Lim Koon Park and another *v* Yap Jin Meng Bryan and another [2013] SGCA 41

Case Number	: Civil Appeal No 107 of 2012 (Suit No 184 of 2010)
Decision Date	: 22 July 2013
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Chelva Ratnam Rajah SC (instructed) (Tan Rajah & Cheah) and Srinivasan V N /Rahayu Mahzam (Heng, Leong & Srinivasan) for the appellants; Sarjit Singh Gill SC/Lum Baoling Georgina/Ho Ching Ying Victoria Anne (Shook Lin & Bok LLP) for the respondents.
Parties	: Lim Koon Park and another — Yap Jin Meng Bryan and another

CONTRACT – Misrepresentation

ADMINSTRATIVE LAW – Natural Justice

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2012] SGHC 159.]

22 July 2013 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of a High Court Judge ("the Judge"), and concerns the purchase of two properties situated at 428 and 434 River Valley Road ("the Properties") (see *Lim Koon Park v Yap Jin Meng Bryan and others* [2012] SGHC 159, ("the Judgment")). The parties had sought to leverage on their collective expertise to acquire, redevelop, and eventually resell the Properties for a profit. The dispute centres on an alleged oral profit-sharing agreement, and an alleged misrepresentation made prior to the acquisition of the Properties.

Undisputed facts

Parties

2 The first appellant, Lim Koon Park ("Park"), was a professional architect and provided architectural expertise to the venture. The first respondent, Yap Jin Meng Bryan ("Bryan"), was a senior banker with the Asset Management Division of Deutsche Bank Group and agreed to secure financing for the venture. The second respondent, Riverwealth Pte Ltd ("Riverwealth"), was incorporated as a joint venture vehicle for the acquisition of the Properties. The second appellant, Wee Pek Joon ("Madam Wee"), is Park's wife and held shares in Riverwealth at Park's behest. Tan Swee Hu Clarence ("Clarence") is a close friend of Bryan; Clarence held shares in Riverwealth as a proxy for Bryan and also provided management services to Riverwealth. Daun Consulting Singapore Pte Ltd ("Daun Consulting") was the corporate vehicle through which Bryan and Clarence provided management services to Riverwealth. Lim Geok Lin Andy ("Andy") provided the real estate and building materials expertise.

Background to the dispute

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3 In 2006, Andy introduced Park to Bryan. Bryan subsequently entrusted Park with identifying potential en-bloc real estate opportunities for a real estate investment fund associated with Deutsche Bank Group. Park agreed to do so, hoping that this arrangement would pave the way for his appointment as a project manager for the en-bloc opportunities.

4 None of the potential projects recommended to Deutsche Bank Group came to fruition. Andy, Bryan and Park then decided to leverage on their collective expertise to buy, potentially redevelop, and resell smaller-scale projects. Andy and Park were to identify suitable properties, while Bryan was to utilise his connections in the finance industry to obtain the requisite financing.

5 To that end, Land Acquisition Advisory N Development Pte Ltd ("LAAnD") was incorporated on 10 May 2007. Clarence held 50% of the shares on behalf of Bryan, while Andy and Park held 25% each. Bryan did not hold any shares as he was then still with Deutsche Bank Group.

6 In early 2007, Park informed Andy, Bryan and Clarence that 434 River Valley Road ("434 RVR") was up for sale. Park knew about the sale because he was engaged by CB Richard Ellis, which was in turn acting for the sellers, ExxonMobil Asia Pacific Pte Ltd ("ExxonMobil"). Park assisted in the submission of an Outline Application to the Urban Redevelopment Authority ("URA") for the redevelopment of 434 RVR into a residential development; in the Outline Application, the plot ratio of 434 RVR was stated as 1.4.

7 Park believed that it was possible to apply to the URA for an increase in the plot ratio of 434 RVR to 2.8. Park thus arranged for a meeting with Lee Yen Pin Timothy ("Timothy"), who was a senior planner at the URA. Andy, Bryan and Clarence were also in attendance. At the meeting, Timothy confirmed that a plot ratio of 2.8 would be approved.

8 On 28 September 2007, Riverwealth was incorporated as a vehicle for the purchase of the Properties. At the point of incorporation, Andy, Clarence and Madam Wee were the directors of Riverwealth. The shares were held in the following proportions:

Andy	50%
Clarence	25%
Madam Wee	25%

9 Clarence held his entire 25% share on behalf of Bryan; Andy held half of his shares (*ie*, 25% of the total number of shares) on behalf of Bryan. The beneficial ownership was thus:

Bryan	50%
Andy	25%
Madam Wee (alleged)	25%

10 Bryan was not the legal owner of any shares as he did not want to disclose his interest in Riverwealth to Deutsche Bank Group. Despite this, the entire $10,000 initial paid-up capital of Riverwealth was provided by Bryan. Park was not the legal owner of any shares as he was not a Singapore citizen and s 3 (read with s 2) of the Residential Property Act (Cap 274, 2009 Rev Ed)

("Residential Property Act") prohibits the sale of land to companies with non-citizen directors and members. It was initially alleged by Bryan and Riverwealth that Madam Wee was in actuality holding her shares in Riverwealth on trust for Park, hence violating s 3 (read of with s 2) of the Residential Property Act. However, Bryan and Riverwealth ultimately did not pursue this point in proceedings below.

11 On 18 December 2007, the option to purchase 434 RVR was exercised for a sum of $36m. The parties subsequently proceeded to negotiate for the purchase of an adjoining plot — 428 River Valley Road — as they believed that they could maximise returns by developing the two plots together. On 22 February 2008, the option to purchase 428 River Valley Road was exercised for a sum of $12.5m.

12 The acquisition of the Properties was financed in two ways. First, a loan of $30m was extended by Hong Leong Finance to Riverwealth; this loan was jointly and severally guaranteed by Andy, Bryan and Park. Second, Bryan, in his personal capacity, extended a loan of $22,580,621.99 to Riverwealth and injected $1m of equity capital.

13 In March 2008, the parties discussed the issue of profit-sharing. The appellants and respondents diverge materially on this issue, which will be canvassed further below.

14 In April 2008, Bryan left Deutsche Bank Group, assumed legal ownership of his 50% beneficial share in Riverwealth, and became a *de jure* director of Riverwealth.

15 On 20 November 2008, Riverwealth's equity shareholding was restructured. Riverwealth issued new shares to Bryan. Andy and Madam Wee's respective shareholdings were diluted to 13% each, while Bryan's share rose to 74%.

16 Due to the extra cash injection and increased risk exposure, Bryan wanted Andy and Madam Wee to either pay for, or transfer to him, their remaining allotments of shares in Riverwealth. Andy opted for the latter, and transferred his allotment to Bryan on 27 March 2009. Madam Wee did neither, and requested information on the financial records and account books of Riverwealth. She was then removed as a director of Riverwealth at an extraordinary general meeting ("EGM") on 12 August 2009. The remaining directors of Riverwealth — Bryan and Clarence — passed a directors' resolution on 4 September 2009 resolving to sell the Properties to Oxley JV Pte Ltd ("Oxley JV"). On 19 September 2009, another EGM was held where a shareholders' resolution was passed to authorise the sale of the Properties to Oxley JV. Madam Wee, via a proxy, voted against this resolution.

17 Notably, Oxley JV was only incorporated on 22 September 2009. The Properties were sold to Oxley JV for a sum of $60.08m via a sale and purchase agreement signed on 8 October 2009. Oxley JV had substantially similar shareholders and directors with Oxley Wealth Pte Ltd ("Oxley Wealth"); further, Bryan was a director of Oxley Wealth from 3 September 2009 to 24 September 2009. This forms the basis for the allegation that the Properties were sold at an undervalue to a related party (see [20], [32] and [80] below).

Summary of pleadings

18 Park pleaded that on or about 24 September 2006, the parties had orally agreed to share the profits from *any* proposed joint venture in the following fixed proportion: 40% to Bryan, 30% to Park and 30% to Andy. This was subsequently varied in May 2007; the new proportions were: 50% to Bryan, 25% to Park and 25% to Andy. Park also averred that LAAnD was incorporated to reflect the varied oral agreement. The oral agreement also obliged Park to use his expertise to introduce developments with collective sale potential to financial institutions via Bryan's contacts.

19 Park further pleaded that it was implied that the parties would not act in a manner contrary to the interests of Riverwealth. Park alleged that Bryan had acted in this manner by:

(a) failing to pay Park his 25% share of the profits from the sale of the Properties;

(b) selling the Properties to Oxley JV at an undervalue;

(c) diverting profits away from Riverwealth; and

(d) charging Riverwealth excessive interest for the personal loan which he extended.

20 Park also pleaded that Bryan, *qua* majority shareholder of Riverwealth, had oppressed him and Wee by unfairly excluding the both of them from management decisions regarding the sale of the Properties, unfairly removing Wee as a director of Riverwealth, diluting Wee's shareholding and refusing to comply with requests for information and documents. Park also alleged that Bryan had breached his fiduciary duties as a director of Riverwealth by selling the Properties to Oxley JV at an undervalue in an interested-person transaction.

21 Contrariwise, the respondents, pleaded in their defence that no oral agreement was ever reached on 24 September 2006; there were only informal discussions on future opportunities at this point, and LAAnD was incorporated only for the purpose of evaluating property development opportunities.

22 The respondents, however, conceded that there was a profit-sharing agreement in place from September 2007 with regard to the Properties, whereby Bryan and Clarence were entitled to 50% of the profits, with Andy and Park entitled to 25% each. However, the agreement was merely indicative and would apply only if the following conditions were achieved:

(a) the Properties were to be resold within four months;

(b) the Properties were to be sold within the price range of $60m to $80m; and

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

23 The onset of the financial crisis of 2008, and the resultant bearish property market, caused holding costs to mount significantly. As the first two alleged conditions were not met, Bryan pleaded that the indicative profit-sharing agreement did not apply. Indeed, Bryan claimed to be assuming all the risks of holding the Properties. Bryan further pleaded that a new agreement was entered into whereby Andy and Madam Wee would either transfer their shareholdings in Riverwealth to Bryan or, in the alternative, pay for their shares.

24 The respondents further counterclaimed that Park had made a misrepresentation. Park had stated that the plot ratio of 434 RVR was 1.4, and that he was confident of making a successful application to increase the plot ratio to 2.8. This was untrue as the plot ratio was already 2.8. This was made fraudulently as Park had known all along that the plot ratio was already 2.8 and that there was no need for any application to be made. In the alternative, Bryan pleaded s 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed) ("Misrepresentation Act").

25 At trial, the respondents amended their pleadings to state that Park's representation was untrue, not because the plot ratio was already 2.8, but because the plot ratio was never 1.4.

Decision below

Oral profit-sharing agreement

26 The Judge held that the oral agreement referred to by Park was somewhat amorphous, that there appeared to be significant ambiguity on the circumstances under which the parties supposedly came to an agreement, that Park appeared to be making his evidence up as he went along, and that it was somewhat far-fetched for the profit sharing arrangement to be cast in stone even before the parties had identified the properties.

27 The Judge held that Bryan's version of events was more likely. The Judge found as a fact that the parties entered into an indicative agreement *vis-à-vis* profit sharing around July to September 2007. The final proportions would vary depending on the final sale price of the properties, the holding period of the investment, as well as Bryan's return on equity. Furthermore, as the sole financial contributor, Bryan was concerned about controlling the parameters of profit sharing so as to maximise his return on equity, and this was to take precedence over the profits flowing to other parties.

Misrepresentation

28 The Judge found that Park had indeed represented to the other parties that 434 RVR had a plot ratio of 1.4. First, Park had himself conceded in his affidavit of evidence-in-chief ("AEIC") that he arranged for the meeting with Timothy because he wanted to explore the possibility of increasing the plot ratio "from the then 1.4 for the Esso gas station to 2.8 for redevelopment" [note: 1]. Second, the very act of forwarding certain documents — *viz*, a brochure from CB Richard Ellis, and the URA's Grant of Outline Permission dated 1 February 2007 ("Grant of Outline Permission") stating that the plot ratio was 1.4 — was held to be an implied representation that the information contained therein was true and accurate.

29 The Judge also found as a fact that the aforementioned representation induced Bryan to enter into the agreement with Park to incorporate Riverwealth for the purpose of purchasing the properties.

30 The Judge held that Park was unable to show that his belief in the truth of his representation was reasonable, and was therefore liable under s 2 of the Misrepresentation Act. In asking Madam Wee to either transfer the shares back to himself, or to pay for her shares, Bryan had rescinded the agreement. Wee was thus obliged to transfer her shares in Riverwealth to Bryan.

Oppression

31 The Judge held that Park had no *locus standi* to allege oppression as he was never a shareholder in Riverwealth. It was also not pleaded that Madam Wee was holding her Riverwealth shares on trust for Park. Furthermore, Madam Wee was obliged to return her shares to Bryan due to the aforesaid rescission. Madam Wee thus also lacked the requisite *locus standi*.

32 In any event, the Properties were not sold at an undervalue despite the fact that the sale was to a related party. The Judge accepted that Bryan had made a commercial decision to rely on one particular valuation as the valuers were familiar with the properties. The mere fact that Bryan had a prior interest in Oxley Wealth was also insufficient to show that the sale of the properties was conducted other than on an arm's length basis. We note that there has been no appeal against this finding.

Supplemental judgment on costs

33 The respondents made an Offer to Settle dated 13 September 2010, where the respondents offered to settle on the condition that Park and Madam Wee take all necessary steps to transfer the Riverwealth shares in Madam Wee's name to Bryan in consideration for a sum of $162,000. The Judge awarded costs to the respondents in accordance with O 22A r 9(3) of the Rules of Court (Cap 322 R 5 2006 Rev Ed) ("the Rules of Court") — *viz*, costs on a standard basis up to and including 13 September 2010 and costs on a full indemnity basis thereafter.

The parties' respective cases

Appellants' case

34 The appellants raised the following arguments in this appeal:

(a) the Judge had erred in finding that Park had made an actionable misrepresentation;

(b) the Judge had erred in finding that there was no oral profit-sharing agreement entitling Park to 25% of the profit of any joint venture. Even if there was no oral profit-sharing agreement, the Judge should have awarded equitable compensation to Park;

(c) the cardinal rule of *audi alteram partem* was breached as the Judge did not allow the appellants to recall their witnesses after having allowed the respondents to amend their pleadings with regard to misrepresentation.

Respondents' case

35 The respondents' case is diametrically opposed to that of the appellants. The following arguments were raised by the respondents:

(a) the Judge had correctly found that there was an actionable representation;

(b) the Judge had rightfully found that there was only an indicative profit-sharing agreement;

(c) there was no miscarriage of justice in the Judge disallowing the appellants from recalling their witnesses.

Issues before the court

36 The issues before this Court are, accordingly, fourfold: first, whether there was an actionable misrepresentation made by Park; second, whether a cast-iron oral profit-sharing agreement entitling Park to 25% of the profits was concluded; third, whether the cardinal rule of *audi alteram partem* was breached; and fourth, whether the cost order made pursuant to O 22A r 9(3) of the Rules of Court was correct. Each issue shall be dealt with in turn.

Our decision

Threshold for appellate intervention

37 It is well-settled that appellate intervention is narrowly circumscribed: a trial judge's findings of fact should not ordinarily be disturbed where they hinge on an assessment of witness credibility (*Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [41] and *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 at [18]).

Nevertheless, appellate intervention is justified where a trial judge's findings of fact is plainly wrong or against the weight of evidence — for instance, where the inferences drawn by the trial judge are not supported by the primary or objective evidence on record (*Ng Chee Chuan v Ng Ai Tee (administratrix of the estate of Yap Yoon Moi, deceased)* [2009] 2 SLR(R) 918 at [12] and [13]).

Did Park make an actionable misrepresentation?

38 An operative misrepresentation consists in a false statement of existing or past fact made by one party before or at the time of making the contract, which is addressed to the other party and which induces the other party to enter into the contract (*Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 ("*Raffles Town Club*") at [20]).

39 S 2(1) of the Misrepresentation Act does not alter the (common) law as to what constitutes a misrepresentation (*Raffles Town Club* at [23]). It does, however, reverse the burden of proof, in that the party who made the misrepresentation has to show that he had reasonable grounds to believe that the fact represented was true (*Ng Buay Hock and another v Tan Keng Huat and another* [1997] 1 SLR(R) 507 at [28]).

Erroneous characterisation of the representation

40 The characterisation of the exact statement of fact made by Park is crucial to the subsequent analysis of its truth. In our view, this aspect of the Judge's decision conflates several different plot ratios. The Judge merely observed (at [92] of the Judgment) that "I believe from the evidence that [Park] did represent to the parties that [434 RVR] had a plot ratio of 1.4 …".

41 There were in fact three different plot ratios that had relevance in relation to 434 RVR: the extant plot ratio, the approved proposed plot ratio, and the maximum permitted plot ratio. As at 1 February 2007, the extant plot ratio was 0.5 (as the site was a petrol station); the approved plot ratio was 1.4 (*per* the Grant of Outline Permission); and the maximum permitted plot ratio had not been established with certainty.

42 To illustrate, there is a critical difference between the following representations:

(a) Representation A: "I obtained prior approval from the URA for a proposed plot ratio of 1.4 in 2007. I shall endeavour to use my professional expertise to apply for a proposed plot ratio of 2.8 if we buy the land."

(b) Representation B: "I obtained prior approval from the URA for a proposed plot ratio of 1.4 in 2007. This was also the maximum plot ratio permitted in 2007. I shall endeavour to use my professional expertise to apply for this maximum limit to be increased to 2.8 if we buy the land."

43 The Judge erroneously concluded that Park had made Representation B, and in doing so had made two *non sequiturs*.

44 Firstly, the Judge had erroneously relied on Park's AEIC, which stated that Park had arranged a meeting with Timothy to ascertain if there was a possibility of the plot ratio of 434 RVR being increased "from the then 1.4 for the Esso gas station to 2.8 for redevelopment" (see [28] above).

45 This statement, taken out of context, can be understood as either Representation A or B; it does not *ipso facto* follow that Park made representations *vis-à-vis* the *maximum* permitted plot ratio. Indeed, a perusal of the context indicates that Park made Representation A, and not

Representation B. Park stated in his AEIC that [note: 2] :

> [A]s a practicing [*sic*] architect, I know the plot ratio is subject to the approval of the Competent Authority under the Planning Act, i.e. URA at the material time. I did not give such an assurance that the plot ratio could definitely be increased to 2.8.

46 This aspect of Park's evidence is broadly corroborated by the URA. Timothy testified that the maximum plot ratio is subject to evaluation by the URA on a case-by-case basis where the prevailing Master Plan is silent. [note: 3]

47 To elaborate, the maximum permitted plot ratio (where the Master Plan is silent) is akin to the paradox known as Schrödinger's Cat, where it is unknown whether the aforesaid cat is dead or alive *until and unless a measurement is made*. One could guess the maximum permitted plot ratio based on the extant and approved plot ratios of the surrounding pieces of land, but similar to Schrödinger's Cat, one could not be sure until an outline or a formal application is actually made. To be more semantically precise, one could not be sure until one's application for a higher ratio is rejected; even where one has in hand an approved proposed plot ratio, it is always possible for a subsequent application, with a higher proposed plot ratio, to succeed.

48 The Judge also proffered a second reason: Park had made an implied representation that 434 RVR had a maximum plot ratio of 1.4 merely by forwarding two documents — the Grant of Outline Permission and a CB Richard Ellis Brochure — to Bryan and Clarence in an e-mail dated 2 July 2007. We do not agree with this finding.

49 To reiterate, the Grant of Outline Permission merely indicated the approved proposed plot ratio (which was 1.4), and is not an indication of the maximum permitted plot ratio.

50 The CB Richard Ellis brochure set out under the heading "REDEVELOPMENT POTENTIAL" that the "Potential Gross Plot Ratio" was 1.4. [note: 4] It also stated under the same heading that outline planning permission had been granted by the URA, and was further subject to URA's and other authorities' approval. Nowhere in the brochure was the word "maximum" used. The brochure was therefore not a representation that the maximum permitted plot ratio was 1.4.

51 In sum, the Judge had mischaracterised the nature of Park's implied representations. Park did not represent that 434 RVR had a *maximum* permitted plot ratio of 1.4. Rather, he represented that 434 RVR had an *approved* proposed plot ratio of 1.4. This was in fact true, and there was thus no misrepresentation. In fact, Park did go on to secure an approved plot ratio of 2.8 from the URA, confirmed in a Grant of Written Permission dated 17 July 2009.

No reliance

52 Assuming *arguendo* that there was a misrepresentation, the Judge did not cite any evidence in finding that there was reliance on the part of Bryan. Instead, the Judge merely invoked a presumption of reliance: if the representation is material, the onus would lie on the representor to show the representee's lack of reliance.

53 This presumption is not a *legal* presumption, but is a presumption of fact. In *St Paul Fire and Marine Insurance (UK) Co Ltd v McConnell Dowell Constructors Ltd and others* [1996] 1 All ER 96 at 112, the English Court of Appeal cited *Halsbury's Laws* vol 31 (Butterworths, 4th Ed, vol 1989) (at para 1067):

> Inducement cannot be inferred in law from proved materiality, although there may be cases where the materiality is so obvious as to justify an inference of fact that the representee was actually induced, but, even in such exceptional cases, the inference is only a prima facie one, and may be rebutted by counter-evidence.

54 As such, the presumption of reliance is not *mandatory:* a court is not constrained to apply the presumption *whenever* materiality is found. Being a presumption of fact, it is optional; a court *may* choose to apply the presumption, depending on the factual matrix. Looked at in this way, the court is merely applying a commonsense inference of fact.

55 To elaborate: all presumptions are merely propositions in the form of "P implies Q; P is proven to be true, so therefore Q is true". Stated in another way, presumptions are special forms of *modus ponendo ponens.*

56 Presumptions of law can be further subdivided into irrebuttable and rebuttable presumptions of law (see also *Lau Siew Kim v Yeo Guan Chye Terence and another* [2008] 2 SLR(R) 108 at [43] and [44]). An irrebuttable presumption of law is such that if P is proven on a balance of probabilities, then Q is *ipso jure* proven regardless of the rest of the available evidence. A rebuttable presumption of law is such that if P proven on a balance of probabilities, then Q is established only if there is insufficient countervailing evidence indicating otherwise. In other words, a rebuttable presumption of law reverses the legal burden of proof once the premise P is established.

57 A presumption of fact, contrary to a presumption of law, is a presumption whereby the *modus ponendo ponens* itself is not an obligatory rule of law. The court has a discretion on whether to apply the presumption to the particular factual matrix. As such, when a court does apply a presumption of fact, it is incumbent on the court to give reasons for the application of the presumption.

58 We summarily set out the types of presumptions in an organisational chart below:

59 The Judge did not explain why the presumption of reliance was invoked. Indeed, a closer perusal of the evidence indicates that the presumption of reliance should not have been utilised.

60 Bryan attended the meeting with Timothy in September 2007, where Timothy confirmed that a proposed plot ratio of 2.8 would be approved. Having heard Timothy personally, there was simply no reliance on any representation made by Park.

61 Additionally, the Judge did not address her mind to important documentary evidence that indicated Bryan was alive to the significance of the applicable plot ratios. In an e-mail dated 31 July 2007 from Bryan to Andy, Clarence and Park, Bryan states that Hong Leong Finance (the bank which

ultimately lent $30m for the acquisition of the Properties) "seem to be aware of the 1.4 vs 2.8 plot ratio (really hope they can keep this info p + c)" [*sic*]. [note: 5] In a subsequent e-mail dated 24 August 2007 from Bryan to Andy, with Park and Clarence being carbon copied, Bryan states that "**with a revised plot ratio**, we will get valuation in the 48–50m range" [emphasis added]. [note: 6] In yet another e-mail dated 2 September 2007 sent by Bryan to Andy, with Clarence and Park carbon copied, Bryan writes that "[r]ight so with plot ratio revised to 2.8, we should get the land valuation (by independent real estate valuer) at anywhere from 48m to 60m". [note: 7]

62 These e-mails confirm that Bryan knew that they were purchasing 434 RVR at an attractive price — probably because it was not widely known that 434 RVR could be readily redeveloped at a higher plot ratio. Consequently, there was no reliance on any representation that 434 RVR had a maximum plot ratio of 1.4; if that were the case, Bryan would not have been so confident of reaping a windfall from a revised *increased* plot ratio of 2.8. In short, Bryan got exactly what he bargained for. Bryan's understanding of the situation is shared by Andy. In an e-mail dated 1 September 2007, Andy opined that: [note: 8]

> if next bidder is $30m for PR of 1.4, then land should be 60m for 2.8. And that's before masterplan 2008. The river shall flow, with wealth that glows … for once my pocket may be heavier than my butt.

63 Plainly, the Judge had erred in choosing to utilise the presumption of reliance. The evidence was abundantly clear that Bryan had not relied on a representation that 434 RVR had a maximum plot ratio of 1.4.

64 In sum, Park did not represent that 434 RVR had a maximum plot ratio of 1.4. Even if he had represented that 434 RVR had a maximum plot ratio of 1.4, there was no reliance on Bryan's part.

Was a cast-iron oral agreement concluded?

65 The Judge initially relied, *inter alia*, on Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 13th Ed, 2011) at para 2-017, where the learned author observes as follows (see [73] of the Judgment):

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

66 At this juncture, we would like to add that the courts scrutinise the objective conduct of the parties in determining if an agreement has been reached. Once the parties have to all outward appearances agreed in the same terms on the same subject-matter, then neither can, generally, rely

on some unexpressed qualification or reservation to show that he had not in fact agreed to the terms to which he had appeared to agree. The subjective reservations of one party cannot prevent the formation of a contract (*Aircharter World Pte Ltd v Kontena Nasional Bhd* [1999] 2 SLR(R) 440 at [30]).

67 Curiously, the Judge found that there was an *indicative* profit-sharing agreement, under which the final proportions of profits would *fluidly vary based on the final sale price of the Properties*, the holding period of the investment, as well as the return on equity obtained by Bryan.

68 This is peculiar for several reasons. First, Bryan's initial pleaded case was not that of fluid final proportions. Rather, Bryan's pleaded case was that 50% of the profits were to go to Bryan, with 25% each to Andy and Park if three conditions were met:

(a) the properties were to be resold within a short time frame of about four months from the time they were acquired;

(b) the properties were to be resold at the indicative price range of about $80m; and

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

69 Second, the Judge had found that it was implausible for Bryan, an astute and commercially savvy businessman, to agree to cast-iron proportions. However, if it is commercially implausible for Bryan to have agreed to cast-iron proportions, it is equally commercially implausible, if not more so, for Park to have agreed to an arrangement whereby Bryan was given *carte blanche* to fully "[control] the parameters of profit sharing so as to maximise his return on equity" and for this to "take precedence over the profit that was to flow to the other parties" (at [87] of the Judgment). This is especially so as Andy and Park were co-guarantors for the $30m loan made by Hong Leong Finance to Riverwealth and were personally exposed to a considerable amount of financial risk. It appears to us more than improbable that Park would have risked legal proceedings for, *inter alia*, negligence and a breach of his fiduciary duty to ExxonMobil (in advising ExxonMobil to sell 434 RVR to Riverwealth) if his share of the profits were to be entirely subject to Bryan's whims (and potentially zero).

70 Third, the Judge had also placed especial weight on Andy's answers during cross-examination, where Andy confirmed that Bryan was concerned with maximising his return on equity. However, it is ultimately irrelevant, even if true, that Bryan would have liked to make as much money as possible. All rational investors would like to maximise their returns. A concern with maximising personal profit does not address the question of whether the parties had entered into a (indicative) contract.

71 Fourth, the Judge pointed out a weakness in Park's case: an e-mail sent on 21 March 2007 by Andy to Park and Bryan, which was sent more than six months after Park pleaded that an alleged oral agreement was concluded (on 24 September 2006) (see [77] of the Judgment). The e-mail spells out a "conclusive meeting" at which the parties agreed to a "4:3:3 set up" for the incorporation of LAAnD. The Judge claimed that there appeared to be much ambiguity about when and how the alleged oral agreement was made between the parties. However, a more holistic approach ought to be utilised in order to ascertain whether the parties had in fact agreed to the same terms. Viewed in this light, this particular e-mail is, in our view, an isolated piece of correspondence that is at variance with the rest of the relevant (especially documentary) evidence.

72 Indeed, subsequent e-mails were not ambiguous at all. An e-mail dated 20 November 2007 authored by Bryan and sent to Andy, Clarence and Park was relied on by the Judge but without

viewing it in its proper context. [note: 9] Bryan distinguished clearly between two scenarios: first, a full-project sale whereby "this profit sharing agreement for all co directors should be hammered out only after we LAY our hands on the land" [*sic*] and second, a land-only sale whereby "[p]rofit sharing for a land only deal means that we revert to the spirit of the original deal whereby Park and Andy were 50% for origination and I am the other 50% for financing" [*sic*]. Clarence was then to be accorded a 2.5% fee from each of the three parties. The Judge only cited the former in support of her finding that there was only an indicative profit-sharing agreement, and appears to have entirely overlooked the latter.

73 This is corroborated by e-mails sent by other parties. In an e-mail sent by Clarence to Andy, Bryan, and Park on 19 November 2007, Clarence also distinguished between the two scenarios. [note: 10] In the event of a full project sale, "earnings are to be disbursed and allocated according to shareholding structure, that is, Bryan – 75.0%, [Madam Wee] – 12.5%, Andy – 12.5%". In the event of a land only sale the earnings "are to be apportioned as follows: Bryan – 35%, [Madam Wee] – 25%, Andy – 25%, Clarence – 15%". The discrepancy in the two e-mails for the land-only sale is presumably because Clarence was holding his 15% share of the profits on behalf of Bryan prior to being paid by the rest. In another e-mail sent by Andy to Bryan on 9 November 2007, with Park and Clarence carbon copied, Andy refers to the parties having "further agreed to revise the structure for profit sharing to 47.5 22.5 22.5 & 7.5 (CT) on a Land Sale Only basis irrespective of the actual physical equity structure of [Riverwealth]". [note: 11]

74 The arrangement reflected in Bryan's 20 November 2007 e-mail is also reaffirmed in other e-mails authored by him. On 27 April 2008, Bryan sent another e-mail where he stated that: [note: 12]

> this is to keep to the equal sharing of the 'profits of the firm' /valuation surplus where by andy and park are 50% n i am 50%
>
> … i am keen to ***retain*** the original sprirt of agreement
>
> [*sic*] [emphasis added in bold italics]

On 27 November 2008, Bryan wrote again to Andy, Clarence and Park: [note: 13]

> The spirit of the profit share is intact and is not different from the last email exchange.

75 To reiterate, the test for whether a contract has been concluded is objective in nature. The documentary evidence on record clearly indicates that an agreement had been reached, with profits from the sale of the Properties (a land only sale) to be split in a 2:1:1 ratio between Bryan, Andy and Park respectively, with each party then paying a fee of 2.5% of the total profits to Clarence. That the exact circumstances surrounding the conclusion of the contract are unclear is no impediment to discerning that one was in fact concluded in the course of the parties' continuing negotiations. The function of the court is to try, as far as practical experience allows, to ensure that the reasonable expectations of honest men are not disappointed (*Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [40]). Bryan's subsequent reprobation cannot be sanctioned; this Court will not allow the subjective reservations of one party to defeat clear, objective evidence of *consensus ad idem*.

76 We acknowledge that the Judge entertained serious doubts on Park's credibility. However, even where a trial judge's evaluation of a witness's credibility is based on his demeanour, this will not invariably immunise the decision from appellate scrutiny. It is always important to test witnesses'

evidence against the objective facts and independent evidence. On the instant factual matrix, the e-mail correspondence between the parties is particularly persuasive because it is an objective record of the parties' respective positions and intentions prior to their wrangle.

Was there a breach of natural justice?

77 In light of our findings above, the issue of natural justice is rendered academic. Assuming *arguendo* that there was a breach of the *audi alteram partem* rule, there is now no point in ordering a rehearing as we are deciding the misrepresentation issue in favour of Park.

Conclusion

78 We find that there was no misrepresentation made by Park that 434 RVR had a maximum permitted plot ratio of 1.4. Even if there was a misrepresentation, there was no reliance on the part of Bryan, who got exactly what he bargained for. We set aside the Judge's order for rescission; Madam Wee need not return her shares in Riverwealth to Bryan.

79 We find that there was an extant oral agreement for profits from the sale of the Properties to be split in a 2:1:1 ratio between Bryan, Andy and Park, with the parties each then paying a fee of 2.5% of the total profits to Clarence (see [84] above).

80 Pursuant to O 43 r 2 of the Rules of Court, we thus order an account of profits to be taken by a judge ("the Assessment Judge"). For the avoidance of doubt, the profits comprise the difference between the $60.08m sale price on the one hand, and the purchase price of the Properties (*ie*, $48.5m) together with certain outgoings to be enumerated below (at [84]) on the other. We note that there have been allegations of impropriety — *viz*, the purported extortionate interest rates charged by Bryan for his personal loan to Riverwealth, the purportedly exorbitant management fees charged by Daun Consulting 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 Bryan were extortionate. The parties are to lead evidence as to what the usual market 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.

82 As to the second allegation, no deductions should be made for the management fees charged by Daun Consulting as the basis for such fees in the event of a land-only sale has not been clearly established. The Judge had (at [117] of the Judgment) held that:

> there was nothing to suggest that [Bryan] was not allowed to use [Daun Consulting] as a vehicle to collect director's fees for Clarence and himself. Indeed, it would appear that [Park] himself was aware of this arrangement, as can be seen from an email dated 2 August 2008 … .

However, a closer perusal of the e-mail indicates that such management fees were to be chargeable only upon a full-project sale. Even then, it is unclear if the parties actually came to *consensus ad idem* regarding the fees chargeable upon a full-project sale: [note: 14]

> Fees [Daun Consulting] would incurr [*sic*] for bringing in say a 30% third party investor are as follows
>
> …

However since I am also a principal investor I propose to charge 0.75 % on the agreed value of the land **at the point in time the service apartment project is successfully negotiated with the 3rd party investor** …

For consideration and discussion

[emphasis added in bold and bold italics]

83 As to the third allegation, we agree with the Judge that Park was not the proper plaintiff. It is open to Madam Wee to institute fresh proceedings for the purported sale of the Properties at an undervalue.

84 Thus, the only deductible outgoings are first, interest charged by Hong Leong Finance for the $30m loan and the legal fees for the sale, and second, interest (at market rates, see [80] above) payable to Bryan for the loan comprising $22,580,621.99. The Assessment Judge may also allow the deduction of such other reasonable expenses necessarily incurred consequentially in relation to the sale (*eg*, marketing fees). We so order pursuant to O 43 r 3 of the Rules of Court.

85 The appeal is therefore allowed. The appellants are entitled to the costs here and below (to be taxed, if not agreed), with the usual consequential orders. The supplemental judgment on costs (which entitled the respondents to costs on an indemnity basis from 13 September 2010) is also set aside.

[note: 1] AEIC of Lim Koon Park dated 31 January 2012 at para 50b.

[note: 2] AEIC of Lim Koon Park dated 31 January 2012 at para 50a.

[note: 3] Notes of Evidence p 1134

[note: 4] Core Bundle Volume II Part A p 272

[note: 5] Record of Appeal Volume V Part E p 30

[note: 6] *Ibid.* p 40

[note: 7] *Ibid.* p 50

[note: 8] *Ibid.*

[note: 9] *Ibid.* at p 134

[note: 10] *Ibid.* at p 132

[note: 11] *Ibid.* at p 118

[note: 12] *Ibid.* p 281

[note: 13] Record of Appeal Volume V Part G p 30

[note: 14] Record of Appeal Volume V Part F p 216