IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 68

Civil Appeal No 65 of 2019

Between

(1) MCH International Pte Ltd
(2) Wong Kok Hwee
(3) Sing Lee Mee Yoke

… *Appellants*

And

(1) YG Group Pte Ltd
(2) YG Logistics Pte Ltd
(3) Liong Chung Yee
(4) Tan Keng Beng
(5) Ang Chee Siong

… *Respondents*

In the matter of HC/Suit No 107 of 2017

Between

(1) MCH International Pte Ltd
(2) Wong Kok Hwee
(3) Sing Lee Mee Yoke

… *Plaintiffs*

And

(1) YG Group Pte Ltd
(2) YG Logistics Pte Ltd
(3) Liong Chung Yee
(4) Tan Keng Beng
(5) Ang Chee Siong

… *Defendants*

Civil Appeal No 67 of 2019

Between

YG Group Pte Ltd

… *Appellant*

And

Wong Kok Hwee

… *Respondent*

In the matter of HC/Suit No 80 of 2017

Between

YG Group Pte Ltd

… *Plaintiff*

And

Wong Kok Hwee

… *Defendant*

Civil Appeal No 68 of 2019

Between

YG Logistics Pte Ltd

… *Appellant*

And

(1) MCH International Pte Ltd
(2) Wong Kok Hwee
(3) Sing Lee Mee Yoke

… *Respondents*

In the matter of HC/Suit No 337 of 2016

Between

YG Logistics Pte Ltd

… *Plaintiffs*

And

(1) MCH International Pte Ltd
(2) Wong Kok Hwee
(3) Sing Lee Mee Yoke

… *Defendants*

JUDGMENT

[Contract] — [Contractual terms] — [Interpretation]

[Contract] — [Contractual terms] — [Interpretation] — [Subsequent conduct]

[Contract] — [Contractual terms] — [Interpretation] — [Commercial purpose]

[Civil Procedure] — [Damages] — [Interest]

[Equity] — [Remedies] — [Equitable compensation] — [Loss of a chance] — [Assessment]

TABLE OF CONTENTS

MCH International Pte Ltd and others
v
YG Group Pte Ltd and others and other appeals

[2019] SGCA 68

Court of Appeal — Civil Appeals Nos 65, 67 and 68 of 2019
Andrew Phang Boon Leong JA, Judith Prakash JA and Woo Bih Li J
29 October 2019

15 November 2019 Judgment reserved

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

Introduction

1 These cross-appeals are against the decision of the High Court judge ("the Judge") in *MCH International Pte Ltd and others v YG Group Pte Ltd and others and other suits* [2019] SGHC 43 ("the Judgment").

2 At the heart of this dispute is a joint venture project between Mr Simon Liong Chung Yee ("Mr Liong") and Mr Henry Wong Kok Hwee ("Mr H Wong") over four cold chain logistics companies in China ("the Target Companies"). Sometime in 2014 and 2015, Mr H Wong represented to Mr Liong that they would be able to exploit the Target Companies' growth potential by hiring and seconding to the Target Companies some industry veterans in the logistics business ("the Core Management Team").

3 YG Group Pte Ltd ("YGG") was incorporated for the purposes of the parties' joint venture. The shareholding of YGG was divided between YG Logistics Pte Ltd ("YGL") and MCH International Pte Ltd ("MCH"). The former's majority shareholding and beneficial ownership eventually traces back to Mr Liong, while the latter's majority shareholding was held by Mr H Wong.

4 Sometime around January 2015, the parties had envisaged acquiring the Target Companies for US$11m to be paid in three tranches and with YGG having full control upon the payment of the first tranche ("the Initial Acquisition Model"). On 29 January 2015, the parties entered into several agreements. These were subsequently amended in August 2015, save for a Deed of Undertakings ("DOU") between YGG, YGL and Mr H Wong. Under clause 1(d) of the DOU, Mr H Wong undertook to YGG and YGL to procure the Core Management Team to be hired by MCH, and seconded to YGG "for a period of three (3) years from the completion of the Acquisition". However, it transpired that Mr H Wong was unable to secure bankers' guarantees to the sellers of the Target Companies ("the Vendors") guaranteeing payment for the second and third tranches of the acquisition, and therefore the parties decided to instead acquire the Target Companies in two phases ("the Revised Acquisition Model"). In the first phase, YGG would acquire a 40% stake for US$4.4m and YGG would then be granted a "Purchaser's Call Option" for it to purchase the remaining 60% stake for US$6.6m, the option to be exercised within a period of 12 months. In the interim, YGG would not be given full control, but would be given several benefits ("the SPA Benefits"). YGG would also be granted rights to participate in the Target Companies' management such as by nominating two directors and a bank signatory for amounts in excess of RMB10,000.

5 To finance Mr H Wong's share of the purchase under the first phase, YGL loaned MCH S$4.5m under a loan agreement signed in January 2015 and amended in August 2015 ("the Amended Loan Agreement"). Mr H Wong and his wife, Ms Sing Lee Mee Yoke ("Mrs Wong"), issued personal guarantees for the loan. The S$4.5m loan meant that, in effect, all the funds for the first phase came from Mr Liong. Several other agreements, which we collectively refer to as the "Amended August Agreements", were also amended. On 19 August 2015, YGG and the Vendors executed the Sale and Purchase Agreement ("SPA").

6 Unbeknownst to Mr Liong, on that very same day, Mr H Wong signed a document under which he would obtain a commission of US$300,000 for facilitating YGG's purchase of the 40% stake of the Target Companies from the Vendors. He received the US$300,000 nine days later. Mr H Wong also signed declarations of trust over MCH's shares in favour of one of the Vendors and the general manager of the Target Companies, Ms Mao Li ("Ms Mao"). The trust deeds purported to give the beneficiaries the power to control Mr H Wong's decisions as to how YGG would deal with its interests in the Target Companies.

7 Soon after the SPA was executed, the relationship between the parties deteriorated. Mr Liong alleged that Mr H Wong had failed to fulfil his obligations to hire and second the Core Management Team under the DOU to YGG and was delaying the exercise of the Purchaser's Call Option by YGG. Mr H Wong denied these allegations. On 3 February 2016, YGL launched Suit No 104 of 2016 ("Suit 104") against Mr H Wong and MCH for breaches of the DOU.

8 On 6 April 2016, YGL commenced Suit No 337 of 2016 ("Suit 337") against MCH for repayment of the S$4.5m loan with interest. Under the

Amended Loan Agreement, a breach of the Amended August Agreements or of the DOU would be "Events of Default" entitling YGL to seek repayment of the principal and interest. Mr H Wong and Mrs Wong were joined as defendants. Mr H Wong and MCH counterclaimed for lawful and unlawful conspiracy on the part of YGL and Mr Liong. Prior to this, from as early as February 2016 Mr H Wong's associates, Mr Troy Shortell and Mr Paraj Kakkar, had conducted negotiations with Yang Kee Logistics Pte Ltd ("YKL") for the latter company to acquire all the shares in the Target Companies. Mr H Wong met with YKL in May 2016. YKL thereafter made two offers ("the YKL Offers"). The second offer on 14 July 2016 was to purchase the Target Companies for US$15.5m. Neither of the offers was disclosed to Mr Liong.

9 On 18 August 2016, YGG exercised the Purchaser's Call Option without the participation of MCH or Mr H Wong. On 31 January 2017, YGG filed Suit No 80 of 2017 ("Suit 80") alleging breach of fiduciary duties by Mr H Wong. On 7 February 2017, MCH, Mr H Wong and Mrs Wong commenced Suit No 107 of 2017 ("Suit 107"), alleging that YGG, YGL, Mr Liong and associated parties had engaged in tortious conspiracy and seeking an order to wind up YGG.

10 In the result, the Judge found largely in favour of Mr Liong, YGG, and YGL. She found that Mr H Wong's lack of funds had motivated him to delay the exercise of the Purchaser's Call Option (see the Judgment at [194]). She awarded the majority of the reliefs prayed for by YGG and YGL. She dismissed MCH's and Mr H Wong's counterclaims in Suit 337 and MCH's, Mr H Wong's and Mrs Wong's claims in Suit 107.

11 Civil Appeal No 65 of 2019 ("CA 65") is MCH's, Mr H Wong's and Mrs Wong's appeal against the majority of the Judge's findings against them.

Civil Appeal No 67 of 2019 ("CA 67") is YGG's appeal seeking to increase the damages awarded in respect of the loss of a chance claim arising from the YKL Offers. Civil Appeal No 68 of 2019 ("CA 68") is YGL's appeal seeking an increase in the award of interest pertaining to the breach of the Amended Loan Agreement.

Our decision on the breach of the DOU in Suit 104

12 The Judge found that Mr H Wong had breached his undertaking in the DOU to procure MCH to hire and second the Core Management Team to the Target Companies. However, MCH was found not to be a party to the DOU (see the Judgment at [58]–[91]). YGL does not contest this latter finding on appeal.

13 In CA 65, Mr H Wong contests the Judge's finding on the basis that clause 1(d) of the DOU states that his obligation arose "from the completion of the Acquisition". When the DOU was executed on 29 January 2015, the parties had only envisaged the Initial Acquisition Model. Mr Wendell Wong, counsel for Mr H Wong, submits that clause 1(d) meant "complete management control" of the Target Companies. Hence, when Suit 104 was commenced, Mr H Wong could not have been in breach of his obligations, since YGG had only acquired a 40% stake and did not have full management control of the Target Companies.

14 In our judgment, the Judge was correct to have found Mr H Wong liable under the DOU. We do not propose to deal with all of Mr Wendell Wong's submissions on Suit 104, as these were already exhaustively canvassed at trial. The Judge had also provided detailed and carefully reasoned grounds to reject all of them. Instead, we focus on the main aspect of Mr Wendell Wong's written submissions, which was that the Judge had erred in referring to subsequent

events and conduct. We then turn to consider Mr Wendell Wong's primary submission at the hearing, which was that an objective interpretation of the DOU would lead to the reading that Mr H Wong's obligation would arise *only* ***after*** the Purchaser's Call Option was exercised.

The use of subsequent conduct

15 The Judge pointed out the competing interpretations in relation to the phrase "from the completion of the Acquisition" in clause 1(d). One was that it referred only to the occasion when YGG acquired full ownership interest in the Target Companies under the Initial Acquisition Model. The second was that it would encompass the first phase of acquisition under the Revised Acquisition Model. In preferring the latter interpretation, the Judge relied on two strands of evidence. First, she considered the "surrounding documents" such as the Amended Loan Agreement and the SPA, which all suggested that "completion" would include an acquisition of a 40% stake (see the Judgment at [59]–[66]).

16 Second, the Judge considered the parties' contemporaneous conduct such as Mr H Wong's stance during the negotiation of the SPA, Mr Liong's decision not to amend the DOU together with the other Amended August Agreements, and Mr H Wong's failure to refute Mr Liong's demands that he second the Core Management Team (see the Judgment at [68]–[73]).

17 However, Mr Wendell Wong submits that the Judge had erred in using the subsequent events and subsequent conduct "under the guise of "contemporaneous conduct of parties"". Mr Wendell Wong argues that the first strand of evidence – the surrounding documents – was also subsequent conduct given that the SPA and other Amended August Agreements were either executed or amended eight months *after* the DOU was signed. He suggests that

both strands of evidence should be discounted and points to academic commentary that has suggested that our courts have taken a restrictive view of subsequent conduct in contractual interpretation (see Goh Yihan, *The Interpretation of Contracts in Singapore* (Sweet & Maxwell, 2018) ("*Interpretation of Contracts*") at para 7.022).

18 In *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] 2 SLR 1083 ("*Hewlett-Packard Singapore*") at [56], this court indicated that it would not endorse a blanket prohibition on the use of subsequent conduct. However, the question of admissibility of subsequent conduct was left as an open question to be decided on a more appropriate occasion. In *HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd* [2015] 3 SLR 885 at [50], the High Court observed that there was no rule completely excluding the use of extrinsic evidence in the form of subsequent conduct. However, Vinodh Coomaraswamy J also highlighted at [34] and [51] that there was a forceful caution against applying too liberal an approach to using subsequent conduct. We note that although Coomaraswamy J's decision was subsequently reversed on appeal in *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069, albeit without discussion on this particular point, both Coomaraswamy J (citing this court's decision in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [132(d)]) and this court in *Hewlett-Packard Singapore* at [56] noted that *in the event that* subsequent conduct was to be admitted, the court also had to bear the following criteria in mind:

(a) The subsequent conduct must be relevant, reasonably available to all the contracting parties, and relate to a clear and obvious context;

(b) The principle of objectively ascertaining contractual intention(s) remains paramount; and accordingly,

(c) The subsequent conduct must always go toward proof of what the parties, from an objective viewpoint, ultimately agreed upon.

19 Up until Suit 104 was commenced, Mr Liong consistently sent demands to Mr H Wong for MCH to hire and second the Core Management Team to YGG. Mr H Wong never refuted the alleged obligation to do so pursuant to the DOU. On the contrary, Mr H Wong actively sought to give reasons to *justify* the delay, which conduct implicitly accepted that he *was* bound by such an obligation. We also agree with the Judge that the surrounding documents executed by the parties in August 2015 showed that the obligation would arise once YGG obtained a 40% stake in the Target Companies (see the Judgment at [64]–[65]). Bearing in mind the ***provisional*** parameters highlighted at [18] above, we would also have had no hesitation in holding that Mr H Wong's subsequent conduct was relevant, reasonably available, and related to a clear and obvious context.

20 However, we stress that that view is *provisional* because reliance on such evidence is nevertheless contingent on this court expressing a definitive view as to the admissibility of subsequent conduct for contractual interpretation. As Prof Goh has observed in *Interpretation of Contracts* at para 7.009, there are potentially several different approaches to this issue. The learned commentator has also pointed out that the ultimate approach remains to be determined in the future (at para 7.022). This court had similarly opined recently that this question had yet to receive our detailed scrutiny (see *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 ("*Simpson Marine*") at [78]).

21 In our judgment, this is ***also*** not an appropriate case for the issue to receive detailed – let alone definitive − treatment. We say so not to forestall determination of the issue, which as Prof Goh's treatise reveals, contains several interesting doctrinal questions. Rather, when one takes a step back, evidence of subsequent conduct tends to fall into two categories which militate against their use. On the one hand, such evidence is likely to be inadmissible by its sheer inability to fulfil the criteria elucidated at [18] above, or is otherwise "unprofitable" as it can be shaped to suit each party's position after the fact (see *Simpson Marine* at [78]). At the other end of the spectrum, the evidence of subsequent conduct does no more than echo what were the *objectively ascertained intentions* of the parties illuminated by the *contextual evidence at the time of the contract*, in which case the evidence of subsequent conduct is rendered superfluous. With respect to the Judge, this was plainly the latter situation, such that it was ultimately unnecessary for her to have had recourse to either the Amended August Agreements, or the parties' subsequent conduct. And it is to that situation that our attention now turns.

The objectively ascertained intentions informed by the contextual evidence at the time of the signing of the DOU

22 As we see it, Mr Wendell Wong's submission that the DOU was signed at a time where the parties had envisaged the Initial Acquisition Model is simply a *non sequitur*. To resolve this issue, we need go no further than this court's comments in *Hewlett-Packard Singapore* at [53], which though made in the context of the *contra proferentem* rule are equally applicable here:

> 53 We also add that simply because the situation in the present case was not contemplated by the drafter…does not mean that the term…was ambiguous. **Neither does it mean that the term therefore did not apply to the present situation.** This is also logical and commonsensical otherwise every dispute in the courts with regard to the interpretation of the term(s) of a contract could, *ipso facto,* be said to involve

ambiguity…Indeed, it is also clear that when a contract is drafted, the drafter would not be able to foresee every possible factual permutation. Put simply, therefore **everything depends on an *objective interpretation* of the term by the court itself**. As Chadwick LJ aptly put it in the English Court of Appeal decision of *Bromarin AB v IMD Investments Ltd* [1999] STC 301 (at 310):

> [I]t is commonplace that problems of construction, in relation to commercial contracts, do arise where the circumstances which actually arise are not circumstances which the parties foresaw at the time when they made the agreement.
> …
> **It is not, to my mind, an appropriate approach to construction to hold that, where the parties contemplated event 'A', and they did not contemplate event 'B', their agreement must be taken as applying only in event 'A' and cannot apply in event 'B'.** *The task of the court is to decide, in the light of the agreement that the parties made, what they must have been taken to have intended in relation to the event, event 'B', which they did not contemplate*. That is, of course, an artificial exercise, because it requires there to be attributed to the parties an intention which they did not have (as a matter of fact) because they did not appreciate the problem which needed to be addressed. But it is an exercise which the courts have been willing to undertake for as long as commercial contracts have come before them for construction. ***It is an exercise which requires the court to look at the whole agreement which the parties made, the words which they used and the circumstances in which they used them, and to ask what should reasonable parties be taken to have intended by the use of those words in that agreement, made in those circumstances, in relation to this event which they did not in fact foresee.***

This exercise of ascertaining what the parties intended is not done in the abstract or in a vacuum but is, instead, **to be anchored in the express contractual language, the internal and external contexts of the contract and, more broadly speaking, the contractual purpose** (see, for example, Man Yip & Yihan Goh, "Dealing with Unforeseen Circumstances: Contractual Construction and Equitable Adjustment" [2014] 1 JBL 83 at 86). It may be the case that after the court undertakes the objective inquiry as to the meaning of the term in question, it nevertheless comes to the conclusion that the

> term is ambiguous as to whether it provides for the unforeseen event…
>
> [emphasis added in bold; emphasis in original in italics]

23 The relevant text in clause 1(d) of the DOU states that Mr H Wong is to:

> d) procure each of [the Core Management Team] be hired by MCH and seconded to [YGG] to manage the businesses of the [Target Companies] for a period of three (3) years from the completion of the Acquisition (the "Secondment Period")…

24 Contrary to Mr Wendell Wong's submissions, nothing about the Revised Acquisition Model prevented the Core Management Team from being ***hired*** by MCH (which was not done), or from being ***seconded*** to YGG. Nor, as we see it, does clause 1(d) require *full* control of the Target Companies, merely that the Core Management Team participate in their ***management***. In any event, nothing about the Revised Acquisition Model necessarily meant that the Vendors would restrict the Core Management Team's overall management of the Target Companies either, if YGG had so wished.

25 We are similarly unpersuaded by Mr Wendell Wong's submission that because there was a lack of funds to defray the expenses of the Core Management Team, the obligation in the DOU would lead to "commercially insensible and unfair outcomes" when implemented in the context of the Revised Acquisition Model. It has not escaped our attention that one of the SPA Benefits would allow YGG to nominate a member of the Core Management Team as an understudy to Ms Mao, whose accommodation would be undertaken at *the Vendors' expense*. Counsel for YGL, Mr Anthony Soh ("Mr Soh"), also points out that there was sufficient funding even under the Revised Acquisition Model, since YGG would receive 40% of the declared dividends.

26 Our interpretation is informed by the overall context of the agreements executed in January 2015. Within the framework of contractual interpretation, due consideration is given to the commercial purpose of the transaction or provision, and more narrowly why a particular obligation was undertaken (see *Zurich Insurance* at [131]; see also the decision of this court in *Ang Tin Yong v Ang Boon Chye and another* [2012] 1 SLR 447 ("*Ang Tin Yong*") at [10]–[12]). The commercial purpose is not to be pursued at all costs, but there is certainly no reason to disregard it when it accords with the objective intentions of the parties (see the decision of this court in *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 ("*Y.E.S. F&B Group*") at [32]; see also *Interpretation of Contracts* at para 10.014).

27 There is no question that the overriding commercial purpose of the entire joint venture envisaged that the Core Management Team would be hired and then seconded. In fact, Mr Wendell Wong conceded that "the deployment of the members of the [Core Management Team] was indeed a key aspect of the deal", though he then submitted the real issue was when they would be engaged on a full time basis. With respect, this was entirely beside the point. The commercial purpose of hiring and seconding the Core Management Team remained *regardless* of whether YGG had full control, or whether they were employed on a full time basis (and in any event, Mr Wendell Wong concedes they were never employed on *any* basis whether full time or part time).

28 From the very start, Mr H Wong had not simply warranted that the Target Companies had growth potential, but that such growth potential could be ***exploited*** precisely because the Core Management Team comprised "Industry Veterans and key specialists" in the cold-chain logistics business. Once YGG acquired a stake in the Target Companies it would stand to gain from the Core

Management Team's ***participation*** in the same, hence the obligation in the DOU for the team's secondment. In our judgment, the parties' objective intentions were for this obligation to remain extant, regardless of whether it was under the Original Acquisition Model, or the Revised Acquisition Model.

29 In the premises, we affirm the Judge's finding that Mr H Wong's liability under the DOU had arisen (albeit on different grounds) and dismiss Mr H Wong's appeal in CA 65 on Suit 104.

Our decision on the Events of Default and Interest in Suit 337

30 The Judge found that there were ***seven*** Events of Default of the Amended Loan Agreement, entitling YGL to recall the loan from MCH (see the Judgment at [95]–[134]).

Event of Default 2: The commencement of Suit 104

31 The earliest Event of Default was the commencement of Suit 104 ("Event of Default 2"), which purportedly triggered clause 12.1(e) of the Amended Loan Agreement ("clause 12.1(e)"):

> 12.1 The following events are events of default (each, an "**Event of Default**"):
>
> …
>
> (e) any legal proceedings, suits or actions of any kind whatsoever (whether criminal or civil) is instituted against MCH which, in the reasonable opinion of [YGL], has a material financial effect on MCH…
>
> [emphasis in bold in original; emphases added in underlining]

32 In Suit 337, YGL submitted that ***its own*** commencement of Suit 104 against MCH would have a material financial impact on MCH. Moreover, it

was for ***YGL*** (in its reasonable opinion) to assess whether its suit had a material financial effect on MCH.

33 In this regard, MCH submits that under a proper interpretation of clause 12.1(e), an Event of Default would occur if it were a third party and *not* YGL that had commenced the suit. Mr Wendell Wong, counsel for MCH, further suggests YGL's interpretation would not be a commercially sensible interpretation as the potential for abuse by YGL would be too high. In addition, MCH maintains that YGL had commenced Suit 104 against MCH *mala fides* in a bid to trigger clause 12.1(e). On appeal, Mr Wendell Wong points out that YGL ultimately failed in its claims against MCH in Suit 104 as the Judge had found that MCH was not a party to the DOU.

The interpretation of clause 12.1(e) of the Amended Loan Agreement

34 In the Judge's view, there was nothing in the text of clause 12.1(e) that limited legal proceedings to third parties. It appeared to her that the phrase "any legal proceedings…of any kind whatsoever" would suggest the opposite effect was intended. The Judge was also of the view that there was no extraneous material to interpret clause 12.1(e) so as to limit proceedings to those commenced by third parties (see the Judgment at [97]–[98]).

35 The Judge was nevertheless of the view that YGL did not have unlimited latitude to bring any action, as clause 12.1(e) limited legal proceedings to those which, in YGL's *reasonable opinion*, had a material financial effect on MCH. In this regard, it was her finding that Suit 104 had not been launched *mala fide* (see the Judgment at [99]).

36 In our respectful judgment, the Judge erred in her interpretation of clause 12.1(e). We say so for several reasons. First, as this court has stressed,

the terms must always be interpreted in their internal context, which includes other provisions, and the document as a whole (see *Zurich Insurance* at [53]). This applies *a fortiori* for the sentence, or paragraph in question. In this case, the phrase "of any kind whatsoever" is followed by the phrase "(whether criminal or civil)". A plain reading indicates that the "kind" of legal proceedings specified in the former phrase is "criminal or civil proceedings" as encapsulated by the parenthesis in the latter phrase. Hence, the phrase "of any kind whatsoever" should not be taken as connoting the quite different and specific distinction between third-party and self-initiated suits.

37 Second, we agree with Mr Wendell Wong that the relevant context would include the commercial purpose. As we had indicated at [26] above, due consideration must be given to this factor and to why a particular obligation was undertaken. In *Ang Tin Yong* at [12], this court cited the House of Lords decision in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 ("*Mannai Investment*") (at 771) that:

> In determining the meaning of the language of a commercial contract…the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And ***the standard of the reasonable commercial person is hostile to technical interpretations*** and undue emphasis on niceties of language. [emphasis added]

38 In our respectful view, the Judge may have adopted perhaps too technical an interpretation of clause 12.1(e). Read in its plain language, there is *technically* nothing in clause 12.1(e) that conclusively forbids YGL from relying on its own suit to trigger an Event of Default. However, we would note with approval Lord Steyn's caution in *Mannai Investment* (at 771), about having too "rigid and formalistic" an approach to interpretation, which in our view may

lead to commercially insensible results. What is necessary is to give effect to the objective intentions of the parties with due regard to the commercial purposes of the contract (see [26] above).

39 Third, and on this point, it is obvious that the commercial purpose of the Amended Loan Agreement (and clause 12.1(e) specifically) was for YGL to protect its interest (in the S$4.5m loan) by allowing it to recall the moneys when MCH was in financial trouble. Mr Soh, counsel for YGL, does not appear to dispute this, as he submits that the Amended Loan Agreement's purpose was to "provide indemnity to YGL against…any breach of the [Amended August Agreements]…arising out of MCH's fault". Such indemnity is already provided for by the fact that YGL would be entitled to invoke clause 12.1(e) in the event that external disputes (*ie*, MCH's disputes with third parties) caused MCH to run into legal difficulties that portended fiscal troubles. There is no reason why YGL would need to launch its own suit in order to recall the moneys.

40 In this regard, Mr Soh submits that if clause 12.1(e) was limited to third party legal proceedings, this would place YGL in a worse position than third parties, who would be able to sue MCH. This submission, with respect, over-states YGL's case because clause 12.1(e) does not *prevent* YGL from suing MCH, it merely prevents YGL from using the commencement of its suit as a basis to recall its loan. Mr Soh's submission also under-states the commercial context because if the true purpose of clause 12.1(e) was to allow YGL to recall its loan, by launching suits that in its "reasonable opinion" were not in bad faith, then much of the wording of the provision is circuitous. Clause 12.1(e) would simply state that an Event of Default would be triggered by "any legal proceedings reasonably instituted by YGL against MCH". In that same vein, we are respectfully unable to agree with the Judge that the only limitation on clause 12.1(e) was that YGL could not launch a suit *mala fides*.

41 Fourth, inasmuch as commercial sensibility is one facet of contractual interpretation, the converse of avoiding a commercially ***insensible*** outcome is one factor (among many) that the court may give succour to in its task of contractual interpretation (see this court's observations in *Y.E.S. F&B Group* at [32]). Allowing YGL an almost unhindered ability to recall its loan (by launching its own suit), as long as it was not done *mala fide*, would give MCH (as borrower) perilously little protection and benefit. YGL, on the other hand, was already amply commercially protected given that, among other things, any Event of Default (which involved the breach of any of the Amended August Agreements) would already allow it to recall the S$4.5m loan. Such an expansive interpretation was therefore entirely unnecessary from YGL's perspective, and yet highly detrimental from MCH's perspective, and the net result veered close to being commercially unrealistic.

42 In the premises, we reverse the Judge's finding that MCH was liable under Event of Default 2 and allow MCH's appeal on this limited ground in CA 65.

Suit 104 was not commenced mala fides against MCH

43 For completeness (and for reasons that are relevant to the counterclaim and Suit 107 for conspiracy (see [93]–[95] below)), we consider the Judge's finding that Suit 104 was not commenced *mala fides* (see the Judgment at [100]–[103]).

44 Mr Wendell Wong submits that Suit 104 was launched improperly because it had named MCH as a defendant, and was for the improper collateral purpose of recalling the loan. We do not accept this submission. Indeed, we

have affirmed the Judge's finding that YGL had *succeeded* in Suit 104 against Mr H Wong.

45 While it is true that MCH was ultimately found not to be liable under the DOU in Suit 104, we do not accept that the joining of MCH was done *mala fides*, although the Judge ultimately found it was done erroneously. In this regard, while we may have overturned the Judge's finding that the launching of Suit 104 triggered an Event of Default (*ie*, Event of Default 2 was not made out), we agree with her assessment that both the interpretation that MCH was a party to the DOU and the instituting of proceedings against MCH were not unreasonable decisions, even if they were erroneous (see the Judgment at [103]).

46 We note that one of the pieces of evidence adduced by YGL was an email *by Mr H Wong* stating that under the DOU, *MCH* had "pledge[d]" to assemble the Core Management Team (see the Judgment at [82]). This was evidence originating from Mr H Wong, and it was not unreasonable for YGL to rely on this evidence to seek to impute liability onto MCH. Although YGL's reliance on this email to attribute liability to MCH was ultimately rejected by the Judge, it cannot be said that YGL's case at trial was motivated by bad faith.

47 In the circumstances, we reject this aspect of MCH's appeal in CA 65 even though we hold that Event of Default 2 was not established.

Event of Default 5: MCH's refusal to amend YGG's Articles of Association

48 Even though Event of Default 2 was not made out, all it would take for YGL to succeed in Suit 337 is for *one* Event of Default to be established. Mr Wendell Wong launches several attacks against the Judge's findings on the other Events of Default. We do not propose to deal with all of them, it suffices that we examine the most *obvious* of these Events of Default. Event of Default 5

also happens to be the next *earliest* of the Events of Default relative to Event of Default 2.

49 Event of Default 5 pertains to MCH's refusal to amend YGG's Articles of Association to bring them in line with the Shareholders' Agreement (which was one of the Amended August Agreements). As early as 25 August 2015, Mr Liong wrote to Mr H Wong about the amendments. Several more emails were sent by Mr Liong to Mr H Wong in September and October 2015 without a response. In February 2016, Mr H Wong indicated that there were "massive changes" to the amendments last proposed in October 2015. Eventually, on 28 February 2016, Mr H Wong wrote to state that "we should stick to the original [Articles of Association]". The Judge found that Mr H Wong's refusal would have been in breach of clause 19 of the Shareholders' Agreement, triggering the repayment of the loan under the Amended Loan Agreement. The Judge noted it was *undisputed* that MCH had refused to amend the Articles of Association, and that Mr Liong's proposed amendments were consistent with the Shareholders' Agreement (see the Judgment at [121]–[125]).

50 On appeal, Mr H Wong's appellate case took a change of tack, *disputing* that there was a refusal to amend the Articles of Association. With respect, we cannot accept this characterisation. We note that Mr H Wong had replied to Mr Liong on 28 February 2016 indicating, "[t]he original [Articles of Association] version is suffice [*sic*] and any amendment will need a resolution which must also be mutually agreed." Mr H Wong's statement in the preceding sentence can only fairly be read as a refusal to accede to Mr Liong's request to amend the Articles of Association.

51 We also find ourselves unable to accept Mr Wendell Wong's attempt to cast this as Mr H Wong engaging with Mr Liong on the amendments because

of "valid concerns about the proposed amendments" and that they were not in line with the Amended August Agreements. For one thing, this point was clearly not taken in the court below, leading the Judge to find that it was undisputed. For another, it was clear that regardless of the contents of Mr Liong's proposed amendments to the Articles of Association, there was a blanket refusal by Mr H Wong to accede to ***any of them***, *even those that were in line with the Shareholders' Agreement*. In the circumstances, we affirm the Judge's finding that Event of Default 5 was made out. At the latest, this breach would have occurred on 28 February 2016.

52 We note that the default interest up until the date of writ on 6 April 2016 was calculated on the basis of the earlier Event of Default 2 on 3 February 2016. On this basis, Mr Soh sought default interest of S$47,571.72. However, due to a calculation error by YGL, a lower sum of S$4,949.74 was pleaded and awarded (see [65] below). Although MCH did not agree that the error should be rectified in principle, it did agree, at the hearing, to accept that if interest began to run from Event of Default 5 (on 28 February 2016) instead of Event of Default 2, the default interest up to the date of the writ would amount to S$40,000 instead of S$47,571.72.

53 As will become apparent (at [71] below), we are of the view that the error should be rectified. Hence, default interest up to the date of writ should begin to run from Event of Default 5 (on 28 February 2016), which would amount to S$40,000. The net result is that although MCH has succeeded in overturning the Judge's findings as to Event of Default 2, it is now liable for the larger sum of S$40,000 in default interest up to the date of writ, instead of the S$4,949.74 that the Judge had awarded in YGL's favour.

54 For completeness, aside from Event of Default 2, we dismiss the remainder of MCH's, Mr H Wong's and Mrs Wong's grounds of appeals in CA 65 on Suit 337.

YGL's appeal on normal and default interest

55 We highlight that the Judge granted *all* of YGL's pleaded reliefs in Suit 337 (see the Judgment at [146]), which consisted of:

(a) S$4.5m for the principal sum;

(b) S$34,338 for a mandatory pre-payment fee;

(c) S$29,344.20 for accrued interest up to the date of filing of the writ; and

(d) S$4,949.74 for default interest and for default interest to continue to run up until the date of Judgment.

Normal interest

56 Before us, YGL nevertheless contends that the award should be corrected in two respects. First, as to amount of normal interest up the date of writ, YGL submits that it had made a calculation error and the accrued interest should have been a *lower* amount of S$29,234.98 (instead of the S$29,344.20 that the Judge awarded). Second, Mr Soh, counsel for YGL, also submits that normal interest would continue to accrue on various "utilisation dates" up until the "revised maturity date". Accordingly, YGL urges us to revise the award upward by S$432,130.68. Mr Soh submits that the correct interpretation of the Amended Loan Agreement was for both normal interest *and* default interest to accrue. Mr Soh submits that were it otherwise, the Judge's decision would be

"tantamount to YGL giving MCH an interest-free loan" up until the revised maturity date.

57 We turn to address YGL's first submission. The *reduction* of the award was a concession by Mr Soh to reduce the award in favour of his opponent. At the same time, Mr Wendell Wong, counsel for MCH, accepts that YGL's calculation error amounting to S$109.22 was *de minimis* and does not press for the award to be revised. In the circumstances, we do not propose to amend the award. We appreciate the gracious and sensible way that counsel have approached this point.

58 As to YGL's second submission, Mr Wendell Wong submits that YGL's appeal on normal interest should be dismissed given that it was not pleaded. It would also lead to double-counting, as upon an Event of Default, YGL would now be able to receive both normal interest and default interest.

59 We agree with Mr Wendell Wong's submission on this aspect of YGL's case. In our judgment, YGL is not entitled to normal interest up until the revised maturity date. First, YGL had not pleaded that normal interest should continue to accrue. Second, and in any event, we do not accept that the terms of the Amended Loan Agreement would allow YGL to claim for normal interest *after* an Event of Default and *in addition* to default interest. In *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [30], this court had elaborated upon the principles surrounding contractual interpretation, and in particular the need to give effect to the objectively ascertained expressed intentions of the contracting parties:

(a) In general, both the text and context must be considered;

(b) It is the objectively ascertained intentions of the parties that are relevant, and not their subjective intentions; and

(c) The object of interpretation is the verbal expressions used by the parties, and as a result, the text of their agreement is of first importance.

60 The relevant clauses are clauses 1.1, 5, 6.1, and 12.2 of the Amended Loan Agreement, which state as follows:

> 1.1… **"Default Interest"** means, in relation to an overdue amount, interest on that overdue amount at a rate which is the sum of two per cent…(2%) per annum and the rate of interest which would have been payable if that overdue amount had, during the period of non-payment, constituted part of the Loan;
>
> …
>
> **"Interest Period"** means a period of six (6) Months, other than the final Interest Period in respect of the Loan, which may be shorter. The first Interest Period in respect of the Loan shall commence on the Utilisation Date of the Loan and the final Interest Period in respect of the Loan shall terminate on the Maturity Date or the last day of the Extended Term (where applicable);
>
> …
>
> **5. INTEREST**
>
> Interest shall accrue on the principal amount of the Loan outstanding from time to time (including the first day of the period during which it accrues and including the last day) at the Interest Rate. Interest shall accrue from day to day and shall be calculated on the number of days elapsed.
>
> **6. DEFAULT INTEREST**
>
> 6.1 If MCH fails to pay any amount payable by it under a Transaction Document on its due date, Default Interest will accrue on the overdue amount from (and including) the due date up to (and including) the date of actual payment (**both before and after judgment**) in the currency of the overdue amount for successive Interest Periods.
>
> …
>
> 12.2 Upon occurrence of an Event of Default:

> (a) all amounts outstanding under this Agreement (including any accrued interest thereon) shall become immediately due and payable by MCH…
>
> [emphasis added]

61 Clause 1.1 of the Agreement must be read in tandem with clause 5, which stipulates that normal interest "shall accrue" from time to time. Under clause 12.2, any accrued interest would also become immediately due and payable. In our judgment, a plain textual reading of clause 12.2 would mean that any normal interest (under clause 5) would become payable immediately upon an Event of Default.

62 Clause 1.1 of the Agreement must also be read in tandem with clause 6.1, which indicates that upon failure to pay, default interest would begin to accrue. Under clause 1.1, default interest is 2% per annum *in addition* to "the rate of interest which would have been payable", which can only mean the normal interest rate (Mr Soh informs us that this is 4% per annum). This makes the default interest rate 6% per annum. As we indicated to Mr Soh during the hearing, the phrase "interest which would have been payable" means that the default interest rate of 6% ***replaces*** what would otherwise have been the normal interest of 4%. This interpretation is informed by the surrounding context, particularly clause 6.1, which suggests that default interest *instead of*, and not in addition to, normal interest would then begin to accrue.

63 As we see it, the objectively ascertained intention of the parties was for default interest to be calculated such that it already includes normal interest (*ie*, 2% *plus* 4% per annum). The relevant contractual provisions could ***not*** be read to allow YGL to avail itself of *both* default interest (6% per annum) and normal interest (4% per annum) for a combined total of 10% per annum.

64 For the foregoing reasons, we dismiss YGL's first ground of appeal in CA 68 pertaining to the award of normal interest.

Default interest

65 Mr Soh also makes two submissions with respect to default interest. First, YGL had mistakenly used the wrong interest rate and reference date in respect of the default interest. This meant that the default interest awarded up until the date of writ should have been S$47,571.72 instead of the award of S$4,949.74.

66 Second, YGL claims that clause 6 of the Amended Loan Agreement clearly specified that default interest would continue to run "both before and after judgment" (see [60] above). Mr Soh submits that the Judge had erred in awarding default interest only up until the date of Judgment (see the Judgment at [147]). Instead, default interest should be awarded up until the date of payment.

(1) Default interest up to the date of writ

67 In *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 ("*Susilawati*"), this court had considered the principles surrounding new points on appeal under O 57 r 13 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). This court had observed at [52]–[54] that such applications would be heard only in *exceptional* circumstances, and leave would readily be refused if the point below had not been pleaded or there had been a lack of proper cross-examination on the point at trial, such as to cause prejudice to the opposing party.

68 In this regard, it is clear that YGL has, in its appellate case, sought leave to introduce this new point. There was therefore adequate notice to the other party as to the new point being argued on appeal (see the decision of this court in *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 at [34]). MCH has also had the opportunity to address us on this point extensively in its written submissions.

69 In *Susilawati* at [53], this court had indicated that "it is easiest to allow a new point to be raised when the new point relates merely to the construction of a document or resolution of a matter that requires no adduction of fresh evidence or review of the factual matrix". Mr Soh submits that this is one such situation. We are inclined to agree. The calculation of the amount of default interest up to the date of writ proceeds automatically from the finding of the relevant Event of Default, which we established was Event of Default 5 (see [53] above). We note that MCH does not dispute the interpretation of the relevant contractual provisions, nor does it submit that further evidence is required.

70 We would nevertheless have hesitated to correct the Judge's award if there was any *hint* of prejudice to the opposing party. In this regard, Mr Wendell Wong accepts that if YGL had submitted S$40,000 (instead of S$4,949.74), counsel for MCH at the trial below could certainly have verified those figures (as Mr Wendell Wong has on appeal). There is therefore no prejudice caused to MCH. We stress as this court has in *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR(R) 571 ("*Panwah Steel*") held that whether to allow a new point on appeal is ultimately "fact-specific and should not generally be taken as a precedent for future cases" (at [18]), and that ultimately, "*substance* must always prevail over form, save where the latter interacts and actually impacts on the former in a significant

manner" [emphasis in original] (at [19]). In the circumstances, we grant leave to YGL to introduce this point on appeal.

71 It follows from the foregoing that the default interest up to the date of writ should be S$40,000 as it proceeds automatically from the Amended Loan Agreement. Mr Wendell Wong agrees to this sum if Event of Default 5 is established. In the premises, we allow YGL's appeal in CA 68 on this ground and revise the award of default interest up to 6 April 2016 from S$4,949.74 to S$40,000 (see [53] above).

(2) Default interest up to the date of payment

72 We turn to the second aspect of YGL's appeal as to default interest, which was the default interest should be calculated up to the date of payment instead of the date of Judgment. YGL had also sought leave to introduce this point, and MCH has also had the opportunity to submit extensively on the same.

73 We would first note that even though the relevant contractual provision (clause 6 of the Amended Loan Agreement) was pleaded, Mr Soh had not drawn the Judge's attention to clause 6 of the Amended Loan Agreement, and she certainly cannot be faulted with regard to this particular point. We would nevertheless have hesitated to entertain this point on appeal, as it does not appear that this question of whether interest should run until the date of Judgment or date of payment was put to the relevant witnesses.

74 However, we note that the issue appears to concern a plain text reading of clause 6 of the Amended Loan Agreement. YGL had in turn pleaded that it sought "[i]nterest pursuant to Clause 6 of the [Amended] Loan Agreement". In this regard, it is of significance that before us, Mr Wendell Wong concedes that

the proper construction of clause 6 was for default interest to run up until the date of payment.

75 Mr Wendell Wong's concession means that even if MCH's witnesses would have provided contradictory evidence as to clause 6, MCH's case is *nevertheless* to accept that YGL's interpretation is correct. We note that it would be difficult for Mr Wendell Wong to otherwise contradict YGL's interpretation, since the plain text of clause 6 is that default interest is calculated "up to…the date of actual payment (both before and after judgment)…". Leaving that aside, the true import of MCH's concession is that there is no real *factual* dispute. Rather, the dispute pertains to the legal effect of the factual substratum. In the circumstances, we do not think there is prejudice in allowing YGL's point to be raised on appeal.

76 We turn to consider the legal import of whether default interest should be taken to run until the date of payment. Despite his concessions, Mr Wendell Wong submits that the Judge's award should nevertheless be maintained for default interest to be paid up to the date of Judgment as otherwise awarding YGL default interest up until the date of payment would amount to awarding interest on interest, and this is impermissible under s 12(2)(*a*) of the Civil Law Act (Cap 43, 1999 Rev Ed).

77 Section 12(2) of the Civil Law Act reads as follows:

> (2) Nothing in this section —
>
> (*a*) shall authorise the giving of interest upon interest;
>
> (*b*) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise…

78 We find ourselves unable to accept MCH's submission. First, the question here is not whether interest is being awarded *on* interest, but rather about the *period* during which default interest is contracted to run. Second, and in any event, s 12(2)(*b*) of the Civil Law Act allows for interest to be made payable as of right pursuant to any agreement. Rightly, Mr Wendell Wong's submission implicitly concedes that clause 6 of the Amended Loan Agreement would be covered by this section since the entire basis for YGL's claim is for default interest pursuant to an agreement – the Amended Loan Agreement.

79 In the circumstances, we allow YGL's appeal in CA 68 on this limited point. We set aside the Judge's award in respect of default interest. In its place, we order that default interest up until the date of writ should be revised upward to S$40,000 and shall continue to accrue until the date of full payment of the overdue amount. Although we had permitted YGL to raise these new points on appeal, these were matters that it could have alerted the Judge to in the trial below. We note that even if a new point is entertained on appeal, there may be a sanction in the form of an appropriate order of costs (see *Panwah Steel* at [20]).

Our decision on Mr H Wong's breaches of fiduciary duty and the awards in Suit 80

80 In her Judgment at [156]–[202], the Judge found that there were ***six*** breaches of duty by Mr H Wong in respect of YGG. She awarded an account of profits in respect of the US$300,000 commission received by Mr H Wong, and equitable compensation in respect of several other breaches. The Judge, however, declined to award equitable compensation in respect of the diminution of YGG's stake in the Target Companies as a result of Mr H Wong's breaches

(see the Judgment at [204]–[234]). We note that YGG does not appeal against this last aspect of her award.

81 Having carefully considered Mr Wendell Wong's contentions on appeal, we reject his arguments. It is clear to us that several of Mr H Wong's breaches were blatant and wilful. In particular, we agree with the Judge that Mr H Wong had failed to act in YGG's best interests by failing to disclose the YKL Offers, which would have given Mr Liong a clear exit option and gained YGG a potential profit of as much as US$4m. In the circumstances, we see no reason to disturb the Judge's findings and her awards in relation to the same, and similarly dismiss Mr H Wong's appeal in CA 65 with respect to Suit 80.

YGG's appeal on the quantum of the loss of a chance award

82 Mr Navin Joseph Lobo ("Mr Lobo"), counsel for YGG, submits that the Judge had erred in assessing the likelihood of the second YKL Offer materialising at 12.5%. Instead, she should have arrived at a figure of 64%, or one as high as 90%. At the hearing, Mr Lobo moderated YGG's proposed figure suggesting that the award should be revised upward to 40% of US$4m.

83 Mr Lobo bases his submission on the fact that at [223(a)] of her Judgment, the Judge indicated that one of the Vendors gave evidence that he did not view the YKL Offers seriously as they "appeared to be unsolicited and involved very little face-to-face negotiation[s]". Mr Lobo alludes to an email from the Vendors to Mr H Wong that "[a]ll things are possible" after the expiry of the Purchaser's Call Option, which implied that the Vendors were actually extremely willing to sell. Mr Lobo submits that since the Judge took into account irrelevant considerations, once these were excluded the likelihood of the deal would necessarily have to be revised upward.

84 We do not accept Mr Lobo's submission. With respect, Mr Lobo seems to have confused the point on several levels. First, Mr Lobo's oral submissions contradict his written submissions, wherein he stated that the Vendor's views were irrelevant. In his written submissions, Mr Lobo pointed out that it would not be the Vendors selling the stake in the Target Companies to YKL. Rather, any sale to YKL would be predicated on Mr Liong (via YGG) exercising the Purchaser's Call Option and obtaining the remaining 60% stake from the Vendors. Once YGG had a complete 100% stake in the Target Companies, it would then proceed to sell them to YKL, the Vendors would not strictly speaking, feature in this aspect of the sale since they would no longer be owners of the Target Companies. It seems to us that Mr Lobo's oral submissions fall quite flat, since (as he points out himself) the Vendors' willingness to sell *after* the exercise of the Purchaser's Call Option is quite beside the point.

85 Second, the Judge was referring to the Vendors' evidence *at the trial*, which was well after YGG had exercised the Purchaser's Call Option to acquire the *entire* stake of the Target Companies from the Vendors. The Vendors had nothing to gain from pitching the odds of the deal at a low likelihood, since they no longer owned the Target Companies. In those circumstances, we could see no reason why this would not be an objective assessment of the odds of the second YKL Offer materialising.

86 Third, and in any event, we do not accept that the mere phrase "[a]ll things are possible" indicates the Vendors thought that there was a high likelihood of a deal (that the YKL Offers were serious, or that the Vendors were actually willing to *sell*). A close reading of the email Mr Lobo referred us to shows that the Vendors were only leaving open the possibility of a deal, as they were only willing to state that they would "*review* the details of the proposal from [YKL] when it is available".

87 Fourth, we also do not accept Mr Lobo's written submission that the Vendors' evidence should be given no weight because it was YGG which would sell the stake in the Target Companies to YKL. This seems to have confused the Judge's reasoning. As we stated at [85] above, it seems to us that she was merely using the Vendors' evidence as a third-party objective ***assessment*** of what the likelihood of a deal would be. Whether the Vendors were in a position to ultimately avail themselves of the opportunity is quite irrelevant, their advantage (from an evidential standpoint) was the fact that they were the recipients of the YKL Offers.

88 On the whole, we are ultimately not persuaded by Mr Lobo's submissions that the Judge had taken into account irrelevant considerations, and failed to take into account the relevant ones. On the contrary, it seems to us that the Judge had carefully considered and taken into account only the relevant facts in arriving at her decision. In particular, the Judge considered that there were several factors that reduced the chance of a deal, including the lack of due diligence by YKL when the second YKL Offer was made, YKL's condition that Ms Mao stay on for the next five years to manage the Target Companies (which appeared unlikely to be met as it was with great difficulty that YGG had persuaded her to stay on for three months), and YKL's assumption that the Vendors would continue to run the Target Companies (see the Judgment at [223]).

89 We note in passing that Mr Lobo relied heavily on the High Court's decision in *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd and another* [2007] SGHC 50 ("*Starwood Asia (HC Assessment)*"). It seems to us that the High Court was ***not*** laying down a general approach applicable to all cases involving loss of a chance in a commercial context. In fact, the High Court at [38] stressed that it was applying a "nuanced approach".

90 Mr Wendell Wong also pointed out that the nature of the property lost in *Starwood Asia (HC Assessment)* is quite different from the present case. In *Starwood Asia (HC Assessment)*, the plaintiff had lost the deal to secure a stake in a hotel. In contrast, although YGG lost the opportunity to sell its stake in the Target Companies to YKL for a substantial profit, it continues to own them and could conceivably sell them for a profit to another seller. In this regard, Mr Soh informs us that the Target Companies remain a going concern. Mr Wendell Wong submits that this factor must be taken into account, and that the Judge's assessment of the likelihood of the deal at 12.5% was therefore a fair one, and her award should be maintained on appeal.

91 We see some force in Mr Wendell Wong's submission. Even though YGG's claim was ultimately for the *profit* arising from the YKL Offer (which now has been lost since YKL is no longer interested in purchasing the Target Companies from YGG), it is worth noting that YGG will continue to retain the possibility of re-selling the Target Companies for profit even after receiving an award arising from the loss of a chance of the YKL Offers. We do not propose to canvass the point further as we did not receive detailed submissions on this distinction between loss of a chance in *Starwood Asia (HC Assessment)* and the present case. In any event, Mr Wendell Wong accepts that the Judge's assessment of the quantum of the award of 12.5% was correct.

92 In the circumstances, we affirm the Judge's award and dismiss YGG's appeal in CA 68.

Our decision on the counterclaim in Suit 337 and the claim in Suit 107

93 The Judge was of the view that the counterclaim for conspiracy in Suit 337 was not made out (see the Judgment at [136]–[144]). She was also of

the view that the claim for conspiracy in Suit 107 failed (see the Judgment at [236]).

94 As we had indicated at [47] above, we did not accept that Suit 104 was launched improperly because it had named MCH as a defendant.

95 As for lawful means conspiracy, we agree that there is no evidence that Mr Liong, YGL, or any of the defendants in Suit 107 was motivated by an intention to injure MCH, Mr H Wong, or Mrs Wong. On the contrary, the Judge's assessment was that Mr Liong was anxious throughout to exercise the Purchaser's Call Option and to second the Core Management Team (see the Judgment at [142]). In our judgment, if Mr H Wong had had sufficient funds to exercise the Purchaser's Call Option at the material time, this would indirectly have been in *his* best interests. We affirm the Judge's findings in this regard.

96 Mr Wendell Wong submits that YGG should nevertheless be wound up on just and equitable grounds. We can see no basis for this submission. In *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827, this court had observed at [31] that the touchstone is that of "unfairness", which then calls forth the court's just and equitable jurisdiction under s 254(1)(*i*) of the Companies Act (Cap 50, 1994 Rev Ed), which was the predecessor provision to the current s 254(1)(*i*) of the Companies Act (Cap 50, 2006 Rev Ed). It does not apply where the loss of trust and confidence in the other member is self-induced. Far from acting unfairly, Mr Liong's and YGL's actions were motivated by Mr H Wong's breaches of his duties and obligations.

97 The Judge cited this court's observations in *Perennial (Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd and other appeals* [2018] 1 SLR 763 at [56] to note the presence of a buy-out mechanism in the Amended

August Agreements as a factor militating against the granting of a winding-up order. Before us, Mr Wendell Wong relies on the same passage, stating that there would be "atypical situations in which unfairness would be established notwithstanding the presence of the buy-out mechanism".

98 With respect, Mr Wendell Wong's submission rather missed the point, as it still remained incumbent upon him to show that there was unfairness on the part of Mr Liong and YGL. Given the underlying context disclosed no bad faith on Mr Liong's and YGL's part, we agree with the Judge that there was no basis for a winding up order (see the Judgment at [238]).

99 We therefore dismiss MCH's, Mr H Wong's and Mrs Wong's appeal in CA 65 with regard to the conspiracy claims and counterclaims.

Conclusion

100 We dismiss CA 67. We allow CA 65 on the very limited point of Event of Default 2. We allow CA 68 in part in so far as default interest up to the date of writ should be revised upward to S$40,000 and will run up until date of payment instead of the date of Judgment.

101 Unless the parties are able to come to an agreement on costs, they are to furnish, within 14 days from the date of this judgment, written submissions limited to 10 pages each, setting out their respective positions on the appropriate costs orders for the appeals in the light of the present judgment.

Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal	Woo Bih Li Judge

Wendell Wong Hin Pkin, Chen Jie'An Jared and Tan Si Ying Evelyn (Drew & Napier LLC) for the appellants in Civil Appeal No 65 of 2019 and the respondents in Civil Appeals Nos 67 and 68 of 2019;
Navin Joseph Lobo, Vani Nair, Shaun Oon Kim San and Sonia Vijendran (Bird & Bird ATMD LLP) for the first respondent in Civil Appeal No 65 of 2019 and the appellant in Civil Appeal No 67 of 2019;
Anthony Soh Leong Kiat and Jasmine Toh (Taylor Vinters Via LLC) for the second to fifth respondents in Civil Appeal No 65 of 2019 and the appellant in Civil Appeal No 68 of 2019.