Li Siu Lun *v* Looi Kok Poh and another
[2015] SGHC 149

Case Number : Suit No 245 of 2009 (Registrar's Appeal No 390 of 2013 and Registrar's Appeal No 391 of 2013)

Decision Date : 29 May 2015

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Roderick Edward Martin SC, Eugene Nai, Ooi Jian Yuan (Martin & Partners) instructed by Tan-Goh Song Gek Alice (A C Fergusson Law Corporation) for the plaintiff; Lek Siang Pheng, Audrey Chiang, June Hong (Rodyk & Davidson LLP) for the 2nd defendant.

Parties : Li Siu Lun — Looi Kok Poh and another

Damages – Aggravation

Damages – Assessment

Tort – Conspiracy

29 May 2015 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 The plaintiff, Mr Li Siu Lun ("Mr Li"), is a British citizen who resides in Hong Kong. He is self-employed and trades in property and stocks. The second defendant, Gleneagles Hospital ("Gleneagles"), is a well-known private hospital in Singapore and is owned by Parkway Hospitals Singapore Pte Ltd.

2 Sometime in April 2006, Mr Li consulted the first defendant, Dr Looi Kok Poh ("Dr Looi"), at his clinic in the Gleneagles Medical Centre in relation to stiffness in his right hand and wrist. Dr Looi performed surgery on Mr Li's right hand and wrist on 26 April 2006. Unfortunately, the surgery was unsuccessful. Mr Li subsequently sued Dr Looi and Gleneagles for the botched surgery on 16 March 2009.

3 In the course of the proceedings, Dr Looi, on 21 June 2010, withdrew his Defence to Mr Li's action in negligence and for trespass to person (*ie*, battery) in connection with a second procedure that was performed on Mr Li's right hand and wrist without his prior consent. Dr Looi concurrently consented to Mr Li entering interlocutory judgment with damages to be assessed. Dr Looi has since settled Mr Li's consent judgment at $160,000 plus costs. [note: 1] The taxation of Mr Li's bill of costs of the action against Dr Looi was also settled by consent at a global figure of $102,000 *vide* Order of Court dated 18 March 2014. [note: 2]

4 Gleneagles, on the other hand, continued to resist Mr Li's action until the third day fixed for the trial. By then, Mr Li's pleaded case against Gleneagles consisted of various causes of action which included the tort of conspiracy to injure by unlawful means. The conspiracy claim against Gleneagles

concerned an addition of a second procedure made to Mr Li's consent form post-surgery by a nurse in the employ of the hospital. On 14 September 2011, with the consent of Gleneagles, interlocutory judgment with damages to be assessed was entered in favour of Mr Li in respect of all causes of action brought against the hospital ("the 2011 Consent Judgment").

5 Mr Li elected to have his damages assessed for conspiracy to injure by unlawful means. The assessment of damages hearing before the Assistant Registrar ("the AR") took four days from 25 to 30 September 2013. Mr Li does not speak English and gave his testimony in Cantonese with the aid of an interpreter in the assessment hearing.

6 The AR awarded $250,000 as damages for unlawful means conspiracy. He awarded compensatory damages in the sum of $10,000 for the time and effort spent by Mr Li in pursuing his claim against Gleneagles. The bulk of the award in the sum of $240,000 was for aggravated damages for distress.

7 Gleneagles appealed against the AR's decision on damages in RA 390 of 2013 ("RA 390"). Mr Li cross-appealed *vide* RA 391 of 2013 ("RA 391"). Mr Li's appeal alleged, amongst other things, that the amount of the award for compensatory damages should be higher than $10,000; that higher aggravated damages should have been awarded; and that punitive damages should have been allowed. Gleneagles cross-appealed against the quantum of the AR's award and costs. Gleneagles argued that the AR should not have awarded any damages (general and aggravated damages) in the absence of supporting evidence as to the amount of Mr Li's claim for damages.

8 At this juncture, I hasten to add that the quantification of Mr Li's pecuniary loss was not so straightforward. One area of concern was how Mr Li's pecuniary loss was to be measured or quantified. Another area of concern, amongst others, was whether Mr Li should only get nominal damages, having not led any evidence as to the amount of the fact of damage in relation to his cause of action in conspiracy by unlawful means for which liability was established by virtue of the 2011 Consent Judgment. In addition, I note that the AR awarded $240,000 as aggravated damages for distress, treating it as a free-standing and distinct head of loss. This judgment will determine some issues of principle in relation to the claim for aggravated damages for conspiracy. They are:

(a) Whether aggravated damages are recoverable in the tort of conspiracy by unlawful means;

(b) Whether it is permissible in law to award aggravated damages for distress as a free-standing head of loss, or is such compensation simply given to augment general damages awarded under other heads of claim; and

(c) Whether the principle of proportionality ought to apply in assessing an award of aggravated damages for distress.

9 As many of these issues of principle were not well-ventilated in the parties' submissions, I directed the parties to submit on, *inter alia*, the above issues on 9 January 2015. The parties submitted their responses on 16 January 2015.

10 I should also at the outset point out that the parties cited numerous authorities and raised a number of subsidiary points in their submissions. I have not found it necessary to refer to all of them in this judgment.

Background facts

11 I need only summarise the relevant background facts which are as follows.

12 As stated, Mr Li was a patient of Dr Looi. The surgery took place on 26 April 2006 at Gleneagles. Unfortunately, Mr Li's condition worsened after surgery. He was unable to stretch out or straighten his little finger. During further consultations with Dr Looi and other doctors, who were consulted for a second opinion, Mr Li suspected that Dr Looi might have botched up the surgery since it had gravely affected the functioning of his right hand. This spurred Mr Li to obtain a copy of his operation report, which was released to him by Gleneagles on 11 August 2006. A few days later on 25 August 2006, Mr Li requested a copy of his operation consent form. Gleneagles' staff then sought Dr Looi's permission (an administrative step that was required under the hospital's procedure) before the release of a copy of Mr Li's operation consent form to him. However, Dr Looi did not give his permission and Mr Li left the hospital empty-handed. I will now elaborate on the operation consent form that was central to the current proceedings.

13 Prior to the surgery, Mr Li had signed a document entitled "Consent for Operation or Procedure form" ("the Consent Form") that was completed by Ms Chew Soo San ("Nurse Chew"), a senior staff nurse of Gleneagles. At that stage, Mr Li's express consent given prior to surgery related only to a single procedure to treat "Tenolysis of the right hand". Mr Li's complaint against Dr Looi and Gleneagles was that no prior consent was given for the other procedure that was performed on him, namely, "Ulnar Neurolysis and Repair" ("the second procedure").

14 It subsequently transpired that Nurse Chew had, at the request of Dr Looi, added the second procedure to the Consent Form post-surgery. Between July and August 2006, Dr Looi contacted Nurse Chew to get her to make the addition to the Consent Form. Even though she was initially reluctant to do what Dr Looi had wanted, Nurse Chew allegedly relented after Dr Looi gave his assurance that he had carried out the second procedure and that he had also explained the second procedure to Mr Li. Nurse Chew then wrote the words "and Ulnar Neurolysis and Repair" (*ie*, the second procedure) on the Consent Form using a pen with the same ink colour.

15 On 28 August 2006, Dr Looi gave his permission to Gleneagles to release a copy of the Consent Form to Mr Li. Gleneagles then contacted Mr Li twice between August 2006 and May 2007 to collect his copy of the Consent Form. Eventually, Mr Li collected his copy of the Consent Form on 8 May 2007. Mr Li also sighted the original Consent Form on 8 August 2007. [note: 3]

16 Mr Li was certain that he had not consented to the second procedure. [note: 4] He suspected that the words "and Ulnar Neurolysis and Repair" had been added to the Consent Form. Around July or August 2007, Mr Li alerted Gleneagles that the Consent Form could have been tampered with.

17 As mentioned, Mr Li sued Dr Looi and Gleneagles on 16 March 2009. In December 2009, Mr Li served Interrogatories on Nurse Chew, and in January 2010, Nurse Chew answered the Interrogatories. She admitted that she amended the Consent Form by adding the words "and Ulnar Neurolysis and Repair" at the request of Dr Looi sometime in July or August 2006.

18 Nurse Chew's answers to the Interrogatories were filed on 4 January 2010. Several months later, Dr Looi withdrew his Defence and consented to judgment being entered against himself on 21 June 2010. As stated, Dr Looi has since settled Mr Li's claim against him for $160,000 and costs at $102,000 (at [3] above).

19 In relation to his case against Gleneagles, Mr Li amended his Statement of Claim twice after Nurse Chew answered the Interrogatories. The amendment to the Statement of Claim on 5 February

2010 (*ie*, Amendment No 2) elaborated on the claim for breach of contract by Gleneagles in failing, amongst other things, to furnish Mr Li with an accurate set of medical records documenting his consent, allowing the alteration/amendment of his medical records without his knowledge and consent, and failing to inform him of the amendment/alteration. The next amendment to the Statement of Claim (*ie*, Amendment No 3) was filed on 26 July 2010. Mr Li introduced two additional causes of action: (a) breach of statutory duty to keep and maintain proper and accurate medical records, and (b) conspiracy to injure Mr Li by unlawful means. There were two further amendments to the Statement of Claim. The amendments filed on 18 July 2011 (*ie*, Amendment No 4) were: (a) to introduce claims in negligence and for breach of fiduciary duty, and (b) to advance Mr Li's claim for aggravated and punitive damages.

20 For completeness, I should mention that the final amendment to the Statement of Claim on 14 August 2013 (*ie*, Amendment No 5) was made post the 2011 Consent Judgment. The amendment was to clarify that the claim for loss of accurate records and consequential financial loss were claims in general and special damages. It also gave particulars of the claim of $25,000 for legal costs incurred in relation to the Interrogatories.

Assessment of damages by the AR

21 Mr Li made the following claims:

(a) Damages comprising the legal costs which Mr Li had incurred in relation to the application for Interrogatories under O 26A of the Rules of Court (Cap 322, R5, Rev Ed 2014) ("the ROC") filed against Nurse Chew ("the Interrogatories Application"), a non-party in his proceedings against Dr Looi and Gleneagles;

(b) Damages for loss of Mr Li's right to an accurate and proper set of medical records and Gleneagles' failure to inform him of the unlawful alteration;

(c) Aggravated damages for the mental distress, anguish and depression suffered by Mr Li because of the aggravation caused by Gleneagles' contumelious or reprehensible conduct in the commission of the wrong and its subsequent conduct; and

(d) Punitive damages for Gleneagles' reprehensible conduct.

22 In his written judgment delivered on 14 November 2013 (see *Li Siu Lun v Looi Kok Poh and another* [2013] SGHCR 27 ("the AR's Judgment")), the AR awarded $10,000 for Mr Li's pecuniary loss (head of claim (b) above) and $240,000 as aggravated damages (head of claim (c) above) (collectively, "the AR's Award"). He dismissed heads of claim (a) and (d). The AR also awarded Mr Li costs of the assessment on the High Court scale of costs.

23 To avoid repetition, I will discuss the AR's reasoning for his decision on quantum when I consider in turn each head of claim. Suffice to say for now, the AR's Award (*ie*, heads of claim (a) and (b)) were looked upon as two separate heads of claim because of the way counsel conducted the assessment. In my view, the AR's heads of claim (a) and (b) (at [21] above) should have been grouped together as a claim for damages in connection with investigating and uncovering the conspiracy including minimising the effect of the conspiracy (see [66] below). I propose to adopt this approach in the appeals.

Observations in relation to the 2011 Consent Judgment

24 Before moving on to discuss the various heads of claim in the appeals, it is necessary to touch on the effect of the 2011 Consent Judgment on the assessment of damages, in particular, the amount of damages that is recoverable in principle, subject to proof of causation and quantification.

25 A convenient starting point is Mr Li's pleaded case in Statement of Claim (Amendment No 5). The plea there related to Gleneagles' breach of statutory duty under Regulation 12(1) of the Private Hospitals and Medical Clinics Regulations (Cap 248, Rg 1) enacted under the Private Hospitals and Medical Clinics Act (Cap 248, 1999 Rev Ed) ("the Act"). As for the conspiracy claim, para 61of the Statement of Claim (Amendment No 5) reads:

> (a) [Gleneagles] wrongfully conspired with [Dr Looi] with intent to injure [Mr Li] by unlawful means, namely by aiding [Dr Looi] to conceal the fact that [Dr Looi] had performed the surgery of "ulnar nerve neurolysis and repair" without the consent of [Mr Li] (i.e. the tort of Battery); and/or
>
> (b) alternatively, [Gleneagles] wrongfully conspired with [Dr Looi] with the sole or predominant purpose to injure [Mr Li] by aiding [Dr Looi] to conceal the fact that [Dr Looi] had performed the surgery of "ulnar nerve neurolysis and repair".

26 Paragraph 62 (e) of the Statement of Claim (Amendment No 5) reads:

> Upon the request of the solicitors of [Mr Li] on or about later 2007 and/or 2008 for copies of medical records of [Mr Li] … , [Gleneagles] supplied [Mr Li] with copies of his medical records which were amended/altered/exchanged/switched and/or otherwise falsified by [Dr Looi] without informing [Mr Li] that the said medical records had been amended/altered /exchanged/switched and/or otherwise falsified by [Dr Looi], despite the fact that [Gleneagles] [was] aware at all material times that [Mr Li] was contemplating legal proceedings against [Dr Looi] and/or [Gleneagles] and was likely to use the medical records as corroborative evidence in a court of law.

27 The terms of the 2011 Consent Judgment admitted to the following matters: [note: 5]

> 1. [Gleneagles] is liable to [Mr Li] for its nurse adding the words "and ulnar neurolysis and repair" to the "Consent for Operation or Procedure" form dated 26 April 2006 after the surgery on [Mr Li] and supplying a copy of the said form to [Mr Li] on 12 September 2007 without informing [Mr Li] of such addition.
>
> 2. [Mr Li's] damages thereon be assessed; and
>
> 3. Costs be awarded to [Mr Li].

28 It was also agreed in a signed note relating to the 2011 Consent Judgment that: [note: 6]

> [Gleneagles] will pay such damages as can be proved by [Mr Li] without the need for [Mr Li] to prove liability for the causes of action.

29 It is necessary to bear in mind the upshot of the 2011 Consent Judgment in light of Mr Li's election to have his damages assessed for unlawful means conspiracy. First, the addition of the second procedure to the Consent Form post-surgery was in itself unlawful *viz*, in breach of the Act, without reference to the conspiracy (see [25] above). Second, the matters set out at [27] above were the overt acts committed by the hospital in the conspiracy. Third, the overt acts were executed

in combination with Dr Looi to further the ends of Dr Looi, which was to protect the latter's interests in the medical negligence action at the expense of his patient's right to seek a redress for the civil wrong. Fourth, the overt acts were the unlawful means pursued to intentionally deceive Mr Li to defeat his claim against Dr Looi in the medical negligence action. Fifth, the fact of damage was conceded. Unlawful means conspiracy is an economic tort that is actionable only on proof of damage (see *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [112]; *Quinn v Leatham* [1901] AC 495 ("*Quinn v Leatham*") at 510, *Lonrho v Shell (No 2)* [1982] AC 173 at 188; *Lonrho Plc. And Others v. Fayed And Others (No. 5)* [1993] 1 WLR 1489 at 1494 ("*Lonrho (No 5)*"); and *William v Hussey* [1959] 103 CLR 30 at 122), and by the 2011 Consent Judgment, Gleneagles conceded to Mr Li's pleaded case of damage suffered as a result of the conspiracy.

30 Gleneagles' counsel, Mr Lek Siang Pheng ("Mr Lek"), raised in defence the absence of any causal link between the conduct complained of (*ie*, the overt acts – the addition of the second procedure to the Consent Form post-surgery and the failure to inform Mr Li about the addition) and Mr Li's loss. He argued that Mr Li would have suffered the same loss anyway because Gleneagles committed the overt acts post-surgery. I disagree with Mr Lek's argument for the reasons explained above (at [29] above). Besides, his contention is a one-sided consideration of the overt acts taken in isolation without regard to the actual events brought about by the overt acts, as understood and examined in the context of the entire pleaded case of conspiracy. Plainly, the nexus between the damage suffered and the overt acts in pursuance of the combination in question was established by the 2011 Consent Judgment.

31 In summary, by the 2011 Consent Judgment, Gleneagles' liability for the tort of conspiracy by unlawful means was made out in that the 2011 Consent Judgment had the overall effect of establishing and satisfying all the elements that were needed to complete the cause of action in conspiracy by unlawful means. Hence, Mr Li admittedly suffered the form of pecuniary loss particularised in the Statement of Claim (Amendment No 4), leaving the amount of damages that is recoverable in principle subject to proof of causation and quantification to assessment by the court. In this case, the pecuniary loss suffered was broadly argued under the AR's heads of claim (a) and (b) (at [21] above).

32 I digress for a moment to make a side comment. If Gleneagles had followed through with the trial, the outcome of the pleaded case in conspiracy would depend on the evidence and cross-examination, in particular, for supporting the allegation of conspiracy to injure Mr Li at the time the addition of the second procedure was made to the Consent Form. I am referring to Nurse Chew's answer to Interrogatories in which she said that she made the addition because she was assured by Dr Looi that the prior consent of Mr Li had been obtained. In contrast, her Affidavit of Evidence-in-Chief filed for the assessment of damages hearing omitted mention of Dr Looi's assurance that the patient's consent was given. I was informed by counsel for Mr Li, Mr Roderick Martin ("Mr Martin"), that Nurse Chew admitted that she and Dr Looi did not talk about the patient's consent. The success of the conspiracy claim would have ultimately depended on evidence of an intention to harm Mr Li. Given the 2011 Consent Judgment, all of this is water under the bridge.

33 Returning to para 64 of Statement of Claim (Amendment No 5), the loss pleaded as "general and/or special damages" was particularised as follows:

> (a) the loss of his right to an accurate and proper set of medical records documenting (A) [Mr Li's] written consent to surgery and/or procedure that was advised and planned by [Dr Looi] and (B) the surgery and/or procedure that was actually performed on [Mr Li] without the consent of [Mr Li];

(b) the financial loss and damage (flowing directly from the conspiracy to injure by the Defendants) incurred in having to commence legal proceedings against parties other than [Dr Looi] and [Gleneagles] for the purpose of establishing that [Mr Li's] medical records are not accurate and/or proper but that they have been altered/amended /exchanged and/or switched by the Defendants.

In particular, [Mr Li] has had to commence legal proceedings against parties other than [Dr Looi and Gleneagles](i.e. Nurse Chew Soo San (in her personal capacity)) in order to establish his case that he had given consent to the procedure of "Tenolysis Right Wrist" only and that his medical records, including his [Consent Form] had been amended by the employees, agents and servants of [Gleneagles], thereby incurring legal fees payable both to his solicitors as well as the cost of such proceedings to Nurse Chew Soo San amounting to about $25,000 which includes but is not limited to work done for the following:

(i) Discussing corresponding with, and advising client on his various legal remedies;

(ii) Preparing and filing the Order 26A Rule 2 application for interrogatories to be administered to Nurse Chew Soo Sin Summons No 5910 of 2009/D, and the supporting affidavit of Alice Tan-Goh Song Gek filed on 13 November 2009;

(iii) Attending and making oral submissions at the hearing of Summons No 5910 of 2009/D before Assistant Registrar Ng Yong Kiat Francis on 18 December 2009;

(iv) Attending at the delivery of judgment by Assistant Registrar Ng Yong Kiat Francis on 22 December 2009;

(v) Extracting the Order of Court dated 22 December 2009 for Summons No 5910 of 2009/D; and

(vi) Reviewing Nurse Chew Soo San's Answer to [Mr Li's] Interrogatories field on 4 January 2010, and updating client thereon.

34 Mr Li's claim for aggravated and punitive damages is set out in para 73 of Statement of Claim (Amendment No 5) in the following manner:

Owing to the flagrant, outrageous or high handed manner in which [Gleneagles] had committed the tort of conspiracy to injure …, [Mr Li] suffered and continues to suffer considerable anger, outrage and distress, in particular loss of confidence in hospitals in Singapore and their standards and treatment. In the circumstances, [Mr Li] claims Aggravated Damages and/or alternatively Punitive damages against [Gleneagles].

Mr Li's successful recovery against Dr Looi

35 I now turn to a related matter which is Mr Li's recovery of damages and costs from Dr Looi. I mentioned that Mr Li elected to have his damages assessed for conspiracy to injure by unlawful means. In this context, the addition of the second procedure made to the Consent Form post-surgery was plainly intertwined with the claim in battery against Dr Looi – the tampered Consent Form was an essential piece of evidence for the battery charge against Dr Looi. The tampered Consent Form was also relevant to the claim in negligence against Dr Looi, and for the doctor, it would have been a folly, from an evidential perspective, to depend on the tampered Consent Form in his defence. After all, the tampered Consent Form would cast doubts as to the accuracy of other entries in medical records.

The existence of the tampered Consent Form created a *prima facie* case of negligence and battery against Dr Looi. Hence, the unsurprising settlement between Dr Looi and Mr Li in June 2010.

36 Mr Lek contended that Mr Li's complaint of depression was covered in the settlement between Mr Li and Dr Looi and that Mr Li would be compensated twice if Mr Li was allowed to claim damages for depression from Gleneagles. [note: 7] I make two points in relation to Mr Lek's contention. First, the precise terms of the settlement between Mr Li and Dr Looi were not disclosed except that the settlement of the consent judgment was at a figure of $160,000 plus costs. The pleadings against Dr Looi before his Defence was withdrawn did not include any claim for conspiracy or aggravated damages. There is thus no apparent basis for Mr Lek's allegation of overlapping claims and double recovery. Second, the claim against Gleneagles for aggravated damages is legally different. I will elaborate on this at [164] below.

37 Above all, in assessing damages in this case, the court would have to take into account Mr Li's success in the underlying action against Dr Looi and the subsequent settlement of $160,000 plus costs of $102,000. This state of affairs is important since the conspiracy was to help Dr Looi avoid liability for medical negligence and a charge of battery. If Mr Li had lost against Dr Looi as a result of having failed to disprove the falsehood in the Consent Form, it would have been necessary to quantify the value of the action against Dr Looi in arriving at a monetary figure for damages against Gleneagles. Conversely, a victory against Dr Looi would invariably preclude Mr Li for obtaining substantial damages for "spoiling" the evidence by the tampering. Therefore, in assessing damages against Gleneagles, the court must find a balanced approach that provides Mr Li with compensation and redress, and at the same time, the court must not confer a windfall on Mr Li. This approach resonates with the notion that damages for conspiracy are at large and the amount of such damages should be reasonable and not exceed a fair compensation.

Relevant principles on quantification of damages at large in conspiracy

38 The problem in the appeal and the cross-appeal is one of quantification of the pecuniary loss. Gleneagles adopted the position that Mr Li had not adduced evidence as to the amount of the damages recoverable and, as such, Mr Li should be awarded nominal damages at the most. The contention is that even though the fact of damage was conceded in the 2011 Consent Judgment, and thus shown, no actual evidence of the amount of the pecuniary loss was given to assist the court to assess damages.

39 In this case, the two related issues of principle touching on the question of quantum of damages are as follows:

(a) Can substantial damages be awarded despite uncertainty of proof of quantum?

(b) Whether it was open to the court to award more than a nominal sum by way of general damages by reasonably inferring evidence of quantum from the existence of the damage since damages are at large in conspiracy?

40 The answers to the two questions in the round are as follows. Generally, substantial damages will not be awarded where the plaintiff adduces no evidence to support the amount of his claim, and nominal damages may be awarded instead. Whether a plaintiff has proved the amount of his loss with sufficient certainty is a question of fact. In some cases, recovery is not denied despite uncertainty of proof of loss, and this might happen in cases where damage is the gist of the cause of action. When this essential element of the tort is proved, the plaintiff would have satisfied the court that he has suffered some pecuniary loss and would be entitled to more than nominal damages. In such cases, it

would be reasonable for the court to infer evidence of quantum from the existence of the damage and take into consideration all the circumstances of the case to award a sum as damages. It is important to note that Gleneagles conceded by virtue of the 2011 Consent Judgment to the fact of damage and the amount of the damages will have to be assessed by the court based on whatever the facts permit.

41 I will now elaborate on the answers outlined at [40] above. In an assessment of damages, the plaintiff would typically propose an appropriate measure of damages to adopt as a yardstick to arrive at a monetary figure to award as damages. This approach enables damages to be assessed with a reasonable degree of certainty alongside principles such as remoteness and the duty to mitigate. But the fact that damages cannot be assessed with certainty because of the nature of the damage and the circumstances giving rise to the damage, does not mean that the wrongdoer is relieved from paying damages. As highlighted by the Court of Appeal in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623 ("*Robertson Quay*") at [30] (citing *Biggin v Permanite* [1951] 1 KB 422 at 438) "the court [will] do the best it can" on the evidence available. *Experience Hendrix LLC v Times Newspapers Ltd* [2010] EWHC 1986 (Ch) ("*Experience Hendrix LLC*") is a good illustration of the court's resolve to "do the best it can" to assess damages. In that case, a newspaper publisher infringed the rights of two United States companies in the performance and recording of a London concert by the Jimi Hendrix Experience in 1969, by giving away to purchasers of its newspapers free CDs containing songs from that concert. The plaintiff claimed damages on the basis that the infringement had delayed the launch of their own project relating to a film of that concert by one year. Though the judge found it exacting to forecast the loss, he expressed the view (at [204]) that the great uncertainty should not mean that the judge should award no damages on the basis that the plaintiff suffered no loss. The judge therefore sought out a basis upon which he could "anchor" the assessment of damages (at [205]-[206]) and decided to refer to a distribution agreement with another company and a rival offer made for some of the performance rights.

42 All said, I note that the observations in *Robertson Quay* at [27] and [32] were not, strictly speaking, made in the context of analysing causes of action where damages were at large. In this case, Mr Li had elected to have his damages assessed for conspiracy to injure by unlawful means, and it is settled law that damages are at large for the tort of conspiracy.

43 As stated earlier (at [29]), the tort of conspiracy by unlawful means requires proof of pecuniary damage for the tort to be actionable. A plaintiff who shows that some pecuniary loss has been suffered by him (without the need to precisely prove that loss) ought to be able to rely on the existence of the damage (*ie*, pecuniary loss) to provide by inference evidence of quantum. Andrew Burrows in *Remedies for Torts and Breach of Contract* (Oxford University Press, 3rd Ed, 2004) helpfully amplifies the application of the proof of loss principle in the context of a cause of action in injurious falsehood with his illustration and explanation at p 62 that "proof of general loss of business is sufficient and the plaintiff is not required to prove the loss of any particular customer or contract". The same sentiments have been expressed by the other courts in cases like *R+V Versicherung AG v Risk Insurance and Reinsurance Solutions SA & Others* [2006] EWHC 42 ("*R+V Versicherung AG*") where Gloster J said in a striking out application at [60]:

> It is clear from this case (and, indeed, others) that in conspiracy, damages are at large and that the court is not over-concerned to require the plaintiff to prove precise quantification of its losses.

44 It is convenient at this juncture to draw attention to the distinction between proof of damage and proof of quantum. I have thus far discussed damages at large in the context of proof of damage. The principle of damages at large also extends to proof of quantum. In short, the principle of damages

at large is applicable across proof of damage to establish the gist of the action and proof of quantum in assessing damages for the tort of conspiracy.

45 I now refer to some cases from common law jurisdictions where the principle of damages at large was invoked in the context of proof of quantum. I begin with a local case. GP Selvam J in *Dootson Investment Corporation & Anor v Highway Video Pte Ltd* [1997] 3 SLR(R) 823 ("*Dootson*") held that the principle of damages at large (in a tort where it is applicable) would extend to the assessment of damages. Quoting the authors of an earlier edition of *McGregor on Damages* (see [48] below), Selvam J said (at [7]):

> In certain cases general damages may be awarded in the sense of damages 'such as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man.' The damages are said to be at large.

46 Damages at large were also assessed in relation to the tort of conspiracy in the decision of the English High Court in *Noble Resources SA v Gross* [2009] EWHC 1435 (Comm). In that case, the employees of the plaintiff engaged in a conspiracy to hide certain losses arising from the speculative trading of aluminium futures from the plaintiff. In assessing the quantum of damages claimable, the court held (at [223]):

> It was also common ground that damages for conspiracy are at large; that this meant *the court is not limited to awarding that amount of loss which can be strictly proven*; and that, in coming to a view as to the level of damages which a defendant ought to pay, the court will consider all the circumstances of the case … [emphasis added].

47 Finally, the British Columbia Supreme Court in *Howard v Madill* [2010] BCJ No 698, noted at [89], *inter alia*, that assessing damages at large "are a matter of discretion for the trial judge and are more a 'matter of impression and not addition'."

48 It is clear that the quotations from the three cases are a variant of the statement of principle that in the context of quantification of damages, the court can still award damages even when there is no appropriate measure of damages. As *McGregor on Damages* (Harvey McGregor eds) (Sweet & Maxwell, 19th Ed, 2015) ("*McGregor on Damages")* at para 10-008 stated, damages are at large "when the judge cannot point out to any measure by which they are to be assessed, except the opinion and judgment of a 'reasonable man'" (hereafter referred to in this Judgment as the "yardstick of the reasonable man"). I will elaborate on this later. It is sufficient to note for now that this yardstick is used to assist the court in deriving the quantum of damages to award.

49 Further, besides the yardstick of the reasonable man, the court may equally rely (either separately or in combination) on evidence of proof of damage as evidence to support its quantification of losses. The analysis in *McGregor on Damages* at para 10-002 supports the proposition that the presence of evidence of damage could provide adequate data for calculating its amount. The same point is made in cases like *Quinn v Leathem* and *Lonrho (No 5)*.

5 0 *Quinn v Leathem* showed that the plaintiff must prove damage, as economic torts are actionable only on proof of actual pecuniary loss. *Lonrho (No 5)* highlights that once some pecuniary loss for maintaining the action in conspiracy is established, damages at large are referable to the act causing the pecuniary loss which constitutes the tort (at 1505). The court in assessing the amount of damages in such a context is not constrained by a precise calculation of the amount of the actual pecuniary loss actually proved or inferred and may take into consideration all the circumstances of the wrong to award a sum. To illustrate, in *Quinn v Leathem*, a case on conspiracy, the following

passage from the trial judge's notes of evidence said (at 498):

> I told the jury that pecuniary loss, directly caused by the conduct of the defendants, must be proved in order to establish a cause of action, and I advised them to require to be satisfied that such a loss to a substantial amount had been proved by the plaintiff. I declined to tell them that if actual and substantial pecuniary loss was proved to have been directly caused to the plaintiff by the wrongful acts of the defendants, they were bound to limit the amount of damages to the precise sum so proved.

51 I now come to the yardstick of the reasonable man as espoused in *Dootson* and *McGregor on Damages* for a tort where damages are at large and damage forms the gist of the cause of action. In such cases, the yardstick of a reasonable man assists in deriving the quantum of damages. Let me elaborate.

52 Let us first take the case where the court is satisfied that the plaintiff has suffered some damage but cannot point to any measure at all by which the damages are to be assessed because there is no known or practicable method of quantifying the loss. The "reasonable man" (personified by the court) steps in to analyse all the circumstances of the case in order to work out a quantum of damages that is reasonable. The rationale for invoking the yardstick of the reasonable man is because once liability is established for an action where damages form the gist of the cause of action, the court is satisfied that some pecuniary loss has been suffered by the plaintiff and it would be unsatisfactory to award only nominal damages, which is only awarded when the court finds that there is no pecuniary loss occasioned by the plaintiff despite an infringement of his legal rights.

5 3 *A fortiori* even when a court is able to find a clear measure to assess the damages, the "reasonable man" still has a role in quantification in cases where the evidence to ascertain the quantum of damages is limited, absent or can only be derived and/or inferred from the fact of damage that was established to complete the cause of action (*ie* establish liability). This proposition is undergirded by the same rationale *viz*, the court is satisfied that the plaintiff has suffered some pecuniary loss and finds it unsatisfactory to award nominal damages. In such situations, the "reasonable man" would not demand that the plaintiff give precise figures to prove quantum; instead, the assessment would be based on what is considered a sum which is reasonable having regard to all the circumstances of the case. Naturally, where the evidence is limited or can only be derived from an analysis of the facts or inferred from the proof of the fact of damage, the court can (and will) only award a modest sum as damages because it cannot possibly be reasonable for an award of substantial damages to be made in the absence of proper evidence to support the assessment.

54 It is important to note that Gleneagles conceded to the fact of damage by virtue of the 2011 Consent Judgment, and the amount of the damages will have to be assessed by the court based on whatever the facts permit as an award. I am mindful that Mr Li was not required by the signed note (at [28] above) to prove the fact of damage at the assessment of damages hearing.

55 As stated, the court has recourse to the yardstick of the reasonable man where a measure of damages cannot be identified. However, I note that this question does not strictly arise in the present case as there are measures by which the loss occasioned by Mr Li may be based upon.

56 As regards an appropriate measure that can be applied as a yardstick to find a monetary figure to be awarded as compensatory damages, Mr Martin proposed: (a) the costs of investigation in relation to the conspiracy (including the time and effort expended by Mr Li and the expenses resulting from proceeding against a non-party in the Interrogatories Application); and (b) the component of the solicitor-own client costs that is not recoverable as party and party costs in relation to the action

pursued against Dr Looi.

57 I note that expenses incurred in investigations have been recognised as an appropriate measure of damages upon which the court may ground its assessment in the tort of conspiracy. Therefore, expenses resulting from the tort of conspiracy including investigatory expenses are, in principle, recoverable as a pecuniary loss in the tort of conspiracy. *Clerk and Lindsell on Torts* (Michael A Jones gen ed) (Sweet & Maxwell, 21st Ed, 2014) at para 24-114 citing *British Motor Trade Association v Salvadori* [1949] Ch 556 ("*British Motor Trade Association*") offers the following view:

> … [D]amage constituted by the expense incurred by claimants in exposing and resisting the wrongful activities of the defendants can be awarded to them as damage directly caused by the conspiracy.

58 The English court of Appeal in *Lonrho (No 5)* also approved *British Motor Trade Association* where Dillon LJ at 1497 accepted that time spent detecting, investigating, countering and minimising the effect of a conspiracy was recoverable in principle in the following manner:

> Subhead (d) claims the cost of managerial and staff time spent in investigating, or mitigating the consequences of, the conspiracy. There is also a claim for out of pocket expenses in respect of extra security guards, small in amount, but obviously related to aspects of the conspiracy. I would allow the subhead to be pleaded. *British Motor Trade Association v. Salvadori* [1949] Ch. 556 indicates that time spent in detecting and countering a conspiracy can be included in a claim for damages, at any rate if, as in that case there is also other pecuniary loss[.] …

59 In a similar vein, Gloster J in *R+V Versicherung AG*, a case concerning a conspiracy relating to reinsurance, explained at [65] that by allowing the claim for staff time spent in investigating and minimising the effect of the conspiracy to be maintained in the pleadings, the appellate court in *Lonrho (No 5)* was approving in principle the correctness of the proposition that damage could be shown in such circumstances. And at [77], Gloster J restated that the expenses relating to managerial and staff time spent in investigating the conspiracy and handling claims that were directly attributable to the conspiracy were recoverable without the need to show any specific loss of profit.

60 To summarise, where evidence as to the amount of the pecuniary loss is missing or inadequate, compensatory damages may still be awarded for the general pecuniary loss occasioned especially in a case where damage as a constituent of the cause of action had been established. In my view, any evidential uncertainty in computing losses does not mean that the court must not award damages on the basis that the plaintiff had not proved the quantum of damages. This would be an unsatisfactory outcome especially in a case where damage as a constituent of the cause of action had been established. Any court called upon to consider what damages are recoverable in conspiracy would have to do its best in assessing damages from inferring evidence of quantum from the existence of the damage. This exercise, as noted above, is conducted with reference to the yardstick of the reasonable man.

61 Indeed, as damages are at large, the court adopts the yardstick of the reasonable man taking into consideration all the circumstances of the case including the conduct of the parties to arrive at a quantum of general damages based on the measure of damages it has selected. From this perspective, the court is using its common sense to achieve justice, not only to the plaintiff but the defendant, and if applicable, among the defendants (per Stuart-Smith LJ in *Holtby v Brigham & Cowan (Hull) Ltd* [2000] 3 All ER 421 at [20]).

62 As to what guides the court when adopting the yardstick of the reasonable man to arrive at a

monetary figure as general damages for conspiracy, Brooking J in *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots (No 2)* [1991] 2 VR 636 at 645 (citing FitzGibbon LJ directions to the jury which were approved by the House of Lords in *Quinn v Leatham* at 498) said that the court would "take all the circumstances of the case including the conduct of the defendant, reasonably into account." (See also *JN Dairies Limited v Johal Dairies Limited* [2010] EWHC 1689 (Ch) at [21].)

63 Other factors to consider (and this is by no means exhaustive) in this case are as follows: (a) credit must be given for benefits received from the settlement with Dr Looi; and (b) the court must take care not to include sums for consequences which may be due to Mr Li's own unreasonable actions. In the final analysis, the court must adopt a balanced approach that provides Mr Li with compensation and redress, and at the same time, the court must make sure that this amount does not turn into an unfair windfall.

64 With these principles set out above in mind, I now turn to the appeals proper.

The general approach to the assessment of damages in the appeal and the cross-appeal

65 Both sides were unhappy with the amounts of damages awarded by the AR. Mr Li and/or Gleneagles have appealed/cross-appealed every aspect of the AR's decision (noted at [22] above).

66 The AR's Award (*ie*, heads of claim (a) and (b) at [21] above) may be properly grouped as damages for investigation to uncover the conspiracy including minimising the effect of the conspiracy. From this perspective, it is appropriate to amalgamate heads of claim (a) and (b) under the rubric of investigatory costs seeing that they arose as a natural and probable consequence of Gleneagles' wrong (see Mr Li's pleaded averment in para 64(b) of the Statement of Claim (Amendment No 3) where he particularises the financial loss and damage flowing directly from the conspiracy to injure). Accordingly, the approach taken in these appeals is to assess and monetarily aggregate the damages sought under heads of claim (a) and (b) (at [21] above).

The evidence of investigation to uncover the conspiracy

67 With the approach outlined above in mind, I go next to the overall evidence that is necessary for the assessment of damages under heads of claim (a) and (b) at [21] above.

68 As mentioned, Mr Li commenced his action against Dr Looi and Gleneagles on 16 March 2009. Before that, Mr Li had to obtain a copy of his operation report which was released to him by Gleneagles on 11 August 2006. A few days later on 25 August 2006, Mr Li requested a copy of the Consent Form. At that stage, Dr Looi did not give his permission and Mr Li's request that he be given a copy of the Consent Form was refused. It was after Nurse Chew made the addition of the second procedure to the Consent Form post-surgery that Dr Looi gave his permission to Gleneagles to provide Mr Li with a copy of the Consent Form. This was on 28 August 2006. Mr Li collected his copy of the Consent Form on 8 May 2007. Mr Li also sighted the original Consent Form on 8 August 2007. [note: 8]

69 It is common ground that Mr Li went to Gleneagles to get copies of his medical records including the Consent Form. It was Mr Li who alerted Gleneagles about the tampering after he was given a copy of the Consent Form.

70 Gleneagles then launched an internal investigation in relation to the addition of the second procedure made to the Consent Form. By 27 August 2007, Gleneagles learnt that Dr Looi had taken the Consent Form to Nurse Chew to amend. Gleneagles' Senior Manager, Mrs Ruth Quek wrote in her

e-mail of 27 August 2007 as follows: [note: 9]

> Relating to the amended consent form.
>
> Pt's name Li Siu Lun
>
> Attending doctor is Dr Looi Kok Poh
>
> We need a report from S/N Chew Soo Sen [sic] on exactly what happened…from what I heard, Dr Looi took the consent form to her for amendment. …We have reported the case to our insurers.
>
> …

71 On 13 September 2007, Mr Li wrote to inquire about the outcome of the investigation into "the nurse who added …on [the Consent Form]". [note: 10] Instead of notifying him of the outcome of the investigation, Mr Li was shunted to another department: Safety and Risk Management Unit. [note: 11]

72 Gleneagles eventually wrote to Mr Li on 26 October 2007. It said: [note: 12]

> "[O]ur Staff Nurse Chew Soo San was the person who prepared the hospital's consent form for your client's signature … "it is for the patient's own private specialist to explain the procedure/surgery to the patient before the formality of the hospital's consent form is done".

73 As can be seen, Gleneagles did not directly answer Mr Li's request that he be given the name of the nurse who added the second procedure on the Consent Form post-surgery. Mr Lek confirmed that the hospital knew of the name of the nurse who made the addition in October 2007. Yet, the hospital chose not to reveal that its employee was involved in the addition of the second procedure to the Consent Form even after Mr Li commenced litigation. Mr Li was left in the dark as to who actually amended the Consent Form. [note: 13] He did not know if the amendment was done by an employee of the hospital or by Dr Looi's clinic nurse.

74 Notwithstanding Mr Lek's confirmation that Gleneagles knew that it was Nurse Chew who had amended the Consent Form, Gleneagles pleaded defence did not reveal who had amended the Consent Form. The defence pleaded that Mr Li had signed the Consent Form to undergo the operation/procedure of "Tenolysis Right Wrist" prior to the operation and that the second procedure was added to the Consent Form which impliedly meant that the addition of the words "ulnar neurolysis and repair" (*ie*, the second procedure) was after the operation; the Defence was silent as to the identity of the person who amended the Consent Form.

75 In its Defence, Gleneagles pleaded that "[Mr Li's] consent to the Tenolysis Right Wrist and Ulnar Neurolysis and Repair procedures had been obtained in accordance with the protocols/in-house rules established by [Gleneagles]". [note: 14] As regards the specific averment in the hospital's Defence that Mr Li's consent to both surgeries was obtained in accordance with the hospital's protocols, Mr Martin pointed out that this averment was intended to convey the impression that the consent was obtained prior to the operation. This was because the protocols only permitted amendments to an operation consent form before surgery and when the amendment was countersigned by the patient. Such an averment obfuscates matters as other paragraphs in the Defence read together seemed to infer that the second procedure was added to the Consent Form post-surgery.

76 Mr Martin drew my attention to Dr Looi's position taken prior to the withdrawal of his Defence

and at the hearing of an interlocutory application for: (a) Further and Better Particulars and (b) leave to administer Interrogatories. At that hearing, Dr Looi's counsel denied that the Consent Form was amended. [note: 15] The same denial was echoed by counsel for Gleneagles despite its pleaded case to the contrary. To elaborate, the Notes of Arguments of the hearing for both Further and Better Particulars and leave to administer Interrogatories on 18 December 2009 recorded counsel for Gleneagles as follows: [note: 16]

> Page 4 of the Notes of Arguments
>
> Our pleaded case in relation to [23] of the Defence is this: insofar as [Mr Li] has alleged that [Gleneagles'] employees amended the [Consent Form] that has been denied. What has been pleaded as a positive averment is that consent for the two procedures was obtained by the private practitioner hand surgeon in his clinic.
>
> …
>
> We are denying that [Gleneagles] amended the [Consent Form] ….
>
> Page 7 of the Notes of Arguments
>
> The second point that I have to make is that these interrogatories are a backdoor attempt to obtain admissions to facts which have been denied by [Gleneagles]. As demonstrated earlier, our case in relation to denying the amendment is very clear. What [Mr Li] is trying to do is, instead of asking us "do you admit that the form was amended", they are trying to jump the gun and say "who amended the form, when was it amended". This shouldn't be allowed as we are denying that there was an amendment of the form.
>
> [Mr Li] has always been fixated on the idea that someone had amended the [Consent Form] without [his] consent. In the affidavit that has been filed by [Gleneagles], there is a notice to admit facts. The second question that [Gleneagles] was asked to admit is the words were added by Staff Nurse Chew after [Mr Li] had signed the form. This is exactly what is being sought by interrogatories right now. [Gleneagles'] position has been consistent. We have always denied this.
>
> Page 10 of Notes of Arguments
>
> Our case is completely different. [Mr Li] is saying there was an amendment. We deny that there was an amendment. How would interrogatories as to who amended the form and when the form was amended assist [Mr Li's] case and can it even be allowed against [Gleneagles] as it is a negative case that my client is pleading?

77 Mr Martin submitted, and rightly so, that both defendants "closed ranks there". [note: 17] In relation to the pleadings between Mr Li and Dr Looi, the latter's pleaded case was that the two procedures were done with the consent of Mr Li. [note: 18] Presumably the addition of the second procedure to the Consent Form was to make explicit what Dr Looi said in his pleadings which was that Mr Li had given implied consent to the second procedure.

78 As for the reference to "Notice to Admit Facts" in the Notes of Argument, I should explain that Mr Li served a Notice to Admit Facts (under O27 r 2 of the ROC) which sought an admission that there was an alteration to the Consent Form and that it was done by Nurse Chew. [note: 19] From the Notes of Arguments, Gleneagles had not only strenuously objected to Mr Li's applications for Further

and Better Particulars, it vigorously objected to Mr Li's application to serve Interrogatories on Nurse Chew. [note: 20]

79 The tort of conspiracy by unlawful means was introduced as a cause of action after Nurse Chew answered the Interrogatories in January 2010. Mr Li also introduced the cause of action of breach of statutory duty to keep and maintain proper and accurate medical records (see [19] above).

Compensatory damages constituted by the time and money expended in investigating and uncovering the conspiracy

Before action commenced

80 On the evidence, Mr Li had expended time and effort to uncover the conspiracy, and this was clearly the case *before* commencing the action in March 2009. It is also clear that the specific Interrogatories Application against Nurse Chew who was not a party to the action against Dr Looi and Gleneagles (like Mr Li's expenditure of time and effort to uncover the conspiracy before litigation) was a natural and probable consequence of Gleneagles' wrong. Indeed, both matters may be characterised as the time and expenses expended in investigating and uncovering the conspiracy. In the context of Mr Li's pecuniary loss, Mr Martin stated in written submissions: [note: 21]

> 36 Though it is not strictly necessary for [Mr Li] to prove actual pecuniary loss, which gives rise to the tort of conspiracy, because of the note signed by Counsel when consent judgment was entered, there is clear evidence that [Mr Li] did incur pecuniary loss (e.g when he paid for a copy of a Consent Form that was not a copy of the original or un-tampered Consent Form or as [Mr Li] has put it, he paid for a "fake", or when he had to incur legal costs for his Order 26A Interrogatories application against Nurse Chew). As [Mr Li] did incur such pecuniary loss, [Mr Li] is entitled to damages at large.

81 Notably, the arguments before the AR were not exactly advanced as damages constituted by investigatory costs globally incurred in investigating and uncovering the conspiracy, which, in my view, is recoverable in principle (see [57] to [59] above), and can be justified in this case.

82 At the appeals, Mr Martin submitted that, *inter alia*, the following should be awarded as damages: (a) a sum of $20,000 for Mr Li's time and effort, (b) a sum of $25,000 for the costs of the Interrogatories Application against a non-party, and (c) a sum of $1,500 being the amount paid to Nurse Chew in respect of the Interrogatories Application.

83 Mr Martin submitted generally that the award of $10,000 by the AR for the time, effort, inconvenience and additional expense incurred was paltry and "completely out of sync with the evidence of what [Mr Li] had to go through because of [Gleneagles] and was therefore manifestly inadequate." [note: 22] Mr Lek, on the other hand, argued that the AR's award of $10,000 was objectionable in principle because every plaintiff in legal proceedings would expend "time and effort and inconvenience" in pursuing the claim against his opponent. [note: 23] Mr Lek further argued that no evidence was adduced as to the amount of time Mr Li had expended in uncovering the truth. [note: 24] He made the same point as regards the claim of $25,000 as damages. He concluded that no damages should be awarded in the absence of evidence of quantum. However, if the court was minded to give Mr Li something, then nominal damages should be awarded.

84 It is not disputed that Mr Li had not turned his mind to maintaining a record of his time spent and personal expenses. Nevertheless, the court was invited to infer some expenditure of time and

money on his part.

85 I agree with Mr Lek that it is incumbent on a litigant to adduce evidence of quantum; otherwise, he is at risk of a finding that no evidence is given as to its amount. However, it is not always the case that the court will award nil or nominal damages where actual evidence of quantum from the litigant is missing or insufficient. Oftentimes "the court does the best it can" on whatever evidence that is available before the court. The same resolve must be adopted (as seen from the cases) especially where damage is the gist of the cause of action. Let me elaborate.

86 In this case, there is a factual basis (no doubt conceded by virtue of the 2011 Consent Judgment) for some compensation to be awarded and the court is under a duty to assess damages at that point. It would be incorrect to award nil or nominal damages since some harm had been established. Damages, which are at large in the present case, are to compensate Mr Li for the consequences of the conspiracy. In my view, evidence of quantum may be inferred from the existence of the damage to enable the court to assess damages as best as it can.

87 As the evidence set out above fully establishes, Gleneagles was effectively stonewalling Mr Li, and Mr Li has diverted his time to investigate Gleneagles' wrong *before* litigation commenced. There was no uncertainty as to the cause of the damages sought for the time and effort made to investigate and uncover the conspiracy. And whilst Mr Li adduced no evidence of his actual expenditure and of the duration of time he actually spent to uncover Gleneagles' wrong, these matters alone (as stated in [86] above) are not a reason for awarding either nil or nominal damages.

88 The AR arrived at the figure of $10,000 based on $2,500 for each year expended by Mr Li from 2007 to the time the 2011 Consent Judgment was entered into to uncover the conspiracy in September 2011. Is the sum of $10,000 a fair compensation bearing in mind the principle that damages in the tort of conspiracy are at large? Would a reasonable man (personified by the court) ascribe compensation at a level that is less than or the same as $10,000 or higher at $20,000 as submitted by Mr Martin?

89 I find that the evidence supported four visits to Gleneagles' office to retrieve, amongst other things, his medical records, and bearing in mind that, at all material times, Mr Li lived in Hong Kong and was self-employed, his attendances at Gleneagles in person on four occasions necessarily involved travelling to and staying over at Singapore. In this way, and looking at the evidence in the context of the overall case, he would have incurred expenditure in time and money in coming to Singapore in an effort to uncover and expose Gleneagles' wrong.

90 It is true that Mr Li did not provide actual figures to assist the court in assessing his time spent including related personal expenses incurred *before* litigation commenced, but that omission would impinge on the quantum of the amount to be awarded in the sense that whilst an award of substantial damages is not possible, the court must do its best to come up with some kind of value for the time and effort by reference to tangibles such as air fares, accommodation and personal expenses that would have been expended in investigating and uncovering the conspiracy. In these circumstances, the amount of damages would be modest.

91 For the reasons stated, Mr Li's time and effort expended in unravelling the conspiracy in relation to the amendment to the Consent Form *before* litigation commenced (which could not be treated as part of the costs of the action) is in principle recoverable. In my view, and for reasons different from the AR, an appropriate quantum, gauged from the opinion and judgment of a reasonable man gathered from Mr Li's four visits to Gleneagles' office, would fall on the side of the global figure of $6,000. Accordingly, I award the sum of $6,000.

After commencement of action

92 I now turn to the other claim which is for (a) the sum of $25,000 being the costs of the Interrogatories Application against Nurse Chew and (b) the sum of $1,500 being the amount paid to Nurse Chew for answering the Interrogatories.

93 The discussions here will centre on whether the costs of the Interrogatories Application plus the sum of $1,500 paid to Nurse Chew are recoverable as damages constituted by the expenses incurred in investigating and uncovering the conspiracy. (See generally the discussions on *Lonrho (No 5)* and *R+V Versicherung AG* at [57]-[59] above.)

94 The Interrogatories Application was filed pursuant to O 26A r 1(2) of the ROC. Order 26A r 1 sets out the procedure that a party would have to comply with in order to seek interrogatories against a non-party before and after an action has commenced. Rule 1 states:

> **Interrogatories against other person (O. 26A, r. 1)**
>
> 1.—(1) An application for an order to administer interrogatories before the commencement of proceedings *shall be made by originating summons* and the person against whom the order is sought shall be made defendant to the originating summons.
>
> (2) An application *after* the commencement of proceedings for an order to administer interrogatories to a person who is not a party to the proceedings shall be *made by summons*, which must be served on that person personally and on every party to the proceedings.
>
> [emphasis added].

95 Order 26A r 1(5) stipulates that this sub-rule is to enable the plaintiff to seek information for the purpose of identifying the person who may be liable to him.

96 The Assistant Registrar, Mr Francis Ng ("AR Ng") who heard the leave application ordered Interrogatories. The sum of $1,500 was paid to Nurse Chew pursuant to O 26A r 5(5), which allowed the court to make an order for the costs of the person ordered to comply with the Interrogatories.

97 From AR Ng's relevant Notes of Arguments, Gleneagles had not only strenuously objected to Mr Li's applications for Further and Better Particulars, it had also vigorously objected to Mr Li's application to administer Interrogatories on Nurse Chew. [note: 25] Gleneagles was privy to the information that the addition was made by Nurse Chew way back in August 2007. Gleneagles, however, did not disclose Nurse Chew's involvement as an employee of the hospital to Mr Li who had to administer interrogatories on Nurse Chew to find out the truth.

98 It is clear that the very purpose of administering Interrogatories on Nurse Chew was to uncover the conspiracy. Here, Mr Martin used the expression "unravel" to allude to the genesis and the circumstances of Nurse Chew's act in relation to the addition of the second procedure made to the Consent Form. As such, the legal fees pleaded in para 64 (b) of the Statement of Claim are properly characterised as investigatory costs. In my view, Mr Li expended money to investigate and uncover the conspiracy *after* litigation against Dr Looi and Gleneagles had started and Nurse Chew's answers to the Interrogatories led to the introduction of the tort of conspiracy and breach of statutory duty as additional causes of action against Gleneagles. The Statement of Claim was amended to plead Gleneagles' conspiracy with Dr Looi to harm Mr Li and Gleneagles' vicarious responsibility for Nurse Chew's action. Specifically relevant to the discussions here are the particulars of loss and damage

suffered by reason of the conspiracy in para 64(b) of the Statement of Claim (Amendment No 3) which reads as follows:

> …
>
> (b) the financial loss and damage (flowing directly from the consequence to injure by the Defendants) incurred in having to commence legal proceedings against parties other than [Dr Looi and Gleneagles] for the purpose of establishing that [Mr Li's] medical records are not accurate and/or proper but that they have been altered/amended/exchanged and/or switched by [Dr Looi] and/or [Gleneagles].
>
> *In particular, [Mr Li] has had to commence legal proceedings against the parties other than [Dr Looi and Gleneagles] (ie. Nurse Chew] (in her personal capacity) in order to establish his case that he had given consent to the procedure of "Tenolysis Right Wrist" only and that his medical records, including his [Consent Form] had been amended by the employees and servants of [Gleneagles], thereby incurring legal fees payable both to his solicitors as well as the cost of such proceedings to Nurse Chew Soo San*.
>
> [emphasis added]

99 I should mention for completeness that after the 2011 Consent Judgment, para 64(b) was further amended *vide* Statement of Claim (Amendment No 5) before the assessment of damages hearing to provide, *inter alia*, the figure of $25,000 being the legal fees of Mr Li's lawyers (see [33] above).

100 As a matter of principle, damages constituted by expenses incurred (quantum of which is to be decided) in connection with the Interrogatories are recoverable. They formed part of the investigatory costs that arose as a natural and probable consequence of Gleneagles' wrong. A chronological history of the proceedings that eventually led to Nurse Chew's answers to Interrogatories has already been set out.

101 I agree with Mr Martin that on the evidence, Mr Li was only able to ascertain that the Consent Form was amended by Nurse Chew as a result of her answers to the Interrogatories. As stated earlier, Gleneagles was privy to the information that it was Nurse Chew who had made the addition. Gleneagles, however, did not disclose Nurse Chew's involvement to Mr Li who had to administer Interrogatories on Nurse Chew to find out the truth. As I see it, Mr Li is entitled to damages on the footing that if Gleneagles had disclosed the truth about Nurse Chew's involvement in the amendment, he would have been able to prove his case against Dr Looi without the investigations into the conspiracy post action, in particular administering Interrogatories on Nurse Chew.

102 As stated, Mr Martin proposed the figure of $25,000 for work done by Mr Li's lawyers in relation to the Interrogatories. Mr Martin used the total legal costs incurred by Mr Li in connection with the Interrogatories Application as a yardstick in assessing damages. The two interim legal bills dated 30 November 2009 and 12 March 2010 ("the Interim Bills") were for the total figure of $68,665.69. Mr Li stated in his affidavit that of the $68,665.69 billed, he estimated that a sum of $25,000 (36.4%) was incurred in relation to the Interrogatories Application. [note: 26]

103 Gleneagles' objected to the figure of $25,000 for the Interrogatories Application on the basis that only $2,500 was asked for by Mr Li against Gleneagles at the Interrogatories Application when Mr Li succeeded in the Interrogatories Application notwithstanding Gleneagles' objections. Mr Li's proposed figure of $2,500 was in relation to the costs incurred by him in dealing with Gleneagles'

objection to the Interrogatories Application. That sum is quite different from Mr Li's legal expenses in pursuing separate Interrogatories Application against Nurse Chew.

104 Whilst I am prepared to treat the lawyer's work not as part of the costs of the action but instead as investigatory costs as described, I am of the view that the proposed figure of $25,000 is too high. My assessment is that $13,500 plus $1,500 paid the Nurse Chew is a fair and reasonable figure that Gleneagles ought to pay Mr Li as damages. Therefore, in addition to the other figure of $6,000 awarded to Mr Li for the time and effort he expended in investigating the conspiracy, the aggregated amount of $21,000 ($6,000 + $13,500 + $1,500) represents my award of damages directly caused by the conspiracy.

Other consequential losses arising from the amendment to the Consent Form

105 Mr Li also claimed damages in relation to his loss of access to accurate medical records and for not having been informed of the unlawful alteration (see [33] above for para 64(a) of Statement of Claim (Amendment No 5). According to Mr Martin, Mr Li is claiming consequential losses arising from the amended Consent Form. The amendment was committed in breach of Gleneagles' common law duty to keep and maintain proper medical records (see *R v Mid Glamorgan Family Health Services* [1995] 1 All ER 356 at 365 on the common law right to access and duty to disclose) and statutory duty to inform Mr Li of the alteration of the Consent Form (see Regulation 12 of the Private Hospital and Medical Clinics Regulations (Cap 248, Rg 1)).

106 The quantum of damages suggested was $30,000 being the difference between a straightforward negligence claim against Dr Looi for severing his ulnar nerves negligently and the more complicated case that Mr Li was required to prove as to whether he had consented to the second procedure of "Ulnar Neurolysis and repair". Mr Martin explained that the absence of accurate medical records made it all the more difficult and costly to prove the underlying negligence claim against Dr Looi. Typically, Mr Li would have been able to rely on the Consent Form to prove against Dr Looi that he did not consent to the second procedure. However, at Dr Looi's instigation, Nurse Chew had added the second procedure to the Consent Form post-surgery. Gleneagles did not disclose to Mr Li the addition of the second procedure made to the Consent Form post-surgery when a copy of the Consent Form was provided to Mr Li. In those circumstances, Mr Li had to work out what had gone on to unravel the truth behind the "fake" Consent Form that Gleneagles had provided to him. [note: 27] Mr Martin argued that if Mr Li wanted to succeed against Dr Looi, he would in essence have to show – as a result of him not being informed by Gleneagles that the Consent Form was amended – that a competent surgeon would not have advised that the procedures of "Tenolysis of the right hand" and "Ulnar Neurolysis and repair" be carried out at the same time since they were considered to be inconsistent rehabilitation paths. [note: 28] Dr Donald Sammut, a hand surgeon, was appointed to support this contention in the proceedings against Dr Looi. According to Mr Martin, it was only after establishing this competency point that Mr Li might be able to convince the court that Dr Looi had negligently severed his ulnar nerves during the surgery. I suppose that Mr Martin was again saying that Mr Li had no accurate medical records to rely on because of the tampering of the Consent Form and Dr Sammut was required to fill that evidential gap.

107 It is now convenient to quote the relevant paragraph of Mr Martin's submissions that explained the basis of his proposed quantification of $30,000. He wrote (at para 101):

> Up to 21 June 2010, [Mr Li] had paid his lawyers $209,880.69 for his action against both defendants… Splitting that in half, the costs attributable to [Dr Looi] would be approximately $104,000. 30% of that would amount to $30,000. Add another $20,000 for time, effort and inconvenience expended and suffered, damages under this would amount to$50,000.

108 Mr Martin was at pains to explain that Mr Li was not seeking a claim for unrecovered solicitor and own client costs that should have been asked of the trial judge but is adopting "the costs paid" as a "measure of damage" to determine the quantum of damages under this head of loss in relation to accurate medical records (see [105] above). [note: 29] In other words, his idea of an appropriate measure of damages was to use the unrecovered costs which he estimated to be 30% as a yardstick to quantify the value of the loss.

109 The AR disagreed with Mr Martin. He agreed with Mr Lek that the sum of $30,000 was in reality legal costs being claimed as damages. The sum of $30,000 represented the legal costs incurred in proceeding against Dr Looi which is the difference between the costs he had expended and the costs he may recover as party-and-party costs against Dr Looi. He opined that such costs were incurred in the same proceedings and as a matter of law not recoverable. He further opined that Mr Li ought to have obtained from Tan Lee Meng J (who gave the 2011 Consent Judgment) a full indemnity costs order that covers the full legal costs incurred in proceedings against Dr Looi.

110 I make two points in relation to Mr Martin's proposed measure of damages. First, Mr Martin's yardstick is not appropriate for measuring Mr Li's damages for this head of claim (*ie*, para 64(a) of the Statement of Claim (Amendment No 5)). By the time the appeals were listed for hearing, the taxation of Mr Li's bill of costs against Dr Looi was settled at $102,000 which is almost 98% of his solicitor and own client bill proposed at $104,000 in the appeals. On this basis, Mr Martin's yardstick of 30% as a measure of damages is plainly inappropriate. Second, the risk of overlapping expenses and hence double recovery are potentially quite real especially in relation to the engagement of Dr Donald Sammut and for his two reports as an expert witness. I should explain that the taxation of Mr Li's bill of costs of the action against Dr Looi was settled at a global figure of $102,000, a breakdown of the figure of $102,000 in respect of "section 1 costs" in the bill of costs was agreed at $60,000 and the consent of parties was recorded *vide* the Order of Court dated 18 March 2014. [note: 30] Notably, the expenses incurred would come under "section 3 disbursements" in the bill of costs (which items of disbursements included all the expenses of the medical experts such as Dr Donald Sammut) were drawn up for a total figure of $41,798.40 but eventually section 3 disbursements was settled at $40,000. I have no doubt that Dr Sammut's charges were covered in the $40,000.

111 Above all, I am not persuaded that the amended Consent Form made the case against Dr Looi more complicated. At this point, I need only caution that the court must take care not to include sums as damages for consequences which may be due to Mr Li's own unreasonable actions (*ie*, Dr Sammut's involvement) *vis-à-vis* Gleneagles. I will elaborate on this at [112] below. Finally, the quantification of damages in respect of the liability for conspiracy is far from straightforward by reason of Dr Looi's settlement in that "credit" must be given for payments received in settlement. In theory, the settlement amounts paid by Dr Looi could have the consequential effect of extinguishing or reducing Mr Li's loss by reason of the conspiracy.

112 As stated above, the amended Consent Form was plainly intertwined with the claim in battery against Dr Looi – the tampered Consent Form was the necessary circumstance for the battery charge against Dr Looi. The tampered Consent Form was also central to the negligence allegation against Dr Looi from an evidential perspective so as to have a significant impact on his defence. After all, the amended Consent Form would cast doubts as to the accuracy of other entries in medical records. The alteration of the Consent Form would create a *prima facie* case of negligence and battery.

113 Given the serious implications associated with the addition of the second procedure made to the Consent Form post-surgery, and in particular, the addition on the face of the Consent Form was

not made out to be a case of a mere late entry to the Consent Form to regularise an honest earlier omission, in assessing damages against Gleneagles, the court would still have to take into account Mr Li's win in the underlying action against Dr Looi and the subsequent settlement of $160,000 plus costs of $102,000. After all the intent of the conspiracy was to avoid Dr Looi's liability for medical negligence and a charge of battery. If Mr Li had lost against Dr Looi, it would have been necessary to quantify the value of the action against Dr Looi, seeing that the tampered evidence was central to the issue of damages. Conversely, any victory against Dr Looi would invariably preclude Mr Li from obtaining substantial damages for "spoiling" the evidence by the tampering.

114 Therefore, I agree with the AR (albeit for different reasons) that the claim amount of $30,000 for expenses is unsustainable and is therefore rejected.

Observations on recovering legal costs as damages

115 I need not dwell on the topic of unrecovered legal costs as damages in light of the recent decision of the Court of Appeal in *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496 ("*Maryani Sadeli*"), which did away with the distinction between legal costs in the same proceedings ("same-party case") and other proceedings ("third-party case"). It is necessary to say something about this decision in light of my award of $15,000 as damages at [104] above.

116 The legal contention raised before the AR below was that Mr Li had characterised "legal costs as damages", and the AR, agreeing with Mr Lek, held (at [14]) that the costs of the Interrogatories Application were already determined in the terms of the 2011 Consent Judgment where the parties had agreed that the *costs of the action* between Gleneagles and Mr Li would be paid by Gleneagles to Mr Li. Further, pursuant to O 59 r 27 of the ROC, he held that such costs were to be assessed on a standard basis. Furthermore, the AR also dismissed the alternative argument advanced by Mr Li that he could claim his legal costs for the Interrogatories Application under O 59 r 3(5) of the ROC, which provides that a party who refuses or neglects to admit a fact under a Notice to Admit Facts served on him under O 27 r 2 of the ROC shall pay the costs of proving that fact, unless the court orders otherwise.

117 Mr Martin made the following submissions. The AR was wrong in holding that the 2011 Consent Judgment was determinative of the issue of costs of the action because Mr Li was claiming damages and not costs of the Interrogatories Application in the assessment of damages hearing. He relied on *Hammond v Bussey* (1888) 20 QBD 79 ("*Hammond*") to support Mr Li's claim for the full cost of legal fees incurred in the Interrogatories against Nurse Chew, a non-party, since Gleneagles' misconduct bought about the expenditure. He explained that as Mr Li had to institute separate proceedings against a third party (who is a non-party to the current proceedings) in order to identify the wrongdoer or obtain information to sue the wrongdoer (the "other proceedings"), Mr Li would be allowed to claim as damages the costs of suing the third party in those "other proceeding" if Mr Li succeeds against Gleneagles in the current proceedings.

118 The correctness of Mr Martin's submissions turned on whether the principle in *Hammond v Bussey* is good law in Singapore. In contrast, Mr Lek urged this court to follow the decision of the High Court in *Then Khek Koon and another v Arjun Permanand Samtani and another and other suits* [2014] 1 SLR 245 where the court there opined (at [228]) that "the distinction between [a same-party case] and [a third-party case] is too fragile and unprincipled a basis to justify one rule applying in the former and the entirely opposite rule applying in the latter." That view was recently accepted on appeal by the Court of Appeal in *Maryani Sadeli* at [48].

119 The Court of Appeal in *Maryani Sadeli* reviewed the justification, if any, for the third-party rule as espoused in *Hammond* and accepted in *Ganesan Carlose & Partners v Lee Siew Chun* [1995] 1 SLR(R) 358 ("*Ganesan Carlose*"). In *Ganesan Carlose*, the Court of Appeal confirmed the rule that it was not possible to recover costs incurred in earlier proceedings as damages in subsequent proceedings when the parties to the previous and subsequent proceedings were the same individuals or legal entities. However, the Court of Appeal in *Ganesan Carlose* accepted the legitimacy of the principle in *Hammond* and the soundness of it operating in situations involving a non-party (*ie*, the third-party case). This position was made clear in the following passages in that case:

> [12] It is settled law that where as a result of the defendant's wrong the plaintiff has incurred costs in other proceedings the plaintiff may, subject to the rules of remoteness recover those costs from the defendant as damages: *Hammond & Co v Bussey* [(1888)] 20 QBD 79
>
> [13] If the [plaintiff] had first taken out proceedings against [the 1st defendant] and [the 2nd defendant] and lost and had subsequently sued [the 3rd defendant] she could certainly claim the costs incurred thereby (both for suing as well as the party and party costs) as damages against [the 3rd defendant]. That would have fallen within the rule in *Hammond v Bussey*.
>
> [18] We would endorse the statement of the law set out in Halsbury's Laws of England vol 12 (Butterworths, 4th Ed) at para 1120:
>
> > A party to court proceedings may not recover his costs of those proceedings from any other party to them except by an award of costs by the court. The costs of other proceedings, however, stand on a different footing. Where, as a result of the defendant's wrong, the plaintiff has incurred costs in other proceedings the plaintiff may, subject to the rules of remoteness, recover those costs from the defendant as damages.
> >
> > …

120 Returning to *Maryani v Sadeli*, Andrew Phang JA, delivering the judgment of the Court of Appeal, opined at [46] that there was no reason why a third-party case should be treated any differently from a same-party case simply because the plaintiffs could point to another party who was ultimately responsible for the state of affairs which resulted in litigation. Commenting further on *Hammond* and *Ganeson Carlose*, Phang JA said at [58]:

> With respect, we therefore do not think the statement made by this court in *Ganesan Carlose* citing *Hammond* ([40] supra) (at [12]) that ,"[i]t is settled law that where as a result of the defendant's wrong the plaintiff has incurred costs in other proceedings the plaintiff may, subject to the rules of remoteness, recover those costs from the defendant as damages", was not meant to be a firm endorsement of the third-party rule, and we decline to adopt the third-party rule as stated in *Ganesan Carlose* for the reasons stated above.

121 The Court of Appeal in *Maryani v Sadeli* held that the general rule that disallows a claim for unrecovered legal costs in previous proceedings as damages in a subsequent action applies to both the same-party cases and the third-party cases. The reason for this general rule is public policy. Our legal regime on costs recovery is such that full recovery of legal costs by the successful party is an exception rather than the norm. This rule does not exist to prejudice the winning party in litigation, but is a manifestation of the law's policy of enhancing access to justice for all. Our public policy of enhancing access to justice applies to same-party cases as well as third-party cases. Phang JA explained that unrecovered legal costs are part and parcel of resolving disputes by seeking recourse

to Singapore's legal system and anyone who comes before the Singapore courts must accept this as a necessary incidence of using the litigation process. Phang JA pointed out at [34] that it is in this light that the general rule must be understood.

122 However, Phang JA at [53] left open for now the narrow possibility of arguing full recovery of legal costs as an exception to the general rule in very rare and exceptional circumstances:

> Where the plaintiff would *only* have been able to claim *costs* based on *the indemnity principle in the previous proceedings, it appears to us to be correct in principle that the plaintiff ought not, in subsequent proceedings, to be able to claim for the unrecovered costs of the previous proceedings - albeit with at least one possible caveat.* Given the myriad of possible fact circumstances, we would not rule out the possibility of situations where the measure of damages awarded by the court might consist of the full costs (*ie*, costs that go beyond the measure awardable pursuant to the indemnity principle). In the nature of things (and given the need to give effect to the policy considerations underlying the law on costs), we would think that such instances *would be exceptionally rare (if they in fact exist at all)*. However, as this issue does not arise in the context of the present appeals, we will render a definitive pronouncement when it arises directly for decision. We would simply clarify, in the context of the present proceedings, that, to the extent that the law laid down in *British Racing* is taken to wholly preclude recovery of the costs of previous proceedings in a subsequent claim in damages, this may be too categorical an approach to adopt when we consider that we are dealing with an area of law where judicial discretion is critical in achieving a fair and just outcome on each particular set of facts. [emphasis in original].

123 Phang JA then summarised the legal position in Singapore (at [59]):

> Let us summarise the analysis thus far. *Where the plaintiff brings a claim in damages against the defendant for the costs of previous proceedings, the general rule is that the measure of the plaintiff's claim would be subject to the policy considerations embodied within the law on costs*. This limit is (in accordance with the indemnity principle) costs on the standard basis (or costs on the indemnity basis where appropriate) and applies both to the plaintiff in a same-party case and a third-party case - subject (possibly) to the exceptionally rare (and indeed, almost hypothetical) instance where the plaintiff is able to persuade the court that the facts of the case are such that an award of the full measure of costs beyond that awardable pursuant to the indemnity principle might be justified (a possible situation which did not arise in the context of the present proceedings and which will be dealt with definitively when it arises directly for decision). In this connection, the effect of *British Racing* (as also recognised by the Judge) should not be taken to constitute an *inflexible bar* to a plaintiff in a third-party case inasmuch as it would proscribe him from recovering any of the costs incurred in the earlier litigation as damages. [emphasis added].

124 In my view, the pronouncements in *Maryani v Sadeli* do not affect my analysis on investigatory costs and my award of $15,000. My point is that on the unique facts of this case, the general rule against recovery of legal costs as damages in *Maryani v Sadeli* is not engaged for the following combined reasons:

> (a) First, pursuant to the 2011 Consent Judgment (at [27] above) Gleneagles conceded that Mr Li suffered pecuniary loss in the form of legal costs to Mr Li in connection with the Interrogatories Application as well as costs to Nurse Chew. In relation to this first point, it is important to note that Gleneagles conceded the fact of damage by virtue of the 2011 Consent Judgment and the amount of the damages will have to be assessed by the court based on whatever the facts permit.

(b) Second, the terms of the signed note (at [28] above). I am mindful that Mr Li was not required by the signed note to prove the fact of damage at the assessment of damages hearing.

(c) Third, the existence of the fact of damage (*ie*, unrecovered solicitor and own client's costs in relation to the Interrogatories Application) was conceded by virtue of the 2011 Consent Judgment. This fact of damage would form the basis to assess the amount of the damages based on a recognised measure of loss.

(d) This leads me to the fourth point. Investigatory costs are a recognised measure of loss that is specific to the tort of conspiracy and my award of $15,000 is for damages constituted by the investigatory costs. The award of $15,000 is based on a discrete principle and is thus not inconsistent nor is it a backdoor attempt to undermine or militate against the general rule against recovery of solicitor and own client costs. Let me amplify on these points.

125 I have already set out Mr Li's pleaded position in relation to this head of claim that first appeared in para 64(b) of the Statement of Claim (Amendment No 3) at [98] above. As Mr Martin pointed out, para 64(b) was already pleaded as early as 26 July 2010 and the 2011 Consent Judgment was entered into in September 2011. The 2011 Consent Judgment ordered that Mr Li's "damages be assessed thereon" (see [27] above) and, as a matter of construction of the 2011 Consent Judgment, the parties were to proceed to assess the quantum of the admitted pecuniary loss as pleaded.

126 I need to go back to my observations on the effect of the 2011 Consent Judgment on the question of quantum at [24] to [34] above to support this construction. In sum, as regards para 64(b) of the pleadings, Gleneagles had conceded and accepted in the 2011 Consent Judgment that Mr Li had suffered the form of pecuniary loss particularised in the Statement of Claim (Amendment No 4), leaving quantum to be assessed.

127 It is therefore clear that Gleneagles accepted that Mr Li had suffered pecuniary loss in the form particularised in para 64(b) and agreed to pay the quantum of the pecuniary loss that could be proved by Mr Li. The form of pecuniary loss particularised in para 64(b) was the full legal costs that he had to pay his lawyers in connection with the Interrogatories Application. It is worth repeating Mr Martin's written submissions which I had earlier quoted at [80] above on Mr Li's pecuniary loss: [note: 31]

36 Though it is not strictly necessary for [Mr Li] to prove actual pecuniary loss, which gives rise to the tort of conspiracy, because of the note signed by Counsel when consent judgment was entered, there is clear evidence that [Mr Li] did incur pecuniary loss (e.g when he paid for a copy of a Consent Form that was not a copy of the original or un-tampered Consent Form or as [Mr Li] has put it, he paid for a "fake", or when he had to incur legal costs for his Order 26A Interrogatories application against Nurse Chew). As [Mr Li] did incur such pecuniary loss, [Mr Li] is entitled to damages at large.

128 As regards the signed note (at [28] above), Gleneagles agreed to pay "such damages as can be proved by [Mr Li] without the need to prove liability for the causes of action."

129 In this case, Gleneagles sought to argue a preliminary point on whether the costs of the Interrogatories Application could, as a matter of principle, be claimed by Mr Li against it as damages. This preliminary point is misconceived. As stated, damage forms the gist of the cause of action in conspiracy. I have already made the point that pursuant to the 2011 Consent Judgment, the fact of damage was conceded. In light of this, it is indisputable that Gleneagles conceded and accepted Mr

Li's suffered pecuniary loss as arising from the Interrogatories Application *viz*, legal costs (subject to quantification) and the amount paid to Nurse Chew. These were the items of expenditure incurred on account of the Interrogatories Application. The pleaded case characterised the legal costs of the Interrogatories Application as damage "flowing directly from the conspiracy". That being the case, pursuant to the 2011 Consent Judgment, Mr Li should be able, subject to quantifying the amount of his loss, to claim the legal costs of the Interrogatories Application as damages. To make my views clear, it is by virtue of Gleneagles' acceptance of Mr Li's pleaded pecuniary loss in the form of lawyer's fees in connection with the Interrogatories Application and the signed note that Gleneagles is precluded from now arguing that such a loss cannot be claimed as a matter of law. What this Court is doing is simply to give effect to the parties' agreement embodied in the 2011 Consent Judgment. I had earlier held that costs of the Interrogatories applications are allowable as investigatory costs and this is a recognised measure of loss that is specific to the tort of conspiracy. What is open to Gleneagles to argue is the amount of the pecuniary loss.

Aggravated damages

Decision of the AR

130 The AR awarded the sum of $240,000 (at a rate of $60,000 per year for a period of four years ("the relevant period") as aggravated damages. The AR held that Gleneagles'act in giving a copy of the Consent Form to Mr Li without informing him that it had been amended as well as failing to reveal the truth to him all the way up to the point in time of entering into the 2011 Consent Judgment constituted exceptional conduct which justified an award of aggravated damages. The AR also made a finding that Mr Li had suffered "great mental anguish" during the relevant period. [note: 32]

131 Mr Li's dissatisfaction was not with the yearly rate of $60,000. His criticism was with the AR's decision to use the date of the 2011 Consent Judgment as the cut-off date, which he argued was without any legal basis. His contention was that the AR ought to have taken into account matters that would affect the quantum of damages up to the time of assessment of damages since Mr Li still suffered residual mental anguish and depression up to and including the time of the assessment hearing. Mr Martin argued that extra damages should be awarded because of the false defence that was raised. [note: 33] The false defence was the denial by counsel at the hearing of the application for Further and Better Particulars and application for leave to administer Interrogatories that the Consent Form was ever amended.

132 In contrast, Mr Lek argued that the AR wrongly based his award of aggravated damages on his finding that Mr Li had suffered "distress" and "depression", arguing the important distinctions between "major depression", "clinical mental disorder" and "reactive depression". The psychiatrists who testified at the assessment hearing opined that Mr Li was suffering from reactive depression which could arise from stress. The evidence is that Mr Li's condition was not severe and that he was not on medication. He did not have to go through any treatment with a psychiatrist or psychologist. Mr Lek pointed out that litigation stress could trigger reactive depression, and that Mr Li's evidence was that he felt better after Gleneagles was given a stern warning by the Ministry of Health. Hence, the AR was wrong to award aggravated damages using reactive depression as a starting point. To Mr Lek, the AR's award was excessive as it was disproportionate by any measure. In his view, if Mr Li was asking for $50,000 as compensatory damages, aggravated damages should be less than $50,000 and that clearly, $240,000 for aggravated damages was excessive.

133 I also note that the AR found that Mr Li's mental anguish arose from Gleneagles *falling short of his* expectations as a premier private hospital. The learned AR opined as follows (at [23] of the AR's Judgment):

> As for Mr Li's mental distress and anguish, it may be summarised in the following way. Mr Li's appreciation of Singapore's reputation was such that *he had taken the propriety and transparency of one of Singapore's premier private hospitals as a given. He had expected the same high standards of its doctors. After he had undergone the botched surgery and had suspected that the consent form was altered, he had expected the hospital to come clean with the truth. Instead, the hospital handed him an altered consent form without telling him that it had been altered. The hospital continued to hide the truth from Mr Li for the years following the operation up to the bringing of the action*. Even after the action was brought, the hospital still did not reveal the truth and in fact resisted Mr Li's attempts to uncover the truth by resisting Mr Li's application for interrogatories to be served on Ms Chew. In this entire process, Mr Li had tried to confide in his friends who instead laughed at him and exclaimed that such a cover-up was not possible in Singapore. *The entire episode made Mr Li become more withdrawn*. He could not believe that this was happening to him. He started to distrust doctors and hospitals. He persisted in bringing the action because he wanted the truth to be uncovered. He also wanted the hospital to be accountable and to prevent this from happening to another person. [emphasis added].

134 The AR's award of $240,000 was for, *inter alia*, the distress Mr Li suffered as a result of Gleneagles' conduct. It was plain that the AR assessed aggravated damages as if it was a free-standing head of loss that required an independent measure of assessment. There was no reference to the other amount of $10,000 awarded to Mr Li as compensatory damages.

135 The AR's decision raises three questions. The first (and prior) question is whether aggravated damages may even be awarded in the tort of conspiracy by unlawful means.

136 The second relates to the nature of aggravated damages *viz*, whether they are meant to be assessed as a separate head of loss based on some external measure or whether they exist to augment an award of compensatory damages.

137 The third question (which is a corollary to the second question) is whether the principle of proportionality applies in the assessment of aggravated damages. I will be addressing the second and third question together.

Availability of aggravated damages in conspiracy by unlawful means

138 It was held in *Tan Harry v Teo Chee Yeow Aloysius* [2004] 1 SLR(R) 513 at [82] ("*Harry Tan*") that in order for a plaintiff to claim aggravated damages, he would need to show that there is contumelious or exceptional conduct or motive on the part of the defendant and that the plaintiff suffered an intangible loss, injury to personality or mental distress, as the case may be. These general guiding principles have been articulated in a similar manner in the English Law Commission's Report on Aggravated, Exemplary and Restitutionary Damages (Law Com No 247, 1997)) ("Law Commission's Report") (at p 11).

139 A preliminary question of relevance is whether aggravated damages can be awarded for the tort of conspiracy by unlawful means. As the parties' research has not found a local case on point, I propose to review the position in other Commonwealth jurisdictions.

United Kingdom

140 In *Quinn v Leatham* (at [50] above), the House of Lords affirmed the decision of the trial judge and dismissed the appeal. The trial judge held that the elements of conspiracy were made out on the

facts and directed the jury to assess damages. I repeat again here the following directions given by the trial judge to the jury (reproduced at 498) and that same direction was later approved by the House of Lords:

> I told the jury that *pecuniary loss, directly caused by the conduct of the defendants, must be proved in order to establish a cause of action*, and I advised them to require to be satisfied that such loss to a substantial amount had been proved by the plaintiff. I declined to tell them that if actual and substantial pecuniary loss was proved to have been directly caused to the plaintiff by the wrongful acts of the defendants, they were bound to limit the amount of damages to the precise sum so proved. I told them that *if the plaintiff gave the proof of actual and substantial loss necessary to maintain the action, they were at liberty in assessing damages to take all the circumstances of the case, including the conduct of the defendants, reasonably into account*." [emphasis added]

141 With the House of Lords' approval, the above directions have been interpreted by subsequent cases to suggest that it is possible to consider aggravating circumstances in the award of damages for conspiracy by unlawful means. One such case is *Khodaparast v Shad* [2000] 1 All ER 545. In that case, the English Court of Appeal had to decide whether aggravated damages could be awarded for the tort of malicious falsehood. In reaching its decision, the English Court of Appeal analysed the state of the law in relation to other torts and noted that *Quinn v Leatham* stood for the proposition that aggravated damages may be claimed in the tort of conspiracy by unlawful means once the requisite pecuniary loss to sustain the action in conspiracy has been proved. This can be gleaned from the following passage (at 556):

> "…**There are a number of cases and areas of law where special damage or pecuniary loss must be established to constitute a cause of action but where, once that is established, damages are at large and aggravated damages can be awarded** (see *Pratt v British Medical Association* [1919] 1 KB 244 at 281, a case of damage to trade; *Lynch v Knight* (1861) 9 HL Cas 577 at 598, 11 ER 854 at 863, where Lord Wensleydale was dealing with a case of slander; ***Quinn v Leatham* [1901] AC 495 at 498, which is the judge's direction to the jury in a case of conspiracy to injure trade**; and *Archer v Brown* [1984] 2 All ER 267, [1985] QB 401, a case of deceit)." [emphasis in bold added]

142 Indeed, commentators have reasoned more generally on the back of the cases referred to in the passage cited at [141] above that aggravated damages may be awarded in causes of action where damages are at large. Commentary to that effect is found in Andrew Tetternborn's *Law of Damages* (LexisNexis, 2nd Ed, 2010) (at para 2.22) and the *Halsbury's Laws of England* (LexisNexis, 5th Ed, Vol 29, 2014) at para 323. I also note that the aforementioned paragraph in *Halsbury's Laws of England* specifically recognises the availability of aggravated damages for the tort of conspiracy in English law.

143 Further, in *Michaels and another v Taylor Woodrow Developments Ltd and others* [2001] Ch 493, Laddie J was asked to strike out an action for conspiracy by unlawful means. While he granted the application and struck out the action, he made the following observations (at [65]) that recognise that the court could award aggravated damages for conspiracy by unlawful means:

> … That said, I can see much attraction in the courts suppressing the pleading of unlawful means conspiracies where the same allegation could be expressed in terms of joint tortfeasance. In such cases the allegation of conspiracy may add nothing but invective to the claim form and pleadings. Second, *the existence and implementation of a wrongful conspiracy may affect the scope of the damages. For example it may be easier to obtain aggravated damages in a case of unlawful*

means conspiracy than it would be in an action against each defendant separately. It is not necessary to determine whether those damages could ever be different from and larger than the damages which would be recovered if the plea was simply stated in terms of joint tortfeasance. [emphasis added]

Australia and Canada

144 In *Latham v Singleton* [1981] 2 NSWLR 843, the Supreme Court of New South Wales had to decide an action brought under the tort of conspiracy by unlawful means. The conspiracy there was to intimidate the plaintiff's employer by unlawful means. In that case, the court considered (at 877) the possibility of awarding general damages for economic loss, general damages for pain and suffering, aggravated damages and exemplary damages. On the facts, the court awarded damages for economic loss and pain and suffering but did not award aggravated or exemplary damages due to the provocative conduct of the plaintiff. Be that as it may it seems clear that, in principle, aggravated damages may be awarded under Australian law for the tort of conspiracy by unlawful means.

145 Indeed, a leading Australian textbook on torts, R P Balkin and J L R Davis, *Law of Torts* (LexisNexis Butterworths, 4th Ed, 2009) notes in the following manner (at p 616 and p 758) that aggravated damages are claimable under Australian law for the tort of conspiracy by unlawful means:

> [21.49] Once the precondition of pecuniary loss has been fulfilled, the measure of the plaintiff's damage will encompass not only the loss of earning capacity but also injury to a person's feelings or to the reputation of a business and, in appropriate circumstances, aggravated or exemplary damages.

146 Lastly, it is to be noted that in the context of Canada, the Supreme Court of Alberta awarded aggravated damages for an action in conspiracy by unlawful means in the case of *McKinnon v F. W. Woolworth Co. Ltd. et al.* (1968) 70 DLR (2d) 280.

A principled approach

147 While the authorities suggest that it is possible to award aggravated damages for the tort of conspiracy by unlawful means, it is important to seek a principled approach for deciding whether aggravated damages should be awarded in the tort of conspiracy by unlawful means. In this regard, the approach in Paula Giliker's *A 'new' head of damages: damages for mental distress in the English law of torts* (2000) 20 Legal Studies 19 ("*Giliker*") is of some assistance. While the author there was advocating the recognition of mental distress damages in English law, she analysed the situations where aggravated damages have been awarded in English law and was able to identify elements inherent in a cause of action that could potentially justify such an award.

148 Insofar as the economic torts, such as malicious falsehood, inducing breach of contract, intimidation and deceit, are concerned, it is, in essence, suggested by *Giliker* at 35 that the pre-existing availability of aggravated damages in these torts is justifiable as these torts are intentionally committed. Given the finding of intentionality, the courts are entitled to take into account the circumstances in which the tort was committed, the social costs to the victim and the conduct of the defendant. I broadly agree with this justification and its applicability to the tort of conspiracy by unlawful means, where the court would make a finding in relation to an unlawful intention on the part of a defendant. In this regard, I also wish to allude to an observation in *McGregor on Damages* (at para 46-020) that the damages in conspiracy by unlawful means follow the same pattern as that of inducing breach of contract.

149 However, I must caution that given the test accepted in *Harry Tan* (at [138] above) aggravated damages must be reserved for cases where there is in existence contumelious or exceptional conduct or motive. Therefore, a defendant's act of conspiracy in and of itself will not justify an award of aggravated damages. A court will have to have regard to the relationship between the parties and the circumstances in which the conspiracy was executed to analyse if the conduct of the defendant can be said to be contumelious or exceptional. In any case, my view is that no aggravated damages are recoverable in principle by a corporate plaintiff since the latter cannot suffer mental distress or injury to feelings.

150 For the reasons stated, I hold that, as a matter of Singapore law, aggravated damages may be awarded in an action for conspiracy by unlawful means. This leads me to the next topic of the discussion which is whether a claim for aggravated damages for distress is a free-standing discrete head of loss or whether it exists to augment an award of compensatory damages.

Was the AR correct in awarding aggravated damages as a free-standing head of loss and does the principle of proportionality apply in the assessment of aggravated damages?

151 Prior to the landmark decision of the House of Lords in *Rookes v Barnard* [1964] AC 1129 ("*Rookes v Barnard*"), aggravated damages were not distinguished from punitive damages and recognised as a separate category of damages in the court's remedial arsenal. Lord Devlin opined in *Rookes v Barnard* (at 1230) that aggravated damages are compensatory in nature as they allow the court to award a greater or *additional compensatory sum* when the conduct or motive of the defendant "aggravates" the injury done to the plaintiff. This provides the first indication that aggravated damages were meant to augment the award of general damages. Furthermore, the decisions of other courts in the common law jurisdiction recognised aggravated damages as a means to augment the award of general damages. In short, claims for aggravated damages are parasitic on another head of loss.

152 I start with Lord Woolf MR's remarks in *Thompson & Hsu v Commissioner of Police of the Metropolis* [1998] QB 498 ("*Thompson & Hsu*"). That case involved two plaintiffs who were wrongfully arrested and subsequently assaulted and manhandled by police officers for a period of four hours. The jury found that the police had fabricated a false case and evidence against the plaintiffs. The Court of Appeal awarded general damages, aggravated damages and punitive damages to the plaintiffs. Lord Woolf there suggests the following touchstone for the award of aggravated damages (at 516):

> (8) If the case is one in which aggravated damages are claimed and could be appropriately awarded, the nature of aggravated damages should be explained to the jury. Such damages can be awarded *where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award*. … [emphasis added].

153 Similarly, the Supreme Court of Canada in *Vorvis v. Insurance Corp. of British Columbia* [1989] 1 S.C.R. 1085 at 1099 stated unequivocally that aggravated damages were meant to augment the general damages assessed in the following manner:

> *Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages.* Aggravated damages are compensatory in nature and may only be awarded for that purpose. [emphasis added]

154 In both Australia and New Zealand, it has been noted that aggravated damages denote *an award which is increased beyond what might otherwise be available as compensatory damages*, *ie*, to augment the award of general damages to take into account the defendant's conduct in the commission of the tort and thereafter up to the hearing of the action (see *Lamb v Cotogno* (1987) 164 CLR 1 at 8; and *Taylor v Beere* [1982] 1 NZLR 81 at 93-94).

155 Insofar as Singapore law is concerned, the Court of Appeal in *Koh Sin Chong Freddie v Chan Cheng Wah Bernard* [2013] 4 SLR 629 ("*Koh Sin Chong Freddie*") endorsed the purpose of awarding aggravated damages as highlighted in *Thompson & Hsu* at [152] above at [77] of the report.

156 As seen above, the law in Singapore and the courts in England, Australia, New Zealand and Canada are unanimous in outlining the compensatory role of aggravated damages and the fact that they exist to augment the amount of general damages available so as to adequately compensate the plaintiff for the aggravation of the injury. Aggravated damages are in this sense "parasitic" on compensatory damages, the plaintiff being unable to recover aggravated damages unless (a) general damages are proved and (b) the adequacy of the amount of damages calls for augmentation of the general damages.

157 In relation to item (a), where proof of pecuniary loss is the gist of the cause of action, as with conspiracy by unlawful means, aggravated damages cannot be awarded unless compensatory damages have been proved. This is summarised in the principle set out in set out in *Thompson & Hsu viz*, whether there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award.

158 It is therefore immediately clear that the AR had erred in relation to this head of damages by seeking an independent measure (see [162] below) to assess the mental distress suffered by Mr Li instead of analysing the adequacy of the compensatory damages he awarded before deciding on whether they should be augmented by way of an award of aggravated damages in light of the conduct of Gleneagles and the consequential anguish Mr Li suffered. The AR's approach lends itself to further criticism as Mr Li had not pleaded a claim for mental distress (*ie*, mental distress falling short of psychiatric harm) as an independent head of loss.

159 Even if one might argue that the approach of the AR was another way of assessing aggravated damages, the inherent problem with the AR's approach is that it does not accommodate the principle of proportionality. And the reason why aggravated damages are awarded with reference to general damages, as espoused in *Thompson & Hsu*, is because of concerns relating to proportionality. Let me explain.

160 I start by highlighting the following general guidelines on proportionality set out by Lord Woolf in *Thompson & Hsu* at 516:

> (10) We consider that where it is appropriate to award aggravated damages the figure is unlikely to be less than a £1,000. We do not think it is possible to indicate a precise arithmetical relationship between basic damages and aggravated damages because the circumstances will vary from case to case. In the ordinary way, however, *we would not expect the aggravated damages to be as much as twice the basic damages except perhaps where, on the particular facts, the basic damages are modest*. [emphasis added].

161 The decision of *Thompson & Hsu* has been followed by the Court of Appeal in *Koh Sin Chong Freddie* where it considered that the principle of proportionality should apply to the assessment of

aggravated damages. The court opined as follows:

> 74 It is clear from the above authorities that courts in Singapore and various other common law jurisdictions do not subscribe to any rule that aggravated damages must be a fixed proportion of general damages. *Be that as it may, we are nonetheless of the view that there should be some semblance of proportionality between the quantum of general damages and aggravated damages awarded*.
>
> …
>
> [77] We endorse the view articulated in *Habib* that our courts should tread cautiously when determining the appropriate amount of aggravated damages to award. Ultimately, even where aggravated damages are appropriate, the total figure for both general and aggravated damages should not exceed fair compensation for the injury suffered by the claimant, see *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498. *Aggravated damages are meant to compensate for the aggravation of the injury; they are not an arbitrary top-up unrelated to the desire of the court to compensate the plaintiff for the aggravation.* [emphasis added].

162 The quantum of aggravated damages awarded by the AR at $240,000 (at a multiple of 24 times that of general damages in the sum of $10,000) was excessive and reveals "no semblance of proportionality" because he analysed aggravated damages as a free-standing and distinct head of loss. First, the AR's approach was to find a comparable figure for mental distress damages. He relied on *Kay Swee Pin v Singapore Island Country Club* [2008] SGHC 143 ("*Kay Swee Pin*") as a suitable starting point. Seeing that the AR was awarding aggravated damages, which is "parasitic" on the basic award of general damages, the general damages awarded (*ie*, $10,000) should have formed the starting point of his assessment. In short, the AR ought to have considered the adequacy of the award of general damages. For these reasons, the AR's award of aggravated damages was grossly disproportionate with his award of general damages.

163 As an aside, aggravated damages have to be specifically pleaded and the amount awarded as aggravated damages must be identified separately in the court's final award. These points do not detract from the legal position that aggravated damages are "parasitic" and depend ultimately on the adequacy of the quantum of general damages awarded.

Discussion and decision on the evidence of contumelious or exceptional conduct of Gleneagles and its impact on Mr Li

164 The circumstances attracting an award of aggravated damages include the manner in which the wrong was committed. As stated earlier (at [138] above), broadly speaking, before aggravated damages are awarded to compensate a plaintiff, there must be evidence of contumelious or exceptional conduct or motive on the part of the defendant in inflicting the injury and the defendant must have suffered some kind of intangible loss (distress, injury to personality, injury to feelings or the like). In assessing aggravated damages, the court takes into consideration not only evidence of the manner and circumstances in which the injury was inflicted but also the events up to and including the trial (in this case the assessment of damages hearing before the AR). Thus, subsequent conduct would include the conduct of Gleneagles' defence where it prolonged or revived the plaintiff's feelings in the form of distress, outrage and like emotions.

165 There are two features here that are material and I propose to focus on them now.

166 First, the status of Mr Li as a patient and Gleneagles as the hospital that admitted Mr Li as a

patient. The expectation of patients in the position of Mr Li is that the treating doctor and hospital will not do anything to harm the patient because of their negligence, carelessness, or reckless attitude of their staff. The vulnerability of patients admitted to a hospital is quite real. During his stay in the hospital, the patient is under the care of the hospital. His medical records form an important part of the hospital's management of Mr Li as a patient. Medical records include a variety of documentation of the patient's history, clinical findings, diagnostic test results, pre-operative care, operation notes, post-operative care, and daily notes of a patient's progress and medications. A patient's signed consent is an important medical record as it shows that a procedure was conducted with the consent of the patient. Against this backdrop of trust and confidence, Mr Li's written consent was tampered with, post-surgery, by an employee of Gleneagles. The latter in turn did not tell Mr Li that a second procedure was added to the Consent Form by an employee post-surgery. Mr Martin submitted that Nurse Chew's participation in the conspiracy by taking up a pen of the same colour to alter the Consent Form was "of a most pernicious and insidious character" [note: 34], and it assisted a rogue doctor to cover up a case of battery in relation to the second procedure.

167 In the scheme of things, the hospital's acts and omissions would more likely than not cause shock, distress and outrage to someone in the position of Mr Li whose Consent Form was tampered with post-surgery. This is of course exacerbated and "aggravated" by Gleneagles' subsequent concealment of the addition of the second procedure made to the Consent Form post-surgery until the Interrogatories Application where the conspiracy was "unravelled". The hospital's conduct in both tampering with the Consent Form and concealing the said tampering from Mr Li was plainly exceptional conduct in the circumstances of the case so as to warrant an award of aggravated damages. There is force in Mr Martin's submission that the "exceptional nature" of the amendment of the Consent Form and the subsequent concealment of the tampering cannot be marginalised and must have led to a heightened sense of injury and grievance on the part of Mr Li, which will allow an award of aggravated damages to be made. [note: 35]

168 The decision of *Appleton v Garrett* [1996] PIQR P1 ("*Appleton*") illustrates the trust and confidence that is reposed in a dental surgeon and is instructive on the type of conduct that would warrant an award of aggravated damages. In that case, the rogue dentist deliberately and in bad faith represented to a series of young patients that their otherwise perfectly healthy teeth required dental treatment. The rogue dentist so represented with the view to profiting from those unnecessary treatments. In that case, aggravated damages were awarded to compensate the plaintiffs for the defendant's malicious and unacceptable behaviour and the anger, indignation and a "heightened sense of injury or grievance" suffered by the plaintiffs (*Appleton* at 7). The two points that rendered the conduct of the dental surgeon all the more exceptional was (a) the vulnerability of the plaintiffs, and (b) the conduct of the dental surgeon given the trust reposed in him by virtue of his position as the treating dental surgeon. It can be easily seen that as between the parties, the patients were clearly vulnerable as the knowledge of their dental condition rested solely within the dominion of the rogue dentist. All in all, the conduct of the defendant, who was in a fiduciary position vis-à-vis the patients, was clearly "exceptional".

169 The second feature of this case is the overall conduct of the defence. This is another circumstance that could attract an award of aggravated damages. I refer to [67] to [79] above for the conduct of Gleneagles from the outset up to and including the hearing of the application for leave to administer Interrogatories against a non-party. As Mr Martin submitted, Gleneagles and Dr Looi "closed ranks" in the conduct of the legal proceedings brought by Mr Li. This went on until Dr Looi withdrew his defence and allowed consent judgment to be entered in Mr Li's favour. What transpired was more than the mere symptoms of stress associated with litigation that has to be endured for the duration of the litigation. I would venture to state that the conduct of this case exceeded the bounds

of acceptable and even robust litigation strategy. It transpired from the evidence that Gleneagles was economical with the truth in pleadings and in fact took positions that were inconsistent with the pleadings and in arguments. It is clear that the Interrogatories Application was necessitated by Gleneagles' posturing in the conduct of the legal proceedings. Plainly, the pattern of conduct of Gleneagles caused Mr Li to incur investigatory costs (as I have found) and it would give rise to frustration, anger, indignation or a heightened sense of grievance.

170 Aggravated damages were considered specifically in the context of conduct *vis-à-vis* legal proceedings in the case of *Sutcliffe v Pressdram* [1991] 1 QB 153 ("*Sutcliffe v Pressdram*"). The court there, *inter alia*, highlighted (at 184E-F) that conduct calculated to "deter the plaintiff from proceeding" would permit an increase in the level of damages (to warrant an award of aggravated damages). Although *Sutcliffe v Pressdram* was a defamation case, the principle in that case is capable of general applicable to all torts where aggravated damages may be awarded.

171 A related complaint is that Gleneagles' cross-examination of Mr Li was aggravating insofar as Gleneagles repeatedly insisted that Mr Li knew that Nurse Chew altered the Consent Form and his depression was only caused by Dr Looi's operation and not Gleneagles' cover-up of the addition of the second procedure to the Consent Form post-surgery. [note: 36] Analysing the transcripts of the hearing before the AR, I find no evidence to support Mr Martin's contention that the cross-examination of Mr Li was "relentless". Indeed, it is for counsel to decide if he had tested the plaintiff's case sufficiently in cross-examination, and the need to repeat questions or pursue a line of questioning vigorously are incidences of litigation. I did not find the cross-examination of Mr Li to be contumelious.

172 As I will point out later, where a defendant's outrageous conduct caused mental anguish or injures the feelings of the plaintiff, the degree of mental anguish suffered by the plaintiff is a factor that the court will take into account in analysing the sufficiency of compensation to the plaintiff in relation to the injury he has suffered from the defendant's wrong.

173 The AR made the following observations in relation to the conduct of Gleneagles (at [22] of his Judgment):

> I accept Mr Li's argument that *Gleneagles' act of giving him the consent form without informing him that it had been altered as well as failing to reveal the truth to him all the way up to the point in time of the entering of the interlocutory judgment is an exceptional act which justifies the granting of aggravated damages*. Although Mr Li also relied on Gleneagles' conduct in the assessment of damages subsequent to the entering of the consent interlocutory judgment, there is nothing to this. After Gleneagles admitted liability, I found that there was nothing aggravating in its conduct in the assessment of damages proceedings before me. Gleneagles through its representatives simply maintained that it did not reveal the truth to Mr Li because the matter had been referred to the legal department which then dictated the actions and the position the hospital had to take. The cross-examination of Mr Li was also hardly as relentless as counsel for Mr Li had suggested. A perusal of the transcript will show this. Therefore, the basis of my granting of aggravated damages lies on the acts which precede the entering of the interlocutory judgment. [emphasis added]

I broadly agree with the AR's reasoning in this regard.

174 Mr Martin highlighted Gleneagles' persistence in stonewalling Mr Li in the course of the proceedings when there was really no genuine and tactical need to do so. First, it refused to respond to Mr Li's Notice to Admit Facts (under O27 r 2 of the ROC) which sought an admission that there was

an alteration to the Consent Form and that it was done by Nurse Chew. [note: 37] Second, in its defence, Gleneagles pleaded that "*[Mr Li's] consent to the Tenolysis Right Wrist and Ulnar Neurolysis and Repair procedures had been obtained in accordance with the protocols/in-house rules established by [Gleneagles]*". [note: 38] This plea was ill-founded since the protocols/in-house rules only allow for amendments prior to surgery. Third, it strenuously objected to Mr Li's applications for Further and Better Particulars in relation to the Consent Form. Fourth, it vigorously objected to the Interrogatories Application. [note: 39]

175 I agree that the opposition put up by Gleneagles was consistent with its stance to stonewall Mr Li and this conduct was exceptional especially in light of Gleneagles' subsequent consent to liability pursuant to the 2011 Consent Judgment (and pleaded case). Let me explain.

176 Apart from knowingly withholding information of the addition of the second procedure made to the Consent Form post-surgery from Mr Li, Gleneagles' overall conduct in the proceedings would in the existing state of affairs give rise to frustration and anger in and distress to Mr Li. And quite so since it was conduct that seemed to deter Mr Li from gaining complete information on the tampering of documentary evidence that had taken place. As noted above (at [170]), in *Sutcliffe v Pressdram*, it was held (at 184E-F) that conduct calculated to deter the plaintiff from further proceeding would in the appropriate case warrant an award of aggravated damages. I am likewise of the view that Mr Li is entitled to aggravated damages.

177 As noted at [164] above, the court would also have to assess the intangible loss or mental anguish (which includes reactive depression that falls short of a recognised psychiatric harm) to the plaintiff arising from the exceptional conduct of the defendant in deciding whether aggravated damages should be awarded.

178 The parties here submitted on whether there was a need to even show any mental anguish on the part of the plaintiff before aggravated damages may be awarded.

179 Mr Martin relied on the decision of *Messenger Newspapers Group Ltd v National Graphical Association* [1984] IRLR 397 ("*Messenger Newspapers*") to argue that injury to feelings or distress need not be shown for an award of aggravated damages. [note: 40] In that defamation case, Caufield J reasoned (at [77]) that an award of aggravated damages can be made (in relation to a corporate claimant) even when injury to feelings is not possible because the touchstone for an award of aggravated damages is whether the injury to the plaintiff has been aggravated by malice or by the manner in which the injury was inflicted.

180 In response, Mr Lek referred me to the case of *Collin Steward & Anor v The Financial Times Ltd* [2005] EWHC 262 ("*Collin Steward*"), [note: 41] which was a case on libel. In that case, Gray J suggested (at [34]) that aggravated damages could not be granted to a corporate claimant as it had no feelings to injure.

181 Our Court of Appeal in *Basil Anthony Herman v Premier Security Co-operative Ltd* [2010] 3 SLR 110 at [65] noted the conflict between the judicial pronouncements in *Messenger Newspapers* and *Collin Steward* but expressed no further view on the matter. However, the High Court in *Golden Season Pte Ltd and others v Kairos Singapore Holdings Pte Ltd and another* [2015] 2 SLR 751 held that aggravated damages should not be awarded to a corporate claimant. The court opined (at [137]) as follows:

> It is hard to see how, on this basis, aggravated damages are applicable to a corporate entity.

> Whilst the English High Court in *Messenger Newspapers Group Ltd v National Graphical Association* [1984] 1 All ER 293 ("*Messenger Newspapers*") case awarded aggravated damages to a corporate plaintiff, the court there was more concerned with the need to punish the defendant for his deliberate wrong doing (see also *Gatley* 2013 at para 9.20). On this basis, *Messenger Newspapers* is really a decision on exemplary damages rather than aggravated damages. Indeed, the court in *Messenger Newspapers* made clear that the award was not in respect of injury to feelings.

182 As I already noted at [149], aggravated damages may not be awarded to a corporate claimant. But as an element of aggravated damages, Mr Li has to show mental anguish, distress or injury to feelings. An award of aggravated damages made without such an element would have the effect, in this case, of blurring the distinction between aggravated damages and punitive damages. As such, I am of the view that Mr Li has to establish that he has suffered some kind of mental anguish, distress or injury to feelings as a result of Gleneagles' exceptional conduct.

183 I have already alluded to many instances where I was satisfied that Mr Li had indeed suffered mental anguish. The evidence adduced in the hearing before the AR is also relevant. And I agree with the AR's analysis of the evidence that Mr Li had suffered mental anguish in the form of reactive depression from the aforementioned conduct of Gleneagles. It is apposite to set out the pertinent parts of the evidence.

184 I now turn to the evidence of Dr Lim Yun Chun ("Dr Lim"), Mr Li's expert. During cross-examination, Dr Lim described the reactive depression suffered by Mr Li in the following manner: [note: 42]

> … [T]he issue of his depression remained the same namely that the botched surgery and his perception that Gleneagles Hospital was stonewalling him and not being cooperative generate [*sic*] what he perceived as a major injustice towards him and he cannot let go [*sic*].
>
> … I was also very clear at that time that the cause of his depression was related to the surgery and his anger at the hospital for not being cooperative when he first sought to legitimise his complaint. …
>
> … And to me, it is very clear in his mind … somebody else is to be blamed for his depression. That's why I was able to say that there was a reactive [depression]. He externalise [*sic*] his depression to something else or someone else.

185 When Dr Lim was further questioned on whether Mr Li's depression arose solely from the botched surgery, Dr Lim responded in the following manner: [note: 43]

> I do not agree… when the plaintiff came to see me, he had already gone through a process which he described as wanting the hospital to come out in the open regarding the [Consent Form]. It was his description and he felt that … because the hospital was not able to be forthright with him, that was contributing, that was perpetuating his suffering. …

186 Dr Tan Chue Tin ("Dr Tan") gave evidence on behalf of Gleneagles. Notwithstanding his broader position that Mr Li's reactive depression may have stemmed from Dr Looi's botched surgery, I note the following concession in his evidence: [note: 44]

> … [I]n the early case or suit against Dr Looi, Mr Li had gone through quite a lot, of … manoeuvres

to try to get at the truth. I think that it's understandable that living this process, he would feel 'anxiety, worry, anger, agitation and despair'. It is understandable. Of which … among this reaction [*sic*], depression is one of them. … I'm talking about reactive depression.

187 Even on Dr Tan's evidence, it would be seen that Mr Li's reactive depression can be linked to the "manoeuvres" to try to get at the truth. This "manoeuvres" must surely include the exceptional conduct of Gleneagles outlined above.

188 Indeed, during cross-examination, Dr Tan also made further concessions that it was possible for Mr Li to have suffered mental distress and reactive depression in the following manner: [note: 45]

Q Yes? To prove aggravated damages, I got to prove two things, I have to prove [contumelious] conduct, reproachful conduct, yes? Plus mental anguish. Is there mental anguish?

…

Q … Mental anguish, distress, is it possible to suffer those?

…

A It's possible.

Q Right. Anxiety?

A Possible.

Q Possible. Reactive depression?

A Possible.

Q Possible. Right. Possible.

A Yah, they're possible.

189 Dr Tan also conceded that there was a causal link between Mr Li's reactive depression and Gleneagles' exceptional conduct: [note: 46]

Q … So however hard you try, the hospital is in the mix, the factual matrix that gave rise to his – let me put it very mildly – reactive depression, at that level at least. Yes? Agree?

A Yah.

190 Indeed, I am satisfied that notwithstanding the differences in the views expressed by expert witnesses who gave evidence for Mr Li and Gleneagles, it was common ground that Mr Li suffered from reactive depression. I am also of the view that a great part of Mr Li's reactive depression stemmed from the "stonewalling" and undermining of his claim by Gleneagles pursuant to its conspiracy with Dr Looi.

191 However, I do not think any aggravating factors were present after Gleneagles consented to the 2011 Consent Judgment. The conduct that should be taken into account should only relate to the

acts of Gleneagles that were done in furtherance of undermining Mr Li's claim against Dr Looi (and itself). This conduct ceased when the 2011 Consent Judgment was entered as the conspiracy was admitted to. As such, "litigation stress" thereafter cannot form the basis for an award of aggravated damages.

192 I now turn to the quantum of aggravated damages and the issue of proportionality. I have to bear in mind the distress that was caused in the particular circumstances of this case on account of the aggravating features identified above. So, the question is how to the fix the amount of aggravated damages. Ultimately, the overall award has to be proportionate to the general damages awarded. Our Court of Appeal in *Koh Sin Chong Freddie* (see [161] above) has pointed out that courts in Singapore and various other jurisdictions do not subscribe to any rule that aggravated damages must be a fixed proportion of general damages. In addition, the appellate court (a) cautioned that courts should tread cautiously when determining the appropriate amount of aggravated damages to award; and (b) observed that in cases where aggravated damages are appropriate, the total figure for both general and aggravated damages should not exceed fair compensation for the injury suffered by the plaintiff.

193 Lord Woolf's general guidelines in *Thompson & Hsu* (at 516) are intended where the general damages are modest. His Lordship opined that aggravated damages should not be as much as twice the general damages even if the general damages are modest. The guidelines can offer, in a proper case, the necessary legal restraint as exemplified by the principle of proportionality in the making of an award of aggravated damages for distress since mental distress and like emotions can be subjective and can vary from one case to the next. By this statement, I am not advocating a rule that aggravated damages must be twice the general damages awarded. Lord Woolf's guidelines simply give the courts a "feel" of how much to award. After all, there must be semblance of proportionality between the quantum of general damages and aggravated damages awarded. Above all, the court has to be mindful that the total figure for both general and aggravated damages should not exceed fair compensation.

194 In this case, an amount twice the award of general damages of $21,000 would ensure that the awards of general and aggravated damages are fair and not disproportionate. Thus, I award a sum of $42,000 as aggravated damages (being an amount two times the award of general damages). On its own, the current award of general damages of $21,000 would not be sufficient to compensate Mr Li for the outrageous conduct of Gleneagles (and the injury he suffered in that regard).

Whether punitive damages should be awarded against Gleneagles

195 The terms punitive damages and exemplary damages refer to the same thing and have been used interchangeably. Mr Li claims a sum of $500,000 as punitive damages and his claim was rejected by the AR.

196 Though once widely available under English law, post-*Rookes v Barnard*, punitive damages could only be awarded if the facts satisfy the "categories test" and "cause of action test" (collectively "the punitive damages tests"). Notably, the court has the discretion to refuse an award of punitive damages even if the tests are satisfied.

197 Before moving on to discuss the tests, the broader question is whether punitive damages are or should even be part of Singapore law. In this regard, Prakash J in *Afro-Asia Shipping Company (Pte) Ltd v Da Zhong Investment Pte Ltd* [2004] 2 SLR(R) 117 at [134] opined that *Rookes v Barnard* was good law in Singapore. A few years later, the Court of Appeal left open the position on punitive damages in *MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another*

appeal [2011] 1 SLR 150 ("*MFM Restaurants*"). In this regard, the Court of Appeal (at [53]) repeated the observations of the High Court in *CHS CPO GmbH v Vikas Goel* [2005] 3 SLR(R) 202:

> 65 … Indeed, the rather limited circumstances under which exemplary damages will be granted under English (and, presumably, Singapore) law appears to be in a state of transition, even flux (compare, for example, the House of Lords decisions of *Rookes v Barnard* [1964] AC 1129 and *Cassell & Co Ltd v Broome* [1972] AC 1027 on the one hand with both the House of Lords decision of *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 and the New Zealand Privy Council decision of *A v Bottrill* [2003] 1 AC 449 on the other; further reference may be made to the English Law Commission's Report on Aggravated, Exemplary and Restitutionary Damages (Law Com No 247, 1997)).
>
> 66 There is the yet further issue as to whether or not exemplary damages could be awarded for cynical breaches of contract (see generally, for example, the *Canadian Supreme Court decision of Whiten v Pilot Insurance Company* (2002) 209 DLR (4th) 257). All these issues raise important questions of great import but fall outside the purview of the present decision.

198 Mr Martin interpreted the above observations in *MFM Restaurants* as suggesting that the position in Singapore law *vis-à-vis* punitive damages might be broader than that in *Rookes v Barnard*. That is too narrow a reading; the natural import of the Court of Appeal's observations above is to question whether punitive damages should even be part of Singapore law. As Mr Lek had not taken a position either way, I will (save for the views expressed at [203]-[204] below) not express any further views on this issue but will proceed to analyse Mr Li's claim for punitive damages in accordance with the submissions of the parties.

Categories test

199 English law allows punitive damages to be claimed under three narrow categories of cases:

(a) Where there is oppressive, arbitrary or unconstitutional action by servants of the government ("First Category");

(b) Where there is wrongful conduct which has been calculated by the defendant to make a profit for himself which may exceed the compensation payable to the plaintiff ("Second Category"); and

(c) Where punitive awards are expressly authorised by statute ("Third Category").

(together, "the *Rookes v Barnard* Categories")

200 Mr Martin submits that the first two categories of the test should be expanded in light of the decision of *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 ("*Kuddus*"). In that case, the issue before the House of Lords was whether the plaintiff's claim for punitive damages should be struck out on the ground that punitive damages are not recoverable for the tort of misfeasance. Lord Nicholls suggested (at [66]) that the First Category should be extended to include acts of national and international companies and individuals who can exercise enormous power. Lord Nicholls also suggested (at [67]) that the Second Category should be extended to include malicious motives of the defendant and not simply motives calculated to profit the defendant.

201 The AR below rejected Mr Li's submissions that his claim fell within the first two categories of the test. Mr Li's arguments that the first two categories of the test should be expanded in light of

Kuddus were equally rejected. In doing so, the AR reasoned that there was need for legal restraint in the realm of punitive damages given the rule of law implications in expanding the categories of *Rookes v Barnard*.

202 By way of comment, the issue of expansion is a non-starter. The position in *Kuddus* has not changed the scope of the *Rookes v Barnard* Categories in English law. First, the court in *Kuddus* did not have to award punitive damages as it was dealing solely with a striking out action. Second, Lord Nicholls' observations were clearly tentative – he stated (at [66]) that he "[was] not sure" if the narrow construction of the First Category should be maintained. Thirdly, none of the other law lords shared Lord Nicholls' view and in fact, Lord Scott took a diametrically opposite view (at [109]-[111]) by calling for punitive damages to be completely abolished in the context of civil proceedings.

203 On a side-note, however, there is attractiveness in Lord Scott's arguments that punitive damages should be completely abolished in civil proceedings. First, developments in the law of restitution would arguably address many issues that a court might be minded to consider under punitive damages. Second, the doctrine of punitive damages engages difficult jurisprudential questions such as whether the punishment requires a state-individual relationship rather than being for one individual to demand against the other.

204 Be that as it may, in the absence of an appellate court's pronouncement to the contrary, *Rookes v Barnard* might tentatively represent the position of Singapore law and I reject the expansion of *Rookes v Barnard* in other Commonwealth authorities (*Uren v John Fairfax & Sons Pty Ltd* [1966] 117 CLR 118; *Taylor v Beere* [1982] 1 NZLR 81; and *Whiten v Pilot Insurance* [2002] 1 SCR 595) that were relied on by Mr Li.

205 Upon examination of the First Category, I find that Mr Li's claim in this connection to be a complete non-starter as Gleneagles does not fall within the class of persons contemplated under this category.

206 Mr Li argued that his claim falls within the Second Category. That argument required him to show that there was wrongful conduct which had been calculated by Gleneagles to make a profit for itself and that it exceeded the compensation payable to Mr Li. Mr Li suggested that Gleneagles' tampering of the Consent Form and "stonewalling" were calculated to pressurise Mr Li to buckle and discontinue the suit or reach an unfavourable out of court settlement. [note: 47] At the same time it was calculated in the sense of maintaining its profitable relationship as a hospital with Dr Looi. [note: 48]

207 As noted in *Cassell & Co Ltd v Broome* [1972] AC 1027 ("*Cassell v Broome*") (at 1079C-E) the Second Category requires a plaintiff to show that the defendant proceeded with his conduct knowing or with reckless disregard to the fact that it was wrong because the material advantages of going ahead outweighed the prospects of material losses. On the face of it, it is arguable that Mr Li has satisfied the Second Category by virtue of the 2011 Consent Judgment (see my observations on the upshot of the 2011 Consent Judgment at [24] to [34] above). It is possible, in theory, to then argue that Gleneagles did so to gain a material advantage *viz*, ensure that it also did not have to satisfy a claim brought by Mr Li or maintain its reputation. In this regard, I do not share the AR's views that there would be a need to extend the Second Category for Mr Li to make out a case that he fell within this category. Be that as it may, the so-called gain to Gleneagles must still be supported by evidence but no evidence was adduced by Mr Li.

Cause of action test

208 The English Court of Appeal in *AB v South West Water Services Ltd* [1993] QB 507 interpreted *Rookes v Barnard* and *Cassell v Broome* as adding a second restriction to the award of punitive damages. The court there held (at 530) that punitive damages could only be awarded if they were awarded for a particular wrong prior to *Rookes v Barnard* ("cause of action test"). This cause of action test was, however, rejected by the House of Lords in *Kuddus* (at [21]). In doing so, the House of Lords (at [22]) endorsed the view in *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 15th Ed, 1998) (at p 746) that the cause of action test "commits the law to an irrational position in which the result depends not on principle but upon the accidents of litigation." Their Lordships were satisfied that punitive damages could be awarded for any tort provided the facts fell within one of the *Rookes v Barnard* Categories. In that case, the evidence justified the exercise of discretion to make an award for punitive damages.

209 The applicability of the cause of action test in Singapore law was not argued by the parties before me, and the parties proceeded on the basis that punitive damages could be awarded for the tort of conspiracy by unlawful means.

The exercise of the court's discretion

210 Even after it has been shown by a plaintiff that his case satisfies one of the *Rookes v Barnard* Categories, the court retains the discretion to refuse an award of exemplary damages. Indeed, as noted by Lord Hailsham in *Cassell v Broome* (at 1060B), an award of punitive damages, if permissible, must always be discretionary.

211 The English cases have identified a number of factors that are relevant to the exercise of the court's discretion. Having analysed the English authorities, the English Law Commission suggested that the following factors would be relevant (see Law Commission's Report at p 63):

(a) the 'if, but only if' test;

(b) whether the plaintiff was the 'victim of the punishable behaviour';

(c) whether the defendant had already been punished by a criminal or other sanction;

(d) the existence of multiple plaintiffs;

(e) the plaintiff's conduct; and

(f) the defendant's good faith.

212 Though I have held that Mr Li has not satisfied any of the *Rookes v Barnard* Categories, I will nevertheless go on to state the reasons why I would not have exercised my discretion to award Mr Li punitive damages even if he had done so. I will only analyse factors (a) and (c), which I consider to be most appropriate in the present case.

The "if, but only if" test

213 In *Rookes v* Barnard, Lord Devlin stated (at 1128) that punitive damages should only be awarded *if, but only if*, the sum awarded as compensation (both general and aggravated damages) is inadequate to punish the defendant for his outrageous conduct, to mark the disapproval of the court (or jury) of such conduct and to deter the defendant from repeating the conduct ("the "if, but only if" test"). The "if, but only if" test therefore recognises that an award of punitive damages is

conditional on general and aggravated damages being inadequate to achieve the ends of punishment, deterrence and disapproval. Further, as noted by the English Law Commission, the "if, but only if" test also "recognises that even awards of compensatory damages may have an incidental punitive effect; and the need for an award of exemplary damages is correspondingly reduced where this is so" (see Law Commission's Report at 64). Furthermore, punitive damages are awarded only if the defendant's conduct affronts the court.

214 I am of the view that this is not a proper case to award punitive damages. First, the court has to give regard to Dr Looi's payment of $160,000 plus $102,000 in settlement. At the end of the day, it was Dr Looi who caused the underlying loss complained of in the conspiracy. It is difficult to see how Mr Li can receive a higher amount from Gleneagles.

Previous sanctions

215 I note that Mr Li lodged an official complaint with the Ministry of Health in relation to Gleneagles' alteration of the Consent Form. I am also cognisant of the fact that the Ministry of Health responded to Mr Li through his solicitors on 11 May 2012 to inform him that Gleneagles had been administered a stern warning from the Ministry of Health. [note: 49]

216 The Parliamentary debates in relation to the Private Hospitals and Medical Clinics (Amendment) Bill indicates that the Act was passed in 1980 to bring private hospitals and medical clinics within the control of the Ministry of Health (see *Singapore Parliamentary Debates*, Official Report (15 April 1999) vol 70 at cols 1228–1236 (Dr Aline K. Wong, Senior Minister for State for Health)). As such, it is absolutely clear that the Act envisages that the Ministry of Health is the gatekeeper insofar as compliance with the Act is concerned. Put another way, Parliament's intention was to allocate the tasks of ensuring compliance and meting out sanctions for offences committed under the Act and subsidiary regulations enacted pursuant to the Act to the Ministry of Health.

217 In *KD v Chief Constable of Hampshire* [2005] EWHC 2550, the court there refused to award punitive damages where there had been previous disciplinary proceedings in relation to the conduct complained of. Tugendhat J there noted [at 193] as follows:

> I have considered whether there should be an award of exemplary damages in this case. I have decided that there should not. The conduct in question was undoubtedly oppressive and arbitrary conduct on the part of a police officer. But there have already been disciplinary proceedings in respect of part of the conduct complained of, and Mr Hull has been punished in those proceedings. …

218 Likewise, the Ministry of Health had deemed it fit to give Gleneagles a stern warning for breach of the relevant regulation. I note that this was not a case where the Senior Management of Gleneagles was involved in the alleged conspiracy. Gleneagles was liable vicariously for (as Mr Martin acknowledged) an error of judgment on the part of Nurse Chew. [note: 50]

219 Unlike compensatory damages, a court is not bound by the terms of the parties' consent in assessing punitive damages, and the court can (and should) draw its own inferences from the facts in deciding if punitive damages should be awarded. This is because an award of punitive damages is to mark the dissatisfaction of the court. On that basis, though I recognised that Gleneagles had in effect consented to the point that the Consent Form was amended with the intention to injure Mr Li, and I took that into account in my award of aggravated damages, I am not inclined to act solely on Gleneagles' consent to the tort of conspiracy pursuant to the 2011 Consent Judgment to exercise my discretion to award Mr Li punitive damages.

AR's costs order was based on High Court scale

220 The AR awarded Mr Li $250,000 in damages and costs on the High Court scale ("the AR's Costs Order"). Gleneagles has appealed against the AR's Costs Order.

221 The general rule on scale of costs is set out in s 39 of the State Courts Act (Cap 321, Rev Ed 2007) ("the SCA") in the following manner:

> **Costs of certain actions commenced in High Court which could have been commenced in a State Court**
>
> 39.—(1) Where an action is commenced in the High Court which could have been commenced in a State Court, then, subject to subsections (3) and (4), the plaintiff —
>
> (a) if he recovers a sum not exceeding the District Court limit, shall not be entitled to any more costs of the action than those to which he would have been entitled if the action had been brought in a District Court; and
>
> …

222 The "District Court limit" referred to in s 39(1) is defined in s 2 of the SCA to be "$250,000 or such other amount as may be specified by an order under section 30 [of the SCA]".

223 However, s 39(1) of the SCA is subject to the following provisions which give the High Court the power to award costs on the High Court scale of costs even when damages awarded are within the District Court limit:

> 39.—(4) In any action, the High Court, if satisfied —
>
> (a) that there was *sufficient reason* for bringing the action in the High Court; or
>
> (b) that the defendant or one of the defendants objected to the transfer of the action to a State Court, may make an order allowing the costs or any part of the costs thereof on the High Court scale or on the State Courts scale as it may direct.

224 This statutory position is also reflected in the ROC in the following manner:

> **Basis of taxation (O. 59, r. 27)**
>
> …
>
> (5) Notwithstanding paragraphs (1) to (4), if any action is brought in the High Court, which would have been within the jurisdiction of a State Court, the plaintiff shall not be entitled to any more costs than he would have been entitled to if the proceedings had been brought in a State Court, *unless in any such action a Judge certifies that there was sufficient reason for bringing the action in the High Court*. [emphasis added]

225 I note that the AR did not state his reasons for awarding costs on the High Court scale. If the AR went on the basis of the award of $250,000, he was mistaken because to attract High Court costs, the damages awarded must exceed the figure of $250,000.

226 Be that as it may, I am satisfied that the AR's Cost Order should stand as there was sufficient reason for bringing the action in the High Court. Let me explain.

227 The definition of the term "sufficient reason" in s 39(4) was analysed by VK Rajah JC (as he then was) in *Cheong Ghim Fah and another v Murugian s/o Rangasamy* [2004] 3 SLR(R) 193. The court there opined (at [10]:

> The legislative directive in s 39 of the SCA is patently intended to ensure that the statutory division of the caseload between the two courts is religiously observed by litigants and their solicitors. A party that breaches this statutory mandate by incorrectly commencing proceedings in the High Court should not be entitled to recover costs that have been unreasonably incurred; hence it should only be permitted to recover the subordinate courts scale of costs unless there is sufficient reason justifying the initial election. Without attempting an exhaustive definition of the term "sufficient reason", in the context of s 39 of the SCA, it can be said to embrace matters that are out of the ordinary. All said and done, this term is an etymological chameleon that has no fixed or settled meaning; satisfying this requirement is coloured and evaluated entirely by its statutory context and the relevant factual matrix. The term has overlapping but not consistently identical meanings in ss 37, 38 and 39 of the SCA.

228 Indeed, in *Tan Chong & Sons Motor Co (Sdn) Bhd v Alan McKnight* [1983] 1 MLJ 220, the Malaysian court there had to consider difficult points of law in relation to warranties and measure of damages. The court there found the aforementioned to be sufficient reason to award costs on the High Court scale and opined as follows:

> **Costs**:
>
> As to the costs, we agree with counsel for the respondent that these should be fixed at High Court scales, because we ourselves find that this is not an easy case to deal with. It involves difficult points of law, especially on the question of warranty and measure of damages.

229 As noted by our Court of Appeal in *Arul Chandran v Chew Chin Aik Victor* [2001] 1 SLR(R) 86 at [62], the court would ultimately have to consider the complexity of the case and "[take] the circumstances of the case into account" in deciding if costs on the High Court scale should be awarded to the successful party.

230 The present case has raised number of important points of law especially in relation to:

(a) the availability of aggravated damages in the tort of conspiracy by unlawful means; and

(b) the quantification of aggravated damages outside of the defamation context.

231 Therefore, I am satisfied that that there was sufficient reason for imposing costs on the High Court scale in respect of the assessment of damages against Gleneagles even though there is a revision to the award of damages.

Conclusion

232 For the reasons stated above, Gleneagles is to pay Mr Li (a) a sum of $21,000 as general damages and (b) a sum of $42,000 as aggravated damages.

233 The costs of the assessment below to Mr Li are to be taxed on the High Court scale.

234 I will hear parties on the cost of the appeal and cross-appeal.

[note: 1] Notes of Evidence dated 25.9.13, p 75, lines 20-21.

[note: 2] Gleneagles' Skeletal Rebuttals dated 22.8.14, p 5, para 12, and Gleneagles' Supplemental Bundle of Authorities and Court Documents, Tab 2.

[note: 3] Lee Sior Peng's AEIC, para 25.

[note: 4] Mr Li's Bundle of AEICs Vol. 1, pp 21-24.

[note: 5] Agreed Bundle Vol 2, p 422.

[note: 6] Agreed Bundle Vol 2, p 425.

[note: 7] Gleneagles' Skeletal Rebuttals dated 22.8.14, para 35.

[note: 8] Lee Sior Peng's AEIC, para 25.

[note: 9] Mr Li's Bundles of AEICs Vol. 1, p 395.

[note: 10] Gleneagles' Submissions dated 4.3.14, pp 5-6.

[note: 11] Gleneagles' Submissions dated 4.3.14, pp 5-6.

[note: 12] Gleneagles' Submissions dated 4.3.14, p 6; Agreed Bundle Vol 1, p 107.

[note: 13] Agreed Bundle Vol 1, p 2.

[note: 14] Gleneagles' Defence (Amendment No. 4), para 23.a.

[note: 15] Agreed Bundle Vol 1, p 136.

[note: 16] Agreed Bundle Vol 1, p 133.

[note: 17] Notes of Arguments dated 29.8.14, p 22.

[note: 18] Notes of Arguments dated 29.8.14, p 22.

[note: 19] Agreed Bundle Vol 2, p 431.

[note: 20] Agreed Bundle Vol 1, p 133.

[note: 21] Mr Li's Submissions dated 3.3.14, para 36.

[note: 22] Mr Li's Submissions dated 3.3 14, para 104.

[note: 23] Gleneagles' Skeletal Rebuttals dated 24.8.14, para 20.

[note: 24] Gleneagles' Submissions dated 4.3.14, para 54.

[note: 25] Agreed Bundle Vol 1, p 130.

[note: 26] Mr Li's Bundles of AEICs Vol. 1, p 306.

[note: 27] Mr Li's Submissions dated 3.3.14, paras 36 & 42.

[note: 28] Mr Li's Submissions dated 3.3.14, paras 94-95.

[note: 29] Mr Li's Submissions dated 3.3.14, para 103.

[note: 30] Gleneagles' Skeletal Rebuttals dated 22.8.14, p 5, para 12; and Gleneagles' Supplemental Bundle of Authorities and Court Documents, Tab 2.

[note: 31] Mr Li's Submissions dated 3.3.14, para 36.

[note: 32] AR's Judgment at [22], [25].

[note: 33] Notes of Arguments dated 29.10.14, p 25.

[note: 34] Mr Li's Written Submissions dated 3.3.14, para 147.

[note: 35] Mr Li's Written Submissions dated 3.3.14, para 148.

[note: 36] Mr Li's Written Submissions dated 3.3.14, para 107(b).

[note: 37] Agreed Bundle Vol.2, p 431.

[note: 38] Gleneagles' Defence (Amendment No. 4), para 23.a.

[note: 39] Agreed Bundle Vol 1, p 130.

[note: 40] Mr Li's Response Letter dated 16.1.2015, para 5.

[note: 41] Gleneagles' Response Letter dated 16.1.2015, para 10.

[note: 42] Notes of Evidence dated 30.9.13, p 12, lines 26-32; p 17, lines 26-31; and p 21, lines 16-19.

[note: 43] Notes of Evidence dated 30.9.13, p 26, lines 1-6.

[note: 44] Notes of Evidence dated 30.9.13, p 56, lines 14-19.

[note: 45] Notes of Evidence dated 30.9.13, pp 85-86.

[note: 46] Notes of Evidence dated 30.9.13, p91, lines 6 -9.

[note: 47] Mr Li's Written Submissions dated 3.3.14, para 310.

[note: 48] Mr Li's Written Submissions dated 3.3.14, para 315.

[note: 49] Agreed Bundle Vol 2, p 430.

[note: 50] Mr Li's Submissions dated 3.3.14, para 20.