IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 88

Suit No 219 of 2016
(Registrar's Appeal No 315 of 2016)

Between

(1) Liew Soon Fook Michael
(2) Wong Siew Ying Esther @ Gui Mee Eng

… *Plaintiffs*

And

Yi Kai Development Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure] — [Striking Out]

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v
Yi Kai Development Pte Ltd

[2017] SGHC 88

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Hoo Sheau Peng JC
19 September 2016, 7 October 2016, 23 January 2017

20 April 2017

Hoo Sheau Peng JC:

Introduction

1 In this action, the plaintiffs, Liew Soon Fook Michael and Wong Siew Ying Esther ("the Plaintiffs"), claimed that there was a substantial shortfall in the *floor area* of a "cluster house" which they purchased from the defendant-developer, Yi Kai Development Pte Ltd ("YKD"). The Plaintiffs alleged that the shortfall in *floor area* arose because as promised, the "cluster house" should have a roof garden, whereas when constructed, it only had a sloping roof structure. YKD's position was that the transaction was based on the *strata area* of the "cluster house", not its *floor area.* There was no substantial shortfall in the *strata area,* the computation of which properly included the area of the sloping roof structure. There was no promise of a roof garden, and in any case, the *floor area* was made known to the Plaintiffs.

2 Pursuant to YKD's application under Order 18 Rule 19 of the Rules of Court (Cap 322, R5, 2014 Rev Ed) ("ROC") ("the striking out application"), the learned Assistant Registrar Chan Wei Sern Paul ("the AR") struck out the action. The Plaintiffs appealed against the decision.

3 After hearing the parties, I dismissed the appeal. The Plaintiffs have appealed against my decision. I now set out my reasons.

Background

4 YKD was the developer of a freehold cluster housing strata development known as Centurion Residences. A strata landed unit in such developments is sometimes referred to as a "cluster house", and for convenience, I use this term in my grounds of decision (including at [1] above). There are 15 cluster houses in Centurion Residences, including the cluster house in dispute which is located at 3B Puay Hee Avenue, Singapore 347467 ("the Unit").

5 Sometime in 2007, YKD began marketing efforts to sell the cluster houses at Centurion Residences. At that time, the construction of the development had not been completed. YKD prepared a brochure which was made available at YKD's showroom and given to the Plaintiffs ("the Brochure"). The Brochure included the following:

(a) The artist's impressions of Centurion Residences. In particular, all the cluster houses were shown to have sloping roof structures;

(b) The floor plans for each cluster house. With respect to the Unit, the Brochure contained the floor plans for the basement, the first and

second storeys, and the attic. The following text appeared on the same page as the floor plans for the Unit:

> Unit 3B
>
> 477 sq.m./5132.52 sq.ft.
>
> *Inclusive of* PES, Bay Window, Yard, A/C Ledge, Planter, *Roof Garden* & Private Carpark
>
> [emphasis added]

(c) Building specifications. The penultimate page of the Brochure provided information on building specifications. Para 6.2.2(a) stated that "Ceramic/Homogeneous tiles" were used for the "Roof garden/Terrace", while para 8.3 stated that "Powder coated aluminium or UPVC frame glass door" was used for the "Roof Garden/Terrace".

(d) A disclaimer. The following was printed at the back of the Brochure:

> Whilst every reasonable care has been taken in preparing this brochure, the developer and its agents cannot be held responsible for any inaccuracies. All statements are believed to be correct but are not to be regarded as statements of representations of fact…All plans are subject to any amendments approved or may be approved by the relevant authority. All art renderings and illustrations contained in this brochure are artist's impressions and photographs are only decor suggestions and none can be regarded as representations of fact. Floor areas are approximate measurements and subject to final survey.

6 On 5 June 2007, in consideration of a booking fee of $138,950, YKD granted to the Plaintiffs an option to purchase the Unit for $2.779m ("the Option"). Should the Option not be exercised within 14 days, only 75% of the booking fee would be refunded. In other words, the sum of $34,737.50 would be forfeited.

7 On 12 June 2007, YKD's conveyancing lawyers issued a letter to the Plaintiffs' conveyancing lawyers enclosing copies of the following documents:

(a) the sale and purchase agreement in respect of the Unit ("the SPA"), the relevant terms of which are set out in [10] below;

(b) the certificate of strata area dated 20 April 2007 issued by the registered surveyor ("the Certificate of Strata Area"), which set out the strata area of each cluster house within the development, and specified that the *strata area* of the Unit was 478m^2, although this was "provisional and subject to alteration on final survey"; and

(c) the schedule of strata units dated 17 April 2007 ("the Schedule of Strata Units") accepted by the Building and Construction Authority ("the BCA") under s 11 of the Building Management and Strata Management Act (Cap 30C, 2004 Ed) ("the BMSMA"). The Schedule of Strata Units described the Unit as a "Detached House" with the total "*floor area*" of 391m^2, and a "share value" of 12 out of the "aggregate share value" of 153 allotted to the development.

8 Further, the Schedule of Strata Units provided a breakdown of the total floor area of 391m^2 of the Unit, by setting out the floor area of each level of the Unit in a table as follows:

FLOOR AREA (M2)		
Basement	119	includes car park 37, garden 15
1st sty	147	includes PES 82, yard 2 *excludes void/duct 6*

2nd sty	68	*excludes ledge 10, duct 0.4*
attic & roof level plan	57	includes planter 3 *excludes roof 71*

[emphasis added]

9 While the Plaintiffs stated that they received the letter of 12 June 2007 from YKD's conveyancing lawyers, the Plaintiffs claimed that they did not receive the Schedule of Strata Units "until a later date". I shall deal with this contention at [46] below. For now, it is worth highlighting that the difference between the *strata area* of 478m^2 (as reflected in the Certificate of Strata Area) and the *floor area* of 391m^2 (as reflected in the Schedule of Strata Units) is made up mainly of the area of the "roof" of 71m^2 on the "attic & roof level plan".

10 On 13 July 2007, the Plaintiffs exercised the Option and entered into the SPA with YKD. The SPA comprised 20 clauses and four Schedules. In the SPA, the Unit is defined as "the house in the Housing Project as described in Schedule B". Schedule B of the SPA stated that:

(a) the Unit was "[t]he unit in the Housing Project known as 3B Puay Hee Avenue, Centurion Residences, Singapore comprising an estimated *strata floor area of 478 square metres (including* PES, bay window, yard, a/c ledge, planter, *roof garden,* private car park, *where applicable) as shown in the registered land surveyor's certificate on strata area*" [emphasis added];

(b) the "Unit Purchase Price" was "$5,813.81 per square metre"; and

(c) the "Share Value allotted to the Unit" was "12/153".

11 Clauses 18.2 and 18.3 of the SPA are also relevant. For present purposes, cl 18.2 essentially provided that should any shortfall in area be discovered "on completion of the title survey as approved by the Chief Surveyor", the Plaintiffs have the right to an adjustment in the purchase price according to cl 18.3. Under cl 18.3, there would be a reduction in the purchase price for any deficiency in area which is "in excess of 3% of the area stated in the [SPA]", calculated "at the amount as stated in Schedule B per square metre of deficiency", *ie*, "$5,813.81 per square metre".

12 Sometime in early 2010, the construction of Centurion Residences was completed, and the temporary occupation permit for the Unit was issued on 11 March 2010. It was not disputed that as constructed, the Unit had a sloping roof structure, and not a roof garden. On 28 September 2010, the Singapore Land Authority ("the SLA") approved the final strata title survey plan of Centurion Residences carried out by the registered surveyor, which certified the strata area of the Unit to be 472m^2 ("the Final Survey"), including the strata area of 69m^2 for the roof. On 15 December 2010, the SLA issued the subsidiary strata certificate of title, which confirmed that the strata area of the Unit was 472m^2. The certificate of statutory completion was issued on 27 December 2010.

The action

13 On 8 March 2016, the Plaintiffs commenced the action against YKD, relying on the twin causes of action of negligent misrepresentation and breach of contract. In the Statement of Claim, the Plaintiffs pleaded that from the contents of the Brochure, YKD had represented to the Plaintiffs that the Unit would be 477m^2 in floor area inclusive of an accessible roof garden. Thus

induced, and acting in reliance of the representations, the Plaintiffs entered into the SPA. However, the representations were false. The Unit did not have a roof garden, but had the sloping roof structure which was generally inaccessible and unusable. The area of the roof should not count towards floor area. As for the breach of contract claim, the Plaintiffs pleaded that Schedule B of the SPA provided for "an estimated *strata floor area* of 478 square metres (*including* PES, bay window, yard, a/c ledge, planter, *roof garden*, private car park, where applicable)" [emphasis added]. The shortfall in floor area and the failure to provide a roof garden constituted material breaches of the SPA. Therefore, the Plaintiffs alleged that they had overpaid YKD for the Unit. The Plaintiffs sought $401,152.89 in damages for the alleged shortfall of 69m^2 in floor area, interest and costs.

The striking out application

14 In its Defence filed on 31 March 2006, the Defendants denied the claims. Further, on 1 June 2016, YKD filed the striking out application. YKD contended*, inter alia,* that the Brochure did not contain any clear and unambiguous representations as to the floor area of the Unit, or that there would be a roof garden. In any event, YKD argued that the Plaintiffs' misrepresentation claim was time-barred. On the breach of contract claim, YKD asserted that the SPA did not contain any terms as to the floor area of the Unit, or that there would be a roof garden. Instead, the SPA clearly provided that the transaction would be based on the strata area of the Unit. In accordance with the contractual provisions, YKD had delivered the Unit with the strata area as stipulated in the SPA. The Plaintiffs' action was "plainly and obviously unsustainable", and should be struck out under O 18 r 19(1) of the ROC. In response, the Plaintiffs contended that YKD's striking out application should be dismissed as it could not be said that any of the grounds in O 18

r 19(1) of the ROC applied.

The decision below

15 The AR struck out the action. On the Plaintiffs' misrepresentation claim, the AR found that the Brochure did not contain any clear and unequivocal representation that the floor area of the Unit was 477m^2. While there might have been a clear representation as to the presence of a roof garden in the Unit, any such representation would only have induced the Plaintiffs to enter into the Option but not the SPA. However, the Plaintiffs' claim, as stated in their Statement of Claim, was that YKD's misrepresentations had induced them to enter into the SPA, not the Option. The AR did not decide on the point whether the Plaintiffs' misrepresentation claim was time-barred. As for the breach of contract claim, the AR could not discern any express terms in the SPA that provided for an accessible roof garden or that the floor area would be 477m^2, and hence found the Plaintiff's claim unsustainable. Thereafter, the matter came before me on appeal.

The legal principles on striking out

16 The parties did not dispute the legal principles applicable to a striking-out application, which are well-settled. Pleadings may be struck out on any of the grounds stated in the four limbs of O 18 r 19(1) of the ROC.

17 YKD cited all four limbs of O 18 r 19(1), but its submissions appeared to focus primarily on the limb in r 19(1)(*b*), *ie*, that the pleading is "scandalous, frivolous or vexatious". YKD's repeated assertions were that the Plaintiffs' claims were "plainly and obviously unsustainable", a phrase which is generally articulated in relation to the words "frivolous or vexatious" in r 19(1)(*b*): see *The Bunga Melati 5* [2012] 4 SLR 546 ("*Bunga Melati*") at

[32]. The Court of Appeal explained in *Bunga Melati* at [39] that a "plainly or obviously sustainable" action is one that is either:

> (a) *Legally unsustainable*: if "it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks"; or
>
> (b) *Factually unsustainable*: if it is "possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance, [for example, if it is] clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based".

Therefore, pleadings may be struck out under O 18 r 19(1)(*b*) if it is clear that they are legally or factually unsustainable.

18 I should add that when a defendant is faced with a claim which is time-barred due to the expiry of the relevant limitation period, the claim may be struck out under O 18 r 19(1)(*b*) on the basis that the claim is "frivolous and vexatious", or under O 18 r 19(1)(*d*) that it would otherwise be "an abuse of the process of the Court": Jeffrey Pinsler SC, *Singapore Court Practice 2017* (LexisNexis), 804-805. A claim is necessarily legally unsustainable if the relevant limitation period has elapsed, while the judicial process may not be used to enforce a claim which is time-barred by statute.

My decision

19 In summary, I agreed with the AR's decision. In my view, the Plaintiffs' misrepresentation claim was time-barred, and thus appropriate to be struck out under O 18 r 19(1)(*b*) for being "frivolous or vexatious", or under r 19(1)(*d*) for otherwise being "an abuse of the process of the Court". Moreover, I had grave doubts as to the sustainability of the misrepresentation claim. As for the breach of contract claim, I did not find any term in the SPA

providing that the Unit would have a roof garden, or a floor area of 478m$^{2.}$ Thus, the Plaintiffs' claim was plainly and obviously unsustainable. Hence, I found it appropriate to strike out the breach of contract claim under O 18 r 19(1)(*b*) as well. I shall expand on my analysis of each of the Plaintiffs' claims shortly.

A preliminary issue: The computation of strata area in a cluster housing development

20 Before going there, I should state that in the course of the hearing, I sought clarification whether the area of a roof of a cluster house (which is ordinarily inaccessible and unusable) may be computed as strata area. In their further submissions dealing with this point, the parties were in agreement that the answer to my query is "yes". The parties also helpfully provided information on cluster housing developments, and the practice of computing strata area for a cluster house which I now set out.

21 To start, while a cluster house is a type of "landed" property, a purchaser of a cluster house obtains a *strata* title. There appears to be no statutory definition of "strata area". However, "stratum" is defined under s 3 of the Land Titles (Strata) Act (Cap 158, Rev Ed 2009) to mean:

> *any part of land* consisting of *a space* of any shape below, on or *above the surface of the land*, or partly below and partly above the surface of the land, the dimensions of which are delineated;
>
> [emphasis added]

The roof of a cluster house can form a "stratum", being any part of land consisting of a space above the surface of the land. Thus, it appears that its area can form strata area.

22 YKD further explained that the method of survey applicable to cluster houses is now expressly referred to in the *CS Directive on Cadastral Survey Practices* (version 4, February 2015) issued by the SLA ("the CS Directive"), which sets out the procedures and practice relating to the conduct of cadastral surveys. Specifically, para 5.13 provides the guiding principles in relation to the strata survey of buildings in cluster housing developments. According to para 5.13, unlike for conventional strata units, the "strata area" for cluster houses can include "open void space within the airspace of box format of the house". A roof constitutes such an "open void space", and may therefore be included in the computation of "strata area" for a cluster house. Although para 5.13 was only formally incorporated into the CS Directive in March 2009, it appears that the guiding principles formed prevailing practice in April 2007 when the Certificate of Strata Area was issued for Centurion Residences.

23 Thus, it was not disputed by the parties that there is no practice, rule or principle against including the area of the roof when computing the strata area of a cluster house, although it does not appear to be mandatory to do so. In fact, the Plaintiffs produced an e-mail from their registered surveyor who stated the view that "[r]oof area can be calculated as strata area if the intention is to delineate the roof as non-common property".

24 As YKD explained, a cluster house has its own attached roof, whereas a conventional strata unit shares its roof as common property with other strata units on various levels. Including the roof within the computation of a cluster house's strata area means that the roof is not common property, and that the owner has exclusive ownership of the roof. The owner may use the roof for his own benefit (although the uses may be limited in scope), and the owner is also solely responsible for its maintenance and repair. If, in consultation with the developer and the surveyor, the roof of a cluster house is not included in the

strata area, then the roof would necessarily constitute common property – which then falls to be used, maintained and repaired by the management corporation of the development.

25 For completeness, it should be noted that the schedule of strata units required under s 11 of the BMSMA is meant to ascribe the share value for each strata lot within a development, so as to determine the owner's voting right and liability for contribution towards various funds. For the purpose of computing the share value of each strata lot in a development, the floor area of each strata lot is used. The area of a roof would be excluded from the computation of floor area, whereas the area of a roof terrace or roof garden would be included in the floor area.

26 Indeed, I found that the further information was useful to provide the context to the case. Returning to the present facts, the Certificate of Strata Area included the area of the roof as strata area of the Unit. Thereafter, the Final Survey (which was approved by the SLA) and the subsidiary strata certificate of title also included the area of the roof as strata area. However, the Schedule of Strata Units (as accepted by BCA) indicated that the void, duct and roof areas were excluded from the computation of the Unit's floor area. Nonetheless, I should reiterate that the main bone of contention between the parties was whether floor area or strata area was the basis for the transaction. There was no disagreement that it was in order for the area of the roof to be computed as part of the strata area of the Unit.

Whether the misrepresentation claim was sustainable

27 With this background in mind, I go to the Plaintiffs' claim that YKD had misrepresented in the Brochure that the Unit would have a roof garden and a floor area of 477m^2. Regardless of the substantive merits, it was clear to

me that the claim was time-barred.

28 In this regard, YKD pointed to s 6(1)(*a*) of the Limitation Act (Cap 163, 1996 Rev Ed) ("Limitation Act"), which provides that actions founded on a contract or on tort "shall not be brought after the expiration of 6 years from the date on which the cause of action accrued". Relying on *Lian Kok Hong v Ow Wah Foong* [2008] 4 SLR(4) 165 at [24] ("*Lian Kok Hong*"), YKD contended that in a claim for a tort founded on a single wrong requiring proof of damage, the cause of action "accrue[s] when the damage occurs". Citing *Chitty on Contracts*, vol 1, (Hugh Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) at para 28-034 ("*Chitty on Contracts"*), it was further argued that the purported damage occurred when the Plaintiffs entered into the SPA on 13 July 2007, when the Plaintiffs were obliged to "overpay" for the Unit. Time started to run then, and the Plaintiffs were out of time when the action was commenced.

29 In response, the Plaintiffs did not point to any authority. However, it was pleaded in the Reply filed on 13 April 2016 that "*the cause of action arises* from the date of completion of building works which would be from the date of obtaining [the] Temporary Occupation Permit ("TOP") or the Certificate of Statutory Completion ("CSC") [emphasis added]." Further, in their written submissions, the Plaintiffs contended that "the limitation period would run from the TOP *whereupon the breach was first discovered*, and not from the SPA where the unit was yet to be built" [emphasis added].

30 Upon consideration, I agreed with YKD that where a cause of action is based on a single tort, requiring proof of damage, the cause of action accrued when damage occurred. *Lian Kok Hong* makes this clear. Insofar as the Plaintiffs seemed to suggest that the cause of action accrued at a time *after*

damage occurred, that would not be the correct position in law.

31 In relation to the tort of negligent misrepresentation, failing any other specific damages allegedly suffered, it appears to me that damage would occur when the contract is entered into: *Chitty on Contracts,* at para 28-034. I noted that in support of this proposition, YKD also cited *Green v Eadie* [2012] 2 WLR 510, where the plaintiff-purchaser brought a claim in negligent misrepresentation against the vendor for having falsely represented that the property included a strip of land. In that case, the court held at [45]-[53] that the damage occurred upon the plaintiff entering into the "flawed transaction".

32 Applying these legal principles to the present facts, I agreed with YKD that the damage would have occurred, at the latest, when the Plaintiffs entered into the SPA, and that the cause of action accrued then. I elaborate. Supposing that the Plaintiffs successfully established the elements of the misrepresentation claim as pleaded, the damage to the Plaintiffs would in fact have occurred at the time that the Plaintiffs became contractually bound to "overpay" for a property without a roof garden and of about 478m^2 in strata area, when they believed that it would have a roof garden and 477m^2 in floor area in reliance on the Brochure's representations. By then, the cause of action was complete.

33 It was clear that more than six years had elapsed between the parties entering into the SPA on 13 July 2007, and the Plaintiffs' commencement of the action on 8 March 2016. The Plaintiffs' claim in misrepresentation was therefore time-barred under s 6(1) of the Limitation Act.

34 I turn to the Plaintiffs' contention in the written submissions (set out at [29]) that time began running upon the discovery of the breaches. I should add

that the Plaintiffs did not specifically rely on s 24A(3)(*b*) of the Limitation Act. Where the damage is "latent", s 24A(3)(*b*) sets the limitation period at three years from the date on which the plaintiff first had both the knowledge required for bringing the action for damages in respect of the relevant damage and a right to bring such an action. Even assuming that the provision is applicable, more than three years had elapsed since the temporary occupation permit was obtained on 11 March 2010, or the certificate of statutory completion was issued on 27 December 2010, when the Plaintiffs claimed to have discovered the matter. Further, in relation to the claims, the Plaintiffs had engaged their own registered surveyor, and obtained a survey report of the Unit dated 25 January 2013, stating that the floor area of the Unit was 403m^2. Again, this was more than three years prior to the commencement of the action.

35 In light of the above, I found that the Plaintiffs' claim in misrepresentation was time-barred under s 6(1) of the Limitation Act. Even on the alternative basis under s 24A(3)(*b*), the claim would have been time-barred. Therefore, I found it appropriate to strike out the claim under O 18 r 19(1)(*b*) on the basis that it was "frivolous and vexatious", as well as under r 19(1)(*d*) that it would otherwise be "an abuse of the process of the Court".

36 While it is not necessary for me to go into the substance of the misrepresentation claim, I nonetheless wish to briefly state that I had concerns as to whether the claim was sustainable even if it were not time-barred. To reiterate, the Plaintiffs pointed to the page of the Brochure which stated "477 sq.m./5132.52 sq.ft." and the phrase "[i]nclusive of… roof garden" under the floor plans of the Unit, and argued that they had relied on these representations and were thus induced to enter into the SPA. Further, the Plaintiffs pointed to the page of the Brochure which contained the building specifications which

also mentioned the types of tiles and doors used for the "Roof Garden/Terrace".

37 Thus, the Plaintiffs argued that it was represented in the Brochure that the Unit would be 477m^2 in floor area and would have a roof garden. In my view, it was neither clear nor unambiguous that the portion "477 sq.m./5132.52 sq.ft.", taken on its own or in the context of the other information in the Brochure, referred to floor area rather than strata area. As for the purported representation of the presence of the roof garden, while the Brochure stated the building specifications for "Roof Garden/Terrace", it was not disputed that the Unit included a small roof terrace using materials as stated in the building specifications. Admittedly, there was the line stating "[i]nclusive of… roof garden". However, the Unit's floor plans did not depict a roof garden, and the artist's impressions of Centurion Residences showed sloping roof structures for all the cluster houses. Thus, again, I came to the view that from the Brochure, it was neither clear nor unambiguous that the Unit would have a roof garden.

38 Even if the Brochure could be said to clearly contain such representations, I did not accept that the Plaintiffs relied on any of them so as to be induced to enter into the SPA. Quite apart from the disclaimer set out in [5(d)], as I explain in [41]-[46] below, the SPA and the Certificate of Strata Area stated that the Unit would be 478m^2 in strata area, while the Schedule of Strata Units provided a breakdown of the Unit's floor area. Any misrepresentation made in the Brochure would have been corrected by the SPA, the Certificate of Strata Area and the Schedule of Strata Units which were sent to the Plaintiffs' conveyancing lawyers. Prior to entering into the SPA, the Plaintiffs should have been advised on these documents by their conveyancing lawyers.

39 While the Plaintiffs might have relied on the Brochure to obtain the grant of the Option, thereafter, the Plaintiffs need not have proceeded with the SPA (albeit with the consequential forfeiture of a portion of the booking fee as set out at [6] for which the Plaintiffs might have been able to lodge a claim against YKD). The claim that the Plaintiffs relied on the representations to enter into the SPA was simply unsustainable, and in turn, the misrepresentation claim was unsustainable.

Whether the breach of contract claim was sustainable

40 Next, I turn to the breach of contract claim. Schedule B of the SPA, as set out at [10(a)] above, stated that the Unit "comprise[d] *an estimated strata floor area* of 478 square metres (*including* PES, bay window, yard, a/c ledge, planter, *roof garden*, private car park, *where applicable*) *as shown in the registered land surveyor's certificate on strata area*" [emphasis added]. The Plaintiffs relied on this description to argue that they had contracted for a unit with a floor area of 478m^2 and an accessible roof garden, and that YKD had breached the SPA by failing to deliver such a unit.

41 The slight difficulty in the present case is the use of the phrase "strata floor area" in Schedule B of the SPA, giving rise to the contention by the Plaintiffs that this meant "floor area" which is meant to be usable space, rather than "strata area". In other words, if the phrase "strata floor area" meant floor area as the Plaintiffs argued, then YKD would have breached the terms of the SPA by delivering a unit with only 403m^2 of floor area. The shortfall of 69m^2 in floor area would exceed the allowance of 3% deviation from the 478m^2 stipulated in the SPA, entitling the Plaintiffs to a reduction in the purchase price of the Unit under cl 18.3 read with Schedule B of the SPA, at a rate of $5,813.81 per square metre of floor area in shortfall.

42 On the other hand, if the phrase "strata floor area" meant strata area as YKD argued, then it would have been proper for YKD to include the roof area of 69m^2 within the 478m^2 figure stipulated in Schedule B. The total strata area was certified in the final survey to be 472m^2, and this fell within the 3% deviation from 478m^2 permitted under cl 18.3 of the SPA. Accordingly, there would have been no breach of contract.

43 In interpreting the provision in Schedule B, I reiterate that the Unit's "estimated strata floor area of 478 square metres" was said to be "as shown in the registered land surveyor's certificate on strata area". It was clearly stated that the "registered land surveyor's certificate" was in relation to "strata area". Further, it was not disputed that the certificate meant the Certificate of Strata Area which was provided to the Plaintiffs on 12 June 2007 along with the SPA, and that the SPA specifically incorporated the Certificate of Strata Area. The Certificate of Strata Area, as its title suggested, clearly certified the "Strata Area" of the Unit to be 478m^2, subject to final survey. To my mind, this made the phrase "strata floor area" clear and unambiguous on its face; it plainly referred to the Unit's strata area.

44 As such, I could not accept the Plaintiffs' contention that the Plaintiffs' interpretation should be preferred in light of the application of the *contra proferentem* rule against YKD as the party who drafted the SPA. The present facts are distinguishable from those in the case of *Fortune Realty Pte Ltd v Lim Sai Kang* [2002] SGHC 59 cited by the Plaintiffs, where the *contra proferentem* rule was applied in the interpretation of the sale and purchase agreement which was ambiguous as to the inclusion of an accessory lot. Here, there was no ambiguity when the SPA and the Certificate of Strata Area – to which the SPA made express reference – were considered together. There was no need for the *contra proferentem* rule to be applied.

45 Further, YKD's interpretation of "strata floor area" to mean strata area was confirmed by the Schedule of Strata Units. As I explain at [47] below, I was satisfied that the Schedule of Strata Units could be used as extrinsic evidence to aid the interpretation of the contractual language, even in the absence of ambiguity. The Schedule of Strata Units stipulated the Unit's "floor area" to be 391m^2 once certain areas, including the roof, were excluded from the calculation. Such areas, once added back to the floor area of 391m^2, would result in 478m^2 being the "strata area". This confirmed that the "strata floor area" in fact meant "strata area", as YKD submitted.

46 I turn to deal with the Plaintiffs' claim that they did not receive the Schedule of Strata Units "until a much later date", and presumably not around 12 June 2007. I noted that the Plaintiffs did not specify when they received the document. Although YKD's conveyancing lawyers filed an affidavit to state that the Schedule of Strata Units was in fact provided to the Plaintiffs along with the Certificate of Strata Area and copies of the SPA on 12 June 2007, there was no evidence adduced from the Plaintiffs' conveyancing lawyers to the contrary. The Schedule of Strata Units was clearly listed as an attached document on the cover letter from YKD's conveyancing lawyers to the Plaintiffs' solicitors. Schedule B of the SPA specifically referred to the share value of the Unit as "12/153". Thus, it would have been necessary to furnish the Schedule of Strata Units together with the SPA so as to allow the Plaintiffs and their conveyancing lawyers to confirm the share value of the Unit. I accepted that the Schedule of Strata Units was furnished on 12 June 2007.

47 I should add that the parties did not raise the issue of the admissibility and use of the Schedule of Strata Units as extrinsic evidence to aid the interpretation of the SPA. In any event, I found that the requirements enunciated by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v*

B-Gold Interior Design & Construction Pte Ltd [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [125], [128]-[129] and [132] were met, so as to allow the document to be used for the purpose. To explain, the Schedule of Strata Units (and its tabulation of floor area) was *relevant* to the interpretation of the term "strata floor area" in Schedule B of the SPA. As observed at [46] above, it was *available* to all parties, and it *related* to the clear and obvious context of the contract. The Schedule of Strata Units was also not used to contradict or vary the contractual language, but merely to "illuminate" it (see *Zurich Insurance* at [122] and [132(f)]).Therefore, nothing precluded the use of the Schedule of Strata Units as extrinsic evidence to confirm that "strata floor area" in fact meant "strata area" as YKD submitted.

48 Apart from the alleged shortfall in floor area, the Plaintiffs also argued that YKD breached the terms of the SPA by failing to provide an accessible roof garden as part of the Unit. I did not find that any term in the SPA provided that the Unit would have a roof garden. In support of their argument, the Plaintiffs again pointed to Schedule B of the SPA which stated that the Unit "compris[ed] an estimated strata floor area of 478 square metres (including PES, bay window, yard, a/c ledge, planter, *roof garden*, private car park, *where applicable*)" [emphasis added]. The Plaintiffs submitted that this meant that the Unit was to include a roof garden, and that the phrase "where applicable" was only in reference to the "private car park" which preceded it.

49 I could not accept the Plaintiffs' strained reading of this provision. I agreed with YKD that the phrase "where applicable" was in reference to all of the Unit's listed features including a "roof garden", and not just the "private car park". Since there was no term in the SPA providing for a roof garden, it was clear that YKD's failure to include a roof garden as part of the Unit could not have amounted to a breach of contract.

50 To sum up, the transaction was based on strata area, and not the floor area of the Unit. There was no substantial shortfall of strata area. The Plaintiffs' breach of contract claim was plainly and obviously unsustainable. As this met the "frivolous or vexatious" threshold under O 18 r 19(1)(*b*) of the ROC, I held that the claim was properly struck out.

Conclusion

51 For the above reasons, I affirmed the AR's decision to strike out the action, and dismissed the appeal. I ordered costs of the appeal to be fixed at $6,000 with reasonable disbursements to be paid by the Plaintiffs to YKD.

Hoo Sheau Peng
Judicial Commissioner

Carolyn Tan Beng Hui and Au Thye Chuen (Tan & Au LLP) for the plaintiffs;
Chan Hock Keng, Ong Pei Chin and Hong Jia (WongPartnership LLP) for the defendant.