IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 235

Originating Summons No 1334 of 2018

Between

Oxley Consortium Pte Ltd

… Plaintiff

And

Geetex Enterprises Singapore (Pte) Ltd

… Defendant

GROUNDS OF DECISION

[Arbitration] — [Award] — [Recourse against award] — [Appeal under Arbitration Act]

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v
Geetex Enterprises Singapore (Pte) Ltd

[2020] SGHC 235

High Court — Originating Summons No 1334 of 2018
Vinodh Coomaraswamy J
6, 26 August; 30 September 2019

5 November 2020

Vinodh Coomaraswamy J:

Introduction

1 The defendant purchased commercial property from the plaintiff in December 2012. The parties' sale and purchase agreement was in the standard form prescribed by statute to govern the sale and purchase of all commercial property. When the property was completed, the defendant refused to proceed and claimed a contractual right to terminate the contract and secure a refund from the plaintiff. In accordance with the parties' agreement, the resulting dispute was referred to arbitration. The arbitrator upheld the defendant's claim in its entirety.

2 The plaintiff now appeals, with my leave, on five questions of law arising from the award.

3 Having considered the parties' submissions, I have answered all five questions in favour of the defendant. The plaintiff has appealed against my decision. I now set out the grounds for my decision.

Background facts

The plans for Oxley Tower

4 The plaintiff is the developer of Oxley Tower, a mixed-use commercial building on Robinson Road. In December 2012, the defendant purchased three units in Oxley Tower from the plaintiff. This dispute relates only to two of those three units: Unit #04-01 ("Unit 1") and Unit #04-02 ("Unit 2") (collectively, "the Units"). As their unit numbers suggest, both Units are on the fourth floor of Oxley Tower.

5 In February 2012, ten months before the defendant purchased the Units, the plaintiff submitted its building plans for Oxley Tower to the Building and Construction Authority ("BCA") for approval. These plans show the following on the fourth floor of Oxley Tower. The Units are the only two units on the floor. The floor comprises the two Units and a mix of vegetation ("softscape areas") and constructed features such as paths and walls ("hardscape areas"). The floor is open to the elements on the sides. Each Unit has an indoor area and an outdoor area. The indoor area for each Unit is smaller than its outdoor area. Unit 1 is a gym or a spa with a swimming pool in its outdoor area. Unit 2 is a restaurant with a garden in its outdoor area. The arbitrator found as a fact that, as described by the plans, the gardens which form part of the softscape areas are not elevated from the hardscape areas and are flush with them.[1]

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[1] Appellant's Case at para 4; Appellant's Core Bundle at pp 37 – 38, [89].

6 In March 2012, the BCA approved the plaintiff's plans for Oxley Tower. I shall refer to these plans as "the 2012 BCA Plans" and to the BCA's letter of approval as "the BCA Approval". The BCA Approval was subject to a condition, however.[2] The condition was that the plaintiff had to obtain clearance from the technical departments listed in the BCA Approval. One of the technical departments expressly listed was the Fire Safety & Shelter Department of the Singapore Civil Defence Force ("FSSD").[3] The task of the FSSD is to ensure that buildings to be erected in Singapore comply with the requirements of the Singapore Fire Code.

7 As required by the BCA Approval, the plaintiff submitted the 2012 BCA Plans to the FSSD. The FSSD raised certain concerns under the Singapore Fire Code. To address those concerns, the plaintiff amended the 2012 BCA Plans to elevate the softscape areas by 300mm from the hardscape areas.

8 In April 2012, the FSSD approved the plaintiff's plans as amended. I shall refer to these amended plans as "the 2012 FSSD Plans". From April 2012, therefore, the 2012 FSSD Plans became the building plans for the construction of Oxley Tower in place of the 2012 BCA Plans.

The options to purchase

9 In November 2012, the defendant's representatives visited the showroom for Oxley Tower and received a copy of the plaintiff's marketing brochure. The marketing brochure stated expressly that its contents were based on building plans for Oxley Tower described by a particular building plan

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2 Appellant's Core Bundle at p 93.

3 Appellant's Core Bundle at p 94.

number and dated 6 March 2012.[4] The only building plans which match the description in the brochure are the 2012 BCA Plans. It appears therefore that the plaintiffs did not amend the brochure to reflect the amendments to the 2012 BCA Plans. The brochure therefore does not mention the 2012 FSSD Plans or depict the softscape areas as elevated from the hardscape areas. As shown in the 2012 BCA Plans, the illustrations in the brochure show the softscape areas on the fourth floor flush with the hardscape areas.[5]

10 The defendant decided to purchase both Unit 1 and Unit 2. The defendant completed two reservation forms, one for each Unit. The reservation forms are a precursor to an option to purchase. The defendant's reservation of Unit 2 for purchase was unconditional. But its reservation of Unit 1 was conditional. The condition was recorded in the reservation form for Unit 1 by the following manuscript words inserted just above the signature of the defendant's representative: "This unit is purchased based on converting from gym/spa to restaurant (exactly like #04-02)".[6] What the defendant wanted was for the plaintiff to make two changes to Unit 1 to make it exactly like Unit 2: (a) change the indoor area of Unit 1 from a gym or a spa to a restaurant; and (b) change its outdoor area from a swimming pool to a garden.

11 In late November 2012, the plaintiff granted the defendant an option to purchase Unit 2 at $12m. The defendant paid the 5% booking fee for Unit 2 unconditionally.

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4 Respondent's Core Bundle at p 135.

5 Respondent's Core Bundle at p 120.

6 Appellant's Core Bundle at p 72.

12 A few days later, the plaintiff granted the defendant a separate option to purchase Unit 1 at just over $9m. But the plaintiff had not yet confirmed that the two changes to Unit 1 were feasible. The plaintiff therefore granted to the defendant a conditional option to purchase Unit 1 and received the defendants' booking fee conditionally. The condition was that if the plaintiff subsequently informed the defendant that the two changes to Unit 1 were not possible, the defendant could cancel the option for Unit 1 and receive a full refund of its booking fee.[7]

The December 2012 Letter

13 Having consulted its architects, the plaintiff confirmed to the defendant that it was indeed possible to carry out the two changes to Unit 1.[8] The defendant therefore decided to proceed with the purchase of Unit 1.

14 The parties then exchanged drafts of the sale and purchase agreements for both Units. As required by s 5 of the Sale of Commercial Properties Act (Cap 281, 1985 Rev Ed) ("the Act") read with r 7 of the Sale of Commercial Properties Rules (Cap 281, R 1, 1999 Rev Ed) ("the Rules"), the draft agreement for each unit was in the standard form prescribed by Form D to the Rules. I shall refer collectively to the Act and to the Rules, including Form D, as "the legislative scheme".

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7 Appellant's Core Bundle at p 78.

8 Appellant's Core Bundle at p 80.

15 In the course of their correspondence over the sale and purchase agreements, the plaintiff supplied to the defendant a copy of the BCA Approval[9] (see [6] above).

16 By a letter dated 3 December 2012 ("December 2012 Letter") and addressed to the defendant, the plaintiff set out formally the conditions on which it would agree to carry out the two changes to Unit 1.[10] The letter runs to three pages. It subjects the plaintiff's agreement to carry out the two changes to 19 detailed conditions. It is obvious – and quite understandable in my view – that the plaintiff's solicitors drafted the December 2012 Letter for the plaintiff to issue on its own letterhead.

17 The effect of the December 2012 Letter is that, if any of the conditions set out in it were not satisfied, the plaintiff would remain entitled to deliver vacant possession of Unit 1 to the defendant upon completion without the two changes, *ie*, as a gym or a spa with an outdoor swimming pool.

18 The conditions which the plaintiff set out in the December 2012 Letter which are material for present purposes may be summarised as follows:

(a) Subject to the condition which I set out at [18(b)] below:

(i) the plaintiff reserved to itself the right to construct Unit 1 as a gym or a spa with a pool if the authorities: (1) declined to approve the two changes;[11] (2) approved the two changes subject

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9 Appellant's Core Bundle at p 93.

10 Appellant's Core Bundle at p 83.

11 Appellant's Core Bundle at p 83, cl (h).

to terms which the plaintiff for any reason did not agree to;[12] or (3) initially approved the two changes and then revoked or terminated the approval.[13]

(ii) the plaintiff reserved to itself the right to accept in its sole discretion any terms or variations imposed by the authorities in order to grant approval for the two changes.[14]

(b) The plaintiff undertook to give notice in writing to the defendant if any of the events described at [18(a)] above occurred.

(c) If the plaintiff gave such notice, the defendant had the right to terminate the agreement within 14 days of receiving the notice. If that happened, the plaintiff would be obliged to repay to the defendant all of its progress payments.[15]

(d) If the plaintiff gave such notice but the defendant did not exercise the right to terminate the agreement, the defendant was obliged to accept Unit 1 constructed by the plaintiff as it saw fit, whether with or without the two changes.[16]

19 The defendant accepted the conditions set out in the December 2012 Letter on 10 December 2012.[17] The plaintiff thereby undertook a critical obligation to the defendant and conferred on the defendant a critical right with

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12 Appellant's Core Bundle at p 83, cl (h).

13 Appellant's Core Bundle at p 84, cl (j).

14 Appellant's Core Bundle at p 84, cll (i) and (k).

15 Appellant's Core Bundle at p 84, cl (m).

16 Appellant's Core Bundle at p 84, cl (l).

17 Appellant's Core Bundle at p 85.

respect to Unit 1. The plaintiff undertook an unqualified obligation to give notice to the defendant if the authorities were to impose any terms for approving the two changes which terms the plaintiff decided to accept. The plaintiff conferred upon the defendant an unqualified right to terminate the contract upon receiving such notice.

The sale and purchase agreements

20 In late December 2012, the defendant entered into two sale and purchase agreements with the plaintiff, one for each Unit. The agreements were both in Form D and were identical in all material respects save, of course, for the quantum of the purchase consideration and the description of the Units.

21 Schedule B of the agreement for Unit 2 read with the definition of "the Unit" in cl 1.1.1 describes the unit as "The Restaurant Unit in the Building known or to be known as Oxley Tower … situated on the 4th storey of the Building…".[18] The agreement for Unit 1, however, recognised that the plaintiff's agreement to carry out the two changes to Unit 1 was subject to the conditions set out in the December 2012 Letter. Thus, Schedule B of the agreement for Unit 1 continues to describe Unit 1 as: "The Gymnasium/Spa Unit in the Building known or to be known as Oxley Tower … situated on the 4th storey of the Building…".[19]

22 Clause 26 of both agreements expressly bars the defendant from using the roof gardens of both Units for any commercial activities.[20] This clause was

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18 Appellant's Core Bundle at p 161.

19 Appellant's Core Bundle at p 126.

20 Appellant's Case at para 11; Appellant's Core Bundles at pp 120, 155.

mandated by and reflected a prohibition in the planning permission granted by the Urban Redevelopment Authority ("URA") for the fourth floor of Oxley Tower.

23 Two points are important to note about cl 26. First, this provision is not part of the standard terms prescribed by Form D. Instead, it is a customised term inserted into the second schedule of the agreements. Second, neither the URA's planning permission nor cl 26 of the agreements prohibits the patrons of the restaurants in either of the Units from having access to the roof gardens otherwise than as part of the commercial activities at the restaurants. The only prohibition is against the defendant conducting or permitting commercial activities in the roof gardens.

24 The plaintiff did not, at any time before the parties' dispute arose, supply a copy of the 2012 FSSD Plans to the defendant, even though these plans were in the plaintiff's possession from April 2012, even though those plans obliged the plaintiff to construct the fourth floor of Oxley Tower with the softscape areas elevated by 300mm from the hardscape areas and even though the 2012 FSSD Plans were contrary to the 2012 BCA Plans and the depiction of the fourth floor in the brochure. Further, none of the documents which the plaintiff did supply to the defendant, whether before the parties entered into the agreements or on the occasion of entering into those agreements, made any reference to the 2012 FSSD Plans or to the fact that the 2012 BCA Plans were no longer the approved building plans for Oxley Tower.

The changes to the plans for Oxley Tower

25 The two changes to Unit 1 required amendments to the plans for Oxley Tower. Making the two changes, however, proved to be more difficult for the

plaintiff to carry out than simply re-designating Unit 1's indoor and outdoor areas exactly like Unit 2's.

26 The difficulty arose because of the maximum occupant load ("MOL") for the fourth floor of Oxley Tower as calculated in accordance with the Singapore Fire Code. The MOL for a given floor of a building is the maximum number of occupants which the Singapore Fire Code deems can be evacuated safely and in a timely manner from that floor in the event of fire. The MOL for a floor is determined by factors which are unrelated to the use of the units on the floor.[21]

27 The occupant load of a particular floor calculated in accordance with the Singapore Fire Code cannot exceed the MOL for the floor. The occupant load of a floor is calculated by dividing its floor area into a number of sections based on the intended use of each section as indicated on the building plans. The area of each section in square metres is then multiplied by the occupant load factor which the Singapore Fire Code assigns to the intended use for that section. That calculation gives the occupant load for each section. The occupant load for the whole floor is simply the sum of the occupant loads for all of the sections in use on that floor.

28 The MOL for the fourth floor of Oxley Tower is 240 persons. The difficulty which the plaintiff faced in making the two changes to Unit 1 is that the Singapore Fire Code allocates to a gym or spa an occupant load factor which is less than one-third that of a restaurant. The plaintiff therefore could not carry

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[21] Appellant's Core Bundle at p 33, [80].

out the two changes simply by re-designating Unit 1's indoor area as a restaurant and its outdoor area as a garden.

29 There were two alternatives open to the plaintiff to carry out the two changes. First, the plaintiff could have left the occupant load for Unit 1 unchanged from that of a gym or a spa, *ie*, less than one-third that of a restaurant. This would have left the fourth floor's occupant load unchanged, *ie*, less than or equal to the MOL, but at the cost of impairing Unit 1's viability as a restaurant. That would also have meant that Unit 1 would arguably no longer be "exactly like" Unit 2 (see [10] above), having a maximum occupancy of less than one-third that of Unit 2. The alternative was to increase the occupant load of Unit 1 by a factor of more than three to that of a restaurant while making corresponding reductions to the occupant load for the remaining sections of the fourth floor to ensure that the MOL was not exceeded.

30 The plaintiff chose the second alternative. It reduced the occupant load in other sections of the fourth floor by raising the softscape areas on the whole of the fourth floor and by rendering them inaccessible to human traffic. This allowed the plaintiff to allocate zero occupant load to the enlarged softscape areas and to allocate the occupant load thereby saved to increase the occupant load of Unit 1.

31 The plaintiff executed this second alternative by making four changes to the building plans for the fourth floor of Oxley Tower. First, the plaintiff reduced the hardscape areas by about 20%. Second, it increased the softscape areas by about 12%. Third, it elevated the increased softscape areas by 450mm (from 300mm as reflected in the 2012 FSSD Plans) from the hardscape areas and planted them over with trees and shrubs. Fourth, it reduced the occupant load for Unit 2 and allocated that occupant load also to Unit 1. These changes

affected the whole of the fourth floor: not only the hardscape and softscape areas of Unit 1 but also of Unit 2.[22]

32 The plaintiff reflected these four changes in a further set of plans which it submitted to the BCA and the FSSD in 2016 ("the 2016 Plans"). The BCA and the FSSD duly approved the 2016 Plans. The plaintiff constructed the fourth floor of Oxley Tower in accordance with the 2016 Plans.

33 At some point before it committed itself to constructing Oxley Tower in accordance with the 2016 Plans, the plaintiff had the right under the December 2012 Letter either to decline to carry out the two changes which the defendant had requested or to accept the terms imposed by the authorities for carrying out the two changes. In either event, the plaintiff was obliged to serve notice on the defendant either: (a) informing the defendant that the plaintiff had decided not to carry out the changes; or (b) informing the defendant of the terms which the authorities had imposed for making the two changes. That would then have given the defendant 14 days in which to terminate the contract and claim a refund of all progress payments. For whatever reason, the plaintiff did not serve notice on the defendant under the December 2012 Letter. The plaintiff instead decided unilaterally to carry out the two changes and to accept the terms imposed by the authorities for doing so.

The dispute

34 The plaintiff delivered vacant possession of the Units to the defendant under the agreements in December 2016. The defendant was dissatisfied with both Unit 1 and Unit 2. Amongst other things, the softscape areas for the entire

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22 Appellant's Core Bundle at pp 41 – 42, [101].

fourth floor had been rendered completely inaccessible to human traffic. The defendant claimed to be entitled to exercise a contractual right under cl 15.4 of the agreements to terminate the agreements and to seek a refund from the plaintiff.[23] The plaintiff rejected the defendant's claim.

35 The defendant therefore commenced the arbitration under the agreements.

The arbitration

36 Clause 15.4 of Form D governs the defendant's right to terminate the agreements and to secure a refund. A purchaser's right to terminate an agreement in Form D arises under cl 15.4 only if a comparison of "the final approved building plans" to "the plans and specifications approved by the Purchaser at the date of this Agreement" show that they "differ substantially". If this condition is satisfied, the purchaser is entitled to terminate the agreement and the vendor is obliged to "refund all moneys paid by the Purchaser with interest". If the condition is not satisfied, the purchaser is obliged to complete. The five questions on appeal turn on the interpretation, within the meaning of cl 15.4, of these three critical phrases which I have put in quotation marks in the preceding sentences.

37 I now set cl 15.4 out in full, with the three critical phrases in italics:[24]

> If the final approved building plans for the Unit and the Building *differ substantially* from the *plans and specifications approved by the Purchaser at the date of this Agreement*, the Purchaser has the right to terminate this Agreement; and if this happens —

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23 Appellant's Core Bundle at pp 109, 144.

24 Appellant's Core Bundle at pp 109, 144.

(a) the Vendor must *refund all moneys paid by the Purchaser* with interest calculated at the rate of 10% per annum; and

(b) upon such payment, neither party will have any claim against the other.

Any dispute as to whether the Unit when built differs substantially from the approved plans and specifications is to be referred to arbitration under the Arbitration Act (Cap. 10).

[emphasis added]

38 There is no dispute that the 2016 Plans are the "final approved building plans" within the meaning of cl 15.4. There is also no dispute that the four changes which the plaintiff made in the 2016 Plans (see [31] above) amount to differences from the 2012 BCA Plans within the meaning of cl 15.4.

39 The defendant succeeded in persuading the arbitrator on all of the remaining points relating to the three critical phrases. The arbitrator held as follows. First, "the plans and specifications" in cl 15.4 were the 2012 BCA Plans, subject only to the two changes which the defendant requested, and thus did not include the 2016 Plans or the 2012 FSSD Plans.[25] Second, the four changes (see [31] above) between the 2012 BCA Plans and the 2016 Plans meant that the 2016 Plans *did* "differ substantially" from the 2012 BCA Plans subject to the two changes.[26] The condition in clause 15.4 was therefore satisfied. The defendant was accordingly entitled to terminate the agreements.[27] Finally, the plaintiff's obligation to "refund all moneys" to the defendant under cl 15.4 encompassed not only money which the defendant had paid to *the plaintiff* by reason of the terminated agreements but also the money which the defendant had paid to *third parties* by reason of the agreements.[28]

Questions on appeal

40 On appeal, the plaintiff poses five questions of law on the interpretation of cl 15.4 under two headings:

> (a) Where the Building and Construction Authority of Singapore ('BCA') approves building plans for a commercial property

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25 Appellant's Core Bundle at p 27 – 29, [69]–[73].

26 Appellant's Core Bundle at p 42 – 43, [102]–[104].

27 Appellant's Core Bundle at p 43, [105].

28 Appellant's Core Bundle at p 46, [116].

> subject to outstanding 'clearances from the technical departments as indicated below', are the requirements of the technical departments part of 'the plans and specifications approved by the Purchaser' for the purposes of clause 15.4 of the prescribed form of sale and purchase agreement ('Clause 15.4') under s 5 of the Sale of Commercial Properties Act (Cap 281, 1985 Rev Ed), and r 7 of the Sale of Commercial Properties Rules (Cap 281, R 1, 1999 Rev Ed) (read with the actual standard form agreement set out in Form D of the Schedule to the Sale of Commercial Properties Rules) (collectively, 'the Legislation')?
>
> (b) Where a purchaser of commercial property under development under the terms of the form of sale and purchase agreement prescribed by the Legislation requests that changes be made to specifications of the unit in the course of construction,
>
> > (i) Would the purchaser be entitled to rely on Clause 15.4 where he has not formally approved of the plans and specifications incorporating the changes requested, or is he left to his remedies at common law?
> >
> > (ii) What constitutes a substantial difference under Clause 15.4 when comparing the plans and specifications incorporating changes requested by the said purchaser and the final approved plans and/or the units as-built? In other words, do the requests and changes (including those necessary to obtain approvals from the relevant authorities) constitute 'the plans and specifications approved by the Purchaser'?
> >
> > (iii) What is the relevance of the restrictions on commercial use contained in clauses 25 and 26 in the prescribed form of sale and purchase agreement when considering what constitutes a substantial difference under Clause 15.4 when comparing the plans and specifications incorporating changes requested by the said purchaser and the final approved plans and/or the units as-built?
> >
> > (iv) What constitutes 'all moneys paid by the Purchaser' under Clause 15.4 that ought to be refunded by the Vendor, in the event of there being a substantial difference as per the previous question?

41 All five of these questions turn on the interpretation of the three critical phrases in cl 15.4 which I have italicised at [36] above. Questions (a) and (b)(i) turn on the interpretation of "the plans and specifications". Question (b)(ii) turns

on the interpretation of "the plans and specifications" and "differ substantially". Question (b)(iii) turns on the interpretation of "differ substantially". Question (b)(iv) turns on the interpretation of "refund all moneys".

42 The answer to all of the plaintiff's questions of law requires me first of all properly to interpret each of these three phrases. It is to that exercise which I now turn. I begin that exercise by considering the general approach which I should take to construing Form D as a whole and cl 15.4 in particular. I then consider the parties' specific arguments on the interpretation of each of the three phrases in turn.

The approach to construing the agreements

43 In ordinary circumstances, it would be axiomatic that I should ascertain the meaning of these three critical phrases by applying the usual principles of contractual interpretation. These principles are well-established and need not be repeated here. They have been set out comprehensively in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029, *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 and most recently in *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd* [2015] 5 SLR 1187 at [30]–[42]. It suffices for present purposes to note that the objective of contractual interpretation is to interpret the text by which the parties have expressed their bargain in its context in order to ascertain objectively and give effect to the parties' intention, bearing in mind always that the context cannot be used as a pretext to rewrite the text.

44 The parties' agreements are not, however, ordinary contracts. A vendor and a purchaser of commercial property are statutorily prohibited from exercising the freedom they would ordinarily enjoy to negotiate their bargain and to express it in a text of their own choosing. Parliament has, by both primary

and subsidiary legislation, curtailed the parties' freedom of contract almost entirely. The Act mandates that *every* vendor and purchaser of commercial property must contract to sell and purchase that property on standard terms. The Rules prescribes those standard terms.

45 The legislative origin of the parties' agreements raises the question whether they should be construed by applying the rules of interpretation which apply to statutes or the rules of interpretation which apply to contracts. The defendant submits that the agreements "should be read in a manner that would promote their underlying legislative objective, similar to the purposive approach of statutory interpretation".[29] The defendant then cites authorities on statutory interpretation which it submits I should apply in interpreting the agreements.

Form D takes effect as a contract

46 I do not agree that the agreements are to be interpreted as legislation. That is subject only to the important qualification which I set out at [57]–[76] below.

47 Parliament could have prescribed the terms on which vendor and purchaser must sell and purchase commercial property directly by legislation. Those terms would then derive their force directly from parliament's legislative power. If parliament had adopted that approach, it would be not only appropriate but necessary to ascertain the scope of the rights and obligations of vendor and purchaser by applying the principles of statutory interpretation to the legislation.

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[29] Respondent's Case at para 33.

48 That is not what parliament did. Parliament instead chose to prescribe the terms on which vendor and purchaser must sell and purchase commercial property *indirectly*, through the medium of the contract. The only direct application of parliament's legislative power in this model is in mandating by legislation that every vendor and every purchaser use the set of terms which parliament has prescribed.

49 By adopting this indirect route, and by limiting the use of its legislative power to channelling the parties to a prescribed contract, parliament has indicated its intention that the legal relationship between a vendor and a purchaser should be regulated by the same private law construct which private parties use voluntarily to confer bargained-for rights and to undertake bargained-for obligations in exchange for consideration.

50 It is true that vendor and purchaser now enter into this contract under statutory obligation and on terms prescribed for them by parliament. In that sense, voluntariness and bargaining is a fiction. But it is not a total fiction. There remains real voluntariness and real bargaining bilaterally as to whether to enter into the sale and purchase transaction at all, and if so, as to the consideration which is to change hands. Voluntariness and bargaining are lacking only in the choice of the specific and granular terms which will regulate the parties' legal relationship.

51 The key point, however, remains that parliament chose to locate the parties' legal relationship in the private law construct of the contract rather than in the public law construct of legislation. Parliament thereby chose to subject the parties' legal relationship to all of the doctrines and rules of the law of contract, from formation to discharge to remedies. An integral component of those doctrines and rules is the body of principles of contractual interpretation.

It is precisely because parliament intended the ordinary law of contract to do all of the heavy lifting in regulating the parties' legal relationship and in achieving parliament's intent that the Act and the Rules can be as brief as they are: the Act contains only five sections and the Rules contain only eleven rules.

52 It therefore appears to me that the principles of contractual interpretation – rather than the principles of statutory interpretation – must be the starting point in ascertaining the scope of the parties' rights and obligations arising out of an agreement in Form D, just as if they had bargained and entered voluntarily into a sale and purchase agreement for commercial property in the complete sense of those words.

53 Subject only to the points I make at [57]–[76] below, I interpret the parties' agreements in the same way as I would any other contract, *ie* by applying the contextual approach to contractual interpretation. I do not accept the defendant's submission that the agreements are to be interpreted for all purposes in the same way as legislation.

54 I am conscious that the Court of Appeal appears to have taken a view opposite to this in a judgment handed down after my decision in this case. In *Orion-One Development Pte Ltd (in liquidation) v Management Corporation Strata Title Plan No 3556 (suing on behalf of itself and all subsidiary proprietors of Northstar @ AMK) and another appeal* [2019] 2 SLR 793 ("*Orion-One*") at [32], the Court of Appeal expressed the view that an agreement in Form D is to be interpreted as legislation:

> We also find it inappropriate … to rely so heavily on the legal background to the [Rules] … because in interpreting *legislation (the* [*parties' agreements*] *are statutorily prescribed)*, primacy should be accorded to the text of the provision and its statutory context over any extraneous material …
>
> [emphasis added]

I am of course bound by the doctrine of *stare decisis*. And I must accept that the Court of Appeal in *Orion-One* was considering the proper approach to construing the very same standard-form sale and purchase agreement which I must now interpret.

55 But for two reasons, and with respect, I do not consider that it is contrary to the doctrine of *stare decisis* or the authority of *Orion-One* for me to take as my starting point the ordinary principles of contractual interpretation in interpreting an agreement in Form D. First, the point was not argued in *Orion-One* and therefore does not form part of its *ratio*. The point which the Court of Appeal is addressing in this passage is not whether Form D should be interpreted as an agreement or as legislation. The Court of Appeal is pointing out that the correct approach to interpreting legislation is to accord primacy to the text of the legislation over any extrinsic material. Second, it seems to me that – insofar as the principles of statutory interpretation differ materially from the principles of contractual interpretation – these differences of principle make no difference to the final analysis in this case.

56 I therefore conclude that the consequence of parliament's choice to regulate the rights and obligations of a vendor and purchaser of commercial property through a contract mandated and prescribed by legislation is that the principles of contractual interpretation are the starting point in ascertaining the scope of those rights and obligations. That conclusion is subject only to the two points which I make next.

The legislative purpose of the Act is part of the context

57 One of the principles of contractual interpretation is that a court must consider the context of the parties' agreement when ascertaining objectively the parties' intention. In my view, the legislative origin of Form D and parliament's

purpose in enacting the legislative scheme of which Form D is an integral component are essential aspects of the context of any agreement in Form D. It is only in that sense that I accept the defendant's submission that I should have regard to Form D's legislative origin and parliament's purpose.

58 I must therefore ascertain parliament's purpose in enacting the legislative scheme in order properly to interpret the parties' agreements in Form D. Ascertaining this purpose is undoubtedly an exercise in statutory interpretation.

59 Section 5 of the Act obliges every sale and purchase of commercial property to take place on standard terms prescribed by subsidiary legislation. The section also nullifies any inconsistent terms which the parties may have agreed, to the extent of the inconsistency:

> **Terms and conditions in an agreement for sale**
>
> 5. —(1) Every agreement for the sale and purchase of a commercial property shall contain such terms and conditions of sale as may be prescribed by rules made under this Act.
>
> (2) Any term or condition of sale in an agreement of sale and purchase referred to in subsection (1) which is inconsistent with the terms and conditions of sale prescribed by rules made under this Act shall to the extent of the inconsistency be null and void.

60 The subsidiary legislation contemplated by s 5(1) of the Act are the Rules. The Rules are enacted under s 10(1)(*d*) of the Act. Rule 7 obliges every agreement for the sale and purchase of commercial property to be in Form D of the Rules. It also prohibits and nullifies any amendment to Form D without the prior approval of the Controller of Housing. Rule 7 provides as follows:

> **Sale and purchase agreement**
>
> 7. —(1) An agreement made between a developer and a purchaser for the sale and purchase of any commercial

> property to which the Act applies shall be in Form D in the Schedule.
>
> (2) No amendment, deletion or alteration shall be made to the agreement referred to in paragraph (1) without the prior approval in writing of the Controller.
>
> (3) Any amendment, deletion or alteration made to the agreement referred to in paragraph (1) without the prior approval in writing of the Controller shall be null and void.
>
> …

61 What then was parliament's purpose in enacting the legislative scheme? That can be gleaned only by interpreting s 5 of the Act, Rule 7 of the Rules and Form D. Section 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) requires a court, when interpreting a statute, to favour an interpretation which would promote the purpose or object of a statute over an interpretation which would not. This is the purposive approach to statutory interpretation. If either of the conditions set out in s 9A(2)(*a*) or (*b*) are satisfied, a court is empowered to have regard to material which is extrinsic to the legislation and which can assist in ascertaining the statute's meaning. Under s 9A(3)(*c*) and s 9A(3)(*d*), this extrinsic material includes parliamentary speeches moving the legislation and debates on the legislation. But even under the purposive approach, primacy must be accorded to the legislative text by which parliament has expressed its intent: *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [43].

62 The defendant submits – and I accept – that the purpose of the Act is to protect purchasers against developers abusing the imbalance of transactional power in their favour to impose inequitable terms when selling commercial property. The Minister for National Development at the time the Act was moved in parliament expressly gave this as the Act's purpose (see *Singapore Parliamentary Debates, Official Report* (30 March 1979) vol 39 at cols 319–320):

> There have been complaints from the public about the inequitable manner in which some developers conduct the sales of their shop units …
>
> … Rules to be enacted under this bill will require agreements for sale and option forms to contain such terms and conditions as may be prescribed. Any terms or conditions of sale which are inconsistent with the prescribed terms shall be null and void…
>
> … The Bill will put an end to prevailing abuses by developers. By laying down proper safeguards, it will inject confidence in commercial property transactions thereby encouraging the healthy development of this sector.

63 Parliament must have been aware, of course, that a purchaser of commercial property to be used as business premises is not in need of protection in the same sense as a purchaser of residential property to be used as a private dwelling. And parliament must also have been aware that it is always possible in a sale of any property to have an unsophisticated developer dealing with a sophisticated purchaser who is labouring under no imbalance of transactional power or who may, in fact, wield superior transactional power to the developer.

64 But the fact remains that developers as a class have greater transactional power than purchasers as a class. This is simply because developers are generally repeat players in the market for commercial property and are therefore generally more sophisticated in the subject-matter of the transaction than

purchasers generally are. As a result, developers as a class therefore have greater opportunity and temptation to abuse that power.

65 And, from a purchaser's perspective, it remains the case that a purchase of commercial property in Singapore, just like a purchase of residential property, is likely to be the most substantial financial transaction that any Singaporean will make in a lifetime. Purchasers are generally less able to bear or mitigate the magnitude of that financial risk than developers generally are.

66 It is to protect purchasers as a class in purchasing commercial property from developers as a class that parliament passed the Act. That remains the purpose even though not every developer will seek to abuse the imbalance of transactional power and not every purchaser may need, or indeed want, parliament's protection.

67 There are two unique features of parliament's purchaser protection purpose which I explore next. First, the protection is positive and not merely passive. Second, the protection is paternalistic.

Positive purchaser protection

68 Parliament could have adopted two approaches to protect purchasers. The first approach is merely to defend purchasers against the depredations of developers who abuse their transactional power to impose standard terms upon purchasers which are tilted in the developer's favour. This approach would have resulted in a standard form agreement which is the paradigm of the neutral agreement which a developer and a purchaser, dealing at arm's length and with equal transactional power, would have negotiated and agreed. An agreement of this type would therefore allocate contractual risk in a commercially even-handed way as between developer and purchaser. The second approach is by

arming purchasers with a standard form agreement which positively protects purchasers by actively shifting contractual risk from purchasers to developers.

69 The Act has chosen the second approach. As a result, Form D goes well beyond merely neutralising the imbalance of transactional power between developers and purchasers. Instead, Form D includes terms which positively reallocate risk to developers. In that sense, parliament's purpose is not merely passive purchaser protection but positive purchaser protection.

70 An example of positive purchaser protection is cl 15 itself. This is the principal clause of which cl 15.4 is merely the fourth and final limb. Clause 15 positively allocates to the developer the full risk of a cost increase arising from a change in the specifications and plans and allocates to the purchaser the full benefit of a cost reduction arising from such a change. Clause 15 provides as follows:

> **Changes from Specifications and Plans**
>
> 15.1 In the course of erecting the Unit, the Vendor shall ensure that no changes from the Specifications and approved plans shall be made except as follows:
>
> (a) changes which have been approved or are required by the Commissioner of Building Control or other relevant authorities; or
>
> (b) changes which have been certified by the Vendor's qualified person as convenient or necessary.
>
> 15.2 The Purchaser need not pay for the cost of any such changes.
>
> 15.3 In the event that any such change involves the substitution or use of cheaper materials or an omission of any works or a reduction in the scale of works originally agreed to be carried out by the Vendor, the Purchaser shall be entitled to a corresponding reduction in the Purchase Price or to damages.
>
> 15.4 If the final approved building plans for the Unit and the Building differ substantially from the plans and specifications approved by the Purchaser at the date of this Agreement, the

> Purchaser has the right to terminate this Agreement; and if this happens —
>
> (a) the Vendor must refund all moneys paid by the Purchaser with interest calculated at the rate of 10% per annum; and
>
> (b) upon such payment, neither party will have any claim against the other.

71 Clause 15 exemplifies positive purchaser protection in three ways. First, it prohibits a developer from making unilateral changes to specifications and plans in the course of constructing a unit. Clause 15.1 allows a developer to make a change if and only if the regulatory authorities approve or require the change or the developer's qualified person certifies that the change is necessary or convenient. Second, if cl 15 allows a change which *increases* a developer's costs, cl 15.2 actively allocates the risk of that increase to the developer in full. But third, if cl 15 allows a change which *reduces* a developer's costs, cl 15.3 allocates the *benefit* of that reduction to the *purchaser* in full.

Paternalistic purchaser protection

72 Parliament's purpose is not merely positive purchaser protection it is also paternalistic. To prevent a developer and a purchaser from circumventing parliament's purpose, s 5(2) of the Act read with r 7(2) of the Rules expressly prohibit the parties from amending, deleting or altering the terms prescribed in Form D without the approval of the Controller of Housing. Any attempt to do so is nullified by s 5(2) of the Act and r 7(3) of the Rules. The attempt is also criminalised bilaterally by s 6 of the Act and r 10 of the Rules. The result is that no purchaser can disclaim unilaterally parliament's positive protection.

73 The legislative scheme shows that parliament is so concerned about the imbalance of transactional power between developers and purchasers and about the risk of developers abusing that imbalance that it does not accept that it is

safe to let purchasers look after their own interests in any negotiation. That is so even if the negotiation takes Form D's positive protection for the purchaser as a starting point, subject only to amendments which are bargained-for and agreed. As far as parliament is concerned, it does not matter whether the purchaser consents to the amendment or even whether the amendment is – on any rational and objective view – to the purchaser's undeniable advantage or to the developer's undeniable disadvantage. *Any* amendment to Form D must be independently scrutinised and approved by an independent, government-appointed regulator to avoid undermining the positive protection for the purchaser in Form D. Parliament is determined paternalistically to protect purchasers positively regardless of any given purchaser's subjective characteristics or wishes.

The premise of purchaser protection

74 Extending such broad and far-reaching protection to purchasers entails significant trade-offs and carries a significant risk of unintended consequences. Compelling developers to contract on standard terms which they did not agree to, which are positively drafted to shift risk to developers and away from purchasers and which developers are prohibited from modifying even with the consent of purchasers could well disincentivise developers from erecting and retailing commercial property. At the very least, it could drive up the price of commercial property with broader economic ramifications. A stable and consistent supply of commercial property at economically viable prices is, after all, a net economic and social good. But the premise of the legislative scheme must be that the degree of risk which Form D allocates to developers and entrenches is a degree of risk which they are well able to bear and willing to bear; and thus will not disincentivise developers. And indeed, the premise has been vindicated.

75 As I have already said, developers as a class are sophisticated repeat players in the commercial property market. They are repeat purchasers of land, repeat retailers of commercial units and repeat purchasers of all the associated professional and other services. These include the services of construction companies, the services of professional consultants such as architects and engineers and the services of legal advisers. Developing and retailing commercial property is also capital-intensive. Developers therefore have the sophistication, the access and the financial wherewithal to secure the full range of professional advice and assistance which is necessary to assess and mitigate the risks of contracting to sell commercial property subject to parliament's positive purchaser protection. Developers also have the commercial sophistication to realise when they need to seek that advice and assistance and to assess when and how to act upon it. Furthermore, if that advice and assistance discloses to them that Form D exposes them to a risk which they cannot mitigate, either generally or in a particular transaction, developers are well-placed to seek further professional advice in order to price that risk into the transaction and have the holding power to refuse to transact until that price is met.

Relevance of legislative source in interpreting Form D

76 Bearing all this in mind, it appears to me that the legislative source of Form D has relevance as part of the context of an agreement in Form D. That has an important consequence when interpreting an agreement in Form D. The purpose of interpreting an agreement is to ascertain and give effect to the parties' intention, objectively ascertained. To do that, it is usual to start from the premise that the parties are unlikely to have intended their agreement to have a result which is uncommercial. An uncommercial result is typically one which rational parties bargaining on equal footing and at arm's length are unlikely to

have agreed. The paradigm uncommercial term is one which places a substantial burden on one party with either no countervailing benefit for that party or with no countervailing burden on the counterparty.

77 The purpose of the legislative scheme, and the presumed sophistication of developers on which that purpose is premised, means that the usual starting point will not necessarily hold when construing an agreement in Form D. In other words, it will not be as easy to reject a possible interpretation of a term in Form D simply because the result of the interpretation would be considered objectively to be uncommercial or commercially absurd in an ordinary agreement negotiated at arm's length. A result which would otherwise be uncommercial or commercially absurd may well make perfect sense when construed against Form D's purpose, when that purpose is considered as part of the agreement's context.

78 A developer who is compelled to contract in Form D is, in that sense, intentionally exposed to a whole host of uncommercial risks by parliament. This is a feature of Form D, not a bug.

79 This feature can lead to surprising outcomes when combined with another feature of contract law. Liability for breach of contract is strict. Subject to the parties' contrary agreement and the doctrine of frustration, contractual liability does not ordinarily depend on the innocent party showing that the contract-breaker is at fault for failing to keep its promise.

80 A developer who breaches an agreement in Form D may therefore find itself liable in contract to the purchaser even if the breach is unconnected to any fault on the developer's part and even if the liability would be considered an uncommercial result, so long as holding the developer liable advances the

purpose of the legislative scheme. There is nothing unfair about this result. The typical developer who finds itself in this position will generally be one who has failed *ex ante* to use the means and resources at the disposal of a developer to mitigate, eliminate or price that risk or one who has chosen to bind itself to Form D regardless of the risk.

81 Bearing these observations in mind, I turn now to interpret the three phrases in cl 15.4 on which the plaintiff's five questions turn.

"The plans and specifications approved by the Purchaser"

82 The first of the three critical phrases is "the plans and specifications approved by the Purchaser at the date of the Agreement". I shall refer to this phrase by the shorthand "the plans…". There is no dispute that "the plans…" encompasses *at least* the 2012 BCA Plans and the two changes to Unit 1 (see [12] above). The arbitrator agreed with the defendant that that is *all* that "the plans…" encompasses. The result is that the four changes which the plaintiff made in the "final approved building plans", *ie*, in the 2016 Plans (see [31] above), are indeed differences from "the plans…" as found by the arbitrator, leaving only the question whether they are substantial differences.

83 The plaintiff submits that the arbitrator was wrong in his holding. The plaintiff's primary case on appeal is that "the plans…", properly interpreted, *also* encompasses the 2016 Plans. The plaintiff's alternative submission is that "the plans…" at the very least *also* encompasses the 2012 FSSD Plans.

84 I reject both the plaintiff's principal and alternative submissions. In my view, the arbitrators' interpretation of this phrase is correct. I analyse the plaintiff's primary and alternative submissions in turn.

"The plans…" does not include the 2016 Plans

85 The plaintiff's primary submission proceeds in two steps as follows. First, "the plans…" is capable, properly interpreted, of encompassing: (a) plans which the authorities have approved and are existing at the time a purchaser enters into an agreement in Form D to purchase a unit; *as well as* (b) plans which come into existence later, *ie*, after the date on which the parties enter into an agreement in Form D. The second step is that "the plans…" therefore encompass later plans if the later plans include changes to the existing plans

which are either requested by the purchaser or which are consequential changes necessary to accommodate changes requested by the purchaser.[30] Applied to the facts of this case, this means that "the plans…" encompasses the 2016 Plans. That is because all four of the changes which the plaintiff made in the 2016 Plans as compared to the 2012 BCA Plans were the necessary consequence of accommodating the two changes which the defendant requested to Unit 1.

86 I do not accept either step of this submission. In my view, "the plans…" is incapable of encompassing later plans, *ie*, any plans which come into existence after the date on which a developer and a purchaser enter into an agreement in Form D. That is the case no matter what the connection is between the existing plans and any later plans. That is also the case even if the later plans reflect only those changes which are necessary to accommodate a change requested by a purchaser to existing plans.

"The plans…" are incapable of encompassing later plans

87 I begin with a textual analysis of "the plans…". There are three textual components of this phrase: (a) the noun phrase, "the plans and specifications"; (b) the verb phrase, "approved by the Purchaser"; and (c) the temporal expression "at the date of this Agreement".

88 There is no controversy as to the meaning of the three textual components in and of themselves. The noun phrase in and of itself is capable conceptually of encompassing any of the three sets of building plans in this case: the 2012 BCA Plans, the 2012 FSSD Plans and the 2016 Plans. They are all "plans…" of some sort.

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30 Appellant's Case at paras 23(e) to 24.

89 There is also no controversy as to the meaning of the verb phrase. "Approve" means simply "officially agree to or accept as satisfactory". "Approved" is the simple past tense of "approve". The simple past tense is the tense used for a discrete, noncontinuous act in the past. "Approved by the Purchaser" therefore means the discrete, noncontinuous act by the purchaser of officially agreeing to or accepting "the plans…" at some point in the past.

90 Finally, there is no controversy as to the meaning of the temporal expression. "At the date of this Agreement" supplies and fixes a point in the past, *ie*, before the date on which the comparison mandated by the condition in cl 15.4 is made. The point in the past which is relevant to cl 15.4 is the date on which the parties entered into the sale and purchase agreement in Form D.

91 It is common ground that the temporal expression modifies the verb phrase. The scheme of cl 15.4 makes no provision for a purchaser to approve "the plans…" in any specific way. Thus, entering into a sale and purchase agreement in Form D is not just the act by which a purchaser becomes contractually bound to the developer. It is also the very act by which the purchaser approves "the plans…".

92 It is the defendant's case that the temporal expression *also modifies* the noun phrase. The result is that the noun phrase encompasses only those plans which exist "at the date of [the] Agreement".

93 The plaintiff's submission is that the temporal expression does *not* modify the noun phrase. The submission proceeds as follows. The purpose of the temporal expression is to fix *only* the point in the past when the purchaser approved "the plans and specifications". The temporal expression, properly interpreted, does *not* modify the noun phrase and therefore does *not* fix the point

in time in the past when "the plans and specifications" must have existed.[31] Interpreted alone and *without* the temporal expression, the noun phrase is wide enough to encompass *any* "plans and specifications", regardless of when they came into existence. It is therefore capable of encompassing the 2016 Plans even though they came into existence *after* the parties had entered into the agreements.

94 I do not accept the plaintiff's submission. It is a strained and artificial interpretation of the entire phrase. The defendant's interpretation is the far more natural reading of the phrase. In my view, the defendant is correct that the temporal expression modifies not only the verb phrase but also the noun phrase. It fixes contractually the point in time when "the plans and specifications" must have existed. I say that for four reasons.

95 First, given the sequence in which the three textual components appear in the introductory phrase of cl 15.4 – "[i]f the final approved building plans for the Unit and the Building differ substantially from the plans and specifications approved by the Purchaser at the date of this Agreement" – it appears to me as a simple matter of language that the temporal expression is intended to modify both the verb phrase and the noun phrase. It is significant to me that the temporal expression follows both phrases. If the temporal expression modified only the verb phrase, I would have expected it to be inserted into the verb phrase and to come immediately after the verb. The immediate proximity of the temporal expression to the verb phrase would then have indicated a clear intent that it modifies *only* the verb itself and no part of the noun phrase. But that is not how

[31] Appellant's Case at para 38.

cl 15.4 is drafted. The natural reading of the clause as drafted is that the temporal expression modifies the noun phrase as well as the verb phrase.

96 Second, cl 15.4 uses the definite article in the noun phrase: "*the* plans and specifications approved by the Purchaser". The use of the definite article, to my mind, indicates an intention to refer to a *specific* set of plans in the *specific* form in which they exist at a *specific* point in time. That point in time can only be the time at which the parties entered into the agreement. The definite article is not apt to describe plans and specifications which do not yet exist or plans and specifications which exist but whose contents are capable of shifting over time, *ie*, which were subject to change after the parties entered into the agreement. Plans and specifications of that type would not be referred to in the agreement with the definite article as "*the* plans and specifications" but as just "plans and specifications", just as I have done at the beginning of this sentence.

97 Combining my first and second reasons together, I would not consider the plaintiff's interpretation to be even arguable as a matter of language unless the introductory phrase of cl 15.4 read as follows (with the amendments shown in strikethrough and underlining): "If the final approved building plans for the Unit and Oxley Tower differ substantially from ~~the~~ plans and specifications approved <u>at the date of this Agreement</u> by the Purchaser ~~at the date of this Agreement~~, the Purchaser has the right to terminate this Agreement…". Even then, I say only that the plaintiff's submission would be arguable, not that it could or would succeed. But even that is not how cl 15.4 has been drafted.

98 Third, what I have found to be the natural interpretation of this phrase appears to me to be in accordance with what would ordinarily be the commercial intention of the parties to an agreement to buy property off-the-plan, *ie*, sight unseen and before the property exists in physical form. Virtually all transactions

for new-build residential and commercial property in Singapore take place off-the-plan. The defendant's purchase of the Units is no exception. A purchase off-the-plan carries substantially more risk for a purchaser than for a developer. There is the risk that the developer may collect all or part of the progress payments and misapply the money. There is the risk that the developer may face delays in completing construction. There is the risk that the developer may fail before completing construction. There is the risk that the developer will deviate from the parties' agreement and attempt to deliver upon completion a unit which is materially different from that which the purchaser agreed to buy. That is an especially significant commercial risk because the purchaser cannot mitigate the risk by inspecting the property to verify for itself the developer's contractual description.

99 The date on which the parties enter into a sale and purchase agreement has commercial and legal significance for both the developer and the purchaser. That is the date from which their commercial bargain binds them legally. That date accordingly draws a line which divides their unbound past from their bound future. Where the subject-matter of an agreement does not yet exist, commercial parties will expect and tolerate changes and uncertainty in the description of what is to be delivered up to this dividing line but are most unlikely to accept any changes or uncertainty beyond the line. That is especially the case when the power to change what is to be delivered rests only on one side of the agreement, as it does with a developer who sells a unit off the plan.

100 The risk of a developer making unilateral changes is a commercial risk which any purchaser is unlikely to accept. That is so even if the purchaser and the developer agree to change the description of what is to be delivered before they are bound by contract and even if the later changes are said to be necessitated by the agreed changes. In a case of that type, the purchaser's

submission would allow a developer unilaterally to bring into existence amended plans at some undefined point in the future and to bind the purchaser to those amended plans sight unseen, based purely on the assent given by the purchaser when the parties entered into the agreement. That appears to me to be an uncommercial interpretation. It compounds the risk of purchasing property off the plan rather than eliminating or even mitigating that risk. If the intent of cl 15.4 is to capture not only existing but later plans, it appears to me that cl 15.4 would use express words to convey and achieve that intention.

101 Finally, the interpretation which the plaintiff advances is inconsistent with the purpose of the legislative scheme. The general purpose of the legislative scheme is to protect purchasers against inequitable conduct by developers abusing the imbalance of transactional power. Form D was specifically drafted to cover a sale and purchase of commercial property off the plan and to address the unique risks of that type of transaction. The specific purpose of cll 15.1 to 15.3 (see [70] above) is to protect a purchaser positively by curtailing a developer's right to make post-contractual and unilateral changes in the description of the unit. Clause 15 achieves this by prohibiting developers from making changes to "the plans…" unilaterally in the course of constructing a unit. Clause 15.1 begins with express words removing the developer's right to make unilateral changes. Clauses 15.2 and 15.3 then set out the only two classes of permitted changes: those required by the authorities and those certified by the developer's qualified person as being necessary or convenient. These restrictions take effect with regard to a particular unit once the developer enters into an agreement in Form D to sell that unit to a purchaser.

102 The interpretation advanced by the plaintiff would amount to giving a developer *carte blanche* to make unilateral changes to "the plans…" so long as the changes are necessary to accommodate changes agreed pre-contractually

between the developer and the purchaser. The effect is that, in such a case, the condition in cl 15.4 will never be satisfied so long as the unit is built in accordance with the final approved building plans. The purchaser will be contractually bound to complete even if there is a substantial difference between what the purchaser was led to believe at the date of the agreement it would receive upon completion and what the developer attempts to deliver to it upon completion. This interpretation would eviscerate the remedy which cl 15.4 provides. It would rob the purchaser of the protection which parliament intended clause 15.4 to create. As the arbitrator recognised, the plaintiff's interpretation would be the functional equivalent of deleting cl 15.4 from Form D, contrary to the prohibition in s 5(2) of the Act and r 7(2) of the Rules.[32]

103 I therefore hold that "the plans and specification approved by the Purchaser at the date of this Agreement" in cl 15.4 means *only* the plans and specifications which exist at the date on which the parties enter into an agreement in Form D. That interpretation is consistent with the language of cl 15.4, with the commercial intention objectively ascertained of the parties to an agreement to purchase real property off the plan and with the purpose of the legislative scheme.

The plaintiff's six arguments rejected

104 The plaintiff advances six arguments why its primary submission on the interpretation of "the plans…" best gives effect to the parties' intentions objectively ascertained in the light of the bargain struck when a purchaser and a developer agree pre-contractually to make changes to the unit. I have already

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[32] Appellant's Core Bundle at p 27, [69].

rejected the second of the plaintiff's six arguments at [93]–[97] above. I now reject the remaining five arguments.

(1) Uncommercial conflict of obligations

105 The first argument is as follows. Interpreting "the plans…" as set out at [85] above makes commercial sense of an agreement in Form D as a whole. Clauses 10.1 and 10.3 of Form D oblige a developer to construct a unit according to the plans approved by the BCA and the other relevant authorities and in compliance with the ongoing requirements of those authorities. It would be commercially illogical to interpret "the plans" so narrowly as to exclude later plans brought into existence purely in order to incorporate changes to the existing plans if those changes are necessary for the developer to comply with: (a) its contractual obligations under cll 10.1 and 10.3; (b) its regulatory obligations under the Building Control Act (Cap 29, 1999 Rev Ed); and (c) its bargain with the purchaser. That would amount to construing Form D as granting a purchaser a right to terminate its contract under cl 15.4 even though the developer has done nothing more than to fulfil its entire suite of obligations, *ie*, generally under Form D, under the applicable building regulations and under its specific bargain with the purchaser.

106 I reject this submission. There are three flaws in it.

107 First, the submission assumes that the existence of conflicting contractual obligations in an agreement is in itself a basis for reading down the scope of those obligations by a process of interpretation so as to protect a party from the consequences of the conflict. There is no basis for that assumption. The premise of the law of contract – and therefore the premise of the medium which the legislative scheme selected to achieve its purpose – is that obligations are voluntarily undertaken and that the parties have an opportunity to bargain

about the content of those obligations before they accept them as binding. As I have conceded, that is a fiction where parliament mandates a developer and a purchaser to contract on terms prescribed by Form D. But that curtails only the parties' usual right to bargain. As I have pointed out, the suite of rights and obligations prescribed by Form D are voluntary in the very real commercial sense that both developer and purchaser retain the freedom *not* to contract at all.

108 Because the premise of the law of contract is that contractual obligations are voluntarily undertaken, liability in contract is generally strict (see [79] above). Unless otherwise agreed, neither the exercise of reasonable care nor the constraints of necessity are, in themselves, excuses for a failure to perform. If a party to a contract finds that the aspects of the suite of obligations which it voluntarily undertook in unqualified terms end up conflicting with each other, or with its obligations under the general law, and therefore finds itself in a situation where it must of necessity breach one or another of its legal obligations, the law of contract extends that party little sympathy whether in terms of affording the party a defence or in terms of allowing that party a lavish interpretation of the terms of the agreement. The party has only itself to blame for failing to foresee the potential conflict at the time of contracting and for failing to bargain around it.

109 Second, all of this is *a fortiori* the case when dealing with an agreement in Form D. As I have explained, the purpose of the legislative scheme, of which Form D is an integral component, is purchaser protection. That purpose and the premise of that purpose both suggest that the risk of a developer undertaking conflicting obligations when contracting in Form D lies with the developer. It is contrary to that purpose to cast the risk on to the purchaser by a process of interpretation, lavish or otherwise. The burden is on developers to use the considerable resources at their disposal to mitigate, eliminate or price that risk

ex ante. They cannot plead a strained interpretation *ex post* to shift that risk to purchasers.

110 The final flaw in this submission, on the facts of this case, is that the plaintiff mischaracterises the parties' bargain. The plaintiff did not undertake an unqualified obligation to deliver Unit 1 to the defendant upon completion as a restaurant with an outdoor garden. The agreement for Unit 1 expressly provided that the plaintiff would deliver Unit 1 to the defendant upon completion as a gym or spa with an outdoor pool. In that sense, the parties' agreement to carry out the two changes to Unit 1 was a collateral agreement recorded in the December 2012 Letter, outside and supplemental to Form D. The plaintiff sought advice from its architect and must have sought advice from its lawyers before offering the conditions in the December 2012 Letter to the defendant. The plaintiff required the defendant to accept the conditions in the December 2012 Letter before agreeing to sell Unit 1 to the defendant precisely to avoid a situation where the plaintiff faced a conflict between its obligations under Form D, its ongoing regulatory obligations while constructing Oxley Tower and its bargain with the defendant. That is why the plaintiff reserved to itself the express right in the December 2012 Letter to deliver Unit 1 to the defendant as a gym or a spa provided that it had given notice to the defendant and the defendant had not exercised its right to terminate the contract.

111 If the plaintiff found itself on the horns of a contractual dilemma after agreeing to carry out the defendant's two changes to Unit 1, it had extracted from the defendant through the December 2012 Letter the means of jumping through those horns and escaping the dilemma. For whatever reason, the plaintiff did not avail itself of that escape in 2016 while Unit 1 was under construction. There is no compelling reason – whether commercial or logical – to manufacture another escape route for the plaintiff by a strained interpretation

of Form D. And there is a compelling reason not to do so arising from the purpose of the legislative scheme.

112 What the plaintiff did before agreeing to the defendant's two changes is entirely consistent with the premise of Form D. That premise is that developers as a class have greater sophistication, greater resources and greater access to professional advice on the subject matter of the agreement, *ie* commercial property, than purchasers as a class. Form D therefore considers a developer to be in the best position to protect itself *ex ante* against voluntarily undertaking conflicting obligations when agreeing to a purchaser's pre-contractual request to make changes to the unit. A developer can do that by amending the plans to reflect not only the changes agreed pre-contractually but also all consequential changes which may be necessary and then securing approval for those amended plans from both the authorities and the purchaser before agreeing to sell the unit on the terms prescribed by Form D. If that is not possible for whatever reason, the developer can protect itself by agreeing to the purchaser's request subject to express conditions which cater for later and necessary changes to the plans. A developer is well placed to secure the advice necessary to do one or the other, or indeed both. It would be contrary to the premise of Form D to read "the plans…" as encompassing the risk of later changes to existing plans when a purchaser knows nothing about those later changes and when the developer could have protected itself against that risk in any of the ways I have mentioned.

113 The plaintiff also makes the point that cll 10.1 and 10.3 give a purchaser a correlative contractual right to compel the developer to obtain all necessary consents and approvals to construct a unit even after the date of the agreement and to construct the unit in accordance with plans which come into existence even after the date of the agreement. The plaintiff submits that if the purchaser has the right to compel the developer to seek later consents and approvals and

to comply with later plans, the purchaser cannot be heard to disavow those future approvals and must be taken to have approved those later plans, especially if the approvals and plans were necessary to give effect to the purchaser's pre-contractual request for changes.

114 The flaw in this argument is that it mischaracterises the content of the phrase "the plans and specifications approved by the Purchaser at the date of this Agreement". The phrase raises a pure question of fact. It can encompass only the plans which the purchaser factually and actually approved at the date of the agreement by entering into the agreement. It does not permit a court to impute an approval to a purchaser contrary to the facts or to prevent a purchaser from disavowing an approval as the plaintiff submits. An approval imputed in this way would again be inconsistent with the purpose of the legislative scheme.

115 There may well be scope for the contractual doctrines of waiver and estoppel to achieve the result which the plaintiff submits is the contractual effect of "the plans…". Assume the plaintiff delivers Unit 1 to the defendant upon completion with the only differences between Unit 1's as-built plans and the 2012 BCA Plans being changes which the defendant requested or otherwise represented that it would accept. In that situation, the defendant will almost certainly be precluded from terminating the agreement under cl 15.4 simply because of those differences. Indeed, the defendant may well even be obliged to complete the purchase. It could then be said quite accurately that approval of the as-built plans was imputed to the defendant, contrary to the facts, preventing the defendant from disavowing the as-built plans. But that result would then be achieved outside the terms of the parties' agreement and by quite a different legal mechanism than imputing approval of the later plans to the defendant contractually through the phrase "approved by the purchaser" in cl 15.4.

(2) Temporal expression does not modify the noun phrase

116 I have dealt with the plaintiff's second argument at [93]–[97] above and need not repeat my analysis. It suffices to say that I cannot accept the plaintiff's submission that interpreting the temporal expression as applying only to "approved by the purchaser" and not to "the plans and specifications" is the natural interpretation of cl 15.4. I consider it a strained interpretation which would be uncommercial even in an ordinary contract, but which is diametrically contrary to the purpose of Form D in general and cl 15.4 in particular.

(3) Implied authority to make Unit 1 "exactly like" Unit 2

117 The third argument reads the plaintiff's obligation under cl 10.1 to construct Unit 1 according to the plans approved by the BCA and the other relevant authorities and in compliance with the authorities' requirements together with the defendant's request to make Unit 1 "exactly like" Unit 2 (see [10] above). This, the plaintiff submits, means that the defendant authorised the plaintiff to make all changes to the 2012 BCA Plans which were necessary to make Unit 1 "exactly like" Unit 2.

118 There are two flaws in this argument.

119 First, the defendant's request to make Unit 1 "exactly like" Unit 2 appears only in the reservation form for Unit 1. The reservation form is of no contractual effect whatsoever. Although it is printed on the plaintiff's letterhead, the form is headed "Particulars of Purchasers". In the form, the prospective purchaser: (a) supplies its particulars; (b) acknowledges that it understands the conditions on which the plaintiff will issue an option to purchase the unit in question; and (c) confirms that it is eligible to take and exercise the option. The purpose of the form is twofold. First, it is for a prospective purchaser of a unit

in Oxley Tower to confirm in writing to the plaintiff its intent to take an option to purchase the particular unit described in the form. Second, it accompanies the 5% booking fee for the unit and supplies the information which is necessary for the plaintiff to issue an option.

120 If the plaintiff's argument were correct, it would allow a pre-contractual and non-contractual statement by a purchaser in a document such as the reservation form to operate as *carte blanche* for the plaintiff unilaterally to make all necessary changes to the plans for a development which exist at the date of the parties' agreement in Form D. That would undermine the purpose of Form D. There may be room for a statement of this sort to operate outside the law of contract and outside the terms of Form D as an estoppel. But reading the defendant's request in the reservation form to make Unit 1 "exactly like" Unit 2 as having contractual effect on Form D, as the plaintiff submits it does, is uncommercial and contrary to the purpose of the legislative scheme.

121 The second flaw is that, once again, the plaintiff overlooks the December 2012 Letter. Its very purpose was to set out the parties' collateral bargain for Unit 1 to be changed to a restaurant with an outdoor garden. There is nothing express or implied in the December 2012 Letter which suggests that the defendant gave the plaintiff *carte blanche* to make all changes to the 2012 BCA Plans which were necessary to make Unit 1 "exactly like" Unit 2. In fact, the notice procedure which the parties agreed in the 2012 December Letter would have been wholly unnecessary if the parties intended to give the plaintiff such *carte blanche*.

(4) Uncommercial allocation of the risk of non-performance

122 The fourth argument is that it would be uncommercial to treat cl 15.4 as locking the plans for Unit 1 to the plans which existed at the time the parties

entered into the agreement. The submission is that this would place on the vendor all the risk of non-contractual performance, even if the risk arose from the developer accommodating the purchaser's pre-contractual requests for changes. The more commercial interpretation, the plaintiff says, is that parties agreed to share this risk, and the plaintiff's primary submission promotes this intention.

123 Like the plaintiff's other arguments, this argument too overlooks both the purpose of the legislative scheme and of the December 2012 Letter. The premise of Form D is not that developers and purchasers share equally the risk of non-performance. The premise is quite the opposite. In the context of cl 15, parliament has deliberately and expressly allocated the risk of non-performance entirely to the developer. It cannot be shifted back to the purchaser, even in part, by an interpretation which may be considered commercial in a neutral contract, let alone by a commercial interpretation which is strained.

(5) Clause 15.4 captures only unilateral changes

124 The fifth argument is that cl 15.4 is intended to capture only those changes to the plans which a developer makes unilaterally, *ie*, changes to the plans which do not arise from the developer's attempts to accommodate a pre-contractual request by a purchaser for a change.

125 This argument again overlooks the December 2012 Letter. That letter set out the express conditions which the plaintiff imposed on the defendant in order for the plaintiff to agree to carry out the two changes to Unit 1.

(6) Clause 15.4 captures only abusive changes

126 The sixth argument is that the purpose of cl 15.4 is to prevent a vendor abusing its power to make changes to the plans by changing the plans to its own advantage. Here, the plaintiff did not abuse its power to make changes to the plans but was instead attempting in good faith to give the defendant precisely what the defendant told the plaintiff that it wanted.

127 This argument overlooks the fact that liability in contract is strict. A failure to perform a contractual obligation is not excused by the contract-breaker's good faith or by presenting the breach of contract as being in the innocent party's own best interests. Parliament may be paternalistic. A contractual counterparty may not.

Conclusion on the plaintiff's six arguments

128 Applied to the facts of this case, the interpretation I have adopted means that the phrase "the plans and specifications approved by the Purchaser at the date of this Agreement" in the usual case – *ie*, assuming that there was no pre-contractual agreement between the defendant and the plaintiff for changes to Unit 1 as there was in this case – would encompass the 2012 BCA Plans and *only* those plans. This is precisely the conclusion which the arbitrator reached:[33]

> 62. In the usual sale and purchase transaction and in the absence of any exceptional circumstances, the 2012 BCA Plans would clearly be the plans and specifications approved by the purchaser for the purpose of Clause 15.4.

129 For the reasons I have given, this result is patently correct. The only qualification which the arbitrator added was to subject the 2012 BCA Plans to

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[33] Appellant's Core Bundle at p 25, [62].

the two changes which the plaintiff and the defendant had agreed pre-contractually. The qualification was necessary because, on the facts of this case, the defendant approved the 2012 BCA Plans only with that qualification. I discuss the import of this issue at [136]–[145] below.

"The plans…" does not include the 2012 FSSD Plans

130 The plaintiff's alternative submission is that "the plans…" includes at least the 2012 FSSD Plans, because those plans came into existence in April 2012, and therefore were in existence as at the date of the agreements, *ie* December 2012. The submission is as follows. The defendant knew that the 2012 BCA Plans were conditional on approval from FSSD. It knew this because it received a copy of the BCA Approval from the plaintiff before entering into the agreements. The BCA Approval was expressly conditional on further approvals from technical departments and expressly named FSSD. The arbitrator's interpretation of "the plans…" creates moral hazard, in the sense that a purchaser would then not need to exercise reasonable diligence to ascertain whether other plans approved by technical departments were in existence at the time of contracting.[34]

131 I accept three points for the purposes of analysing this submission: (a) that the defendant was aware when it entered into the agreements in December 2012 that the BCA Approval in March 2012 was conditional on FSSD's approval, and therefore that FSSD's approval had not yet been obtained as at March 2012; (b) the plaintiff did not supply to the defendant a copy of the 2012 FSSD Plans before the defendant entered into the agreement; and (c) the

[34] Appellant's Skeletal Submissions at paras 16 – 17.

defendant did not have actual knowledge of the 2012 FSSD Plans and did not approve those plans.

132 I nevertheless reject the plaintiff's alternative submission for two reasons.

133 First, what the plaintiff is in substance arguing for is a concept of constructive knowledge or imputed approval under cl 15.4. The concept deems a purchaser to have knowledge of and to have approved plans even if the purchaser has no actual knowledge of the plans and never actually approved those plans by entering into an agreement in Form D. That would impose upon purchasers a duty to take positive steps to make inquiries of developers to ascertain whether other plans are in existence at the date the parties enter into the agreement.

134 There is no scope for such a far-reaching concept in Form D. It goes well beyond the words of cl 15.4. And it is contrary to the purpose of the legislative scheme. That purpose would, to my mind, dictate that the burden should be on the developer to supply to a purchaser all of the plans for the construction of the commercial property being sold which are available and have been approved at the time of entering into the agreement. And as far as moral hazard is concerned, it seems to me that the intent of Form D, at least in connection with cl 15.4, is *caveat venditor*, not *caveat emptor*.

135 Second, this interpretation of "the plans…" is impractical in reality. The plaintiff's architect gave evidence in the arbitration that the 2012 FSSD Plans were not available for inspection by a purchaser or even by a developer.[35] In the

[35] Respondent's Case at para 43.

circumstances, it is difficult to see how the defendant could have ever discovered the 2012 FSSD Plans. This too militates against cl 15.4 imposing any duty on a purchaser to seek out "the plans…". The duty to disclose "the plans…" rests on the developer.

This interpretation does not create uncertainty

136 The plaintiff argues that the "the plans…" cannot encompass *only* the 2012 BCA Plans. This is because the defendant did not approve the 2012 BCA Plans insofar as they describe Unit 1 as a gym or a spa with an outdoor pool. That is of course true. But the defendant's rejection was not unconditional. It was subject to the contractual conditions agreed in the December 2012 Letter. In that sense, I would characterise the defendant as having approved the 2012 BCA Plans conditionally, rather than having rejected them.

137 As a result of the defendant's conditional approval of the 2012 BCA Plans, therefore, the defendant remained obliged to accept Unit 1 as a gym or a spa if the conditions in the December 2012 Letter entitling it to terminate the agreement were not met. Equally, the plaintiff remained entitled to deliver Unit 1 to the defendant as a gym or a spa if the conditions in the December 2012 Letter for doing so were met.

138 The fact that the defendant's approval of the 2012 BCA Plans was conditional in this sense does not prevent the 2012 BCA Plans from coming within the scope of the verb phrase "approved by the purchaser" in "the plans…".

139 The difficulty of course is that neither party advocates this to be the proper interpretation of cl 15.4 where a purchaser requests a pre-contractual change, and a developer accedes to the request. Thus, it is common ground

between the parties that the agreement for Unit 1 permits the plaintiff to depart from the 2012 BCA Plans *at the very least* to the extent of changing Unit 1 to a restaurant and its outdoor swimming pool to an outdoor garden. The arbitrator expressly recognised and grappled with this difficulty.[36] He concluded as follows:[37]

> 70. The preferable interpretation would be to read the plans and specifications approved by the [defendant] as 2012 BCA Plans subject to the Changes which had been agreed to by the parties. ….

140 The plaintiff argues that it was wrong for the arbitrator to include the expression "the Changes which had been agreed to by the parties" within the meaning of "the plans…" in cl 15.4. The plaintiff's argument is as follows. There was no certainty when the parties executed the agreements precisely *how* the 2012 BCA Plans would have to be modified to accommodate the two changes to Unit 1.[38] The expression is therefore too uncertain to be translated into concrete amendments which can be applied even notionally to the 2012 BCA Plans. It is impossible to ascertain what the 2012 BCA Plans "subject to the changes requested by the defendant" look like. The arbitrator's interpretation of "the plans…" therefore makes it impossible to ascertain what the baseline is for the comparison required by cl 15.4.

141 I reject this argument.

142 There is no uncertainty whatsoever about the two specific changes which the defendant requested to Unit 1 and which the plaintiff agreed to carry

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36 Appellant's Core Bundle at p 25, [63]–[64].

37 Appellant's Core Bundle at p 27, [70].

38 Appellant's Case at para 30.

out: (a) change it from a gym or a spa to a restaurant and (b) change its outdoor swimming pool to an outdoor garden. In that sense, the defendant approved the 2012 BCA Plans subject to, and subject *only* to, these two specific changes. What the plaintiff is complaining about now in reality is that carrying out these two specific changes entailed consequential changes which the plaintiff did not foresee at the time it entered into the agreement to sell Unit 1 to the defendant. But that complaint lies ill in the plaintiff's mouth.

143 The ability of developers as a class to have access to professional advice before agreeing to sell commercial property is one of the premises underlying parliament's deliberate shifting of risk to developers in Form D. And in this case, the plaintiff did seek advice from its architect as to whether it was feasible to accommodate the defendant's request before it entered into the agreement with the defendant. The plaintiff's architect advised the plaintiff expressly that carrying out the two specific changes would require the plaintiff to address a number of planning and technical considerations as a consequence.[39] One of these considerations was that the outdoor area of Unit 1 – formerly an outdoor swimming pool and now to be an outdoor garden – would have to be elevated in order "to avoid [a] further increase in occupancy".

144 Having found out from its architect that it would have to address these planning and technical considerations, including specifically a need to elevate Unit 1's outdoor area, the plaintiff had to decide whether to proceed to sell Unit 1 to the defendant subject to the two specific changes or to refuse to do so. If it decided to proceed, it could have protected itself in any one of three ways. First, it could have been transparent with the defendant and informed the defendant

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[39] Respondent's Core Bundle at p 23.

of each of the consequential considerations identified by its architect. Second, it could have asked its professional consultants to draw up new plans specifying with precision the nature of every consequential change which would be needed to the entirety of Oxley Tower in order to carry out the defendant's two specific changes and price that into the agreement. Finally, the plaintiff could defer that detailed inquiry for the future and protect its position upon completion by setting out a comprehensive set of contractual conditions for agreeing to the changes. The plaintiff chose the last route. The plaintiff thereby took upon itself the risk that the consequential changes to the building plans for Oxley Tower which would eventually be necessary would be compared to the 2012 BCA Plans subject only to the two specific changes which the defendant had requested and which the plaintiff had agreed to provide. And it designed the notice mechanism in the December 2012 Letter specifically in order to mitigate the risk of non-performance.

145 There is therefore nothing surprising or uncommercial about the baseline for the comparison in cl 15.4 being the 2012 BCA Plans subject only to the two specific changes which the defendant requested. It is nothing more than Form D operating precisely as it was intended.

Conclusion on the first critical phrase

146 The plaintiff's objections all amount to arguing that the arbitrator's interpretation could not have been what the parties intended, objectively ascertained, because it leads to an uncommercial outcome. As I have already held, I do not consider that to be a strong argument for an agreement in Form D, which parliament has prescribed to protect purchasers as a class and on the basis that developers as a class have the wherewithal to protect their own

interests, if necessary and in the last resort either by adjusting the price or by simply refusing to transact.

147 In the circumstances, I hold that the phrase "plans and specifications approved by the Purchaser" in cl 15.4 of Form D, properly interpreted, encompasses only the plans and specifications: (a) which are in existence when a developer and a purchaser enter into an agreement in Form D; (b) which are disclosed to the purchaser at that time. The purchaser then approves those "plans…" by entering into the agreement. To the extent that a purchaser asks a developer pre-contractually to carry out changes to those plans and the developer agrees to do so, the purchaser's approval of those existing plans nevertheless arises upon the purchaser entering into an agreement in Form D but is conditional on those specific changes being carried out. It does not, however, extend to any consequential changes.

148 This phrase does not include: (a) any plans or specifications in existence when the contract is entered into but which the developer does not disclose to the purchaser; and (b) any plans or specifications which come into existence after the agreement is entered into, even if those plans or specifications were necessitated by the developer's decision to agree to a purchaser's pre-contractual request to carry out changes.

149 Form D thereby places the burden on developers to: (a) disclose to purchasers all plans and specifications in existence when purchasers enter into an agreement in Form D; and (b) not to agree to any pre-contractual requests for changes by purchasers without taking professional advice in advance to assess whether the consequential changes necessitated by carrying out the purchaser's specific requests will conflict with any of the developer's obligations – whether contractual, regulatory or otherwise – or trigger the purchaser's right to

terminate under cl 15.4. Both consequences are the result of the purpose of the legislative scheme.

150 Applying this interpretation to the questions of law which turn on it:

(a) In response to question (a), where the BCA approves building plans for a commercial property subject to outstanding "clearances from the technical departments", the requirements of the technical departments are not *ipso facto* part of "the plans and specifications approved by the Purchaser" for the purposes of the legislative scheme of which Form D and clause 15.4 of Form D are a part. Plans which are amended to secure clearance from and to address the requirements of technical departments are part of the "plans and specifications approved by the Purchaser" for the purposes of the legislative scheme and only if: (i) the amended plans exist at the time a purchaser enters into an agreement in Form D; and (ii) the developer discloses the amended plans to the purchaser.

(b) In response to question (b)(i), where a person purchases commercial property in the course of construction on the terms prescribed by the legislative scheme and asks the developer pre-contractually to carry out specific changes to the specifications of the commercial property, the purchaser is entitled to rely on cl 15.4 even if the purchaser has not formally approved the plans and specifications incorporating the specific changes requested.

"Differ substantially"

151 I have held "the plans…" to be the 2012 BCA Plans subject only to: (a) changing Unit 1 from a gym or a spa to a restaurant and (b) changing Unit 1's

outdoor swimming pool to an outdoor garden. The scheme of cl 15.4 requires the 2016 Plans to be compared to "the plans…" to see if the two sets of plans "differ substantially". If so, the defendant has a right to terminate the agreement. If not, the defendant is obliged to complete.

152 The arbitrator found that the 2016 Plans differed from the "the plans…" in the four respects I have summarised at [31] above. These differences affected the entire fourth floor, *ie*, both Unit 1 and Unit 2. The arbitrator held as follows:[40]

> (a) The quality of the softscape areas have changed from an accessible garden flushed [*sic*] with the hardscape areas to a raised planters of 450 mm height which are not meant to be accessed;
>
> (b) The hardscape areas for the roof garden had been reduced from 141 m2 to 111.18 m2, a reduction of approximately 21%;
>
> (c) The softscape areas for the roof garden had been increased to 797.33 m2 as follows:
>
> a. [Unit 1] 15.63%
>
> b. [Unit 2] 8.41%
>
> c. Overall 12.19%
>
> (d) The occupant load of [Unit 2] had been reduced to accommodate the change of usage from gym/spa to restaurant in [Unit 1] as the occupant load factor for gym/spa (5 m2/person) is much lower that the occupant load factor for restaurant (1.5 m2/person).

The question now is whether these four differences are "substantial" within the meaning of cl 15.4.[41]

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40 Appellant's Core Bundle at p 42, [101].

41 Appellant's Case at para 21(b).

The plaintiff's case

153 The plaintiff's submission on this issue is as follows.[42] The phrase "differs substantially" must be construed contextually in the light of the parties' bargain as recorded in their agreements. The phrase refers to those differences which the parties would, objectively speaking, have contemplated as being substantial at the time they entered into the agreements. In the context of these agreements, therefore, principal weight should be given to differences which have a discernible impact on the commercial value of the Units.

154 The plaintiff gives three reasons to support its submission. First, the parties' agreements are commercial contracts for the sale and purchase of commercial property.[43] Second, the defendant purchased the Units with no specific commercial expectations for the Units as restaurants. Finally, there is a wider interest in an agreement for the sale of commercial property in holding a purchaser to its bargain where any differences upon completion have no discernible commercial impact on the commercial value of the commercial property. On the facts of this case, the changes to "the plans…" have no commercial impact[44] because an express term of the agreements prohibited the defendant from using the outdoor areas of the Units for commercial purposes.

155 The plaintiff submits that the arbitrator's failure to give principal weight to commercial considerations led him into two errors in arriving at his conclusion that the four changes to "the plans" were a substantial difference within the meaning of cl 15.4. First, the arbitrator ignored the fact that the

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42 Appellant's Case at para 63.

43 Appellant's Case at para 69.

44 Appellant's Case at para 62.

URA's planning permission and cl 26 of the parties' agreements (see [22] above) both prohibited the defendant from using the outdoor gardens of both Units for commercial activities. The arbitrator therefore failed to analyse whether elevating the softscape and making it inaccessible to human traffic made any commercial difference to the Units. Second, the arbitrator failed to recognise that the defendant had adduced no evidence that the raised softscape had diminished the commercial value of the Units.

Commercial considerations are not given principal weight

156 I accept the plaintiff's submission that the proper approach to construing the phrase "differs substantially" is the contextual approach. That is axiomatic. The plaintiff omits, however, the point I have made at [76]–[78] above. The purpose of the legislative scheme must form part of the context against which every agreement in Form D is interpreted.

157 I do not accept the plaintiff's submission that "differs substantially" gives principal weight to differences which have a discernible impact on the commercial value of a unit. It is notable that the plaintiff does not base its submission on the words of cl 15.4. The plaintiff concedes implicitly that there is no warrant for any such restriction on the face of cl 15.4 itself. That concession must be correct. The plain meaning of the verb "differ" and the adverb "substantially" are not constrained by any words of limitation in cl 15.4 or elsewhere in Form D. And I do not accept that any such constraint can be imported into cl 15.4 by a process of interpretation. Any such interpretation contradicts the case law on misdescription and contradicts the purpose of the legislative scheme.

No authority

158 Both parties accept, correctly in my view, that the gist of cl 15.4 is a purchaser's right to rescind an agreement in Form D for a substantial misdescription. Both parties therefore rely on the line of well-established cases which establishes that a purchaser of real property has a general right to rescind an agreement to purchase the property if the vendor has made a material and substantial misdescription of the property, even in the absence of fraud: *Flight v Booth* (1834) 1 Bing (NC) 370 at 377–378, *per* Tindall CJ; *Lee v Rayson* [1917] 1 Ch 613 ("*Lee v Rayson*") at 618–619, *per* Eve J; *Yeo Brothers Co (Pte) Ltd v Atlas Properties (Pte) Ltd* [1987] SLR(R) 490 at [15], *per* Lai Kew Chai J.

159 The plaintiff seeks to draw a distinction in law between the sale of commercial property and the sale of residential property. None of these cases are authority for any such distinction. Indeed, *Lee v Rayson* is a case: (a) where a misdescription of a commercial aspect of residential property entitled the purchaser to rescind the agreement to purchase the property; and (b) where the purchaser was entitled to exercise the right to rescind even though no commercial value could be ascribed to the misdescription. As Eve J said:[45]

> … what the Court has to do … is to decide whether the purchaser is getting substantially that which he bargained for, or whether the vendor is seeking to put him off with something which he never bargained for …

That is the correct test, and the test which the arbitrator applied. No authority supports applying this test differently as between commercial property and residential or other property.

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45 Respondent's Case at para 92.

160 A purchaser's right to terminate arises under cl 15.4, without more, if: (a) a difference exists; and (b) that the difference is substantial There is no authority for giving those words anything other than their plain and ordinary meaning. The test is a question of fact, to be applied and resolved in all the circumstances of each case.

161 In my view, therefore, a substantial difference within the meaning of cl 15.4 can include any difference, even one which is non-pecuniary in nature.

Contrary to the purpose of the legislative scheme

162 As I have pointed out, the purpose of the legislative scheme including Form D is to extend positive and paternalistic protection to purchasers of commercial property. That purpose is especially clear from the way parliament has drafted cl 15. As I have shown at [70]–[71] above, cll 15.1 to 15.3 place the risk of a deviation from the description squarely and entirely on the developer.

163 Furthermore, cl 15.4 signals an intent to give a purchaser a right to terminate an agreement in Form D for misdescription which is significantly *wider* than the right established by the cases for ordinary agreements. The cases give a purchaser a right to rescind an agreement only if the purchaser would not have entered into the agreement but for the misdescription, *ie*, there is a requirement of materiality (*Flight v Booth* at 377–378 per Tindall CJ).[46] Clause 15.4 does not require materiality at all. All it requires is a substantial difference, regardless of whether that difference would have led the purchaser to reject the property *ex ante*. In that sense, cl 15.4 presumes materiality against the developer, and it does so irrebuttably. That has two consequences. First, it

[46] Respondent's Case at para 90.

relieves the purchaser of the burden of proving the counterfactual, *ie*, of proving what the purchaser would have done if the property had been described accurately at the time of the agreement. Second, cl 15.4 gives a purchaser a right to terminate even if the misdescription is, on any objective view, to the purchaser's advantage. Of course, no rational purchaser would exercise the right to terminate the agreement in those circumstances. But it does mean that cl 15.4 deliberately permits a purchaser to terminate an agreement in Form D without having to justify in objective terms its own subjective and idiosyncratic view of the substantial difference. All of this is part of the positive purchaser protection extended by the legislative scheme.

164 For both these reasons, interpreting cl 15.4 as having its operation confined primarily to those differences which are commercial in nature – even as a rule of guidance rather than a rule of law – would be entirely out of step with the protective intent of cl 15.4.

165 In my view, therefore, the arbitrator adopted the correct test on "differs substantially".

The differences were substantial

166 Applying the test is a question of fact. It is not part of the plaintiff's appeal. In any event, I consider that the arbitrator was correct in his finding that raising the gardens of both Unit 1 and Unit 2 and rendering the gardens inaccessible to human traffic is a substantial difference in that it reduced the accessible areas of both units by two-thirds.

167 To the extent that it was needed, there was evidence before the arbitrator also of materiality, *ie*, that the defendant purchased the Units believing that the gardens were flush with the ground and accessible to human traffic, and that the

defendant would not have purchased the Units if it had known that the gardens would be elevated and rendered inaccessible to human traffic.

168 There was also evidence that the defendant saw commercial value, albeit unquantified, in the gardens being accessible to human traffic. Under the 2012 BCA Plans, the patrons of both Units had free access to the outdoor areas, whether before or after a meal. It was only commercial activities which were prohibited in the outdoor areas.

Conclusion on the second critical phrase

169 In conclusion, I do not accept that the test in cl 15.4 must be interpreted so as to give principal weight to differences which reduce the commercial value of commercial property. It may be a tautology, but it appears to me that cl 15.4 intends a "substantial difference" to encompass any factual difference which is objectively substantial. That of course can extend to a difference which is commercially significant, or which has an ascertainable commercial value. But it also capable of encompassing, to my mind, differences which are of a non-pecuniary nature, *eg*, differences purely of amenity or aesthetics. Although the question is not before me, the arbitrator was correct to find that the differences between the 2016 Plans and "the plans…" were substantial.

170 Applying this interpretation to the questions of law which turn on it, where a person purchases commercial property in the course of construction on the terms prescribed by the legislative scheme and asks the developer pre-contractually to carry out specific changes to the specifications of the commercial property:

(a) In response to question (b)(ii), a substantial difference under cl 15.4 is any factual difference which is objectively substantial when

comparing the plans and specifications approved by the purchaser, subject only to those specific changes, to the final approved plans and to the unit as-built. A difference resulting from any such specific change will not be a substantial difference under cl 15.4. But any other change may be a substantial difference, even if that other change was necessary to obtain approval from the relevant authorities to carry out the specific changes and even if that other change results in a difference which has no discernible impact on the commercial value of the unit.

(b) In response to question (b)(iii), the relevance of contractual restrictions on commercial use, such as those which are contained in cll 25 and 26 of the sale and purchase agreements for Unit 1 and Unit 2 in this appeal, is that those contractual restrictions are amongst the many factors which must be taken into consideration when comparing the plans and specifications approved by the purchaser, subject only to those specific changes, to the final approved plans and to the unit as-built in order to decide, in all the circumstances of a particular case, whether any factual difference which is found upon that comparison is objectively substantial under cl 15.4.

"Refund all moneys paid by the Purchaser"

171 My findings thus far mean that the arbitrator was correct to hold that the defendant was entitled to terminate the agreements under cl 15.4 of the agreements.

172 I thus turn to the final of the three critical phrases. This phrase concerns a developer's obligation when a purchaser exercises its right to terminate a contract under cl 15.4. Clause 15.4(a) provides that upon the termination of an agreement in Form D, the developer shall "refund all moneys paid by the

Purchaser". In my view, this makes it essential that the purchaser paid the money which is to be refunded as the direct result of performing its obligations under Form D. The division between the parties is as to whether this phrase obliges the developer to pay to the purchaser sums of money which the purchaser paid to third parties under the terminated agreement. The plaintiff submits that this phrase properly interpreted obliges the plaintiff to refund to the defendant only money which the defendant paid to the plaintiff. The defendant submits that this phrase properly interpreted covers both money which defendant paid to the plaintiff as well as money which the defendant paid to third parties.

Ordinary meaning of "refund"

173 I begin with the ordinary meaning of the word "refund". The Oxford English Dictionary defines "refund" as a verb to mean "pay back (money), typically to a customer who is not satisfied with goods or services bought" and as a noun to mean "a repayment of a sum of money". "Refund" is defined similarly in the Cambridge English Dictionary as a verb to mean "give someone back an amount of money" and as a noun to mean "an amount of money that is given back".

174 The ordinary meaning of "refund" is therefore reversing a past payment, both in terms of the identity of the payer and payee and in terms of the quantum of the sum repaid. On this meaning, a person (A) refunds a sum of money to another person (B) if A pays that sum to B in order to reverse B's previous payment of the same sum to A with the intention thereby of restoring A and B to their original positions before B's initial payment.

175 The defendant accepts that this may be the ordinary meaning of "refund". But the defendant submits that "refund" has the alternative, but

equally legitimate, meaning of "reimburse". The defendant submits that this alternative meaning is recognised by two authoritative dictionaries on either side of the Oxford/Cambridge divide:[47]

> 130. The Cambridge International English Dictionary, for example, defines refund as 'a returned sum of money'. The example sentence provided is as follows: 'When I went on business to Peru, the office refunded my expenses.' (underline added). Clearly, the 'expenses' refunded in this example would not have been paid to the office that refunded those expenses.
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> 131. Similarly, the online Oxford English Dictionary provides the following example: 'The supplier of a speed camera detector has paid out thousands of pounds to drivers after guaranteeing to partially refund customers who are fined for speeding.' Again, the payments referred to in this example (i.e. the speeding fines) would not have been paid to the supplier refunding those payments, but to the authorities instead.
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> 132. In fact, even Oxley's dictionary citations suggest that the word 'refund' is not limited in the manner suggested by Oxley. At [83(c)] AC, Oxley provides the following example from the Oxford English Dictionary: 'They…refunded to the peasantry of the country the money which had been extorted from them'. It seems likely that the entity refunding the peasantry is not the same entity that extorted the peasantry in the first place.

176 The critical difference between the ordinary and the alternative meaning of "refund", of course, is that a "refund" involves two parties whereas "reimburse" involves three parties. A reimburses B a sum of money if A pays B that sum of money after (and because) B has paid C the same sum of money and in order to restore B to the position it was in before B's payment to C. "Reimburse" still requires identity of quantum, but does not require identity of payer and payee. As a result, "reimburse" suggests a payment made to indemnify B or to make B whole rather than a reversal of a bilateral payment.

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47 Respondent's Case at paras 130 – 132; Respondent's Bundle of Authorities at Tabs 12 and 16.

177 I accept that the authorities cited by the defendant establish that "reimburse" is a legitimate alternative meaning of "refund", albeit not its ordinary or primary meaning. It appears, therefore, that the meaning of "refund" as a word of the English language is inconclusive on the interpretation of this phrase. The ordinary meaning supports the plaintiff. The alternative meaning supports the defendant.

Legislative history of cl 15.4

178 I thus turn to the legislative history of cl 15.4. As the defendant points out, cl 15.4 was introduced in 1995 by the Sale of Commercial Properties (Amendment) Rules 1995 (S 378/1994). The predecessor of cl 15.4 was cl 9(4) of Form D of the Schedule to the Sale of Commercial Properties Rules 1994. Upon termination under cl 9(4), a developer's express obligation was to return all money which the developer had collected *from the purchaser*:

> If the final approved building plans for the building unit and the Building differ substantially from the plans and specifications approved by the Purchaser at the date of this Agreement, the Purchaser shall be entitled to determine this Agreement if he so desires, in which event *all money collected from him by the Vendor shall be refunded to him in full with interest* thereon at the rate of ten (10) % per annum and in such event neither party shall have any claim against each other thereafter …
>
> [emphasis added]

179 Both cl 9(4) and cl 15.4 use the verb "refund". But cl 15.4 changed the scope of the refund by replacing the phrase "all money collected from [the Purchaser] by the Vendor" with the phrase "all moneys paid by the Purchaser". The amendment to cl 9(4), on its face, removed an express limitation on the scope of the developer's obligation to refund money to a purchaser upon termination. The scope of the refund was no longer defined by reference to money which the developer *received* from the purchaser under the terminated

contract. It now encompassed all money which the purchaser *paid* as a result of the terminated contract. This turned the obligation to "refund" upon termination from a developer-oriented, receipt-based obligation to a purchaser-oriented, payment-based obligation. This deliberate change does suggest an intention to broaden the scope of the developer's obligation upon termination and an intention to use "refund" in its alternative meaning of "reimburse".

180 The plaintiff argues that this change in wording is meant to capture only the situation where a purchaser is obliged to pay a sum of money to a developer under the agreement, but the agreement requires the purchaser to pay the money to a third-party, who gives the purchaser a good receipt in discharge of that obligation. In that situation, the money is not "collected" by the developer, even though it is the ultimate legal and economic beneficiary of the payment.[48] The plaintiff submits that the likely reason for this change is because a third party, the Singapore Academy of Law ("SAL"), was introduced as a stakeholder for all of a purchaser's payments under the payment schedule to Form D. The SAL was introduced in 1995, coinciding with the amendment to Form D in 1995. As a result, the purpose of amending cl 9(4) to read as cl 15.4 was to clarify that money paid by a purchaser to SAL as stakeholder was nevertheless recoverable by the purchaser, even if the money had not been released to the developer.[49]

181 I am unable to accept the plaintiff's argument. First, the plaintiff has furnished no basis to connect the 1995 amendment to cl 9(4) to the SAL becoming a stakeholder. Second, if the plaintiff's submissions were correct, one would expect the amendments to cl 9(4) which are now reflected in cl 15.4 to

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48 Appellant's Case at para 90.

49 Appellant's Case at para 90.

make express reference to the SAL. Furthermore, even before the SAL was introduced as a stakeholder, law firms frequently acted as stakeholders in the sale and purchase of commercial property. The three-party situation which the plaintiff submits is the reason for the change to cl 9(4) in 1995 existed even before 1995. If the purpose of the amendment to cl 9(4) was to capture a purchaser's payments to third parties such as stakeholders, Form D would have required amendment even before 1995.

182 The plaintiff also argues that interpreting "refund" as "reimburse" leads to a risk of double recovery. In this case, the plaintiff points out that this interpretation of cl 15.4 means that the defendant can claim a refund of the stamp duty paid on the terminated agreements from *both* the developer *and* the tax authorities.[50]

183 Double recovery is a real risk on the defendant's interpretation of this phrase. If a developer is liable to pay to a terminating purchaser a sum of money which the purchaser has paid to a third party in the course of performing its obligations under the terminated agreement, there is a real risk of double recovery if the terminating purchaser has a concurrent right to recover the same sum of money directly from the third party.

184 The defendant's response is that a purchaser will not be made whole if a developer is *not* liable under cl 15.4 to pay to the purchaser all money which the plaintiff has paid under the terminated agreements including money which the purchaser has paid to third parties. A purchaser may make payments to third parties in order to perform its obligations under an agreement in Form D but

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[50] Appellant's Case at para 86.

may have no right to recover that money from the third party if the agreement is terminated. For instance, a purchaser has no right to recover any maintenance charges paid to a management corporation simply because the agreement has been terminated. Furthermore, the management corporation may have spent the money and so may not be in a position to return the payment even *ex gratia*. In that situation, the defendant argues, the plaintiff's interpretation would mean that the purchaser will be unable to recover the sums it has paid from both the developer and the third party. The bar on future claims under cl 15.4(b) will then operate fully and finally to extinguish any other avenue which the purchaser may have to recover the payment from the developer.

185 It is true that interpreting cl 15.4 as allowing a terminating purchaser to recover payments to third parties from a developer creates a risk of over-recovery. But it is also true that interpreting cl 15.4 as excluding payments to third parties creates a risk of under-recovery. It appears to me that there was a positive purpose in the amendment to cl 9(4) in 1995. That purpose was to increase the protection to purchasers afforded by the legislative scheme. Clause 15.4 as it stands now, with its focus on the purchaser's payment rather than the developer's receipt, appears to me to be intended to operate as an indemnity to the purchaser to accompany the bilateral reversal of benefits upon termination under cl 15.4. In that sense, it appears to me that cl 15.4 was amended to achieve the same remedial effect as the court's power in equity to grant an indemnity to accompany the bilateral reversal of benefits achieved by rescission alone. Bearing in mind the purpose of the legislative scheme, my view is that the intent of cl 15.4 is to ensure that a purchaser is made whole when it exercises its right to terminate under cl 15.4, with the risk of overcompensation and of the third party's insolvency shifted to the developer. This interpretation is consistent with the purpose of the legislative scheme in that it shifts the risk of a purchaser failing to recover these third-party payments to the developer, who is better able

to bear that risk. The risk of double recovery by a purchaser is a trade-off necessary to advance the purpose of the legislative scheme.

186 Further, the risk of double recovery is more apparent than real. It can be satisfactorily mitigated by safeguards. And developers are well-placed to appreciate the need for safeguards and to secure them from an arbitrator, given the resources at their disposal. For instance, in this very case, the arbitrator ordered the plaintiff to reimburse the defendant for the stamp duty which the defendant had paid on both agreements, but subject to an obligation on the defendant to pay back to the plaintiff any remission of the stamp duty it may receive from the tax authorities. The same result can be achieved by extracting suitable undertakings from purchasers to prevent double recovery rather than by making orders. In any event, the court is no stranger to the risk of double recovery: see *Sevilleja v Marex Financial Ltd* [2020] UKSC 31. The risk of double recovery cannot be allowed to override the contractual effect of the words of the contract or to undermine the purpose of the legislative scheme.

Conclusion on the third critical phrase

187 In summary, cl 15.4(a) obliges a developer to reimburse to a purchaser all money which a purchaser pays in performing its obligations under a contract to purchase commercial property in Form D. This includes money which the purchaser pays to the developer directly *and* money which a purchaser pays to a third party as a result of entering into the sale and purchase agreement. That is the case whether the third party receives the money as an intermediary for the developer (*eg* a stakeholder such as the SAL or a law firm) or receives the money in its own right (*eg* the tax authorities and a management corporation). That is also the case even if the purchaser has an independent right to recover that money from the third party.

188 Applying this interpretation to the question of law which turns on it, in response to question (b)(iv), a developer's obligation to "refund all moneys paid by the Purchaser" under cl 15.4 constitutes an obligation to repay to a purchaser all money which the purchaser paid to the developer under the terminated agreement as well as to reimburse the purchaser for all money which the purchaser paid to third parties in performing its obligations under the terminated agreement, even if the purchaser has a right as against that third party to recover the money so paid upon exercising its right to terminate the agreement under cl 15.4.

Conclusion

189 I have answered all five questions of law on appeal in favour of the defendant. I have therefore dismissed the plaintiff's appeal with costs.

Vinodh Coomaraswamy
Judge

Paul Tan, Jonathan Lai and Torsten Cheong (Rajah & Tann Singapore LLP) for the plaintiff;
Lok Vi Ming, SC and Qabir Singh Sandhu (LVM Law Chambers LLC) for the defendant.