IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 46

Civil Appeal No 152 of 2016

Between

LIM GEOK LIN ANDY

… Appellant

And

YAP JIN MENG BRYAN

… Respondent

Civil Appeal No 176 of 2016

Between

LIM GEOK LIN ANDY

… Appellant

And

YAP JIN MENG BRYAN

… Respondent

In the matter of Suit No 1057 of 2013

Between

LIM GEOK LIN ANDY

… Plaintiff

And

YAP JIN MENG BRYAN

… Defendant

JUDGMENT

[Abuse of process]

[Contract] — [Variation] — [Oral agreement]

[*Res judicata*] — [Extended doctrine]

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v
Yap Jin Meng Bryan and another appeal

[2017] SGCA 46

Court of Appeal — Civil Appeals Nos 152 and 176 of 2016
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Tay Yong Kwang JA
2 May 2017

14 August 2017 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 The present proceedings constitute two appeals. The first (Civil Appeal No 152 of 2016 ("CA 152")) is an appeal against the decision of the High Court judge ("the Judge") in *Lim Geok Lin Andy v Yap Jin Meng Bryan* [2016] SGHC 234 ("the Judgment"), in which the Judge dismissed the plaintiff's ("the Appellant") claim against the defendant ("the Respondent") in Suit No 1057 of 2013 ("S 1057"). CA 152 is the main appeal. The second (Civil Appeal No 176 of 2016 ("CA 176")) is an appeal against the decision of the Judge in *Lim Geok Lin Andy v Yap Jin Meng Bryan* [2016] SGHC 261 ("the Supplemental Judgment"), which dealt with the issue of costs.

2 As the Judge aptly put it, these proceedings constitute "yet another chapter in the dispute between [the Respondent] and his former partners in his

2008 investment in properties located at … River Valley Road" ("the Properties") (see the Judgment at [1]). As we shall see, the previous "chapters" in this narrative are, of *crucial importance* in the context of CA 152 – in particular because they affect the issue of whether or not, given his involvement in previous related proceedings, the claim by the Appellant in the present case constituted an abuse of process pursuant to the broader doctrine of *res judicata* laid down by the seminal English decision of *Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313 ("*Henderson*") and ought therefore to be dismissed on this basis alone. We shall consider this issue first ("Issue 1"). For the reasons set out below, we find that there had indeed been an abuse of process pursuant to the principle laid down in *Henderson* and therefore ***dismiss*** the present appeal on this ground.

3 However, as the Judge also spent a substantial part of the Judgment considering the Appellant's claim on its merits, we will also consider this particular issue ("Issue 2") – although it is, strictly speaking, unnecessary as the Appellant's claim fails under Issue 1. For the reasons set out below, we find that the Appellant has *not* made out his case against the Respondent and we thus also find against the Appellant with regard to Issue 2.

4 In so far as the issue of costs that arises from the Supplemental Judgment ("Issue 3") is concerned (for which leave to appeal was granted by consent *vide* High Court Originating Summons No 1324 of 2016), we ***allow*** the appeal for the reasons set out below.

5 We will first turn to the facts of, and the background to, the present appeals.

Facts and background

Parties to the dispute

6 The Appellant is a director in his family company, Kim Hup Lee & Co Pte Ltd, a property developer. The Respondent was a managing director in the Global Market division of Deutsche Bank Group until April 2008. Lim Koon Park ("Park") is an architect.

7 The Appellant had known the Respondent since their student days in the same junior college. The Appellant had known Park since 2000. The Appellant introduced Park to the Respondent in September 2006. Eventually, the three of them agreed to bring together their different expertise for investment purposes.

Background

Setting up of Riverwealth

8 The Appellant, the Respondent and Park entered into a joint venture to acquire, redevelop and resell properties for profit. Riverwealth Pte Ltd ("Riverwealth") was incorporated on 28 September 2007 as a joint venture vehicle for the acquisition of the Properties. The Properties were purchased in late April 2008 for a total of $48.5m and the purchase was financed by a $30m loan from Hong Leong Finance Limited ("HLF") to Riverwealth which was jointly and severally guaranteed by the Appellant, Respondent and Park, with the balance provided by the Respondent to Riverwealth in the form of a personal loan and injection of equity capital. There was allegedly an oral agreement for profits from the sale of the Properties to be split in a 2:1:1 ratio (henceforth referred to as "the Initial Agreement") among the Respondent, Park and the Appellant, respectively. It was undisputed that the Respondent paid for all the

share capital in Riverwealth despite the shareholding indicating otherwise. The shareholding in Riverwealth as of April 2008 was as follows:

S/N	Name	Percentage
1	The Respondent	50%
2	Park's wife, Wee Pek Joon ("Wee")	25%
3	The Appellant	25%

9 It is not disputed that Wee held the Riverwealth shares on Park's behalf. On 19 November 2008, Riverwealth's equity shareholding was restructured to comply with the terms of the HLF loan, resulting in the following shareholding:

S/N	Name	Percentage
1	The Respondent	74%
2	Wee	13%
3	The Appellant	13%

The global financial crisis and breach of the HLF loan

10 It was originally envisaged by the parties that Riverwealth would try and "flip" the Properties for profit within a few months of their purchase. However, Riverwealth's ownership of the Properties coincided with the onset of the global financial crisis in 2008 and 2009, which made it difficult to sell the Properties. One of the key terms of the HLF loan was that Riverwealth had to submit final plans for the proposed development of the Properties by October 2008, which term was not complied with. It is not disputed that the failure to submit these plans put Riverwealth in breach of the terms of the HLF loan, with the result that HLF was entitled to cancel the loan arrangement. On 3 December 2008,

HLF demanded that Riverwealth place a $1m fixed deposit pursuant to the terms of the HLF's loan. This $1m deposit was eventually placed by the Respondent. The Respondent claims that this event changed the complexion of the Initial Agreement – if the profit sharing agreement was to be sustained, capital had to be injected by the Appellant and Park.

The Uluru meeting and the Appellant's transfer of shares to the Respondent

11 The Appellant, the Respondent and Park subsequently met at the Uluru restaurant on 17 December 2008 ("the UIuru meeting"). The events that transpired at this meeting are disputed. The only near-contemporaneous record of what occurred at the meeting was an email dated 19 December 2008 sent from the Respondent to Park, copied to the Appellant, recording Park's purported agreement to transfer his remaining 13% shareholding in Riverwealth (held in Wee's name) for a nominal sum of $1 and having Wee step down as a director, in exchange for the Respondent undertaking to discharge Park's obligation under the HLF guarantee and indemnifying Park for any claims arising from the guarantee. However, by an email dated 2 January 2009, Park refused to follow any of the actions outlined in the 19 December 2008 email, citing legal concerns. It is undisputed that Park held on to his 13% of shares.

12 In contrast, the Appellant executed two deeds of transfer in favour of the Respondent on 30 January 2009 and 27 March 2009, respectively, effectively divesting his remaining 13% of shares in Riverwealth to the Respondent. He also resigned from his position as director on 27 March 2009. The reasons for these actions, which are material to the Appellant's claim, are disputed. The Respondent transferred 1000 shares to the Appellant on 13 May 2009, which shares were returned to the Respondent on 29 September 2009; however, these transfers are peripheral to the dispute.

The 2010 Suit between Park and the Respondent

13 The Properties were eventually sold for a sum of $60.08m on 8 October 2009. A dispute between Park and the Respondent first arose over the profits from this sale. Park brought a claim against the Respondent for his share of the profits made under this investment ("the 2010 Suit"), based on the terms of the Initial Agreement. The 2010 Suit was also heard by the Judge. It is crucial to note that *the Appellant was a witness in the 2010 Suit* for Park, the plaintiff in the 2010 Suit, a matter which will take on greater significance later in this judgment (see [45]–[47] below).

14 Although the Judge dismissed Park's claim and allowed the Respondent's counterclaim based on Park's misrepresentation (see *Lim Koon Park v Yap Jin Meng Bryan and others* [2012] SGHC 159 ("the 2012 HC Judgement")), this court allowed Park's appeal and affirmed the existence of the Initial Agreement whereby the Respondent and Park (as well as the Appellant in the present proceedings) would share profits from the sale of the Properties in the ratio of 2:1:1 (see *Lim Koon Park and another v Yap Jin Meng Bryan and another* [2013] 4 SLR 150 ("the 2013 CA Judgment") at [79]). More importantly, this court also found (at [16]) that with the extra cash injections and increased risk exposure, the Respondent wanted the Appellant and Wee to "either pay for, or transfer to him, their remaining allotment of shares in Riverwealth", and that the Appellant opted to transfer his shares in Riverwealth to the Respondent.

15 Pursuant to an order by this court that an inquiry be conducted to determine Park's share of the profits from the gross sale proceeds of the Properties less specified deductions, the Judge allowed deductions amounting to $5,408,676.58 to be effected from the said gross proceeds (see *Lim Koon*

Park and another v Yap Jin Meng Bryan and others [2015] SGHC 284). At a further hearing, the Judge determined the rate and amount of interest to be awarded to the Respondent in relation to his personal loan extended to Riverwealth (see *Lim Koon Park v Yap Jin Meng Bryan* [2016] SGHC 29). Both parties appealed to this court; Park's appeal was allowed in part (in Civil Appeal No 44 of 2016) whilst the Respondent's appeal was dismissed (in Civil Appeal No 51 of 2016) on 27 October 2016.

16 What is of special significance for the purpose of CA 152 is the fact the Appellant commenced his claim in these proceedings against the Respondent just *a few months* after the 2013 CA Judgment (which finally confirmed the success of Park's claim on the issue of liability against the Respondent). We do not think that this is a coincidence. Indeed, this was also the view of the Judge who (correctly, in our view) did not mince her words when she observed as follows (see the Judgment at [175]):

> The [Appellant] waited until the outcome of the CA judgment [*ie*, the 2013 CA Judgment] was in Park's favour and then immediately tried to take advantage thereon by requesting the defendant to consent to judgment on his claim without going through the legal process.

17 She proceeded to observe (at [176]) that "[t]he [Appellant's] conduct is nothing less than opportunistic". We agree with the Judge although, for the reasons set out below, we differ from the legal basis she had relied upon as a reason for rejecting the Appellant's claim against the Respondent. Indeed, there is other conduct on the part of the Appellant which supports the inference that he was guilty of an abuse of process. In particular, the Appellant made an unsuccessful attempt to intervene as a defendant at the inquiry on profits that had been ordered by this court in relation to the 2010 Suit (*vide* Summons

No 299 of 2014), arguing that his claim and Park's claim were the same in substance.

18 We now come to the Appellant's claim in the present proceedings against the Respondent proper.

The central issue

19 In so far as the Appellant's actual claim in the present proceedings was concerned, the central issue revolved around the reason behind the Appellant's divesting of his remaining 13% of his shares in the Company to the Respondent (which divestment was noted above at [12]).

The Appellant's position below

20 The Appellant's position in the court below was that *the share transfer* was effected in order to facilitate refinancing of the Properties by the Respondent. The proposed refinancing arrangement ("the Alternate Financing Proposal") required the Respondent to be the sole shareholder in the Company, as alluded to in the Respondent's email of 2 August 2008 to Park and the Appellant. The Appellant argued that the share transfer pursuant to the Alternate Financing Proposal did not affect his entitlement to profits under the Initial Agreement. The Appellant's position was that at the Uluru meeting (see above at [11]), the Respondent assured both Park and the Appellant that the Initial Agreement would remain intact after their respective share transfers. The Appellant also claimed that it was at the Uluru meeting that he agreed to transfer all his shares *pursuant to the Alternate Financing Proposal*. In addition, after Park left the Uluru meeting, the Appellant stated that the Respondent also assured the Appellant that *the profits from the eventual sale of the Properties*

should not be less than $1.55m, if they were sold at $60m ("the Minimum Profit Assurance").

21 The Appellant also alleged the existence of *an oral promise by the Respondent to bear the holding costs of the Properties for a period of at least 18 months from the date of purchase of the Properties in April 2008* ("the Minimum Financing Period"). It bears noting that the existence of the Minimum Profit Assurance and the Minimum Financing Period were first averred in the Appellant's Reply (Amendment No 1) dated 4 June 2014 to the Respondent's Defence (Amendment No 3). The initial averment in Reply (Amendment No 1) was that the Minimum Financing Period was part of the Initial Agreement. This was changed in the Further and Better Particulars served on 7 January 2015, wherein the Appellant claimed that the Minimum Financing Period was agreed around the first quarter of 2008 and reconfirmed at a meeting on 9 July 2008 at Park's office, with the Appellant, the Respondent, Park and Clarence (another director of Riverwealth at the material time) present. The Minimum Financing Period went towards supporting the Appellant's position that there was no reason for the Appellant to exit the venture because he was not liable to inject capital into the venture.

The Respondent's position below

22 The Respondent's position in the court below, on the other hand, was that he had made an "Exit Offer" to the Appellant, which the Appellant had accepted. The terms of the pleaded Exit Offer were that the Appellant would inject fresh equity into Riverwealth ("Option 1") or would transfer his shares to the Respondent and surrender his profits under the Initial Agreement ("Option 2"). This was because the prevailing financial situation during the period when Riverwealth held the Properties was such that the parties were at

risk of being liable on their joint and several guarantees to HLF. There was therefore an "urgent need to renegotiate the [HLF] loan or find alternative sources of financing". The timing at which the Exit Offer was made was varied a number of times, but the Respondent's final position was that it was made impliedly to the appellant at the Uluru meeting in the course of making the same offer to Park, and then expressly to the Appellant between end January 2009 and 27 March 2009. The Respondent's case was that the Appellant had agreed to Option 2 and had therefore made an "Exit Agreement" by transferring his shares in Riverwealth to the Respondent as he did not want to contribute to the holding costs of the Properties. This varied and superseded the Initial Agreement with the result that the Appellant was no longer entitled to any of the profits arising from the sale of the Properties. Not surprisingly, the Respondent denied the existence of the purported Minimum Profit Assurance or Minimum Financing Period.

The issue of costs

23 In so far as the issue of costs was concerned, it should be noted that the Appellant did not, in fact, address the costs implications of the Respondent's offer to settle on 25 February 2016 ("the OTS") in his submissions before the Judge. The terms of the OTS were that:

> (a) The Appellant would pay 90% of the Respondent's costs on a standard basis until the date of acceptance of the OTS, to be agreed or taxed; and
>
> (b) Within 7 days of the Respondent receiving the settlement costs, the Appellant would file a notice of discontinuance in the suit.

24 The Respondent argued for costs to be paid on an indemnity basis from the date of the commencement of the suit, in the light of the Judge's finding that the suit was an abuse of process.

The Judge's decision

25 The Judge distilled the following issues for determination in the Judgment (at [130]):

> (a) Whether the Appellant had transferred all his shares in Riverwealth to the Respondent because of the Alternate Financing Proposal;
>
> (b) Whether the Respondent had made the Exit Offer to the Appellant;
>
> (c) Whether the Appellant had transferred his shares pursuant to his exercise of Option 2 of the Exit Offer; and
>
> (d) Whether the Appellant's claim amounted to a collateral attack on the 2013 CA Judgment and was an abuse of the court process.

26 As a preliminary observation, the Judge was of the view that the Appellant had not discharged his burden to establish "*prima facie* that the Initial Agreement was not superseded by the [Respondent]'s Exit Offer" (see the Judgment at [132]). The Judge was also of the view that the Appellant's claims with regard to the existence of a Minimum Profit Assurance and Minimum Financing Period were afterthoughts which surfaced late in the day without an "iota of evidence" (see the Judgment at [145]). She took the view that the Minimum Profit Assurance was concocted because the Appellant realised from the 2013 CA Judgment that the profits left for division in the ratio 2:1:1 would

not have amounted to much for him (see the Judgment at [146]). If the Minimum Profit Assurance did in fact exist, it would have been mentioned in the pleadings much earlier than the Appellant's Reply (Amendment No 1) on 4 June 2014 (see the Judgment at [147]). In so far as the Minimum Financing Period was concerned, the Judge found it highly unlikely that a former banker like the Respondent would have undertaken such an onerous obligation in 2008.

27 The Judge first reasoned that the Appellant's claim that he transferred the remaining shares pursuant to the Alternative Financing Proposal could not be accepted. It was no longer feasible given Park's refusal to transfer his portion of shares to the Respondent, with the result that the Respondent could not fulfil the requirement of being a sole shareholder for the purposes of the Alternative Financing Proposal (see the Judgment at [154]). She reasoned that the Respondent must have therefore made the Exit Offer to the Appellant (see the Judgment at [155]). The Judge, while acknowledging that the Exit Offer was for no consideration even if it were accepted, took the view that the issue of consideration was of no consequence to the existence of the Exit Offer. She relied on the 25 September 2009 email sent by the Respondent to the Appellant entitled "Letter Accompany Share Transfer" as proof of the parties' agreement, even though the Appellant did not sign the relevant portions of the email or acknowledge the email (see the Judgment at [156]).

28 The Judge then found that the Appellant must have transferred his shares in Riverwealth because he accepted Option 2 of the Exit Offer (see the Judgment at [152]). The Judge was of the view that the Appellant's behaviour after the Uluru meeting was consistent with someone who was not a shareholder and who had no interest in Riverwealth, otherwise he would have found out about the sale of the Properties directly rather than through third parties. In our view, however, she failed, with respect, to consider the fact that the Appellant

remained liable under the joint and several guarantee for the $30m loan from HLF up till 2 July 2010 – a point which we will discuss further below.

29 In so far as the issue of whether the Appellant's claim amounted to a collateral attack on the 2013 CA Judgment was concerned, the Judge found in favour of the Respondent inasmuch as to allow the Appellant his claim would amount to an abuse of process and would be tantamount to a collateral attack on the 2013 CA Judgment's finding at [16] (see the Judgment at [177]). In essence, the Judge found that the Appellant's *entire action* was an abuse of process. The Judge found the Appellant's behaviour opportunistic in the light of his evidence in the 2010 Suit.

30 The Judge therefore dismissed the Appellant's claim in its entirety.

31 The Judge ordered that the Appellant pay the Respondent's costs on a standard basis from the commencement of the action on 21 November 2013 to 24 February 2016, and on an indemnity basis from 25 February 2016 onwards (see the Supplemental Judgment at [13]), because of the OTS served by the Respondent which turned out to be more favourable to the Appellant than the terms of the Judgment. The Judge declined to award costs on an indemnity basis for the period from 21 November 2013 to 24 February 2016 as she found that the Appellant was not unreasonable in thinking that he was entitled to what Park was awarded eventually (see the Supplemental Judgment at [12]).

The parties' arguments on appeal

The Appellant's case

32 In CA 152, which relates to the substance of the claim in S 1057, the Appellant maintains his position below and argues that:

(a) The Judge erred in finding that to allow the Appellant's entire claim would be tantamount to a collateral attack on the 2013 CA Judgment at [16].

(b) The Judge erred in finding that the Exit Offer alleged by the Respondent had been established on a balance of probabilities. This error was because the Judge had wrongly relied on the 2013 CA Judgment as having already found that the Appellant had accepted the alleged Exit Offer, had wrongly apportioned the burden of proof of showing that the Initial Agreement was not superseded by the Exit Offer on the Appellant, and had also ignored several other facts. The Respondent's evidence on the timing of the Exit Offer was also inconsistent.

(c) The Judge erred in according too much weight to the email of 25 September 2009 from the Respondent to the Appellant in arriving at her finding that the Exit Offer had been accepted by the Appellant.

(d) The Judge erred in not adequately addressing the effect of lack of consideration supporting the transfer of the Appellant's shares pursuant to the Exit Agreement.

(e) The Judge erred in considering a number of irrelevant matters in arriving at her decision.

(f) The Judge erred in giving undue weight to the Minimum Profit Assurance and Minimum Financing Period, which were not determinative of issues in S 1057.

(g) The Judge erred in finding that the Appellant's transfer of shares affected his profit share under the Initial Agreement.

33 In CA 176, the Appellant argues that the Judge had erred in ordering the Appellant to pay costs on an indemnity basis from the time of the OTS, because the OTS was not a genuine offer to settle. The material term of the OTS was (as we have noted above at [23]) that the Appellant would pay 90% of the Respondent's costs on a standard basis until the date of acceptance of the OTS.

The Respondent's case

34 In CA 152, the Respondent takes the position that the Appellant's share transfer and resignation as director of Riverwealth was pursuant to the Exit Agreement. In so far as the Minimum Profit Assurance and Minimum Financing Period were concerned, they were contrived. In addition, the Respondent also argues that the Appellant's averment with regard to the Minimum Profit Assurance and Minimum Financing Period amounts to an abuse of the court's process, as it is an attempt to modify the terms of the Initial Agreement found by this Court in the 2013 CA Judgment. In CA 176, the Respondent objects to the Appellant's arguments based on the OTS, because the Appellant did not address the issue of costs in the court below.

The issues before this court

35 The following issues arise for determination in these appeals are as set out at the outset of this judgment (at [2]–[3]). To recapitulate, they are:

(a) whether the entire claim by the Appellant amounts to an abuse of process (Issue 1);

(b) whether the Appellant is entitled to profits under the Initial Agreement notwithstanding the transfer of his remaining shares to the Respondent and the Appellant's resignation as director (Issue 2); and

(c) whether the costs order below ought to be upheld (Issue 3).

Our decision

Issue 1: Abuse of process

The applicable principles

36 As Sundaresh Menon JC (as he then was) noted in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*") at [51], the English case of *Henderson* is often regarded as the root of the doctrine of abuse of process. This is notwithstanding that the facts of *Henderson* had actually engaged cause of action estoppel instead, and the case could therefore have been decided on that (narrower) basis instead (see K R Handley, *Spencer Bower & Handley*: *Res Judicata* (LexisNexis, 4th Ed, 2009) at para 26.03). In *Henderson* itself, Sir James Wigram VC's oft-quoted statement was that:

> … where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter[s] which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, *not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time*. [emphasis added]

37 Wigram VC's statement gave birth to what is known as the rule in *Henderson*. Lord Bingham of Cornhill in his dictum in the House of Lords decision of *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 ("*Johnson v Gore Wood*") affirmed (at 31) the existence of the doctrine of abuse of process

as "separate and distinct" from the doctrine of *res judicata*, which comprises cause of action estoppel and issue estoppel. He observed in relation to the doctrine of abuse of process that (see *ibid*):

> *…Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should *in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before*. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. [emphasis added]

38 The fact-specific approach set out by Lord Bingham in the preceding paragraph was further elaborated upon by Menon JC in *Goh Nellie*. He held (at [53]) that whether there was an abuse of process under the rule in *Henderson* depended on all the circumstances of the case including: (a) whether the later proceedings were nothing more than a collateral attack upon the previous

decision; (b) whether there was fresh evidence that warranted re-litigation; (c) whether there were *bona fide* reasons why an issue that ought to have been raised in the earlier action was not; and (d) whether there were some other special circumstances that justified allowing the case to proceed. Simply put, there is a balance to be struck between allowing a litigant with a genuine claim his day in court, and ensuring that the litigation process is not be unduly oppressive to the defendant.

39 The prominence of the rule in *Henderson* was recently re-affirmed in the United Kingdom Supreme Court case of *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited (formerly known as Contour Aerospace Limited)* [2013] UKSC 46. Lord Sumption observed (at [25]) that:

> Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation.

40 This court in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 also clarified (at [102]) that doctrine of abuse of process is oft-called the "the extended doctrine of *res judicata*" because:

> …it extends cause of action estoppel and issue estoppel beyond cases where the point sought to be argued in later proceedings had actually and already been decided by a court in earlier proceedings between the same parties … to cases where the point was not previously decided because it was not raised in the earlier proceedings even though it could and should have been raised in those proceedings.

41 It is therefore clear from the authorities that the principles that underlie the doctrine of abuse of process under the rule in *Henderson* is both well-

established as well as uncontroversial. And this is despite the occasional (and trenchant) critique it has been subjected to (see, for example, Gary Watt, "The Danger and Deceit of the Rule in *Henderson v. Henderson*: A New Approach to Successive Civil Actions Arising from the Same Factual Matter" (2000) 19 CJQ 287). We observe, parenthetically, that, given the appropriate limitations as well as approach (see also [44] below), it is in fact a useful rule that can be invoked when there would otherwise be an abuse of process of the court.

42 However, the difficulty in many cases, as in the present one, lies in *the application of the principles to the facts*, because whether there is abuse of process turns on the precise facts and circumstances of each case. An example of such fact-based analysis can be found in *Johnson v Gore Wood* itself, where, having laid down the relevant principles relating to abuse of process under the rule in *Henderson*, the House of Lords nevertheless held that there was no abuse of process on the facts of the case. The plaintiff, a businessman, and his company retained the defendants as solicitors in certain transactions. The company's action for negligence against the defendants was settled with costs. The plaintiff then brought proceedings to recover his personal losses arising out of the same matters approximately four and a half years later, which was met with an application by the defendants' solicitors for summary dismissal on grounds of abuse of process. The Court of Appeal ordered summary dismissal but the decision was reversed on appeal to the House of Lords. Lord Bingham, in his leading judgment, found (at 33) that the company's settlement with the defendants proceeded on the basis of an underlying assumption that a further proceeding by the plaintiff would not be an abuse, and that it was unfair to allow the defendants to go back on that assumption. It turned out that the company's solicitors had notified the defendants' solicitors that the plaintiff also had a

personal claim against the defendants, arising out of the same matters, which he would pursue in due course. The plaintiff was willing to try and negotiate an overall settlement of his and the company's claims, but it was not possible in the time available and the defendants' solicitors explicitly stated that the personal claim would be a separate claim for negotiation in due course. Given that the plaintiff's claim was left out of the settlement on purpose and the settlement was made with the understanding that the plaintiff would be allowed to pursue it separately, the defendants were found to be estopped by convention from seeking to strike out the plaintiff's action. Lord Bingham (at 34) also observed that the court below had "adopted too mechanical an approach, giving little or no weight to the considerations which led Mr Johnson to act as he did and failing to weigh the overall balance of justice".

43 We note that many of the relevant abuse of process decisions relate to situations where the ***same plaintiff*** sues different parties. In these cases, one of the governing principles appears to be that there is generally no abuse of process unless the defendants are themselves related by what has been termed a "*privity of interests*" (see, especially, *per* Sir Robert Megarry VC in *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510 at 515) – presumably on the basis that the plaintiff ought, owing to a close or special relationship or commonality of interest between the defendants, to have brought a claim against both of them in one and the same action. However, the defence of abuse of process could also be successfully invoked where the ***same defendant*** is sued twice by different plaintiffs on the identical issues which have already been determined in the earlier action: A case in point is the Privy Council decision of *Nana Ofori Atta II, Omanhene of Akyem Abuakwa and anor v Nana Abu Bonsra II as Adansehene, and as representing the Stool of Adanse and anor* [1957] 3 WLR 830 ("*Nana Ofori*"). In *Nana Ofori*, the Odikro of Muronam ("Muronam") sued

the Stool of Banka ("Banka") in 1940 for, *inter alia*, a declaration of title to certain lands in Ghana but the claim was dismissed. The Stool of Akyem Abuakwa ("Abuakwa") and Muronam subsequently claimed title to the same lands against the Stool of Adanse ("Adanse") and Banka in 1954. It was established that Abuakwa, Muronam's superior, and Adanse, Banka's superior who had a claim through Banka, *were aware* of the 1940 proceedings though they were not parties. The later claim in 1954 failed as the West African Court of Appeal held that Abuakwa was estopped by *res judicata* as it was a privy to Muronam and was also estopped by conduct when Abuakwa stood by whilst the title was fought out by its subordinate such that it was inequitable to allow them to bring up the question again. Manyo-Plange J expressed the view that Abuakwa should have applied to be joined as co-plaintiff in the 1940 proceedings. The West African Court of Appeal applied Lord Penzance's dictum in the English Court of Probate and Divorce decision of *Wytcherley v Andrews* (1871) LR 2 P&D 327 ("*Wytcherley v Andrews*") at 328 that:

> …there is a practice by this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that *if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case…* [emphasis added]

The Privy Council affirmed the West African Court of Appeal's decision on the basis of the application of Lord Penzance's dictum. Lord Denning observed (at 834) that the present case was "not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fought out or at most giving evidence in support of one side or the other".

44 It seems to us that the common thread linking the decisions relating to the doctrine of abuse of process is the courts' concern with managing and

preventing multiplicity of litigation so as to ensure that justice is achieved for all. In our judgment, the rule in *Henderson* is applicable where *some connection* can be shown between the party seeking to relitigate the issue and the earlier proceeding where that essential issue was litigated, which would make it unjust to allow that party to reopen the issue. There is no reason in principle why the rule in *Henderson* ought to be confined only to repeated claims by the same plaintiff or to repeated claims against the same defendant. It is important to also emphasise not only the *fact-sensitive* nature of the inquiry that is entailed in applying the rule in *Henderson* but also the *strict limits* within which such a rule will be applied (see, for example, the application of this rule on the facts of the present case at [52]−[54] below). Indeed, as has already been noted above (at [38]), the court will exercise its discretion in such a way as to strike a balance between allowing a litigant with a genuine claim to have his day in court on the one hand and ensuring that the litigation process would not be unduly oppressive to the defendant on the other. The court will also be mindful of the considerations which led a claimant to act as he did (see [42] above).

The facts of the present case

45 Turning to the present case, the history of the Appellant's role in the previous proceedings is crucial. The Appellant was subpoenaed as a witness for Park's case for the 2010 Suit. The Appellant's testimony spanned three days but as he did not file his affidavit of evidence-in-chief ("AEIC"), he had to be orally examined and cross-examined. The key aspects of his testimony supported Park's case that the Initial Agreement of splitting profits in the ratio 2:1:1 amongst the Respondent, Park and the Appellant existed. This issue was a key area of dispute in the 2010 Suit. However, in the course of the Appellant's testimony, he also made a similar claim to that in the present case, that there was a separate oral agreement made with the Respondent which entitled the

Appellant to share in the profits of the venture, despite his divesting of all Riverwealth shares. Under cross-examination, he conceded that he had no documentary proof of this agreement. The Judge in the 2012 HC Judgment found against the Appellant's claim in this respect, stating (at [11]) that:

> Given the extra cash he had to inject and his increased risk exposure, [the Respondent] wanted the shares held by Andy and [Park's wife] to be returned to him, or for them to pay for those shares. … [the Appellant] decided to give up his shares and completed the transfer of all his shares to [the Respondent] on 27 March 2009.

46 Although this was not strictly an issue before this court in the appeal from the 2012 HC Judgment, this court affirmed the Judge's finding in this respect (see [16] of the 2013 CA Judgment).

47 The 2010 Suit then proceeded to consider the account of profits by the Respondent to Park, and it was at this belated stage that the Appellant applied to intervene in the proceedings. At the hearing of the Appellant's application to intervene on 19 February 2014, counsel for the Appellant relied on the authority of *Kwa Ban Cheong v Kuah Boon Sek and others* [2003] 3 SLR(R) 644 to submit that there was "the possibility that even though [the Appellant was] not a party to [the 2010 Suit], he would be bound by the parties in [the 2010 Suit]". The application to intervene was not granted.

48 We see some similarity between the Appellant's case and that of *Oak v Frobisher Limited et al (No 2)* (1959) 27 WWR 594 ("*Oak v Frobisher*"), a decision of the Saskatchewan Court of Queen's Bench. Whilst this latter case is in no way crucial to the outcome of the present appeal (the applicable principles having, in fact, been set out in the preceding section of this part of the judgment), it nevertheless has illustrative value in so far as it furnishes a useful backdrop against which to illustrate (by way of a comparative exercise) the necessarily

fact-sensitive nature of any inquiry that is undertaken pursuant to an application of the rule in *Henderson*. In *Oak v Frobisher*, the defendants applied to strike out the plaintiff's entire statement of claim of conspiracy to injure, on, amongst other grounds, abuse of process. The plaintiff, one Mrs Oak, successfully staked 16 mining claims to some land in Saskatchewan, Canada. Her husband, Mr Oak, and three other business partners entered into an option agreement with one of the defendants, Mr James Harquail ("James"), granting James an option to purchase 37 claims, which included the 16 mining claims under the Mrs Oak's name. In her statement of claim, Mrs Oak stated that this agreement was made without her authorisation, express or implied, in writing or verbal. In an act of double dealing, Mr Oak and his partners then entered into another option agreement to sell the same 37 claims to Canadian Pipelines and Petroleums Limited ("C"), a corporation. Again, Mrs Oak claimed that this was without her authorisation. In her statement of claim, however, she stated that she ratified the agreement with C, and delivered a transfer of her 16 claims in blank in trust to C to implement that agreement.

49 James then lodged a caveat over the 37 claims with the Department of Natural Resources based on the agreement which he had with Mr Oak and his partners. One of the defendants, Frobisher Ltd, alleging that James was its agent, commenced a separate action against Mr Oak and his partners as well as C, for specific performance of the option agreement between James and Mr Oak and his partners. In this particular action, Mrs Oak *was not a party* but testified as a witness for Mr Oak and his partners. Specifically, she was not asked anything concerning her ownership of the 16 claims, other than the fact that she had recorded them after having staked these claims. Her evidence was directed mainly to the question as to the timing of the signing of the agreement between James and her husband and his partners (at 599). In this separate action, the first

instance court found in favour of the defendants and ordered specific performance against Mr Oak and his partners. On appeal to the Court of Appeal for Saskatchewan, this decision was affirmed (see *Frobisher Limited v Canadian Pipelines & Petroleums Limited et al* (1957-58) 23 WWR 241). Crucially, the court observed of Mrs Oak's evidence as follows (*ibid* at 257, 267 and 295, *per* Gordon, McNiven and Culliton JJA, respectively):

> Mrs Oak, who gave evidence at the trial, was not asked a question as to the ownership of the claims as of the day the option was signed although she swears to the fact that she personally staked the claims, which is not denied. It was, however, proved that she had given a transfer in blank to the partners and they in turn had placed them in escrow under the [agreement with C]. *These transfers in blank are in the custody of the court and are proved to belong to [Mr Oak and his partners] jointly. For these reasons I do not think that [Mrs Oaks] was or is a necessary party to the action.*
>
> […]
>
> Mrs Oak gave evidence at the trial and *did not assert any personal interest in the said claim.* By reason of the foregoing facts, Mrs Oak is *not a necessary party* to the action
>
> […]
>
> …it is indisputable, nonetheless, that [Mr Oak and his partners] represented themselves to be the beneficial owners of these claims, and as such, had the right to make any disposition thereof they wished. Upon them would rest the responsibility of obtaining legal title to complete any sale or other disposition. That such indeed was the situation is clear both from the evidence and the pleadings. …*Mrs Evelyn Oak, in whose name the claims are registered, and who gave evidence at the trial, did not claim ownership.*
>
> [emphasis added]

50 In *Oak v Frobisher*, the Saskatchewan Court of Queen's Bench noted (at 602) that Mrs Oak's claim against the defendants asserted that she was the legal and beneficial owner of the 16 claims. Whilst acknowledging the general rule that no person should be adversely affected by a judgment in an action to which he was not a party (*ibid*), the court held that Mrs Oak came within the

principle enunciated by Lord Penzance in *Wytcherley v Andrews* at 328 (reproduced above at [43]).

51 The Saskatchewan Court of Queen's Bench held (at 603) that Mrs Oak could not be "allowed to relitigate the question of the right of the partners to sell the claims when that question was of the very essence of the former action and she was in privity with the partners".

52 Although the Appellant in the present case made his general position regarding his profit share fairly clear during the hearing of the 2010 Suit unlike Mrs Oak, in our view, like Mrs Oak, the Appellant here commenced an action that was tantamount to relitigating the question of the parties' entitlement to profits arising out the venture which was dealt with in the 2013 CA Judgment. The Appellant's claim in relation to the existence of the Minimum Profit Assurance and the Minimum Financing Period poses a direct challenge to the "cast-iron" 2:1:1 split of profits that was upheld in the 2013 CA Judgment, and the outcome of the account of profits that followed. The profits that Park derived from the final inquiry were less than the purported $1.55m minimum, and it would make no sense for the Appellant to obtain anything more than Park even if the Appellant succeeds in demonstrating that he is entitled to profits from the Initial Agreement. The claim in relation to the Minimum Profit Assurance therefore *amounts to* ***a collateral attack*** on the 2013 CA judgment. Further, the existence of the Minimum Financing Period would affect the calculation of the costs and the net profits for Riverwealth from the sale of the Properties, because the Minimum Financing Period as pleaded by the Appellant implies that the Respondent would personally absorb the costs of servicing the $30m HLF loan for a lengthy period of time. This amounts to ***a collateral attack*** on the Judge's decision on the inquiry on profits, and the subsequent outcome of the appeals therefrom.

53 What makes it clearer that there is an abuse of process in the present case (as compared to *Oak v Frobisher*) is the fact that the Appellant was aware of the potential of his claim being precluded by the defence of abuse of process, as evidenced by his counsel's submissions in 2014. As a witness in the suit between Park and the Respondent, he was aware of the ongoing dispute, and his sudden claim during their trial that he was entitled to profits arising out of the same venture indicated that he was *just as interested and involved* in the dispute between Park and the Respondent. Given the Appellant's position in so far as his entitlement to the profits from the Riverwealth joint venture is concerned, he is in sufficient "privity of interest" as Park such that both sets of claims against the Respondent should have been heard together, *given his knowledge and involvement in Park's claim*. As we have stated above at ([43]), the term "privity of interests" really refers to a close or special relationship or commonality of interest between the relevant parties. The Appellant's claim to profits arises out of the *same agreement and same factual backdrop* as Park's claim such that their interests were aligned. The Appellant's involvement in the 2010 Suit, albeit as a non-party, and the tenor of his evidence make it inexplicable why he could not have commenced his action and applied to have it consolidated. In our judgment, there is no *bona fide* reason why he was unable to commence his action as soon as he became aware of the ongoing suit between Park and the Respondent (presumably, *via* Park's solicitors), and then applied to have it consolidated with Park's action.

54 In our judgment, to allow the Appellant to proceed with his claim would be an abuse of the process of court, and it would be tantamount to allowing the Respondent to be vexed twice over in respect of the same issues, albeit by a different party. We hasten to emphasise that the application of the principles underlying the doctrine of abuse of power *is a fact-sensitive exercise*, and our

decision should not be construed as in any way conflicting with the general rule that no person should be adversely affected by a judgment in an action to which he was not a party. In this particular case, the Appellant fell outside of the scope of this general rule because of his not insignificant involvement in the 2010 Suit.

Issue 2: Merits of the case

55 Given our conclusion with regard to Issue 1, it is, strictly speaking, unnecessary to consider Issue 2. However, for completeness, we will consider the arguments made with regard to this particular issue as well.

The Appellant's case as pleaded

56 The Appellant's case as pleaded is rendered unpersuasive when we consider the Respondent's email of 27 March 2009. The essence of this particular email was not about profit-sharing, but rather about carrying the costs of the joint investment that had unexpectedly accrued due to the poor economic outlook, which made the Initial Agreement no longer viable. In this email, the Respondent essentially set out identical terms to the Exit Offer, and asked that Park pick either Option 1 or Option 2. In the same email, after listing out Option 2, the Respondent stated that "For the record, [the Appellant] has already agreed and initiated the above". The email was sent to Park while copying the Appellant and Clarence. Crucially, the Appellant did not seek to dispute this; he neither replied to the group email directly nor clarified with the Respondent privately. The Appellant explained in his AEIC that he did not respond because he had acceded to the Respondent's request to "stay out of his actions against Park". On the other hand, given the fact that the Appellant had neither shares nor a directorship in Riverwealth by then, it defies logic that he would not seek to re-confirm that the Initial Agreement was intact after receiving the

Respondent's email, stating that it was sent "for the record", if indeed that was the Appellant's case. The Appellant's silence in relation to this email of 27 March 2009 is glaring and probative of the fact that he had exited the Riverwealth venture completely.

57 In any event, even if it were true that the Appellant's share transfers were for the purpose of the Alternate Financing Proposal, it would have been readily apparent, that it was never going to come to fruition given Park's refusal to comply with the Exit Offer. Moreover, the Respondent managed to renegotiate some terms of the HLF loan on 7 January 2009, and the terms of the loan relating to development plans of the Properties were successfully varied. Hence, there was no longer a need for the Appellant to transfer his shares to the Respondent for the purposes of the Alternate Financing Proposal. Despite these developments, the Appellant did not seek to recover the shares from the Respondent. When cross-examined on this, the Appellant only explained (unpersuasively, in our view) that he did not think it was necessary to hold any shares, because there was "a profit-sharing agreement that [did not] require [him] to be a shareholder of the company". Such conduct appears at odds with the fact that the venture was entered into for the purpose of individual profit, as well as with the precarious situation that Riverwealth was in at that particular point in time. The three founders of the venture were looking out for as well as trying to protect their own interests, despite some semblance of an underlying friendship. Without a directorship or shares in Riverwealth, the most legally relevant features of a stake in the venture, the Appellant's purported security in an oral agreement on maintaining the Initial Agreement seems to us to be rather unlikely.

58 In our view, it is more likely that the Respondent's exit offer to Park was for him to either inject capital into Riverwealth, or to transfer his shares and

give up his profits from the venture. We accept the Respondent's submission that there is no reason why an exit offer to the Appellant would contain better terms than those offered to Park, in terms of allowing him to retain a share of profit without injecting any capital.

59 We also do not accept the Appellant's fall-back argument that the Exit Agreement was not enforceable for lack of consideration. The picture that emerges from the evidence is that the Appellant (right or wrongly) believed that he would be obliged to inject capital into the venture, and in exchange for not having to do so, he had divested himself all his shares and resigned from his directorship, as requested by the Respondent. Viewed in that light, the Appellant received consideration for these share transfers. It may be that he had committed a tactical error in not holding on to the shares like Park, but it is certainly not the role of the courts to rescue him from a bargain which he had voluntarily entered into.

60 The Appellant's claims concerning the Minimum Profit Assurance and Minimum Financing Period fail for lack of evidence. First, these two terms were never mentioned in the Appellant's testimony in the 2010 Suit when he was testifying regarding the terms of the Initial Agreement. The purported minimum sum of $1.55m first appeared in an email dated 2 August 2008 sent by the Respondent to the other two parties in the joint venture regarding the potential profit pay-outs corresponding to various holding costs and sale prices of the Properties. This sum of $1.55m was calculated based on holding costs of 5 months, which would have been arrived at by September 2008. Hence, these assumptions were outdated even before the Uluru meeting and it therefore makes little (or even no) sense that the Respondent would make such a profit assurance to the Appellant. In so far as the Minimum Financing Period is concerned, the Appellant's arguments are not persuasive, to say the least. The

thrust of the Appellant's submissions in this regard is that the effect of the 2013 CA judgment is that there is such a Minimum Financing Period, which plainly contradicts his initial position that the Minimum Financing Period was *part of* the Initial Agreement.

61 For these reasons, even if the Appellant's claims did not fail on the basis of abuse of process, they would not succeeded on the substantive merits in any event.

The Appellant's new argument during oral submissions

62 We note that, during oral submissions, counsel for the Appellant, Mr Alvin Tan ("Mr Tan"), appeared to proffer a slightly different case theory, based on emails in November 2008 regarding the Alternate Financing Proposal. Mr Tan argued that the Appellant had trusted the Respondent as a long-time friend with regard to the Alternate Financing Proposal, and therefore transferred his shares despite issues with Park. Hence, he argued, the Appellant acted the way he did because he had trusted the Respondent to eventually sort out the details with Park as well as whichever private bank that would be the alternate financier.

63 This argument, strictly speaking, fails because it was not pleaded to begin with. However, even if it were, it would not succeed, because as we have found, the Alternate Financing Proposal was no longer within contemplation by March 2009 when the Appellant divested himself of all his shares and had resigned from his directorship.

The Respondent's arguments

64 In fairness to the Appellant, there appear to be flaws in the Respondent's case but, in our view, these flaws do not detract from the ultimate (and important) conclusion that the Appellant had exited the joint venture.

65 The Respondent failed to explain why the Appellant was still a guarantor for the HLF loan until 2 July 2010, which was much later than the time of his exit from the venture in March 2009. However, in so far as the guarantee was concerned, the Appellant testified that he was not worried about his guarantee to HLF for the $30m loan being called upon, because he did not think there was a likelihood it would happen, as is borne out by the following exchange:

> Q. If refinancing is not done holding costs are going to be higher than everyone would like, which also cuts into profits, so surely it was in your interest to try to convince Mr Park not to be so difficult about the guarantee. Agree or disagree?
>
> A. Disagree. I wasn't really thinking about that really.
>
> Q. *Right. Were you actually worried about the guarantee being called?*
>
> A. *No.*
>
> Q. *Why?*
>
> A. *I don't think it would get to that stage.*
>
> Q. Because?
>
> A. Because it would have been in Bryan's interest as well because he committed so much money, right, but when it came to a stage where you really have to sell the property and if somebody needs help I can still go and look for someone to come. But as I said to you, Bryan had always maintained he wanted to control the business from then on.
>
> [emphasis added]

66 Given the Appellant's own lack of concern for the guarantee, it is not improbable that the parties had neglected to deal with it when the Appellant

exited the venture. In any case, the inadequacies in the Respondent's case in this respect do not strengthen Appellant's already weak case.

67 Having regard to all the facts and circumstances, the Appellant's substantive arguments do not persuade us that the Judge had erred in her assessment of the case. We therefore find in favour of the Respondent with regard to Issue 2.

Issue 3: Costs

68 In our view, the appeal ought to be allowed with respect to the Judge's order on costs, as the Respondent's OTS could not be said to be a genuine offer to settle and falls short of the requirements necessary to claim costs on an indemnity basis.

69 This court in *Man B&W Diesel S E Asia Pte Ltd and another v PT Bumi International Tankers and another appeal* [2004] 3 SLR(R) 267 ("*Man*") has stated (at [7]) that a court is not obliged to award indemnity costs simply because the offer to settle made by one party is more favourable than what the opposing party eventually obtained. The offer to settle should be "a serious and genuine offer and not just to entail the payment of costs on an indemnity basis" and should contain "an element which would induce or facilitate settlement": see *Man* at [8], citing *Singapore Airlines Ltd and another v Fujitsu Microelectronics (Malaysia) Sdn Bhd and others* [2001] 1 SLR(R) 38 at [10]. Although what constitutes a serious and genuine offer depends on the circumstances, the key question to ask is whether the offeror is effectively expecting the other party to capitulate: see *Man* at [14].

70 In the present case, the Respondent's OTS did not offer even a nominal sum to the Appellant, but had asked that the Appellant pay 90% of the

Respondent's costs instead. It is unsurprising that on the eve of a trial that essentially turned on the competing testimonies of the parties, such an offer would not be capable of persuading the Appellant to enter a settlement with the Respondent.

71 Hence, the Judge should not have ordered that the Appellant pay the Respondent's costs of the suit on an indemnity basis from the date of the OTS. Instead, the Appellant should pay the Respondent the costs of the suit on a standard basis throughout.

Conclusion

72 CA 152 is therefore dismissed with costs to the Respondent, while CA 176 is allowed. The parties are to bear their own costs in relation to CA 176 because even though the Appellant prevailed on his appeal, he had failed to raise the arguments regarding the OTS in the court below. The usual consequential orders are to follow.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Tay Yong Kwang Judge of Appeal

Alvin Tan Kheng Ann and Os Agarwal (Wong Thomas & Leong) for the appellant in Civil Appeals Nos 152 and 176 of 2016;
Marina Chin Li Yuen, Calvin Liang Hanwen, Eugene Jedidiah Low Yeow Chin, Lee Hwee Yenn Amanda (Tan Kok Quan Partnership) for the respondent in Civil Appeals Nos 152 and 176 of 2016.