Lim Koon Park *v* Yap Jin Meng Bryan and others
[2015] SGHC 284

Case Number	: Suit No 184 of 2010
Decision Date	: 29 October 2015
Tribunal/Court	: High Court
Coram	: Lai Siu Chiu J
Counsel Name(s)	: Srinivasan s/o V Namasivayam and Nur Liyana Binte Mohamed Sinwan (Heng Leong & Srinivasan) for the plaintiff and third defendant; Chew Mei Lin Lynette and Ang Minghao (Morgan Lewis Stamford LLC) for the first and second defendants
Parties	: LIM KOON PARK — YAP JIN MENG BRYAN — RIVERWEALTH PTE LTD — WEE PEK JOON

Damages – Assessment – Account of profits

29 October 2015 Judgment reserved.

Lai Siu Chiu J:

Introduction

1 This is the third (but by no means final) chapter in the long running dispute between Lim Koon Park ("the plaintiff") on the one side and Yap Jin Meng Bryan ("the first defendant) and Riverwealth Pte Ltd ("Riverwealth") on the opposing side. The plaintiff and the first defendant had used Riverwealth as the corporate vehicle to purchase two plots of land at River Valley Road (collectively, "the Properties") in 2007 for $48.5m, which the first defendant subsequently sold for $60.08m in 2009. Wee Pek Joon ("Wee"), the third defendant, is the wife of the plaintiff.

2 The parties fell out before the Properties were sold resulting in the plaintiff commencing this suit against the first defendant and Riverwealth. The two defendants joined Wee as the third defendant to the suit as she was a shareholder of Riverwealth and a director (until 12 August 2009) as well.

3 The first chapter of the dispute was the trial before this court in March and May 2012 ("the main trial"). In August 2012, this court dismissed the plaintiff's claim against the first defendant for a share of the profits arising from the sale of the Properties (based on an oral profit sharing agreement), whilst judgment was awarded to the first defendant on his counterclaim (see *Lim Kook Park v Yap Jin Meng Bryan* and others [2012] SGHC 159). The first defendant's counterclaim had alleged that the plaintiff had made certain misrepresentations to him regarding the Properties before their purchase.

4 The second chapter in this case was when the plaintiff successfully appealed to the Court of Appeal in July 2013 (see *Lim Koon Park and another v Yap Jin Meng Bryan and another* [2013] 4 SLR 150 ("the CA judgment")). The Court of Appeal held that there was indeed an oral profit sharing agreement between the plaintiff, the first defendant and one Andy Lim Geok Lim ("Andy") in the ratio of 2:1:1. The appellate court awarded judgment to the plaintiff on his claim and ordered that an account of profits be taken to determine the plaintiff's share of the profits that were made from the sale of the Properties. This court was assigned the task of assessing the plaintiff's profits.

5 In [80] of the CA judgment, it was stated that the profits arising from the sale of the Properties would comprise the difference between the sale price ($60.08m) and the purchase price ($48.5m) together with certain outgoings which were listed in [84] of the CA judgment.

6 In [84] of the CA judgment, the deductibles that were allowed from the sale profits were stated as: (i) interest charged by Hong Leong Finance ("HLF") for the $30m loan obtained to part-fund the purchase of the Properties, (ii) interest payable to the first defendant for his personal loan of $22,580,621.99 ("the loan") to part-fund the purchase of the Properties, together with (iii) "such other reasonable expenses necessarily incurred consequentially in relation to the sale (*eg*, marketing fees)".

7 In [82] of the CA judgment, the Court of Appeal specifically disallowed as a deductible the management fees charged to the Properties by the first defendant's company Daun Consulting Singapore Pte Ltd ("Daun").

8 As with the main trial before this court, the plaintiff and the first defendant testified in this third tranche of the proceedings. In addition, the first defendant, in order to rebut the plaintiff's allegation that he had charged an extortionate rate of interest for the loan, called two expert witnesses to give evidence on the appropriateness of the interest rate that he had charged. The first defendant filed two affidavits, one being his affidavit of evidence in chief ("AEIC"), while the second was the affidavit to verify the accounts ("AVA") that he had filed pursuant to O 43 r 4 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("the Rules"). The AVA related to the expenses of the purchase and sale of the Properties. The plaintiff similarly filed his AEIC for these proceedings along with Wee. The plaintiff did not have expert witnesses but Andy was his other factual witness. The first defendant's factual witnesses were Low Chee Seng ("Low"), Ng Kim Leng and Tan Kok Keong. By consent of the parties, Wee's testimony was dispensed with.

The dispute

9 I should point out at this stage that before the commencement of the assessment hearing, the parties informed the court that the following deductibles and their amounts had been accepted by the plaintiff:-

Item	Particulars	Amount($)
1	Stamp fees relating to the purchase of the Properties (both plots)	1,444,200.00
2	Legal expenses relating to purchase of the Properties	121,540.32
3	Legal fees relating to sale of the Properties	54,089.23
4	Payments on Hong Leong's mortgage and commitment fee	2,590,420.96
5	Properties tax	389,823.09
6	Expenses relating to URA approvals	18,637.50
7	Fees paid for a "Qualified Person"	326,350.00
8	Payments made to National Environment Agency	2,000.00
9	Expenses relating to general maintenance of the Properties	20,487.20

10	Fees for valuation reports and report from Environcorp Consulting Services	28,355.00
11	Payment for secretarial services from Corporate Secretarial Services	30,500.14
12	Payment to Moore Stephens LLP (for secretarial services)	15,311.70
13	Payment for accounting services and in relation to GST filing	23,854.58
14	Payment to PricewaterhouseCoopers ("PWC") in relation to IRAS queries on income for Y/A 2011 (for tax filing for year ending July 2010)	31,757.60
15	Payment to PWC for preparation and filing of tax returns	10,921.26
16	Payment of membership fees to Singapore Business Federation	428.00

The above items totalled $5,108,676.58. I should add however that the plaintiff's acceptance of items 13 to 16 was premised on the first defendant's representation that they related to the sale of the Properties.

10 The following expenses were disputed by the plaintiff and formed the subject matter of the assessment hearing:

Item	Particulars	Amount($)
1	Brokerage fees paid for the sale of the Properties	600,000.00
2	Legal fees paid to Rajah & Tann LLP ("R&T") for drafting of term sheet agreement	34,248.66
3	Fees paid to R&T for work done for Suits 438 of 2009 and 344 of 2010 and advice rendered on corporate issues	275,814.98
4	Interest paid to first defendant for the personal loan + payments from end 2007 and May 2008 (3,088,350.14 + 2,780.14)	3,091,130.28
	Total:	4,001,193.92

By the time of the hearing, the first defendant had withdrawn one expense item, namely, the sum of $2,437.00 paid to the Commissioner of Stamp Duties.

11 Unlike the main trial, the first defendant bore the burden of proof for the accounts he had prepared. Consequently, he took the stand first along with his other witnesses.

The evidence

12 I shall deal with each of the four disputed items in [10] in turn.

(i) The brokerage fee

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13 The first defendant's company Daun had charged Riverwealth $600,000 or 1% of the sale price as brokerage fee. In turn, Daun paid out therefrom to (i) Low and (ii) one Mohdar Bin Hassan ('Mohdar") the sums of $200,000 and $100,000 respectively. In support of this item, the first defendant had in his AVA produced (at page 299) a letter on Daun's letterhead dated 29 Dec 2009 signed by himself, Low and Mohdar wherein the latter two acknowledged receiving the sums of $200,000 (by two part-payments of $165,000 and $35,000) and $100,000 respectively.

14 The first defendant's evidence on this item was that the Properties were bought by Oxley JV Pte Ltd ("the Buyer") which was a consortium comprising of Ching Chiat Kwong, Tan Swee Meng ("Bill Tan") and Gilbert Ee ('Gilbert"). Daun brought in Gilbert while Low (through Mohdar) had introduced Bill Tan.

15 Low also known as Jeffrey Low, testified that he is a property broker by profession and was attached to a real estate agency in 2009 when he was introduced by Mohdar to the first defendant. In turn, Low introduced Bill Tan, a developer, to the first defendant. Low then left it to the first defendant to negotiate with Bill Tan on the understanding that if a sale was concluded, he would be paid his commission for brokering the deal.

16 However, it was also the common testimony of the first defendant and Low that there was no written agreement between them that the latter should be paid a brokerage fee if a sale materialised from Low's introduction of prospective buyers to Riverwealth. During cross-examination, the first defendant revealed he had agreed, acting on behalf of Daun, to pay Low 1% commission if the Properties were sold. However, according to Low's testimony during cross-examination, there was no evidence that Riverwealth had agreed to pay Low the 1% commission.

17 Even though Low played no role in the formation of the tripartite consortium that eventually incorporated the Buyer to purchase the Properties and Low "could not conclude the sale" (in the first defendant's own words), the first defendant nonetheless paid Low half of 1% brokerage (which Low shared with Mohdar in the proportion of 2:1 see [13]). The first defendant said the 1% brokerage fee to Low had been varied and reduced. He had himself helped to form the consortium from the parties that Low introduced to him so he felt Low was entitled to part of but not the whole 1% fee – he thought that half thereof was fair.

18 As for Daun itself taking the remaining half of the 1% brokerage fee (as the sales agent of Riverwealth), the plaintiff drew the court's attention to an extraordinary general meeting ("the EOGM") of the company held on 19 September 2009 that his counsel, Mr Srinivasan s/o V Namasivayam ("Mr Srinivasan"), had attended on his behalf. At the meeting, Mr Srinivasan had questioned the first defendant on whether Riverwealth had appointed any dedicated agent to which the first defendant replied in the negative. The first defendant added that Riverwealth chose not to have an agent and Daun was Riverwealth's project manager for the purpose of either disposing of the Properties or developing them. It was recorded in the minutes that Mr Srinivasan stated that even so, Daun was not an agent of Riverwealth and that the first defendant (who chaired the EOGM) confirmed this. No evidence was adduced at the main trial that Daun was appointed as Riverwealth's broker or agent.

19 Consequently, the plaintiff contended that Daun was not entitled to any commission for the sale to the Buyer especially since it was a related party transaction. Both the first defendant and Low had each claimed to be the lead broker for the sale of the Properties, and it was unclear from their contradictory testimony as to when Low actually introduced Bill Tan to the first defendant. If the introduction was made in June 2009 (as postulated by the first defendant and Bill Tan), then the

introduction would have had nothing to do with the Properties but only related to other properties like the one at Tanjong Katong that the consortium was considering to purchase. This was also consistent with the fact that the Buyer was incorporated in September 2009. On the other hand, if Low's evidence that he introduced the first defendant to Bill Tan in September 2009 was accepted, that introduction could not form the basis for payment of any brokerage fee as the parties had already been introduced back in June 2009. The plaintiff's submissions went so far as to allege that the first defendant "created" the brokerage fee as an afterthought after the Court of Appeal held that the management fees ($901,200) charged by Daun were not a deductible expense.

20 The plaintiff also contended that the court should draw an adverse inference against the first defendant under s 116(g) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act"), for failing to call Mohdar to testify. Apparently, Mohdar had initially been listed as a witness for the first defendant. As no explanation was provided by the first defendant for Mohdar's absence from court, the court was requested to draw an inference that had Mohdar testified, his evidence would have been unfavourable to the first defendant's case.

21 The first defendant on the other hand argued that the payment of 1% brokerage fee on the Properties' sale price of $60.08m was reasonable, pointing out that neither the plaintiff nor Wee had disputed that brokerage for property sales is the usual industry practice. In support of this submission, the first defendant confirmed in the course of cross-examination (at N/E 1008) that the plaintiff had agreed in 2008 to Riverwealth's appointment of CB Richard Ellis Pte Ltd ("CBRE") to exclusively market the Properties for a period of four months. In that sole agency agreement dated 29 May 2008, the brokerage payable to CBRE (described as fee commission) would have been 0.8% of the sale price.

22 Consequently, the first defendant contended that the brokerage charged to Riverwealth of 1% of the sale price of the Properties was reasonable as there was no exclusive appointment of any sales agent. Moreover, neither the plaintiff nor Wee disputed the fact that Low had indeed received half of the 1% commission for the sale.

23 As for the payment to Daun of the remaining half percent fee, the first defendant refuted the plaintiff's complaint that the payment was not disclosed as a related party transaction, pointing out that the brokerage fee was reflected in Riverwealth's financial statements as of 31 July 2010. For that reason, the fee was not disclosed at the AGM of Riverwealth held on 16 October 2009.

24 During cross-examination (at N/E 45), the first defendant asserted he did not hide the transaction at all. If indeed he wanted to hide the brokerage fee received by Daun, the first defendant said he would have caused Riverwealth to pay Low the entire 1% fee, then collect 50% back from Low and the court would have been none the wiser.

25 As for the lack of any agreement, the first defendant testified Low felt that "documentation was not necessary" (N/E 47). It was also drawn to the court's attention by the first defendant's counsel that in the main trial before this court, the plaintiff had not questioned the first defendant on the brokerage fee paid to Daun but only on the management fees. Further, the first defendant was told by his legal advisors not to bring up the subject at the EOGM of Riverwealth on 19 September 2009 as by then, the first defendant had good reason to believe that the plaintiff and the third defendant had hostile intentions against Riverwealth – the plaintiff's firm had by then commenced proceedings against Riverwealth for outstanding architectural fees. His legal advisers had also opined that the issue was not relevant as it was part of Riverwealth's expenses.

26 I should add that Daun's receipt from Riverwealth of a brokerage fee for the sale of the

Properties was not raised at the main trial for the reason that the matter was not one of the issues for determination by this court then.

27 A further observation I would make at this juncture is that Riverwealth's accounts as of 31 July 2010 referred to at [23] did not contain an item of $300,000 as brokerage fees; there was only one expense item of $901,200 labelled as "consulting fees".

(ii) The legal fees of $34,248.66 paid to R&T

28 According to the first defendant, he engaged the services of R&T to draft the term sheet between the shareholders of Riverwealth so as to record the oral agreement on profit-sharing. The shareholders had also agreed Riverwealth would be R&T'S client. In this regard, the plaintiff, the first defendant and Andy had held a meeting with R&T on or about 28 March 2008. Subsequently, however, the shareholders did not sign the term sheet.

29 The plaintiff submitted that R&T's fees (encompassed in two bills) did not relate to the sale of the Properties. Moreover, based on the first defendant's testimony and his exchange of emails with R&T on 28 March 2008, the latter would have prepared the draft agreement sometime after 28 March 2008. However, the first bill of R&T (No. 806607) for $27,689.56 was dated 24 November 2009 ("the first bill") while the second (No. 825088) for $6,559.10 was dated 31 August 2010 ("the second bill"). Apart from the fact that the heading of the first bill was "Drafting Term Sheet Agreement" nothing in its contents referred to the term sheet. The period of work for the first bill was stated to be 9 September to 13 November 2009 while that for the second bill was from 17 November 2009 to 31 August 2010. The plaintiff surmised that more likely than not, R&T's fees related to work done for the incorporation of the Buyer (see [14]) in which the first defendant was involved, as the periods of the work done by R&T coincided with the formation of the Buyer. If indeed a term sheet was drafted by R&T, it pertained to the consortium behind the Buyer and not Riverwealth's shareholders.

30 I should point out that the contents of the second bill were revealing – it stated *inter alia* that minutes were prepared for Riverwealth along with directors' resolutions and corporate advice was rendered in relation to the claims made by Wee and the plaintiff. There was no mention of any work done in relation to the term sheet apart from the fact that it had the same heading as the first bill.

31 The first defendant and/or Riverwealth did not address the plaintiff's objections in [29] to the two bills. Instead, the two defendants' submissions contended that: (i) the plaintiff's speculation (in [29] on the Buyer being the actual client of R&T) was baseless; and (ii) the bills should be admitted into evidence pursuant to s 32(1)(b) of the Evidence Act. The submission misses the point – it is justification and not admissibility of the bills that is in issue. The burden was on the first defendant to prove that R&T's two bills pertained to the sale of the Properties, especially when the contents of the two bills did not support his testimony.

(iii) The fees totalling $275,814.28 paid to R&T for work done on Suits 438 of 2009 and 344 of 2010.

32 R&T's charges were encompassed in eight bills, the first was dated 30 July 2009 and the last was dated 28 June 2010. The plaintiff had caused his firm Park and Associates Pte Ltd ("PAPL") to sue Riverwealth for architectural fees for services he had rendered for the Properties.

33 The first defendant testified that Riverwealth resisted the claims initially because he felt the plaintiff had reneged on an agreement not to charge more than $250,000 and not to ask for payment until after the Properties had been sold and Riverwealth had the means to pay. The plaintiff had also

falsely assured the first defendant that PAPL's invoice no. 1136 dated 6 May 2008 for $250,000 (excluding 7% GST of $17,500) was for record purposes. PAPL later rendered a second invoice no. 1302 dated 1 October 2009 in the sum of $427,406.70 (inclusive of GST of $27,961.11).

34 The first defendant disclosed a board resolution passed by Riverwealth on 10 June 2008 approving a sum of $250,000 for architectural fees. Unfortunately, that resolution (which the plaintiff volunteered to and did draft) only referred to one plot, namely, Lot 434 River Valley Road and not to the other plot at Lot 428 River Valley Road.

35 The amounts claimed in the suits were for the two invoices which totalled $694,906.70. R&T on behalf of Riverwealth reached agreement with PAPL in June 2010 to pay $315,650 to settle both suits.

36 The plaintiff not surprisingly objected to R&T's invoices on the basis they were not connected to the sale of the Properties and did not fall within the ambit of the CA's order that allowed deductibles. He contended that it was the first defendant's refusal to pay PAPL's invoices that necessitated both suits being filed. Had payment been made, such legal costs would have been avoided.

37 I do not doubt that the plaintiff's initiation of both suits and the first defendant's initial refusal to pay PAPL's claims stemmed from their mutual hostility after they fell out. In this regard, I do not accept or believe the plaintiff's assertion (at para 77 of his closing submissions) that the filing of his firm's claims was due to the fact that he felt that PAPL's payment was at a real risk. Indeed, the contrary is true. By filing the two suits, he jeopardised Riverwealth's efforts to sell the Properties.

38 I accept the first defendant's testimony that the plaintiff reneged on his assurance not to ask for payment on the invoices until Riverwealth had the funds to pay and the latter took advantage of his own drafting of the board resolution in [34] to claim more than $250,000 from Riverwealth. Understandably, the first defendant feels aggrieved that the plaintiff now contends the legal fees paid to Riverwealth's lawyers should not be allowed to be deducted from the sale proceeds of the Properties. Indeed, it must be galling to the first defendant that the plaintiff is denying the deductibility of the legal fees occasioned by his own firm's suits.

39 It bears noting that if the ultimate outcome of this assessment is that the legal fees of R&T are disallowed, the sum of $275,814.28 (together with the earlier sum of $34,248.66) would have to be debited back to Riverwealth in its accounts. The total liability of $310,062.94 would need to be addressed and settled by the shareholders of Riverwealth should the company be liquidated eventually, after the dust has finally settled on the litigation front.

(iv) The interest paid to the first defendant for the loan.

40 This was the most contentious of the four items in dispute and it was also the largest amount deducted by the first defendant from the sale proceeds.

41 The plaintiff did not dispute that the first defendant injected into Riverwealth the cash required ($22,580,621.99) for the purchase of the Properties over and above the loan from HLF. His objection to this item was to the rate of interest charged by the first defendant. In this regard I refer to the following extracts from the CA judgment:

> [80] … We note there have been allegations of impropriety – *viz*, the purported extortionate interest rates charged by [the first defendant] for his personal loan to Riverwealth; the purported exorbitant management fees charged by [Daun] and the purported sale of the Properties at an

undervalue.

[81] As to the first allegation, we think that the Assessment Judge would be better placed to determine whether the interest rates charged by [the first defendant] were extortionate. The parties are to lead evidence as to what the usual market rate practice is with regard to the interest rates chargeable (and if this cannot be satisfactorily established the Assessment Judge is to assess a reasonable rate on such personal loans).

42 I should point out that the amount advanced by the first defendant to Riverwealth to complete the purchase of the Properties was $18.5m. The first defendant extended further advances to Riverwealth totalling $5,060,740.32 for stamp fees on the transfer documents, Goods and Services tax, legal expenses as well as the commitment fee of $100,000 paid on the HLF loan. In that regard, the plaintiff had (at [9] above) agreed to deductions totalling $5,108,676.58 subject to his caveat on three items therein.

43 As stated earlier (at [8]), unlike the first defendant, the plaintiff chose not to adduce any expert testimony on what would be deemed to be reasonable interest rates chargeable on unsecured loans similar to those extended by the first defendant to Riverwealth. His submission was that there is no market rate for such personal loans and it is for the court to assess a reasonable rate therefor.

44 The plaintiff further submitted that:

(a) there were no express terms pertaining to the loan let alone to interest;

(b) there is no evidence that the profit sharing agreement contemplated any interest being payable on the loan;

(c) the consideration for the first defendant's loan was his larger share in the profit-sharing agreement but no interest was payable; and

(d) since the parties never discussed nor agreed on the interest rate, even if there was interest payable in respect of the loan, the same was so negligible that it did not have a significant impact on the share of profits to be distributed to the plaintiff.

45 In the light of [81] of the CA judgment as set out in [41] above, it is no longer open to the plaintiff to argue that no interest was payable on the loan. In this regard, the first defendant had submitted that *res judicata* or *issue estoppel* applies: *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Nellie Goh's* case"). Whether reliance is placed on *Nellie Goh's* case or on the appellate court's decision in *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157, the fact remains that the four elements to found *issue estoppel* are satisfied by the CA judgment *viz*:

(a) there was a final and conclusive judgment on the merits (on the question of the first defendant's entitlement to interest);

(b) the judgment was by a court of competent jurisdiction;

(c) there was identity of parties; and

(d) there was identity of subject matter in the two proceedings.

46 Consequently, this court's task is no longer to determine whether Riverwealth is liable for

interest on the loan but to determine the quantum of the interest it should pay the first defendant if not the sum charged of $3,088,350.14. Although the question of Riverwealth's liability for interest is no longer in issue, I should observe that the resolution passed by the board of directors of Riverwealth dated 12 October 2009, signed by one Tan Swee Hu Clarence ("Clarence Tan") and the first defendant agreeing to pay interest on the loan, is a self-serving document; it would not have assisted the first defendant had the CA judgment disallowed interest on the loan.

47 The first defendant contended that there was an agreed interest rate of 7.5% per month chargeable on the loan. He deposed that he charged interest akin to overdraft facilities granted by a bank (setting out his calculations in a spreadsheet at exhibit BY-29 of the AVA). The computation of interest (on a compounded basis) totalling $3,088,350.14 commenced from January 2008 until December 2009 as the holding period of the loan was 24 months (from December 2007 when the Options for the Properties were exercised until the completion of the sale of the Properties in December 2009). In his AEIC (at para 47) however, the first defendant deposed that he was prepared to accept market interest rates for his loan to Riverwealth as determined by this court. I should point out at this juncture that the CA judgment at [84] referred to $22,580,621.99 as the loan figure. However, in the AVA (at para 55), the first defendant deposed that his advances to Riverwealth exceeded $25.5m while his solicitors' opening statement dated 2 April 2015 gave a figure of $23,395,903.30.

48 The plaintiff's submissions criticised the first defendant's *volte face* as an opportunistic move and an attempt by the latter to claim interest of as much as 30% (based on the first defendant's experts' testimony) that would effectively wipe out any profit due to the plaintiff.

49 I now turn to the testimony of the first defendant's two experts on interest rates *viz*, Sabyasachi Dash ("Dash") and Colin Macdonald ("Macdonald").

50 Dash is currently the chief executive officer of BB Capital Partners Pte Ltd, a corporate advisory firm. He was previously attached to four banking institutions where his duties were focussed, *inter alia*, on credit risks and credit related products. I should add that one of the four banks Dash worked for was Deutsche Bank. He worked there at the time when the first defendant was also there. However, they knew each other only in passing and their offices were not in the same building. Dash described the first defendant's loan to Riverwealth as mezzanine funding and a junior loan as opposed to HLF's senior loan.

51 In his AEIC, Dash addressed the following issues:

(a) the appropriate interest rate chargeable by the first defendant as a junior lender;

(b) whether it was appropriate for the first defendant to charge a margin over HLF's loan and if so, why;

(c) the interest calculation methodology for the first defendant's loan;

(d) the danger of foreclosure and other risks to the first defendant; and

(e) the impact of the global financial crisis ("GFC") on interest rates, liquidity and cost of capital at the material time.

52 In his AEIC, Dash referred to proceedings in OS 1044 of 2008 where a Singapore company known as Consult Asia Pte Ltd ("Consult Asia") had in or about December 2006, taken a loan of $30m

from a foreign bank ("the Consult Asia loan") secured by plots of land located at Balestier and Changi Roads. The Consult Asia loan was repayable within 18 months of its date. Dash testified the effective interest charged on the same approximated to 25%. In answer to the court's question, Dash opined that it was more likely than not that Consult Asia was unable to borrow from Singapore-based bank lenders and had to resort to borrowing from a Hong Kong-based foreign bank (which subsequently sold off the loan in December 2007 at a loss because of the said borrower's weak credit).

53 In a similar vein, the loan to Riverwealth was unsecured, subordinated to that of HLF and had no fixed repayment date. Moreover, the loan was made during the GFC, which started in 2007 (with the subprime mortgage crisis in the United States) and worsened with the collapse of Bear Sterns in March 2008 and Lehman Brothers in September 2008. During the GFC, the supply of global liquidity was reduced by more than 30% year on year, creating a shortage of funds for risky investments. In the 18 months between the fourth quarter of 2007 and the second quarter of 2009, providers of capital held pricing power due to the sharply reduced liquidity and risk appetite in the market.

54 Consequently, Dash opined that the interest rate of 7.5% charged by the first defendant for the loan was on the low side when the correct market level for a mezzanine loan of this nature should have been in the region of 30% per annum. A lender's risk appetite would have been low in 2008 and that translated into higher interest rates charged by a willing lender. Dash added that the first defendant's methodology of calculating interest on a compounded basis *viz*, by adding accrued interest to the principal sum monthly was also correct.

55 Whilst he recognised that shareholder loans typically do not carry interest, Dash pointed out that it was different in this case as only the first defendant and none of the other shareholders, extended the loan. Consequently, he felt it was only appropriate that the mezzanine loan extended by the first defendant should be treated on an arm's length basis.

56 In cross-examination and re-examination, Dash opined that the fact that there was a profit-sharing arrangement between the shareholders that was outside the capital structure of Riverwealth would not affect his opinion or make any difference to his analysis of the interest rate.

57 At the conclusion of his cross-examination, Dash had made the following points:

(a) Liquidity in fund markets was a factor in determining interest rates of loans outside the commercial banking market;

(b) Hedge funds, private equity funds, asset managers and the like would not have ready access to the banking industry for liquidity and typically, if these institutions lend money, their interest rate would be much higher than that charged by banking institutions. If their own cost of capital is say 15%, then they would be pricing their loans much higher.

(c) He agreed that the first defendant's loan and the Consult Asia loan in [52] were not like-for-like comparisons. It would be difficult to find an identical comparable transaction;

(d) Notwithstanding there were no similar transactions as comparisons, he had no difficulty pricing the first defendant's loan;

(e) The Singapore interbank offered rates ("SIBOR") (suggested by the plaintiff) would not apply; and

(f) Prime lending rates were the interest rates charged by a bank to its best customers and

would not be applicable to the first defendant's loan to Riverwealth since the former was not a bank.

58 In answer to the court's questions, Dash opined that SIBOR would not be appropriate or relevant in any event in his analysis, as SIBOR would only be applicable to loans made by banking institutions *inter se* over a short period of time. Neither did he consider the first defendant's loan to Riverwealth a bridging loan because typically, bridging loans are a temporary measure with short tenure, as they are meant to bridge a liquidity need between different points in time.

59 The first defendant's other expert witness was Macdonald who is the chief executive of an Asian private equity real estate investor company called Fine Grain Property Pte Ltd ('Fine Grain"). Macdonald's task was to give his opinion on the appropriate interest rate chargeable by the first defendant as an unsecured subordinate lender at the material time.

60 It was Macdonald's evidence that a shareholder's loan is characterized by *pari passu* lending and only in such a scenario would a nominal or zero interest rate be equitable and/or likely. In this case, he noted that the first defendant extended 100% of the loan to Riverwealth instead of 50% based on his 50% share in the company while neither the third defendant nor Andy assumed their proportionate 25% share of the loan.

61 Macdonald testified there are six Cs in evaluating the credit risk of a borrower *viz*, (i) capacity, (ii) collateral, (iii) conditions, (iv) character, (v) credit, and (vi) capital. Of the six factors, the capacity of the borrower to repay a loan would normally have the most weightage followed closely by collateral that was offered by the borrower for the loan. During re-examination, he qualified his answer stating all six factors are important in different situations and their relative importance would vary, depending on a particular loan.

62 Macdonald cited, as a comparative loan, a transaction handled by his company involving a prime commercial property in Singapore that was purchased by a UK fund in 2007 using bank borrowings. As a result of the GFC, the UK fund found that its borrowings exceeded the value of the property. The borrowings comprised of both senior and junior debts. Both lenders and borrower sought Fine Grain's assistance to find a solution. Eventually, the commercial property was sold and the banks agreed to write-off the majority of the junior debt.

63 Macdonald explained that pricing of loan facilities is based on a nominal interest rate which consists of the lender's base interest rate plus a margin to reflect the risk of the facility. In the case of a mezzanine debt, given the higher risk associated with being a subordinated lender and a higher loan to value ("LTV") ratio, it is frequently agreed that the lender will be paid an additional amount upon a successful exit. Macdonald explained that a LTV is the amount of a loan divided by the security pledged. The higher the value of the security pledged for a particular loan, the lower would be the LTV. Typically, a loan with a LTV above 80% is considered to be of extremely high risk, as in the case of Riverwealth. The central consideration in the pricing of mezzanine loans is to try to achieve an agreed internal rate of return ("IRR") on the loan which is fair to both lender and borrower. Macdonald opined that the loan to value ratio ("LTV") for this case was in excess of 100% in June 2008 and would have been even higher by the end of 2008 following the severe market correction resulting from the GFC.

64 In his AEIC, Macdonald had said the following on the interest rate chargeable by the first defendant to Riverwealth:

> 33 In assessing the appropriate or reasonable rates to be charged, it is important to consider

the fair apportionment of risk between the Mezzanine Loan provider and the borrower and its shareholders. Given the high risk of the project, the lack of any cashflow to service debt, the absence of any security documentation and the unprecedented financial crisis prevailing in late 2008, the Mezzanine Loan was extremely high risk. It is very unlikely that [Riverwealth] would have been able to borrow funds in excess of the HLF [l]oan and certainly not more than 100% of the acquisition cost.

34 On the other hand, due to the Mezzanine Loan, [Riverwealth] and its shareholders had negligible or no funds at risk in the project. This [meant] that any profit accruing to them on sale of the Properties would give an exceptionally high (or potentially infinite) IRR (eg an investment of $1.00 which gives a return of $100 in one year has generated an IRR of 10,000% an investment of $0 which generates a return of $1.00 has generated an infinite IRR).

35 As such, the Mezzanine Loans extended by the [first defendant] can be characterised as bearing virtually all of the financial risk. In my opinion, it would be reasonable for the [first defendant] to have expected an IRR of 30% per annum on his Mezzanine Loans, in the event of a sale of the Properties.

Macdonald contrasted the (mezzanine) loan with the HLF loan which had a nominal interest rate of 5% comprising a base rate of 4.5% (at the time the same was extended) and a margin of 0.5%. The nominal interest rate reflected the relatively low risk nature of the HLF loan, given that it was secured by collateral which included a mortgage over the Properties and joint and several guarantees from the shareholders/directors; it subsequently demanded additional security in December 2008 (which the first defendant provided by the $1m deposit).

65 Ignoring Macdonald's AEIC and the extracts in particular at [64], Mr Srinivasan spent an inordinate amount of time cross-examining him and (later) Dash on the basis that no interest should be chargeable by the first defendant on the loan as he is a shareholder of Riverwealth. In the light of this court's earlier comment in [46], a large portion of the experts' evidence from cross-examination was irrelevant.

66 The plaintiff's closing submissions went further to assert that apart from being told by the first defendant and/or his counsel, the two experts had not seen any documentation that suggested that the first defendant's loan to Riverwealth was a mezzanine loan that was subordinated to HLF's senior loan. Mr Srinivasan had asked and both experts had confirmed that they had not seen any terms or conditions relating to the first defendant's loan nor the expected interest rate payable. However, they had (particularly, Macdonald) looked at the structure of the loan and concluded that it was indeed a mezzanine loan which was subordinated to the HLF loan. It was a mezzanine loan because it was a layer of financing between Riverwealth's senior debt (the secured loan of HLF) and equity (the first defendant's injection of $1m into the company). The first defendant was clearly a junior lender in respect of the Properties as his mezzanine loan to Riverwealth was unsecured and subordinated to that of HLF.

67 The plaintiff submitted that the court should disregard the testimony of the two experts as neither gave evidence on the market rate applicable to the loan. It was further contended that the Consult Asia loan was not relevant as that was a secured loan. The plaintiff then revived his submission (which the court rejects for the reason stated in [46] above) that no interest was payable on the loan. The plaintiff's alternative submission was that a reasonable interest rate to be charged by the first defendant is 0% – a proposition so absurd it does not warrant any consideration by this court.

68 The first defendant's submissions on the other hand pointed out that it was common ground between the two experts that the loan had high credit risk throughout the holding period of two years, given Riverwealth's lack of credit rating which was greatly exacerbated by external market conditions during the GFC.

69 In his AVA, the first defendant deposed he was prepared to abide by the court's decision to award him a market or reasonable interest rate on the loan. Hence, this court has the choice of: (i) either accepting the compound interest rate of 7.5% per annum that the first defendant had charged Riverwealth or (ii) accepting the experts' testimony that the first defendant should be entitled to around 30% per annum on the loan. However, giving the higher rate to the first defendant would effectively wipe out any profit for distribution to the shareholders (as the plaintiff complained). A third alternative would be to award interest at a rate between 7.5% and 30%.

The decision

(i) The brokerage fee

70 Taking into consideration all the evidence adduced and bearing in mind that the burden of proof the first defendant needs to discharge is only on a balance of probabilities, the court finds that the first defendant did pay to Low and Mohdar $300,000 or half the 1% brokerage fee. Although Mohdar did not testify, the fact remains that Low did. There is no reason for this court to doubt Low's testimony that he received $200,000 while Mohdar received the remaining $100,000 paid by Daun on behalf of Riverwealth. Granted, the CA judgment disallowed as a deductible management fees paid to Daun by Riverwealth. Daun was also never formally appointed as Riverwealth's agent. That did not mean that Daun was not acting as Riverwealth's agent *in fact* when it paid $300,000 to Low and Mohdar. The court notes that it is the industry practice in Singapore for a seller to pay brokerage fee amounting to 1% of a property's sale price. Further, Mohdar's absence from court does not necessarily give rise to an inference that his testimony would have been unfavourable had he testified (as the plaintiff submitted). $100,000 is not a small amount and it is highly unlikely that Low would not have insisted that the first defendant pay him the full $300,000 if indeed Mohdar was not paid at all.

71 I should add that neither party addressed the court on who was the effective cause of the sale of the Properties. Was it the first defendant/Daun or was it Low and Mohdar? Arguably, applying the "but for" test, it can be said that but for the introduction of the first defendant to Low by Mohdar and then Low's introduction of Bill Tan to the first defendant, the consortium that eventually led to the incorporation of the Buyer and the sale to the latter would not have come about.

72 That said, the payment of the remaining half percent brokerage fee to Daun merits different consideration altogether. In this regard, it was noted earlier (at [27]) that contrary to the first defendant's claim (see [23]), the accounts of Riverwealth as of 31 July 2010 did not contain, as *a specific expense item*, either the total brokerage fee of $600,000 or $300,000 therefrom paid to Daun. Consequently, bearing in mind that this was a related party transaction (as the plaintiff contended), the sum of $300,000 paid to Daun is disallowed as an expense item and cannot be deducted from the sale proceeds of the Properties.

(ii) Legal fees of $34,248.66 paid to R&T

73 In the light of the court's earlier observations in [29] and [30], this item is disallowed as a deductible from the sale proceeds of the Properties. The first defendant failed to discharge the burden to prove that the two invoices from R&T related to the term sheet prepared in or about March

2008 for the then three shareholders of Riverwealth to sign and not for work done for and incidental to the incorporation of the Buyer.

(iii) R&T's fees of $275,814.28 for work done for Suits 438 of 2009 and 344 of 2010

74 The plaintiff was undoubtedly responsible for the incurring of these fees by Riverwealth. While I accept the plaintiff's submission in [36] that these expenses do not fall within the ambit of the CA order of allowed deductibles, I also believe the first defendant's evidence ([33] *supra*) that the plaintiff had reneged on his promise not to charge more than $250,000 for his architectural fees for the Properties. The plaintiff had not only reneged on this promise by suing on his invoice no 1136 dated 6 May 2008 in Suit 438 of 2009 but deliberately prepared a board resolution for Riverwealth that restricted his promise to lot 434 River Valley Road. He then capitalised on that board resolution by rendering invoice no. 1302 dated 1 October 2009 for the second of the Properties at lot 428 River Valley Road ([33] and [34] *supra*). The plaintiff's conduct was reprehensible and reflects poorly on his integrity. Unfortunately, the plaintiff's objectionable behaviour does not detract from the fact that the legal fees are not an allowable deduction from the sale proceeds of the Properties. The first and third defendants as well as Andy would need to find other ways and means for Riverwealth to resolve this item after the sums have been written back as expenses in Riverwealth's accounts.

(iv) Interest of $3,088,350.14 charged by the first defendant on the loan

75 As stated earlier (at [67]), the plaintiff criticised the first defendant's two experts but chose not to call any experts himself on the issue of the applicable interest rate. Instead, counsel had suggested to both experts the use of SIBOR as a guide to the applicable interest rate chargeable by the first defendant on the loan. In the light of the answers by Dash to the court's questions at [58], the use of SIBOR is a non-starter and need not even be considered.

76 The first defendant on the other hand submitted that this court should accept his experts' testimony citing the following passage from *Halsbury's Laws of Singapore* vol 10 (LexisNexis, 2013 Reissue):

> [120.227]–… [T]he court may, if there is no definite expert evidence to the contrary, agree with the expert but it must not blindly accept the evidence merely because there is no definite opinion to the contrary. Apart, however, from that duty, the duty of the court is largely negative. Ex hypothesi, the evidence is outside the learning of the court. Therefore, the role of the court is restricted to electing or choosing between conflicting expert evidence or accepting or rejecting the proffered expert evidence though none else is offered. The court should not, when confronted with expert evidence which is unopposed and appears not to be obviously lacking in defensibility, reject it nevertheless and prefer to draw its own inferences. While the court is not obliged to accept expert evidence by reason only that it is unchallenged, if the court finds that the evidence is based on sound grounds and supported by the basic facts, it can do little else than to accept the evidence. …

77 The first defendant's submissions also cited the case of *Khoo James v Gunapathy d/o Muniandy* [2002] 1 SLR(R) 1024 (at [64]-[65]) (*Gunapathy's* case) for the two stage threshold test of logic this court should apply:

> (a) had the expert directed, considered and weighed all the countervailing factors relevant to the issue?
>
> (b) if so, had the expert then arrived at a "defensible conclusion" as a result of the balancing

process.

78 The first defendant asserted that the opinions of Dash and Macdonald did not fall foul of the test in *Gunapathy's* case as both had taken into consideration the relevant factors for their analysis of the interest rate payable to the first defendant for the loan based on market practice. Consequently, the court should accept their testimony; I agree.

79 I disagree with the plaintiff's submission that the testimony of the first defendant's two experts should be rejected as irrelevant. On the contrary, in the absence of any countervailing evidence from the plaintiff and bearing in mind the guidelines from the passage from *Halsbury's Laws* at [76] and the two stage logic test from *Gunapathy's* case set out at [77], I accept the experts' testimony. In particular, I find Macdonald's answers during cross-examination to be logical and reasoned.

80 The plaintiff's assertion that the Consult Asia loan used by Dash as an example should be disregarded as not being a like-for-like comparison is unreasonable. It would be unrealistic to expect the first defendant to find an exact comparable for the loan in the financial market. The Consult Asia loan was a useful guide, as it similarly had no prior credit history or borrowing record. Notwithstanding the fact that it was a secured loan (unlike this case), Consult Asia was forced to borrow at exceptionally high interest rates.

81 In fact, the first defendant was worse off than the lenders for the Consult Asia loan, as he was unsecured, had exposure as a guarantor of the HLF loan and was at risk of losing the $1m deposit he was obliged to place with HLF to ensure payment of the monthly instalment of $125,000 by Riverwealth which he advanced for HLF's loan. It was all very well for counsel for the plaintiff to suggest to Macdonald during cross-examination that HLF held personal guarantees not only from the first defendant but also from the plaintiff and Andy as security for the HLF loan. No evidence was adduced by the plaintiff that when it came to the crunch, HLF would also look to the guarantees of the plaintiff and Andy and not only to the first defendant's guarantee, should Riverwealth default on the HLF loan. As was pointed out in Macdonald's AEIC (at para 34), Riverwealth, the plaintiff, Andy and Riverwealth's shareholders had negligible or no funds at risk due to the loan. Any profit accruing to them on the sale of the Properties would give an exceptionally high (or potentially infinite) IRR. In other words, an investment of $1.00 which gives a return of $100 in one year has generated an IRR of 10,000% while an investment of $0 which generates a return of $100 has generated an infinite IRR.

82 The first defendant's submissions had set out the interest calculation as $15,084,545.53 based on the experts' figure of 30% per annum compounded on a monthly basis, on the basis that the disputed items in (ii) and (iii) above are disallowed. As this court has already disallowed items (ii) and (iii) in [73] and [74], there is no need to consider the first defendant's other computations of interest had those items or either of them been allowed.

83 However, allowing the first defendant to charge $$15,084,545.53 as interest on the loan meant there would be no profit left for distribution to the plaintiff, Andy and the first defendant himself – that would be inequitable.

84 It was also the plaintiff's submission that interest ordered by the CA judgment was on the fixed sum of $22,580,621.99 and the first defendant should not be allowed to argue that it should be more than that figure (as stated in the AVA and his solicitors' opening statement ([47] *supra*). I agree. The figure of $22,580,621.99 is specifically set out in the order of court for the CA judgment ("CA's orders"). The first defendant is not entitled to replace that with any other figure.

85 Taking into consideration all the relevant factors reviewed earlier, this court finds that it would

not be unreasonable or unfair to allow the first defendant to charge 7.5% per annum on a compounded basis for the loan of $22,580,621.99. It is unrealistic to expect to find another comparable transaction on a like-for-like basis as the plaintiff submitted should be the case. What is undisputed is that the loan bore all the characteristics of a mezzanine loan as defined by the first defendant's two experts, it was unsecured and it was a junior debt to HLF's senior loan. Above all, the court is conscious that it would have been well-nigh impossible for an unknown entity like Riverwealth to have gone into the financial market before, during and after the GFC to find a loan of $22 – 25m without collateral, credit rating and above all, no capacity to repay the loan (unless and until the Properties were sold) let alone obtain loans at SIBOR, prime lending or even overdraft interest rates.

Conclusion

86 The first defendant is entitled to deduct $300,000 for half brokerage fee that was paid to Low and Mohdar (see [13]). After adding $300,000 to the figure of $5,108,676.58 in [9], the gross sum of $5,408,676.58 and the purchase price of $48.5m are to be deducted from $60,080,000 to leave a balance of $6,171,323.42 (before interest computation).

Sale price		$60,080,000.00
Purchase price		($48,500,000.00)
Add:	Allowed deductions	
	i. $5,108,676.58	
	ii. $ 300,000.00	($5,408,676.58)
Balance:		$6,171,323.42

87 No deduction is required to be made from the agreed deductibles in [9] of items 13 to 16 therein (totalling $66,961.44) as the plaintiff did not dispute those figures in his closing submissions.

88 The first defendant is further entitled to interest on $22,580,621.99 calculated at 7.5% on a compounded basis.

89 The first defendant's submissions contained a whole host of submissions on matters unrelated to the CA judgment (but described as "other related issues" by his solicitors) prompting a complaint dated 16 June 2015 from the plaintiff's solicitors. I note that issues such as Wee's 13% shareholding in Riverwealth, Clarence Tan's 2.5% cut from the profits of each shareholder and Riverwealth's tax position are outside the purview of the account of profits ordered under the CA judgment. Indeed, the CA's orders stated that Wee is entitled to retain her shareholding of 130,000 shares in Riverwealth. Consequently, this court declines to deal with those matters. However, that is not to say that the protagonists in this suit do not have to resolve these outstanding issues after the net profits from the sale of the Properties have been distributed. The issues have to be addressed and resolved before Riverwealth can eventually be liquidated if that is the parties'/shareholders' intention.

90 In his closing submissions (at para 204), the plaintiff claimed for interest on the amount due to him from the date of the Writ to the date of this court's judgment. That would be contrary to the CA's orders where it awarded the plaintiff interest at the rate of 5.33% from the date of the writ (16 March 2010) to the date of the CA judgment (22 July 2013).

91 I will hear the parties (on a date to be fixed by the Registrar), on the quantum of interest payable to the first defendant on the loan and on costs. Once the quantum of interest on the loan is finalised, the net profit on the sale of the Properties can similarly be determined and the plaintiff's 25% share thereof crystallised.