Park Regis Hospitality Management Sdn Bhd *v* British Malayan Trustees Limited & Ors [2013] SGHC 268

Case Number	: Suit No 201 of 2011 (Registrar's Appeals Nos 98 of 2013 and 99 of 2013, Summons No 2366 of 2013)
Decision Date	: 11 December 2013
Tribunal/Court	: High Court
Coram	: George Wei JC
Counsel Name(s)	: Cheah Yew Kuin and Michelle Lee (Wong & Leow LLC) for the plaintiff/appellant; Lee Eng Beng, SC and Matthew Teo (Rajah & Tann LLP) for the defendants/respondents.
Parties	: Park Regis Hospitality Management Sdn Bhd — British Malayan Trustees Limited & Ors

Civil Procedure – Pleadings – Striking Out

Tort – Inducement of Breach of Contract

11 December 2013 Judgment reserved.

George Wei JC:

Introduction

1 These were appeals from the decision of the learned Assistant Registrar David Lee Yeow Wee ("the AR") to strike out the appellant's action against the respondents, and consequentially, dismiss the appellant's application to amend their statement of claim. I considered the arguments of the parties bearing fully in mind the principles of striking out, most importantly, that it must be plain and obvious that there was no merit in the claim before the claim was to be struck out. After considering the issues before me, I am of the view that the AR did not err in law and fact in striking out the action (apart from potentially one point of law pertaining to the "Release Rule") and therefore am dismissing both appeals.

The Facts

The Parties

2 The appellant, Park Regis Hospitality Management Sdn Bhd ("Park Regis"), is a hotel management company registered in Malaysia and is part of the Staywell Hospitality Group ("Staywell"). Staywell manages a network of 35 hotels in the Asia Pacific region under the brands, Leisure Inn and Park Regis. The appellant was the plaintiff in the hearing below.

3 British & Malaysian Trustees Limited ("BMT") is the trustee of Allco Property Return on Investment Fund ("the Fund"). BMT was the 1st defendant in the hearing below. The assets of the Fund are redeemable preference shares in Taragon Capital Malaysia Sdn Bhd ("Taragon"). Taragon is a company registered in Malaysia and is in the business of property development and investment.

4 The 1st respondent, Allco Funds Management (Singapore) Limited ("Allco Funds"), is the

manager of the Fund. Allco Funds was the 2nd defendant in the hearing below. The 2nd respondent, Allco FMS Investments Pte Ltd ("Allco FMS"), is the registered legal and beneficial owner of all the units in the Fund. Allco FMS was the 3rd defendant in the hearing below.

Background to the Dispute and Claims

5 According to Park Regis' submissions, in 2005 and 2007, BMT as trustee of the Fund invested some RM45m in Taragon in connection with a proposed development of a hotel on certain parcels of land in Kuala Lumpur, Malaysia. This was done by BMT subscribing to 20 million units of redeemable preference shares and 25 million units of RPS-B shares in Taragon. These redeemable preference shares were held on trust for the benefit of the Allco FMS.

6 On 16 August 2010, an Operating Agreement ("the OA") was signed between Park Regis and Taragon. Park Regis was appointed operator of the hotel for an initial term of three years, with five automatic renewals for further terms of three years each.

7 On 21 February 2011, Taragon entered into an agreement to sell the hotel to Grace Hub Sdn Bhd ("Grace") which was a subsidiary of Furama Hotels International Management Pte Ltd ("Furama") for RM150m ("the SPA"). The SPA contained an express provision that if the OA was not terminated within 30 days of the date of the SPA, the SPA would automatically be "rescinded". This provision was set out in cl 3.2 of the SPA which was entitled "Conditions Precedent".

8 On 21 February 2011, Taragon served a notice of termination of the OA on Park Regis pursuant to cl 3.5 of the OA. By letter dated 25 February 2011, the notice of termination was rejected by Park Regis. In the letter, Park Regis expressly affirmed the OA and put Taragon on notice that it remained ready and willing to give full effect to the OA.

Legal Proceedings

9 On 17 March 2011, Park Regis sued Taragon in Malaysia for breach of the OA, and one day later, also applied for an injunction to restrain the sale of the hotel to Grace. At the preliminary hearing on 31 March 2011, an interim injunction was granted with the hearing date for the injunction set down for 18 April 2011.

10 In Singapore, on 25 March 2011, Park Regis then commenced Suit No 201 of 2011 against Furama, Grace and Allco Funds for conspiracy to induce Taragon to commit a breach of contract with Park Regis.

11 However, on 14 April 2011, shortly before the injunction hearing date in Malaysia, Park Regis and Taragon entered into a Resolution Agreement ("the RA") whereby Park Regis was to receive RM7.5m. The application for an injunction in Malaysia was withdrawn and the proceedings in Malaysia against Taragon for breach of the OA were discontinued. As a result of the RA, Park Regis discontinued the action against Furama and Grace on 13 May 2011.

12 The Singapore action against Allco Funds was, however, not discontinued. On 17 August 2011, Park Regis amended the claim so as to include BMT and Allco FMS as defendants. (This statement of claim hereafter referred to as "SOC (Amendment No.1)".) Then on 6 June 2012, Park Regis took out Summons No 2800 of 2012 to amend the statement of claim in order to, *inter alia*, add two additional defendants, namely Tan Aik Kiat ("Tan") and Ferrier Hodgson Pte Ltd ("Ferrier"). This (proposed) statement of claim has been referred to as "1st Draft SOC-2." At about the same time, the Respondents took out Summons No 3728 of 2012 to strike out the entirety of the Park Regis claim.

13 Both summonses were heard together by the AR on 11 October 2012. At a further hearing on 14 November 2012, the AR "invited" Park Regis to consider further aligning its proposed amendments (found in 1st Draft SOC-2) in line with its submissions on the alleged breaches of the OA. This resulted in a second draft of the "1st Draft SOC-2" on 21 November 2012 (hereafter referred to as the "2nd Draft SOC-2").

14 On 15 March 2013, the AR found in favour of the Respondents and struck out the claim. The AR also dismissed the application to amend the statement of claim (this would be the 2nd Draft SOC-2).

15 The two appeals that came before this court was therefore Park Regis' appeal against the AR's decision to strike out the statement of claim, ("RA 98/2013") and his decision refusing to grant leave to amend the statement of claim as set out in 2nd Draft SOC-2 ("RA 99/2013"). Apart from these two appeals, Park Regis also took out Summons No 2366 of 2013, which was an application for leave to adduce the 13th affidavit of Simon Wan dated 6 May 2013 ("Sim-13") in support of these two appeals.

16 For completeness, BMT had also taken out a separate striking out application (Summons No 3752 of 2012) against Park Regis. BMT was successful in their application, and Park Regis did not appeal against this.

The Assistant Registrar's Decision

17 The following provides a brief overview of the learned AR's decision, and I shall elaborate further below where relevant.

18 At the very outset of his brief grounds of decision dated 15 March 2013 ("the GD"), the learned AR at [4] summarised the key issue before him as the following question:

> [H]aving entered into a particular bargain to resolve a dispute with the counterpart to an agreement, should that party be allowed to pursue claims against other defendants for more damages to be paid, essentially re-writing the bargain that he had struck to settle the dispute?

19 This was of course with reference to, as mentioned above, the RA that Park Regis had entered into. Eventually, the AR answered the question posed above in the negative – Park Regis should not be allowed to pursue its claims against the other parties. In doing so, the AR felt that (what I shall refer to as) the "Release Rule" applied in Singapore. The Release Rule is a common law doctrine which states that where one joint tortfeasor is released from liability, this also discharges the other tortfeasors from liability, based on the premise that the cause of action against all the joint tortfeasors is one and indivisible.

20 Even if the Release Rule did not apply, the AR found that there was simply no breach of the OA. Even if there was a breach, the AR held that Park Regis did not suffer any damage from the breach. Therefore, Park Regis' claim for conspiracy to induce a breach was bound to fail. Accordingly, the learned AR struck out Park Regis' action. Park Regis' application to amend their statement of claim was consequentially dismissed.

The issues in this appeal

21 There were three (main) issues before the court in this appeal:

(a) Whether leave should be granted to Park Regis to adduce further evidence for the appeals ("the Preliminary Issue").

(b) Whether the Respondents could rely on the RA and the application of the Release Rule in Singapore such that Park Regis no longer had a claim against them ("Issue 1").

(c) Whether there was a breach of the OA, and if so, whether the breach led to any loss suffered by Park Regis ("Issue 2").

22 Issue 1 and Issue 2, although distinct issues by themselves, must be viewed in the context of a striking out application. Therefore, I considered these issues with the perspective of whether it was "plain and obvious" that there was no merit to Park Regis' claim against the Respondents.

The Preliminary Issue – whether leave should be granted to Park Regis to adduce further evidence

The Applicable Law

23 The law pertaining to adducing further evidence in an appeal is not controversial, and is guided by the three conditions set out in *Ladd v Marshall* [1954] 1 WLR 1489 ("the *Ladd v Marshall* Test") and summarised by Jeffrey Pinsler SC in *Principles of Civil Procedure* (Academy Publishing, 2013) ("*Principles of Civil Procedure*") at para 24.057. Under the *Ladd v Marshall* Test, three conditions must be satisfied before the court will grant leave to adduce evidence on an appeal:

(a) the new evidence could not have been obtained with reasonable diligence by that party at trial;

(b) the further evidence is such that it would probably have an important influence on the result of the case, though it need not be decisive; and

(c) the evidence is such as is presumably to be believed.

24 However, it has also been clarified that strictly speaking, the *Ladd v Marshall* Test only applies to appeals from a trial (albeit with certain qualifications). In *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 1 SLR(R) 1053 ("*Lian Soon Construction*"), the Court of Appeal held that when it was an appeal from a registrar to a judge in chambers (as were the appeals before me), the *Ladd v Marshall* Test served only as a guide, and did not apply strictly. Even if the new evidence sought to be adduced did not meet the requirements of the *Ladd v Marshall* Test, the appellate judge retained the discretion to admit the evidence. In this respect, Professor Pinsler in *Principles of Civil Procedure* explains at [24.061] that in the case of an interlocutory appeal, the judge in chambers exercises a "confirmatory jurisdiction" and that his discretion to hear evidence is not fettered by the decision of the Registrar.

25 Subsequently, the Court of Appeal in *Lassiter Ann Masters* v *To Keng Lam* [2004] 2 SLR(R) 392 ("*Lassiter*") raised the concern that if the *Ladd v Marshall* Test did not apply, a liberal use of a wide discretion to admit fresh evidence could defeat the very rationale underlying the delegation of matters to the Registrar. As a result, the court in *Lassiter* decided that the *Ladd v Marshall* Test should be applied to an application to adduce fresh evidence before a judge in chambers on an appeal from a registrar's assessment of damages. In *Principles of Civil Procedure* at [24.062], the view was also taken that the first condition in *Ladd v Marshall* might be modified in such a case so that it was sufficient if the applicant could show strong reasons why the evidence was not adduced at the

assessment before the Registrar.

26 Any confusion surrounding the seemingly conflicting decisions of *Lian Soon Construction* and *Lassiter* was put to rest by the Court of Appeal's decision in *WBG Network (S) Pte Ltd v Sunny Daisy Ltd* [2007] 1 SLR(R) 1133 ("*WBG Network*"), which recognised (at [13]):

> … a distinction between the standard to be applied in appeals where there had been the characteristics of a full trial or where oral evidence had been recorded (for example, in proceedings of inquiries or, as in *Lassiter*, in an assessment of damages) and those that were interlocutory in nature.

27 The court therefore concluded that different "standards" could apply. In the former situation, the second and third conditions of the *Ladd v Marshall* Test should strictly apply, whereas in the latter situation, the court would be allowed to exercise its discretion more liberally. This would mean that it would be left to the court hearing any particular matter to decide whether the facts justified the application of the *Ladd v Marshall* Test (and if so, to what extent). The observations of the Court of Appeal in *WBG Network* at [14] are also instructive:

> A party wishing to adduce further evidence before the judge in chambers in cases where the hearing at first instance did not possess the characteristics of a trial might still have to persuade the judge hearing the matter that he had overcome all three requirements of *Ladd v Marshall* if he were to entertain any hope of admitting the further evidence because the judge was *entitled*, though not *obliged*, to employ the conditions of *Ladd v Marshall* to help her decide whether or not to exercise her discretion to admit or reject the further evidence. In such a case, if the appellant could not persuade the judge that the conditions, if applied, would result in his favour, then it would be unlikely that the judge would allow his application to adduce the fresh evidence.
>
> [emphasis in original]

28 I briefly summarise the following steps of analysis which could therefore be employed in deciding whether or not the evidence would be admitted:

> (a) First, there is a distinction to be drawn between appeals from trials and appeals from other matters. Only in the former would the *Ladd v Marshall* Test apply strictly.
>
> (b) Second, there is a distinction to be drawn between matters which had characteristics of a full trial or where oral evidence had been recorded, and matters which were generally "interlocutory" in nature. As a result of the decision in *Lassiter*, in the former situations the second and third conditions of the *Ladd v Marshall* Test would apply.
>
> (c) Third, in matters which were generally interlocutory in nature, the court was entitled, though not obliged, to employ the conditions of the *Ladd v Marshall* Test to help decide whether or not to exercise the discretion to admit or reject the further evidence.

Application of the Law

29 Given the nature of the case, I found that the application to admit further evidence belonged to the "third situation" (matters which were generally interlocutory in nature). There was therefore a wide discretion in deciding whether or not to allow the further evidence to be adduced.

30 The grounds for the application are to be found in the 12th affidavit of Simon Che Hing Wan

dated 6 May 2013 ("Sim-12") who explains that Park Regis sought leave to adduce additional evidence in order to highlight certain erroneous findings of fact made by the AR in the GD, which is the subject of the appeals. The "details" of the errors and the nature of the evidence that Park Regis sought to adduce was in turn expanded on in Sim-13 which was set out as an attachment to Sim-12.

31 A perusal of Sim-13 shows that it largely comprised submissions to the effect that the AR had drawn wrong or inappropriate inferences from the facts in coming to his decision to strike out the claim. Much of Sim-13 was in substance, argument. For example, Section A of Sim-13 is entitled: "The Malaysian Courts did not grant an injunction against the sale of the Hotel". The section sets out nothing new except to underscore that no final injunction was granted by the Malaysian courts since Park Regis had withdrawn the application and that there was no certainty in any case that the "Kuala Lumpur High Court would grant a final injunction against the sale of the Hotel to Grace Hub." This may well be so, but it contains nothing new and is in reality legal argument.

32 To the extent that "new evidence" was set out, it appears that much of this was available before and was unlikely to have an important influence. For example, Section B of Sim-13 is entitled: "The Plaintiff was prevented from entering the Hotel premises and could not operate the Hotel." Section B deals with the period between Taragon's attempt to terminate the OA pursuant to cl 3.5 on 21 February 2011 and the signing of the RA on 14 April 2011. The AR in the GD at [25] came to the conclusion that:

> (a) the purported wrongful termination on 21 February 2011 did not cause any loss to the Plaintiff – indeed, by virtue of their acts of affirming the contract and seeking an injunction, they have demonstrated that it was within their means – and at least until the Resolution Agreement was effected – to continue the contract with the help of the Malaysian Courts granting them an injunction;
>
> (b) that being the case, they continued to operate the Hotel and therefore suffered no loss…

33 This is said by Park Regis to be wrong because after the attempt to terminate on 21 February 2011, Taragon locked Park Regis out of the Hotel and took other steps to prevent Park Regis from having access.

34 In SOC (Amendment No 1), it was not pleaded that Taragon was in breach of the OA by the taking of steps to prevent or to hinder access to the Hotel by Park Regis in the period immediately after 21 February 2011. What is pleaded at para 17 of SOC (Amendment No 1) is that Furama, Grace, BMT and the Respondents caused, induced or procured Taragon to breach cl 19.1 of the OA by purportedly terminating the OA and assigning its interest in the Hotel to Grace. Summons No 2800 of 2012 was subsequently taken out for leave to amend the SOC (Amendment No 1). As stated above, this concerned the application to add Tan and Ferrier as defendants and to make some amendments to the pleadings. Of particular interest are the changes sought for para 17 of SOC as set out in the "2nd Draft SOC-2." The proposed amendment sets out detailed particulars of the alleged breach by Taragon of the OA. This includes a new sub-paragraph (i) which states:

> Notwithstanding the Plaintiff's affirmation of the Operating Agreement, Taragon continued to take steps towards completing the sale of the Hotel to Grace Hub and refused to perform its obligations under the Operating Agreement, thus resulting in a further repudiation of the Operating Agreement in the manner as follows:
>
> (a) From on or about 21 February 2011 and in breach of its obligations under cl 2.2 of the Operating Agreement, Taragon prevented the Plaintiff and/or its employees from accessing

the Hotel to perform its obligations under the Operating Agreement;

(b) From on or about 21 February 2011 and in breach of its obligations under cl 3.7 of the Operating Agreement, Taragon prevented the Plaintiff from continuing to provide technical services in relation to the completion of the Hotel (including providing advice on the internal designs and furnishings for the Hotel);

(c) From on or about 21st February and in breach of its obligations under cl 17.2 of the Operating Agreement, Taragon prevented the Plaintiff from continuing to enter into agreements with third party vendors (including laundry services providers) with regard to the provision of services in relation to the operation of the Hotel.

35 The point was that the assertion that Taragon had taken steps to prevent or hinder Park Regis (as referred to in Sim-13) was already before the AR since Summons No 2800 of 2012 was heard together with Summons No 3728 of 2012. Indeed, it is noted that the AR at [6] of the GD specifically referred to the opportunity provided to Park Regis to amend the proposed amendments so as to align its pleadings with its arguments (*ie*, 2nd Draft SOC-2) and that "having had sight of the new proposed amendments and submissions by both counsel" he concluded that the amendments could not be sustained. The evidence set out in Sim-13 could have been made available earlier and in any case the AR would have been aware of the general nature of the assertions as they were set out in the proposed amendments. Even if the point is taken that the court cannot take "judicial notice" of the particulars set out in the proposed amendments, the point remains that much of Sim-13 could have been made available earlier.

36 Section C of Sim-13 is headed "The Plaintiff did not cause its own loss when it entered into the Resolution Agreement." Section D is entitled "The AR's finding of fact regarding the initial bargain struck between the Plaintiff and Taragon is wrong and contrary to the intentions of the parties." Both of these sections comprise essentially arguments that the AR was wrong to have drawn the conclusion that any loss was caused by Park Regis decision to enter into the RA and that the AR's interpretation of the scope and effect of the RA was wrong. These are arguments and do not relate to new evidence as such.

37 Accepting that a judge in chambers hearing an appeal is not bound by the *Ladd v Marshall* Test and enjoys a discretion to admit further evidence even if conditions set out in the *Ladd v Marshall* Test are not met, it was nevertheless my decision that this was not a case where leave was appropriate. The main reason is that there was very little new evidence as such in Sim-13 to begin with. As explained earlier, most of Sim-13 is an attempt to underscore points that had already been made and which the deponent thought the AR had not paid sufficient weight to. Even in the case of the evidence on the alleged interference by Taragon (preventing/hindering performance by Park Regis) the substance of the allegations had been set out in the 2nd Draft SOC-2 that was before the AR. Accordingly, the application for leave to adduce further evidence was disallowed.

The general body of law applicable to striking out

38 Order 18 r 19(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC") provides that the court may strike out the claim on the ground that: (a) it discloses no reasonable cause of action; (b) it is scandalous, frivolous or vexatious; (c) it may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of the process of the court. Order 18 r 19(2) goes on to state that no evidence is admissible on an application made on the ground that no reasonable cause of action is disclosed.

39 In *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR (R) 649 ("*Gabriel*"), the Court of Appeal ("CA") stated that the power to strike out should only be exercised in plain and obvious cases and should not be exercised by a minute and protracted examination of the documents and the facts of the case in order to see if the plaintiff really has a cause of action. The CA also held that even if the application is based only on one limb of O 18 r 19(1) that the applicant would not normally be prohibited from relying on another ground (absent any prejudice to the other parties). As to what is the threshold test for a "reasonable cause of action" the guiding principle was said to be "a cause of action which has some chance of success when only the allegations in the pleading are considered" (at [21]). Yong Pung How CJ continued in the same paragraph, stating that:

> … as long as the statement of claim discloses some cause of action or raises some question fit to be decided at trial, the mere fact that the case is weak and is not likely to succeed is no ground for striking it out.

Similar remarks were made by Andrew Phang Boon Leong JA in the more recent case of *Ng Chee Weng v Lim Jit Ming Bryan* [2012] 1 SLR 457 at [110]:

> [T]he draconian power of the court to strike out a claim at the interlocutory stage under limb (a) of O18 R19(1) can only be exercised if it is patently clear that there is no reasonable cause of action on the face of the pleadings.

40 What is important is that where the attack is mounted on the basis that no reasonable cause of action is disclosed, this must be based on the face of the pleadings alone. Indeed, in *Singapore Civil Procedure 2013* (G P Selvam gen ed) (Sweet & Maxwell, 2013) ("Singapore Civil Procedure"), para 18/19/5 states that where the striking out application is based on limb (a) no affidavit can be filed in support because it is essentially a question of law and the pleaded facts are presumed to be true in favour of the claimant. (In this regard, see also *Tan Eng Khiam v Ultra Realty Pte Ltd* [1991] 1 SLR (R) 844.)

41 Finally, it is noted that where the pleadings reveal a point of law which requires serious argument striking out may not be appropriate. It is otherwise if the court is satisfied that the issue of law is unarguable and unsustainable. (see *Singapore Civil Procedure* at para 18/19/6).

42 Bearing these principles in mind, I now consider Issue 1 and Issue 2 from the perspective of deciding whether the legal arguments raised show that it was plain and obvious that Park Regis' claim had no merit.

Issue 1 – Whether the Respondents could rely on the RA and the application of the Release Rule in Singapore such that Park Regis no longer had a claim against them

The RA and the positions of the parties on it

43 The RA was signed by Park Regis and Taragon on 14 April 2011. In Park Regis' written submissions for the instant appeal, it was asserted at para 26 that since there was "no certainty of success in the injunction application", Park Regis negotiated a settlement with Taragon with a view to concluding it before 18 April 2011. This was because if "Park Regis fail to obtain the injunction on 18 April 2011, it would then be in a much worse bargaining position." The written submissions go on to assert that pursuant to the negotiations, Park Regis reached an agreement on its claims against Taragon in the form of the RA "with the intention of recovering a portion of its loss from Taragon at the same time reserving its rights to proceed against other responsible parties responsible for the remaining portion of such loss."

44 The Respondents on the other hand assert that the purpose of the RA was to set out a consensual termination of the OA. Given the importance placed by both parties on the RA, the key terms and recitals relevant to the present proceedings are set out below:

(a) Recital 4 refers to the disputes between Park Regis and Taragon with respect to the OA, the disputed attempt by Taragon to terminate by letter on 21 February 2011 as well as the entry by Taragon into the SPA agreement with Grace.

(b) Recital 6 refers to the Malaysian legal proceedings commenced by Park Regis on 18 March 2011 against Taragon.

(c) Recital 7 refers to the Singapore proceedings commenced on 25 March 2011 against Furama, Grace and Allco Funds (for inducing breach of contract and conspiracy).

(d) Recital 10 refers to the agreement by Park Regis and Taragon to effect "a global settlement of the Disputes."

(e) Clause 1 of the RA states that the payment by Taragon to Park Regis is made "without admission as to liability."

(f) Clause 1(e)(iii) of the RA provides that upon execution of the RA, Park Regis shall:

> … [s]ubject to [inter alia] receipt of written confirmation from Grace and Furama that they consent to a discontinuance of the Singapore action with no order as to cost, discontinue the Singapore Action with no order as to costs within 3 working days of receiving the requested confirmation.

(g) Clause 6(a) of the RA provides that upon receipt of the agreed sum by Park Regis, that Park Regis:

> … [s]hall unconditionally and irrevocably for and on behalf of themselves … their servants, agents, shareholders, directors, assigns and employees forever and completely release and discharge [Taragon] its servants, agents, shareholders directors, assigns and employees (other than Allco, Grace or Furama) from any and all claims, actions, cause of action, rights, suits, proceedings, damages, costs, charges, obligation, liabilities, orders and demands of whatever kind in nature, in law and equity, whether known or unknown which [Park Regis] has or may have or which may arise directly or indirectly out of or as a consequence of the OA and the Disputes.

45 The RA signed by Taragon and Park Regis is significant in two different but related ways. First, it unequivocally settles the dispute (with no admission as to liability) between Taragon and Park Regis over the OA. In particular, the wording of cl 8 of the RA is indicative of the fact that the RA was meant to "substitute" the OA between the parties. Clause 8 provides that:

> … [i]n the event [Taragon] defaults in its obligations in respect of payment of the Agreed Sum … [Park Regis] shall be entitled to terminate the Resolution Agreement and enforce all its rights under the OA. Likewise, in the event [Park Regis] fails to withdraw the caveat and the OS and discontinue the ad interim order … [Taragon] shall be entitled to terminate the Resolution Agreement and enforce all its rights under the OA.

46 Second, cl 1(e)(iii) of the RA requires Park Regis, subject to certain conditions, to discontinue

the "Singapore action" with no order as to costs (cl 1(e)(iii) being what I would call "the Discontinuance Provision"). This refers to the Singapore proceedings commenced on 25 March 2011 against Furama, Grace and Allco Funds for inducing breach of contract and conspiracy (*ie*, Suit No 201 of 2011 when it was first started). The problem with the Discontinuance Provision is that whilst the RA refers to the Singapore action, the Discontinuance Provision requires written confirmation from Grace and Furama to the discontinuance. Allco Funds is not specifically referred to in the discontinuance provision. On 13 May 2011, the suit against Furama and Grace was discontinued. As set out earlier, the Singapore action was continued against Allco Funds. BMT and Allco FMS were at this stage added as defendants to Suit No 201 of 2011. As I had observed earlier, Park Regis has not appealed against the striking out of its action against BMT, as its position is that BMT was covered by the release in cl 6(a) of the RA as being a shareholder of Taragon.

47 The key dispute between the parties surrounds cl 6(a) as set out above. Park Regis has urged the court to approach the RA from the stand point that the RA does not expressly release the Respondents from their liability and that any release of Taragon was irrelevant to the Singapore action since the alleged release of Taragon would only release the Respondents from liabilities for which Taragon was a joint tortfeasor with the Defendants. The claim brought by Park Regis against Taragon was not in tort but for breach of contract. Taragon was not a joint tortfeasor in respect of inducing breach of contract as "it is impossible for a contract breaker to induce its own breach". That being so, any release of Taragon from the contract claim could not operate as a release of the Respondents from the claim in Singapore in tort.

48 The Respondents on the other hand argued that the RA had a broader effect. It pointed to the recital which makes clear express reference to the disputes between Park Regis and Taragon and the legal proceedings commenced in both Malaysia (against Taragon in contract) and Singapore (against Furama, Grace and Allco Funds in tort). The Respondents stress that Recital 10 refers to Taragon and Park Regis's agreement as one that was intended to effect a "global settlement" of the disputes. Clause 1(e)(iii) goes on to provide that upon the fulfilment of certain conditions by Taragon that Park Regis is to "discontinue the Singapore Action with no order as to costs."

49 In any case, the Respondents also rely on the "Release Rule". The Respondents have argued that under the RA, Park Regis "had agreed to discontinue this Suit and release all claims arising out of the OA. It no longer has any claims against the 2nd and 3rd Defendants or Ferrier Hodgson or Tan Aik Kiat".

What is the legal effect of the RA?

50 In respect of the effect of the RA in achieving a release, two issues arise. The first pertains to an issue of the proper construction of the RA. On the proper construction of the wording in the RA, does the RA effect a release of the Respondents in respect of the claim for inducing breach of contract and conspiracy? The second issue pertains to an issue of law, which is what I referred to earlier on as the "Release Rule" – if the wording does achieve the effect of releasing a tortfeasor from its liability, does the release of Furama and Grace automatically amount to a release of all other Defendant tortfeasors?

The issue of construction – Clause 6(a)

51 The first issue can be cursorily dealt with. On the question of construction it is to be noted that whilst the RA was signed by Park Regis and Taragon (not by the Respondents) the existence of the Singapore action (*ie*, Suit No 201 of 2011) was clearly recognised in the Recital. Indeed, the Singapore action was specifically referred to in cl 1(e)(iii) in connection with the obligation that Park

Regis discontinues the Singapore action with no order as to costs. Park Regis did indeed discontinue the Singapore action against Furama and Grace but did not discontinue the action against Allco Funds. On this it is noted Park Regis in its written submissions explained that the conditions set out in cl 1(e)(iii) were not met and that a separate arrangement was then reached with Furama and Grace which led to the notice of discontinuance being filed in relation to the action against Furama on 13 May 2011. No notice of discontinuance was apparently required for Grace as they had not yet been served with the proceedings.

52 The wording of cl 6(a) is also far from clear. For ease of reference, cl 6(a) provides that:

> [Park Regis] shall unconditionally and irrevocably for and on behalf of themselves … their servants, agents, shareholders, directors, assigns and employees forever and completely release and discharge [Taragon] its servants, agents, shareholders directors, assigns and employees (*other than Allco, Grace or Furama*) from any and all claims, actions, cause of action, rights, suits, proceedings, damages, costs, charges, obligation, liabilities, orders and demands of whatever kind in nature, in law and equity, whether known or unknown which [Park Regis] has or may have or which may arise directly or indirectly out of or as a consequence of the OA and the Disputes.
>
> [emphasis added in italics]

53 Park Regis' assertion was that words in parenthesis supported their argument that the parties intended a "carve out" such that there was no release in the RA of Park Regis' claims against the Respondents, Grace and Furama. They also assert that the discontinuance of the action against Furama and Grace was pursuant to a separate arrangement and that Park Regis all along had intended to proceed against the other parties in tort. Although it is true that the Allco, Grace and Furama are clearly referred to in brackets and at first glance may not be ambiguous, I also note counsel's point that it is not explicitly clear as to whether they are being referred to in their capacities as "servants, agents, shareholders, directors, assigns and employees", or as corporate entities. Furthermore, if Park Regis indeed did not intend to release the Respondents from liability, it is odd as to why Park Regis did not simply add an express reservation of rights clause.

54 In any case, there was no need for me to conclusively decide on the construction of cl 6(a) of the RA. Quite apart from the construction of cl 6(a) a question also arose over the effect of the discontinuance of the Singapore action against Furama and Grace. Did the RA as a whole (bearing in mind the discontinuance) effect a release of Furama and Grace and if so did the release extend to all other joint tortfeasors? This in turn raised a question of law as to whether the Release Rule remained good law in Singapore.

The issue of law – the Release Rule

55 Whatever the proper interpretation of cl 6(a) should be, Park Regis then discontinued the Singapore action against Furama and Grace. The question (as noted) therefore arises: does the discontinuance of the action against Furama and Grace amount to a release of Furama and Grace such as to prevent Park Regis from commencing a fresh action against them for the same cause of action? The learned AR whilst not expressly addressing the point appears to take the view that the provisions on discontinuance of the Singapore action did amount to a release of the Furama and Grace and that the release was effective to "protect" the Respondents. This was because there was no express or implied reservation of Park Regis's rights against the Respondents. This was so notwithstanding the clumsy wording of cl 6(a) as I had discussed above.

The applicable law

The applicable law

56 On the intention of the parties, the learned AR citing the English Court of Appeal case of *Nigel Watts Count Nikolai Tolstoy-Miloslavaski v The Right Honourable Toby Lowe and others* [1989] L & TR 578 ("*Nigel Watts*") took the view that an objective approach had to be taken as to whether the words used amounted to a reservation of rights. For that reason the learned AR at [40] stated that he:

> … placed little weight – if at all – on [Park Regis] protestations that it had settled on RM 7.5m on the basis that it would be going after other parties.

57 The learned AR rightly states that "what has to be looked at is an objective assessment given the terms of the contract and the factual matrix around the material time." On this basis, the learned AR came to the view that there was no reservation of rights against the Respondents and that the Respondents were covered by the release.

58 In coming to the decision that the Respondents were in any case protected by the release, the learned AR had to consider whether the Release Rule remained good law in Singapore. The Release Rule developed in the 19th Century and is well-reflected in the case of *Duck v Mayeu* [1892] 2 QB 511. In that case, Smith LJ (at 513) held that:

> … a release granted to one joint tortfeasor, or to one joint debtor, operates as a discharge of the other joint tortfeasor, or the other joint debtor, the reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released.

59 It has been said that the rationale for the Release Rule lies in the concept of unity of action. Putting the rule in very simple terms: where a Plaintiff suffers loss as a result of a particular tort, he has but one action although there may be several Defendants who are liable in that action as joint tortfeasors. Since there is only one action, release of one tortfeasor is said to operate as a release of all the joint tortfeasors.

60 This concept of unity action and the Release Rule also appears to be related to another old common law rule: that a cause of action against two or more joint tortfeasors merged into the first judgment recovered against any one of them even though that judgment remained unsatisfied. The effect was that once judgment was obtained against one tortfeasor, the Plaintiff was barred from bringing an action against any other joint tortfeasor. This rule (the merger rule) has been abrogated in many common law jurisdictions including Singapore. After the amendments in 1998, s 17 of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA") now provides that:

> Judgment recovered against such person liable in respect of any debt or damage is not a bar to an action, or to the continuance of an action against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage.

61 Even though the Release Rule was not specifically touched on by the 1998 amendments the question has arisen in Singapore as to whether the release rule survived the 1998 amendments made to the CLA. In the United Kingdom it was held in *Bryanston Finance Ltd v De Vries* [1975] QB 703 ("*Bryanston Finance*") that the effect of s 6(1)(a) of the Law Reform (Married Women and Tortfeasors) Act 1935 (c 30) (UK) was to abolish the old common law rule that a cause of action against two or more joint tortfeasors merged in the first judgment recovered against any one of them even though that judgment remained unsatisfied. Although in *dicta*, Lord Diplock comments (at 731) that:

> [t]he description embraces all joint tortfeasors other than those whom the victim of the joint tort covenanted not to sue: or has released from liability prior to judgment by entering into an agreement of release with any one of them. The technical common law doctrine of release is unaffected by the Act. Such an agreement still has the effect in law of releasing all other joint tortfeasors as well, though courts nowadays are reluctant to construe an agreement with one tortfeasor as a release rather than as a covenant not to sue him unless it is plain that the agreement was intended by the plaintiff to operate also as a release of the other joint tortfeasors from their liability.

62 Section 6(1)(a) was subsequently replaced in the UK by s 3 of the Civil Liability (Contribution) Act 1978 ("the UK Act"). Indeed, s 17 of the CLA appears to be borrowed from s 3 of the UK Act. In *Nigel Watts*, Neill LJ explained that the general rule was that joint liability whether in contract or tort gave rise to a single cause of action and that accordingly the release of one joint promisor or one tortfeasor discharged any other persons jointly liable. Over time, a number of exceptions were engrafted onto the rule: some by case law developments and some as a result of statutory provisions. An early common law qualification was said to be found in the distinction drawn between a covenant not to sue and a release. A mere covenant not to sue one joint tortfeasor did not effect a release of any other joint tortfeasor (see *Clayton v Kynaston* (1701) 2 Salk 573). Thereafter, it was recognised that the victim could have an express term saving his remedy against other persons jointly liable. Thus in *North v Wakefield* (1849) 13 QB 536, it was held that where a deed of release contained an express clause that it should not operate to discharge anyone jointly liable with the person so discharged, it did not so operate. In the opinion of Neill LJ, it was preferable to consider whether the relevant document is an absolute release or a release with a reservation rather than to consider whether the document can be fitted into the straitjacket of a covenant or agreement not to sue. The reservation of rights could be express and in some cases it might be implied.

63 Turning to the effect of s 3 of the UK Act, Neill LJ after referring to the remark of Lord Diplock in *Bryanston Finance*, noted in passing that the High Court of Australia had doubted whether the unity of the common law action against all tortfeasors had survived statutory reform so that more than one judgment could be given against joint tortfeasors for damages caused by a joint tort. In *XL Petroleum v Caltex* (1985) 155 CLR 448 ("*XL Petroleum*"), Gibbs CJ at 459 expressed the view (albeit in *dicta*) that the whole rule that there is only one cause of action against joint tortfeasors was gone and that the statutory provision was not just about abolishing the doctrine of merger.

64 *XL Petroleum* was subsequently followed and applied by the Australian High Court in *Thompson v Australian Capital Television Pty Limited* [1996] 186 CLR 574 ("*Thompson*"). Brennan CJ, Dawson and Toohey JJ explained that the principle that where there was a joint tort there could only be one action and one judgment was the basis for both the merger rule and the release rule. In Australia (Australian Capital Territories ("AUCT")), s 11(2) of the Law Reform (Miscellaneous Provisions) Act 1955 (although this has now been repealed by the AUCT Civil Law (Property) Act 2006) provides that:

> Judgment recovered against a tort-feasor liable in respect of the damage is not a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage.

65 They held that the effect of s 11(2) was that the cause of action against joint tortfeasors was no longer one and indivisible and agreed with *dicta* view of Gibbs CJ in *XL Petroleum* that there could no longer be any foundation for the rule that the release of one joint tortfeasor releases the others. Gummow J in the *Thompson* case agreed. Gummow J noted that in *Wah Tat Bank Ltd v Chan* [1975] AC 507, the Privy Council (on appeal from Singapore) had observed in passing (at 517) when

considering the effect of the statutory provisions on the merger rule that it was an established canon of construction that a statute should not be construed as altering the common law any further than it does so expressly or by necessary implication. Nevertheless, Gummow J found (at 613) that once it had been determined:

> as it has been in this Court, that a necessary implication of [the statutory provision on the merger rule] is that the unity of the cause of action against all joint tortfeasors is to be treated as severed, the answer to the present issue becomes apparent. This is that the common law … with respect to the effect of the release of one of several joint tortfeasors, can no longer operate on the foundation that that which is the subject of the release is an indivisible unity. The existence of that indivisible unity is … the ground upon which the remaining joint tort feasors are treated as released. The present case thus is an example of … the implied abrogation of a rule of law.

The Learned AR's application of the law

66 In the present proceedings, the learned AR found that the Release Rule was part of the common law of Singapore. In *Industrial and Commercial Bank Ltd v Li Soon Development Pte Ltd* [1993] 3 SLR(R) 518 ("*ICB*"), Chao Hick Tin J (as he then was) held (at [68]) that it was settled law that if liability of guarantors is joint or joint and several that the release of one without the consent of others will discharge all the guarantors unless there is a sufficient reservation of the creditor's rights against the other guarantors. More recently, Steven Chong JC (as he then was) in *Econ Piling Pte Ltd v Sambo E&C Pte Ltd* [2010] SGHC 120 ("*Econ*") had to decide whether a scheme of arrangement in relation to one joint debtor has the effect of compromising the entire debt with other debtors. The learned judicial commissioner noted that the scheme of arrangement was proposed by the judicial manager. The scheme received the approval from three quarters of Econ's creditors and was sanctioned by an order of court. In this context the question arose as to whether the discharge of a joint debtor pursuant to a scheme sanctioned by the court is tantamount to accord and satisfaction with the effect of discharging joint debtors. After reviewing the case law, the learned judicial commissioner held that the scheme and its attendant legal consequences owed its efficacy entirely to the order of the court that sanctioned it and was therefore tantamount to a release by operation of law. It was not to be regarded as a release by accord and satisfaction. The learned judicial commissioner added that where a joint debtor's liability was released by operation of law, there was no need for the creditor to reserve its rights to proceed against the other joint debtors. *Econ* whilst recognising the common law Release Rule did not consider whether the release rule in Singapore was affected by s 17 of the CLA. The same is true of the earlier decision of Chao J in *ICB*. Indeed, this was a point that the learned AR recognised in the instant case. Nevertheless, the learned AR regarded that he was bound by the Singapore High Court decisions and that even if it was open to him to consider the specific arguments on s 17 that he would likely have preferred to follow the guidance of the English authorities.

My view – The effect of the RA in the context of a striking out application

67 In addressing the legal effect of the RA pertaining to release as well as the relevance and applicability of the release rule in Singapore, this Court is reminded that the question has arisen in the context of an application to strike out the Plaintiff's claim under O 18 r 19(1) of the ROC. In particular, the learned AR struck the action out on the basis that the statement of claim disclosed no reasonable cause of action. Keeping the principles of striking out as I had discussed above in mind, I found the decision of the Court of Appeal in *Bunga Melati 5* [2012] 4 SLR 546 ("*Bunga Melati*") particularly helpful.

68 In *Bunga Melati*, VK Rajah JA noted at [34] that prior local case law centered the test on whether the action is "plainly or obviously unsustainable" and that the generality of the test of sustainability is "precisely what enables a court to do justice based on the facts before it." That said, VK Rajah JA went on at [39] to set out some guidelines to assist the courts in applying the test. The first guideline was that a claim is legally unsustainable if it is clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. The second guideline is that a claim is factually unsustainable if it is possible to say with confidence before the trial that the factual basis for the claim is entirely fanciful because it is entirely without substance. An example was said to be a case where it is "clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based."

69 Returning to the present proceedings, a striking out of the action by Park Regis on the grounds of the Release Rule is problematic for two reasons. First, there is the question of law that has been raised as to whether the Release Rule continues to apply given s 17 of the CLA. Whilst English authorities are strongly supportive of continuance of the Release Rule the equally robust decisions of the Australian High Court against continuance has also been noted. The Singapore court is not of course bound by either line of authority. Even though there are High Court decisions which suggest that the Release Rule has survived, it cannot be said with confidence that it is clear (beyond doubt) that this is indeed the position in Singapore. Whilst it is not necessary for me to decide in the present case whether the unity of action principle has been abrogated by s 17 of the CLA such as to undermine the basis for the Release Rule, I accept that this is certainly something which is plainly arguable as a matter of law.

70 The second difficulty with a striking out based on the continuance of the Release Rule concerns the interpretation of the RA. The RA it will be recalled was an agreement signed by Park Regis and Taragon. Whilst it did state that what was desired was a global settlement of the disputes the drafting of the detailed provisions could have been far clearer as to the intended effect. This is especially so as concerns the effect of the RA on the Singapore action for inducing breach of contract and conspiracy. Did the RA set out a release of the claim against one or more of the joint tortfeasors: in particular, Furama, Grace, BMT, Allco Funds and Allco FMS? Alternatively was there an express or implied reservation of rights against one or more of the joint tortfeasors? Even though an objective approach is taken to the interpretation of a release agreement the court must interpret the agreement in light of the actual facts existing at the relevant time. It is not enough that the court feels that the Plaintiff's case is weak: the Plaintiff's interpretation of the RA must be one which is obviously unsustainable before the action would be struck out.

71 For these reasons, I am not satisfied that Park Regis's action can be struck out solely on the basis that the RA amounted to a release of the Defendants with no reservation of rights.

Issue 2 – whether there was a breach of the OA

72 Given that the legal effect of RA pertaining to the Release Rule (if still applicable) was not clear, the appeal based on this alone would have succeeded. However, the next hurdle Park Regis had to cross was to show that the learned AR had erred in his finding that there was no breach of the OA, and that Park Regis in any case subsequently suffered no loss arising from the alleged breach.

The decision below

73 It will be helpful to briefly review Park Regis' pleaded cases in the hearing below first. In the SOC (Amendment No 1) the claim against BMT, Allco Funds and Allco FMS was framed under the

general heading: "Conspiracy to use unlawful means to induce/procure a breach of the Operating Agreement."

74 Paras 16 to 19 of the SOC (Amendment No 1) further elaborate on the details of the claim. Without going into the details, the essence is that Taragon had breached cl 19.1 of the OA and that Furama, Grace, BMT, Allco Funds and Allco FMS had conspired and caused or induced the breach of cl 19.1. After reviewing the arguments of the parties, pertaining to the issue of the breach of the OA, the learned AR at [7] of the GD explains that:

> … after careful analysis of the contractual documents and the arguments put forth by the parties, I agree with the Plaintiff's submissions that not only had there not been a breach of Clause 19.1 of the Operating Agreement, there was no cause of action against the Defendants which could be based on a breach of the Operating Agreement as a whole.

The learned AR also found that even if he was wrong, Park Regis did not suffer any loss from the result of the supposed breach. As a result, the learned AR held that there was no reasonable cause of action that could be maintained against the Respondents and therefore the Statement of Claim against the Respondents would be struck out pursuant to O 18 r 19(a).

My decision

75 Once again, since this was in the context of a striking out, in considering the issue of whether there was any breach of the OA, the legal inquiry was whether it was patently clear on the face of the pleadings that there was no case against the Respondents for conspiring and inducing Taragon to commit a breach of the OA such as to cause losses to Park Regis.

76 After reviewing the parties' arguments, I am of the opinion there was no breach of the OA. Therefore, the issue of whether there was any damage suffered by Park Regis leading from the breach was rendered moot.

The clause the Respondents are allegedly in breach of

77 Park Regis' main claim rests on the assertion that the sale of the Hotel to Grace is in breach of cl 19 of the OA, which provides that:

> 19.1 Either party shall be entitled to assign its interest in this Agreement to a third party provided it first obtains the prior written consent of the other party. The other party will not unreasonably withhold such consent provided the assigning party is not in default of its obligations under this Agreement, and if the prospective assignee is respectable, responsible and financially able to meet the assigning party's prospective obligations (from the date of the intended assignment) under this Agreement and, in the case of [Taragon] is not a Competitor of the [Park Regis]. In either case, the assigning party must procure that the prospective assignee enters into an appropriate deed with the non-assigning party adopting, as form [sic] the date of assignment, all of the assigning party's rights and obligations under this Agreement.
>
> 19.2 Either party shall be entitled to assign this Agreement to its Affiliate without the prior written consent of the other party provided such Affiliate agrees to be bound by the terms of this Agreement and remains an Affiliate. In the case of the Owner, simultaneous with the assignment of this Agreement, the Affiliate must also become the legal and beneficial owner of the Property business and the owner of the Property and in the event the Affiliate has a pre existing security over it, it will ensure its financier enters a deed of non disturbance which complies with clause

2.3

78 There is no doubt that Furama is a competitor of Park Regis. It follows that on the express wording of cl 19.1, Taragon would not be able to assign its interest in the OA to Furama.

79 The contractual relationship between Taragon and Park Regis is that between the owner of the hotel (the property) and the operator of the hotel established on the property. It is readily understandable that Park Regis as the contractual operator would want the right to prevent an assignment by Taragon of the rights under the OA to a competitor of Park Regis.

Is Taragon in breach of Clause 19.1 of the OA if it sells or enters into negotiations to sell the hotel property to a competitor of Park Regis?

80 Clause 19.1 is concerned with the assignment of the OA. It does not deal expressly with the right of Taragon as the owner of the hotel property to sell the hotel (*ie*, the land and building). Does it follow that Taragon is allowed to sell the land and building to a third party (whether or not a competitor of Park Regis) so long as it does not assign its interest under the OA such as to breach Clause 19.1? The latter clause must be interpreted in the context of the OA as a whole. The purpose of the OA was to appoint Park Regis to run and operate a hotel at the property which was owned by Taragon for an initial term of three years, with five automatic renewals for further terms of three years each. Clause 2.1 of the OA provided (*inter alia*) that Taragon "warrants it is the registered and beneficial owner of the Property."

81 Whilst it is accepted that cl 19.1 does not specifically prevent a sale of the property to a third party without the consent of Park Regis, it does expressly preclude any assignment of Taragon's interest under the OA to a competitor of Park Regis. Does this mean that Taragon can enter into a contract to sell the property so long as it does not also assign its interest under the OA to a competitor? If so, Taragon could sell the property to Furama so long as it did not also assign the OA to Furama. In such a situation the end result would be that Furama would be the owner of the property. Park Regis would remain as the operator under the OA with Taragon. Taragon in turn would have to enter into an arrangement with Furama so as to enable Taragon to fulfil its obligations to Park Regis.

82 An alternative interpretation is that there is an implied term in the OA governing the position where the property is to be sold during the life time of the OA. The implied term might, for example, prohibit any sale of the property during the life time of the OA without the consent of Park Regis or the sale of the property during the life time of the OA to a competitor of Park Regis. The difficulty of course is that terms are not so readily implied into contracts. This is especially so in those cases where the contract sets out extensive detailed express terms.

83 In the present case, a number of express terms (apart from cl 19.1) are set out in the OA which may be relevant. This includes cl 2.2 which sets out a warranty that the Owner "is the registered and beneficial owner of the property." Clause 2.2 does not state that the Owner (Taragon) must remain the registered and beneficial owner throughout the term of the OA. Instead, what is provided is that:

> 2.2. … Except as specifically provided for in this Agreement [Taragon] shall during the Term provide [Park Regis] with uninterrupted and unrestrained access to and control over the Property.

84 Bearing in mind the admonition of the CA in *Gabriel* against a minute examination of the documents and facts it will be necessary now to set out certain terms of the OA so as to provide the

context of the dispute:

(a) Clause 2.4, which provides that:

> [Taragon] previously entered into an agreement to lease the property to RHI. RHI has issued a notice to [Taragon] purporting to terminate RHI's agreement with [Taragon]. Subsequent to receipt of RHI's notice, [Taragon] requested [Park Regis] whether it would be interested in entering into an operating agreement relating to the Property if RHI's agreement was formally terminated and [Park Regis] confirmed that it was interested in doing so provided the agreement between the [Taragon] and RHI had been terminated. This Agreement and all of the rights and obligations pursuant to it, is subject to the agreement between the [Taragon] and RHI being terminated. This Agreement will cease to be of any force or effect if the condition precedent in this clause 2.4 has not been satisfied by 5pm on the date which is 15 Business Days after the date of this Agreement.

(b) Clause 3.1, which provides that:

> [s]ubject to the other provisions of this clause 3 and the satisfaction of the condition precedent in clause 2.4, this Agreement will begin on the Commencement Day and continue for the Initial term unless terminated earlier pursuant to any of the provisions of this Agreement."

(c) Item 8 of the Details Schedule, which defines the Commencement Date as:

> [t]he date falling fourteen (14) days after the date the Property has been fully constructed and fitted out with all operating equipment installed and operational in accordance with all relevant regulatory requirements … together with all necessary approvals, permits and licences needed to enable the Property to be operated as a hotel and let to the public whichever is the latest.

(d) Clause 3.5, which provides that:

> [w]hile [Taragon] and [Park Regis] are in the process of determining the matters in Schedule 1 and 2, final decisions have yet to be made. In particular, [Taragon] and [Park Regis] have yet to fully agree the matters set out in the Issues List attached to this Agreement including the following: (a) the detailed schedule of finishes; (b) the ID design concept … (j) the Property handover program and the defect rectification process … [Taragon] and [Park Regis] agree that they will use their best endeavours to finalise these matters within 30 days of execution of this Agreement. [Park Regis] and [Taragon] agree that either party may terminate this agreement by written notice to the other if these matters are unable to be finalized within that 30 day period with neither party having any further liability to the other …

(e) Clause 3.7, which sets out duties of Park Regis relating to "Pre-opening Services" during the period between the date of the Agreement and the Commencement Date. These include, for example, to provide [Taragon] with "assistance to source proposed staff for the Property … and which staff will be selected by [Park Regis] in its sole discretion …"

(f) Clause 3.8, which sets out further terms touching on the duties of Park Regis and Taragon to:

… liaise with each other generally in respect of the completion of the Property … to enable satisfactory opening of the Property (subject to such matters being within [Park Regis] hotel operating and development expertise)." The clause also states that "[Park Regis] will commence hiring staff on behalf of [Taragon], will enter into supplier contracts on behalf of [Taragon] and will commence marketing the Property … on and from the date of this Agreement…

(g) Clause 4.10, which provides that:

[Taragon] shall not interfere in the day to day operation of the Property and acknowledges [Park Regis] right to control operational activities of the Property…

(h) Clause 15.1, which provides that Taragon may:

… terminate this Agreement by written notice to [Park Regis] if (a) an Insolvency Event occurs in relation to [Park Regis]; (b) [Park Regis] fails to rectify a material breach of this Agreement within thirty (30) Business Days after a receipt of a notice from [Taragon] specifying the breach; or (c) the matters set out in clause 3.5 have not been agreed within 30 days after the date of this Agreement.

(i) Clause 17.2, which provides that Park Regis is authorized to:

… make, enter into and perform in good faith in the name of and for the account of [Taragon] any contracts which it is necessary [Park Regis] enters in performance of its obligations under this Agreement.

(j) Clause 21.13, which sets out a list of warranties given by Taragon to Park Regis. These include that Taragon:

(a) is the sole beneficial owner of the Property…

…

(f) save and except for the fact that the Owner has entered into a Sale and Purchase Agreement dated 10th February 2010 for the sale of the Property to Joinland Holding (Malaysia) Sdn Bhd who will be acquiring the Property subject to [Park Regis] interest under this Agreement, it has not at any time prior to and up to the date hereof entered into any other valid, ongoing and binding agreements or arrangements, whether in writing or otherwise for the sale or disposal of the Property to any other person …

85 A perusal of the OA makes it clear that there is no express term which prohibits Taragon from entering into negotiations for the sale of the property during the lifetime of the OA. Whilst the OA does contain express warranties that Taragon is the owner of the property at the date of the agreement, there is no express warranty or promise that Taragon will remain the owner. If Taragon wanted to sell the property it was free to do so subject, of course, to its obligations under the OA. For example, under cl 4.10 (referred to above) Taragon was bound not to interfere with the day-to-day operation of the Property. The practical reality, therefore, would be that if Taragon wished to sell the property, it would need to ensure that the proposed buyer of the property was prepared to take over Taragon's responsibilities under the OA. This could be done by means of an assignment by deed as stipulated in the last sentence of cl 19.1 of the OA. (It would be apposite to note at this point that liabilities can only be novated and not assigned.) The problem in the present case, however, is

that cl 19.1 prohibited assignment by Taragon of its interest under the OA to a competitor of Park Regis. The commercial importance to Park Regis of being able to prevent such an assignment is readily appreciable. In the circumstances, if Taragon wished to sell the property to a competitor of Park Regis, it would have to obtain the agreement of Park Regis. This would in all likelihood have required a consensual termination of the OA. Nevertheless, it is clear that the OA did not prohibit a sale of the hotel as such. Indeed, this was the holding of the AR who commented at [10] of the GD that:

> …a detailed perusal of the entire Operating Agreement reveals that there are no clauses in the Operating Agreement which prohibits the sale of the Hotel by the owners to a third party. This is significant because on a plain reading of the Operating Agreement, the parties – at the time of entering into the Operating Agreement – could not have contemplated a sale of the Hotel to be a breach of the Operating Agreement and that must be in line with the commercial realities of the situation. It would be quite patently unsustainable for any operator of a hotel to tell the owner of the hotel that he is not able to sell the hotel for the period of the agreement. Even if that was the intent, there should have been clauses to prohibit such an act, but the silence on that front is very telling.

86 Pausing here, it is noted that cl 2.4 of the OA refers to the fact that Taragon had previously entered into an agreement to lease the property to Rendezvous Hotels International Private Limited ("RHI"). That being so, the OA signed by Taragon with Park Regis was itself made subject to the express condition precedent set out in cl 2.4. This provides that if for any reason Taragon was not able to terminate the lease agreement with RHI by a specified date, the OA with Park Regis would "cease to be of any force or effect." For good measure it is also to be underscored that the OA in cl 21.13(f) made specific reference to the fact that Taragon had at that time entered into an agreement to sell the property to Joinland Holding subject to Park Regis' interest under the OA. Whilst it is not immediately clear as to who is Joinland Holding and what happened to that agreement, the point worth noting is that Park Regis must be aware of the possibility of sale of the property during the lifetime of the OA. Further, Park Regis on all accounts was also familiar with the use of a condition precedent.

87 If Taragon had entered into an agreement to sell the property to a competitor of Park Regis without "sorting out" the rights of Park Regis under the OA, the question of course arises as to whether and if so when, Taragon commits a breach of the OA. Even if there is no term preventing Taragon from selling the property, the sale would not relieve Taragon of its obligations under the OA. The question that arises in such an eventuality is whether by selling the property Taragon would have made it impossible for it to perform its obligations to Park Regis under the OA. If so, Taragon would be in a repudiatory breach: actual or anticipatory.

88 But, is this what happened? Did Taragon enter into a sale purchase agreement which had the effect of preventing Taragon from carrying out its contractual obligations to Park Regis in a manner as to amount to a breach of the OA? There is no dispute between the parties that Taragon did enter into discussions to sell the property in late 2010 or early 2011. This culminated in the signing of the SPA between Taragon and Grace. The SPA was for the sale of the property with vacant possession to Grace. The intention was that Furama should be the operator of the hotel business on the property. Important clauses in the SPA include the following:

(a) Clause 3.1, which provides that:

> [i]n consideration of the premises, subject to the fulfillment of the Conditions Precedent, the Vendor hereby agrees to sell and the Purchaser hereby agrees to purchase the Hotel free from all Encumbrances created therein and with vacant possession…

(b) Clause 3.2.1(b). Clause 3.2 as a whole is entitled "Conditions Precedent". The sub clause provides that the sale and purchase of the Hotel is conditional upon the termination of the Operating Agreement. This refers to the OA signed on 16 August 2010 between Taragon and Park Regis. In particular the sub clause states that:

> "(i) The termination of the Operating Agreement and documentary evidence of such termination having been delivered to the Purchaser's Solicitors within THIRTY (30) DAYS from the date of this Agreement or such later date as the parties may agree.
>
> (ii) The Vendor shall deliver to the Purchaser a copy of the notice of termination issued to [Park Regis] within three (3) Business Days from the date of the said notice of termination. The date of receipt by the Purchaser's Solicitors of a copy of the notice of termination addressed to [Park Regis] shall be the date on which this condition precedent has been fulfilled."

(c) Clause 3.3.1, which provides that:

> [i]n the event that the Conditions Precedent … is/are … not satisfied upon the expiry of the respective time frames … then this Agreement shall automatically be rescinded at the expiration of seven (7) days from the date following the expiration of the last time frame for securing the Conditions Precedent.

89 Park Regis assertion, as set out in para 17(b) of 2nd Draft SOC-2, is that the condition precedent in the SPA "was satisfied as long as Taragon delivered to Grace Hub a copy of the notice of termination issued to [Park Regis] …" For good measure, para 17(c) of 2nd Draft SOC-2 also asserts that the condition precedent "was satisfied when Taragon had issued to the [Park Regis] the notice of termination of the [OA] dated 21 February 2011 ("the Notice of Termination")".

90 Park Regis in the 2nd Draft SOC-2 asserts in para 17(d) that the Notice of Termination amounted to a repudiation of the OA. That being so, Park Regis' claim is that Taragon was by 21 February 2011 in repudiatory breach of the OA. The importance of this assertion to the present proceedings is that Park Regis is now essentially claiming against the Respondents for having induced or conspired to induce Taragon to commit the breach of the OA. Even if Park Regis subsequently settled the claim for breach of the OA against Taragon itself, it claims to retain the right to proceed in tort against the defendants in the present proceedings.

91 The position of the Respondents is very different. On 21 February 2011 (the date the SPA was signed), Taragon served a notice of termination on Park Regis. The purported basis for this notice was cl 3.5 of the OA. This notice of termination was rejected by Park Regis who by a letter dated 25 February 2011 (by their Malaysian solicitors) affirmed the OA and stated that they were ready and willing to give full effect to the OA.

92 The learned AR found (at [13] of the GD) that there was no basis for the attempt to contractually terminate the OA under the provisions of cl 3.5. It followed that issuing the notice of termination on the 21 February 2011 was wrongful. There is no doubt that the notice of termination was not valid and that Park Regis was entitled to reject the notice and the attempt to "contractually" terminate under cl 3.5. This they did with the result that the OA continued to be fully operative. Did it also mean that Taragon by serving a contractually invalid notice of termination had thereby evinced an intention not to be bound of the terms of the OA such as to have committed a repudiatory breach of contract? Whilst this was not an issue that was specifically addressed by the learned AR it is noted

that the learned AR went on to state (at [13] of the GD) that even if there had been a wrongful termination at that point in time, that was not the end of the analysis. After all, Park Regis did not accept the notice and had expressly affirmed the contract with the result that the OA was not terminated and continued in operation.

93 Given that the Notice of Termination of 21 February 2011 did not have any legal effect as it was invalid and rejected, the question arises as to whether that notice had any effect on the operation of the condition precedent in the SPA between Taragon and Grace. Park Regis' view was that the condition precedent had been met and that the SPA was operative and that Taragon was in breach of the OA.

94 The learned AR disagreed. He held (at [15] of the GD) that in order for the SPA to be operative it was not enough that Taragon had delivered to Grace a copy of the notice of termination issued to Park Regis. In addition, under cl 3.2.1(b) it was also necessary to show that the OA had actually been terminated. This could not be the case since the notice of termination was invalid and had been quickly rejected by Park Regis. That being so, the learned AR rightly came to the conclusion that the SPA had not yet become operative because the OA had not yet been terminated. For good measure, I would add that even if Taragon had committed a breach by sending an invalid notice of termination, the OA did not *ipso facto* terminate. After all, Park Regis had elected to continue and affirmed the OA.

95 Returning to the terms and conditions of the SPA, the point might be raised that cl 3.2 which is generally entitled "Condition Precedent" states in cl 3.3.1 that the consequence of non-compliance is that the SPA is "automatically rescinded." Does it follow that because on 21 February 2011 the condition precedent had not yet been fulfilled that the SPA agreement was not yet "rescinded" and that therefore Taragon was in breach for having entered into the SPA? This cannot be correct. As discussed above, there is no express term prohibiting Taragon entering into negotiations and/or selling the property during the lifetime of the OA. If Taragon did sell the property during the lifetime of the OA this would not relieve Taragon of its obligations under the OA to Park Regis. If as a result of the sale, Taragon rendered it impossible for it to comply with its obligations under the OA, Taragon would be in repudiatory breach. That, however, was not the case. Even if the SPA was not yet rescinded on 21 February 2011, it is clear that the SPA would be rescinded in due course if the OA was not terminated. In short, the signing of the SPA on 21 February 2011 did not mean that Taragon had put itself into a position whereby it was unable to perform its obligations under the OA.

Events occurring between 21 February 2011 and the signing of the Resolution Agreement on 14 April 2011

96 Given that the sale of the Hotel (*ie*, the entry into the SPA) was not in breach of the OA, the other possible way that the OA could have been breached, was through a series of events that occurred after the signing of the SPA and before the signing of the RA on 14 April 2011. Admittedly, this was not pleaded in SOC (Amendment No 1) and the particulars are only provided for in 2nd Draft SOC-2 but for completeness, I shall briefly address them as well.

97 In his GD, the learned AR explains at [16] that it was undisputed that, on 25 February 2011, Park Regis wrote to affirm the OA.

98 However, Park Regis also claimed (in 2nd Draft SOC-2) that despite the affirmation of the OA, Taragon continued to take steps towards completing the sale of the Hotel to Grace and refused to perform its obligations under the OA thereby committing further repudiatory breaches of the OA. These were said to comprise breaches of cll 2.2, 3.7 and 17.2 of the OA.

99 Clause 2.2 it will be recalled sets out Taragon's warranty of ownership as well as a duty to provide Park Regis with uninterrupted and unrestrained access to and control of the property. This was said to have been breached as from about 21 February 2011 when Taragon allegedly prevented Park Regis employees from accessing the Hotel property to perform its duties under the OA.

100 Clause 3.7 it will be recalled sets out duties of Park Regis relating to "Pre-opening Services" during the period between the date of the Agreement and the Commencement Date. Taragon was said to have breached this clause as from about 21 February 2011 by its preventing Park Regis from continuing to provide technical services in relation to the completion of the hotel (including providing advice on the internal designs and furnishings for the Hotel).

101 Clause 17.2 it will be recalled deals with the right of Park Regis to enter into contracts necessary for the performance of its obligations. Taragon was said to have breached this clause by preventing Park Regis from entering into agreements with third party vendors including laundry service providers with regard to the provision of services in relation to the operation of the Hotel.

102 The alleged breaches of cll 2.2, 3.7 and 17.2 were not set out in the SOC (Amendment No.1) as originally filed. They were set out in 2nd Draft SOC-2 that was before the AR. For the sake of completeness, it should be noted (again) that the AR informed Park Regis below that some submissions on breaches of the OA had not been pleaded. Thereafter, it appears that upon the invitation of the learned AR that Park Regis proposed further amendments to SOC (Amendment No.1).

103 Whether or not breaches of these clauses of the OA had *actually* taken place is not a matter that the court can or must decide in the present case. The decisive response must be that even if the alleged breaches had occurred, Park Regis did not claim that the Respondents or their employees had anything to do with these alleged further acts of repudiation. Paragraph 17 of 2nd Draft SOC-2 starts with the general assertion that Furama, Grace, BMT and the Respondents "caused, induced or procured Taragon to breach the [OA] by purportedly terminating the [OA] and assigning its interest in the Hotel to [Grace]." Counsel for the Respondents rightly takes the point that Park Regis does not in any case plead that the Respondents had anything to do with these alleged further acts of repudiation. Instead, the central thrust of the claim against the Respondents as pleaded is that they induced or procured Taragon to breach the OA by its purported termination of the OA and the assignment of its interest to Grace.

Summary of my findings pertaining to the breach of the OA

104 Given my findings as above, it would be helpful to briefly summarise my main findings regarding any breach of the OA as alleged by Park Regis. Park Regis alluded to various instances of breaches, and at the end of the day, the single question was really: Did one or more of the alleged breaches take place? While I had concluded that this would not be material since it was clear (in the sense of not pleaded) that the Respondents or their employees did not have anything to do with the alleged acts of repudiation (see [103] above), for completeness, I now discuss the possibility of any breach with reference to the various clauses set out in the OA.

Clause 2.2

105 Clause 2.2 sets out a warranty that the Owner is the registered and beneficial owner of the property. The clause does not expressly state that the Owner will continue to remain the registered and beneficial owner throughout the life time of the OA. Even if that is the proper interpretation, Taragon did not breach cl 2.2 since the SPA was conditional to the termination of the OA. It does not appear that Taragon ceased to be the registered and beneficial owner of the property before the

making of the RA between Taragon and Park Regis.

Clause 4.10

106 Clause 4.10 sets out Taragon's duty *inter alia* "not to interfere in the day to day operation of the Property." Clause 4.10 is contained in a section of the OA generally entitled "[Park Regis] duties and operation of the Property." This section of the OA deals with Park Regis duties as from the Commencement Date to operate the property on a sole and exclusive basis. The Commencement Date is defined as the "date falling fourteen days after the date the Property has been fully constructed and fitted out with all operating equipment installed." The Respondents' response is that as at 21 February 2011, the hotel had not opened and had not become operational. It follows that the clause could not have been breached by Taragon.

Clause 19.1

107 Clause 19.1 has been extensively discussed earlier. As noted, the clause is concerned with assignments by the parties of their respective interests under the OA. Clause 19.1 does not deal with the right of Taragon to enter into discussions for the sale of the property or indeed to enter into a sale agreement for the property. It is true that if the prospective new owner wanted or intended to become the actual operator of the hotel established on the property that this would mean that the OA with Park Regis would have to be terminated. Leaving aside any express provision for early termination of the OA, this would mean that Park Regis consent to terminate the OA would have to be obtained. Taragon could not assign its interest under the OA to Grace or Furama since the latter was a competitor of Park Regis. This was the legal backdrop which existed at the time the SPA agreement was signed on 21 February 2011 and explains the necessity for the condition precedent in cl 3.2.1(b) of the SPA regarding termination of the OA.

108 Park Regis has argued that cl 3.2.1(b) of the SPA merely required that Taragon deliver a notice of termination to Park Regis. Once that was done the condition precedent was met and the SPA became fully effective. This interpretation cannot be sustained. Clause 3.2.1(b) of the SPA clearly states that the OA must be terminated and that documentary evidence of the termination must be delivered to Grace. It cannot be that even an invalid notice of termination of the OA suffices to fulfil the condition precedent. That would make no sense at all. Accordingly I am of the view that the AR correctly held that there was no breach of cl 19.1 of the OA committed by Taragon.

Clause 21.13

109 Clause 21.13(a) sets out another warranty that Taragon is the sole beneficial owner of the property. The comments made earlier in respect of cl 2.2, apply to this provision. It is noted however that cl 21.13(f) refers to the fact that Taragon had entered into a Sale and Purchase Agreement dated 10th February 2010 to sell the property to "Joinland Holding (Malaysia) Sdn Bhd" ("Joinland") and that Joinland would be acquiring the property subject to Park Regis's interest under the OA. This particular provision was not referred to in any pleadings and it is not immediately clear who Joinland is and what happened to that sale and purchase agreement. Accordingly, I make no further comment on cl 21.13(f) save to note that given the detailing of the terms of the OA if Park Regis had wanted the right to prevent Taragon from selling the property any time in the future (during the lifetime of the OA) then this should have been expressly provided.

No clauses were breached

110 Given that the clauses set out and expressly relied on in the SOC (Amendment No 1) and 2nd

Draft SOC-2" as having been breached were not in fact breached by Taragon, the claim by Park Regis against the Respondents for having conspired to use or to have used unlawful means to induce or procure a breach of contract by Taragon must fail. In any case, even if Taragon may have been in breach by preventing or hindering Park Regis from providing technical services *etc* after 21 February 2011, Clause 17 of 2nd Draft SOC-2 is focussed on the purported termination of the OA and the assignment of "Taragon's" interest in the property to Grace. In any event, the reality was that the OA was terminated as a result of the RA.

Conclusion

111 For completeness, I wish to address one final possible "breach" by Taragon, which is the wrongful attempt to terminate the OA on 21 February 2011. There is no doubt that Taragon did indeed send the notice of termination and that there was no basis for doing so under the terms of cl 3.5. That notice was invalid and quite properly rejected by Park Regis. The learned AR rightly comments that the attempt to terminate under cl 3.5 was wrongful. It is not clear at this stage as to why Taragon made the mistake over cl 3.5– was this a case where a contracting party genuinely thought that he had a contractual right to terminate (but was mistaken) or was it a case where the contracting party knew that the clause was inapplicable? The difference might be as follows.

112 In the former case, could it be said that Taragon by issuing the invalid notice under cl 3.5 (under the error that they were contractually entitled to issue the notice) was not thereby evincing an intention not to be bound by the OA? In other words, by asserting cl 3.5 (by mistake) they were in fact evincing an intention to perform the contract. Doubtless, many will regard this interpretation as far-fetched and point to the principle that contractual duties are generally strict and performance is to be objectively assessed. In the latter case, there is no doubt that the deliberate sending of an invalid notice of termination amounts to evincing an intention not to be bound. But, even if the distinction is false and that Taragon was in breach of contract for sending the invalid notice even by innocent mistake, the fact of the matter is that such a breach would not result in the automatic termination of the contract. Park Regis as the innocent party would enjoy the right to affirm the contract or to accept the repudiatory breach and to sue for damages. In the present case, there is no dispute that Park Regis rejected the notice of termination and expressly affirmed the contract. Thereafter, shortly before the hearing of the application by Park Regis for an injunction the RA was entered into (which as noted several times was intended to effect a global settlement of the disputes (without any admission of liability) in respect of the OA and the signing of the SPA agreement with Grace). For this reason, I find that the learned AR was correct in coming to the conclusion at [17] that the signing of the RA on 14 April 2011 effectively terminated the OA by consent.

113 It follows that the OA was not terminated because of repudiatory breaches by Taragon but solely because Park Regis and Taragon had entered into the RA which effectively terminated the OA by consent. Park Regis has made much of the complaint that the consideration which they received under the RA, RM7.5m, did not adequately compensate them for the losses which would arise from the termination of the OA. Park Regis explains that it was always their intention to proceed against the other defendants in tort and to recover their full loss by those means. This may well have been the intention of Park Regis. It does not mean that that is sufficient to establish a cause of action against the Defendants in tort. The claim against the Respondents is essentially for inducing a breach of contract by Taragon. The alleged breach relied upon was the purported termination of the OA and the assignment of the hotel to Grace. The purported termination on the 21st February was wrongful and had been rejected. The contract had been affirmed and continued to govern the relationship between Taragon and Park Regis. Any losses said to arise as a result of the termination of the OA as a result of the signing of the RA is due to Park Regis entry into the RA. If the consideration that they have

received is inadequate to cover their anticipated losses, that was simply a commercial decision made by Park Regis.

114 For the above reasons, both appeals, as well as Park Regis' application to adduce further evidence, are dismissed and costs are awarded to the Respondents.