

RESPONDENT'S CONTENTIONS

A. Clause 7.1 is unenforceable as a penalty clause. It is a fairer outcome to both parties if liquidated damages are awarded for losses that can be proved.

1. There was no genuine attempt to pre-estimate the loss

a. Pre-estimation of the loss is to be determined at the time of formation

Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd, [1915] AC 79
Phillips Hong Kong Ltd v The Attorney-General of Hong Kong, [1993] 1 HKLR 269
Hong Leong Finance Ltd v Tan Gin Huay, [1999] 1 SLR(R) 755

b. \$11m offer to remove clause 3 by Carlsen was not the basis for which the \$9m penalty sum figure was derived and was not agreed to by Rapport

2. The sum of \$9m is extravagant in comparison to the greatest loss that could conceivably result from the breach at the time of formation, not breach

Beihai Zingong Property Development Co v Ng Choon Meng, [1999] 1 SLR(R) 527

Furthermore, comparison to the sum of \$5.5m is not meaningful as:

- a. Greatest conceivable loss is determined at time of formation**
- b. Not all of the losses can be attributed to the breach**

Hong Leong Finance Ltd v Tan Gin Huay, [1999] 1 SLR(R) 755
Allplus Holdings v Phoon Wui Nyen, [2016] SGHC 144

3. Other factors point cumulatively towards clause 7.1 being penal. The term "penalty sum" is used and while not conclusive, demonstrates the intent of the contract drafter. The \$9m is also a lump sum payment, triggered by any breach.

4. The *Cavendish* test would not lead to a different result

Cavendish Square Holdings BV v Talal El Makdessi, [2015] UKSC 67

a. Clause 7.1 is not a conditional primary obligation, but a secondary obligation, triggered upon breach of clause 3

iTronic Holdings Pte Ltd v Tan Swee Leon, [2016] 3 SLR 663
CIFG Special Assets v Polimet Pte Ltd, [2017] SGHC 22

b. The sum of \$9m is out of proportion to Carlsen's legitimate interest in enforcing clause 3 (the primary obligation)

Allplus Holdings v Phoon Wui Nyen, [2016] SGHC 144
iTronic Holdings Pte Ltd v Tan Swee Leon, [2016] 3 SLR 663
CIFG Special Assets v Polimet Pte Ltd, [2017] SGHC 22