

Woo Kah Wai and another v Chew Ai Hua Sandra and another appeal
[2014] SGCA 41

Case Number : Civil Appeals Nos 83 and 84 of 2013
Decision Date : 01 August 2014
Tribunal/Court : Court of Appeal
Coram : Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s) : Edmund Kronenburg and Alicia Zhuang (Braddell Brothers LLP) for the appellants in Civil Appeal No 83 of 2013 and the respondents in Civil Appeal 84 of 2013; Christopher Anand Daniel and Harjean Kaur (instructed) and Lawrence Lim Cheng Hock (Matthew Chiong Partnership) for the respondent in Civil Appeal No 83 of 2013 and the appellant in Civil Appeal No 84 of 2013.
Parties : Woo Kah Wai and another — Chew Ai Hua Sandra

Contract – Contractual Terms – Breach

Contract – Formation

Land – Sale of Land – Contract

[LawNet Editorial Note: The decision from which this appeal arose is reported at [\[2013\] 3 SLR 1088.](#)]

1 August 2014

Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 These two related appeals, Civil Appeal No 83 of 2013 (“CA 83/2013”) and Civil Appeal No 84 of 2013 (“CA 84/2013”), arise from the High Court’s decision in *Chew Ai Hua Sandra v Woo Kah Wai and another (Chesney Real Estate Pte Ltd, third party)* [2013] 3 SLR 1088 (“the Judgment”) concerning the legal effect of a written offer to purchase a unit in a condominium (“the Property”). Enclosed with this written offer (“the Written Offer”) was a cheque for 1% of the offer price as the money for the joint owners of the Property, Mr Woo Kah Wai (“Mr Woo”) and Mdm Lum Pic Yee Joyce (“Mdm Lum”), to issue an option to purchase (“OTP”) to the interested purchaser, Mdm Chew Ai Hua Sandra (“the Purchaser”). Mr Woo and Mdm Lum (collectively referred to hereafter as “the Vendors”), who were the defendants in the action below (“the Originating Suit”), are the appellants in CA 83/2013 and the respondents in CA 84/2013. The Purchaser, who was the plaintiff in the Originating Suit, is the respondent in CA 83/2013 and the appellant in CA 84/2013.

2 The heart of the dispute relates to the question of whether, in the events which occurred, the Vendors evinced an intention to accept the Written Offer, such that what we shall hereafter term “the Pre-Option Contract” – *ie*, a contract between the Vendors and the Purchaser under which the Vendors were to issue to the Purchaser an OTP which complied with the terms set out in the Written Offer (referred to in this judgment as a “compliant OTP” where appropriate to the context) – came into being. If the Pre-Option Contract did indeed come into being, the secondary issue is whether the option period (*ie*, the period of time during which an OTP is open for acceptance) stipulated in the OTP eventually issued by the Vendors (“the Option”) was in compliance with the terms of the Pre-

Option Contract.

3 In view of the diametrically different positions taken by the parties in relation to the construction of the Written Offer, the sale and purchase of the Property did not materialise. This led the Purchaser to commence the Originating Suit against the Vendors for specific performance or, alternatively, damages for breach of the Pre-Option Contract. However, in the meantime, the Vendors had already sold the Property to an innocent third party at a higher price.

4 CA 83/2013 is the Vendors' appeal against the main ruling of the Judicial Commissioner ("the Judge") that they were in breach of the Pre-Option Contract, while CA 84/2013 is the Purchaser's appeal against certain other rulings by the Judge.

Background facts

The Purchaser's offer to purchase the Property

5 Unless otherwise stated, all the dates referred to in this judgment are dates in 2010. In January, the Vendors decided to sell the Property and engaged the services of a real estate agency ("Chesney") to assist in the sale. On or about 9 February, the Purchaser was informed by her estate agent, one Adrian Thoo ("Adrian"), that the Property was on sale. The Purchaser offered to buy the Property at the price of \$920,000. This offer was conveyed by Adrian to Cindy Lim ("Cindy"), a director of Chesney, who in turn conveyed the offer to the Vendors. The Vendors were agreeable, and this information was conveyed by Cindy to Adrian.

6 Adrian then, in accordance with his understanding with Cindy, proceeded to prepare the Written Offer, and had it signed by the Purchaser. Dated 10 February, the operative part of the Written Offer reads: [\[note: 1\]](#)

We the undersigned hereby offer to purchase [the Property] ... at the purchase price of S\$920,000/- ... subject to the following terms and conditions:

1. Option Period: 3 days
2. Completion Period: 12 weeks
3. The sale of [the Property] is subject to signing the Option to Purchase.
4. Within three (3) Days (i.e. by 4p.m. 13th February 2010), the Owner of [the Property] must either accept or reject this offer failing which this offer shall lapse. If rejected, the option money tendered herewith will be refunded to us within the time stipulated above without any interest thereon and thereafter neither party shall have any claim against each other. If accepted, the Owner shall deliver to the undersigned the Option duly signed by the Owner within the stipulated time above.

...

Enclosed herewith [cheque] for the amount of S\$9,200/- ... made payable to Woo Kah Wai ... being Option money for the purchase of [the Property].

[underlining in original]

7 On 11 February, the Written Offer was handed by Adrian to Cindy's personal assistant, one Masila binte Kamis ("Masila"), together with a cheque for \$9,200, being the "Option money for the purchase of [the Property]" ("the Option Money"). On Cindy's instructions, Masila then prepared a draft OTP to be issued by the Vendors. That draft was sent via e-mail to Mr Woo at 4.53pm on the same day (*ie*, 11 February). [\[note: 2\]](#) Sometime after 5.00pm that day, Mr Woo went to Chesney's office to sign the draft OTP (which then became the Option as defined at [2] above).

8 The key terms of the Option, which was dated 11 February, were the mode of acceptance and the option period. [\[note: 3\]](#) Essentially, to accept the Option, the Purchaser had to sign it and deliver it, together with 5% of the purchase price of \$920,000 (less the Option Money), to the Vendors' solicitor "on or before the 13th [of] February 2010, 4.00 p.m.". [\[note: 4\]](#)

Delivery of the Option to the Purchaser

9 It is undisputed that when Mr Woo went to Chesney's office on 11 February to sign the draft OTP prepared by Masila, he also collected the cheque for the Option Money, which he deposited into his bank account that same evening. It was only at Chesney's office that Mr Woo was told of the Written Offer, which he duly acknowledged and signed. [\[note: 5\]](#)

10 It is also undisputed that Adrian went to Chesney's office at around 6.00pm on 12 February to collect the Option, although the parties disagree as to the precise time at which Adrian was informed on that day that the Option was available for collection. (We should add here that only Adrian was informed when the Option was available for collection; the Purchaser herself was not notified.) On receiving the Option, Adrian noticed that it stated that the option period would expire at 4.00pm the following day (13 February), which happened to be a Saturday as well as the eve of the Chinese New Year holidays. Upon Masila's attention being drawn to this, she arranged for Adrian to speak to Cindy. What happened after this point remains very much in controversy.

11 According to Adrian, when he pointed out to Masila that the option period of three days mentioned in the Written Offer (see [6] above) meant three working days, Masila admitted that the deadline specified in the Option was not in accordance with the terms set out in the Written Offer. This assertion was denied by Masila.

12 According to Cindy, Adrian admitted to her over the telephone that he made a mistake in specifying three days as the option period in the Written Offer and requested that it be changed to the industry norm of 14 days. Cindy said that she asked Adrian to leave the Option with Masila so that she (Cindy) could speak to the Vendors about the proposed amendment. Adrian agreed and the Option thus remained in Chesney's office that evening (*ie*, the evening of 12 February).

13 On the same evening, Cindy telephoned Mdm Lum to inform her of the problem. According to Cindy, Mdm Lum said that she was agreeable to amending the option period to 14 days, but added that any agreement would have to wait until after she had discussed the matter with her husband, Mr Woo. Mdm Lum denied that that was what she told Cindy. Her evidence was that she only told Cindy that she and Mr Woo would consider the request.

14 A flurry of telephone calls took place between Cindy and Mdm Lum as well as between Adrian and Cindy at around 12.00 noon the following day (13 February), which was also the day on which the option period stipulated in the Option was due to expire. In summary, the different accounts adduced in evidence are as follows:

(a) Adrian claimed that at around 11.55am, Cindy informed him that although the Option would not be amended, the Vendors had agreed that it would be exercisable within three working days from the date on which it was delivered to him.

(b) The Vendors claimed that they informed Cindy that morning that they were not going to amend the Option. However, they offered to return the Option Money as a gesture of goodwill. Cindy subsequently called Mdm Lum to tell her that the Purchaser would try to beat the 4.00pm deadline for exercising the Option.

(c) Cindy claimed that Mdm Lum called and informed her that she could notify the Purchaser that the Vendors were not going to amend the Option. Upon Cindy's inquiry as to whether the Vendors had already deposited the cheque for the Option Money, Mdm Lum replied in the affirmative. Cindy also claimed that Mdm Lum mentioned that although the cheque for the Option Money had already been banked in, she and Mr Woo were open to refunding the Option Money if it came down to that. However, Cindy did not regard that as something which Mdm Lum wanted her to convey to the Purchaser. [\[note: 6\]](#)

15 There is also some controversy as to the precise time at which Adrian finally collected the Option (which was left unamended) on 13 February. Adrian claimed that he collected it from Masila at 3.00pm at a bus stop in Toa Payoh, [\[note: 7\]](#) while Masila averred that she handed it to Adrian at that bus stop shortly after 5.22pm. [\[note: 8\]](#) It is, however, undisputed that Adrian handed the Option to the Purchaser sometime after 6.00pm that day. Of course, by then, the deadline for exercising the Option had already expired (see [8] above).

The Purchaser's attempted exercise of the Option

16 Over the next three days, 14 February being a Sunday as well as the first day of the Chinese New Year and 15 and 16 February being public holidays, there was apparently no contact between the Purchaser and the Vendors, nor between their respective agents. On the morning of 17 February, a Wednesday and also the first working day after the Chinese New Year holidays, the Purchaser and Adrian attended at the office of the Purchaser's solicitor. Adrian claimed that there, he informed the Purchaser's solicitor that Cindy had represented to him that notwithstanding the 13 February deadline stipulated in the Option, the Vendors would accept the exercise of the Option so long as that took place by 19 February (*viz*, three working days from 13 February (see [14(a)] above)). [\[note: 9\]](#)

17 The Purchaser's solicitor then attempted to exercise the Option at the office of the Vendors' solicitor on that same day (17 February), but was unable to do so as the latter was still closed for the Chinese New Year holidays. No attempt was made to contact either the Vendors or their agent, Cindy.

18 The following day (18 February), the Purchaser's solicitor again attempted to exercise the Option, but the attempt was rejected by the Vendors' solicitor on the ground that the deadline stated in the Option had already expired. Again, there was no attempt to contact either the Vendors or Cindy.

Events after the Purchaser's attempted exercise of the Option

19 Between 19 February and 10 March, the parties' solicitors exchanged letters setting out their respective clients' positions. There was no progress to the impasse. The last letter between the solicitors on 10 March was from the Vendors' solicitor. It informed the Purchaser's solicitor that the

Vendors would be appointing another law firm to act for them in the matter. [\[note: 10\]](#) No caveat against the Property was lodged by the Purchaser.

20 In July, unknown to the Purchaser, the Vendors sold the Property to an innocent third party for \$1.05m. Almost a year later, on 24 June 2011, the Purchaser commenced the Originating Suit from which the present appeals arise.

Summary of the parties' pleadings

The Purchaser's pleaded case

21 In her pleadings, the Purchaser sought specific performance of "the sale of the Property or the issuance of an [OTP] capable of being exercised within three working days" (see [56] of the Judgment), or, alternatively, damages on two main grounds – breach of the Pre-Option Contract and misrepresentation. [\[note: 11\]](#)

22 In respect of the breach of contract limb of her claim, the Purchaser averred that it was an implied term of the Pre-Option Contract that the Option would remain open for acceptance for a period of three working days, and not merely three calendar days. Therefore, the option period stipulated in the Option should have expired only on 19 February, taking three working days from 13 February (as mentioned earlier, 17 February was the first working day after the Chinese New Year holidays). By their solicitor's refusal to accept the Purchaser's attempt to exercise the Option on 18 February, the Vendors were in breach of their obligations under the Option.

23 Alternatively, the Purchaser pleaded, the Vendors were in breach of the terms of the Pre-Option Contract when they issued an OTP (in the form of the Option) which did not conform to the requirement stated in the Written Offer that the OTP to be granted by the Vendors if they accepted the offer should remain open for acceptance for three working days.

24 In respect of the misrepresentation limb of her claim, the Purchaser alleged that the Vendors' agent, Chesney, had (through Cindy) represented to Adrian, via a telephone call at around 11.55am on 13 February, that the Option would be open for acceptance for three working days from the date on which it was delivered to Adrian, *ie*, until 19 February. In reliance on this representation ("the Representation"), Adrian had accepted delivery of the Option on 13 February.

The Vendors' pleaded case

25 In their defence, the Vendors denied that they had accepted the Written Offer and were legally bound by its terms. [\[note: 12\]](#) They averred that Mr Woo's signature on the Written Offer was not an indication of his acceptance of the offer contained therein, but only an acknowledgement of receipt of the Option Money. The Vendors further pleaded that if anything, the OTP which they later executed in favour of the Purchaser (*ie*, the Option) superseded the Written Offer. They were, therefore, not obliged to grant the Purchaser an OTP which was open for acceptance for three days (whether calculated by reference to calendar days or working days).

26 Moreover, the Vendors averred, even if the Written Offer were binding on them in the contractual sense, they were only obliged to grant the Purchaser an OTP which was open for acceptance for three calendar days – and not three working days – from (and inclusive of) the date of the OTP. They had fulfilled this obligation by issuing the Option. Therefore, on either basis, they were entitled to reject the Purchaser's attempt to exercise the Option on 18 February as the deadline for acceptance had already lapsed by then.

27 In respect of the Purchaser's misrepresentation claim, the Vendors pleaded that if the Representation had indeed been made by Chesney, it had not been a representation authorised by them. In any case, the Representation was incapable of varying the express terms of the Option as, contrary to the requirement set out in s 6(d) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("the Civil Law Act"), it was not made in writing. The Vendors further contended that in any event, a reasonable purchaser would not – and the Purchaser therefore should not – have relied on the Representation even if it had indeed been made by Chesney.

28 To protect themselves, the Vendors joined Chesney as a third party to the Originating Suit and sought an indemnity from the latter on the ground that if the court were to find that Chesney had indeed made the Representation, it had been made without their authorisation. That would amount to a breach by Chesney of its duty of care and its fiduciary duties as the Vendors' agent. [\[note: 13\]](#) In response to the Vendors' third-party claim against it, Chesney denied having made the Representation. [\[note: 14\]](#)

The decision below

29 The Judge held (at [21]–[28] of the Judgment) that the Written Offer was accepted by the Vendors, and therefore, a binding agreement arose between the parties. In other words, the Pre-Option Contract was formed. He also found (at [29] of the Judgment) that the option period specified in the Written Offer referred to three calendar days, and not three working days. It followed that the Option only had to be open for acceptance for three calendar days.

30 However, the Judge was of the view that the option period started to run only from the date on which the Option was made available for collection by the Purchaser or her agent, Adrian, and not, as the Vendors claimed, from the time the Vendors signed the Option. Since it was undisputed that the Option was only made available for collection on 12 February, the expiry date of the option period stated in the Option should have been 15 February, and not 13 February. On that premise, the Judge held (at [33] of the Judgment) that the Vendors were in breach of the terms of the Pre-Option Contract, which came into being upon the Vendors' acceptance of the Written Offer.

31 With regard to the Purchaser's claim for misrepresentation, the Judge found that Chesney, through Cindy, did not make the Representation. He came to this conclusion (at [38]–[44] of the Judgment) because he found the testimony of Adrian on this issue to be rather incredible and certainly less credible than that of Cindy and Masila. Moreover, he considered Adrian's testimony to be suspect when viewed in the light of the other contemporaneous as well as subsequent events.

32 On the question of the appropriate remedy to be granted to the Purchaser, the Judge held (at [56] of the Judgment) that it was inappropriate to grant the Purchaser the primary relief of specific performance as the Property had already been sold to an innocent third party (due to a failure on the Purchaser's part to lodge a caveat against the Property). Thus, the Purchaser's recourse lay only in damages.

33 The Judge also recognised (at [58] of the Judgment) that the contract breached in the present case "was only an agreement to grant an [OTP] ... and not a concluded sale and purchase agreement". Accordingly, to qualify for the usual measure of damages awarded for the breach of a concluded contract for the sale and purchase of property (namely, the difference between the contract price and the market value of the property as at the date of completion), the Purchaser would have to prove that she could and would have exercised the Option had it been issued on proper terms. On this, the Judge found that the Purchaser could and would have done so.

34 Based on the foregoing findings, and given that the completion period was to be 12 weeks from the date of exercise of the Option, the Judge held (at [60] of the Judgment) that the putative date of completion if the sale and purchase of the Property had materialised would have been 10 May. As the Judge found that there was insufficient evidence before him on the market value of the Property as at 10 May, he ordered a separate assessment of damages to be undertaken to determine the said market value of the Property. The Option Money was also ordered to be returned to the Purchaser.

The Vendors' and the Purchaser's respective cases on appeal

35 Before us, the Vendors argue that the Judge was wrong to hold that they were in breach of the Pre-Option Contract, which arose upon their acceptance of the Written Offer. Their main contentions are the following:

(a) The Written Offer was only an invitation to treat and not an offer to purchase the Property. Even if it were an offer in law, it was not accepted by the Vendors because the mode of acceptance specified in the Written Offer was not complied with. In the circumstances, the Option issued by the Vendors, which was not a compliant OTP, was a counter-offer that was not accepted by the Purchaser within the specified time.

(b) In any event, no consideration was furnished by the Purchaser to the Vendors to enter into an agreement on the terms set out in the Written Offer. The Option Money was consideration for the Option, and not for the offer to purchase evinced in the Written Offer.

36 The Vendors further submit that even if they did indeed breach the Pre-Option Contract, they are, in any event, not liable in damages because there is no causative link between their breach and the Purchaser's loss. Moreover, and in any case, the quantum of damages should be limited to the difference between the contract price and the market value of the Property as at the date of the breach, and not as at the putative date of completion of 10 May. The Vendors also claim that the Judge erred in ordering a refund of the Option Money.

37 On her part, the Purchaser argues that the Judge's holdings are correct, except in relation to the following three findings:

(a) that "3 days" in the context of the provision "Option Period: 3 days" in the Written Offer should be interpreted as three calendar days;

(b) that Chesney did not make the Representation; and

(c) that a separate assessment of damages was necessary as the Purchaser had not adduced evidence to show her loss, and that in that separate assessment, damages should be assessed by reference to the difference between the contract price and the market value of the Property as at the putative date of completion.

These findings are also the issues raised by the Purchaser in CA 84/2013.

38 The Purchaser contends that the above three findings of the Judge are erroneous because:

(a) The adoption of working days instead of calendar days in interpreting the provision "Option Period: 3 days" in the Written Offer would be more in line with commercial reality and should be preferred. This, the Purchaser submits, is all the more so in the context of this case, where

13 February was a Saturday and the eve of the Chinese New Year holidays, followed by 14 February being a Sunday (as well as the first day of the Chinese New Year) and 15 and 16 February being public holidays.

(b) Chesney's version of the events relating to the Representation was self-serving and should not have been given much weight by the Judge. Viewing the evidence as a whole, and having regard to the circumstances alluded to in sub-para (a) above, it is clear that there was an agreement between the parties to extend the expiry date of the option period specified in the Option.

(c) In view of the decision in *Beckett Pte Ltd v Deutsche Bank AG* [2009] 3 SLR(R) 452 ("*Beckett*"), the Purchaser should have been allowed to adduce evidence to show her full loss. In addition, the Vendors' bad faith and opportunistic conduct justifies assessing damages by reference to the difference between the contract price and the market value of the Property as at the date of judgment, and not as at the putative date of completion.

39 In response to the Purchaser's contentions in CA 84/2013, the Vendors submit that the Judge was correct in finding that the Representation was not made by Chesney. As for the interpretation of the option period of "3 days" stipulated in the Written Offer, the Vendors make no submissions, but reiterate their point in CA 83/2013 that the Judge should not have regarded the Written Offer as having been accepted by them and as having, consequently, given rise to a binding contract between the parties in the form of the Pre-Option Contract.

40 The Vendors also repeat their submission that even if they were in breach of the Pre-Option Contract, the Judge should have used the date of their alleged breach rather than the putative date of completion as the reference point for assessing damages.

The issues before this court

41 In view of the parties' arguments before us, the main issues which we have to decide in relation to the present appeals are the following:

(a) Was the Written Offer at any point in time, up till immediately before the issue of the Option by the Vendors, accepted by the Vendors, thereby giving rise to a binding contract between the parties in the form of the Pre-Option Contract? If so, what were the act(s) on the part of the Vendors which brought about the Pre-Option Contract?

(b) If the question in sub-para (a) above is answered in the affirmative, did the Vendors breach the terms of the Pre-Option Contract by granting the Purchaser an OTP (in the form of the Option) which had to be exercised by 4.00pm on 13 February? (For completeness, we should add that if the question in sub-para (a) above is answered in the negative, the Purchaser's claim against the Vendors would fail *in limine*, at least in so far as the breach of contract limb of her claim is concerned.)

(c) Did Chesney make the Representation to Adrian, and if so, did the Purchaser have until 19 February to exercise the Option?

(d) Assuming that we find that the Vendors are indeed liable for breaching the terms of the Pre-Option Contract, what is the appropriate remedy for the Purchaser? In particular, was the Judge correct to:

- (i) refuse to allow the Purchaser to adduce additional evidence to prove her loss;
- (ii) use the putative date of completion as the reference point for assessing the damages due to the Purchaser; and
- (iii) order the Vendors to refund the Option Money to the Purchaser?

Whether the Pre-Option Contract was formed

42 For the purposes of the trial in the court below, the key question was really the first issue, which is whether, in the circumstances of this case, the Pre-Option Contract came into being before the Option was issued by the Vendors.

The normal situation in a sale and purchase of property

43 We begin with the observation that between the Purchaser's and the Vendors' respective agents, a view was taken that the Purchaser should demonstrate the seriousness of her intention to secure the purchase of the Property by issuing the Written Offer (see [6] above). It seems to us, *vis-à-vis* a purchaser who is really keen on a property, that the more common way for such a purchaser to show that he is serious about purchasing the property (at a price he is willing to pay) is by handing a cheque for the option money (typically set at 1% of the contemplated purchase price) to his agent (or directly to the owner if there is no agent) in exchange for an OTP to be granted by the owner. The agent will no doubt show the cheque to the owner to demonstrate the purchaser's good faith and serious intention to purchase the property.

44 In this situation, which we shall, for convenience, refer to as "the industry norm", unless and until the owner issues an OTP in exchange for the option money, there is no contractual relationship between the parties. The question in the present case is this – is there a difference in the legal position where a purchaser's interest in and intention to purchase a property are manifested in the form of a cheque for the option money *as well as* a written document with two essential terms typically found in an OTP, namely, terms that specify the option period and the completion period?

45 The Vendors do not think so. Counsel for the Vendors, Mr Edmund Kronenburg ("Mr Kronenburg"), takes the position that the Written Offer was no more than an invitation to treat which could not have given rise to a binding contract. He emphasises, in particular, that cl 3 of the Written Offer expressly makes the signing of an OTP the trigger for the formation of any "valid and binding sale and purchase agreement in respect of the Property" [\[note: 15\]](#) [underlining in original omitted].

46 Citing *Gay Choon Ing v Loh Sze Ti Terence Peter and another* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") at [48], Mr Kronenburg argues that an intention on the offeror's part to be bound is necessary before a statement can constitute an offer capable of being accepted, and in turn result (if accepted) in the formation of a binding contract. He contends that the Written Offer was not an offer to purchase the Property as the Purchaser clearly did not intend there to be a binding contract for the sale and purchase of the Property once the Written Offer was accepted by the Vendors. [\[note: 16\]](#) Instead, a compliant OTP had to be issued by the Vendors, which OTP must then be exercised by the Purchaser within the stipulated option period.

The legal character of the Written Offer

47 The first question which one needs to ask in ascertaining whether the Pre-Option Contract was

formed is what exactly the legal character of the Written Offer was. In our view, it was an offer to purchase an OTP – specifically, a *compliant* OTP – on certain terms. This intention of the Purchaser could not be stated more clearly than in the opening sentence of the Written Offer:

We the undersigned hereby **offer to purchase** *[the Property]* ... *at the purchase price of S\$920,000/-* ... subject to the following terms and conditions ... [emphasis added in italics and bold italics]

48 Later at cl 4, it was provided (*inter alia*):

Within three (3) Days (i.e. by 4p.m. 13th February 2010) the Owner of [the Property] must either accept or reject this **offer** *[to purchase]* failing which this offer shall lapse. ... [underlining in original; emphasis added in italics and bold italics]

49 By this provision, the Vendors were given only three days from 10 February (the date of the Written Offer) to consider the Purchaser's offer. It was a very definitive deadline. It was also expressly provided that in the event that the offer was not accepted by the stipulated deadline, the Vendors had to refund the Option Money, which was enclosed with the Written Offer. The last sentence of cl 4 stated what the Vendors had to do if they accepted the offer:

... If accepted, the Owner shall deliver to the undersigned the Option duly signed by the Owner within the stipulated time above.

50 The last paragraph of the Written Offer stated that the enclosed cheque for \$9,200 was to be the Option Money.

51 These terms of the Written Offer clearly indicate that the Vendors could respond to the Purchaser's offer by *agreeing* to grant an OTP on the terms set out in the Written Offer (*ie*, a compliant OTP). This response by the Vendors would be a necessary antecedent to and also distinct from the Purchaser's subsequent exercise of the OTP to be granted by the Vendors. A contract for the sale and purchase of property only comes into being upon the exercise by the purchaser of a valid OTP.

52 The crux, therefore, is whether, as a matter of law, the Vendors accepted the Purchaser's offer to purchase an OTP on the terms set out in the Written Offer, which include an option period of "3 days" and a completion period of 12 weeks.

Whether there was acceptance of the Written Offer

53 In our view, the Vendors *did* accept the Written Offer. In this regard, the second page of the Written Offer is significant. It provided the following:

I, the registered proprietor and owner of the above Premises, confirm having received the above Option money: <u>[Mr Woo's signature]</u> Signature of Vendor: Name: Woo Kah Wai Passport No: [XXX]	} First section First section
Pursuant to Paragraph 4 above: 1. The purchaser hereby acknowledges receiving the Option duly signed by the Vendor and witnessed: _____ Signature of Purchaser and Date OR 2. The Owner here rejects the above offer. _____ Signature of Owner and Date	} Second section (first part) } Second section (second part)

For ease of reference, we shall hereafter refer to this part of the Written Offer as "the Acknowledgement Block".

54 There are, as can be seen above, two sections to this block. The first section relates to the acknowledgement by the Vendors of their receipt of the cheque for the Option Money. The second section, which has two parts, appears under the heading "Pursuant to Paragraph 4 above", which, as will be recalled (see [6] above), deals with the two possible outcomes of the Purchaser's issuance of the Written Offer, namely, acceptance or, alternatively, rejection of the Written Offer.

55 The two parts of the second section of the Acknowledgement Block reflect these two possible alternative outcomes. As just mentioned, one possible outcome is that the Vendors accept the Written Offer. In this situation, the Vendors would sign the first section of the Acknowledgement Block and would grant the Purchaser an OTP, *which must be a compliant OTP*. The Purchaser would then acknowledge her receipt of the (compliant) OTP as specified in the first part of the second section.

56 The second part of the second section of the Acknowledgement Block is significant. This part shows the alternative outcome that may result from the Purchaser's issuance of the Written Offer, which is that the Vendors reject the Written Offer, *ie*, they refuse to issue a compliant OTP to the Purchaser. If that was what the Vendors had intended to do in the present case, Mr Woo could simply have signed the second part of the second section of the Acknowledgement Block and asked his agent to return the Written Offer (including the cheque for the Option Money) to the Purchaser's agent, Adrian. For that matter, Mr Woo need not even have signed any part of the Acknowledgement Block at all. It would have sufficed for him to simply return everything to Adrian: the message would have been clear to the Purchaser. Mr Woo, however, acknowledged the Written Offer and signed the first section of the Acknowledgement Block.

57 It is here that Mr Kronenburg's submission that the OTP issued by the Vendors (in the form of the Option) was a counter-offer breaks down. The fact of the matter is that the Vendors were willing to and *did accept* the Written Offer, as we shall show below.

58 First, the Vendors' own evidence was that when they were told by Cindy that the Purchaser's offer price of \$920,000 was in line with the Property's prevailing market price, they accepted her advice to sell and proceeded to instruct her to prepare an OTP. At this point, Cindy, acting as the Vendors' agent, asked Adrian to prepare the Written Offer.

59 Secondly, Masila prepared the draft OTP (which later became the Option) only *after* Adrian had given her the Written Offer. Masila's evidence was that as instructed by Cindy, she prepared the terms of the draft OTP "based on" the Written Offer. [\[note: 17\]](#) This is consistent with Cindy's evidence that the purpose of the Written Offer was to specify the terms and conditions which the Purchaser wanted to have in the OTP to be issued by the Vendors if they accepted her offer. [\[note: 18\]](#)

60 Thirdly, Mr Woo's evidence was that when he arrived at Chesney's office on 11 February to sign the draft OTP prepared by Masila, he found the short option period stipulated therein unusual, and confirmed with Masila that it was not erroneous (although this was denied by Masila). He said that he even made inquiries with his solicitor to ensure that such a short option period would not pose any problems. His solicitor replied that while it was shorter than usual, the duration of the option period stipulated in an OTP was a matter of agreement between the purchaser and the vendor.

61 It was on *that* basis that Mr Woo left Chesney's office on 11 February, having: (a) signed the draft OTP (which then became the Option); (b) accepted the cheque for the Option Money; and (c) signed the first section of the Acknowledgment Block. He did not sign the second part of the second section, which was the part for indicating rejection of the Written Offer. He also banked in the cheque for the Option Money that same evening. Given these circumstances, we are hard-pressed to and do not agree with Mr Kronenburg's submission that Mr Woo did not consider himself (and by extension, the Vendors) as having accepted the Written Offer.

62 If the Vendors had wished to introduce terms that were new or different from those of the Written Offer into the OTP which, having accepted the Written Offer, they were contractually bound to issue, they should have *rejected* the Written Offer by signing the rejection portion of the Acknowledgement Block (*ie*, the second part of the second section), or, as indicated earlier (at [56] above), they could simply have returned the Written Offer unsigned (together with the cheque for the Option Money) to Adrian. They would then have been free to specify whatever terms they wished in the OTP which they issued and offer it to the Purchaser for her consideration. Such an OTP would then, in legal terms, have been a counter-offer.

63 But, that was not what was done here. If the Vendors had intended to make a counter-offer but did not wish to see the cheque for the Option Money moving to and fro, the proper thing for them to have done would have been to further state that they were holding on to the cheque pending the resolution of the terms of the OTP to be issued. Mr Woo should also have signed the second part of the second section of the Acknowledgement Block to indicate the Vendors' intention to reject the Written Offer. This was not done because, in our view, that was never what the Vendors intended to do. There is not a doubt that they were at all material times willing to sell the Property to the Purchaser on the terms stated in the Written Offer.

64 Reverting to the question that we posed at [44] above, the present case is quite different from the typical situation under the industry norm. By the time Mr Woo left Chesney's office on 11 February, the only conclusion that one can draw from his (and by extension, the Vendors') conduct was that the Vendors had agreed to issue a compliant OTP to the Purchaser. In short, the Vendors had *accepted* the Written Offer and the Pre-Option Contract had come into being. The Vendors no longer had the liberty to issue an OTP with *any terms* they wished.

65 We are therefore unable to agree with Mr Kronenburg's submission that the introduction of a written offer to purchase with specific terms typically found in an OTP, such as the Written Offer in the present case, does not alter the analysis or the legal position of the parties as compared to the

normal situation. Instead, we find (with reference to the question posed at [44] above) that once the Vendors accepted the Written Offer, a contractual relationship between the parties – *ie*, the Pre-Option Contract – arose, under which the Vendors were legally bound to issue a compliant OTP to the Purchaser.

66 Indeed, we would go so far as to say that on the evidence, the Vendors considered that they had, by issuing the Option, granted the Purchaser a compliant OTP. For instance, when they were informed on 12 February that Adrian had requested for an amendment of the option period from three days to 14 days, they never once told Cindy that the Option was a counter-offer which the Purchaser was free to reject. Their response – *viz*, that they were not going to amend the option period – speaks volumes, instead, about their position towards the Option, which was that the Option had been crafted in that way because that was what the Purchaser had indicated she wanted through the Written Offer.

67 The further suggestion that Mdm Lum had offered, through Cindy, to refund the Option Money “as a gesture of goodwill” only underscores the point that the Vendors considered themselves as having discharged their obligation to issue a compliant OTP to the Purchaser by granting her the Option. We can see no other way of interpreting the Vendors’ conduct at all material times.

68 We would reiterate that in the normal scenario where there is no written offer to purchase (unlike the case here), the vendor is indeed free to stipulate any term that he likes in the OTP which he grants, in addition to those terms that have already been orally agreed on (these would typically be terms relating to the purchase price, the description of the property, the parties, the amount of money to be paid upon the exercise of the OTP and the option period).

69 The purchaser or his agent is free to hand the cheque for the option money (usually set at 1% of the contemplated purchase price) to the vendor or his agent and take the OTP. If the purchaser or his agent does that, the vendor would not thereafter have the liberty to sell the property to any other person during the option period, and the purchaser would have until the expiry of that period to decide whether to exercise the OTP.

70 Having obtained the OTP, if the purchaser finds that the new or varied terms (if any) inserted by the vendor into the OTP are not to his liking, or if he has second thoughts about purchasing the property, he can simply walk away without exercising the OTP. In that event, the OTP will simply lapse, and all that the purchaser loses would be the option money, which the vendor is entitled to forfeit and keep. A contract for the sale and purchase of property would not, in this scenario, arise. As stated earlier (at [51] above), such a contract only comes into existence upon the exercise by the purchaser of a valid OTP.

71 Another submission that ought to be dealt with is Mr Kronenburg’s argument that in order for the court to find that the Vendors did accept the offer to purchase set out in the Written Offer, it must be shown that they complied with the “requirements for acceptance” specified in cl 4, which include issuing a compliant OTP to the Purchaser. [\[note: 19\]](#) Mr Kronenburg contends that since the Purchaser claims that the expiry date of the option period stipulated in the Option was not in accordance with the terms of the Written Offer, the Vendors did not comply with the “requirements for acceptance”, and thus, the Written Offer was never accepted. The Option should therefore be regarded as a counter-offer.

72 The short answer to Mr Kronenburg’s submission is that it is based on a misunderstanding of cl 4. The requirement in cl 4 that the Vendors “shall deliver” a compliant OTP is prefaced by the words “If accepted” (see [6] and [49] above). That, to us, is an important preface because it sets the

proper context for construing what Mr Kronenburg calls the “requirements for acceptance”. In providing that the Vendors “shall deliver” a compliant OTP if they accepted the Written Offer, cl 4 was stating the *consequence* of accepting the Written Offer; it was not prescribing the mode of demonstrating acceptance of the Written Offer as such.

Enforceability of a contract to grant an OTP

73 Although, as pointed out earlier, the Pre-Option Contract in this case is not typical, it is by no means novel. Indeed, this court encountered a similar pre-option contract in *Joseph Mathew and another v Singh Chiranjeev and another* [2010] 1 SLR 338 (“*Joseph Mathew*”). There, the vendors of a property were negotiating its sale with the purchaser primarily through e-mails with a property agent. In one of the e-mails, the agent set out the terms on which the OTP should be granted. The terms included the option period, the option money of 1% of the purchase price and the completion date.

74 Subsequently, there was a conversation, following which the agent took steps to send the OTP to the vendors for their signature. This was followed by an e-mail from one of the vendors indicating his written assent to the sale and instructing the agent to deposit the option money into his bank account, which the agent duly did. The OTP was couriered to the vendors at around the same time. The vendors, however, later changed their minds and decided that they were not going to sell the property anymore. They communicated that the option money would be returned to the agent. The vendors ultimately did not sign the OTP. The purchaser then sued the vendors for breach of a contract to grant an OTP.

75 The High Court ordered the vendors to sign and grant an OTP to the purchaser (see *Singh Chiranjeev and another v Joseph Mathew and others* [2009] 2 SLR(R) 73). The vendors’ appeal against the High Court’s decision was dismissed by this court. There was no doubt in this court’s mind that a (pre-option) contract for the grant of an OTP could be validly formed and binding on the parties (see [22] of *Joseph Mathew*).

76 The above principle was applied in the later case of *Ong Kok Ming (alias Ong Henardi) v Happy Valley Holdings Pte Ltd and another* [2011] SGHC 199, a decision of the High Court. There, the contract to procure an OTP was concluded over a lunch meeting. The purchaser believed that the parties had reached an agreement on the purchase price of the property, even though he had mentioned to the vendor that the funds which he needed to exercise the OTP would only be arriving some two months later, sometime in October 2009. At the end of the lunch meeting, the purchaser informed the vendor that he would pay the option money of 1% of the purchase price immediately, but, for some administrative reason, he was told to pay the option money the following day instead, which he did.

77 When the purchaser received the draft OTP from the vendor, he noticed that it stated that the offer set out therein was to be exercised within 14 days, *ie*, in September 2009, instead of in October 2009. The parties could not resolve the difference and the purchaser never received a formal OTP. Shortly thereafter, a third party made a higher offer for the property to the vendor, which the latter accepted. The vendor tried to refund the option money to the purchaser, but the latter refused to accept it and, instead, sued the vendor for breach of the contract to issue an OTP.

78 The main point raised by the vendor was that the alleged contract for the grant of an OTP was insufficiently complete because, amongst other things, the purchase price of the property had not been agreed upon as the purchaser had said that he needed to check with his wife about the purchase; furthermore, the option period and the completion date had not been agreed upon. The

High Court judge rejected these contentions and held (at [39]) that the “main terms of the [OTP], *ie*, price, parties and property had been agreed”. Although there were outstanding details which had yet to be agreed upon, she held that they were not insuperable difficulties because there was some kind of understanding between the parties as to those details, and in respect of those details which were indeed uncertain, the parties did not appear to be concerned.

Uncertainty in the Written Offer

79 We now turn to address the Vendors’ argument that even accepting that in a proper case, there can be a (pre-option) contract for the grant of an OTP, because of uncertainties in the terms of the Written Offer, such a contract could not have arisen here. Before this court, Mr Kronenburg cited “Option Period: 3 days” and “Completion Period: 12 weeks”, and questioned what each term meant. He said that the two terms were each capable of bearing different interpretations.

80 With respect, this argument is a non-starter. We do not think the meanings of the expressions “Option Period” and “Completion Period” as used in the Written Offer are ambiguous in the context of a proposed transaction for the sale and purchase of property.

81 In relation to the option period of “3 days”, while it is true that this prescription could mean either three calendar days or three working days, it is clear that in the context of the Written Offer, “3 days” must mean three *calendar* days. It will be recalled that the Vendors were similarly given, under cl 4 of the Written Offer, three days to consider whether to accept the Purchaser’s offer to purchase the Property. The Judge held that that meant three calendar days. We agree with the Judge. This sense comes out clearly from cl 4 itself. This can be seen from the fact that cl 4 stated that the three-day period would expire at 4.00pm on 13 February – *ie*, in relation to the date of the Written Offer (10 February), the three-day period comprised: (a) 10 to 11 February as Day 1; (b) 11 to 12 February as Day 2; and (c) 12 to 13 February as Day 3. Although 13 February, a *Saturday*, was a *non*-working day, that did not prevent it from being stipulated as the expiry date for acceptance of the Written Offer.

82 It must follow, as a matter of logic and reasonableness (unless there is an express contrary indication), that “3 days” in the context of the provision “Option Period: 3 days” should similarly mean three *calendar* days. We think the Judge’s holding on this point is correct. In any event, as recognised in *Gay Choon Ing* (at [50]), the requirement of certainty and completeness of terms does not render all contracts with gaps invalid, and “possible gaps may be filled by a previous course of dealing or by trade practice”.

83 The next alleged ambiguity concerns the commencement date of the three-day option period. We do not see this as a gap which would fatally undermine certainty. At most, it is only a matter of contractual construction, and for this purpose, common sense as well as accepted market practices would be useful aids. Obviously, the three days cannot begin to run earlier than the date on which the Purchaser’s agent, Adrian, was informed that the Option was available for collection (as mentioned at [10] above, only Adrian was informed when the Option was available for collection; the Purchaser herself was not notified).

84 As for the prescription of 12 weeks for completion, we are absolutely baffled as to why Mr Kronenburg even raised the point of uncertainty. We are unable to see any ambiguity there. The 12 weeks must be reckoned from the date of the Purchaser’s exercise of the Option (assuming the Option had been a compliant OTP). In our opinion, this is again a wholly unmeritorious submission.

85 At this point, it is convenient for us to deal with the contention by Mr Christopher Anand Daniel

("Mr Daniel"), the Purchaser's counsel, that it is reasonable to construe the three-day option period stated in the Option (as opposed to that stated in the Written Offer) to mean not merely three calendar days, but three working days. Mr Daniel says that the objective circumstances dictate that such a construction should be adopted. He points to the fact that 13 February was a Saturday and the eve of the Chinese New Year holidays, while 14 February was a Sunday and the first day of the Chinese New Year, followed by 15 and 16 February being public holidays. [\[note: 20\]](#) His argument is that the parties could not have intended to provide for the Option to expire on a date on which its exercise was impossible. Indeed, it seems undisputed that the office of the Vendors' solicitor was not open on 14, 15 and 16 February (nor, for that matter, on 17 February).

86 We do not think this constructional point matters. This is because if the Option had in fact stated that it should be exercised by 15 February (being the expiry date calculated based on three calendar days from 12 February, the date on which Adrian was informed that the Option was available for collection), the responsibility would have fallen upon the Vendors to ensure that their solicitor's office remained open on that day for the Purchaser to exercise the Option. If the Purchaser had been prevented from exercising the Option on that day because the office of the Vendors' solicitor was closed, the Vendors would have had to bear liability for that default. Of course, an OTP that was to be exercised by 15 February was never issued by the Vendors to the Purchaser, and so, this question is academic.

Intention to create legal relations

87 On the issue of intention to create legal relations, Mr Kronenburg submits that there was no intention to create a legal relationship between the parties via the Purchaser's issuance of the Written Offer and the Vendors' response to it. He relies in this regard on *Lim Koon Hai and another v Alex Yeo Siak Chuan and another* [2013] SGHC 90 ("*Lim Koon Hai*"). Although Mr Kronenburg couched his submission on this point in terms of a lack of intention to create legal relations, the real nub of his argument appears to be that letters setting out offers to purchase property ("offer-to-purchase letters"), such as the Written Offer in the present case, are not capable of becoming legally binding whatsoever. [\[note: 21\]](#)

88 The flaw in this submission by Mr Kronenburg stems from his conflation of: (a) a contract for the grant of an OTP; with (b) a contract for the sale and purchase of property. The latter comes into being only after a valid OTP is exercised by the purchaser. Mr Kronenburg's premise seems to be that only one kind of document (namely, an OTP) coupled with a corresponding act (namely, acceptance and exercise of the OTP) is capable of binding the parties to a transaction for the sale and purchase of property. However, as shown in *Joseph Mathew*, that is not necessarily the case. Indeed, this court in *Joseph Mathews* observed (at [21]) that on the facts of that case, "needless to say ... an intention to create legal relations was ... present".

89 There is nothing in *Lim Koon Hai* which discusses the nature of an offer-to-purchase letter either in general or specifically in relation to the contractual requirement of an intention to create legal relations. The passages which Mr Kronenburg has referred to show, at most, the court's observation that it is unclear whether offer-to-purchase letters are an industry-wide practice (see [67] of *Lim Koon Hai*).

90 The central legal issue in *Lim Koon Hai* related to rectification of an alleged mistake in the OTP concerned. The facts of that case are similar to the present facts in some but not all respects. In particular, the offer-to-purchase letter and the circumstances surrounding the offer and acceptance in that case are eerily similar to the Written Offer and the Vendors' response to that offer here.

91 The offer-to-purchase letter in *Lim Koon Hai* was prepared on 14 August 2012, and the offer to purchase contained therein was open for acceptance by the vendors until 16 August 2012. The offer-to-purchase letter stated that the option period (if the offer was accepted) was to be 14 days. However, when the purchasers' agent drafted the OTP (which was dated 15 August 2012), instead of stating that it was open for acceptance for 14 days, he erroneously provided that it had to be exercised by 16 August 2012, a mere one day later. The vendors signed the OTP and returned it to the purchasers' agent on either 15 or 16 August 2012; the purchasers' agent then gave it to the purchasers. No one noticed the mistake until sometime later. When the purchasers subsequently tried to exercise the OTP on 28 August 2012 (which would have been within 14 days from 15 August 2012 if the OTP had been correctly drafted), the vendors refused to accept the exercise. The purchasers then sought rectification of the date for acceptance stipulated in the OTP and specific performance of the OTP.

92 In those circumstances, the question of the nature of an offer-to-purchase letter did not arise as an issue. In fact, there was a dispute as to whether the vendors even had sight of the offer-to-purchase letter in question. The court found that the witnesses for the purchasers were not particularly credible, and eventually held that the offer-to-purchase letter was never even given or shown to the vendors (see [18] and [51] of *Lim Koon Hai*). For that reason, it was understandable why the court in *Lim Koon Hai* held that there was no agreement arising from the offer-to-purchase letter.

93 There is no such dispute in the present case. Unlike the vendors in *Lim Koon Hai*, the Vendors in the present case did not merely have sight of the Written Offer. As we pointed out above at [57]–[67], the Vendors acted in a manner which was consistent only with their acceptance of the Written Offer. Mr Kronenburg's reliance on *Lim Koon Hai* is therefore misplaced.

Consideration

94 Finally, the Vendors raise a highly technical point – namely, that the lack of consideration for the Pre-Option Contract prevents it from becoming legally enforceable. Their argument here is that the cheque for the Option Money was consideration only for the OTP to be issued by the Vendors if they accepted the Written Offer (which OTP was ultimately issued in the form of the Option); it was not consideration for the Pre-Option Contract. No consideration was given for the promise by the Vendors to grant a compliant OTP to the Purchaser.

95 It is trite that consideration from the promisee is a necessary condition for the promisee's enforcement of the promisor's obligation. However, the contractual impediment of lack of consideration simply does not obtain here. We do not agree with the Vendors' myopic, blinkered characterisation of the transaction in the present case.

96 The Pre-Option Contract is so inseparably linked to the grant of the Option that the entire transaction must be viewed as a continuum. The \$9,200 paid by the Purchaser to the Vendors was consideration for the Pre-Option Contract as much as for the Option. On the coming into existence of the Pre-Option Contract, the issuance of the Option would, on the facts of this case, become a formality. *Joseph Mathew* is a case on point, although it would appear that the issue of lack of consideration was not raised there. In our view, that issue was not so raised because it would have been wholly unmeritorious.

97 What we have just stated is entirely consistent with Russell LJ's remark in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (at 18) that:

... [I]n my judgment, the courts nowadays should be more ready to find [the] existence [of consideration] so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflect the true intention of the parties.

This view was adopted by our High Court in *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594, where it was stated at [139] that “the modern approach in contract law requires very little to find the existence of consideration”.

98 Returning to the points made earlier at [53]–[67] above, Mr Woo, on behalf of the Vendors, accepted and banked in the cheque for the Option Money on 11 February because the Vendors had accepted the Written Offer and were prepared to grant the Purchaser a compliant OTP. The Vendors did not reject the Written Offer and make a counter-offer to the Purchaser by way of the Option, even though that was not a compliant OTP for the reasons set out at [102]–[105] below.

99 Thus, we cannot see any reason why the Option Money could not or should not also be regarded as consideration for the Vendors’ promise to grant the Purchaser a compliant OTP.

Whether the Vendors were in breach of the Pre-Option Contract

Conformity of the Option with the terms of the Pre-Option Contract

100 Having found that the Written Offer was accepted by Mr Woo on behalf of the Vendors on 11 February such that a binding contract – viz, the Pre-Option Contract – came into existence, we now turn to consider whether the Option (the OTP granted by the Vendors pursuant to their acceptance of the Written Offer) conformed with the terms of the Pre-Option Contract as set out in the Written Offer. This is purely a constructional issue: how should the Vendors’ obligations under the Pre-Option Contract be construed? Specifically, what were the Vendors’ obligations *vis-à-vis* the option period that was to be stipulated in the Option?

101 Although Mr Woo (on behalf of the Vendors) signed the draft OTP (which then became the Option) on the evening of 11 February, it is common ground that the Purchaser’s agent, Adrian, was told only on 12 February that the Option was available for collection. Therefore, effectively, the Purchaser was only given one day (comprising the period 12–13 February) to exercise the Option as it was stated to lapse at 4.00pm on 13 February. That was inconsistent with cl 1 of the Written Offer, which provided for an option period of “3 days” (see [6] above).

102 In our judgment, the option period of “3 days” meant that the Purchaser should have three calendar days, counted from the date on which Adrian was notified that the Option was ready for collection, to exercise the Option (see [83] above). To comply with that three-day requirement, the Option should have been expressed to be valid until 15 February, with 12–13 February constituting Day 1 of the three-day period, 13–14 February constituting Day 2 and 14–15 February constituting Day 3.

103 Although there was some suggestion (by Cindy) that the option period stipulated in an OTP usually starts from and includes the date of the OTP, *with Day 1 of the option period ending on that date itself*, we do not think that can be the proper way of computing an option period. Using an approach that counts the first day of an option period as starting *and also ending* on the date of the OTP itself may, in some cases, mean that by the time the purchaser receives the OTP, it could already have expired. That goes against every grain of common sense, especially since the option period is of grave importance to purchasers as most purchasers would want to use that window to

arrange their finances before exercising the OTP. Thus, it would require very clear and express words to that effect in the relevant contract – be it a pre-option contract to grant an OTP (like the Pre-Option Contract in the present case, premised as it was on an antecedent written offer to purchase in the form of the Written Offer) or the OTP itself – before a court will treat Day 1 of an option period as starting *and also ending* on the date of the OTP.

104 There is one other factor in this case which militates against adopting such a computation of the option period stated in the Option, and this lies in the Written Offer. It will be recalled that the Purchaser gave the Vendors three days to consider the Written Offer. It is significant to see how the Purchaser counted that three-day period in relation to the date of the Written Offer (*viz*, 10 February) – that three-day period was stated to end at 4.00pm on 13 February. This indicates that the Purchaser treated Day 1 of that period as comprising 10–11 February (see [81] above) – *ie*, she regarded Day 1 of that period as ending *not* on the date of the Written Offer itself, but on 11 February, one day *after* the date of the Written Offer. Similarly, the Purchaser considered Day 2 of the three-day period to be 11–12 February, with Day 2 ending on 12 February, and Day 3 to be 12–13 February, with Day 3 ending on 13 February.

105 Hence, by issuing an OTP (in the form of the Option) expiring on 13 February, which effectively gave the Purchaser only one day instead of three days to exercise the Option, the Vendors breached their obligations under the Pre-Option Contract.

Whether the Vendors have any defences to liability

106 Although the Vendors were in breach of the Pre-Option Contract, they may yet avoid liability if they are able to avail themselves of a recognised defence. In the present case, the Vendors have raised two possible defences – causation, and waiver of breach or estoppel.

Causation

107 In relation to their causation defence, the Vendors contend that the Purchaser has not proved a causative link between their failure to grant her a compliant OTP and her alleged loss. Their point is that even if they had issued a compliant OTP, the Purchaser would not have been in a position to exercise that OTP as she did not have the requisite financial resources to do so at the material time.

[\[note: 22\]](#)

108 The Judge held (at [58] of the Judgment) that “there was no evidence that the [Purchaser] was not in a position to exercise [an OTP] ... which complied with the [Written] Offer”. Mr Kronenburg says that by this statement, the Judge appeared to have reversed the burden of proof as the burden always lies on the party who claims damages to prove his claim.

109 As we see it, there is no merit to this point at all. On 17 February, the first working day immediately after the Chinese New Year holidays in 2010, the Purchaser sought to exercise the Option (even though it was not a compliant OTP), but was unsuccessful because the office of the Vendors’ solicitor was still closed on that day. 14, 15 and 16 February, being public holidays, were also non-banking days. It seems to us that if the Purchaser had the financial means in her bank account to exercise the Option on 17 February, it must follow that she had the financial ability to do likewise on 15 February. The Purchaser could not have done anything on 15 and 16 February to shore up the balance in her bank account as those were non-banking days.

110 We do not think that the Judge, by the statement quoted at [108] above, intended to reverse the burden of proof. That was no more than a statement of fact that there was no contrary evidence

against the Purchaser. We would only underscore that in that same paragraph of the Judgment (*viz*, [58] of the Judgment), the Judge went on to refer to evidence which indicated that the Purchaser had the wherewithal to exercise the Option by 12.29pm on 12 February.

Waiver of breach or estoppel

111 Another point raised by the Vendors as a defence is that the Purchaser waived their breach of the Pre-Option Contract, or is otherwise estopped from claiming that the Option was not a compliant OTP.

112 Mr Kronenburg's contention in this regard is that the Purchaser's failure to reject or protest against the Option after receiving it and her subsequent attempts to exercise the Option amounted to an "election that she did not regard the Option as being defective". [\[note: 231\]](#) Her conduct, Mr Kronenburg submits, suggested that she intended to proceed with the sale and purchase of the Property on the basis of the Option even though, from her perspective, it was not a compliant OTP where the option period was concerned. As a result, the Vendors were led to believe that the Purchaser was happy with the terms of the Option. Accordingly, Mr Kronenburg contends, it is inequitable to now allow the Purchaser to resile from the course of action which she took after receiving the Option.

113 In making this submission, Mr Kronenburg relies on *Chai Cher Watt (trading as Chuang Aik Engineering Works) v SDL Technologies Pte Ltd* [2012] 1 SLR 152 ("*Chai Cher Watt*") and *Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409 ("*Aero-Gate*"). These cases are, however, hardly relevant. Both *Chai Cher Watt* and *Aero-Gate* clarify that the doctrine of waiver by election operates to preclude an innocent party from terminating a contract for repudiatory breach. This is not the scenario which we are concerned with here.

114 In any event, we do not see how any question of election can arise here. The principles governing election were succinctly summarised in *Aero-Gate* (at [42]) as follows:

First, the innocent party must have acted in a manner consistent only with affirming the contract, *ie*, treating the contract as still alive: see the decision of Belinda Ang Saw Ean J in *The Pacific Vigorous* [2006] 3 SLR(R) 374 at [15]. Second, the innocent party must have communicated his election, *ie*, his choice to affirm the contract, to the party in breach in clear and unequivocal terms: see *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 at 398. Third, because the element of choice is essential, there must be sufficient knowledge on the part of the innocent party. He must at least be aware of the facts giving rise to his right to terminate the contract before his subsequent conduct will be taken as amounting to an election.

115 On the facts, we find it surprising that this submission on election was even made as it can hardly be said that the Purchaser elected to accept the Vendors' breach of the Pre-Option Contract or otherwise waived her right to make a claim against the Vendors for such breach. Mr Kronenburg's submission seems to suggest that the Purchaser ought not to have even tried to exercise the Option on 17 February. We do not understand how her attempt to exercise the Option as soon as possible after the Chinese New Year holidays were over could reasonably give the Vendors the impression that she was happy about the terms of the Option being inconsistent with the terms of the Written Offer.

116 Moreover, it was always the Purchaser's case that the Vendors (through their agent) had made the Representation, which she (through her agent, Adrian) relied upon in attempting to exercise the Option on 17 February. The Vendors might not have known of the fact that their agent might have

made the Representation, but they would nonetheless have been bound by that representation if it had indeed been made. The fact that the Judge found that no such representation was made by the Vendors' agent does not alter the fact that the Purchaser and/or Adrian thought that the Representation had been made.

117 In any event, given the dispute of fact as to whether the Representation was made by the Vendors' agent, we do not see how the Vendors can assert that the Purchaser elected to accept the Option even though it was not a compliant OTP. In the circumstances, we do not see how waiver or estoppel can arise. Neither do we find it inequitable for the Purchaser to claim that the Vendors breached their obligations under the Pre-Option Contract in granting her an OTP (in the form of the Option) which was not a compliant OTP.

Whether the Representation was made

118 As mentioned earlier at [31] above, on the question of whether the Representation was made by Chesney, through Cindy, to the Purchaser's agent, Adrian, the Judge found Adrian to be a less reliable witness than Cindy as well as Masila, and thus ruled against the Purchaser. Before us, the Purchaser submits that the Judge erred in his determination.

119 To recapitulate, the Representation, which was allegedly made by Cindy to Adrian in a telephone call at around 11.55am on 13 February, was that the Purchaser would have until 19 February – three working days from 13 February, the date on which the Option was delivered to Adrian (see [14(a)] and [15] above) – to exercise the Option. The Judge's finding that the Representation was not made was obviously a finding of fact. In the light of our determination that the OTP granted by the Vendors to the Purchaser (*ie*, the Option) was not a compliant OTP, this factual point as to whether or not the Representation was made does not make any difference to the outcome of CA 83/2013 (which relates to the breach of contract limb of the Purchaser's claim), and affects only the outcome of CA 84/2013.

120 In our view, given the Purchaser's pleadings on and the evidence relating to the Representation, the Judge was right to find that that representation was not made. This can be seen from the following factors:

(a) First, the Purchaser's pleadings and Adrian's evidence leave some doubt as to whether the Representation was made by Masila or Cindy. [\[note: 24\]](#)

(b) Second, if the Representation was indeed made to Adrian at around 11.55am on 13 February, why did Cindy and Masila make several calls to him thereafter asking him to collect the Option?

(c) Third, interestingly, if the Representation was indeed made, why was it that Adrian did not inform the Purchaser on 13 February itself that the Vendors had agreed to extend the deadline for exercising the Option until 19 February, a matter which must have been of great concern to the Purchaser? The Purchaser could not recall Adrian having told her on 13 February about the Representation.

(d) Fourth, the Purchaser's evidence was that when she and Adrian attended at her solicitor's office on 17 February, Adrian explained to the solicitor that the 13 February deadline stated in the Option was a typographical error. He did not say that that deadline was immaterial in the light of the Representation. This casts doubt on Adrian's evidence (at [16] above) that on that occasion, he informed the Purchaser's solicitor about the Representation.

121 The only factor which, arguably, supports the Purchaser's allegation that the Representation was made is that Adrian appeared to take his time to collect the Option after the Vendors indicated on 13 February that they would not be amending the option period stated therein. He collected it on that day only at either 3.00pm (according to his evidence) or shortly after 5.22pm (according to Masila's evidence). This late collection suggests that some representation was made to Adrian to render the 13 February, 4.00pm deadline unimportant. By 5.22pm on 13 February, the deadline for exercising the Option had already lapsed. Even on Adrian's evidence that he collected the Option at 3.00pm that day, that was still very late, considering that there was just one hour left for the Purchaser to exercise the Option. However, this factor is, in our view, outweighed by the other factors mentioned at [120] above. Thus, we do not think the Judge erred in finding that the Representation was not made.

What is the appropriate remedy for the Purchaser?

Whether there should be a refund of the Option Money

122 Turning to the remedies granted in the court below, first, the Judge ordered the Vendors to refund the Option Money to the Purchaser. Mr Kronenburg submits that such a refund should not have been ordered because the court should have awarded the Purchaser damages for either total failure of consideration or expectation loss, but not for both. [\[note: 25\]](#) To that, Mr Daniel argues that the refund of the Option Money is warranted because the Purchaser can no longer buy and own the Property since it has already been sold to an innocent third party, such that specific performance can no longer be ordered against the Vendors.

123 It seems to us that neither party has properly understood the basis upon which the Judge ordered the refund of the Option Money. It was to place the Purchaser in the position which she would have been in if the Pre-Option Contract had been performed and had eventually led to the sale of the Property to her. We think the position is best explained by way of an example.

124 Suppose that the sale of the Property had been completed at the agreed price of \$920,000 and the Property had appreciated in value to \$1m on the completion date. Suppose, further, that on that same day, the Purchaser had decided to reap her profit by selling the Property. The net position of the Purchaser would have been a gain of \$80,000, besides recovering her capital expenditure of \$920,000.

125 Flowing on from our decision that the Vendors breached their obligations under the Pre-Option Contract, merely awarding the Purchaser the sum of \$80,000 as damages would not be adequate because it fails to take into account the Option Money, which the Vendors were still holding at the time the Purchaser commenced the Originating Suit. Unless the Option Money is refunded to the Purchaser, an award of damages of \$80,000 would short-change her as she would in fact receive only \$70,800 as damages, and not the \$80,000 which she would have obtained had the Pre-Option Contract been performed.

126 There are two ways in which the Purchaser's total loss can be remedied. One would be by taking the Judge's approach of ordering a refund of the Option Money in addition to awarding damages (under the example given above, that would mean awarding the Purchaser a separate sum of \$80,000 as damages on top of the sum of \$9,200). The other way would be by adding the Option Money to the sum of \$80,000, with the total (*viz*, \$89,200) representing the loss suffered by the Purchaser on account of the Vendors' breach of the Pre-Option Contract. In either case, there is no windfall of \$9,200 as the Option Money, which would have been used to pay for part of the purchase price if the sale and purchase of the Property had gone through, was paid over to the Vendors, but the

envisaged sale and purchase did not eventually materialise.

127 On the evidence available before him, the Judge was unable to ascertain the loss suffered by the Purchaser in terms of the enhancement (if any) in the market value of the Property as at the putative date of completion, and accordingly ordered that that loss be separately assessed. What the Judge did was to order a refund of the Option Money first, with the separate assessment of damages to be carried out later (in relation to the said enhancement, if any, in the market value of the Property). Undoubtedly, when the assistant registrar conducts the assessment of damages, he would be alive to the fact that the Option Money has already been ordered to be refunded, and would not add that sum into the computation of the total damages suffered by the Purchaser; otherwise, there would be double recovery as far as the Option Money is concerned.

128 In the result, we do not think that the Judge was wrong to have ordered the refund of the Option Money to the Purchaser.

Whether there should be a separate assessment of damages

129 We next turn to Mr Daniel's contention, on behalf of the Purchaser, that the Judge should have allowed the Purchaser to adduce further evidence at the trial itself to prove her loss. We are completely nonplussed by this point when what the Judge ordered was for the damages suffered by the Purchaser to be assessed as at the putative date of completion.

130 We do not understand how this order could be viewed as being adverse to the Purchaser. It is difficult to understand what prejudice the Purchaser has suffered or might possibly suffer as a result of the order for a separate assessment of damages. It is not as though the Judge awarded the Purchaser only nominal damages for failing to show at the trial what the market value of the Property was as at the putative date of completion. If, at all, anyone could complain, it would be the Vendors, who could be said to have been disadvantaged by the order, and who could have appealed against it but have not.

131 A case relied upon by Mr Daniel in relation to his contention is *Beckett*. However, for essentially the reasons provided by Mr Kronenburg, [\[note: 26\]](#) *Beckett* is entirely distinguishable and Mr Daniel's reliance on the case is thus misplaced. It suffices to draw attention to just one key distinction.

132 The relevant issue in *Beckett* was the trial judge's interpretation of the type of loss which needed to be proved at the trial following a bifurcation order made before the trial. He held that under that order, the plaintiff had to adduce all its evidence in relation to a particular type of loss at the trial itself, and not later at a separate assessment of damages after the trial. Since the plaintiff did not adduce any evidence for that type of loss at the trial, that loss was not established and the plaintiff was only entitled to nominal damages for it. On appeal, this court disagreed with the trial judge's interpretation of the bifurcation order. Clearly, *Beckett* is hardly a relevant case for our present purposes.

The date which should be adopted as the reference point for assessing damages

133 Finally, the last issue in respect of the appropriate remedy for the Purchaser is whether the damages awarded to her should be assessed by reference to the difference between the contract price and the market value of the Property as at: (a) the date of the Vendors' breach of the Pre-Option Contract; or (b) the date of judgment; or (c) the putative date of completion. The Judge held that the proper date to adopt should be (c), that is, the putative date of completion. Both parties are appealing against this holding, with the Vendors contending that the appropriate date should be the

date of breach and the Purchaser, that it should be the date of judgment.

134 Mr Kronenburg submits that the date of the Vendors' breach of the Pre-Option Contract is more apposite because this case concerns a contract for the grant of an OTP, and not a contract for the sale and purchase of property. We note that while, on this point, Mr Kronenburg has finally recognised the distinction between these two types of contract (a distinction which he did not seem to appreciate and/or accept when discussing whether a contract for the grant of an OTP (in the form of the Pre-Option Contract) came into being in this case (see [88] above)), his submission fails to appreciate that in the present circumstances, since the Pre-Option Contract has been breached, the expectation loss is necessarily the value which the Purchaser has lost as a result of her inability to exercise the Option (which she had the wherewithal to do) and purchase the Property. That value is the difference between the contract price and the market value of the Property as at the putative date of completion.

135 There is also little merit to Mr Daniel's submission that the Judge should have used the date of judgment instead of the putative date of completion as the reference point for assessing damages. The premise of this submission is that the Vendors' fault justifies adopting the date of judgment as the relevant date as that would (presumably) yield a larger sum. The assumption here seems to be that the property market will always rise, although, in the light of the recent property cooling measures adopted by the Government, the converse could also happen.

136 The primary fault or objectionable conduct adverted to by the Purchaser is the Vendors' failure to disclose to her that the Property was subsequently sold in July 2010 to an innocent third party. Mr Woo's response, when cross-examined, was that the sale was public information. Mr Daniel calls his attitude "cavalier". [\[note: 27\]](#) But, the Purchaser could have protected her position by lodging a caveat against the Property; that, she did not do. Moreover, as the parties' solicitors stopped corresponding after 10 March, the Vendors were legitimately entitled to think that the Purchaser had realised that she had lost her right to purchase the Property, especially since she had also not lodged any caveat against the Property.

137 The sale of a property is a matter of public record, and if the Purchaser had at any time been concerned about the status of the Property, she could have obtained the information by doing a simple search at the Singapore Land Authority. There was nothing objectionable about the Vendors' conduct in selling the Property following what seemed like a total cessation of correspondence between the parties.

Final observations

138 There is one final point which we need to touch on before we conclude this judgment. During the course of the hearing, we raised the question of whether the Written Offer contained all the necessary terms for the formation of a (pre-option) contract for the grant of an OTP. After the conclusion of the oral hearing before us, the parties were also given the opportunity to make further written submissions on this issue.

139 The specific point which we had a query on concerned the fact that the Written Offer did not spell out what would be the sum payable on the exercise of the OTP to be granted by the Vendors if they accepted the Written Offer. It is settled law that for a contract for the sale and purchase of property to come into being, three things must be agreed on: the parties, the property and the purchase price. A contract without terms dealing with these three matters would be incomplete. Of course, the contract must also be evidenced in writing to satisfy s 6(d) of the Civil Law Act. In a similar vein, for a valid contract for the grant of an OTP to arise, the parties, the property, the

purchase price as well as the amount payable upon the purchaser's exercise of the OTP to be granted must be agreed on (in addition to satisfying s 6(d) of the Civil Law Act).

140 An offer to purchase an OTP, if accepted, results in the formation of a (pre-option) contract for the grant of an OTP, which would ordinarily be exercised. This being the case, there is genuine doubt as to whether the Written Offer (the offer to purchase an OTP in the present case) was sufficiently complete to give rise, upon its acceptance, to a valid contract for the grant of an OTP without stipulating the sum that was payable upon the exercise of the OTP to be granted. Without such a stipulation in a contract for the grant of an OTP, there would be uncertainty as to what sum of money the vendor may require from the purchaser upon the latter's exercise of the OTP.

141 In Mr Daniel's further submissions, he drew the court's attention to the fact that incompleteness of the Written Offer, as the document setting out the terms of the Pre-Option Contract, was never raised in the Vendors' pleadings, and neither was it raised in the Vendors' Case in CA 83/2013. He submitted that it would be "patently unfair" to allow this issue to affect the outcome of the present appeals. Mr Daniel appears to be saying that if this issue had been raised in the Vendors' pleadings, the Purchaser could have adduced evidence to show the industry norm in this regard.

142 We appreciate the difference which further and more direct evidence could make to a finding on the completeness (or otherwise) of the Written Offer as the document setting out the terms of the Pre-Option Contract, which arose between the parties upon the Vendors' acceptance of the Written Offer. We also appreciate that it is the Vendors' decision not to plead this issue, and not the Purchaser's inability to lead evidence on it, that has limited this court's ability to fully consider and adjudicate on it.

143 Moreover, we find it particularly significant that in relation to the OTP which was actually issued by the Vendors (*ie*, the Option), there was no dispute between the parties as to the terms therein, except for the stipulated option period. Adrian did not express any surprise that the sum to be paid by the Purchaser on the exercise of the Option was 5% of the purchase price of \$920,000, less the Option Money. In our view, that speaks volumes about the industry norm, which must have been acting on the parties' minds at the material time. The parties, as between themselves, were clearly *ad idem* about the sum which the Purchaser had to pay upon exercising the Option. It is impossible for us to arrive at any other conclusion even on the basis of the available evidence.

144 In the circumstances, we do not think we should allow the issue of the completeness (or otherwise) of the Written Offer, as the document setting out the terms of the Pre-Option Contract, to affect the outcome of the present appeals; otherwise, the Purchaser would be unfairly prejudiced.

145 We would, however, caution that our conclusion on this issue is tied to the specific facts of this case. If contracts for the grant of an OTP become more prevalent and if a similar dispute is argued more comprehensively before this court in a future case, there may be a different answer to the question of whether the absence of a term in a contract for the grant of an OTP (or a document setting out the terms of such a contract) stipulating the amount payable on the exercise of the OTP to be granted is fatal to the completeness of that contract.

Conclusion

146 In the result, we dismiss both CA 83/2013 and CA 84/2013. As regards costs, having looked at both appeals in the round and after setting off the costs of one appeal against the other, we order the Vendors to bear 50% of the Purchaser's costs in relation to CA 83/2013. We make no costs order

in relation to CA 84/2013. The usual consequential orders will apply.

[\[note: 1\]](#) Appellant's Core Bundle for CA 83/2013 ("CA 83 ACB") vol II at pp 9–10.

[\[note: 2\]](#) CA 83 ACB vol II at p 15.

[\[note: 3\]](#) CA 83 ACB vol II at pp 16–20.

[\[note: 4\]](#) CA 83 ACB vol II at p 16.

[\[note: 5\]](#) CA 83 ACB vol II at p 10.

[\[note: 6\]](#) Joint Record of Appeal ("Joint RA") vol 3D at p 185 (line 27) to p 188 (line 20).

[\[note: 7\]](#) Joint RA vol 3A at p 260, para 18.

[\[note: 8\]](#) Joint RA vol 3D at p 285 (line 27) to p 286 (line 7).

[\[note: 9\]](#) Joint RA vol 3B at p 91 (lines 8–24).

[\[note: 10\]](#) CA 83 ACB vol II at p 43.

[\[note: 11\]](#) Joint RA vol 2 at pp 74–84.

[\[note: 12\]](#) Joint RA vol 2 at pp 86–97.

[\[note: 13\]](#) Joint RA vol 2 at pp 123–131.

[\[note: 14\]](#) Joint RA vol 2 at pp 133–140.

[\[note: 15\]](#) Appellants' Case for CA 83/2013 ("CA 83 AC") at para 8.

[\[note: 16\]](#) CA 83 AC at para 9.

[\[note: 17\]](#) Joint RA vol 3B at p 9, para 8.

[\[note: 18\]](#) Joint RA vol 3D at p 200 (p 40 of the certified transcript of the hearing on Day 5 of the trial).

[\[note: 19\]](#) CA 83 AC at para 24.

[\[note: 20\]](#) Appellant's Case for CA 84/2013 ("CA 84 AC") at paras 16–22.

[\[note: 21\]](#) CA 83 AC at paras 41 and 56.

[\[note: 22\]](#) CA 83 AC at paras 72–73.

[\[note: 23\]](#) CA 83 AC at paras 60–63.

[\[note: 24\]](#) Joint RA vol 2 at p 80.

[\[note: 25\]](#) CA 83 AC at para 67.

[\[note: 26\]](#) Respondents' Case for CA 84/2013 at paras 78–82.

[\[note: 27\]](#) CA 84 AC at para 94.

Copyright © Government of Singapore.