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

[2021] SGHC 249

Suit No 1254 of 2018

Between

(1) Doo Wan Tsong Charles
(2) Kon Kwok Seng
(3) Lim Meng Suan Dawn
(4) Lim Sen Hong, Lester
(5) Yeo Seok Chin

… *Plaintiffs*

And

(1) Oxley Jasper Pte Ltd
(2) Yap Siew Kee

… *Defendants*

JUDGMENT

[Contract] — [Discharge] — [Rescission]
[Contract] — [Contractual terms] — [Condition precedent]
[Equity] — [Remedies] — [Rectification]

TABLE OF CONTENTS

Doo Wan Tsong Charles and others
v
Oxley Jasper Pte Ltd and another

[2021] SGHC 249

General Division of the High Court — Suit No 1254 of 2018
Andre Maniam J
4–7, 11–12 May, 6 August 2021

5 November 2021 Judgment reserved.

Andre Maniam J:

Introduction

1 When one party makes a mistake about the nature or quality of a contractual term, can it have that term rewritten by rectification? Or does that go too far, in creating a contract that the other party evidently had not agreed to, and would not have agreed to?

Background

2 The plaintiffs are five of the 43 subsidiary proprietors ("SPs") of 5 Jalan Ampas (the "Property"), which was sold *en bloc* to the first defendant ("Oxley") for $95m. Oxley paid an initial deposit of $4.75m (the "Initial Deposit"), but later purported to rescind and cancel the sale and purchase agreement ("SPA")[1]

[1] Agreed Bundle of Documents vol 1 ("1ABOD"), 781.

because one of the stipulated conditions precedent could not be met, namely the obtaining of outline planning permission ("OPP") from the Urban Redevelopment Authority ("URA") to develop "no less than 120 dwelling units" at the Property (the "120 units CP"). The URA only granted an OPP for 112 units, and rejected a subsequent application for an OPP for 120 units.

3 After Oxley purported to rescind and cancel the SPA, however, the Collective Sale Committee ("CSC") insisted that Oxley should nevertheless pay a further deposit of another $4.75m (the "Further Deposit"); when Oxley declined to do so, the CSC purported to forfeit the Initial Deposit.

4 The plaintiffs say the CSC made a mistake in agreeing to the 120 units CP – specifically, that the CSC mistakenly thought that 120 was the "maximum permissible number of dwelling units under the prevailing laws, regulations and guidelines".[2] The maximum permissible number of dwelling units under the prevailing guidelines (in particular, URA's 2012 Guideline) was 112, although URA could nevertheless approve a higher number.

5 The plaintiffs sought to rectify the SPA such that the 120 units CP would be satisfied if the URA approval was for only 112 units (which approval had already been obtained). If the SPA were thus rectified, Oxley's purported rescission and cancellation of the SPA would be ineffective, and Oxley's Initial Deposit would have properly been forfeited for its failure to pay the Further Deposit.

6 Oxley contends that the law does not allow the SPA to be rectified for unilateral mistake of the kind asserted by the plaintiffs; and moreover, that

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[2] Statement of Claim Amendment No 3 ("SOC Amendment No 3"), para 52 (d).

allowing rectification of the SPA to what the CSC would like it to be, would create a contract that the CSC knew Oxley had not agreed to, and would not have agreed to. Oxley also disputes the plaintiffs' case that the CSC had made the mistake in question; and even if the CSC had made that mistake, Oxley says it did not know of it.

7 The plaintiffs' case does not rest only on rectification: they also say that even if the SPA were not rectified, Oxley had acted prematurely in purporting to terminate it on 26 October 2018, which was before the long-stop date of 27 December 2018 for the fulfilment of the 120 units CP.

The facts

The CSC

8 The plaintiff SPs represent 42 of the 43 SPs. The remaining SP is the second defendant, who is not aligned with the others – unlike the other SPs, she was willing for her share of the Initial Deposit to be returned to Oxley.

9 Of the five-member CSC, three signed the SPA[3] and the option to purchase:[4]

(a) Yeo Seok Chin ("Mr Yeo"), the fifth plaintiff;

(b) Lim Meng Suan Dawn ("Ms Lim"), the third plaintiff; and

(c) Kon Kwok Seng ("Mr Kon"), the second plaintiff.

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3 1ABOD, 781.

4 1ABOD, 692.

10 Mr Yeo and Ms Lim gave evidence, Mr Kon did not. The two remaining members of the CSC (Mr Lai and Ms Jeanthi) were not plaintiffs and did not give evidence.

11 This CSC was formed on 30 September 2017. There was an earlier attempt at a collective sale of the Property in 2013, which did not go through although an offer of $97m had been received.

The CSC's meetings with marketing agents

12 Huttons Asia Pte Ltd ("Huttons") was the marketing agent appointed by the CSC, after the CSC had met with five different marketing agents (including Huttons) in October 2017. In the course of those meetings, the CSC had seen a presentation from Jones Lang LaSalle Property Consultants Pte Ltd ("JLL") which stated that the "Maximum No. of Units Allowed", "Based on URA Dwelling Units Guide" was 112. JLL also stated, "URA imposing minimum average size of 70 sqm / 753 sf now!!!"[5] The CSC also saw a presentation from Savills Singapore ("Savills"), in which Savills stated that the development potential of the Property was "High-rise residential development up to 36 storeys with 112 units of 70 sqm".[6]

13 Mr Yeo and Ms Lim say they did not bother about such "technical details".[7] Mr Yeo says the CSC was "not focusing on these technical details",[8] and that the maximum number of units allowed based on URA's 2012 Guideline

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5 1ABOD, 99–118.

6 1ABOD, 149–159.

7 Transcript, 5 May 2021, 124:18 and 129:15–20.

8 Transcript, 5 May 2021, 129:4–130:14.

was not "something significant".[9] Ms Lim says that the CSC did not ask any questions about the development details, with the qualification that she "cannot recall" if Mr Lai may have asked such questions.[10] She says that details about the development potential of the Property "didn't register" and "doesn't sink in".[11]

14 This evidence from Mr Yeo and Ms Lim contrasts with the mistake that they allegedly made in agreeing to the 120 units CP: they claim to have thought that 120 was the maximum permissible number of units under the prevailing guidelines.

15 Mr Yeo and Ms Lim do not say that when they agreed to the 120 units CP, they had forgotten what JLL and Savills had told them about the maximum number under the prevailing URA Guideline, *ie*, 112 units averaging 70 sq m / 753 sq ft. They say that that aspect of JLL's and Savills' presentations in October 2017 just did not register with them. Their evidence is not that they intended to agree to 112 units but mistakenly agreed to 120 units: they did not have the number 112 in mind when they signed the SPA. Instead, their evidence is: they agreed to the 120 units CP because the CSC's agent Huttons said it was "achievable", at the meeting of 23–24 March 2018 when the SPA was negotiated and the terms agreed upon.

16 The CSC's reserve price for the Property was $95m, the same figure which it eventually agreed to sell the Property to Oxley for. In the months leading to the SPA, no higher offers were received. The CSC did receive an

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9 Transcript, 5 May 2021, 125:25.

10 Transcript, 5 May 2021, 26:12–14 and 28:4–7.

11 Transcript, 5 May 2021, 26:21–27:20.

offer from one Mr Ong for $87m, which was raised to $87.8m, and then $90m, but Mr Ong's offers were not accepted. In the same period, the CSC also received a valuation report from GB Global Pte Ltd valuing the Property at $87.6m.

The CSC's meeting with Oxley on 23–24 March 2018

17 The 23–24 March 2018 meeting lasted some seven hours, from 10.00pm on 23 March 2018 to around 5.00am the next morning. Four members of the CSC (Mr Yeo, Ms Lim, Mr Kon and Mr Lai) attended with representatives from Huttons, and lawyers from Seah Ong & Partners. Oxley was represented by its Mr Eugene Lim, accompanied by lawyers from Lee & Lee.

18 Oxley asked for the 120 units CP. The CSC tried to get Oxley to agree to a lower number, but Oxley took the position that the number 120 was non-negotiable. In the event, the CSC agreed to the 120 units CP being included in the SPA. Of the five members of the CSC, Mr Yeo, Ms Lim, and Mr Kon signed the SPA. Mr Lai left before the end of the meeting, and so he did not sign the SPA. The final CSC member, Ms Jeanthi, did not attend the meeting.

Rectification

The plaintiffs' case on rectification

19 The plaintiffs seek to rectify the SPA such that clauses 7(5)(i)(b) and 7(5)(ii) of the SPA would refer to "112 dwelling units averaging 70 square metres", instead of "120 dwelling units averaging 700 square feet". However, the figures "112" (for units) and "70 square metres" (for average unit size) were not mentioned during the meeting, there was no mention of the URA guidelines about the number of units, and Mr Yeo and Ms Lim did not have the number

112 in mind. What was mentioned, and agreed to, was "120 dwelling units averaging 700 square feet".

20 The plaintiffs do not say that in agreeing to the 120 units CP, the CSC had mistakenly thought it was agreeing to some other number, such as 112. The CSC knew that the number it was agreeing to, was 120. The plaintiffs say that the mistake the CSC made, was in thinking that 120 was the maximum number of units under the prevailing guidelines, when that number was 112. That is not a mistake as to what was agreed, *ie*, 120 units; it is a mistake as to the nature or quality of what was agreed – that the number of 120 units that had been agreed, represented something: the maximum number of units under the prevailing guidelines. Is rectification available for such a mistake?

The law on rectification for unilateral mistake

21 The plaintiffs seek rectification on the basis of *unilateral* mistake (by the CSC); the plaintiffs do not contend that Oxley had made the same mistake, such that there was a *common* mistake.

22 I consider two aspects of the law on rectification for unilateral mistake:

(a) the kind of mistake for which rectification is available; and

(b) whether the rectified contract must reflect the true agreement/intention of the parties, or at least what the mistaken party believed that true agreement/intention to be.

The kind of mistake for which rectification is available

23 The commentary on rectification of contracts for unilateral mistake in *Snell's Equity* (John McGhee and Steven Elliott gen eds) (Sweet & Maxwell, 34th Ed, 2020) at paras 16-018–16-019 is instructive:

> **(a) Contracts and other bilateral transactions.** Traditionally, there could be no rectification for a unilateral mistake, as where one party genuinely believes the document reflects the underlying agreement but the other party does not, the former can rely on the objective principle and enforce the contract as drafted, and this remains the general rule … But today a document may exceptionally be rectified for unilateral mistake where one party knows of the other's mistake and acts unconscionably in seeking to take advantage of it.
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> Historically, rectification for unilateral mistake was permitted only in cases where fraud could be established; in other words, where, although only one party was mistaken, the other was fraudulent … More recently, the basis on which rectification will be ordered for unilateral mistake has widened beyond cases of fraud.
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> **(b) Rectification in cases where unconscionable advantage taken.** It is now established that if one party to a transaction knows that the instrument contains a mistake in his favour, but does nothing to correct it and seeks to take advantage of the other's mistake, he (and those claiming under him) may be precluded from resisting rectification on the ground that the mistake is unilateral and not common. This has been described as a species of equitable estoppel.
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> Under this head, evidence of the knowledge and intention of the defendant is crucial. The relevant test is no longer described as requiring "sharp practice", rather:
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> > "the conduct must be such as to affect the conscience of the party who has suppressed the fact that he has recognised the presence of a mistake."

24 The quote immediately above is from *Thomas Bates and Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 ("*Thomas Bates*") at 515 per Buckley LJ. In that case, at 515–516, the conditions for obtaining rectification were set out as follows:

> … it must be shown: first, that one party, A, erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain; second, that the other party, B, was aware of the omission or the inclusion and that it was due to a mistake on the part of A; third, that B has omitted to draw the mistake to the notice of A. And I think there must be a fourth element involved, namely that the mistake must be one calculated to benefit B. If these requirements are satisfied, the court may regard it as inequitable to allow B to resist rectification to give effect to A's intention on the ground that the mistake was not, at the time of execution of the document, a mutual mistake.

25 If that were the law, the plaintiffs would fail to obtain rectification, for on their own case there was no mistake on the part of the CSC as to what the terms of the SPA *were*. The CSC knew that the SPA contained the 120 units CP, and agreed to its inclusion. The mistake which the plaintiffs say the CSC made, was as to the *nature* or *quality* of a particular term, namely, the 120 units CP – the CSC claims to have thought that 120 was the maximum number of units under the applicable guidelines, when that was actually 112.

26 Buckley LJ's conditions in *Thomas Bates* were applied by the English High Court in *Connolly Ltd v Bellway Homes Ltd* [2007] EWHC 895, a case similar to the present one. The parties had entered into a written contract with an "Inflation Adjustment" term that had a formula X = (A - B x 100) - C%. In that term a specific figure was stated for B, as follows: "B = £212 (representing the estimated average sales price per net square foot of the Residential Development at the date of this Agreement)": (see [18] of the judgment).

27 The plaintiff, Connolly, sought rectification for unilateral mistake on the basis that its intention was that "the figure to be inserted as 'B' in the formula 'would be a genuine and accurate estimate of the average sales price per net square foot of the Residential Development' at the date of the agreement" (at [106]). However, the parties had discussed and agreed to a specific figure for B,

ie, £212. They did not contract on the basis of B being expressed as a formula or concept ("the estimated average sales price per net square foot of the Residential Development at the date of this Agreement"). The figure of £212 which they agreed upon had been suggested by Mr Draper, a representative of Connolly's agent. Connolly sought to rectify that figure from £212 to £173 (at [75]). In denying rectification, the court expressed its decision thus (at [107]–[109]):

> **[107]** It seems clear to me that Mr Draper was in error when he went back to Mr Davis and suggested the figure of £212. But the error he made was in not challenging the figure proposed by Mr Davies. This is not a case where "one party … erroneously believed that the document sought to be rectified contained a particular term or provision". Mr Draper's error was an error as to the quality (in commercial terms) of the agreed figure.
>
> **[108]** There has never been any doubt that both parties intended the agreement to include the figure of £212. Connolly's reliance on the definition of the figure (viz "representing the estimated sales price per net square foot of the Residential Development at the date of this Agreement") is misplaced: the £212 was what the parties agreed as representing the estimated sales price.
>
> **[109]** This is in truth a case where one party has subsequently come to appreciate that it should not have agreed to the inclusion of a particular term. But that is not the sort of error which enables a court to rectify the agreement. The court cannot remake the parties' bargain just because it has turned out to be significantly to the detriment of one party, and significantly to the benefit of the other.

28 Likewise, the parties in the present case agreed on a specific number of 120 in the 120 units CP. They did not express the 120 units CP with reference to a concept such as "the maximum allowable number of units under the prevailing guidelines", although the plaintiffs say the CSC believed that is what the number 120 represented. If the CSC had made that mistake in agreeing to 120 units, as in *Connolly* it was a mistake as to the *nature* or *quality* of the specific figure that had been agreed upon. This is a case, as it was in *Connolly*,

where "one party has subsequently come to appreciate that it should not have agreed to the inclusion of a particular term", but there is no mistake as to what terms had been included.

29 Indeed, the plaintiffs' case for rectification here is even weaker than in *Connolly*, where the Agreement at least stated that the figure of £212 was "representing the estimated average sales price per net square foot of the Residential Development at the date of this Agreement"; in the SPA in the present case, it is not stated that 120 units represented anything in particular, let alone anything with reference to the prevailing guidelines.

30 On the basis of the authorities reviewed above, the mistake the plaintiffs allege is not one which would entitle them to rectification for unilateral mistake.

31 Local authorities do not assist the plaintiffs in this regard. In *Kok Lee Kuen and another v Choon Fook Realty Pte Ltd and others* [1996] 3 SLR(R) 182 ("*Kok Lee Kuen*"), the Court of Appeal granted rectification on the basis that there was a concluded oral agreement before it was reduced into writing, with a mistake as to the description of the subject property. The authorities cited by the court included *Thomas Bates*, and the mistake in question related to what the contractual terms were.

32 In *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 ("*Yap Son On*") the Court of Appeal noted that it would only have been possible to achieve the outcome the respondent sought, if there had been a successful application for rectification – this was however not pleaded, and in any event the court declined to grant that remedy (see [61] and [68]).

33 The court said the equitable doctrine of rectification refers to "the reconstruction or amendment of a document" where there is a "mismatch between the parties' agreement and the instrument which purports to record it" (at [61]). That too indicates that the relevant mistake must be one as to what the terms of the agreement were. The parties here agreed on 120 units and the document reflected that by way of the 120 units CP. There is therefore no mismatch between the parties' agreement and the instrument which purports to record it.

34 In my opinion, a mistake on the part of one party as to the nature or quality of what it had agreed to, does not justify rectification of the contract.

Contracts are rectified to give effect to the true agreement/intention of the parties, or at least what the mistaken party believed that to be

35 The second issue is related to the first (discussed above) – in rectifying a contract, is the court seeking to give effect to the true agreement/intention of the parties, or at least what the mistaken party believed that to be? Or can a contract be rectified such that it reflects what the mistaken party (*on its part*) would like to have agreed to, although that would not be the true agreement/intention of *both* parties, nor even what the mistaken party believed that to be?

36 The plaintiffs say that because the CSC's agreement to 120 units was based on a mistaken premise (that 120 was the maximum permissible number of units under the applicable guidelines), the court should now ask what the guidelines allow, arrive at 112 units, and write "112" into the SPA in place of "120". Can a rectified contract, however, not reflect the true agreement/intention of the parties, or even what the mistaken party believed that agreement/intention to be? In other words, can a rectified contract only reflect

what the CSC would like to have agreed to (112 units), and not what *both* parties in fact agreed to/intended (120 units) or even what the CSC *believed* both parties had agreed to/intended (120 units)?

37 The plaintiffs rely on English authorities for the proposition that the rectified contract need not reflect the true agreement/intention of the parties – a contract may be rectified to reflect what the mistaken party believed that true agreement/intention to be.

38 In *A Roberts & Co Ltd And another v Leicestershire County Council* ("*Roberts*") [1961] 1 Ch 555, the plaintiff company submitted a tender to carry out certain works for the defendant council on the basis of an 18-month contract period; it did not notice that the period which was then inserted in the written contract differed by a year, such that the contract period would be 30 months instead. The company sought rectification of the completion date from 30 September 1956 to 30 September 1955. Pennycuick J stated the principle as follows: "a party is entitled to rectification of a contract upon proof that he believed a particular term to be included in the contract, and that the other party concluded the contract with the omission or a variation of that term in the knowledge that the first party believed the term to be included."

39 On the facts of that case, the court found that – prior to the company executing the contract – a representative of the council realised that the company was mistaken as to the contract period, but did not draw this to the company's attention. Rectification was granted.

40 The rectified date of 30 September 1955 did not reflect the true agreement/intention of the parties: it was what the company intended, but it was not what the council intended. Nevertheless, rectification was granted to reflect

what one party mistakenly thought the contract terms were, when the other side knew of that mistake, and did not highlight it.

41 The plaintiffs also cite *FSHC Group Holdings Limited v Glas Trust Corporation Limited* [2020] Ch 365 for the proposition at [105]:

> In the case of common mistake it is inequitable for a party to the contract to seek to apply the contract inconsistently with what that party knew to be the common intention of the parties when the written contract was executed. *The doctrine of unilateral mistake extends this principle to the situation where a party seeks to apply the contract inconsistently with what that party knew the other party believed to be the common intention of the parties when the written contract was executed.*
>
> [emphasis added]

42 The English authorities thus support rectification of a contract to the true agreement/intention of the parties, or what the mistaken party believed that to be, *ie*, what the mistaken party believed *both* parties had agreed/intended.

43 I then consider the local authorities. The Court of Appeal in *Kok Lee Kuen* stated at [48]: "At the end of the day the court must be satisfied that in granting rectification it is not making a new contract for the parties, but affirming a contract which the parties made." However, the court had also commented at [44]–[45] that in *Frederick E Rose (London) Ld v William H Pim Jnr & Co Ld* [1953] 2 QB 450 at 461, Denning LJ seemed to think that for rectification there must be a concluded antecedent contract, but there appeared to be authorities which suggest it will suffice to show a common intention to include a term which by mistake was omitted. The court did not resolve that conceptual question as on the evidence there was a concluded oral agreement.

44 More recently, in *Yap Son On* at [67], the Court of Appeal accepted that "a common continuing intention, whether or not amounting to an agreement"

will suffice. The court explained (at [62]) the difference between interpretation and rectification as follows: "Rectification … is a form of relief that involves 'correcting a written instrument which, by a mistake in verbal expression, does not accurately reflect *[the parties'] true agreement*' (see *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova and Nai Superba* [1984] 1 Lloyd's Rep 353 at 359 *per* Slade LJ)" [emphasis added].

45 The court in *Yap Son On* also endorsed Mustill J's judgment in *Etablissements Georges et Paul Levy v Adderley Navigation Co Panama SA (The Olympic Pride)* [1980] 2 Lloyd's Rep 67 ("*The Olympic Pride*") at 72, that equitable rectification is available in two broad situations: (a) common mistake – "where there is a mistake common to both parties, the mistake being the belief that the document accurately records *the transaction*"; and (b) unilateral mistake – "where one party is mistaken as to the compliance of the document with *the transaction* and the other party knows of this mistaken belief but does nothing to correct it" [emphasis added] (at [65]). The court further held that "[t]he burden is on the party seeking rectification to show 'convincing proof' not only that the document to be rectified was not in accordance with *the parties' true intention* at the time of its execution but also that the document in its proposed form would accord with *that intention*" [emphasis added] (see *Industrial & Commercial Bank Ltd v PD International Pte* Ltd [2003] 1 SLR(R) 382 at [29]).

46 The court's acceptance of rectification for unilateral mistake as described in *The Olympic Pride* indicates that a contract may be rectified not only to reflect the true agreement/intention of the parties, but also to reflect what the mistaken party believed that to be.

47 Indeed, that was already the law at the time of *Kok Lee Kuen*, where the court stated at [54] that it would have granted rectification for unilateral mistake

even if there were *part* of the subject property that the Vendors did not intend to sell, for the Vendors knew that the purchaser thought he was buying the *whole* of the subject property, and did not disabuse him of this. The court cited *Roberts* as authority that rectification could be ordered in those circumstances.

48 The statement in [48] of *Kok Lee Kuen* (see [43] above) that rectification affirms "a contract which the parties made" was in the context of rectification for common mistake (the court's primary finding); the court however also accepted that unilateral mistake would have been available, if only the purchaser were mistaken. Similarly, the reference at [65] of *Yap Son On* to rectifying a document to accord with "the parties' true intention" was in the context of common mistake. Where rectification is granted for unilateral mistake, the touchstone is what the mistaken party believed "the parties' true intention" to be, and that is what the document would be rectified to reflect, as discussed above.

49 The English and local authorities are thus aligned: a contract may be rectified not only to reflect the true agreement/intention of the parties, but also to reflect what the mistaken party believed that to be. But they do not say that a contract may be rectified to reflect what the mistaken party (*on its part*) would like to have agreed to, although that would not be the true agreement/intention of *both* parties, nor even what the mistaken party believed that to be.

50 In the present case, what the parties agreed to was 120 units, which the plaintiffs wish the court to rectify to 112 units, on the basis that the CSC believed that 120 was the maximum allowable number of units under the applicable guidelines, when that number was actually 112. The only agreement or common intention between the parties was in relation to 120 units, not 112 units, nor whatever the maximum allowable number of units under the

applicable guidelines was. The plaintiffs do not contend (nor could they) that the parties had agreed to 112 units; indeed, Oxley had made it plain that it would not agree to a number less than 120, and in the event the parties agreed on the number 120. The number 112 is not what the parties had agreed to, nor what the CSC believed the parties had agreed to; there was no actual/perceived agreement or common intention as to the number 112. The authorities on rectification for unilateral mistake do not support rectification in these circumstances.

51 The plaintiffs' claim for rectification thus fails on the law. I go on to consider whether it also fails on the facts.

The facts relevant to rectification

52 I consider whether the CSC had made the alleged mistake, and if so whether Oxley knew of that mistake.

Did the CSC mistakenly believe that 120 was the maximum permissible number of units under the prevailing URA guidelines?

53 At the 23–24 March 2018 meeting, the CSC's lawyers Seah Ong & Partners advised the CSC to confirm with Huttons if the 120 units CP was achievable, and Huttons confirmed this:

(a) Mr Steven Seah of Seah Ong & Partners said he had advised the CSC to ensure that the condition precedent was "achievable", and Huttons confirmed that it was "achievable";[12] there was no discussion of

[12] Steven Seah's Affidavits of Evidence-in-Chief ("Steven Seah's AEIC"), paras 47–51.

what the maximum number of units under the URA guidelines might be;[13] and

(b) the evidence of Ms Wong Bei Shan (formerly of Seah Ong & Partners) was that Mr Seah had advised the CSC to seek Huttons' confirmation that the condition precedent "could be met", and that Huttons confirmed that the parameters in the condition precedent were achievable;[14] nobody said at the meeting that 120 represented the "maximum permissible" number of dwelling units under the URA guidelines.

54 Stephen Tan ("Stephen") from Huttons too gave evidence that he had said the 120 units CP was achievable.[15]

55 Mr Yeo and Ms Lim say they agreed to "120 dwelling units averaging 700 square feet" because Stephen from Huttons said that was "achievable".[16] Mr Yeo's evidence is to the effect that the CSC was concerned with what was *achievable*, rather than what was the maximum under the guidelines.[17] Similarly, Ms Lim says that Stephen never said that 120 dwelling units was the maximum under the guidelines.[18] She says nobody asked Huttons if 120 was the maximum permissible number of units under the prevailing guidelines, all that

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13 Steven Seah's AEIC, para 50; Transcript, 4 May 2021, 93:12–25, 99:17–101:15.

14 Wong Bei Shan's AEIC, paras 47–48; Transcript, 4 May 2021, 119:4–13.

15 Stephen Tan's AEIC, paras 14 and 20, Transcript, 6 May 2021, 41:5–42:25, 56:9 –22.

16 Transcript, 5 May 2021, 46:23–47:3; 86:21–87:2; Transcript 6 May 2021, 58:1–12; see also Transcript, 5 May 2021, 151:22–152:5, 153:16–21, 154:25–156:1 and 173:5–177:21; and Ms Lim's AEIC, paras 32–33.

17 Transcript, 5 May 2021, 151:22–152:5, 153:16–21, 154:25–156:1 and 173:5–177:21.

18 Transcript, 5 May 2021, 79:7–80:20, 81:18–25, 83:15–19, 84:5–19, 87:10–88:2.

was asked of Huttons was whether 120 units was achievable.[19] Huttons confirmed that, and so the CSC members agreed.[20]

56 At the meeting, in relation to the number of dwelling units to be stated in the condition precedent, there was no reference to the prevailing URA guidelines.[21]

57 There is a conceptual difference between what is "achievable", and what the maximum is under the prevailing guidelines, for URA's guidelines change over time, and moreover URA can waive compliance with its guidelines.

58 When Stephen from Huttons said 120 units was "achievable", he was simply conveying that he thought that URA approval could be obtained for that number of units. He was not saying that 120 was the maximum permissible number under the prevailing guidelines; he was not saying anything in particular about the prevailing guidelines at all.

59 Indeed, Stephen's evidence was that his statement that 120 units was "achievable", was not based on an application of the prevailing guidelines. He says he used 700 sq ft as the average unit size, not because he had misread the guidelines and used 700 sq ft as the average unit size instead of the prescribed 70 sq m (equivalent to 753 sq ft). Rather, that was the "average of the large, medium and small [units] in Balestier area", which Stephen had ascertained by a caveat search on a sample size of 30–40 units in Balestier.[22] Dividing the gross

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19 Transcript, 5 May 2021, 85:12–86:14.

20 Transcript, 5 May 2021, 84:5–8; Transcript 6 May 2021, 110:13–18.

21 Transcript, 5 May 2021, 175:24–177:20 (Mr Yeo) and 68:9–12, 82:1–4, and 83:20–84:4 (Ms Lim); Transcript, 4 May 2021, 118:10–13, 122:19–25 (Ms Wong); Stephen Tan's AEIC, paras 24–25; Transcript, 6 May 2021, 70:10–22 (Stephen Tan).

22 Transcript, 6 May 2021, 52:8–25 and 53:1–54:7.

floor area of 84,669.27 sq ft by 700 sq ft yields 120.95 units, which Stephen rounded down to 120 units.

60 Stephen says he believed (and represented) that 120 units was "achievable", because he thought that for the Property, (which was in the Balestier area) URA approval could be obtained for 120 units, as the average unit size would be the same as that in the area.

61 The plaintiffs belatedly submitted (in their reply closing submissions at paras 27–33) that Stephen's explanation was not a truthful one. Stephen was the plaintiffs' own witness, and if the plaintiffs wished to contend that Stephen was untruthful in this respect, they ought to have said so when Stephen was on the stand. Indeed, the plaintiffs ought to have applied to treat Stephen as a hostile witness and cross-examine him. It was not fair to Stephen (and Huttons) to belatedly submit that he should be disbelieved as to how he had arrived at the number 120. In the circumstances, I decline to make a specific finding as to whether Stephen had arrived at 120 units in the manner he had explained, or whether (as the plaintiffs now contend) Stephen had made a mistake in applying the URA guidelines – which resulted in him stating "120 dwelling units" in the Information Memorandum which Huttons provided to Oxley.

62 That it is unnecessary for me to find whether Stephen/Huttons had made such a mistake, is in line with the plaintiffs' recognition (at para 26 of their reply closing submissions) that strictly speaking how Stephen had arrived at 120 units as stated in the Information Memorandum is not relevant to the CSC's state of mind at the 23–24 March 2018 meeting: the Information Memorandum had not been provided to the CSC, and the process by which Stephen had arrived at 120 units was not expressly communicated at that meeting. As the plaintiffs accept,

"what *is* relevant is what was communicated to the CSC and *how* the CSC understood what was communicated."[23]

63 In this regard, what was communicated to the CSC was that the 120 units CP was "achievable", but what the CSC members Mr Yeo and Ms Lim say they understood from that, was that 120 units was the maximum permissible number under the prevailing guidelines. That is not what was *communicated*, and I do not accept that that is what Mr Yeo and Ms Lim *understood* from what was communicated.

64 Ms Lim says she understood the "120" figure to be based on Huttons' judgment or assessment and not with reference to any law, regulation, or guideline.[24] That is inconsistent with her position that she believed 120 units was the maximum number under the prevailing guidelines.

65 As for Mr Yeo, he had queried whether it made sense for the CSC to agree to a proposed condition precedent that 36 storeys could be built at the Property, when there had been discussion that 36 was the maximum number of storeys that could be built there.[25] The number of storeys was negotiated down to 26 and the condition precedent in clause 7(5)(i)(a) thus referred to OPP being obtained for "no less than 26 storeys". The reference to the number of dwelling units is similarly worded in clause 7(5)(i)(b) as "no less than 120 dwelling units". If Mr Yeo believed that 120 was the maximum permissible number of units under the prevailing guidelines, one would have expected him to query whether the CSC should agree to the 120 units CP, as he had with the proposed

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23 Plaintiff's Reply Closing Submissions, para 26.

24 Transcript, 5 May 2021, 88:24–89:6.

25 Mr Yeo's AEIC, para 57(b).

condition precedent in relation to 36 storeys; but he did not. That indicates that Mr Yeo did not think 120 units was the maximum permissible number under the prevailing guidelines. Indeed, he did not have any particular idea what the maximum permissible number under the prevailing guidelines was – he simply believed that 120 units was "achievable", as Stephen had said it was.

66 It is also noteworthy that the CSC's case on mistake evolved over time.

67 Mistake was first raised by the CSC in para 3 of its lawyers' letter of 3 December 2018, which in material part reads as follows:

> …
>
> c. In response to your client's allegation that Clause 7(5)(i)(b) cannot be fulfilled, the CSC's position is tht there is a clear mistake in the Clause and Clause 7(5)(i)(b) can **nevertheless be fulfilled** by rectifying the clear mistake.
>
> d. The CSC notes that paragraph 2 of the URA Advice states:
>
> *"Based on the Master Plan allowable GPR of 2.8 and the subject site's area,* ***the maximum allowable number of DUs is 112****. The formula for computing the permissible number of DUs can be found in our external circular dated* ***4 Sept 2012****, which has been* ***consistently applied*** *to all new developments."*
>
> e. In light of paragraph 2 of the URA Advice, it is evident that there must have been a mistake made in the number of dwelling units specified at Clause 7(5)(i)(b) as parties could not have agreed to a condition in the SPA that **cannot be fulfilled** based on URA guidelines that were already in existence then.
>
> f. … The CSC also has reason to believe that your client was aware that the maximum permissible dwelling units at the Property was 112, even before the URA Advice was issued. Given the above, it would appear that that [*sic*] your client was well aware that there was a mistake in Clause 7(5)(i)(b) all along…Your client's sudden assertion on 26 October 2018 that Clause 7(5)(i)(b) cannot be fulfilled is simply a convenient excuse to hide

> what is in truth an unmeritorious attempt to escape and renege upon its obligations under the SPA.
>
> g. Given the above, the CSC takes the view that it is also not open to your client to assert that Clause 7(5)(i)(b) cannot be fulfilled. In fact, Clause 7(5)(i)(b) can clearly be fulfilled through rectifying the mistake and amending the clause ***in accordance with the spirit of what was agreed upon*** between parties. Clause 7(5)(i)(b) should therefore be amended to read as follows: *"the New Development shall comprise of no less than* ***112*** *dwelling units averaging* ***70 square meters*** *each"* …
>
> [emphasis in original]

68 What was then alleged was: a mistake in agreeing to a condition precedent that cannot be fulfilled, *ie*, was not "achievable" (see (e) in the above quote). At that time, the CSC did not say that when the SPA was signed, the CSC had thought 120 units was the maximum permissible number under the prevailing guidelines.

69 The plaintiffs' first pleaded position, in their original Statement of Claim ("original SOC") dated 11 December 2018, was consistent with the CSC's lawyers' letter of 3 December 2018. The CSC's alleged mistake was pleaded as follows: "that there was no law, regulation or guideline which would prevent the fulfilment of the Condition Precedent" (original SOC at para 45(a)). As a corollary, it was contended that there *was* some law, regulation or guideline which would prevent the fulfilment of the Condition Precedent, specifically, URA's 2012 Guideline.

70 If that had remained the plaintiffs' case on mistake, it would have been incumbent on them to prove that, at the time the SPA was signed, it was not possible to obtain an OPP for 120 units within the next nine months, because of URA's 2012 Guideline. The plaintiffs led no evidence to prove that, nor did they seek to elicit such evidence from Oxley's witnesses such as the various

architects who testified. In their reply closing submissions at para 64, they say they do not dispute that at the time of the SPA, approval for 120 units was "achievable" in the sense that it was within the realm of possibilities.

71 In the original SOC, the plaintiff's case was based on both common mistake (original SOC at paras 45–48) and unilateral mistake (original SOC at paras 49–51).

72 Common mistake was abandoned by Amendment No 1 dated 16 July 2019 ("SOC Amendment No 1"). The plaintiffs continued to rely on unilateral mistake, but the original version of the CSC's alleged mistake (as set out in para 45(a) of the original SOC) changed. Instead, it was said that *Huttons* had made a mistake, which the CSC allegedly shared (for the CSC "depended on Huttons for advice in matters relating to the development potential of the Property") – SOC Amendment No 1 at paras 52(b) and (c). It was said that Huttons made a mistake in calculating the maximum permissible number of dwelling units under the prevailing laws, regulations and guidelines, by using a minimum average size of 700 sq ft, instead of the formula in the URA Circular (which used 70 sq m, or 753 sq ft) – Huttons thus arrived at a figure of 120 units (which the CSC agreed to put into the SPA) rather than 112 units. The plaintiffs say that Oxley knew of the mistake, which both Huttons and the CSC had made.

73 This version of the CSC's alleged mistake continued through Amendment No 2 dated 6 September 2019 ("SOC Amendment No 2" – see para 52).

74 In SOC Amendment No 3 dated 12 April 2021, however, the previous references to Huttons having made a mistake in calculating the maximum

permissible number of dwelling units[26] were deleted. The plaintiffs no longer pleaded that Huttons had made that mistake, or any mistake. But they still said the CSC had made a mistake, as follows: "the CSC came to the mistaken conclusion that '120 dwelling units averaging 700 square feet' represented the maximum permissible number of dwelling units under the prevailing laws, regulations and guidelines."[27]

75 The plaintiffs continued to maintain that the CSC members "depended on advice from the representatives from Huttons on whether the Condition Precedent *could be met* i.e. whether an OPP from the relevant authority could be obtained for no less than 120 dwelling units averaging 700 square feet each to be built on a new development at [the Property]" [emphasis added] (SOC Amendment No 3 at para 14).

76 The shifts in the plaintiffs' case as to what mistake the CSC supposedly made at the time of the SPA do not inspire confidence:

(a) first, to say that the CSC mistakenly thought the 120 units CP was achievable, *ie*, could be met;

(b) then to say the figure of 120 units resulted from a calculation error by Huttons, whose advice the CSC relied upon; and

(c) finally, to say that the CSC alone mistakenly thought that 120 units was the maximum permissible number under the prevailing guidelines, even if that was not what Huttons thought, and not what Huttons said.

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26 SOC Amendment No 1 and SOC Amendment No 2, para 52(c).

27 SOC Amendment No 3, para 52(d).

77 I find that the CSC members Mr Yeo and Ms Lim did not think at the time of the SPA that 120 units was the maximum permissible number of units under the prevailing guidelines – they were not thinking about the guidelines at all. Rather, they were simply concerned about whether the 120 units CP was achievable, *ie*, could be met, for that is what their lawyers had asked them to confirm with Huttons, and that is what Stephen from Huttons confirmed.

78 As such, I find that the plaintiffs have not proved that the pleaded mistake was made by the CSC.

79 For completeness, I accept that it would have been sufficient for the plaintiffs to show that two of the three CSC members who signed the SPA had made the alleged mistake, but I find the evidence does not establish this.

If the CSC had made the alleged mistake, did Oxley know of it?

80 I do however accept that Mr Lim from Oxley thought that the CSC was acting under a mistake, specifically, he thought the CSC believed that the maximum permissible number of units under the prevailing guidelines was 120. Mr Lim thought this because, to him, the reference to "120 dwelling units" in Huttons' Information Memorandum was the result of a calculation error – with Huttons having used 700 sq ft rather than 70 sq m (753 sq ft) in applying URA's 2012 Guideline to derive the maximum number of units. Since Huttons was advising the CSC, Mr Lim believed that the CSC had made the same mistake. However, he considered that it was not for him to draw the CSC's attention to such a mistake – he said it was not his job to advise the CSC on commercial terms; that was the job of the CSC's lawyer and sales consultant.[28]

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[28] Transcript, 11 May 2021, 61:1–10.

81 Stephen's evidence, however, was that he and Huttons had made no such mistake – he had arrived at 120 units through a different route. This would mean that Oxley's belief that the CSC had made a mistake, was based on Oxley's *mistaken* belief that Huttons had made a mistake. But had the CSC in fact made the alleged mistake (which I do not accept), and had that mistake otherwise been sufficient to justify rectification as sought by the plaintiffs (which I also do not accept), I would have regarded Mr Lim's state of mind as amounting to knowledge on Oxley's part.

82 It remains the case, though, that the alleged mistake is one as to the nature or quality of what was agreed to. Oxley did not think that the CSC meant to agree to some other figure, like 112; from Oxley's perspective, the CSC meant to agree to 120 units, albeit in the belief that under the prevailing guidelines no waiver by the URA was necessary to meet the 120 units CP. As I have held, such a mistake (even if made) does not justify rectification.

Is bad faith/unconscionability relevant here?

83 The plaintiffs also submit that Oxley acted in bad faith, and unconscionably.[29] This does not save the plaintiffs' case on rectification: if the elements for rectification are not established, allegations of bad faith or unconscionability are to no avail.

84 For completeness, I accept Oxley's evidence that it had a genuine intention to build 120 units, and that first obtaining approval for 112 units was a step in that direction. I also accept that Mr Low did not misrepresent at a 23 July 2018 meeting that there had already been a failed application for 120 units. Oxley tried to obtain URA approval for 120 units (which approval would

[29] Plaintiffs' closing submissions ("PCS"), paras 98–118.

have been in Oxley's interests to obtain); when that was rejected by URA, Oxley was entitled to rely on the 120 units CP. There was no bad faith or unconscionability on Oxley's part.

If the SPA were not rectified, did Oxley have the right to rescind it on 26 October 2018 as it purported to do?

85 As I do not agree with the plaintiffs' case on rectification, it follows that the 120 units CP stands. It was not met, as URA approval for 120 units was never obtained.

86 Nevertheless, the plaintiffs contend that Oxley acted prematurely in purporting to terminate the SPA as it did on 26 October 2018, which was before the long-stop date of 27 December 2018 to achieve the 120 units CP (the Contract Date was 27 March 2018, and consequently the date falling nine months after that, *per* clause 7(5)(i), was 27 December 2018).

87 The plaintiffs' case is:

(a) Oxley could only terminate the SPA pursuant to clause 7(5) read with clause 7(5A), on or after 27 December 2018; and

(b) even if it was not possible to obtain the requisite URA approval, Oxley was still obliged to pay the Further Deposit of $4.75m on 1 December 2018, failing which the Vendors themselves could rescind and cancel the SPA, and forfeit the Initial Deposit – as the CSC purported to do on 10 December 2018.

88 Clauses 7(3), 7(5) and 7(5A) are sub-clauses within clause 7 on "Consents, Approvals and Clearances". They read as follows:

(3) Subject to Clause 7 below (on Land Dealings (Approval) Unit), if the sale cannot be completed by the Completion Date by reason of the Purchaser failing to obtain the requisite consent, approval and clearance then either party shall be entitled at their absolute discretion to rescind the sale and purchase whereupon all monies paid to the Vendors by the Purchaser shall be refunded to the Purchaser free of interest and thereafter the Contract shall be null and void. The Purchaser shall have no claim whatsoever against the Vendors for costs, damages, compensation or otherwise hereunder.

…

(5) Notwithstanding any other provision in the Contract and this provision being paramount in all circumstances, the sale and purchase herein shall be subject to the following conditions precedent:-

(i) the Purchaser obtaining on or before the date falling nine (9) months after the Contract Date, the following an outline planning permission from the relevant authority (the "OPP") on the following basis:

…

b) The New Development shall comprise of no less than 120 dwelling units averaging 700 square feet each; …

…

(5A) In the event that on the date falling nine (9) months after the Contract Date (or such later date as may be mutually agreed between the parties):-

(i) the Purchaser fails to receive the OPP on the basis as set out above in Clause 7(5)(i);

…

the Purchaser shall be entitled at the Purchaser's option to rescind and cancel the Contract by giving the Solicitors written notice in that behalf whereupon the Vendors shall forthwith refund and instruct the Solicitors to refund to the Purchaser all monies paid by the Purchaser herein in full without any compensation or deduction whatsoever in exchange for the return to the Vendors all documents of title in respect of the Property in his or his solicitor's possession and withdraw or procure the withdrawal of all caveats (if any) lodged against the Development by the Purchaser or any other party claiming under him and thereafter the Contract shall be deemed

> cancelled and rescinded and the sale and purchase herein shall be abortive and deemed null and void and of no further effect whatsoever and neither party shall have any claim demand or action against the other whether for damages compensation costs or otherwise. Without prejudice to the provisions of Clauses 7(5) and 7(5A), the Purchaser shall be entitled to waive any one or more of the conditions precedent under these said Clauses and where any such condition precedent is waived, such waiver shall not affect the remaining conditions precedent, except to the extent as determined by the Purchaser to take into account such waiver of that condition precedent.

Clause 7(5) of the SPA

89 I start with the observation that clause 7(5) expressly provides that the "sale and purchase herein" shall be subject to the stipulated conditions precedent, "[n]otwithstanding any other provision in the Contract and this provision being paramount in all circumstances". This "paramount clause" stipulation is significant.

90 The plaintiffs contend that under clause 7(5), non-fulfilment of the 120 units CP would only be determined on 27 December 2018; if, prior to that date, it was already not possible for Oxley to obtain the requisite URA approval by 27 December 2018, Oxley would still have to continue performing the SPA until 27 December 2018 before it could rescind and cancel it

91 On the evidence, I am satisfied that as of 26 October 2018, when Oxley purported to rescind and cancel the SPA, it was already not possible for Oxley to have obtained URA approval for 120 units by 27 December 2018.

92 First, on 17 September 2018, URA had *refused* Oxley's application for 120 units,[30] stating in its letter: "Your proposal for a residential flat development with 120 dwelling units (DUs) cannot be supported as it has exceeded the

[30] 4ABOD, 2689.

maximum allowable number of DUs for the subject development … the maximum allowable number of DUs is 112. The formula for computing the permissible number of DUs can be found in our external circular dated 4 September 2012, which has been consistently applied to all new developments."

93 Second, on 17 October 2018 URA issued a circular ("URA's 2018 Guideline") with new formulas for calculating the maximum of dwelling units. URA's 2018 Guideline was more restrictive than that of URA's 2012 Guideline: for the Property (in Balestier), the maximum number of units would only be 76, down from 112; if the Property were in an area where more units would be permitted, the maximum number would still only have been 92. On its terms, URA's 2018 Guideline would only apply to applications submitted to URA on or after 17 January 2019 (and as such, 112 units could still be developed at the Property, based on the approval already obtained), but in view of URA's 2018 Guideline it was not possible to persuade URA to reconsider its refusal to approve the development of 120 units at the Property. This is especially since Balestier was one of the nine areas identified in URA's 2018 Guideline "where the cumulative effect of new developments could pose a severe strain on local infrastructure" and as such an even more restrictive formula was stipulated in URA's 2018 Guideline, than would generally be the case.

94 As of 26 October 2018 it was thus already the case that the 120 units CP could not be fulfilled. Under clause 7(5), it was a condition precedent that Oxley obtain the requisite URA approval or on before 27 December 2018. That does not mean that the parties had to wait till 27 December 2018 to know whether the 120 units CP had been fulfilled. Once it was not possible to obtain such approval "on or before" 27 December 2018, the condition precedent would not be fulfilled. Once a condition precedent cannot be fulfilled, it is not fulfilled.

95 With the non-fulfilment of a condition precedent to the sale and purchase, the parties would be released from their mutual obligations in relation thereto. That is, unless Oxley waived the 120 units CP as a condition precedent (as clause 7(5A) says it was entitled to do). By purporting to rescind and cancel the SPA, however, Oxley made it plain that it did not waive the condition precedent. In the circumstances, the parties were released of their obligations under the SPA (including the payment of the Further Deposit by Oxley). It also follows that Oxley would be entitled to recover the Initial Deposit, since that had been paid as part and parcel of the sale and purchase, for which the condition precedent had not been met.

96 The plaintiffs' interpretation of clause 7(5) is uncommercial: that even though the 120 units CP could not be fulfilled, the parties would have to continue performing the SPA (including Oxley paying more money) until a future date (27 December 2018), when all monies paid would be refunded. The plaintiffs themselves submit that a reasonable deposit is regarded as earnest money given to guarantee the due performance of the contract.[31] It would run counter to that to require Oxley to pay the Further Deposit at a time when URA approval for 120 units could no longer be obtained: what "due performance" was Oxley expected to guarantee when the parties had expressly agreed that the sale and purchase would be subject to the condition precedent of obtaining such URA approval by 27 December 2018, and that condition precedent could not be fulfilled?

97 I am reinforced in my conclusions by the "paramount clause" stipulation in clause 7(5), the objective being to relieve the parties of having to proceed with the sale and purchase if Oxley could not obtain URA approval for 120 units

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[31] PCS, para 158(b).

on or before 27 December 2018, regardless of any other provision of the SPA. It would go against that to say that even after it was no longer possible to obtain the requisite URA approval by 27 December 2018, Oxley still had to continue performing the SPA until 27 December 2018 – in particular by paying the Further Deposit of $4.75m – or face forfeiture of the Initial Deposit it had already paid. Indeed, the 120 units CP was expressed as a condition precedent to the "sale and purchase", *ie,* the whole transaction that was the subject of the SPA. The obligation to pay the Further Deposit was subject to that condition precedent, as was any right to forfeit the Initial Deposit if the Further Deposit were not paid. All those obligations and rights fall away upon non-fulfilment of the condition precedent.

Clause 7(5A) of the SPA

98 Clause 7(5A) builds on clause 7(5). It stipulates that Oxley had the right to waive the conditions precedent under clause 7(5), including the 120 units CP. It further states that "[i]n the event that on [27 December 2018] (or such later date as may be mutually agreed between the parties)" Oxley fails to receive such URA approval, Oxley would be entitled to rescind and cancel the SPA.

99 Oxley relies on *Tan Soo Leng David v Wee, Satku & Kumar Pte Ltd and another* [1997] 3 SLR(R) 257 ("*Tan Soo Leng*") where clause 6 of the option read: "The sale shall also be subject to the consent of the Developers, which said consent to the sale is required under the terms of the principal agreement. In the event such consent is refused or not received by the Completion Date (as defined in Clause 7 below), the sale and purchase herein shall be deemed rescinded forthwith …" (see [12]). The court accepted that the natural and ordinary meaning of the clause was that the sale and purchase would be rescinded in two instances:

(a) first, immediately, if the Developers refused to give consent, there would be a rescission; and

(b) second, if the Developers did not respond to the request for consent such that by the Completion Date consent had not been received, then the sale would be rescinded on that date;

save that the court added that the seller had to have made reasonable efforts to get the consent, or it must have been useless to make such efforts (see [62]).

100 In the event, the court held that the option was rescinded on 14 July 1992 (when the Developers refused consent), or at the latest, 20 September 1992 (the Completion Date).

101 There was an express reference in that clause to consent being "*refused* or not received by the Completion Date", whereas clauses 7(5) and 7(5A) here make no reference to any "refusal" by URA, instead they refer to Oxley "obtaining" or "fail[ing] to receive" the requisite approval.

102 Given the differences in wording, I have some difficulty interpreting clause 7(5A) in the same way as the clause in *Tan Soo Leng*. Clause 7(5A) says, "[i]in the event that <u>on</u> 27 December 2018 [Oxley] fails to receive [URA approval]" [emphasis added], and that suggests that it was not until 27 December 2018 that Oxley could give notice under clause 7(5A) to rescind and cancel the SPA. Clause 7(5A) was evidently built upon clause 7(5) – clause 7(5A)(i) refers back to clause 7(5)(i). However, the wording in clause 7(5): Oxley "obtaining [URA approval] on or before [27 December 2018]" was not tracked in clause 7(5A)(i). Instead, clause 7(5A)(i) was drafted as: "[i]n the event that on 27 December 2018 [Oxley] fails to receive [URA approval]". That allowed the plaintiffs to argue that it was only <u>on</u> (or after) 27 December 2018

that Oxley could issue a notice under clause 7(5A), even if months earlier the condition precedent in clause 7(5)(i) already could not be fulfilled.

103 None of this, however, derogates from the effect of clause 7(5) – indeed, it could not, given that clause 7(5) was agreed to be the "paramount clause". In my opinion, even without clause 7(5A), upon non-fulfilment of a condition precedent under clause 7(5) (here, the 120 units CP) Oxley was still entitled to give notice that it was not waiving the condition precedent, and that consequently the sale and purchase would not proceed.

104 Taking the plaintiffs' case at its highest – that Oxley could not give *any* notice to rescind and cancel the SPA until 27 December 2018, and so Oxley still had to pay the Further Deposit on 1 December 2018 – Oxley would still be entitled thereafter to recover any monies paid (and any monies purportedly forfeited) because of the non-fulfilment of a condition precedent under clause 7(5): there would be a total failure of consideration for the monies paid. That result would be consistent with clause 7(5) being "paramount" as the parties had expressly agreed. The plaintiffs cannot be allowed to keep any monies paid by Oxley and purportedly forfeited, for that would make the "paramount clause" 7(5) subordinate to forfeiture clause 4(6) (set out at [111] below), which would go against the parties' agreement. It would thus suffice for Oxley's purposes to rely on clause 7(5) without also having to invoke clause 7(5A).

Clause 7(3) of the SPA

105 Oxley says that, besides clauses 7(5) and 7(5A), it can also rely on clause 7(3) to rescind and cancel the SPA. The plaintiffs say that Oxley's right to rescind and cancel for non-fulfilment of the 120 units CP is exclusively governed by clauses 7(5) and 7(5A) and so clause 7(3) has no application.

106 While clauses 7(5) and 7(5A) specifically address the non-fulfilment of the 120 units CP, it does not follow that clause 7(3) would have no application in that scenario.

107 Clause 7(3) states that "if the sale cannot be completed by the Completion Date by reason of the Purchaser failing to obtain the requisite consent, approval and clearance then either party shall be entitled at their absolute discretion to rescind the sale and purchase". Clause 7(3) is a sub-clause within clause 7 on "consents, approvals and clearances", which consents, approvals and clearances include the matters stated in clause 7(5) as conditions precedent which the sale and purchase was subject to. There is no basis to read clause 7(3) as covering only consents, approvals and clearances in clause 7 *other than those in clause 7(5)*. Indeed, it would be consistent with the "paramount clause" stipulation in clause 7(5), for clause 7(3) to include the matters in clause 7(5) within the phrase "the sale cannot be completed by the Completion Date by reason of the Purchaser failing to obtain the requisite consent, approval and clearance".

108 If the OPP were not obtained on the basis stated in clause 7(5)(i), and Oxley did not waive that as a condition precedent, the sale could not be completed by the Completion Date per clause 7(3), or indeed, at all. Further, clauses 9(1)(i)–(v) stipulate various events, the latest of which would determine the Completion Date. Clause 9(1)(v) was: three months after the date of the Purchaser's written notice to the Vendors or the Solicitors that the OPP has been obtained – Oxley would not give such written notice if the OPP were not obtained on the basis in clause 7(5)(i), and Oxley did not waive that as a condition precedent.

109 If, however, the OPP obtained was not on the basis stated in clause 7(5)(i) but Oxley waived that as a condition precedent, then the sale could proceed to completion and clause 7(3) would not then apply. But here Oxley did not waive the condition precedent. As I stated above (at [91]–[93] above), as of 26 October 2018 it was already the case that "the sale cannot be cannot be completed by the Completion Date by reason of the Purchaser failing to obtain the requisite consent, approval and clearance".

110 It follows that under clause 7(3), and not just under clause 7(5), Oxley could rescind the sale and purchase whereupon all monies paid to the Vendors by the Purchaser (here, the Initial Deposit) were to be refunded to Oxley.

Was the CSC entitled to forfeit the Initial Deposit as it purported to?

111 Clause 4(6) on the Purchaser's right to forfeit the Deposit reads as follows:

> If the Purchaser fails to pay to the Solicitors the sums under this Clause 4 within the period(s) stated, the Vendors shall be entitled at the Vendors' absolute discretion to (but without any obligation on their part to do so) rescind and cancel the Contract and upon rescission and cancellation the Deposit shall be forfeited by the Vendors and shall belong to the Vendors absolutely and beneficially. Provided that this provision shall be without prejudice to any other rights or remedies available to the Vendors either at law or in equity against the Purchaser.

112 The plaintiffs contend that clause 4(6) was triggered by Oxley's failure to pay the Further Deposit when it was due on 1 December 2018. By then, however, the 120 units CP could not be fulfilled. Moreover, Oxley had indicated that it would not waive that condition precedent; instead it validly rescinded and cancelled the SPA. In the circumstances, Oxley had no obligation to pay the Further Deposit; and the plaintiffs had no right to forfeit, or retain, the Initial Deposit. In any event, given the non-fulfilment of the 120 units CP in clause

7(5) which the parties had agreed was a "paramount clause", Oxley was entitled to recover the monies it had paid.

Conclusion

113 It follows from the above that I dismiss the plaintiffs' claims for:

(a) rectification of the SPA;

(b) declaratory relief that Oxley's rescission of the SPA was invalid; and

(c) damages.

114 As a corollary, I find that Oxley is entitled to a refund of the Initial Deposit in the sum of $4.75m, with interest.

115 I will hear parties further on the specific orders to be made in light of the above, including as to the caveats lodged by Oxley, and costs.

Andre Maniam
Judge of the High Court

Lee Ee Yang, Wilbur Lua, Douglas Pang and Michelle Ong
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Singapore LLP) for the first defendant;
Fong Weng Khai (W K Fong & Co) for the second defendant.
