

(1) Liu Shu Ming
(2) Tong Xin

… *Applicants*

And

Koh Chew Chee

… *Respondent*

In the matter of Suit No 143 of 2020

Between

Koh Chew Chee

… *Plaintiff*

And

(1) Liu Shu Ming
(2) Tong Xin

… *Defendants*

JUDGMENT

[Contract — Breach]
[Contract — Remedies — Damages — Measure of damages]
[Damages — Measure of damages — Contract — Reliance damages]

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This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Liu Shu Ming and another
v
Koh Chew Chee and another matter

[2023] SGHC(A) 15

Appellate Division of the High Court — Civil Appeal No 23 of 2022 and Summons No 28 of 2022
Belinda Ang Saw Ean JCA, Woo Bih Li JAD and Hoo Sheau Peng J
29 September, 1 November 2022

28 April 2023 Judgment reserved.

Woo Bih Li JAD (delivering the judgment of the court):

Introduction

1 He who asserts must prove. This is one of the golden rules of litigation. The present appeal against the decision of a judge of the General Division of the High Court (the "Judge") in *Koh Chew Chee v Liu Shu Ming and another* [2022] SGHC 25 (the "Judgment") is a salutary reminder of the consequences of failing to adduce the necessary evidence to prove one's case.

The facts and the Judgment below

Background and the deal struck between the parties

2 The first and second appellants are Liu Shu Ming and Tong Xin ("Mr Liu" and "Ms Tong" respectively and collectively, the "Appellants"). They

were involved in the "condotel" business where they provided condominium units for short-term accommodation. They ran this business through a company called MaxStays (Philippines) Inc ("**MaxStays**") in the Philippines. In 2016, the Appellants wanted to expand their business and began looking for investors. One such investor they sought out was the respondent ("Ms Koh").

3 This was the investment offered by the Appellants: the investor would purchase condominium units and lease them back to the Appellants at a rate amounting to approximately 6–7% of the annual return on the principal purchase price.

4 Ms Koh found this rate of interest to be attractive and became an investor. On 30 May 2017, she entered into a series of agreements (the "Contracts") with the Appellants. These were made up of two components.

(a) First, an agreement for Ms Koh to purchase five condominium units ("**the Units**" and "**the Purchase Agreement**"). The Units consisted of three units, *ie*, Unit 806A, 615A and 614A at Fort Victoria ("**the Victoria Units**") and two units, Unit 18H and 18B of Alessandro Tower at the Venice Residences ("**the Venice Units**").[1]

(b) Second, an agreement for the Appellants to rent the Units from Ms Koh for an initial period of three years, that is renewable every three years ("**the Leaseback Agreement**"). This component of the agreement was where Ms Koh would earn her return on investment, as the rent paid to her was meant to provide around a 6–7% annual return.

[1] Statement of Claim ("SOC") at paras 9(a) and 9(b).

5 Both the Purchase Agreement as well as the Leaseback Agreement were captured in writing, which took the form of a "leaseback guarantee" and a "receipt". As a preliminary point, while it was recognised by the Judge that the receipts did not constitute an agreement for the sale of land nor did the leaseback guarantee constitute an investment contract *per se*, nothing turns on this because it was accepted by the parties that there was an agreement for the sale and leaseback of the Units.

6 Apart from the Purchase Agreement and the Leaseback Agreement, one other important component of the deal struck between the parties, according to Ms Koh, was that if the market price of the Units had fallen upon the expiry of the leaseback period, the Appellants would buy the Units back from Ms Koh at the principal purchase price paid. However, if the market price of the Units had gone up, Ms Koh could sell the Units on the open market (the "**Alleged Buyback Term**").

7 The Judge, however, found that Ms Koh had not proved the existence of the Alleged Buyback Term: Judgment at [35]. Amongst other reasons, the Judge held that if the Alleged Buyback Term was so important to Ms Koh for her to enter into the Contracts, she would have at least queried whether that term was still on the table given that it was missing from the written documents (*ie*, the leaseback guarantee and receipt) which the Appellants had produced for her signature shortly after she had orally accepted the Contracts. Ms Koh has not sought to challenge the Judge's findings on this point in the present appeal.

8 Pursuant to the Contracts, Ms Koh began paying the purchase price for the Units, making her final payment in August 2018. It is undisputed that Ms Koh had paid S$1,468,895.69 to the Appellants. What is disputed, however,

is whether this constituted full payment of the entire purchase price, as the Appellants' case is that there was a shortfall.

Ms Koh discovers issues and allegedly terminates the Contracts

9 The Appellants began falling behind on rental payments in late 2019. To explain this, Mr Liu told Ms Koh in a WeChat message on 15 October 2019 that he was facing financial difficulties and thus could not pay the rent.

10 Investigations by Ms Koh through her solicitors showed that the Units were encumbered. Specifically, she found that there were mortgages over the Victoria Units, that the Appellants had assigned their rights and interests in the Victoria Units to MaxStays, and that MaxStays had in turn assigned these rights and interests to the Philippine National Bank. With regard to the Venice Units, she similarly discovered that the Appellants had assigned their rights and interests in these units to MaxStays.

11 Ms Koh, accompanied by her husband, met with Mr Liu on 16 November 2019. Ms Koh secretly recorded this meeting, and the recording and its transcript were produced in evidence. Essentially, Mr Liu tried to explain the current state of affairs, and the meeting ended with some suggestion that a resolution of their dispute would be forthcoming.

12 Further communications between parties regarding this potential resolution, however, bore no fruit. Ms Koh allegedly terminated the Contracts on 27 December 2019.

The claim in the High Court

13 Ms Koh filed an action against the Appellants on 14 February 2020 in HC/S 143/2020. Her main claim was for breach of the Contracts arising from the

Appellants' failure to transfer title to the Units and the non-payment of rent under the Leaseback Agreement. Ms Koh sought to recover damages representing two heads of loss. First, the sum she would have regained had the Appellants not acted in breach and had thus performed the obligation to repurchase the Units. Second, the rental she would have earned if the Leaseback Agreement had continued.

14 Ms Koh's alternative claim was for fraudulent misrepresentation. She alleged that the Appellants had made many false representations to induce her to enter into the Contracts. In particular, Ms Koh pointed to the assurance, which the Appellants had made, that they would repurchase the Units. She said that without such an assurance, she would not have entered into the Contracts. In respect of her claim for fraudulent misrepresentation, Ms Koh sought to recover the sum of money she paid, less payments received from the Appellants under the Leaseback Agreement.

15 The Judge allowed Ms Koh's claim for breach of contract, but not the claim for fraudulent misrepresentation. There is, before us, no appeal against the Judge's decision to dismiss the claim for fraudulent misrepresentation.

16 In arriving at the conclusion that the Appellants had breached the Contracts, the Judge found it appropriate to characterise the two components of the Contracts as parts of a broader commercial investment. The reasons for doing so were twofold. First, the components of the Contracts were evidenced within single documents. Second, these documents did not contain any of the terms or details ordinarily seen in contracts for the sale of real property or leases. The lack of such detail strongly suggested that parties appear to have understood the Contracts as loose collections of obligations which facilitated Ms Koh's investment in the business.

17 With this characterisation of the Contracts in mind, the Judge held that the Appellants' obligation to transfer legal title in the Units to Ms Koh was a condition of the Contracts, the breach of which entitled Ms Koh to terminate the Contracts and sue for damages. An essential part of the Contracts was that Ms Koh would obtain a proprietary interest in the Units. Without obtaining such an interest, Ms Koh's payment to the Appellants would be akin to an outright, unsecured loan. This was not what the parties had intended (Judgment at [97]–[98]).

18 Having found that there had been a breach of the Contracts and termination thereof, the Judge then turned to consider the issue of damages. This exercise was rendered more complex because of the manner in which Ms Koh's case had been run.

19 Ms Koh had sought to recover her principal investment of around S$1.5m based solely on the Alleged Buyback Term. She submitted that on the standard measure of damages, if the Appellants had performed the Contracts, she would have recovered her principal investment. This was entirely orthodox.

20 There was, however, one problem. The Judge had found that there was no Alleged Buyback Term. This meant that damages should be awarded for the Appellants' failure to deliver title to real property on the expectation basis, *ie*, what Ms Koh would have expected to receive if the Appellants had performed the Contracts by transferring title to her. Damages would be measured by taking the market value of the property at the time when title should have been transferred and deducting the contract price if that had not already been paid. If the contract price had been paid, as Ms Koh alleged, then the measure of damages would simply be the market value of the Units at the time when title should have been transferred. The difficulty the Judge faced was that Ms Koh

did not adduce clear evidence to establish when title should have been transferred. More importantly, she did not adduce evidence to prove the market value of the Units.

21 Ultimately, the Judge held that the Appellants were liable to pay reliance damages, *ie*, the money which Ms Koh had expended on the Contracts, instead of expectation damages. The Judge was of the view that Ms Koh was entitled to recover S$1,468,895.69 as her full payment of the purchase price and ₱340,504.50 as her costs of incorporating a Philippine company, LK (Philippines), to be her nominee to whom title was to be transferred. He then set-off the sum of S$202,727 which Ms Koh had received as rental payments from the leaseback arrangement. He ordered the Appellants to pay the net sum to Ms Koh, *ie*, S$1,266,168.69 and ₱340,504.50 with the latter to be converted to Singapore currency on the date when execution is authorised (Judgment at [184] and [185]).

22 As for Ms Koh's claim for an account of profits as a consequence of the misuse of the Purchase Price she had paid to the Appellants, this was dismissed by the Judge who considered that the facts of the case did not justify such an award. There is no appeal by Ms Koh in relation to this point.

The appeal

Appellants' case

23 The Appellants raise four issues on appeal. First, they argue that the Judge wrongly found that they had breached the Contracts ("**the Breach Issue**"). Second, that the Judge had wrongly awarded Ms Koh reliance damages ("**the Damages Issue**"). Third, that the Judge erred in awarding Ms Koh interest on the judgment sum from 1 October 2019 instead of the date of the Judgment ("**the**

Interest Issue”). Finally, the Appellants argue that the Judge should have awarded them S$51,825.23 for their “counterclaim” for the remainder of the purchase price that allegedly was outstanding from Ms Koh (“**the Shortfall Issue**”).

Respondent’s case

24 Ms Koh argues that the Judge had rightly held that the Appellants had breached the Contracts by failing to transfer title to the Units and that Ms Koh had validly terminated the Contracts. As for the Damages Issue, Ms Koh argues that the award of damages ought to be upheld. In particular, Ms Koh asserts that the Judge was right in principle to award reliance damages, that there was evidence to support the award of such damages and that the damages awarded did not run afoul of the principle laid down in *Robinson v Harman* (1848) 1 Exch 850 (“*Robinson*”). As for the Interest Issue, Ms Koh argued that the Judge was justified in granting pre-judgment interest from 1 October 2019. Ms Koh also argued that there was no shortfall as she had paid the full purchase price.

Application for leave to adduce further evidence for the appeal: AD/SUM 28/2022

25 Before dealing with the appeal, we address AD/SUM 28/2022 (“SUM 28”). This is an application by the Appellants to adduce the following pieces of further evidence (the “Further Documents”):

(a) A document apparently from New San Jose Builders, Inc. (“New San Jose”) on the transfer of rights with drafts of documents related to the transfer;

(b) Two documents said to be setting out "the list of requirements for the processing of the Deed of Absolute Sale and transfer of ownership" from MegaWorld Corporation ("**MegaWorld**"); and

(c) Various emails between Mr Liu and a gentleman named Kilroy P. Amar in July 2022. Mr Amar was apparently a representative from the contract management department of MegaWorld.

26 New San Jose is the developer of the Victoria Units while MegaWorld is the developer of the Venice Units.

27 In considering whether the Further Documents are to be admitted, the three cumulative requirements for adducing further evidence as set out in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") are relevant (see also *Loy Wei Ezekiel v Yip Holdings Pte Ltd and another matter* [2022] SGHC(A) 43 at [40]; *Kashmire Merkaney v NCL Housing Pte Ltd and another matter* [2022] SGHC(A) 23 ("*Kashmire Merkaney*") at [6], citing *BNX v BOE* [2018] 2 SLR 215 at [74]):

(a) First, the evidence could not have been obtained with reasonable diligence for use at the hearing below.

(b) Second, the evidence, if given, would probably have an important influence on the result of the case, though it need not be decisive.

(c) Third, the evidence must be apparently credible, though it need not be incontrovertible.

28 The fact that the litigants are unrepresented *per se* does not necessarily mean that the first *Ladd v Marshall* criterion would be satisfied. If the evidence

was indeed available or could have been obtained with reasonable diligence and could have been put before the trial judge, then the mere fact that the party in question was unrepresented does not give them a second bite of the cherry to adduce that evidence on appeal: see *Chan Ah Beng v Liang and Sons Holdings (S) Pte Ltd and another application* [2012] 3 SLR 1088 at [21]–[22].

29 It also bears noting that the *Ladd v Marshall* requirements would typically be applied with full rigour when the proceedings below were a full trial. There are exceptions to this general rule. The *Ladd v Marshall* criterion may be relaxed in cases where: (a) the new evidence reveals a fraud that has been perpetrated on the trial court; (b) the applicant was prevented from adducing further evidence during the hearing below in circumstances which amount to a denial of natural justice; or (c) the subject matter of the dispute engenders interests of particular importance to the litigant or to the society at large: *Kashmire Merkaney* at [6] and [7] and *Anan Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] 2 SLR 341 ("*Anan Group*") at [57] and [58].

The parties' arguments

30 The Appellants argue that the Further Documents should be admitted. They had only been able to obtain copies of the Further Documents in July 2022, which was some time after the trial had concluded even though they had for some time attempted to obtain such documents. These Further Documents, according to the Appellants, would have a significant impact on the case as they showed that the Appellants had been willing to transfer title to the Units, but had been unable to do so as Ms Koh had not complied with the requirements for transfer. These Further Documents were also credible, as they had been prepared and obtained from the developer.

31 Ms Koh, however, takes the position that leave should not be granted to adduce the Further Documents as evidence because the *Ladd v Marshall* requirements were not met. First, Ms Koh argues that the Further Documents could have been obtained for use at trial and that this was clear from the fact that the Appellants had stated at the first Case Management Conference that they had some of the Further Documents in their possession.[2] Second, Ms Koh argues that the Further Documents have not been shown to be relevant or material; they would not have had a perceptible impact or important influence on the Judgment had they been adduced at trial.[3] Finally, Ms Koh argues that the Further Documents do not appear to be credible as it is not known who had prepared each of these documents, and that the circumstances and purpose for which they were prepared and received by the Appellants is unknown.[4]

Our decision on SUM 28

32 We dismiss the Appellants' application to adduce the Further Documents. While the Appellants claim that they were only able to obtain the Further Documents in July 2022 even though they had been attempting to do so for some time, they did not adduce adequate evidence of their earlier attempts to demonstrate that these Further Documents could not have been obtained in time for the trial. For example, there was one email dated 15 July 2022 from Mr Liu to Mr Amar (referred to as Mr Kilroy) thanking him for providing the "SOP after waiting for more than three months". At most this suggested that Mr Liu had begun to seek documents around beginning of April 2022 (which is more than three months before 15 July 2022).

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[2] Respondent's Skeletal Submissions in AD/SUM 28/2022 at para 33.

[3] Respondent's Skeletal Submissions in AD/SUM 28/2022 at para 37.

[4] Respondent's Skeletal Submissions in AD/SUM 28/2022 at para 43.

33 It is clear to us that these Further Documents could have been obtained in time for the trial. Ms Koh had purportedly terminated the Contracts on 27 December 2019. The action was filed on 14 February 2020. The discovery process was already well underway as of 3 December 2020 when a Senior Assistant Registrar gave directions for specific discovery. The trial started on 19 August 2021. Given this, it is difficult to understand why these Further Documents could not have been obtained in time for trial. The story would have been different had the Appellants produced evidence showing that they had written to the developers requesting the Further Documents much earlier than April 2022 but had only received a reply after the trial had concluded. But there was no such evidence before us.

34 More importantly, we do not find that the Further Documents would have been significant. We accept that if the evidence in question was of such importance that the court cannot simply shut its eyes, then it may still be admitted despite it being available earlier: *Anan Group* at [59]. This was not the case.

35 The Appellants have stated that the Further Documents relate to two issues. First, that the Judge had "shifted" the burden to them to initiate the transfer of title. Second, that the Judge had not considered that it was impossible for them to transfer title without key documents.[5]

36 It was, however, clear to us that both issues which the Appellants have raised were non-starters in the suit below. This was because the Appellants had conceded in their Defence (Amendment No 1) ("the Defence") that they were obliged to transfer title once Ms Koh had confirmed and informed them of the nominee(s) whom she wished for the title to be transferred to. It was therefore

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5 Appellants' Skeletal Submissions in AD/SUM 28/2022 dated 30 August 2022 at pp 2, 7 and 8.

erroneous of the Appellants to claim that the Judge had "shift[ed]" the burden to them to initiate the transfer of title. By their own case, they were obliged to transfer the title once Ms Koh had confirmed and informed the Appellants as to her choice of nominee. Once Ms Koh had done this, the burden was on them to fulfil their obligation to complete the transfer.

37 The Judge had proceeded on this basis. He considered that in determining whether the Appellants had breached the Contracts, three questions were relevant. First, who was Ms Koh's nominee? Second, when did she confirm to the Appellants that such nominee was to be the title recipient? Third, what information did she provide so as to effect the transfer? (Judgment at [59]).

38 The Judge found that on 25 August 2018, Ms Koh had informed Mr Liu that transfer of title was to be made to LK (Philippines). She had also asked him to liaise with one Mr Renz directly in respect of any documents that Mr Liu might need. Mr Renz was a corporate secretary for LK (Philippines) and was introduced by Mr Liu to Ms Koh. Although there was no evidence as to any further information provided by Ms Koh, the Appellants had not mentioned to Ms Koh thereafter that they were awaiting further information or documents from her to transfer title to LK (Philippines).

39 Viewed in this light, it was clear that the Further Documents would not be significant. The question was not so much what the requirements for the transfer of title were but whether the Appellants were indeed waiting for Ms Koh to provide more information. The Further Documents did not address this issue.

40 For the above reasons, we dismiss SUM 28 being the Appellants' application to adduce the Further Documents.

41 Besides SUM 28, the Appellants also sought to introduce some more new evidence by letter dated 21 September 2022 which was eight days before the first hearing of the appeal on 29 September 2022.

42 The new evidence *per* the Appellants' letter dated 21 September 2022 was:

(a) three certificates of full payment from New San Jose dated 13 July 2020, stating that MaxStays had paid the full purchase price for the Victoria Units;

(b) two certificates from MegaWorld which were undated stating that MaxStays had paid the total contract price for the Venice Units; and

(c) a document entitled "Partial Release of Real Estate Mortgage" which was undated and purportedly executed by PNB-Mizuho Leasing and Finance Corporation to partially release five units in Fort Victoria (including the Victoria Units) from a mortgage (the "Partial Release").

43 Ms Koh objected to this attempt to adduce more fresh evidence. She pointed out that the Judge had allowed the Appellants' every request, nine in total, to adduce further documents already.

44 She said there was no evidence on the provenance of the documents. Also, the Appellants' Case did not argue that the Judge was wrong in concluding that the Appellants had not redeemed the mortgages over the Units. The new evidence also did not show that as of 27 December 2019, which was the purported date of termination by Ms Koh, the Units were unencumbered.

45 We do not allow such evidence to be adduced. We agree that the provenance of the documents has not been established. In addition, the Partial Release appeared to be an incomplete document as the space for indicating the date of execution was left blank. The space for a witness to the execution to append his signature was left blank too.

46 The documents also do not show that as at 27 December 2019, the Units were unencumbered.

47 We add that at the end of the first hearing of the appeal on 29 September 2022, we adjourned the hearing to give parties time to address us on a legal point which we will elaborate on later (see [121] below). However, the Appellants sought to tender more documentary evidence via email on 24 October 2022. These documents pertained to:

> (a) A title search on 4 October 2022 on various properties.
>
> (b) Statements of Account dated 10 April 2022 and 11 January 2022 on real property taxes from the City of Taguig, Metro Manila, in respect of the Victoria Units and the Venice Units.
>
> (c) A letter dated 9 June 2022 from lawyers for Max Group of Companies Inc to New San Jose and emails thereafter.

48 At the resumed hearing on 1 November 2022, Mr Liu said that the purpose of the title search was to show that the Units were no longer encumbered.

49 The documentary evidence about property tax was to show that the developers had paid such tax for which the Appellants had to reimburse them.

50 The letter dated 9 June 2022 was a demand for Victoria Units, as well as two other units at Fort Victoria (Unit 714A and 715A), to be released from encumbrances and the emails showed a discussion thereafter about payment of property tax first before release of encumbrances.

51 Mr Liu suggested that he was producing the documents because the court had observed at the hearing on 29 September 2022 that the Appellants had not adduced any title search to elaborate whether the Units were still encumbered. However, that observation was made in the context of the evidence before the Judge at the material time. It was not an invitation for the Appellants to attempt to furnish further evidence at this late stage.

52 Unsurprisingly, Ms Koh's counsel objected to this attempt to adduce such evidence without even a formal application to do so. He did not accept that the title search showed that the Units were unencumbered and he was unable to assist on the other documents.

53 We are of the view that this belated attempt by the Appellants to adduce further evidence was unsatisfactory and reject it.

54 As intimated above, our observation at the hearing on 29 September 2022 was not an invitation for the Appellants to attempt to adduce more evidence. Furthermore, aside from the absence of a formal application to adduce such evidence, the same principles in *Ladd v Marshall* apply.

55 The credibility of the new evidence and its significance was unclear. The Appellants were effectively trying to give evidence on what the title searches showed without the benefit of elaboration by Philippine lawyers. Without such

elaboration, we could not tell whether the Units were still encumbered, for example, by a paramount mortgage.

56 More importantly, as we observed (above at [36]), it was the Appellants' case that they were obliged to transfer title once Ms Koh had confirmed and informed them of her choice of nominee. The only relevant inquiry, as we have noted (above at [39]), was whether the Appellants had all the necessary details from Ms Koh in order to discharge their contractual obligations. The further evidence which the Appellants sought to adduce by way of their email on 24 October 2022 did not assist the Appellants. Likewise for the evidence which the Appellants sought to adduce via their letter on 21 September 2022.

57 There was a further email dated 28 October 2022 from the Appellants enclosing emails about settlement discussions between the parties. However, while we agree that the disputes should be settled amicably, the discussions did not bear on the merits of the disputes and were therefore of no legal significance.

58 We would mention that there is a process by which parties can, if they so choose, adduce further evidence on appeal. A formal application to do so must be made. It does not suffice to drip-feed materials to the court by way of letters or emails to the Registrar/Registry of the Supreme Court. Even when a formal application is made, it may not be successful. In the present case, all the various attempts by the Appellants to introduce new evidence are rejected even if each of them was made by a formal application, as was done in SUM 28.

Our decision in respect of the appeal

The issues

59 We turn now to address the substantive appeal. The following issues arose for our consideration:

(a) Whether the Judge was correct in finding that the Appellants had breached the Contracts because they did not transfer title of the Units to Ms Koh and whether Ms Koh had validly terminated the Contracts.

(b) Whether the Judge was correct in awarding reliance damages.

(c) If the Judge was correct in awarding reliance damages, should there be a set-off as claimed by the Appellants?

(d) Should interest have been awarded to Ms Koh from 1 October 2019?

60 In considering these issues, the principles governing appellate interference with a trial judge's factual findings are relevant. As we had noted in *Ma Binxiang v Hainan Hui Bang Construction Investment Group Ltd* [2022] SGHC(A) 37 at [19], a trial judge's findings should be taken as *prima facie* correct and should not be disturbed in the absence of sound reasons. The threshold for appellate intervention is a high one: *Dextra Partners Pte Ltd and another v Lavrentiadis, Lavrentios and another appeal and another matter* [2021] SGCA 24 at [9]. An appellate court would be slow to overturn the trial judge's findings of fact unless it can be shown that those findings are plainly wrong or are manifestly against the weight of evidence: *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 at [18]. Where inferences of fact are concerned, an appellate judge is as competent as

any trial judge to draw any necessary inferences of fact from the circumstances of the case: *Ng Chee Chuan v Ng Ai Tee (administratrix of the estate of Yap Yoon Moi, deceased)* [2009] 2 SLR(R) 918 at [12]–[13].

61 We turn to consider the issues, *seriatim*.

Whether the Judge was correct in finding that the Appellants had breached the Contracts because they did not transfer title of the Units to Ms Koh and whether Ms Koh had validly terminated the Contracts

Did Ms Koh state who the title of the Units was to be transferred to?

62 At trial, and on appeal, the Appellants' position was that they were not obliged to transfer title to the Units because Ms Koh did not provide them with certain documents over and above the question as to whether she had informed them of the nominee to whom title was to be transferred.

63 However, the Appellants had said in the Defence (see above at [36]) that they would transfer the title to the Units once Ms Koh had confirmed and informed them of the nominee(s) to whom she wished for the title to be transferred. The pertinent question, therefore, was whether the Appellants' obligation to transfer title had arisen. This turns on whether Ms Koh had informed the Appellants of the identity of the nominee for the transfer.

64 We agree with the Judge that Ms Koh had provided such information to the Appellants on 25 August 2018. The Judge had arrived at this conclusion based on an exchange of messages between Ms Koh and Mr Liu on 25 August 2018 (Judgment at [67]–[68]). We elaborate below on the exchange:

(a) Mr Liu messaged Ms Koh and her husband (Vincent) telling them that he had deposited the rent from the Units.

(b) Ms Koh asked Mr Liu to "advise" on the status of the transfer of the Units' titles to LK (Philippines). Ms Koh added that she and her husband were transferring ownership of LK (Philippines) to a Singapore company.

(c) When Ms Koh pressed for an update, Mr Liu told Ms Koh that he was "waiting for [her] final decision" and that it would take "six to twelve months to transfer" title to LK (Philippines) if she chose it as her nominee.

(d) Ms Koh then asked: "[i]f to Singapore registered firm direct??" Presumably, she was asking how long it would take to transfer title to a Singapore company instead of to a Philippines entity.

(e) Before Mr Liu could reply, Ms Koh asked why title had yet to be transferred as she had made full payment 12 months ago (referring to the Venice Units). Mr Liu replied that it was because LK (Philippines) has "not yet complete[d] the required documents". It is unclear what he meant by this, but Ms Koh then replied that she would check, and asked how long the transfer would take if LK (Philippines) was "full registered".

(f) In reply, Mr Liu sent a PDF file called "Comparison of Alternatives". This showed a table comparing the pros and cons of transferring title to either LK (Philippines), Strategic Eduhub Pte Ltd (also referred to as "SEPL") or MaxStays.

(g) After this, Ms Koh stated "Mr Liu, we have decided. Property to be under LK and LK will be under a Singapore registered firm". She then added that this decision was "final" and that they could not wait for six

months. She hoped that the transfer would be completed in three months. Mr Liu replied to say that they would expedite provided that the LK (Philippines) documents were ready. Ms Koh responded to ask what documents were needed and whether Mr Liu could liaise directly with Mr Renz, the corporate secretary whom Mr Liu had introduced.

(h) Mr Liu replied to say that they would try but "no guarantee". He would check with Mr Renz on the process.

(i) Ms Koh stressed that they needed the Units to be "fully registered in 3 months' time".

(j) Mr Liu repeated that they would try to expedite the process, though some things were out of their control.

65 In the circumstances, we saw no reason to disturb the Judge's finding that Ms Koh had informed Mr Liu of the nominee to whom the title of the Units was to be transferred.

66 Against this, the Appellants argue that they were confused as to who the nominee for the transfer was to be (*ie*, between SEPL and LK (Philippines)).[6] We reject this argument. The exchange between Ms Koh and Mr Liu on 25 August 2018 unequivocally showed that there was no confusion as to the nominee. As mentioned above, after Ms Koh had confirmed her choice of nominee, Mr Liu replied to say that they would expedite provided that the LK (Philippines) documents were ready.

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[6] Appellants' Case at para 46.

Whether Ms Koh had failed to provide required documents to effect the transfer

67 We now address the Appellants' argument that the title could not have been transferred as Ms Koh had failed to provide two key documents which the developer required to effect the transfer to a corporate nominee: (a) a board resolution from her nominee and (b) a Business Information Sheet.

68 The fatal flaw with this argument is that the Defence had not pleaded that Ms Koh had failed to provide these two documents as reasons for the non-transfer of title. Parties are bound by their pleaded case. The Appellants' failure to plead this meant that the court below was precluded from deciding on the matter which the Appellants decided not to put into issue: *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 at [38] (see also, *Foo Khoon Chin & Ors v Gas Pantai Works Sdn Bhd & Anor* [2011] 5 MLJ 438 at [15]).

69 Leaving aside the issue of pleadings, it is clear to us that the Appellants could not establish their argument on the evidence.

70 The Appellants had raised these two points in the trial below, and the Judge had rejected them both. They sought to raise the same points on appeal, but in our view, the result remains the same. We saw no reason to disturb the Judge's findings on these points. While Mr Liu did inform Ms Koh that a board resolution was required, this request had been made before Ms Koh finally decided to choose LK (Philippines) as her nominee.

71 Furthermore, it was clear from the evidence earlier referenced (see above at [64(g)]) that Mr Liu knew who to approach to obtain the necessary documents

in order to effect the transfer to LK (Philippines). If he had tried but was unable to obtain these documents from Mr Renz, then he would have informed Ms Koh. But there was no evidence that he had sought any document from Mr Renz. Furthermore, at no time after 25 August 2018 until commencement of action by Ms Koh did the Appellants say that they were awaiting the necessary board resolution. In addition, Ms Koh had pointed out in her closing submissions below that Mr Liu had made written statements to Ms Koh after 25 August 2018 that the transfer of title was "in progress" and that the transfer was being expedited. Mr Liu would not have said these without mentioning the board resolution if he was really waiting for it prior to effecting the transfer of ownership of the Units to LK (Philippines).

72 As for the Appellants' assertion that Ms Koh had refused to sign the "Buyer Information Sheet", the Judge noted that this request for her signature was made only in July 2021 (Judgment at [73]). By this time, Ms Koh had already purportedly terminated the Contracts and both parties were in the midst of preparing for trial. Any request made by the Appellants to Ms Koh to assist in transferring title would have, at that point, been water under the bridge. In addition, there was no evidence that the Appellants had made any request for the Buyer Information Sheet prior to the purported termination of the Contracts.

Whether the Appellants were entitled to any further payment before transferring title

73 The Appellants argue that there was a shortfall in payment by Ms Koh of the purchase price for the Victoria Units. In their Defence, this was pleaded as a set-off and not a counterclaim although both sides refer to the alleged shortfall as a counterclaim in their respective cases for the appeal.

74 Furthermore, the Appellant's Defence did not assert that the shortfall was a valid reason for not transferring title to Ms Koh.

75 Nevertheless, for the appeal, the Appellants suggest that they must be paid the shortfall before they are obliged to transfer title. Hence, we address the Shortfall Issue here.

76 As mentioned above (at [8]), Ms Koh had paid S$1,468,895.69 to the Appellants for the Units. According to the Judge (Judgment at [42]), the parties had pleaded that the total purchase price was S$1,520,719.97 although the figure derived from the written evidence about the Contracts shows that the price should have been S$1,520,717. For present purposes, the very small difference is not material. Using the latter figure, the difference between S$1,520,717 less S$1,468,895.69 was S$51,821.31. According to the Appellants at the trial, and on appeal, the difference was S$51,824.28. It is not necessary to try and understand how the very small difference came about because the crux of the Appellants' position is that there was a shortfall of about S$51,000.

77 The issue as to the shortfall arose in respect of the Victoria Units. As mentioned by the Judge, a final tranche of ₱16,093,035.80 was payable by Ms Koh for the Victoria Units. She claimed that she had received Mr Liu's instructions on 9 July 2018 to transfer either ₱16,093,035.80 or an equivalent amount of S$407,479,546[7] The latter would be the equivalent of ₱16,093,035.80 using the prevailing exchange rate of S$1 to about ₱39.45 on 9 July 2018. Eventually Ms Koh transferred S$407,979.55 on 7 August 2018. The Appellants did not dispute that aspect of Ms Koh's evidence but alleged that the rate was used "erroneously" by Mr Liu and that the parties had orally agreed to use an

7 Record of Appeal ("ROA") III Part A at pp 262 – 263.

exchange rate of S$1 to ₱35 which would account for the difference of about S$51,000.

78 The Judge considered the evidence and arguments and concluded that the Appellants had failed to prove the oral agreement to use an exchange rate of S$1 to ₱35 (see Judgment at [47]–[53]). It is not necessary for us to reiterate his analysis. It is important to note that during the exchange of messages on 25 August 2018 when Ms Koh was asking for transfer of title (see above at [64]), Mr Liu did not say that there was any shortfall in payment. There was also no subsequent request or demand from him for such payment up to the date of the alleged termination of the Contracts.

79 In the circumstances, the Appellants have not established that the Judge had erred on this issue. We agree that there was no shortfall in the payment of the purchase price of the Victoria Units. The Appellants cannot use it as a reason for not transferring the Units or as a counterclaim or set-off against Ms Koh's claim for damages.

When title should have been transferred

80 We turn to consider when the Appellants should have effected the transfer of title. The Appellants appeared to suggest, on appeal, that there was some "flexibility" as to when the title should have been transferred.

81 As to the date by which the Appellants had to effect the transfer, the only written document pertaining to the Purchase Agreements and the Receipts do not set out a timeline for transfer. The Appellants argue that it is common practice in the Philippines for agreements relating to property to be flexible, and that this explains why there was no stipulated timeline in the Contracts. They further say

that the Judge had failed to appreciate the "dynamics regarding [the] transfer of properties in [the] Philippines".[8]

82 The Appellants, however, did not put forth any evidence to support their argument about a practice relating to the transfer of properties in the Philippines. We also do not accept, as they suggest, that such flexibility means that they have an indefinite time to do so. That does not make commercial sense. At most, they could argue that they had to do within a reasonable time from 25 August 2018.

83 In cases "where a party to a contract undertakes to do an act, the performance of which depends entirely on itself, and the contract is silent as to the time of performance … the law implies an obligation to perform the act within a reasonable time, having regard to all circumstances of the case": *Chitty on Contracts* vol 1 (Hugh G Beale gen ed) (Sweet & Maxwell, 34th Ed, 2021) ("*Chitty*") at [24-013]; *Naughty G Pte Ltd v Fortune Marketing Pte Ltd* [2018] 5 SLR 1208 at [148], citing *Max Master Holdings Ltd v Taufik Surya Dharma* [2016] SGHC 147 at [98] (see also, *Sutcliff v Thirkell* [2001] ADR.L.R. 06/08; *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 1 at p 24C *per* Purchas LJ).

84 On the facts, we find that a reasonable time for the Appellants to have effected the transfer was six to 12 months from the exchange of messages on 25 August 2018. After all, Mr Liu himself had told Ms Koh, during their exchange on 25 August 2018, that it would take six to 12 months to transfer the title to LK (Philippines) (see [64(c)] above). The latest date was therefore 25 August 2019.

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8 Appellants' Case at para 40.

85 On this basis, the Appellants were in breach of the Contracts. By the time Ms Koh purportedly terminated the Contracts on 27 December 2019, this was more than a year since 25 August 2018 and the Appellants had yet to transfer title.

Whether the breach entitled Ms Koh to terminate and did she validly terminate the Contracts?

86 We examine whether there was a breach of the Contracts which gave Ms Koh the right to terminate them, and whether she had validly terminated the Contracts.

87 We start with what Ms Koh had pleaded in her Statement of Claim (Amendment No 1) ("SOC").

88 Ms Koh had, at paragraph 20 of the SOC, alleged that the Appellants had made late payments of the monthly Lease Back Payments that fell due from June 2019 to September 2019. Further, the Appellants did not make payment of those which fell due starting from October 2019.[9]

89 Paragraph 21(c) of the SOC alleged that as of 15 October 2019, the Appellants had not made full payment for the Victoria Units to the developer.[10]

90 Paragraph 22 of the SOC alleged that the Appellants had also not made full payment for the Venice Units.[11]

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[9] ROA II pp 65-66.

[10] ROA II p 67.

[11] ROA II p 67.

91 Paragraph 23 of the SOC alleged that the Appellants had admitted to Ms Koh on or around 16 November 2019 to having taken up "in-house financing" in respect of the Units without Ms Koh's knowledge or consent.[12]

92 We now come to paragraph 24 of the SOC. In view of its importance, we set it out in full.[13]

> By way of the letter dated 27 December 2019 sent by the Plaintiff's then solicitors to the Defendants, the Plaintiff accepted the Defendants' repudiation of the Agreement and/or otherwise terminated the Agreement.

93 We note that paragraph 24 did not specify which act of the Appellants amounted to a repudiation of the Contracts. The Appellants' taking of a mortgage was not in itself an act of repudiation. Failure to transfer title would be a breach of contract but not necessarily an act of repudiation.

94 At paragraph 33, Ms Koh pleads in the alternative that the Appellants' failure to make payment of the Lease Back Payments is a breach of the Contracts for which she was entitled to, *inter alia*, terminate the leases created under the Contracts. But Ms Koh had only pleaded that she was entitled to terminate the ***leases*** for breach, and not the Contracts.

95 Ms Koh's pleadings have, as we explain below (at [105]–[113]), consequences.

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[12] ROA II p 68.

[13] ROA II p 69.

96 We now address the letter dated 27 December 2019 which was sent by Ms Koh's lawyers at the time, Asia Law Corporation, to the Appellants ("the Letter").[14]

97 The Letter mentioned:

(a) That Ms Koh had paid $1,520,719.97 (which was actually inaccurate as we have elaborated above at [76]);

(b) The monies were used to purchase the Units;

(c) Lease Back Guarantees from the Appellants by virtue of which the Appellants were to pay Ms Koh a Monthly Lease Back Payment;

(d) Since around August 2019, such payments have not been made.

98 We set out below paragraph 7 of the Letter which states:

> In the circumstances, **TAKE NOTICE** that our Client demands that you do, within fourteen (14) days hereof, pay the Monthly Lease Back Payment in arrears, the All-in Purchase Price for the five (5) properties, failing which our Client shall commence litigation in respect of the same, in which case you may be liable for the attendant costs thereof.
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> [emphasis in original]

99 The reference to the repayment of the purchase price of the Units was out of place because the previous paragraphs did not state why Ms Koh should be entitled to such repayment. The focus was on the Lease Back Payment instead.

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[14] ROA V Part E pp 124-125.

100 In addition, there was only a demand for certain payments followed by a threat of legal proceedings. The Letter did not purport to terminate the Contracts.

101 When we pointed this out to Ms Koh's counsel, he sought to rely on paragraph 12 of the Opening Statement for the Appellants at the start of the trial. Paragraph 12 states:[15]

> The Plaintiff terminated the Lease on 27th December 2019 via her then lawyer and confirmed the termination through her present lawyer via an email on 23rd Jul 2021. The Defendants have accepted and agreed on the termination of the lease with effective from 27th Dec 2019.

102 In so far as this paragraph referred to an email dated 23 July 2021 from Ms Koh's new lawyers, Rajah & Tann Singapore LLP, the email did not help her. The email stated:[16]

> As you know, our client had on 27 December 2019 terminated the agreements between yourselves and her because you failed to transfer the units to her and had subjected the units to mortgages. Our client's claim against you stands at S$1,771,552.97, statutory interest thereon at 5.33% per annum, and legal costs. Our client is under no obligation to and will not be completing the Buyer Information Sheet.

103 As can be seen, the email had assumed that the Letter had validly terminated the Contracts on 27 December 2019 when this was not the case.

104 Coming back to paragraph 12 of the Opening Statement, we note that it referred to the termination of "the Lease" (*ie*, the Lease Back arrangement), not

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15 ROA IV Part B p 152.

16 ROA V Part E p 147.

the Contracts. The Appellants had accepted that only the former had been terminated. Ms Koh's counsel had misconstrued paragraph 12.

105 The Judge said (at [94]) that he had to consider whether the Appellants had committed repudiatory breaches of the Contracts. He concluded (at [98]) that their obligation to transfer legal title of the Units to Ms Koh were conditions of the Contracts, the breach of which entitled her to terminate the Contracts and claim damages.

106 A repudiatory breach, in the narrow sense, refers to the renunciation of a contract: *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) ("*The Law of Contract in Singapore*") at [17.007], citing *San International Pte Ltd (formerly known as San Ho Huat Construction Pte Ltd) v Keppel Engineering Pte Ltd* [1998] 3 SLR(R) 447 ("*San International*"). The broader definition of a repudiatory breach extends its scope to include reference to a breach of a condition: *The Law of Contract in Singapore* at [17.006], citing *Heyman v Darwins Limited* [1942] AC 356 at p 397.

107 Our courts have referred to a repudiatory breach in its wider sense. That is evident from *Phosagro Asia Pte Ltd v Piattchanine, Iouri* [2016] 5 SLR 1052 where, at [52], the Court of Appeal ("CA") referred to *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 as stating four situations in which a breach of contract would amount to a repudiatory breach.

108 Ms Koh, however, had not pleaded that there was a repudiatory breach. She pleaded that there had been a "repudiation of the Agreement" (*ie*, the Contracts).

109 Ms Koh's case, therefore, was that the Appellants had, by their conduct, evinced an intention not to perform their obligations at all under the Contracts. In other words, Ms Koh's case was that the Appellants had ***renounced*** the Contracts: see *iVenture Card Ltd and others v Big Bus Singapore City Sightseeing Pte Ltd and others* [2022] 1 SLR 302 at [63] and [64].

110 In short, Ms Koh had not pleaded in the SOC the breach of a condition by the Appellants which entitled her to terminate the Contracts. Even if her pleading could be read to include the breach of a condition, there was another difficulty, *ie*, whether she had validly terminated the Contracts. Her pleaded position was that the termination was effected by the Letter.

111 The Judge appears to have wrongly assumed that the Contracts were validly terminated on 27 December 2019 by the Letter when this was not the case (Judgment at [73]). As earlier mentioned, the Letter did not purport to effect any termination of the Contracts.

112 While the Appellants did not accept that Ms Koh was entitled to terminate the Contracts, they did not challenge the Letter as the act of termination. Be that as it may, we asked Ms Koh's counsel about the sufficiency of the Letter as the act of termination and, as mentioned, he relied on paragraph 12 of the Opening Statement for the Appellants.

113 We find that Ms Koh did not validly terminate the Contracts. Hence, she is not entitled to claim damages on the basis of termination, whether they be expectation or reliance damages. However, she is nevertheless still entitled to seek performance of the Contracts which the Appellants allege they are willing and able to perform but, as we have mentioned, the Appellants are not entitled to claim any shortfall in payment from Ms Koh. We now turn to Ms Koh's

fallback plea which seeks an order for possession of the Units if the Contracts are adjudged not to be validly terminated. In this regard, and in light of our findings in [84] and [85] above, the breach continues to persist which is totally unacceptable. The Appellants are to transfer, free of encumbrance, title of the Units, and to give possession thereof, to the nominee of Ms Koh. This is to be done within two months from the date of this Judgment.

114 In the circumstances, the question whether the Judge was correct in granting Ms Koh reliance damages is academic but because of the significance of that issue, both generally and in the Judgment, we address it below.

Whether the Judge was correct in awarding reliance damages

115 We come now to the issue of whether damages should have been assessed on the reliance basis. It was clear from the Judgment that Ms Koh had failed to adduce evidence as to the market value of the Units as at 25 August 2019 (*ie*, the latest date for the transfer) or any other date for that matter. We will refer to the "market value" simply as "the value".

116 The Judge said that Ms Koh's omission had put the court in a difficult position. Notwithstanding this, the Judge considered that damages in this case could and should be awarded on the reliance basis, although Ms Koh had only sought damages on the expectation basis.

117 In arriving at this conclusion, the Judge noted that there were cases which had "allowed innocent parties to recover the ***purchase price*** they paid as a form of 'wasted expenditure' within the ambit of reliance damages" [emphasis in original] (Judgment at [109]).

118 It however, appeared to us that in cases where plaintiffs have been awarded reliance damages, this was because it was impossible or, at least, extremely difficult, to prove that they would have turned a profit had the contract not been breached. In the case before us, Ms Koh did not suggest that it was impossible or difficult to adduce evidence of the value of the Units. Indeed, logic suggests that it should have been a simple matter for her to adduce such evidence had she applied her mind to do so.

119 Therefore, the main question was when a court may award reliance damages. Connected to this, a sub-issue was whether a plaintiff could make such a claim only if it was impossible to prove expectation damages in the usual way (*ie*, by proving the value of the Units).

120 The main question and sub-issue were matters of law which were not raised by the Appellants as such. Their arguments were focussed on the holdings of the Judge which led to his conclusion that they were in breach of contract. Nevertheless, we considered the question and sub-issue because they were important generally and central to the present case.

121 We asked Ms Koh's counsel to assist us on the main question and, more specifically, the sub-issue and he sought time to do so. As mentioned, the Appellants were not legally represented and were unlikely to assist then. We therefore granted an adjournment of two weeks for parties to file further submissions. The Appellants, being litigants-in-person, were given the opportunity to engage counsel to file submissions on their behalf.

122 Ms Koh's subsequent submissions took the position that the impossibility of proving expectation damages was not a requirement for claiming reliance

damages.[17] At best, the impossibility of proving expectation damages would be one basis to claim reliance damages by raising the presumption that the plaintiff's wasted expenditure would have been recouped had the contract been performed. This would then shift the burden of proof to a defendant to show that the plaintiff would not have recouped wasted expenditure. The Appellants' subsequent submissions on this issue simply regurgitated the general rule that a plaintiff was ordinarily entitled to expectation damages.

123 Having considered parties' submissions, we agree that the impossibility of proving expectation damages is not a prerequisite which a plaintiff must always meet before being entitled to claim reliance damages. In this case, Ms Koh did not advance a claim for reliance damages. Her pleaded relief is for expectation damages only. On the facts of this case, Ms Koh did not succeed in her claim for expectation damages because she omitted to lead any evidence to support her claim for expectation damages; the situation that she finds herself in, from her omission to adduce evidence to support her claim for expectation damages, is detrimental to her.

124 We are also of the view that it is not open to a plaintiff to claim reliance damages simply because he chooses not to adduce evidence of expectation damages. Such a plaintiff does not have an unfettered option to switch to a claim for reliance damages and the court does not have a wide discretion to grant such damages in every case even when such damages are not pleaded.

125 As mentioned, it was not difficult, let alone impossible to prove the value of the Units as at a certain date.

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17 Respondent's Further Submissions (Amendment No. 1) dated 31 October 2022 at para 3.

126 In the circumstances, it was not open to the Judge to award reliance damages to Ms Koh after she failed to prove expectation damages. We elaborate below.

The law on contract damages

127 We begin with the basic principle governing contractual damages as expressed in *Robinson* at 855:

> The rule of the common law is that where a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.

128 In considering the position that the party would have been in had the contract been performed, the following points are relevant. Parties would have to, in pursuing performance of the contract, typically incur some form of capital expenditure. If the plaintiff is confident of showing that the gross profits he would have made, but for the breach, exceeds his initial outlay, the claim would be framed on the basis of his expectation loss in the form of the lost gross profits (*Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 ("*Turf Club*") at [125]). An award of damages on this basis would include and exceed his expenditure.

129 Alternatively, his claim could be framed as one for loss of profits on a nett basis, as well as expenses and costs that have or would be incurred in enabling the claimant to earn those nett profits: *The Law of Contract in Singapore* at [21.065]; *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2020] 3 SLR 1234 at [52]–[63].

130 In the vast majority of cases, the plaintiff, being able to put forth evidence as to the quantum of his lost gross profits, would usually claim for expectation

damages. In certain situations, however, the plaintiff may realise that he will not be able to adduce evidence to prove the quantum of lost gross profits. Here, the plaintiff may instead choose to frame his claim as one for reliance damages as we elaborate later.

131 If this path is taken, the plaintiff has to show that he had incurred expenses in reliance on the contract. The burden of proof is then shifted to the defendant who has to show that the contract would have been unprofitable, and that the plaintiff would not even have been able to recoup such expenses (*Turf Club* at [126] and [128]).

132 It is clear that even in cases where reliance damages are awarded, the underlying principle is still that as laid down in *Robinson*: that the innocent party should be placed in the position he would have been had the contract been performed. As the CA noted in *Alvin Nicholas Nathan v Raffles Assets (Singapore) Pte Ltd* [2016] 2 SLR 1056 ("*Alvin Nicholas*") at [23] and [24]:

> 23 When a contract is terminated pursuant to a repudiatory breach and damages are awarded, the court seeks to place the innocent party in the position *he would have been in if the contract had been performed.* In respect of a case where a contract is terminated pursuant to a repudiatory breach, the court held in *Hong Fok Realty Pte Ltd v Bima Investment Pte Ltd and another appeal* [1992] 2 SLRI 834 ("*Hong Fok v Bima*") at [24]:
>
> > The object of the award of damages in this type of situation is *not to restore the parties to their respective positions as if the contract had not been made,* but rather, in recognition of the existence of the contract and the subsequent breach, to compensate the innocent party, as far as money can do so, for the loss, damage and injury which he has suffered as a result of the breach. It is to *place the innocent party, so far as money can do so, in the same position as if the contract had been performed.*
>
> 24 Following this principle, damages for breach of contract are ordinarily assessed in terms of the claimant's *expectation loss,* which refers to the value of the benefit that the claimant

> would have obtained but for the breach of contract, or, to put it another way, the gains the claimant expected as a result of the full performance of the contract: Andrew Phang Boon Leong, The *Law of Contract in Singapore* (Academy Publishing, 2012) ("The Law of Contract") at para 21.033. On occasion, damages for breach of contract may be quantified in terms of the claimant's *reliance loss* – that is, the costs and expenses the claimant incurred in reliance on the defendant's contracted-for performance, but which were wasted because of the breach of contract: *The Law of Contract* at para 21.034. The basis for awarding reliance loss is the assumption that were the contract performed, the claimant would have at least fully recovered the costs and expenditure incurred: *Van Der Horst Engineering Pte Ltd v Rotol Singapore Ltd* [2006] 2 SLR(R) 586 at [54]–[55]. Indeed, in cases where a claimant enters into a bad bargain and would not have recovered all his costs/expenditure even if the contract had been performed, his losses may not be quantified by reference to his reliance expenditure: *C & P Haulage v Middleton* [1983] 1 WLR 1461 at 1468. Thus, the underlying principle, *even in cases where reliance loss is awarded*, is to place the innocent party in the position he would have been in *had the contract been performed.*
>
> [emphasis in original]

133 As can be seen, the expressions used in that case were "expectation loss" and "reliance loss". These are interchangeable with "expectation damages" and "reliance damages" respectively and we continue to use the latter expressions.

134 Reliance damages are not awarded on a different basis from expectation damages (see Adam Kramer, *The Law of Contract Damages* (Hart Publishing, 3rd Ed, 2022) ("*Law of Contract Damages"*) at [18-67]–[18-68]; Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016) at p 123). We note that in *Turf Club*, Justice Andrew Phang Boon Leong said at [126], *obiter*, that in contrast to expectation damages, reliance damages puts the plaintiff in the position ***as if*** the contract had never been entered into in the first place. This statement is not inconsistent with the proposition set out at the start of this paragraph. Reliance damages would put a plaintiff in a situation *akin* to one where the contract had not been entered into.

That is, practically speaking, the end result. But it does not detract from the fundamental rule that damages for breach of contract should put a plaintiff in the position he would be in if the contract had been performed. However, it is impermissible to award a claimant both expectation damages (*ie*, a claim for gross profits lost) as well as reliance damages (*ie*, a claim for wasted expenditure) as that would violate the principle laid down in *Robinson*.

135 The Judge was aware that the normal measure of damages in respect of the failure by the Appellants to transfer title was the value of the Units at the time the transfer should have been effected if the contract price had been paid (see Judgment at [101]). This would be expectation damages. However, he noted that this would require Ms Koh to prove the value of the Units and no valuation had been tendered as evidence.

136 As mentioned, the Judge was of the view that the court was put in a difficult position. Without evidence of the value of the Units, the court could not state with any certainty the position Ms Koh would be in had the contracts been performed. Therefore, expectation damages could not be properly quantified. On the other hand, there was no claim brought by Ms Koh in unjust enrichment.

137 The Judge considered whether he could nevertheless assume that the value of the Units was that which Ms Koh had originally paid for, but he thought that this would be to coat a conceptual question with evidential veneer (Judgment at [104]). He thought that there were at least two issues with this.

138 First, the assumption would not only unjustifiably relieve Ms Koh of the burden of proving expectation damages. It might also be at the risk that she might be over-compensated (Judgment at [105]).

139 Secondly, Ms Koh did not mount a claim for unjust enrichment. If the court were to assume the value of the Units as the price that Ms Koh paid for, it would effectively be granting her a restitutive remedy without requiring her to demonstrate a total failure of basis of her expenditure (as well as the other elements for an unjust enrichment claim) (Judgment at [106]).

140 That said, the Judge nevertheless considered whether he could and should award Ms Koh reliance damages, *ie*, the price she had paid for the Units (plus any unpaid rent which she was entitled to receive).

141 He noted that there will invariably be cases where a plaintiff will not be able to prove the profitability of a contract, for example, where the subject of the contract may be too speculative. In such a situation, if the plaintiff was unable to prove that he would have earned a profit, it would be likely that he would also struggle to prove that he would at least have recovered his expenditure. The Judge was of the view that in such a situation, a plaintiff should not be left without any recovery, even if he did not rely on unjust enrichment. The Judge was of the view that even within the field of contract, the law would allow the plaintiff his expenditure by shifting the burden of proof to the defendant. This would mean that it would be for the defendant to prove that the plaintiff would not even have been able to recover his expenditure. The Judge was of the view that the shifting of the burden of proof where reliance damages is claimed is well-established by case authorities (Judgment at [119]). The basis for shifting or reversing the burden of proof is a presumption that a plaintiff would not enter a loss-making contract (Judgment at [120], citing *Commonwealth of Australia v Amann Aviation Pty* (1991) 104 ALR 1 ("*Amann*"), *L Albert & Son v Armstrong Rubber Co* 178 F (2d) 182 (1949) ("*L Albert & Son*")).

142 The Judge concluded that reliance damages is awarded on the same basis as ordinary expectation damages (*ie*, to put a plaintiff in the position he would have been had the contract been performed) (Judgment at [122]). We agree with the Judge's observation (see above at [134]).

143 The Judge was of the view that he could still award Ms Koh reliance damages. Citing as strong authority the case of *One Step (Support) Ltd v Morris-Garner* [2019] AC 649 ("*One-Step*"), he was of the view that it was ultimately for the court to select the method of assessing damages most suitable for the facts before it. He awarded Ms Koh reliance damages as elaborated above (at [21]). The Appellants disputed liability for reliance damages, including the cost of incorporating LK (Philippines), on the basis that Ms Koh could still use the company for other purposes.

144 With respect, the Judge's reliance on *One Step* was in error. He referred to [36], [37] and [96] of the majority judgment delivered by Lord Reed:[18]

> 36 It follows from the principle in *Robinson v Harman* 1 Exch 850 that the language of election is not appropriate in a discussion of the quantification of damages for breach of contract. The objective of compensating the claimant for the loss sustained as a result of non-performance (an expression used here in a broad sense, so as to encompass delayed performance and defective performance) makes it necessary to quantify the loss which he sustained as accurately as the circumstances permit. What is crucial is first to identify the loss: the difference between the claimant s actual situation and the situation in which he would have been if the primary contractual obligation had been performed. Once the loss has been identified, the court then has to quantify it in monetary terms.
>
> 37 The quantification of economic loss is often relatively straightforward. There are, however, cases in which its precise measurement is inherently impossible. As Toulson LJ observed in *Parabola Investments Ltd v Browallia Cal Ltd (formerly Union Cal Ltd)* [2011] QB 477, para 22:

18 Judgment at [130].

> "Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant s wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss."

> An example relevant to the present case is the situation where a breach of contract affects the operation of a business. **The court will have to select the method of measuring the loss which is the most apt in the circumstances to secure that the claimant is compensated for the loss which it has sustained.** It may, for example, estimate the effect of the breach on the value of the business, or the effect on its profits, or the resultant management costs, or the loss of goodwill: see *Chitty on Contracts*, 32nd ed (2015), vol I, paras 26-172 to 26-174. The assessment of damages in such circumstances often involves what Lord Shaw described in the *Watson, Laidlaw* case 1914 SC (HL) 18, 29—30 as "the exercise of a sound imagination and the practice of the broad axe".
>
> …
>
> 96 Applying these conclusions to the present case, it is apparent that neither the judge [2015] IRLR 215 nor the Court of Appeal [2017] QB 1 applied an approach which can now be regarded as correct. The judge was mistaken in considering that the claimant had a right to elect how its damages should be assessed. He was mistaken in supposing that the difficulty of quantifying its financial loss, such as it was, justified the abandonment of any attempt to quantify it, and the award instead of a remedy which could not be regarded as compensatory in any meaningful sense.
>
> [emphasis added in bold]

145 Presumably, the Judge was referring to the sentence, "The court will have to select the method of measuring the loss which is the most apt in the circumstances to secure that the claimant is compensated for the loss which it has sustained" ("the Sentence").

146 However, it is important to bear in mind the first two sentences of [37] in *One Step* before the Sentence which states: "The quantification of economic loss is often relatively straightforward. There are, however, cases in which its ***precise measurement*** is inherently impossible." [emphasis added].

147 The case of *Parabola Investments Ltd v Browallia Cal Ltd (formerly Union Cal Ltd)* [2011] QB 477 is then cited which mentions consequential damages which are capable of being established with precision and others which are not. An example of the latter is then given (pertaining to a breach of contract affecting the operation of a business), followed by the Sentence.

148 Therefore, the Sentence was referring to the second scenario where the precise measurement of economic loss is inherently impossible and not the first where quantification of economic loss (*ie*, expectation damages) is relatively straightforward.

149 In the first scenario, expectation damages can be proven quite easily. Therefore, *One Step* is not a basis upon which the award of reliance damages to Ms Koh can be justified.

150 The Judge's later reliance on *Chitty* at [29-019] and [38] of *One Step* was also in error for a similar reason (Judgment at [131]). We set out the first part of [38] of *One Step* which states:

> Evidential difficulties in establishing the measure of loss are reflected in the degree of certainty with which the law requires damages to be proved. As is stated in *Chitty*, para 26-015:
>
> > "Where it is clear that the claimant has suffered substantial loss, **but the evidence does not enable it to be precisely quantified**, the court will assess damages as best it can on the available evidence."
>
> [emphasis added]

151 The passage from *Chitty* refers to genuine difficulty in establishing expectation damages with precision. That should not be read to apply to a situation where a plaintiff simply fails to adduce evidence to prove expectation damages.

152 On the question of pleadings, the Judge was mindful of *Filobake Ltd v Rondo Ltd and another* [2005] EWCA Civ 563 ("*Filobake*") where a plaintiff had applied to amend the particulars of its claim at the appeal stage to insert a claim for "wasted expenditure" (*ie*, reliance damages). The UK Court of Appeal refused the application to amend. Chadwick LJ said at [62] and [63]:

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

153 The Judge also noted (Judgment at [134]) Chadwick LJ's observations in *Filobake* at [64] that:

> "[T]here are formidable objections to running the two claims in the alternative, not the least being that, as we have seen, on the issue of the outturn of the contract the burden under a lost expense claim rests with the defendant; whereas under a lost profits claim the claimant bears the burden of establishing his loss. That conjunction is at least potentially embarrassing for the defendant" (at [64]). This remark is *also* sound. It would be rather confusing – in a single trial – to hold the defendant to proof that the plaintiff "would not even have generated (*x*) in revenue" so as to recoup the expenses reasonably undertaken in

> reliance of the contract, whilst simultaneously holding the plaintiff to proof that it "would not only have generated (*x*) in revenue, it would have made (*x* + *y*)", with (*y*) representing the plaintiff's nett profits. Such a situation would make the fact-finding role of the court quite difficult.

154 The Judge continued (Judgment at [135]):

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

155 The Judge then said that he would offer no general solution and that the matter would have to be resolved in another case.

156 However, and more importantly for our present purposes, the Judge was of the view that the court could determine the most suitable measure of damages even without much assistance from counsel and, we add, even if the alternative method of assessment had not been pleaded or advocated by the plaintiff. Hence, he was of the view that it was permissible to award Ms Koh reliance damages even where she did not claim such a loss "so long as the defendant is not prejudiced by the shift in the burden of proof …" (Judgment at [138]).

157 On the facts before him, the Judge was of the view that the Appellants would not be prejudiced. Even if the Appellants had been put on notice that the burden of proof had shifted to them, it was highly unlikely that they would have discharged the burden for two reasons (Judgment at [139]).

158 First, the Judge took into account the rental revenue which Ms Koh was supposed to receive from the Leaseback Agreement. This represented about 18.5% of the total expenditure. He then opined that as the Units were situated in Manila, the capital of the Philippines, it was not likely that their value would have dropped by a rather substantial 18.5% (Judgment at [141]).

159 Secondly, even if the Appellants could have shown a drop in value, Ms Koh could have waited for an upswing in the market and continued leasing out the Units in the meantime to generate revenue (Judgment at [142]).

160 Accordingly, the Judge found it appropriate to award Ms Koh reliance damages notwithstanding (a) that she had only claimed expectation damages and (b) the difficulties identified in *Filobake* if a plaintiff were allowed such a claim after trial.

161 With due respect, we do not agree with the Judge at various levels.

162 First, we do not agree with the two reasons given by the Judge to say that the Appellants would not be prejudiced. It was not for the Judge to determine that it was unlikely that the value of the Units would not drop by more than 18.5%. This was a matter for expert evidence. He was effectively attributing some arbitrary value to the Units without the benefit of a valuation. It was not open to a court to do so in the circumstances.

163 It was also not open to him to consider that Ms Koh could rely on an upswing in the market. The value of a property is to be determined as at a certain date (or a certain period). It is not for a court to take into account possible upswings in the future.

164 Furthermore, Ms Koh had not given notice of a claim for reliance damages such that the Appellants might have realised that the burden of proof might shift to them to show the value of the Units and so that they could have taken steps to show that the value was less than what she had expended. It is no answer to say that, being lay defendants, they were not likely to have acted on that opportunity. They were represented initially and if the appropriate plea had been made at the outset, they might have received advice to adduce such evidence as they needed. In any event, the point is that they should have been given the opportunity to respond to a claim for reliance damages whether or not they would have acted on it.

165 It is not necessary for us to decide whether claims for expectation and reliance damages may be made, if both are being pursued as alternatives. Assuming it is permissible (and we do not decide on this), at the minimum, Ms Koh should have given notice of a claim for reliance damages as soon as possible so that the Appellants were given the opportunity to take such steps as they deemed fit.

166 Most importantly, the Judge had wrongly concluded that it is open to a court to award reliance damages because it is for the court to determine the most suitable measure of damages in any event. This suggested a wide discretion to award reliance damages in any case so long as there is no prejudice to a defendant ("the Judge's proposition"). As we mentioned above (at [143]–[151]), the Judge's reliance on *One Step* was in error.

167 Furthermore, in our view, there is always prejudice to a defendant if reliance damages are considered because the burden of proof is shifted to him to show that the plaintiff would have not been entitled to wasted expenditure. The correct approach is not to see if there is prejudice to a defendant. It is for a

plaintiff to first cross the threshold that it is appropriate to consider reliance damages in the first place.

168 We turn next to address the sub-issue which we had earlier identified (above at [119]).

169 Expectation damages are ordinarily the damages that a plaintiff is entitled to claim. He may also claim reliance damages but the question is whether that is at his unfettered option or whether such a claim may only be made if it was impossible to prove expectation damages.

170 In *Cullinane v British "Rema" Manufacturing Co Ltd* [1954] 1 QB 292 ("*Cullinane*"), Sir Evershed MR said, at p 303:

> As a matter of principle also, it seems to me that a person who has obtained a machine, such as the plaintiff obtained, being a machine which was mechanically in exact accordance with the order given but which was unable to perform a particular function which it was warranted to perform, may adopt one of two courses. He may say, when he discovers its incapacity, that it was not what he wanted, that it is quite useless to him, and he may claim to recover the capital cost he has incurred, deducting anything he can obtain by disposing of the material that he got. A claim of that kind puts the plaintiff in the same position as though he had never made the contract at all. In other words, he is back where he started; and, if it were shown that the profit-earning capacity was in fact very small, the plaintiff would probably elect so to base his claim. But, alternatively, where the warranty in question relates to performance, he may, in my judgment, make his claim on the basis of the profit which he has lost because the machine as delivered fell short in its performance of that which it was warranted to do. If he chooses to base his claim on that footing, it seems to me that depreciation has nothing whatever to do with it.

171 At p 308, Jenkins LJ said:

> … while no doubt the plaintiff can at his option claim damages based on the difference between the value to him of the article as actually supplied and the contract price of the article, he cannot claim both that amount, representing his capital expenditure thrown away by reason of the breach, and also the full amount of the profit which he can show that he would have made in the event of the article answering the warranty. …

172 The *ratio* of *Cullinane*, as some commentators have observed, is debatable (*McGregor on Damages* (James Edelman, Jason Varuhas & Simon Colton gen ed) (Sweet & Maxwell, 21st Ed, 2020) at [4-044]–[4-049]). What is clear, however, is that *Cullinane* did lay down the proposition that a plaintiff could choose between expectation and reliance damages, but he could not have both. *Cullinane*, however, is silent as to when a plaintiff is entitled to claim reliance damages.

173 In *Anglia Television Ltd v Reed* [1972] 1 QB 60 ("*Anglia Television*"), the plaintiff, which was a television company, took action against an actor, the defendant, for his wrongful repudiation of a contract to play the leading man's part in a television play that the plaintiff was producing.

174 Lord Denning MR noted that the plaintiff could not say what its profit would have been if the defendant had performed the contract. So, the plaintiff claimed wasted expenditure (*ie*, reliance damages). The issue there was not whether the plaintiff could claim reliance damages, as such, but whether such damages would extend to expenditure incurred before the contract with the defendant was made. Lord Denning MR said (at 63 and 64):

> … It seems to me that a plaintiff in such a case as this has an election: he can either claim for loss of profits; or for his wasted expenditure. But he must elect between them. He cannot claim both. If he has not suffered any loss of profits – or if he cannot

> prove what his profits would have been – he can claim in the alternative the expenditure which has been thrown away, that is, wasted, by reason of the breach. That is shown by [*Cullinane*].

175 In *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16 ("*CCC Films*"), Hutchison J cited the passages of the judgments of Sir Evershed MR in *Cullinane* and Lord Denning MR in *Anglia Television* which we have mentioned above and said (at 32):

> I interpret the passage I have just read [*ie*, meaning the passage by Sir Evershed M.R. in *Cullinane*] and that cited from Lord Denning M.R.'s judgment in [*Anglia Television*] as indicating that in these cases the plaintiff has an unfettered choice: it is not only in those cases where he establishes by evidence that he cannot prove loss of profit or that such loss of profits as he can prove is small that he is permitted to frame his claim as one for wasted expenditure. I consider that when Lord Denning M.R. says, "If he has not suffered any loss of profits – or if he cannot prove what his profits would have been – he can claim in the alternative the expenditure which has been thrown away …" and when Sir Raymond Evershed M.R. says in [*Cullinane*], "if it were shown that the profit-earning capacity was in fact very small, the plaintiff would probably elect so to base his claim," each is describing factors which would be likely to motivate the plaintiff to elect to claim on the lost expenditure basis rather than laying down what must be proved before such a claim can be entertained. In other words, I consider that those cases are authority for the proposition that a plaintiff may always frame his claim in the alternative way if he chooses. I reach this conclusion all the more readily when I reflect that to hold that there had to be evidence of the impossibility of making profits might in many cases saddle the plaintiff with just the sort of difficulties of proof that this alternative measure is designed to avoid.

176 It is this part of the judgment of Hutchinson J that supports the view that a plaintiff has an unfettered option to claim reliance damages ("the *CCC Films* proposition") even if he could otherwise have adduced evidence of his expectation damages. This carries with it the implication that a court has a wide discretion to grant reliance damages, *ie*, the Judge's proposition. It is unsurprising that Ms Koh placed much reliance on this case.

177 In so far as *CCC Films* may be cited as authority for the proposition that a plaintiff has an unfettered option to claim reliance damages instead of expectation damages, we do not agree with the validity of such a proposition. As we mentioned, in *Anglia Television*, the plaintiff took the position that it could not prove its loss of profit. Hutchinson J was aware of this and yet he extended what Lord Denning MR had said to any case instead of confining it to a case where it was impossible, or at least extremely difficult, to prove expectation damages. With respect, there was no sound basis to warrant such an extension.

178 Likewise, nothing in the judgment of Sir Evershed MR (as well as in the judgment of Jenkins LJ) in *Cullinane* would warrant such an extension. In our view, such an extension would mean that a plaintiff in any case could take the easy way out and say he is claiming expectation damages, and alternatively, reliance damages if he should fail to prove the former. Consequently, a defendant would then have to show that the plaintiff would not have recovered his expenditure if the contract had been performed in response to the claim for reliance damages.

179 The next case we consider is *Amann*. That case was cited by the Judge for the proposition that there is a presumption that a plaintiff would not enter into a loss-making contract (Judgment at [120]). That presumption is supposed to justify why a plaintiff may thus claim reliance damages and shift the burden of proof to a defendant to prove that the plaintiff would not have recovered his expenditure if the contract had been performed (*Law of Contract Damages* at [18-70], citing *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] 1 Lloyd's Rep 526 at [188] and [190]). However, it is important to bear in mind that the judgments in *Amann* were premised on one of two scenarios:

(a) where it was impossible, or at least extremely difficult for the plaintiff to prove expectation damages; or

(b) the contract was not entered into for the purpose of making a profit.

None of the judgments in *Amann* suggested that because of the presumption that a plaintiff would not enter into a loss-making contract, the *CCC Films* proposition or the Judge's proposition is correct.

180 We add that Mason CJ and Dawson J in *Amann* were also of the view that the language of election, or the notion that a plaintiff has alternative ways to frame a claim for relief, was not appropriate in a discussion of the measure of damages for breach of contract. Damages for loss of profits (*ie*, expectation damages) and for expenditure reasonably incurred (*ie*, reliance damages) are simply two manifestations of the same principle (see *Amann* at 13). Toohey J was of a similar opinion that opinions expressed in *Anglia Television* and *CCC Films*, that a plaintiff may, at his option, claim for loss of profits or wasted expenditure are not appropriate ways of looking at the question (*Amann* at 51).

181 In so far as the Judge was of the view that observations by Mason CJ and Dawson J in *Amann* that the absence of such a presumption "would be an invitation to the repudiation of contractual obligations" is a sound and an accurate representation of the law in Singapore (Judgment at [120]), we respectfully disagree. Such observations were made on the premise of one of the two scenarios we have mentioned (above at [179]). They should not be taken out of context and applied generally without qualification.

182 Therefore, *Amann* is not authority supporting the *CCC Films* proposition or the Judge's proposition.

183 Likewise and with respect, the Judge's reliance on *L Albert & Son* was in error. There the court said (at 189), "… [i]t is often very hard to learn what the value of the performance would have been; and it is a common expedient, and a just one, in *such* situations to put the peril of the answer upon that party who by his wrong has made the issue relevant to the rights of the other" [emphasis added]. There was an important qualification in this proposition: it must be hard to learn (*ie*, to establish) the value of the performance, before shifting the burden of proof to a defendant.

184 To the extent that the Court of Appeal of New South Wales in *Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd* [2020] NSWCA 234 ("*Meetfresh*") were also of the view that the presumption mentioned in *Amann* allows a court to award reliance damages, we would respectfully disagree. In *Meetfresh*, the Court of Appeal said, at [31], that the effect of *Amann* is that the court may award reliance damages "where the evidence does not establish any loss of profits". However, with respect, that is stating the facts in *Amann* too widely. In *Amann*, the evidence did not establish any loss of profits because it was impossible, or extremely difficult, for the plaintiff to do so. In our case, Ms Koh could easily have adduced evidence of the value of the Units if she was minded to do so.

185 We also considered the recently released decision of the New South Wales Court of Appeal in *123 259 932 Pty Ltd v Cessnock City Council* [2023] NSWCA 21 ("*Cutty Sark*"). The main issue discussed in *Cutty Sark* was whether the impossibility of proving expectation damages was a prerequisite for claiming reliance damages. This decision was released on 20 February 2023, which was after we had heard oral arguments from parties. Given that the decision in *Cutty Sark* was of direct relevance to the present case, we drew parties' attention to this decision, and invited both of them to serve written submissions in response.

186 In their further written submissions, the Appellants did not address *Cutty Sark*. Instead, the Appellants argued that it was not open to the court to consider the decision in *Cutty Sark*. They raised two reasons. First, that the hearing had ended on 1 November 2022 and that there was a court letter dated 2 November 2022 directing that "no further evidence or documents should be submitted to the court".[19]

187 There is no merit to the Appellants' first contention. The letter was to dissuade parties from adducing more evidence unilaterally. That is different from drawing a relevant case to the attention of the court. In any event, it is open to this court to invite parties to make further submissions on specific points after oral arguments have been heard: see *Astrata (Singapore) Pte Ltd v Portcullis Escrow Pte Ltd and another and other matters* [2011] 3 SLR 386 at [50]; *ACB v Thomson Medical Pte Ltd and others* [2017] 1 SLR 918 at [18]; *PT Bayan Resources TBK and another v BCBC Singapore Pte Ltd and another* [2019] 1 SLR 30 at [123]. *Cutty Sark* is directly relevant to the question which we posed to parties on whether impossibility of proving expectation damages was a prerequisite to claiming reliance damages. It is also relevant as to when a party may seek and when a court may award reliance damages. There was every reason to invite further submissions from parties.

188 There is also no merit to the Appellants' second argument that the court is unable to consider *Cutty Sark* as that case was decided after the Judgment had been issued.[20] The appellate court is entitled to take into consideration decisions rendered after the judgment in question is on appeal. This is illustrated by the CA decision in *Lee Tat Cheng v Maka GPS Technologies Pte Ltd* [2018] 1 SLR

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[19] Appellants' Written Submissions on NSWCA 21 at p 1.

[20] Appellants' Written Submissions on NSWCA 21 at p 6.

856 ("*Lee Tat Cheng*"). The CA, in that case, had to consider the issue of patent infringement. In doing so, the CA considered, at [17], principles enunciated in the recent decision of the UK Supreme Court in *Actavis UK Limited v Eli Lilly and Company* [2017] UKSC 48 ("*Actavis*"), which parties had brought to the court's attention, and whether those principles should be applied in Singapore. *Actavis* had, as the CA noted, been handed down after the trial judge had rendered the judgment. Although parties in the present case had not brought *Cutty Sark* to our attention, this is not, in our view, a material distinction. The fundamental point is that the appellate court is entitled to take into account decisions rendered after the judgment in question is on appeal.

189 As for Ms Koh's arguments, they mostly regurgitated what had been said in *Cutty Sark*. Ms Koh argued that *Cutty Sark* stood for the proposition that reliance damages may be recovered regardless of whether it was impossible to prove expectation damages, and even if the evidence before the trial judge did not establish any loss of profits.[21]

190 In *Cutty Sark*, the respondent, Cessnock City Council ("Cessnock") owned land on which Cessnock Airport was located (the "Land"). Cessnock entered into an agreement with the Appellant, Cutty Sark, whereby Cessnock agreed to lease a part of the Land to Cutty Sark. This entailed subdividing the Land. To that end, as part of the agreement, Cessnock promised to take all reasonable action to register the plan of subdivision (the "Plan") by 30 September 2011 (the "Sunset Date"). Cutty Sark proceeded to build an aircraft hangar on this piece of land, at a cost in excess of AUD$3m. Cessnock,

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[21] Respondent's Written Submissions on NSWCA 21 at para 17.

however, failed to register the Plan by the Sunset Date. The proposed lease was not granted.

191 Subsequently, Cutty Sark commenced proceedings against Cessnock, claiming damages for breach of contract. The trial judge found that Cessnock had breached their agreement for the proposed lease by failing to take all reasonable action to apply for and obtain registration of the Plan by the Sunset Date. Cutty Sark's claim for reliance damages, however, was rejected. On appeal, the New South Wales Court of Appeal reversed the trial judge's decision and allowed Cutty Sark's claim for reliance damages.

192 We reproduce below the paragraphs from *Cutty Sark* (at [86]–[90] and [93]) which are germane to our present discussion:

> 86 Notwithstanding the primary judge's characterisation of Cutty Sark's claim in the manner summarised above, Cutty Sark's case did not involve the proposition that it was "*impossible* for it to prove that it would have recouped" its expenditure, or that the Council's breach had rendered it so; the contention was simply that the Council had not discharged its onus of proving that Cutty Sark would not have recouped its expenditure. Thus arises the question whether it is a precondition to the application of the presumption referred to in *Amann Aviation* that it be *impossible* for the plaintiff to prove that it would have recouped its expenditure.
>
> 87 Although there are passages in the judgments in *Amann Aviation* where terminology such as "not possible" is used, in my opinion they do not support the proposition that the presumption can be invoked only where it is impossible to work out lost profits or expectation damages. The context is important. Thus when Mason CJ and Dawson J said:
>
> > "Similarly, where it is not possible for a plaintiff to demonstrate whether or to what extent the performance of a contract would have resulted in a profit for the plaintiff, it will be open to a plaintiff to seek to recoup expenses incurred, damages in such a case being described as reliance damages or damages for wasted expenditure."

that was not a statement that impossibility of assessment of lost profits is a precondition to claiming reliance damages, as is clear from their Honours' later explanation that reliance damages were not an alternative to loss of bargain damages in the sense of involving an election, as all were but manifestations of the central principle enunciated in *Robinson v Harman*, rather than discrete and truly alternative measures of damages which a party not in breach may elect to claim. And as their Honours further explained (emphasis added):

> "Naturally, the categories of case in which a plaintiff is likely to make a claim for the recovery of expenditure incurred are those in which the plaintiff has not suffered a loss of profits and those in which it is impossible to assess what would have been the outcome had the contract been performed or those in which that outcome is otherwise uncertain. So much is acknowledged by Lord Denning in the passage from *Anglia Television* already cited. The manner in which a plaintiff frames his or her claim for damages will be dictated not so much by a choice of alternatives giving rise to an election but simply according to whether the contract, if fully performed, would have been and could be shown to have been profitable (even if the actual amount of profit is not readily ascertainable). *If this can be demonstrated, a plaintiff's expectation of a profit, objectively made out, will be protected by the award of damages. Otherwise, subject to it being demonstrated that a plaintiff would not even have recovered any or all of his or her reasonable expenses, a plaintiff's objectively determined expectation of recoupment of expenses incurred will be protected by the award of damages.*"

88 Deane J referred to "a case where a plaintiff has incurred expenditure either in procuring the contract or in its performance but it is impossible or *difficult* (emphasis added) to establish the value of any benefits which the plaintiff would have derived from performance by the defendant". That does not support the proposition that it must be "impossible" to prove an expectation loss before the presumption arises, let alone that the impossibility be attributable to the defendant's breach.

89 Similarly, Toohey J characterised reliance damages as (emphasis added) "a means of compensating the plaintiff where there has been no loss of profits or, more likely, *where the plaintiff cannot prove loss of profits with any certainty*" and said that damages were most appropriately assessed by reference to expenditure incurred where profits are *difficult* or impossible to quantify or where the outcome of the contract is not predictable. Gaudron J quoted the observation of Lord Denning MR in *Anglia Television Ltd v Reed* that "if [a plaintiff] has not suffered any

> loss of profits — *or if he cannot prove what his profits would have been* — he can claim in the alternative the expenditure which has been thrown away, that is, wasted, by reason of the breach", and said:
>
> > "The present case is *one in which the uncertainties are such that it is not possible to make any reliable estimate of the value of Amann's contractual rights*. Thus, it is one in which the assessment of damages might properly be approached having regard to Amann's wasted expenditure."
>
> 90 What emerges from the passages discussed in the preceding paragraphs is that reliance damages may be recovered where a plaintiff does not prove an expectation of a profit. **None of those expositions of the circumstances in which reliance damages may be claimed, properly understood, requires that it is a precondition to their recoverability that it first be established that it has been rendered "impossible" to prove an expectation loss.**
>
> …
>
> 93 *Meetfresh* thus stands as clear authority of this Court that reliance damages may be recovered not only where it is impossible to quantify expectation damages, but also where the plaintiff does not undertake to prove, or the evidence does not establish, any loss of profits. For the reasons stated above, that position is a correct understanding of the dominant reasoning in *Amann Aviation*. Moreover, it would be quite illogical that a presumption casting the onus on the defendant to prove that the plaintiff would not have recouped its expenditure would arise only where the plaintiff first established that it could not possibly prove the opposite.
>
> [emphasis in original; emphasis added in bold]

193 Insofar as *Cutty Sark* took the view that the impossibility of proving expectation damages is not a prerequisite to claiming reliance damages, we agree (see above at [123]).

194 *Cutty Sark*, however, went one step further in reasoning that *Amann* was clear authority for the proposition that reliance damages could also be recovered where "the plaintiff does not undertake to prove, or the evidence does not

establish, any loss of profits": *Cutty Sark* at [87]–[90] and [93]. With respect, we do not think that this view taken by *Cutty Sark* is correct.

195 *Cutty Sark*, at [87]–[89], cites passages from *Amman* which suggest that reliance damages are available where it is impossible or difficult to establish reliance damages. There is, however, a quantum leap in the first line of [90] of *Cutty Sark* where the court reasoned that "[w]hat emerges from the passages discussed in the preceding paragraphs is that reliance damages may be recovered where a plaintiff does not prove an expectation of a profit".

196 *Cutty Sark* had, in our view, misread *Amann*. It is one thing to refer to a situation where it is impossible to prove, or extremely difficult to establish, that there has been a loss of profit. It is another to refer to a situation where a plaintiff simply does not prove an expectation of a profit. The two situations are not the same. For example, it may not be impossible or extremely difficult for a plaintiff to prove his profit, but he fails to do so in any event.

197 The reference by Toohey J, to there being no loss of profits, is made with respect to a situation where the transaction was not entered into to make a profit. That is a different situation from where the plaintiff fails to adduce evidence of the profit. Therefore, *Amann* is not authority for the proposition that the plaintiff may recover reliance damages simply because he does not prove expectation damages.

198 Ms Koh also points to the case of *AC Daniels & Co Ltd v Jungwoo Logic (a firm)* [2000] Lexis Citation 1924 ("*AC Daniels*") which she says supports the *CCC Films* Proposition. She argued that the English High Court had, in that case, considered the evidence for both expectation and reliance damages, and awarded

the latter for which the plaintiff had provided better and sufficient evidence as compared to the former.

199 In *AC Daniels*, the court rejected the defendants' argument that the claimant had to, at some (not clearly specified) stage before judgment, elect between a claim for expectation or reliance damages. The court noted (at [44]) that:

> So far as Mr Walters' submission on the "fourth proposition" concerning election resurrects itself in these new circumstances I reject it for the reasons explained in para 42 above, which are even stronger when the supposed difference in the comparison to be made is removed. It is true that in *Anglia Television v Reed*, already referred to in a different connection, the phrase "he must elect" is used, but only as the equivalent of "he cannot claim both", which immediately follows (page 692b). **There is no suggestion of some procedural stage by which one basis or the other must be abandoned, and reliance is placed at that point on *Cullinane* itself, in which no "election" was ever made by the plaintiff; the choice was that of the Court of Appeal.**
>
> [emphasis added in bold]

200 As we have explained above, we do not think the court has a wide discretion to grant reliance damages (above at [124] and [166]), much less the discretion to make such an election on behalf of the plaintiff.

201 Apart from the aforementioned authorities, Ms Koh also relied on a number of Singapore cases which, according to her, endorse the *CCC Films* proposition and establish that the impossibility criterion is not a requirement for claiming damages. We accept that impossibility is not, strictly speaking, a requirement. We address the point about endorsement of the *CCC Films* proposition below.

202 In *TCL Industries (Malaysia) Sdn Bhd v ICC Chemical Corp* [2007] SGHC 211, the High Court endorsed the *CCC Films* proposition at [11]. However, we note that that was a case for specific discovery of documents and the court did not analyse whether the *CCC Films* proposition was correct.

203 In *PT Panasonic Gobel Indonesia v Stratech Systems Ltd* [2010] 3 SLR 1017 ("*PT Panasonic 2010*"), the High Court endorsed the *CCC Films* proposition (at [6]–[7]). The judge also agreed with the opinion of an Assistant Registrar that it is open to a plaintiff to choose between a claim for reliance damages or one for total failure of consideration. The judge noted (at [4]) that the opinion was in accordance with the decision of Justice Judith Prakash ("Prakash J") (as she then was) in *PT Panasonic Gobel Indonesia v Stratech Systems Ltd* [2009] 1 SLR(R) 470. However, we do not think that that decision of Prakash J lends any support to the *CCC Films* proposition. We set out [4] of *PT Panasonic 2010* below:

> The principal action between the parties from which the AR's damages assessment followed was Suit No 34 of 2007, *PT Panasonic Gobel Indonesia v Stratech Systems Ltd* [2009] 1 SLR(R) 470, where Judith Prakash J found at [87] that the plaintiff's claim was one for damages to be assessed and "not a claim for refund of payments made on the basis of a total failure of consideration". The learned Prakash J had found at [86] that the plaintiff was entitled "to claim whatever damages it can prove it has sustained by [the defendant's] breach up to the amount of S$1,830,000 being the total costs of services to be provided by [the defendant] (for all four modules) under the Services Agreement, plus interest".

204 As can be seen, Prakash J was not addressing the question of the unfettered option of a plaintiff to claim reliance damages. Furthermore, it appears that there was no argument in *PT Panasonic 2010* as to whether the *CCC Films* proposition was correct.

205 Although *CCC Films* was cited with approval in *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2012] 3 SLR 428 ("*Out of the Box*") at [16], this was only to say that a plaintiff should be entitled to recover his wasted expenditure to the extent that such expenses could be recouped if the contract had been performed. Thus, *Out of the Box* is not authority for any wider proposition.

206 In *Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409, the High Court awarded reliance damages and cited with approval *PT Panasonic 2010* and *CCC Films* (at [63]). However, there was no analysis as to whether the *CCC Films* proposition was correct.

207 Ms Koh's reliance on *Loh Chiang Tien and another v Saman Dharmatilleke* [2020] SGHC 45 ("*Loh Chiang Tien*") at [25] also does not assist her because the court had assumed that a plaintiff may claim reliance damages as an alternative measure of damages without elaboration, but ultimately considered that the analysis on reliance damages was unnecessary for the decision as the claim for damages was time-barred (*Loh Chiang Tien* at [28]).

208 In *Simran Bedi v Montgomery, Mark A* [2022] SGHC 67 ("*Simran*"), the court also proceeded on the premise that a plaintiff may claim reliance damages in the alternative (*Simran* at [66]–[68]).

209 Likewise, Ms Koh's point that various passages from *Loh Chiang Tien* and *Simran* were affirmed by the Judge in the present case does not assist her as that is the decision under appeal to this court.

210 In summary and with due respect, the above Singapore cases are not binding on this court and as there was no analysis (except in the Judgment which

is under appeal) conducted on whether the *CCC Films* proposition was valid, they are not persuasive that it was valid.

211 We are reinforced in our view by an observation made by Justice Andrew Phang Boon Leong in *Turf Club* where he said (in *obiter*) at [126], that reliance loss "… is usually awarded by the court where it is *impossible* to ascertain the expectation loss" [emphasis in original] and referring to *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 ("*McRae*"). The reference to *McRae* was apt because there, the vessel (the contractual subject matter) was non-existent, and thus it was impossible to assess the loss of profits.

212 Likewise, *The Law of Contract in Singapore* states (at [21.052]) that "… it seems that a claimant may elect to 'limit' its recovery to its expenditures incurred … instead of claiming for the 'full' recovery by reference to gross profit that would have been generated, but for the breach of contract, where it can satisfy the court that it would be exceedingly difficult or impossible to quantify such gross profit".

213 Interestingly, Ms Koh also relied on *Turf Club* to argue that the impossibility criterion is not a requirement before a plaintiff can claim reliance damages because of the adverb "usually" (see above at [211]). However, as we have mentioned, *Turf Club* does suggest, on the other hand, that the *CCC Films* proposition is too wide and that the Judge's proposition is not valid.

214 As regards *The Law of Contract in Singapore* (at [21.052]), Ms Koh suggested that this should be read subject to [21.039] which states that, "there is no reason why the promisee should be prevented from claiming the *lower* sum of reliance expenditure" [emphasis in original] and "it has been suggested that the promisee may choose to frame its claim on the basis of its gross expectation

loss, or on the basis of its reliance loss" citing *Anglia Television* and *CCC Films*. Read in this way, Ms Koh says that [21.039] of *The Law of Contract in Singapore* shows that impossibility is not a requirement to claim damages and that that paragraph is consistent with the *CCC Films* proposition.

215 We have accepted that impossibility of proving expectation damages is not, *strictly speaking*, a requirement to claim reliance damages. However, we doubt that [21.052] is to be read subject to [21.039] in *The Law of Contract in Singapore*.

216 In any event, we have explained why we do not accept the *CCC Films* proposition or the Judge's proposition. We add that if the impossibility criterion is merely one basis for claiming reliance damages, as Ms Koh submits, this implies that there are other lower criteria which she did not elaborate on. The impossibility criterion will then be effectively redundant as there is no good reason for a plaintiff to endeavour to meet that higher criterion.

217 To summarise, a plaintiff does not have an unfettered option to claim reliance damages and neither is there a wide discretion for a court to grant reliance damages. Such a relief is usually available if it is impossible, or at least extremely difficult, for a plaintiff to prove his expectation damages in the usual way or if his contract was not for profit. Ms Koh's case does not fall into any of these categories.

218 As we alluded to in the introduction, parties who assert the existence of certain facts must adduce sufficient evidence in support of their claims. Conceptual questions may, at times, be coated with an evidential veneer. But this evidential veneer is important and should not be ignored. After all, it is the evidence adduced by parties that provides the basis on which the trial judge

makes findings of facts before applying the law to those facts. Parties who fail to put forth evidence in support of their claim must let the chips lie where they have fallen (see, *eg*, *Aquarius Corporation v Haribo Asia Pacific Pte Ltd and another appeal* [2022] SGHC(A) 39 where the plaintiff failed to establish the quantum of their alleged lost profits as the primary documents supporting their expert witness's calculations were not properly admitted into evidence).

Set-off and Interest

219 Given our finding that Ms Koh was not entitled to reliance damages, the question whether there should be a set-off because of a shortfall in payment of the purchase price would have been academic. Further, as mentioned previously (see above at [79]), we have concluded that there was no shortfall in the first place.

220 The fourth issue raised by the Appellants as to whether interest to be paid on the reliance damages should run from 1 October 2019 has also become academic.

Conclusion

221 For the reasons given above, SUM 28 is dismissed but AD/CA 23/2022 is allowed. We set aside the Judge's award of reliance damages and interest, as well as his order of costs for the trial made on 18 March 2022.

222 However, we order the Appellants to transfer, free of encumbrance, title of the Units, and to give possession thereof, to the nominee of Ms Koh. This is to be done within two months from the date of this Judgment (see [113] above). Ms Koh is liable for property tax only from the date of transfer of title to her nominee. There shall be liberty to apply.

223 As for costs, the Appellants have succeeded on their main appeal but they have not done so on reasons raised by them and their other arguments on factual issues have failed. Furthermore, their application in SUM 28 has been dismissed.

224 In the circumstances, there shall be no award of costs for the costs of SUM 28, the appeal in AD/CA 23/2022 and of the trial.

225 The usual consequential orders apply.

Belinda Ang Saw Ean
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

Hoo Sheau Peng
Judge of the High Court

The appellants in person;
Winston Kwek Choon Lin, Li Kun Hang and Dion Chan (Rajah & Tann Singapore LLP) for the respondent.