Lim Koon Park *v* Yap Jin Meng Bryan and others
[2012] SGHC 159

Case Number : Suit 184 of 2010/Z

Decision Date : 07 August 2012

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Josephine Choo and Emily Su (WongPartnership LLP) for the plaintiff and third defendant; Vinodh Coomaraswamy SC, Georgina Lum and Victoria Ho (Shook Lin & Bok LLP) for the first and second defendants.

Parties : Lim Koon Park — Yap Jin Meng Bryan and others

Contract – Oral Agreement – Misrepresentation

Companies – Minority Oppression – Breach of Director's Duties

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 107 of 2012 (Suit No 184 of 2010) was allowed by the Court of Appeal on 22 July 2013. See [2013] SGCA 41.]

7 August 2012

Lai Siu Chiu J:

Introduction

1 This suit centres around two properties, situated at Nos. 428 and 434 River Valley Road, Singapore ("the properties"), during the heady days of property investment before the 2008 global financial crisis. The main actors sought to leverage on their collective expertise to embark on a joint venture to acquire, possibly develop, and eventually sell the properties for a profit. Lim Koon Park ("the plaintiff") was the architect, Yap Jin Meng Bryan ("the first defendant") was the financier, Lim Geok Lin Andy ("Andy") was the seasoned property developer while Tan Swee Hu Clarence ("Clarence") was the administrator. Wee Pek Joon ("the third defendant"), the wife of the plaintiff, was joined as an unwilling co-defendant to this action. Riverwealth Pte Ltd ("the second defendant") was the company incorporated to acquire and hold the properties until they could be sold.

The facts

The background

2 In 2006, the first defendant was a high-flying banker in the Asset Management Division of Deutsche Bank Group ("the Bank"). In the course of sourcing out potential real estate projects for the Bank, the first defendant consulted and had regular discussions with Andy, an old friend, whose family business dealt in building materials and real estate development. Andy eventually introduced the first defendant to the plaintiff, who joined the regular discussions, and the three became fast friends. The first defendant and the plaintiff saw their relationship as being mutually beneficial – the first defendant sought to tap the industry knowledge of the plaintiff (as he is an architect) while the plaintiff had hopes of being appointed by the Bank as a project manager on one of the potential real estate projects.

3 While nothing did materialise as far as the Bank was concerned, the seeds of future cooperation between the parties were sown as the first defendant entertained thoughts of investing personally in smaller scale projects, and was keen to leverage on the expertise and industry knowledge of both Andy and the plaintiff. This led to the incorporation of Land Acquisition Advisory N Development Pte Ltd ("LAAnD") on 10 May 2007, with Clarence (a trusted friend of the first defendant) holding 50% of the shares, the plaintiff 25% of the shares, and Andy the remaining 25%. The first defendant did not take up any shareholding as he was still with the Bank.

Surfacing of the properties and incorporation of the second defendant

4 In early July 2007, the plaintiff informed the first defendant, Andy and Clarence that No 434 River Valley Road ("No 434") was up for sale. The erstwhile owner of No 434 was ExxonMobil Asia Pacific Pte Ltd ("Exxon"). The plaintiff learnt about the sale as he was engaged by CB Richard Ellis ("CBRE"), who represented Exxon, to assist them in submitting an Outline Application to the Urban Redevelopment Authority ("URA") for the development of No 434 into residential flats with attic and swimming pool. In that Outline Application submitted to the URA, the gross plot ratio of No 434 was stated to be 1.4.

5 The plaintiff, however, believed that it was possible to secure approval from the URA for a higher plot ratio of 2.8 for No 434 and duly communicated this to the first defendant, Andy and Clarence. This understandably sparked great enthusiasm among the foursome as a higher plot ratio meant that the property could be developed at a greater intensity, meaning there was significant commercial gain to be had by purchasing No 434 (which plot ratio was perceived by the market to be 1.4), applying for the plot ratio to be increased to 2.8 and then selling or developing the property. Eager to take advantage of what appeared to be an attractive commercial opportunity, the parties arranged a consultation in September 2007 with one Timothy Lee ("Lee"), a senior planner at the URA. At that meeting, the plaintiff, being an architect and the only one with the industry knowledge, led the discussions. Following the meeting, the parties decided to proceed with their plan as there was money to be made.

6 Subsequently, on 28 September 2007, the parties incorporated the second defendant. At incorporation, the directors and shareholders of the second defendant were Andy (50% shareholding), the third defendant (25% shareholding) and Clarence (25% shareholding). The first defendant injected all of the initial paid-up capital of the company ($10,000) and held 50% beneficial interest through the shareholdings of Andy and Clarence. This arrangement was adopted as the first defendant was still a director of the Bank and was sensitive about his disclosure obligations. The third defendant took up the 25% shareholding in accordance with the plaintiff's preference and no one objected.

7 As stated in [1], the second defendant was incorporated as a special investment vehicle for the specific purpose of purchasing the properties. On 18 December 2007, the option to purchase No 434 was signed. The parties also began negotiations for the purchase of the adjoining plot at No. 428 River Valley Road ("No 428") as they believed that they could maximise returns by selling, or developing, the two properties together. On 6 March 2008, the option to purchase No 428 was inked.

Financing

8 Financing was critical, especially since this was the parties' maiden foray into property investment as a team. The bulk of the requisite funds came from Hong Leong Finance, which provided a $30m loan to the second defendant, equivalent to 61.8% of the purchase price of the properties (which was $48.5m). The loan was guaranteed by the first defendant, the plaintiff, and Andy, jointly and severally. In addition, the first defendant extended a personal loan of $22.58m to the second

defendant, and injected all of the second defendant's equity capital ($1m).

The first defendant leaves the Bank

9 Around April 2008, the first defendant left the Bank and became a director of the second defendant. He also assumed legal ownership of 50% of the shares of the second defendant, hitherto held on his behalf by Andy and Clarence, and thereby became the majority shareholder of the second defendant. Around this time, Daun Consulting Singapore Private Limited ("Daun") was also incorporated, as a vehicle through which the first defendant and Clarence were to provide management services to the second defendant. The plaintiff was also officially appointed architect for the project through his firm, Park+Associates Pte Ltd.

Dark clouds gather

10 Meanwhile, a major financial storm was brewing. Jones Lang LaSalle ("JLL") had initially valued the properties at $80m with a maximum plot ratio of 2.8. Based on this valuation, the second defendant had engaged CBRE as its marketing agent for an exclusive period of 4 months. Unfortunately, the financial tsunami hit the shores of Singapore around that time, the property market moved southward and there was no investor or buyer in sight. This put the parties in a financial bind as the lukewarm property market led to an increased holding period for the properties; that meant that the first defendant, who was the sole financier of the project, had to pump even more money into the venture to meet the additional financing costs (interest payments) that were incurred.

Relations thaw

11 The erstwhile marriage of convenience between the parties soon crumbled under the stress and vicissitudes of the market. Given the extra cash he had to inject and his increased risk exposure, the first defendant wanted the shares held by Andy and the third defendant to be returned to him, or for them to pay for those shares. The honeymoon, so to speak, was over. Andy decided to give up his shares and completed the transfer of all his shares to the first defendant on 27 March 2009. The third defendant returned 12% of her shareholding to the first defendant but refused to return the remainder.

12 Earlier, around March 2008, the parties had also started to discuss how profits, if any, were to be shared. This was the gravamen of the dispute before the court – the parties took diametrically opposed positions which will be discussed later. It suffices to say at this juncture that the dispute about profit sharing caused the breakdown in the parties' relationship.

13 The infighting manifested itself in the boardroom of the second defendant. Matters escalated and the third defendant was told that she should either pay for her remaining 13% stake in the second defendant or resign as a director. The plaintiff on his part started to question Daun's role in Riverwealth, and demanded fees for his architectural services. The third defendant, in her erstwhile capacity as a director of the second defendant, requested for financial records and account books. She was eventually removed as a director of the second defendant on 12 August 2009 at an extraordinary general meeting ("EGM").

14 Meanwhile, the first defendant and Clarence started probing into how the plaintiff arrived at the view that the maximum plot ratio of the properties could be increased to 2.8. This was after they heard from different sources that the properties never had a maximum plot ratio of 1.4. Rather, they were told that at all material times, the properties already had a plot ratio of 2.8. After consulting CBRE, Lee (from URA), and Dr Goh Chong Chia ("Dr Goh") (who was the first and second defendants'

expert), they took the view that the plaintiff had misrepresented the applicable maximum plot ratio of the properties since 2006.

Sale of the properties

15 On 19 September 2009, another EGM of the second defendant was held, and it was resolved that the properties would be sold "on such terms and to such parties as may be approved by the directors". This EGM was attended by the third defendant's proxy, Srinivasan s/o Namasivayam ("Srinivasan"), who is a lawyer. At the EGM, Srinivasan informed the first defendant and Clarence that Colliers International ("Colliers") had valued the properties at $62.5m, based on a desktop valuation, and that there had also been an expression of interest from an anonymous third party, to purchase the properties at $60m. The first defendant, however, was of the view that neither offer was credible: the valuation by Colliers had not been authorised by the directors of the second defendant and it was a mere desktop valuation, and it was impossible to ascertain the veracity and credibility of the expression of interest – it was from an individual who would not reveal his identity.

16 A few days later, on 22 September 2009, an offer to purchase the properties for the sum of $60.08m was received by the second defendant from Tan Swee Meng ("Bill") and Ee Guan Hui Gilbert ("Ee"). The offer to purchase was accompanied by an immediate 1% down-payment of $600,800. The second defendant accepted the offer on the same day. Bill and Ee eventually nominated Oxley JV Pte Ltd ("Oxley JV") as a special purpose vehicle to purchase the properties. The sale and purchase agreement was signed on 8 October 2009. The plaintiff alleged that the sale to Oxley JV was at an undervalue as Oxley JV had substantially similar shareholders and directors with Oxley Wealth Pte Ltd ("Oxley Wealth"), in which company the first defendant was a director between 3 and 24 September 2009.

Legal proceedings

17 Meanwhile, the plaintiff had sued the second defendant in Suits No 438 of 2009 and No 344 of 2010 for his architectural fees. Letters were also exchanged between the parties' solicitors leading up to these proceedings. This suit was commenced on 16 March 2010.

The pleadings

The Statement of Claim ("SOC")

18 The plaintiff's case was that on or about 24 September 2006, discussions between the parties culminated in an oral agreement, under which the profit from any proposed joint venture entered into by the parties would be shared in the following *fixed* proportion: 40% to the first defendant; 30% to the plaintiff; and 30% to Andy. According to the plaintiff, this oral agreement was then varied in May 2007, reducing the plaintiff's and Andy's share of the profit to 25% each, in consideration of Clarence's participation in the venture. The varied oral agreement thus purportedly reflected the following *fixed* profit distribution: 50% to the first defendant and 25% each to the plaintiff and Andy. The plaintiff further asserted that LAAnD was incorporated to reflect the varied oral agreement. The plaintiff further claimed that it was a principal term of the oral agreement, and later, the varied oral agreement, that he was to use his expertise and resources as an architect to introduce developments with collective sale potential to financial institutions through the firstdefendant's contacts.

19 The plaintiff pleaded that it was implied that the parties would not act in a manner contrary to the interests of the second defendant. In this regard, the plaintiff alleged that the first defendant had breached the varied oral agreement by, *inter alia*:

(a) Failing to pay the plaintiff his 25% of the profits from the sale of the properties;

(b) Selling the properties to Oxley JV at an undervalue;

(c) Diverting profits to Daun; and

(d) Charging the second defendant excessive interest rates for the personal loan extended to the former.

20 The plaintiff also alleged that the first defendant, as the majority shareholder of the second defendant, had oppressed the plaintiff and the third defendant. In particular, he asserted that the first defendant had unfairly excluded the plaintiff and the third defendant from management decisions relating to the purchase and sale of the properties, unfairly procured the removal of the third defendant as director of the second defendant, diluted the plaintiff's/third defendant's shareholding and refused to adhere to the plaintiff's request for information and documents. It was also alleged that the first defendant had breached his fiduciary duties as a director of the second defendant by selling the properties to Oxley JV at an undervalue, in what the plaintiff believed was an interested-person transaction.

21 At this juncture, it should be noted that the plaintiff's pleadings were somewhat strange. At [3] of the SOC, it was said:

> WPJ (the 3rd defendant) appointed the plaintiff as her attorney with authority to do all acts relating to her shareholding and/or directorship in the 2nd defendant, including but not limited to bringing an action on her behalf. In the circumstances, references to WPJ shall be synonymous to the plaintiff (and vice versa) unless the context otherwise requires.

22 Notwithstanding what was stated in [3] of the SOC, the plaintiff and the third defendant could not possibly act in "synonymous" capacities. The plaintiff was neither a shareholder nor a director of the second defendant – he thus had no *locus standi* to bring a claim for oppression and breach of fiduciary duty. The third defendant on the other hand was not party to any of the alleged oral agreements and she therefore had no *locus standi* to sue on them either. Neither was it claimed that the third defendant was holding her shares in the second defendant on behalf of the plaintiff who was the beneficial owner. The plaintiff and third defendant were in reality acting in different capacities and the attempt to somehow merge their claims as one was confusing, to say the least.

The defence and counterclaim

23 On the alleged oral agreement and varied oral agreement, the first defendant averred that no such agreements were reached. According to the first defendant, at that stage, the parties were only involved in informal discussions on potential opportunities to work together in the future, and no agreement had been reached. There being no oral or varied oral agreement, the first defendant averred that LAAnD was incorporated merely to evaluate property development opportunities in Singapore and the region.

24 The first defendant further averred that, in or about July 2007, the plaintiff informed the parties of the availability of No 434 for sale, that the property had a plot ratio of 1.4, and that he was confident of obtaining approval to increase the plot ratio to 2.8. In reliance on the plaintiff's representations about the plot ratio, the parties agreed to incorporate the second defendant to purchase the properties on the following terms and conditions:

(a) The plaintiff was to provide such professional services as was necessary to increase the approved plot ratio of the properties from 1.4 to 2.8;

(b) The first defendant was to be responsible for arranging financing for the purchase of the properties; and

(c) The first defendant was to provide the initial start-up capital for the second defendant and any cash component over and above the bank loan required for the purchase of the properties.

25 Significantly, the first defendant averred that the parties agreed that profits were to be shared in the *indicative* proportion of 50% to the first defendant and Clarence, 25% to Andy, and 25% to the plaintiff, but only if the following conditions were achieved:

(a) The properties were to be re-sold within a short time frame of about 4 months from the time they were acquired;

(b) The properties were to be re-sold at the indicative price range of about $80m; and

(c) The risks and costs of holding the properties over time were minimised in view of the declining property market at that time.

26 However, as the properties could not be sold within the stipulated four month period at the price range of between $60m to $80m, and as the property market was declining leading to increased costs of holding, the first defendant averred that the basis for profit-sharing no longer applied. Instead, the first defendant averred that it was agreed between the parties that the third defendant and Andy would either transfer their shareholding in the second defendant to the first defendant or pay for their shares, since it was the first defendant who had funded the purchase of the properties and assumed all the risks of holding the same. According to the first defendant, the plaintiff and/or the third defendant breached this agreement by transferring only 12% of their shareholdings in the second defendant to him and retaining the remaining 13%.

27 Turning to the plaintiff's allegation that the properties were sold to Oxley JV at an undervalue, the first defendant averred that the decision to sell the properties was one taken in good faith and in the best interests of the second defendant, duly approved by the second defendant's shareholders and board of directors at an Extraordinary General Meeting ("EGM") convened on 19 September 2009. The first defendant also denied any relationship with Oxley JV. The first defendant further averred that it had not diverted profit to Daun and that the loan from him to the second defendant was properly authorised. The first defendant also denied any oppression of the plaintiff and/or the third defendant.

28 The first defendant then counterclaimed that the representation made by the plaintiff, about No 434 having a plot ratio of 1.4, was made fraudulently as the plaintiff knew all along that the plot ratio referenced in the Master Plan 2008 was already 2.8, and that no further application needed to be made to URA to increase the plot ratio from 1.4 to 2.8. Alternatively, the first defendant pleaded s 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed) ("Misrepresentation Act"). At trial, the first defendant amended his defence to plead that the alleged representation made by the plaintiff was untrue, not because the plot ratio was already 2.8 at that time (as originally pleaded), but rather because the plot ratio was never referenced at 1.4.

The trial

29 Given that the case involved disputes about the existence of oral agreements and misrepresentations, much turned on the testimonies of the key factual witnesses who appeared in the course of the 14 days trial. Four of the witnesses were the plaintiff's, while the remaining eight testified for the first and second defendants.

The plaintiff's witnesses

The third defendant

30 The plaintiff's first witness was his wife. The third defendant's evidence had little relevance to most of the issues, as she had no personal knowledge of the interactions involving the plaintiff, Andy, and the first defendant. While her testimony was relevant to the alleged instances of minority oppression and breach of fiduciary duties by the first defendant, it was evident that it was the plaintiff who was in the driver's seat in relation to all dealings with the second defendant – the third defendant's involvement was minimal. Indeed, the third defendant would not even be a party to the present action had she not been unwillingly joined as a co-defendant. Overall, I placed very little weight on the third defendant's testimony.

31 The third defendant's testimony, however, was revealing for the following limited purposes. First, she confirmed that the shareholding percentage in the second defendant was completely delinked from the issue of entitlement to profits. Second, in the light of her testimony that the shareholding in the second defendant was delinked from the issue of entitlement to profits, the third defendant's claim against the first and second defendants for profits was practically hollow [note: 1] :

Q: You were asked also for an account of the profits made pursuant to the sale of the property. Again, if your husband is correct, this is meaningless for you because none of those profits are coming to you anyway.

...

Q: Listen very carefully to what I'm saying. You, Mdm Wee Pek Joon, have never agreed with anyone at any time that you should get 25 per cent of the profit from the sale of 428 and 434 River Valley Road. Isn't that correct?

A: Yes, the profit goes to my husband.

...

Q: Now, again, if you look at paragraph e, you are asking for losses and damages to be assessed and/or equitable compensation from sale of the property by the second defendant at an undervalue. If the second defendant sold the property at an undervalue, again it makes no difference to you, accordingly to your case, because the money goes to your husband; right?

A: Yeah, the money will go to my husband.

Q: So you would suffer no loss if the sale goes through at an undervalue. You, Mdm Wee Pek Joon.

A: Me personally?

Q: Yes.

A: Yes.

Q: "Yes", meaning you would suffer no loss?

A: Yeah, I won't suffer any loss.

Q: Paragraph f, you were asking for an order for Bryan Yap to purchase your shares at a price to be determined by a valuer. Again, you never paid for your shares, right? Not a cent?

A: Yes, I never paid.

Q: According to you and your husband, whatever profits from the venture which he claims to be entitled to under the agreement goes to him, not you; right?

A: Yes.

32 In relation to the issue of oppression, the third defendant conceded that she was happy for the second defendant to be managed by the first defendant and Clarence as the first defendant was the majority owner [note: 2] :

Q: It's not correct then to say that you were excluded from the management of Riverwealth. Nobody excluded you; you just didn't want to be involved.

A: I didn't say I didn't want to be involved, but I'm happy for you to run it if you want to. After all, you have 75---74 per cent shares.

Q: Correct. So you left it to the majority to run.

A: I left it to them to run, yes.

The third defendant also admitted that she was merely acquainted with the first defendant, Clarence and Andy, and thus had no reason to either trust or have confidence in them.

Andy

33 The next witness to give evidence for the plaintiff was Andy. Andy was an important factual witness as he was involved from the beginning, first in the events leading to the formation of LAAnD, and later, in the formation of the second defendant for the purpose of acquiring the properties.

34 Under cross-examination, Andy testified that an oral agreement was entered into by the parties in July 2007, at a meeting in the first defendant's house, the terms of which (upon eventual variation) entitled him and the plaintiff each to 25% of the profits from the eventual sale of the properties. In other words, according to Andy, the profit sharing was cast in stone at around July 2007, and the parties were entitled to a fixed share of any profits from the eventual sale of the properties, regardless of the circumstances.

35 However, in his subsequent cross-examination, Andy agreed that the concept of return on equity was one that was important to the first defendant at that time, in the sense that if the first defendant ended up putting in more money into the venture, the first defendant would expect greater

"upside". This can be seen from the following exchange between Andy and counsel for the first and second defendants (Mr Coomaraswamy) [note: 3] :

Q: The more money he puts in, the more he has at risk, right?

A: That's correct.

Q: If the upside is small, he will want a bigger share of that to compensate him for the risk.

A: That's normal, yes.

Q: If the upside is large, he may be prepared to take a smaller percentage, because that gives him a bigger number in absolute terms. Right?

A: When the upside is large?

Q: Yes. If the profit is large, he'll take a smaller percentage because the absolute number is still bigger.

A: That's correct.

Q: All of these factors were important to Mr Yap.

A: That's correct.

Q: Every one of you---you, Mr Clarence Tan, and Mr Lim Koon Park---knew that well before 434 River Valley Road was introduced to you?

A: That's correct.

36 It was also revealed that even as at 9 November 2007, as reflected in an email sent by Andy, the parties appeared to be still in discussions about "profit banding", and that this was "subject to fine tuning". This dented Andy's version of events somewhat for one would expect the parties to be taken aback when the first defendant brought up the issue of "profit banding" in November 2007, if the parties had allegedly reached an oral agreement on profit sharing [note: 4] :

Q: According to you, in July 2007 you had an agreement to get 25 per cent profit share?

A: That's correct.

Q: That agreement was firm, unconditional, cast in stone?

A: That's correct. Yes.

Q: If that were the case, in November 2007 when Mr Yap starts talking about profit banding scheme, you must have been taken aback, "This is not what we agreed"?

A: That's correct, yes, I was.

Q: If that were true, in this e-mail you would have said, "Even though this is not what we agreed, I will go along with this profit banding scheme". Wouldn't that have been reasonable?

Instead, Andy's reply in the email of 9 November 2007 made no reference to the oral agreement on profit sharing that had supposedly been concluded. On the contrary, the email indicated that the parties were amenable to further discussions on the first defendant's suggestion on "profit banding".

37 Indeed, as Andy's cross-examination continued, there were more indications that profit sharing as at November 2007 remained fluid. In an email sent on 20 November 2007 by the first defendant, which was a response to an earlier email sent by Clarence summing up the key points of a meeting which took place on 15 November 2007, the first defendant wrote that "this profit sharing agreement for all co directors should be hammered out only after we LAY our hands on the land".

38 In yet another email thread, by an email sent on 15 November 2007, the first defendant threatened to "walk away and remain as friends" if the profit sharing plan did not go as he had proposed. Andy responded by email on the same day, but it was interesting to note that he did not actually make any reference to the 25% profit share, which he claimed was cast in stone by then.

39 In fact, the first defendant continued sending emails to the parties proposing different matrices for profit sharing. For instance, in an email dated 30 April 2008, the first defendant proposed different profit bandings based on different possible exit valuations of the properties. During cross-examination, when queried whether he had raised the fact that profit sharing was already agreed to by the first defendant, Andy's reply was consistently "no". Even up to August 2008, after the parties had bought the properties and had enlisted CBRE to do the marketing, the issue of profit sharing appeared to be still in flux, as was evident from yet another email sent by the first defendant on 2 August 2008. The following exchange during the cross-examination of Andy illustrates the point [note: 5] :

Q: If you look at the email on page 1571, the paragraph that begins "FYI", these worksheets produce a profit sharing of 50 percent for Mr Yap and 50 percent for you and Mr Lim Koon Park, all the way to 65 per cent for Mr Yap and 35 per cent for you and Mr Lim Koon Park; right?

A: I think by this time we were discussing possible exit routes.

Q: Perhaps you could answer my question first. What was being proposed were profit shares from 50 per cent for Mr Yap, 50 per cent for you and Mr Lim Koon Park, ranging all the way to 65 per cent for Mr Yap and 35 per cent for you and Mr Lim Koon Park; right?

A: That's correct.

Q: Again you didn't reply to this email to say "We have an agreement that I will get 25 per cent"?

A: No, I did not.

40 In relation to the plot ratio of the properties, Andy testified that as part of the parties' analysis in deciding whether to make a bid for No 434, they had considered a letter containing the grant of outline planning permission from the URA to the plaintiff's architectural firm dated 1 February 2007, which stated that the "Allowable plot ratio" for the property was 1.4. The letter was shown to the parties by the plaintiff and according to Andy, the parties were given the impression that the plot ratio of No 434 was 1.4 and the plaintiff did not suggest otherwise.

41 Overall, while I found Andy to be a measured and credible witness, his testimony raised doubts as to whether an oral agreement on profit sharing was reached in July 2007; the documentary

evidence seemed to indicate otherwise. Andy's testimony on the plot ratio also suggested that the parties were under the impression that the plot ratio of No 434 was 1.4 before the purchase and, that the impression was given by the plaintiff.

The plaintiff

42 The plaintiff's testimony was of considerable importance as he was the main protagonist in this dispute. The plaintiff has been registered as an architect under the Architects Act (Cap 12, 2000 Rev Ed) for about 14 years. He is also a qualified person ("QP") under the Planning Act (Cap 232, 1998 Rev Ed). He was unfortunately evasive and defensive during cross-examination and this dented his credibility.

43 In the course of his testimony, questions were raised about the plaintiff's competence as an architect. As an example, when queried about how a competent architect would ascertain the maximum allowable plot ratio of a piece of land when conducting a redevelopment feasibility study, the plaintiff, somewhat surprisingly, claimed that he did not know that if the plot ratio was not set out in a Master Plan, it could be contained in a Government Gazette notification. By the plaintiff's own admission, as a competent architect and QP, this was something he ought to have known.

44 The plaintiff also acknowledged that, as a matter of fact, by a Government Gazette notice dated 12 May 2000, Master Plan 1998 had been amended such that the maximum permissible plot ratio of the properties was specified as 2.8. However, and again by the plaintiff's own admission, when submitting the request for outline planning permission on behalf of Exxon on 9 June 2006, he had merely transcribed information contained in a CBRE valuation report (which showed that the plot ratio of the properties was 1.4), without verifying the information as a competent architect should. The plaintiff's excuse that he was merely doing administrative or clerical work, was shown up in the following line of questioning by Mr Coomaraswarmy [note: 6] :

Q: Mr Lim, your application for planning permission at pages 913 to 915 was sent on your firm's letterhead, right?

A: Yes.

…

Q: In fact, on page 915 the URA requires you to declare that the particulars given are true and correct, right?

A: That's right.

Q: They require you to certify and declare the submissions are in accordance with the planning or conversation submission requirements; right?

A: Yes, that's on the form.

Q: And you certified and declared to the URA when you submitted this?

A: Yes.

Having realised by then that he was on dangerous ground, the plaintiff attempted to extricate himself by asserting that it was good enough to check only the Master Plan as he had done, without

checking other sources, if no plot ratio was indicated on the Master Plan. This was despite the plaintiff's earlier concession that a competent architect and QP ought to have checked the relevant Government Gazette if the plot ratio of a property was not set out in a Master Plan.

45 It should also be noted that the plaintiff had claimed in his affidavit of evidence-in-chief (AEIC) that the information on the plot ratio was provided to him by Exxon through CBRE. However, this too was shown to be untrue, as Exxon had written to the first and second defendants' lawyers to explain that the information on the plot ratio and "zoning" of the properties was provided by the plaintiff's architectural firm to Exxon through CBRE.

46 In the light of the foregoing observations, I entertained serious doubts on the plaintiff's credibility.

Lim Jit Kgoh

47 The final witness for the plaintiff was Lim Jit Kgoh ("Lim"), a trained architect and the plaintiff's expert. Lim's evidence related primarily to the issue of what the plot ratios of the properties were, given that there were no numerical values indicated on Master Plan 2003, which was the applicable Master Plan.

48 In essence, Lim's testimony supported his assertion that as there was no numerical indication of the plot ratio of the properties on Master Plan 2003, one could not be sure what the plot ratio was, unless one verified with the URA. According to Lim, this was so despite the Government Gazette of 12 May 2000.

49 I placed little weight on Lim's evidence, as he appeared to be over-eager to put forward the plaintiff's case without actually answering the questions put to him during cross-examination. In fact, in cross-examination, most of Lim's answers appeared to be non-sequitur as he was merely interested in reiterating the point he made in [48].

The first and second defendants' witnesses

Ching Chiat Kwong

50 The first witness for the first and second defendants was Ching Chiat Kwong ("Ching"). Ching is a director of both Oxley JV and Oxley Wealth. His evidence pertained to the events surrounding the sale of the properties, as well as the question of whether the first defendant had any involvement with Oxley JV, the entity that eventually purchased the properties from the second defendant.

51 While counsel for the plaintiff (Ms Choo) tried to suggest repeatedly during Ching's cross-examination that it was more than just a mere coincidence that the first defendant's resignation from Oxley Wealth, the incorporation of Oxley JV, and the sale of the properties by the second defendant to Oxley JV, all took place at around the same time, Ching maintained that Oxley JV and Oxley Wealth were different entities. According to Ching, not only were the two companies different entities, the first defendant had actually deliberately sold his shareholding in Oxley Wealth when the sale of the properties was contemplated, in order to avoid the appearance of impropriety. In addition, it also transpired in the course of his cross-examination that while Ching was the person with the means, it was Bill who dealt with most of the matters involving Oxley JV. The evidence of Ching was inconclusive in relation to the plaintiff's allegation that the sale of the properties was an interested party transaction.

Timothy Lee

52 The second witness for the first and second defendants was Lee. His evidence was most useful as Lee clarified how a Master Plan works.

53 First, Lee made clear that the relevant Master Plans (1998 and 2003) were never meant to be a reflection of what was on site, but were simply a reflection of planning intention, or a guide to future developments. He next explained that the plot ratios indicated on the Master Plan referred to the maximum permissible plot ratio, although the written statement, which accompanied the Master Plan, also made provision for bonus plot ratios and incentive plot ratios. Significantly, Lee also stated that when the Master Plan is revised every five years, the new Master Plan would supercede the previous Master Plan. The following exchange during the cross-examination of Lee was illuminating [note: 7] :

Q: Can you explain to the court, if there had been a duly approved and gazetted amendment plan which specified a plot ratio of 2.8 for the subject site, what is the effect of the Master Plan being silent?

A: It would depend on when the amendment plan was made.

Q: To give you the chronology, Mr Lee, the amendment plan was approved by the Minister and gazetted in May 2000.

Court: 12 May 2000.

...

Q: Mr Lim, the question really is: what is the effect of the 2008 Master Plan being silent on the plot ratio for the subject site on this gazetted and approved amendment plan?

A: As I had explained earlier, we will determine a development application in accordance, in conformity to the prevailing Master Plan at that point in time.

So if I were to receive an application today, the prevailing Master Plan today is the Master Plan 2008.

Court: Yes.

A: Right. For which we will then interpret *solely* using the prevailing Master Plan.

[emphasis added]

54 In other words, Lee confirmed that since there was no numerical indication of the plot ratios in Master Plan 2003 and then in Master Plan 2008 despite the Government Gazette notification of 12 May 2000, one ought to interpret Master Plans 2003 and 2008 without reference to the Gazette notification of 12 May 2000. Indeed, given that both Master Plans 2003 and 2008 did not stipulate a plot ratio for the properties, URA's position was that the plot ratio was subject to evaluation and determination by URA. In short, at all material times, the maximum permissible plot ratio of the properties was never 2.8.

55 Lee further explained that typically, when the plot ratio is not stated, one would take the cue from the surrounding areas, as planning is never on a site specific basis. In relation to the properties, Lee opined that the fact that the plot ratios of the surrounding pieces of land were all 2.8 made it likely that the properties would similarly be zoned 2.8, although one could not be sure until an outline or a formal application was made.

56 Finally, Lee confirmed that as stated in an email sent by him to the first defendant and Clarence on 22 September 2009, just because URA had given approval for an earlier outline planning permission at a proposed plot ratio of 1.4, did not mean that the maximum permissible plot ratio was 1.4. As Lee explained, the zoning and plot ratio of the subject site would remain as per the relevant Master Plan, because the grant of outline planning permission did not in itself amend the Master Plan. Importantly, Lee stated that the URA had never indicated that the plot ratio for the properties was 1.4. Indeed, in response to a suggestion by Ms Choo that the plot ratio of the properties was 1.4 in the light of the outline planning permission that was granted, he answered as follows [note: 8] :

> A: I say again, the outline planning permission was issued in response to a proposal submitted by the architect, at 1.4. So it is not an indication.
>
> Court: Of the actual plot ratio of the site?
>
> A: Of the actual plot ratio, or a reflection of the URA's planning intention for the particular site.

57 Quite apart from his role as an authority on URA matters, Lee was the URA officer who met with the parties in September 2007 to address their queries about the properties. Unfortunately however, as the nature of his job entailed multiple meetings with numerous parties, during which plot ratios were commonly discussed, Lee was unable to recollect any details of the meeting in September 2007.

The first defendant

58 The first defendant was the third witness. Like the plaintiff, the first defendant played a central role in the dispute and his evidence was also of considerable importance. Unlike the plaintiff however, I found that not only was the first defendant a savvy investor who knew what he was doing, he was also a credible witness whose testimony stood up to scrutiny.

59 In response to Ms Choo's suggestion that the properties were sold at an undervalue (as he and Clarence, as directors of the second defendant, only considered a valuation by JLL without considering the other valuations tabled by the third defendant's proxy at the EGM of 19th September 2009), the first defendant responded that it was reasonable to consider only JLL's valuation as the firm was familiar with the properties, having been involved from the stage when applications were made to the URA to increase the plot ratio. [note: 9] He indicated that the Colliers' valuation tabled by the third defendant's proxy was not considered as it was only a desktop valuation and not a full valuation. He added later quite candidly that he was also concerned about possible mischief from the third defendant and the plaintiff. In relation to the other valuation from DTZ tabled by the third defendant's legal proxy, the first defendant explained that it was not considered as it was based on an indicative bid from an unknown party. [note: 10]

60 Later, when Ms Choo confronted the first defendant with Andy's assertion that the second defendant originated from the concept in LAAnD, the first defendant's answer was forthright [note: 11] :

> A: I disagree with Andy's comment. He's taking too much credit for that.

This was further elaborated on by the first defendant during re-examination [note: 12] :

A: LAAnD was conceptualised to be a marketing company, primarily, and if the parties in LAAnD, or LAAnD as a company itself wanted to participate in any development project, they would probably have to participate in any such project in that particular project SPV on---separate to LAAnD. So that was the conceptualisation.

61 Importantly, the first defendant maintained consistently throughout his cross-examination that the profit sharing was all along an *indicative* profit sharing arrangement which was never cast in stone. This was illustrated by the following exchange during cross-examination [note: 13] :

Q: I put it to you, Mr Yap, that by the time Mr Lim Koon Park introduced 434 River Valley Road to you, parties had already agreed that the profit sharing arising from this investment would be 50/25/25 in your favour, Mr Andy Lim and himself. You can agree or disagree.

A: As an indicative profit sharing, yes.

Q: It was not an indicative profit sharing, Mr Yap, it was a firm percentage that everybody agreed to.

A: It would have been a firm percentage if the properties could have been sold immediately for a certain number. If the venture had to be---to proceed on an extended period, then it is---it has to be indicative.

62 The first defendant further explained that commercially speaking, it was not typical for introducers to be participants in the profit sharing of such a deal. Rather, what was typically done would be for the introducer to get a fixed fee. However, the first defendant was amenable to an arrangement involving indicative profit sharing, which was why he had sent Andy and the plaintiff a matrix on November 2007 detailing the varying profit banding based on different scenarios. When Ms Choo put it to the first defendant that there was no reason for the plaintiff to bring the potential development to the parties unless he was assured of 25% profit, the first defendant disagreed. In re-examination, he gave the reason for his disagreement [note: 14] :

Q: Can you explain why [you] disagreed?

A: First of all, it's such [a] illogical statement to agree with. It's like I'm your private banker and I say, "I'm going to show you a very good investment, but I'm not going to tell you anything about it until you promise me 25 per cent"...

…

Then I said okay, hold on. A couple of things need to be verified: pricing, parameters, return on investment parameters, and verification of the fact that the plot ratio can indeed go higher.

63 During his re-examination, the first defendant also explained what he meant by "indicative" profit sharing [note: 15] :

...

A: ...So I said, "Andy, let me look at the numbers first and I'll try and come up with some sort of a method where I can arrange for this, but certain risk parameters must be controlled,

because I cannot be bearing all the downside and I cannot be bearing all the risk fully and only give you guys the upside". Because typically when you refer a good project you charge more fees, but you don't get a cast-in-stone profit share.

And that is the concept of "indicative". To be indicative, you must fix some of the moving parameters just to have a look at what the profit share might look like, and then you make decisions on how this profit share moves up or down when the parameters change.

...

The quickest exit would be to sell in the shortest space of time. The risks of the project had to be --- and my indicative profit consideration had to be limited to a short space of time...

…

So that's a limited space of time, because if you have a limited period of time of holding an asset, then your risk of the valuation of the asset going up or down is limited.

Then your risk is also limited by the exit price, if you sell fully or if you find a joint venture partner who wants to come in, but the minority shareholders...would have the opportunity to cash out at that point in time, or dilute or cash out and then come back in into the new venture.

And basically --- so it's time and exit price that are very critical, and also the amount of gearing that the bank will give, and the amount of gearing was discussed on a very early stage...

So all these three things basically will impact the return, and that impacts the total profit, made versus the total cash outlay, and then that impacts satisfying a minimal return to the provider of the cash and whether there's enough room to give a profit share, more generous or less generous, to the other two parties, Andy and Park.

64 The first defendant went on to explain why if the venture proceeded on an extended basis (which it did), profit sharing had to be indicative [note: 16] :

Q: ...Can you explain why it has to be indicative if the venture proceeds on an extended basis?

A: Yeah. Because as I just explained, the longer you hold an asset, the longer the uncertainty on your exit price. And that impacts the return. The longer you hold this property in the way the finance is structured, the more cash you have to pump in to hold it, so even if your exit price remains the same...

65 In relation to why late completion interest was not charged to Oxley JV, I also found the first defendant's explanation to be reasonable. In essence, the first defendant explained that Oxley JV, as buyers, were cooperative when the second defendant was in danger of losing the written permission for the properties. Thus, as a gesture of *quid pro quo*, no late completion interest was charged when Oxley JV had trouble getting their loan approved on time.

Dr Goh Chong Chia

66 Goh (DW4) was the first and second defendants' expert witness. He is a practising architect

with over 39 years of experience. Goh's main contribution was his opinion that the applicable plot ratio of the properties had been 2.8 since the amendment was made to the Master Plan 1998 via the Government Gazette dated 12 May 2000, and it remained at 2.8 even after Master Plan 2003 was published. However, I gave Goh's opinion little weight, in the light of Lee's evidence that as Master Plan 2003 remained silent on the plot ratios of the properties, one ought to interpret Master Plan 2003 without reference to the Government Gazette notification of 12 May 2000.

Clarence

67 The fifth witness for the first and second defendants was Clarence. In his testimony, Clarence largely reiterated the first defendant's version of the events. For instance, in relation to suggestions that the first defendant and himself had wrongly failed to consider the two other valuations for the properties, Clarence's response was that the DTZ offer was not considered as the identity of the offeror and the exact terms of the offer were unknown. As for the Colliers valuation, Clarence's position was again consistent with the first defendant's, which was that the Colliers valuation was merely a desktop valuation.

68 Clarence also testified that his shares in LAAnD were for his own benefit, and were not held on trust for the first defendant. Again, this was consistent with the evidence given by the first defendant.

69 On the whole, I found Clarence's evidence useful as corroboration of what the first defendant said, with added input on some of the material events of the dispute.

Tan Swee Meng (Bill)

70 Bill (DW6*)* testified for the first and second defendants. Bill is a director of Oxley JV, which purchased the properties. His testimony was brief and nothing turns on it. Ching had testified that he left most of the day to day management of Oxley JV to Bill. Yet Bill was not cross-examined on the first defendant's alleged secret interest in Oxley JV.

Tan Keng Chiam

71 Tan Keng Chiam ("Tan") is a professional valuer, and was the person who prepared the JLL valuation assessing the properties as being worth $58m. In relation to the different valuations of the properties, Tan (DW7*)* testified that the difference between the valuations of Colliers and the JLL was small, and that both parties may be right. More importantly, while he considered the Colliers valuation to be reasonable, given the small difference between the two valuations, he saw no reason to question his own valuation.

Gilbert Ee

72 The first and second defendants' last witness was Gilbert Ee ("Ee"). Ee (DW8) is a 40% shareholder of Oxley JV. While Ee admitted to having known the first defendant for some time, he steadfastly maintained that the first defendant never had any interest, direct or indirect, in his Oxley JV shares.

The findings

The alleged oral agreement

73 In Edwin Peel, *The Law of Contract* (Sweet & Maxwell, 13th Ed, 2011) ("*Treitel*") at 2-017, it is stated:

> **Continuing negotiations.** When parties carry on lengthy negotiations, it may be hard to say exactly when an offer has been made and accepted. As negotiations progress, each party may make concessions or new demands and the parties may dispute whether they had ever agreed at all. The court must then look at the whole correspondence and decide whether, on its true construction, the parties had agreed to the same terms. If so, there is a contract even though both parties, or one of them, had reservations not expressed in the correspondence...
>
> ...
>
> Businessmen do not, any more than the courts, find it easy to say precisely when they have reached agreement, and may continue to negotiate even after they appear to have agreed to the same terms. The court will then look at the entire course of the negotiations to decide whether an apparently unqualified acceptance did in fact conclude the agreement...

74 This would also appear to be the Singapore position. In *Projection Pte Ltd v The Tai Ping Insurance Co Ltd* [2001] 1 SLR(R) 798 ("*Projection*"), the Court of Appeal at [15] cited its earlier decision in *Aircharter World Pte Ltd v Kontena Nasional Bhd* [1999] 2 SLR(R) 440 at [30] for the following proposition:

> ...Under this test, once the parties have to all outward appearances agreed in the same terms on the same subject-matter, then neither can, generally, rely on some unexpressed qualification or reservation to show that he had not in fact agreed to the terms to which he had appeared to agree. Such subjective reservations of one party, therefore, do not prevent the formation of a contract...

75 What this means is that in instances where the parties engage in continuing negotiations, an objective test will be applied, *albeit* with some modifications to the traditional analysis of offer and acceptance, due to the obvious practical difficulties with identifying the particular instances of the offer and acceptance. The Court of Appeal in *Projection* elaborated on this at [16]:

> In the present case, the parties were involved in continuing negotiations, either directly or through the broker, Douglas, over a period of time. In such cases, the traditional analysis of offer and acceptance is not really helpful in determining the true position. In this regard, we agree with the observation expressed by Lord Denning MR in *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons* [1977] 2 Lloyd's Rep 5 at 10:
>
> > ... I do not much like the analysis in the text-books of inquiring whether there was an offer and acceptance, or a counter-offer, and so forth. I prefer to examine the whole of the documents in the case and decide from them whether the parties did reach an agreement upon all material terms in such circumstances that the proper inference is that they agreed to be bound by those terms from that time onwards.
>
> His Lordship repeated, in substance, his observation in *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd* [1979] 1 All ER 965 at 968, where he said:
>
> > I have much sympathy with the judge's approach to this case. In many of these cases our traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out-of-date. This was observed by Lord Wilberforce in *New Zealand Shipping Co Ltd v AM*

Satterthwaite [1974] 1 All ER 1015 at 1019-1020, [1975] AC 154 at 167. The better way is to look at all the documents passing between the parties and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points, even though there may be differences between the forms and conditions printed on the back of them.

76 The focus will thus be on the documents passing between the parties, or on the conduct of the parties, from which one tries to glean whether an agreement had been achieved on all material points.

77 Central to the plaintiff's case was that an oral agreement was entered into on 24 September 2006 and which was subsequently varied on May 2007, entitling him to 25% of the profits made from the sale of the properties. To show that there was such an agreement, the plaintiff relied on an email sent on 21 March 2007 by Andy to the first defendant and the plaintiff (see exhibit D-1), as the "most contemporaneous record" of that agreement. In that email, Andy referred to a "conclusive meeting" at which the parties agreed to a "4:3:3 set up" for the incorporation of LAAnD. I note however that exhibit D-1 and the thread of emails that followed were sent on 21 and 22 March 2007, more than six months *after* the plaintiff said the alleged oral agreement was made. This fact is illustrative of the weakness in the plaintiff's case. There appeared to be much ambiguity about when and how the alleged oral agreement was made between the parties.

78 By way of illustration, the plaintiff's case as first pleaded was that the oral agreement was concluded on 24 September 2006. However, when it was pointed out in cross-examination that emails sent by both the first defendant (on 25 September 2006) and the plaintiff (on 26 September 2006) during the period made no reference to the alleged oral agreement, the plaintiff shifted his position and said that the oral agreement was not concluded on 24 September 2006, but had "culminated towards the end of 2006 or first quarter of 2007". [note: 17] The plaintiff went on to state the following about the meeting at the first defendant's house on 24 September 2006 [note: 18] :

Q: Do you agree that at this meeting there was no discussion of profit sharing?

A: I agree.

Q: There was no discussion of profit sharing?

A: I agree that there's no discussion of profit sharing on the meeting, 24 September.

The more the plaintiff was cross-examined, the clearer it became that the oral agreement he was referring to was (to say the least) somewhat amorphous [note: 19] :

Q: So you're saying that the agreement came about because there was some profit sharing mentioned several months after September 2006, and you did some work. Is that what you're saying?

A: The agreement came several months after 2006. September 2006.

Q: But you're saying it came about because profit sharing was mentioned, and you did work.

A: No, I did work first, without asking any questions, and I think it was appreciated --

Q: Without any agreement?

A: Without any agreement, and it was appreciated.

79 In addition, there also appeared to be significant ambiguity on the circumstances under which the parties supposedly came to an agreement. The plaintiff's pleaded case appeared to take the position that the agreement was essentially concluded at one meeting on 24 September 2006 at the first defendant's house. During cross-examination he claimed that there were a series of meetings which took place during this period, only to subsequently recant and revert to his original position that the issues were discussed at the one meeting on 24 September 2006 [note: 20] :

Court:	In answer to my question about paragraph 13, and also Mr Coomaraswamy, you said that paragraph 13 is another meeting, not the one on 24 September 2006 that you refer to in paragraph 11.
	You also added, when I asked again, that the paragraph 15 meeting is not the one in your paragraph 13.
A:	Yes.
Court:	So there are at least three meetings we are talking about.
A:	Yes...
Mr Coomaraswamy:	So paragraph 15 is back to the meeting on or about 24 September 2006?
A:	Yes.
Q:	A moment ago you said this too was a separate meeting. A different meeting.
Court:	Which is it, Mr Lim, please. Your paragraph 15, is that a meeting of 24 September 2006 you are referring to?
A:	Yes. Paragraph 15, we did discuss these issues and this is the meeting that happened on 24 September.

80 Finally, in relation to the terms and obligations of the alleged oral agreement that was concluded, the plaintiff's answers during cross examination were again vague and inconsistent. Indeed, as Mr Coomaraswamy suggested, the plaintiff appeared to be making it up as he went along. For instance, the plaintiff in his SOC (at [16]) had indicated that one of his obligations under the alleged oral agreement was to source for potential buyers. However, when asked during cross-examination, his initial answer was that it was not an obligation, only for him to recant that position after being reminded of his pleadings, and claim that sourcing for potential buyers fell under the "broad term" of being an advisor.

81 The plaintiff's inconsistent evidence is to be contrasted with that of Andy's which was to the effect that the agreement was reached in July 2007 [note: 21] :

Q: Mr Lim, your evidence is that there was an agreement reached in relation to the profit sharing for the two properties at River Valley Road?

A: There was an oral agreement, yes.

Q: This agreement was a binding legal agreement, not just talk between good friends?

A: To me it is binding.

Q: And this agreement was reached in July 2007?

A: The agreement all along---

Q: That's what you said on Friday, Mr Lim.

A: Yes, okay. It was confirmed in July 2007.

Q: In fact, you said it was agreed at a meeting at Mr Yap's office in July 2007. That's what you said on Friday.

A: Yes.

Q: Are you changing your evidence?

A: No, I'm not.

82 It is clear from the extracts of the notes of evidence referred to earlier that there was ambiguity and doubt as to whether an agreement was entered into (as pleaded by the plaintiff), and if so, the circumstances surrounding the agreement and its terms and conditions.

83 On the specific issue of profit sharing, I find the plaintiff's case that profit sharing was cast in stone even before the parties identified the properties, to be somewhat far-fetched. As discussed at [36] and [37], over the course of Andy's cross-examination, it was revealed that the contemporaneous emails exchanged by the parties gave no indication that the parties came to a "cast-in-stone" agreement on profit sharing.

84 In addition, quite apart from the seemingly fluid version of events propounded by the plaintiff and Andy as well as the fact that the contemporaneous documents exchanged amongst the parties seemed inconsistent with the plaintiff's assertion that a "cast-in-stone" agreement on profit sharing had been entered into, it was highly unlikely that the parties could have determined the distributions of profits in the manner alleged by the plaintiff. Throughout the first defendant's testimony, it was clear that he was an astute and commercially savvy businessman. The first defendant's response when it was suggested to him during cross-examination that he had agreed from the start to allow the plaintiff to have a 25% profit which was cast in stone [note: 22], was candid:

...

A: Considerations and conditions, yes. It's not just "I agree, give you 25%, blank cheque".

Q: What is the consideration you're talking about in paragraph 16?

A: You're talking about (d), right?

Q: Yes.

A: So the properties had to be re-sold, correct? We were trying to target an exit price,

Q: So those are the conditions?

A: There have to be some conditions. You don't just give away 25 per cent.

85 Indeed, as the first and second defendants pointed out in their closing submissions and as discussed at [62] and [64] above, it would have been commercially implausible for the parties to have agreed to the determination of profits as alleged by the plaintiff when, *inter alia*:

(a) The properties had not yet been identified;

(b) No firm decision had been taken on the capital outlay required;

(c) No decision had been taken on how much loan would be taken for the project;

(d) No decision had been taken on the holding period of the properties;

(e) The overall costs involved were still unknown to the parties; and

(f) No decision had been taken on the mechanism by which the parties could determine an exit price.

86 While it is true that it is not the function of courts to save parties from commercially bad bargains they have entered into, the plaintiff had to first convince me that the parties did in fact enter into the bad bargain. Having considered the totality of the evidence, I am of the view that the plaintiff has failed to do so. Given my finding that the parties had not entered into an oral agreement as alleged by the plaintiff, the plaintiff's claim that the oral agreement was subsequently varied must consequently fail.

87 On balance, I believe that the first defendant's version of events was the more likely one. I accept that the parties entered into an agreement at around July to September 2007 (as pleaded by the first defendant), about the time the second defendant was incorporated (28 September 2007), with the specific purpose of purchasing the properties. In particular, I find that under the agreement, profit-sharing was to be "indicative", in the sense that the final profit sharing arrangement would vary depending on the final sale price of the properties, the holding period of the investment, as well as the return on equity obtained by the first defendant, who wholly and solely financed the investment. Indeed, as the only financial contributor to the venture, the first defendant was concerned about controlling the parameters of profit sharing so as to maximise his return on equity, and this was to take precedence over the profit that was to flow to the other parties. The following exchange between Mr Coomaraswamy and Andy during cross-examination illustrates this concern [note: 23]:

Q: If the project makes a small return on equity, then the investor would want a bigger slice of it.

A: That's correct.

Q: To reward him for the risk he has taken.

A: Yes.

Q: Whereas if the project has a higher return on equity, the investor will take a smaller percentage, which will be a bigger number in absolute terms.

A: That's correct.

Q: This was already in everybody's mind before Mr Lim Koon Park introduced 434 River Valley Road?

A: That was correct, for marketing to investors, yes.

Q: Marketing to investors, yes, but just as a general proposition it makes sense, doesn't it, that whoever puts in the money would want to achieve a return on his money? That makes sense?

A: That's correct.

Q: The more money he puts in, the more he has at risk, right?

A: That's correct.

Q: And the more of an upside he wants; right?

A: That's correct.

Q: If the upside is small, he will want a bigger share of that to compensate him for the risk.

A: That's normal, yes.

Q: If the upside is large, he may be prepared to take a smaller percentage, because that gives him a bigger number in absolute terms. Right?

A: When the upside is large?

Q: Yes. If the profit is large, he'll take a smaller percentage because the absolute number is still bigger.

A: That's correct.

Q: All of these factors were important to Mr Yap.

A: That's correct.

Q: Every one of you -- you, Mr Clarence Tan, Mr Lim Koon Park -- knew that well before 434 River Valley Road was introduced to you?

A: That's correct.

88 Pursuant to this agreement entered into around July to September 2007, the third defendant was then allotted 25% of the shares in the second defendant, even though neither she nor the plaintiff paid for them.

Misrepresentation

89 The first defendant had counterclaimed that he was induced into entering into the oral agreement by certain false representations made by the plaintiff. The first defendant's counterclaim was based on fraudulent misrepresentation, and in the alternative, s 2 of the Misrepresentation Act. Given that the law on what constitutes an actionable misrepresentation is the same regardless of

whether the claim is based on fraud or on s 2 of the Misrepresentation Act (see *Tan Chin Seng and Ors v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 ("*Tan Chin* Seng") at [22] and [23]), I turn first to consider whether an actionable misrepresentation had been made out in the present case.

90 In *Tan Chin Seng* at [20], the Court of Appeal affirmed the following definition from *Anson's Law of Contract* (28th Ed, 2002) at p 237 of an actionable misrepresentation:

> An operative misrepresentation consists in a false statement of *existing or past fact* made by one party (the "misrepresentor") before or at the time of making the contract, which is addressed to the other party ("the misrepresentee") and which induces the other party to enter into the contract. [emphasis in original]

91 To succeed on his counterclaim, therefore, the first defendant must first show that a representation of fact was made by the plaintiff that was untrue, that he was induced to act on the representation and that he suffered a loss as a result. In relation to the requirement that the first defendant must have acted on the false statement, the Court of Appeal in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 ("*Panatron*") held at [23] that:

> The misrepresentations need not be the sole inducement..., so long as they had played a real and substantial part and operated in their minds, no matter how strong or how many were the other matters which played their part in inducing them to act...If inducements in this sense are proved and the other essential elements of the tort are also made out, as is the case here, then liability will follow.

The question that arises is, did the plaintiff represent that No 434 had a plot ratio of 1.4?

92 While the plaintiff flatly denied that he did, I believe from the evidence that the plaintiff did represent to the parties that No 434 had a plot ratio of 1.4 for the following reasons. First, the plaintiff in his own AEIC at [50(b)] had stated that he had arranged a meeting with URA's Lee sometime in September 2007 to hear if there was a possibility for the plot ratio of No 434 to be increased "*from the then 1.4 for the Esso gas station to 2.8 for redevelopment*".

93 Second, while the plaintiff sought to hide behind CBRE's brochure dated 2007 and URA's Grant of Outline Permission dated 1 February 2007, by claiming that the information in those documents was provided to him by Exxon through CBRE, this was proved to be untrue during cross-examination as he was shown a letter by Exxon which unequivocally stated that Exxon never informed CBRE or the plaintiff that the plot ratio of No 434 was 1.4 (see [45] above).

94 Third, in *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 ("*Raiffeisen*") at [81], the court held (applying *MCI WorldCom International Inc v Primus Telecommunications Inc* [2004] EWCA Civ 957, per Mance LJ at [30]) that:

> ...Whether any and if so what representation was made has to be "judged objectively according to the impact that whatever is said may be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee "...The reference to the characteristics of the representee is important. The court may regard a sophisticated commercial party who is told that no representations are being made to him quite differently than it would a consumer.

95 The court in *Raiffeisen* then went on to explain (at [82]), that in relation to an implied statement, the court performs a similar task to that when it considers an express statement, save that "it has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context".

96 The plaintiff was the only architect and QP among the parties, the rest of whom had no technical knowledge or architectural background. Even if the plaintiff himself was not responsible for the plot ratio of 1.4 being on the CBRE brochure and URA's Grant of Outline Permission, by forwarding the said documents to the other parties, he must be taken to have at least impliedly represented that the information contained therein was true and accurate. A reasonable person in the first defendant's shoes, as a layperson untrained and unskilled in architectural and planning matters, would have taken the plaintiff's actions to mean that the plot ratio of No 434 was in fact 1.4.

Was the plaintiff's representation about the plot ratio untrue?

97 Having considered the evidence of the two expert witnesses, and that of Lee, it is quite clear that the plot ratio of the properties was never 1.4. During his cross-examination, Lee explained that under the Master Plan 1998, the site was zoned transport facility with a plot ratio of 0.5. As of 12 May 2000, after the Gazette was published, the plot ratio was 2.8. Subsequently, since Master Plans 2003 and 2008 did not stipulate a plot ratio for the properties, URA's position was that the plot ratio was subject to evaluation and determination by URA. What is unequivocal however is that the plot ratio of the properties was *never* 1.4, and this was confirmed by Lee when the court questioned him [note: 24] :

> Court: And the plot ratio for transport facilities is 0.5?
>
> A: That is correct.
>
> Court: It has never been said for this particular plot, Mr Lee, that the plot ratio was 1.4?
>
> A We have never said that.

Did the first defendant rely on the plaintiff's representation?

98 In *The Law of Contract in Singapore*, Andrew Phang Boon Leong, gen ed. (Academy Publishing, 2012) ("*The Law of Contract in Singapore*"), para 11.065 states:

> To be entitled to remedy, whether in damages or for rescission, the representee must establish an adequate causal link between the statement and his subsequent entry into the contract from which he wishes to be relieved. This causal link is found in the representee's *reliance* on the false representation; in other words, the misrepresentation must have *induced* him to enter into the contract. Whether this is the case or not is a question of fact...
>
> [emphasis in original]

99 Further, if the representation is a material representation, the onus would lie on the representor to show the representee's lack of reliance. Whether a representation is material is objectively determined. A material representation is one that would affect a normal and reasonable person (see *The Law of Contract in Singapore* at paras 11.087 and 11.088).

100 In the present case, there is little doubt that the plaintiff's representation about the plot ratio was material. As mentioned earlier, by virtue of being the only trained architect and QP among the parties, the plaintiff's representation would have carried great weight in the first defendant's mind. Indeed, this appeared to be one of the plaintiff's main contributions to the venture. Accordingly, I find that the plaintiff's representation about the plot ratio induced the first defendant to enter into the agreement with the plaintiff to incorporate the second defendant for the purpose of purchasing the properties.

Did the first defendant suffer loss?

101 By virtue of having been induced to enter into the agreement with the plaintiff for the incorporation of the second defendant to purchase the properties, the first defendant suffered loss – as a direct result of that agreement, the third defendant was issued shares in the second defendant, which would not have happened had the first defendant known that the plot ratio of the properties was never 1.4.

Was the misrepresentation fraudulent or negligent?

102 In order for the misrepresentation to be fraudulent, it must be shown that the representation was made with the knowledge that it is false. The representation must be either wilfully false or at least made in the absence of any genuine belief that it is true (see *Panatron* at [14]).

103 In *Tang Yoke Keng v Lek Benedict* [2005] 3 SLR(R) 263 at [13], it was stated that in civil cases where fraud is alleged, the burden is on the claimant to adduce cogent evidence that there was wilful conduct amounting to fraudulent behaviour.

104 After assessing all the evidence, including those of the expert witnesses as well as Lee's testimony, I believe that the plaintiff's conduct was more negligent than fraudulent. In fact, it appeared to me that rather than deliberately misrepresenting the plot ratio of the properties to be 1.4 despite knowing otherwise, the plaintiff had simply chosen to rely on the information contained in the CBRE brochure and URA's Grant of Outline Permission without taking the trouble to ascertain the basis of that information.

105 It must be remembered that dishonesty is the touchstone of fraudulent misrepresentation (see *The Law of Contract in Singapore* at para 11.167). Based on my observations of the plaintiff during his cross examination, it seems to me that the plaintiff did not know how to interpret the plot ratio of the properties when there was no numerical indication stated on the relevant Master Plan. While the plaintiff's conduct in this regard was inexcusable, given his professional background and training, I am not convinced that his conduct was either dishonest or fraudulent.

106 However, and as alluded to above, I find that the plaintiff's conduct amounted to negligent misrepresentation. In that regard, I note that the first defendant had pleaded his case under both the tort of negligence for negligent misstatement and under s 2(1) of the Misrepresentation Act. In *The Law of Contract in Singapore* at paras 11.195 to 11.197, it is stated:

> ...It is convenient to juxtapose consideration of these causes of action as both are essentially premised on false statements that were made, in the ordinary sense of the word, *negligently*. Indeed it is not uncommon for the section 2(1) claim to be referred to as "negligent misrepresentation".
>
> There are however significant differences between the two. Liability for negligent misstatement in

the tort of negligence is dependent on the establishment of *a duty of care*, owed by the representor to the representee, which has, in the circumstances, *been breached*. The onus of establishing these factors lie with the representee. There is no need for any contractual relationship to subsist between the representor and representee. On the other hand, liability under the Misrepresentation Act does not depend on there being such a duty of care owed, although the representee must have entered into contractual relations with the representor. Once the elements of actionable misrepresentation have been established by the representee, the burden of proof shifts, and the representor would be liable under section 2(1) unless he is able to prove his honesty and that he was reasonable in his belief of the truth of the representation.

Hence, in terms of the burden of establishing a right to claim against the representor, it would appear to be relatively easier for a representee to bring his claim under section 2(1) of the Misrepresentation Act than in the tort of negligence. There is also the matter of damages. If, as it has been held by the English Court of Appeal, that the measure of damages that is appropriate is the fraud measure of damages, the advantage of suing under s 2(1) is all the clearer.

107 As the plaintiff and the first defendant had clearly entered into a contractual arrangement following the plaintiff's representations about the plot ratio of the properties, in the light of my findings, it is only necessary to deal with the first defendant's case under s 2(1) of the Misrepresentation Act. In my view, the plaintiff was unable to show that his belief in the truth of his representation was reasonable. While I accept that the fact that there was no numerical indication in the Master Plan of the plot ratio of the properties from 2003 onwards meant that the plot ratio was subject to evaluation, there was nothing to suggest that the plot ratio could reasonably be said to be 1.4. If anything, Lee had during his cross-examination testified that when the Master Plan is silent, one would typically take the cue from the surrounding areas, as planning is never on a site specific basis. In relation to the properties, Lee opined that the fact that the plot ratios of the surrounding areas were 2.8 made it likely that the properties would similarly be zoned 2.8.

108 Since the plaintiff could not convince me that his belief in the truth of his representation was reasonable, I find that he is liable to the first defendant for negligent misrepresentation under s 2 of the Misrepresentation Act. Accordingly, and as a result of the plaintiff's misrepresentation, the first defendant is entitled to either rescind the agreement or to claim damages.

The alleged oppression

109 I turn now to the plaintiff's claim that the second defendant's affairs had been conducted in a manner unfairly prejudicial to the plaintiff and the third defendant. It is here that the ambiguity in the plaintiff's pleadings gave rise to some problems.

110 In his submissions, the plaintiff claimed that the first defendant and Clarence oppressed and unfairly prejudiced the plaintiff and/or the third defendant in the following manner:

(a) By causing the second defendant to sell the properties at an undervalue to Oxley JV, a party said to be related to the first defendant;

(b) Diverting the profit derived from the sale of the properties by charging exorbitant interest on purported loans extended by the first defendant, and by causing Daun to charge project management fees to the second defendant; and

(c) By manipulating the second defendant's shares to the detriment of the plaintiff and/or the

third defendant.

111 However, since the position of both the plaintiff and the third defendant appeared to be that the shares held by the third defendant in the second defendant company were wholly owned by the third defendant, with the plaintiff having no beneficial interest, it would appear that the plaintiff has no *locus standi* to claim that he was unfairly prejudiced *qua* shareholder of the second defendant.

112 The claim of oppression thus rests entirely on the third defendant's claim. However, the third defendant herself obtained her shares in the second defendant pursuant to an agreement that was entered into as a direct result of the plaintiff's misrepresentations. The first defendant therefore has a right to rescind the agreement. In *Treitel* (at para 9-087), it was stated that a contract may be rescinded by the bringing of legal proceedings, or simply by the giving of notice to the other party. On 1 April 2009, after the first defendant and Clarence discovered the misrepresentation by the plaintiff, the first defendant had asked the third defendant to either resign as director of the second defendant or to pay for the shares she held in the second defendant. In my view, that amounted to rescission of the agreement by the first defendant.

113 Accordingly, the third defendant was obliged to return her shares in the second defendant. She too lacked the *locus standi* to bring a claim for oppression. In any event, even if the plaintiff and the third defendant possessed the requisite *locus standi*, I am of the view that their claim cannot succeed.

114 In relation to the allegation that the sale of the properties to Oxley JV was at an undervalue, I accept the first defendant's explanation that he had made the commercial decision to rely on JLL's valuation of the properties ($58m) as they were familiar with the properties. I also accept the first defendant's reasons for refusing to consider the offer based on the desktop valuation by Colliers International or the offer from the anonymous party represented by DTZ (see [59] above).

115 It must be borne in mind that it is not for the court to gauge what the interests of a company are, nor for the court, with the benefit of hindsight, to sit in judgment over decisions of management (see Tan Cheng Han, gen ed. *Walter Woon on Company Law*, Rev 3rd ed. (Sweet & Maxwell, 2009) at 8.34). Seen in this light, the decision to accept the offer from Bill and Ee was beyond reproach. As the first defendant explained, there were two main reasons for accepting the offer:

(a) The expression of interest by Bill and Ee to purchase the property at $60.8m was attractive as it was not only considerably higher than the JLL valuation of $58m, but it was also accompanied by an immediate down payment of $600,800, which evinced that the offer was serious; and

(b) The first defendant was also concerned about incurring further holding costs along the lines of $150,000 a month and was anxious to sell the properties.

116 Last but not least, despite attempts by Ms Choo to suggest that the first defendant somehow had an interest in Ee's shares in Oxley JV, based on the first defendant's prior interest in Oxley Wealth and the relationship between Ee and the first defendant, that alone was insufficient to convince me that the sale of the properties was conducted other than on an "arms length" basis. Ms Choo was unable to show, either from the cross examination of Bill, Ching, and Ee, or from documentary evidence that there was indeed a conspiracy to sell the properties at an undervalue.

117 In relation to the fees paid to Daun, there was nothing to suggest that the first defendant was not allowed to use Daun as a vehicle to collect director's fees for Clarence and himself. Indeed, it

would appear that the plaintiff himself was aware of this arrangement, as can be seen from an email dated 2 August 2008, sent by the first defendant to the plaintiff and Andy to inform them about the fees Daun would be charging the second defendant. The plaintiff accepted during cross-examination that he was so aware [note: 25] :

Q: Mr Lim, can you look now at AB 1575.

On 2 August 2008, Mr Bryan Yap told you about his company Daun Consulting; is that right?

A: Yeah, he told us about Daun Consulting Limited.

...

Q: He was telling you that Daun Consulting would be playing a role in the marketing and management of these properties at River Valley Road?

A: Yes.

...

Q: I'm asking you to look at AB 1575, Mr Lim. It's a very specific e-mail from Mr Bryan Yap addressed to you, Mr Andy Lim, copied to Mr Clarence Tan. Do you see that?

A: Yes.

Q: It talks about the fees which Daun Consulting would incur for bringing in a 30 per cent third party investor, right?

A: Yes.

Q: Then in paragraph 1 he talks about introducer fees, right?

A: Yes.

Q: Paragraph 2, he talks about other fees that Daun Consulting may charge on similar projects, right?

A: Yes. That's right.

118 More importantly, given that the plaintiff himself was also charging the second defendant fees for providing architectural services through his architectural firm, it is somewhat disingenuous for the plaintiff to now complain about the management fees that were charged by Daun.

119 In relation to the interest charged on the loan, out of the approximate $23.58m that the first defendant contributed to the venture, about $22.58m constituted a personal loan from the first defendant to the second defendant, with the remaining $1m being the second defendant's final paid-up capital. While the interest rate charged by the first defendant for the loan was high, it must be remembered that the first defendant was personally financing all costs towards purchasing and holding the properties and was thus exposed to a high degree of risk. In addition, the inability to sell the properties within the time period initially envisaged, due to the 2008 financial crisis, also greatly exacerbated the risk to the first defendant's capital. Viewed from this perspective, the interest rate

charged by the first defendant on the loan was justifiable.

120 I also find the third defendant's claim of being wrongly excluded from the second defendant's management to be without merit. It cannot be said that there was a legitimate expectation on the third defendant's part that she would be allowed to participate in such management, given that it was never contemplated that she would be involved in the venture in any way. Further, as the majority shareholder of the second defendant, the first defendant was entitled to remove the third defendant as a director. Indeed, the third defendant herself admitted during cross-examination that she was happy for the first defendant, Andy and Clarence to manage the company [note: 26] :

> Q: It's not correct to then to say that you were excluded from the management of Riverwealth. Nobody excluded you; you just didn't want to be involved.
>
> A: I didn't say I didn't want to be involved, but I'm happy for you to run it if you want to. After all, you have 75---74 per cent shares.
>
> Q: Correct. So you left it to the majority to run?
>
> A: I left it to them to run, yes.

It is telling that it was only when relations soured that the third defendant started complaining about being excluded from the second defendant's management.

121 Ultimately, the allegation of oppression must be viewed in context. Under the terms of the agreement entered into by the parties, in particular under the indicative profit sharing arrangement, the interests of the plaintiff and Andy in the second defendant would have been greatly diminished once it was clear that the holding period of the properties was going to be a lot longer than expected. It was the first defendant who would have the most to lose the longer the holding period became, and if the properties were not eventually sold at the highest possible price. In such a scenario, there could have been very little incentive for the first defendant to mismanage the affairs of the second defendant.

Conclusion

122 In the light of the reasons set out earlier, I dismiss the claims of the plaintiff and the third defendant in their entirety. In addition, the first defendant shall have judgment on his counterclaim. I further order the plaintiff and/or the third defendant to take all necessary steps to transfer the 130,000 shares in the second defendant presently held in the name of the third defendant to the first defendant.

123 The court has been given to understand that there were offers to settle made in these proceedings, pursuant to O 22A of the Rules of Court (Cap 322, R 5 2006 Rev Ed). Consequently, the court will hear arguments on costs from parties on a date to be fixed by the Registrar.

[note: 1] See N/E pgs 103 to 106.

[note: 2] See N/E pgs 62 and 63.

[note: 3] See N/E pgs 213 and 214.

[note: 4] See N/E pg 238.

[note: 5] See N/E pg 282.

[note: 6] See N/E pg 372.

[note: 7] See N/E pg 1131.

[note: 8] See N/E pg 1170.

[note: 9] See N/E pg 1193.

[note: 10] See N/E pg 1195.

[note: 11] See N/E pg 1254

[note: 12] See N/E pg 1482.

[note: 13] See N/E pg 1259.

[note: 14] See N/E pg 1489.

[note: 15] See N/E pg 1494.

[note: 16] See N/E pg 1497.

[note: 17] See N/E pgs 457 and 459.

[note: 18] See N/E pg 464.

[note: 19] See N/E pg 465.

[note: 20] See N/E pg 535.

[note: 21] See N/E pg 189.

[note: 22] See N/E pg 1259.

[note: 23] See N/E, pgs 212 to 214.

[note: 24] See N/E pg 1154.

[note: 25] See N/E pgs 828 to 829.

[note: 26] See N/E pgs 62 to 63.