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

[2023] SGHC 256

Originating Application No 423 of 2023

Between

(1) Li Jialin
(2) Li Suinan

… *Applicants*

And

Wingcrown Investment Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Contract — Remedies — Deposits]
[Contract — Remedies — Liquidated damages — Penalties]
[Civil Procedure — Damages — Interest — Pre-judgment interest]

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v
Wingcrown Investment Pte Ltd

[2023] SGHC 256

General Division of the High Court — Originating Application No 423 of 2023
Kwek Mean Luck J
5 July, 21 August 2023

12 September 2023

Kwek Mean Luck J:

Introduction

1 In this application, Ms Li Jialin and Mr Li Suinan (the "Applicants") principally sought the return of $1,195,354.42 (less any amount refunded to date) from Wingcrown Investment Pte Ltd (the "Respondent"), along with interest at a rate of 5.33% per annum. The Applicants had paid the sum of $1,195,354.42 to the Respondent pursuant to two abortive attempts to purchase a residential property (the "Property"). Although it was undisputed that the sale had been terminated due to repeated defaults by the Applicants, the Applicants submitted that the Respondent was not entitled to retain *any* part of this sum. Out of this sum, the Respondent had returned $488,957.04 to the Applicants prior to the commencement of proceedings and submitted that it was entitled to retain the balance of $706,397.38.

2 After hearing the parties' submissions, I held that the Respondent was entitled to forfeit $380,000 as a true deposit and that the Respondent was to retain the remaining $326,243.07 pending the determination of its claim of equitable set-off in an assessment of damages hearing to be heard by an Assistant Registrar. As the Respondent had made an offer to settle that was without prejudice save as to costs, I reserved the matter of costs to the Assistant Registrar, who would be able to determine whether the net sum found payable to the Applicants after any set-off would fall below the settlement offer. I also ordered the Respondent to pay pre-judgment interest on the moneys found payable to the Applicants. The Applicants have appealed against my decision to dismiss their application, my decision that interest was to run only in respect of the net sum of money that is eventually found to be repayable to the Applicants after the assessment of damages hearing, as well as my decision to reserve the matter of costs and the applicable rate of interest to the Assistant Registrar. I set out my grounds in full below.

Facts

3 The Respondent is the developer and vendor of a residential development that included the Property. The Applicants are citizens of the People's Republic of China and reside abroad. The parties were legally represented at all material times and principally corresponded through their respective solicitors.

The first attempted purchase

4 On 5 December 2015, the Respondent issued the Applicants an Option to Purchase ("OTP 1") in respect of the Property, at the purchase price of $1,785,000. On 28 December 2015, the parties entered into a Sale and Purchase Agreement ("SPA 1"). Pursuant to cl 7.4(d) of SPA 1, the Respondent was

entitled to forfeit and keep 20% of the purchase price (amounting to $357,000) should SPA 1 be "annulled" by the Respondent following a repudiation of the contract by the Applicants. Under cl 7.4(c) of SPA 1, the Respondent was also entitled to recover from prior payments "all interest, property tax, maintenance charges and other amounts owing and unpaid" under SPA 1 as at the date of annulment and "all costs and expenses legal or otherwise" incurred in relation to the recovery of possession of the Property.[1] Both OTP 1 and SPA 1 were in the standard form prescribed under the Housing Developers Rules.

5 On 12 March 2018, SPA 1 was annulled by the Respondent. It was undisputed that this termination was valid as the Applicants had defaulted on their payment obligations. The Respondent informed the Applicants that pursuant to cl 7.4 of SPA 1, the Respondent was entitled to the sum of $379,195.58, comprising the $357,000 deposit as well as deductions for interest on outstanding payments, maintenance fees, and tax reimbursements. By then, a total of $1,217,550 had already been paid by the Applicants. The Respondent said that the remaining $838,354.42 would be returned to the Applicants.[2]

The second attempted purchase

6 Despite the termination of SPA 1, the Applicants remained interested in purchasing the Property and commenced negotiations with the Respondent. To demonstrate their "utmost sincerity" and to plead for a "final chance", the Applicants' solicitors wrote to the Respondent on 3 and 4 April 2018, seeking the Respondent's "kind indulgence to allow [the Applicants] to continue the purchase of the Property on the same terms".[3] Although the Respondent refused

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1 Affidavit of Koh Chin Beng dated 16 May 2023 at pp 48–49.

2 Affidavit of Koh Chin Beng dated 16 May 2023 at pp 88–89.

3 Affidavit of Li Jialin dated 25 April 2023 at pp 142–144.

to continue on the terms of SPA 1 and reiterated that SPA 1 had already been annulled, negotiations eventually resulted in the grant of a fresh Option to Purchase dated 17 April 2018 ("OTP 2"). Under OTP 2, the revised purchase price for the Property was $1,900,000.[4]

7 OTP 2 is a single document. It sets out the terms of the Option to Purchase, followed by a section headed "Terms of Sale" which sets out the terms that would become operative upon exercise of the Option to Purchase. The preamble to OTP 2 recorded the chronology of events leading up to the grant of OTP 2. Recital III of the preamble to OTP 2 noted that:

> Out of the Original Price, the sum of Singapore Dollars **Three Hundred And Seventy-Nine Thousand One Hundred And Ninety-Five and Cents Fifty-Eight ($379,195.58)** (the "Forfeited Amount") was deducted by the [Respondent] pursuant to Clause 7.4 of the SPA and the sum of Singapore Dollars **Eight Hundred and Thirty-Eight Thousand Three Hundred and Fifty-Four and Cents Forty-Two ($838,354.42)** is to be to be returned to the [Applicants] (the "Refund Amount") subject to the terms of the SPA …
>
> [emphasis in original]

Recital IV stated that:

> [The Applicants have] requested the [Respondent] to:-
>
> a. issue the [Applicants] a fresh option to purchase the Property at the price of Singapore Dollars **One Million Nine Hundred Thousand ($1,900,000.00)** (the "Purchase Price");
>
> b. out of the Forfeited Amount, not to forfeit the sum of Singapore Dollars **Three Hundred And Fifty-Seven Thousand ($357,000.00)** and to instead credit that sum towards the option fee payable under the fresh option to purchase the Property; and

[4] Affidavit of Li Jialin dated 25 April 2023 at pp 129–135.

> c. notwithstanding the terms of the SPA, not refund the Refund Amount to the [Applicants] unless it is in accordance with Clause C below; and
>
> d. to transfer and credit the Refund Amount towards the deposit payable under the fresh option to purchase the Property in accordance with Clause B below, in the event the [Applicants] exercises the Option in accordance with Clause B below …

[emphasis in original]

Clause A of OTP 2 stated that the grant of OTP 2 was in consideration for the payment of the "Option Fee", being the $357,000 already received by the Respondent as recorded in Recital IV.

8 Pursuant to cl B of OTP 2, the Applicants were required to deliver OTP 2 and a signed acceptance copy to the Respondent by 30 April 2018 to properly exercise OTP 2. By such exercise, the Applicants would "irrevocably authorise and direct the [Respondent] to credit the Refund Amount towards payment of the Deposit (defined below) less the Option Fee". Pursuant to cl C of OTP 2, upon the due exercise of OTP 2, "the Option Fee already paid by the [Applicants] will be credited to the Purchase Price, and there shall be a binding contract for the sale and purchase of the Property between the parties hereto on the 'Terms of Sale' set out below". Conversely, should the Applicants fail to properly exercise OTP 2, the Respondent would be entitled to forfeit the "Option Fee" (the $357,000) and the Respondent would return the "Refund Amount" (the $838,354.42) to the Applicants.

9 Under the section headed "Terms of Sale", cl 1 of OTP 2 set out various definitions and interpretations, the most salient of which was that:

> "Deposit" means Singapore Dollars **One Million One Hundred And Ninety-Five Thousand Three Hundred And Fifty-Four and Cents Forty-Two Only (S$1,195,354.42)** and shall form part of the Purchase Price.

> [emphasis in original]

The sum of $1,195,354.42 was derived from the $1,217,550 that had already been paid to the Respondent, less the deductions that the Respondent was entitled to make pursuant to cl 7.4(c) of SPA 1 (at [5] above). In other words, the sum comprised the $357,000 originally paid as a deposit under SPA 1, as well as the $838,354.42 that the Respondent would otherwise have returned to the Applicants following the termination of SPA 1.[5]

10 On 30 April 2018, the Applicants exercised OTP 2. The Applicants were therefore obliged to pay the balance of the $1,900,000 purchase price on the completion date, which was ten weeks from the date of OTP 2 (26 June 2018). Under the section headed "Terms of Sale", cl 2 of OTP 2 incorporated The Law Society of Singapore's Conditions of Sale 2012 (the "Conditions"). Condition 15 of the Conditions concerns the issuance of a notice to complete, which requires the recipient to complete the transaction within 21 days after the day of service. Condition 15.9 provides that:[6]

> If the Purchaser does not comply with the terms of any effective Notice to Complete served by the Vendor under this Condition, then the following terms apply:
>
> (a) on the expiry of the Notice to Complete or within such further period as the Vendor may allow, the Purchaser must immediately return all title deeds and documents in his possession that belong to the Vendor;
>
> (b) the Purchaser must at his own expense procure the cancellation of any entry relating to the Contract in any register; and
>
> (c) *without prejudice to any other rights or remedies available to him at law or in equity*, the Vendor ***may***:

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5 Affidavit of Li Jialin dated 25 April 2023 at paras 20-22; Affidavit of Koh Chin Beng dated 16 May 2023 at para 28.

6 Respondent's Bundle of Authorities dated 28 June 2023 at pp 119–120.

> i. *forfeit and keep* ***any deposit*** *paid by the Purchaser*; and
>
> ii. resell the Property whether by auction or by private agreement without previously tendering a Conveyance to the Purchaser.

[emphasis added]

11 It was undisputed that the Applicants failed to complete on 26 June 2018 as required under OTP 2. Despite several extensions of time and repeated reminders by the Respondent, the Applicants failed to perform their payment obligations.[7] The Respondent thus served the Applicants a notice to complete dated 24 October 2018.[8] Despite the notice, the Applicants failed to complete within 21 days and the Respondent notified the Applicants that OTP 2 had been terminated by way of a letter dated 20 November 2018. In that letter, the Respondent expressly reserved its right to forfeit under Condition 15.9 of the Conditions.[9] The Applicants accepted that OTP 2 was validly terminated.[10]

12 The Respondent thereafter attempted to sell the Property to third parties, eventually completing the sale of the Property on 14 April 2021.[11]

13 From the available evidence, the parties next corresponded by way of a "letter of appeal" dated 1 March 2019, wherein the Applicants explained the reason for their repeated defaults and asked for the Respondent to show "empathy" and to "help mitigate [the Applicants'] losses … by refunding them

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7 Affidavit of Li Jialin dated 25 April 2023 at pp 167–193.

8 Affidavit of Li Jialin dated 25 April 2023 at p 195.

9 Affidavit of Li Jialin dated 25 April 2023 at p 197.

10 Affidavit of Li Jialin dated 25 April 2023 at para 55.

11 Affidavit of Koh Chin Beng dated 16 May 2023 at paras 54-55.

the money of SGD$1,195,354.42 that they had paid todate [*sic*]".[12] By an email dated 29 April 2019, the Respondent declined to return the sum of $1,195,354.42 and reasserted that its rights under Condition 15.9 of the Conditions were reserved.[13] Further appeals by the Applicants were turned down by the Respondent on 4 June 2019 and 3 October 2019.[14] In consequence, the Respondent retained the sum of $1,195,354.42.

The letter of demand

14 The Applicants next wrote to the Respondent close to four years later, issuing a letter of demand dated 21 March 2023. In a change of tack, the Applicants demanded the return of the entire sum of $1,195,354.42 along with interest at a rate of 5.33% per annum calculated from 20 November 2018 to the date of payment. The Applicants claimed that the "deposit" of $1,195,354.42 had to be returned in full as it was not a true deposit and operated as a penalty.[15]

15 On 10 April 2023, the Respondent informed the Applicants that it would return $488,957.04 out of the $1,195,354.42. The Respondent took the position that it was entitled to:[16]

(a) forfeit 20% of the purchase price of $1,900,000 stated in OTP 2, being the sum of $380,000; and

(b) set-off the sum of $326,397.38 as reasonable fees and expenses incurred as a result of the termination of SPA 1 and OTP 2.

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12 Affidavit of Li Jialin dated 25 April 2023 at pp 206–207.

13 Affidavit of Li Jialin dated 25 April 2023 at pp 279.

14 Affidavit of Li Jialin dated 25 April 2023 at pp 281 and 284.

15 Affidavit of Li Jialin dated 25 April 2023 at p 292.

16 Affidavit of Li Jialin dated 25 April 2023 at p 296.

I pause to observe that, for the purposes of this application, the Respondent subsequently reduced the amount of fees and expenses claimed as a set-off to $326,243.07 after reviewing the documents in relation to this matter.[17]

16 On 19 April 2023, as promised, the Respondent paid the sum of $488,957.04 to the Applicants.

Summary of the parties' cases

17 The Applicants primarily prayed for the following orders:

(a) a declaration that the sum of $1,195,354.42 paid to the Respondent was not a true deposit;

(b) a declaration that the forfeiture of the sum of $1,195,354.42 was an unenforceable penalty; and

(c) an order that the Respondent repay the sum of $1,195,354.42 (less the $488,957.04 already repaid) with interest at a rate of 5.33% per annum calculated from 20 November 2018 to the date of full payment.

18 The Applicants submitted that although the sum of $1,195,354.42 was labelled as a "deposit" under OTP 2, it amounted to approximately 63% of the purchase price of the Property and was thus neither moderate nor customary. It therefore could not be forfeited as a true deposit. In any event, the Respondent was not expressly entitled to forfeit 20% of the purchase price of $1,900,000 under any of the terms of OTP 2. The Applicants thus submitted that the forfeiture of the sum of $1,195,354.42 became subject to the penalty rule and was unenforceable as an extravagant and unconscionable penalty. Furthermore,

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17 Affidavit of Koh Chin Beng dated 16 May 2023 at para 77.

the Applicants submitted that the Respondent was not entitled to set-off any fees or expenses and should have commenced a separate claim to prove its damages, which the Applicants argued were unreasonable and unsubstantiated. Accordingly, the Applicants submitted that the Respondent was not entitled to any part of the $1,195,354.42, and that the Applicants were entitled to pre-judgment interest on the entire sum pursuant to s 12(1) of the Civil Law Act 1909 (2020 Rev Ed) (the "Civil Law Act") for being wrongfully kept out of use of the moneys.[18]

19 The Respondent submitted that despite having defaulted on both SPA 1 and OTP 2, the Applicants were in effect attempting to convert their breaches of contract into an interest bearing "fixed deposit account". By claiming the return of the full sum of $1,195,354.42 plus interest at 5.33% per annum, the Applicants would be rewarded for their default and profit from what would essentially be an advantageous "risk-free transaction". The Respondent submitted that only $380,000 had been forfeited, which represented 20% of the purchase price. This was reasonable as earnest money and was thus forfeitable as a true deposit. The Respondent was contractually entitled to forfeit pursuant to Condition 15.9(c)(i) of the Conditions ("Condition 15.9(c)(i)"), which empowered the Respondent to "forfeit and keep *any* deposit paid" by the Applicants. The Respondent also submitted that it was entitled to equitable set-off and that the court should direct an assessment of damages to determine the quantum of damages to be set-off.[19] Although the Respondent did not initially make detailed submissions on the issue of pre-judgment interest, it developed

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18 Applicants' Written Submissions dated 28 June 2023 at paras 35, 53, 79, 81–85, and 103.

19 Respondent's Written Submissions dated 28 June 2023 at paras 8, 59, 62-63, 87; NE, 5 July 2023, at p 13.

its position on the applicable period and quantum of pre-judgment interest in its further submissions.[20]

Issues determined

20 Consequently, the following issues arose for my determination:

(a) whether the Respondent was entitled to forfeit;

(b) whether Condition 15.9(c)(i) was a penalty;

(c) whether the Respondent was entitled to equitable set-off, and if so, whether an assessment of damages should be directed; and

(d) whether the Applicants were entitled to interest.

Whether the Respondent was entitled to forfeit

21 Both parties agreed on the key legal principles governing the forfeiture of deposits but disputed the application of those principles to the facts. Both parties also agreed that in the context of a sale and purchase of real property, 20% of the purchase price was the "magic number" and that a deposit of such amount would be customary and moderate, and thus be forfeitable as a true deposit.[21]

22 Although the Applicants initially submitted that there was nothing in OTP 2 that entitled the Respondent to forfeit 20% of the purchase price of $1,900,000,[22] the Applicants subsequently agreed at the hearing that the

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20 Respondent's Further Written Submissions dated 8 August 2023 at paras 60–62 and 64.

21 Applicants' Written Submissions dated 28 June 2023 at para 41.

22 Applicants' Written Submissions dated 28 June 2023 at paras 50–53.

Respondent had purported to rely on the express right to forfeit under Condition 15.9(c)(i) (at [10] above). The crux of the dispute was thus the proper interpretation of Condition 15.9(c)(i).[23] In particular, the issue was whether on a proper construction of Condition 15.9(c)(i), the Respondent was entitled forfeit such sum it considered reasonable as a true deposit, namely 20% of the purchase price.

Applicants' case

23 The Applicants submitted that the sum of $1,195,354.42, which was what the parties had defined as a "deposit" under cl 1 of OTP 2 (at [9] above), was extortionate and far in excess of the standard customary rate for deposits in such transactions, which was 20% of the purchase price. As the sum that was labelled as a "deposit" under OTP 2 amounted to approximately 63% of the purchase price, it was disproportionate to what would have been reasonably necessary to serve the function of earnest money.

24 The Applicants relied on the Hong Kong Court of Final Appeal's decision of *Polyset Ltd v Panhandat Ltd* [2002] 3 HKLRD 319 ("*Polyset*"), where it was held that the vendor was not entitled to forfeit a deposit representing 35% of the purchase price. The Applicants also referred to the framework set out in the leading case of *Hon Chin Kong v Yip Fook Mun and another* [2018] 3 SLR 534 ("*Hon Chin Kong*"). First, the Applicants submitted that the "deposit" of 63% in OTP 2 was contrary to the parties' prior dealings, as this was a departure from the quantum of deposit stipulated under cl 7.4(d) of SPA 1, which had been the "magic number" of 20% (at [4] above). Second, the Applicants submitted that although a lengthier completion period could

[23] NE, 5 July 2023, at pp 7–8.

justify the need for a larger *quid pro quo* (citing *Polyset* at [107]), the Respondent was only required to keep the Property "off the market" for ten weeks from the exercise of OTP 2. This was in contrast to the period of nine months in *Polyset*, which therefore could not justify a higher quantum of deposit than was customary. The Applicants therefore submitted that the sum of $1,195,354.42 should be characterised as a part payment, the forfeiture of which was subject to the penalty rule, rather than a true deposit.[24]

25 As for Condition 15.9(c)(i), the Applicants submitted that it *only* allowed the Respondent to forfeit the *entire quantum* of "deposit" as defined in OTP 2 and not part of it.[25] According to the Applicants, interpreting the phrase "any deposit" to include any lesser part of the sum stipulated by the parties in the contract as a "deposit" would lead to arbitrariness and unacceptable uncertainty in a contracting party's liability or obligations, as they would not be able to ascertain the maximum loss they would suffer in the event of termination.[26]

26 On that premise, the Applicants submitted that the forfeiture of the entire sum of $1,195,354.42 was extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the Applicants' breach and was not a genuine pre-estimate of loss. Accordingly, the Respondent could not enforce Condition 15.9(c)(i) because it operated as a penalty clause.[27]

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24 Applicants' Written Submissions dated 28 June 2023 at paras 40–49.

25 Applicants' Written Submissions dated 28 June 2023 at para 55.

26 NE, 5 July 2023, at p 6.

27 Applicants' Written Submissions dated 28 June 2023 at paras 70–80.

27 In their further submissions, the Applicants applied a slightly different approach despite having relied upon substantially the same arguments. The Applicants submitted that the power of forfeiture under Condition 15.9(c)(i) was limited only to deposits which have been determined to be true deposits as a matter of law. According to the Applicants, no power to forfeit arose at all once the court determines that the sum is not a true deposit. On the premise that the sum of $1,195,354.42 was in fact a part payment, the Applicants submitted that the Respondent could have no recourse to Condition 15.9(c)(i) as the sum fell entirely outside its scope of operation. The key difference between this submission and the Applicants' earlier submission, was that the Respondent could not rely on Condition 15.9(c)(i) at all.[28]

Respondent's case

28 The Respondent submitted that it was contractually entitled to forfeit the sum of $380,000 pursuant to Condition 15.9(c)(i). It was undisputed that the Applicants had failed to comply with an effective notice to complete. The Respondent was therefore expressly empowered to "forfeit and keep any deposit paid" by the Applicants under Condition 15.9(c)(i) (at [10] above). The Respondent submitted that the effect of the words "may" and "any" in Condition 15.9(c)(i) was that its power to forfeit was *not* limited to forfeiture of the *entire quantum* of "deposit" as defined in OTP 2, but instead vested the Respondent with the discretion to forfeit such lesser sum it considered reasonable. The language of Condition 15.9(c)(i) was wide enough to encompass the forfeiture of a lesser sum and could be distinguished from the type of forfeiture clauses which provide that "*the* deposit shall be forfeited".

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[28] Applicants' Further Written Submissions dated 8 August 2023 at paras 8–16.

29 The Respondent submitted that it had in fact only forfeited the sum of $380,000, which amounted to 20% of the purchase price of $1,900,000, and never purported to forfeit the sum of $1,195,354.42. The amount actually forfeited was entirely consistent with the parties' prior dealings under SPA 1. Furthermore, the court should prefer an interpretation that upholds the validity of a clause over an interpretation that would render the clause invalid. The Respondent also highlighted that the Applicants had a history of serial defaults prior to OTP 2 and were unquestionably aware that the Respondent could and would forfeit reasonable deposits given what had transpired following the termination of SPA 1. The Respondent had only granted OTP 2 at the repeated request of the Applicants, who had portrayed themselves as sincere and genuine purchasers. As a result of the Applicants' repeated breaches, the Property had been kept "off the market" for approximately three years (5 December 2015 to 20 November 2018), and the Respondent only managed to complete the sale of the Property in April 2021 after spending substantial time and resources to find a substitute purchaser, some five years after the grant of OTP 1. The Applicants had also delayed by waiting four and a half years before making their formal demand on 21 March 2023. Accordingly, the Respondent submitted that the forfeiture of the sum of $380,000 was reasonable as a true deposit.[29] Finally, the Respondent submitted that the penalty rule was not applicable to true deposits, relying on *Hon Chin Kong* (at [123]).[30]

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29 Respondent's Written Submissions dated 28 June 2023 at paras 62–78.

30 Respondent's Written Submissions dated 28 June 2023 at paras 79–80; NE, 5 July 2023, at pp 4-5.

Decision

Law on deposits

30 The law allows for the forfeiture of *true* deposits. Both parties agreed that *Hon Chin Kong* sets out the proper approach to the forfeiture of a contractual deposit. The framework may be summarised as follows (see *Hon Chin Kong* at [140] and [143]):

(a) First, the court must determine whether the vendor had an express or inferred power to forfeit on a proper construction of the contract. That a sum was intended to be paid as a deposit usually leads to the inference that there was the power to forfeit. If there was no power to forfeit, the sum must generally be returned subject to any right of set-off for damages.

(b) Second, if there was a power to forfeit, the court must determine whether the sum is a *true* deposit. A true deposit is a sum that is reasonable as an earnest or is customary or moderate. It need not be a genuine pre-estimate of loss and may be forfeited regardless of its proportionality or relation to any actual loss occasioned. The touchstone of reasonableness looks at whether the sum is "so large that it cannot be objectively justified by reference to the functions which such a deposit properly serves", assessed in the specific context of the facts of each case. The court may have regard to any factors relevant to the effectiveness of the true deposit as an earnest of performance.

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

(d) Fourth, if the sum is reasonable or otherwise justifiable, it may be forfeited as a true deposit. Forfeiture of a true deposit is subject only to relief against forfeiture (if available) and cannot be regarded as a penalty. If the sum is *not* a true deposit, it will be characterised as a part payment. The contractual power to forfeit remains exercisable subject to the penalty rule.

31 A useful starting position in understanding the law on deposits is the *dicta* of Lord Browne-Wilkinson in the Privy Council case of *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 ("*Workers Trust*") at 578D–578G:

> In general, a contractual provision which requires one party in the event of his breach of the contract to pay or forfeit a sum of money to the other party is unlawful as being a penalty, unless such provision can be justified as being a payment of liquidated damages being a genuine pre-estimate of the loss which the innocent party will incur by reason of the breach. *One exception to this general rule is the provision for the payment of a deposit by the purchaser on a contract for the sale of land.* Ancient law has established that the forfeiture of such a deposit … does not fall within the general rule and *can be validly forfeited even though the amount of the deposit bears no reference to the anticipated loss to the vendor flowing from the breach of contract.*
>
> … The special treatment afforded to such a deposit derives from the ancient custom of providing an earnest for the performance of a contract in the form of giving either some physical token of earnest (such as a ring) or earnest money …
>
> [emphasis added]

32 The effect of this is that a deposit is forfeitable even if it exceeds the amount of loss actually arising or anticipated to arise from the breach. Bokhary PJ expounded upon this distinction in *Polyset* (at [10]):

> Provided that what the vendor takes as a deposit is within the bounds of an earnest of performance, it will constitute a true deposit. As such, it will be forfeited to the vendor if the purchaser wrongfully fails to perform his part of the bargain.

> *This is so even if the vendor's loss is less than the deposit. It is so even if the vendor suffers no loss at all. Indeed, it is so even if the vendor makes a profit by selling the property to someone else at a higher price.* If the vendor's loss exceeds the deposit, he is of course entitled to recover the full extent of his loss, giving credit for the deposit forfeited to him.
>
> [emphasis added]

33 Unlike liquidated damages, which are intended to be a genuine pre-estimate of loss, the primary purpose of a deposit is *not* to *compensate* for anticipated damages. Instead, a deposit serves the dual purpose of *signalling* the good faith commitment of a purchaser and of *securing* the due performance of the contract. It dissuades purchasers who lack earnest. This is why it is said that disallowing forfeiture would enable the defaulting purchaser to escape from the bargain struck by the parties and thereby "take advantage of his own wrong" (*Hon Chin Kong* at [49] and [124]–[127]).

34 However, to avoid the circumvention of the penalty rule, the parties' designation of a sum as a "deposit" cannot be conclusive (*Hon Chin Kong* at [130]). While the fact that the parties have defined or stipulated that a sum in a contract is a "deposit" will be relevant to the determination of whether there is an inferred *power to forfeit* (at [30(a)] above), the validity of the forfeiture itself engages a different inquiry. To be a forfeitable true deposit, the sum must satisfy the touchstone of reasonableness. The sum must not be so large that it cannot be objectively justified by what is reasonably necessary to serve effectively as earnest moneys. This is not the same as asking whether the sum is a genuine pre-estimate of loss. In *Hon Chin Kong* at [143(d)], Kannan Ramesh J (as he then was) said: "Ultimately, the question of reasonableness is one for the court to assess on the facts of each case". Some relevant factors include the history of dealing between the parties, their financial means, the degree of commitment required on the part of the vendor to keep the property "off the market" for the

duration of the sale in light of the prevailing market conditions (*Hon Chin Kong* at [143(d)]; *Polyset* at [102]–[107]), and the circumstances in which the figure was derived (see the High Court decision of *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd and another* [2022] SGHC 316 at [97]). In addition, I also considered the parties' relative bargaining power to be another relevant factor. This factor, while not explicitly mentioned in *Hon Chin Kong* or *Polyset*, is consistent with the character of the non-exhaustive factors mentioned by Ramesh J. Taking into account the relative bargaining power of the parties is also consistent with established contractual principles (see, for example, in the context of the penalty rule, *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2021] 1 SLR 631 ("*Denka*") at [173] and *Polyset* at [103]-[104]). In short, the context will be key.

35 As for the interaction between the law on deposits and the penalty rule, I agreed with the view of Kannan Ramesh J (as he then was) in *Hon Chin Kong* (at [123]) that the penalty rule does not apply to true deposits. This is so especially in light of the Court of Appeal's reaffirmation in *Denka* at [152] that the penalty rule is directed at secondary obligations which purport to be, but are not, a genuine pre-estimate of loss. As set out in the *Hon Chin Kong* framework (at [30] above), if the sum is found to be forfeitable as a true deposit, no question of penalty will arise.

36 However, if the sum is far in excess of what would be reasonably necessary to serve effectively as earnest moneys, the sum will be characterised as a part payment. This does not automatically entitle the purchaser to claim for the return of the part payment where the vendor has an express contractual power to forfeit. To avoid forfeiture in the case of an express forfeiture clause,

the purchaser must go on to show that the forfeiture clause falls foul of the penalty rule (*Hon Chin Kong* at [136] and [140]).

The Respondent had the power to forfeit under Condition 15.9(c)(i)

37 The parties' respective submissions began from different focal points. While the Applicants focused their analysis on the sum that was *defined* as a "deposit" in cl 1 of OTP 2, *ie*, the sum of $1,195,354.42, the Respondent focused on the sum that was *actually* forfeited, *ie*, the sum of $380,000. Notably, the Respondent did not at any point assert that forfeiture of the sum of $1,195,354.42, amounting to 63% of the purchase price, would be customary or moderate as an earnest. In my view, the determinative question was hence whether the Respondent was entitled to forfeit $380,000 (amounting to 20% of the purchase price under OTP 2).

38 I held that the Respondent was entitled to forfeit the sum of $380,000 pursuant to Condition 15.9(c)(i). Prior to the Applicants' further submissions (at [27] above), it was undisputed that Condition 15.9(c)(i) was potentially applicable. In my view, as it was undisputed that OTP 2 had been terminated following an effective notice to complete, the Respondent had the contractual power under Condition 15.9(c)(i) to "forfeit and keep any deposit paid" by the Applicants, "without prejudice to any other rights or remedies available to [the Respondent] at law or in equity" (at [10] above).

39 As the Conditions do not set out a definition for "deposit", the power to forfeit in Condition 15.9(c)(i) must be construed together with cl 1 of OTP 2, which defined "deposit" to mean the sum of $1,195,354.42 (at [9] above). The parties' submissions diverged on whether Condition 15.9(c)(i) entitled the Respondent to forfeit $380,000 as a true deposit, being a lesser part of this

designated "deposit", or whether it restricted the Respondent to forfeiture of only the entire quantum. As noted, the Respondent did not take the position that it was forfeiting the entire sum of $1,195,354.42, either prior to the commencement of proceedings or in its written and oral submissions. Furthermore, while both parties agreed that the operation of the penalty rule on a contractual clause was all or nothing, no such limitation was imposed in the case of true deposits. The parties therefore agreed that the primary issue was the proper construction of Condition 15.9(c)(i).[31]

40 On a plain reading of Condition 15.9(c)(i), I agreed with the Respondent that the phrase "*any* deposit" supported an interpretation of Condition 15.9(c)(i) that entitled the Respondent the discretion to forfeit a lesser part of the sum that was designated as a "deposit" in OTP 2. The language used was wide enough to allow the Respondent to choose to forfeit the sum of $380,000, being part of the $1,195,354.42 that had been designated as a "deposit".

41 The Applicants focused on the sum of $1,195,354.42 because they had submitted that Condition 15.9(c)(i) would *only* allow the Respondent to forfeit the *entire quantum* of "deposit" as labelled under the contract. However, the Applicants accepted that the plain language of the clause was potentially broad enough to cover forfeiture of a lesser part.[32] Indeed, the Applicants were unable to explain how their proposed interpretation could be workable in a case where the purchaser defaults on its contractual obligations and fails to make full payment of the amount stipulated under the contract as a "deposit". The Respondent had raised as an illustrative example a case where a purchaser paid only 5% of the purchase price towards a deposit, in breach of their obligation to

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31 NE, 5 July 2023, at p 8.

32 NE, 5 July 2023, at p 9, lines 4–5.

furnish the stipulated amount of 20% of the purchase price. When asked whether this breach by the purchaser would disentitle the vendor from forfeiting any lesser amount, such as the 5% that was actually paid by the purchaser, the Applicants only suggested that such a situation would be "highly unusual" and ultimately agreed that the vendor *would* be entitled to keep such lesser part of the stipulated "deposit" that was actually received.[33] To construe Condition 15.9(c)(i) in the way contended by the Applicants would have led to an absurd result in such situations. More fundamentally, a defaulting purchaser would be able to avoid the agreed upon consequences of their breach by relying upon their own wrongful conduct, defeating the purpose of a deposit as a security for performance. Given the breadth of the phrase "*any* deposit", I could not accept the Applicants' submission.

42 I also did not accept the Applicants' submission that arbitrariness and uncertainty would result from the Respondent's interpretation of Condition 15.9(c)(i). The conditions for the Applicants' liability to arise under Condition 15.9(c)(i) were wholly unambiguous: the Applicants would be liable should they fail to comply with an effective notice to complete served by the Respondent. The ceiling of the Applicants' liability was also certain: the Respondent could not purport to forfeit under Condition 15.9(c)(i) any sum *greater* than the sum stipulated as the "deposit". In coming to this conclusion, I also considered the High Court decision of *Goh Liang Yong Jonah and another v Heng Kuek Hoy and another* [2013] SGHC 203 ("*Goh Liang Yong Jonah*"), which was cited by the Applicants. There, the court opined that a clause that was materially identical to Condition 15.9(c)(i) could be construed to envisage and encompass the payment of *further* deposits in addition to what had been

[33] NE, 5 July 2023, at p 10.

stipulated as a "deposit" by the parties under the contract. The analysis ultimately depended upon what the parties had agreed between themselves (*Goh Liang Yong Jonah* at [33]). While not directly relevant to the issue at hand, in my view, *Goh Liang Yong Jonah*, only further exemplified the wide drafting of Condition 15.9(c)(i). It did not support the Applicants' proposition that the Respondent could only forfeit *the entirety* of such amount stipulated as a "deposit" under the contract.

43 I also did not accept the Applicants' alternative interpretation of Condition 15.9(c)(i), which they made in their further submissions (at [27] above), that the power of forfeiture under Condition 15.9(c)(i) was limited only to deposits which have been determined to be true deposits as a matter of law. This submission was premised on the sum of $1,195,354.42 being characterised as a part payment, as the starting point of analysis. However, this ignored the plain language of Condition 15.9(c)(i), which refers to "any" deposit. As set out above, this allowed the Respondent to forfeit *part* of the $1,195,354.42 (that was labelled as a "deposit" in OTP 2). The Applicants' alternative submission inverted the *Hon Chin Kong* framework (at [30] above) by bringing forward the true deposit analysis and presupposed a finding in their favour. However, the first step of the analysis was to determine whether a contractual power to forfeit existed, and if so, the scope of that power. It is only thereafter that the court would analyse whether the sum was a true deposit, which goes to the determination of whether the forfeiture was valid (*Hon Chin Kong* at [143]). The Respondent sought to forfeit $380,000. I had found that this would fall within the scope of their power to forfeit under Condition 15.9(c)(i). If this sum was a true deposit, the right to forfeit would have been validly exercised, subject to relief against forfeiture where available (*Hon Chin Kong* at [140]).

The forfeited sum was a true deposit

44 Having decided that the Respondent had the power to forfeit under Condition 15.9(c)(i), the next step was to determine whether the forfeited sum was a true deposit. I held that the sum of $380,000 had been validly forfeited as a true deposit.

45 This was in light of the parties' agreement that 20% of the purchase price was the "magic number" (at [21] above).

46 In addition, I was also satisfied that the forfeited sum of $380,000 met the touchstone of reasonableness on the facts of this case. This sum was *not* so large that it could not be objectively justified by what was reasonably necessary to serve effectively as earnest moneys. On the contrary, I found that it was amply justified. Indeed, in my view, to disallow forfeiture in the circumstances of this case would be to allow the Applicants to take advantage of their own wrong.

47 First, it was undisputed that the Applicants had repeatedly breached their obligations under both SPA 1 and OTP 2, despite repeated reminders from the Respondent. It was therefore reasonable for the Respondent to require some assurance of the Applicants' earnestness. It was undisputed that the Respondent was an innocent party and had in fact granted the Applicants multiple extensions of time notwithstanding the Applicants' repeated failure to complete. The Respondent was not obliged to do this and had extended this courtesy after repeated pleas by the Applicants, who had claimed to be genuine and sincere purchasers. The Applicants had also procured the grant of OTP 2 on this basis. Nevertheless, the Applicants still failed to complete OTP 2.

48 Second, the quantum of 20% of the purchase price was reasonable given the contractual rights that had accrued to the Respondent. After the termination

of SPA 1, it was undisputed that the Respondent had validly forfeited the $357,000 deposit paid under that contract. The Respondent had *only* agreed to credit this sum towards the option fee payable for OTP 2 after the Applicants had pleaded for a second chance to purchase the Property. This was explicitly recorded in the preamble to OTP 2 (at [7] above). Furthermore, as a matter of law, I noted that the Respondent was absolutely entitled to the $357,000 as that sum had been paid as consideration *for the grant* of OTP 2 itself, as explicitly set out in cl A of OTP 2 (at [7] above (see the Court of Appeal decision of *Aqua Art Pte Ltd v Goodman Development (S) Pte Ltd* [2011] 2 SLR 865 at [34])). The Applicants were, therefore, *not* in any event entitled to demand the return of the full sum of $1,195,354.42.

49 More importantly, the sum of $380,000, representing 20% of the purchase price under OTP 2, was consistent with the parties' course of dealing under SPA 1, where the Respondent was entitled to forfeit the sum of $357,000 pursuant to cl 7.4(d) of SPA 1, being 20% of the purchase price under SPA 1. I thus agreed with the Respondent that the Applicants had to have known and agreed that 20% of the purchase price represented a reasonable sum that could be forfeited as a true deposit. The Applicants never contended that forfeiture of the $357,000 deposit under SPA 1 would have been improper.

50 Third, it was undisputed that both parties were legally represented and had engaged in "fairly extensive negotiations" leading up to the conclusion of OTP 2.[34] It was also clear from the evidence, in particular the correspondence between the parties (at [6] above), that the sum of $1,195,354.42 was intended (in a *literal* sense) to be earnest money to demonstrate the Applicants'

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[34] Affidavit of Li Jialin dated 25 April 2023 at para 52; Respondent's Written Submissions dated 28 June 2023 at paras 32, 57–58.

commitment to the purchase and to prove that they were sincere and genuine, notwithstanding their failure to complete SPA 1. It was in this context that OTP 2 had been drafted and granted. The circumstances showed that the Applicants were not an unadvised and ignorant party, but had instead negotiated for OTP 2, which was bespoke in comparison to SPA 1. As neither party contended that the sum of $1,195,354.42 constituted a true deposit in law, I expressed no view on that point. It sufficed for present purposes that, having put up the money to signal their commitment to the purchase of the Property, the Applicants could not contend that forfeiture of $380,000, being a lesser part of that sum, was unreasonable.

51 I therefore held that the Respondent was entitled to forfeit under Condition 15.9(c)(i) the sum of $380,000 as a true deposit.

Whether Condition 15.9(c)(i) was a penalty

52 As stated, under the framework set out in *Hon Chin Kong*, the penalty rule would not be applicable if the forfeiture was of a true deposit. As I had found that the Respondent was entitled to forfeit the sum of $380,000 as a true deposit, the issue of whether Condition 15.9(c)(i) was a penalty became academic.

53 For completeness, I did not accept the Applicants' alternative argument, which emerged in their further submissions, that Condition 15.9(c)(i) would have been subject to the penalty rule *regardless* of whether the Respondent was entitled to forfeit a true deposit.[35] As stated, the penalty rule did not apply to true deposits. True deposits need not be a genuine pre-estimate of loss and may be

[35] Applicants' Further Written Submissions dated 8 August 2023 at paras 24–35.

forfeited regardless of the actual loss caused by the breach. To apply the penalty rule to true deposits would depart from its purpose of serving as earnest moneys and defeat the very concept of deposits.

Whether the Respondent was entitled to set-off

Respondent's case

54 The Respondent submitted that it was entitled to set-off fees and expenses of $326,243.07 incurred in preparation of and following from the abortive transaction, relying on the Court of Appeal decision of *Pacific Rim Investments Pte Ltd v Lam Seng Tiong and another* [1995] 2 SLR(R) 643 ("*Pacific Rim Investments*") and the High Court decision of *Wingcrown Investment Pte Ltd v Mannepalli Gayatri Ram* [2023] SGHC 1 ("*Mannepalli Gayatri Ram*").[36] At the hearing, the Respondent relied on *Workers Trust* at 582H–583B to submit that if the evidence before the court was not sufficient, there can be an order for an assessment of damages conducted by an Assistant Registrar. The Respondent also submitted that it was entitled to temporarily retain the sum of $326,243.07, in the event that such an assessment was ordered. The Respondent highlighted that the Applicants were not resident in jurisdiction, which could cause the Respondent difficulties in making and enforcing a separate claim.[37]

Applicants' case

55 The Applicants denied that the Respondent had any valid counterclaim and submitted that the Respondent was not entitled to set-off the claimed fees and expenses. First, the Applicants contended that the Respondent should be

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36 Respondent's Written Submissions dated 28 June 2023 at paras 44, 81–88.

37 NE, 5 July 2023, at p 13.

made to commence a separate claim for damages. Second, the Applicants argued that insufficient evidence had been tendered to prove the Respondent's loss and damages, and that causation had not been established. Finally, the Applicants asserted that the Respondent's claims were unreasonable and unsubstantiated.[38]

Decision

56 After considering the parties' respective submissions, I held that the Respondent was entitled *in principle* to an equitable set-off and directed that the matter of the Respondent' claims for expenses be determined at an assessment of damages before an Assistant Registrar. I elaborate on my reasons below.

57 I found that the Respondent's reliance on *Mannepalli Gayatri Ram* was misplaced. In that case, the vendor was the party that had brought the claim against the purchaser and had not relied upon any set-off.

58 However, I did accept that the Respondent was entitled to an equitable set-off in principle. In *Hon Chin Kong*, it was held at [143(b)] that if the sum was never intended to be forfeitable on a proper construction of the contract, it must be returned subject to a right of set-off for damages. The Court of Appeal also held in *Pacific Rim Investments* at [35]–[38] that there may an equitable right of set-off, if such right was not expressly excluded by contract and equitable considerations supported such an exercise. In this case, Condition 15.9(c)(i) did not expressly exclude equitable set-off and instead expressly preserved rights or remedies available to the Respondent at law or in equity. The Respondent had a valid counterclaim as it was undisputed that the

[38] Applicants' Written Submissions dated 28 June 2023 at paras 102–123; Applicants' Further Written Submissions dated 8 August 2023 at para 61.

Applicants had breached OTP 2. The claims asserted by the Respondent arose from the same transaction and were closely linked to the Applicants' claim. I thus found that the Respondent was entitled to the self-help remedy of set-off. However, the Respondent must adduce sufficient evidence to substantiate its claims. Unlike the claim in *Mannepalli Gayatri Ram*, which had been fully ventilated, there was further evidence to be adduced and tested in court. I therefore considered it apposite to direct that the Respondent apply for an assessment of damages (*Workers Trust* at 582H–583B).

59 I agreed with the Respondent that the sum of $326,243.07 should be retained by the Respondent pending the conclusion of the assessment of damages. The Applicants also accepted that this was the most practical course of action.[39] In the context of disputes over deposits, the court may allow the retention of a sum against which a claim for damages may be set-off (*Hon Chin Kong* at [107(c)] and [143(b)]). In *Workers Trust*, the Privy Council allowed the retention of a fund from which damages could be claimed because it appeared that the vendor "may have suffered some damage as a result of the purchaser's failure to complete" (at 582H–583A). Here, although I found the evidence of damages at the hearing somewhat tentative, I was likewise satisfied that the Respondent should be allowed to retain the sum of $326,243.07 pending the conclusion of the assessment of damages.

Whether the Applicants were entitled to interest

60 The final issue was whether the Applicants were entitled to interest. As I have held that the Respondent was entitled to forfeit the sum of $380,000 as a true deposit, the Applicants were not entitled to any interest on that sum. The

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[39] Applicants' Further Written Submissions dated 8 August 2023 at para 55.

issue of interest thus arose only in relation to two sums. First, the sum of $488,957.04 that had been repaid to the Applicants on 19 April 2023. Second, the sum of $326,243.07 that was retained by the Respondent pending the conclusion of the assessment of damages.

Applicants' case

61 The Applicants submitted that they were entitled to interest on the entire sum of $1,195,354.42 at a rate of 5.33% per annum, with interest running from the date that OTP 2 was terminated, 20 November 2018, until the date of repayment. Of this total, interest on the sum of $488,957.04 was to run from 20 November 2018 to 19 April 2023, and interest on the balance moneys in the hands of the Respondent was to run until the date of full repayment.

62 The Applicants sought to be compensated by way of interest, on the basis that they had been wrongly held out of money to which they were entitled. Relying on the Court of Appeal decision of *Grains and Industrial Products Trading Pte Ltd v Bank of India and another* [2016] 3 SLR 1308 ("*Grains and Industrial Products*") at [138], the Applicants submitted that interest should be awarded for the period starting from the date of their entitlement to the money until the date the money was repaid. The Applicants submitted that they were entitled to pre-judgment interest during the period starting from the date the cause of action arose to the date of judgment pursuant to s 12(1) of the Civil Law Act. The Applicants also argued that they had not been dilatory in bringing these proceedings, as they had written letters of appeal to the Respondent from 1 March 2019 (at [13] above).

63 As for the rate of interest, the Applicants submitted that the rate of 5.33% per annum should be applied.[40] According to the Applicants, the Respondent had failed to provide an evidential basis supporting the rate of interest they proposed, citing the High Court decision of *Noor Azlin bte Abdul Rahman and another v Changi General Hospital Pte Ltd and others* [2021] SGHC 10 ("*Noor Azlin*") at [222].[41]

Respondent's case

64 The Respondent submitted that no interest should be awarded on any moneys found payable to the Applicants out of the retained sum of $326,243.07. If the Respondent is found to have over-deducted the quantum of money it was entitled to set-off at the assessment of damages, it nevertheless ought not be required to pay interest as the Respondent had acted reasonably and in good faith in its estimation of its set-off.[42]

65 The Respondent also submitted that the period of interest should begin on 10 April 2023, the date on which the Respondent actually exercised the power to forfeit, or on 21 March 2023, the date on which the Applicants first formally demanded the return of the entire sum.[43]

66 Finally, the Respondent submitted that the rate of 5.33% per annum should not be applied. This was because the Respondent itself did not and could not have earned interest at the rate of 5.33% per annum. Instead, the Respondent submitted that a rate of 1.28% per annum was more appropriate, being derived

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40 Applicants' Written Submissions dated 28 June 2023 at paras 81–101.

41 Applicants' Further Written Submissions dated 8 August 2023 at paras 66–67.

42 Respondent's Further Written Submissions dated 8 August 2023 at para 44.

43 NE, 5 July 2023, at pp 11–12.

from the average annual rate of interest income the Respondent actually received on its other funds during the equivalent period. Alternatively, the Respondent submitted that the issue of the applicable rate of interest should be dealt with by the Assistant Registrar hearing the assessment of damages, where submissions and evidence could be tendered.[44]

Decision

67 Three distinct issues were engaged. First, whether interest should be awarded. Second, if interest was awarded, the applicable rate of interest. Third, the period for which any interest should be awarded.

68 I agreed with the Applicants that they ought to be compensated for being kept out of use of moneys to which they were entitled, in the form of interest on that amount. I therefore rejected the Respondent's submission that no interest should be awarded on any moneys found payable to the Applicants out of the retained sum of $326,243.07.

69 The court has a wide discretion to award pre-judgment interest under s 12 of the Civil Law Act. Pre-judgment interest serves to compensate a successful claimant for the time value of money, the use of which was lost between the date on which the cause of action arose and the date of the judgment. In other words, pre-judgment interest recognises that the claimant had been wrongfully kept out of moneys by the defendant, who had enjoyed the use of it during that period. However, a claimant is not entitled to interest as of right, and the court is entitled to exercise its discretion in the manner best able to achieve justice in the circumstances of each case. Nevertheless, interest

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44 Respondent's Further Written Submissions dated 8 August 2023 at paras 60–62 and 64.

would generally be awarded if the claimant succeeds at proving that it had been wrongly held out of money to which it was entitled (*Grains and Industrial Products* at [137]–[138] and [142]).

70 In *Grains and Industrial Products*, the Court of Appeal identified a non-exhaustive list of factors that the court could consider in the exercise of its discretion (at [140]):

(a) in the absence of a prescribed rate, what rate of interest would be appropriate to the relevant period(s);

(b) whether the claimant was dilatory in the bringing and conduct of the proceedings;

(c) whether the claimant had received compensation for the loss suffered from a source other than the defendant;

(d) whether the claimant had sought and been awarded damages which include damages for the loss of the use of money;

(e) whether the debt is paid immediately after proceedings are commenced; and

(f) whether the parties have agreed that pre-judgment interest should not be recoverable.

71 In my judgment, interest must be awarded on the sum of $488,957.04. The Respondent did not dispute that it was not entitled to this sum and had in fact already returned it to the Applicants on 19 April 2023.

72 Interest must also be paid on the *net* sum found payable to the Applicants out of the retained sum of $326,243.07, if any, after the conclusion of the

assessment of damages. In line with the rationale and purpose of pre-judgment interest, the Applicants are *only* entitled to be compensated interest on such sum that is found to have belonged to them (in other words, moneys the Respondent ought not to have claimed as set-off). If the Respondent is found to have properly set-off the entire sum of $326,243.07, the Respondent is entitled to retain that entire sum and the Applicants cannot be said to have been wrongfully kept out of use of the moneys.

73 I did not accept the Respondent's submission that no interest should be awarded on any sum found payable to the Applicants. First, it was the Respondent who had not been ready to fully substantiate their claim for expenses with sufficient evidence at the time of the hearing and it was the Respondent who had asked for the assessment of damages. Second, the onus is now on the Respondent to make the application for an assessment of damages. Hence, the Respondent ought to bear the cost of keeping the Applicants out of use of money that the Applicants are entitled to, in the form of interest.

74 The next issue was the period for which interest was to accrue, which was similarly a matter of discretion. Although any interest awarded should generally run from the date the loss accrued, the court retains a wide discretion to award interest from a later date, such as where there has been an unjustifiable delay on the part of the claimant in bringing the claim (see the High Court decision of *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd and other appeals* [2023] 1 SLR 536 at [219]). The discretion to determine the appropriate period to award pre-judgment interest is also found in s 12(1) of the Civil Law Act, which provides:

> In any proceedings tried in any court of record for the recovery of any debt or damages, the court *may, if it thinks fit*, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of

> the debt or damages for the whole or *any part of the period between the date when the cause of action arose and the date of the judgment.*
>
> [emphasis added]

Accordingly, the general approach of awarding interest from the date the loss accrued is only the default starting point that represents the *maximum* period for which pre-judgment interest may be awarded (see the Court of Appeal decision of *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 at [100]).

75 I did not accept the Respondent's submissions on the starting date for the interest period. Although I accepted the force behind their submission that a demand for the return of the deposit had to be sufficiently clear, I did not accept their submission that such clarity could only be found in the form of a formal letter of demand from a party's solicitors. The Respondent had submitted that interest should only accrue from 21 March 2023, the date of the formal letter of demand issued by the Applicants' solicitors. While the correspondence from the Applicants, which had been drafted by their solicitors, had used language such as "appeal and entreat" and not the language of a formal demand, the Applicants had nevertheless made clear that they were asking the Respondent to refund "the money of SGD$1,195,354.42 that [the Applicants] had paid todate [*sic*]" (at [13] above). It was hence sufficiently clear that the Applicants were asking for the return of the deposit in this letter. Not all purchasers may be able to avail themselves of the services of legal counsel. As a matter of general principle, the form of the demand or the use of specific language cannot be determinative, provided that there is sufficient clarity in what the purchaser is seeking. In my view, the Applicants had made it sufficiently clear in their letter dated 1 March 2019 that they were seeking the return of the sum of $1,195,354.42.

76 I thus awarded interest on the sum of $488,957.04, for the period starting on 2 March 2019 to 18 April 2023. As for any sum found payable to the Applicants after the conclusion of the assessment of damages, I awarded interest on such sum to be calculated from 2 March 2019 to the date of payment.

77 In relation to the applicable rate of interest, the Applicants had relied upon *Noor Azlin* in support of their submission that the rate of 5.33% per annum should be applied. I noted that the court in *Noor Azlin* had reached its conclusion in that case because of the lack of any explanation for why a different rate of interest was justified (*Noor Azlin* at [222]). In this case, the Respondent had contended that it could not have earned interest at the rate of 5.33% per annum on the retained sums and was seeking to prove its actual annual income rate. This would more properly reflect the consequences of being kept out of use of the money. I considered it fair to allow the Respondent the opportunity to develop its stance on the appropriate rate of interest at the assessment of damages, bearing in mind that no substantive submissions had yet been made on this issue.

Conclusion

78 To conclude, I held that the Respondent was entitled to forfeit the sum of $380,000 as a true deposit. The Respondent is to apply for an assessment of damages to determine the amount it may set-off against the retained sum of $326,243.07. The rate of interest to be applied to the repaid sum of $488,957.04 as well as for any sum determined to be payable to the Applicants after the set-off is also to be determined at the assessment of damages.

79 The Respondent had submitted that the issue of costs of the hearing may be affected by the eventual orders made at the assessment of damages, in light

of a without prejudice letter, and asked that it be decided by the Assistant Registrar hearing the assessment of damages. I accepted this submission and made no order on costs, reserving it to the Assistant Registrar hearing the assessment. As for the hearing of further arguments, I fixed costs in favour of the Respondent at $9,000, including disbursements.

Kwek Mean Luck
Judge of the High Court

Sara Ng Qian Hui and Benaiah Lim Oon Kuan (Covenant Chambers LLC) for the applicants;
Tay Yong Seng and Toh Jia Jing Vivian (Allen & Gledhill LLP) for the respondent.