IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 37

Originating Summons No 360 of 2017

Between

Carpe Diem Holdings Pte Ltd

… *Plaintiff*

And

(1) Carpe Diem Playskool Pte Ltd
(2) Chee Fung Mei
(3) Genesis Child Care Pte Ltd
(4) Genesis Child Care (TJ) Pte Ltd

… *Defendants*

GROUNDS OF DECISION

[Insolvency Law] — [Avoidance of transactions] — [Disclaimer of onerous transactions]

[Land] — [Sale of land]

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v
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25 September 2017; 10, 25 October 2017

21 February 2018

Kannan Ramesh J:

Introduction

1 At the heart of this application was the plaintiff's attempt to assert ownership over a lease of a Housing and Development Board shop-unit which had expired before the commencement of these proceedings. The lease had been assigned by the first defendant to the fourth defendant pursuant to a sale and purchase agreement between the two parties. Shortly after the execution of the sale and purchase agreement, the first defendant was placed in creditors' voluntary liquidation. The first defendant and the fourth defendant were not related parties. The second defendant stepped in first as provisional liquidator and then as liquidator of the first defendant. The plaintiff did not challenge the assignment on any of the grounds for vitiating transactions in an insolvent

liquidation set out in the Companies Act (Cap 50, 2006 Rev Ed) ("the Act").

2 In Originating Summons No 360 of 2017 ("OS 360"), the plaintiff sought leave pursuant to s 299(2) of the Act to commence proceedings against the first defendant and second defendant. The plaintiff sought leave in relation to proposed applications under s 310 and s 315 of the Act. In relation to s 310, the plaintiff sought the determination of two questions arising in the liquidation of the first defendant. In relation to s 315, the plaintiff sought to: (a) reverse the decision of the second defendant as liquidator to complete the assignment of the lease to the fourth defendant on the ground that the assignment was wrongful; or (b) modify the decision of the second defendant by seeking payment from any of the defendants of its loss of profits for breach of its contract with the first defendant. Having heard the parties' submissions, I dismissed OS 360 with costs. The plaintiff has appealed my decision. I now give my reasons.

Facts

The parties

3 The plaintiff, Carpe Diem Holdings Pte Ltd, is a Singapore incorporated company engaged in the business of providing childcare services for pre-school children through franchising.

4 The first defendant, third defendant and fourth defendant are Carpe Diem Playskool Pte Ltd, Genesis Child Care Pte Ltd and Genesis Child Care (TJ) Pte Ltd respectively. They are also Singapore incorporated companies engaged in the business of providing childcare services for pre-school children. The first defendant was the franchisee of the plaintiff until 31 December 2015, operating a pre-school at 153 Yung Ho Road, #01-41, Singapore 610153 ("the Premises") under the Carpe Diem brand and trademark. The second defendant,

Chee Fung Mei, is the liquidator of the first defendant. The first defendant was placed in creditors' voluntary liquidation on 16 January 2016.

Background to the dispute

The contractual relationship between the plaintiff and the first defendant

5 The present dispute stemmed from a decade-long relationship between the plaintiff and the first defendant. In November 2005, the plaintiff and the first defendant entered into a Unit Franchise Agreement ("the First Agreement") with the plaintiff as the franchisor and the first defendant as the franchisee. Pursuant to the First Agreement, the first defendant obtained a lease from the Housing and Development Board ("the HDB") for the Premises. Thereafter, the first defendant began to operate a pre-school centre at the Premises.

6 The First Agreement expired on 1 November 2010. Upon its expiry, the plaintiff and the first defendant entered into a second Unit Franchise Agreement dated 1 November 2010 ("the Franchise Agreement"). Under the Franchise Agreement, the first defendant was granted franchise rights to operate a childcare and child development centre under the name "Carpe Diem". At the material time, "Carpe Diem" was a registered trademark in Singapore in the name of the plaintiff.

7 The lease with the HDB was subsequently renewed for three-year terms on January 2008, January 2011 and January 2014. The last renewal in January 2014 was for the period 1 January 2014 to 31 December 2016 ("the Lease"). It was this lease that was the subject of the tussle between the parties. The assignment of the Lease by the first defendant to the fourth defendant was the source of the plaintiff's dissatisfaction. The plaintiff asserted that it enjoyed rights superior to the fourth defendant's over the Lease.

8 The following clauses of the Franchise Agreement were pertinent (the plaintiff being referred to as "the Franchisor" and the first defendant being (referred to as the Unit Franchisee"):

> 11. OBLIGATIONS OF THE UNIT FRANCHISEE
>
> (C) Option to assign. The Unit Franchisee shall use its best efforts to cause any Lease it enters into to contain a provision giving the Franchisor the option to obtain an assignment of the Lease in the event that the Unit Franchisee should for whatever reason decide that it wants to surrender the Lease or should this Agreement expire or be terminated for whatever reason.
>
> …
>
> 28. EFFECT OF TERMINATION
>
> (A) Upon the expiry or termination of this Agreement: -
>
> …
>
> (8) Transfer of Lease. *the Franchisor shall have the option which shall be exercised within thirty (30) days from the date of termination or expiry by written notice to the Unit Franchisee to obtain a lease of the premises of the Centre or a transfer or assignment of the existing Lease of the Centre from the Unit Franchisee* so as to continue the Business there whether by itself or through its nominee and the Unit Franchisee shall:-
>
> (a) if it owns the premises of the Centre, grant a lease to the Franchisor or its nominee at market price and subject to such terms and conditions as are usual in leases of the same nature; or
>
> (b) if the premises of the Centre are leased from another party, use its best endeavours to procure from the landlord a transfer or assignment of the lease for the premises of the Centre to the Franchisor or its nominee within a reasonable time.
>
> [emphasis added]

Clause 28(A)(8) ("the Option Clause") was crucial to the plaintiff's case. The plaintiff asserted an equitable interest in the Lease on the basis of the exercise of the Option Clause. The plaintiff further asserted that the interest which

resulted trumped any interest that the fourth defendant acquired in the Lease. It is important to note the plaintiff did not contend that the Option Clause *per se* conferred an interest in the Lease, *ie*, the exercise of the Option Clause conferred rights in the plaintiff.

9 Separately, despite cl 11(C) of the Franchise Agreement requiring the first defendant to use its best efforts to ensure that the Lease would contain a provision that granted the plaintiff an option for the assignment of the same, this was not in fact incorporated into the Lease. To the contrary, the Lease prohibited assignment or subletting of the Premises *without approval by the HDB*. The relevant clause read as follows:

> 3 The Tenant hereby covenants with HDB as follows:-
>
> 3.3 Not to (*unless with prior written consent of HDB*):-
>
> (a) Transfer, assign, sublet or part with the actual or legal possession of the said premises or any part thereof;
>
> (b) enter into any Agreement whether verbal or written with any person corporation firm or company where the effect of the said Agreement will be a defacto sub-letting assignment licensing or parting with legal or physical possession of the premises or any part thereof to the person corporation firm or company.
>
> [emphasis added]

This was important for reasons discussed below (see [63]–[64] below).

Termination of the Franchise Agreement

10 The Franchise Agreement was for a term of five years commencing on 1 November 2010. Accordingly, the Franchise Agreement would have terminated on 1 November 2015. However, parties agreed to extend the term to 31 December 2015.

11 By a letter dated 22 December 2015, the plaintiff's solicitors notified the first defendant that unless renewed, the Franchise Agreement would terminate on 31 December 2015. In the same letter, the plaintiff's solicitors demanded confirmation by 28 December 2015 that the first defendant would transfer the Lease to the plaintiff in the event the first defendant did not intend to renew the Franchise Agreement. The plaintiff did not rely on this letter as constituting an exercise of the Option Clause. This must be correct as the plaintiff would only be able to exercise the Option Clause upon termination of the Franchise Agreement on 31 December 2015. In any event, it would be difficult to construe the letter as exercising the Option Clause as its focus was on renewal of the Franchise Agreement. As will be seen, this remained the focus of the plaintiff until 26 January 2016. On 29 December 2015, the first defendant responded by email and sought "a month to a month and half" to evaluate its options.

12 On 4 January 2016, the plaintiff's solicitors replied to the first defendant's email of 29 December 2015 to state that the Franchise Agreement had terminated ("the 4th January letter"). Notwithstanding this, the plaintiff's solicitors demanded that the first defendant respond by 14 January 2016 on, amongst other things, whether it intended to extend the Franchise Agreement. On 14 January 2016, Connie Lim ("Connie"), the sole director of the first defendant, informed the plaintiff's solicitors by email that the first defendant would consider renewing the Franchise Agreement but needed details before making a decision.

13 On 18 January 2016, the plaintiff's solicitors rejected the first defendant's request for details. The plaintiff's solicitors demanded that the first defendant sign by 22 January 2016 an extension to the Franchise Agreement of five years. A copy of the agreement that was to be signed was enclosed in the

letter. As no response was received from the first defendant, the Franchise Agreement came to an end with effect from 31 December 2015.

The Sale and Purchase Agreement between the first defendant and the fourth defendant.

14 It would be helpful at this stage to interpose in the recitation of facts the sale and purchase agreement between the first defendant and the fourth defendant for the assignment of the Lease. Many of the events in this regard occurred contemporaneously with the exchange of correspondence between the plaintiff, and the first defendant and second defendant on the renewal of the Franchise Agreement.

15 In early December 2015, the third defendant's agent informed Ng Kim Wah ("Kim Wah"), a director of the third defendant and the fourth defendant, that the childcare business of the first defendant was for sale. Kim Wah was informed by the agent that, according to the first defendant, the franchisor of the business (*ie,* the plaintiff) had consented to the sale.

16 Sometime in the third week of December 2015, Kim Wah viewed the Premises with the agent. Thereafter, Kim Wah made an offer to acquire the business and the Lease, but not the franchise, for $88,000. A few days later, towards the end of December 2015, Kim Wah was informed by the agent that the first defendant had accepted the offer.

17 At that time, Kim Wah intended to acquire the Lease and the business in the name of a company to be incorporated. He had in mind the fourth defendant. However, he wanted to close the transaction quickly. As such, the understanding between the first defendant and Kim Wah was that the Lease and the business would be first acquired by the third defendant on behalf of the

fourth defendant. This understanding was recorded in a document signed on 26 December 2015. Nothing untoward was alleged by the plaintiff on account of Kim Wah's desire to close the transaction quickly.

18 On 4 January 2016, the first defendant and the third defendant, on behalf of the fourth defendant, signed the Sale and Purchase Agreement ("the S&P"). I should pause to observe that it was unclear from the record which was first in time – the execution of the S&P or the receipt of the 4th January letter by the first defendant. It was understood by the parties (to the S&P) that the S&P included the transfer of the Lease to the fourth defendant. At that time, the Lease had just under a year to run. Its term expired on 31 December 2016. As will be seen below (at [41]), under the S&P, completion was conditional upon the fourth defendant obtaining the relevant licence to carry on a childcare business at the Premises and approval from the HDB for the assignment of the Lease. The transaction under the S&P was completed on 1 June 2016 and Kim Wah handed a cheque for $88,000 to the agent. It had been agreed between the fourth defendant and the first defendant that the agent would hold the cheque until the issues with the plaintiff were resolved.

19 I pause to make three observations here:

(a) First, between the effective date of expiry of the Franchise Agreement on 31 December 2015 and the execution of the S&P on 4 January 2016, the plaintiff had not exercised the Option Clause. Indeed, as noted above (at [13]), even as late as 18 January 2016, the plaintiff was waiting for the first defendant's response as to whether it would renew the Franchise Agreement. The plaintiff, however, argued that the Option Clause was exercised by the 4th January letter (see above at

[12]). I was of the view the plaintiff's position was incorrect. This point is discussed at [48]–[49] below.

(b) Second, the plaintiff did not assert that, as at the date of execution of the S&P, Kim Wah (or the third defendant or the fourth defendant) was aware of the discourse between the plaintiff and the first defendant or the terms of the Franchise Agreement. Indeed, when queried by me, counsel for the plaintiff confirmed, that the plaintiff was not making this assertion.

(c) Third, as at the date of execution of the S&P, the second defendant had not been appointed as provisional liquidator.

These were important considerations in the final analysis.

20 The fourth defendant was incorporated on 11 January 2016. On 12 January 2016, the fourth defendant's board of directors resolved that it would take over the S&P from the third defendant.

21 On 13 January 2016, pursuant to cl 3.3 of the Lease, the fourth defendant applied to the HDB for approval of assignment of the Lease by the first defendant (see [9] above]. The fourth defendant also applied to the Early Childhood Development Agency ("the ECDA") for issuance of a childcare licence.

The creditors' voluntary liquidation of the first defendant

22 By a board meeting on 16 January 2016 ("the 16th January Meeting"), it was resolved that the first defendant be placed in creditors' voluntary liquidation and the second defendant be appointed as provisional liquidator. The minutes reflected that the first defendant could not carry on its business by

reason of its liabilities. Further, it was agreed that the meetings of the members and creditors be convened within one month from that date. It appears that after the 16th January Meeting, Connie informed the second defendant that the business of the first defendant had been sold to the third defendant. The second defendant did not enquire further at that time.

23 On 26 January 2016, the second defendant informed the plaintiff's solicitors that the first defendant was in creditors' voluntary liquidation. The plaintiff's solicitors replied on the same day to demand that the first defendant transfer the Lease to the plaintiff pursuant to the Option Clause. The plaintiff's solicitors also enclosed a copy of the Franchise Agreement in their letter. This appeared to be the first occasion when the plaintiff purported to exercise the Option Clause. When the second defendant asked Connie about the Franchise Agreement, Connie explained that, in her view, the first defendant no longer owed any obligations to the plaintiff under the Franchise Agreement because the plaintiff had rejected an earlier offer by the first defendant to sell its business to the plaintiff.

24 Subsequently, on 1 February 2016, and on 10 February 2016, the plaintiff's solicitors sent two further letters to the second defendant. These letters reiterated the plaintiff's demand for the first defendant to transfer the Lease to the plaintiff.

25 Per the resolution of the 16th January Meeting, the second defendant scheduled a creditors' meeting on 15 February 2016. The second defendant was appointed as liquidator of the first defendant at this meeting.

26 Subsequently, the second defendant called for another creditors' meeting on 14 March 2016 ("the Second Creditors' Meeting"). The agenda for

the Second Creditors' Meeting was, among other things, for the creditors to decide whether to approve the sale of the first defendant's business and the assignment of the Lease to the fourth defendant. It was resolved that the business be sold and the Lease be transferred to the fourth defendant. The plaintiff, represented by Ng Lee Choo ("Ng"), voted against the resolutions. The majority, comprising Connie and Lee Kum Hong ("Lee"), voted for the resolutions. It should be noted that Lee was also a shareholder of the first defendant. It should also be noted that though the resolutions specified the fourth defendant, as opposed to the third defendant, as the purchaser, nothing turns on this. The third defendant had at all times contracted on behalf of the fourth defendant.

27 After the Second Creditors' Meeting, the plaintiff's solicitors sent two letters on 16 March 2016 and 24 March 2016 to the second defendant. Once again, the letters reiterated the first defendant's obligation under the Franchise Agreement and the plaintiff's demand for the first defendant to transfer the Lease to the plaintiff. In the letter sent on 16 March 2016, the plaintiff's solicitors informed the second defendant that she was not entitled to disclaim the Franchise Agreement as the obligation to assign the Lease to the plaintiff was "clearly not onerous". In the subsequent letter on 24 March 2016, the plaintiff's solicitors demanded that the second defendant decide if she would disclaim the Franchise Agreement.

28 The second defendant then called for a third creditors' meeting on 19 April 2016. Two items on the agenda were pertinent:

(a) whether an application should be made to court to determine the appropriate course of action to be taken in relation to the competing

claims between the plaintiff and the fourth defendant over the Lease; and

(b) if such an application were to be made, who would bear the costs.

While it was resolved that an application should be made, none of the creditors were agreeable to bearing the costs. The second defendant thereafter sought legal advice on her obligations as liquidator. She was advised to apply to disclaim the Franchise Agreement as an onerous transaction and that the fees would be between $5,000 to $7,000. The second defendant was prepared to bear these costs herself if the first defendant did not have sufficient funds. Accordingly, by a letter dated 20 April 2016, the second defendant informed the plaintiff that she would be applying to disclaim the Franchise Agreement. In response, the plaintiff informed the second defendant on 22 April 2016 that it would be contesting the application to disclaim. In view of the plaintiff's challenge, the second defendant revised the estimate of the costs upwards by $30,000. As a result of this sharp upward revision, the second defendant was no longer willing to bear the costs of the application herself.

Interaction between the plaintiff, and the third defendant and the fourth defendant

29 On 22 April 2016, well after the execution of the S&P but before completion, the plaintiff's solicitors wrote to Kim Wah to assert that the plaintiff was entitled to an assignment of the Lease pursuant to the Franchise Agreement. This was the first occasion Kim Wah was made aware of the dispute between the plaintiff and the first defendant. In response, Kim Wah requested that the agent verify the contents of the letter with the first defendant. Kim Wah was informed by the agent that the first defendant would resolve the matter with the

plaintiff. Kim Wah and the third defendant and the fourth defendant thus took no further action.

30 On 5 May 2016, the HDB gave approval for the assignment of the Lease to the fourth defendant. This was followed by the fourth defendant and the HDB entering into a tenancy agreement for the Premises on 24 May 2016 for a term of seven months from 1 June 2016 to 1 January 2017. Soon thereafter, on 27 May 2016, the ECDA approved the fourth defendant's application as well. On 1 June 2016, the fourth defendant took over the business of the first defendant and began operating at the Premises as a lessee of the HDB. It is notable that the plaintiff took no steps to stop completion of the S&P on the basis that it had an interest in the Lease. Indeed, OS 360 was commenced on 31 March 2017, well after the term of the Lease had expired on 31 December 2016. The fourth defendant has since continued to operate at the Premises. This would appear to be under an entirely new lease from the HDB given that there was no option to renew the Lease or the tenancy agreement between the fourth defendant and the HDB dated 24 May 2017 in either of the two instruments.

Procedural history

31 The plaintiff had initially commenced OS 360 against the first defendant, second defendant and third defendant only. The third defendant was included because it appeared from the S&P that the first defendant had transferred the Lease to it. However, the plaintiff subsequently discovered, after Kim Wah filed his affidavit on 22 June 2017, that the fourth defendant had taken over the Lease. Consequently, the plaintiff applied to amend OS 360 to include the fourth defendant, and to discontinue proceedings against the third defendant. These applications were granted.

The parties' cases

The plaintiff

32 The thrust of the plaintiff's case was that the assignment of the Lease to the fourth defendant was wrongful. The plaintiff made the following submissions:

(a) First, the assignment was wrongful because the second defendant failed to disclaim the Franchise Agreement in accordance with s 332 of the Act. It was argued that the failure to disclaim "effectively prohibited [the second defendant] from … proceeding with the [S&P]". The plaintiff argued that the second defendant had a *duty* to disclaim the Franchise Agreement, but failed to do so. Specifically, it was argued that the obligation to disclaim arose when the second defendant formed the view that the Lease should not be assigned to the plaintiff notwithstanding exercise of the Option Clause.

(b) Second, the S&P did not assist the second defendant for the following reasons:

(i) The S&P was for the sale of the first defendant's business only and not the business *and* the Lease. It did not therefore confer on the fourth defendant an equitable interest in the Lease pending completion.

(ii) Even if the fourth defendant had an equitable interest in the Lease pending completion, the plaintiff's interest upon exercise of the Option Clause on 4 January 2016 took priority. The fourth defendant's equitable interest, if any, was only created upon the conditions precedent in the S&P being satisfied (*ie*, on 5 May 2016) (see [41] below), and not upon execution of the S&P (*ie*, on 4 January 2016). Accordingly, as the plaintiff's

equitable interest in the Lease was first in time, it ought to be given priority. As noted earlier, the plaintiff accepted that it would have an equitable interest in the Lease only upon exercise of the Option Clause.

(iii) In any event, the fourth defendant was not a *bona fide* purchaser of a legal title for value for two alternative reasons:

(A) First, the fourth defendant was a purchaser of an equitable interest as opposed to a legal title.

(B) Second, for a purchaser to be considered *bona fide*, the purchaser should not have had notice of the prior interest before consideration is given. In other words, absence of notice at the date of execution of the S&P was insufficient; the fourth defendant had to show that it did not have notice at the time payment was made under the S&P, *ie*, upon completion. As the fourth defendant had received notice of the plaintiff's interest on 22 April 2016, which was before completion, it was not a *bona fide* purchaser.

(c) Third, leave ought to be granted under s 299(2) of the Act to commence proceedings against the first defendant and the second defendant for the following reasons:

(i) In relation to the first defendant, on the basis that (1) there was no undue delay in bringing OS 360, (2) the remedy sought, *ie*, an order for the assignment of the Lease to be reversed, could not be obtained by filing a proof of debt, and (3)

the views of the majority creditors should not be followed as they had marginalised the plaintiff as a minority creditor.

(ii) In relation to the second defendant, on the basis that the plaintiff had shown a *prima facie* arguable case that the assignment of the Lease to the fourth defendant was wrongful.

33 Further, as against the fourth defendant, the plaintiff made the following submissions:

(a) The fourth defendant was liable for the tort of conversion of the Lease.

(b) As the fourth defendant had notice of the plaintiff's interest pursuant to the Franchise Agreement prior to obtaining approval from the HDB for assignment of the Lease, it was liable for the tort of inducing breach of contract.

The defendants

34 The first defendant and second defendant submitted that leave ought not to be granted to the plaintiff to commence legal proceedings against them under s 299(2) of the Act for the following reasons:

(a) The first defendant argued that the court's discretion ought not to be exercised in the plaintiff's favour given (1) the plaintiff's undue delay in bringing OS 360, (2) the existence of a remedy for damages for breach of contract namely the filing of a proof of debt, and (3) the approval by the majority creditors for the sale of the business and the assignment of the Lease to the fourth defendant.

(b) The second defendant argued that the plaintiff had failed to show a *prima facie* arguable case that the second defendant had breached her duties as liquidator. Instead, the second defendant's decision to complete the S&P was not wrong as it was not unreasonable or made in bad faith. It was made in the best interests of the first defendant's creditors.

35 The fourth defendant submitted as follows:

(a) First, the assignment of the Lease to the fourth defendant was not wrong as the fourth defendant was a *bona fide* purchaser for value without notice. By the time the fourth defendant was made aware of the plaintiff's claim, on 22 April 2016, the S&P had already been executed.

(b) Second, it was no longer possible to "reverse" the transfer of the Lease given that its term had expired on 31 December 2016. In other words, there was no interest left in the Lease to reverse.

(c) Third, the fourth defendant was not liable to the plaintiff for loss of profits given that the claim arose from an alleged breach of the Franchise Agreement to which it was not a party. Nor was the fourth defendant liable for the tort of inducing breach of contract.

Issues to be determined

36 The following issues arose for consideration and determination:

(a) First, whether the fourth defendant had an interest in the Lease, equitable or otherwise, pending completion upon execution of the S&P

("the Interest Issue"). This in turn required the consideration of several sub-issues which are outlined below.

(b) Second, whether the second defendant had an obligation to disclaim the Franchise Agreement before completing the assignment of the Lease to the fourth defendant pursuant to the S&P ("the Disclaimer Issue").

(c) Third, whether the fourth defendant was liable for the tort of conversion of the Lease ("the Conversion Issue").

(d) Fourth, whether the fourth defendant was liable for the tort of inducing breach of contract of the Franchise Agreement ("the Inducement Issue").

(e) Fifth, whether, in these circumstances, leave ought to be granted to the plaintiff to commence legal proceedings against the first defendant and second defendant ("the Leave Issue").

I consider each of these issues in turn.

The Interest Issue

37 By asserting that the assignment of the Lease to the fourth defendant was wrongful, the plaintiff was in effect claiming that the exercise of the Option Clause should be given effect to over the S&P. This raised two sub-issues. First, whether the fourth defendant had an equitable interest in the Lease pending completion. Second, if so, whether by exercising the Option Clause on 4 January 2016, the plaintiff had an earlier equitable interest that took priority to or trumped the fourth defendant's interest under the S&P.

First Sub-Issue – Whether the S&P conferred an equitable interest pending completion

38 Did the S&P confer on the fourth defendant an equitable interest in the Lease pending completion based on the rule in *Lysaght v Edwards* (1876) 2 Ch D 499 ("*Lysaght v Edwards*")? The rule states that a contract for sale of land confers an equitable interest on the purchaser pending completion. If the fourth defendant had such an interest, then, subject to the other issues I will consider, the second defendant was correct in completing the assignment of the Lease to the fourth defendant.

39 Given the importance of the issue, on 25 September 2017, I directed parties to file further submissions on this point.

40 The plaintiff submitted that the fourth defendant did not have an equitable interest in the Lease pending completion because the S&P was for the sale of the first defendant's business only, and not the business and the Lease. In support of this submission, the plaintiff pointed out various clauses in the S&P which drew a distinction between the "Business" of the first defendant and the "Tenancy Agreement" (which referred to the Lease).

41 The following clauses in the S&P were highlighted:

> WHEREAS
>
> a) The Vendor are currently operating their Business at the premises described Blk 153, Yung Ho Road, #01-41, Singapore 610153. (hereinafter called the said premises) at a monthly rental Singapore Sevent Thousand Four Hundred only (S$7,400.00) (exclusive of GST) on the terms, conditions, reservations, convenants and stipulations contained in the Tenancy Agreement made between Landlord and the Vendor dated 16/01/2014 (hereinafter called the Tenancy Agreement).

b) Carpe Diem Playskool Pte Ltd (Reg. No.:200515183E) is now carrying on its Business at the said premises.

c) The Vendor are now agreed with the Purchaser to assign all its rights, interest and goodwill in the Business at the said premises to the Purchaser on the following terms and conditions

…

1. DEFINITIONS

1.1. In this Agreement, except to the extent otherwise requires, the following words or expressions shall have the following meanings:-

…

"Business" means the business of childcare centre undertaken by Carpe Diem Playskool Pte Ltd @ Blk 153, Yung Ho Road, #01-41, Singapore 610153;

"Centre" means the childcare centre at Blk 153, Yung Ho Road, #01-41, Singapore 610153;

…

"Tenancy Agreement" means the tenancy agreement with HDB (hereinafter known as "Landlord" for the Business at Blk 153, Yung Ho Road, #01-41, Singapore 610153;

….

2. CONDITIONS PRECEDENT

1. The obligations of the Purchaser under this Agreement are conditional upon and Completion shall not take place until all of the following conditions have been fulfilled:-

(i) all consents, approvals and licenses (whether governmental, corporate or otherwise) (in form and substance satisfactory to the Purchaser), which are necessary or desirable to be obtained under any existing contractual or such other consents or approvals from any third party, governmental or regulatory body or relevant competent authority as may be necessary or desirable to be obtained in respect of or in connection with the transactions described or contemplated herein, being granted or obtained and such consents and approvals remaining in full force and effect and not withdrawn or revoked or amended, on or before the Completion Date, and all conditions attaching thereto

required to be complied with being complied with on or before the Completion Date;

(ii) the Purchaser acknowledged and confirmed his/her satisfaction in reviewing all licenses, books, student list and documents related to the sale of the Business specified in the Agreement.

(iii) the Vendor shall settled all liabilities and debts related to the operation of the Business (including any salaries, bonuses, CPF, rentals, rates, relevant government charges and taxes, etc. if any) incurred before the completion date;

3. CONSIDERATION

…

5. *The Purchaser shall pay stamp duties or any costs relating to the new Tenancy Agreement with Landlord or any other new applications for the permits or licenses for the Centre (if any).*

…

4. WARRANTIES AND UNDERTAKINGS

4.1 The Vendor hereby jointly and severally warrant, represent and undertake to and with the Purchaser and its successors in title (with the intent that the provisions of this Clause shall continue to have full force and effect notwithstanding Completion) as follows:

1. that the Vendor is the lawful and beneficial owners of, and have good and marketable title to, the Business which are registered in their names;

2. that the Vendor is and will on Completion be legally and beneficially entitled to or is otherwise able to procure the transfer of the Business to the Purchaser;

…

5. COMPLETION

5.1 Subject to Clause 2.1, Completion shall take place at Blk 153, Yung Ho Road, #01-41, Singapore 610153. on the later of:-

(1.i) The date of which the Purchaser has successfully registered and approval received from MSF; and

(1.ii) *The date of which the Tenancy Agreement has been successfully transferred to the Purchaser*

[emphasis added]

42 The plaintiff further submitted that the S&P made a distinction between the first defendant's business and the Lease in cl 1 of the S&P, which set out the definitions of relevant terms in the S&P. It was argued that the first defendant and fourth defendant had, through the use of these terms, distinguished between the sale of the business and sale of the Lease in various other clauses of the S&P. The plaintiff referred to cl (c) of the preamble and cl 4.1 and explained them as follows:

> (a) Clause (c) of the preamble demonstrated that the S&P was for the first defendant to "assign all its rights, interest and goodwill in the Business" to the fourth defendant, without an assignment of rights in the Lease. This showed that the S&P was not intended to convey the interest in the Lease.
>
> (b) The warranties and undertakings provided by the first defendant under cl 4.1 related only to the "Business" and not the Lease. This, showed that the S&P was not intended to convey the Lease.

43 I did not accept these submissions. While I accepted that there was a distinction drawn between the "Business" and the "Tenancy Agreement" (or the Lease) in the S&P, this was explicable on the basis that the two were in fact distinct assets of the first defendant that were being transferred or assigned pursuant to the S&P. Drawing such a distinction did not mean that the S&P related only to a sale of the first defendant's business. Such a construction did not comport with what was the understanding of the parties when Kim Wah's offer to purchase was accepted by the first defendant (see [16] and [17] above). The plaintiff did not challenge this. It was inconceivable that the fourth defendant would purchase the business of the first defendant without also taking over the Lease. How else would the business continue at the Premises under the

fourth defendant? It was not disputed by the plaintiff that it was the fourth defendant's intention to continue the business at the Premises. The references in parts of the S&P, such as cl (c) of the preamble and cl 4.1, to the "Business" and not the Lease, did not therefore mean that the S&P was intended to transfer the first defendant's business only. That would be to read these clauses out of context. Instead, those clauses could be explained as follows:

(a) Clause (c) of the preamble, when read in the light of the preamble as a whole, made it evident that the "Business" had to be assigned *together* with the Lease. It was pertinent, in my view, that the clause referred not simply to the "Business" but to the "Business at the said premises". Clause (a) of the preamble defined the term "the said premises" to be the premises where the first defendant was operating their business. Clause (b) of the preamble also made reference to the fact that the first defendant was carrying on its business "at the said premises". In my judgment, it was apparent that the location was crucial. This was consistent with the parties' intention for the fourth defendant to continue the business at the Premises. Hence, while the "Business" and the "Tenancy Agreement" (or the Lease) were conceptually separate assets, the parties to the S&P clearly intended that they be sold together.

(b) As for cl 4.1, the use of the term "Business" simply meant that the warranties related only to the first defendant's business and not to the Lease. It might very well be that the fourth defendant did not deem it necessary to seek warranties as to whether the first defendant was the lessee of the Premises simply because approval by the HDB was needed before the assignment of the Lease could be completed.

44 In any event, I did not think that an overly technical analysis of the language used in the various clauses was of much use in construing the S&P. It was obvious from a review of the S&P that it was not drafted with great care and legal precision. In the circumstances, the question of whether the S&P had the effect of conveying not just the first defendant's business but also the Lease should be considered by looking at the S&P at a broader level for pointers as to what the parties had in fact intended. The following three aspects made it clear that the S&P covered the first defendant's business *and* the transfer of the Lease:

(a) First, cl 3.5 provided that the consideration to be paid by the fourth defendant to the first defendant included the "stamp duties or any costs relating to the new Tenancy Agreement". Clearly, the "new Tenancy Agreement" was a reference to the new lease that would be entered into between the fourth defendant and the HDB following approval by the latter for the assignment of the Lease to the former. That the stamp fees would be paid by the fourth defendant, as the assignee and new tenant, confirmed this. The plaintiff contended that the stamp duty to be paid was part of the consideration for the sale of the first defendant's business. This was a strange argument. It was not at all clear why the first defendant would require payment of the said stamp fees as part of the consideration for the sale of the business particularly when the consideration – the payment of $88,000 – was clearly stipulated. Further, that payment, being stamp fees, would not go to the first defendant. Finally, the obligation to stamp the agreement would be on the new lessee, *ie*, the fourth defendant. Clause 3.5 clearly pointed to the assignment of the Lease being part of the S&P.

(b) Second, cl 5.1(1.ii) made it evident that completion of the S&P was contingent on the transfer of the Tenancy Agreement (*ie*, the Lease). This confirmed that the parties intend to assign the Lease to the fourth defendant. However, as there was no other agreement that dealt specifically with the Lease or its transfer, the reasonable conclusion must be that assignment of the Lease was governed by the S&P. This would explain why the S&P sought to provide in cl 3.5 that the fourth defendant would pay the stamp fees for the new Tenancy Agreement. Clearly the S&P contemplated the assignment of the Lease to the fourth defendant as being part of completion.

(c) Third, consistent with their intention, the parties had conducted themselves on the basis that the S&P was for the sale of the first defendant's business and transfer of the Lease. Approval was sought from the HDB for the assignment in accordance with cl 3.3 of the Lease (see [9] above). Completion was conditional on approval being granted (see cl 2.1(i) of the S&P at [41] above). It was inconceivable that the parties would proceed on this basis if they did not regard the S&P as covering the business as well as the Lease.

45 For these reasons, I was unable to accept the plaintiff's submissions that the S&P was for the first defendant's business only. It followed that the plaintiff's submission that, on this basis, the S&P did not confer on the fourth defendant an equitable interest in the Lease pending completion was incorrect.

Second Sub-Issue – Whether the plaintiff had an earlier equitable interest that took priority over the fourth defendant's equitable interest

46 The plaintiff submitted that even if the fourth defendant had an equitable interest in the Lease, the plaintiff had an earlier equitable interest that took

priority over the fourth defendant's interest. The plaintiff made two broad submissions in this regard.

The plaintiff's earlier equitable interest

47 The plaintiff's first submission was that its equitable interest arose on 4 January 2016 when it exercised the Option Clause pursuant to the 4th January letter whereas the fourth defendant's equitable interest only arose on 5 May 2016 when approval was granted by the HDB for the assignment of the Lease. The plaintiff thus relied on the rule of priority that, where the equities were equal, the first in time prevailed. I had great difficulties with the points that undergirded the plaintiff's submission.

(1) Whether the plaintiff exercised the Option Clause on 4 January 2016

48 I did not accept that the plaintiff had exercised the Option Clause on 4 January 2016. The plaintiff relied specifically on the 4th January letter (see [12] above). However, it was apparent that the plaintiff had not sought to exercise the Option Clause through that letter. To the contrary, the plaintiff offered the first defendant the choice of either extending the Franchise Agreement *or* transferring the Lease to the plaintiff. The 4th January letter stated as follows:

> 3. WE DO HEREBY DEMAND A RESPONSE by CLOSE OF BUSINESS, 14 JANUARY 2016 on the following:
>
> (a) *To inform us in writing if you wish to extend the Agreement pursuant to Clause 4 of the Agreement.*
>
> (b) *If you do not wish to extend the agreement*, our client requires a transfer of the [Lease] pursuant to Clause 28(A)(8)(b) of the Agreement. Please therefore provide us with a copy of the Lease entered into between Carpe Diem Playskool and the Housing and Development Board by 14 January 2016.
>
> [emphasis added]

49 Paragraphs 3(a) and (b) of the 4th January letter made it quite clear that the plaintiff was presenting alternatives to the first defendant. At that time, the plaintiff was exploring the possibility of having the first defendant renew the Franchise Agreement. In those circumstances, it would have made no sense for the plaintiff to exercise the Option Clause and require the transfer of the Lease as that would then give the first defendant no basis to extend the Franchise Agreement. It must be remembered that the Option Clause was exercisable only upon termination of the Franchise Agreement. If efforts were being made to renew the Franchise Agreement, it surely could not be convincingly argued that there was any intention to exercise the Option Clause.

50 That the plaintiff did not intend to exercise the Option Clause by the 4th January letter was made even clearer by the plaintiff solicitors' letters dated 18 January 2016 where the plaintiff demanded that the first defendant confirm it intended to renew the Franchise Agreement. In fact, in that letter, the plaintiff also demanded that the first defendant sign the enclosed agreement to extend the Franchise Agreement (see [13] above). The letter was inconsistent with the plaintiff's submission that the Option Clause was exercised by the 4th January letter. Arguably, the first document that purported to exercise the Option Clause was the plaintiff's solicitors' letter dated 26 January 2016 (see [23] above). I therefore rejected the plaintiff's submission that it had exercised the Option Clause on 4 January 2016.

51 In any event, even if I was incorrect on this point, it alone would not assist the plaintiff. There was no evidence before me that the Option Clause was exercised before the execution of the S&P. The evidence merely showed that both events took place on 4 January 2016. Without more, it could not be said that the plaintiff had an earlier equitable interest by virtue of the Option Clause being exercised before the execution of the S&P.

(2) Whether cl 2.1(i) of the S&P delayed the fourth defendant acquiring an equitable interest in the Lease

52 I also did not accept the plaintiff's submission that the fourth defendant did not acquire an equitable interest in the Lease until 5 May 2016 when the approval from the HDB for the assignment was granted. The plaintiff's submission was premised on cl 2.1(i) of the S&P stipulating condition precedents to the S&P (see [41] above).

53 The plaintiff argued that until the condition precedents set out in cl 2.1(i) of the S&P was fulfilled, the fourth defendant did not acquire an equitable interest in the Lease. Specifically, reliance was placed on the condition that "all consents, approvals and licenses" had to be obtained before the S&P could be completed. In response, the first defendant and second defendant submitted that the presence of such a condition precedent did not prevent an equitable interest from arising in favour of the fourth defendant at the outset and pending completion.

54 I did not agree with the plaintiff's submission. Crucially, in this case, the condition in cl 2.1(i) of the S&P was eventually fulfilled. The position was thus as the learned authors of Tan Sook Yee, Tang Hang Wu & Kelvin FK Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) state at [16.81]:

> There has always been a difference of views as to when the equitable interest passes to the purchaser or when the constructive trust arises. There is a view that it arises as soon as the contract is entered into, while *another view is that it arises only when the contract is binding* and then it is *related back to the time when the contract was entered into.* While this may be in doubt in other jurisdictions, in Singapore the view of the courts is clearly that *the equitable ownership passes when the contract is enforceable and binding.*
>
> [emphasis added]

55 The learned authors cited the Court of Appeal decision in *Lee Christina v Lee Eunice and another* [1993] 2 SLR(R) 644 ("*Lee Christina*") as the authority for this principle. In that case, the appellant contended, among other things, that since she had paid part of the purchase price and was in possession of the property, she had a "trust claim to enforce her equitable interest in the property", relying on *Lysaght v Edwards* (see *Lee Christina* at [45]). This argument was rejected by the Court of Appeal as the appellant did not have a "valid contract" that fell within the rule in *Lysaght v Edwards* (see *Lee Christina* at [48]). As Jessel MR stated in *Lysaght v Edwards* (at 506), and which was endorsed by the Court of Appeal in *Lee Christina* at [47], it is (only) upon the "moment you have a valid contract of sale" that the "vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser". A "valid" contract of sale, to Jessel MR, was one which was "sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser – a contract binding on both parties" (see *Lysaght v Edwards* at 507; endorsed in *Lee Christina* at [47]). On the facts in *Lee Christina*, the Court of Appeal found that there had been no "valid contract" as it had been rescinded by the appellant (see *Lee Christina* at [48]). Accordingly, the appellant did not have an equitable interest in the property. There was no question here that there was a valid contract for sale in the form of the S&P. Clause 2.1(i) only related to completion and not formation of the contract.

56 It is true that, on the facts, the Court of Appeal in *Lee Christina* did not have to consider the question of whether there was a relation back of an equitable interest to the time the contract was entered into. Nonetheless, it appears to me that the Court of Appeal accepted this principle as correct. This was made clear by the Court of Appeal's endorsement of *Ridout v Fowler*

[1904] 1 Ch 658, wherein Farwell J cited (at 661–662) the following passage from *Rayner v Preston* (1881) 18 Ch D 1 at 13 per James LJ:

> I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is in fieri the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is in fieri. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, ***then that completion relates back to the contract***, and it is thereby ascertained that the ***relation was throughout that of trustee and*** **cestui que trust**.
>
> [emphasis in bold italics]

57 Applying this principle to the facts, when the condition in cl 2.1(i) of the S&P was fulfilled, the fourth defendant had, by a relation back, an equitable interest in the Lease as of the date of the S&P (*ie*, 4 January 2016). It is true that prior to approval for the assignment being granted by the HDB, the S&P was still *in fieri* (*ie*, in the process of completion). However, upon approval being granted by the HDB on 5 May 2016, the S&P became enforceable and the fourth defendant thereby was deemed to have acquired an equitable interest in the Lease from 4 January 2016. The equitable interest would relate back to that date.

58 I note that there are some authorities which hold that where there is a condition precedent to the completion of a contract of sale, the purchaser does not have an equitable interest in the property until such condition is fulfilled. However, I did not consider these authorities to be contrary to the principle as stated above (at [54]). The crucial point of distinction was that, in those cases, the relevant condition precedent was never fulfilled. As a result, the contract never became enforceable and there was no relation back of any equitable interest to the time of contracting.

59 One such case is *Chi Liung Holdings Sdn Bhd v AG* [1994] 2 SLR(R) 314 ("*Chi Liung Holdings*"). In that case, the appellant was a foreign company that sought to sell two properties governed under the Residential Property Act (Cap 274, 1985 Rev Ed). They had previously undertaken to the relevant authority that they would not sell or dispose of the properties without prior approval. Subsequently, the appellant intended to sell the properties and sought the approval from the relevant authority. Options were granted to the purchaser which provided that the sales were conditional upon the purchaser obtaining qualifying certificates from the relevant authority. Consent was refused, and the issue that arose was whether the appellant had breached their undertaking by selling or disposing of the properties without the requisite approval. The appellant argued that there had been no sale given that the condition to obtain the qualifying certificate was a condition precedent to the sale. It was argued that no interest under the contract would pass and hence there was neither a sale nor a disposition in breach of the undertakings (see *Chi Liung Holdings* at [13]). The Court of Appeal took the view that no interest in the property passed upon the purchaser entering into the contract. This was because the Residential Property Act prohibited the transfer of the properties and rendered null and void any purchase (see *Chi Liung Holdings* at [34]). In those circumstances, the Court of Appeal reasoned that specific performance was not available and the purchaser could not be deemed the equitable owner of the property as at the date of the contract (see *Chi Liung Holdings* at [33]). This is consistent with the principle as I have explained above. Given that the condition in *Chi Liung Holdings* was not met (*ie*, to obtain qualifying certificates), the contract never became enforceable and hence no equitable interest could have passed.

60 Another is the decision of GP Selvam JC (as he then was) in *Tan Soo Leng David v Wee, Satku & Kumar Pte Ltd and another* [1993] 1 SLR(R) 246 ("*Tan Soo Leng David*"). In that case, Selvam JC held that the purchaser of a

leasehold interest had no equitable interest as a result of the landlord withholding consent. As between the landlord and the vendor, who was the lessee, the lease agreement prohibited the assignment of the lease without the prior written consent of the landlord. The sale agreement between the vendor and purchaser contained a condition that the sale was subject to the consent of the landlord and that if such consent was refused, the agreement would be "deemed rescinded" (see *Tan Soo Leng David* at [3]). This was crucial to Selvam JC's decision. The condition provided for the "automatic termination of the agreement" if consent was refused. Subsequently, consent was refused by the landlord and the purchaser sought specific performance of the sale agreement. Selvam JC held that the purchaser was not entitled to specific performance of the agreement as the landlord had refused consent. Again, this was consistent with the principle of an interest relating back upon the condition being fulfilled; the condition of consent was simply never fulfilled in this case.

61 For completeness, I note that the fourth defendant made the submission that the equitable interest in the Lease passed to the fourth defendant upon the signing of the S&P because cl 2.1(i) of the S&P was "not a condition precedent which had to be fulfilled before the contract could come into being". It was argued that cl 2.1(i) of the S&P was for the exclusive benefit of the fourth defendant and therefore could be waived by the fourth defendant. Consequently, notwithstanding that cl 2.1(i) of the S&P had not yet been fulfilled, the S&P could be enforced by specific performance and the equitable interest in the Lease was conveyed to the fourth defendant upon the signing of the S&P. While I accepted the submission that cl 2.1(i) only related to completion and not the formation of contract, I had difficulty with the submission that it could be waived by the fourth defendant.

62 In support of its submission, the fourth defendant relied on *Cheng-Wong Mei Ling Theresa v Oei Hong Leong* [2006] 2 SLR(R) 637 ("*Cheng-Wong Mei Ling*") where the Court of Appeal accepted the proposition that "a condition in a contract for the exclusive benefit of one party may be waived by that party" (see *Cheng-Wong Mei Ling* at [22]). In that case, the appellant had entered into an agreement to buy a property subject to the condition that a declaration be obtained that the property enjoyed an implied easement of way through the adjoining property (see *Cheng-Wong Mei Ling* at [7]). The Court of Appeal held that this condition was intended exclusively for the benefit of the appellant and it was therefore "within her right to waive that benefit and seek specific performance without the declaration" (see *Cheng-Wong Mei Ling* at [22]). This meant that the appellant had "acquired the equitable interest" (see *Cheng-Wong Mei Ling* at [23]) notwithstanding that such a declaration had not been obtained. However, this approach was not open to me on the facts. For the approach in *Cheng-Wong Mei Ling* to apply, the condition had to be for the *exclusive* benefit of one party. That was not the case here. Clause 2.1(i) of the S&P was for the benefit of *both* the first defendant and the fourth defendant. Clause 2.1(i) of the S&P ensured that the fourth defendant did not have to complete the transaction under the S&P until the HDB consented to an assignment of the Lease. At the same time, it enabled the first defendant to comply with cl 3.3 of the Lease. In other words, cl 2.1(i) was necessary *inter alia* because of cl 3.3 of the Lease. It was not open to either the first defendant or the second defendant to waive it. It would therefore be incorrect to say that cl 2.1(i) existed for the exclusive benefit of the fourth defendant and might be waived by it.

63 I pause at this stage to observe that there was an inherent contradiction in the plaintiff's submission that the fourth defendant could not have acquired an equitable interest in the Lease until approval from the HDB was obtained. The contradiction is obvious when one examines how the submission plays out

in the context of the Franchise Agreement. It was clear that when the Franchise Agreement was entered into, the plaintiff and the first defendant were well aware that approval from the HDB would be required for the assignment of the Lease from the first defendant to the plaintiff. To get around this issue, cl 11(C) of the Franchise Agreement required the first defendant to use its best efforts to ensure that the Lease would contain a provision that granted the plaintiff an option for the assignment of the same (see [8] above). This would then facilitate the transfer of the Lease to the plaintiff upon exercise of the Option Clause. However, as noted earlier, the Lease did not incorporate a provision in line with cl 11(C) of the Franchise Agreement. Clause 3.3 of the Lease stated that approval by the HDB was required (see [9] above). Thus, the parties proceeded with the Franchise Agreement on the basis that assignment or transfer of the Lease pursuant to exercise of the Option Clause would be subject to approval from the HDB. Indeed, given the circumstances, it was inconceivable that the parties to the Franchise Agreement would have thought that the Lease could be transferred to the plaintiff without approval from the HDB.

64 Accordingly, upon exercise of the Option Clause, the plaintiff's position was akin to the first defendant's position under the S&P, *ie*, assignment of the Lease was subject to approval from the HDB. Thus, on its own case, the plaintiff would not have acquired an equitable interest in the Lease merely by the exercise of the Option Clause. In fact, since the HDB never gave their approval for the transfer of the Lease to the plaintiff, no equitable interest would have passed at all. It follows that, by the logic of the plaintiff's own submission, it could not have had an equitable interest earlier in time to the fourth defendant.

65 To conclude on this sub-issue, I found that the plaintiff had not acquired an equitable interest by exercise of the Option Clause on 4 January 2016 *and* that the fourth defendant's equitable interest in the Lease, by a relation back,

took effect from 4 January 2016. I therefore did not accept the plaintiff's submission that they had an earlier equitable interest that took priority over the fourth defendant's equitable interest in the Lease.

Bona fide purchaser for value

66 The second of the plaintiff's arguments was that the fourth defendant could not rely on the "defence of bona fide purchaser". The submission was predicated on three conclusions being accepted as correct. First, that the plaintiff exercised the Option Clause on 4 January 2016. Second, the plaintiff's exercise of the Option Clause was before the execution of the S&P. Third, the execution of the S&P did not give the fourth defendant an equitable interest with effect from 4 January 2016. I had found against the plaintiff on first and third points, and had observed that there was no evidence before me either way on the second point. As such, the second of the plaintiff's arguments – that the fourth defendant was not a *bona fide* purchaser for value – did not therefore take its case further.

67 To conclude on the Interest Issue, the fourth defendant acquired an equitable interest in the Lease as at the date of execution of the S&P (*ie*, 4 January 2016). Such interest was first in time to any interest that the plaintiff might have pursuant to exercise of the Option Clause. Consequently, the second defendant, acting as the liquidator for the first defendant, was bound to complete the assignment of the Lease in accordance with the S&P upon the relevant approvals under cl 2.1(i) being obtained. Refusal to do so on the part of the second defendant would have exposed the first defendant to a claim for specific performance to transfer the Lease. The assignment of the Lease to the fourth defendant was thus not wrongful.

The Disclaimer Issue

68 The plaintiff submitted that the assignment of the Lease was wrongful because the second defendant failed to disclaim the Franchise Agreement under s 332 of the Act. It was argued that without disclaiming the Franchise Agreement, the first defendant would be prohibited from proceeding with the S&P. I was unable to accept this submission for three reasons.

69 First, the submission was misconceived insofar as it implied that a failure to disclaim the Franchise Agreement would prevent the first defendant and second defendant from proceeding with the assignment of the Lease. That was not the correct consequence. The submission conflated the rights of the plaintiff under the Franchise Agreement against the first defendant with its rights in relation to the Lease. Failure to disclaim did not enhance or improve the plaintiff's rights in relation to the Lease. The analysis in this regard is as outlined earlier on the effect of the exercise of the Option Clause. The failure to disclaim meant that the second defendant had to assess which of the two competing claims *to the Lease* ought to be recognised. The party with the claim that was not recognised would then be left with a claim in damages for breach of contract by reason of the first defendant's inability to assign the Lease to that party. In the present case, the second defendant recognised the right of the fourth defendant to an assignment of the Lease, leaving the plaintiff to prove for damages for breach of contract, *ie*, breach of the Option Clause, in the liquidation of the first defendant. Indeed, counsel for the first defendant and second defendant conceded that the first defendant was in breach of the Option Clause. The second defendant's failure to disclaim the Franchise Agreement did not therefore give the plaintiff an interest in the Lease. Instead, the plaintiff's remedy was for damages which it should pursue in accordance with the statutorily prescribed framework for pursuing claims against the estate of an

insolvent corporation, *ie*, by the lodgement of a proof of debt.

70 Second, the plaintiff's submission was flawed insofar as it was premised on the second defendant having a legal obligation to disclaim the Franchise Agreement. There was no authority to support such a submission. By contrast, s 332(1) of the Act makes clear that the liquidator exercises a discretion as to whether to disclaim an onerous property. Section 332(1) of the Act provides that:

> Disclaimer of onerous property
>
> 332. – (1) Where any part of the property of a company consists of –
>
> (a) any estate or interest in land which is burdened with onerous covenants;
>
> (b) shares in corporations;
>
> (c) unprofitable contracts; or
>
> (d) any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money,
>
> the liquidator of the company, notwithstanding that he has endeavoured to sell or has taken possession of the property or exercised any act of ownership in relation thereto, *may*, with the leave of the Court or the committee of inspection and, subject to this section, by writing signed by him, at any time within 12 months after the commencement of the winding up or such extended period as is allowed by the court, disclaim the property; but where any such property has not come to the knowledge of the liquidator within one month after the commencement of the winding up, the power of disclaiming *may* be exercised at any time within 12 months after he has become aware thereof or such extended period as is allowed by the Court.
>
> [emphasis added]

It is clear from s 332(1) of the Act that there is no duty to disclaim. Failure to disclaim simply meant that the estate was bound by the Franchise Agreement.

This then meant that the estate remained liable *as a matter of contractual damages* for the first defendant's inability to perform the Option Clause upon exercise.

71 Third, even if there was such a duty, the second defendant would not have been able to disclaim the Franchise Agreement for the following reasons:

(a) The Franchise Agreement did not readily fall within any of the categories of property that might be disclaimed under s 332(1) of the Act. I deal with each limb of s 332(1) as follows:

(i) The Franchise Agreement did not fall within s 332(1)(a) as it was not an "estate or interest in land". It was not the plaintiff's submission that the Lease, being burdened with onerous covenants (in the form of the Option Clause) should have been disclaimed. In fact, the plaintiff's solicitors' letter dated 16 March 2016 took the position that the second defendant could not disclaim on this basis (see [27] above). In any event, such an argument would not have assisted the plaintiff as the Option Clause could hardly be said to be onerous.

(ii) The Franchise Agreement did not fall within s 332(1)(b) as it was not "shares in corporations".

(iii) Section 332(1)(c) applied to "unprofitable contracts" but there was no evidence to justify a finding that the Franchise Agreement was "unprofitable" by reason of the Option Clause.

(iv) Section 332(1)(d) of the Act did not assist. For this limb to apply, it had to be shown that property of the company comprises some other property which is not saleable *because* it

> imposed on the possessor the performance of an onerous act or the obligation to pay money. In other words, the property of the company cannot be effectively realised because of an onerous covenant or obligation to pay. The idea behind the provision is to relieve the company from property which carries obligations that would have an adverse impact on the remaining assets of the company or which hamper the liquidation process because it made the assets of the company not saleable. It was difficult to see how the Franchise Agreement could be regarded in this manner.

(b) Separately, even if s 332(1) of the Act were wide enough to encompass the Franchise Agreement, it was difficult to imagine that an attempt to disclaim the Franchise Agreement would be regarded as proper. It is clear that the power to disclaim is not to be used simply because "it would be better in the liquidator's view not to have to perform the contract" (see Tan Cheng Han SC (gen ed), *Walter Woon on Company Law* (Sweet & Maxwell, Revised 3rd Ed, 2009) at [17.159] ("*Walter Woon on Company Law*")). The learned author in *Walter Woon on Company Law* further states at [17.159] that "[i]t is hardly likely that the court will allow a disclaimer of property merely to increase the amount returnable to the members". That would be precisely the situation here should the second defendant have disclaimed the Franchise Agreement (assuming that she could do so in the first place). Such an attempt would be to avoid the plaintiff's claim for damages for breach of the Option Clause as exercised. Oddly enough, that would mean that disclaiming the Franchise Agreement would be to disenfranchise the plaintiff from filing a proof of debt. Such an exercise of the power would not be to facilitate the liquidation of the first

> defendant, which is the true purpose behind the power to disclaim (see *Walter Woon on Company Law* at [17.158]). Thus, even if the second defendant had the power to disclaim the Franchise Agreement, it would not have been correct to exercise it.

72 Accordingly, this submission failed on three levels. I therefore could not agree that the assignment of the Lease was wrongful by reason of the second defendant's failure to disclaim the Franchise Agreement.

The Conversion Issue

73 To support its prayer for the fourth defendant to pay damages, the plaintiff submitted that the fourth defendant was liable for the tort of conversion of the Lease. Quite clearly, this submission faced significant difficulties. I did not accept it for two reasons.

74 First, the tort of conversion applied only to *personal* property, or chattel, and not *real* property (*ie*, land). This was set out clearly by the Court of Appeal in *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 ("*Tat Seng*") which the plaintiff ironically relied on in its submissions. In *Tat Seng*, the Court of Appeal observed that the following propositions in relation to the tort of conversion were regarded as well established (at [45]):

> 45 … Generally, an act of conversion occurs when there is unauthorised dealing with the claimant's ***chattel*** so as to question or deny his title to it (*Clerk & Lindsell* at para 17-06). Sometimes, this is expressed in the terms of a person taking a ***chattel*** out of the possession of someone else *with* the "intention of exercising a permanent or temporary dominion over it" …
>
> [emphasis added in bold italics]

It is evident from this extract that the tort of conversion was regarded by the Court of Appeal as being confined to the unauthorised dealing of chattels and not land.

75 The plaintiff's response to this difficulty was to argue that they were seeking to extend the principle. However, beyond this bare submission, the plaintiff did not present any arguments on principle or authority as to why or how the tort of conversion could be so extended. Conceptually, I could not see how the tort could apply to real property. I therefore rejected this submission.

76 Second, even if, for the sake of argument, the tort of conversion could be extended to real property, the plaintiff would nonetheless not be able to succeed on this point. As *Tat Seng* makes clear, the tort of conversion applied only when there were unauthorised dealings. As I have found above that the assignment of the Lease was not wrongful and that the fourth defendant validly acquired equitable interest in the Lease, it followed that the fourth defendant's 'dealings' in the Lease could not be considered as unauthorised.

77 For both these reasons, I did not accept the plaintiff's claim that the fourth defendant was liable for the tort of conversion of the Lease.

The Inducement Issue

78 The plaintiff made the alternative submission that the fourth defendant was liable for the tort of inducing breach of contract. I note at the outset that this point was only raised briefly at the hearing on 25 September 2017 and was not seriously pursued in the plaintiff's written submissions. Nonetheless, I have decided to address it for completeness.

79 In short, I did not accept this submission because the element of

knowledge of an existing contract could not be made out on the facts. It is trite that for the tort of inducing breach of contract to be made out, the defendant "must have known of the existence of the contract" (see Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at [15.007] ("*The Law of Torts in Singapore*")). As stated above (at [19(b)]), at the time that the S&P was entered into by the first defendant and the fourth defendant, the latter did not know that the plaintiff had a contractual claim to the Lease under the Franchise Agreement. It was only subsequently on 22 April 2016 that the fourth defendant was made aware of the existence of the Franchise Agreement and the exercise of the Option Clause (see [29] above). However, the Franchise Agreement had already been breached by the first defendant by that time by entering into the S&P. Accordingly, it could not be said that the fourth defendant induced the breach of the Franchise Agreement given that they had no knowledge of such an agreement until after the alleged breach.

80 Further, I could not see how the fourth defendant could be said to have induced the first defendant to breach the Franchise Agreement. The learned authors of *The Law of Torts in Singapore* have described this element as "persuasion" and explained that the inducement must be "directed at the relevant contracting party and have the effect of influencing him [to breach the contract]" (see *The Law of Torts in Singapore* at [15.012]). In this case, the fourth defendant did not influence the first defendant to enter into the S&P. By contrast, it was the first defendant who first approached the fourth defendant, via the latter's agent, to consider purchasing the first defendant's business. This element was thus not satisfied.

81 I therefore did not accept the submission that the fourth defendant had committed the tort of inducing breach of contract.

The Leave Issue

82 I turn now to address the final issue, which is whether leave should be granted to allow the plaintiff to commence proceedings against the first defendant and the second defendant. Given that the considerations as to whether leave ought to be granted differed between the first defendant and the second defendant, I will consider each separately.

Whether leave should be granted to proceed against the first defendant

83 Given that the first defendant was in liquidation, the plaintiff had to seek leave to commence proceedings against the first defendant. This is statutorily required under s 299(2) of the Act which provides as follows:

> Property and proceedings
>
> 299. – (2) After the commencement of the winding up no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

84 In addressing this issue, both the plaintiff, and the first defendant and second defendant referred to the principles set out by VK Rajah JC (as he then was) in *Korea Asset Management Corp v Daewoo Singapore Pte Ltd* [2004] 1 SLR(R) 671 ("*Korea Asset Management*"). In brief, three broad factors were considered to be relevant in *Korea Asset Management* (at [47]–[57]). They were:

(a) the timing of the application for leave;

(b) the nature of the claim that was sought to be pursued; and

(c) whether the claim could be adequately addressed within the insolvency regime.

I note that Rajah JC also considered several other relevant factors which he termed "matrix factors". One of these was the views of the majority creditors. Having considered the factors outlined in *Korea Asset Management* in the round, I took the view that leave ought not to be granted to the plaintiff to proceed against the first defendant. The nature of the plaintiff's claim as well as the adequacy of remedies within the insolvency regime were, in my judgment, the crucial factors in this case. Both pointed away from leave being granted.

85 First, the plaintiff's claim (or at least part of it) was for the Lease to be assigned to it. By the time OS 360 was commenced, there was no Lease to speak of: (a) as it had been assigned to the fourth defendant (with the approval of the HDB); (b) a fresh tenancy agreement dated 24 May 2016 had been entered into between the HDB and the fourth defendant as a result; and, (c) most importantly, the term of the tenancy under the Lease and the said tenancy agreement had expired on 31 December 2016. There was therefore no interest in the Lease that could be restored to the plaintiff. As Rajah JC noted in *Korea Asset Management*, "where there is no likelihood of the claim being satisfied in any way, leave ought not to be given" (see *Korea Asset Management* at [48]). This comports with the statutory rationale behind s 299(2) of the Act which is to preserve the assets of a company in liquidation so as to ensure an optimal distribution among the company's creditors. The grant of leave for proceedings to be commenced against the company would necessarily incur costs and thereby diminish the available assets for distribution (see *LaserResearch (S) Pte Ltd v Internech Systems Pte Ltd and another matter* [2011] 1 SLR 382 at [12]) without any concomitant benefit to the plaintiff. To allow the plaintiff to pursue a claim for an interest in the Lease would be a futile exercise and would incur unnecessary costs that would deplete the assets of the first defendant. The plaintiff was not disenfranchised. It had its claim for damages for breach of the Option Clause which I discuss next.

86 Second, as observed above (at [69]), the plaintiff had an existing remedy within the insolvency framework. While the plaintiff might have no proprietary claim to the Lease, it did have a claim in damages for the first defendant's breach of the Franchise Agreement particularly the Option Clause. This remedy can, and ought properly to be, within the insolvency framework. Indeed, this claim (for damages) seemed to be fairly uncontroversial given the concession by the first defendant and the second defendant that the Franchise Agreement had been breached. Rajah JC made it clear that the court would not be inclined to grant leave to proceed where the proof of debt mechanism offered an adequate alternative (see *Korea Asset Management* at [50]). Insofar as the plaintiff's claims can be dealt with by the option of filing a proof of debt, the plaintiff should be compelled to do so. I note that the plaintiff's claim would be a provable debt as it is a claim in contract for unliquidated damages arising from an obligation incurred before the date of the winding up resolution (see ss 87(1) and 87(3) Bankruptcy Act (Cap 20, Rev Ed 2009) read with s 327(2) of the Act).

87 The two factors above were in my view sufficient justification not to grant leave to the plaintiff as against the first defendant. Nonetheless, I considered the remaining two points which were raised by parties:

(a) In relation to the timing of the application, I found this to be very much a neutral factor in this case. As Rajah JC observed in *Korea Asset Management*, an application may be said to be late when the "liquidator has completed a substantial amount of his work" or when the "creditor has acquiesced in the liquidator's discharge of his duties for a substantial period" (see *Korea Asset Management* at [47]). I did not think Rajah JC intended to confine the situations in which an application might be late to just those two scenarios. What Rajah JC's observation did suggest

was that whether an application was late could not be determined solely by reference to the *absolute* period of time that had passed. Rather, it is *relative* to the progression of the company's liquidation. In this regard, I noted that apart from the submission that the plaintiff's application was almost 10 months after it could have first filed OS 360, there was no further explanation by the first defendant or the second defendant as to *how* this was an undue delay in relation to the ongoing liquidation of the first defendant. Seen in isolation without reference to the earlier point that there was no Lease to speak of, 10 months was not "undue" delay.

(b) As for the first defendant's submission that leave ought not to be granted against the first defendant given that the majority of creditors voted to approve the S&P, I considered this not to be a factor against the plaintiff. As Rajah JC observed in *Korea Asset Management*, while the views of the majority creditors were important, the position was quite different where they were related entities. In such a situation, considerations of fairness and commercial morality require that the court exercised greater caution in giving weight to the views of the majority creditors (see *Korea Asset Management* at [52]). A similar consideration appears to have been expressed in the context of voting on a scheme of arrangement. In *SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd* [2017] 2 SLR 898, the Court of Appeal proffered the preliminary view (at [67]) that the votes of creditors related to the scheme company should be wholly discounted. It would be in line with that principle to similarly discount the votes of related creditors in the present context. In the present case, the majority creditors who voted to approve the transfer of the Lease under the S&P were Connie and Lee. Lee was a shareholder of the first defendant while Connie was the director who caused the first defendant to enter into the S&P with the

> fourth defendant, through the third defendant, in the first place. In the circumstances, I did not think their votes should be given the same weight as in a situation where a majority was obtained by the vote of independent creditors.

88 In sum, I did not consider it appropriate for leave to be granted for the plaintiff to commence proceedings against the first defendant.

Whether leave should be granted to proceed against the second defendant

89 The parties did not dispute that there was a common law requirement for leave to commence proceedings against a liquidator. Section 299(2) of the Act only provided for leave in respect of proceedings "against the company". Both sides adopted the decision of Quentin Loh J in *Excalibur Group Pte Ltd v Goh Boon Kok* [2012] 2 SLR 999 ("*Excalibur Group*") as setting out the relevant principles. In *Excalibur Group*, Loh J was of the view that while there was no statutory requirement for leave to be obtained before proceeding against a liquidator, there was a common law rule to that effect (see *Excalibur Group* at [28]). Loh J was also of the view that "the applicant must at least be able to show a *prima facie* arguable case" (see *Excalibur Group* at [35]). The rationale for the view was to support the expeditious winding up of a company by sieving out frivolous claims. I agreed with Loh J's views on the requirement for leave and the applicable test.

90 Applying the test, I found that the plaintiff had not shown a *prima facie* arguable case that the acts of the second defendant should be reversed or modified under s 315 of the Act. The second defendant's decision to proceed with the assignment of the Lease to the fourth defendant was not wrongful in light of the equitable interest that the fourth defendant had acquired under the S&P. It is important to remember by the time the plaintiff was appointed as

liquidator on 16 January 2016, the mould had been cast. The S&P had been executed. The plaintiff thereafter demanded that the Lease be transferred to it pursuant to exercise of the Option Clause. Faced with the competing claims, the second defendant made the call to proceed with the S&P, which I have concluded was the correct one. She did not disclaim the Franchise Agreement, which I had concluded was also the right call. As I have stated above (at [68]–[72]), there was no obligation on the second defendant to disclaim the Franchise Agreement under s 332 of the Act. Further, I had also concluded that there was no basis to disclaim and even if there was one, it would have been inappropriate for the second defendant to do so. While directions could have been sought from the court to sort out the competing claims, that in the final analysis would not have mattered given the conclusions that I have reached. In any event, she should not be criticised for not doing so given that there seemed to be a paucity of funds in the first defendant and an unwillingness on the part of the creditors to fund an application.

91 The plaintiff's case to reverse or modify the act of the second defendant in assigning the Lease to the fourth defendant, on the ground that it was wrongful, therefore did not meet the threshold of a *prima facie* arguable case. I thus did not grant leave for the plaintiff to proceed against the second defendant.

Conclusion

92 In conclusion, I was of the view that the plaintiff failed to establish any of their claims against any of the defendants. Accordingly, I dismissed OS 360 in its entirety with costs to the fourth defendant fixed at $10,000 and reasonable disbursements. I made no order as to costs as regard the first defendant and the second defendant. Specifically, leave was not granted to proceed against either

the first defendant or the second defendant. It follows that the questions sought to be determined under s 310 of the Act need not be conclusively answered. That said, I have, in the course of my grounds, taken the view that the assignment the Lease was not wrongful. Accordingly, those questions might very well have been answered in substance. Consequently, prayers 3 and 4, which sought a reversal of the transfer of the Lease or damages for loss of profit in lieu, were also not granted given that the assignment of the Lease was not wrongful in the first place. The proper recourse for the plaintiff lay in lodging a proof of debt for contractual damages in the liquidation of the first defendant.

Kannan Ramesh
Judge

Loh Kia Meng and Francis Wu Wenbang (Dentons Rodyk & Davidson LLP) for the plaintiff;
Magdalene Chew Sui Gek and Edwin Cai Jianye (AsiaLegal LLC) for the first defendant and second defendant;
Wu Xiaowen (Lexton Law Corporation) for the fourth defendant.