

## Case Note

# FORFEITURE OF SUMS PAID AND THE PENALTY RULE IN SALE TRANSACTIONS OF REAL PROPERTY: UNEASY BEDFELLOWS?

### *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] SGHC(A) 13

The forfeiture of the option fee in the context of an aborted sale and purchase of real property is generally uncontroversial in typical transactions where the “standard” option fee is 1% of the purchase price. However, in non-typical transactions such as “bulk purchases” or where the option period is significantly longer than the standard 14 days which may involve a larger option fee,<sup>1</sup> the forfeiture of the option fee is less uncontroversial. This case note discusses the approach and reasoning of the Appellate Division of the High Court, and the ruling by the General Division of the High Court that the forfeiture of sums paid over to the vendor in this case was penal.

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- 1 In Singapore, it is not uncommon for the term “deposit” to be used to refer to any moneys paid by the purchaser prior to the completion of the sale (typically, the option fee and option exercise fee). Ideally, these terms should be used with greater precision as other payments may be made prior to the completion of the sale and purchase. In the present case, a “Further Sum” (see para 5 below) was payable by the purchaser after the option fee was paid (and this was payable before the expiry of the option period). Interestingly, the prescribed form of the option to purchase for Housing & Development Board properties defines the term “Deposit” as the option fee and option exercise fee collectively. The authors understand that this is also common in “standard” form options to purchase.
  - 2 The authors were trial counsel on record for the purchaser, who succeeded at first instance: *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2022] SGHC 316. The parties were represented by separate sets of solicitors during the appeal. The authors are grateful for Cheyenne Low’s assistance. The views expressed in this case note are the personal view of the authors and are not representative of the views of ADTLaw LLC. All errors and omissions remain the authors’ alone.

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## I. Introduction

1 In transactions involving the sale and purchase of real property, it is standard practice for the purchaser to pay an option fee to the vendor for the issuance of an option to purchase<sup>3</sup> (“OTP”). For private residential properties, the option fee is typically 1% of the purchase price and the option period is typically 14 days. In cases where the option period is significantly longer than the standard 14 days, the quantum of the option fee may be higher. Further, the parties may choose to structure their transaction in any manner they see fit, limited only by the bounds of their creativity and the law.

2 The option fee is typically forfeited by the vendor if the purchaser does not exercise the OTP before the expiry of the option period or fails to complete the purchase.<sup>4</sup> The vendor’s right to forfeit the option fee is generally uncontroversial. However, the forfeiture of other sums may be less uncontroversial in “non-standard” transactions such as a “bulk purchase”, *ie*, where the purchaser purchases several units together or at the same time, or in circumstances where a “deposit” that is larger than the customary amount is paid.<sup>5</sup>

3 In *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd*, the General Division<sup>6</sup> (“*TG Master (General Division)*”) and Appellate Division<sup>7</sup> (“*TG Master (Appellate Division)*”) of the High Court considered, *inter alia*, whether the vendor’s forfeiture of various sums in a bulk purchase of eight townhouses contravened the rule against penalties. These sums included the sum of \$500,000 per

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3 On options to purchase generally, see *Woo Kah Wai v Chew Ai Hua Sandra* [2014] 4 SLR 166 and Alvin W-L See, “Contract for the Grant of a Compliant Option to Purchase” [2015] Sing JLS 241.

4 In the event that the option to purchase is exercised and the purchaser subsequently fails to complete the purchase, the option exercise fee (which is usually 4% of the purchase price) is typically forfeited as well.

5 In Singapore, the option fee and option exercise fee are typically 1% and 4% respectively of the purchase price. See also n 8 below.

6 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2022] SGHC 316.

7 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] SGHC(A) 13.

townhouse (amounting to approximately 20% of the purchase price of each townhouse) and \$550,000 in respect of the renovation costs of two townhouses used as “show houses”.<sup>8</sup> The General Division ordered the plaintiff developer to return an aggregate sum of \$4.55m (\$500,000 x eight townhouses plus \$550,000) paid by the defendant purchasers to the plaintiff after they failed to exercise the OTPs and the transaction was aborted. The Appellate Division allowed the developer’s appeal and dismissed the purchaser’s counterclaim for the return of the aggregate sum of \$4.55m. Further, the Appellate Division ordered the Defendant purchasers to pay various “extension fees” on account of the developer’s agreement to extend the option period. This case note will focus on the Appellate Division’s analysis and reasoning in respect of eight sets of “Further Sums” (amounting to the aggregate sum of \$4m) paid by the Defendant purchasers.

## II. Facts

4 The plaintiff, TG Master Pte Ltd (“Developer”), was the developer of the “Skies Miltonia” project in Yishun (“Development”). The Development comprised various apartment blocks and ten townhouses.

5 In January 2018, the Developer granted eight OTPs to the second defendant, Mr Yung Man Tung (“Purchaser”), in a “bulk” sale and purchase of eight townhouses (“Properties”) in the Development.<sup>9</sup> The terms of the OTPs were substantially similar, and the aggregate purchase price of the Properties was approximately \$22.4m. The OTPs were issued under the Developer’s Extended Deferred Payment Scheme (“EDPS”). Under the EDPS, the Purchaser was permitted to take possession of the Properties during the extended option period of 24 months after paying certain sums known as the “Further Sums”.<sup>10</sup>

6 Under the terms of the OTPs, the Purchaser was to pay an option fee of \$59,375 (“Option Fee”) and a “Further Sum” of \$500,000 in respect of each townhouse. The Option Fee and Further Sum amounted to approximately 2.05% and 18.88% of the purchase price respectively. Additionally, two of the eight townhouses were renovated by the Developer, and the Purchaser was required to pay the aggregate sum of \$550,000 to the Developer as reimbursement of “Renovation Costs”.

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8 The Singapore courts have noted that the “customary rate” in respect of “deposits” (*ie*, the option fee and option exercise fee) is 10%. It would appear that market practices and the “customary rate” may have evolved since the relevant cases were decided: see n 5 above.

9 In respect of 1, 3, 5, 7, 9, 11, 13 and 15 Miltonia Close.

10 See para 7 below.

7 Further, each OTP contained certain “bundling provisions”. These provisions required the Purchaser to pay the Further Sum for all the Properties before any of the OTPs could be exercised. The relevant provisions stated:

... This Option is granted together with Options for the sale of the following units 1, 3, 5, 7, 9, 11, 13 and 15 ... This Option may only be exercised if the Further Sum (as defined below ...) is paid for all units 1, 3, 5, 7, 9, 11, 13 and 15 ... (‘All Units’). In the event the Further Sum for All Units is not paid, the Options for All Units shall be deemed to have lapsed and no longer valid for acceptance. ...

The Purchaser shall pay a further sum of ... (S\$500,000.00) [*sic*] equivalent to the balance of twenty per cent (20%) of the Sale Price by 30 April 2018 (the ‘Further Sum’) and in consideration of the Further Sum, [the Developer] shall grant a tenancy of the Property ... on and subject to the terms as set out in the tenancy agreement ... The Purchaser shall reimburse the cost of renovation of units 1 and 9 Miltonia Close Skies Miltonia Singapore for such sums as determined by the Vendor (‘renovation cost’) latest by 15 May 2018.

8 The OTPs contained forfeiture provisions (“Forfeiture Clause”). These provisions stated:

After the Further Sum and the renovation cost is paid and reimbursed respectively to the Vendor, in the event: ... (d) that this Option is not exercised in the manner stated herein; ... the Vendor shall have the right (but shall not be obliged to) terminate this Option and in such an event: (i) the Option shall be null and void and the Option Fee, renovation cost reimbursed to the Vendor and the Further Sum shall be forfeited to the Vendor absolutely ...

9 The Purchaser paid the Option Fees for the Properties and signed a letter confirming his understanding and acceptance of the terms of the OTPs. Subsequently, the Developer entered into various tenancy agreements for a term of two years and six months with the first defendant, Tung Kee Development (Singapore) Pte Ltd (“Company”), of which the Purchaser was a director. All the tenancy agreements were on substantially the same or similar terms.

10 The Purchaser subsequently paid the Further Sums for the Properties and Renovation Costs amounting to the aggregate sum of \$4.55m. However, the Purchaser did not exercise the OTPs within the option period. The parties engaged in discussions for the payment of “extension fees” to extend the deadline to exercise the OTPs, however, the Purchaser did not exercise the OTPs. Accordingly, the Developer sought to forfeit the Option Fees, Further Sums and Renovation Costs.

11 In 2021, the Developer commenced proceedings against the Purchaser and the Company for moneys allegedly owed to the Developer in connection with the aborted sale and purchase of the Properties.

The Developer claimed,<sup>11</sup> *inter alia*, the sums of: (a) \$863,147 in respect of “extension fees” that the Purchaser had allegedly agreed to pay to extend the option period in respect of the OTPs; and (b) \$620,000 in respect of a loan that the Developer had granted to the Purchaser pursuant to a loan agreement.

12 The Purchaser counterclaimed for, *inter alia*, the refund of \$475,000 in Option Fees, \$4m in Further Sums and the sum of \$550,000 in respect of Renovation Costs paid by the Purchaser.

### III. Decision of the General Division

13 The General Division rejected the Developer’s claim for extension fees in its entirety but allowed its claim for repayment of the sum of \$620,000 loaned to the Purchaser plus accrued interest pursuant to the loan agreement.<sup>12</sup>

14 In relation to the Purchaser’s counterclaim, the General Division held that the Developer was entitled to forfeit the Option Fees. However, the General Division found that the forfeiture of the Further Sums and Renovation Costs contravened the penalty rule and, consequently, the Developer was not entitled to forfeit these sums. The General Division allowed the Purchaser’s counterclaim for the refund of the Further Sums amounting to \$4m and Renovation Costs of \$550,000.<sup>13</sup>

### IV. Decision of the Appellate Division

15 The Appellate Division allowed the Developer’s appeal. It held that the Option Fee and Further Sum were part of a larger option fee (which it described as the “True Option Fee”) for each property. The True Option Fee, which was paid in two tranches, was the fee payable for the grant of the “options to buy”. Accordingly, the True Option Fee was paid in fulfilment of a primary obligation. It was not a deposit and

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11 The Developer obtained summary judgment for vacant possession of the Properties prior to trial.

12 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2022] SGHC 316 at [112].

13 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2022] SGHC 316 at [113].

the framework<sup>14</sup> in *Hon Chin Kong v Yip Fook Mun*<sup>15</sup> (“*Hon Chin Kong*”) was not applicable. The Purchaser was therefore not entitled to the return of the True Option Fee. Further, the Appellate Division held that the reimbursement of the Renovation Costs was payment of a sum of money pursuant to a primary obligation. Accordingly, the penalty doctrine did not apply to the forfeiture of the Renovation Costs paid by the Purchaser.

16 The discussion below focuses on the forfeiture of the Further Sums.

## V. The applicable framework

### A. TG Master (General Division)

17 The General Division accepted the Purchaser’s submission that the Court of Appeal’s decision in the seminal decision of *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd*<sup>16</sup> (“*Denka*”) concerned liquidated damages stipulated to be paid after a breach of contract while the present case concerned the forfeiture of sums already paid.<sup>17</sup> The General Division further agreed with the Purchaser that the applicable framework governing the forfeiture of sums already paid was as enunciated in *Hon Chin Kong*.

18 In *Hon Chin Kong*, the High Court set out the following framework:<sup>18</sup>

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14 Under the framework in *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534, the court determines if a sum that has been paid over is a “true deposit” or a part payment. A “true deposit” is forfeitable. A part payment may not be forfeited if the forfeiture is penal. See para 18 below.

15 [2018] 3 SLR 534.

16 [2021] 1 SLR 631.

17 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2022] SGHC 316 at [88]. The distinction between liquidated damages and the treatment of sums paid over goes to the heart of the application of the framework in *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 (“*Hon Chin Kong*”). The High Court in *Hon Chin Kong* referred to the Hong Kong Court of Final Appeal’s decision in *Polysat Ltd v Panhandat Ltd* [2002] HKCFA 15 (at [112]). In this case, the court observed that deposits and liquidated damages served different purposes and had different origins. It further stated that the test of reasonableness (for the purpose of determining whether a sum paid over was a true deposit or part payment) was different from the test of a genuine pre-estimate of loss.

18 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2022] SGHC 316 at [93], citing *Hon Chin Kong v Yip Fook Mun* [2018] 3 SLR 534 at [143].

(a) Firstly, the court determines whether, on a proper construction of the contract, the vendor is entitled to forfeit the sum of money paid over.

(b) If the vendor is not entitled to forfeit the sum, then it must be returned notwithstanding a breach of contract.

(c) If there is a right to forfeit, the court must then consider if the sum is a “true deposit”. In considering whether the sum is a “true deposit”:

(i) The applicable test is whether the sum is reasonable as an earnest or is customary or moderate. In this context, a deposit is not “reasonable as an earnest” (and hence, not a true deposit) if it is “so large that it cannot be objectively justified by reference to the functions which such a deposit properly serves”.<sup>19</sup>

(ii) If the deposit in question is higher than the customary or conventional deposit, the vendor must show “special circumstances” to justify that amount.

(iii) If the sum is a true deposit, it may be forfeited regardless of the vendor’s actual loss.

(d) If the sum is not a true deposit, it should be recharacterised as a “part payment”. The right to forfeit the part payment must then be tested against the penalty rule in accordance with the principles in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*.<sup>20</sup> In this respect, the General Division stated that the forfeiture of the part payment must be tested against the penalty rule in accordance with the guidance in *Denka*, with suitable modifications.<sup>21</sup>

### (1) *Forfeiture of the Further Sums*

19 Applying the framework in *Hon Chin Kong*, the General Division found that the Further Sums were not reasonable as an earnest and hence, were not true deposits. The deposit amounting to 20% of the purchase

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19 The question of reasonableness will be assessed on the facts of each case.

20 [1915] AC 79. Although the English courts have since adopted the legitimate interest approach to the penalty rule in *Cavendish Square Holdings BV v Makdessi* [2016] AC 1172, the Singapore Court of Appeal in *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2021] 1 SLR 631 declined to adopt the legitimate interest approach and affirmed the long-standing approach in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79.

21 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2022] SGHC 316 at [88].



price exceeded the customary rate of 10% and the Developer was unable to put forward any “special circumstances” to justify that amount. Further, the General Division noted that the Purchaser was “treated akin to an owner” as he was given physical possession of the Properties for two and a half years (*ie*, the option period) and he could even sublet the Properties during this time.<sup>22</sup> In the General Division’s view, “the parties have moved past indications of good faith [and] were seriously considering completing the transaction”. In other words, the parties had moved past the initial stage of the purchaser offering to purchase the properties (by paying the option fee). Accordingly, the General Division found that the Further Sums were part payments towards the total purchase price of the Properties.

20 In testing the forfeiture of the Further Sums against the penalty rule, the General Division rejected the Developer’s argument that the bundling provisions were irrelevant as the rule against penalties applied to the vendor’s right of forfeiture contained in the Forfeiture Clause (and not the bundling provision). The court noted that the OTPs had to be construed as a whole and the Forfeiture Clause could not be read in isolation.<sup>23</sup> In other words, the court had to consider the effect of the bundling provisions, which governed the “context and content” of how the right of forfeiture was to be exercised. In rejecting the Developer’s argument in this respect, the General Division stated:

... it would be all too easy for parties to escape from the penalty rule if they could isolate the application of the rule to a clause that plainly provides the right of forfeiture but relegate the context and content of how that right is to be exercised to other clauses in the contract ... it is important to consider the entire contract, in particular with the provisions providing for the payment of the sum to begin with and giving rise to the right of forfeiture ...

21 In the General Division’s view, the requirement for the Purchaser to have paid the Further Sum for *all* the Properties before he could exercise the OTPs for *any* property was “clearly penal”, as it had the effect of compelling the Purchaser to pay the Further Sums *so that* he could deal with each of the Properties individually, when he had *already* paid the option fees. Accordingly, the bundling provisions were penal as the Purchaser was unable to deal with any of the Properties unless all the Further Sums were paid.

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22 Typically, a purchaser would not take possession of the property until the sale and purchase of the property is completed. The fact that the Purchaser was permitted to take possession of the properties suggests that at the time of contracting, the parties were proceeding on the basis that they would complete the sale and purchase in due course.

23 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2022] SGHC 316 at [100]–[102].



22 Further, the General Division found that the bundling of the Further Sum for all eight Properties was not a genuine pre-estimate of the Developer’s loss and there was no proper reason why the Developer would need the Further Sums to account for any loss that it suffered.<sup>24</sup> In particular, the General Division found that the arrangements were “unilaterally decided” by the Developer based on “its subjective belief of how the so-called ‘bulk purchase’ should be implemented and its assumption that these arrangements would not present issues for the [Purchaser]”. In the circumstances, the Developer’s forfeiture of the Further Sums infringed the penalty rule, and the General Division allowed the Purchaser’s claim for a refund of the Further Sums.

### **B. TG Master (Appellate Division)**

23 On appeal, the Developer argued that the Further Sums constituted the consideration for the grant of the 30-month tenancies of the Properties, being akin to a lump sum rental payment. As the tenancies were granted, the Developer was therefore entitled to payment of the Further Sums, “and the court ought not to question the adequacy of consideration”. On this basis, the Developer submitted that the *Hon Chin Kong* framework was inapplicable to the Further Sums, which were paid as consideration for the grant of the tenancies and were therefore neither deposits nor part payments.

24 The Appellate Division held that the *Hon Chin Kong* framework did not apply to a sum that was neither a deposit nor a part payment as these “presupposed an obligation to complete a purchase”. The OTPs were not sale and purchase agreements and the Purchaser was not under an obligation to exercise or complete the sale. The Further Sums were paid “for an entirely distinct contractual objective from completing a purchase and where there was no obligation to complete any purchase at all”, and they “were neither deposits nor part payment towards a purchase”. As the True Option Fee was paid in exchange for the grant of the rights contained in the OTPs, it was paid “in fulfilment of a primary obligation” and its forfeiture therefore could not be penal.<sup>25</sup>

25 Further, the Appellate Division considered that the plain wording of the OTPs supported the argument that the Further Sums were consideration for the grant of the tenancies. It went on to consider the “overall context of the OTPs”, stating that the “Further Sums could not

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24 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2022] SGHC 316 at [104]–[105].

25 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] SGHC(A) 13 at [93]–[100].

be divorced from the OTPs”. The Appellate Division noted that the OTPs described the Further Sums as the “balance of twenty per cent (20%) of the Sale Price” and it would have been considered as payments made toward the sale price had the OTPs been exercised. The Appellate Division was of the view that the Further Sum was in substance “a part of the fee for the option to buy, being the right to exercise the OTP whereupon a sale and purchase agreement would be constituted”. Further, while the tenancies were granted upon payment of the Further Sums, that “did not mean that the Further Sum was consideration *only* for the tenancy agreement” [emphasis in original]. On these bases, the Appellate Division held that the Option Fee and Further Sum “were both parts of a larger option fee of \$559,375 (per property)”.<sup>26</sup>

## VI. Commentary

26 The law on deposits, the law against penalties and the law of forfeiture have traditionally been regarded as challenging. In respect of the latter, it has been noted that “there has been a good deal of confusion” over how the law against penalties relates to the law of forfeiture.<sup>27</sup> In this respect, the Appellate Division described the case before it as one involving the “novel” issue of the ambit of the law of deposits in the context of an OTP. This case note will focus on the General Division’s and the Appellate Division’s treatment of the Further Sums and the Appellate Division’s statements on the *Hon Chin Kong* framework.

### A. *Consideration, part payment or deposit: circumstances in which sum paid are material*

27 Crucially, the Appellate Division was of the view<sup>28</sup> that the *Hon Chin Kong* framework only applied to a sum paid “towards the acquisition of the subject matter of a *sale*” [emphasis in original], *ie*, the parties had to be under an *obligation* to complete an agreement to sell and purchase.<sup>29</sup> On this basis, the Appellate Division reasoned that the *Hon Chin Kong* framework “did not apply to a sum that was *neither* a deposit

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26 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] SGHC(A) 13 at [70]–[74].

27 Justice Timothy Fancourt, Vice-Chancellor of the County Palatine of Lancaster, “Forfeiture, Penalties and Damages in Property Law”, speech at the 8th Annual Property Law Lecture (21 February 2023) <<https://www.judiciary.uk/wp-content/uploads/2023/03/Liverpool-Forfeiture-lecture-2023.pdf>> (accessed 26 July 2024).

28 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] SGHC(A) 13 at [94].

29 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] SGHC(A) 13 at [95].

*nor* a part payment” [emphasis in original]; *a fortiori* “where the sum was paid for an entirely distinct contractual objective from completing a purchase and where there was no obligation to complete any purchase at all”. Accordingly, when the General Division applied the *Hon Chin Kong* framework by considering the “binary characterisation of a sum as being either a true deposit or a part payment”, such an approach “presupposed an obligation to complete a purchase”.<sup>30</sup>

28 While the General Division and Appellate Division arrived at different outcomes, both regarded the circumstances in which the Further Sums were paid as being material. In the authors’ respectful view, it is arguable that the Further Sums ought to be subject to the *Hon Chin Kong* framework given the unique nature of an OTP. As Prof Tan Sook Yee noted, an OTP is *sui generis*<sup>31</sup> and it serves a specific purpose:

The option will give the potential purchaser time ... to consider if he really wants to purchase the property and/or determine if financing is available for the purchase. The advantage of purchasing land by the grant of an option first, rather than a straight contract of sale, is that whilst the option prevents the vendor from ‘gazumping’ the potential purchaser during the option period, it gives the option-holder ‘breathing space’ to consider whether or not to proceed with the purchase. The option locks the vendor to selling the property at a stated price, which upon exercise, creates a contract for the sale of land. If the vendor breaches the terms of the option while the period is still valid, then he is liable to compensate the option-holder for his loss. On the other hand, the small sum that is paid as consideration for the option ensures that the option-holder is a ‘serious’ buyer, for he stands to lose the fee if he does not exercise the option within the stated period.

29 With respect, regard ought to be given to the *sui generis* nature of an OTP. On the facts of *TG Master (General Division)*, the OTPs were issued in consideration for the Purchaser’s payment of the Option Fee of \$59,375. Pertinently, while the Purchaser had to pay a Further Sum of \$500,000 before he could *exercise* each OTP, the validity of each OTP was *not* conditional on the Purchaser paying the Further Sum. Upon its issuance, each OTP was a valid and enforceable (executory) contract which governed the parties’ respective rights and obligations. They bound the parties forthwith, created substantive *proprietary* rights (and corresponding obligations) and conferred on the Purchaser a *caveatable* interest in the property.<sup>32</sup> The Developer therefore could not deal with

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30 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] SGHC(A) 13 at [94].

31 Tan Sook Yee, Tang Hang Wu & Kelvin FK Low, *Tan Sook Yee’s Principles of Singapore Land Law* (LexisNexis, 4th Ed, 2019) at paras 16.3–16.4.

32 *Eng Bee Properties Pte Ltd v Lee Foong Fatt* [1993] 2 SLR(R) 778 at [26].

the Properties after the OTPs were issued.<sup>33</sup> This indeed is the purpose of an OTP: “options to purchase” (albeit on terms) were conferred when the OTPs were issued, even if the Purchaser was under no obligation to complete the purchase, and from the Developer’s perspective, it had entered into binding conditional sale and purchase agreements on the terms of the OTPs.<sup>34</sup>

30 Crucially, the OTPs in *TG Master (General Division)* had already been issued by the Developer *prior to* the payment of the Further Sums,<sup>35</sup> and the terms of the sale and purchase<sup>36</sup> were thus settled. The Developer regarded the Purchaser’s payment of the Option Fee as sufficient “earnest” (in the general sense) and was prepared to (and did) issue the OTPs on this basis. As the Appellate Division noted (at [84]):

While an option fee will typically be credited as part of the payments made towards the purchase price if the Option is exercised and a sale and purchase agreement is constituted, it remains fundamentally distinct from other part payments because it is paid by the prospective purchaser as full payment in *consideration* for the *grant* of the Option, rather than by a purchaser pursuant to an obligation to pay the purchase price under a sale and purchase agreement. [emphasis in original]

31 The disapplication of the *Hon Chin Kong* framework on the basis that the Further Sum was not paid pursuant to a *sale* would unduly circumscribe the application of the *Hon Chin Kong* framework. Having regard to the nature of an OTP, the Further Sums were paid by the Purchaser pursuant to a *conditional sale* as the Developer was *already* bound by the OTPs *prior to* receipt of the Further Sums.<sup>37</sup> Even if the Purchaser was not obligated to complete the sale, this does not derogate from the obligations assumed by the Developer upon the issuance of the OTPs. While the Appellate Division expressed the view that the “true nature of the Option Fee would have been clear” had “the drafter of the OTPs simply provided for one option fee that was payable in two tranches”,<sup>38</sup> the fact that the drafter did *not* do so ought to be a material

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33 This was accepted by the Developer in the proceedings below where it argued (in respect of its claim for extension fees) that the caveats lodged in respect of the Properties “would have been kept ‘in limbo’ until the extension fees were paid”.

34 See *Alrich Development Pte Ltd v Rafiq Jumabhoy* [1995] 2 SLR(R) 340 at [44]–[46].

35 However, the Appellate Division found that the True Option Fee was the fee payable for the *grant* of the options to purchase: *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] SGHC(A) 13 at [96].

36 In Singapore, real property is conveyed by way of an option to purchase that is typically issued upon payment of an option fee.

37 See para 29.

38 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] SGHC(A) 13 at [74]. See also para 40 below. Interestingly, while the Appellate Division considered that each Further Sum was paid as the second tranche in respect of the Option Fee

*(cont’d on the next page)*

consideration given that the Developer had drafted and issued the OTPs with the benefit of legal advice. Further and in this respect, to the extent that the nature of the Further Sums and/or terms of the OTPs were ambiguous, it is arguable that any such ambiguity ought to have been resolved in the Purchaser's favour. From a layperson's perspective, this may be perceived as incongruous. An OTP holder, who has the right (but not the obligation) to purchase, would appear to have less "protection" against the "forfeiture" of a sum paid over. On the other hand, a purchaser who is obligated to complete could potentially recover "unreasonable deposits" through the application of the *Hon Chin Kong* framework.<sup>39</sup>

32 The Appellate Division's view that the "*Hon Chin Kong* framework therefore did not apply to a sum that was neither a deposit nor a part payment, such as where the payment constituted a full payment made in consideration of the transaction" does not appear to sit well with remarks made by the courts in earlier English decisions (which were noted in *Hon Chin Kong* at [100]) as it allows the court to scrutinise the reasonableness of the sums paid over by the purchaser in this specific context.

33 Further, the Appellate Division considered the Developer's evidence regarding its "practice" of collecting 20% of the purchase price "upfront".<sup>40</sup> However, it is respectfully submitted that the probative value of the Developer's *internal* practice is doubtful. There does not appear to be any suggestion that the Purchaser knew of such a practice, or that the parties negotiated the OTPs with this particular practice in mind. Further, it is unclear if the parties turned their minds to the nature of the Further Sums given that the bundling of all eight sets of Further Sums was "something that the [Developer] had *unilaterally* decided on based on its subjective belief of how the so-called 'bulk purchase' should be implemented and its assumption that these arrangements would not present issues for the [Purchaser]"<sup>41</sup> [emphasis in original].

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(ie, the "True Option Fee"), in practice vendors may not be prepared to issue an option to purchase ("OTP") unless and until the entire option fee is paid in one tranche and in exchange for the OTP. In this respect, it bears reiterating that in the present case the OTPs (which bound the developer as to the terms of the sale and purchase) had been issued prior to the developer's receipt of the Further Sums.

39 Leaving aside related but important issues such as the vendor's loss and damage for the purchaser's breach of contract. However, in a rising property market the vendor would likely suffer no loss and damage.

40 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] SGHC(A) 13 at [74].

41 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2022] SGHC 316 at [105].

## B. *Bundling of Further Sums arguably “penal”*

34 The Appellate Division’s key finding that the True Option Fee was paid in exchange for the grant of the right contained in the OTPs, and hence was in fulfilment of a primary obligation, appeared to be determinative.<sup>42</sup> Nevertheless, *TG Master (General Division)* and *TG Master (Appellate Division)* present unique learning opportunities for property developers given that bulk sales of real property are not uncommon in Singapore.

35 In a typical transaction, the vendor would grant the purchaser an OTP in consideration of payment of the option fee. However, and importantly, the Purchaser in *TG Master (General Division)* could not exercise each OTP individually even though the option fee had already been paid. Instead, the terms of the OTP required the Purchaser to pay the Further Sums for *all* the Properties before any of the OTPs could be exercised.

36 The Developer’s representative testified at trial that the Developer: (a) structured the payments of the Option Fees and the Further Sums such that it would receive 20% of the purchase price of each Property upfront;<sup>43</sup> (b) considered such an approach to be justified on the basis that the payment of the Further Sums by the deadline specified in the OTPs “was longer than the usual time frame when immediate possession was granted”;<sup>44</sup> and (c) gave a bulk discount on the aggregate purchase price on the basis that all eight Properties would be purchased.<sup>45</sup>

37 On a closer examination of the Developer’s explanations, the bundling provisions were the means by which the Developer *compelled* the Purchaser to pay the Further Sums (in addition to the Option Fees) for all the Properties, even if the Purchaser did not wish to complete the purchase in respect of any Property.<sup>46</sup> On the basis of settled law, the fact that a forfeiture clause is included in a contract is not determinative –

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42 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] SGHC(A) 13 at [99].

43 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2022] SGHC 316 at [98].

44 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2022] SGHC 316 at [23].

45 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2022] SGHC 316 at [23] and [104].

46 The General Division stated that “the undoubted effect of the provision is to compel the second defendant to pay the Further Sum so that he could deal with each of the Properties individually, for which he had *already* paid over the Option Fees” [emphasis in original] (*TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2022] SGHC 316 at [104]).



as the General Division highlighted, the contract must be construed as a whole.<sup>47</sup> With respect, this must be the correct position at law. Otherwise, an approach which focuses *solely* on the forfeiture provisions in a contract without any regard to *how* the relevant sum which is sought to be forfeited was paid would undoubtedly promote “clever drafting” by lawyers. As the Court of Appeal noted in a different albeit related context, “clever drafting” is not a practice to be encouraged and would not be countenanced by the courts.<sup>48</sup>

38 Further, the Developer’s desire to collect 20% of the purchase price of each Property upfront (which would be forfeited if the Purchaser did not exercise the relevant OTP in respect of that Property) was designed to secure (*ie*, compel) the Purchaser’s completion of the bulk sale and purchase of *all* the Properties. In other words, the Developer wanted to ensure that it received a sum equivalent to 20% of the purchase price for *all* the Properties *in any event*. These considerations led the General Division to conclude that the bundling provisions were “clearly penal”.<sup>49</sup> However, the Developer’s inclusion of the bundling provisions in the OTPs did not appear to feature in the Appellate Division’s judgment<sup>50</sup> and it may be that detailed submissions on this issue might have persuaded the Appellate Division to arrive at a different outcome having regard to where the balance of justice ought to lie on the facts.

39 Nevertheless, the authors are hopeful that instances of developers unilaterally including provisions in OTPs without prior discussions with purchasers would be rare in practice. Further, such practices may result in the parties incurring unnecessary time and costs (as shown in this case), which would be counterproductive.

40 In any event, it may be appropriate and timely for the real estate industry to reconsider the prevalent (and unsatisfactory) practice of not providing drafts of OTPs to purchasers in advance. At the same time, it would be advisable for purchasers to negotiate and agree on the terms of the OTPs prior to their issuance, if possible. Further, this case also illustrates the importance of ensuring that contractual documents are clearly drafted in accordance with the parties’ commercial intentions. As the Appellate Division noted, “[h]ad the drafter of the OTPs simply

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47 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2022] SGHC 316 at [102].

48 *Ethoz Capital Ltd v Im8ex Pte Ltd* [2023] 1 SLR 922 at [2].

49 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2022] SGHC 316 at [104].

50 The Appellate Division described this as “simply a condition to the right to exercise the OTPs individually” (*TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] SGHC(A) 13 at [78]).



provided for one option fee that was payable in two tranches, the true nature of the True Option Fee would have been clear”.<sup>51</sup>

### C. *Relief against forfeiture*

41 Various commentators have noted difficult and thorny issues in relation to the law on penalties and forfeiture as applicable to “sums paid over” including “excessive” or “unreasonable” deposits.<sup>52</sup> It has been observed that the application of the rule against penalties to the return of deposits is unclear, with some observing that the rule against penalties does not apply to the return of deposits (which should instead be resolved by the principles governing relief against forfeiture).<sup>53</sup>

42 The Appellate Division did not have occasion to properly consider this issue.<sup>54</sup> It noted that the case of *Pacific Rim Investments Pte Ltd v Lam Seng Tiong*<sup>55</sup> was in respect of relief against forfeiture of a proprietary interest and not forfeiture of a deposit. In this respect, it did not appear that the Appellate Division’s attention was drawn to the authorities considered in *Hon Chin Kong* including, in particular, the English decision of *Stockloser v Johnson*,<sup>56</sup> which has been described as “the leading case” on whether relief against forfeiture may be granted in cases which do not involve proprietary interests in land.<sup>57</sup> Interestingly, the seminal decision of *Denka* was decided in the context of a liquidated damages clause while the seminal English decision of *Cavendish Square*

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51 *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] SGHC(A) 13 at [74].

52 Yeo Tiong Min SC (*honoris causa*), Yong Pung How Professor of Law, Singapore Management University, “Deposits: At the Intersection of Contract, Restitution, Equity and Statute”, speech at the Sixth Yong Pung How Professorship of Law Lecture (16 May 2013) <[https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1000&context=yph\\_lect](https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1000&context=yph_lect)> (accessed 26 July 2024). See also n 27 above.

53 Yeo Tiong Min SC (*honoris causa*), Yong Pung How Professor of Law, Singapore Management University, “Deposits: At the Intersection of Contract, Restitution, Equity and Statute”, speech at the Sixth Yong Pung How Professorship of Law Lecture (16 May 2013) <[https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1000&context=yph\\_lect](https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1000&context=yph_lect)> (accessed 26 July 2024). See also n 27 above.

54 The Appellate Division noted (*TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd* [2024] SGHC(A) 13 at [102]) that the Purchaser’s submissions did not thoroughly consider this issue and it “failed to provide any explanation or elaboration on why relief against forfeiture should be available in this context”.

55 [1995] 2 SLR(R) 643.

56 [1954] 1 QB 476.

57 Yeo Tiong Min SC (*honoris causa*), Yong Pung How Professor of Law, Singapore Management University, “Deposits: At the Intersection of Contract, Restitution, Equity and Statute”, speech at the Sixth Yong Pung How Professorship of Law Lecture (16 May 2013) at para 34 <[https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1000&context=yph\\_lect](https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1000&context=yph_lect)> (accessed 26 July 2024).

*Holdings BV v Makdessi*<sup>58</sup> was decided in the context of a conveyancing transaction involving the sale and purchase of shares.<sup>59</sup>

#### **D. Further development or reform**

43 In 2015, the Law Reform Committee of the Singapore Academy of Law formed a subcommittee to study the law of part payments and deposits and consider if law reform was necessary. The subcommittee issued a report in 2015.<sup>60</sup> While it considered that law reform was not necessary, it recommended that developments in the common law be monitored in case this issue “requires revisiting in the future”.

44 Almost ten years have passed since the subcommittee issued its report in 2015. Given the developments in the law since then, it may be timely to consider if these issues require “revisiting”.<sup>61</sup>

### **VII. Conclusion**

45 The decision in *TG Master (General Division)* is a timely reminder to commercial parties to properly document their agreement. Key provisions governing payments including the “contractual objective” and whether such payments would be recoverable should be clearly stated in the contract. Further, parties should also discuss *all* the terms (and not only the commercial terms) and, ideally, circulate drafts before OTPs are issued. This would minimise the likelihood of disputes arising. Given the scarcity of land in Singapore, real property will continue to be an attractive investment class and the courts will likely have occasion to revisit the “difficult relationship” between the law on deposits and the rule against penalties in the future.

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58 [2016] AC 1172.

59 See, in particular, the majority judgment in *Cavendish Square Holdings BV v Makdessi* [2016] AC 1172 at [16].

60 Singapore Academy of Law, Law Reform Committee, *Report on the Law of Part Payments and Deposits* (December 2015).

61 Such issues are beyond the scope of this case note.