Foo Jong Long Dennis
v
Ang Yee Lim Lawrence and another

[2016] SGHC 10

High Court — Suit No 72 of 2013 and Summons No 4391 of 2015
Chan Seng Onn J
18, 25, 26, 27 November 2014; 23, 24 April 2015; 6, 8, 9, 12, 13, 14, 15 October 2015, 26 November 2015

Contract — Breach

Tort — Misrepresentation — Fraud and deceit

Tort — Conspiracy

28 January 2016 Judgment reserved.

Chan Seng Onn J:

Introduction

1 The plaintiff, Dennis Foo ("DF"), the defendants, Lawrence Ang ("LA") and William Tan ("WT"), and one Peter Lim ("PL") were business partners in, *inter alia*, Raffles Town Club ("RTC"), Europa Holdings Pte Ltd ("EH") and ABR Holdings Limited ("ABR") prior to 2000. In the year 2000, their relationship broke down giving rise to a series of litigations that year ("the Year 2000 Suits"). 15 years after the breakdown of their relationship, the plaintiff and the defendants are still in litigation. Although PL is not a party to the present

proceedings, as will be seen below, he has cast a long shadow on and shaped the events that form the subject of the present proceedings.

2 On 4 April 2014, the plaintiff applied in Summons No 1698 of 2014 for the present action to be bifurcated. I granted the plaintiff's application for bifurcation and the present action was bifurcated on 28 April 2014.

3 This judgment relates to the trial on liability. In the present proceedings, the plaintiff claims that:

(a) The defendants breached the pre-emption provisions of the Articles of Association ("Articles") of RTC and EH ("the Relevant Articles") by *allegedly* selling the *shares belonging to them* to one Margaret Tung Yu-Lien ("TYL") and Lin Jian Wei ("LJW") on 14 April 2001 without allowing him to exercise his rights of pre-emption ("the Breach of Articles Claim").

(b) The defendants unlawfully conspired to conceal the *alleged* agreement made on 14 April 2001 with TYL and LJW from the plaintiff and/or made certain express or implied representations fraudulently (or otherwise) to the plaintiff by rejecting a purchase mechanism proposed by PL, thereby inducing the plaintiff to enter into a deed of settlement on 19 April 2001 ("the Conspiracy, Fraud and Misrepresentation Claims").

4 The plaintiff also initially claimed that the defendants breached certain disclosure rules of the Singapore Exchange Ltd ("the SGX") by failing to disclose the sale of shares in ABR, a public-listed company. This claim is not pursued in the plaintiff's closing submissions.

5 When shareholders decide to part ways there are, broadly speaking, two options available to them. They can liquidate the company and realise the equity that remains after the liabilities of the company have been satisfied or agree that one faction of shareholders buys out the other. In the latter scenario, the seller may have agreed to sell his shares for a number of reasons. He may, *inter alia*, not have sufficient funds to buy out the other shareholders or be unoptimistic about the prospects of the underlying company. These circumstances may change with the course of time. He may subsequently find the necessary funds and/or the prospects of the underlying company may have improved. With the benefit of hindsight, he may feel that he has struck a bad deal by agreeing to sell his shares earlier. The seller may then construct a fanciful claim to reverse the state of affairs or seek a remedy for his bad commercial judgment. In so doing, he will find himself grasping at straws and will have to concede his claim eventually. This is because the law does not provide remedies for bad bargains and poor commercial judgment *without more*, and cannot be used to get a "second bite" at the proverbial cherry.

6 The plaintiff made concessions in the trial before me that go to the core of the Breach of Articles Claim. Though he changed his evidence one day after he made the relevant concessions and attempted to lead evidence to rebut his own testimony, I find at the end of the trial that the plaintiff's concessions reflect the state of affairs at the material time. I also find that the Conspiracy, Fraud and Misrepresentation Claims are brought on erroneous factual premises, rendering them complete non-starters.

Background to the present dispute

7 The plaintiff and the defendants together with one Tan Buck Chye (together, "the RTC Developers") had bid for a site around Trevose Road,

Singapore. This is the site on which RTC now sits ("the Site"). They wanted to develop a premium private recreation club on the Site. As their successful bid was almost 60% higher than the next highest bid, the RTC Developers had difficulty obtaining bank financing for the purchase of the Site.

8 At that point, the RTC Developers approached PL who arranged funding for the purchase of the Site. With the assistance of PL, RTC was conceived. It is uncontroversial that PL had a great degree of influence in the running of RTC. PL nominated his associates to the board of RTC, including one Ricky Goh ("RG"), but was not a director or a registered shareholder of RTC.

9 Soon after RTC was launched, PL proposed listing the business. Eventually, this was done through a back door listing. A substantial stake in ABR, a public listed company on SGX, was acquired by Sullivan Development Limited ("Sullivan") and Goldhurst Properties Limited ("Goldhurst"). The pub and restaurant businesses held by EH were then injected into ABR in consideration for shares in ABR. Together, Sullivan, Goldhurst and EH owned 69.12% of ABR. The defendants, the plaintiff and RG in turn owned shares in Sullivan and Goldhurst. As noted, the relationship between the defendants and PL broke down following a meeting on 30 August 2000 when matters relating to the shareholding of PL in RTC were tabled. This breakdown engendered the Year 2000 Suits.

10 Of the Year 2000 Suits, Suit 742 of 2000 ("Suit 742") is relevant to the present proceedings. In that suit, PL claimed for specific performance of an oral agreement between himself on the one hand and the defendants and the plaintiff on the other under which he was entitled to 40% of the shareholding in RTC

and EH. He also averred that DF was to be a 10.1% shareholder of RTC and EH.[1]

11 The defendants' defence in Suit 742 was that there was no such oral agreement as alleged by PL, and that PL was a shadow director and beneficial shareholder of RTC and EH.[2] The defendants contended that PL was the beneficial owner of 39.21% of the shares in RTC and EH, while the plaintiff owned 10.6% of the same.[3]

12 Though the plaintiff was also initially a defendant in Suit 742, he agreed with PL's averment that he was a 10.1% shareholder of RTC and EH and consented to judgment being entered against him.[4]

13 At the time of Suit 742, the registered shareholdings of the defendants, the plaintiff, RG and PL were as follows:

	EH	**RTC**	**Goldhurst**	**Sullivan**
LA	76.51%	76.51%	60%	60%
WT	11.00%	11.00%	15%	15%
DF	12.49%	12.49%	15%	15%
PL	0%	0%	0%	0%
RG	0%	0%	10%	10%

[1] LA's AEIC, para 19.

[2] LA's AEIC, para 20.

[3] 7AB 5389.

[4] 6AB 4347 – 4357.

Total	**100%**	**100%**	**100%**	**100%**

14 In the Year 2000 Suits, LA was represented by Mr Michael Khoo SC of Messrs Michael Khoo & Partners who was instructed by Mr Terence Teo ("Mr Teo") of Messrs Chee & Teo; WT was represented by Mr Harry Elias SC ("Mr Elias") and Mr Michel Palmer of Harry Elias Partnership LLP ("HEP"); the plaintiff was represented by Mr Cheoh Chai Beng Johnny ("Mr Cheo") of Cheo Yeoh & Associates LLC; and PL was represented by Mr Davinder Singh SC of Messrs Drew & Napier ("D&N").

15 During the course of the Year 2000 Suits, the parties asked for an adjournment of the trial to mediate their disputes. The mediation of the Year 2000 Suits ("the Mediation") took place in April 2001 in three tranches. It is not disputed that there were two factions in the Mediation *viz*, the defendants on one hand and PL, the plaintiff and RG on the other. The Mediation focused on one faction buying out the other on the basis that the two factions were *equal shareholders ie*, with each faction holding 50% of the shares. The parties therefore negotiated with the view that one faction would buy out all the legal and beneficial interests of the shares held by the other faction.

16 The first tranche of the mediation took place on 6 April 2001 at the Singapore Mediation Centre ("the SMC"). The mediators were Mr Goh Joon Seng, Mr Joseph Grimberg SC and Mr Peter Chi ("the SMC Mediators"). The negotiations during this tranche of the Mediation focused on the defendants selling their shares in RTC, EH and ABR ("the defendants' Shares") for S$40m to PL and the plaintiff. This tranche of the Mediation was unsuccessful as no settlement was reached.

17 According to the defendants, the second tranche of the Mediation was held on 6 and 7 or 8 April 2001 at the "office of Arfat Selvam's law firm".[5] The plaintiff claims that he could not recall the existence of this tranche. Mr Cheo, his then solicitor, however confirmed at trial that this tranche took place albeit in his absence. The defendants gave evidence that during this second tranche, they took the position that they would be willing to sell the defendants' Shares to the plaintiff and PL at a reduced price of S$36m instead of the hitherto proposed amount of S$40m.

18 The third and final tranche of the Mediation proceeded at the SMC from 9 – 12 April 2001 before the SMC Mediators. The parties never returned to court after the completion of the Mediation and entered into a deed of settlement on 19 April 2001 ("the Deed") where, in essence, PL and the plaintiff sold their interests in ABR, EH and RTC registered or otherwise ("PL and DF's Interests and Shares") to the defendants at S$36m. Suit 742 was thereafter discontinued. A key issue that has to be resolved in the present case is whether an agreement was reached at the end of the Mediation on 12 April 2001 that PL and the plaintiff would sell PL and DF's Interests and Shares to the defendants at S$36m if the defendants obtained financing ("Alleged Mediation Agreement"). There is before the court *at least* three versions of events as to what happened at the end of the Mediation on 12 April 2001.

19 I pause to note that during the course of the third and final tranche of the Mediation on or about 12 April 2001, PL proposed that he and the plaintiff use RTC's monies to buy the defendants' Shares. To this end, PL suggested that the defendants should transfer the defendants' Shares to him and the plaintiff, and

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[5] LA's AEIC, para 41.

then draw out S$36m from RTC *by way of dividends* to pay themselves ("PL's Proposal"). There is no significant dispute between the parties that this payment mechanism was proposed by PL. It is also not disputed that the defendants rejected this arrangement as unacceptable. The plaintiff avers that the defendants had expressly (or alternatively impliedly) represented to the plaintiff that it was totally unacceptable and improper that the cash held by RTC be utilised either directly or indirectly to buy out LA and WT's shareholding in RTC, EH and ABR ("the Alleged Representation"). This Alleged Representation forms the basis of the Conspiracy, Fraud and Misrepresentation Claims. The plaintiff submits that the Alleged Representation was false as the defendants' motivation was actually to sell their shares to TYL and LJW and they "entered into an agreement with TYL and LJW for the sale of their shares with the consideration to be paid from monies in RTC"[6] and hence they could not have believed that taking money from RTC to pay the purchase consideration for shares was "improper" or "unacceptable"[7]; consequently, the plaintiff was induced into selling his shares to the defendants.

20 LA gave evidence that his solicitor, Mr Teo, who was instructing Mr Michael Khoo SC, had introduced TYL and LJW to the defendants as potential investors. The defendants gave evidence that after the Alleged Mediation Agreement, they decided to approach TYL and LJW to obtain financial assistance to purchase PL and DF's Interests and Shares.

21 The day following the completion of the Mediation *ie*, Friday, 13 April 2001, was Good Friday and hence a public holiday. On that day, the defendants

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[6] The plaintiff's closing submissions, para 423.

[7] The plaintiff's closing submissions, para 428.

met TYL and LJW at TYL's home. Ms Wong Kok Yee and Mr Foong Daw Ching, who were TYL's accountants and tax advisors, were present at that meeting. According to the defendants, the meeting related to the financing by TYL and LJW of the defendants' purchase of PL and DF's Interests and Shares.

22 On 14 April 2001, TYL and LJW on the one hand ("the TYL Consortium") and the defendants on the other signed a handwritten Chinese document entitled "Minutes of Meeting" ("the 14 April Minutes"). A legal issue that arises for determination is whether the 14 April Minutes was or evidenced an agreement between the defendants and the TYL Consortium for the latter to purchase the defendants' Shares. If it was an agreement by the defendants to sell the defendants' Shares, then the plaintiff contends that the Breach of Articles Claim has been made out as the defendants disposed of the defendants' Shares without allowing the plaintiff to exercise his rights of pre-emption under the Relevant Articles. The defendants aver that the 14 April Minutes was not an agreement but simply a record of their discussion with the TYL Consortium. The defendants further point out that even if the 14 April Minutes was an agreement, it was an agreement where the defendants were contemplating the sale of PL and DF's Interests and Shares once they were acquired and not the defendants' Shares. As a result, the defendants argue that the Breach of Articles Claim is a complete non-starter.

23 On Monday, 16 April 2001, a draft of the Deed was circulated by Messrs Lee & Lee ("Lee & Lee") who were acting for LA to each of the solicitors acting for the parties in the Year 2000 Suits. The Deed was faxed over to all parties except D&N to whom the Deed had been handed to physically earlier at "the mediation centre". The Deed was 35 pages long and set out in detail the obligations of the parties to it *vis-à-vis* each other.

24 Also on 16 April 2001, Messrs Wong Partnership ("Wong Partnership"), solicitors acting for RTC, wrote to the Urban Redevelopment Authority ("URA") to request for URA's consent for the plaintiff to transfer his shares in RTC to the defendants.

25 The defendants gave evidence that a cheque for S$3 million, intended to be the initial deposit payable upon the signing of the Deed, was provided by TYL to Mr Teo on 16 April 2001. This amount was subsequently paid as a S$2 million cashier's order *addressed to PL* and S$1 million cashier's order *addressed to PL's solicitors* pursuant to the terms of the Deed. These monies did not pass through the hands of the defendants but were paid directly to PL and his solicitors.

26 Lee & Lee wrote on 17 April 2001 to the Securities Industry Council ("the SIC") to inform that there was a proposed settlement of the Year 2000 Suits for LA to acquire all the shares held by the plaintiff in Sullivan, Goldhurst and EH and RG in Sullivan and Goldhurst. Sullivan, Goldhurst and EH in turn held the shares in ABR. Lee & Lee requested for confirmation from the SIC that by this proposed acquisition, LA would not be required to make a general takeover offer for ABR.

27 On 19 April 2001, the SIC responded to Lee & Lee. The SIC stated that LA would not be required to make a mandatory general offer for the shares of ABR if he purchased the plaintiff's shares in Sullivan, Goldhurst and EH and RG's shares in Sullivan and Goldhurst.

28 The Deed was entered into on 19 April 2001. Under the Deed, the plaintiff and RG sold their interests in RTC, EH and ABR to LA for S$36m and PL released the defendants from Suit 742. Essentially, the plaintiff and PL sold

all their interests in the shares of RTC, EH and ABR. I highlight at the outset that pursuant to cl 2.3 of the Deed, the parties to the Deed (which included the plaintiff) waived all pre-emption rights that they might have in relation to the sale and/or transfer of the Sale Shares (as defined in the Deed). Pursuant to cl 2.4 of the Deed, PL, the plaintiff and RG, *inter alia*, waived all rights and claims against the defendants *in respect of any interest in shares*, whether existing or otherwise *from the date of Closing ie*, 30 April 2001. I reproduce these clauses below:

> 2.3 The parties hereby waive all and any pre-emption rights they may have (whether arising under or out of the respective constitutions of the Sale Companies or otherwise) in relation to the sale and/or transfer of the Sale Shares.
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> 2.4 (a) Each party agrees that subject to and on Closing, it shall release, waive or otherwise hold harmless the other Parties from all actions, rights, choses in action, remedies, claims, proceedings and demands whatsoever and howsoever arising which it has or may have against the other Parties in respect of all subject matters of and/or allegations made in the Suits inclusive of costs and interest.
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> (b) PL and the Vendors hereby agree and acknowledge that upon Closing, they have no actions, rights, choses in action, remedies, claims, proceedings and demands whatsoever and howsoever arising against the associated companies in respect of any interest in shares, whether existing or otherwise, in RTC, EH, Sullivan, Goldhurst or their respective subsidiaries or associated companies.

29 On 23 April 2001, which was 4 days after the Deed was signed, the defendants and the TYL Consortium entered into an agreement known as an Exchangeable Facility Agreement ("the 1st EFA"). Under the 1st EFA, it was agreed that the TYL Consortium would provide LA a loan facility of S$36m, with an option to exchange the loan facility for 50% shares of RTC, 50% shares of EH and approximately 35% shares in ABR. On that very day, the TYL

Consortium requested the Defendants to sign another agreement in Chinese ("the 23 April Chinese Agreement"). The reason given by TYL was that the 1st EFA was in English and she was not comfortable with signing the agreement in English.

30 On 27 April 2001, the defendants acknowledged the two banker's guarantees of S$16.5 million each furnished by the TYL Consortium, *which were addressed to PL*. These guarantees were to serve as the remaining consideration to be paid under the Deed. A receipt ("the 27 April Receipt") was signed by the defendants and the TYL Consortium in order for the defendants to acknowledge the provision of these banker's guarantees by the TYL Consortium.

31 On 30 April 2001, LA, the TYL Consortium and Sullivan entered into an Agreement Relating to Sale of and Option over Shares in ABR Holdings Limited ("the ABR Agreement"). The ABR Agreement essentially provided for the TYL Consortium to acquire approximately 35% shares in ABR, and the consideration for the acquisition of and option over the ABR shares were to be set off against S$13,331,673.40 of the S$36 million loan facility provided by the TYL Consortium.

32 I note that the ABR Agreement expressly (through Recital (C)) terminated the 1st EFA. Also on 30 April 2001, the defendants and the TYL Consortium signed a further Chinese agreement ("the 30 April Chinese Agreement") for the purpose of varying the term in the 23 April Chinese Agreement concerning the amount of damages payable for any breach of the 23 April Chinese Agreement. On 11 May 2001, LA and the TYL Consortium entered into another Exchangeable Facility Agreement ("the 2nd EFA")

pursuant to which LA granted the TYL Consortium the right to exchange the balance of the S$22,668,326.60 of the S$36 million loan facility into 50% shares in RTC.

33 On 12 May 2001, the TYL Consortium exercised their rights under the 2nd EFA and finally acquired 50% shares in RTC. The agreements entered into between the parties after this date are not material to the present proceedings.

Issues arising for determination

34 The following issues arise for determination in relation to the Breach of Articles Claim:

(a) Whether an agreement was reached at the end of the Mediation on 12 April 2001 that PL and the plaintiff would sell PL and DF's Interests and Shares to the defendants for S$36m if they obtained financing.

(b) Whether the 14 April Minutes is evidence of or constitutes a legally binding agreement in which the defendants agreed *to sell the defendants' Shares.*

35 The main factual question that I have to determine in relation to the Conspiracy, Fraud and Misrepresentation Claims that arise from the Alleged Representation is whether the terms in PL's Proposal that was ultimately rejected by the defendants were similar to the terms offered to the TYL Consortium in the sense that the whole consideration for the sale was to come from the monies in RTC to be paid to the sellers as dividends, such that the defendants can be said to have (fraudulently) misrepresented to the plaintiff or conspired against the plaintiff by making the Alleged Representation.

36 Apart from the above factual issues, the present dispute also presents questions of law on when silence can amount to acceptance and the parameters of a right of pre-emption.

Agreement reached at the end of the Mediation on 12 April 2001

37 I commence the analysis by setting out my findings of fact based on the evidence before deciding whether the facts as found give rise to an agreement at law.

Analysis of the evidence

38 In this regard, I start by noting the plaintiff's position when he commenced this action. This is found in his 1st affidavit dated 12 June 2013. I set out para 8:

> a. In the course of the negotiations, both [PL] and I on one hand, and the [defendants] on the other hand, sought how best to amicably part ways in respect of the Companies. The negotiations swayed from initially who should buy who out to how much any buy-out would cost.
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> b. Initially, [PL] and I expressed interest in buying out both [the defendants]. [PL] sought to negotiate the purchase consideration. Eventually, there was an in-principle agreement that the price of S$36 million was acceptable. [PL] proposed that the purchase consideration be funded by cash sitting in [RTC] – most likely through the issue of dividends to [the defendants].
>
> c. Both [the defendants] objected to the same and claimed that such an exercise would be improper. Instead, they offered to raise the requisite finance to buy [PL] and I out instead.

39 The defendants submit that the plaintiff must be taken to have agreed that there was an agreement at the end of the Mediation on the basis of, *inter alia*, the above averments in his 1st affidavit. The above averments may support

the reading that the defendants advance. However, they do not refer clearly to the Mediation; it could well be the case that the "negotiations" referred to therein could have occurred well after the end of the Mediation and during the long weekend commencing on Good Friday *ie*, 13 April 2001, as suggested by Mr Cheo, the plaintiff's witness.

40 However, I note that the above-cited averments are not the only evidential bows in the defendants' quiver. The defendants refer to the evidence of the plaintiff during trial. Therefore, it is sensible to revisit the question of whether the plaintiff was referring to the Mediation in the above paragraph in his affidavit after analysing his evidence at trial. I now turn to this.

41 During trial, the plaintiff did not agree that there was an *agreement* formed at the end of the Mediation. He preferred to use the word "concurrence". It does not matter whether the plaintiff uses the word "agreement". It is not for him to decide whether there was an agreement at the end of the Mediation on 12 April 2001. As noted, the existence of an agreement is a question of law that the court has to determine after analysing the factual evidence.

42 The plaintiff was initially asked of his recollection of what happened at the end of the Mediation on 12 April 2001. He stated as follows:[8]

> Q. And you can't remember the third mediator's name, even though you were there --
>
> A. I was there, but I only remember Joe Grimberg and Goh Joon Seng.
>
> Q. Okay. What happened at the end of that session?

[8] Transcript dated 18 November 2014, pp 108 –109.

> A. *At the end of that session, I think there was some form of a conclusion, and now I know, and then -- I would know then also that instead of [PL] and I to buy [LA] and [WT] out, the reverse happened. A proposal was put that because [PL] could not raise the financing, it's only fair that the other party make an attempt at it.* That is my understanding of the situation. And I got that understanding both from reading and -- some of the documents and trying to recollect, and that would be the logical answer.
>
> Q. Try and answer me as much as you can in your memory.
>
> A. I'm trying very hard.
>
> Q. Not logic and not what you read.
>
> A. Yes.
>
> [emphasis added].

43 The plaintiff stated unequivocally that the state of affairs at the end of the Mediation on 12 April 2001 was as follows:[9]

> Q. Would it be clear that on the 12th, provided they found the finance, they would be buying your shares and [PL's] shares; yes or no?
>
> A. If they find the financing, they would be buying my shares, and we would be selling only to them, yes.
>
> Q. So would you expect the 12th for them to now go and find the finance?
>
> A. Of course.
>
> Q. And if they found the finance, the deal is done?
>
> A. I mean, at that time, yes, if they found the finance, the deal is done.

44 In light of the above, I gave an opportunity to the plaintiff to clarify his position once again on what exactly occurred at the end of the Mediation on 12

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[9] Transcript dated 18 November 2014, p 112.

April 2001, as his concession went to the core of his case. The plaintiff replied that there was a *concurrence* at the end of the Mediation. His evidence was as follows:[10]

COURT:	Let's take your description. There was a concurrence. So it was not an understanding.
A.	Concurrence.
COURT:	All right. Concurrence to do what.
A.	It's as close as an agreement I can come to.
COURT:	Okay, I use your word concurrence, concurrence to do what. What was the concurrence of the four parties.
A.	For them to look for the money.
COURT:	For who to look for the money.
A.	[LA] and [WT].
COURT:	Then after that?
A.	If they find the money, they will buy us out. Only they.
COURT:	Only they.
A.	Yes.
COURT:	This was a concurrence?
A.	Yes.
COURT:	It was made clear to them.
A.	That must be the understanding.
COURT:	So it was not explicitly said that they are the only ones who must buy?
A.	It is understood because it's one party -- in their own words, both faction cannot work together.
COURT:	Both faction cannot work together. They will buy you out provided they have the money.

[10] Transcript dated 25 November 2014, pp 13 – 14.

A. Yes.

45 I note that the plaintiff however later changed his evidence. The change of tack during trial was both suspicious and abrupt to say the least. He suddenly became "very clear" of what happened. He stated that the Mediation ended with "no conclusion".[11] This is a mendacious claim in light of his evidence two days earlier that there was a "concurrence" at the end of the Mediation that PL and himself would sell their shares and interests to the defendants if the defendants obtained financing. Even on a cursory perusal of the transcripts of the plaintiff's cross-examination on 27 November 2014, it is apparent that the plaintiff was struggling to hold together his newly concocted version of events that there was no conclusion at the end of the Mediation.[12]

46 Nevertheless, during the same day when the plaintiff changed his evidence to suggest that there was no conclusion at the end of the Mediation, he slowly receded back to his earlier position that there was a conclusion at the end of the Mediation. Let me explain.

47 The plaintiff stated that he did not speak throughout the Mediation because it was led by PL.[13] It is uncontroversial that the parties were negotiating as two factions. The plaintiff himself gave evidence that although PL was the one speaking at the Mediation, he "supported [PL] from behind".[14] The thrust of the plaintiff's evidence however seems to be this: even if PL had agreed that

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[11] Transcript dated 27 November 2014, p 64.

[12] Transcript dated 27 November 2014, p 113.

[13] Transcript dated 27 November 2014, p 121 – 122.

[14] Transcript dated 27 November 2014, p 124.

the defendants could purchase PL and DF's Interests and Shares at S$36m at the end of the Mediation on 12 April 2001, that did not bind him as he said nothing during the Mediation and, in any case, he did not expressly agree to such a position at the end of the Mediation on 12 April 2001. I reproduce the pertinent parts of the plaintiff's evidence:[15]

> MR ELIAS: You sat there because you knew that whatever [PL] decided you would follow. Just as you did in Suit 742, surrender, if he says, he says, fine. Even when he says "sign the charge", fine. You kept your mouth shut because you wanted [PL] to conduct the entire mediation and you agreed with [PL]. Yes or no?
>
> A. For one party buy the other party out, yes.
>
> Q. And that was decided, at the end of the day, that one party would buy the other party out?
>
> A. I didn't agree because -- I didn't agree.
>
> …
>
> A. No, I don't agree because I didn't say yes, they didn't come to me --

48 The following points emerge from a holistic analysis of the plaintiff's evidence:

(a) The parties negotiated in two factions during the Mediation. The first faction comprised the defendants. The second faction comprised PL and the plaintiff. PL led the Mediation for his faction and the plaintiff supported the position PL took.

(b) The Mediation ended on 12 April 2001 with a "concurrence" that the plaintiff and PL would sell their shares and interests to the

[15] Transcript dated 27 November 2014, pp 123 – 124.

> defendants at S$36m if the defendants could obtain financing. Although PL was the one who assented to this position at the end of the Mediation, the plaintiff is nevertheless not party to that agreement because he did not speak during the Mediation.

49 The defendants also factually proffered a similar version of events as the plaintiff on what happened at the end of the Mediation on 12 April 2001. In this connection, the defendants' evidence was that the Mediation was led by PL and that the two factions agreed at the end of the Mediation on 12 April 2001 that the plaintiff and PL would sell their shares to the defendants at S$36m if the defendants could obtain financing. I note from LA's affidavit that PL drew diagrams on the whiteboard available at the SMC to initially explain a proposal on how he planned to buy out the defendants.[16]

50 The plaintiff decided to adduce further evidence to show that he did not say anything during the Mediation. To my surprise, the plaintiff chose to call the then lead counsel for the defendants in these proceedings, Mr Elias, as his witness to give evidence on what happened at the end of the Mediation on 12 April 2001 and to state whether he spoke during the Mediation. Mr Elias took the stand. His evidence, *inter alia*, was as follows:

> (a) The Mediation was led by PL who spoke the most; apart from the SMC Mediators and Mr Davinder Singh SC, everybody else spoke almost nothing;[17] and

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[16] LA's AEIC, para 45.

[17] Transcript dated 9 October 2015, p 48 - 49.

(b) The plaintiff was silent throughout the Mediation but was "nodding" at the suggestions put forth by PL.[18]

51 I must at this point pause to recapitulate the events that occurred after the 12 April 2001 Mediation. As noted, the next day, 13 April 2001, was Good Friday *ie*, a Public Holiday. In the evening of the Monday that followed *viz*, 16 April 2001, a draft of the Deed was circulated by Lee & Lee to the parties. On that same day, Wong Partnership, solicitors acting for RTC, wrote to the Urban Redevelopment Authority (URA) to request for URA's consent for the plaintiff to transfer his shares in RTC to the defendants.

52 The defendants said that the draft of the Deed circulated on the Monday following the Mediation and the letter written by Wong Partnership was the result of an agreement reached at the end of the Mediation on 12 April 2001. This was similarly the testimony of Mr Elias when he was called to testify on behalf of the plaintiff. Mr Elias recalled that "the deal was done on the [19 April 2001] based on the [16 April 2001] based on the [12 April 2001]".[19] According to Mr Elias, matters culminated on 12 April 2001 when an agreement was reached at the end of the Mediation. After the defendants made the offer to purchase, Mr Elias recalled PL pausing to think about it before saying "Okay, must raise the finance". The plaintiff raised no objections and remained quiet at that time.[20]

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[18] Transcript dated 9 October 2015, p 56 - 57.

[19] Transcript dated 9 October 2015, p 53.

[20] Transcript dated 9 October 2015, pp 61 – 62.

53 I pause to note that the plaintiff said that it was on 13 April 2001 that PL told him that they should sell their shares to the defendants if the defendants could secure the requisite funding.[21]

54 The plaintiff also called Mr Cheo to give evidence on the issue on whether there was an agreement at the end of the Mediation on 12 April 2001. Mr Cheo presented a third version of events. He stated that there were no open negotiations between the parties. He stated in his evidence that after a joint opening session, the parties broke off into private caucuses during the Mediation. He stated that the Mediation ended without any further joint sessions and without any settlement or agreement as to terms.[22] Mr Cheo also stated that the sale price of S$36m did not surface throughout the Mediation. In his evidence, the state of affairs *ie*, the last unaccepted proposal put across, at the end of the Mediation on 12 April 2001 was that PL and the plaintiff were to buy the defendants' Shares at S$40m.[23] Mr Cheo agreed that PL drew diagrams on the whiteboard board, as suggested by LA in his affidavit (see [49] above). However, Mr Cheo suggested that these diagrams were drawn in the private caucus. This does not rest well with the fact that LA had said that he saw PL drawing on the whiteboard – LA was not present at the private caucus of the other faction. Also, Mr Cheo's evidence that the figure of S$36m did not surface throughout the Mediation was inconsistent with that of every other witness who gave evidence in relation to this point.

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[21] Transcript dated 27 November 2014, pp 155 – 156.

[22] Transcript dated 14 October 2015, pp 137, 171.

[23] Transcript dated 14 October 2015, pp 168 –169, 174.

55 Nevertheless, Mr Cheo suggested that on the very next day *ie*, 13 April 2001, lawyers from D&N called to inform him that there was a proposal from the defendants to buy out PL and DF's Interests and Shares at S$36m (a figure which – to go with Mr Cheo's version – had hitherto not been discussed).[24] Mr Cheo said that he thereafter informed the plaintiff of this offer and discussed the proposal over the weekend with the plaintiff. According to him, the plaintiff decided to sell his shares to the defendants at the latest before Mr Cheo went to HEP's office on 16 April 2001. He stated that when he went to HEP's office on 16 April 2001, the lawyers for the various parties *viz*, the defendants, the plaintiff and PL, were at that point still discussing the terms and conditions of the sale of PL and DF's Interests and Shares.

56 Mr Cheo was then confronted with a covering fax enclosing the draft of the Deed sent by Lee & Lee at 5.22pm on 16 April 2001 ("the L&L Cover Letter"). The L&L Cover Letter stated as follows:

> We enclose herewith for your respective comments the draft dated 16 April 2001 of [the Deed] (for [D&N] – without enclosures as we have handed copies to yourselves at the mediation centre).

57 There were two points put to Mr Cheo. The first was that it was highly unlikely that Lee & Lee would be able to come up with a draft of the Deed, which was by no means brief, on 16 April 2001 if the parties had not reached an agreement well-prior to 16 April 2001. Mr Cheo responded as follows:

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[24] Transcript dated 14 October 2015, p 178.

(a) After "a first round of discussions" at HEP's office on 16 April 2001, D&N brought in their team of corporate lawyers to HEP. The parties started negotiating without any written terms before them.

(b) Sometime "towards the afternoon", Lee & Lee, on receiving instructions from the defendants on 16 April 2001, stationed themselves at HEP's offices and started drafting the Deed.

(c) The drafting of the Deed took place "in parallel" with the negotiations on the terms of the sale. D&N's team of corporate lawyers drafted some clauses while Lee & Lee took charge of the document.

(d) The negotiations at HEP's office went past 6pm.

58 Mr Cheo was then cross-examined on the portion of the L&L Cover Letter that stated that the draft was handed to D&N at the mediation centre. It was suggested to Mr Cheo that this must mean that D&N had met Lee & Lee sometime earlier to receive a copy of the draft of the Deed *ie*, the terms that are found in the draft of the Deed must have been proposed at a time earlier. Mr Cheo responded to this by suggesting that it might be the case that Lee & Lee mistook HEP's offices for the mediation centre. I note that Lee & Lee was not present at the Mediation on 12 April 2001.

59 Mr Cheo therefore, produced yet another version of events before the court. In the face of the many versions put across by the plaintiff, a constant version of events from the defendants and Mr Elias and a very different version put forth by Mr Cheo, it is clear that at least one witness has not been forthright with his evidence.

60 I do not accept Mr Cheo's testimony on what happened at the Mediation for several reasons. His version of events is far removed from that of the plaintiff and every other witness who gave evidence on this point ("the Other Witnesses"). Notwithstanding the differences in their testimonies, the Other Witnesses agreed that both factions were considering the figure of S$36m towards the later stages of the Mediation, which is in stark contrast to Mr Cheo's version that the figure of S$36m never surfaced at all during the Mediation. Furthermore, the common thread in the evidence of the Other Witnesses was that the Mediation comprised largely of open negotiations led by PL whereas Mr Cheo's version was that apart from the joint opening session, the parties broke off into private caucuses and the Mediation ended without any further joint sessions and without any settlement or agreement as to terms. I find it far more believable that PL had used a white board to explain to all present at the Mediation (and not at a private caucus as per Mr Cheo's version) the intricacies of how he and the plaintiff were proposing to purchase the defendants' Shares using the funds in RTC by having dividends declared from RTC and paid to the defendants' for selling their shares to him and the plaintiff. That was how LA and Mr Elias were able to testify to the fact that PL used a white board to explain his payment proposal. In my view, it is less probable for PL's complicated payment proposal to be made at a private caucus because an intermediary would then have to convey PL's explanation of his complicated payment arrangement to the private caucus of the other faction with the attendant risk of conveying an incomplete or inaccurate explanation.

61 Mr Cheo's version of events on 16 April 2001 also seems improbable. By his reckoning, Lee & Lee would have, after having arrived in the afternoon, had but a few hours to produce a complete draft of the Deed *while the parties were still negotiating* the terms of the sale.

62 It seems to me that Mr Cheo's evidence has been shaped to salvage the plaintiff's case after the plaintiff conceded that there was a "concurrence" at the end of the Mediation on 12 April 2001. I do not find Mr Cheo to be a credible witness and reject his evidence, which is inconsistent with *even* the plaintiff's own evidence in this trial.

63 Ignoring his subsequent unashamed prevarications, the plaintiff's evidence given during the earlier part of his cross-examination strongly suggests that there was an agreement reached at the end of the Mediation on 12 April 2001 that the plaintiff and PL would sell their shares to the defendants if the defendants could obtain financing (see [42] – [44] above) ("Earlier Evidence"). While the plaintiff viewed that the "concurrence" alone would not provide the basis for a valid agreement at law, this is his own view.

64 Having assessed the plaintiff's evidence, among other things, it is clear to me that his subsequent evidence during trial that there was "no conclusion" at the end of the Mediation is a self-serving version of events that I do not find believable.

65 In accordance with the plaintiff's Earlier Evidence and the defendants' and Mr Elias' evidence, I find that the two factions – as a matter of fact – agreed at the end of the Mediation on 12 April 2001 that the defendants would be able to buy PL and DF's Interests and Shares at S$36m if they could obtain financing.

66 In my view, all the essential elements necessary for an enforceable agreement were present. The identity of the buyers and sellers was clear, the subject matter of the sale being PL and DF's Interests and Shares was clear and the price at which those Interests and Shares were to be sold was also clear. In

the circumstances, it is quite apparent that the defendants could have sued PL and the plaintiff if they had refused to sell their interests and shares to them after they had obtained financing.

67 The plaintiff, of course, maintains that he could not possibly have agreed because he remained silent throughout the Mediation. In the plaintiff's submission, his silence cannot amount to an agreement. I now set out the legal position on when silence can amount to acceptance.

When silence can amount to acceptance

68 As noted by the Court of Appeal in *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521("*R1 International*") at [51], the law adopts an objective approach towards the question of whether the parties have reached an agreement. The Court of Appeal also noted as follows at [53]:

> Third, although silence by one party may not by itself constitute acceptance of the terms sent by the other party, it does not follow from this that silence is fatal to a finding that the terms sent have been accepted. The effect of silence is context-dependent. In many cases, while there may not be actual communication of acceptance, the parties' positive, negative or even neutral conduct can still evince acceptance: *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 at [50] and [52].

69 I refer also to the decision of the High Court in *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 ("*Midlink Development*"). In that case, the tenant leased units from the landlord. The parties met to discuss future arrangements in relation to the lease ("the Meeting"). The parties agreed on an extension of the lease and reduced rent at the Meeting. The landlord then sent the tenant a draft agreement which the tenants did not sign. However, the tenant continued to pay the reduced rent at

the beginning of each month. The tenant subsequently sought to give notice of "termination of lease" and refused to make rental payments. The landlord sued the tenant on the basis that there was an oral agreement formed at the Meeting that the tenant would continue the lease at the reduced rent. The tenant stated that since it did not return the draft of the agreement signed, its silence cannot amount to acceptance. The court had to decide if the tenant's silence could amount to acceptance.

70 The court ultimately ruled that there was an oral agreement formed at the Meeting. However, the court observed that even if it were not the case, the tenant's contention that the unsigned tenancy agreements were not binding was without merit. A contract could be concluded on the terms of a draft agreement if the parties were perceived by their conduct to have acted on it. While the tenant remained "silent" by not signing the tenancy agreements, the tenant's omission to sign the tenancy agreements was a calculated attempt to exploit the unsigned agreements grounded on the tenant's belief that leaving the agreements unsigned would allow it to walk away from the tenancy when new premises were found.

71 The observations of the court in this regard are instructive. The court noted as follows:

> 48 Acceptance in a contractual setting must be ascertained objectively. Acceptance can be signified orally, in writing or by conduct. *When there is a history of negotiations and discussions, the court will look at the whole continuum of facts in concluding whether a contract exists. The subjective intention of a party and silent mental conduct that may incorporate dissemblance is neither relevant nor legally admissible.*
>
> …
>
> 51 To say that silence can never be unequivocal evidence of consent may be going too far: see *Cheshire, Fifoot & Furmston's*

> *Law of Contract: Second Singapore and Malaysia Edition* (1998) by Professor Andrew Phang Boon Leong at 112. *It is always a question of fact whether silent inactivity after an offer is made is tantamount to acceptance. Indeed, in some matters there could be a duty to speak arising from the relationship between the parties. In such instances, silence is likely to amount to a representation.* Buckley LJ in *Spiro v Lintern* [1973] 1 WLR 1002 at 1011 observed:
>
> > … if A sees B acting in the mistaken belief that A is under some binding obligation to him and in a manner consistent only with the existence of such an obligation, which would be to B's disadvantage if A were thereafter to deny the obligation, A is under a duty to disclose the non-existence of the supposed obligation.
>
> 52 George Spencer Bower and Alexander Kingcome Turner in *The Law Relating to Estoppel by Representation* (3rd Ed, 1997) at para 59 on p 52 incisively state apropos negotiating parties:
>
> > Where A and B are parties to a negotiation or transaction, and, in the course of the bargaining or dealings between them, A perceives that B is labouring under a mistake as to some matter vital to the contract or transaction, he may come under an obligation to undeceive B, at all events if the circumstances are such that his omission to do so must inevitably foster and perpetuate the delusion. In such cases silence is in effect a representation that the facts are as B mistakenly believes them to be, and A is accordingly estopped from afterwards averring, as against B, any other state of facts.
>
> In the final analysis, the touchstone is whether, in the established matrix of circumstances, the conduct of the parties, objectively ascertained, supports the existence of a contract. *Reduced to its rudiments, it can be said that this is essentially an exercise in intuition. Legal intentions, whether articulated or unarticulated, should not be viewed in isolation but should be filtered through their factual prism. Silence, depending on whether it is conscious or unconscious, may also from time to time entail altogether disparate legal consequences.*

72 The observations also broadly echo the position in s 69(1)(b) of the American Law Institute's *Restatement (Second) of Contracts* ("the

Restatement"), which proposes that acceptance by silence be dealt with in the following manner:

> **Acceptance By Silence Or Exercise Of Dominion**
>
> (1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
>
> (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.
>
> (b) *Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.*
>
> (c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.
>
> (2) An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him.
>
> [emphasis added].

73 The observations highlighted in *R1 International*, *Midlink Development* and s 69(1)(b) of the *Restatement* make the same point that under a certain factual matrix, it may be possible to infer acceptance notwithstanding the relevant party's silence. In my view, the following general propositions of law can guide the court in determining whether silence amounts to acceptance:

(a) The effect of silence is *context-dependent*; the parties' positive, negative or even neutral conduct can still evince acceptance.

(b) It is always a question of fact whether silent inactivity after an offer is made is tantamount to acceptance. The court must not only look

at the facts surrounding the acceptance but must assess the *whole continuum of facts* and the background to the parties' relationship.

(c) The subjective intention of a party and silent mental conduct that may incorporate dissemblance (*ie*, mental conduct that is not consonant with objective conduct) is not relevant or legally admissible in assessing this question.

(d) In instances where the court can infer a duty to speak arising from the relationship between the parties or the context of the negotiations, silence is likely to amount to a representation of acceptance.

(e) Where the offeror has stated, given the offeree reason to understand or the offerree has reason to understand that assent may be manifested by silence or inaction, the offeree in remaining silent and inactive may well be signifying his acceptance of the offer.

The plaintiff's silence in the Mediation amounts to acceptance

74 It is undisputed that the four parties (*ie* PL, the plaintiff, and the defendants) were negotiating as two opposing factions on the sale of their respective shares and/or interests at the Mediation. Under such circumstances, the parties in one faction would be expected by the parties in the other faction to consolidate the positions within their respective faction before making the offer to the other faction. Should any one party take a different position from his own faction's consolidated position, he would be under a duty to speak up and make clear to all the parties in the other faction that he is not accepting or agreeing with the consolidated position presented by his faction. If he does not do so and remains silent, he may be taken to be representing to the other faction

that he similarly assents to the consolidated position being presented by his faction on his behalf. Thus, when his faction presents a consolidated position of acceptance of an offer from the other faction, this may be sufficient at law to amount to his acceptance of the same offer although he never intended to accept that offer in the first place and although he may have made known his disagreement privately to the parties within his own faction. To avoid being treated at law as having agreed to the consolidated position of his faction, he cannot keep silent. He must disclose and make clear to the other faction his disagreement with his own faction's consolidated position.

75 On the present facts, it is clear from the plaintiff's own evidence that he was satisfied in letting PL conduct and lead the negotiations for his faction and in supporting PL "from behind". Under such a situation, the plaintiff was representing unequivocally to the other faction comprising the defendants that his position was wholly aligned with that of PL. The plaintiff is under a duty to speak if he suddenly decides to fall out of the line. On the totality of the evidence, I find that PL had communicated at the end of the Mediation on 12 April 2001 that he was agreeable to the proposal that the defendants would purchase PL and DF's Interests and Shares for S$36m if the defendants could find the financing. As the plaintiff chose to keep silent, he represented at law that he had also accepted this proposal. Therefore, I conclude that there was a *conditional* oral agreement at the end of the Mediation on 12 April 2001 ("the Agreement") between the parties, which included the plaintiff. Under the Agreement, the defendants would not be legally obliged to purchase PL and DF's Interests and Shares if they could not obtain financing but if the defendants obtained financing (as they eventually did), PL and the plaintiff would have to sell their shares (as they eventually did) to the defendants.

76 I note that the plaintiff states that, subjectively speaking, he did not agree to anything at the Mediation on 12 April 2001. His subjective intentions are however legally irrelevant. In any case, I find that the plaintiff would not have harboured any such intention as the plaintiff had suggested in his own evidence that he was happy to go with any proposal put across by PL. The defendants set out at length the facts leading up to the founding of RTC and Suit 742 to show the court that the plaintiff was happy to go with any proposal by PL as he was "beholden" to him. Apart from the observations I have made in this paragraph, I need not express any further view on this point for the purpose of these proceedings.

The 14 April Minutes

77 As noted at [21] above, the defendants met the TYL Consortium on 13 April 2001 after the Agreement was reached at the end of the Mediation on 12 April 2001. As I have found at [75] above, the Agreement was conditional upon the defendants securing financing to purchase PL and DF's Interests and Shares.

78 On 14 April 2001, the defendants on the one hand (in this connection, "Party A") signed the 14 April Minutes written in Chinese with the TYL Consortium on the other hand (in this connection, "Party B"). I reproduce a translation of the 14 April Minutes below:

Minutes of Meeting

Party A agreed to the sale at S$36 million of:

ABR 35% (approximately 34. ….%) in short, the total of both parties was 70%

RTC 50%

(signed)

EUROPA HOLDINGS PTE LTD 50% (signed) (signed)

and that the profits received by Party A in the first and second years after the joining of the new shareholder(s) would be transferred and given to Party B.

Party B agreed that the loan utilised by the former shareholder(s) before the lawsuit need not be repaid to the company. However, the former shareholder(s) would have to be responsible for the legal and tax issues; the new shareholder(s) would not be held liable.

If Party B breached the Agreement, Party B would have to compensate Party A S$18 million.

If Party A breached the Agreement or sold (the abovementioned) to another party instead, Party A would have to compensate Party B S$18 million. The compensation would have to be paid in full within 14 days; the same condition applied to both parties.

Mode of payment upon conclusion of Agreement:

Party B would have to pay to the law firm S$3 million on 16 April 2001, and hand over two banker's guarantees on 30 April 2001:

One in the sum of S$16.50 million to be cashed on 30 July 2001,

One in the sum of S$16.50 million to be cashed on 30 October 2001.

When Party B handed over the two banker's (guarantees) on 30 April 2001, Party A would have to transfer the shares in ABR Holdings and 50% of RTC Club to Party B speedily.

Remarks:

After the (shares) in ABR had been transferred, both parties would have to mortgage a total of 70% of the shares to a bank to obtain a loan to be extended to Party B. Both parties would think of a way and assist one another jointly.

Matters pertaining to transfer of RTC shareholding

URA: Would there be any problem to apply to URA for transferring 50% and the former shareholder(s) keeping 50%? How many working days were required to effect the transfer?

Question as to the need of reporting to URA for the change of shareholders if CSC was obtained.

As CSC had yet to be obtained, it was still outstanding. The Fire Safety and Shelter Department.

As there were too many members, it was not easy for the Fire Safety Department to grant an approval speedily. As such, there might be a delay. It was left to the shareholder(s) to consider as to what measures to be taken.

(signed)

(signed)

Confirmation by Party A

Both ABR and RTC had no external debts (including banks)

(there was O/D)

ABR Company had fixed deposits of more than $18 million (to be based on the financial report as it was a listed company).

RTC had 138,000,000/=

However, a provision of 100 million was required.

There was an outstanding sum of construction fee; after deducting all the external debts, there would be at least $30 million of fixed deposits.

(signed)

(signed)

Minutes of Meeting

Date: 14 April 2001

Party A:

Ang Yee Lim (signed)

Tan Leong Ko (signed)

Party B:

Lin Jian Wei (by fax transmission)(signed) for

Tung Yu Lien (signed)

79 I recapitulate that the plaintiff argues that the 14 April Minutes was an agreement where the defendants sold *the defendants' Shares* in breach of the pre-emption rights that he possessed under the Relevant Articles. There are two questions that need to be resolved. The first is whether the 14 April Minutes was "evidence of or constituted an agreement" at law.[25] If the first question is answered in the positive, then there remains the question of whether the 14 April Minutes is or is evidence of an agreement where the defendants agreed to sell the defendants' Shares or whether it sets out the agreed mechanism by which Party B would ultimately acquire PL and DF's Interests and Shares.

80 The defendants take the position that the 14 April Minutes is not an agreement because of the following:[26]

(a) it was titled "Minutes of Meeting";

(b) the matters recorded therein were tentative in nature;

(c) the parties entered into the 23 April Chinese Agreement, 1st EFA, 2nd EFA and 30 April Chinese Agreement ("the Other Agreements") subsequently; and

(d) the defendants' evidence was that both parties did not intend to be bound notwithstanding the words used in the 14 April Minutes.

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[25] Statement of Claim (Amendment No. 2), para 14.

[26] The defendants' reply submissions, para 7, 14.

The court's approach to analysing the legal effect of commercial arrangements

81 I propose to briefly synthesise the law as it stands and set out some broad general principles that may be applied to assess whether a commercial arrangement is intended to have legal effect. These are as follows:

(a) As a starting point, in matters of commerce, there is a rebuttable presumption that the parties intend to create legal relations in any commercial arrangement that they propose (see *Chua Kim Leng (Cai Jinling) v Phillip Securities Pte Ltd* [2006] SGHC 221 at [24]).

(b) The onus on a party who asserts that a commercial arrangement is not to have legal effect is a heavy one (see *Tan Eck Hong v Maxz Universal Development Group Pte Limited* [2012] SGHC 240 at [60]).

(c) Where the parties perform the terms of the commercial arrangement, it is likely that they intend to enter into legal relations pursuant to the commercial arrangement (see *G Percy Trentham Ltd v Archital Luxfer* [1993] 1 Lloyd's Rep 25 at 27).

(d) The fact that the commercial arrangement is drafted/structured by solicitors and the use of language importing legal relations are factors that would go towards finding that parties intend to create legal relations (see *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2011] 2 All ER (Comm) 963 at [37]).

The 14 April Minutes evidenced an agreement between the defendants and the TYL Consortium

82 The defendants' argument that the document was entitled "Minutes of Meeting" does not go very far as the plaintiff's case is a broader one: the 14 April Minutes *is evidence of* or constitutes an agreement. The 14 April Minutes states that the parties "agreed" to a number of things. As the parties were dealing in a commercial capacity, there is a rebuttable presumption that they intended to create legal relations as regards their agreement *that was recorded* in the 14 April Minutes.

83 The defendants have not rebutted this presumption. In my view, the 14 April Minutes was intended, on a balance of probabilities, to evince the fact that the parties reached an oral agreement on 14 April 2001 on a number of matters ("the 14 April Agreement"). In the 14 April Minutes, the parties then recounted that they agreed on how the payment for the eventual acquisition of shares in RTC, EH and ABR was to be made. I refer, in particular, to one part of the 14 April Minutes that I reproduce here for convenience:

> …
>
> Mode of payment upon conclusion of Agreement:
>
> *Party B would have to pay to the law firm S$3 million on 16 April 2001, and hand over two banker's guarantees on 30 April 2001*:
>
> One in the sum of S$16.50 million to be cashed on 30 July 2001,
>
> One in the sum of S$16.50 million to be cashed on 30 October 2001.
>
> …
>
> [emphasis added].

84 It is undisputed that the TYL Consortium did on 16 April 2001 perform the 14 April Agreement by paying S$3m. The performance of the terms

recorded in the 14 April Minutes does suggest that the parties reached an agreement on 14 April 2001 that was intended to have legal effect.

85 My conclusion is buttressed by the fact that the parties set out their liabilities *vis-à-vis* each other. I reproduce the relevant portion of the 14 April Minutes:

> …
>
> If Party B breached the Agreement, Party B would have to compensate Party A S$18 million.
>
> If Party A breached the Agreement or sold (the abovementioned) to another party instead, Party A would have to compensate Party B S$18 million. The compensation would have to be paid in full within 14 days; the same condition applied to both parties.
>
> …
>
> [Emphasis added]

86 While I am cognisant of the fact that the 14 April Minutes was not drafted by a lawyer and that the TYL Consortium did not have their own solicitors present at the meeting (apart from Mr Teo who was a friend of TYL and LJW and counsel of LA), I note from the 14 April Minutes that the 14 April Agreement contemplated clearly legal effects that should flow from the TYL Consortium's refusal to pay S$3m on 16 April 2001.

87 The fact that the TYL Consortium on the one hand and the defendants on the other entered into the Other Agreements is not legally relevant, as the Other Agreements can be rationalised as subsequent agreements to implement the commercial understanding of the parties of their obligations in the 14 April Agreement. Additionally, the 14 April Minutes does not in any sense suggest that the 14 April Agreement was some sort of a "subject to contract"

arrangement. It was in essence a binding contract that was to be in place until the parties enter into the Other Agreements.

88 I also note LA's evidence in cross-examination:[27]

> Q. This is my first question: there was a fear on 14 April 2001 that [TYL] may not live up to her commitment; correct?
>
> A. Yes.
>
> …
>
> Q. Correct. The last thing you wanted was a situation where [the TYL Consortium] played you out, correct? That means they don't give you the money on 16 April?
>
> A. Yes.
>
> Q. It's a short time. 14 April 2001 is this document, 16 April 2001 is the first date in which [the TYL Consortium] have to fork out $3 million as the first part, the first tranche, of the consideration.
>
> A. Yes.
>
> Q. You wanted some kind of assurance yourself, correct? Am I right?
>
> A. Yes.
>
> Q. And that is why, [LA], you negotiated with [the TYL Consortium], by proxy, I suppose, that if [TYL] breached the agreement, she would have compensate you $18 million?
>
> A. Yes.
>
> Q. In that way, at the very least, you have an assurance. On the one hand, you know she's serious, because she is basically telling you, "Don't worry, if I go back on this word, on my commitment to extend this to you, on my commitment to provide the three tranches of financing, I will compensate you", am I right?
>
> A. Yes.

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[27] Transcript dated 9 October 2015, pp 183 – 184.

> Q. That gave you the assurance; correct? Because, if [the TYL Consortium] did back out, you could then go back and say, "Hey, hey, you now owe me 18 million because you breached this", am I right?
>
> A. Yes.
>
> Q. In your mind, if [the TYL Consortium] had backed out, you would have brought this clause to their attention to say, "*Hey, you said that you would compensate me 18 million if you breached it. You have breached your commitment to me, therefore, I'm now claiming 18 million from you", yes?*
>
> A. *Yes.*
>
> [emphasis added].

89 It seems to me that LA himself was of the view that he could have sued the TYL Consortium for the S$18m as recorded in the 14 April Minutes if the TYL Consortium did not pay the S$3m on 16 April 2001. This, to me, is evidence of the defendants' and the TYL Consortium's intentions on 14 April 2001 when they discussed the terms that were then recorded in the 14 April Minutes. It becomes entirely clear on the objective evidence that the parties wanted the 14 April Agreement to have legal effect pending their entry into the Other Agreements.

90 The fact also remains that the defendants' were only able to confidently inform PL and the plaintiff that they had fulfilled the condition in the Agreement *viz*, obtained financing to buy out PL and DF's Interests and Shares, because they had entered into the 14 April Agreement with the TYL Consortium.

No breach of the pre-emption rights in any case

91 For completeness, I endeavour to analyse if the defendants' would have breached the pre-emption rights of the plaintiff under the Relevant Articles if the 14 April Agreement as evinced by the 14 April Minutes was indeed an

agreement to sell the defendants' Shares. I note however that this analysis is hypothetical, as I have found that the 14 April Agreement related to the sale of PL and DF's Interests and Shares (see [107] below).

92 The leading decision on the issue of pre-emption rights is that of the House of Lords in *Lyle & Scott Ltd v Scott's Trustees, Lyle & Scott Ltd v British Investment Trust Ltd* [1959] AC 763 ("*Lyle v Scott's Trustees*"). The case arose out of an outside bid for the issued share capital in a company with articles of association conferring rights of pre-emption upon existing members. The articles contained a provision in article 9 that "no transfer of ordinary shares ... shall take place for an onerous consideration so long as any other shareholder is willing to purchase the same" and that a shareholder who is "desirous of transferring his ordinary shares" should give notice in writing to the company secretary, whereupon the pre-emption machinery would be set in motion ("art 9").

93 The respondents and certain other shareholders accepted the bid, executed and delivered proxies, declarations of trust and the share certificates to the bidder and received payment of the purchase price. All that remained to be done was for the shareholders to execute transfers and the bidder to present them for registration. The respondents also bound themselves legally to vote as the bidder desired, so as to put him as fully in control of the company as they could without registering transfers of the shares. The appellant company commenced proceedings for a declaration that the sales of shares had been in breach of art 9 and for an order of specific implement requiring the shareholders to activate the pre-emption machinery by giving notice to the secretary. The House of Lords had to decide whether the respondents can be said to be "desirous of transferring [their] ordinary shares." This turned on the

interpretation on what "transfer" meant in the context of pre-emption rights. The House of Lords held that the respondents had transferred their shares by entering into a *binding* agreement with the bidder *where they held the shares as trustees for the bidder*.

94 In this regard, Viscount Simonds noted as follows at 774 – 775:

> … [A]s I have said, the question is not whether what has been done is a breach of the first part of the article but whether it demonstrates with sufficient clearness that Scott's trustees are persons desirous of transferring their ordinary shares. It appears to me that there is no room for doubt that that is just what they are. Here I can proceed on their admissions. For, *since it is the admitted fact that they entered into the agreement for sale of their shares and have received and retain the price, it follows that, whether or not they have yet done all that they ought as vendors to do, they hold the shares as trustees for the purchaser*. They are bound to do everything that in them lies to perfect the title of the purchaser. They cannot compel the company to register him as the holder of the shares, but everything else they must do, and it is straining credulity too far to suppose that everything else would not already have been done, if it had not been hoped to gain some tactical advantage by delay. …
>
> …
>
> … I have already indicated that a shareholder who has *agreed to sell his shares and has received the price is to be deemed to be desirous of transferring them*. At once, therefore, the machinery of the article is put in motion and he must inform the secretary of the number that he desires to sell …
>
> [emphasis added].

95 Lord Reid opined that the context in which the words are used in the articles should ultimately determine whether the pre-emption right has been triggered at 778:

> … They say that transfer "and transferring" only apply to a complete transfer of the ownership of shares by acceptance and registration of deeds of transfer, and that a shareholder who agrees to sell his shares is quite entitled to do so and to receive

> the price and vote as the purchaser wishes so long as he is not desirous of having a transfer registered.
>
> I see no reason for reading the article in that limited way. Transferring a share involves a series of steps, first an agreement to sell, then the execution of a deed of transfer and finally the registration of the transfer. *The word transfer can mean the whole of those steps*. Moreover, the ordinary meaning of "transfer" is simply to hand over or part with something, and a shareholder who agrees to sell is parting with something. *The context must determine in what sense the word is used*.
>
> …
>
> [emphasis added].

96 Another noteworthy decision is that of the English High Court in *Re Sedgefield Steeplechase Co (1927) Ltd, Scotto v Petch and others* [2000] 2 BCLC 211 ("*Re Sedgefield*"). The decision of the English High Court there was delivered by Lord Hoffmann (sitting as an additional Judge of the Chancery Division). The plaintiff in that case ("S") was a shareholder in a company whose articles of association conferred pre-emption rights which required a shareholder who "intends to transfer" shares to give written notice of his intention to the board which might then offer the shares to other members. A take-over bid was made for the company by an outside bidder and all the shareholders other than S ("the other shareholders") entered into agreements with the *bidder to sell it the equitable interest in their shares*.

97 The agreements provided that the bidder as trustee for the other shareholders had no authority to transfer the shares in any way which would contravene any subsisting pre-emption rights contained in the articles of association of the company and required the other shareholders to use their best endeavours to requisition a meeting to pass a resolution to delete the pre-emption articles. S presented a petition under s 459 of the Companies Act 1985 (UK) claiming to be entitled to exercise her pre-emptive rights complaining that

the proposed alteration of the articles would be unlawful and unfairly prejudicial to her interests. At the same time she issued a writ claiming a declaration that the other shareholders were obliged to give transfer notices under the articles and a mandatory order that such notices be given. Two preliminary issues were tried by the English High Court, namely whether in the circumstances each of the other shareholders "intends to transfer shares" within the meaning of the articles of association and whether they were bound to give written notice to the board of such intention.

98 Lord Hoffmann ultimately decided that a shareholder who wished to dispose of his shares but had no intention of contravening the subsisting pre-emption provisions in the articles of association did not intend to transfer for the purpose of triggering an obligation to give notice unless he went further and did something which was in breach of those provisions.

99 He considered all relevant English decisions in which a similar question had arisen: *Lyle v Scott's Trustees, Owens v. GRA Property Trust Ltd* (10th July 1978, unreported), *Theakston v. London Trust Plc* [1984] BCLC 390 and *Ex -p Schwarcz (No 2)* [1989] BCLC 427.

100 Lord Hoffmann observed as follows at 220 – 221:

> If a shareholder who has a definite intention to transfer his shares in accordance with the proper machinery of the pre-emption article can choose his own time for serving a transfer notice, then I do not see that it makes any difference that he agrees with an outside party to serve such a transfer notice at a time of the latter's choosing. *So far as the other shareholders are concerned, all that matters is that there is an intention to comply with the articles.* The arrangements which the shareholder has made for determining when he will give the notice are a matter for him. This, as it seems to me, is the effect of *Theakston v London Trust plc* [1984] BCLC 390, in which an agreement with a bidder to serve a transfer notice when called

> upon to do so did not trigger an obligation to give a transfer notice at once.
>
> By the same reasoning, I do not think that an intention to *transfer shares to an outsider conditional upon the pre-emption rights having been deleted by special resolution can be an intention which creates an immediate obligation to give a notice. The shareholder is entitled to say that he has no intention of violating any rights of pre-emption.* He intends to transfer his shares strictly in accordance with the articles as they stand at the time of the transfer. And, again by the same reasoning, I do not think it matters that the shareholder has bound himself to transfer to the outsider conditional upon the deletion of the articles. *Such an agreement equally contemplates no intention to infringe any right of the other shareholders.* Nor can there be any contravention of the articles in an agreement to vote in favour of the necessary special resolution. These conclusions in my view follow from *Re a company (No 005685 of 1988), ex p Schwarcz (No 2)* [1989] BCLC 427.
>
> The general principle which I would derive from the cases is that *a shareholder who has done nothing inconsistent with an intention to comply, at the appropriate moment, with the subsisting provisions of the articles, cannot be required to serve a transfer notice at an earlier stage.* The obligation attaches only when the shareholder has entered into arrangements (such as the sale in the [*Lyle v Scott's Trust*] case or the grant of the option in *Owens v GRA Property Trust Ltd*) which place him under a contractual obligation to execute and deliver a transfer in violation of the rights of pre-emption.

101 Although *the other shareholders sold their beneficial interests in the shares* in that case to a bidder, Lord Hoffmann took the view that there was no breach of the pre-emption rights at 221–222:

> In my view the sale of the beneficial ownership by the old documentation was *so qualified* that (unlike the option in *Owens v GRA Property Trust Ltd*) it did not give Northern Racing the right to call upon a shareholder to do anything inconsistent with the pre-emption rights. … [S] cannot therefore complain of any intention to execute a transfer in violation of her rights under the articles. So, for the reasons which I have discussed, I do not think that the old documentation demonstrated an intention to transfer which gave rise to an immediate obligation to serve a notice.

> … [T]he new documentation, like the old, expressly precluded Northern Racing from requiring the vendors to do anything else which would contravene subsisting pre-emption rights. It therefore does not evince the necessary intention to transfer. …
>
> [emphasis added].

102 *Re Sedgefield* builds on *Lyle v Scott's Trust* and states that a highly qualified sale of shares might not be in breach of a pre-emption right. This is a positive development in the law. When the court approaches the question of the scope of pre-emption rights, it must remember that the owner of a share in a company has in his hand *a property right*. The pre-emption right of another shareholder in turn is a contractual right that seeks to restrict a person from dealing freely with his property right. An analogy can thus be drawn with the law on restrictive covenants in the context of land law. It has long been established in that context that a restrictive covenant is to be construed strictly so as to not create a wider obligation than that imported by its actual words (see the decision of the English Court of Appeal in *Brigg v Thornton* [1904] 1 Ch 386 as applied by Megarry J (as he then was) in *Rother v Colchester Corporation* [1969] 1 WLR 720 at 728 – 730). Understandably, this flows from the general view that any other right that purports to restrict free dealing with property should be construed strictly ("the property view"). There remains a strong case for suggesting that the property view applies to pre-emption clauses in general and any act short of presenting an executed instrument of transfer for registration should not trigger a pre-emption right. There is no real prejudice to the holder of the pre-emption right in that case, as the relevant company can refuse to register the instrument of transfer if notice is not first served on it in accordance with the articles of association.

103 In such a case, commercial parties can negotiate freely and enter into any agreement bearing in mind that there is risk that they might not be able to

complete the transaction if an existing shareholder should exercise his pre-emption rights. The law would also operate in a commercially friendly manner that would, among the other things, allow parties to proceed with legitimate transactions, which include mergers and acquisitions, without needless obstacles. Nevertheless, I need not express a firm view on this point given that the present issue can be sufficiently dealt with by applying *Re Sedgefield* and *Lyle v Scott's Trust*.

104 In the present case, even if the 14 April Agreement as evinced by the 14 April Minutes related to the sale of the defendants' Shares, there would not have been a breach of the pre-emption rights as there would have been nothing in that agreement which made the defendants' hold the defendants' Shares for the TYL Consortium on trust. There was simply no money exchanged and nothing to create an option over the defendants' Shares. Therefore, the obligation of pre-emption would not even be triggered.

105 I also note that the option granted to the TYL Consortium pursuant to the 1st EFA (which implemented the 14 April Agreement) stated clearly in cl 4.1(b) that the option granted to the TYL Consortium to obtain 50% shares in RTC was conditional upon LA having full legal and beneficial ownership of 89% of the shares in RTC and in cl 4.2 that the right to exchange the facility for shares in ABR was conditional upon LA having full legal and beneficial ownership in EH, Sullivan and Goldhurst. The same arrangement is envisaged by the 2nd EFA. Therefore, even on the plaintiff's unsustainable argument that the defendants sold the defendants' Shares in the 14 April Agreement, the defendants' would not have breached the pre-emption rights in the Relevant Articles as the transfer was envisaged to be conducted in a manner that was consistent with the Relevant Articles; LA was to own all the shares before any

option for the TYL Consortium to purchase the said shares can crystallise. As noted in *Re Sedgefield* at 221 "a shareholder who has done nothing inconsistent with an intention to comply" with the pre-emption rights cannot be liable for breach of the said rights.

106 In any case, there is a strong argument that if the 14 April Agreement did (as the plaintiff fancifully argues) relate to the sale of the defendants' Shares, it *would not even be enforceable*. This is because the consideration for the purchase of those shares would have been paid to PL directly.

The 14 April Agreement relates to the financing of the purchase of PL and DF's Interests and Shares

107 Nothing turns on my finding that the defendants and the TYL Consortium entered into a legally binding agreement on 14 April 2001 because this agreement *very clearly* relates to the financing of the purchase of PL and DF's Interests and Shares and was not an agreement to purchase the defendants' Shares.

108 It is so obvious that the 14 April Agreement related to the back-to-back financing deal where the TYL Consortium financed the purchase by LA of PL and DF's Interests and Shares and then procured the defendants to transfer the PL and DF's Interests and Shares to them. This was also the mechanism found in the 1st EFA and 2nd EFA and ultimately how the TYL Consortium became owners of shares in RTC, EH and ABR (see [31] – [33] above).

109 It did not make sense for the TYL Consortium to want to purchase the defendants' Shares. That would be a very inexplicable commercial move by the TYL Consortium. The defendants' Shares were the subject of Suit 742. If the

TYL Consortium were agreeing to purchase those shares, they would, in essence, be stepping into the shoes of the defendants' as litigants in Suit 742 if PL and DF did not transfer their shares and interests to the defendants. Such a move is beyond reason. The logical interpretation of the commercial arrangement between the defendants and the TYL Consortium is that the financing of the defendants' purchase of PL and DF's Interests and Shares came with the condition that the said shares were to be transferred to the TYL Consortium. The provision in the 14 April Minutes which made the defendants liable to TYL and LJW if they sold the shares "to another party instead" was therefore necessary; the TYL Consortium did not want the defendants to transfer PL and DF's Interests and Shares to any other party other than the TYL Consortium after the defendants had purchased PL and DF's Interests and Shares with the financing obtained from the TYL Consortium.

110 As suggested by WT in his evidence, it did not make any sense to suggest that the 14 April Agreement related to the purchase of the defendants' Shares. This is because, as we know, it was LA who purchased PL and DF's Interests and Shares. If the defendants had transferred the defendants' Shares to the TYL Consortium, then WT will be left with no shares and would not have been paid any compensation at all. What follows is that the subject matter of the 14 April Agreement must be PL and DF's Interests and Shares. I reproduce WT's evidence in this regard:

> Q. One other question. Do you recall, again this morning, you mentioned that according to the plaintiff's case, you had sold your shares in RTC, ABR and EH on 14 April 2001 and that you were not a buyer or a seller under the deed of settlement dated 19 April 2001? Do you recall your evidence?
>
> A. Yes.
>
> Q. You said you would be very angry if that was the case.

> A. Yes.
>
> Q. Why would you be very angry? Can you maybe explain?
>
> …
>
> A. Yes, if I have sold my shares. Then -- 50 per cent it's written here, 50 per cent of RTC. It must have been -- according to their case, it will be 40 per cent from [LA], 10 per cent from me. So I have zero shares. So, as a zero shareholder, from that day onwards, and during [the Deed] on the 19th when we sign, clearly shows that I am not a buyer. Don't you think I would be thinking, hey, what are you all trying to do? You should be giving me my shares, or some shares. Then, on top of that, I never collected any moneys at all. The moneys, [TYL] made sure that [Mr Teo] is giving the money to [PL] side and [the plaintiff's] side to settle the suit and then they -- two cashier's order also was given to [PL] and [the plaintiff].
>
> So, I mean, that's why do I go through this settlement, I have got nothing. Might as well continue to fight. At least I still git my 11 percent.

111 This sits well with the 14 April Minutes that contemplated that the parties therein (*ie*, the defendants and the TYL Consortium) would own 70% of the shares in ABR after PL and DF's Interests and Shares had been transferred to the TYL Consortium (*ie* defendants having 35% of the ABR shares and TYL Consortium having 35% of ABR shares, with the balance of 30% of the ABR shares being owned by members of the public). I reproduce the two relevant portions of the 14 April Minutes:

> Party A [*ie* the defendants] agreed to the sale at S$36 million of:
>
> ABR 35% (approximately 34. ….%) in short, *the total of both parties was 70%*
>
> …
>
> Remarks:
>
> *After the (shares) in ABR had been transferred, both parties would have to mortgage a total of 70% of the shares to a bank* to obtain a loan to be extended to Party B. Both parties would think of a way and assist one another jointly.

> …
>
> [emphasis added].

112 Additionally, the defendants' would not have also been able to give two years of profits to the TYL Consortium if they ceased to be shareholders by selling their shares to them. It would not have made any sense for the defendants to have agreed to the following portion of the 14 April Minutes if the defendants were to have sold the defendants' Shares to the TYL Consortium pursuant to the 14 April Agreement:

> Party A [*ie* the defendants] agreed …
>
> …
>
> …. that the profits received by Party A in the first and second years after the joining of the new shareholder(s) would be transferred and given to Party B [*ie,* the TYL Consortium].
>
> …

113 The plaintiff argues that it is not possible for the 14 April Agreement to deal with PL and DF's Interests and Shares as they did not have 50% shareholding. The plaintiff thus argues that technically, LA would have had to draw on his own shares to transfer his shares to the TYL Consortium. This argument however ignores the fact that the parties were negotiating during the Mediation on the basis that each faction had 50% shareholding. It was by that time agreed by the defendants expressly in Suit 742 that shares were being held beneficially for PL, and although that was not exactly PL's position, it remains the fact that the factual assumption that undergirded the Mediation in relation to buying out the other party was that each faction was seeking to buy out the 50% stake held by the other faction.

114 As noted at [25] and [30] above, the respective purchase amounts that were paid for the stake in ABR, EH and RTC (as set out in the 14 April

Minutes), were eventually paid to PL and/or his solicitors. It is difficult to see why these amounts would have to be paid to PL if the TYL Consortium were buying the defendants' Shares as one would then expect the TYL Consortium to be paying the purchase amounts to the defendants and not to PL. This leads to the inexorable conclusion that the 14 April Agreement must relate to the TYL Consortium's financing of the defendants' purchase of PL and DF's Interests and Shares with an attached obligation on the defendants to procure the transfer of the shares received from the purchase to themselves. It is thus not reasonable to argue that the 14 April Agreement related to the sale of the defendants' Shares to the TYL Consortium.

115 Lastly, I also note that that the option granted to the TYL Consortium pursuant to the 1st EFA on 23 April 2001 stated clearly in cl 4.1(b) that the option granted to the TYL Consortium to obtain 50% shares in RTC was conditional upon the LA having full legal and beneficial ownership of 89% of the shares in RTC and in cl 4.2 that the right to exchange the facility for shares in ABR was conditional upon LA having full legal and beneficial ownership in EH, Sullivan and Goldhurst. The same arrangement is envisaged by the 2nd EFA. As the 1st EFA implemented the substance of the 14 April Agreement, it becomes quite clear that the parties envisaged a back-to-back agreement where LA would acquire PL and DF's Interests and Shares and then transfer them to the TYL Consortium pursuant to their exercise of the options set out in the Other Agreements.

Accuracy of translation of the 14 April Minutes

116 I must also point out that a particular sentence in the 14 April Minutes in its original form uses the Chinese characters "转卖" (which *literally* means "resell" when reference is made to a few of the Chinese-English Dictionaries

produced in court).[28] This was however translated by the then Head Interpreter of the Supreme Court ("the Original Interpreter") as "sold" instead of "resold" in the sentence which he translated into English as "*If Party A breached the Agreement or* ***sold*** *(the abovementioned) to another party instead, Party A would have to compensate Party B S$18 million*." The defendants' counsel during the last tranche of the hearing wanted to establish if there was any error in the translation as the literal meaning of the two Chinese characters used in the 14 April Minutes could suggest that the TYL Consortium was entering into a back-to-back transaction with the defendants' to purchase PL and DF's Interests and Shares and then to resell it to the TYL Consortium. The plaintiff's counsel took the contrary position that there was no error in translation.

117 As the Original Interpreter had since left the Supreme Court, the parties agreed that the Head Interpreter of the Chinese Section of the Supreme Court be called to give evidence to assist the court on the accuracy of the translation. As the Head Interpreter was not available, the Acting Head Interpreter took the witness stand. The Acting Head Interpreter confirmed the accuracy of the translation and reasoned why the Original Interpreter did not translate "转卖" as "resell" (as it should have been on a literal interpretation) and chose to translate it as "sell". She termed this as the "contextual approach". Her view was as follows:

> The translator, having looked at the term "zhuan mai" ["resell"] would probably also see that there are only two parties mentioned in this document, there is only one so-called transaction mentioned in this document and then the translator would ask themselves, why "zhuan mai"? Why is it a resale? Because the transaction described here is that A agrees to sell and then to B, so where is the resale?

[28] Transcript dated 8 October 2015, pp 38 – 39.

> So the translator would read on, to find -- to try and look for any tell-tale signs that this is a resale, and if, having done that, the translator is unable to find any clue pointing to what's a resale, the translator would probably look at the term again, because there is another way of interpreting the meaning of the term "zhuan mai", ie to take the meaning of "zhuan" as a single character, it has its own meaning, and then "mai" also has its own meaning, and then we take the meanings of it these two separate Chinese characters as a whole, as a combination, to come up with a possible way of translating this phrase.

118 Given the confirmation of the accuracy of the translation by the Acting Head Interpreter, I accept that there is no error in the translation of the 14 April Minutes into English. Based on the English translation provided, I am of the view that the factual matrix reveals clearly that the 14 April Agreement aims to set out how the purchase of PL and DF's Interests and Shares was to be financed and eventually transferred to the TYL Consortium. As I have already observed at [108] – [115] above, the 14 April Agreement as evinced by the 14 April Minutes plainly reveals that the parties contemplated a back-to-back transaction where the TYL Consortium would finance the defendants' purchase of PL and DF's Interests and Shares and after the defendants' said purchase, the defendants would have to transfer the said interest and shares to the TYL Consortium and if the defendants were to *sell* the said interest and shares to someone else, the defendants would have to compensate the TYL Consortium a sum of S$18 million. The fact that the English word "resell" is not used in the 14 April Minutes as translated does not mean that there was no possibility of a resale, as in every resale, there are always two transactions *ie*, a "buy" followed by a "sell" transaction. The second transaction can just as accurately be described as another "*sell*" transaction.

Summary of findings

119 In light of the above, I conclude that the 14 April Agreement did not relate to the sale of the defendants' Shares but related to the financing of the purchase of PL and DF's Interests and Shares by the TYL Consortium and the subsequent transfer of the said interests to the TYL Consortium.

120 I endeavour to also state the effect of my finding on the Breach of Articles Claim. I first set out the Relevant Articles that the plaintiff contends that the defendants' have breached.

121 Article 24A(a) and (b) of EH's Articles state:[29]

> (a) Except where a transfer is to be made by a member with the consent of all the other members (in which case the following provisions of this article 24A shall not apply), no shares may be transferred to any person (including any member) unless and until the rights or pre-emption conferred by this article 24A (hereinafter called this "Article") have been exhausted.
>
> (b) Every member (hereinafter in this Article called the "Vendor") who desires to transfer any shares shall give to the Company notice in writing of such desire (hereinafter in this Article called the "Transfer Notice"). Subject as hereinafter mentioned, the Transfer Notice shall constitute the Company the Vendor's agent for the sale of the shares specified therein (hereinafter in this Article called the "Shares") in one or more lots at the discretion of the directors (other than the Vendor if the Vendor is a director) at a price to be agreed upon between the Vendor and the other members or, in case of a dispute, at a price, which the auditor of the Company for the time being shall, by writing under his hand, certify to be in his opinion the fair value thereof as between a willing seller and willing buyer. In so certifying the auditor shall be considered as acting as an expert and not as an arbitrator and accordingly the Arbitration Act Cap. 10 shall not apply. The Transfer Notice shall not be revocable except with the sanction of all members (other than the Vendor)."

[29] 9 Agreed Bundle 06547

122 Article 26(B) and (C) of RTC's Articles state:[30]

> (B) Save as hereby otherwise provided, no share shall be transferred to any person who is not a member of the Company as long as any member or any person selected by the Directors as one whom it is desirable in the interest of the Company to admit to membership is willing to purchase the same at the fair value, which shall be determined as hereinafter provided.
>
> (C) In order to ascertain whether any member or person selected as aforesaid is willing to purchase the share at the fair value, the person, whether a member of the Company or not, proposing to transfer the same (hereinafter called "the retiring member") shall give a notice in writing (hereinafter described as a "sale notice") to the Company that he desires to sell the same. Every sale notice shall specify the denoting numbers of the shares which the retiring member desires to sell, and shall constitute the Company the agent of the retiring member for the sale of such shares to any member of the Company at the fair value, and such sale shall be subject to the prior written consent of the URA. No sale notice shall be withdrawn except with the sanction of the Directors.

123 As can be seen from the Relevant Articles, the pre-emption rights therein are only triggered when the defendants' seek to transfer their own shares to a third party.

124 As a consequence of my finding noted at [119] above, the Breach of Articles Claim fails *in toto*; the defendants' were not selling their shares and hence the pre-emption provisions would not even be triggered.

Plaintiff estopped from asserting his pre-emption rights

125 The plaintiff and PL were negotiating as one faction led by PL ("PL's faction"). Prior to reaching the Agreement at the end of the Mediation on 12 April 2001, the defendants had agreed to sell their Shares to PL's faction at S$36

[30] 9 Agreed Bundle 06807

million, if PL's faction could raise the necessary financing without touching the funds in RTC. However, PL wanted the defendants to pay themselves the purchase consideration out of the funds in RTC by way of dividends, to which the defendants were not agreeable. The defendants were of the view that it was improper and if that was PL's method of "raising funds", the defendants could just as easily buy PL and DF's Interests and Shares. The plaintiff admitted that "[PL] could not raise the financing". It was only after PL's faction was not able to raise the financing (without touching RTC's funds) that the parties agreed to the opposite scenario at the end of the Mediation, where the defendants would buy out PL's faction instead at the same price of S$36 million if the defendants could obtain financing (without touching RTC's funds). The SMC Mediators had apparently facilitated this Agreement by suggesting that if PL's faction could not buy out the defendants at S$36 million, it was only fair that the defendants should be given the same opportunity to buy out PL's faction instead.

126 In reliance on the representation by PL that his faction would sell their interests and shares if the defendants obtained the financing, the defendants met the TYL Consortium on 13 April 2001 and sought financial assistance from them. The TYL Consortium agreed to and did subsequently provide the financing as evidenced in the 14 April Minutes, which thus enabled the defendants to purchase PL and DF's Interests and Shares. Under the circumstances when PL and the plaintiff had bound themselves to dispose of all their interests and shares as they no longer wished to remain as shareholders, I would also find that the plaintiff is estopped from exercising his pre-emption rights.

Plaintiff's rights of pre-emption waived under the Deed

127 The defendants also rely on the following two clauses in the Deed to argue that the plaintiff had waived his rights of pre-emption:

> 2.3 The *parties hereby waive all and any pre-emption rights they may have* (whether arising under or out of the respective constitutions of the Sale Companies or otherwise) *in relation to the sale and/or transfer of the Sale Shares*.
>
> 2.4 …
>
> (b) PL and the Vendors hereby agree and acknowledge that upon Closing, they have no actions, rights, choses in action, remedies, claims, proceedings and demands whatsoever and *howsoever arising against the Purchaser, WT, the Sale Companies* or any of their subsidiaries or associated companies in respect of any *interest in shares*, whether existing or otherwise, in RTC, EH, Sullivan, Goldhurst or their respective subsidiaries or associated companies.
>
> [emphasis added].

128 The plaintiff argues that cl 2.3 of the Deed does not apply to him as he was selling and not buying shares under the Deed. That argument completely misses the point. In my view, cl 2.3 states unequivocally that the parties waive all the pre-emption rights they may have in relation to the sale and/or transfer of the Sale Shares. The plaintiff was the seller of the Sale Shares; he would have had pre-emption rights attached to the shares that he was selling under the Relevant Articles relating to those shares. In agreeing to cl 2.3 of the Deed, he waived his right to enforce those pre-emption rights that attached to the shares he was selling. Therefore, the plaintiff simply has, in any case, no right of pre-emption to assert in the present case as he had waived them under cl 2.3 of the Deed on 19 April 2001 when the Deed was executed.

129 The plaintiff argues that the cl 2.4(b) does not extinguish his accrued rights (if any) before Closing *ie*, 30 April 2001. On the facts, the parties delayed

the effectiveness of cl 2.4(b) until Closing because they knew that there was a chance that the transaction contemplated under the Deed might not be eventually completed. The banker's guarantees had not yet been furnished at the time of the signing of the Deed on 19 April 2001. They were furnished only on 27 April 2001. Therefore, pursuant to cl 2.4(b), if the parties successfully closed the transaction on Closing, the plaintiff or PL would not be able to subsequently assert any "interest in shares" in relation to the shares set out in cl 2.4(b) (howsoever they arose). As the transaction successfully closed on 30 April 2001, the plaintiff and PL from that date onwards had waived any claims they might have had in respect of an interest in the shares set out in cl 2.4(b). Accordingly, this extinguishes all of the plaintiff's accrued rights (if any) in relation to his "interest in shares" before Closing.

130 However, cl 2.4(b) of the Deed is not applicable in the present case as it deals with waivers of claims in relation to an "interest in shares". The plaintiff does not purport to claim an interest in shares but has framed this action as a simple claim in breach of contract. Therefore, the defendants would ***not*** be able to invoke cl 2.4(b) of the Deed against the plaintiff.

The Conspiracy, Fraud and Misrepresentation Claims not supported by the facts

131 As noted at [19] above, during the course of the third tranche of the Mediation and on or about 12 April 2001, PL proposed that the plaintiff and himself use RTC's monies to buy the defendants Shares. To this end, PL suggested that the defendants should transfer the defendants' Shares to himself and the plaintiff and draw out S$36m from RTC to pay themselves *by way of dividends ie*, PL's Proposal. There was no significant dispute between the plaintiff and defendants' version as to this mechanism proposed by PL. It was

also not disputed that the defendants rejected this arrangement. The plaintiff asserts that the defendants had represented during the Mediation that the payment mechanism PL proposed was improper and unacceptable *ie*, the Alleged Representation.

132 This Alleged Representation forms the basis of the Conspiracy, Fraud and Misrepresentation Claims. The plaintiff avers that the Alleged Representation was false as the defendants "entered into an agreement with the TYL Consortium for the sale of their shares with the consideration to be paid from monies in RTC"[31] and made the Alleged Representation with knowledge of its falsity; consequently, the plaintiff was induced into selling his shares to the defendants. He suffered loss as he was, *inter alia*, deprived of the opportunity to insist upon and assert his rights of pre-emption under the Relevant Articles. This is in essence the plaintiff's claim in fraud and misrepresentation.

133 The part of the plaintiff's claim on conspiracy referred to an agreement between LA and WT to cause damage to DF. I set out the plaintiff's account of the alleged agreement:[32]

> … [T]here was an agreement between [the defendants] to deceive [the plaintiff] into thinking that it was unacceptable to use the monies in RTC to pay the purchase price of their shares. They also agreed to sell their shares to [the TYL Consortium] with the consideration being paid from the monies in RTC. They hid this from [the plaintiff] …

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[31] The plaintiff's closing submissions, para 423.

[32] The plaintiff's closing submissions, para 447.

134 In light of the above, the Conspiracy, Fraud and Misrepresentation Claims may be disposed of by determining whether the deal cut with the TYL Consortium ("the TYL Consortium Deal") was the same as PL's Proposal that was rejected by the defendants. Even not considering the higher standard of proof required to establish fraud (see generally *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and Others* [2005] 3 SLR 263), I am of the view that the plaintiff's argument in relation to the Conspiracy, Fraud and Misrepresentation Claims is, factually, a complete non-starter as the TYL Consortium Deal is very different from PL's proposal. As an aside, the defendants, based on my finding of facts, did not sell their shares to the TYL Consortium. That is a bridge that the plaintiff would have had to cross to prove that the defendants had resiled from the Alleged Representation. The plaintiff has not crossed that bridge.

135 Moving back to the central point, PL's Proposal did not involve the injection of any fresh funds in relation to the purchase of shares. He simply sought to take the money out of RTC. Whereas, under the TYL Consortium Deal, the TYL Consortium had to provide the S$3m payment on 16 April 2001 and had to secure two bank guarantees of S$16.5m each on 27 April 2001 to make up the purchase consideration. The funds to enable the two cashier's orders totalling S$3m to be furnished and the two bank guarantees for a total of S$33m to be secured were not from RTC. It is disingenuous to suggest that the ability to provide S$36m upfront (in cash and through guarantees) was insignificant. It is to the TYL Consortium's credit that they were able to raise such amounts so quickly and the plaintiff must confront the fact that PL and

himself were unable to raise the same amount. This is borne out by his own testimony.[33]

136 Therefore, I find that the Conspiracy, Fraud and Misrepresentation Claims are factually unsustainable as the Alleged Representation made by the defendants' was not false because the TYL Consortium had to provide fresh funds to the tune of S$36m to enable the defendants to buy out PL and DF's Interests and Shares.

Conclusion

137 The plaintiff by his own mouth admitted that he was beholden to PL. It is hard to think of the plaintiff cutting a deal independent of PL. In cross-examination he admitted that PL "could not raise the financing" to buy the defendants' Shares. It is for that reason that they reached the Agreement with the defendants at the end of the Mediation on 12 April 2001 that they would sell their interests and shares to the defendants for S$36m on the condition that the defendants obtained financing.

138 It is fortuitous that the defendants managed to raise financing from the TYL Consortium to purchase PL and DF's Interests and Shares. The defendants agreed to then transfer *those* shares and interests to the TYL Consortium. As the defendants never sold the defendants' Shares to the TYL Consortium, the pre-emption rights in the Relevant Articles were not triggered.

139 Even in the hypothetical scenario where the defendants entered into an agreement to sell the defendants' Shares to the TYL Consortium on 14 April

[33] Transcript dated 18 November 2014, pp 108 – 109.

2001, the pre-emption rights were not activated as the defendants structured the Other Agreements that implemented the 14 April Agreement to ensure that any option granted to the TYL Consortium would only crystallise when LA had received all of PL and DF's Interests and Shares. The 14 April Agreement would have been unenforceable if it purported to sell the defendants' Shares to the TYL Consortium as the defendants would have received no consideration from the TYL Consortium for the purported sale; an unenforceable agreement cannot give rise to pre-emption rights. The plaintiff would have been estopped from enforcing his pre-emption rights under the Relevant Articles after the Agreement was reached on 12 April 2001 and, in any case, the plaintiff also waived his pre-emption rights in cl 2.3 of the Deed on 19 April 2001.

140 The Representation by the defendants' that PL's Proposal was unacceptable is not false as factually, the TYL Consortium Deal to purchase PL and DF's Interests and Shares is radically different from PL's Proposal.

141 For the reasons mentioned above, I find that all the plaintiff's claims fail *in toto* and dismiss the present action.

142 I will hear the parties on costs if there is no agreement.

Grounds of decision in relation to Sum 4391

143 I now turn to a separate issue that emerged in the course of the last tranche of the trial. On 7 September 2015, the plaintiff filed Summons No 4391 of 2015 ("Sum 4391"). In Sum 4391, the plaintiff sought, *inter alia*, the following relief:

> That the firm of Harry Elias Partnership LLP including, in particular, Mr Harry Elias S.C. and Mr Andy Lem, shall not act as counsel / solicitors for the 1st and/or 2nd Defendants in Suit

> No. 72 of 2013 and/or in any applications and/or appeals arising out of or made in connection with Suit No. 72 of 2013 and/or give legal advice to and/or legally represent in any other way the 1st and/or 2nd Defendant in connection with Suit No. 72 of 2013.

144 The plaintiff urged the court to exercise its inherent jurisdiction under O 92 r 4 of the Rules of Court (Cap, 322, R5, Rev Ed 2014) ("ROC") to injunct HEP from acting as solicitors for the defendants in these proceedings *ie*, Suit 72 of 2013 ("Suit 72") because Mr Elias and Mr Andy Lem ("Mr Lem") had breached r 64(2) of the Legal Profession (Professional Conduct) Rules (Cap 161, R1, Rev Ed 2010) ("the PCR") that provides as follows:

> **Solicitor not to act if he is a witness**
>
> 64. …
>
> (2) An advocate and solicitor shall discharge himself from representing a client if it becomes apparent to the advocate and solicitor that he is likely to be a witness on a material question of fact.
>
> …

145 I heard submissions from counsel for the parties on 6 and 8 October 2015 and dismissed Sum 4391 and the plaintiff's oral application for leave to appeal on 8 October 2015.

146 The plaintiff applied to the Court of Appeal for leave to appeal against my decision in Sum 4391 *vide* CA Originating Summons No 23 of 2015 (CA/OS 23/2015) on 8 October 2015. The plaintiff then applied to adjourn the last tranche of the trial of Suit 72 pending the outcome of CA/OS 23/2015. I refused the plaintiff's application for an adjournment on 9 October 2015. The last tranche of the trial of Suit 72 was therefore completed on 15 October 2015.

147 The Court of Appeal dismissed the plaintiff's application for leave to appeal in CA/OS 23/2015 on 21 October 2015. I now set out the reasons for my decision.

Salient facts

148 The factual background to Suit 72 has already been set out in my decision on the substantive merits. I highlight only the salient facts relating to Sum 4391.

149 I highlight that the defined terms used in my grounds of decision in relation to Sum 4391 shall unless otherwise mentioned bear the same meaning as that used in my above judgment in relation to Suit 72.

150 On 4 March 2013, the plaintiff's then solicitors, Bernard & Rada Law Corporation ("BRC") wrote to HEP. BRC highlighted as follows:

> …
>
> 4. At the hearing of the present suit, evidence has to be given as to, *inter alia, what had transpired during the settlement negotiations leading to the execution of the said Deed of Settlement, including but not limited to whether there had been disclosure made to our client on issues* relating to the said Chinese agreement. As the solicitors of [HEP] had been involved in the Year 2000 Suits as well as Suit No. 46 of 2006/J, *they* will have information and knowledge on such issues, and *will be called as witnesses for this suit.*
>
> 5. In this regard, we trust that you are well aware of [r 64 of the PCR] …
>
> [emphasis added].

151 HEP responded on 10 April 2013 as follows:

> 6. We are fully aware of [r 64 of the PCR]. Should the situation arise where we find that our continued representation

> of [LA] and [WT] will be in breach of [r 64 of the PCR], we will take the necessary steps to discharge ourselves immediately.

152 No application was taken out by BRC under the PCR. The plaintiff's present solicitors Stamford Law Corporation ("SLC") (as it was then known) then took over conduct of Suit 72 on 18 April 2013.

153 On 10 June 2013, SLC wrote to HEP and stated that "the impact of what transpired at the mediation and discussions leading to [the Deed] remain very much in issue" and "welcome[d] a joint application for guidance to the Law Society" as suggested by HEP previously to BRC.

154 HEP replied to SLC on 26 June 2013. In relation to the Mediation and negotiations leading to the execution of the Deed, it stated that the facts pleaded in the defendants' defence were similar to that set out in the plaintiff's affidavit dated 12 June 2013. Therefore, it took the following view:

> 8. … *There were no material questions of fact* whether in relation to the [Mediation] or negotiations leading to [the Deed] or otherwise in [Suit 72] *to which any of our solicitors would have reason to believe that they are likely to be witnesses*.
>
> 9. We are therefore of the view that Section 71 [*sic*] of [the PCR] has no application in the present case. *Please let us know your position in this regard.*
>
> [emphasis added.]

155 There was no response from SLC, and neither was there an application by SLC for an injunction. 16 months passed. There was still no response from SLC.

156 On 11 November 2014, the defendants filed their opening statement as the trial was approaching. It stated clearly that following the Mediation between the parties in the Year 2000 Suits, **an agreement was reached on or about 12**

April 2001 between, *inter alia*, the plaintiff and the defendants for the plaintiff to sell his shares in RTC, EH and ABR to the defendants, and as such, the plaintiff was no longer entitled to his pre-emption rights. The trial commenced seven days later on 18 November 2014. Despite knowing full well that Mr Elias was in fact present at the last day of the Mediation on 12 April 2001 when the Alleged Mediation Agreement was reached, and having been re-appraised of the fact well before the trial *vide* the defendants' opening statement that the defendants would definitely be running their defence of an Alleged Mediation Agreement concluded on 12 April 2001, the plaintiff still did not instruct his then counsel, Mr Tan Chuan Thye SC ("Mr Tan"), to apply to injunct Mr Elias, or Mr Lem or HEP from acting for the defendants at the trial. In fact, Mr Tan specifically informed the court that the plaintiff had only one witness *ie*, the plaintiff himself. Evidently, the plaintiff had made up his mind not to call Mr Elias and Mr Lem or anyone else for that matter as his witnesses of fact.

157 Accordingly, by the time the trial commenced, there was no longer any reason for Mr Elias and Mr Lem to believe that they would likely be or would in fact be involved as witnesses of any fact (material or otherwise) for this trial. They were simply not going to be witnesses for this trial.

158 The trial then continued for eight days spread over two tranches in November 2014 and April 2015. The plaintiff concluded his testimony on 24 April 2015 and his counsel Mr Daniel Chia ("Mr Chia"), who had since taken over from Mr Tan, then formally closed the plaintiff's case, thus confirming once again to the court that no other witnesses would be called by the plaintiff. The court was informed that a third tranche of eight hearing days commencing on 6 October 2015 had been fixed, whereupon the defendants' case would begin and the only witnesses were the two defendants. It was only several months later

on 4 August 2015 that SLC (by then known as Morgan Lewis Stamford LLC ("MLS")) wrote to HEP apparently in response to HEP's letter dated 12 June 2013 (see [154] above) sent some two years ago when HEP asked to be apprised of the plaintiff's position on the matter in relation to the PCR. The letter from MLS referred to the defendants' opening statement filed on 11 November 2014. It noted that the plaintiff had been cross-examined on the Alleged Mediation Agreement and the Mediation. Despite the fact that the plaintiff had known all along that Mr Elias was present throughout the Mediation, MLS nevertheless asked HEP to confirm whether "[Mr Elias] or any lawyer from [HEP] was present at the conclusion of the [Alleged Mediation Agreement]".

159 HEP replied on 14 August 2015 highlighting that the plaintiff's concessions noted, *inter alia*, at [42] – [44] above made the existence of the Alleged Mediation Agreement not a material question of fact. HEP also stated in a letter dated 3 September 2015 that Mr Elias was present at the Mediation. The plaintiff thereafter filed Sum 4391 on 7 September 2015. I heard this application on 6 October 2015, the first day of the third tranche of the trial.

The law on invoking the inherent jurisdiction of the court to discharge a solicitor pursuant to r 64(2) of the PCR

160 The law on invoking the inherent jurisdiction of the court to discharge a solicitor pursuant to r 64(2) of the PCR is set out in the decision of the High Court in *Then Khek Khoon and another v Arjun Permanand Samtani and another* [2012] 2 SLR 451("*Then Khek Khoon*"). In that case, an application was made to discharge the whole of a law firm on the basis that they had breached rr 25 and 64 of the PCR. The court ultimately dismissed the application.

161 In reaching his decision, Quentin Loh J. in *Then Khek Khoon* set out the following propositions of law in relation to an application made to the court on the back of r 64(2) of the PCR:

(a) The court's inherent jurisdiction under O 92 r 4 of ROC should only be exercised where there is a clear need and where the justice of the case so demands. Strong or compelling reasons have to be identified by the party in support of such an application: at [14] – [15].

(b) The Law Society of Singapore ("the Law Society") is the proper forum for the determination of breaches of the PCR but where matters impinge on the proper administration of justice, due process and wider public interest issues, the court should intervene: at [22].

(c) In assessing whether there is a breach of r 64(2), the court will have to consider whether there is a material fact in issue and whether there is "the danger of the subconscious shaping of the evidence to suit the solicitor's interest as against that of his client and the duty to the court": at [47].

(d) While the wording of r 64(2) of the PCR is expressly limited to the advocate and solicitor, the question of whether it will extend to all other solicitors in the firm depends on the facts and circumstances of each case: at [48].

(e) A court will have to balance the mischief that is to be prevented against the right of a party to be represented by a lawyer of his choice. This involves a balancing of all the facts and circumstances including the alleged breach, the *bona fides* of the opposing-party-applicant, the

time at and circumstances under which the application is made and the mischief the rule is intended to prevent: at [28].

162 In applying the propositions noted above, it must be borne in mind that even if the court finds a breach of r 64(2) of the PCR, the court should only exercise its inherent jurisdiction and discharge the solicitor from acting for his client only when it is of the view that such an order would prevent injustice or an abuse of process of the court. In addition to the question of prejudice to either party, there must be "reasonably strong or compelling reasons" showing why the court should exercise its inherent jurisdiction: *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 at [30].

163 If the court takes the view that the application to discharge a solicitor was brought in bad faith, it should not grant the plaintiff any relief, as the plaintiff who comes with unclean hands should not ask the court to grant it a relief in the exercise of its inherent jurisdiction.

The plaintiff's application was not granted

164 The question of whether a solicitor is likely to be a witness to a material question of fact is not analysed historically but at the time the application is heard by the court. In this regard, it must be borne in mind that the court's role is not to declare if each and every act of a solicitor in the course of his conduct of a matter is in breach of the PCR. The proper forum for that would be the Law Society. The role of the court would be to analyse if it should exercise its inherent jurisdiction to discharge a solicitor on account of a breach of the PCR that is subsisting at the time of the hearing of the plaintiff's application because it prejudices the plaintiff and would cause injustice or lead to an abuse of process.

165 I asked the plaintiff the basis for his application which was made well after he had closed his case, by which time it was clear to me that Mr Elias was not going to be called as a witness to testify to any factual matter at the trial by either the plaintiff or the defendants. What then was the point of applying for Mr Elias to be discharged from representing the defendants on the basis that "he [was] likely to be a witness on a material question of fact" when it was already a fact that he would not be a witness at the trial? To be sure, I asked counsel if Mr Elias would be called as a witness.

166 Mr Chia then surprised me by stating that the plaintiff wanted to call Mr Elias and Mr Lem from HEP to be the plaintiff's witnesses. As such, HEP should be discharged from acting for the defendants. With this "strategic move", it was no longer a mere "likelihood" that both leading counsel from HEP would be witnesses. The plaintiff had made it a reality.

167 I believed that the plaintiff decided to call Mr Elias and Mr Lem as his witnesses predominantly to buttress his application to discharge them and the whole firm of HEP from further acting for the defendants in this suit. I was inclined to think that it had less to do with any useful evidence that Mr Elias or Mr Lem could give to support the plaintiff's case and more to do with deliberately causing disruption to the defendants' conduct of their defence at the trial with the assistance of counsel from HEP, who were thoroughly familiar with the defendants' case. The plaintiff's application at this late stage of the trial, if allowed, would not only prevent the defendants from having a counsel of their choice but would also force them to change to a fresh set of counsel from another law firm, who would be unfamiliar with the case, to act for them at additional expense and on very short notice. This would likely compromise the effectiveness of their defence. Therefore, I found that the defendants would

clearly be prejudiced. Essentially, the plaintiff was trying to interfere with the defendants' right to counsel of their choice to defend themselves against the plaintiff's claim. It must be remembered that the court has to balance the policy undergirding r 64 of the PCR against the right of a litigant to be defended by counsel of his choice.

168 I also had to consider the consequential disruption caused to the court's calendaring and the wastage of an allocated eight hearing days in this third and final tranche to complete the trial, which had been much delayed already because of the difficulties of fixing hearing dates to suit the diaries of the court and that of counsel. Wastage of the court's precious resources, particularly of allocated hearing dates, would not be looked upon favourably by the court. An adjournment of the whole of the third tranche of the trial to enable the defendants to engage new counsel and for the new counsel to familiarise themselves with the case would necessarily mean a further delay of completion of the trial by several more months. This would in turn adversely affect the court's management of cases and the efficient disposal of cases that would allow parties to move on with their affairs knowing where they stand.

169 I further considered if the application was brought in bad faith, and I took the following matters into account.

170 Notwithstanding the fact that HEP had asked for the plaintiff's view on its position that its solicitors were unlikely to be witnesses to a material question of fact, the plaintiff took two years to communicate its view to HEP. There was no good reason for the long delay in the plaintiff's response.

171 Even after having been re-apprised of the defendants' defence in the defendants' opening statement filed seven days *before* the trial commenced, the

plaintiff did not make his application when the trial commenced on 18 November 2014, despite having known all along that Mr Elias was present throughout the Mediation. I found that the plaintiff had ample opportunity well before the trial began to consult and give instructions to his counsel to injunct Mr Elias, Mr Lem and HEP from representing the defendants in this suit. He chose to wait for some ten months till the last tranche of the trial was almost about to begin to make his application to invoke the inherent jurisdiction of the court. Apart from the fact that the court would be very slow to entertain an application to exercise its inherent jurisdiction if such an application was not brought timeously, it was apparent to me that this was more a tactical move made in bad faith on the part of the plaintiff, probably after realising that his concessions made at the first tranche of the trial during his rigorous cross-examination by Mr Elias had been detrimental to his case. He then felt he had to prejudice the defendants by forcing them to change their counsel mid-way through the trial. I believed that the plaintiff was also unhappy with the way he was treated during his cross-examination, as he felt very exasperated when Mr Elias kept asking him to answer the same question repeatedly whenever he failed to give a direct answer on numerous occasions during his long cross-examination. Discharging Mr Elias and his firm HEP was an opportunity to get back at him.

172 Additionally, I highlighted to Mr Chia that there were many other better alternatives which would achieve the principal evidential objectives of the plaintiff and yet minimise the prejudice to the defendants and the disruption to the court's administration of this suit.

173 For a start, if the evidence sought by the plaintiff from Mr Elias and Mr Lem was not going to be disputed and could be agreed, *eg* that no internal

records or internal memo existed within HEP noting any such alleged Agreement reached on 12 April 2001, or that the plaintiff had said nothing throughout the Mediation (both of which I understood from counsel for the defendants to be the case), then one practical approach could be to prepare a statement of agreed facts between the parties. There would then be no necessity to call Mr Elias and Mr Lem as witnesses simply to testify to facts not in dispute. This suggested approach was however not taken up although it appeared to me after hearing Mr Chia's submissions that such was the thrust of the evidence that the plaintiff wanted from Mr Elias and Mr Lem.

174 The plaintiff was also made aware at the hearing that there were many other persons present at the Mediation who could be more advantageously called by the plaintiff to give evidence on his behalf if he wanted to prove that *no* Agreement was reached at the end of the Mediation on the 12 April 2001, contrary to the defendants' version of the facts. If the plaintiff was indeed seeking to establish the truth of what happened at the Mediation, the following were some of the potential witnesses entirely unconnected with this suit and hence wholly independent witnesses that the plaintiff could easily have called:

(a) Mr Davinder Singh SC;

(b) Mr Michael Khoo SC;

(c) Mr Michael Palmer; and

(d) The other lawyers who were part of the D&N Team.

There would then be no real need to compel Mr Elias, Mr Lem and HEP to be discharged mid-way during the trial and the last tranche of the trial would still be able to proceed expeditiously.

175 Why did the plaintiff not do so? Why must he target the solicitors from HEP, and in particular Mr Elias (especially when he knew that his evidence, if asked, on whether there was an Agreement reached would not likely be beneficial to the plaintiff), when there were so many others present at the Mediation, not involved in any aspect of this suit, who could be relied upon as totally independent witnesses to testify truthfully that *no* Agreement was in fact reached on 12 April 2001, which in essence was the evidence desired by the plaintiff? I therefore inferred that there was a lack of good faith on the part of the plaintiff by insisting on calling Mr Elias and Mr Lem when there were so many other better choices of witnesses open to the plaintiff to call to prove the same fact.

176 Without having a prior signed statement ("prior statement") either from Mr Elias or Mr Lem indicating a position consistent with and in support of the plaintiff's own factual position, the plaintiff could not reasonably be harbouring a view that either Mr Elias or Mr Lem would likely testify that there was *no* Agreement reached at the end of the Mediation on the 12 April 2001 for PL and DF's Interests and Shares to be sold to the defendants at S$36m provided the defendants obtained financing. The plaintiff obviously knew that it would be difficult to extract any testimony from them that would be in his favour on the issue of the non-existence of the Alleged Mediation Agreement. Without such a prior statement from Mr Elias and Mr Lem, the plaintiff would not be in a position to impeach either Mr Elias or Mr Lem, or substitute their evidence with their prior statement. Yet the plaintiff insisted on calling them as his witnesses knowing that their evidence would likely be more damaging than helpful to his own case on this issue. If it was not bad faith or for other ulterior purposes, what then was the plaintiff's real purpose in calling them?

177 I also had regard to the degree of risk of there being any subconscious shaping of the evidence of the defendants' case to suit the solicitor's interest as against that of his client and the duty to the court or to negate a potential professional negligence claim if Mr Elias, Mr Lem and HEP were not ordered be discharged from further acting for the defendants *prior* to them testifying in court. The premise here was that only after their discharge would they have less incentive to shape their evidence.

178 I could not see any real risk of that happening in this case as it was quite clear to me that Mr Elias' personal position on what took place on 12 April 2001was all along similar to his clients. It did not appear to me that Mr Elias needed to shape his evidence to be aligned with his client or *vice versa* as there was already alignment in the first place. There was no indication anywhere that Mr Elias' knowledge of what happened at the conclusion of the Mediation on the 12 April 2001 was going to be contrary to what the defendants were saying had happened.

179 I also queried Mr Chia on how Mr Elias' evidence as part of the plaintiff's case should be dealt with if it contradicted the plaintiff's evidence or the plaintiff's case. The two ways suggested by Mr Chia was either to expunge Mr Elias' evidence or give little weight to it, presumably on the basis that his evidence should still be considered as "tainted" because he had acted previously for the defendants in this suit or he would still have subconsciously shaped his evidence to align it with his previous clients even though Mr Elias and his firm HEP might have been discharged from further acting in Suit 72. However, it made no sense to me to call a witness just to expunge his evidence or to give little or no weight to it, unless there was some other ulterior motive in calling Mr Elias as the plaintiff's witness. The inexorable conclusion was that Mr Elias

was called as a witness so that the plaintiff could better justify his application to prevent Mr Elias and his firm from further acting in Suit 72. The plaintiff wanted to inconvenience and prejudice the defendants in the conduct of their defence and at the same time, to get back at Mr Elias for cross-examining him in a way that had exasperated him. In short, I found that there was a lack of *bona fides* in the plaintiff's application, which was made also without any due regard to the adverse consequences it might have on the smooth administration of trial cases in the court.

180 In my view, the plaintiff was plainly abusing the process of the court by invoking its inherent jurisdiction when his injunction application was not made in good faith.

181 After taking into consideration all the matters mentioned above, I decided not to grant the plaintiff's injunction application in the interim and I reserved to myself a second consideration of his injunction application at a later stage of the trial when I would have a better grasp of the actual materiality of the evidence of Mr Elias and Mr Lem, should they be called subsequently by the plaintiff to testify on his behalf.[34]

182 The plaintiff was dissatisfied with my decision not to grant his injunction application in the interim and sought leave from me to appeal to the Court of Appeal. I refused to grant him leave to appeal on my interim decision and further refused the plaintiff's application to adjourn the whole of the third tranche of the trial pending disposal of his application to the Court of Appeal for leave to appeal. I ordered the trial to proceed forthwith.

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[34] Transcript dated 8 October 2015, pp 19 and 20.

183 Since the plaintiff had closed his case, Mr Chia then sought leave to call Mr Elias and Mr Lem and he included one further witness, Mr Cheo, who had represented the plaintiff in the Year 2000 Suits previously. I granted the plaintiff permission to do so as the defendants had not yet opened their case.

184 As expected, Mr Elias' evidence was in the main unhelpful, if not detrimental to the plaintiff, in particular in relation to the existence of the Alleged Mediation Agreement reached at the end of the Mediation on 12 April 2001. Mr Lem maintained in his evidence that he was not present at the Mediation and accordingly, he could not really provide any material evidence on what happened at the Mediation on 12 April 2001.

185 After completion of their testimony, Mr Lem informed me that he would take over conduct of Suit 72 from Mr Elias. Mr Elias took it upon himself to take no further part in the proceedings after the completion of his testimony. As such, there was no need for me to reconsider my interim decision not to grant the plaintiff's application to injunct Mr Elias from further acting for the defendants. As Mr Lem was unable to provide any material evidence because he was not present at the Mediation, my interim decision not to injunct Mr Lem from further acting for the defendants remained. Weighing all the matters once again, I decided that there was no good reason to injunct HEP as a firm from further acting for the defendants. Accordingly, my original interim decision refusing the plaintiff's injunction application in Sum 4391 was not changed after I heard the testimonies of Mr Elias and Mr Lem.

186 The trial thus proceeded to its conclusion within the hearing dates

allocated for the third tranche.

Chan Seng Onn
Judge

Daniel Chia, Kenneth Chua and Stephany Aw (Morgan Lewis Stamford LLC) for the plaintiff;
Andy Lem, Toh Wei Yi and Farrah Isaac (Harry Elias Partnership LLP) for the defendants.
