Low Kin Kok (alias Low Kong Song) and another *v* Lee Chiow Seng and another [2014] SGHC 208

Case Number : Suit No 747 of 2012

Decision Date : 21 October 2014

Tribunal/Court : High Court

Coram : George Wei JC

Counsel Name(s) : Boon Khoon Lim and Dora Chua (Dora Boon & Company) for the plaintiffs; Defendants in person.

Parties : Low Kin Kok (alias Low Kong Song) and another — Lee Chiow Seng and another

Contract – Misrepresentation

Contract – Contractual Terms

Contract – Breach

21 October 2014

George Wei JC:

Introduction

1 This was a case arising out of a failed investment project undertaken by the plaintiffs ("the Plaintiffs"), Low Kin Kok @ Low Kong Song ("P1") and Lim Hun Wan ("P2"), and the defendants ("the Defendants"), Lee Chiow Seng ("D1") and Lee Chiow Poh ("D2"). The trial took place between 18 and 20 February 2014, and I reserved judgment upon the conclusion of the trial. Having considered both the evidence and the parties' submissions, I allowed the Plaintiffs' claim for breach of contract and granted judgment in the sum of S$750,000 to the Plaintiffs. The Plaintiffs' claims in misrepresentation and restitution were disallowed. The Defendants have since filed an appeal against my decision and I now set out the grounds for my decision.

The background facts

2 At the outset, I observed that the dispute was mainly factual in nature. On the evidence before me, I noted significant disparities between the factual accounts of the plaintiffs and the defendants. While I recognised that the parties had given a relatively comprehensive account of what actually transpired over the course of the past 20 years, for the purposes of this decision, I will focus only on the relevant facts.

3 In 1991, D1 informed P1 that he knew an Indonesian landowner, Jackson Kennedy Tarigan ("Tarigan"), who owned nine plots of land in Padang, Indonesia. It appeared that the nine plots of land had been pledged to an Indonesian bank to secure a credit line in connection with a sawmill business. The Indonesian company operating the sawmill business, PT Indo Max Padang, was owned by an Indonesian referred to by the Defendants as Mr Syafril ("Syafril"). [note: 1]

4 At that point in time, Tarigan required two guarantors to provide the Indonesian bank with S$230,000 so that the bank would not exercise its right of foreclosure. The money would also secure

the release of the original title deeds from the bank. In this regard, it was alleged that D1 had made the following representations to P1: [note: 2]

(a) the nine plots of land had good commercial development prospects and the potential of generating lucrative returns;

(b) Tarigan was willing to allow the persons who could procure the release of the original title deeds to develop the nine plots of land and generate profits; and

(c) the profits arising from development of the nine plots of land would be split in the following proportions:

(i) 1/5 to Tarigan; and

(ii) 4/5 to the rest of the investors.

5 P1 subsequently agreed to stand as guarantor and he transferred S$230,000 to the Indonesian bank, as instructed by D1. Sometime later, D1 allegedly informed P1 that he had taken possession of the original title deeds, and that the Defendants (*ie*, both D1 and D2) had entered into an agreement with Tarigan to develop the nine plots of land into a beach resort, which would later be sold for a profit. P1 was allegedly told that the Defendants would be looking for other investors to fund the development of the beach resort. It was undisputed that P1 was subsequently returned the sum of S$230,000 that he had paid to the Indonesian bank earlier.

6 At this juncture, I also note the passing reference to a seaweed and ginger business started by the Defendants in Indonesia, which P1 had invested a sum of S$100,000 in. It was undisputed that the seaweed and ginger business had failed to take off and that P1 had lost his entire investment of S$100,000. While P1 complained that the failure of the business was attributable to poor management, [note: 3] I was not inclined to make any finding on this matter due to the paucity of the evidence before me. In any event, the failure of the seaweed and ginger business was irrelevant.

7 Sometime after P1 had agreed to be an investor of the beach resort project, D2 approached P2 and persuaded P2 to meet D1 for a better understanding of the beach resort project. [note: 4] It was alleged that similar representations (see [4] above) had been made to P2 at the meeting. P2 subsequently agreed to invest in the beach resort project and provided a sum of S$100,000 to the Defendants.

8 In or around the middle of 1991, the Defendants informed the Plaintiffs that there were no other investors. In other words, the Plaintiffs and the Defendants were the only investors of the beach resort project. At this juncture, it bears emphasising that the parties in the present action did not dispute that the Plaintiffs had each invested S$100,000 in the beach resort project. The main factual dispute concerned the representations that were made by the Defendants to the Plaintiffs, and whether the Defendants ever intended to carry out the beach resort project. I noted that S$100,000 was and is a substantial sum of money. The evidence was that until the nine plots of land were developed and sold, the money derived from the land would be divided equally amongst the investors.

9 The evidence relating to what happened between the middle of 1991 and 2010 was extremely hazy. There appeared to be an extended hiatus during which nothing much happened to the nine plots of land. While there was some evidence of D1 preparing brochures and plans to attract

investors, it appeared that there was limited progress apart from a few sporadic visits to the actual site. This included a visit by D2 and an architect to prepare some drawings for the beach resort project.

10 Sometime in 2010, the Defendants orally informed the Plaintiffs that the beach resort project was to be called off and that the landowner had decided to sell the nine plots of land on an "as is" basis. Given the extraordinary lapse of time after the initial investment of funds, it was unsurprising that the beach resort project was cancelled. In this regard, the Plaintiffs alleged that they had been told to assist in finding buyers for the nine plots of land.

11 While the Plaintiffs questioned the *bona fides* of the Defendants in respect of the beach resort project, and whether the Defendants had ever intended for the beach resort project to become a reality, the fact of the matter is that between 1991 and 2010, there was little or no evidence to suggest that the Plaintiffs had made any complaints about the lack of progress. In contrast, the Plaintiffs appeared to be largely contented with adopting a "wait and see" approach.

12 It was also clear that the Plaintiffs' active involvement in seeking buyers for the nine plots of land only started in 2010. This happened after a severe earthquake in Padang, in which D1 had the misfortune of being trapped under the rubble of a hotel he was staying in. [note: 5] In this regard, D1 expressed his hurt and anguish at the apparent insensitivity of P1, who had asked for updates regarding the beach resort project when D1 was still recovering from his traumatic experience. Nevertheless, D1 subsequently accepted that he had asked the Plaintiffs to assist in looking for a buyer or investor for the nine plots of land as his injuries had made it difficult for him to continue working on the beach resort project.

The parties' arguments

13 Before moving on to the reasons for my decision, I will first set out a brief summary of the parties' arguments. I noted that the evidence pertaining to the terms of the arrangement under which the Plaintiffs had each invested S$100,000 was based entirely on the oral testimony of the parties as the agreement had not been reduced in writing.

The Plaintiffs' position

14 In essence, the Plaintiffs asserted that they had been deceived by the Defendants into investing S$100,000 each in the beach resort project, which they complained turned out to be completely fictitious and dubious. [note: 6] To this end, the Plaintiffs pleaded fraudulent or innocent misrepresentation and/or deceit.

15 With regard to the later agreement to call off the beach resort project, the Plaintiffs set out in detail the chronology of events to establish their case that the Defendants never harboured the intention of allowing the Plaintiffs to find a buyer for the nine plots of land.

16 The Plaintiffs asserted that the parties had reached an oral understanding in 2010 as follows: [note: 7]

(a) the nine plots of land would be sold on an "as is" basis;

(b) the nine plots of land would be divided equally between P1, P2, D1 and D2;

(c) each party would select two plots of land and the Plaintiffs would be given priority to make

their selections first;

(d) the ninth plot of land would be split equally between P1, P2, D1 and D2; and

(e) 1/5 of the net proceeds from the sale of each party's share would be paid to the landowner.

I noted that D1, while under cross-examination, accepted that he had asked the Plaintiffs to help look for buyers and that the decision to shelve the beach resort project was his idea. [note: 8] D1 also agreed that in principle, each investor would be allotted two plots of land while the ninth plot was to be shared equally, and that the landowner was to receive 1/5 of the net sale proceeds. [note: 9]

17 As a result of the oral understanding above, the Plaintiffs arranged for their friend, Wee Khoon Guan ("Wee"), who was a property agent, to assist in finding buyers. Subsequently, a meeting took place towards the end of 2010 between P1, P2, D1 and Wee to discuss the sale of eight plots of land for S$1m. However, according to the Plaintiffs, D1 informed the Plaintiffs shortly after the meeting that he had changed his mind and did not wish to sell his two allotted plots. D1 later confirmed his change of mind via an email dated 22 February 2011 to the Plaintiffs. [note: 10] Nonetheless, it was stated in the email that D2 was to proceed with the sale of his two allotted plots of lands, though it would only take place after the Plaintiffs had sold their four allotted plots.

18 Thereafter, a second meeting took place between P1, P2, D2 and Wee to discuss the sale of six plots of land for S$1m. In or around this time, D1 was said to have verbally assured the Plaintiffs that the title deeds were still in D1's possession, and that they would be released upon the Plaintiffs finding a buyer. To this end, the net sale proceeds, after deduction of a 10% commission to Wee, would be split amongst the parties as follows:

(a) the landowner, Tarigan, was to receive 1/5 of the sale proceeds; and

(b) P1, P2 and D2 would share the balance in accordance with the oral understanding above (see [16] above).

19 The Plaintiffs also asserted that D1 had orally assured them that if any sale should fall through due to the Defendants' failure to release the title deeds, the Defendants would reimburse the Plaintiffs on the basis of the agreed sale price. [note: 11] While the use of the term "reimburse" gave rise to some ambiguity, it appeared that the Defendants were meant to purchase the four plots of land allotted to the Plaintiffs at the buyer's offer price should the sale be aborted as a result of the Defendants' failure to release the title deeds.

20 Subsequently, the sale of the six plots of land fell through as the Defendants informed the Plaintiffs by way of an email dated 31 March 2011 that they would not be selling their plots of land together with the Plaintiffs. [note: 12] Thereafter, Wee informed the Plaintiffs that potential buyers for the Plaintiffs' four plots of land had been found at the price of S$750,000 with a request for completion by April 2011. In this regard, the Plaintiffs asserted that unsuccessful attempts had been made on various occasions to obtain the title deeds from D1. Sometime later, it was said that D1 agreed to release the four title deeds on the condition that the Plaintiffs forward a cashier's order amounting to 20% (less 10% commission for Wee) of the purchase price of S$750,000. [note: 13]

21 Through their solicitors, the Plaintiffs wrote to the Defendants' solicitors on 3 May 2011

requesting a date to exchange the cashier's order in return for the Plaintiffs' four title deeds. [note: 14] However, the Defendants did not respond and the Plaintiffs sent another letter on 31 May 2011, [note: 15] whereupon the Defendants responded on 31 July 2011. The Defendants requested that the Plaintiffs draft a sale and purchase agreement for the Defendants' review prior to their handing over of the title deeds. P1 complied and sent a draft agreement to D1 via email on the same day. [note: 16] In response, D1 forwarded the draft agreement to his lawyers and sought their opinion on certain legal issues, including foreign ownership of land in Indonesia.

22 Following this, one Ai Ai informed the Plaintiffs that D1 was ready to hand over the title deeds on the condition that they were to be passed to a Singapore lawyer. Ai Ai, who was Tarigan's ex-wife, became the landowner in Indonesia given that Tarigan had passed away. In this respect, while under cross-examination, D1 agreed that Ai Ai had called him before 7 September 2011 and that he had told her to go to Singapore. [note: 17] It was further acknowledged that there was some uncertainty over her entitlement, if any, to Tarigan's estate. Nevertheless, the issues concerning Tarigan's estate and the rights of Ai Ai and the children are irrelevant in so far as they do not affect the claims of the Plaintiffs against the Defendants.

23 The Plaintiffs had requested the title deeds from D1 via email. However, no title deeds were handed over at the scheduled meeting between P2 and D1. Instead, D1 forwarded to the Plaintiffs his email to his lawyers asking whether D1 should hand over all nine title deeds on the condition that the Plaintiffs sign personal undertakings to the Defendants. In addition, the Plaintiffs asserted that the Defendants had asked for equal shares of the net profits arising from the sale of the four plots of land, regardless of any earlier allocation.

24 Thereafter, D1 informed P1 via an email dated 17 October 2011 that he was prepared to release all nine title deeds to the Plaintiffs' lawyers on the condition that the Plaintiffs sign a "power of attorney" to represent all the parties involved. [note: 18] In response, P1 explained in an email to D1 dated 22 October 2011 that the Plaintiffs had no interest in the Defendants' allotted plots and were only concerned with their four plots of land, for which a buyer had been found. [note: 19] In this regard, the Plaintiffs also intimated that they might look to D1 for the lost opportunity should the sale be aborted due to D1's delay in handing over the four title deeds.

The Defendants' position

25 On the other hand, the Defendants made no mention of any oral agreement or understanding as set out at [16] above. There was also a dispute over whether the landowner's share was 1/5 or just 5%. In this regard, D1 adduced a confirmation letter dated 15 December 1990 wherein the landowner's share was reflected as 5%. D1 explained during cross-examination that the 5% figure referred to the proportion of the net profits that the landowner would receive in the event the beach resort was developed and sold, whereas 1/5 represented the corresponding figure if the land was merely sold on an "as is" basis. Regardless, D1 agreed that P1 had informed the Defendants that he had been able to find a buyer for the properties through Wee.

26 In addition, it was also unclear if the Plaintiffs were intended to be financial investors *per se* or be co-owners of the nine plots of land or the beach resort. To this end, it appeared that D1 had adopted the latter position in his email response to the Plaintiffs dated 1 November 2011. [note: 20] Pursuant to P1's explanation that the Plaintiffs were only concerned with their allotted plots, D1 stated via the email dated 1 November 2011 that the parties had purchased the nine plots of land in 1992. Moreover, it appeared that D1 was of the view that the Plaintiffs should sell the nine plots of

land in the common interests of all four parties.

27 Moreover, D1 asserted under cross-examination that problems would arise if the Plaintiffs' four allotted plots of land were sold, leaving the other four plots behind. However, no reasons were furnished in support of his position. Furthermore, although D1 agreed that he knew the Plaintiffs had wanted the title deeds to the four plots of land, he was of the view that the Plaintiffs did not know what they were doing as the offer price of S$750,000 was too low.

28 I noted that the dispute between the parties also extended to the ninth plot of land, as well as the compensation received by the Defendants from an Indonesian state-owned company when the latter had compulsorily acquired parts of the nine plots of land for road building purposes. In contrast to the Plaintiffs' understanding that the parties were to share the sale proceeds for the ninth plot of land equally, D1 set out his position on the matter in his email dated 22 February 2011. He wanted to donate the ninth plot of land to a local Catholic Church. [note: 21] However, this did not appear to have taken place.

29 With regard to the issue of compensation, the Plaintiffs asserted that an amount of Rp 65,000 per square metre was paid, whereas the Defendants stated that only three compensation payments amounting to Rp 179.2m had been made. In elaboration, D1 also asserted that the entire compensation amount had been used to meet annual land tax payments as well as overhead expenses of maintaining the land, which exceeded the compensation amount.

30 On a related note, it was also disputed who the landowner of the nine plots of land was. In this regard, Wee helpfully clarified the issue on the chain of ownership in his evidence. It appeared that Syafril had acquired the land from the predecessor landowners and sold it to Tarigan via a sale and purchase agreement on 3 January 1991. As the Land Register had not been updated, a power of guarantee was executed by the predecessor landowners in favour of Tarigan. Together with the title deeds and the sale and purchase agreement, the power of guarantee established that the nine plots of land were owned by Tarigan. Tarigan appeared to be D1's nominee. Subsequently, a proxy and sub-proxy were appointed by way of a series of powers of attorney. It appeared that the appointments might have been for the limited purpose of seeking land compensation. Pursuant to Tarigan's demise, there may be potential claims by Tarigan's ex-wife, Ai Ai, and their four children with respect to the nine plots of land. Nevertheless, this was not an issue before me. What was at least clear was that there were nine separate title deeds to the nine plots of land.

The decision

Misrepresentation

31 The Plaintiffs' claim in misrepresentation appeared to be based on the Defendants' statements made to induce the Plaintiffs to invest money in the beach resort project back in 1991. On that basis, the representations which the Plaintiffs relied on to establish their claim would have been made more than 20 years ago. In that respect, s 6(1) of the Limitation Act (Cap 163, 1996 Rev Ed) clearly states that actions founded on a contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. To that end, subject to s 29(1) and postponement of the limitation period in cases of fraud, the Plaintiffs' claim in misrepresentation appears to be time-barred.

32 Nevertheless, it bears noting that s 4 of the Limitation Act states unequivocally that:

> Nothing in this Act shall operate as a bar to an action unless this Act has been *expressly pleaded*

as a defence thereto in any case where under any written law relating to civil procedure for the time being in force *such a defence is required to be so pleaded*.

[emphasis added]

In this regard, it is trite law that the relevant statute of limitation has to be pleaded specifically if a party intends to rely on the defence of limitation. This requirement is set out in O 18 r 8 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed):

A party must in any pleading subsequent to a statement of claim *plead specifically any matter*, for example, performance, release, *any relevant statute of limitation*, fraud or any fact showing illegality —

(*a*) which he alleges makes any claim or defence of the oppose party *not maintainable*;

(*b*) which, if not specifically pleaded, might *take the opposite party by surprise* …

[emphasis added]

On that basis, given that the Defendants did not plead any relevant statute of limitation, the defence of limitation was inapplicable. I therefore proceed to evaluate the substantive merits of the Plaintiffs' claim in misrepresentation.

33 The relevant legal principles are relatively straightforward. In the recent Court of Appeal decision of *Lim Koon Park and another v Yap Jin Meng Bryan and another* [2013] 4 SLR 150, V K Rajah JA, in delivering the judgment of the court, made the following observations at [38] on what amounts to an operative misrepresentation:

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

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

34 A representation is a statement of fact, which may be a past or present fact. In this respect, it has been acknowledged that a statement as to a man's intention, or his own state of mind, is no less a statement of fact. On that basis, a misstatement of the state of a man's mind is a misrepresentation of fact (see *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483). The Court of Appeal in *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 made the following observations at [13]–[14]:

13 The point that a statement as to intention could be a statement of fact was further elucidated by Tudor Evans J in *Wales v Wadham* [1977] 2 All ER 125 at 136:

A statement of intention is not a representation of existing fact, unless the person making it does not honestly hold the intention he is expressing, in which case there is a

misrepresentation of fact in relation to the state of that person's mind.

…

14 Of course, it will be difficult to prove what was the state of a person's mind at any particular point in time. Nevertheless, that is a matter of proof and it should not be confused with the substantive principles of law.

35 Here, the representations made by the Plaintiffs could be broadly classified into two main categories. The first category included statements which pertained to the Defendants' state of mind. In particular, it would include the Defendants' representation that they had intended to develop the nine plots of land into a beach resort. The second category included statements concerning the attributes of the nine plots of land, such as its physical location and commercial viability. At the outset, I noted that the Plaintiffs' claim in misrepresentation appeared to be confined to the statements falling within the first category. This was based on the Plaintiffs' main argument that the Defendants never intended to carry out the beach resort project in the first place.

36 Nevertheless, even if I had accepted that the Plaintiffs' claim included representations that fell within the second category, I was of the view that the claim could not succeed due to the lack of evidence to establish the falsity of those representations. In this regard, the learned authors in *Chitty on Contracts* vol 1 (H G Beale gen ed) (Sweet & Maxwell, 31st Ed, 2012) ("*Chitty on Contracts*") commented at para 6–023 that "[i]t is an obvious requirement of misrepresentation that the statement relied on be *false*" [emphasis added]. This was also alluded to in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 11.056:

> A misrepresentation is simply a representation that is *false or untrue*. To be actionable, *the plaintiff must allege and prove that the representation was false*. A true statement, even one made with the malicious intent of causing harm, is not actionable as a misrepresentation. A statement is false when *the facts as asserted do not correspond with the facts as they exist*. …
>
> [emphasis added]

In my judgment, there was simply insufficient evidence to establish the falsity of the representations concerning the physical attributes and commercial viability of the nine plots of land. While it was undisputed that the development of the beach resort project did not proceed in accordance with the original plan, there was no evidence to suggest that it had been due to the attributes of the plots of land in question. The Plaintiffs had not produced any other objective evidence to demonstrate that the description given by the Defendants were false or inaccurate. Therefore, any claim for misrepresentation on the basis of the second category of representations could not succeed.

37 Moving on to the first category of representations, which pertained to the issue of whether the Defendants had intended to carry out the beach resort project, I found that that the Defendants did intend to develop the beach resort. Therefore, there was no misrepresentation of the Defendants' intention to develop the nine plots of land at the point in time when the Plaintiffs were approached to join as investors. This was notwithstanding the fact that between 1991 and 2010, relatively little progress was made apart from a few sporadic site visits by the Defendants with architects and potential investors.

38 I noted that the evidence above was consistent with the fact that the Plaintiffs were largely contented with allowing D1 to drive the project over the course of the past 20 years. To be clear,

there was no evidence to suggest that the Plaintiffs had suspected anything untoward on the part of the Defendants between 1991 and 2010. In fact, P1 accepted that they were both silent investors in the beach resort project throughout the past 20 years: [note: 22]

Court:	… Between 1991 and 2010, apart from the---there were some attempts made, according to the evidence anyway - but I presume it's going to come through - of a business by potential developers to the site. But unfortunately nothing---no, no, nothing materialised, right. So that's---that's a long span of time, all right. Did you complain during that period?
A:	We---we are just concerned *but since everything leave it to him, of course, I don't complain*.
Court:	Okay. So let's assume you're a bit---*you were like a silent investor*, is it, or would that---would that be a fair description?
A:	That is---
Court:	Would that be fair?
A:	*That is the positions.*

[emphasis added]

In this respect, P2's evidence on the same issue was also consistent with P1's position: [note: 23]

Court:	And that's because everything was largely left to the 1st defendant and the 2nd defendant, all right, yes? Do you---do you agree with that, that is, you confirm if that's what happened? In those---in that interim of 20 years, all right---
A:	Yes.
Court:	---basically everything was left---
A:	Yes.
Court:	---in the hands of D1 and D2.
A:	Yes, because I---I mean, totally I even---I trust from 100%, I mean, we are really good relationship because I trust them totally what we did---we---I don't know anything whatever they do. Even we don't ask them what---what will happening, everything, they just---whatever they---they want to do, they do.

Looking at the evidence as a whole, the Plaintiffs trusted the Defendants to handle the beach resort project and it was undisputed that they had not made any complaints over the course of the 20 years between 1991 and 2010.

39 Although I was prepared to accept as a fact that the project appeared to be ill-conceived right from the get-go, this did not necessarily yield the conclusion that the Defendants had not harboured the intention to develop the beach resort. In arriving at that finding, I also took into account the fact

that the Defendants did make attempts to carry out the beach resort project although it was also apparent that those attempts did not lead to much success. They were both, in my opinion, and if I might say so of them, inexperienced and overly optimistic, rather than being dishonest or fraudulent as the Plaintiffs had put them out to be. In fact, D1 went so far as to candidly admit that he was not a good businessman: [note: 24]

Court:	Didn't you feel worried for your co-investors, right, after so long, right, the money is still locked into this investment; and then after 20 years, it's still exactly the same?
A:	*I'm not a good businessman.*

[emphasis added]

40 Even if I had accepted that the Plaintiffs did in fact represent that they had intended to develop the nine plots of land into a beach resort, there was no evidence to suggest that they did not honestly hold the intention that they were expressing so as to amount to a misrepresentation of fact in relation to the state of their minds. On that basis, the Plaintiffs' claim in misrepresentation had to be dismissed in its entirety.

Breach of contract

41 At the outset, I noted that no written agreement had been entered into by the parties throughout the course of their entire working relationship. If there existed a written agreement to govern the relationship between the parties, it was likely that the considerable heartache involved in painstakingly setting out the evidence through oral accounts could have been avoided. Nevertheless, it is trite law that with the exception of certain specific types of contracts (such as those concerning the transfer of real property), the law does not require a contractual agreement to be in writing.

42 When the court is confronted with a contract that is not reduced in writing, the identification of the contractual terms would effectively involve a fact-finding exercise. Apart from the evidential difficulty in reconstructing what actually transpired between the parties, there is also the challenge in ascertaining which of the statements and representations were intended to be contractual terms. The learned authors in *The Law of Contract in Singapore* made the following observations at paras 06.005 and 06.007:

> Statements that are made during negotiations may be either mere representations, or they may be terms of a contract and are therefore contractually binding. …
>
> …
>
> The distinction between statements that are terms and those that are mere representations rests on the *intentions* of the parties, ascertained in accordance with the *objective* test of agreement. It will be recalled that under this principle, the law considers, not the actual intention of the parties, but what would *appear* to a reasonable person to be the intention in the particular circumstances of the case. As such, there can be no strict rules for the determination of the question. Instead, the facts of the case and the conduct of the parties will have to be closely examined. …
>
> [emphasis in original]

43 An example of how a court would approach the issue of whether there was a contract in the absence of a proper written agreement can be found in the High Court decision of *Colliers International (Singapore) Pte Ltd v Senkee Logistics Pte Ltd* [2007] 2 SLR(R) 230. In that case, the plaintiff argued that an agreement had been entered into between the parties where the plaintiff would be paid a commission by the defendant should the property be sold to a party introduced by the plaintiff to the defendant. The alleged agreement was made partly orally, partly in writing and partly by conduct. In dismissing the plaintiff's claim, Lai Siu Chiu J made the following observations at [60]:

> … It is a trite and an established principle of contract law that an *objective test* will be applied to determine whether an agreement has been reached between any two prospective contracting parties and that, accordingly, the parties' subjective belief, *ipso facto*, is irrelevant unless it assists in ascertaining the objective understanding between them: see, for example, *Projection Pte Ltd v The Tai Ping Insurance Co Ltd* … at [15]. As such, even if one prospective party was of the subjective view that a contract had been concluded *inter partes*, if, on an objective analysis, no such contract was in existence, there would be, in law, no concluded agreement and either side would be free to walk away completely unfettered by any previous negotiations.

44 In the decision of *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63, the Court of Appeal had to deal with an implied contract based on correspondence between two commercial entities. It was observed that contracts may in certain cases be "implied from a course of conduct or dealings between the parties or from correspondence or all relevant circumstances". The Court of Appeal also noted that all the requirements for the formation of a contract, *viz*, offer and acceptance, consideration, intention to create legal relations, and certainty of term must be satisfied before the court would imply the existence of a contract. The following observations from the earlier decision of *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 were also cited by the Court of Appeal at [49]:

> The principles of law relating to the formation of contracts are clear. Indeed the task of inferring an assent and of extracting the precise moment, if at all there was one, at which a meeting of the minds between the parties may be said to have been reached is one of obvious difficulty, particularly in a case where there has been protracted negotiations and a considerable exchange of written correspondence between the parties. Nevertheless, the function of the court is to try as far as practical experience allows, to ensure that the reasonable expectations of honest men are not disappointed. To this end, it is also trite law that the test of agreement or of inferring *consensus ad idem* is objective. Thus, the language used by one party, whatever his real intention may be, is to be construed in the sense in which it would reasonably be understood by the other.

It is clear that what is required is an objective appraisal of what was said and done by the parties in determining whether the essential elements of a valid contract can be made out. It was also observed in Michael Furmston & G J Tolhurst, *Contract Formation: Law and Practice* (Oxford University Press, 2010) at para 1.19 that it is possible to prove a contract by conduct without reference to offer and acceptance if all the essential elements are made out. What is necessary is to prove conduct demonstrating that the parties agreed to be bound by the agreed terms. With these broad legal principles in mind, I now proceed to address the Plaintiffs' claim for breach of contract.

45 I noted that the Plaintiffs' claim in breach of contract was confined to the subsequent agreement concluded between the parties to enable the Plaintiffs to recover their investments. In other words, the Plaintiffs were not alleging any breach of the agreement, if any, that the parties had

entered into at the commencement of the beach resort project when the Plaintiffs first made their monetary contributions. Nevertheless, if it was accepted that an original agreement had been entered into by the parties back in 1991, the subsequent agreement could be characterised in two possible ways:

(a) an agreement to *vary* the original contract; or

(b) an agreement to *rescind* the original contract and enter into a *new* contract.

46 I found it useful to refer to the following observations made by the learned authors of *Chitty on Contracts* at para 22–028:

> A rescission of the contract will also be implied where the parties have *effected such an alteration of its terms as to substitute a new contract in its place*. The question whether a rescission has been effected is frequently one of considerable difficulty, for it is necessary to distinguish a rescission of the contract from a variation which merely qualifies the existing rights and obligations. If a rescission is effected the contract is extinguished; if only a variation, it continues to exist in an altered form. The decision on this point will depend on the *intention of the parties to be gathered from an examination of the terms of the subsequent agreement and from all the surrounding circumstances*. Rescission will be presumed when the parties enter into a new agreement which is *entirely inconsistent with the old*, or, if not entirely inconsistent with it, *inconsistent with it to an extent that goes to the very root of it*. …
>
> [emphasis added]

On the evidence, I was satisfied that the parties had entered into a *new* agreement as part of the process of bringing their longstanding collaboration to an end. In other words, the original agreement entered into by the parties, if any, would have been rescinded by agreement. In arriving at this finding, I took into account the fact that the subsequent agreement to enable the Plaintiffs to recover their investment was wholly inconsistent with and had a completely different object as compared to the original agreement to develop the beach resort. On that basis alone, I was of the view that the parties had agreed to rescind the original contract and enter into a new contract for the purpose of allowing the Plaintiffs to recover whatever was left of the failed beach resort project.

47 The next issue to be addressed pertained to the ascertainment of the terms of this new agreement that was entered into by the parties. As explained above, this effectively involved a fact-finding exercise, which depended on the intentions of the parties as ascertained in accordance with the objective test of agreement. At the outset, I noted that the main dispute appeared to be in relation to the method used to divide the nine plots of land. Based on the evidence led by the parties, there were three distinct possibilities:

(a) to sell the entire parcel of nine plots as a whole and split the sale proceeds in the following proportions:

(i) 4/5 to be shared equally by the parties (*ie*, the Plaintiffs and the Defendants); and

(ii) 1/5 to the landowner.

(b) to allocate to each investor two plots of land and share equally in the proceeds arising from the sale of the ninth plot of land. Each investor would be entitled to retain 4/5 of the sale proceeds (from the sale of his own share) with the remaining 1/5 to be given to the landowner;

or

(c) to allocate to each investor two plots of land and share equally in the proceeds arising from the sale of the ninth plot of land. While each investor would be allotted two plots of land, the proceeds from the sale of their respective shares would be shared in the following proportions:

(i) 4/5 to be shared equally by the parties (*ie*, the Plaintiffs and the Defendants); and

(ii) 1/5 to the landowner.

48 It was apparent that the second and third options would likely involve the nine plots of land being sold separately, as opposed to the first option, which entailed all nine plots being sold as a whole. In this respect, the Plaintiffs argued that the agreement entered into by the parties was the second option. On the other hand, the Defendants' position appeared relatively unclear. Based on the affidavits filed and the Defendants' evidence in court, it appeared that D2 had left the management of the beach resort project to D1. To this end, I recognised that D1 had been very much in charge of the entire project. Nevertheless, D1's evidence as to what had transpired between the parties in 2010 was relatively hazy.

49 Looking at the evidence as a whole, including the cross-examination of D1, I was of the view that the arrangement was to allocate two plots of land to each investor as per the second option described above. In fact, it was consistent with the position set out by D1 in his closing statement: [note: 25]

… The decision to split the land for sale and for each investor to take two plots of land was only made much later and this is the reason why I held the title deeds from the beginning. …

50 Moreover, the Defendants did not show that the agreement between the parties was in fact the first option as described above. First, D1 did not show how his apparent concerns regarding the land sale were inconsistent with the Plaintiffs' evidence that the new agreement embodied the second option as described above. These concerns included, amongst others, whether the Defendants' interests would be protected, whether the landowner would be paid, and whether the Plaintiffs were selling their plots of land at an undervalue. It appeared that D1 was also worried that the Plaintiffs were not familiar with the intricacies of Indonesian law.

51 Furthermore, in view of D1's apparent fears over P1's competence in handling the sale, it was indeed surprising that D1 would have agreed to let the Plaintiffs sell the nine plots of land as per the first option set out above. Therefore, it was more likely the case that D1 only changed his mind when the Plaintiffs were making progress in finding a buyer for their four plots of land in or around October 2011. D1 thereafter demanded that the sale proceeded as per the first option and would only agree to hand over the title deeds if the Plaintiffs undertook to sell all nine plots of land on behalf of the four investors (*ie*, both the Plaintiffs and the Defendants).

52 The above was also consistent with D1's evidence while under cross-examination: [note: 26]

Q: Now I put it to you that sometime in or about 2010, you confirm to Paul and Lim that you and Michael decided to shelve the development project; do you agree?

A: Agree.

Q: Now as a result, you and Michael would not be carrying out the beach resort development project at all; do you agree?

A: Only me; nothing to do with Michael.

Q: *You informed Paul and Lim that the plots of land were to be sold away together as one or in separate plots to potential buyers without any development; do you agree?*

A: *Agree.*

[emphasis added]

That clearly went against the first option, which required all nine plots to be sold together as a whole.

53 In addition, I noted that the email correspondence between the parties supported the finding that the new oral agreement had been concluded on the basis of the second option:

(a) On 21 February 2011, P1 sent an email to the Defendants setting out the proposal that lots 1938 and 1939 be allocated to D1. [note: 27]

(b) D1 replied P1 on 22 February 2011 stating that he had no issues with him being allocated those two plots of land. It was also stated that the buyer could choose which plot he wanted so long as the price was "fair and safe" for the Plaintiffs. [note: 28]

(c) On 31 March 2011, D1 sent an email to P1 regarding the Plaintiffs' proposal to sell six plots of land for S$1m. [note: 29] In that email, D1 expressed his concern that the price was too low. That said, D1 also stated that if P1 really needed the money badly, P1 should make his own decision and that he was entitled to sell his own share.

Therefore, looking at the evidence as a whole, I was satisfied that the agreement had been concluded on the basis that each party would be allocated two plots of land and that they were free to sell their respective shares as long as 1/5 of the net sale proceeds was paid to the landowner.

54 I turn now to the question of whether it was a term of the oral agreement that D1 would compensate or reimburse the Plaintiffs if any sale of their respective shares fell through as a result of D1's failure to release the relevant title deeds. This was an issue heavily disputed by the parties. The Defendants' position was that no such undertaking had been agreed upon by the parties. One of the reasons given by the Defendant was the possibility of the sale being aborted for reasons totally unrelated to the Defendants' actions.

55 The Plaintiffs' position was rather different in this respect. In 2010, at the time when D1 had informed the Plaintiffs that the beach resort project was to be aborted, D1 had allegedly assured the Plaintiffs that the title deeds would be released and necessary arrangements would be made with the Indonesian landowner to effect the transfers pursuant to any sale agreement. Thereafter, the Plaintiffs' evidence was that at the point in time when the Plaintiffs were trying to find a buyer for their four allotted plots of land, D1 had provided various assurances. This included an assurance that D1 had possession or control of the titles deeds as well as an assurance that the Defendants would reimburse the Plaintiffs the agreed sale price should the sale be aborted as a result of the Defendants' failure to release the title deeds.

56 I noted that the Plaintiffs' lawyers had sent a letter dated 3 May 2011 to the Defendants' lawyers, stating that they had been instructed that D1 had earlier proposed to execute the option to buy the land from the Plaintiffs should the proposed sale be aborted. While I accepted that the Plaintiffs' lawyers had merely been setting out the instructions that they had received, the Defendants never responded to that letter. Furthermore, while the letter had referred to the proposal by the Defendants to buy the land should the sale be aborted, it was clear from the letter's contents as a whole that this was made in the context of the Defendants being obliged to hand over the title deeds and other necessary documents to effect the sale.

57 Under cross-examination, D1 revealed that he had instructed his lawyers not to reply to the letter dated 3 May 2011. The reason behind D1's decision appeared to be due to the short time frame given to him to respond, and his anger and concern as to whether the Plaintiffs' lawyers were competent. D1 also denied that he had ever stated that the title deeds would be released, although he agreed that he had told the Plaintiffs to go ahead and sell their allotted plots of land. In this regard, I noted that the letter dated 3 May 2011 had been sent to the Defendants' lawyers pursuant to an indication that D1 was prepared to hand over the four title deeds on the condition that a cashier's order for 20% of the sale price was to be handed over by the Plaintiffs. Furthermore, D1 had also requested the Plaintiffs to engage the services of a Singapore law firm and appeared to be upset that they had engaged a different law firm from the one appointed by the Defendants. Under cross-examination, D1 went as far as to state that if the Plaintiffs had used the law firm that he had appointed, the present dispute would not have arisen. This was because D1 did not trust the Plaintiffs' lawyers. D1 also stated that his concern over the sale of the four plots of land was to protect the interests of P2.

58 Looking at the evidence as a whole, I was satisfied that D1 did assure the Plaintiffs that he had possession or control of the title deeds and that the relevant titles deeds would be released to the Plaintiffs upon them finding a buyer for their four allotted plots of land. In any event, given the oral agreement entered into by the parties on the basis of the second option stated above, it must have followed that D1 was under a duty to release the title deeds to the relevant plots so as to effect the sale. Under such a circumstance, given that there was no doubt that D1 had control over the title deeds, even if such a term had not been expressly agreed upon by the parties, I was prepared to find that there had been, in any event, an implied term that the Defendants would release the title deeds to the plots allocated to the Plaintiffs and take all necessary steps to enable the completion of the sale.

59 The issue of whether D1 did, in fact, on behalf of D2 and himself, provide an assurance that they would take over the purchase should the sale be aborted as a result of any failure to release the title deeds was less clear. For clarity's sake, the Plaintiffs were not adopting the position that the Defendants would be obliged to reimburse them regardless of the reason why the sale was aborted. The obligation to reimburse the Plaintiffs was only said to arise in the event that the sale was aborted as a result of the Defendants' failure to hand over the title deeds. On that basis, I did not find the Defendants' argument, that no such obligation had existed as it would have been absurd for the Defendants to reimburse the Plaintiffs under *all* circumstances, particularly convincing.

60 Viewing the evidence in its totality, I was satisfied that the Defendants had provided the undertaking to reimburse the Plaintiffs in the event that the sale was aborted as a result of the Defendants' failure to release the title deeds. There was evidence to show that the Plaintiffs had been rather concerned about the whereabouts of the title deeds. This was understandable as any proposed sale would have been aborted in the absence of the titles deeds and other relevant documents. The Plaintiffs gave evidence that D1 had stated the Defendants would reimburse the Plaintiffs the sale price of S$750,000 in the event the sale was aborted due to the Defendants' failure

to release the title deeds. This must be understood as an agreement by the Defendants to take over the purchase at the sale price of S$750,000, which was consistent with the Plaintiffs' position as set out in their lawyers' letter dated 3 May 2011. The undertaking formed part of the agreement entered into by the parties to draw a closure to the failed beach resort project that had begun in 1991.

61 In arriving at that conclusion, I also noted that D1 was, at times, uncooperative and combative, especially during the course of his cross-examination. I was unable to accept D1's account of events as his evidence was inconsistent. At the outset, D1 conceded that he had agreed to release the relevant title deeds upon a potential buyer being found by the Plaintiffs: [note: 30]

Q:	Now you gave your assurance to both Paul and Lim that once a potential buyer is found, you and Michael would release the relevant original title deeds and make the necessary arrangement with the Indonesian landowner to do the transfer of the land to the potential buyer; do you agree?
A:	"Assurance" under what sense?
Q:	That if you were to find a potential buyer then you---because you have the original title deeds, you will release them?
A:	"Agreed" doesn't mean assurance.
Court:	But you agreed to that?
A:	Yes.
…	
Q:	You also reminded Paul and Lim that upon the completion of sale of Paul and Lim's respective two allocated plots of land, the Indonesian landowner would take one-fifth share of the net profit of sale and the remaining four-fifth share of net profit of sale would belong to them respectively; do you agree?
A:	In principle, I agree.

In this regard, it could be seen that the arrangement between the parties was for the plots of land to be sold and for each party to retain four-fifth of the net profits arising from the sale of the allotted plots. To effect the sale, D1 had agreed to release the original title deeds upon a potential buyer being found by the Plaintiffs. D1 abruptly changed his position later when he gave evidence that the buyer had no right to the original title deeds: [note: 31]

Q: … Okay, Paul and Lim were only left---they were o---they were only able to sell their plots of land. Do you agree?

A: Of course.

Q: Now without the original title deeds a sale cannot take place, do you agree?

A: *No.*

Q: So before a title deed---before the original title deeds a sale can take place?

A: Title deeds is kept by a safekeeper. They saw---

Q: No---

A: ---the things.

Q: The statement, without the original title deeds a sale cannot take place, do you agree?

A: *No. The buyer has no right to access to the original title deeds.*

[emphasis added]

This clearly went against the weight of the evidence demonstrating that the buyer had to, at the very least, be able to verify the original title deeds if the sale was to proceed. This was also practical from a commercial perspective as it was highly unlikely that any reasonable buyer would be prepared to release its funds without having access to the original title deeds in question. To that end, I was not prepared to accept D1's evidence that the buyer has "no right to [have] access to the original title deeds". [note: 32]

62 D1 also gave contradictory reasons to justify why he had refused to hand over the title deeds to the Plaintiffs. On one hand, D1 suggested that the problem was with the lawyers appointed by the Plaintiffs. In fact, D1 went so far as to state that the deal would have gone through without a hitch if the Plaintiffs had appointed Mr Joseph Lopez as their lawyer: [note: 33]

Q:	Now what is required of you for Paul and Lim to sell their plots of land is for you to surrender the original title deeds to the four plots of land, do you agree?
A:	I---yes, I agree. I already sender---surrender the things to a lawyer office. If they want to appoint Joseph Lopez, the deal will go through by now. They don't trust my lawyer, I don't trust their lawyer, this is as simple as that.
…	
Court:	That means the whole dispute, at the end of the day, whatever the history is, turned on whether it's Dacheng or Lopez, jen---Mr Joseph Lopez. If P1 and P2 need to---tell me if I'm wrong if I---if I heard this thing correctly, right, if P1 and P2 had in fact appointed Mr Lopez, all right, then your evidence is that everything would be finished by now. The four plots would be sold, they would have their 750 minus the 20% of whatever it is, yes.
A:	Yes.

The Defendants had, however, not adduced a single iota of evidence to support their baseless accusations directed at the lawyers appointed by the Plaintiffs to handle the sale. More importantly, the evidence could be contrasted with the earlier part of the cross-examination, where D1 gave evidence to the effect that he had refused to hand over the title deeds as the price obtained by the Plaintiffs was undervalued to a large extent. However, upon further questioning on his basis for arriving at such a conclusion, D1 gave the following evidence: [note: 34]

A: … The price is really killers, nonsense price.

Q: Now as a result, the meeting was adjourned in order to allow you time to consult an independent valuer. Do you agree?

A: Yes.

…

Q: So because of what you say, as a matter of fact, you did not consult any independent valuer at all? Do you agree?

A: PLN is my best valuer.

Q: So other than PLN, you did not consult any other valuer at all.

A: I have other valuer giving me the indication by the US$15 per square metre. But they are developer themselves.

There was, however, absolutely no evidence to suggest that D1 had approached other developers to obtain an indication of the market price. More importantly, D1's explanation as to why he had refused to hand over the title deeds was clearly at variance to his objections to the appointment of the Plaintiffs' lawyers.

63 In fact, D1 subsequently alluded to the structure of the joint partnership to support his view that things were not as straightforward as each party selling their respective plots of land: [note: 35]

Q:	Do you agree that at whatever price that Paul and Lim were willing to sell for their four allocated plots of land is not of your concern?
A:	I don't agree. They are my partners all the while. Lim is the partner I treasure a lot.
Q:	But these are their plots of land.
A:	So? This is supposed to be a joint venture partnership, hor. Just because somebody said, "I don't want to join", hor, then they started all this whole things. There is no such thing as, you want to divide as simple as---you think you are---you can do it in Singapore. But can you do it in Indonesia?
…	
Court:	It's like---suppose I---suppose in---on contract, I buy nine tins of baked beans, all right, one contract for nine tins of baked beans, yes. Why should that make it difficult for me to sell four tins of baked beans? Why should that affect anything else?
A:	It's all emotional things. At the end of it---
Court:	It's emotional? Okay.
A:	Yes. All---at the end of---I give up.

Court:	Okay.
A:	My friend is only concerned about what?

As can be seen from the short extract above, D1 once again gave inconsistent evidence. In this case, D1 attributed his reluctance to hand over the title deeds to the nature of the relationship between the parties, as opposed to the lawyers appointed by the Plaintiffs or the undervalued sale price.

64 In the course of being cross-examined, D1 also cast aspersions on many other parties who were purportedly out to "deceive" the Plaintiffs. There was, however, no evidence to back any of these bare allegations by D1. In summary, I found it extremely difficult to follow D1's evidence due to the multiple inconsistencies and I could not accept his justification for failing to hand over the title deeds to the Plaintiffs. The general tenor of the evidence showed that the Defendants had been blowing hot and cold throughout the course of the negotiations for the release of the title deeds. On one hand, the Defendants made multiple requests, such as for the Plaintiffs to submit a draft of the sale and purchase agreement for the Defendants' review and to forward a cashier's order amounting to 20% (less 10% commission for Wee) of the purchase price of S$750,000. On the other hand, after the Plaintiffs had complied with the Defendants' request, D1 still refused to hand over the title deeds as promised on multiple occasions. As mentioned above, I was unable to accept D1's justification for refusing to release the original title deeds.

65 By way of summary, based on the evidence led by the parties, I made the following findings:

(a) The parties had agreed to rescind the original contract and enter into a *new* agreement for the purpose of allowing the Plaintiffs to recover their investments.

(b) D1 had provided an undertaking, on behalf of D2 and himself, to release the relevant title deeds so as to enable the Plaintiffs to sell their allotted plots of land.

(c) The arrangement was for each party to sell their respective shares, as opposed to a sale of all nine plots of land as a whole.

(d) D1 had agreed, on behalf of D2 and himself, to take over the purchase of the Plaintiffs' allotted plots of land at the price agreed by the prospective buyer in the event that the sale was aborted due to the Defendants' failure to release the relevant title deeds.

(e) D1 was largely in charge of the beach resort project and there was no doubt that he had authority and did act on behalf of himself and D2.

66 On that basis, I gave judgment for the Plaintiffs for the sum of S$750,000 with interest as from the date of the judgment. In essence, the Defendants had breached their undertaking to take over the purchase of the Plaintiffs' allotted plots of land in the event that the sale was aborted as a result of the Defendants' failure to release the relevant title deeds. While I acknowledged that the Plaintiffs had also made submissions in respect of the ninth plot of land, I noted that they had, regrettably, failed to make any claim for specific performance or to adduce any evidence as to the value of that particular plot. On that basis, I was unable to award the Plaintiffs any substantive damages in relation to the ninth plot of land.

67 I now address the issue concerning the compensation, which was said to have been received

by D1 as a result of parts of the nine plots of land being compulsorily acquired for road building purposes. While it was accepted that compensation was indeed paid to D1, the parties disputed the quantum of compensation that was paid and whether D1 did use the same to offset expenses incurred in respect of the nine plots of land (*eg*, annual land tax payments). The Plaintiffs' position was that D1 had received more compensation than the amount he disclosed. On the other hand, D1 denied this allegation and asserted that he had disclosed all sums received by him. D1 also stated that the compensation monies had been properly used to pay for expenses incurred in relation to the nine plots of land.

68 On the facts before me, the Plaintiffs did not provide sufficient evidence to support their assertion that more compensation monies had been received by D1. P1 referred to the email from D1 dated 24 December 2012, which had stated four compensation payments totalling some Rp 178m. [note: 36] The same email also stated that the expenses incurred by D1 to make the compensation claim amounted to more than Rp 178m. P1 claimed that this was contrary to the position set out in the defence, where only three compensation payments were admitted. While that may be true, I noted that the three pleaded compensation payments totalled Rp 179.2m. This figure was broadly consistent with the total sum referred to in the email dated 24 December 2012. On that basis, I was unable to agree with the Plaintiffs' position that the Defendants had concealed other compensation payments. In the circumstances, there was no reason to reject the evidence that the compensation received had been spent on expenses incurred in relation to the nine plots of land. After all, I noted that the day-to-day running of the beach resort project in the 20-year period between 1991 and 2010 was very much left to D1. Under cross-examination, D1 agreed that he did not inform the Plaintiffs of the compensation but denied that this was an act of concealment on his part. The tenor of his evidence, as noted above, was that the Plaintiffs were akin to sleeping partners and that the reason why he did not provide them with information on the compensation (and other matters such as the appointment of proxies) was because they had never asked and he was under no duty to inform them. [note: 37] Nevertheless, although the agreement was likely to have involved monies earned from the land being shared among the investors, there was no doubt that this would be subject to the deduction of costs and expenses incurred in relation to the nine plots of land. For the reasons above, the Plaintiffs' argument concerning the compensation sums received by D1 was rejected.

Restitution

69 Since I found that the Defendants had breached the undertaking to reimburse the Plaintiffs, it was unnecessary for me to deal with the Plaintiffs' claim in restitution, which had been pleaded in the alternative. Moreover, I noted that the parties had not made any submissions on the Plaintiffs' claim in restitution. In any event, the absence of an unjust factor in the present case would have ruled out the Plaintiffs' claim in restitution.

Conclusion

70 For the reasons above, the Defendants were to pay the sum of S$750,000 to the Plaintiffs for breach of the undertaking. The Plaintiffs' claims in misrepresentation and restitution were disallowed. Costs to be taxed before the Registrar were awarded in favour of the Plaintiffs.

[note: 1] D1's Affidavit filed on 30 November 2012 ("D1A-1") at p 5, para 14.

[note: 2] P1's Affidavit-of-Evidence-in-Chief filed on 2 May 2013 ("P1AEIC") at p 3, para 7.

[note: 3] P1AEIC at p 11, para 28.

[note: 4] P2's Affidavit-of-Evidence-in-Chief filed on 2 May 2013 ("P2AEIC") at p 2, para 5.

[note: 5] D1A-1 at p 8, para 28.

[note: 6] Plaintiffs' Closing Submissions filed on 20 March 2014 ("PCS") at p 2, para 3.

[note: 7] PCS at pp 29–30, paras 78–79.

[note: 8] Notes of Evidence, 19 February 2014 (Day 2) at pp 101–102.

[note: 9] Notes of Evidence, 19 February 2014 (Day 2) at p 103, lines 12–16.

[note: 10] Agreed Bundle of Documents ("ABD") at p 194.

[note: 11] PCS at p 43, para 120.

[note: 12] ABD at pp 197–198.

[note: 13] PCS at p 51, para 140.

[note: 14] ABD at pp 199–200.

[note: 15] ABD at p 201.

[note: 16] ABD at pp 202–203.

[note: 17] Notes of Evidence, 20 February 2014 (Day 3) at p 24, lines 16–26.

[note: 18] ABD at pp 228–232.

[note: 19] ABD at pp 233–236.

[note: 20] ABD at pp 237–241.

[note: 21] ABD at p 194.

[note: 22] Notes of Evidence, 18 February 2014 (Day 1) at p 45, lines 20–32; p 46, line 1.

[note: 23] Notes of Evidence, 18 February 2014 (Day 1) at p 64, lines 27–32; p 65, lines 1–8.

[note: 24] Notes of Evidence, 19 February 2014 (Day 2) at p 65, lines 15–18.

[note: 25] D1's Closing Statement filed on 20 March 2014 at p 2.

[note: 26] Notes of Evidence, 19 February 2014 (Day 2) at p 101, lines 21–31.

[note: 27] ABD at pp 192–193.

[note: 28] ABD at p 194.

[note: 29] ABD at pp 197–198.

[note: 30] Notes of Evidence, 19 February 2014 (Day 2) at p 103, lines 1–10, 12–16.

[note: 31] Notes of Evidence, 20 February 2014 (Day 3) at p 6, lines 27–32; p 7, lines 1–7.

[note: 32] Notes of Evidence, 20 February 2014 (Day 3) at p 7, line 7.

[note: 33] Notes of Evidence, 20 February 2014 (Day 3) at p 20, lines 10–14, 24–32.

[note: 34] Notes of Evidence, 19 February 2014 (Day 2) at p 109, lines 4–7, 21–26.

[note: 35] Notes of Evidence, 20 February 2014 (Day 3) at p 117, lines 18–26; p 118, lines 23–32.

[note: 36] ABD at pp 268–272.

[note: 37] Notes of Evidence, 20 February 2014 (Day 3) at p 44, lines 5–7.