Yeo Boong Hua and others *v* Turf Club Auto Emporium Pte Ltd and others [2015] SGHC 207

Case Number	: Suit No 27 of 2009
Decision Date	: 06 August 2015
Tribunal/Court	: High Court
Coram	: Woo Bih Li J
Counsel Name(s)	: Adrian Tan, Ong Pei Ching, Roy Paul Mukkam and Lim Siok Khoon (Stamford Law Corporation) for the plaintiffs; Kelvin Poon, Farrah Salam, Chai Wei Han and Alyssa Leong (Rajah & Tann Singapore LLP) for the 1st, 2nd, 3rd, 4th, and 7th defendants; Sim Chong and Kate Loo (JLC Advisors LLP) for the 5th defendant; Khor Wee Siong (Khor Thiam Beng & Partners) for the 8th defendant.
Parties	: Yeo Boong Hua — Lim Ah Poh — Teo Tian Seng — Turf Club Auto Emporium Pte Ltd — Singapore Agro Agricultural Pte Ltd — Koh Khong Meng — Turf City Pte Ltd — Tan Huat Chye — Ng Chye Samuel — Tan Chee Beng — Ong Cher Keong

Contract – breach

Contract – contractual terms – implied terms

Res Judicata – issue estoppel

[LawNet Editorial Note: Civil Appeal No 168 of 2015 was dismissed by the Court of Appeal on 22 March 2017 (save that the Court of Appeal reversed the trial judge's order to set aside the Consent Order and revive the Consolidated Suits). Civil Appeal No 171 of 2015 was also dismissed by the Court of Appeal, while Civil Appeal No 173 of 2015 was deemed withdrawn. See [2017] SGCA 21.

The Court of Appeal considered, and made orders in relation to, the remaining issues in Civil Appeals Nos 168 and 171 of 2015 which had not been decided in [2015] 5 SLR 268 and which were not the subject of the first appeal hearing in [2017] 2 SLR 12. The respondents' claim for breach of fiduciary duties was dismissed, and the High Court judge's findings in [2018] 3 SLR 806 on the liability of the fifth appellant in CA 168/2015 and the appellant in CA 171/2015 for the torts of conspiracy and inducement of breach of contract and the liability of the third appellant in CA 168/2015 for the tort of conspiracy were affirmed. See [2018] SGCA 44.

For the Court of Appeal's decision on the issues of damages and costs, see [2018] SGCA 79.]

6 August 2015 Judgment reserved.

Woo Bih Li J:

Introduction

1 This case concerns a number of parties. The three plaintiffs ("the Plaintiffs") are:

(a) Yeo Boong Hua, also known as "Johnny Yeo";

(b) Lim Ah Poh, also known as "Michael Lim"; and

(c) Teo Tian Seng, also known as "Raymond Teo".

2 The 1st defendant, Turf Club Auto Emporium Pte Ltd ("TCAE") and the 4th defendant, Turf City Pte Ltd ("TCPL"), are nominal defendants. The other defendants are:

(a) the 2nd defendant, Singapore Agro Agricultural Pte Ltd ("SAA");

(b) the 3rd defendant, Koh Khong Meng ("Roger Koh");

(c) the 5th defendant, Tan Huat Chye ("Tan Senior");

(d) the 6th defendant, Ng Chye Samuel ("Samuel Ng");

(e) the 7th defendant, Tan Chee Beng ("Tan CB") who is the son of Tan Senior; and

(f) the 8th defendant, Ong Cher Keong ("Ong CK").

I will refer to these eight defendants collectively as "the Defendants".

3 This action may be described as the latest saga in a longstanding dispute between two business groups of a joint venture. The two groups have been engaged in legal tussles with each other for more than 12 years. The Plaintiffs make up one group. The five individual defendants *viz*, Roger Koh, Tan Senior, Samuel Ng, Tan CB, and Ong CK make up the other faction along with SAA which is a company. However, Samuel Ng has not taken any substantive role in the present action. I will refer to these five individual defendants collectively as the "SAA Group". TCAE and TCPL are companies incorporated under the joint venture. [note: 1] More will be said later on the background of these two groups as well as TCAE and TCPL, but suffice to say for now, these two companies are the subject of the dispute between the two groups.

4 The Plaintiffs' primary relief is to set aside a consent order which they had entered into with the 1st to 6th defendants ("the Consent Order") on 22 February 2006. The Consent Order was meant to settle the minority oppression actions brought by the Plaintiffs for various reliefs including an account of profits of the joint venture. As it turned out, disputes arose over the implementation of the Consent Order, and these disputes have brought the parties into the courtroom on a number of occasions. In the present action, the Plaintiffs' goal is to set aside the Consent Order. If they succeed, they intend to reinstate the minority oppression actions.

Background facts

The formation of the joint venture

5 The joint venture between the two groups concerned the development and operation of a site known as Parcel A of the former Bukit Timah Turf Club ("the Site"). The Site was a large plot of land (roughly 557,000 m^2) [note: 2] located in Bukit Timah.

6 On 5 January 2001, the Singapore Land Authority ("SLA"), which was then known as the Singapore Land Office, invited tenders for the lease of the Site. An advertisement of the tender invitation was published in the Straits Times on 5 January 2001 and in the Lian He Zao Bao on 9 January 2001. Amongst other information, the following was stated in the advertisement: [note: 3]

Tender of the State Property for Parcel A at former Bukit Timah Turf Club with use as Commercial,

Institution/ Community, Sports & Recreation, Residential; 3+3+3 years Tenure

7 To facilitate the tender exercise, SLA also put up a Tender Notice [note: 4] which contained general information of the tender. In the Tender Notice, the "duration of period contract" was stated to be "(From) 1 September 2001 … (To) 30 August 2010 …". Under a section called "General Information", the tenure was described to be "3+3+3 years". The "Guide Rent" was $380,000 per month. The "3+3+3 years" tenure was repeated under a section called "Property Description". [note: 5]

8 When the tender exercise closed on 2 March 2001, SLA received only two bids. The first bid was submitted by the Plaintiffs through their own joint venture vehicle named Bukit Timah Carmart Pte Ltd ("BTC"). All of them are businessmen who at the material time were in the used car trading business. They had their own businesses but the three also had experience working with each other before. For instance, on 15 March 2000, they incorporated Leng Kee Carmart Pte Ltd, a used car centre which sublets spaces to car dealers. [note: 6] Today, they are still in this trade.

9 The SAA Group used SAA to submit a second bid, pursuant to a joint venture between the five individuals in the SAA Group. [note: 7]

10 SAA had previously developed a farm-style mall known as "Farmart Centre" located near Sungei Tengah. Tan CB and Ong CK were directors [note: 8] and shareholders [note: 9] of SAA. Tan Senior, who is the father of Tan CB, used to be a shareholder and director of SAA until he sold his shareholding to Tan CB and ceased to be a director on 23 February 2001. [note: 10] Tan Senior and Ong CK had been business partners for over ten years. [note: 11] The other two individuals, Roger Koh and Samuel Ng, were neither directors nor shareholders of SAA. However, they were business partners with Tan Senior in a separate company called Kallang Auto Centre Pte Ltd ("Kallang Auto") which sublets spaces to car dealers.

11 The SAA Group's initial plan was to rely on their internal expertise in developing the Site. Architects Group Associates Pte Ltd ("AGA"), an architectural consultancy firm, would be in charge of the architectural aspects. Ong CK was an architect. He was a shareholder and principal director [note: 12] of AGA. [note: 13] Goodland Development Pte Ltd ("Goodland"), a construction and property development company in which Tan CB was a director and shareholder, [note: 14] would be in charge of the construction works. Tan CB was previously working as a civil engineer at the Housing and Development Board. [note: 15]

12 The two bids were both submitted on the tender closing date of 2 March 2001. The Plaintiffs submitted a bid of $260,000 rent per month while the SAA Group submitted a bid of $390,000 rent per month. The submissions were to take place at the SLA office which was formerly located at 8 Shenton Way, #24-01 Temasek Tower, Singapore 068811. There, the Plaintiffs bumped into Tan Senior, Roger Koh and Tan CB. Tan Senior and Roger Koh had been acquainted with Raymond Teo previously through the car trading industry. [note: 16] It was during this encounter that each group came to know that the other group had placed or was planning to place a bid for the Site. The two groups commenced discussions about jointly developing and operating the Site, although there was some disagreement as to whether the discussions commenced before or after the bids were submitted. [note: 17]

13 A consensus was reached that the two groups would enter into a joint venture to develop and operate the Site ("the Joint Venture"). A Memorandum of Understanding ("MOU") was signed on

8 March 2001 by the Plaintiffs and the SAA Group ("the Eight Individuals"). It is common ground that before the MOU was signed, SLA had already released information on the identity of the bidders and the bid amounts but SLA had not yet awarded the tender to either bidder. Even though the Eight Individuals signed the MOU, parties disputed as to whether Tan CB and Ong CK signed the MOU in their personal capacity or whether they entered into the MOU using SAA.

14 The salient terms of the MOU may be summarised as follows:

(a) a new joint venture company ("New Company") would be incorporated to develop and operate the Site;

(b) Johnny Yeo, Michael Lim and Raymond Teo would hold 37.5% of the shareholding of the New Company, and the remaining 62.5% shareholding would be collectively held by the other group;

(c) only shareholders are deemed to be directors of the New Company; and

(d) the development of the Site would be jointly headed by AGA and Goodland.

15 The Plaintiffs' case was that the terms of the Joint Venture were not exhaustively contained in the MOU. Apart from the MOU, they alleged that there were two separate oral agreements between the Eight Individuals. The first was entered into on 2 March 2001 before the signing of the MOU at a Starbucks Café located on the ground floor of Temasek Towers [note: 18] and later at Tung Lok Restaurant located at East Coast Recreation Centre ("OA1"). [note: 19] The second was entered into after the signing of the MOU, either on 8 March 2001 [note: 20] or sometime in April 2001 [note: 21] (8 March 2001 being the Plaintiffs' latest position) at Punggol Marina ("OA2"). A summary of the salient terms allegedly contained in OA1 and OA2 are as follows: [note: 22]

(a) The Eight Individuals who were party to the Joint Venture would jointly exploit the lease of the Site in equal shares of 12.5% each.

(b) The lease of the Site would be held beneficially by the Eight Individuals jointly so long as SLA continued to grant leases to either the Plaintiffs or SAA.

(c) Instead of the New Company, two newly incorporated Joint Venture companies, TCAE and TCPL ("the JV Companies"), would develop the Site. The previous name of TCAE was Turf Club Auto Megamart Pte Ltd. [note: 23] The JV Companies would sublease the Site from either BTC or SAA on identical terms as the lease between BTC/SAA and SLA.

(d) The monthly rent of the sub-tenancies between SAA and the JV Companies would be fixed at 3% above the tender rate payable by SAA to SLA. [note: 24]

16 It was the Plaintiffs' case that flowing from the alleged oral agreements and the MOU, there was an understanding that so long as a head lease was in place between SAA/BTC and SLA, the JV Companies would be granted sub-tenancies on identical terms ("the Back-to-Back Arrangement"). The Defendants disputed the existence of the two oral agreements and the existence of the Back-to-Back Arrangement, but they agreed that subsequent to the MOU there was an oral agreement to form two joint venture companies instead of one. [note: 25] The parties spent a significant part of the trial arguing about the existence of the Back-to-Back Arrangement although the outcome of the present

action does not turn on whether this arrangement did in fact exist before the Consent Order was recorded.

17 It was not really disputed that the parties to the Joint Venture agreed that the business model of the JV Companies was to develop part of the Site into a used car centre and the areas known as the Main and the North Grand Stands into a shopping mall ("the Project"). TCAE would operate the used car centre and TCPL would operate the shopping mall. [note: 26] The JV Companies would then rent or license out individual lots or units to ultimate tenants or licensees. The rent or license fees payable by the ultimate tenants/licensees would form the main source of revenue for the JV Companies. The JV Companies would bear all costs of developing and operating the Site as well as incidental costs. The JV Companies would pay an aggregate monthly rent comprising the same amount as the head lease rent plus 3% of its gross monthly rental income to the head leasee, which would hold the head lease from SLA.

18 On 25 April 2001, SLA wrote to inform SAA that its bid was accepted. [note: 27] The acceptance letter stated that the term of tenancy would be three years with an option to renew for a three-year term plus a further option for a three-year term. The grant of the options was stated to be at the absolute discretion of the Collector of Land Revenue.

19 On 10 July 2001, SLA and SAA formally entered into a tenancy agreement ("the 2001 Head Lease"). A Draft Tenancy Agreement previously attached to the Tender Notice dated 5 January 2001 was adopted for the 2001 Head Lease. The tenure of the 2001 Head Lease was stipulated in two clauses. Clause 1(1) of the 2001 Head Lease stated that the lease period was three years starting from 1 September 2001 at a monthly rent of $390,000. Clause 1(3) stated that "[t]he Landlord may at his absolute discretion grant a fresh tenancy for a further term of 3 years subject to new terms and conditions and revision of rental upon the expiration of the term hereby created." [note: 28]

20 With the successful procurement of the head lease, SAA entered into separate sub-tenancy agreements with TCAE and TCPL on the same day for a period of three years less one day from 1 September 2001 to 30 August 2004 ("the 2001 STAs"). In line with the business model outlined at [17], the multi-story carpark at 720 Dunearn Road, Singapore [note: 29] was subleased to TCAE (under its previous name *viz*, Turf Club Auto Megamart Pte Ltd) to be developed into a used car centre while the Main and North Grandstands [note: 30] were subleased to TCPL to be developed into a shopping mall. TCAE and TCPL would each pay a gross monthly rent of $195,000 to SAA (making a total of $390,000 rent per month) plus 3% of its gross rent or license fee per month (instead of 3% of the rent payable by SAA to SLA). Notably, the 2001 STAs contained an "Option to Renew" clause (found in paragraph 7 of Schedule 1) which purportedly granted the JV Companies two options to renew the three-year tenancy for a period of three years each.

21 In the meantime, renovation works began shortly after SAA was notified that it was the successful bidder. In accordance with the MOU, Goodland and AGA were appointed to be in charge of the construction and architectural aspects of the Project respectively. On 14 June 2001, 26 October 2001 and 26 November 2001, TCPL purportedly awarded Goodland contracts for $5m, $6.1m and $1.85m respectively for Phases 1, 2 and 3 of the renovation works.

22 On 25 June 2001, the Eight Individuals were appointed as directors of TCPL. [note: 31] As for TCAE, Tan Senior and Ong CK were the directors since its incorporation [note: 32] and Raymond Teo also became a director on 23 October 2001. [note: 33] Tan CB was appointed a director of TCAE on 9 February 2002. Roger Koh was subsequently made a director of TCAE on 28 February 2004. [note:

34]

Minority Oppression Actions

23 As the renovation works were being carried out, disagreements arose between the Plaintiffs and the SAA Group. The Plaintiffs raised concerns over the accounts and finances of the JV Companies. On 17 April 2002, the Plaintiffs appointed PricewaterhouseCoopers LLP ("PwC") to review the accounts of the JV Companies to check whether there was any irregularity. [note: 35] On 26 April 2002, Johnny Yeo made a formal request to Ong CK by way of letter to inspect documents and accounting records of the JV Companies. [note: 36] A similar request was made to Tan CB on 23 May 2002. [note: 37] According to the Plaintiffs, the Defendants put up many obstacles to prevent them from carrying out a proper review of the JV Companies' accounts and finances. Several other disputes arose between the parties. [note: 38]

24 The disputes culminated in the commencement of two minority oppression actions after the Plaintiffs were not re-elected to TCPL's Board of Directors on 16 August 2002. [note: 39] Raymond Teo was, however, still a director of TCAE. On 15 November 2002, Johnny Yeo and Michael Lim commenced Originating Summons No. 1634 of 2002/D ("OS 1634/02") for various reliefs including an order to restrain TCPL from amending its Articles of Association. [note: 40] TCPL, SAA, Tan Senior, Samuel Ng and Roger Koh were named defendants in OS 1634/02. Raymond Teo was originally a defendant [note: 41] in OS 1634/02 but was added as a plaintiff on 28 May 2004.

25 On or about 25 August 2004, the Plaintiffs commenced Suit No. 703 of 2004/S ("S 703/04") for various reliefs including an account of profits involving TCAE. [note: 42] TCAE, SAA and Roger Koh were named defendants in S 703/04. OS 1634/02 and S 703/04 were consolidated on 28 January 2005 ("the Consolidated Suits"). [note: 43] Tan CB and Ong CK were not sued by the Plaintiffs in the Consolidated Suits.

26 While the Consolidated Suits were ongoing, Samuel Ng, Tan Senior and Ong CK were adjudged bankrupts on 25 April 2003, 29 August 2003 and 5 March 2004 respectively. Due to their bankruptcy the three individuals could no longer hold onto their directorships in the JV Companies, leaving Tan CB and Roger Koh as the ones formally in charge of the operations of the JV Companies from 2004 onwards (save that Raymond Teo was a director of TCAE until 15 November 2006 when he did not get re-elected [note: 44]). Following the bankruptcy of Tan Senior, the Plaintiffs did not apply for leave to continue the Consolidated Suits against him. [note: 45] This went on until 2009 when the Plaintiffs decided to reinitiate legal action against him by naming him as one of the defendants in the present suit. As for Ong CK, he was never named as a defendant in the Consolidated Suits to begin with since the commencement of proceedings in 2002. It was only in the present suit that he was named a defendant.

Leases entered into in 2004

27 While the court proceedings were pending, the 2001 Head Lease and the 2001 STAs expired. On 10 September 2004, SLA granted SAA another lease of the Site for a period of three years from 1 September 2004 ("the 2004 Head Lease"). The rent payable by SAA was reduced to $260,000 per month because of poor economic conditions during the renewal. The 2004 Head Lease contained a "Renewal of Tenancy" clause as follows:

Clause 2- Renewal of Tenancy

2.1 The Landlord may at his absolute discretion grant a fresh tenancy for a further term [of] **3 YEARS** subject to new terms and conditions and revision of rental upon the expiration of the term hereby created.

Clause 2.1 is *in pari materia* with clause 1(3) found in the 2001 Head Lease (refer to [19] above).

28 On the same day of 10 September 2004, SAA entered into sub-tenancy agreements with TCAE and TCPL respectively for a period of three years less one day from 1 September 2004 to 30 August 2007 ("2004 STAs"). The 2004 STAs involved the same areas as the 2001 STAs. The monthly rent payable by TCAE and TCPL was $130,000 each (making a total of $260,000 per month) plus 3% of each JV Company's gross monthly rental/license fee income. However, unlike the 2001 STAs, the 2004 STAs did not include an "Option to Renew" clause. Raymond Teo – who was still a director of TCAE then (until his removal on 15 November 2006) [note: 46] – was not consulted on the terms of TCAE's 2004 STA. [note: 47] The Plaintiffs further alleged that they were not shown the 2004 Head Lease and 2004 STAs because by then they were no longer directors of TCPL although Raymond Teo was still a director of TCAE.

The Consent Order

Terms of the Consent Order

29 The parties managed to reach a settlement before the Consolidated Suits proceeded to trial. The terms of the settlement were encapsulated in the Consent Order dated 22 February 2006 made before Justice Choo Han Teck ("Choo J"). [note: 48] Negotiations leading up to the Consent Order were conducted by the solicitors representing each side. AsiaLegal LLC ("AsiaLegal") represented the plaintiffs and Rajah & Tann LLP ("Rajah & Tann") represented the defendants. The parties to the Consent Order ("Consent Order Parties") were:

(a) the Plaintiffs;

(b) TCPL;

(c) SAA;

(d) Tan Senior;

(e) Samuel Ng;

(f) Roger Koh; and

(g) TCAE.

I will refer to parties (b) to (g) as the "Defendants (CO)" instead of the "Defendants" because Tan CB and Ong CK were neither defendants in the Consolidated Suits nor parties to the Consent Order.

30 The aim of the Consent Order was to settle the Plaintiffs' allegations made in the Consolidated Suits and put an end to the Joint Venture by extricating the Plaintiffs or the SAA Group from the JV Companies. Broadly speaking, a three-stage mechanism was embodied within the Consent Order to achieve these goals: (1) an investigation of the Plaintiffs' allegations including whether various costs

and expenses incurred by the JV Companies in the course of renovating the Site were reasonable; (2) a valuation of the JV Companies; and (3) a closed bidding exercise.

31 At the end of the bidding exercise, the higher bidder would purchase the respective shares of the lower bidder (clause 9(d)). The lower bidder would also resign from their directorship positions in the JV Companies (clause 9(f)). An important clause, which I shall elaborate more upon later, was that if the higher bidder were the Plaintiffs, the Defendants (CO), in particular SAA, were to use their best endeavours to transfer SAA's head lease with SLA to the JV Companies (clause 9(g)).

32 Two entities were appointed to implement the Consent Order. KPMG Business Advisory Pte Ltd ("KPMG BA") was in charge of the investigation aspect while KPMG Corporate Finance Pte Ltd ("KPMG CF") was in charge of the valuation aspect. KPMG CF was also to supervise the bidding exercise.

33 The Consent Order contained certain timelines. Both the investigation and the valuation exercises were to be completed within 60 days of the date of appointment of KPMG BA ("the IV Date") unless parties agreed in writing to a different time period (clause 2). Within one week from the IV Date, all decisions, findings and conclusions as determined by KPMG CF in the conduct of the valuation exercise were to be contained in a written report ("Valuation Report") to be submitted to the Consent Order Parties. Within 28 working days of the receipt of the Valuation Report, the bidding exercise was to be carried out (clause 9). The bidding exercise would be completed within two working days of receipt of each party's bid (if any) (clause 9(b)).

34 Clauses 4, 6 and 11 were put in place to facilitate a fair implementation of the Consent Order.

(a) Clause 4 stated that the parties "may refer any and all matters which they deem relevant to the Independent Valuer for his consideration and review".

(b) Clause 6 placed an obligation on both parties to provide KPMG BA and KPMG CF "full access" to certain documents that they "may require". It also stated that KPMG CF was at liberty to engage an independent Quantity Surveyor ("QS") as it deemed necessary or appropriate for the purposes of the Investigation and Valuation Exercises.

(c) Clause 11 imposed an obligation on both parties to preserve the value of the JV Companies when the Consent Order was still in operation. Both parties undertook not to do anything that would affect the assets and ongoing liabilities of the JV Companies, including anything which would "affect, vary and/or alter the status quo" of the JV Companies, "including but not limited to doing anything to affect the head lease between [SAA and SLA] and sub leases presently entered into between [SAA and the JV Companies]."

Implementation of the Consent Order

35 On 25 April 2006, both KPMG entities were formally appointed by the Consent Order Parties to perform the tasks stipulated under the Consent Order. [note: 49] Based on the timelines envisaged in the Consent Order, the IV Date was supposed to be 25 June 2006. Consequently, the Valuation Report was to be submitted to the Consent Order Parties by 2 July 2006. However, the investigation and valuation exercises were delayed as parties were unable to agree on the fees of appointing a second QS to replace the first QS who was no longer prepared to be involved in the investigation exercise. The deadlock culminated in KPMG BA writing to inform the Consent Order Parties on 3 August 2007 as follows: [note: 50]

As we have not received any objection from both the Plaintiffs and Defendants to complete the

valuation exercise without the appointment of an independent quantity surveyor and in order not to protract the matter further, we will proceed to finalise the valuation report.

KPMG CF proceeded to issue the Valuation Reports for TCPL and TCAE on 10 August 2007. This was more than 13 months after the deadline envisaged under the Consent Order. In both reports, TCAE and TCPL were valued as at 31 May 2006.

36 In the meantime, unknown to both KPMG entities and the Plaintiffs, [note: 51] SAA had procured an in-principal renewal of the 2004 Head Lease with SLA as early as 8 September 2006. [note: 52] SAA then formally entered into a tenancy agreement with SLA on 22 May 2007 for the Site for a term of 3 years from 1 September 2007 ("2007 Head Lease"). [note: 53] The monthly rent was $260,000. This time round, SAA did not grant corresponding sub-tenancies to the JV Companies. The 2007 Head Lease was not disclosed by the Defendants (CO) to the KPMG entities or the Plaintiffs.

37 As a result of the above non-disclosure, the Valuation Reports did not take into account any head lease or sub-tenancies for the period between 1 September 2007 and 31 August 2010. Both Valuation Reports stated at para 5.6 that "[a]s at [10 August 2007], [KPMG] have not received any confirmation from [TCPL and TCAE] that the said lease would be extended for another term of three years".

38 On 17 August 2007, AsiaLegal wrote to KPMG BA expressing shock over para 5.6 of the Valuation Reports as they had come to understand that the head lease between SAA and SLA had actually been renewed prior to the issuance of the Valuation Reports. They called for the Valuation Reports to be reissued to take into account the renewal. [note: 54]

39 It was not until 23 August 2007 that Rajah & Tann disclosed to KPMG BA and the Plaintiffs about the existence of the 2007 Head Lease and SAA's non-renewal of the sub-tenancies with the JV Companies. By way of a letter, Rajah & Tann stated as follows, at paragraph 2: [note: 55]

> 2. We are instructed that the Principal Tenancy Agreement has since been renewed. The sub-tenancies with TCPL and TCAE, on the other hand, have not been renewed.

40 Claiming that the non-renewal of the sub-tenancies constituted a breach of clause 11 of the Consent Order, AsiaLegal wrote to KPMG BA on 25 August 2007 seeking a confirmation from Rajah & Tann by 27 August 2007 that SAA would renew the sub-tenancies. Rajah & Tann replied to AsiaLegal on 29 August 2007, rejecting their request. They disagreed that "the Consent Order extends to the renewal of the Principal Tenancy Agreement". They also disagreed that the Consent Order had placed an obligation on SAA to renew the sub-tenancies with the JV Companies. [note: 56] Rajah & Tann were against the reissuance of the Valuation Reports and pressed for the bidding exercise to be conducted.

41 KPMG BA also responded to the disclosure made by Rajah & Tann on 23 August 2007. In a letter dated 29 August 2007, it recommended that the Valuation Reports be revised as the Valuation Reports were done on the basis that the 2004 Head Lease might not be renewed. However, in the light of the reluctance of the Defendant (CO) for the Valuation Reports to be revised, it wrote to the parties again on 12 September 2007 to clarify that parties remained bound by the Valuation Reports until they were able to reach an agreement for a new report to be issued.

Disputes over the implementation of the Consent Order

Plaintiffs applied to court for the Consent Order to take into account the 2007 Head Lease

42 By September 2007 it became clear that SAA would not be granting corresponding sub-tenancies to the JV Companies. On 13 September 2007 the Plaintiffs filed Summons 4117 of 2007/X ("SUM 4117") to apply for, *inter alia*, an order that the Valuation Reports dated 10 August 2007 be revised and/or reissued by KPMG CF taking into account the 2007 Head Lease. [note: 57] SUM 4117 was heard by Justice Chan Seng Onn on 19 and 22 November 2007. Chan J granted leave to the Plaintiffs to amend the application.

43 The amended SUM 4117 ("SUM 4117 (amended)") was filed on 25 January 2008. [note: 58] The Plaintiffs asked for an order that the Consent Order be clarified and/or varied. In particular, it asked for clause 9(g) to be amended to expressly provide that SAA would assign the 2007 Head Lease to the JV Companies should the Plaintiffs win the bidding exercise. In the event that SLA was not agreeable to the transfer, SAA was to grant sub-tenancies to the JV Companies on identical terms as the 2007 Head Lease and it was also to transfer all sub-tenancies and/or licenses between SAA and the ultimate tenants to the JV Companies. It asked for a revaluation exercise to be conducted based on these terms.

44 Choo J heard SUM 4117 (amended). On 23 June 2008, Choo J delivered a written judgment dismissing the Plaintiffs' application (*Yeo Boong Hua and others v Turf City Pte Ltd and others and another suit* [2008] 4 SLR(R) 245). [note: 59] He was of the view that a preliminary issue was whether the court had jurisdiction to hear the application and that any allegation of a breach of the Consent Order ought to have been brought in a separate claim.

45 The Plaintiffs' failure in overcoming the jurisdiction issue would have been sufficient grounds to dismiss the appeal. Nevertheless, Choo J also discussed the allegations of breach of the Consent Order and held that "upon a proper construction of the Consent Order … [the] allegations are unfounded because no such obligations existed on the part of the defendants" (at [11]). This holding relating to the construction of the Consent Order (at [16]–[26]) features strongly in the defence of Tan CB, Roger Koh and SAA in the present action. These defendants argued that the Plaintiffs are precluded from re-litigating issues that had previously been argued before and decided by Choo J.

46 The Plaintiffs did not appeal against Choo J's decision in SUM 4117 (amended).

Defendants applied to court to fix bidding date

47 Following Choo J's dismissal of SUM 4117 (amended), the Defendants (CO) filed Summons 4848 of 2008/P ("SUM 4848") on 3 November 2008 for an order that the bidding exercise be held on 15 December 2008. [note: 60] The Plaintiffs resisted by filing Summons 5373 of 2008/J ("SUM 5373") on 5 December 2008 for an order that the bidding exercise cannot be proceeded with. [note: 61]

48 Both applications came before Choo J. On 12 January 2009, Choo J dismissed the Plaintiffs' application and ordered the bidding exercise to proceed. In his grounds of decision delivered on 12 February 2009 (*Yeo Boong Hua and Others v Turf City Pte Ltd and Others and Another suit* [2009] SGHC 34), Choo J explained that he was not persuaded by the reason given by the Plaintiffs to substantiate why the bidding exercise could not be proceeded with. The Plaintiffs' reason was that they had commenced a fresh suit against the Defendants. Choo J concluded that the Plaintiffs' new cause of action "should proceed independently" (at [2]).

49 The Plaintiffs appealed against Choo J's decision of 12 January 2009 by way of Civil Appeal No. 6 of 2009/Z ("CA 6/2009"). The appeal was allowed on 7 July 2009. The Court of Appeal rescinded

the bidding exercise which was supposed to be held on 9 February 2009.

Commencement of the present action

Defendants applied to strike out the action

50 As alluded to above, before SUM 4848 and SUM 5373 were heard by Choo J, the Plaintiffs separately commenced the present action on 8 January 2009 to set aside the Consent Order on the grounds of repudiatory breach, frustration and mistake. The inspiration for this move came perhaps from Choo J's earlier decision concerning SUM 4117 (amended), where he mentioned that "[a]ny allegation of breach of the Consent Order ought to be brought in a separate action" (at [11]) (see also [44] above). In addition, the Plaintiffs claimed breach of fiduciary duties. The Plaintiffs also claimed conspiracy and knowing assistance in depriving the Plaintiffs of the benefit of the 2007 Head Lease. [note: 62]

51 The Defendants applied to strike out the action on the grounds that, *inter alia*, it disclosed no reasonable cause of action. On 19 November 2009, AR Then Ling ("AR Then") struck out all of the Plaintiffs' claims except the claim based on frustration. The Plaintiffs filed an appeal against AR Then's decision.

52 The appeal was heard by Choo J and it was dismissed on 7 April 2010. For the second time, the Plaintiffs appealed against Choo J's decision. This was by way of Civil Appeal No. 71 of 2010 ("CA 71/2010"). [note: 63]

53 By the time CA 71/2010 was ready to be heard, the Plaintiffs' newly appointed solicitors Central Chambers Law Corporation ("CCLC") wrote to the Registrar on 19 November 2010 to seek leave from the Court of Appeal to use a revised version of the Statement of Claim (Amendment No. 2) ("Revised SOC"). On 11 February 2011, after hearing the parties, the Court of Appeal granted the Plaintiffs leave to file and serve the Revised SOC. In other words, the Plaintiffs' appeal was effectively allowed.

Summary dismissal of the action

54 The present suit was originally set down for a 15-day trial before Choo J. However, during a hearing held on 17 October 2012, Choo J gave the following directions:

> Parties to agree facts and submit on first main issue – whether the Consent Order is to be set aside
>
> - basis for setting aside
>
> - from which point ie nature of setting aside
>
> Second main issue – what remedies if any do the plaintiffs have in the event –
>
> (a) the Consent Order is set aside
>
> (b) the Consent Order is not set aside
>
> After submissions I will let parties know whether oral evidence is necessary for my decision.
>
> Further conduct of trial adjourned to after decision/directions regarding setting aside of Consent

Order.

55 The Plaintiffs filed their written submissions on 23 October 2012 and the Defendants filed theirs on 30 October 2012. On 2 November 2012, Choo J dismissed the Plaintiffs' claim (refer to his grounds of decision delivered on 12 November 2012 (*Yeo Boong Hua and others v Turf Club Auto Emporium Pte Ltd and others* [2012] SGHC 227) for more details).

56 For the third time, the Plaintiffs filed an appeal against Choo J's decision by way of Civil Appeal No. 156 of 2012 ("CA 156/2012"). The Court of Appeal allowed the appeal on 3 July 2013, directing the matter back to the High Court for trial before a different judge. The Court of Appeal also said that "[p]arties are not precluded, in the course of the trial, from raising *res judicata* as one of the issues for the final determination of the new judge." No written grounds were issued by the Court of Appeal. It was on this note that the parties came before me to have the present action tried.

The parties' claims

57 The Plaintiffs' main claim in the present action is that the Consent Order should be set aside. The following grounds were pleaded: [note: 64]

(a) the Defendants (CO) had committed a repudiatory breach of the Consent Order;

(b) the Plaintiffs' claims in the Consolidated Suits have not been compromised;

(c) the Consent Order had been frustrated; and/or

(d) the Plaintiffs entered into the Consent Order operating under a mistake of fact.

58 From the Plaintiffs' closing submissions, it appears that they are no longer pursuing ground (d) – that the Plaintiffs were operating under a mistake of fact. Their submissions also did not specifically cover ground (c), the issue of frustration.

59 Should the Consent Order be set aside, the Plaintiffs also asked for the court to order that that they be at liberty to proceed with the Consolidated Suits, with such directions as may be appropriate ("the Consequential Orders"). [note: 65]

60 In the event that the Consent Order is not set aside, the Plaintiffs alternatively argued that the five individuals in the SAA Group (namely, Tan CB, Roger Koh, Samuel Ng, Tan Senior and Ong CK) and SAA are liable to account to the Plaintiffs for the profits made in breach of their fiduciary duties owed.

61 The substantive defendants (*ie*, excluding the JV Companies and Samuel Ng) are represented by three different sets of lawyers. SAA, Tan CB and Roger Koh are represented by Rajah & Tann and the lead counsel is Mr Kelvin Poon ("Mr Poon"). I will refer to this group of defendants collectively as "the R&T Defendants". Tan Senior is represented by Mr Sim Chong ("Mr Chong") of JLC Advisors LLP. Ong CK is represented by Mr Khor Wee Siong ("Mr Khor") of Khor Thiam Beng & Partners. From the discussions that follow, it will be apparent that the arguments put forth by these three groups of defendants are quite different, although the existence of the Back-to-Back Arrangement and the alleged oral agreements were unanimously denied by all of them. Significantly, the R&T Defendants have also advanced a counterclaim against the Plaintiffs, asking for an order that the bidding exercise be proceeded with.

62 As a preliminary matter, it should be noted that the dispute over the setting aside of the Consent Order is mainly between the Plaintiffs and the R&T Defendants. The main defence of Tan Senior and Ong CK to the grounds advanced by the Plaintiffs to set aside the Consent Order is straightforward – that they were not proper parties to the Consent Order to begin with. For Tan Senior, even though he was originally named as a party in the action leading to the Consent Order, he contended that he did not participate in the negotiations leading to the Consent Order. [note: 66] His participation was not required as after he became a bankrupt in 2003, the Plaintiffs did not seek leave to continue proceedings against him in the Consolidated Suits. Ong CK argued that he was never a party to the Consolidated Suits or to the Consent Order.

63 I proceed now to detail the arguments raised by the parties with respect to the various claims and counterclaim.

Repudiatory breach of the Consent Order

The Plaintiffs' case

64 According to the Plaintiffs, several repudiatory breaches had been committed.

65 First, it was contended that SAA's refusal to grant a renewal of the sub-tenancies in 2007 despite having secured the 2007 Head Lease from SLA amounted to a breach of clause 11 of the Consent Order. Clause 11 prohibited parties from doing anything to alter the "status quo" of the JV Companies. Even though SAA's purported obligation to renew the sub-tenancies was not expressly provided for in clause 11, the Plaintiffs argued that this obligation nevertheless came within the phrase "status quo" on the basis of, amongst other things, the purported oral agreement between the parties. This Back-to-Back Arrangement continued to be the status quo at the time the Consent Order was entered into and SAA was required to preserve the status quo by continuing to grant sub-tenancies to the JV Companies. When it failed to do so, SAA had disrupted the "status quo".

66 The Plaintiffs also made the related argument that SAA had further disrupted the "status quo" by misappropriating the JV Companies' "assets and/or benefits". It had done so by transferring to itself some of the sub-sub-tenancy agreements that the JV Companies had with the ultimate tenants. The ultimate tenants' cash deposits held by the JV Companies were also transferred to SAA. In addition, it took over the JV Companies' renovation structures. SAA received these benefits without paying the JV Companies anything for them. Not only did these developments affect the "assets and/or benefits" of the JV Companies, they denuded the JV Companies' of any value. This amounted to a breach of clause 11 of the Consent Order. This argument is also contingent upon a finding that a Back-to-Back Arrangement falls within the ambit of clause 11.

67 Alternatively, the Plaintiffs averred that by securing the 2007 Head Lease from SLA and failing to grant the renewal of the sub-tenancies to the JV Companies, the Defendants had appropriated the benefit of the 2007 Head Lease. This was in breach of an implied term of the Consent Order. [note: 67] It was illogical for SAA to insist that it would need to transfer the 2004 Head Lease only, but not the 2007 Head Lease, if the Plaintiffs won the bidding exercise since TCPL and TCAE already held the 2004 STAs. There was therefore nothing of value to transfer in relation to the 2004 Head Lease. If the winner of the bidding exercise was not meant to have the benefit of the 2007 Head Lease, there would have been no need for clause 9(g) of the Consent Order. [note: 68]

68 The Plaintiffs also claimed that clause 5 of the Consent Order was breached when the Defendants allegedly hid material facts from the KPMG entities. Clause 5 stated that the parties

"undertake not to … do anything to … hinder [KPMG CF]'s discharge of [its] duties in respect of the Valuation Exercise". Clause 5 imposed an obligation on the parties not to hide material facts from the KPMG entities as doing so would hinder KPMG CF's conduct of the Valuation Exercise. [note: 69] The failure and/or refusal to disclose the 2007 Head Lease had materially affected the valuation of the JV Companies since the Valuation Reports were prepared on the basis that there was no confirmation on the renewal of the 2004 Head Lease.

69 Lastly, the Plaintiffs argued that clause 6 of the Consent Order was breached when the Defendants (CO) did not provide KPMG BA "full access" to all the documents that it may require for the Valuation Exercise. [note: 70] KPMG BA was supposed to investigate contracts between the JV Companies and Goodland as well as services performed by AGA. The Defendants (CO) failed to give KPMG BA "full access" to the contracts and architectural drawings required to conduct a proper investigation and valuation exercise. For instance, a number of QSes approached by KPMG BA were unable to verify the works done as the available information was insufficient. As a result, the investigation exercise in relation to the Plaintiffs' allegations in the Consolidated Suits was not properly carried out. In addition, they also claimed that the Defendants (CO) obstructed the KPMG entities' efforts in appointing a QS by unreasonably refusing to pay their share of the additional fees quoted by a replacement QS.

The R&T Defendants' case

70 With respect to the allegation that SAA had breached the Consent Order in failing to renew the JV Companies' sub-tenancies in 2007, the R&T Defendants argued that the Consent Order did not impose such an obligation on SAA. The existence of the "Back-to-Back Arrangement" was strenuously disputed. They argued that there was no oral agreement save that parties agreed to incorporate two joint venture companies instead of one. [note: 71] There was an agreement to jointly develop and operate the Site, but such an agreement did not extend to sharing the beneficial ownership of the head lease between SLA and SAA. [note: 72] The R&T Defendants argued that SAA had the discretion to decide whether to renew the JV Companies' sub-tenancies after the initial three-year term. [note: 73] SAA also retained proprietary ownership of its head lease with SLA at all times. [note: 74]

71 As for the argument that SAA had further disrupted the "status quo" by misappropriating the JV Companies' "assets and/or benefits" without providing valuable consideration for them, the R&T Defendants argued that this allegation was not even pleaded. In any case, they argued that the JV Companies would no longer have any more ultimate tenants once the 2004 STAs had expired. The JV Companies could not complain of conversion when the assets SAA took did not belong to them in the first place.

72 With respect to the point that an implied term of the Consent Order had been breached, the R&T Defendants argued that it was always contemplated that the entire bidding process under the Consent Order would be completed well before the 2004 Head Lease expired. At the time the Consent Order was entered into, there were no guarantees that the Government would grant the 2007 Head Lease and therefore clause 9(g) of the Consent Order was never meant to enable the winner of the bidding exercise to have the benefit of a renewed term of the Head Lease. [note: 75] The R&T Defendants also averred that there was no gap that needed to be filled through the implication of a term. Clauses 9(g) and 11 were clear in that they were meant to only refer to the 2004 Head Lease. This was therefore not a case of implication of terms but one of interpretation. The R&T Defendants further submitted that even if there was a gap, no term should be implied as the Consent Order retains its efficacy and the officious bystander test would fail.

73 With respect to the Plaintiffs' point that clause 5 of the Consent Order had been breached, the R&T Defendants argued that there was nothing in the Consent Order that required SAA to disclose the 2007 Head Lease to anyone. [note: 76] In addition, reliance was placed on Choo J's judgment in SUM 4117 (amended) in that this issue had already been decided in favour of the Defendants (at [24]) and therefore, the Plaintiffs were precluded from rearguing this point. [note: 77]

74 Regarding the Plaintiffs' claim that there was no full disclosure of information required by KPMG BA to carry out a proper investigation, the R&T Defendants argued that this was not pleaded. In addition, little weight should be given to the fact that several QSes were unable to do the task due to incomplete information since there was one QS, DLS Contract Advisory & Dispute Management Services Pte Ltd ("DLS"), which was able do it based on the same information. As for the failure to pay their share of the QS fees, the R&T Defendants denied the existence of any obligation on their part to agree to the costs of appointing a QS. [note: 78]

Claims in the Consolidated Suit have not been compromised

The Plaintiffs' case

75 The Plaintiffs contended that KPMG BA and KPMG CF did not meet the standard required under the Consent Order in conducting the investigation and valuation exercise. [note: 79] Based on the disclaimers and cursory write-up in the Valuation Reports, it was evident that KPMG CF simply relied on figures provided by the Defendants instead of conducting an independent investigation into the JV Companies' finances and accounts. Their pleaded case was that a proper investigation of the Plaintiffs' claims in the Consolidated Suits was the main consideration the Plaintiffs were supposed to derive from having entered into the Consent Order. As KPMG BA did not carry out a full investigation, their claims were not fully compromised.

76 Another allegation was that KPMG BA should have appointed a QS to assist it in determining whether the contracts awarded to Goodland and AGA were of fair value. KPMG BA could not have been able to do this by itself without a QS.

77 The Plaintiffs also claimed that it was inappropriate for KPMG CF to have adopted the Net Asset Valuation ("NAV") methodology to value the JV Companies' shares. [note: 80] The valuation figures provided were inaccurate. KPMG CF should have used the "pro-forma revenue" method instead that can be found in a report submitted by the Plaintiffs' expert witness, Timothy James Reid. [note: 81]

78 Related to the above argument on methodology is the point that KPMG CF should have taken into account the revenue receivable by the JV Companies from the period of September 2007 to September 2010. [note: 82] But because of SAA's failure to disclose the 2007 Head Lease, it was unable to do so. This materially affected the valuation of the JV Companies since their potential to earn revenue was directly related to whether there was a head lease.

79 Further, although it was initially pleaded as a claim of "frustration", [note: 83] the Plaintiffs in their closing submissions appeared to have re-characterised the 13.5-month delay in the issuance of the Valuation Reports as evidencing that the claims in the Consolidated Suit had not been compromised.

The R&T Defendants' case

80 The R&T Defendants argued that the Plaintiffs did not plead with sufficient clarity the claim of there being no independent investigation conducted by the KPMG entities. [note: 84] Even if it were pleaded, they argued that the Plaintiffs had failed to discharge their burden of proving that the investigation conducted by the KPMG entities was inadequate. [note: 85] In any event, they argued that KPMG CF enjoyed "unfettered and absolute discretion" in conducting the investigation and valuation exercise (clause 5). [note: 86]

81 As for the alleged deficiencies in the valuation exercise, the R&T Defendants argued that they were not properly pleaded. [note: 87] In any event, the R&T Defendants averred that since KPMG CF would have unfettered and absolute discretion in the valuation exercise, there was no basis for the Plaintiffs to argue that the valuation exercise was deficient.

Consequential Orders

82 If the Plaintiffs succeed in setting aside the Consent Order, they argued that they should be allowed to bring the minority oppression claim against Tan CB and Ong CK in their personal capacity. In this regard, they argued that both Tan CB and Ong CK were parties to the Joint Venture in their personal capacity and not through SAA.

83 Tan CB and Ong CK both disputed this claim. They argued that SAA was the vehicle they had used to enter into the Joint Venture and therefore SAA should be named as defendants, not them.

84 Ong CK additionally raised the defence of laches and estoppel by conduct. He claimed that he had never been a party to the Consolidated Suits since 2002. He was only joined as a defendant to the present suit in 2009. The delay of seven years has prejudiced him.

85 As for Tan Senior, he argued that the doctrines of abuse of process, estoppel by conduct and waiver precluded the Plaintiffs from suing him again in 2009 in the present action. After he became bankrupt in 2003, the Plaintiffs did not seek leave to continue the Consolidated Suits against him. [note: 88] In fact, the Plaintiffs stopped or abandoned all litigation against him since his bankruptcy until they commenced the present action in 2009.

Counterclaim by the R&T Defendants: whether the bidding exercise should be proceeded with

86 The R&T Defendants filed a counterclaim against the Plaintiffs for an order that the bidding exercise be proceeded with. The Plaintiffs' main defence to the counterclaim are the same as those canvassed in their claim. Further and in the alternative, the Plaintiffs argued that the Valuation Reports dated way back in 31 May 2006 (or even 10 August 2007) could no longer serve its purpose of informing the bidding exercise. In addition, the JV Companies were practically worthless today and therefore it would be pointless to bid for them.

Plaintiffs' residual claim: breach of fiduciary duties and conspiracy

87 In the event the Plaintiffs do not succeed in setting aside the Consent Order, [note: 89] they argued that in the alternative, the five individuals from the SAA Group (namely, Tan CB, Roger Koh, Samuel Ng, Tan Senior and Ong CK) and SAA are liable to account to the Plaintiffs for the profits made including but not limited to the 2007 Head Lease. [note: 90] They are relying on the same Back-to-Back Arrangement to say that these Defendants owed them fiduciary duties under the Joint Venture. In not renewing the sub-tenancies to the Joint Venture Companies in 2007, they had

breached their fiduciary duties. Further and in the alternative, they had conspired with each other to breach the fiduciary duties.

88 However, when SAA did not renew the JV Companies' sub-tenancies in 2007, both Tan Senior and Ong CK were no longer directors of SAA and the JV Companies. Tan Senior [note: 91] and Ong CK [note: 92] claimed that they were no longer involved in the management of SAA and the JV Companies upon the cessation of their respective directorships. Nevertheless, the Plaintiffs' basis for proceeding against these two individuals was that they had masterminded the scheme to deprive the Plaintiffs of the benefits under the 2007 Head Lease ("Mastermind Allegation").

89 In their defence, Tan CB, Roger Koh, Samuel Ng, Tan Senior, Ong CK and SAA all argued that there had been no oral agreement that the parties would share the beneficial interest of the head lease between SLA and SAA. Therefore, there were no fiduciary duties owed by them to the Plaintiffs.

90 Tan Senior claimed that the Mastermind Allegation was fabricated by the Plaintiffs in order to drag him back into litigation. Until the present suit commenced in 2009, the Plaintiffs had abandoned all proceedings against him after he became a bankrupt in 2003. They did not seek leave to continue OS 1634/02 against him. They also did not sue him in S 703/04.

91 Ong CK raised the defence of laches against these claims.

92 I would also add that with respect to these residual claims, the Plaintiffs have indicated that they would subsume these claims under the Consolidated Suits, should the Consent Order be set aside and the Consolidated Suits be reinstated. [note: 93]

Issues

93 The broad overarching issue that arose in the present dispute was whether the Consent Order should be set aside. This raised the following questions in respect of the Consent Order:

(a) Whether the Consent Order imposed an obligation on SAA to pass on the benefit of the 2007 Head Lease to the JV Companies by way of the granting of sub-tenancies ("the Non-Renewal Issue").

(b) Whether the Consent Order imposed an obligation on SAA to disclose the procurement of the 2007 Head Lease to the KPMG entities ("the Non-Disclosure Issue").

(c) Whether the investigation and valuation exercises required of the KPMG entities were properly carried out ("the Investigation and Valuation Issue").

(d) Whether the Defendants obstructed efforts to appoint a QS and whether the failure to appoint a QS enables the Plaintiffs to set aside the Consent Order ("the QS Issue").

94 Should the Consent Order be set aside, the Consequential Orders requested for by the Plaintiffs raise two questions:

(a) Whether Tan CB and Ong CK were proper parties to the Joint Venture.

(b) Whether Tan Senior and Ong CK could rely on the Plaintiffs' delay in bringing them back into litigation to avoid being named as defendants in the reinstated Consolidated Suits.

My decision

Preliminary considerations

95 Before I proceed to assess the merits of the various claims, I address two logically anterior questions which deserve some discussion. First, I consider the principles which should be applied in interpreting the Consent Order and secondly, I consider whether Choo J's previous decision in *Yeo Boong Hua and others v Turf City Pte Ltd and others and another suit* [2008] 4 SLR(R) 245 ("Choo J's Decision") gives rise to issue estoppel.

Principles applied in interpreting Consent Order

96 There are two types of consent orders. In determining whether a consent order may be set aside or varied, the court would, as a preliminary matter, examine the type of consent order in question. This was discussed by MPH Rubin J in *CSR South East Asia Pte Ltd (formerly known as CSR Bradford Insulation (S) Pte Ltd) v Sunrise Insulation Pte Ltd* [2002] 1 SLR(R) 1079 ("*Sunrise Insulation*") at [8]:

> 8 The nature and concept of the phrase "by consent" had received considerable judicial attention over the years. Lord Denning MR, in *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 All ER 377 (CA), after a brief survey of the earlier decisions, observed at 380*a*–380*g*:
>
> > It should be clearly understood by the profession that, when an order is expressed to be made 'by consent', it is ambiguous. There are two meanings to the words 'by consent'. That was observed by Lord Greene MR in *Chandless-Chandless v Nicholson* [1942] 2 All ER 315 at 317; [1942] 2 KB 321 at 324. *One meaning is this: the words 'by consent' may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract.* The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without obligation?
> >
> > …
>
> [emphasis added]

97 It is common ground that the Consent Order in the present case falls under the first category referred to in *Sunrise Insulation*. It is a contract between the parties and it is undisputed that the Consent Order may only be set aside on the same grounds as would apply to an ordinary contract. I therefore approach the question of whether the Consent Order may be set aside with reference to prevailing contractual principles.

Issue estoppel

98 With respect to the question of issue estoppel, I note that the Non-Renewal Issue and the Non-Disclosure Issue had previously been discussed in Choo J's Decision. [note: 94] This raises the question of whether I am thereby precluded from revisiting the same issues in this judgment. It is the

R&T Defendants' case that I am not allowed to do so because the views expressed in Choo J's Decision allow the invocation of the doctrine of issue estoppel.

99 To examine whether the R&T Defendants are entitled to raise the doctrine of issue estoppel, it is necessary to discuss whether the requirements of issue estoppel have been met. The requirements of issue estoppel are as follows (see *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan 301* [2005] 3 SLR(R) 157 ("*Lee Tat*")):

(a) There must be a final and conclusive judgment on the merits.

(b) The previous judgment must be of a court of competent jurisdiction.

(c) There must be identity between the parties to the two actions that are being compared.

(d) There must be an identity of subject matter in the two proceedings.

100 The fourth requirement was subsequently expounded on by Menon JC (as he then was) in the oft-cited local case of *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh v Goh*") to encapsulate three further sub-requirements:

(a) The issues in the prior decision must traverse the same ground as the subsequent proceedings and the facts and circumstances giving rise to the earlier decision must not have changed.

(b) The previous determination in question must have been fundamental and not merely collateral to the previous decision so that the previous decision could not stand without that determination.

(c) The issue in question should be shown in fact to have been raised and argued.

101 There is no disagreement between the parties that requirements (b) and (c) in *Lee Tat* have been satisfied in respect of Choo J's decision. The bone of contention centres on requirements (a) and (d) in *Lee Tat*, *viz*, whether Choo J's holding with respect to the allegations of breach of the Consent Order was "final and conclusive" and whether there was an identity of subject matter in the two proceedings. The Plaintiffs' arguments, in this regard, are that Choo J did not intend to preclude subsequent proceedings and that his decision does not give rise to issue estoppel because his observations made with respect to the proper construction of the Consent Order were collateral findings which were not fundamental to his decision.

102 Before examining the validity of the arguments raised by the parties, it is worth understanding the background of the matter before Choo J. As I have alluded to earlier, SUM 4117 (amended) concerned the Plaintiffs' application to vary the Consent Order. The application was filed pursuant to the Plaintiffs' belated discovery that SAA had failed to pass on the benefit of the 2007 Head Lease to the JV Companies and as a result the benefit was not properly taken into account in the valuation reports issued by KPMG CF. Consequently, the Plaintiffs applied to court for an order that a fresh valuation exercise be conducted on the basis that the 2007 Head Lease should be taken into account as an asset of the JV Companies which would then fall within the pool of assets that the parties would be bidding for.

103 The Plaintiffs' application was dismissed by Choo J. He held that the court's jurisdiction to hear the application was not invoked insofar as it was asked to make further substantive orders to vary

the Consent Order. He was of the view that the circumstances under which a court may interfere with a Consent Order were exceptional, and the arguments raised by the Plaintiffs in relation to the non-renewal of the sub-tenancies and the failure to disclose the procurement of the 2007 Head Lease did not fall squarely within the "exceptional circumstances" that would ordinarily warrant the making of further substantive orders.

104 It must be borne in mind that the order sought by the Plaintiffs was for the Consent Order to be varied and for the purposes of making this determination, allegations that the Consent Order had been breached were irrelevant. The failure on the part of the Plaintiffs to satisfy the stringent criteria required to invoke the court's jurisdiction for the purposes of *varying* a Consent Order would have been sufficient for Choo J to dispose of the matter.

105 Nevertheless, as the R&T Defendants have argued, [note: 95] Choo J went on to examine the merits of several allegations of *breach* made by the Plaintiffs on the *assumption* that the proper cause of action, *ie*, breach of Consent Order, had been pleaded, and he held that there was no breach.

106 I am of the view that while there is some merit in the R&T Defendants' reliance on Choo J's holdings as a basis for arguing issue estoppel, there is no issue estoppel.

107 With respect to requirement (a) of the *Lee Tat* test, I am of the view that this requirement has not been made out – Choo J's holding on the proper construction of the Consent Order was not meant to be final and conclusive. It was observed in *Goh v Goh* at [28], "whether the decision in question is a final and conclusive judgment on the merits may be ascertained from the intention of the judge". In *Alliance Entertainment Singapore Pte Ltd v Sim Kay Teck* [2006] 3 SLR(R) 712, Andrew Ang J noted (at [23]) that:

> That, in this respect, the intention of the judge is critical can also be seen in *Setiadi Hendrawan v OCBC Securities Pte Ltd* [2001] 3 SLR(R) 296. In that case, Woo Bih Li JC (as he then was) had to decide whether the plaintiff was estopped from bringing a second action against the defendants by reason of an earlier action between the same parties having been struck out after counsel for the plaintiff unsuccessfully sought leave to discontinue. The plaintiff argued that as his claim in the first action had not been dismissed he was not precluded from re-litigating it. Woo JC went through the trial judge's notes of the proceedings in chambers on the plaintiff's application for leave to discontinue and concluded that, in refusing the plaintiff's application and ordering a striking out of the action, the trial judge had intended to preclude any fresh action.

108 I turn now to consider if Choo J intended for his judgment to be final and conclusive on the merits when he rendered his decision. At [11] of Choo J's Decision, he stated that:

> … The plaintiffs argued that the amendments are necessary to remedy the following breaches of the Consent Order by the defendants:
>
> …
>
> Any allegation of breach of the Consent Order ought to be brought in a separate action. Nonetheless, it will become apparent upon a proper construction of the Consent Order that both allegations are unfounded because no such obligations existed on the part of the defendants.

It was not clear from [11] of Choo J's Decision whether the views he expressed in relation to the Plaintiffs' allegations of breaches of the Consent Order were *obiter*. It may be that they were *obiter* in

that he wanted to show the Plaintiffs that there would be no purpose in commencing a fresh action based on the allegation of breaches which were bound to fail. Conversely, he could have intended his views to be final and conclusive in that he was prepared to make a binding decision even though the Plaintiffs' allegations of breach ought to have been brought in a separate action.

109 Interestingly, the R&T Defendants appear to have accepted that his views were *obiter*. In [368] of their closing submissions, they said:

> … Choo J accepted the Plaintiffs' submission that he had jurisdiction to vary the Consent Order. *Choo J however declined to do so* because any allegation of breach of Consent Order had to be brought in a separate action. Nonetheless, he considered and rejected the Plaintiffs' argument that the Consent Order had been breached. [emphasis added]

The R&T Defendants therefore appear to affirm the position that Choo J had declined to vary the Consent Order because he was of the view that allegations of breach should have been ventilated in a separate action. This would mean that his observations with respect to the construction of the Consent Order were *obiter*.

110 There is another point in favour of the contention that Choo J did not intend his views to be final and binding. It will be recalled that subsequent to his decision in SUM 4117 (amended), the R&T Defendants had applied in SUM 4848 for the bidding to be held on 15 December 2008. This was met by the Plaintiffs' application in SUM 5373 for an order that the bidding cannot be held by reason of non-compliance with the Consent Order. Choo J granted the application for the bidding to proceed and dismissed the opposing application. In Choo J's grounds of decision for both these summonses (see *Yeo Boong Hua and Others v Turf City Pte Ltd and Others and Another suit* [2009] SGHC 34), he said:

> 2 The plaintiff thus applied to set aside the consent order or a re-valuation of the shares. This was disallowed by the High Court and the decision was upheld by the Court of Appeal. The defendant then applied for the consequential order that the bidding process be ordered to proceed. The plaintiff applied for a stay of that application on the ground that they had commenced a fresh suit against the defendant. I dismissed the plaintiff's application for stay and granted the defendant's application to proceed with the bidding process for the shares. The defendant's present application was a formal end to a long dispute. *The plaintiff's alleged new cause of action should proceed independently*. I therefore granted an order in terms to proceed with the bidding process. [emphasis added]

111 Before I continue, I should mention a number of clarifications. In respect of [2] of Choo J's grounds of decision, I assume that his reference to the Plaintiffs' application to set aside the Consent Order was to SUM 4117 (amended). However, as elaborated above (see [102]), the Plaintiffs' application was not actually to set aside the Consent Order, but was instead for a variation of the terms of the Consent Order.

112 Secondly, the Plaintiffs did not appeal against Choo J's decision to dismiss SUM 4117 (amended).

113 Thirdly, as regards Choo J's reference to the Plaintiffs' application for a stay, this would presumably be a reference to SUM 5373 which was not couched in terms of a stay but rather for an order that the bidding exercise cannot be held. Choo J may have construed that application as a stay because he was informed during arguments on 12 January 2009 that the Plaintiffs had issued a fresh writ of summons in Suit 27 of 2009 (*ie*, the present action).

114 I now come to why I am of the view that Choo J did not intend for his decision in SUM 4117 (amended) to be final and binding. As quoted above, Choo J said that the alleged new cause action (*ie*, the present action) *should proceed independently* even though the R&T Defendants argued that it covered the same substance as SUM 4848. There was no qualification by Choo J that the Plaintiffs' continuation of that action was subject to the decision he had already rendered in SUM 4117 (amended).

115 Choo J's unqualified statement that the Plaintiffs' new cause of action should proceed independently reinforced the Plaintiffs' contention that there was no *res judicata*, in particular, that he did not intend the views he expressed in SUM 4117 (amended) on the Plaintiffs' allegations of breaches to be final and conclusive.

116 The burden of proof ultimately rests on the R&T Defendants to establish issue estoppel and I am of the view that they had not discharged this burden.

117 Having decided that requirement (a) of the *Lee Tat* test has not been fulfilled, it is not necessary for me to consider whether requirement (d) has been made out. However, for completeness, I would state that in the light of my above conclusion that Choo J's Decision *vis-à-vis* the Plaintiffs' allegations of breach was not final and conclusive, requirement (d) is similarly not fulfilled.

118 In *Goh v Goh*, it was observed that for there to be an identity of subject-matter, one key consideration is whether the previous determination in question was fundamental to the previous determination:

> 35 The second idea which is contained within the requirement of an identity of subject-matter is that ***the previous determination in question must have been fundamental and not merely collateral to the previous decision so that the decision could not stand without that determination*** : see *The Doctrine of Res Judicata* at para 201. The author of *The Doctrine of Res Judicata* traces the authorities for this principle back to the decision of Holt CJ in *Blackham's Case* (1709) 1 Salk 290; 91 ER 257, but a more recent statement may be found in *Blair v Curran* (1939) 62 CLR 464, in which Starke J held at 510:
>
> > [A] judgment concludes not merely the point decided but matters which were necessary to decide and which were actually decided as the groundwork of the decision itself though not then directly the point at issue and that a judgment is conclusive evidence not merely of the facts directly decided but of those facts which are necessary steps to the decision – so cardinal to it that without them it cannot stand … [emphasis added]
>
> …
>
> 37 The distinction between those issues that are "no more than steps in a process of reasoning" and those which are "so cardinal" that the decision "cannot stand without them" is not an easy one. The author of The *Doctrine of Res Judicata*, at para 202, proposes that one test is whether the issue in question may be appealed. If there can be no effective appeal against that determination, then the issue is not fundamental to the judgment. However, as even they concede, this test may not always be useful because many determinations which may be necessary to the decision for purposes of res judicata may not be susceptible to challenge by appeal. ***In my judgment, the assessment of which side of the line an issue falls should be approached from a commonsensical perspective, balancing between the important public interest in securing finality and in ensuring that the same issues are not repeatedly***

litigated on one hand, and on the other, the private interest in not foreclosing a litigant from arguing an issue which, in substance, was not the central issue decided by a previous court . …

[emphasis added in bold italics]

119 As I have concluded above, Choo J's decision to reject the Plaintiffs' application in SUM 4117 (amended) ultimately rested on his lack of jurisdiction. His observations with respect to the Plaintiffs' allegations of breach of the Consent Order were not fundamental to his decision.

120 I therefore reject the R&T Defendants' defence of issue estoppel and will proceed to construe the Consent Order afresh. This is not to say, however, that Choo J's observations with respect to whether there was a breach of the Consent Order are irrelevant. In the course of reaching my own conclusion, as and when applicable, I will refer to Choo J's observations.

The Non-Renewal Issue: whether a repudiatory breach arose from SAA's failure to grant the JV Companies sub-tenancies arising out of the 2007 Head Lease

121 The issue of whether the Defendants were obliged to grant sub-tenancies which arose out of the 2007 Head Lease to the JV Companies ("the Renewal Obligation") turns on two separate questions.

122 The first question is the proper construction of clause 11 of the Consent Order, which is the provision which the Plaintiffs relied on, and whether its wording captures the Renewal Obligation.

123 According to the Plaintiffs, clause 11 captures the Renewal Obligation. Clause 11 states as follows:

> The Plaintiffs and the Defendants undertake not to do anything or cause anything to be done which would in any way **affect, vary and/or alter the status quo of the Companies**, both in terms of on-going liabilities/obligations to which the Companies are subject to, and **assets and/or benefits which the Companies *presently* enjoy**, including but not limited to doing anything to affect the **head lease** between the 2nd Defendants and the Singapore Land Office and sub leases ***presently*** **entered into** between the 2nd Defendants and the Companies. In particular, the Plaintiffs and Defendants undertake that in respect of the respective **sub leases *presently* entered into** between the Companies and the 2nd Defendants, the Plaintiffs and Defendants and/or their agents and/or employees and/or servants shall not do anything that would alter or affect the said sub leases including doing anything to effect, procure or cause the termination of the said agreements.
>
> [emphasis added in bold and bold italics]

124 The Plaintiffs averred that the Back-to-Back Arrangement formed part of the "status quo" of the JV Companies which the Defendants were prohibited from altering or disrupting.

125 The R&T Defendants, on the other hand, argued that there was no Back-to-Back Arrangement and therefore the Renewal Obligation was not captured by the terms of the Consent Order.

126 The second question is if clause 11 does not capture the Renewal Obligation, whether such an obligation arises from an implied term of the Consent Order.

Proper construction of clause 11 of the Consent Order

127 Both parties' arguments on clause 11 of the Consent Order centre on the existence of the Back-to-Back Arrangement. A significant time at trial was spent on proving this fact. However, as alluded to earlier (at [16]), the construction of clause 11 does not turn on this fact. I am of the view that whether or not a Back-to-Back Arrangement did exist prior to the entering of the Consent Order is not determinative in concluding what the parties intended when they used the phrase "status quo" in clause 11 of the Consent Order. This conclusion is supported by the context in which the Consent Order was entered into.

128 When parties entered into the Consent Order, it was with a view to settling the disputes which arose in the Consolidated Suits. One of the issues raised in the dispute was that the 2004 sub-tenancies granted to the JV Companies were on terms which were inconsistent with the 2004 Head Lease between SAA and SLA in that the 2004 sub-tenancies did not have an option to renew clause. [note: 96] As highlighted by the R&T Defendants, the very existence of the Back-to-Back Arrangement was already hotly contested in the Consolidated Suits that engendered the Consent Order. [note: 97] I note that in Choo J's Decision at [18], Choo J placed great emphasis on the fact that the exact words used in clause 11 was that parties would not affect the status quo in terms of "benefits which the Companies *presently* enjoy" (emphasis added). The word "presently" formed the basis on which he concluded, albeit *obiter*, that clause 11 did not impose an obligation on the Defendants to pro-actively renew the sublease upon its expiry. In other words, Choo J was of the view that clause 11 applied only to the 2004 sub-tenancies and not to future sub-tenancies. Even if the Back-to-Back Arrangement existed, this would only kick in again in 2007 and was not a right which the JV Companies enjoyed at the time which the Consent Order was entered into.

129 The Plaintiffs' reliance on clause 11 was premised on the existence of the Back-to-Back Arrangement before the Consent Order was entered into and that this arrangement was encapsulated within the words "status quo" and "presently enjoy". As mentioned, the existence of such an arrangement was hotly contested before the Consent Order was entered into. When the Consent Order was entered into, it was open to the parties to agree either to include or to exclude the Back-to-Back Arrangement as part of the resolution of their dispute. Therefore, even if there was a Back-to-Back arrangement before the Consent Order, the parties could have agreed to exclude it from the Consent Order. Conversely, even if there was no such arrangement before the Consent Order, the parties could have agreed to include it as part of the Consent Order. Accordingly, a finding that there was such an arrangement before the Consent Order was entered into would not necessarily mean that clause 11 encapsulates the Back-to-Back Arrangement.

130 Since it will not assist in the interpretation of clause 11, I make no conclusion as to the existence of a Back-to-Back Arrangement before the Consent Order was entered into.

131 However, it is regrettable that although the Back-to-Back Arrangement was such a contested subject before the Consent Order was entered into, the lawyers who drafted the Consent Order did not address this arrangement specifically one way or the other in the Consent Order itself. Consequently, parties were left to argue whether the Consent Order did or did not contain the Back-to-Back Arrangement.

132 In the meantime, notwithstanding my above views, since both the Plaintiffs and the Defendants (CO) expended much effort to establish or deny the existence of the Back-to-Back Arrangement prior to the entering of the Consent Order and since the evidence they rely on is not entirely irrelevant to the issues I have to grapple with and may also become relevant in other proceedings, I will set out the various pieces of evidence relied upon by them.

Evidence supporting the existence of the Back-to-Back Arrangement

133 The source of the Back-to-Back Arrangement, as argued by the Plaintiffs, was OA1 and OA2 (see above at [15]).

134 Apart from OA1 and OA2, the Plaintiffs relied on several other alleged facts to establish the existence of the Back-to-Back Arrangement.

(a) The parties had the commercial expectation that the lease from SLA to SAA would be for "3+3+3" years. According to the Plaintiffs, this was evident from several pieces of evidence:

(i) The advertisement published by SLA in the Straits Times and in the Lian He Zao Bao stated that a lease of the Site was available for tender for a "3+3+3 years Tenure". [note: 98]

(ii) Under a section called called "General Information" in the Tender Notice, the tenure was described to be "3+3+3 years" and the "duration of period contract" was stated to be "(From) 1 September 2001 … (To) 30 August 2010 …". [note: 99]

(iii) Under a section called "Tendered items" in the Tender Notice, it is stated that the tenure was for a "3+3+3 years Tenancy". [note: 100]

(iv) Clause 2.1 of the "Particulars and Conditions of Tender" provided for a three year tenancy with an option to renew another three year term subject to the terms and conditions contained therein as well as those contained in the Draft Tenancy Agreement

(v) Tan CB admitted during his testimony in court that from an objective standpoint, the marketing materials would give the impression that the Site would be leased to the prospective tenderer for "3+3+3 years" [note: 101]

(vi) In Ong CK's business plan dated 8 March 2001, he stated that the "site is leased from Land Office for Commercial Use for a period of 3 years + 3 years + 3 years with effect from April 2001". [note: 102]

(b) The Defendants agreed to pass on the benefit of the "3+3+3" years Head Lease tenure to the JV Companies through the grant of corresponding sub-tenancies. Apart from OA1 and OA2, the Plaintiffs averred that there was other objective evidence to support this conclusion:

(i) Ong CK's business plan, as alluded to earlier, was presented to the Plaintiffs prior to the signing of the MOU.

(ii) Tan CB had also stated in a memo titled "Addendum MOU", which was drafted by him, that "[NC] will need to sign a contract *back to back* with SAA". [note: 103]

(iii) The 2001 STA was entered into on the same day that SAA signed the 2001 Head Lease with SLA and it similarly contained an option to renew clause.

(iv) The way the parties chose to structure the Joint Venture arrangement – the JV Companies were the ones to commercially exploit the Site, acquire the relevant licenses and bear the costs arising out of such commercial exploitation – is indicative of the parties'

intention of forming the Back-to-Back Arrangement.

(v) The sub-sub-tenancies granted by the JV Companies to the ultimate tenants, which were signed off by Tan CB, provided for a three-year tenure with an option to renew for two more terms of three years each. [note: 104]

Evidence against the existence of the Back-to-Back Arrangement

135 The R&T Defendants' main contention against the existence of the Back-to-Back Arrangement was that OA1 and OA2 did not in fact take place. Much emphasis was placed on the various inconsistencies present in the Plaintiffs' witnesses' testimonies.

(a) First, the Plaintiffs had to correct their evidence several times in relation to the sequence of the terms contained in OA1 and OA2. [note: 105]

(b) Secondly, the Plaintiffs' attempt to change the sequential order of certain terms in OA1 and OA2 effectively resulted in the transplantation of certain terms from OA1 onto OA2. Such a transplantation exercise, according to the R&T Defendants was untenable because the terms sought to be transplanted envisaged only *one* joint venture company whereas OA2 envisaged *two* joint venture companies. [note: 106]

(c) Thirdly, it was strenuously argued by the R&T Defendants that one of the terms agreed upon in OA1, *viz*, SAA would grant sub-tenancies on identical terms as the head lease between SAA and SLA (see [15(c)] above), is directly contradicted by one of the terms agreed upon in OA2, *viz*, the rent payable by the JV Companies is fixed at a nominal rate of 3% above the rent payable by SAA to SLA (see [15(d)]) above). It could not be said that the terms are "identical" when the rent payable by the JV Companies and the rent payable under the head lease are not identical. [note: 107]

(d) Fourthly, the R&T Defendants argued that it was impossible for SAA to feature in OA2 because at the time OA2 allegedly took place of 8 March 2001, SAA had not yet been announced as the winner of the bidding exercise conducted by SLA. [note: 108]

(e) Fifthly, the R&T Defendants argued that it did not make sense for parties to sign the MOU which envisaged the incorporation of only one joint venture company and then immediately afterwards agree to form two joint venture companies. According to the Plaintiffs, OA2 was entered into on the same day the MOU was signed. If it was indeed the case that parties had orally agreed at the time the MOU was signed that there would be two joint venture companies, the MOU would have reflected this new position. [note: 109] For the same reason, the MOU should also have been amended to include the other terms of OA2. [note: 110] I would observe at this juncture that eventually, two joint venture companies were in fact formed and therefore it is not entirely clear how this argument advances the R&T Defendants' position.

(f) Sixthly, until the commencement of the present action, there had been no mention of the oral agreements in the litigation history between the parties. For instance, in SUM 4117 (amended), the Plaintiffs' attempt to claim a stake in the head lease was made by way of an allegation that the head lease was held by SAA on trust for the JV Companies. This, according to the R&T Defendants, was quite different from the present allegation that SAA was to renew the JV Companies' sub-tenancies so long as SLA renews the head lease. [note: 111]

These inconsistencies, according to the R&T Defendants, militated against the finding that a Back-to-Back Arrangement existed.

136 The R&T Defendants also highlighted that in all the Head Leases, 2001 STAs and sub-sub-tenancies, the option to renew clause was caveated by clauses indicating that the lessor would have the absolute discretion to determine if a renewal should be granted. According to them, this evidenced that there was never any agreement between SLA and SAA, and accordingly between SAA and the JV Companies, that the leases would be for the tenure of "3+3+3" years. [note: 112]

137 As I have alluded to earlier, I make no conclusion as to whether the evidence establishes the existence of the Back-to-Back Arrangement prior to the entering of the Consent Order. Notwithstanding this, I am of the view that by appropriating the benefit of the 2007 Head Lease for themselves, the Defendants (CO) had altered the "status quo". This is in breach of clause 11 of the Consent Order, the terms of which are stated in [123] above.

138 I note that this conclusion differs from the one reached by Choo J. In his decision, Choo J placed emphasis on the fact that the words in clause 11 such as "presently enjoy" and "status quo" meant that only the 2004 Head Lease fell within the ambit of clause 11. The words in clause 11, however, should not be viewed in isolation but must be considered with reference to the other provisions in the Consent Order. In my view, clause 9(g) of the Consent Order evidences that the "status quo" under clause 11 of the Consent Order did encapsulate the benefit of the 2007 Head Lease. Clause 9(g) states:

> Further, in the event that the Sole Bidder or Higher Bidder are the Plaintiffs, the Defendants, in particular the 2nd Defendants, shall use its best endeavours to facilitate and procure the assignment / transfer / novation of the 2nd Defendants' head lease with the Singapore Land Office, to the Companies (subject always to the consent, if required, of Singapore Land Office).

139 It seems to me that the envisaged assignment of the 2004 Head Lease from the Defendants to the Plaintiffs under clause 9(g) would carry with it the assignment of all the benefits under the 2004 Head Lease which includes, *inter alia*, the benefit under clause 2 of the 2004 Head Lease:

> **Clause 2 - Renewal of Tenancy**
>
> 2.1 The Landlord may at his absolute discretion grant a fresh tenancy for a further term [of] **3 YEARS** subject to new terms and conditions and revision of rental upon the expiration of the term hereby created.

140 I note that the R&T Defendants have sought to argue that clause 2.1 of the 2004 Head Lease gives the landlord absolute discretion to grant a fresh tenancy to SAA and therefore cannot be characterised as an "option to renew" clause. While I do agree that clause 2 is not strictly an "option to renew", it nevertheless carries value as it puts the holder of the 2004 Head Lease in an advantageous position to acquire the 2007 Head Lease. Such a position was in fact taken by the R&T Defendants themselves in their submissions before Choo J prior to the parties entering into the Consent Order. These submissions were meant to address certain questions posed by Choo J to the parties which arose from the Draft Consent Order. Their submissions noted that: [note: 113]

> … Currently, the Head Lease has a remaining term of approximately 1 ½ year [*sic*]. In addition, it can hardly be disputed that the 2nd Defendant, as the present tenant of the Bukit Turf Club site, will be able to renegotiate for a fresh lease with the Singapore Land Officer. These factors have

> commercial value, and an appropriate commercial value ought to be ascribed to them by professional valuers. It is untenable for the Plaintiffs to insist upon the Head Lease being transferred for 'nominal' consideration. After all, the head lease is an asset belonging to the 2nd Defendant, which value stands to be determined properly and in accordance with legitimate valuation principles. If it is required to transfer its interest in the Head Lease to the Companies, it is only proper that the Companies should pay adequate consideration to the 2nd Defendant for the same

It is evident that the Defendants (CO) themselves acted on the basis that the holder of the head lease has the right to "renegotiate for a fresh lease with the Singapore Land Officer" and that this right has commercial value.

141 Clause 2.1 of the 2004 Head Lease may therefore be effectively characterised as a right of first refusal *vis-à-vis* the 2007 Head Lease. In my view, parties were always operating under the understanding that barring any exigency, SLA would offer the tenancy of the Site to SAA for a period of "3+3+3" years. This is evident from several objective facts which the Plaintiffs had relied upon to establish the existence of the Back-to-Back Arrangement (see above at [134(a)]). In particular, I find that Tan CB's testimony and Ong CK's business plan clearly reflect this understanding whether or not there was the Back-to-Back Arrangement before the Consent Order was entered into.

142 Neither party has disputed that the 2004 Head Lease forms part of the "status quo" under clause 11 which cannot be altered. Since the right to negotiate for the 2007 Head Lease is one of the benefits under the 2004 Head Lease, the Defendants (CO) had altered the status quo and had therefore breached clause 11 of the Consent Order when they acquired the 2007 Head Lease for themselves. In my view, if the Plaintiffs had won the bid, the JV Companies would have been entitled to the 2007 Head Lease (which would have made the 2007 sub-tenancies from SAA academic) or at the very least, fresh 2007 sub-tenancies from SAA.

143 I note that Choo J did consider the construction of clause 9(g) and concluded that clause 9(g) focuses on the assignment of the 2004 Head Lease (see Choo J's Decision at [19]). I agree with this view. However, Choo J went on to conclude that the assignment of the 2004 Head Lease did not go so far as to prohibit the Defendants (CO) from entering into the 2007 Head Lease or mandate a pro-active renewal of the sub-tenancies to the JV Companies. It is on this point that I respectfully reach a different conclusion from Choo J. It appears that Choo J had overlooked the previous submission of the Defendants (CO) before the terms of the Consent Order were settled *viz*, that there was commercial value in the 2004 Head Lease in the form of the benefit of negotiating for the 2007 Head Lease.

144 I would also clarify that this submission of the Defendants (CO) was to persuade Choo J to include an express term in the Consent Order that the valuation to be undertaken by KPMG BA had to assign a specific value for the benefit of negotiating for the 2007 Head Lease. The Plaintiffs did not dispute that there was such a benefit but argued that no such express term was necessary.

145 Therefore, although Choo J did not include the express term in the Consent Order that the Defendants (CO) were seeking, this did not mean that the 2004 Head Lease no longer had that benefit.

146 Indeed, under cross-examination in the trial before me, Tan CB reinforced the previous submission of the Defendants (CO) when he reluctantly accepted that the party holding the 2004 Head lease would have the benefit of negotiating for the 2007 Head Lease and that it could not be that one side would hold the 2004 Head Lease and the other side the 2007 Head Lease. I set out the

relevant parts of his evidence: [note: 114]

Q. There was a prospect that there would be a 2007 head lease, correct?

A. I disagree.

Q. Do you agree that SAA, at that time the tenant under the 2004 head lease, would be able to re-negotiate a fresh lease with the Singapore Land Office?

A. Yes.

Q. Yes. So in effect, the party holding the 2004 head lease would be in a position to negotiate for a 2007 head lease; true?

A. Yes.

Q. Yes. That was a matter of commercial value, correct?

A. To who?

Q. Whoever holds the 2004 head lease.

A. Yes.

Q. Yes. So if the joint venture companies had the 2004 head lease, they would be in a position to re-negotiate for the 2007 head lease, correct?

A. Yes.

…

Q. Yes. But at all times, it was understood that should the plaintiffs win the bid to buy over the joint venture companies, the joint venture companies would then hold the 2004 head lease and be in a position to negotiate for the 2007 head lease. Yes?

A. Yes, your Honour.

Q. The person who holds the 2004 head lease would be the person negotiating for the 2007 head lease. True?

A. I disagree.

Q. You disagree. Can it be that one party would hold the 2004 head lease, but a different party would hold the 2007 head lease? Can it be?

A. I wouldn't know.

Q. The two are linked, aren't they, the 2004 head lease and the 2007 head lease?

A. I disagree.

Q. You don't think they are linked?

A. I disagree.

COURT: Let's look at it from another angle. When counsel asked you that the party who holds the head lease would be the one who's negotiating for the 2007 lease, the one that is holding the 2004 head lease will be the one negotiating for the 2007 head lease. Do you remember his question?

A. Yes.

COURT: You said you disagreed.

A. Yes.

COURT: Why do you disagree?

A. Because if the plaintiff wins the bid and they hold the 2004 head lease, they have to be the one that have to negotiate with the SLO on the 2007 head lease.

COURT: That's his point. The one who is holding the head lease, that means if they win the bid, they are going to be assigned the head lease, isn't it?

A. Yes. I understand now, your Honour. Yes.

MR TAN: So it cannot be that one party would hold the 2004 head lease and another party would hold the 2007 head lease. Do you agree?

A. Yes.

147 I add that although Tan CB sought to change his evidence the next day on 26 September 2014, he still accepted that the 2004 Head Lease had value because the one who holds it will be able to negotiate for the 2007 Head Lease and that it cannot be that one party will hold the 2004 Head Lease and another the 2007 Head Lease. [note: 115]

148 I add also that the Defendants (CO) had relied on the evidence of a lawyer, one Mr Ernest Balasubramaniam ("Mr Balasubramaniam"). His evidence-in-chief was that he had advised Tan CB that there was no option to renew in the 2004 Head Lease since SLA had the absolute discretion whether to grant the 2007 Head Lease. In late 2006, Tan CB had asked whether SAA was obliged to issue fresh sub-tenancies to the JV Companies since SAA was obtaining the 2007 Head Lease. Tan CB had said that he was concerned that the JV Companies might be liquidated and if so, this would have an impact on the sub-tenants and licensees of the JV Companies.

149 Mr Balasubramaniam advised Tan CB that there was no option to renew in the 2004 sub-tenancies which SAA had granted to the JV Companies and that his reading of the Consent Order was that there was no obligation on SAA to grant fresh sub-tenancies to the JV Companies if SAA had obtained the 2007 Head Lease. He said that his view was consistent with Choo J's Decision.

150 I found this piece of evidence interesting. First, there was no evidence that the JV Companies would be liquidated. On the contrary, the disputing parties were intending to bid for shares in the JV Companies and carry on with the business of the JV Companies.

151 Secondly, the real question was whether clause 11 and/or clause 9(g) of the Consent Order imposed an obligation on SAA to assign the 2007 Head Lease to the JV Companies if the Plaintiffs were successful in their bidding. If so, it was irrelevant whether the JV Companies might be liquidated by the Plaintiffs. The purported concern of Tan CB for the ultimate sub-tenants and licensees appeared to be a sham.

152 Thirdly, it was Rajah and Tann who had acted for the Defendants (CO) in the negotiation of the terms of the Consent Order. If Tan CB had really wanted to know the extent of the obligation of the Defendants (CO) under the Consent Order, he should have consulted Rajah and Tann and not Mr

Balasubramaniam. It also did not escape my attention that the R&T Defendants preferred to call Mr Balasubramaniam rather than a lawyer from Rajah and Tann who was involved in the negotiation for the terms of the Consent Order to give evidence.

153 I did not find Mr Balasubramaniam's evidence on the interpretation of the Consent Order to be of any assistance. In so far as he was of the view that the 2004 Head Lease did not have an option to renew, strictly speaking, since SLA had the absolute discretion whether to grant the 2007 Head Lease, this was not in dispute. That, however, did not mean that the 2004 Head Lease had no value and no bearing on the 2007 Head Lease as I have elaborated above.

154 Therefore, Mr Balasubramaniam's evidence did not assist the Defendants (CO) on the Non-Renewal Issue.

Implied term of the Consent Order

155 Apart from the allegation that SAA had breached clause 11 of the Consent Order by failing to grant sub-tenancies which arose out of the 2007 Head Lease, the Plaintiffs also alleged as an alternative that the Defendants had breached an implied term of the Consent Order by appropriating the benefit of the 2007 Head Lease for themselves. This was on the basis that there was an implied term in the Consent Order that SAA would not "alter the status quo and in particular … [not] appropriate for themselves the benefit of the Head Lease (and any potential renewal, extension or regrant thereof) pending full performance of the Consent Order". [note: 116]

156 Before I proceed to consider the merits of this argument, I note that it is arguable from the Revised SOC that this point appears to be subsumed within the Plaintiffs' allegations that there had been a breach of clause 11 of the Consent Order. [note: 117] However, I am of the view that while the pleadings could have been better drafted, this was a separate point from the allegation that clause 11 of the Consent Order had been breached. This is evident from the fact that in the Revised SOC, this point was phrased as one that was "[f]urther or in the alternative". The Defendants have also not appeared to dispute that this point had been pleaded separately. [note: 118] I therefore turn now to consider the merits of this point.

157 In the event that my above interpretation of clause 11 is incorrect, I am of the view that there was indeed an implied term in the Consent Order that pending full performance of the Consent Order, the Defendants would not appropriate the benefit of the 2007 Head Lease for themselves.

158 In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [101], the Court of Appeal expounded a three-step test for determining whether a term is to be implied into a contract ("the three-step test"):

> (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
>
> (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
>
> (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue

The first step

159 The gap in the Consent Order that arises here is the absence of any provision which sets out the parties' obligations in the event that the bidding exercise is not carried out within the timelines laid down in the Consent Order.

160 The Plaintiffs have averred that this gap was not contemplated as it was not envisaged by the parties that the bidding exercise would take place after the 2004 Head Lease had expired. [note: 119] This was not disputed by the Defendants. In fact, in their closing submissions, the R&T Defendants affirmed Choo J's construction of the Consent Order, [note: 120] where he noted at [19] that:

> Clause 11 of the Consent Order was drafted in this manner because parties had envisaged that the valuation reports would be ready by May 2006. At the time the Consent Order was negotiated, both parties knew full well that the 2004 Head Lease was expiring in September 2007. It did not strike parties at that time to make provision for the expiry of the 2004 Head Lease since the expiry was only *due more than a year* later in September 2007. … [emphasis in original].

161 I am in agreement with Choo J that the parties did not envisage a 13.5 month delay in the issuance of the Valuation Reports and I agree that they did not contemplate that the bidding exercise would take place after the 2004 Head Lease had expired.

The second step

162 In my view, it is necessary in the business or commercial sense to imply a term to give the Consent Order efficacy where the bidding exercise had not yet been carried out although the 2004 Head Lease had expired. If a term is not implied to fill the gap mentioned above, and the Defendants are allowed to appropriate the benefit of 2007 Head Lease (which they did do in the present case), the Plaintiffs would effectively be deprived of the entire benefit of the Consent Order. At the time that the Consent Order was entered into, the benefit that was available to the parties were the remaining tenure of the 2004 Head Lease and the right to negotiate for the 2007 Head Lease. As alluded to earlier (at [140]-[141]), and as affirmed by the R&T Defendants, the latter right is of significant value.

163 To render the Consent Order efficacious after the 2004 Head Lease had expired, there must therefore be the implication of a term which would allow the parties to still be able to meaningfully bid for the JV Companies. The sub-tenancies were the JV Companies' lifeblood. The JV Companies were in the business of collecting rent and license fees and its business would effectively ground to a halt when it could no longer let or license out individual units on the Site to third parties. Without the implication of a term to fill the above gap, the bidding exercise under the Consent Order would be rendered nugatory as the Plaintiffs would essentially be bidding for an empty shell.

164 This conclusion is further reinforced when one considers clause 9(g) of the Consent Order, which provides that where the Plaintiffs are the higher bidder, the Defendants (CO) shall use their best endeavours to transfer the head lease with SLA to the JV Companies. As I have elaborated above, the parties acted on the basis that the 2004 Head Lease, carried with it the right to negotiate for the 2007 Head Lease.

165 The R&T Defendants have sought to argue that the Consent Order is still efficacious without the implied term because parties can still achieve the purpose of the Consent Order by proceeding

with the bidding exercise because the purpose of the Consent Order was to end the Joint Venture. [note: 121] I am unable to agree. In my view, the purpose of the Consent Order was not simply to end the Joint Venture. If that was its only purpose, the JV Companies could have been sold to third parties or liquidated. Rather, the purpose was to end the joint venture by allowing either side to carry on with the business of the JV Companies. That aspect was no longer available as there was no more business to continue on the facts if the R&T Defendants were correct. The R&T Defendants are essentially saying that having the Plaintiffs bid for something valueless would be efficacious. This is a wholly untenable position. As argued by the Plaintiffs in their further reply submission, the purpose of the Consent Order was to end the Joint Venture and separate the warring shareholders *in an equitable manner*. [note: 122] In my view, the mechanism of the bidding exercise was meant to ensure that the party who values the JV Companies more would be able to gain control over them and the party who values the JV Companies less would receive in monetary terms a greater sum than what it ascribes to the JV Companies. This would have resulted in a win-win situation which was the essence of the compromise reached in the Consent Order.

166 Therefore, for the Consent Order to retain its efficacy after the expiry of the 2004 Head Lease, a term had to be implied to prevent either party from appropriating the benefit of the 2007 Head Lease before the bidding exercise had concluded and indeed to preserve the right to negotiate for the 2007 Head Lease or to the 2007 Head Lease itself.

The third step

167 In the circumstances, if the officious bystander asked the parties whether the Defendants (CO) should be prohibited from appropriating the benefit of the 2007 Head Lease pending the performance of the Consent Order, would the parties have responded "Oh, of course!"?

168 In my view, the answer must be in the affirmative. If this were not the case, the Plaintiffs would effectively be put in a position where they were to bid for something which is bereft of value. That could not have been something which the parties would have agreed to.

169 Therefore, I conclude that there is an implied term in the Consent Order that the Defendants are obligated to refrain from appropriating the benefit of the 2007 Head Lease pending the full performance of the Consent Order. The Defendants (CO), in securing the 2007 Head Lease for themselves and refusing to grant corresponding sub-tenancies to the JV Companies, have failed to do so and have therefore breached this implied term.

170 Having found that this implied term has been breached, the next question is whether the breach is repudiatory. Only repudiatory breaches would entitle the innocent party to terminate the contract (or treat the contract as discharged) (*RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*") at [90]). Whether a breach is considered repudiatory in turn depends on the seriousness of the breach.

171 I note that the R&T Defendants did not dispute that if the appropriation of the 2007 Head Lease was a breach of the Consent Order, it would amount to a repudiatory breach. In any event, I am of the view that SAA's failure to renew the sub-tenancies of the JV Companies would constitute a repudiatory breach as it "[deprived] the innocent party of substantially the whole benefit that it was intended that the innocent party should obtain from the contract" (*RDC Concrete* at [107]). The purpose of the Consent Order was for one of the two parties to buyout the shareholding of the other party through a bidding exercise. As I have said, depriving the JV Companies of the benefit of the 2007 Head Lease had made the bidding exercise meaningless. There was simply no longer any point for the Plaintiffs to bid for the JV Companies.

172 The repudiatory breach committed by SAA gave the Plaintiffs the right to bring the Consent Order to an end, and I find that the Plaintiffs had formally elected to end this contract by the commencement of the present suit on 8 January 2009.

The Non-Disclosure Issue: whether any repudiatory breach arose from SAA's failure to disclose the renewal of the head lease with SLA for the third tranche

173 The Plaintiffs' success with the Non-Renewal Issue, which embodied the primary claim mounted by the Plaintiffs, would have been sufficient to achieve its overarching goal of setting aside the Consent Order. For completeness, however, I will move on to deal with several other fall-back claims raised by the Plaintiffs.

174 The first fall-back claim was SAA's failure to disclose its procurement of the 2007 Head Lease. As a preliminary matter, it may be noted that the Plaintiffs' claim of non-disclosure was initially advanced as a breach of an implied term in their pleadings. [note: 123] In their closing submissions, they appear to have shifted away from this approach to rely on clause 5 of the Consent Order instead, [note: 124] which stated as follows: [note: 125]

> 5. The Independent Valuer shall have unfettered and absolute discretion in conducting the Valuation Exercise as he deems fit and the *Plaintiffs and Defendants undertake not to interfere, impede, obstruct, or do anything to prevent or hinder the Independent Valuer's discharge of his duties in respect of the Valuation Exercise*. …
>
> [emphasis added]

The italicised portion of clause 5 is relied upon by the Plaintiffs to advance their non-disclosure argument.

175 The Plaintiffs' argument is that SAA's failure or refusal to disclose to the KPMG entities that it had secured the 2007 Head Lease "hindered" the investigation exercise which KPMG BA was supposed to undertake, thereby violating clause 5 of the Consent Order. The issue arising from the Plaintiffs' contention therefore is whether SAA was hindering or preventing the KPMG entities from discharging its duties when it did not disclose the existence of the 2007 Head Lease.

176 It should first be noted that the duties in question relied upon by the Plaintiffs to support their contention of the non-disclosure complaint was the KPMG entities' duty to value the JV Companies' assets and liabilities for the purposes of informing the parties' decision on a fair amount to submit in the bidding exercise that would ensue. As the Plaintiffs argued, the KPMG entities would no longer be able to value the JV Companies' accurately when "a material fact" such as the 2007 Head Lease was hidden from them. To justify his decision not to disclose this matter, Tan CB explained that the 2007 Head Lease was a property that properly belonged to SAA and therefore it had no reason to disclose it to the KPMG entities; it did not fall within the pool of assets which the JV Companies were supposed to value. By now, it should be clear that this argument does not hold water as I have held that the right to negotiate or the right to the 2007 Head Lease itself was one of the benefits which the parties were bidding for under the Consent Order. Indeed, it was an important benefit given that there was only about one and a half years left under the 2004 Head Lease if the bidding exercise was carried out in accordance with the anticipated timelines. The 2007 Head Lease should therefore have been disclosed to the KPMG entities for the purposes of carrying out the valuation exercise and thereby the bidding exercise.

177 In failing to disclose the 2007 Head Lease, the Defendants (CO) had "hindered" the valuer's discharge of its duties and had thereby breached clause 5 of the Consent Order.

178 In my view, this amounts to a repudiatory breach of the Consent Order as well. The failure to disclose the existence of the 2007 Head Lease is inextricably linked to the above conclusion that the Defendants (CO) had breached the Consent Order by misappropriating the benefit of the 2007 Head Lease for themselves.

The Investigation and Valuation Issue: whether the investigation and valuation exercises required of the KPMG entities were properly carried out

179 The Non-Renewal Issue and the Non-Disclosure Issue thus far concerned the JV Companies' claim for a stake in the benefit of the 2007 Head Lease. The Investigation and Valuation Issue, which I will now turn to, touches upon the KPMG entities' duties and responsibilities under the Consent Order. In this regard, the Plaintiffs argued that the investigation and valuation aspects were not properly carried out by the KPMG entities.

The investigation exercise

180 The main thrust of the Plaintiffs' allegations under this claim can be described as a dissatisfaction with the investigation findings made by KPMG BA. However, before delving into the parties' substantive arguments, I make a short comment on the way this point was couched in legal terms by the Plaintiffs. In the Revised SOC, it was alleged that the Consent Order suffers from a total failure of consideration as the Plaintiffs' allegations in the Consolidated Suits were not properly compromised. This ground was relied upon in the Revised SOC to support the Plaintiffs' overarching attempt to set aside the Consent Order. However, there appears to have been a departure from this stance in the Plaintiffs' closing submissions. The same complaint was no longer developed in the context of "a total failure of consideration". Instead, the Plaintiffs appeared to have characterised the KPMG entities' efforts in implementing the Consent Order as a "breach" of the Consent Order. [note: 126] The latter submission rested on an assumption that a non-party is capable of breaching a contract. This struck me as an intriguing proposition for, as the R&T Defendants quickly pointed out in their closing submissions, [note: 127] the Plaintiffs did not explore in greater detail the legal principles behind the assumption they were making. Nevertheless, I find that there are other cogent reasons why the Plaintiffs' complaint against the KPMG entities is unfounded and it is to this that my analysis now turns to.

181 The Plaintiffs cast various aspersions against the KPMG entities, but the gist of it can be summarised as follows. They alleged that KPMG BA did not conduct an independent investigation into both the JV Companies' cost and expenses as well as its revenue stream. In this regard, they tried to persuade me that all KPMG BA relied on to do its job was the audited accounts. The Plaintiffs relied on section 1.1 of the Valuation Reports for both TCAE and TCPL which stated as follows:

> In performing this assignment, [KPMG CF]:
>
> - Has used and relied solely on information (the "Information") furnished by the Parties to the Action;
>
> - has not independently investigated or verified the Information received;
>
> - assumes no responsibility for the accuracy and completeness of the Information and will not be held liable for it under any circumstances;

- has not made an appraisal or independent valuation of any of the assets or liabilities of the Company; and

- has no conducted an audit; due diligence or a review of the financial statements provided by the Parties to the Action.

182 In particular, emphasis was placed on the failure to verify the reasonableness of the monies paid to Goodland and AGA, [note: 128] both of which were entities related to some of the Defendants. The Plaintiffs contended that this association warranted a closer scrutiny from KPMG BA. Further, KPMG BA did not appear to have given sufficient weight to the revenue that was allegedly generated from the landfill activity which it claimed to have amounted to about $5m. [note: 129]

183 While I am able to sympathise with the Plaintiffs' concerns that the Valuation Reports did appear to be slightly cursory in its findings, I do not find it appropriate for me to make a conclusive finding on whether or not KPMG BA had carried out a proper investigation. It is true that on a purposive reading of the Consent Order, KPMG BA was under a duty to conduct a thorough investigation of the Plaintiffs' allegations so as to give a meaningful closure to the parties' dispute in the Consolidated Suits. Even the R&T Defendants' expert, Andrew Grimmett, agreed on cross-examination that the investigation was supposed to be fairly rigorous, and that the standard expected of the investigation should match that of an audit, if not more stringent. [note: 130] But my ability to resolve this issue is nevertheless circumscribed by two considerations.

184 First, neither of the KPMG entities were called to give evidence on what exactly was done or not done insofar as the investigation exercise was concerned. Thus, while the Plaintiffs contended that a valuer would be obliged to the court to show the basis on which it had arrived at the valuation, it would be unfair, in this particular instance, to the KPMG entities if I were to jump to conclusions without giving them an opportunity to respond to the allegations the Plaintiffs were making. After all, amongst all the parties and witnesses involved in this action, they are probably the ones in the best position to shed light on the tasks they had performed under the Consent Order. In the absence of this critical piece of evidence from the overall picture, I do not find it wise to make a ruling on this issue.

185 The second consideration I have in mind is the way the Consent Order was drafted. Clause 5 clearly stipulated that the KPMG entities had *absolute discretion* in carrying out the investigation and valuation exercise. This suggests that great latitude would be accorded to the KPMG entities in determining the appropriate manner to carry out the investigation and valuation exercise. That being the case, I find it difficult for the Plaintiffs' to go back on what they have expressly agreed to by now attempting to prescribe a higher normative standard on the KPMG entities. In this regard, I find the following words of Rajah JA in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 poignant in describing the limits of the courts' powers when it is asked to interpret the express terms of a contract (at [132(f)]):

> A court should always be careful to ensure that extrinsic evidence is used to explain and illuminate the written words, and not to contradict or vary them. Where a court concludes that the parties have used the wrong words, rectification may be a more appropriate remedy …

186 Before I move on from this topic, I will address one of the defences mounted by the R&T Defendants, which is that the investigation issue was not sufficiently pleaded. [note: 131] They argued that the Plaintiffs' pleaded case has always been that there were no investigations at all conducted by KPMG BA, and not that investigations were not properly conducted. This is not how I understood

the Plaintiffs to have pleaded the matter. The relevant portion in the Revised SOC at paragraph 41(a), which was in relation to the claim that "the Plaintiffs' claims in the Consolidated Suits have not been compromised", is as follows:

> (a) there has not been an investigation by [KPMG BA] pursuant to clauses 2 and 5 of the Consent Order …

187 Based on the phrase "pursuant to clauses 2 and 5 of the Consent Order", it seems clear to me that Plaintiffs were claiming that KPMG BA had fallen below the standards required of them under the two clauses in question, although I would add that it would certainly have benefited the Plaintiffs had they worded the claim in more precise terms. But given that the message it sought to convey was not as unclear as the R&T Defendants purported, I do not think drawing such fine distinctions in the wording would do much to bolster their case.

The valuation exercise

188 What was discussed in the previous section relates to the Plaintiffs' dissatisfaction with the investigatory aspect of KPMG BA's work. I now turn to examine whether there is any merit in the Plaintiffs' complaint over the valuation aspect of KPMG CF's work.

189 Under this section, the Plaintiffs' complaints can be further classified into two sub-categories. The first is that the NAV (Net Asset Valuation) methodology adopted by KPMG CF was inappropriate. To that, I reiterate my comments made earlier, that the KPMG entities should have been called to give the best evidence. Suffice to say, in choosing this methodology KPMG CF may very well have been motivated by its assumption that the 2004 STAs were about to expire in August 2007 and there would be no subsequent renewals. If this was a valid assumption made by KPMG CF, the alternative method proposed by the Plaintiffs' expert witness, Timothy James Reid, that is to value the JV Companies based on its prospective revenue receivable, may not necessarily be superior.

190 The second point appears to be more significant. The Plaintiffs contended that because the Valuation Reports were issued so late – 13.5 months after its expected due date based on the timelines stipulated in the Consent Order – the bidding exercise had been rendered meaningless. [note: 132] While the R&T Defendants argued that the delay was not unexpected as the timelines were subject to variation by consent, this does not detract from the fact that the valuation figures contained in the Valuation Report were way out of date. The outdated valuation date set by the KPMG entities of 31 May 2006 coupled with the fact that the parties were asked to bid for the JV Companies much later in August 2007, gave rise to the inexorable conclusion that the valuation figures were no longer capable of serving the purpose originally intended, which is to inform the parties accurately of the value of the JV Companies so that commercially sensible and realistic bids can be submitted. Even Tan CB agreed on cross-examination that it is paramount for valuation figures to be accurate and up to date for them to assist him in the bidding exercise and that the value of the JV Companies could have changed between 31 May 2006 and August 2007. [note: 133]

191 I am of the view that although the Valuation Reports were issued so late, and that even if the bidding exercise had indeed been rendered meaningless, it cannot be said that the KPMG entities had breached the Consent Order. As alluded to earlier, the question of whether a non-party can be found to be in breach of contract was not canvassed fully before me.

192 However, what this shows is that even if I am wrong that there had been a repudiatory breach of the Consent Order committed by the Defendants, I cannot order the bidding exercise to be

proceeded with. This is because there is nothing left to bid for. At this point in time, both the 2004 and 2007 Head Leases have already run their course.

193 As mentioned earlier (see above at [165]), the purpose of the Consent Order cannot be myopically viewed as simply a mechanism to bring the Joint Venture to an end with no regard to the interests of the parties. If the R&T Defendants' position is correct, it would be akin to saying that the purpose of the Consent Order can be met by the Defendants (CO) bidding a nominal sum and in so doing, gaining control over the JV Companies and keeping all the benefits of the 2004 Head Lease and the 2007 Head Lease. This would essentially leave the Plaintiffs with absolutely nothing. I am unable to agree that this is what the Consent Order was meant to achieve. While it would not make a difference in the ultimate analysis, I would also add that the Defendants (CO) are not even offering to account to the Plaintiffs the revenue that was generated from the JV Companies during the period of the 2004 STAs if the Plaintiffs were to win the bid or the remainder of such a period, if the bidding exercise was carried out in accordance with the anticipated timelines under the Consent Order. This exemplifies a lack of *bona fides*. The Defendants (CO) are seeking to gain everything for nothing.

194 In *Hoban Steven Maurice Dixon and another v Scanlon Graeme John and others* [2007] 2 SLR(R) 770 ("*Hoban*"), the trial judge had resolved a minority oppression action by ordering that there be a valuation of the company's shares with a view to a buy-out by one party of the other party's shares. The court-appointed expert valued the shares at 'nil' value. The appellants requested that the trial judge adjust the valuation of the share but the trial judge refused to intervene. The Court of Appeal declined to interfere with the trial judge's decision to affirm the 'nil' valuation but went on to hold that the 'nil' valuation rendered the buy-out order "inoperative" (at [42]–[43]). The Court of Appeal then made the consequential order that parties be restored to the *status quo ante*, as if the buy-out order had never been made (at [46]). I find *Hoban* to be on point. It makes clear that the court can set aside an order on the basis that it is rendered inoperative. From my observations above, I am of the view that the Consent Order has indeed been rendered inoperative, much like the case in *Hoban*. I am accordingly unable to order for the bidding exercise to be proceeded with.

195 Therefore, apart from the repudiatory breaches committed by SAA in not renewing the sub-tenancies for the third tranche, I will also set aside the Consent Order on the basis that the Consent Order has been rendered inoperative. This is so even if Choo J's Decision constitutes *res judicata* on the Plaintiffs' allegations about the repudiatory breaches. The *res judicata* argument does not extend to the question of whether the Consent Order has been rendered inoperative. Indeed it will be recalled that although Choo J also decided in another application that the parties to the Consent Order were to carry on with the bidding exercise, the Court of Appeal had set aside that decision (see [49] above).

196 The R&T Defendants argued that the Plaintiffs did not plead that the valuation reports were useless because they were issued almost one year after the valuation date. [note: 134] I am unable to agree. The claim of frustration still exists in the Revised SOC although not elaborated as such in the Plaintiffs' arguments. It is clear that in both the Plaintiffs' case and the R&T Defendants' case, the bidding exercise was to be undertaken so that if the Plaintiffs won the bid, they would get the benefit of operating the JV Companies for at least the remainder of the 2004 sub-tenancies even if the JV Companies and the Plaintiffs were not supposed to get the benefit under the 2007 Head Lease as well. By the time the valuation reports were issued on 10 August 2007, there was less than a month left on the 2004 sub-tenancies. I therefore find that this point had been sufficiently pleaded by the Plaintiffs.

The QS Issue: whether the Defendants obstructed efforts to appoint a QS and whether the failure of appoint a QS enables the Plaintiffs to set aside the Consent Order

197 The Investigation and Valuation Issue in the previous section discusses the duties of the KPMG entities under the Consent Order and whether they had fallen below the standards expected of them. I now come to an ancillary issue that also touches upon certain aspects of the investigation exercise, but the allegations cast by the Plaintiffs were directed more towards certain obstructions put up by the Defendants to hinder the investigation exercise as opposed to the KPMG entities' inadequacies *per se*.

198 I begin by noting that clause 6 of the Consent Order envisaged the possible appointment of a QS to assist the KPMG entities in its work. The clause stated as follows:

> 6. To assist the Independent Valuer in this regard, the Plaintiffs and Defendants shall provide the Independent Valuer and/or KPMG Business Advisory Pte Ltd with full access to all cause papers, documents referred to in the respective List of Documents and Supplementary List of Documents (if any), existing expert or such other reports and such other documents that the Independent Valuer and/or Messrs KPMG Business Advisory Pte Ltd **may require** for the purpose of conducting the Valuation Exercise, and the Plaintiffs, Defendants and/or the Defendants' agents and/or servants, and/or the Companies' employees, agents and/or servants shall assist the Independent Valuer and/or Messrs KPMG Business Advisory Pte Ltd with any or all enquiries in this regard. The Independent Valuer shall be at liberty to engage a quantity surveyor and such other professionals or experts or technical advisors as he deems necessary or appropriate to arrive at a fair valuation and/or to determine the propriety (or lack thereof as the case may be) of the past contracts and transactions entered into by the Companies or on their behalf. The cost of appointing a quantity surveyor or such other professionals or experts or technical advisors shall, once such cost is agreed to between the Plaintiffs and the Defendants, be apportioned between the Plaintiffs and the Defendants (other than the Companies) in the proportion of their respective shareholdings in the Companies. …
>
> [emphasis added in bold]

199 Suffice it to say for now, as the story unravelled, the KPMG entities did not manage to appoint a QS. Notwithstanding this, the KPMG entities proceeded to finalise the investigation and valuation exercise. The Plaintiffs relied on the failure to appoint a QS as an additional plank to attack the integrity of the Valuation Reports. The assistance of a QS, they argued, was a cornerstone to any meaningful implementation of the investigation exercise for without which KPMG BA would not be able to investigate the reasonableness of the construction costs paid by the JV Companies. [note: 135]

200 The factual matrix concerning this issue may be summarised briefly. The first QS appointed, Goh Tiak Chua & Co Pte Ltd ("GTCCPL"), withdrew itself because the drawings made available to it were inadequate for the purposes of verifying the costs of renovation work done for the JV Companies. Subsequently, after several QSes had refused to take up the verification works (*ie*, George Low Co and T.J. Chiam Surveyors Pte Ltd), DLS (see above at [74]) agreed to carry out the works although its quoted fee was $16,750 more than the fee quoted by GTCCPL. AsiaLegal wrote to KPMG BA insisting that the additional costs of appointing DLS should be borne by the JV Companies since the previous QS was unable to perform the verification works due to the JV Companies' failure to provide the required information/drawings. After protracted negotiations, AsiaLegal subsequently informed KPMG BA that the Plaintiffs would make payment of their share of DLS' fees purely to expedite matters and that the payment was made strictly under protest. Rajah & Tann then informed KPMG BA that the Defendants (CO) were not agreeable to paying their share of DLS' fees, and that they were prepared for KPMG CF to prepare the Valuation Reports without engaging a QS. [note: 136] Eventually, KPMG BA wrote to the Consent Order Parties informing them that as they had not received

any objection from the Consent Order Parties to complete the Valuation Exercise without the appointment of a QS and in order not to protract the matter further, they would proceed to finalise the Valuation Report.

201 Against this factual backdrop, the Plaintiffs blamed the Defendants for causing the investigation work to be done without a QS. The allegations made were two-fold. First, the Plaintiffs averred that the Defendants had hidden important documents required by the QS to carry out its work. Secondly, when KPMG BA finally found a QS (*ie*, DLS) that was willing to perform the task, the Defendants (CO) threw yet another spanner in the works by refusing to pay their share of the additional fees required by DLS. Cumulatively, these two moves obstructed KPMG from appointing a QS. [note: 137]

202 I need not conclude whether these allegations have been made out because there is a fundamental reason why the Plaintiffs' claim would ultimately fail even assuming there was any merit in their allegations. It was strenuously argued by the Plaintiffs that the QS formed an integral part of the investigation and valuation exercises and any attempt to detract from the goal of appointing a QS cannot be condoned with. However, while the appointment of a QS might have been important, the Plaintiffs appeared willing not to insist on such an appointment. The Plaintiffs did not voice any objection when KPMG BA wrote to the parties on 24 July 2007 informing them that the Valuation Reports would be issued without engaging a QS unless parties object otherwise. Their silence on this matter gave rise to an irresistible inference that they were amenable to the dispensation of a QS. This led to KPMG BA writing to the parties on 3 August 2007 informing them that they would proceed to finalise the Valuation Report without engaging a QS as there had been no objection from the parties.

203 The Plaintiffs averred in their reply closing submissions that even though there was no written objection, they had made an objection over the phone to Bob Yap, a director of KPMG BA. I find this account of events improbable for several reasons. First, Johnny Yeo testified on the stand that he could not even remember whether such a conversation took place between the critical period of 24 July 2007 and 3 August 2007. [note: 138]

204 Secondly, consistent with Johnny Yeo's murky testimony on this point, Michael Lim also did not unequivocally testify that the objection was made to Bob Yap. When pressed for the contents of the objection, he replied it was Bob Yap who said that engaging a QS would be preferable. His evidence did not show that the Plaintiffs had insisted on appointing a QS. [note: 139]

205 Thirdly, if there had been a verbal objection between 24 July 2007 and 3 August 2007, KPMG BA would surely not have issued the letter dated 3 August 2007 (see [202]) to notify the parties that it had not received any objection from the parties. Furthermore, if the letter dated 3 August 2007 was issued by mistake as the Plaintiffs have contended, then the logical thing to do would be for them to write to KPMG BA immediately to correct them. They continued to remain silent even after receiving the 3 August 2007 letter from KPMG BA even though they were represented by lawyers at the material time.

206 Fourthly, in a letter issued to Rajah and Tann by the Plaintiffs' lawyers, AsiaLegal, dated 23 July 2007, it was stated in unequivocal terms that the Plaintiffs themselves were prepared to proceed without a QS so as to expedite matters:

> … We are instructed that unless the said sum of S$10,468.75 is paid to [KPMG CF] by close of business on Wednesday, 25 July 2007, our clients reserve the right to take such appropriate

steps as they deem fit, including but not limited to *making an application to Court and/or requesting [KPMG CF] to proceed with the valuation without engaging a [QS] if [KPMG CF] deems it to be fit* …

[emphasis added]

During the trial, Michael Lim tried to explain away this letter by claiming that AsiaLegal had sent it against their instructions. [note: 140] I do not find this explanation to be credible as this letter was copied to the Plaintiffs and it was not corrected by them.

207 Fifthly, and crucially, in the Plaintiffs' written submissions in SUM 4117 (amended), they conceded that "the Plaintiffs had no option but to reluctantly agree to dispense with the engagement of a surveyor so as to expedite matters". [note: 141] This shows clearly that the Plaintiffs were ultimately willing for the valuation exercise to proceed without the appointment of a QS.

208 Before I conclude this issue, a fall-back argument mounted by the Plaintiffs merits a brief discussion. The Plaintiffs contended that even if the parties had agreed to dispense with the use of a QS, there was an overriding duty on KPMG BA's part to ensure it would utilise a QS in performing the investigative work. [note: 142] I am unable to agree. Clauses 5 and 6, when read together, gave rise to no such obligation. In fact, both clauses indicated that the appointment of a QS was never fundamental to the investigation and valuation exercise. It was always at the discretion of the KPMG entities to appoint a QS as they deem fit. This is borne out by clause 6, which stated that KPMG CF "shall be *at liberty* to engage a [QS] … as [it] deems necessary or appropriate …" [emphasis added]. Consistent with clause 6, clause 5 gave KPMG CF "unfettered and absolute discretion in conducting the Valuation Exercise as [it] deems fit …" It was ultimately the KPMG entities' judgment call whether a QS should be appointed to assist them and it was within their rights to dispense with the need for a QS. In any event, it is not open to the Plaintiffs to say that KPMG BA had such an overriding duty when they had themselves, by conduct, waived this requirement.

The R&T Defendants's counterclaim

209 Having decided above that the Consent Order is to be set aside, either on the basis of a repudiatory breach or that the Consent Order had been rendered inoperative, I dismiss the R&T Defendants' counterclaim for the bidding exercise to be proceeded with.

The Consequential Orders

210 Having set aside the Consent Order, I turn now to consider the Consequential Orders requested by the Plaintiffs (*ie*, for leave to continue with the Consolidated Suits with the appropriate directions) (see [59] above). With the Consent Order having been set aside, it follows that the Consolidated Suits are allowed to be reinstated. Tan CB, Ong CK and Tan Senior have, however, raised certain objections to being named in the Consolidated Suits. This gives rise to two questions. The first question is whether Tan CB and Ong CK were parties to the Joint Venture. The answer to this question would determine whether the Plaintiffs have a legal basis to name these two individuals as defendants in the Consolidated Suits. The second question is whether Ong CK and Tan Senior may avoid being named as defendants in the Consolidated Suits, but for reasons different from the first question. They contended that because they had not been named as defendants in the Consolidated Suits for a significant number of years, it was unfair to now drag them back into the litigation.

Whether Tan CB and Ong CK were proper parties to the Joint Venture

211 As alluded to in the background facts, when the Consolidated Suits were commenced in 2002 and 2004, the Plaintiffs did not name Tan CB and Ong CK as defendants. In the present suit, the Plaintiffs are applying for these two individuals to be added to the list of defendants in the underlying Consolidated Suits which have now been reinstated pursuant to the setting aside of the Consent Order. Unsurprisingly, Tan CB and Ong CK did not want the Plaintiffs to drag them into the Consolidated Suits, claiming that they were never parties to the Joint Venture in their personal capacity. Instead, they had used SAA as the corporate vehicle to represent them in the Joint Venture, and this was reflected in the Plaintiffs' election to sue SAA in the Consolidated Suits. The question that arises for my determination is therefore whether Tan CB and Ong CK were parties to the Joint Venture.

212 The MOU, being the primary document containing the terms of the Joint Venture, is an appropriate starting point to examine this question. The first page of the MOU clearly stated that SAA was a party to the Joint Venture. Tan CB and Ong CK were not named.

213 However, the second page of the MOU stated that:

> This memorandum of understanding is made between the following *joint venture parties* … [emphasis added]

Tan CB's and Ong CK's names and signatures were penned down below that sentence. The two individuals contended that they were signing as directors on behalf of SAA but SAA's name is not stated in the second page as one of the joint venture parties and there was no indication in the second page that they were signing on behalf of SAA. Furthermore, the two names and signatures were not side by side or one below the other. This gave rise to the impression that they were signing in their individual capacities and not for a joint purpose.

214 As for evidence other than the express words in the MOU itself, the closing submissions from Rajah and Tann pointed out (at para 124) that the Plaintiffs had themselves asserted in earlier pleadings and other court documents that SAA was a party to the MOU.

215 On the other hand, as Johnny Yeo explained, [note: 143] the allocation of the shares in the Joint Venture was based on 12.5% for each of the Eight Individuals with Tan CB and Ong CK being two of the Eight Individuals. That is why the three Plaintiffs had a combined shareholding of 37.5% only. If there were only seven shareholders with SAA being one shareholder instead of Tan CB or Ong CK, then how did the Plaintiffs come to hold only 37.5% of the shares? This was not adequately explained by the SAA Group. It was not sufficient for Tan CB to simply assert that the SAA Group wanted to be in the majority as that explanation did not address the actual percentages held by the parties. Furthermore, as Johnny Yeo explained, [note: 144] it was because there were eight persons to the Joint Venture that Tan CB and Ong CK signed the second page of the MOU without any indication on the page that they were signing on behalf of SAA.

216 I reiterate that it was Ong CK who drafted the MOU. He could not give a satisfactory explanation as to why SAA was named as a contracting party in the first page of the MOU but yet Tan CB and he signed on the second page without any indication that they were signing on behalf of SAA. I also draw an adverse inference against Ong CK under the *contra proferentem* rule.

217 On a balance of probabilities, I am of the view that the factors in favour of the Plaintiffs' contention outweigh those in favour of the contention of Tan CB and Ong CK.

218 All things considered, I conclude that Tan CB and Ong CK did enter into the Joint Venture in

their personal capacities and it was they, and not SAA who were parties to the Joint Venture. SAA may have been the vehicle used by Tan CB and Ong CK to hold their shares in the JV Companies. I therefore grant the Plaintiffs leave to join Tan CB and Ong CK as defendants in the reinstated Consolidated Suits.

Whether Tan Senior and Ong CK could rely on the Plaintiffs' delay in bringing them back into litigation to avoid being named as defendants in the reinstated Consolidated Suits

219 Although Tan Senior was named as a party in the Consolidated Suits, the Plaintiffs did not continue such action against him after he became bankrupt. Since he is no longer a bankrupt, the Plaintiffs seek to continue such actions against him. As for Ong CK, the Plaintiffs wish to add him and Tan CB as defendants as discussed above. Both Tan Senior and Ong CK pleaded a number of defences to bar the Plaintiffs from pursuing them in the reinstated Consolidated Suits, namely, laches, estoppel by conduct and waiver by election.

Doctrine of laches and doctrine of estoppel by conduct

220 It is not disputed that there was a long delay before the Plaintiffs joined Tan Senior and Ong CK to the present action in January 2009. For Tan Senior, the Plaintiffs did not seek leave from the court to continue the Consolidated Suits against him after he fell into bankruptcy on 29 August 2003, giving rise to a delay of about five years. [note: 145] For Ong CK, he was never named as a defendant in the Consolidated Suits to begin with since its commencement in 2002. The delay in Ong CK's case was therefore about seven years.

221 Insofar as the doctrines of laches and estoppel are concerned, "prejudice" or "detriment" is a common element embodied in both doctrines that has to be satisfied before the defendant can successfully rely on either of them to defeat a plaintiff's claim (see *Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418 at [33] for elements of doctrine of laches and *Chai Cher Watt (trading as Chuang Aik Engineering Works) v SDL Technologies Pte Ltd and another appeal* [2012] 1 SLR 152 ("*SDL Technologies*") at [33] for elements of estoppel by conduct). In *Dynasty Line Ltd (in liquidation) v Sia Sukamto and another* [2013] 4 SLR 253, Lai Siu Chiu J rejected the first defendant's reliance on the doctrine of laches because he was unable to show he had suffered "significant prejudice" (at [37]). Here, similarly, neither Ong CK nor Tan Senior has adduced any evidence of them having suffered such prejudice. In Ong CK's case, repeated bare assertions of having suffered a detriment from the delay of seven years were made without any attempt to furnish evidence or even details of the so-called detriment. [note: 146] Both Ong CK and Tan Senior also claimed to have lost certain "documents". [note: 147] However, no effort was made to elaborate on what exactly was lost that could have caused them prejudice. It goes without saying that claims of "prejudice" must be proved; bare assertions of suffering prejudice could not avail them of the defences. While Ong CK did allude to having lost his diaries, he did not sufficiently show how this was a source of prejudice to him. Furthermore, SAA should have its own records or documents which Ong CK and Tan Senior can rely on.

Waiver by election

222 Tan Senior raised the doctrine of waiver by election as an additional plank to bolster his defence. [note: 148] While the doctrine of waiver by election, unlike estoppel by conduct, does not require the defendant to prove that he has suffered "detriment" or "prejudice", the defendant nevertheless must show that the abandonment of a right was communicated in "clear and unequivocal terms" to him (see *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The*

"Kanchenjunga") [1990] 1 Lloyd's Rep 391 at 397–399, endorsed by the Court of Appeal in *SDL Technologies* at [33]). In the present case, the Plaintiffs' failure to apply for leave to continue proceedings was equivocal at best as to whether they had abandoned their right to sue him. It seems to me that the Plaintiffs had only suspended any step they could have taken against him in the light of his bankruptcy. It does not amount to a representation that was "clear and unequivocal".

Abuse of process

223 Tan Senior cited the case of *Morris v Wentworth-Stanley* [1999] 1 QB 1004 ("*Morris*") which he claimed to stand for the proposition that a plaintiff who has removed a defendant from proceedings commenced previously cannot, without at the time reserving the right to sue him/her later, bring a claim against the same person in a fresh set of proceedings later on. To do so, he claimed, would amount to an abuse of process. [note: 149]

224 In response, the Plaintiffs argued that *Morris* can be distinguished from the present case on the basis that, the plaintiff in that case actively deleted the name of the person whom the plaintiff sought to commence fresh proceedings against. Here, no such active steps were taken by the Plaintiffs and when they eventually realised that they could continue litigation against Tan Senior despite his bankruptcy, they proceeded to do so. [note: 150]

225 I agree with the Plaintiffs that the case of *Morris* is distinguishable on the facts. In *Bradford & Bingley Building Society v Seddon* [1999] 1 WLR 1482 at 1493, Auld LJ observed that there must be an "additional element" apart from "re"–litigation before an abuse of process can be found. He went on to observe that in the case of *Morris*, Potter LJ had described the plaintiff's election to remove the defendant from the earlier proceedings and subsequent attempts to commence further action as being fraudulent. That was the "additional element" present in *Morris*. In the present case, I can find no "additional element" to justify a conclusion that there has been an abuse of process.

Conclusion

226 For the reasons stated in the foregoing discussion, I dismiss the defences raised by Tan Senior and Ong CK to avoid being named as defendants in the underlying Consolidated Suits that have now been reinstated. Put another way, the Plaintiffs have the right to name them as defendants in the Consolidated Suits.

Conclusion

227 I summarise the orders that I have made in the preceding sections:

(a) The Consent Order is set aside on the basis of two repudiatory breaches committed by the Defendants (CO):

(i) a breach of clause 11 of the Consent Order or alternatively a breach of an implied term of the Consent Order by misappropriating the benefit of the 2007 Head Lease; and

(ii) a breach of clause 5 of the Consent Order by failing to disclose that they had acquired the 2007 Head Lease.

(b) Even if there was no repudiatory breach committed by the Defendants (CO) or the judgment of Choo J in SUM 4117 (amended) is *res judicata* on the issues of the repudiatory breaches, the Consent Order is still set aside on the basis that it is inoperative.

(c) The R&T Defendants' counterclaim that the bidding exercise is to be proceeded with is dismissed.

(d) As a result of the Consent Order being set aside, the Consolidated Suits are reinstated.

(e) Tan CB and Ong CK were parties to the Joint Venture.

(f) The Plaintiffs are not precluded from naming Tan Senior and Ong CK as defendants in the Consolidated Suit.

228 I should also add that in the light of my decision to set aside the Consent Order, there is no need for me to decide on the residual claim advanced by the Plaintiffs (*ie*, claim of breach of fiduciary duty and conspiracy). As mentioned earlier, the Plaintiffs have indicated in their closing submissions that they would subsume the residual claim under the Consolidated Suits should they be reinstated.

Costs

229 I will hear the parties on costs.

Concluding remarks

230 Several important lessons may be gleaned from the obstacles the Plaintiffs have had to overcome just to put themselves back in the same position as they were ten years ago when the minority oppression actions (*ie*, the Consolidated Suits of OS 1634/02 and S 703/04) were mounted against the Defendants. In these ten years, multiple actions were filed by both sides over disputes flowing from the implementation of the Consent Order. It is somewhat ironic that what was supposed to be a peaceful and cost-efficient way of resolving the parties' differences has become the subject of a series of acrimonious and costly legal battles. These legal battles have, thus far, gone up to the Court of Appeal a total of three times before the delivery of this judgment. But even then, this is not the end of the Plaintiffs' struggles as there remain thorny issues that need to be resolved if the Plaintiffs wish to obtain any meaningful reward from their endeavours in the courtroom.

231 In summary, the legal battles expended over the last ten years were largely a result of the MOU which was poorly drafted and of the Consent Order which was also not well drafted even though it was drafted by solicitors. However, the true reason for the disputes was a lack of *bona fides* on the part of the Defendants (CO), and of Tan CB and Ong CK.

232 I add that in the course of the trial, Tan CB had said that it was the JV Companies who had paid for the renovations to the premises at the Site. Yet in Suit No 51 of 2012, which was an action between a new master tenant, SH Cogent Logistics Pte Ltd against SAA, Tan CB had alleged that it was SAA who had paid for the renovations. When Tan CB was asked about this contradiction, he was evasive. [note: 151] It seems clear that he had perjured himself, one way or another.

[note: 1] Tan CB's AEIC, paras 38–39.

[note: 2] 1 AB 108.

[note: 3] 1 AB 109.

[note: 4] 1 AB 106.

[note: 5] 1 AB 113.

[note: 6] PBD vol 4 1003-1005.

[note: 7] Notes of Evidence ("NE") 24/9/2014, p 22 (TCB's testimony).

[note: 8] 3 AB 782-784.

[note: 9] SOC para 8(viii) (Ong's shareholding in SAA was through OCK International Pte Ltd); NE 24/9/2014, pp 17-18, (TCB's testimony).

[note: 10] 30 AB 8785-8786.

[note: 11] NE 3/9/2014, p 40, lines 4-6 (Ong's testimony).

[note: 12] NE 3/9/2014, p 41 (Ong's testimony).

[note: 13] TCB's AEIC, para 6.

[note: 14] NE 16/9/2014, p 16 (THC's testimony).

[note: 15] TCB's AEIC, para 3.

[note: 16] TCB's AEIC, para 19.

[note: 17] NE 16/9/2014, pp 57-60.

[note: 18] NE 21/8/2014, pp 4 and 18 (Yeo's testimony).

[note: 19] NE 20/8/2014, pp 105-6 (Yeo's testimony); NE 19/8/2014, pp 51-52 (Yeo's testimony) referring to Exhibit P2-C, items 5(a) and (b).

[note: 20] NE dated 19/8/2014, p 76 (Yeo's testimony) referring to Exhibit P2-C, item (e).

[note: 21] NE dated 17/1/2014, pp 11-15 (Lim's testimony) referring to Plaintiffs' reply to FNBP at PSDB 258.

[note: 22] Yeo's AEIC, para 40 and para 76.

[note: 23] 6 AB 1724.

[note: 24] Yeo's AEIC, para 76.

[note: 25] Ong's Defence, para 15, Tan Senior's Defence, para 4(d), 1-4 and 7 Defendants' Defence, para 22; NE 19/8/2014, p 107; NE 26/8/2014, p 40; NE 17/9/2014, p 88

[note: 26] NE 20/8/2014, pp 4-5 (Yeo's testimony).

[note: 27] 147DBD 230–231.

[note: 28] 2 AB 420–421.

[note: 29] 2 AB 412.

[note: 30] 2 AB 398.

[note: 31] 2 AB 338.

[note: 32] Yeo's AEIC, p 27; NE 23/1/2014, p 24 (Lim's Testimony).

[note: 33] 3 AB 601.

[note: 34] Yeo's AEIC, p 27; TCB's AEIC, para 41 and TCB-7; 147DBD 537.

[note: 35] 3 AB 821.

[note: 36] Yeo's AEIC, YBH-36.

[note: 37] TCB's AEIC, pp 348-352.

[note: 38] TCB's AEIC, paras 96-125.

[note: 39] Yeo's AEIC, pp 73-75 and YBH-57.

[note: 40] OS at 5 AB 1223-1226; SOC at 6 AB 1628.

[note: 41] TCB's AEIC, para 138.

[note: 42] Writ at 6 AB 1654.

[note: 43] Re-re-amended SOC for OS 1634/02 dated 30 Aug 2005 at 8 AB 2365. Amended SOC for S 703/04 dated 30 Aug 2005 at 8 AB 2351.

[note: 44] TCAE's EGM minutes found at 147DBD vol 2 1015-1016; TCB's AEIC, p 443,TCB 36.

[note: 45] NE 21/1/2014, p 53 (Lim's testimony).

[note: 46] TCAE's EGM minutes found at 147DBD vol 2 1015-1016; TCB's AEIC p 443, TCB-36.

[note: 47] NE 25/9/2014, pp 31-34 (TCB's testimony).

[note: 48] 11 AB 3280.

[note: 49] 12 AB 3403.

[note: 50] 13 AB 3634.

[note: 51] R&T Defendants' Defence, para 40.

[note: 52] 147DBD 1058.

[note: 53] 147DBD 1059.

[note: 54] 13 AB 3779-80.

[note: 55] 13 AB 3787.

[note: 56] 13 AB 3793.

[note: 57] 14 AB 4090; Yeo's AEIC 912.

[note: 58] Yeo's AEIC 916-926.

[note: 59] TCB's AEIC at p 698; 15 AB 4553 refers to the unreported version of the judgment: [2008] SGHC 93.

[note: 60] 16 AB 4534.

[note: 61] 16 AB 4712.

[note: 62] SOC (pre-amendment), para 53.

[note: 63] 26 AB 7846.

[note: 64] Revised SOC, para 39.

[note: 65] Revised SOC, para 72(ii).

[note: 66] NE 21/1/2014, pp 61-71 (Lim's testimony).

[note: 67] Revised SOC, para 35.

[note: 68] Plaintiffs' closing submissions, paras 332–334.

[note: 69] Revised SOC, para 50(i); Plaintiffs' closing submissions,paras 373 to 385.

[note: 70] Revised SOC, para 50(ii).

[note: 71] R&T Defendants' Defence and Counterclaim (Amendment No. 2), para 22.

[note: 72] R&T Defendants' Defence, para 9.

[note: 73] R&T Defendants' closing submissions, para 140.

[note: 74] R&T Defendants' Defence, para 8.

[note: 75] R&T Defendants' closing submissions, paras 316–319.

[note: 76] R&T Defendants' Defence, para 49.

[note: 77] R&T Defendants' closing submissions, para 250.

[note: 78] R&T Defendants' closing submissions, paras 277-279.

[note: 79] SOC para 41(a); NE 7/8/2014, p 90 (Mr Tan).

[note: 80] Revised SOC, para 41(b)(iv).

[note: 81] AEIC of Timothy James Reid, 5/10/2012.

[note: 82] Revised SOC, paras 41(b)(ii) and (iii).

[note: 83] Revised SOC, paras 54-56.

[note: 84] R&T Defendants' closing submissions, paras 220-222.

[note: 85] R&T Defendants' closing submissions, para 225.

[note: 86] R&T Defendants' Defence, para 45.

[note: 87] R&T Defendants' closing submissions, paras 256 and 271.

[note: 88] Tan Senior's Defence, para 3.

[note: 89] Plaintiffs' closing submissions, para 603.

[note: 90] SOC, para 72(iii).

[note: 91] Tan Senior's Defence, para 9(d).

[note: 92] Ong CK's Defence, para 38.

[note: 93] Plaintiffs' closing submissions, para 602.

[note: 94] TCB's AEIC at p 698; 15 AB 4553 refers to the neutral citation version: [2008] SGHC 93.

[note: 95] R&T Defendants' closing submissions, para 368.

[note: 96] Re-re-amended Statement of Claim, 30/8/2005, para 13(vii) at 8 AB 2370.

[note: 97] R&T Defendants' closing submissions, para 348.

[note: 98] 1 AB 109

[note: 99] 1 AB 106

[note: 100] 1 AB 108.

[note: 101] NE 24/9/2014, p 8, lines 6-15; p 9, lines 1-9; p 10, lines 6-10 (Tan CB).

[note: 102] NE 3/9/2014, p 83, lines 24-25; p 110, lines 22-25; p 114-119.

[note: 103] NE 24/9/2014, pp 84-88.

[note: 104] See *eg*, 2AB 371; 2AB 379; 3AB 662 and 3AB 844.

[note: 105] NE 5/8/2014, p 38 (lines 14-17) and NE 19/8/2014, pp 79-82.

[note: 106] R&T Defendants' closing submissions, para 81.

[note: 107] R&T Defendants' closing submissions, para 82.

[note: 108] R&T Defendants' closing submissions, para 86.

[note: 109] R&T Defendants' closing submissions, para 88.

[note: 110] R&T Defendants' closing submissions, para 89.

[note: 111] R&T Defendants' closing submissions, para 93; 14 AB 4179.

[note: 112] R&T Defendants' closing submissions, paras 179-180.

[note: 113] 11 AB 3090.

[note: 114] NE 25/9/2014, p 94 (line 24) – p 97 (line 17).

[note: 115] NE 26/9/2014, p 22 (line 4) – p 28 (line 9).

[note: 116] Plaintiffs' closing submissions, para 338.

[note: 117] Revised SOC, para 34(iv).

[note: 118] R&T Defendants' closing submissions, para 381.

[note: 119] Plaintiffs' reply closing submissions, p 90.

[note: 120] R&T Defendants' closing submissions, para 362.

[note: 121] R&T Defendants' further closing submissions, para 45–46.

[note: 122] Plaintiffs' further reply submissions, para 6.

[note: 123] Statement of Claim (Amendment No. 2), 18/2/2011, para 50(i), Plaintiffs' Setting-Down Bundle, p 91.

[note: 124] Plaintiffs' closing submissions, paras 373-385.

[note: 125] 11 AB 3285.

[note: 126] Plaintiffs' closing submissions, para 11(c).

[note: 127] R&T Defendants' closing submissions, paras 209-215.

[note: 128] Plaintiffs' closing submissions, para 443.

[note: 129] Plaintiffs' closing submissions, para 444.

[note: 130] NE 2/9/2014, p 39 (line 19) to p 40 (line 20).

[note: 131] R&T Defendants' closing submissions, paras 220-222.

[note: 132] Plaintiffs' closing submissions, paras 470–480.

[note: 133] NE 29/9/2014, p 74 (lines 24-25) to p 75 (lines 1-23).

[note: 134] R&T Defendants' closing submissions, para 256.

[note: 135] Plaintiffs' closing submissions, paras 389-391.

[note: 136] 12 AB 3611.

[note: 137] Plaintiffs' closing submissions, paras 388-418.

[note: 138] NE 22/8/2014, p 5 (lines 18-25) and p 6 (lines 1-16).

[note: 139] NE 13/8/2014, p 27 (lines 7-25); p 28 (lines 1-14).

[note: 140] NE 13/8/2014, p 10 (lines 12-25) to p 11 (lines 1-15).

[note: 141] 15 AB 4363.

[note: 142] Plaintiffs' closing submissions, para 419.

[note: 143] NE 21/8/2014, p 60 (lines 3–13).

[note: 144] NE 21/8/2014, p 59 (lines 4–20) .

[note: 145] NE 20/8/2014, p 47 (lines 16-21) (Johnny Yeo).

[note: 146] 8th Defendant's reply to plaintiffs' closing submissions, paras 288-304.

[note: 147] 5th Defendant's closing submissions, para 59; 8th Defendant's reply to plaintiffs' closing submissions, para 116.

[note: 148] 5th Defendant's closing submissions, paras 61-64.

[note: 149] 5th Defendant's closing submissions, paras 53-57.

[note: 150] Plaintiffs' reply closing submissions, p 97.

[note: 151] NE 26/9/2014, p 100(line 5) – p 103(line 22).