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

[2024] SGHC(A) 13

Appellate Division / Civil Appeal No 53 of 2023

Between

TG Master Pte Ltd

… *Appellant*

And

(1) Tung Kee Development (Singapore) Pte Ltd
(2) Yung, Man Tung

… *Respondents*

In the matter of Suit No 321 of 2021

Between

TG Master Pte Ltd

… *Plaintiff*

And

(1) Tung Kee Development (Singapore) Pte Ltd
(2) Yung, Man Tung

… *Defendants*

GROUNDS OF DECISION

[Civil Procedure — Appeals — New points]
[Land — Sale of land — Contract — Options to purchase]
[Contract — Remedies — Deposits]
[Contract — Remedies — Liquidated damages — Penalties]
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v
Tung Kee Development (Singapore) Pte Ltd and another

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Woo Bih Li JAD, Debbie Ong Siew Ling JAD, Audrey Lim J
27 November 2023

2 May 2024

Woo Bih Li JAD (delivering the grounds of decision of the court):

Introduction

1 TG Master Pte Ltd ("TG Master") was the appellant. The first and second respondents were Tung Kee Development (Singapore) Pte Ltd ("Tung Kee") and Mr Yung Man Tung ("Mr Yung") respectively (collectively, the "Respondents"). TG Master granted Mr Yung eight options to purchase eight properties situated at 1, 3, 5, 7, 9, 11, 13, and 15 Miltonia Close (collectively, the "Properties"). We refer to the eight options collectively as the "OTPs" or singularly as an "OTP". The OTPs were each dated 3 January 2018 and had some unusual features. First, the option period for each OTP was unusually long; each remained valid for exercise for a period of 24 months. Second, as we elaborate later, the true option fee was in fact payable in two tranches. Third, each OTP came bundled with a tenancy agreement for the respective property, which leased that property to Tung Kee (as designated by Mr Yung) for a term

of 30 months. Pursuant to each tenancy agreement, possession of each property was given to Tung Kee. Fourth, two of the Properties, *ie*, 1 and 9 Miltonia Close, were renovated at the request of Mr Yung for which renovation costs were payable by Mr Yung.

2 Although there was no evidence about the customary period for an ordinary option to purchase (an "Option"), TG Master had submitted in the appeal that a two-week Option was commonplace, and the Respondents did not disagree. Indeed, parties proceeded on the basis that an option period of 24 months was unusually long.

3 Subsequently, TG Master also lent the sum of $620,000 to Tung Kee, which was guaranteed by Mr Yung.

4 The option periods of the OTPs were also extended in exchange for extension fees agreed by Mr Yung and Tung Kee, or Mr Yung alone. However, the Respondents did not eventually exercise the OTPs and the envisioned sales never materialised. No sale and purchase agreements were ever concluded. Tung Kee refused to return possession of the Properties after the tenancies expired and failed to repay the loan. Part of the extension fees were not paid. TG Master therefore claimed against the Respondents for the repayment of the loan and for unpaid extension fees. Mr Yung made a counterclaim for the return of various sums, which we will elaborate on below.

5 In *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd and another* [2022] SGHC 316 (the "Judgment"), the trial judge (the "Judge") allowed TG Master's claim for the repayment of the $620,000 loan (plus interest of six per cent per annum on an accrued basis and compounded monthly) but

denied its claim for the unpaid extension fees. The Judge also allowed Mr Yung's counterclaim for the return of $4,550,000, being substantially all the sums that he had previously paid to TG Master, save for the $475,000 total "Option Fees" (see [10] and [16] below) paid in respect of the Properties. The net result was that TG Master had to repay the Respondents a substantial sum of money (and interest). By agreement, TG Master paid $3,885,223.17 into court on 6 June 2023, pending the determination of this appeal. This sum comprised the moneys payable by TG Master less the moneys payable to TG Master and interest, as calculated by the parties.

6 In this appeal, TG Master sought to retain the $4,550,000 and claim $448,000 in unpaid extension fees. After carefully considering the true nature of the sums paid by Mr Yung and the distinction between an Option and contracts of sale, we allowed TG Master's appeal with costs.

7 Before the Judge, the parties focused their submissions on the application of the framework governing the law of deposits as set out in *Hon Chin Kong v Yip Fook Mun and another* [2018] 3 SLR 534 ("*Hon Chin Kong*"), and the application of the penalty doctrine in relation thereto (the "*Hon Chin Kong* framework"). Before us, TG Master adopted a different approach and primarily contended that the *Hon Chin Kong* framework *did not apply at all*, though it made submissions based on the framework as its fallback case. We therefore considered the novel issue of the proper ambit of the law of deposits in the context of an Option.

8 In our view, with respect, the Judge did not properly consider (and the parties did not adequately identify) the *nature* of the sums that had been paid by Mr Yung pursuant to the OTPs before applying the *Hon Chin Kong* framework.

In our judgment, the sums that were paid should not have been considered under the *Hon Chin Kong* framework and Mr Yung was not entitled to claim their return. Additionally, the Judge had also incorrectly dismissed TG Master's claim for unpaid extension fees on the basis that it had insufficiently particularised its pleadings or that it had failed to prove that the Respondents or Mr Yung were legally obliged to pay such extension fees. We therefore allowed TG Master to retain the sums paid by Mr Yung pursuant to the OTPs and also allowed its claim for extension fees. We set out the facts and our reasons below.

Facts

9 Mr Yung, a Hong Kong resident, was the sole shareholder of Tung Kee, a company incorporated in Singapore. Pursuant to the OTPs, Tung Kee was granted a tenancy agreement for each of the Properties and possession thereof. TG Master subsequently succeeded in compelling the return of possession of the Properties (which possession was returned to TG Master on 24 September 2021) by obtaining a summary judgment for possession. The subsequent appeal by Tung Kee and Mr Yung failed.

The OTPs

10 As mentioned (above at [1]), TG Master granted Mr Yung eight OTPs in respect of the eight Properties. Each OTP was dated 3 January 2018 and expired on 2 January 2020, for a total option period of 24 months. It was undisputed that their terms were substantially the same. Clause A of the OTPs provided that:

> In consideration of the sum of … (S$ **59,375.00)** ("Option Fee") received by [TG Master] from [Mr Yung], [TG Master] hereby grants [Mr Yung] this option to purchase ("Option") the Property upon the terms and conditions set out in this Option. This

> Option is granted together with Options for the sale of the following units 1, 3, 5, 7, 9, 11, 13 and 15 (other than the unit stated above) Miltonia Close Skies Miltonia Singapore. This Option may only be exercised if the Further Sum (as defined below under Paragraph B) is paid for all units 1, 3, 5, 7, 9, 11, 13 and 15 Miltonia Close Skies Miltonia Singapore ("All Units"). In the event the Further Sum for All Units is not paid, the Options for All Units shall be deemed to have lapsed and no longer valid for acceptance.

Clause B of the OTPs provided that:

> [Mr Yung] shall pay a further sum of … (S$500,000.00) *equivalent to the* ***balance*** of twenty per cent (20%) of the Sale Price by 30 April 2018 (the "Further Sum") and *in* ***consideration*** *of the Further Sum*, [TG Master] *shall grant a tenancy of the Property*, commencing on the date falling on the fourteenth (14th) business day after the date of the tenancy agreement to be entered into between [TG Master] and [Mr Yung]'s designated entity ("Commencement Date"), on and subject to the terms as set out in the tenancy agreement … (the "Tenancy Agreement"). [Mr Yung] shall reimburse the cost of renovation of units 1 and 9 Miltonia Close Skies Miltonia Singapore for such sums as determined by [TG Master] ("renovation cost") latest by 15 May 2018.
>
> [emphasis in original omitted; emphasis added in italics and bold italics]

11 As can be seen, the "Option Fee" payable for each OTP was $59,375 and each OTP provided for the payment of a "Further Sum" of $500,000. We add that the "Sale Price" of each of the Properties was $2,796,875 (totalling $22,375,000 for the Properties). The Option Fee and the Further Sum for each Property totalled 20 per cent of the Sale Price of each of the Properties. TG Master's evidence was that the Sale Price took into account a "bulk discount" for the fact that the Properties were being purchased together. It was undisputed that the cost of renovation for 1 and 9 Miltonia Close referred to in cl B was the sum of $550,000 (the "Renovation Costs"). According to TG Master, it was

only after the Option Fees, Renovation Costs and Further Sums were paid for every one of the OTPs that each OTP could be exercised individually.

12 Finally, Clause E(d) provided that:

> After the Further Sum and the renovation cost is paid and reimbursed respectively to [TG Master], in the event:
>
> …
>
> (d) that this Option is not exercised in the manner stated herein; …
>
> …
>
> [TG Master] shall have the right (but shall not be obliged to) to terminate this Option and in such an event:
>
> (i) the Option shall be null and void and the *Option Fee, renovation cost reimbursed to [TG Master] and the Further Sum shall be forfeited to [TG Master] absolutely*;
>
> (ii) (unless otherwise waived by [TG Master]), the Tenancy Agreement shall become null and void and of no further effect;
>
> (iii) [Mr Yung] shall immediately return vacant possession of the Property to [TG Master] (and unless otherwise specified by [TG Master]) in the same original state and condition as at the date of this Option;
>
> …
>
> (v) neither party shall thereafter have any claim against the other in respect of this Option.
>
> [emphasis added]

After the OTPs were issued, Mr Yung signed a letter dated 8 January 2018, declaring that he had read and understood the terms of the OTPs and recording his acceptance and agreement to their terms. This letter was signed and witnessed by Mr Yung's solicitors in Hong Kong.

13 Before the date of each OTP, there was a document dated 2 January 2018 titled "Offer to Purchase" (the "Offer to Purchase"). This document appeared to originate from Mr Yung as the prospective purchaser of the Properties. It was in any event undisputed that Mr Yung had signed the Offer to Purchase. The Offer to Purchase set out Mr Yung's offer to purchase the Properties for the same total price of $22,375,000, subject to several conditions, including:

> …
>
> 2. First payment of $475,000.00 upfront via post-dated cheque en-cashable on 4th Jan 2018.
>
> 3. Second payment of $4,000,000.00 by 30th April 2018. Buyer will issue postdated cheque to be en-cashed on or after 30th April 2018.
>
> 4. The total of $4,475,000.00 in 2) and 3) above *shall constitute and form the option fee* stated in the Option To Purchase (OTP)
>
> 5. Balance 80% to be paid in full 2 years from OTP date.
>
> 6. Master TA to be signed after *20% option fee* has been paid up.
>
> 7. Handover of the above properties will be done immediately after the Master TA has been signed in 6).
>
> …
>
> [emphasis in underline in original, emphasis in italics added]

14 The Offer to Purchase also included a statement that Mr Yung confirmed and agreed that "any non-exercise of the OTP would result in a forfeiture of the option fee of 20%(EDPS) of the purchase price". The Offer to Purchase therefore evidently contained substantially the same key terms as the agreement contained in the OTPs. However, the "Option Fee" and "Further Sum" referred to in the OTPs were referred to as the "[f]irst payment" and "[s]econd payment" respectively under the Offer to Purchase. In other words, under the Offer to Purchase, *both* payments were to "constitute and form *the option fee*". This was

although under each OTP, *only* the *first* sum of $59,375 (totalling $475,000 for the Properties) was referred to as the "Option Fee" whereas the second sum of $500,000 (totalling $4,000,000 for the Properties) was referred to as a "Further Sum". In addition, the Offer to Purchase showed that at that time, Mr Yung wanted to buy the Properties collectively and not individually or in a piecemeal way. We will return to the significance of these points later.

The Tenancy Agreements

15 TG Master thereafter granted Tung Kee (as Mr Yung's "designated entity" under cl B of the OTPs) a tenancy agreement in respect of each of the Properties (the "Tenancy Agreements"). The eight Tenancy Agreements, which contained substantially the same terms save for their commencement dates, each leased the respective Properties to Tung Kee for a term of 30 months. The latest end date for the term of the leases of the Properties was in April 2021, which was in respect of 7, 11, and 13 Miltonia Close. Clause 4(a)(iv) of the Tenancy Agreements provided that TG Master was entitled to terminate the respective tenancy and repossess the property if the Respondents did not exercise the relevant OTP in accordance with its terms before the OTP expired. As mentioned above (at [9]), possession was returned to TG Master only on 24 September 2021, well after the expiry of all the leases.

Non-exercise of the OTPs

16 It was undisputed that the Option Fees, Further Sums, and Renovation Costs were paid to TG Master (save for the clarification in [16(c)] below):

(a) The Option Fees totalling $475,000 were paid on 4 January 2018. The Further Sums were paid in tranches between 30 April 2018

and 28 December 2018. The total amount of Further Sums to be paid was $4,000,000. The Renovation Costs of $550,000 were paid on 30 April 2018. Therefore, Mr Yung was supposed to have paid a total sum of $5,025,000 to TG Master (*ie,* $475,000 + $4,000,000 + $550,000).

(b) As mentioned (above at [5]), the Judge allowed Mr Yung's counterclaim for $4,550,000.

(c) However, for accuracy, we mention that we were informed that there was actually a goodwill discount of $80,000 granted by TG Master in relation to the Further Sums. In other words, Mr Yung in fact paid $3,920,000 instead of $4,000,000. However, this was overlooked at the trial below. Mr Yung therefore paid a total sum of $4,945,000 to TG Master (*ie*, $475,000 + $3,920,000 + $550,000).

17 It was also undisputed that Mr Yung did not exercise the OTPs by the initial expiry date of 2 January 2020.

The Loan Agreement

18 On or around 31 December 2019, the Respondents sought a loan from TG Master. By a written agreement dated 22 January 2020, TG Master agreed to lend $1,240,000 to Tung Kee in two equal tranches, with Mr Yung acting as guarantor (the "Loan Agreement"). It was undisputed that the Respondents were acting under legal advice when they entered into the Loan Agreement. Clause 3.1 of the Loan Agreement provided that:

> The full amount of the Loan with interest payable and extension fees in Clauses 4.1 and 4.2 shall be repayable by [Tung Kee] in lump sum by 30 June 2020.

Pursuant to cl 3.2 of the Loan Agreement, interest was at the rate of six per cent per annum on an accrued basis and compounded monthly. On 22 January 2020, the first tranche of $620,000 was disbursed to Tung Kee. The second tranche of $620,000 was contingent on the exercise of the OTPs for 3, 9, 11, and 15 Miltonia Close, and was never disbursed. The disbursed sum of $620,000 and interest thereon were not repaid on 30 June 2020.

The Extension Agreements

19 It was undisputed that Mr Yung had requested extensions of time to exercise the OTPs, and that TG Master had *agreed* and *granted* such extensions of time beyond the original option periods. Despite these extensions, the OTPs were never exercised. It was further undisputed that Mr Yung had paid to TG Master $62,720 on 13 May 2020 and $60,000 on 3 August 2020 as extension fees to extend the expiry date of the OTPs. These sums, totalling $122,720, were the only extension fees Mr Yung paid to TG Master. However, it was disputed whether the Respondents collectively or Mr Yung individually were obliged to pay other extension fees. Before the Judge, TG Master contended that it was entitled to be paid six sets of extension fees, totalling $985,867. After deducting payment of the $122,720, the unpaid total was $863,147. While the first set of extension fees was contained in the Loan Agreement, the subsequent five sets were premised on oral agreements with Mr Yung. In other words, the obligation to pay the first set of extension fees was said to rest on both Respondents as that obligation was stated in the Loan Agreement which was guaranteed by Mr Yung. The obligation to pay the other five sets of extension fees allegedly rested on Mr Yung alone since he was the one who had the benefit of the OTPs in the absence of any other agreement binding Tung Kee. On the other hand, Mr Yung claimed the return of the $122,720 he had paid as extension fees.

20 The extensions were granted mostly in respect of two groups of four properties, *ie*, 3, 9, 11 and 15 Miltonia Close (the "1st Group of 4 Properties") and 1, 5, 7 and 13 Miltonia Close (the "2nd Group of 4 Properties").

Extensions under the Loan Agreement

21 Under cl 4.1 of the Loan Agreement, the OTPs for the 1st Group of 4 Properties were extended to 3 March 2020 for a fee of $89,600. Under cl 4.2 of the Loan Agreement, the OTPs for the 2nd Group of 4 Properties were extended to 30 June 2020 for an extension fee of $268,800. The total amount of extension fees set out in cll 4.1 and 4.2 was $358,400 (the "1st Set of Extension Fees"). Clauses 4.4 and 4.5 obliged Tung Kee to "procure and ensure" that the respective OTPs "shall be exercised" by 3 March 2020 and 30 June 2020. Mr Yung executed a deed of guarantee and indemnity dated 16 January 2020 in respect of the loaned amounts as well as the 1st Set of Extension Fees.

Extensions to 3 April, 3 May and 30 June 2020, for the 1st Group of 4 Properties

22 According to TG Master, after the initial extension of time granted under cl 4.1 of the Loan Agreement, the parties agreed that TG Master would grant a further extension of time in respect of the OTPs for the 1st Group of 4 Properties from 3 March 2020 (under cl 4.1 of the Loan Agreement) to 3 April 2020. The fee agreed for this further extension was $44,800 (the "2nd Extension Fee") to be paid by 31 March 2020. Including the $89,600 in extension fees set out in cl 4.1 of the Loan Agreement (above at [21]), the total extensions fees for the 1st Group of 4 Properties amounted to $134,400. Notably, Mr Yung gave TG Master a cheque for $134,400 dated 31 March 2020. However, this cheque was dishonoured.

23 According to TG Master, Mr Yung requested, and the parties thereafter orally agreed that TG Master would grant a further extension of time in respect of the OTPs for the 1st Group of 4 Properties from 3 April to 3 May 2020. The fee for this extension of time was $44,800 (the "3rd Extension Fee"), to be paid by 30 April 2020. Mr Yung also agreed to transfer the outstanding extension fees of $134,400 to TG Master's bank account on 30 April 2020. This was not done.

24 According to TG Master, the parties thereafter orally agreed on yet another extension of time in respect of the OTPs for the 1st Group of 4 Properties from 3 May to 30 June 2020 ("the 4th Extension") and agreed to an extension fee of $62,720 (the "4th Extension Fee"). As mentioned above (at [19]), Mr Yung paid an extension fee of $62,720 on 13 May 2020, and an extension fee of $60,000 on 3 August 2020 without specifying for which extension each payment was made.

Extension to 3 November 2020 (1, 3, 5, 7, 9, 11, and 13 Miltonia Close), to 17 November 2020 (1, 3, 5, 7, 9, 11, and 13 Miltonia Close), and to 4 December 2020 (15 Miltonia Close)

25 According to TG Master, Mr Yung thereafter again requested for an extension of time from 30 June to 3 November 2020 in respect of the OTPs for seven properties, *ie*, all the Properties except 15 Miltonia Close, for an extension fee of $325,440 (the "5th Extension Fee"). This request was allegedly made in September 2020. The parties thereafter allegedly reached an oral agreement for further extensions in respect of the OTPs for the seven properties to 17 November 2020 and in respect of 15 Miltonia Close to 4 December 2020 for an extension fee of $36,587 and $113,120 respectively (the "6th Set of

Extension Fees"), with all outstanding extension fees to be paid by 13 November 2020.

26 For easy reference, we set out a table of the extension fees which TG Master initially claimed:

Extension Fees	**Properties concerned**	**Extension period**	**Extension fees**
1st Set	1st Group of 4 Properties	2 January to 3 March 2020	$89,600
	2nd Group of 4 Properties	2 January to 30 June 2020	$268,800
2nd	1st Group of 4 Properties	3 March to 3 April 2020	$44,800
3rd	1st Group of 4 Properties	3 April to 3 May 2020	$44,800
4th	1st Group of 4 Properties	3 May to 3 June 2020	$62,720
5th	1, 3, 5, 7, 9, 11 and 13 Miltonia Close	3 June to 3 November 2020	$325,440
6th Set	1, 3, 5, 7, 9, 11 and 13 Miltonia Close	3 to 17 November 2020	$36,587
	15 Miltonia Close	3 November to 4 December 2020	$113,120
Less (sums paid by Respondents):			$122,720
Total:			**$863,147**

27 As mentioned, Mr Yung did not pay most of the extension fees. By a letter dated 22 February 2021, TG Master gave notice to the Respondents to hand over vacant possession of the Properties by 8 March 2021 as extension fees had not been fully paid by 13 November 2020. A final notice was given by a letter dated 23 March 2021. As the Respondents were not forthcoming with payment or possession, TG Master commenced proceedings against them on 5 April 2021.

Decision below

TG Master's claim for the loan repayment

28 TG Master claimed for the repayment of $620,000 plus interest under the Loan Agreement. By the time of the trial, the Respondents did not contest that the loan was owed and due. The Judge was satisfied that the Respondents were obliged to repay the amount of $620,000 with contractual interest, and accordingly allowed this claim against the Respondents on a joint and several basis. There was no appeal against this decision.

TG Master's claim for unpaid extension fees

29 However, the Judge dismissed TG Master's claim for the unpaid extension fees because it had not "proved the underlying contract(s) that entitle[d] it to claim the Extension Fees": Judgment at [47].

30 First, based on a plain reading of cll 4.1 and 4.2 of the Loan Agreement (which we set out later at [138]), the Judge held that the 1st Set of Extension Fees was payable *only* upon the *exercise* of the OTPs, and that cll 4.1 and 4.2 did not impose an obligation on the Respondents to pay the 1st Set of Extension

Fees without more. In particular, focusing on the specific phrase "*subject* to payment" [emphasis added] in cll 4.1 and 4.2, the Judge found that TG Master's obligation to grant an extension of time and Mr Yung's obligation to pay the 1st Set of Extension Fees were "interdependent" rather than independent obligations, where Mr Yung's payment of the extension fees was required *before* TG Master was obliged to grant the extension of time. The Judge reasoned that TG Master therefore could not impose on Mr Yung the obligation to pay by unilaterally granting an extension of time. If Mr Yung *elected* not to pay the 1st Set of Extension Fees, TG Master would not be obliged to grant the extension of time, and any extension of time so granted would be "out of pure goodwill" by TG Master. The Judge therefore dismissed TG Master's claim for the 1st Set of Extension Fees: Judgment at [48]–[53].

31 Second, in respect of the remaining extension fees, the Judge held that as TG Master had not pleaded the "particulars as to when these oral agreements were agreed" with sufficient specificity, the claim for extension fees on the basis of oral agreements could be entirely dismissed on this basis alone: Judgment at [54]–[56]. In any event, the Judge held that the evidence did not support TG Master's entitlement to extension fees. TG Master's obligation to grant the relevant extension of time would only arise if Mr Yung paid the relevant extension fee(s). The documentary evidence relied upon by TG Master showed only "interdependent" obligations, or recorded mere offers, or failed to capture any specific agreement: Judgment at [57]–[68].

32 On the other hand, the Judge held that TG Master did not need to return the $122,720 in extension fees already paid: Judgment at [69]. His reason was that because this sum was paid, TG Master was then obliged to grant "the

relevant extensions of time" and there was no suggestion that it had not done so.

The Respondents' arguments on unilateral mistake

33 The Respondents had contended that the OTPs should be set aside due to a unilateral mistake. The Judge rejected this submission, as the Respondents had not pleaded any particulars concerning the knowledge element of the mistake or the particulars of the mistake itself. This caused TG Master irreparable prejudice as it had made it difficult for TG Master to know the case it had to meet: Judgment at [83]–[86]. There was no appeal against this aspect of the decision.

The Respondents' counterclaim for the Option Fees, Further Sums, and Renovation Costs

34 The Respondents had counterclaimed the refund of the Option Fees totalling $475,000, the Further Sums totalling $4,000,000 (which should have been for $3,920,000 in view of the goodwill discount of $80,000: see above at [16]) and the Renovation Costs of $550,000. Based on the *Hon Chin Kong* framework, they submitted that the forfeiture of these sums would offend the penalty rule because they were not true deposits or payments of earnest money and they were not genuine pre-estimates of loss. Alternatively, they submitted that the court should grant equitable relief against the forfeiture of these sums. TG Master's submissions in response were also premised on the *Hon Chin Kong* framework. The Judge agreed that *Hon Chin Kong* was the governing case, as the present facts concerned "the forfeiture of sums already paid, as opposed to liquidated damages stipulated to be paid after breach of contract": Judgment at [88].

The Option Fees

35 After the trial, the Respondents conceded that the Option Fee of $59,375 payable in respect of each of the OTPs was a true deposit that TG Master was entitled to forfeit. The Judge therefore rejected the Respondents' claim for the refund of the total sum of $475,000. The Judge also agreed that each Option Fee would be regarded as a *deposit*: Judgment at [89].

Further Sums

36 The Judge allowed the Respondents' counterclaim for the sum of $4,000,000, being the aggregate of the Further Sums paid to TG Master (as claimed by the Respondents).

37 Applying the *Hon Chin Kong* framework, the Judge held that the Further Sums were not reasonable as earnest money and were therefore not true deposits that could be forfeited by TG Master. First, the Further Sum was approximately 17.88 per cent of the purchase price of each of the Properties. He referred to prior case authorities to derive "the customary figure of 10%" as a deposit: Judgment at [96] and [99]. As the Option Fee and Further Sum taken together amounted to 20 per cent of the Sale Price of each of the Properties, the Judge held that TG Master was obliged to show "special circumstances" to justify the higher amount of deposit. TG Master was unable to do so other than alluding to the fact that the Further Sums were for allegedly keeping the OTP open for 104 weeks. The Further Sums were therefore part payments that had to be tested against the penalty rule: Judgment at [100].

38 Further, the Judge reasoned that as the Respondents had obtained immediate possession of the Properties for two-and-a-half years and the right to sublet them, they were treated as being akin to an owner, which cohered with the Further Sum being a part payment towards a purchase: Judgment at [101].

39 The Judge then held that the forfeiture of the Further Sum infringed the penalty doctrine. In applying the penalty rule, the entire OTP had to be construed as a whole: Judgment at [102]. The Judge also found that because the penalty assessment was directed at the time of contracting, the fact that Mr Yung could exercise the OTPs separately after the Further Sums were paid was "beside[s] the point": Judgment at [103]. The requirement in cl A that Mr Yung had to pay the Further Sum in respect of *all* the Properties before any of the OTPs could be individually exercised was held to be "clearly penal" as it had the effect of compelling Mr Yung to pay the Further Sum in order to deal with each of the Properties individually despite having already paid the Option Fees. This "bundling provision" was thus not a genuine pre-estimate of loss but an unilateral arrangement by TG Master based on how it thought a "bulk purchase" should be implemented: Judgment at [104]–[106].

Renovation Costs

40 The Judge allowed the Respondents' counterclaim for $550,000 in Renovation Costs. He noted that TG Master had objected to the claim on the basis that the Respondents had not pleaded a claim in relation to the Renovation Costs: Judgment at [91]. The Judge dismissed this objection on the basis that the Respondents had pleaded for damages to be assessed: Judgment at [107]. He held that the Renovation Costs were not a true deposit as the payments were made on a "reimbursement" basis and should "therefore be seen as part

payments". The forfeiture of the Renovation Costs infringed the penalty doctrine as they were not a genuine pre-estimate of TG Master's loss. As TG Master would be taking the benefit of renovated Properties, it would have suffered "*no* loss because the Properties [were] being returned in an even better state" [emphasis in original]: Judgment at [108]–[109].

The Supplemental Judgment

41 Subsequently, the Judge also released *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd and another* [2023] SGHC 64 (the "Supplemental Judgment"). This followed a request by TG Master for further arguments *after* the Judgment was released.

42 First, TG Master had submitted that the Further Sums were the agreed consideration for the grant of the 30-month tenancies and hence the payment of the Further Sums was a primary obligation to which the penalty doctrine did not apply. The Judge rejected this submission on the basis that it was the *Hon Chin Kong* framework, and not the traditional penalty doctrine, that was applicable. On TG Master's argument, as forfeiture related to sums that have *already* been paid over, it would *never* amount to a secondary obligation (*ie*, a payment to be made "only when there was a breach of contract") such as to attract the application of the traditional penalty doctrine, since forfeiture was predicated on a primary obligation to pay money over: Supplemental Judgment at [53]–[55].

43 Second, TG Master had submitted that the Respondents had failed to discharge their burden of proving the applicable customary rate of deposit for an Option. The Judge rejected this submission on the basis that *Hon Chin Kong*

had mentioned a customary rate of 10 per cent and he was entitled to take judicial notice of the fact that this was a well-established position in Singapore: Supplemental Judgment at [57]. The Judge also found that TG Master had failed to lead evidence on the nature and quantum of the losses it had suffered, and in any event the forfeiture of the Further Sums was "likely incommensurate with the losses that [TG Master] might suffer as a result of a potential breach": Supplemental Judgment at [58]–[59].

The appeal

44 TG Master appealed against the Judge's decision to order the return of the sum of $4,550,000 to the Respondents, which comprised $4,000,000 in Further Sums and $550,000 in Renovation Costs. TG Master also appealed against the Judge's decision to deny its claim for the unpaid extension fees. However, TG Master limited its claim on appeal to the first four sets of extension fees totalling $510,720. After taking into account one of the part payments of $62,720 on 13 May 2020 (above at [19]), its claim on appeal was reduced to $448,000.

TG Master's case

45 TG Master claimed that it was entitled to retain the Further Sums and submitted as follows:

(a) First, it was undisputed that the Further Sums had been consideration for the grant of the 30-month tenancies for the Properties. Thus, the *Hon Chin Kong* framework was fundamentally inapplicable, as consideration for the grant of a lease was neither a deposit nor a part

payment. A claim in restitution was impossible as there was a valid contract and no total failure of consideration.

(b) Second, the *Hon Chin Kong* framework was inapplicable to *unexercised* OTPs, as there was no *obligation* to exercise the OTP. A non-exercise did not result in breach. The fact that cl E used the word "forfeit" could not be conclusive of whether it was a secondary obligation. Instead, the payment of the Further Sums was a primary obligation, being the condition for the right to exercise the OTPs, and the Further Sums were not payable upon breach. The penalty doctrine, which applied only to primary obligations, was therefore also inapplicable.

(c) Third and alternatively, if the *Hon Chin Kong* framework was applicable, the Further Sums were *akin to* a true deposit, as Mr Yung had signalled his commitment to eventually enter into a purchase by electing to make payment of the Further Sums. There was nothing unconscionable about its forfeiture upon Mr Yung's failure to exercise the OTPs. The Judge had erred in relying on the figure of 10 per cent as the customary amount. What was reasonable as a true deposit depended on the context and circumstances, which in this case justified a higher amount. In any event, 20 per cent was the customary amount of deposit. Even if it was not a true deposit, the Further Sums were not a penalty as the Respondents had failed to discharge their burden of proving that it was extravagant.

46 TG Master also submitted that the Renovation Costs of $550,000 should not be refunded to the Respondents. The Respondents' claim had not been

specifically pleaded or prayed for, and the Renovation Costs were in any event neither a part payment nor a deposit, but simply a sum which Mr Yung had agreed to pay for to enjoy the tenanted Properties. The payment of such costs was clearly intended to be recoverable as a debt owed to TG Master.

47 Finally, TG Master argued that the Judge erred in dismissing its claim for the 1st Set of Extension Fees and 2nd to 4th Extension Fees:

(a) For the 1st Set of Extension Fees (above at [21]), the Respondents' obligation to pay the fees was a condition subsequent rather than a condition precedent to the extensions of time granted. Such extensions also could not be conditional on the payment of the fees as some of the extended option periods would have expired before Mr Yung was required to pay those fees. This position is also fortified by the surrounding provisions in the Loan Agreement.

(b) For the 2nd to 4th Extension Fees (above at [22]–[24]), TG Master argued that any lack of particulars did not prejudice Mr Yung as he knew the case he had to meet. His obligations to pay these fees were clearly reflected in the contemporaneous evidence. Furthermore, Mr Yung's obligation to pay each of the extension fees arose at the time of agreement on each extension and not only when Mr Yung paid the extension fee.

48 However, the sum of $62,720 with respect to the 4th Extension Fee was actually academic because the Judge had allowed TG Master to retain the $62,720 (as part of the $122,720 that had been already paid to TG Master). We

will therefore focus on the 1st Set of Extension Fees, as well as the 2nd and 3rd Extension Fees.

The Respondents' case

49 The Respondents made the preliminary point that TG Master had raised new arguments on appeal, namely: (a) TG Master's characterisation of the Further Sums as consideration for the Tenancy Agreements (above at [45(a)]); and (b) TG Master's submission that the *Hon Chin Kong* framework was not applicable to unexercised OTPs and its submission that the penalty doctrine did not apply because the non-exercise of an OTP did not constitute a breach of contract (above at [45(b)]).

50 The Respondents submitted that TG Master's appeal for the Further Sums should be dismissed for the following reasons:

(a) First, the Further Sums were "not *in substance* treated as the consideration for the grant of the tenancies" [emphasis in original].

(b) Second, the first step of the *Hon Chin Kong* framework did not require that the contractual entitlement to forfeit arises only upon breach of contract.

(c) Third, the Further Sums were part payments, as the context showed that TG Master did not have a need for any further earnest moneys beyond the Option Fees. The Option Fees and Further Sums, which amounted to 20 per cent of the Sale Price, were higher than the customary amount of 10 per cent. As part payments, the Further Sums could not be forfeited as they were unenforceable penalties.

51 The Respondents argued that TG Master had to refund the Renovation Costs, an argument which they claimed was explicitly pleaded. The fact that Mr Yung was to reimburse TG Master for these costs showed that the Renovation Costs were not intended to be a deposit, as such payment would have been made upfront otherwise. They submitted that the Renovation Costs were penal because there was no evidence to show that the sum was a genuine pre-estimate of loss upon the non-exercise of the OTPs.

52 Finally, the Respondents submitted that TG Master's appeal regarding the extension fees should be dismissed:

(a) On the 1st Set of Extension Fees, TG Master could not impose an obligation on Mr Yung to pay the fees by performing its obligation of granting extensions of time. This was because the two obligations were interdependent, as borne out by the wording of cll 4.1 and 4.2. The Judge's finding that Mr Yung's obligation to pay the fees was a condition precedent to TG Master's obligation to grant extensions of time should be upheld.

(b) On the 2nd and 3rd Extension Fees, TG Master had failed to plead sufficient particulars of the alleged oral agreements as it had not even pleaded a general time period during which these agreements were entered. In any event, the contemporaneous documentary evidence was insufficient to show that Mr Yung owed any obligations to pay such fees.

Issues

53 The issues that arose in this appeal were:

(a) whether TG Master had raised new arguments on appeal;

(b) whether TG Master was entitled to retain the Further Sums, either because the *Hon Chin Kong* framework was not applicable to their "forfeiture" or because forfeiture of the Further Sums was valid under the *Hon Chin Kong* framework;

(c) whether the Respondents were entitled to equitable relief against forfeiture of the Further Sums;

(d) whether TG Master was entitled to retain the Renovation Costs;

(e) whether TG Master's claim for the 2nd to 3rd Extension Fees was barred on the basis of insufficient particularisation; and

(f) whether TG Master had made out its claim for the 1st Set of Extension Fees and the 2nd to 3rd Extension Fees.

New arguments on appeal

The parties' positions

54 The Respondents submitted that TG Master had raised new arguments on appeal, without highlighting that the points were new and without filing an application for permission to raise new points.

55 First, the Respondents submitted that TG Master's *characterisation* of the Further Sums as being consideration for the Tenancy Agreements (above at [45(a)]) had not been properly raised before the Judge, as TG Master had consistently referred to the Further Sums as having been "forfeited" rather than "retained" as consideration. We shall refer to this argument by TG Master as the "Characterisation Argument". The Respondents claimed that they would be

prejudiced by the Characterisation Argument, as they would be denied the opportunity to cross-examine TG Master's witness on "whether, *in substance*, the Further Sum was treated by parties as consideration for the grant of the tenancies" [emphasis in original].

56 Second, the Respondents objected to TG Master's contention that: (a) the *Hon Chin Kong* framework was not applicable to unexercised OTPs; and (b) the penalty doctrine did not apply as the non-exercise of an OTP did not constitute a breach of contract (above at [45(b)]). We shall refer to these arguments as the "Contractual Nature Argument" and "No-Breach Argument" respectively. According to the Respondents, before the Judge, TG Master had relied only upon authorities where the vendor of a property was found to be entitled to retain a deposit upon the purchaser's breach. TG Master's position at trial was therefore that *both* the Option Fees and the Further Sums comprised a *deposit* that would be "forfeited" upon the expiry of the OTPs and TG Master had made submissions on the premise that the penalty doctrine could be applicable to cl A of the OTPs *in principle*. Raising these new points allowed TG Master a second bite at the cherry, causing irreparable prejudice to the Respondents, who would be unable to cross-examine TG Master's witness on "matters germane".

57 TG Master submitted that the Characterisation Argument was not new and arose from undisputed facts. It had been expressly pleaded and was an agreed issue between the parties, which the Respondents had *conceded* before trial. The Characterisation Argument was also raised in further submissions. As for the Contractual Nature Argument and the No-Breach Argument, TG Master submitted that they had already been made before the Judge and in any event

concerned points of law that did not require any cross-examination. However, at the hearing before us, counsel for TG Master correctly conceded that the Contractual Nature Argument and the No-Breach Argument had *not* been raised before the Judge and were new points on appeal. TG Master thus sought our permission to raise the new arguments.

Our decision

58 Under the Rules of Court 2021 ("ROC 2021"), O 19 r 31(1)(*b*) requires an Appellant's Case to contain "detailed submissions on the facts and the legal issues, including the relevant authorities, *highlighting any new points not raised in the lower Court*" [emphasis added]. The importance of adhering to this requirement cannot be understated. It reflects the overarching concern that parties must not conduct an appeal by ambush through raising a new point without first providing adequate notice. However, the appellate court may still allow a new point to be raised on appeal even if it was not highlighted in the Appellant's Case as such.

59 In considering whether to allow a new point to be raised on appeal, the court will have due regard to the factors set out in *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 (at [38]): (a) the nature of the parties' arguments below; (b) whether the court had considered and provided any findings and reasoning in relation to the new point; (c) whether further submissions, evidence, or findings would have been necessitated had the new points been raised below; and (d) any prejudice that might result to the counterparty in the appeal if the new point is allowed to be raised.

The Characterisation Argument

60 We agreed with TG Master that the Characterisation Argument was not a new point at all. The Respondents unduly relied upon TG Master's reference to the "forfeiture" of the Further Sum. However, contrary to the Respondents' submissions, TG Master had *also* repeatedly maintained that the Further Sums had been consideration for the Tenancy Agreements in:

(a) its pleadings;

(b) the summary judgment proceedings for vacant possession of the Properties;

(c) the affidavits filed in the lead up to trial;

(d) the agreed list of issues set out in the lead counsel's statements; and

(e) TG Master's opening statement; and its reply submissions after trial.

61 This characterisation was also acknowledged in the Judgment at [21]. While the use of the word "forfeited" in the OTP was arguably distracting, this did not detract from the fact that the Characterisation Argument was *not* a *new* point. Furthermore, the Respondents had already "conceded" that the Further Sums were consideration for the grant of the tenancies before the trial. There was no prejudice to the Respondents and no new evidence or amendment to the pleadings was required by the Characterisation Argument.

62 In any event, we would have allowed TG Master to raise the Characterisation Argument even if it had been a new point and not highlighted

in the Appellant's Case as such. The Characterisation Argument essentially depended on the contractual interpretation of cl B of the OTPs (see [10] above). Contractual interpretation in the overall context was a question of law that did not depend on the parties' subjective views on the interpretation of cl B, and we were just as well placed as the court below to adjudicate upon this issue.

The Contractual Nature Argument and the No-Breach Argument

63 We agreed with the Respondents that counsel for TG Master had run its case before the Judge on the assumption that the *Hon Chin Kong* framework was applicable in principle. Hence, the Contractual Nature Argument and the No-Breach Argument were new points raised on appeal and TG Master should have clearly mentioned in its Appellant's Case that these were new points. Nevertheless, counsel for TG Master sought the court's permission during the hearing of the appeal to raise these arguments.

64 After considering the relevant factors, we exercised our discretion to allow both arguments to be raised.

65 In our view, adequate notice of both arguments had been provided to the Respondents. Those had been raised in TG Master's request for further arguments before the Judge and the Judge had briefly expressed his views on the arguments in the Supplemental Judgment (above at [41]–[43]). Furthermore, both arguments were *purely* legal arguments that concerned the legal nature of Options, the applicability of the *Hon Chin Kong* framework to the general category of unexercised Options, and the ambit of the penalty doctrine. An appellate court is in just as good a position as the trial court to adjudicate upon purely legal issues (*Ma Hongjin v SCP Holdings Pte Ltd* [2021] 1 SLR 304 at

[56]). Importantly, no new evidence was required for either argument and no prejudice was occasioned to the Respondents. Indeed, the Respondents could not articulate any actual prejudice, except for the generic submission that they would be prevented from cross-examining TG Master's witness on unspecified "matters germane".

The Further Sums

66 Having allowed the Characterisation Argument, Contractual Nature Argument and No-Breach Argument to be raised, we considered whether TG Master was entitled to retain the Further Sums. The Judge had allowed the Respondents' counterclaim for the return of the Further Sums, finding that they were part payments rather than a true deposit, and that their "forfeiture" was a penalty. The Judge appeared to have considered that the *Hon Chin Kong* framework was applicable to the "forfeiture" of *any* sum (regardless of its nature), so long as those sums were *already* paid over under a contract (regardless of its nature), in contrast with being a sum that was payable only *after* a breach of contract (above at [34] and [42]).

67 In order to determine whether the Judge had erred in finding that TG Master was not entitled to the Further Sums, it was necessary to first consider the true nature of the Further Sums.

The nature of the Further Sums

The parties' cases

68 TG Master submitted that it was in fact undisputed that the Further Sums constituted the consideration for the grant of the 30-month tenancies of the

Properties, being akin to a lump sum rental payment. Clause B of the OTP had expressly stated that each Further Sum was consideration for the tenancies. As the 30-month tenancies *had* been granted, TG Master was entitled to the Further Sums, and the court ought not to question the adequacy of consideration. Accordingly, the *Hon Chin Kong* framework was inapplicable to the Further Sums. In allowing the Respondents' counterclaim, the Judge had effectively allowed the Respondents to benefit from the 30-month tenancies for free, including the right to sublet the Properties. Furthermore, this was contrary to the principle that restitution could not operate where there was a valid contract conferring payment. Here, there was no total failure of consideration as the tenancies had been granted and Mr Yung had in fact enjoyed possession of the Properties even beyond the maximum term of the tenancies. There was accordingly no ground for restitution of the Further Sums.

69 The Respondents denied this characterisation of the Further Sums and submitted that they were "not *in substance* treated as the consideration for the grant of the tenancies" [emphasis in original]. They suggested that the Option Fees alone could have been the consideration for the tenancies. In reply, TG Master submitted that this line of argument was not open to the Respondents, as they had already "conceded" that the Further Sums had been consideration for the grant of the tenancies prior to the trial.

Our decision

70 We were of the view that while TG Master's characterisation of the Further Sums as consideration for the grant of the tenancies *was* supported by the plain wording of cl B of the OTPs (see above at [10]), the overall context of the OTPs also had to be considered.

71 The Further Sums could not be divorced from the OTPs. Pursuant to cl A of each OTP, a Further Sum had to be paid before the OTP could be exercised, failing which the OTP would be deemed to have lapsed. In cl B of the OTP, the Further Sum was described not only as the consideration for the grant of the tenancies, but also as the "balance of twenty per cent (20%) of the Sale Price" (above at [10]). Had any of the OTPs been exercised, both the Option Fee and the Further Sum paid in respect of that property would have been taken into account as payments made towards the Sale Price.

72 In our view, what was referred to in each OTP as a "Further Sum" was *in substance* a part of the fee for the option to buy, being the right to exercise the OTP whereupon a sale and purchase agreement would be constituted. Each tenancy agreement was granted pursuant to the OTP and the payment of both the "Option Fee" and the "Further Sum". What cl B meant in stating that "in consideration of the Further Sum, [TG Master] shall grant a tenancy …" was that the tenancy agreement would be granted if the Further Sum was paid. That did not mean that the Further Sum was consideration *only* for the tenancy agreement.

73 The Respondents argued that Tung Kee was granted a tenancy agreement for one of the Properties before the Further Sum was paid. This did not take them very far for it could simply have meant that TG Master had not insisted on payment of the Further Sum first, as a matter of *timing*.

74 In other words, the "Option Fee" and the "Further Sum" were both parts of a larger option fee of $559,375 (per property), which we shall refer to as the "True Option Fee". The True Option Fee amounted to 20 per cent of the Sale Price. This was why the Further Sum was described in cl B as being the

"balance" of 20 per cent of the Sale Price and had to be paid before Mr Yung was entitled to exercise the Option. Our conclusion was buttressed by Mr Yung's Offer to Purchase, which described the "first payment" of $475,000 (corresponding to the aggregate total amount of "Option Fees" payable) and "second payment" of $4,000,000 (corresponding to the aggregate total amount of "Further Sums" payable) as *together* constituting "the option fee" for the transaction (above at [13]–[14]). Furthermore, TG Master's evidence at trial was that its practice was to collect 20 per cent of the purchase price upfront, and that the stated "Option Fee" of $59,375 per OTP would have been "too little". The Judge appeared to have accepted this evidence: Judgment at [98]. Had the drafter of the OTPs simply provided for one option fee that was payable in two tranches, the true nature of the True Option Fee would have been clear.

Whether the Hon Chin Kong *framework was applicable*

75 The Judge decided that the *Hon Chin Kong* framework was applicable to each OTP, and we considered whether this was correct.

The parties' cases

76 TG Master submitted that the *Hon Chin Kong* framework was not applicable to *unexercised* Options. The analysis in *Hon Chin Kong* was concerned with the situation where sums were paid prior to the breach of a *sale and purchase agreement*, where the defaulting purchaser was already *obliged* to complete the purchase and the sums already paid could accordingly be considered as part payment towards the whole purchase price. Conversely, an unexercised Option simply granted a *prospective* purchaser the *right* to purchase and did not *oblige* him to exercise the Option or purchase the property.

77 In this case, the non-exercise of the OTPs did not result in a breach by Mr Yung as Mr Yung had the right but not the *obligation* to exercise the OTPs. TG Master was simply entitled to retain the Further Sums as the natural consequence of the non-exercise. It was only upon the exercise of the OTPs that the Further Sums could possibly be described as part payments. The mere fact that cl E used the word "forfeit" could not be conclusive of the characterisation of a clause as a secondary obligation to which the penalty doctrine applied, and merely made clear that TG Master was entitled to *retain* the Further Sums if the OTPs expired without being exercised.

78 TG Master's retention of the Further Sums was not subject to the penalty doctrine, as the Respondents' obligation to pay the Further Sums was a primary obligation (a condition) for the right to exercise the OTP for any one of the Properties. The non-exercise of an OTP did not constitute a breach that attracted the application of the penalty doctrine. The Further Sum was also not payable upon breach. The "bundling provision" in cl A of the OTPs, which required all of the Further Sums to be paid, was simply a condition to the right to exercise the OTPs individually. Separately, it could not even be regarded as an onerous primary obligation as the Sale Price of the Properties was premised on a bulk discount in favour of Mr Yung.

79 The Respondents submitted as follows. The first step of the *Hon Chin Kong* framework did not require that the contractual entitlement to forfeit arises only upon breach. TG Master's submission had been rejected by the Judge in the Supplemental Judgment, where the Judge opined that the *Hon Chin Kong* framework was applicable to the forfeiture of sums already paid over. As the Judge was able to apply the *Hon Chin Kong* framework, there was therefore no

conceptual difficulty in applying the framework and the penalty doctrine to the context of sums paid under an unexercised OTP. Furthermore, there was a policy justification in favour of applying the penalty doctrine, to prevent property developers from taking advantage of their superior bargaining position by allowing them to demand exorbitant option fees to make bigger profits. Counsel for the Respondents suggested that the Judge had extended the *Hon Chin Kong* framework to the context of unexercised OTPs due to an unarticulated policy reason, namely the need for judicial regulation of contracts that were commonly used by laypersons.

80 Notably, the Respondents did not argue that the payment of the Further Sums was a secondary obligation.

Options to purchase

81 We first considered the nature of a *typical* Option.

82 An Option is fundamentally a contract between a vendor and *prospective* purchaser of a property, under which the vendor undertakes to sell the property on the stated terms (usually at a fixed purchase price) upon the exercise of the Option by the prospective purchaser. The vendor limits his right to deal with the property in exchange for an option fee paid by the prospective purchaser. The prospective purchaser is granted an exclusive *right* to purchase the property and the vendor is *obliged* to keep the property off the market for the duration of the option period.

83 The prospective purchaser is *not obliged* to exercise the right and is free to allow it to lapse. If the Option lapses, the prospective purchaser is not in

breach of the Option and no sale and purchase agreement will come into existence (*Woo Kah Wai and another v Chew Ai Hua Sandra and another appeal* [2014] 4 SLR 166 at [69]–[70]). If the prospective purchaser exercises the Option, a sale and purchase agreement is constituted and the vendor is obliged to sell the property to the purchaser. If the vendor fails to complete the sale, this will amount to a breach on the vendor's part, which may be remedied by an order of specific performance to compel the vendor to sell the property (*Goh Kar Tuck (alias Wu Jiada) and another v Koh Samuel* [2022] SGHC 165 at [28]–[31]).

84 While an option fee will *typically* be credited as part of the payments made towards the purchase price *if* the Option is exercised and a sale and purchase agreement is constituted, it remains fundamentally distinct from other part payments because it is paid by the *prospective* purchaser as full payment in *consideration* for the *grant* of the Option, rather than by a purchaser pursuant to an obligation to pay the purchase price under a sale and purchase agreement. If the prospective purchaser opts not to exercise the Option, the option fee is *not* recoverable as it is paid as good and valuable consideration for the vendor's *grant* of the Option and the right to exercise contained therein (*Ong Keh Choo v Paul Huntington Bernardo and another* [2020] SGCA 69 at [129]; *Li Jialin and another v Wingcrown Investment Pte Ltd* [2023] SGHC 256 ("*Li Jialin*") at [48]). *Before* the Option is exercised, the option fee is not part payment towards the purchase. Unless otherwise agreed, an option fee operates as a non-returnable booking fee that the vendor is entitled to keep.

85 Here, each OTP was in nature the same as a typical Option. No sale and purchase agreement would be constituted unless the OTP was exercised. The difference was in the details as mentioned above at [1].

Hon Chin Kong

86 In *Hon Chin Kong*, the plaintiff entered into a sale and purchase agreement for the defendants' shares in a company, for a purchase price of $828,000. The parties had initially agreed on a lump sum payment, but after the plaintiff repeatedly failed to make timely payment, he sought a variation for payment in three tranches. It was agreed that the first tranche of $300,000 was to be a "down payment deposit". However, no further payments were made although the plaintiff was granted extensions of time. The plaintiff then repudiated the contract and failed to complete the sale. Thereafter, he demanded the return of the $300,000 arguing, *inter alia*, that there was no express forfeiture clause, or that the forfeiture amounted to a penalty. The defendants claimed that they were entitled to keep the $300,000.

87 Kannan Ramesh J (as he then was) held that the defendants were contractually entitled to forfeit the $300,000. In the absence of an express forfeiture power, whether a sum was intended to be a forfeitable deposit was a question of construction and depended on the intended nature of the payment as expressed in the contract (*Hon Chin Kong* at [44]). Whilst the word "deposit" was not conclusive, if the sum was paid as a "deposit", it would normally be implied that the sum was forfeitable on the purchaser's default, unless the overall context of the contract evinced a contrary intention (at [45] and [49]–[50]). References to the nature of the payment in the contract were therefore important in construing its effect and consequences (at [51]).

88 The nature of a deposit was to serve as security for performance by the purchaser (*Hon Chin Kong* at [49]). In that case, the plaintiff had failed to pay for the purchase of the defendants' shares and then proposed to pay in three tranches. The defendants then stipulated that the first payment of $300,000 would be a "down payment deposit". In that case, this proved that the sum was intended as a deposit to secure performance of the contract and was forfeitable upon the plaintiff's breach (at [47]).

89 Ramesh J next considered whether the forfeiture would be subject to the penalty doctrine and held that the doctrine did not apply to *true* deposits (*Hon Chin Kong* at [123]). The penalty doctrine was directed at regulating clauses which purported to serve as a genuine pre-estimate of loss (*ie*, a liquidated damages clause). Such clauses were remedial in that they focused on *compensating* for a breach of contract. A *true* deposit was *not intended to compensate* for a breach of contract. It was intended to be earnest moneys given to *guarantee* performance of the contract and to *signal* the good faith commitment of the purchaser towards completing the purchase. Forfeiture of a *true* deposit was not punitive, as disallowing forfeiture would allow a purchaser to escape from his bargain and take advantage of his own wrong (at [124]–[127]). Ramesh J found that the $300,000, amounting to 36 per cent of the purchase price, was reasonable as a true deposit that could be forfeited by the defendants (at [145]).

90 Accordingly, a deposit, being a sum paid as security for performance by the purchaser, was exempt from the penalty doctrine if it could be considered a *true* deposit: a deposit which is reasonable as earnest moneys. This prevented the abuse of the label of "deposit" as a guise for the forfeiture of sums that far

exceeded what would be reasonably necessary to serve the function of earnest money (*Hon Chin Kong* at [130] and [132]).

91 The framework set out by Ramesh J was as follows (as adapted from *Hon Chin Kong* at [95], [107], [136]–[140], and [143]; and Kwek Mean Luck J's restatement in *Li Jialin* at [30] and [34]):

> (a) First, the court determines whether there was an express or inferred power to forfeit. The power is inferred if the sum was intended to be paid as a deposit. If there was *no* power to forfeit, the sum must generally be returned on a failure to complete, subject to any right of set-off. The basis for the return is unjust enrichment.
>
> (b) Second, the court then determines whether the sum is a *true* deposit. A true deposit is a sum that is reasonable as an earnest or is customary or moderate. This is distinct from the penalty doctrine. A true deposit need not be a genuine pre-estimate of loss and may be forfeited regardless of its proportionality or relation to any actual loss occasioned. The touchstone of reasonableness looks at whether the sum is "so large that it cannot be objectively justified by reference to the functions which such a deposit properly serves", assessed in the *specific context* of the facts of each case. Therefore, even if a customary or conventional amount for a particular type of contract can be ascertained as a matter of evidence, it nevertheless represents only a starting point. The court may have regard to any factors relevant to the effectiveness of the true deposit as an earnest of performance, including: the history of dealing between the parties, their financial means, the degree of commitment required on the part of the vendor to keep the property "off the market" for the

duration of the sale in light of the prevailing market conditions, and the parties' relative bargaining power.

(c) Third, even if the sum is larger than the customary amount for the type of transaction in question (if such a convention is discernible), the vendor may show "special circumstances" to justify that amount. The vendor bears the onus of proving reasonableness.

(d) Fourth, if the sum is reasonable or otherwise justifiable, it may be forfeited as a *true* deposit. The penalty doctrine *does not* apply and the forfeiture of a true deposit cannot be regarded as a penalty. However, if the sum is *not* a true deposit, it will be characterised as a part payment in law, even if expressly described as a "deposit".

(i) If there was no express provision for forfeiture or retention, the purchaser may sue for the return of the part payment in unjust enrichment without invoking the penalty doctrine. As the transaction failed prior to the transfer of the subject matter of the aborted sale, the purchaser may seek restitution for unjust enrichment by relying on the unjust factor of total failure of consideration.

(ii) If there was an express power of forfeiture or retention, the purchaser does not have any automatic right to recover the part payment. The contractual power to forfeit remains exercisable. To recover the part payment, the purchaser must successfully invoke the penalty doctrine.

92 The *Hon Chin Kong* framework was therefore concerned with the forfeiture of sums paid under a *sale and purchase agreement*, where the sums were paid *pursuant to the purchaser's obligation to complete the purchase*, but the purchaser subsequently failed to do so. More specifically, the *Hon Chin Kong* framework dealt with sums that were intended to be paid as a deposit or at least as a partial payment towards the purchase price, and governed whether that sum was forfeitable as a *true* deposit or was a part payment the forfeiture of which could be subject to the penalty doctrine.

Our decision

93 In our view, the *Hon Chin Kong* framework was not applicable to an Option or an option fee paid under the Option. It was not applicable to each OTP or to the True Option Fee.

94 The *Hon Chin Kong* framework applied only to a sum that could properly be classified as a *deposit* or as a *part payment* towards the acquisition of the subject matter of a *sale*. The binary characterisation of a sum as being *either* a true deposit *or* a part payment presupposed an obligation to complete a *purchase*. A deposit secures the obligation to complete the purchase, and a payment is partial because it is made towards the whole purchase price. The *Hon Chin Kong* framework therefore did not apply to a sum that was *neither* a deposit *nor* a part payment, such as where the payment constituted a *full* payment made in consideration of the transaction. This must be so *a fortiori* where the sum was paid for an entirely distinct contractual objective from completing a purchase and where there was no obligation to complete any purchase at all, as such payments cannot meaningfully be described as either a deposit or a part payment *towards a purchase*. Ramesh J did not need to

consider the logically anterior question of whether the sum in question could even be regarded as a deposit or part payment on the facts of *Hon Chin Kong*, but properly appreciating the true nature of the Respondents' payments was imperative in this case.

95 We have already explained that in the present case, the OTPs were not sale and purchase agreements. Mr Yung had the *right* to exercise each OTP but was not under any *obligation* to exercise or to complete any purchase when the OTP was granted.

96 With respect, the Judge erred in applying the *Hon Chin Kong* framework without considering the nature of the payments. The True Option Fee was the fee payable for the *grant* of the OTPs (above at [82]–[84]). It did not secure, and was not paid pursuant to, any obligation to complete a purchase and therefore could not be classified as either a deposit or a part payment.

97 TG Master's entitlement to the True Option Fee was therefore *not* subject to the *Hon Chin Kong* framework. In general, the *Hon Chin Kong* framework would not apply to a sum paid under an unexercised Option, as such a sum would typically be the option fee paid for the grant of the Option. While Mr Yung *could have* exercised the OTPs, his failure to do so did not detract from the fact that he had nevertheless already got what he had bargained for: the *right* to exercise the OTPs. Having granted that right, TG Master was therefore entitled to keep the True Option Fee (above at [84]).

98 With respect, the Judge appeared to have been influenced by the use of the word "forfeited" in cl E(i) of the OTPs to describe the effect on the Option Fee, Further Sum and Renovation Costs upon the non-exercise of the OTP

(above at [12]). This was evident from the Judge's view that the *Hon Chin Kong* framework was the governing law for the "forfeiture of sums paid". However, the proper construction of a contract is a matter of substance over form, and the word "forfeited" could not by itself transform the nature of the True Option Fee. The use of the word "forfeited" was to make it clear that TG Master was entitled to keep the True Option Fee if the OTP was not exercised.

99 As the payment of the True Option Fee was made in exchange for the grant of the right contained in the OTPs, it was made in fulfilment of a *primary* obligation. The payment of the True Option Fee therefore could not be a penalty. The applicable test for whether a clause amounts to a penalty is whether it provides a genuine pre-estimate of the likely loss suffered by the innocent party pursuant to the breach by the offending party. The pre-estimate is as at the time of contracting, rather than at the time of breach. The penalty doctrine does not apply to primary obligations, given the court's reluctance to intervene in the contents of the parties' contractual bargain even if the term is particularly onerous (*Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2021] 1 SLR 631 at [82], [92]–[93], [151]–[153] and [281]). Clause E(i) of the OTPs was not a secondary obligation triggered by a breach of contract, as the triggering event in cl E(d), *viz*., the non-exercise of an OTP, did not constitute a breach. Clause E(i) was therefore not subject to the penalty doctrine.

100 We therefore allowed the appeal and held that TG Master was entitled to retain the True Option Fee, comprising the Option Fees of $475,000 and Further Sums of $4,000,000. As TG Master had upheld its end of the bargain in granting Mr Yung the right to exercise the OTPs, TG Master had earned the

True Option Fee and there could also be no suggestion of total failure of consideration. There was therefore no basis for the Respondents' claim for the Further Sums.

101 The Judge had denied the Respondents' claim for the return of the Option Fees, but had ordered TG Master to repay the Further Sums in the amount of $4,000,000. However, the total amount of Further Sums actually paid was $3,920,000, because of the $80,000 goodwill discount granted by TG Master (above at [16]). We deal with this discrepancy below (at [115]).

Relief against forfeiture

102 The Respondents' legal submissions on relief against forfeiture were spartan save for a cursory reference to *Pacific Rim Investments Pte Ltd v Lam Seng Tiong and another* [1995] 2 SLR(R) 643 ("*Pacific Rim*") at [60]. In the first place, it is unclear whether there exists a standalone doctrine of relief against forfeiture *in the context of deposits* (see, generally, *Hon Chin Kong* at [79], [93], and [99]). As TG Master pointed out, the doctrine of relief against forfeiture as discussed in *obiter* in *Pacific Rim* (at [60]) related to relief against forfeiture of a purchaser's *proprietary* interest in land under a contract of sale where there was a breach of a provision as to payment, in respect of which time was of the essence. This was distinct from relief against forfeiture of a deposit paid by a purchaser to a vendor, which the Court of Appeal described as an "exercise of the courts' power to relieve against a penalty" (*Pacific Rim* at [42]). TG Master suggested that this latter situation refers to the penalty doctrine and does not establish a standalone basis for intervention. In contrast, the Respondents failed to provide any explanation or elaboration on why relief against forfeiture should be available in this context.

103 We make the following observations. First, the True Option Fee was not a deposit to begin with (above at [74] and [96]). Second, there was strictly speaking no *forfeiture* as TG Master was entitled to retain the True Option Fee (above at [96]–[98] and [100]). Third, there were no "exceptional circumstances" calling for intervention. Nothing relied upon by the Respondents revealed "elements of unconscionability and injustice" (*Pacific Rim* at [60]). It is also important to bear in mind that in *Pacific Rim*, the purchasers, who were the party seeking relief against forfeiture, had paid an instalment of the purchase price late and the vendors were seeking to terminate the sale and purchase agreement because of the non-payment of *late payment interest*, which was a very small sum. In that context, the Court of Appeal was of the view that relief against forfeiture would be granted, but with an order to pay the interest, even if the vendors would have been entitled to terminate or annul the sale and purchase agreement (which was not the case) (at [38]–[39] and [61]). On the facts before us, we found no valid basis for granting relief, even if such relief had been available.

The Renovation Costs

104 We now explain why TG Master was entitled to retain the Renovation Costs. To recapitulate, Mr Yung was obliged to reimburse TG Master the Renovation Costs under cl B of the OTPs. Pursuant to cl E of the OTPs, the Renovation Costs would be "forfeited" if the OTPs were not exercised (above at [10]). It was undisputed that the Renovation Costs of $550,000 were paid by the Respondents to TG Master on 30 April 2018 (above at [16]).

105 The Judge allowed the Respondents' counterclaim for the Renovation Costs. On the basis of the *Hon Chin Kong* framework, the Judge held that the

Renovation Costs were not a true deposit because they were intended by the parties to be made on a "reimbursement" basis. This made them part payments the forfeiture of which would be subject to the penalty doctrine. The Judge reasoned that, because such forfeiture would allow TG Master to retake the Properties in an "even better state" than when they were handed over to the Respondents, TG Master would have suffered no loss from Mr Yung's failure to exercise the OTPs. The forfeiture of the Renovation Costs would therefore not be a genuine pre-estimate of TG Master's loss (above at [40]).

The parties' cases

106 TG Master argued that the Renovation Costs were *neither* part payments *nor* a deposit but simply a sum which Mr Yung had agreed to pay for at the very outset to enjoy the tenanted Properties. The fact that the Renovation Costs were paid on a "reimbursement basis" could not "transform" them into part payments. The parties intended for the Renovation Costs to be paid by Mr Yung and to be recoverable as a debt owed to TG Master. In any event, the Renovation Costs would not have gone towards part payment of the Sale Price of the Properties. Moreover, the penalty doctrine did not apply as the forfeiture was not triggered by an antecedent breach of a primary obligation.

107 The Respondents argued that the fact that the Renovation Costs were to be "reimbursed" to TG Master indicated that such costs must have been incurred *before* such reimbursement. Hence, the *reimbursement* of these costs could not have functioned as a true deposit indicating an assurance of an intention to perform an obligation as TG Master would already have performed its obligation under the OTPs to renovate 1 and 9 Miltonia Close. The Respondents further submitted that the forfeiture of the Renovation Costs infringed the

penalty rule because TG Master could not show that it held the genuine belief that the entirety of the renovations would necessarily be lost upon the non-exercise of the OTPs.

Our decision

108 In our view, the Judge had erred in finding that the Renovation Costs were part payments and that the "forfeiture" of these sums offended the penalty rule.

109 It was clear that the Renovation Costs were *not* paid pursuant to any obligation on Mr Yung's part to complete the *purchase* of the Properties. As mentioned earlier, Mr Yung had the *right*, but was not under any *obligation*, to exercise the OTPs. The *Hon Chin Kong* framework therefore did not apply to the Renovation Costs.

110 Furthermore, the Renovation Costs could not meaningfully be characterised as either a deposit or part payment of a purchase. In our view, the payment of the Renovation Costs was for an objective *entirely distinct* from completing any purchase although it arose because of the Tenancy Agreements which in turn arose because of the OTPs.

111 For one, the Renovation Costs could not be said to have been paid as a *deposit* as its payment did not serve to secure any obligation owed by Mr Yung to TG Master for the purchase of a property. Moreover, the Renovation Costs were never intended by the parties to be refundable at all (regardless of whether the OTP was exercised or not). Clause B of the OTPs simply set out an unconditional obligation that Mr Yung "shall reimburse" TG Master.

112 The Renovation Costs also could not have constituted *part payments* for the simple reason that they did not, under any circumstances, go toward the purchase price of the relevant Properties. We did not agree with the Judge's conclusion that the Renovation Costs should be characterised as part payments because they were not a true deposit and/or, as mentioned, were paid as a reimbursement.

113 Instead, we agreed with TG Master that the correct characterisation of the obligation to reimburse the Renovation Costs was the payment of a sum of money pursuant to a primary obligation. The parties had agreed that TG Master would carry out renovation works for 1 and 9 Miltonia Close and that the costs it incurred would be reimbursed by Mr Yung. This obligation to pay for the Renovation Costs was described as "a debt due from [Mr Yung]" in a letter from TG Master to Mr Yung dated 3 January 2018, which Mr Yung had signed. The reimbursement of the Renovation Costs was therefore simply the fulfilment of Mr Yung's primary obligation to reimburse TG Master for costs incurred on his account. Thus, the penalty doctrine did not apply.

114 We therefore allowed TG Master's appeal against the Judge's decision to order the return of $550,000 in Renovation Costs. Along with the Further Sums (above [100]–[101]), we reversed the Judge's order and allowed TG Master to retain the sum of $4,550,000.

115 TG Master paid $3,885,223.17 into court as the net moneys payable by TG Master to the Respondents, as calculated by the parties (above at [5]). As we have reversed the Judge's order that TG Master was to repay the Further Sums and Renovation Costs (above at [101] and [114]), the sum of $3,885,223.17 was to be returned to TG Master. We therefore did not need to

deal with the discrepancy between the order made by the Judge and the total amount of Further Sums actually paid, that arose from the $80,000 goodwill discount granted by TG Master (above at [16]).

The Extension Fees

116 We turn to address the issues concerning the extension fees.

117 The Judge had dismissed TG Master's claim for the extension fees which were based on oral agreements as he was of the view that it had not "proved the underlying contract(s)" that entitled it to these fees. To begin with, the Judge took the view that as TG Master had not pleaded the "particulars as to when [the] oral agreements were agreed" with sufficient specificity, the claim for five sets of extension fees following the 1st Set of Extension Fees should be dismissed. His concern about the lack of particulars did not extend to the 1st Set of Extension Fees which were, after all, set out in the Loan Agreement. In any case, the Judge held that TG Master's obligations to grant extensions of time and Mr Yung's obligations to pay the extension fees were "interdependent" obligations (above at [30]). This meant that TG Master's obligations to grant the extensions of time only arose upon Mr Yung's performance of his obligations to pay the extension fees: Judgment at [49].

Whether there was insufficient particularisation in TG Master's pleadings

118 We first considered whether TG Master's claim for the 2nd to 3rd Extension Fees should have been dismissed solely on the basis of insufficient particularisation in its pleadings.

The parties' cases

119 TG Master argued that any lack of particulars regarding the oral agreements did not prejudice the Respondents as they knew the case they had to meet. Not only had the Respondents admitted in their pleadings to Mr Yung having requested for and being *granted* extensions to the option periods, they also never requested for any further particulars of the oral agreements. In truth, any prejudice would only have pertained to Mr Yung, as only he was potentially liable for the 2nd to 3rd Extension Fees. Our grounds continue on this premise.

120 Mr Yung argued that it was not apparent from TG Master's pleadings whether there were oral agreements between the parties at different points in time, or whether there were multiple oral agreements at a single point in time. This led to Mr Yung only being able to give evidence "generally" on whether there were any oral agreements on the extension fees that were reached between the parties.

Our decision

121 In our view, the Judge had erred in dismissing TG Master's claim for the 2nd to 3rd Extension Fees on the sole basis that they were insufficiently particularised. An insufficiency in *particularisation*, as opposed to a complete failure to plead, was not a basis to summarily dismiss a claim after trial. In any event, Mr Yung was clearly not prejudiced by any lack of particulars in the pleadings.

122 The rationale for disallowing an insufficiently pleaded claim is to prevent injustice to an opposing party who is *unable to respond* to the claim due to the failure to plead: *How Weng Fan and others v Sengkang Town Council*

and other appeals [2023] 2 SLR 235 ("*How Weng Fan*") at [18]. The overarching enquiry therefore concerns irremediable prejudice, rather than inflexible technicalities. A party may show that no prejudice was occasioned to the opposing side by, for instance, establishing that the issue was raised in evidence, that it was clearly appreciated by the other party, and if no reasonable objections were taken at the trial to such evidence being led and the point in question being put into issue: *How Weng Fan* at [29(b)]. Indeed, evidence given at trial can, in appropriate circumstances, overcome defects in pleadings: *How Weng Fan* at [20].

123 In this case, the issue was *not* a failure to plead that the 2nd to 3rd Extension Fees were based on oral agreements or a failure to set out the material terms of the agreements. Those facts were expressly pleaded by TG Master. Instead, the issue was that TG Master had failed to provide particulars about the dates on which the oral agreements were concluded. However, the dates or range of dates pertaining to TG Master's claim for the 2nd to 3rd Extension Fees were raised in evidence. The affidavit of evidence-in-chief of Mr Ong Kai Hoe ("Mr Ong"), TG Master's project manager and its representative in the dealings between the parties, was made available to the Respondents *long before* the trial began on 13 September 2022. This affidavit expressly set out the specific extensions of time granted by TG Master (as set out above at [19]–[25]). At the trial, the oral agreements and the documentary evidence were shown and put to Mr Yung, who *agreed* that there were oral agreements and disputed only the *quantum* of fees.

124 Mr Yung also acknowledged, in the Defence and Counterclaim, that there was a "general agreement" for an extension of time to be granted for the

exercise of the OTPs and that $122,720 had already been paid to TG Master as extension fees. Mr Yung also made reference to "extension fees for May and June 2020" in his affidavit of evidence-in-chief. In addition, the conversation history of the WhatsApp group comprising Mr Yung, Mr Ong and one Ms Peggy Kuah showed that Mr Yung was aware of (and indeed deeply involved in) the ongoing negotiations between the parties for the various extensions of time granted in 2020. It was clear that Mr Yung knew the case he had to meet.

125 While litigants are generally expected to plead at least a range of dates on which an oral contract was concluded (*Chan Tam Hoi (alias Paul Chan) v Wang Jian and other matters* [2022] SGHC 192 at [47]), this was an entirely different matter from whether a claim should be *dismissed* after trial *solely* because of an alleged lack of particularisation.

126 Had there been any lack of clarity which prejudiced Mr Yung, it was open to him to apply for Further and Better Particulars in relation to the dates of the alleged oral agreements. Yet, he did not seek such particulars.

127 As no prejudice was occasioned to Mr Yung (much less irremediable prejudice), we disagreed with the Judge's decision to dismiss TG Master's claim for the 2nd to 3rd Extension Fees on the sole basis of insufficient particularisation.

128 On that basis, we turned to consider whether TG Master had made out its claim with respect to the 1st Set and the 2nd to 3rd Extension Fees.

Whether TG Master made out its claim for the 1st Set of Extension Fees

129 The Judge held that TG Master was not entitled to the 1st Set of Extension Fees because cll 4.1 and 4.2 of the Loan Agreement stated that the extension of time was "subject to" payment of the fees (see [30] above and [138] below). This indicated that TG Master's obligation to grant the extension of time and Mr Yung's obligation to pay the 1st Set of Extension Fees were "interdependent obligations". On this analysis, TG Master's obligation to grant the extension of time therefore did not arise *until* Mr Yung paid the extension fees. As he did not pay these fees, TG Master was not obliged to grant the extension of time and, crucially, could not impose any obligation on Mr Yung to pay the Extension Fees. The Judge took the view that Mr Yung's obligation to pay the Extension Fees only arose in the situations spelt out in cll 4.1.1 or 4.1.2 (and cll 4.2.1 or 4.2.2 correspondingly).

130 While the Judge accepted that cll 3.1 and 4.3 of the Loan Agreement (see [138] below) suggested that Mr Yung's obligation to pay the Extension Fees was an independent one, he nonetheless concluded that these clauses were expressly made subject to cll 4.1 and 4.2. In sum, he found (at [53] of the Judgment) that:

> … the purport of these clauses is that the second defendant can *elect* not to pay the Extension Fees, in which case the plaintiff does not need to provide the extensions of time specified within (and if any extension was provided by the plaintiff, that would be made out of pure goodwill and does not stem from a contractual obligation).
>
> [emphasis added]

The parties' cases

131 TG Master submitted on appeal that the Judge had placed undue focus on the words "subject to" without considering the entire context of the Loan Agreement. It argued that the surrounding provisions (such as cll 3.1 and 4.3) showed that the payment of the 1st Set of Extension Fees was due. In addition, if payment was a pre-condition to the extension of the option periods, this would mean that the OTPs, which would have expired on 2 January 2020 (above at [10]), and the caveats related to them would have been kept "in limbo" until the extension fees were paid. Such an outcome could not have been intended by the parties. Finally, TG Master argued that the term "subject to payment" could be construed as meaning that payment was a condition subsequent to the granting of an extension of time, instead of a condition precedent.

132 On the other hand, Mr Yung maintained that the Judge was right in finding that the obligations were "interdependent". As such, TG Master could not seek to impose an obligation on him to pay the 1st Set of Extension Fees by unilaterally granting extensions of time to Mr Yung. Mr Yung also argued that the phrase "subject to payment" could not be construed as meaning that the payment of the 1st Set of Extension Fees was a condition subsequent to TG Master's granting of an extension of time, as it would mean that the Loan Agreement would come to an end upon Mr Yung's failure to pay the 1st Set of Extension Fees.

Our decision

133 In our view, the Judge had erred in finding that cll 4.1 and 4.2 of the Loan Agreement did not entitle TG Master to the payment of the 1st Set of Extension Fees. This was because the Respondents' obligation to pay the 1st

Set of Extension Fees was an *independent* obligation which arose at the point the parties entered into the Loan Agreement.

134 The distinction between independent and dependent obligations (or promises) was explained in *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2018) at paras 24-036–24-038. As described in short at para 24-036:

> … Promises are said to be independent when the obligation of one party is absolute and not conditional upon the performance by the other of his part of the bargain. They are said to be dependent when the obligation of one party depends upon the performance, or the readiness and willingness to perform, of the other …

135 Further, in J W Carter, *Carter's Breach of Contract* (Hart Publishing, 2nd Ed, 2018), the learned author observed at para 1-08 that:

> …. *An obligation is dependent if its performance is postponed until the occurrence of an uncertain event. Otherwise, it is an independent obligation* …
>
> The distinction between dependent and independent obligations and promises expresses a relationship between performance obligations. Although it may be used for other purposes, it determines the right of one party to enforce the contract against the other. The question is therefore whether proof of the occurrence (or non-occurrence) of a particular event is a necessary ingredient of the right of a promisee to enforce the performance obligation of the promisor.
>
> [emphasis added]

136 The concepts of dependent and independent obligations therefore determine not only the order of contractual performance but also, accordingly, the right of each party to enforce the contract against the other. Moreover, the determination of whether obligations are independent or dependent is a matter of construction that turns on the objective intention of the parties, as evinced

through the text and the surrounding context. This is consistent with the general principles governing the construction of contracts: see *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal* [2018] 1 SLR 170 at [19].

137 On the evidence before us, it was clear that the Respondents' obligation to pay the 1st Set of Extension Fees was an *independent* obligation which arose at the point the parties entered into the Loan Agreement. It was not conditional upon any performance of TG Master's obligations. Likewise, TG Master's obligation to grant the extension was not dependent on payment of the extension fees. However, if the payment was not made, TG Master could arguably be discharged from continuing to grant the extension on the basis of a total failure of consideration but that would be a separate point.

138 We began by looking at the plain wording of cll 4.1 and 4.2 of the Loan Agreement, which we reproduce here for convenience:

> 4.1 [TG Master] has agreed to grant an extension of time to 3 March 2020 for the option period in respect of 3, 9, 11 and 15 Miltonia Close Singapore, subject to payment to [TG Master of] an extension fee of Singapore Dollars Eighty Nine Thousand and Six Hundred (S$89,600.00) *on* ***either***:-
>
> 4.1.1 together with the exercise of the Options to Purchase in respect of 1, 5, 7 and 13 Miltonia Close Singapore; ***or***
>
> 4.1.2 30 June 2020, *whichever is the earlier.*
>
> 4.2 [TG Master] has also agreed to grant an extension of time to 30 June 2020 for the option period in respect of 1, 5, 7 and 13 Miltonia Close Singapore, subject to payment to [TG Master] of an extension fee of Singapore Dollars Two Hundred Sixty Eight Thousand and Eight Hundred Only (S$268,800.00) *on* ***either***:-

> 4.2.1 together with the exercise of the Options to Purchase in respect of 1, 5, 7 and 13 Miltonia Close Singapore; ***or***
>
> 4.2.2 30 June 2020, *whichever is earlier*.
>
> 4.3 ***Since*** *the payment of the extension fees referred to in Clauses 4.1 and 4.2 is* ***due after*** *the extension of time is granted*, [Tung Kee] shall procure [Mr Yung] to provide a personal guarantee guaranteeing the payment of the extension fees referred to in Clauses 4.1 and 4.2 to [TG Master].
>
> [emphasis added in italics and bold italics]

139 It was not in dispute that the extensions stated in the Loan Agreement were granted by TG Master. An examination of cll 4.1.1 and 4.1.2 (and correspondingly cll 4.2.1 and 4.2.2) revealed that the Respondents were obliged to pay the 1st Set of Extension Fees ***either*** (a) together with the exercise of the OTPs in respect of 1, 5, 7 and 13 Miltonia Close, ***or*** (b) on 30 June 2020, whichever was the earlier. They were alternative timings for payment. This meant that *even if* the Respondents had *not* exercised those OTPs, their obligation to pay the 1st Set of Extension Fees by 30 June 2020 subsisted.

140 The effect of cll 4.1.1 and 4.1.2 of the Loan Agreement (and the corresponding provisions in cll 4.2.1 and 4.2.2) was simply to determine the precise *timing* that the Respondents' obligation to pay the extension fees had to be *performed.* This did not detract, however, from the fact that this obligation was an *independent* obligation which arose at the point of contract.

141 This was made clear by cl 4.3 of the Loan Agreement, which clearly stated that the provision for Mr Yung to act as a guarantor was included *because* the payment of the extension fees in cll 4.1 and 4.2 would only be *due after* the grant of the extensions of time. The need for a guarantor was envisioned

because the relevant extensions of time would be granted prior to the time of payment. Mr Yung's guarantee secured the *existing* obligation to pay that arose at the point of contract. We were therefore of the view that TG Master was entitled to the 1st Set of Extension Fees.

Whether TG Master made out its claim for the 2nd Extension Fee

142 The 2nd Extension Fee amounting to $44,800 was allegedly agreed upon by parties in the course of their oral discussions to extend the option periods for the 1st Group of 4 Properties from 3 March to 3 April 2020 (above at [22]). The Judge found that the primary document in support of this oral agreement was the letter by TG Master's previous solicitors to the Respondents' solicitors dated 3 March 2020. This letter stated:

> At [Mr Yung's] request, [TG Master] agrees to extend the option period for exercise of Options for 3, 9, 11 and 15 Miltonia Close Singapore to 3 April 2020 *provided the extension fee $134,400.00 (including the extension fee of $89,600.00 owing) is paid* to [TG Master] by 31 March 2020.
>
> [emphasis added]

143 The Judge held that the words "provided the extension fee … is paid" in the above sentence showed that TG Master's obligation to grant the extension of time and Mr Yung's obligation to pay the fee were "interdependent". As with the Loan Agreement, there was no independent obligation on Mr Yung to pay and there could not therefore have been any breach of such an obligation.

Our decision

144 In our view, the Judge had erred in rejecting TG Master's claim for the 2nd Extension Fee.

145 Despite the poor drafting and the words "provided the extension fee … is paid", TG Master's obligation to grant the extension of time to 3 April 2020 did not arise only upon the performance of Mr Yung's obligation to pay these fees. If that were so, TG Master would have been entitled to deal with the properties from 4 March 2020 until payment of the extension fees was made. However, that was not Mr Yung's position. It was clear to us that TG Master had granted the extension because it was obliged to do so by way of the agreement on the extension fees even though such fees were payable later.

146 The parties had intended for both obligations (to pay and to grant the extension) to arise at the time they *agreed* that this extension of time would be given. It was undisputed by the Respondents that TG Master did in fact grant an extension of time. The 2nd Extension Fee was payable on 31 March 2020, whereas the relevant OTPs expired on 3 March 2020. The extension of time therefore had to be granted prior to the date of payment. This meant that TG Master's obligation to grant an extension of time was not dependent on the payment of the extension fees by Mr Yung. These obligations were thus independent obligations. On this basis, we allowed TG Master's claim for the 2nd Extension Fee of $44,800.

Whether TG Master made out its claim for the 3rd Extension Fee

147 With respect to the 3rd Extension Fee (above at [23]), TG Master relied on the contents of the signed letter *from Mr Yung* to TG Master dated 31 March 2020. This letter stated:

> Telephone conversation between your Mr. Ong and Ms. Peggy and me this morning at 9.00a a.m. refers.
>
> It was agreed between us as follows:-

> …
>
> (2) the four Units *will be given* extension of time for the exercise of the Options to Purchase from 3 April 2020 to 3 May 2020, *and I agree to pay you* an interest sum of S$44,800.00 for the extension of time to 3 May 2020 for the exercise of the Options to Purchase for the four Units.
>
> [emphasis added]

148 The Judge acknowledged that TG Master was on "slightly stronger ground provided that [he] accept[ed] this letter as proof of the parties' alleged oral agreement", because of the use of the word "and" as opposed to the phrase "subject to". Although he stated that the letter was not a word-for-word record of the alleged oral agreement, he recognised that the phrasing of the agreement indicated that the parties' obligations were independent. However, he rejected the claim on the basis that the oral agreement arising from the telephone conversation between the parties on 31 March 2020 was insufficiently particularised in TG Master's pleadings: Judgment at [61]–[62].

Our decision

149 In the light of our conclusion that the claim for the extension fees ought not to have been dismissed on the sole basis of insufficient particularisation (at [121] above), we were of the view that the claim for the 3rd Extension Fee was incorrectly dismissed.

150 The letter had expressly evidenced Mr Yung's independent obligation to pay the 3rd Extension Fee of $44,800. Furthermore, the reasons we have stated in respect of the 2nd Extension Fee also apply here. If TG Master was not obliged to grant any extension till payment of the extension fee, it would undermine having an extension and, in any event, that was not Mr Yung's position.

151 Therefore, we allowed TG Master's claim for the 3rd Extension Fee of $44,800.

Summary

152 As mentioned, the total of TG Master's claim for the 1st Set of, and the 2nd and 3rd, Extension Fees amounted to $448,000.

153 Also, as mentioned (above at [19]), TG Master had in fact received $122,720 of which $62,720 was part. The $62,720 was for payment of the 4th Extension Fee. That left $60,000 unaccounted for as TG Master did not give credit for the $60,000 in its claim for $448,000. Although the Judge had allowed TG Master to retain the $60,000 (and the $62,720), this did not necessarily mean that TG Master did not have to account for the $60,000 in its claim on appeal.

154 The Judge had not ascribed the $60,000 to any extension and the parties also did not offer much assistance as to which it should apply to.

155 However, as the payment of $60,000 was made on 3 August 2020, it was more likely that it was made in respect of an obligation to pay that had accrued prior to that date. According to the WhatsApp conversation between Mr Yung and Mr Ong, Mr Ong requested on 19 June 2020 for Mr Yung to make, at the very least, payment for the 1st Set of Extension Fees. On 13 July 2020, Mr Ong asked Mr Yung for an update on a "$100k payment". Mr Ong followed up on this request on 20, 21, 22 and 23 July 2020. Mr Yung then transferred $60,000 as part of the promised "$100k payment" in early August 2020.

156 On this basis, we were of the view that the payment of $60,000 could not be ascribed to the 5th Extension Fee or 6th Set of Extension Fees which

were agreed to after 3 August 2020. We therefore applied it towards the 1st Set of Extension Fees being the extension fees owed by the Respondents to TG Master and in respect of which Mr Ong had pressed Mr Yung for payment.

157 As such, we held that the balance of $388,000 was payable to TG Master:

(a) $298,400 was to be paid as the unpaid balance of the 1st Set of Extension Fees. This liability was jointly and severally owed by the Respondents (see [19] above).

(b) $89,600 was to be paid by Mr Yung as the unpaid 2nd and 3rd Extension Fees.

Interest

158 We turn finally to the issue of interest on: (a) the extension fees which the Respondents owed to TG Master; and (b) the sum of $3,885,223.17 which TG Master paid into court pending this appeal.

159 With regard to the 1st Set of Extension Fees, TG Master sought contractual interest at the rate of six per cent per annum on an accrued basis and compounded monthly from 30 June 2020. According to TG Master, cll 3.1 and 3.2 of the Loan Agreement indicated that the contractual rate of interest ought to be applied to the 1st Set of Extension Fees.

160 This was not correct. Clauses 3.1 and 3.2 of the Loan Agreement provided that:

> 3.1 The *full amount of the Loan with interest payable* and extension fees in Clauses 4.1 and 4.2 shall be repayable by [Tung Kee] in lump sum by 30 June 2020.
>
> 3.2 [Tung Kee] shall pay to [TG Master] interest at the rate of six per cent (6%) per annum on an accrued basis and compounded monthly.
>
> [emphasis added]

161 It was clear from the plain wording of cl 3.1 of the Loan Agreement that the interest referred to in cl 3.2 applied only to the full amount of the loan and not to the extension fees referred to in cll 4.1 and 4.2. In other words, Tung Kee had to pay the loan *with six per cent interest per annum on an accrued basis and compounded monthly*, and *separately*, the extension fees to TG Master by 30 June 2020. As such, we ordered the Respondents to pay simple interest at the rate of 5.33 per cent per annum applicable to the balance of the 1st Set of Extension Fees (*ie*, the sum of $298,400) from 30 June 2020 (the date the sum was due) to the date of payment.

162 As for the 2nd and 3rd Extension Fees (*ie,* $89,600), we ordered Mr Yung to pay simple interest at the rate of 5.33 per cent per annum from the date of the writ (5 April 2021) to the date of payment. This was sought by TG Master, and the Respondents indicated that they had no objection to this.

163 We proceed to address the issue of interest on the $3,885,223.17 which TG Master had paid into court. This sum comprised:

(a) $3,811,749.33 as the net judgment sum below; and

(b) $73,473.84 as the post-judgment interest on the net judgment sum from the period of 19 December 2022 to 30 April 2023.

164 TG Master was entitled to the return of the entire sum above. The net judgment sum had previously been calculated on the basis that: (a) TG Master was liable to return to the Respondents the sum of $4,550,000 (comprising the Further Sums and the Renovation Costs); and (b) the Respondents were liable to return to TG Master the loan amount of $620,000 plus contractual interest. As the result was that TG Master owed the Respondents a net sum plus post-judgment interest, TG Master paid the above amount into court by agreement pending this appeal. However, as we have found that TG Master was entitled to the Further Sums and the Renovation Costs, the outcome of this appeal was that the Respondents remained obliged to repay the loan amount of $620,000 with contractual interest at the rate of six per cent per annum on an accrued basis and compounded monthly from 22 January 2020 on a joint and several basis (above at [28]) while the $3,885,223.17 was to be returned to TG Master.

165 An issue arose as to whether the Respondents were liable to pay interest on the sum of $3,885,223.17 which had been paid into court. This issue could have been avoided if both parties had agreed or sought the court's assistance for the sum to be held by stakeholders in an interest-bearing account with interest to be paid to the successful party and no further interest to be payable by the losing party.

166 While some authorities were cited by TG Master, we decided the issue based on the conduct of the parties as elaborated below.

167 On 31 May 2023, TG Master's previous solicitors proposed that the sum of $3,885,223.17 be held by the Respondents' solicitors and be placed in a fixed deposit account for a period of six months. If TG Master succeeded on appeal, the interest earned would be used to reduce the amount which the Respondents

owed to TG Master. Conversely, if the Respondents succeeded in resisting the appeal, the interest earned would be used to offset any amount which TG Master owed the Respondents. Essentially, the interest would be credited to the losing party on appeal even though logically it should be credited to the successful party.

168 However, that was not the reason why the Respondents rejected the proposal. Through their solicitors, the Respondents had taken the position that interest should be "only accountable" to them. TG Master's previous solicitors then extended an invitation for parties to meet to discuss this issue before TG Master decided to change lawyers. When the Respondents' solicitors subsequently asked TG Master's present solicitors to clarify what sort of discussion was needed, the latter stated that they would write back separately at a later date if necessary. There was, however, no indication that TG Master's solicitors followed up on this particular issue before the hearing.

169 In our view, the Respondents' position that only they would be entitled to the interest was unreasonable. In the circumstances, we exercised our discretion to order Mr Yung to pay interest on the sum of $3,885,223.17 at the rate of 2.6 per cent per annum from the date of payment into court, *ie*, 6 June 2023 till the date of judgment, 27 November 2023. We used 2.6 per cent after taking into account the statutory rate of 5.33 per cent per annum as interest payable on a judgment debt (subject to the discretion of the court) and the rate of 0.1 per cent per annum that would be earned on money paid into court under O 27 r 6 of the ROC 2021. This resulted in a net rate of 5.23 per cent. We then halved this figure to 2.6 per cent since TG Master should have been more pro-

active in obtaining the court's assistance for the money to be held by stakeholders in an interest-bearing account.

Conclusion

170 For the reasons provided above, we allowed the appeal and set aside the Judgment to the following extent:

(a) Mr Yung's counterclaim for the Further Sums in the amount of $4,000,000 was dismissed. TG Master was entitled to the Further Sums of $3,920,000, which were a part of the True Option Fee. There was no basis for Mr Yung to claim the return of the sums. TG Master's retention of the sums was not a penalty and there was no valid basis upon which to grant relief against forfeiture of those sums.

(b) Mr Yung's counterclaim for the Renovation Costs was dismissed as the reimbursement of this sum was simply the payment of a sum of money pursuant to a primary obligation. As such, TG Master was entitled to the sum of $550,000 in Renovation Costs. The retention of the sum did not constitute a penalty and there was no valid basis upon which to grant relief against forfeiture of that sum.

(c) TG Master's claim for the extension fees of $448,000 was allowed, being the total sum payable for the first three extensions. However, TG Master had received $122,720 as extension fees, with $62,720 of that sum being attributable to the 4th Extension Fee. The remaining $60,000 was attributable to the first of the three extensions. TG Master thus had to take the $60,000 into account as part of the $448,000. We ordered the payment of $388,000 as follows:

(i) $298,400 was to be paid by the Respondents to TG Master as the balance of the 1st Set of Extension Fees. This liability was joint and several.

(ii) $89,600 was to be paid by Mr Yung to TG Master as the 2nd and 3rd Extension Fees.

For (i) above, interest was to run at the rate of 5.33 per cent per annum from 30 June 2020 to the date of payment. For (ii) above, interest was to run at the rate of 5.33 per cent per annum from the date of the writ, *ie*, 5 April 2021, to the date of payment.

171 The sum of $3,885,223.17 which TG Master had paid into court was to be paid over to TG Master with any interest accrued thereon. Mr Yung was also ordered to pay interest on that sum to TG Master at the rate of 2.6 per cent per annum from the date of payment into court, *ie*, 6 June 2023, till the date of judgment, *ie*, 27 November 2023.

172 In accordance with the decision below, the Respondents were to pay the sum of $620,000 to TG Master with interest from 22 January 2020 to the date of repayment, at six per cent interest per annum on an accrued basis and compounded monthly in accordance with the Loan Agreement. This liability was joint and several.

173 We ordered Mr Yung to pay $50,000 all-in as costs of the appeal to TG Master. The Respondents were ordered to pay an agreed sum of $3,000 to TG Master for HC/SUM 993/2023 which we need not elaborate on.

174 Finally, we ordered the Respondents to pay 95 per cent of the costs of the trial below as well as 95 per cent of disbursements to TG Master. This liability was joint and several. We did not award the full costs and disbursements of the trial to TG Master because TG Master had dropped its claim to some of the extension fees. Parties were given 14 days to agree on the quantum failing which it was to be fixed by the court below and, failing that, it was to be fixed by the Appellate Division of the High Court.

Woo Bih Li
Judge of the Appellate Division

Debbie Ong Siew Ling
Judge of the Appellate Division

Audrey Lim
Judge of the High Court

Lee Peng Khoon Edwin, Amanda Koh Jia Yi and Mirza Akmal Bin Mohamad Shahri (Eldan Law LLP) for the appellant;
Lin Hui Yin Sharon, Oh Zhen Hao Thaddeus (Hu Zhenhao) and Phng Boon Yew Gideon (Withers KhattarWong LLP) for the respondents.