Chee Peng Kwan and Another v Toh Swee Hwee Thomas and Others
[2009] SGHC 141

Case Number : Suit 423/2008, NA 5/2009

Decision Date : 09 June 2009

Tribunal/Court : High Court

Coram : Teo Guan Siew AR

Counsel Name(s) : Toh Kok Seng and Chia Aileen (Lee & Lee) for the plaintiffs; Harpreet Singh Nehal SC and Ho Shu-Wen Dawn (Drew and Napier LLC) for the defendants

Parties : Chee Peng Kwan; Sim Hui Lin Jackelyn — Toh Swee Hwee Thomas; Lim Leng Leng Lilian; Tan Denis; Mitchell David Arthur; Samantha Poo Siok Mei (All Formerly Trading Under The Name and Style of Toh Tan & Partners)

Contract

Damages

[LawNet Editorial Note: This judgment has been amended pursuant to an Order of Court dated 9 September 2009 to remove the first defendant from the case title.]

9 June 2009 Judgment reserved.

Teo Guan Siew AR:

1 The central question in this case is the extent to which a negligent law firm, which failed to exercise the option in a conveyancing transaction on time for its clients, should be liable for the loss suffered by the clients as a result of the transaction falling through. It brings into play in this specific context the application of the principles of remoteness of damage as laid down in the well-known decision of *Hadley v Baxendale* (1854) 9 Exch 341, which has received continued endorsement by our Court of Appeal most recently in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd & Anor* [2008] 2 SLR 623. It should be stated at the outset that although this action was commenced against six defendants who were solicitors from the law firm, the plaintiffs subsequently chose to discontinue the action against the first, fifth and sixth defendants. The assessment of damages thus involved only the second to fourth defendants, and references to "the defendants" in this judgment should be construed accordingly.

Facts

2 The plaintiffs, who are husband and wife, were interested to purchase a condominium unit in a development known as "The Seafront on Meyer". This was because this new development was located on the site of what was previously "Meyer Tower", at which the second plaintiff's family used to stay before it was sold in a collective sale. At the time of the collective sale of "Meyer Tower", the second plaintiff's family had wanted an option to buy back two units in the new condominium to be built, but that was not possible. The family therefore did the next best thing which was to look out for the launch of the new development. Upon realising that CRL Realty Pte Ltd ("the developer") had taken over the site, they registered their interest to purchase with the developer even before the launch.

3 The intention of the family was to purchase two units in the same development, one for the

plaintiffs and another for the second plaintiff's father and sister. In particular, they wanted the two units to be very proximate to each other because they wished to stay close as a family and also to facilitate childcare arrangements. There was further a desire that the two units be located on high floors because their previous unit (which was on the tenth floor) in the old development "Meyer Tower" did not allow them to have a sea view unobstructed by trees, and also because the first plaintiff was an avid lover of skyscrapers.

4 There was strong demand for "The Seafront on Meyer" and people queued up to five days before the launch on 6 April 2007. The family was second and third in the queue. On the first day of the launch, the second plaintiff's father and sister booked unit #22-09 while the plaintiffs booked unit #23-09. These were high floor units in the same block with the same facing, and one unit was one floor directly above the other. The purchase price of unit #23-09 was $2.924 million.

5 Both the plaintiffs and the second plaintiff's father and sister retained the defendants as their solicitors to act for them in the two purchases. Unfortunately and quite inexplicably, the defendants exercised the option for unit #22-09 on the due date of 7 May 2007 but failed to exercise the option for the plaintiffs' unit #23-09 on time. The option signed by the plaintiffs was delivered by the defendants to the developer one day late on 8 May 2007. The plaintiffs only found out about this when the developer's solicitors informed them that their signed option had not been received within the exercise period. Thereafter, despite repeated pleas from the plaintiffs as well as the defendants, the developer refused to allow the plaintiffs to exercise the option out of time and proceeded to forfeit 25% of the booking fee.

6 The plaintiffs then engaged another set of lawyers, Lim Soo Peng & Co, who advised them to mitigate their loss by continuing to try and buy the same #23-09 unit from the developer. The defendants also suggested to Lim Soo Peng & Co that such attempts should be made. However, the developer was not willing to release the unit and its solicitors informed the plaintiffs that the developer "had no intention to resell the unit at the moment". Lim Soo Peng & Co then wrote another letter to the developer appealing on behalf of the plaintiffs, stating *inter alia* the following:

> 1. …
>
> 2. Our clients (Mr Chee Peng Kwan and Ms Jackelyn Sim Hui Lin) had intended to purchase the captioned property (#23-09) so that they could stay in the same block together with their father (father-in-law) and sister (sister-in-law) who had already exercised their own option to purchase the unit directly below (#22-09).
>
> 3. (i) Our clients have no intention to resell the property in the open market.
>
> (ii) They are not speculators but genuine purchasers who want to live close to their family members.
>
> (iii) Our clients have young children who need to be taken care of by their grandparents and that is why our client have been so keen to purchase the unit just one floor above their father's.
>
> 4. (i) Our clients understand that the property market is on the upsurge and your clients have the right to resell the property at a higher price.

(ii) Our clients are therefore prepared to pay your clients the market price for the property.

This, and a follow-up letter reiterating the same, failed to persuade the developer to change its decision.

7 At the same time, Lim Soo Peng & Co wrote to the defendants setting out the loss and damage suffered by the plaintiffs, including the forfeiture of the booking fee and the difference between the original purchase price of $2.924 million and the new price of unit #23-09 or the price of a similar property. They informed the defendants that the plaintiffs had in view of the rising property market and towards mitigating their losses instructed their estate agent to "repurchase" the same unit from the developer and at the same time look for a similar property in the vicinity. In particular, it was stated in the letters that unless the defendants could confirm that they had made arrangements for the plaintiffs to "purchase back" unit #23-09, the plaintiffs would be seriously considering purchasing a similar unit in "The Seafront on Meyer" from the resale market or a unit from another nearby development known as 'The Allto". No less than three letters were sent but no response was forthcoming from the defendants at all.

8 Subsequently, the plaintiffs engaged their present solicitors Lee & Lee to take over conduct of the matter from Lim Soo Peng & Co. From June to December 2007, Lee & Lee continued to write to the developer's solicitors to attempt to purchase unit #23-09. These were all met with the same reply that the plaintiffs may purchase the unit when it is released to the public but that the developer is unable to commit to the timing of such release or to the pricing. During this same period, the plaintiffs did look for comparable developments and specifically "The Allto", but these were found to be unsuitable. The second plaintiff explained as follows in her affidavit of evidence-in-chief:

> We did not pursue the purchase of any units at The Allto. Allto did not have a 1,604 square feet unit, which was the size of Unit #23-09. The next available size was 2,000 square feet. We would have been accused of not mitigating our losses if we had proceeded to purchase a 2,000 square feet unit at The Allto. The Defendants never responded to our suggestion to consider buying a unit at The Allto and merely restated their suggestion to buy back Unit #23-09. Furthermore, the units at The Allto were less desirable to us. They were closer to the expressway (and therefore noisier) and did not have as good a view as our Unit #23-09. *Most importantly, if we were to purchase a unit at The Allto, it would mean our family would be separated from my parents*. [emphasis added]

9 Lee & Lee wrote to the defendants again in August 2007 and then in December 2007 seeking a response to the earlier three letters sent by Lim Soo Peng & Co on behalf of the plaintiffs. It was only on 18 December 2007 that the defendants responded, with nothing more than an allusion to their earlier suggestion to Lim Soo Peng & Co that the plaintiffs should mitigate their loss by appealing to the developer to give them the right to purchase the same unit #23-09.

10 In March 2008, Lee & Lee sent another letter to the developer's solicitors requesting that unit #23-09 be released for sale to the plaintiffs. This was met with the same non-committal reply from the developer. Concurrently, the plaintiffs, realising that they could not wait indefinitely for the same unit, looked for alternative units within the same development and found out that unit #20-12 was available in the sub-sale market for the price of $3.6 million. However, this unit was found in a different block and was three floors lower than unit #23-09. Based on the price difference of $26,000 per floor as set by the developer at the time of launch, unit #20-12 would be worth approximately

$78,000 less than unit #23-09. On 25 April 2008, Lee & Lee communicated to the defendants the intention of their clients to buy this alternative unit #20-12 and to claim from the defendants the difference between the purchase price of $3.6 million and the original purchase price of $2.924 million for unit #23-09.

11 But before steps were taken to purchase the alternative unit, on 16 May 2008, the developer suddenly decided to release unit #23-09 for sale to the public at the price of $3.609 million, on a first come first served basis. The plaintiffs' estate agent, after being notified about this through his company's marketing department, immediately alerted the plaintiffs. As the price was more than $600,000 above the original $2.924 million, the plaintiffs requested for some time to consider but were told by the estate agent that they had to make up their minds by 1 pm the same day. The second plaintiff explained in her affidavit that they were under tremendous pressure as they were concerned that if they did not confirm the purchase, the unit might be bought by a third party. In that situation, they might end up having to pay an even higher price, even assuming that the third party was willing to sell in the first place. Moreover, in a sub-sale, the plaintiffs might lose the benefit of the deferred payment scheme which was offered to direct purchasers from the developer.

12 The plaintiffs therefore decided to proceed with the purchase of unit #23-09 at the stated price of $3.609 million. They managed to persuade the developer to extend to them the deferred payment scheme, as well as a 1 percent discount amounting to $36,090 under a Multi-Family Cash Rebate. The plaintiffs further managed to obtain a 50% waiver of the cancellation charge imposed by their bank for the cancellation of their original housing loan, as they went back to the same bank for a fresh loan in respect of the same unit.

The Proceedings

13 The plaintiffs commenced proceedings against the defendants for breach of contract and for negligence in failing to exercise the option to purchase in respect of unit #23-09 on time, resulting in the following loss and damage suffered by the plaintiffs:

Loss and damage	**Amount**
(a) Forfeiture of 25% of the booking fee	$36,550
(b) Difference between the new purchase price and the old purchase price (less 1% cash rebate)	$678,150
(c) Additional stamp duty payable on new purchase price	$20,550
(d) Partial cancellation fees for financial arrangements	$7,487.50
(e) Additional legal and financing costs	To be quantified

14 Consent judgment was entered in respect of liability and for damages to be assessed. It is pertinent to note the pleaded defence, which was that the plaintiffs had suffered no loss or damage and that even if there was any loss suffered, the plaintiffs had failed to *mitigate their loss*. It was pleaded that the plaintiffs failed to mitigate by insisting on "repurchasing" unit #23-09 at the price of $3.609 million demanded by the developer when the true market value was very substantially lower and in refusing to source for an alternative unit in the same development from the secondary market

or an alternative unit from an equivalent development at a reasonable price.

15 For the purpose of assessing damages, the second plaintiff's affidavit of evidence-in-chief ("AEIC") detailed the plaintiffs' actual losses and how these were computed, as well as the steps that were taken by them to mitigate their losses in the best way they could under the circumstances. For the defendants, the lawyer who handled the property transaction for the plaintiffs described in her AEIC the events leading up to the failure to exercise the option on time. Upon the proposal of the *defendants*, both parties agreed to dispense with the attendance and cross-examination of these two witnesses of fact. The effect of this is that the defendants did not challenge at all the evidence of the second plaintiff as to how the plaintiffs had done everything they could reasonably do in the circumstances to mitigate their loss. This was initially puzzling to me: since the defendants' pleaded case was one of failure to mitigate, one would have expected the defendant's counsel to cross-examine the second plaintiff and put this issue in contention.

16 The assessment hearing before me was essentially an exercise in valuation. Both sides called their own expert valuer to endeavour to provide an accurate market value of the subject unit #23-09 as at the date of the actual purchase 16 May 2008. The two experts used the same methodology of looking at the prices of comparable units transacted around the same period, and adjusting the figures to take into account the premiums that are attributed to units with a sea-view and which are on higher floors. Even though the approach was the same, the experts reached very different results. The plaintiffs' expert concluded that the unit was sold at its market price of $3.609 million, whereas the defendants' expert valued the unit at only $2.65 million. Much time was spent during the cross-examination of the two expert witnesses on what should be the appropriate condominium units to be used for comparison, as well as the specific details of calculation such as whether the sea-view and higher floor premiums should be applied by way of percentages or lump sum figures. It should also be mentioned that in the course of the hearing, counsel for the defendant, Mr Harpreet Singh SC, abandoned the defendant's own expert evidence and instead embarked on his own analysis of what the market value of the subject unit was, by tendering various new tables of computation to try and assist the court. As will be explained later, the whole valuation exercise is not material to the basis of my decision.

17 It was only at the stage of closing submissions that the defendants revealed what their primary line of defence was going to be. Mr Singh relied on the principle of remoteness of damage laid down in *Hadley v Baxendale* (1854) 9 Exch 341 to argue that the loss claimed by the plaintiffs, in the form of the difference between the purchase price of $3.609 million on 16 May 2008 and the original price of $2.924 million, was too remote and not recoverable under the law. Under the first limb of the rule in *Hadley v Baxendale*, damages that are recoverable for a breach of contract should be such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract. Mr Singh placed significant emphasis on the English Court of Appeal decision of *Simpson v Grove Tompkins & Co* (The Times, 17 May 1982) which applied the rule in *Hadley v Baxendale* in the context of a solicitor's negligence in a conveyancing transaction. Based on the case of *Simpson*, Mr Singh contended that what would be within the reasonable contemplation of the parties at the time of contract was that in the event of a breach by the defendants, the plaintiffs will take a reasonable period of time to look for and purchase a suitable equivalent property or to get back the same property at the market price; and that such a reasonable period was three months after the date of the breach. This, according to Mr Singh, meant that the assessment of the loss should be based on the value of the subject property three months after 7 May 2007. Mr Singh argued that the loss claimed by the plaintiff, based on the value of the property a whole year after the date of breach, was clearly too remote under the first limb of the rule in *Hadley v Baxendale*. Mr Singh further submitted that there were also no special circumstances made known to the defendants that might bring this case within the second limb of the rule. He eloquently argued that the plaintiffs might well

have "set their hearts" to purchasing only unit #23-09 and no other for a variety of reasons (as they are perfectly entitled to do), but as long as these precise circumstances were not specifically communicated to the defendants, the plaintiffs were not entitled to delay a whole twelve months before repurchasing the unit at a high price as demanded by the developer and to saddle the defendants with the full extent of that loss.

18 It was the defendants' case that since the plaintiffs' expert had only valued the subject property as at one single date, *ie* on the actual date of purchase 16 May 2008, and no evidence was led whatsoever by the plaintiffs as to the property's value at other points in time and in particular three months after the date of the breach (*ie* in August 2007), the plaintiffs have therefore failed to justify their claim for substantial damages. Mr Singh submitted that the plaintiffs are only entitled to nominal damages, as any figure which the court may pick as the value in August 2007 would be completely arbitrary.

19 The defendants' alternative argument was that even if the court is minded to assess the loss based on the value of the subject property one year after the defendants' breach, the valuation of unit #23-09 as at 16 May 2008 is much less than $3.609 million. As mentioned above, Mr Singh did not rely on the defendants' own expert valuation of $2.65 million but instead on his own analysis, which yielded a figure of between $3.1 and $3.2 million.

Pleadings and the Burden of Proof

20 It became clear after the hearing why Mr Singh had decided not to cross-examine the second plaintiff, since the evidence in her AEIC pertained mainly to the steps the plaintiffs took to mitigate their losses, which was an area that Mr Singh on behalf of the defendants had decided not to address in his submissions. Mr Singh's point was that it is for any loss to be first established before one moves on to determine whether such loss could have been reasonably mitigated. It follows, so the argument went, that there is no need for him to deal with the question of mitigation since the plaintiffs have in the first place not even established that they had suffered any loss that is recoverable in law. From the perspective of burden of proof, Mr Singh is clearly right that the onus is on the plaintiffs to prove that their loss is not too remote. Indeed, it would seem to be precisely because of this that Mr Singh astutely chose to attack the plaintiff's case on the issue of remoteness of damage rather than the question of mitigation, bearing in mind that with regard to the latter, the burden would fall on Mr Singh's clients instead to show that the plaintiffs had failed to mitigate. However, the question of burden of proof is separate from the question of pleadings.

21 Counsel for the plaintiffs, Mr Toh Kok Seng, rightly pointed out that it was not pleaded in the defence that the loss suffered by the plaintiffs is too remote to be recovered. Instead, the pleaded defence was that the plaintiffs had not mitigated their losses and the only particulars provided were in relation to such failure to mitigate. Although it is true that the legal burden is on the plaintiffs to prove that their loss is not too remote under the law, it surely must be for the defendants to first raise the question of remoteness of damage in the pleadings as an issue in dispute. This must be done to put the plaintiffs on notice, so that they could prepare their case accordingly and adduce the necessary evidence to discharge their burden of proving their case that the loss is recoverable. Under O 18 r 8 of the Rules of Court (Cap 322, R5, 2006 Rev Ed), a party must plead specifically any matter "which he alleges makes any claim or defence of the opposite party not maintainable" and "which, if not specifically pleaded, might take the opposite party by surprise". It should follow that if the defendant wishes to raise matters such as remoteness, these must be specifically pleaded: see Jeffrey Pinsler, *Singapore Court Practice 2006* (LexisNexis, 2006) at para 18/13/3. In *Bullen & Leake & Jacob's Precedents of Pleadings* (London: Sweet & Maxwell, 13th Ed., 1990), it is stated that there should therefore be pleaded in the defence "matters as to causation or remoteness of damage, or as

to whether damage was foreseeable".

22 To be sure, the defendants did in their pleadings "deny that the plaintiffs have suffered any loss or damage and put them to strict proof thereof". It may conceivably be argued that implicit in such denial of loss is that the plaintiff's alleged loss is one that is not recoverable in law, for reasons which may include that fact that the loss is too remote. Such an approach, however, would not in my view be conducive to the fair and transparent conduct of the litigation process. Having proceeded on the basis, as indicated by what was expressly pleaded by the defendants, that the issue is mainly one of mitigation, the second plaintiff had provided in her AEIC all the details of the steps taken to mitigate their losses. Yet, it subsequently turned out only during the stage of closing submissions that the defendants would in fact not be addressing this point at all but would rather be contending that the loss claimed by the plaintiffs is too remote. The emphasis would as a result shift much more to the events around the time of contract rather than simply what happened after the breach of contract and negligent act took place. The plaintiffs were caught by surprise. Mr Singh contended that the plaintiffs had failed to lead any evidence to demonstrate that the plaintiffs had in fact communicated to the defendants how special the subject property was to them when they engaged the defendants' services. He also suggested that the state of the evidence indicated that the meeting that the plaintiffs had with the defendants' lawyer handling the property transaction was just a standard meeting which followed standard protocol. However, had the plaintiffs known earlier that the defendants would be raising the issue of remoteness of damage, they could possibly have adduced more evidence of the precise circumstances under which they had retained the defendants to act for them, and especially what was the exact background to their intended purchase that was made known to the defendants. What we know from the second plaintiff's AEIC is that both the plaintiffs and the second plaintiff's father and sister had engaged the defendants to act for them in the purchase of both condominium units. The second plaintiff's father had also called the defendants to remind them to exercise the option on behalf of the second plaintiff's unit. It may of course be the case that in actual fact that is precisely all that was communicated to the defendants. But the point is that the court would never know because the plaintiffs were not put on notice. They should have been given the opportunity to elaborate on whether something more was in fact told to the defendants, and for any such evidence to be tested at cross-examination.

23 It seems to me right in principle that if a defendant wants to raise the defence of remoteness of damage, this must be expressly pleaded in the defence. It ought to follow that the defendants in this case, having failed to plead that the plaintiffs' loss is too remote, should be precluded from raising it to resist the plaintiffs' claim for damages. But it must be said that Mr Toh acting for the plaintiffs did not vigorously pursue this procedural objection, and neither were any authorities cited to me in support of the need to specifically plead the issue of remoteness of damage. Instead, substantial arguments were made by both parties on the substantive question of whether the loss claimed by the plaintiffs is indeed too remote under the law. That being the case, I shall proceed to address the law on remoteness and its application to the facts of this case.

The Law on Remoteness of Damage

24 It used to be a matter of some controversy whether the test for remoteness of damage in the law of contract is different from that in the law of torts. But the Court of Appeal in the recent decision of *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd & Anor* [2008] 2 SLR 623 ("*Robertson Quay*") has clarified that there is a distinction, as the rationality and functionality of the respective rules on remoteness are different. Although the plaintiffs' claim in the present case is framed both in contract as well as in tort, both counsel focussed exclusively on the principles of remoteness in contract law. It is therefore to these contractual principles that I turn my attention, especially since it would seem that the remoteness regime in contract should prevail over that in tort

in a situation where the civil wrong in question arises out of a contractual relationship, albeit there may be concurrent liability in tort.

25 The starting point is the classic exposition of the rule by Alderson B in *Hadley v Baxendale* (1854) 9 Exch 341 at 354:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.

26 This rule can be and has typically been interpreted as consisting of two limbs: the loss that is not too remote and therefore recoverable must either be (a) such loss that arises naturally according to the usual course of things from such breach of contract or such as would be within the reasonable contemplation of both parties at the time of contract; or (b) loss that cannot be said to be naturally arising from the breach but which because of the knowledge of certain special circumstances would be within the reasonable contemplation of the parties. Under the first limb, the contracting parties are assumed to have the knowledge that a reasonable person would possess, such that they are taken to have contemplated losses that would follow "naturally" from a breach of the contract. It appears that it is in fact the same principle that underlies both limbs of the *Hadley v Baxendale* rule, namely what is recoverable is what may reasonably be supposed to be within the contemplation of the parties at the time of contracting as the loss that would flow from such a breach of contract. The only difference that distinguishes the two limbs lies in the *degree of knowledge* possessed by the parties. This is made clear by the modern restatement of the rule by Asquith LJ in the English Court of Appeal decision of *Victoria Laundry (Windsor) Ld v Newman Industries Ld* [1949] 2 KB 528 (at 539):

(2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably forseeable as liable to result from the breach.

(3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

(4) For this purpose, knowledge "possessed" is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the "first rule" in *Hadley v. Baxendale*. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the "ordinary course of things," of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable.

27 Other than the rather controversial use of the concept of reasonable "foreseeability" as opposed to "contemplation" which suggests an equation of the test of remoteness for contractual and tortious causes of action, the reformulation by Asquith LJ has generally been accepted, and indeed received endorsement by our Court of Appeal in *Robertson Quay*. The Court of Appeal in that case explained, in a similar vein, that the only distinction between the first and second limbs lies in the varying "horizon of contemplation":

> [T]he criterion of "reasonable contemplation" applies to both limbs of the rule in *Hadley*, although a difference exists between its application with respect to each of the two limbs. For the first limb of *Hadley*, the horizon of contemplation is confined to loss which arises naturally in the usual course of things and which is therefore presumed to have been within the contemplation of the parties. For the second limb of the rule in *Hadley* ("the second limb of *Hadley*"), by reason of the special knowledge possessed by the party who breaches the contract ("the contract-breaker"), the horizon of contemplation is extended to loss that does not arise in the usual course of things.

28 As the degree of knowledge changes, so too would what is within the reasonable contemplation of the parties as to the loss that will result from a contractual breach. Typically, one would expect that the greater the knowledge acquired by the contract-breaker, the wider is the scope of the damage that he is liable for, although this is not necessarily always so. Knowledge of certain circumstances, such as the existence of a sub-contract, may show that the plaintiff would in fact suffer less damage than in the usual course of things (*per* Lord Pearce in *Czarnikow v Koufos, The Heron II* [1969] 1 AC 350).

29 Since it is a question of degree that separates the two limbs, there is bound to be some overlap and it may not always be easy to identify whether it is the first or second limb of the rule that is in operation. This led to a comment in *McGregor on Damages* (London: Sweet & Maxwell, 17th Ed., 2003) that "there can be no rigid division between the 'first rule' and the 'second rule', and that the modern re-statement of the rule as a totality is a salutary trend" (at para 6-165). The English Court of Appeal in *Kpohraror v Woolwich Building Society* [1996] 4 All ER 119 took a similar view (at 127-128):

> The contentions for both parties were presented as if in a straitjacket imposed by the strict application of the rule in *Hadley v Baxendale* so as to require the separate consideration of each of the two limbs…I would prefer to hold that the starting point for any application of *Hadley v Baxendale* is the extent of the shared knowledge of both parties when the contract was made…When that is established, it may often be the case that the first and second parts of the rule overlap, or at least that it is unnecessary to draw a clear line of demarcation between them.

30 In the present case, counsel for the defendants Mr Singh appeared to have treated the second limb of the formulation in *Hadley v Baxendale* as a different legal rule from the first limb. The contention made was that the plaintiffs have simply jumped to the second limb without showing that they qualify under that limb. If the argument is that there is a requirement that the circumstances communicated be *of a certain nature* so as to constitute "special circumstances" before the operation of the second limb of the rule can be triggered, I would disagree. The phrase "special circumstances" is not a legal term of art. There should not be a mechanistic application of the rule in *Hadley v Baxendale* as comprising of two totally disparate limbs. Instead, in every case, it is simply a question of fact what were the precise circumstances known to the contracting parties at the time of contract, to be followed by an inquiry as to what may reasonably be supposed to have been within the parties' contemplation in light of their common knowledge of those circumstances.

31 That such should be the proper approach to applying the rule becomes clear once it is appreciated that the same conceptual basis underpins both limbs of the rule. As the Court of Appeal in *Robertson Quay* explained, both limbs of the *Hadley v Baxendale* rule are concerned with giving effect to the concept of a contract *as an agreement*. This is the normative basis for the remoteness principle in contract that distinguishes it from that in tort. According to the Court of Appeal, the task of the courts is to formulate rules and principles, universally applicable in all situations where the contracting parties have failed to expressly provide in advance, for the consequences of a breach of their contract. The aim is to seek to uphold the original bargain between the contracting parties. The operation of the first limb of the rule in *Hadley v Baxendale* does not violate the original bargain because if the parties had thought about this issue they would in all likelihood have agreed that the party in breach should be liable for such "naturally arising" or "ordinary" damage. As more information about the circumstances of the parties that may affect the loss suffered in the event of a breach of contract are conveyed by one party to the other, we may cross over to the second limb whereby even though the damage sustained cannot be said to arise naturally from the breach, the actual knowledge vested in the contract-breaker means that the parties *must be taken to have agreed* that should such "non-natural" damage occur the contract-breaker will be liable for such loss, in the absence of any express contractual provision to the contrary. Therefore, again, in a situation that may be said to fall within the second limb of the rule, the contractual bargain is sought to be preserved by the courts.

32 There has been recent developments in English law that would appear to have taken this notion of upholding the parties' bargain as the underlying principle for the rule on remoteness of damage to a next level, by requiring that not only must the loss have been or be taken to have been within the parties' contemplation at the time of contract, but further that the party in breach must have *assumed responsibility* for such losses. In other words, even if the loss is of a nature that falls within the first or second limb of the rule in *Hadley v Baxendale*, it may still be regarded as too remote if it can be established on the evidence that the contract-breaker had not undertaken to bear the risk of such loss. A notable advocate of such a novel and perhaps radical approach is Lord Hoffmann, most recently in his speech in the House of Lords decision of *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2009] 1 AC 61 ("*The Achilleas*"). The case concerned the late re-delivery of a

chartered vessel. After the charterers had given notice of redelivery to the owners of the vessel, the latter had fixed the vessel for a new charter at a higher rate as the market had improved substantially. Due to a delay in a subcharter, the charterers were unable to redeliver the vessel on time, as a result of which the owner could not make available the vessel to the new charterers by the latest delivery date after which the new charterers were entitled to cancel. As the market rate had by that time fallen again and also in consideration of an extension of the cancellation date, the owner had to reduce the rate of hire for the new fixture. The owners sued the charterers for the loss of the difference between the original rate and reduced rate of the new fixture, and were successful both at arbitration and subsequently on appeal before the English Court of Appeal. The House of Lords were unanimous in reversing the decision of the Court of Appeal and holding that the loss claimed by the owners was too remote, but on different grounds. The focus here will be on Lord Hoffmann's reasoning, insofar as it can be argued to substantially change the fundamental basis of the rule of remoteness in contract.

33 For Lord Hoffmann, it is the concept of assumption of responsibility that forms the foundation of the principle that damages that are too remote are not recoverable. Citing his earlier decision in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191, he said that one must first determine whether the loss in question is of a "kind" or "type" for which the contract-breaker ought fairly to be taken to have accepted responsibility. In his view, there is both an inclusive as well as exclusive aspect to the principle of remoteness (at [21]):

> It is generally accepted that a contracting party will be liable for damages for losses which are unforeseeably large, if loss of that type or kind fell within one or other of the rules in *Hadley v Baxendale*…That is generally an inclusive principle: if losses of that type are foreseeable, damages will include compensation for those losses, however large. But…it may also be an exclusive principle and that a party may not be liable for foreseeable losses because they are not of the type or kind for which he can be treated as having assumed responsibility.

34 On the facts of *The Achilleas*, even if it might be said that the loss suffered by the owners in relation to the forward fixture is within the reasonable contemplation of the parties as arising out of the charterers' delay in re-delivering the vessel, Lord Hoffmann was of the view that such loss would not have been reasonably considered by the parties as a type or kind of loss for which the charterers were assuming responsibility. Set against the backdrop of market expectations, the parties would not reasonably have thought that the extent of liability or risk the charterers were undertaking encompassed such losses, particularly since such a risk would be unquantifiable because the charterers would have no idea when the following fixture would be entered into and on what terms.

3 5 *The Achilleas* was decided by the House of Lords only after our Court of Appeal's decision in *Robertson Quay*, as a consequence of which our highest court has not had the opportunity to examine the approach to remoteness of damage as enunciated by Lord Hoffmann. In addition, the parties in the present case did not refer me to *The Achilleas* in the course of submissions. Several observations can nevertheless be made of Lord Hoffmann's approach. Insofar as Lord Hoffmann appeared to suggest that the question of remoteness is simply an inquiry aimed at discerning the intention of the parties as to liability for loss, this may be reminiscent of the approach of requiring that it be a term of the contract that the defendant had assumed the risk of the loss in question before such loss is recoverable. Probably the strongest indication that this may be close to what Lord Hoffmann had in mind is found in the following passage which drew a parallel between implication of terms and remoteness of damage (at [26]):

> I suppose it can be said of many disputes over interpretation, especially over implied terms, that the parties could have used express words or at any rate expressed themselves more clearly than they have done. But, as I have indicated, *the implication of a term as a matter of construction of the contract as a whole in its commercial context and the implication of the limits of damages liability seem to me to involve the application of essentially the same techniques of interpretation. In both cases, the court is engaged in construing the agreement to reflect the liabilities which the parties may reasonably be expected to have assumed* and paid for. It cannot decline this task on the ground that the parties could have spared it the trouble by using clearer language. [emphasis added]

36 However, such a view has been rejected previously by the House of Lords in the earlier decision of *Czarnikow v Koufos, The Heron II* [1969] 1 AC 350 ("*The Heron II*"), wherein Lord Upjohn in particular held that it is unnecessary it should be a term of the contract that both parties contemplate the loss as a result of the breach. To the extent that Lord Hoffmann's approach seeks to decipher the actual intention of the parties (objectively ascertained) as to the risk of loss through the interpretation of the contract, a learned commentator has pointed out that this would often be artificial since there would usually be little or no evidence of the parties having thought about the risks they were accepting (Edwin Peel, "Remoteness Revisited" (2009) 125 LQR 6).

37 The test of remoteness, as reformulated by Lord Hoffmann, has become one involving the scope of the underlying obligation or duty undertaken by the defendant, as opposed to what losses can be reasonably contemplated. There is a view that such an approach may engender too much uncertainty to the law on remoteness. Edwin Peel perceptively observed (at 11 of his note):

> There is also the risk of uncertainty and *The Achilleas* might be thought to provide a case in point. The principal reason for Lord Hoffmann's conclusion that the charterers had not assumed responsibility for a lost fixture was "market expectation", but this was an expectation not based on any firm decision in law and the owners clearly did not regard it as so well embedded that, when a lost fixture did convert into a financial loss, they should not claim for it. It may be questioned whether market expectation was sufficient to overturn the particularly strong prima facie assumption that losses which fall within the first limb of the rule of remoteness should be recoverable.

38 The fundamental difference between the more orthodox approach to remoteness based on general recoverability for all reasonably contemplated losses and the more radical approach based on assumption of responsibility can be understood by considering the following question posed by Lord Hoffmann in *The Achilleas*:

> [I]s the rule that a party may recover losses which were foreseeable ("not unlikely") an external rule of law, imposed upon the parties to every contract in default of express provision to the contrary, or is it a prima facie assumption about what the parties may be taken to have intended, no doubt applicable in the great majority of cases but capable of rebuttal in cases in which the context, surrounding circumstances or general understanding in the relevant market shows that a party would not reasonably have been regarded as assuming responsibility for such losses?

39 Lord Hoffmann took the view that it is the latter which is the true principle underlying the law on remoteness of damage in contract. But it would seem that our courts in Singapore conceive remoteness of damage more as an external rule of law that aims to set suitable limits on the scope of

recoverable loss in contract. The Court of Appeal in *Robertson Quay* opined (at [70]) by reference to an earlier decision of its own:

> As we recognised in a recent decision of this court in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR 782 at [56], the concept of remoteness of damages is essentially a necessary limitation imposed by the law to protect the contract-breaker from infinite damages since "the consequences of an act theoretically … can … stretch into infinity". The question of remoteness is ultimately an inquiry in which (*ibid*):
>
> > … legal policy and accepted value judgment must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were to be held to answer for *all* consequences of his default. [emphasis in original]

The same idea seems to be brought across when the Court of Appeal said (at [83]) that the purpose of the law on remoteness is to formulate *universal* rules and principles and create "the best legal regime available given the fact that the contracting parties have not, *ex hypothesi*, expressly provided for what is to happen should a breach of their contract occur".

40 As such, although the principle on remoteness is, as explained above, premised on upholding the bargain of the contracting parties, it would seem that the principle is ultimately still motivated by the necessity to keep liability within reasonable limits. What constitutes reasonable limits is determined by reference to what parties ought reasonably to have contemplated as recoverable losses that flow from the breach of contract. In other words, had they addressed their minds to the matter at the point of contract, these would be losses that they can contemplate would be liable to result from a contractual breach. As the relationship between the parties is characterised by a consensual agreement, this approach serves as a fair and just way of addressing both the interest of the plaintiff in securing due compensation for his loss and the interest of the defendant not to be subject to indeterminate liability. This is at the end of the day a delicate balancing exercise involving a certain degree of discretion and value judgment (see [70] of *Robertson Quay*). It should be noted that unlike in the case of, for example, the law on implied terms where the primary objective is to give effect to parties' intentions (at any rate in relation to terms implied in fact), the law on remoteness can be said to be concerned not merely with protecting the contractual bargain but also the wider policy consideration of placing suitable limitations on contractual liabilities.

41 As the concern is therefore with what the contracting parties *ought reasonably* to have contemplated, it follows that in order to make the contract-breaker liable for the loss, "it is not necessary that he should actually have asked himself what loss is liable to result from a breach…It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result" (see *Victoria Laundry* at 540).

42 There has been debate, especially in English cases, as to what is the precise degree of probability of loss required under the rule in *Hadley v Baxendale*. Must the reasonable contemplation of the parties be that the loss is "liable to result", "not unlikely", "a serious possibility" or "a real danger"? These are but a few of the possible formulations, principally considered by the Law Lords in *The Heron II*. It would appear that as a matter of English law, the test for the required likelihood has now generally settled in favour of the phraseology of "not unlikely" as first propounded by Lord Reid in *The Heron II*. Thankfully, and with respect sensibly, our Court of Appeal in *Robertson Quay* (at [60]) refused to engage in a linguistic exercise of ascertaining what is the best way to capture the requisite degree of probability. Instead, the view taken was that such "semantic hairsplitting" is

unnecessary as the exercise is not an exact science and the meaning conveyed by the phrases and words in the test of *Hadley v Baxendale* are sufficiently clear thus benefiting little from further paraphrasing or substitution.

Application to Present Case

43 To recapitulate briefly the facts of the present case, the plaintiffs had, as a result of the defendants' negligence, failed to acquire the condominium unit of their choice, which was priced at $2.924 million. At the advice of their solicitors as well as on the suggestion of the defendants themselves, they had tried to purchase the same unit from the developer. However the developer chose to hold back the unit. The plaintiffs, through their solicitors persisted to request that the unit be sold to them, but to no avail. At the same time, the plaintiffs tried to source for alternatives but none was found to be suitable. Eventually, they found a unit in the same development in the resale market for which they were probably prepared to settle, at the price of around $3.6 million. However, before they could proceed with the purchase of that alternative unit, the developer decided to release the original unit they had wanted for sale. By this time, a year had passed since the date when the defendants had failed to properly exercise the option on behalf of the plaintiffs. The plaintiffs proceeded to purchase the original unit, but at the higher price of $3.609 million as set by the developer. In resisting the plaintiffs' claim for the difference between the purchase prices on the ground that such loss is too remote under the rule in *Hadley v Baxendale*, reliance was placed by the defendants principally on the English Court of Appeal decision in *Simpson*, which according to the defendants' counsel involved facts that are almost on all fours with our present case.

44 In *Simpson*, the plaintiff Mr Simpson and his wife had "set their hearts" on buying the long lease of Nos. 4 and 5 Chad Road. Mr Simpson was already the sub-tenant of the ground-floor of No. 4 and was using it as one of the premises for his dental practice. As this was where "he had started his working life living, as it were, over the shop with his dental surgery in the same premises as his residence", their intention was, as they were getting on in life, to be able to go back to that position and live in No. 5 and practise in No. 4. Mr Simpson instructed the defendant firm to act for him in the purchase of the property, which the owner was willing to sell at £53,250 if the contracts were exchanged no later than 3 November 1978. Due to the negligence of the defendants, the contracts were not exchanged on the scheduled date and the property was sold by the owner to a third party buyer the following day, at the price of £60,000. Mr Simpson managed to find this third party buyer, but the latter was unwilling to sell what he had just bought. Subsequently however, by February 1979 and three months after the plaintiff had lost his original bargain, the third party buyer changed his mind and decided to sell the property, but not unexpectedly only at a much higher price of £92,500. There was evidence before the court that the market value of the property in February 1979 was £75,000.

45 The English Court of Appeal refused to allow Mr Simpson to recover the difference between £92,500 (being the actual price paid for the property by Mr Simpson) and £53,250 (being the original purchase price), on the basis that such loss was too remote. It was accepted by the court that the first limb of the rule in *Hadley v Baxendale* does include reasonable conduct on the part of the victim of the breach because reasonable conduct is part of the ordinary course of things. But even if the conduct of Mr Simpson could be argued to be reasonable, the matter had to also be considered from the defendants' perspective. The primary reason for the court's ruling was that even though the property was very special and of unique value to Mr Simpson and his wife, *this was never conveyed to the defendants*. In the circumstances, the court was of the view that the defendants could not reasonably have contemplated at the time of contract that Mr Simpson would be willing to purchase the property subsequently *at such an inflated price* instead of sourcing for an alternative. Further, Stephenson LJ in particular thought that a solicitor acting for his client in a conveyancing transaction

would not expect that a new purchaser like the third party buyer, who presumably wanted the property as much as the plaintiff wanted it, would be prepared to sell it shortly even before he had any real opportunity of living in it. In the court's view, Mr Simpson was therefore not entitled to saddle the defendants with the full extent of his loss.

46 But the court did award Mr Simpson damages, based on the difference between the market price of the property in February 1979 which was £75,000, and the original purchase price of £53,250. According to the court, although the usual rule is that damages should be assessed as at the date of the breach of contract, this rule cannot apply strictly in the context of property transactions, where the purchaser ought to be given a reasonable period of time to find and buy a suitable replacement property. As the court eventually assessed the damages recoverable as at the date when Mr Simpson purchased the same property from the third party buyer, which was three months after the date when the original purchase should have taken place, it was implicit that a period of three months was thought to be a reasonable amount of time to make another contract to purchase property.

47 It was argued by Mr Singh that as established in *Simpson*, a three-month period would have afforded the plaintiffs in our case a reasonable period of time to proceed to either negotiate the "repurchase" of the subject property or to source for a suitable equivalent. Thus, loss that would have been within the reasonable contemplation of parties is the difference between the original purchase price and the price of the property as valued after three months. Mr Singh contended that it could not have been contemplated by the parties that (i) the developer would hold back the subject property for a whole twelve months; and (ii) the plaintiffs would decide not to purchase any other equivalent property in the meantime and "repurchase" that same unit only after one year at whatever price the developer demanded. The loss claimed by the plaintiff based on the value of the property one year later is thus, in Mr Singh's submission, too remote under the first limb of *Hadley v Baxendale* rule.

48 Mr Singh went on to say that this is also not a situation where the second limb of the rule can operate. For the second limb to apply, he argued that the following "special circumstances" must have been made known to the defendants by the plaintiffs:

(a) if the option was not exercised on 7 May 2007, the subject property would not be available for a considerable time afterwards because the developer would withdraw it from the market for a whole year;

(b) the subject property is so unique that if the option is not exercised, there is no suitable equivalent property on the market; and

(c) following from (a) and (b) above, in the event the option is not exercised on 7 May 2007, the plaintiffs will be entitled to wait for as long as it took for the subject property to be put back on the market by the developer and to pay whatever price was demanded by the developer.

49 The circumstances that are relevant for the purpose of the inquiry under the rule in *Hadley v Baxendale* are the circumstances surrounding the intended purchase and in particular why the plaintiffs wanted unit #23-09 so badly. What was postulated by Mr Singh under (a) above was that in order for the second limb to apply, the plaintiffs must also have known that if the option was not exercised on time, the developer would hold on to the unit for one year and refuse to release it to them, and that the plaintiffs must have communicated this to the defendants at the time of contract. But surely, the plaintiffs could not have known in advance what would happen in the event of the breach by the defendants and in particular what course of action the developer would take. With respect, Mr Singh's argument appears to have conflated the risk of loss (which should have been

reasonably contemplated) with the special circumstances underlying the intended purchase (which should have been made known to both parties). The delay by the developer in releasing the unit for sale, coupled with inflation in the market price, could potentially lead to loss for the plaintiffs, and the issue is whether such action by the developer and the loss that may occasion is within the reasonable contemplation of the parties when they contracted. This must be the proper conception of the issue. In a typical case where the market price rises leading to greater losses, it certainly cannot be the case that a claimant would only be entitled to recover those losses if the parties could have *known* in advance at the time of contract the direction in which the market would move: what matters is whether the parties could have *contemplated* such market movements.

50 With regard to Mr Singh's assertion that the "special circumstances" that must have been communicated included the subject property being so unique that there could be no substitute and that the plaintiff would thus be entitled to wait as long as it took to get back the property, it must be remembered that the plaintiffs had never advanced the submission that the unit in question was unique and that there could be no substitute whatsoever. It is also not the case on the facts that the plaintiffs were prepared to wait indefinitely for that unit. The contemporaneous correspondence showed that the plaintiffs were in fact looking for alternative units either in the same or another nearby development. The critical question to ask instead is whether, taking into account what was made known to the defendants, the plaintiffs were entitled to purchase back the same unit *after a lapse of one year*, having failed to find and buy a suitable equivalent property during that interim period.

51 As mentioned above, there need not be a strict application of the rule in *Hadley v Baxendale* in two separate stages. In every case, the common starting point is for the court to examine the question of fact as to what the precise circumstances known to both parties were which formed the background at the time of contract. In this case, it would appear from the evidence available that the plaintiffs did not communicate to the defendants the detailed reasons why they had "set their hearts" on unit #23-09 in "The Seafront on Meyer", such as the fact that the second plaintiffs' family had previously stayed at the same site in an old development and it was their strong desire to be able to go back there. The qualification to be added here is that the paucity of evidence in this regard could have been due to the plaintiffs not knowing that the defendants would be raising the issue of remoteness as a defence because this was not pleaded. But even leaving aside this difficulty, it cannot be disputed that the defendants were certainly aware at the time they were engaged that two contiguous units in the same development were being purchased by the same family. The plaintiffs had retained the defendants' services in relation to unit #23-09, while the second plaintiff's father and sister had engaged them in relation to unit #22-09. In addition, the second plaintiff's father had called the defendants specifically to remind them to exercise the option in respect of not his own unit but *the plaintiffs' unit*. In the circumstances, the defendants obviously had *actual knowledge* that the family wanted to stay close to each other, and specifically that they wanted to live together in two units with one directly above the other.

52 Mr Singh argued that the plaintiffs' intention might be to buy two condominium units close to each other, but that this could be achieved by purchasing units which were "within the same block, same development, or within one kilometre of each other". There was nothing to indicate disability or any special needs on the part of the plaintiffs' family such that they had to stay in one unit directly above the other. Mr Singh further contended that the family proximity desired by the plaintiffs does not convert into a "special circumstance". First, at the risk of repetition, the phrase "special circumstances" in my view is not a term of art with certain ingredients to be satisfied before the second limb of the rule in *Hadley v Baxendale* can be triggered. Second, in my opinion, there is a difference between staying as a family in two units one a floor directly above the other, and having two units that are not contiguous and which may be in different blocks albeit in the same

condominium development. Needless to say, there is an even bigger difference if we are talking about another unit in a different condominium altogether, even if nearby. To say that one would expect the plaintiffs' family to be insistent about staying in one unit directly above the other only if there were disability or special needs seems to me to put the matter far too highly.

53 With the actual knowledge of the wish of the plaintiffs' family to stay together in two contiguous units one above the other, even if the exact underlying reasons for such a desire were not known, I think the defendants would clearly expect that in the event that the transaction for one of the two units were to fall through, the plaintiffs would try their very best to get back that same unit. In my view, the loss that resulted from the increase in purchase price set by the developer for that unit after a period of one year would be within the reasonable contemplation of the defendants in the circumstances of this case. I say this for several reasons. First, in terms of the timing, contrary to Mr Singh's contention, I do not believe that the one year that the plaintiffs took to finally "repurchase" the subject property was an excessive period of time that could not have been expected. A property transaction is typically a significant investment for the purchaser and substantial time is needed to consider and finalise the purchase. Moreover, the condominium in question was an uncompleted project, and the plaintiffs were obviously not in a hurry to move in and indeed nor were they in a position to do so. That being the case, the defendants must have contemplated that if the plaintiffs were unsuccessful in finding a suitable substitute property, they would be prepared to hold on and hope that the developer would eventually release the unit that they desired. In this connection, it is pertinent to note that the defendants themselves had repeatedly suggested that the plaintiff should try to "repurchase" the same unit from the developer. Notably, they had maintained this position up to as late as their letter of 18 December 2007, more than 7 months after the date of the original purchase which failed to go through. Ironically, the defendants have now come to court and asserted that what was reasonable and which would have been within the parties' contemplation was that the plaintiffs should have purchased an alternative unit within a period of only 3 months. Second, in relation to the developer's refusal to release the subject property for sale after the option lapsed, Mr Singh said that this was unexpected and came as a surprise to everyone. I am not sure that is necessarily true. The evidence that emerged after hearing both experts is that the property market was somewhat uncertain at the material time but that there were indications that property prices were generally still rising albeit at a slower rate. In that climate, it should have been obvious or at any rate was not unlikely (particularly to lawyers in the conveyancing business) that the developer might decide to hold on to the unit and release it only when conditions are more favourable to it. Third, as to the price at which the subject property was eventually sold to the plaintiffs, it should be noted that although the price increase of $678,150 was not insignificant, this was only slightly more than a 20% increase over the original purchase price. That the developer would decide to release the unit only at such a price after a year should not, in light of the generally rising market at that time, be outside the reasonable contemplation of the parties.

54 It should be reiterated that to reach the conclusion that the loss claimed by the plaintiffs is not too remote, it is not necessary that the defendants should in fact have contemplated that the loss would occasion. The court needs only to be satisfied that the circumstances were such that they ought to have so reasonably contemplated. This is so because ultimately, the quest is not to discover the actual intentions of the parties but rather to strike a reasonable and fair balance between the right to recovery and the limits of liability.

55 On the issue of the appropriate limits of liability, Mr Singh raised the prospect of the floodgates opening should the decision be made that the plaintiffs are entitled to recover the full extent of their actual losses suffered in this case. He queried what would happen if the plaintiffs had instead decided to wait for five or even ten years, or if the price of the unit had actually doubled. He pointed out that negligent solicitors cannot possibly be made to bear the full brunt of the losses in such situations.

That may well be so in these hypothetical examples. However, that was not what happened here. The plaintiffs did manage to get back the same unit after one year. Had that been impossible, the evidence suggests that they would in all likelihood have purchased the alternative unit #20-12 in the same development instead of waiting indefinitely for unit #23-09. The question of whether the losses in question are within the reasonable contemplation of the parties and hence recoverable is dependent on the facts and circumstances of each individual case. My holding that the losses are recoverable is confined to the particular facts of our present case, and does not for a moment say what the position ought to be if the plaintiffs had taken a much longer period of time than the one year or had purchased at a price substantially above $3.609 million. Similarly, it says nothing about whether the same loss would have been recoverable had this been an ordinary case where the plaintiffs are purchasing only one single unit as opposed to one of two contiguous units for the same family.

56 Although the facts in the case of *Simpson* appear prima facie to be very similar to those of the present case, there are crucial points of distinction. Unlike in our case where the defendants were clearly aware that the two condominium units were purchased by the same family in order to stay close together, there was no evidence in *Simpson* at all that Mr Simpson had in fact communicated to the defendants in that case why the property in question was so special to him and his wife. And whereas the complaint in our present case is directed primarily at the *timing* of the "repurchase", the reason why the English court in *Simpson* disallowed the recovery of the loss was because of the *price* at which Mr Simpson "repurchased" the property from the third party buyer. As the plaintiffs' counsel Mr Toh pointed out, it was common ground in that case that the third party buyer had charged Mr Simpson a hugely inflated price way above the market price of the property at that time. This is in contrast to our present case where the plaintiffs basically paid the price that was set by the developer. There is some force in Mr Toh's submission that since in our case a new unit was being sold directly by the developer, the price set by the developer represented the market price of the unit. There was also no suggestion at all that this was not a transaction at arms' length, and the unit was released to the general public on a first come first served basis. The exorbitant price in *Simpson*, which represented an almost 75% hike from the original purchase price and which was very substantially above the market valuation of the property, was what primarily influenced the court there to find that Mr Simpson's resultant loss in proceeding with that purchase was too remote. Things are very different for the plaintiffs in our case, where the increase was not more than 25% of the original price. As to Mr Singh's contention that the *Simpson* case stood for the proposition that a period of three months is reasonable for sourcing an alternative property, a close reading of the English Court of Appeal's decision will reveal that none of the judges made such a positive statement. Three months simply happened to be the amount of time Mr Simpson took to "repurchase" the property, and there was evidence before the court as to market valuation of the property in the month that the "repurchase" took place. Since the court decided that the assessment of damages should be as at the date of "repurchase", it was *implicit* that the three months Mr Simpson took was regarded as reasonable. That appears to be purely a decision on the facts, as suggested by Eveleigh LJ's comment that the court was not concerned to lay down general principles in that case. In short, there was no express holding by the court that as a general rule a reasonable time frame to find alternative property is three months.

Valuation

57 I come to the issue of valuation, which as I mentioned earlier was what took up the bulk of the assessment hearing. Mr Singh's alternative argument was that even if the court finds that it was within the parties' reasonable contemplation that the plaintiffs would wait for one year to "repurchase" the subject property, they are still not entitled to recover the full extent of their loss because the actual valuation of that condominium unit at the time of the "repurchase" is much less

than the figure of $3.609 million set by the developer. He appeared to have treated the question of whether the subject unit was sold at its market valuation as a separate issue from that of remoteness of damage. Both parties thus embarked, through their respective experts (as well as, in the defendants' case, through Mr Singh) on an elaborate exercise to establish what should be the proper valuation of the unit at the time it was eventually sold to the plaintiffs.

58 However, I do not think that the question of valuation is distinct from that of remoteness. The price at which the unit was sold and whether it may be above or below the market value seems to me to clearly be subsumed within the issue of whether the loss was too remote. The inquiry as to what ought to be within the reasonable contemplation of parties would involve considerations not only of the timing of the sale but obviously the price at which the property was sold as well. As mentioned, the price increase of slightly more than 20% from the original purchase price after a year in a generally rising market is not, in my opinion, something that would be outside the reasonable contemplation of the parties. Having thus reached my conclusion above that the loss of $678,150 being the difference between the actual and original purchase prices could have been contemplated and is not too remote, there is no need to go further to determine whether or not the price of $3.609 million was in fact the market value of the property.

59 In any event, as alluded to earlier, there is something to be said for Mr Toh's submission that in respect of new units being sold directly by the developer, the price set by the developer represents the market price. This was not a case where the developer had decided to sell the unit at a much higher price to the plaintiffs as compared to other potential buyers. The offer to sell at $3.609 million was open to the general public on a first come first served basis. But I would say that if it were necessary to derive the market value of the unit in question through a process of valuation, I would have reservations accepting the defendants' counsel own analyses and ignoring the valuation of their own expert (which they decided to abandon in the midst of the hearing), not least because the very reason why the experts are engaged in the first place is the assumption that the area of property valuation is outside the expertise of both the court as well as the lawyers. Further, I agree with Mr Toh that the various methods of computation proposed by Mr Singh had either not been put to the plaintiffs' expert or were not given in advance to her so that she could come prepared to comment on it during the hearing. I add that if it had been material for my decision, I would have favoured the testimony and report of the plaintiffs' expert over that of the defendants'. There were several flaws in the valuation by the defendants' expert, such as his use of inappropriate units (including those in apartments and not condominiums) for comparison and unrealistically low sea-view and higher floor premiums. Incidentally, Mr Singh's own analyses also produced a figure that is closer to the valuation by the plaintiffs' expert.

Conclusion

60 For the foregoing reasons, the defendants who failed to exercise the original option on behalf of the plaintiffs should be made to compensate the plaintiffs for the loss they suffered in having to pay the increased purchase price to get back the unit from the developer. This result is reached without considering the issue of mitigation of damage, which although pleaded by the defendants was not a defence that was eventually pursued, the defendants choosing to focus instead on the question of remoteness of damage. It would suffice for me to observe that the evidence of the second plaintiff in her AEIC (such evidence being wholly unchallenged by the defendants) would seem to indicate that the plaintiffs had taken reasonable steps to mitigate their loss. I award damages in favour of the plaintiffs in respect of items (a) to (d) as stated above under [13]. I should mention that during the hearing, Mr Singh informed me that the defendants would agree to the claim under item (a) in respect of the forfeiture of 25% of the booking fee. As for item (e) on the additional financing and legal costs, Mr Toh said the plaintiffs would not be pursuing this claim if the appropriate interest is awarded on

the judgment sum. I will hear parties on the question of interest, as well as on costs.