HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) *v* Toshin Development Singapore Pte Ltd
[2012] SGCA 48

Case Number	: Civil Appeal No 108 of 2011
Decision Date	: 27 August 2012
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Alvin Yeo SC, Sim Bock Eng, Tan Mei Yen, Lawrence Foo and Lim Shiqi (WongPartnership LLP) for the appellant; Cavinder Bull SC, Gerui Lim, Adam Maniam (Drew & Napier LLC) for the respondent.
Parties	: HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) — Toshin Development Singapore Pte Ltd

CONTRACT

CIVIL PROCEDURE

LANDLORD AND TENANT

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2012] SGHC 8.]

27 August 2012 Judgment reserved.

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

Introduction

1 Is a contractual clause directing the parties to in "good faith endeavour to agree" valid in law? If valid, what might be its legal content? Are there any legal consequences if such a clause is breached? Is an expert or adjudicator obliged, before accepting appointment, to inform all parties involved in the appointment process of any prior relationship with any appointer that might be viewed as compromising his impartiality? These are some of the interesting issues discussed in this judgment. This appeal involves a dispute between the appellant landlord, HSBC Institutional Trust Services (Singapore) Limited ("the Appellant"), and the respondent tenant, Toshin Development Singapore Pte Ltd ("the Respondent"), over a contractual rent review mechanism in the lease agreement between them ("the Lease Agreement"). The rent review mechanism in question ("the Rent Review Mechanism") provided that the rent for each new rental term after the first rental term was to be determined by agreement between the Appellant and the Respondent (collectively, "the Parties"), or, failing agreement, by "three international firms of licensed valuers" [note: 1] appointed either jointly by the Parties or by the President (or other designated officer) of the Singapore Institute of Surveyors and Valuers ("the SISV").

2 Between July 2010 and early 2011, the Respondent, without notifying the Appellant, unilaterally approached all eight "international firms of licensed valuers" [note: 2] present in Singapore – namely, CB Richard Ellis (Pte) Ltd ("CBRE"), Chesterton Suntec International Pte Ltd ("Chesterton"), Colliers International Consultancy & Valuation (S) Pte Ltd ("Colliers"), Cushman & Wakefield, DTZ Debenham

Tie Leung (SEA) Pte Ltd ("DTZ"), Knight Frank Pte Ltd ("Knight Frank"), Jones Lang LaSalle ("JLL") and Savills (Singapore) Pte Ltd ("Savills") – to prepare valuation reports on the market rental value of the demised premises ("the Demised Premises") as at 8 June 2010 (the sole exception in this regard was JLL, which was tasked to prepare a valuation report as at 31 December 2010). It should be noted that the date 8 June 2010 was exactly one year before the commencement date of the next new rental term, *viz*, 8 June 2011. The Respondent subsequently engaged the seven firms which agreed to prepare the requested valuation reports. These seven firms (collectively referred to hereafter as "the seven 2010 Valuers" for convenience, even though not all of them were actually engaged by the Respondent in 2010) were the eight firms just mentioned minus Savills, which declined to act for the Respondent The Appellant was dismayed when it discovered what had transpired. It claimed that the Rent Review Mechanism had been rendered inoperable by the Respondent's actions and commenced Originating Summons No 376 of 2011 ("OS 376") seeking a declaration to this effect.

3 The High Court judge who heard OS 376 ("the Judge") concluded that the Rent Review Mechanism remained operable and dismissed the Appellant's application (see *HSBC Institutional Trust Services (Singapore) Ltd, (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd* [2012] SGHC 8 ("the GD")). This is the Appellant's appeal against that decision.

The facts

4 The Appellant is the trustee of Starhill Global Real Estate Investment Trust, which is in turn managed by YTL Starhill Global REIT Management Limited. The Demised Premises consist of six floors of Ngee Ann City (namely, Basement 2 to Level 4), which are all part of the shopping centre managed by the Respondent.

5 The lease granted by the Appellant to the Respondent is for a 20-year term expiring on 7 June 2013, with the Respondent possessing an option to renew the lease for a further 12 years. This 20-year term is divided into rental terms of successive three-year periods, except for the last rental term, which is for the two-year period from 8 June 2011 to 7 June 2013 ("the Last Rental Term"). It is the Last Rental Term which we are concerned with in the present appeal.

The Rent Review Mechanism

6 The Rent Review Mechanism is set out in clause 2.4(c) of the Lease Agreement ("Clause 2.4(c)"), which stipulates how the rent for each new rental term after the first rental term is to be determined. The material part of Clause 2.4(c) reads as follows: [note: 3]

> (c) (i) Prior to the commencement of each Rental Term (other than the first), *the Lessor and the Lessee shall in* ***good faith endeavour to agree*** *on the prevailing market rental value of the Demised Premises* (excluding service charge payable and disregarding the value of all fixtures and fittings installed by the Lessee) for [the] purpose of determining the New Annual Rent for the relevant Rental Term.
>
> (ii) If by three (3) months (time being of the essence) before commencement of the relevant Rental Term the parties have not reached agreement on the New Annual Rent, the parties shall appoint three international firms of licensed valuers (the "licensed valuers") on the basis that each of the licensed valuers shall proceed to separately determine the prevailing market rental value of the Demised Premises. The licensed valuers shall be nominated by agreement between the Lessor and the Lessee or in the absence of agreement by the parties on any one of the licensed valuers by a date ten

(10) weeks (time being of the essence) before commencement of the relevant Rental Term, such of the licensed valuers as have not been agreed upon shall be nominated by the President for the time being of the Singapore Institute of Surveyors and Valuers (or its successor institute) on the application of either the Lessor or the Lessee. If the said President is not available or is unable to make such nomination at the time of [the] application, the nomination may be made by the Vice-President or the next senior officer of the said Institute then available and able to make such nomination. All costs and expenses of and in connection with the appointment of the licensed valuers shall be borne by the Lessor and the Lessee in equal shares. The licensed valuers shall act as experts and not as arbitrators and their respective decisions shall be binding and conclusive on the parties.

(iii) Each of the licensed valuers shall be required by the Lessor and the Lessee to submit its report to the Lessor and the Lessee within one (1) month from the date of its appointment and the licensed valuers in determining the prevailing market rental value shall have regard to the annual rental value of the Demised Premises in the open market as a shopping centre at the date of review on a lease for a term equal to the relevant Rental Term based on an assumed area (the "assumed area") of 21,000 square metres. Each of the licensed valuers in determining such prevailing market rental shall:

(aa) take into account the notional circumstance that the assumed area would necessarily include areas used for circulation;

(bb) disregard the service charge payable and the value of all fixtures and fittings installed by the Lessee;

(cc) assume that the Demised Premises are ready for and fitted out for immediate occupation and use for the purpose or purposes required by the willing tenant.

(iv) The prevailing market rental value of the Demised Premises thus agreed by the Lessor and the Lessee pursuant to clause 2.4(c)(i) or the average of the three market rental values as determined by the licensed valuers, as the case may be, shall be the New Annual Rent for the relevant Rental Term Provided Always that:

(aa) if the prevailing market rental value is less than the Current Annual Rent, the Current Annual Rent shall continue in force and shall be deemed to be the New Annual Rent for the relevant Rental Term; and

(bb) if the prevailing market rental value is an amount which exceeds one hundred and twenty-five percent (125%) of the Current Annual Rent, the New Annual Rent for the relevant Rental Term shall be fixed at an amount equivalent to one hundred and twenty-five percent (125%) of the Current Annual Rent.

(v) In the event the New Annual Rent has not been determined in accordance with this clause prior to the commencement of the relevant Rental Term, the Current Annual Rent shall continue until the New Annual Rent has been determined, but shall be adjusted retrospectively to the commencement of the relevant Rental Term as soon as the New Annual Rent has been determined. Any accumulated arrears of rent owing to the difference between the New Annual Rent and the Current Annual Rent shall be paid by the Lessee to the Lessor within thirty (30) days of the determination of the New Annual Rent.

[emphasis added in italics and bold italics]

7 Under the Rent Review Mechanism, therefore, the new rent for each new rental term after the first rental term is determined via a three-stage process as follows:

(a) At the first stage ("Stage One"), the Parties are to first "in good faith endeavour to agree on the prevailing market rental value of the Demised Premises", [note: 4] which will constitute the new rent for the new rental term.

(b) At the second stage ("Stage Two"), which is triggered if the Parties fail to reach agreement on the prevailing market rental value of the Demised Premises by the date three months before the commencement of the new rental term, the Parties shall jointly appoint "three international firms of licensed valuers" [note: 5] ("the Designated Valuers"), which will each separately determine the prevailing market rental value of the Demised Premises. The average of the three valuations will constitute the new rent for the new rental term.

(c) At the third stage ("Stage Three"), which is triggered if the Parties are unable to reach agreement on the three valuation firms to be appointed as the Designated Valuers at Stage Two, the President (or other stipulated officer) of the SISV shall nominate such of the Designated Valuers that the Parties have not agreed upon. The average of the three valuations produced thereafter will constitute the new rent for the new rental term.

8 Two other aspects of Clause 2.4(c) are noteworthy, namely:

(a) It is expressly provided that the valuation firms appointed as the Designated Valuers "shall act as experts and not as arbitrators and their respective decisions shall be binding and conclusive on the [P]arties". [note: 6]

(b) The new rent for a new rental term cannot fall below the existing rent for the subsisting rental term, nor can it rise above 125% of the existing rent. If the new rent, as determined by any one of the three stages of the Rent Review Mechanism, is less than the existing rent, the new rent will be fixed at the existing rent; if, on the other hand, the new rent is determined to be more than 125% of the existing rent, the new rent will be capped at 125% of the existing rent.

The valuations unilaterally obtained by the Respondent between July 2010 and early 2011

9 As mentioned above, the rental term which we are concerned with in this appeal is the Last Rental Term. Between July 2010 and early 2011, the Respondent approached and engaged the seven 2010 Valuers to conduct a valuation of the prevailing market rent of the Demised Premises as at 8 June 2010 (the only exception was JLL, which was commissioned to provide a valuation as at 31 December 2010 (see [2] above)). The valuations prepared by these seven valuers will hereafter be referred to collectively as "the Toshin valuations". [note: 7] As mentioned earlier, 8 June 2010 was exactly one year before the date on which the Last Rental Term was to begin. According to the Appellant, the SISV was of the view that in deciding on the three valuation firms to be appointed as the Designated Valuers for each rent review exercise, it was good market practice to exclude valuation firms which had performed similar rent reviews within the 12 months preceding the rent review exercise in question. [note: 8]

The rent review exercise for the Last Rental Term

10 On 13 January 2011, pursuant to the Rent Review Mechanism, the Parties arranged for a meeting to discuss the new rent for the Last Rental Term. At this meeting ("the 13 January 2011 meeting"), the Respondent indicated that it wanted to maintain the same rent for the Last Rental Term, while the Appellant indicated that the new rent should be set at the prevailing market rate. [note: 9] Given the Parties' lack of consensus on the new rent, it was agreed that the Parties would proceed to Stage Two of the Rent Review Mechanism. The Parties then began preliminary discussions on the selection process for the three valuation firms which were to be appointed as the Designated Valuers. [note: 10] Despite having commissioned the seven 2010 Valuers to conduct the Toshin valuations and despite having already received those valuations by this time, the Respondent did not disclose these facts to the Appellant during the 13 January 2011 meeting. [note: 11] The meeting concluded with the Parties agreeing to propose their respective choice of valuation firms for the rent review exercise apropos the Last Rental Term ("the Rent Review Exercise") by the following week. [note: 12] The Appellant remained unaware about the Toshin valuations.

The Appellant finds out about the Toshin valuations

11 Eventually, the Toshin valuations did come to light. On 21 February 2011, CBRE (one of the seven 2010 Valuers) informed the Appellant that it had earlier been appointed by the Respondent in 2010 to conduct a similar rental valuation of the Demised Premises. [note: 13] The Appellant immediately sent an e-mail to the Respondent stating that given CBRE's disclosure, the joint appointment of CBRE as one of the Designated Valuers for the Rent Review Exercise would give rise to a conflict of interest and, thus, CBRE was not an appropriate valuer to carry out a valuation of the Demised Premises for both of the Parties. [note: 14] The Respondent disagreed. It took the view that licensed valuers were professionals who would be independent in assessing the market rental value of the Demised Premises, regardless of whether they were appointed jointly by the Parties or individually by one of the Parties. [note: 15] Notably, even at this stage, the Respondent remained reticent about the fact that it had actually engaged not just CBRE, but six other valuation firms as well to value the market rent of the Demised Premises in advance of the Rent Review Exercise.

12 On 16 March 2011, the Appellant wrote to the SISV asking if there were reasonable grounds to exclude CBRE from the Rent Review Exercise, given that CBRE had been appointed by the Respondent to carry out a valuation of the market rent of the Demised Premises in 2010. [note: 16] In the meantime, the Appellant wrote to all eight international valuation firms present in Singapore and discovered, to its consternation, the Toshin valuations. [note: 17] The Appellant promptly conveyed this information to the SISV and requested it to respond promptly with its views. [note: 18]

13 On 4 April 2011, the SISV replied opining that the valuation firms to be jointly appointed by the Parties as the Designated Valuers for the Rent Review Exercise "should be perceived as fair and equitable". [note: 19] The SISV also suggested that: [note: 20]

> On the basis of prudence, any firm appointed by any Party that undertook rental valuation [of] the [Demised] [P]remises before the [R]ent [R]eview [Exercise] should not be included in the list of firms to be appointed for rental valuation under the … [R]ent [R]eview [E]xercise.

The SISV further advised the Appellant that if it remained in doubt about the matter, it ought to seek legal advice. [note: 21]

Relations between the Parties sour

14 After receiving the SISV's letter of 4 April 2011, the Appellant immediately called for a meeting with the Respondent the next day, 5 April 2011. At that meeting, the Appellant confronted the Respondent with the SISV's letter and highlighted its concern that the Respondent, by procuring the Toshin valuations between July 2010 and early 2011, had put itself in a position of advantage for the process of selecting the Designated Valuers for the Rent Review Exercise. The Respondent replied that since 1993, it had always carried out interim valuations of the Demised Premises prior to each rent review exercise for business forecasting purposes. It maintained its view that the independence of the valuation firms which could potentially be appointed as the Designated Valuers for the Rent Review Exercise had not been compromised. In turn, the Respondent queried the Appellant as to why Savills had been proposed as one of the Designated Valuers despite the fact that Savills had a close relationship with the Appellant (the Appellant had appointed Savills to undertake a capital valuation of the entire strata area in Ngee Ann City for the preceding two years). [note: 22] The Appellant insisted that its appointment of Savills had been of a different nature and, thus, Savills was not in a position of conflict.

15 Less than two days after the meeting of 5 April 2011, the Appellant sent the Respondent a letter dated 7 April 2011 stating that the Respondent had, by its actions, rendered the Rent Review Mechanism inoperable. [note: 23] In that letter, the Appellant further claimed that by seeking to gain an unfair advantage in the Rent Review Exercise, the Respondent was in breach of the Lease Agreement as it had acted in bad faith. Additionally, in a further letter dated 14 April 2011, the Appellant asserted that the Respondent would commit a "further breach" [note: 24] of the Lease Agreement if it approached the SISV's President to nominate three valuation firms to act as the Designated Valuers for the Rent Review Exercise.

16 In the light of the impasse, by a letter dated 9 May 2011, the Respondent, in what it described as "a gesture of goodwill" [note: 25] and in the interests of saving time and costs, provided the Appellant with copies of the rental valuation reports produced by Chesterton, Colliers, Cushman & Wakefield, DTZ and Knight Frank in 2010. (The Parties had earlier, before the Appellant found out the Toshin valuations, jointly issued Requests for Proposals ("RFPs") to these five valuation firms (collectively, "the five Shortlisted Valuers") inviting them to provide rental valuation services for the Rent Review Exercise.) The valuation reports showed the date of the valuations and the valuation figures, with the Respondent's confidential information redacted. The Respondent hoped that this would assuage the Appellant's "perceived concerns about [its (*ie*, the Appellant's)] alleged disadvantage in selecting the 3 valuers" [note: 26] which were to act as the Designated Valuers for the Rent Review Exercise. In addition, the Respondent suggested that the Parties issue joint instructions to the three valuation firms eventually appointed as the Designated Valuers to state that: [note: 27]

> … [I]n exercising their professional judgment to determine the prevailing market rental of the Demised Premises, the valuers shall be independent and fair to both parties and in particular shall not be bound by any previous valuations which they have carried out for either party. …

The Appellant files OS 376

17 The Appellant was not placated by this gesture. It replied on 13 May 2011 stating that the Respondent's disclosure of the five Shortlisted Valuers' valuation reports had in fact exacerbated its concerns as it "[did] not know what [the Respondent] had told the valuers and what information had transpired between them". [note: 28] However, we note that the Appellant never directly asked for the relevant records to be made available to it. On the same day (*viz*, 13 May 2011), the Appellant filed

OS 376.

Confirmation in writing from the five Shortlisted Valuers that they would be able to act independently

18 After the Appellant filed OS 376, the Respondent wrote to the five Shortlisted Valuers and obtained from them written confirmation that if they were appointed as the Designated Valuers for the Rent Review Exercise: [note: 29]

(a) they would be able to provide a fair and independent valuation of the Demised Premises;

(b) they would exercise their professional judgment and make an objective and accurate assessment of the available facts and information to form an opinion on the prevailing market rental value of the Demised Premises;

(c) their prior engagement in 2010 by the Respondent would not compromise their obligations under (a) and (b) above; and

(d) there would not be any conflict of interest on their part in carrying out the Rent Review Exercise.

The decision below

19 In the court below, the Judge dealt with the overarching issue of whether the Rent Review Mechanism had been rendered inoperable by breaking this issue down into two sub-issues, namely:

(a) whether the independence of the valuation firms which could potentially be appointed as the Designated Valuers for the Rent Review Exercise had been compromised (the Judge found that the Appellant's allegations of conflict of interest, bias and improper influence fell under this sub-issue); and

(b) whether the Respondent stood to gain any unfair advantage as a result of its prior engagement of seven out of the eight valuation firms which could potentially be appointed as the Designated Valuers.

20 On sub-issue (a), the Judge found that the question of whether a conflict of interest existed was best addressed not by looking at the ostensible purposes of the Toshin valuations (since the purposes of a valuation could be "amorphous" (see the GD at [27]), depending on the context in which the valuation was done and the subjective understanding of the different valuers involved), but rather, by asking whether there was a concern that the seven 2010 Valuers would be unduly restricted by a professional unwillingness to depart from the Toshin valuations which they had earlier prepared for the Respondent (see the GD at [27] and [33]).

21 In answering that question, the Judge entertained no reasonable concerns about the seven 2010 Valuers being bound by the professional views expressed in their previous valuations (*ie*, the Toshin valuations). The Judge was impressed by the fact that the three valuation firms eventually appointed as the Designated Valuers for the Rent Review Exercise would have to be jointly appointed by the Parties. She also took into account (at [34] of the GD) the Respondent's "eminently sensible" proposal that the Parties issue joint instructions to the three valuation firms eventually appointed as the Designated Valuers that they should be independent and should not be bound by any previous valuations which they had done for either of the Parties.

22 Dealing with the bias argument in respect of sub-issue (a), while the Judge declined to decide whether the test of actual bias or that of apparent bias ought to apply to the seven 2010 Valuers, she found that even taking the Appellant's case at its highest and applying the apparent bias test, it could not be said that there was any suspicion or likelihood of bias, let alone a reasonable or real one (see the GD at [46], [49] and [50]).

23 On sub-issue (b), the Judge found that the Toshin valuations were irrelevant to the Rent Review Exercise, and that the three valuation firms eventually appointed as the Designated Valuers were not duty-bound to abide by those valuations. For these reasons, she held that there was no unfair advantage to be gained by the Respondent in the Rent Review Exercise (see the GD at [53]–[54]).

24 Given her findings on sub-issues (a) and (b), the Judge concluded that the Rent Review Mechanism was still operable and thus dismissed the Appellant's application in OS 376 (see the GD at [55]).

The Parties' arguments on appeal

The Appellant's submissions

25 In its submissions before this court, the Appellant argued that the seven 2010 Valuers, by virtue of having rendered their expert opinion on the same subject matter of the market rental value of the Demised Premises between July 2010 and early 2011, were affected by a conflict of interest and were unable to act independently. [note: 30] The seven 2010 Valuers, it was contended, were in a position of conflict because they had an existing "confirmation bias" in not deviating from the Toshin valuations, given that those valuations were in effect their predictions of the likely rental rates which they would ascribe to the Demised Premises if they were appointed as the Designated Valuers for the Rent Review Exercise. [note: 31] The Parties also tussled over whether actual bias or apparent bias was the appropriate test to apply in order to impugn the independence of the seven 2010 Valuers. In support of its contention that the applicable test to apply was the apparent bias test, the Appellant raised the two main points below: [note: 32]

(a) those of the seven 2010 valuers which were eventually appointed as the Designated Valuers for the Rent Review Exercise would in effect be acting as adjudicators performing a quasi-judicial function in deciding on the new rent for the Last Rental Term; and

(b) apparent bias was the applicable test when the independence of a valuation firm was in issue before, as opposed to after, its appointment as one of the Designated Valuers.

26 In the alternative, the Appellant claimed the Respondent's actions were in breach of an implied duty of good faith under the Lease Agreement.

27 The Appellant thus claimed that the Rent Review Mechanism had been rendered inoperable either because the independence of the valuation firms which might potentially be appointed as the Designated Valuers for the Rent Review Exercise had been compromised, or because the Respondent had breached an implied duty of good faith in the Lease Agreement. The Appellant further submitted that if the court agreed with its argument that the Rent Review Mechanism has been rendered inoperable, the court had the power to substitute its own mechanism to determine the new rent for the Last Rental Term.

The Respondent's submissions

The Respondent's submissions

28 The Respondent argued that at law, actual bias (and not apparent bias) was required to challenge an expert's appointment. It asserted that the Appellant was plainly unable to show actual bias on the facts. [note: 33] The Respondent submitted that even if the lower threshold of apparent bias or a "potential conflict of interest" [note: 34] were applicable, the facts did not disclose any apparent bias or potential conflict of interest. [note: 35] The Respondent also asserted that there could not be an implied duty of good faith in relation to an agreement to agree which had no meaning in law. [note: 36] Accordingly, the Respondent submitted that the Rent Review Mechanism remained operable and the appeal ought to be dismissed.

The issues before this court

29 In the course of the arguments before us, it quickly became apparent that the dispute between the Parties turned narrowly on the ramifications of the Toshin valuations, which the Respondent unilaterally commissioned between July 2010 and early 2011, and whether those valuations irremediably undermined the machinery of the Rent Review Mechanism, thus rendering it inoperable. The Respondent's motives in approaching all eight international valuation firms present in Singapore to prepare valuation reports on the market rental value of the Demised Premises in advance of the Rent Review Exercise and eventually engaging the seven 2010 Valuers for this purpose were plainly questionable. Even if the Respondent were not technically in breach of the Lease Agreement in commissioning the Toshin valuations, the question arose as to whether the Respondent was obliged to disclose the fact that it had commissioned these valuations to the Appellant. That question was especially pertinent since the Lease Agreement explicitly stipulated in Clause 2.4(c)(i) that under Stage One of the Rent Review Mechanism: [note: 37]

> Prior to the commencement of each Rental Term (other than the first), the Lessor and the Lessee ***shall in good faith endeavour to agree*** on the prevailing market rental value of the Demised Premises (excluding service charge payable and disregarding the value of all fixtures and fittings installed by the Lessee) for [the] purpose of determining the New Annual Rent for the relevant Rental Term. [emphasis added in bold italics]

30 Given that the Lease Agreement contains an express term obliging the Parties to in good faith endeavour to agree on the new rent for each new rental term after the first rental term, the following issues are central in the present case:

(a) whether the above express "good faith" term is valid;

(b) if so, what the content of the "good faith" obligation is; and

(c) whether the Respondent is in breach of that obligation.

31 Crucially, if we find the Respondent to be in breach of the aforesaid "good faith" obligation, we then have to decide whether the Rent Review Mechanism has been rendered inoperable as a result.

Our decision

Is the express term obliging the Parties to in good faith endeavour to agree on the new rent valid?

32 By enjoining the Parties to "in good faith endeavour to agree on the prevailing market rental

value of the Demised Premises", [note: 38] which is to be the new rent for each new rental term after the first rental term, Clause 2.4(c)(i) imposes an obligation on the Parties, under Stage One of the Rent Review Mechanism, to conduct negotiations on the new rent in good faith.

33 There would appear to be some uncertainty as to whether a term enjoining the parties to a lease agreement to in good faith endeavour to agree on the new rent under the lease, or to negotiate such new rent in good faith is valid. The Respondent, citing the House of Lords' decision in *Walford and Others v Miles and Another* [1992] 2 AC 128 ("*Walford*"), argued that a duty of good faith in negotiations was inherently repugnant to the adversarial position of the parties involved in the negotiations. [note: 39] *Walford* concerned an oral agreement entered into between the buyers and the sellers of a company, under which the sellers orally agreed to deal with the buyers exclusively and to terminate any negotiations between them (the sellers) and any other competing purchaser. The sellers subsequently decided not to proceed with their negotiations with the buyers and eventually sold the company to another party. In the buyers' action against the sellers for (*inter alia*) breach of the aforesaid oral agreement, the sellers argued that since the oral agreement was subject to contract, the parties were still in negotiations and the oral agreement was merely an agreement to negotiate in good faith. In the context of finding that a bare agreement to negotiate had no legal content, Lord Ackner (who delivered the leading judgment) observed (at 138):

> *… [T]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations*. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. … *A duty to negotiate in good faith is … unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies*. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. … [emphasis added]

34 In *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518, it was observed by this court that "[t]he doctrine of good faith is very much a fledgling doctrine in English and (most certainly) Singapore contract law" (at [47]), and that there could be no general implied duty of good faith derived from the common law (at [60]). This court was not then deciding that an express clause to negotiate in good faith was unenforceable. In contrast, in the later case of *Sundercan Ltd and another v Salzman Anthony David* [2010] SGHC 92 ("*Sundercan*"), in the context of deciding whether a contract had been formed, the High Court had to decide if there was a mechanism in place to determine the payment schedule by negotiation, an important term in the contract. As future agreement between the parties was the only mechanism to determine the payment schedule, the High Court held at [25] that:

> This was akin to an agreement to negotiate which, as is clear from the decision of the House of Lords in [*Walford*], is unenforceable because it lacks the necessary certainty.

35 It is worth noting, however, that the court in *Sundercan* applied *Walford* without considering developments in the case law of various other jurisdictions (including Australia and England).

36 Indeed, in the recently-published *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012), while the learned authors observe (at para 3.165) that the case of *Sundercan* confirms that the "somewhat controversial decision" in *Walford* remains good law in England (and presumably, in Singapore), they also opine (at para 3.164) that based on existing

academic criticisms of *Walford* and the extrajudicial views of Lord Steyn (see Johan Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433 at p 439), there are "indications that [*Walford*] will be reversed should an opportunity arise".

37 In our view, notwithstanding Lord Ackner's statement in *Walford* (at 138) that "[a] duty to negotiate in good faith is … unworkable in practice", that case does *not* have the effect of invalidating an express term in a contract which employs the language of good faith (see [40]–[41] below). As a preliminary observation, we are of the view that a valid distinction can be drawn between the pre-contractual negotiations in *Walford* and the "negotiations" between the Parties under the Rent Review Exercise in the present case. We would hesitate to characterise the position of the Parties as being strictly "adversarial". While they obviously do not have identical interests and, to that extent, may not see eye to eye, they have committed themselves to a mechanism to resolve how the new rent for (*inter alia*) the Last Rental Term is to be set. Unlike parties who are merely in pre-contractual negotiations, the Parties are not free to simply walk away from the negotiating table for no rhyme or reason. By virtue of entering into the Lease Agreement, the Parties have committed themselves to a rent review exercise for the purposes of determining the new rent for each new rental term after the first rental term: the new rent will eventually have to be determined during one of the three stages provided for under the Rent Review Mechanism. The express agreement to negotiate in good faith in the context of the Lease Agreement is predicated on the promise of both of the Parties to co-operate at Stage One in order to agree on the new rent for the new rental term in question so as to avoid having to go on to Stage Two (which would incur expenses for the Parties). When one compares this to pre-contractual negotiations of the type encountered in *Walford*, it is apparent that the latter situation is entirely different. In a *Walford*-type situation, the parties have much greater latitude as there is no overarching contractual framework binding them. In contrast, and pertinently, in the present case, Clause 2.4(c)(i) specifically states that the obligation to "in good faith endeavour to agree on [the new rent for a new rental term]" [note: 40] only applies prior to the commencement of "each Rental Term *(other than the first)*" [note: 41] [emphasis added] – *ie*, there was no such obligation before the Lease Agreement was entered into.

38 In this regard, the Supreme Court of New South Wales decision of *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236 ("*Aiton*") is instructive. *Aiton* concerned a dispute involving a building contract that had a clause obliging the parties to negotiate any dispute in good faith before resorting to legal action. Einstein J noted (at [103]):

> To my mind, notwithstanding the unsettled status of law in this area, *Tobias* [*viz*, *Tobias v QDL Ltd* 12 September 1997 (unreported)], like *Coal Cliff* [*viz*, *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1], can be distinguished from the question presently before me. Both cases concern a clause requiring the negotiation in good faith of a substitute agreement. In the circumstances of each case, such a clause was said to be illusory (though the majority in *Coal Cliff* was prepared to countenance such an agreement in appropriate circumstances). In cl 28, however, *the parties have made their agreement to follow a process of dispute resolution as a precondition to litigation – the obligation of good faith relates to performance of the agreement, and is, therefore, quite different*. [original emphasis omitted; emphasis added in italics]

39 In particular, when, as part of a wider existing contractual framework, there is a clause obliging the parties to negotiate certain contractual modalities in good faith, such negotiations need not necessarily be adversarial and hostile, but call instead for a consensual approach to resolve the identified matters as part of the performance of the broader existing agreement. This is also part of the wider contractual duty to co-operate to implement the contract. The parties are, of course, certainly not disentitled from having regard to their own commercial self-interests in the course of the

negotiations so long as their conduct does not involve bad faith. As Einstein J explained in *Aiton* at [81]–[84]:

> 81 … Giles J in *Elizabeth Bay* [*viz*, *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709] (at 716) … emphasised the "necessary tension between negotiation, in which a party is free to, and may be expected to, have regard to self-interest rather than the interests of the other party, and the maintenance of good faith". For Giles J, it was this tension, rather than the difficulty inherent in attempting to ascertain the presence or absence of good faith, which was determinative of the "forbidding" "vagueness" of cl 11.
>
> 82 With great respect, I disagree – such tension ought not be the linchpin in an argument that a good faith requirement in negotiation is too vague and uncertain to be meaningfully enforced.
>
> 83 It is clear that a tension may exist between negotiation from a position of self-interest and the maintenance of good faith in attempting to settle disputes. *However, maintenance of good faith in a negotiating process is not inconsistent with having regard to self-interest*: see D Cremean, "Agreements to Negotiate in Good Faith" (1996) 3 Commercial Dispute Resolution Journal 61 at 64. As Cremean points out (at 65): "… *good faith is not co-extensive with selflessness*." It does not require a party to make concession upon concession. Clearly, good faith negotiation is not the equivalent of agreement, is not a synonym for settlement, and does not require any particular outcome: see C McPheeters, "Leading Horses to Water: May Courts which have the Power to Order Attendance at Mediation also Require Good-Faith Negotiation?" (1992) 2 Journal of Dispute Resolution 377 at 391.
>
> 84 To further take up the point raised by Lord Ackner in *Walford*, nor should good faith prevent a party from withdrawing from negotiations if appropriate.
>
> [emphasis added]

40 In our view, there is no good reason why an express agreement between contracting parties that they must negotiate in good faith should not be upheld. First, such an agreement is valid because it is not contrary to public policy. Parties are free to contract unless prohibited by law. Indeed, we think that such "negotiate in good faith" clauses are in the public interest as they promote the consensual disposition of any potential disputes. We note, for instance, that it is fairly common practice for Asian businesses to include similar clauses in their commercial contracts. As Assoc Prof Philip J McConnaughay has insightfully observed in "Rethinking the Role of Law and Contracts in East-West Commercial Relationships" (2000–2001) 41 Va J Int'l L 427 at pp 448–449:

> A core term of many Asian commercial contracts – the "friendly negotiations" or "confer in good faith" clause –captures the essence of contractual obligation in the Asian tradition. Such clauses typically recite that, if differences or disputes arise during the course of the contractual relationship, the parties will discuss and resolve the matter amicably. The Western view of such clauses is that they impose no real obligation at all; at most, they represent a mechanism for making unenforceable requests for novation, or perhaps an initial formality in a multiple-step dispute resolution process culminating eventually in compulsory adjudication intended to enforce precise contractual terms. But these views presuppose a Western understanding of the contract itself, which is not shared in Asia. *From a traditional Asian perspective, a "confer in good faith" or "friendly negotiation" clause represents an executory contractual promise no less substantive in content than a price, payment, or delivery term. It embodies and expresses the traditional Asian supposition that the written contract is tentative rather than final, unfolding rather than static, a source of guidance rather than determinative, and subordinate to other values – such*

> *as preserving the relationship, avoiding disputes, and reciprocating accommodations – that may control far more than the written contract itself how a commercial relationship adjusts to future contingencies*. ***Characterizing a "confer in good faith" or "friendly negotiation" clause as a "dispute resolution" clause tempts a misapprehension of this essential nature, for no "dispute" exists if all of the parties to the contract share an Asian understanding of its evolving and responsive (through good faith conferences and friendly negotiations) nature.*** [emphasis added in italics and bold italics]

We think that the "friendly negotiations" and "confer in good faith" clauses highlighted in the above quotation are consistent with our cultural value of promoting consensus whenever possible. *Clearly, it is in the wider public interest in Singapore as well to promote such an approach towards resolving differences.* The second reason why we are of the view that "negotiate in good faith" clauses should be upheld is that even though the fact that one party may not want to negotiate in good faith (for whatever reason) will lead to a breakdown in negotiations, no harm is done because the dispute can still be resolved in some other way. That said, if one party breaks the terms of a "negotiate in good faith" clause and this is later discovered, there might be legal consequences, depending on the terms of the clause in question. For instance, the party which has been prejudiced could have a right to void the consequences of the other party's breach.

41 We note that in *Petromec Inc, Petro-Deep Societa Armamento Navi Appogio Spa v Petroleo Brasileiro SA* [2006] 1 Lloyd's Rep 121 ("*Petromec*"), the English Court of Appeal held that the decision in *Walford* did not have the effect of invalidating an express term of a contract which employed the language of good faith. One of the issues in *Petromec* concerned the enforceability of a clause in the contract between the parties (*viz*, clause 12.4 of the Supervision Agreement) which provided that "Brasoil agrees to negotiate in good faith with Petromec the extra costs referred to in clauses 12.1 and 12.2 above and the extra time referred to in clause 12.2 above" (see *Petromec* at [86]). In expressing the court's reluctance to find the clause invalid, Longmore LJ held at [121]:

> … Clause 12.4 of the Supervision Agreement is not a bare agreement to negotiate. It is not irrelevant that it is an express obligation which is part of a complex agreement drafted by City of London solicitors and issued under the imprint of Linklater & Paines (as Linklaters were then known). *It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered. I have already observed that it is of comparatively narrow scope. To decide that it has "no legal content" to use Lord Ackner's phrase would be for the law deliberately to defeat the reasonable expectations of honest men*, to adapt slightly the title of Lord Steyn's Sultan Azlan Shah lecture delivered in Kuala Lumpur on 24 October 1996 (113 LQR 433 [(1997)]) … [emphasis added]

42 It appears that the chief objection to the validity of a term enjoining parties to negotiate in good faith appears to be the lack of certainty. Lord Ackner explained this in *Walford* at 138 as follows:

> The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty.

43 Lord Ackner is, of course, correct as a matter of legal theory. However, his reasoning does not apply to the particular "good faith" agreement in the present case because, obviously, his observation was not directed at such an agreement (see [37] above). When parties have agreed to in good faith negotiate the rent for a new tenancy, their intention would be to do just that in order to arrive at a consensual result (see Henry J Brown & Arthur L Marriott, *ADR Principles and Practice* (Sweet & Maxwell, 2nd Ed, 1999) at paras 6-009–6-025). Even though agreement cannot be guaranteed, it

does not mean that the parties concerned should not try as far as reasonably possible to reach an agreement. In principle, there is no difference between an agreement to negotiate in good faith and an agreement to submit a dispute to mediation. In this connection, we note that "best endeavour" clauses, which are similar in nature to "negotiate in good faith" clauses, have been upheld by the High Court in *Ong Khim Heng Daniel v Leonie Court Pte Ltd* [2000] 3 SLR(R) 670 ("*Leonie Court*") at [38]–[42] and *Justlogin Pte Ltd and another v Oversea-Chinese Banking Corp Ltd and another* [2004] 1 SLR(R) 118 at [47]–[50]. Both decisions were subsequently approved and applied by this court in *Travista Development Pte Ltd v Tan Kim Swee Ausgustine and others* [2008] 2 SLR(R) 474 ("*Travista*") at [22]. Pertinently, in *Travista* at [22], Chan Sek Keong CJ, on behalf of this court, expressly approved the following observation made by Kan Ting Chiu J in *Leonie Court* at [42]:

> A covenant to use best endeavours is not a warranty to produce the desired results. It does not require the covenantor to drop everything and attend to the matter at once; the promise is to use the best endeavours to obtain the result *within the agreed time*. Nor does it require the covenantor to do everything conceivable; **the duty is discharged by doing everything reasonable in good faith with a view to obtaining the required result within the time allowed.** [emphasis added in italics and bold italics]

44 It therefore appears to us that the impediment of the uncertainty referred to in *Walford* is not relevant in the present case. The court is not being asked to determine whether it can compel the Parties to negotiate the new rent for the Last Rental Term in good faith or whether they have failed to negotiate such rent in good faith (see J W Carter and M P Furmston, "Good Faith and Fairness in the Negotiation of Contracts: Part II" (1995) 8 JCL 93 at p 114, and A F Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 LQR 66 at p 78). The court is also not being asked to decide whether either of the Parties may, in its own self-interest, withdraw from the negotiations on the new rent for the Last Rental Term. Instead, what the court has to determine here is whether the Respondent, in unilaterally obtaining valuations (in the form of the Toshin valuations) of the market rental value of the Demised Premises in advance of the Rent Review Exercise, has breached its duty to "in good faith endeavour to agree" [note: 42] on the new rent for the Last Rental Term (by disabling itself from fulfilling this obligation in the light of the advantage it has gained) and, if the Respondent has indeed breached this duty, what the consequences would be.

45 We think that the concept of good faith is reducible to a core meaning. In *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 at [132], this court pointed out (citing Auld LJ in *Street v Derbyshire Unemployed Workers' Centre* [2004] 4 All ER 839 at [41]) that "[s]horn of context, the words 'in good faith' have a core meaning of honesty … [but] it is dangerous to apply judicial attempts at definition in one context to that of another". At its core, the concept of good faith encompasses the threshold subjective requirement of acting honestly, as well as the objective requirement of *observing accepted commercial standards of fair dealing in the performance of the identified obligations*. This encompasses a duty to act fairly, having regard to the legitimate interests of the other party. It is important that the courts, as upholders of bargains, give practical effect to agreements entered into by commercial persons, rather than be quick in finding abstract difficulties. *The choice made by contracting parties, especially when they are commercial entities, on how they want to resolve potential differences between them should be respected*. Our courts should not be overly concerned about the inability of the law to compel parties to negotiate in good faith in order to reach a mutually-acceptable outcome. As mentioned earlier (at [40] above), "negotiate in good faith" agreements do serve a useful commercial purpose in seeking to promote consensus and conciliation in lieu of adversarial dispute resolution. These are values that our legal system should promote.

46 Where Australian case law is concerned, *Aiton* (cited with approval by the Court of Appeal of

the Supreme Court of Western Australia in *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222) similarly suggests that while it is difficult to define precisely what good faith entails, this is not an insurmountable obstacle to enforcing an obligation to negotiate in good faith. As Einstein J stated in *Aiton* (at [132]):

> This is not to suggest … that there may not be general, overarching "core" principles of "good faith" which may provide a framework for the "commonsense and experience of the judge or jury after consideration of all the relevant circumstances".

47 The common threads connecting most attempts to define "good faith" are fairness and honest dealing. A quick examination of definitions of "good faith" in other jurisdictions similarly affirms the prevalence of the same core meaning. In the United States, for instance, "good faith" is defined in § 1-201(b)(20) of the Uniform Commercial Code as "honesty in fact and the observance of reasonable commercial standards of fair dealing". In the United Kingdom, Lord Bingham of Cornhill held in *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481 ("*Director General of Fair Trading*"), in the context of the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994 No 3159) (UK), that the requirement of good faith in consumer contracts was one of "fair and open dealing" (at [17]). While acknowledging that the Member States of the European Union had no common concept of good faith, Lord Bingham noted that at the minimum, good faith encompassed "good standards of commercial morality and practice" (see likewise *Director General of Fair Trading* at [17]).

48 In the present case, the obligation to "in good faith endeavour to agree" [note: 43] on the new rent for each new rental term after the first rental term is both certain and capable of being observed by both of the Parties. It is an obligation that requires the Parties to co-operate fully to facilitate the determination of the new rent. It is not difficult to ascertain what reasonable commercial standards of fair dealing require in such a context. Accordingly, in the context of Clause 2.4(c)(i), we see no obstacle to the court determining whether the Parties behaved in accordance with the aforesaid standards of fair dealing during their negotiations on the new rent for the Last Rental Term.

What is the content of the obligation imposed by Clause 2.4(c)(i) and has the Respondent breached that obligation?

49 What then is the content of the obligation imposed on the Parties by Clause 2.4(c)(i) to "in good faith endeavour to agree" [note: 44] on the new rent for each new rental term after the first rental term? In our view, what constitutes reasonable commercial standards of fair dealing in the context of an express contractual duty of good faith will depend heavily on the commercial nature and purpose of the contract in question. This can be seen from the English High Court case of *Compass Group UK and Ireland Ltd (trading as Medirest) v Mid Essex Hospital Services NHS Trust* [2012] EWHC 781, which involved a long-term facilities contract that obliged the parties to, *inter alia*, co-operate in good faith. In delineating what the duty to co-operate in good faith entailed, Cranston J aptly summarised the authorities and observed at [31]–[33]:

> 31 Two decisions of this court are especially helpful in interpreting an express contractual duty of good faith. In *Berkeley Community Villages v Pullen* [2007] EWHC 1330 (Ch) there was an express term in a contract between a developer and landowners that in all matters relating to it the parties would act in utmost good faith towards one another and reasonably and prudently. Morgan J considered *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16, where French J in the Federal Court of Australia canvassed United States authority. Morgan J concluded that the term meant *a duty to observe reasonable commercial standards of fair dealing, to be faithful to the agreed common purpose and to act consistently with justified expectations*: [97].

32. In *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch) there was an express duty to act in the utmost good faith in a joint venture agreement. Vos J reviewed the authorities, adopted Morgan J's formulation, but added that *the meaning of the obligation of utmost good faith before him had to take its colour from the commercial nature of the contract*: [243]–[246]. Vos J expressed his agreement with Lord Scott in [*Manifest Shipping Co v Uni-Polaris Shipping Co* [2003] 1 AC 469], that without bad faith it was hard to understand how there could be a breach of the duty of good faith: [246].

33. In the contract in the present case the term good faith in clause 3.5 referred to how the parties were to conduct themselves in the course of its performance. Conduct which could be said to be committed in bad faith was clearly caught. Additionally, in its context, the term had an objective character. It qualified how the duty to cooperate was to occur, that duty having the features already described. Moreover, it concerned the performance of a long term, complex contract, involving the provision of an important service to members of the public, the patients and visitors to the hospital. In deriving the full benefit of the contract under clause 3.5 for itself and the beneficiaries identified in the contract, the [defendant] was in a real sense pursuing a common purpose with [the plaintiff] of benefit to the public. *To my mind the objective standard of conduct demanded in this case of both parties primarily encompassed faithfulness to this common purpose*. Fair dealing and acting consistently with justified expectations were, in a sense, corollaries of that.

[emphasis added]

50 As far as the Rent Review Mechanism is concerned, the ultimate purpose is the determination of the prevailing market rental value of the Demised Premises, which is to be the new rent for each new rental term after the first rental term. Both of the Parties are required to faithfully co-operate with each other to achieve this common purpose. *Faithfulness to the common purpose incorporates an obligation during the course of negotiations not to attempt to unfairly profit from the known ignorance of the other* (see [52] below). While it is true that the Parties do not have identical interests in each rent review exercise, the Rent Review Mechanism envisages not an adversarial process, but joint action and collaboration by the Parties, either by genuinely endeavouring to agree on the new rent for the new rental term in question under Stage One or by jointly appointing the three valuation firms which are to act as the Designated Valuers under Stage Two. Furthermore, by limiting the valuation firms eligible to be appointed as the Designated Valuers to "international firms of licensed valuers", [note: 45] the Parties must have been keenly aware, when they entered into the Lease Agreement, that only a handful of valuation firms with such standing exist in Singapore. In such circumstances, it would have been obvious to both of the Parties that any unilateral dealing(s) with any of the eligible valuation firms in relation to the Demised Premises would be a highly-sensitive matter, to put it mildly. Indeed, there is a high likelihood that a valuation firm approached unilaterally by either of the Parties to value the Demised Premises in advance of a rent review exercise might be one of the three firms eventually appointed as the Designated Valuers for that rent review exercise. The party (be it the Appellant or the Respondent) which unilaterally commissions valuation reports on the Demised Premises in advance of a rent review exercise without informing the other party would possess a significant and, in our view, unfair advantage in the rent review exercise. It would also be contrary to the common purpose sought to be achieved by the Rent Review Mechanism, *ie*, the determination of the new rent for each new rental term after the first rental term by a process that not only accords, but is also perceived by both of the Parties as according with reasonable commercial standards of fairness and fair dealing. The Parties, in the context of the appointment of the three valuation firms which are to act as the Designated Valuers for a rent review exercise, are required to deal with each other with their cards laid open face up, rather than placed face down.

51 Accordingly, when the Parties entered into negotiations on the new rent for the Last Rental Term, reasonable commercial standards of fair dealing must necessarily dictate the disclosure of all material information which could have an impact on the negotiations and/or the ultimate determination of the new rent. The fact that the Toshin valuations had been carried out would surely have qualified as material information in this regard. It must be highlighted that the role of the Designated Valuers in the determination of the new rent for a new rental term after the first rental term is crucial in the absence of an agreement between the Parties under Stage One of the Rent Review Mechanism. If the Parties fail to reach agreement on the new rent under Stage One, the Designated Valuers would play a decisive role in determining the new rent under either Stage Two or Stage Three. It is also pertinent to note that the Lease Agreement expressly states in Clause 2.4(c)(ii) that the determination of the new rent by the Designated Valuers "shall be binding and conclusive on the [P]arties". [note: 46]

52 It has been suggested with some diffidence that the content of a duty to negotiate in good faith includes "[a]n obligation not to take advantage, in the course of the negotiations, of the known ignorance of the other party" (see Alan Berg, "Promises to Negotiate in Good Faith" (2003) 119 LQR 357 at p 363). We would qualify this suggestion by stating that it is not the taking of any or every advantage that is to be eschewed, but only the taking of an unfair advantage that would afford one party a commercially-significant insight into the conduct of the negotiating process. The aforesaid suggested obligation is of particular salience in the present case in the light of the context highlighted above (at [50]–[51]). This is all the more so since the Respondent commissioned valuation reports from, not one or two, but *seven* of the eight international valuation firms present in Singapore – that is to say, from all of the valuation firms eligible for appointment as the Designated Valuers which were willing and available to act for the Respondent (as mentioned at [2] above, out of the eight eligible valuation firms, only Savills declined to act for the Respondent). In our view, the Respondent's failure to disclose the existence of the Toshin valuations and the corresponding valuation reports during the 13 January 2011 meeting could be said to constitute a breach of its "good faith" obligation under Clause 2.4(c)(i).

53 At the same time, we also acknowledge that while unilateral interim valuations of the Demised Premises by either of the Parties pending a rent review exercise would be a highly-sensitive matter, it may not have been the Parties' intention that neither of them would be able to individually approach one or more of the valuation firms eligible for appointment as the Designated Valuers for a prior valuation of the Demised Premises in advance of a rent review exercise. That would be somewhat unrealistic as the Lease Agreement provides for a rent review exercise to be conducted only once every three years, and there might, from time to time, be a legitimate commercial need for either of the Parties to seek a valuation in the interim period. In the circumstances, we are of the view that the balance is best struck through voluntary disclosure of any such prior valuations together with the corresponding reports. In that connection, we wish to address the Respondent's bare contention that it had carried out regular interim valuations of the Demised Premises since 1993 for business forecasting purposes (see [14] above). These business forecasting purposes apparently included the negotiation of sub-leases with the Respondent's sub-tenants, the preparation of shareholder reports by the Respondent's parent Takashimaya group (publicly listed in Japan), the assessment of short-term rental changes in the rental environment, *etc*. We have no reason to disbelieve the Respondent's motives in obtaining the Toshin valuations in advance of the Rent Review Exercise since these valuations are only forecasts of the probable market rent for the Demised Premises based on prevailing and/or future economic and business trends. Nevertheless, one legitimate complaint raised by the Appellant is the necessity of the Respondent commissioning *seven* separate valuation reports. We find this conduct commercially inexplicable except when it is viewed as an attempt by the Respondent to gain an unfair advantage for the purposes of negotiating the new rent for the Last Rental Term. Such advantage would subsist at two different stages: first, at Stage One *vis-à-vis* the

Parties' negotiations on the new rent; and second, if the negotiations fail, at Stage Two *vis-à-vis* the choice of the valuation firms to be jointly appointed as the Designated Valuers for the Rent Review Exercise. The Appellant was justifiably dismayed by the initial failure of the Respondent to disclose the Toshin valuations at the early stages of the Rent Review Exercise, and the piecemeal way in which it eventually made disclosure.

54 In his submissions, counsel for the Respondent, Mr Cavinder Bull SC, vigorously maintained that the Respondent had in fact "voluntarily" disclosed copies of the valuation reports produced in 2010 by the five Shortlisted Valuers (*viz*, Chesterton, Colliers, Cushman & Wakefield, DTZ and Knight Frank). The difficulty with this argument is that these valuation reports (as well as the valuation reports prepared by the remaining two of the seven 2010 Valuers, *viz*, CBRE and JLL) were only disclosed belatedly after the Appellant had accidentally discovered the existence of the Toshin valuations. Unsurprisingly, the belated disclosure by the Respondent provided cold comfort to the Appellant. The Appellant rightly pointed out that the Respondent had not disclosed the contents of its communications with the five Shortlisted Valuers, which added further to the Appellant's unease about the situation. For disclosure of time-sensitive information to have any real impact, disclosure must be made as soon as practicable. There was no good reason for the Respondent to have concealed the Toshin valuations during the 13 January 2011 meeting other than to gain a distinct commercial advantage over the Appellant apropos the Rent Review Exercise. In our view, the Respondent was contractually obliged to make full disclosure of these valuations in a timely manner as part of the parcel of obligations imposed on the Parties to "in good faith" [note: 47] negotiate the new rent for the Last Rental Term.

55 That said, while there was, at the onset of the Parties' negotiations, a breach of this obligation by the Respondent, since all the Toshin valuations were eventually disclosed by the Respondent before the negotiations were completed or an agreement reached, it appears to us that the Respondent's initial breach was remedied and the Parties ought to have resumed their endeavours to "in good faith … agree" [note: 48] on the new rent for the Last Rental Term. By disclosing all the Toshin valuations, the Respondent was signalling that it had nothing to hide and was prepared to negotiate the new rent in good faith. We pause here to observe that an unremedied breach of the duty to "in good faith endeavour to agree" [note: 49] on the new rent would only make the Rent Review Exercise voidable. In other words, if, in fact, the Parties had agreed on the new rent for the Last Rental Term without the Respondent disclosing the Toshin valuations, the new rent thus agreed on would not bind the Appellant because the Respondent would not have negotiated in good faith. Here, however, the Appellant refused to negotiate even after the Toshin valuations were disclosed to it by the Respondent.

56 We accept that the Rent Review Mechanism can also be rendered inoperable if all the valuation firms eligible for appointment as the Designated Valuers for a rent review exercise are disqualified from giving valuations. It is to this issue that we now turn.

Has the Rent Review Mechanism been rendered inoperable by the Respondent's breach?

57 As just mentioned, despite our findings at [54]–[55] above, the critical question remains as to whether the Rent Review Mechanism has been rendered inoperable as a consequence of the Respondent's breach of its "good faith" obligation at the initial stages of the Rent Review Exercise. In our view, the answer to this question is "No" as the Rent Review Mechanism remains capable of being effectively implemented notwithstanding the Respondent's initial breach. As emphasised above, the "international firms of licensed valuers" [note: 50] eligible for appointment as the Designated Valuers for a rent review exercise are the cornerstones of the Rent Review Mechanism. While the Respondent did

not act in good faith during and immediately after the 13 January 2011 meeting in that it withheld material information concerning the Toshin valuations from the Appellant, the Rent Review Mechanism would remain workable so long as the independence and probity of the valuation firms eligible for appointment as the Designated Valuers for the Rent Review Exercise had not been irretrievably compromised.

58 In this regard, we find that there is nothing (other than implausible conjecture on the Appellant's part) to suggest that any of the seven 2010 Valuers, if appointed as one of the Designated Valuers for the Rent Review Exercise, would be unable to carry out a fair and independent valuation of the Demised Premises simply by virtue of having carried out a prior valuation of the same premises for the Respondent as at 8 June 2010 (or, in the case of JLL, as at 31 December 2010). In our view, the issue of bias (whether actual or apparent) does not even arise in this case. When a prior retainer of a valuer by one of the parties to a lease agreement has ended, the valuer in question no longer owes any competing legal duties that may give rise to a conflict of interest in the preparation of a fresh valuation of the property concerned. It bears emphasis that while property valuation ultimately involves the exercise of professional judgment, it is a judgment which is based on and which has to be justified by reference to recognised valuation methodologies and verifiable facts. [note: 51] In its valuation report, a valuer would have to explain how it arrived at its valuation using the particular methodology adopted. Furthermore, in the present case, the Lease Agreement itself precisely sets out (via Clause 2.4(c)(iii)) additional parameters to be adopted by the Designated Valuers for each rent review exercise, *viz*: [note: 52]

> 2.4 …
>
> (c) …
>
> (iii) … [T]he licensed valuers in determining the prevailing market rental value shall have regard to the annual rental value of the Demised Premises in the open market as a shopping centre at the date of review on a lease for a term equal to the relevant Rental Term based on an assumed area (the "assumed area") of 21,000 square metres. Each of the licensed valuers in determining such prevailing market rental shall:
>
> (aa) take into account the notional circumstance that the assumed area would necessarily include areas used for circulation;
>
> (bb) disregard the service charge payable and the value of all fixtures and fittings installed by the Lessee;
>
> (cc) assume that the Demised Premises area ready for and fitted out for immediate occupation and use for the purpose or purposes required by the willing tenant.

59 What this means is that there is no plausible reason to think that the three valuation firms eventually appointed as the Designated Valuers for the Rent Review Exercise would feel bound or compromised by the Toshin valuations, especially since their fresh valuations of the market rental value of the Demised Premises would be made in the context of market conditions different from those prevailing at the time of the Toshin valuations. Market conditions in Singapore's dynamic property market constantly change. The seven 2010 Valuers were specifically tasked by the Respondent to assess the prevailing market rental value of the Demised Premises as at 8 June 2010 (save for JLL (see [2] above)) based on the information available at the time of their respective appointments. If any of these seven valuation firms are now appointed as one of the Designated Valuers for the Rent Review Exercise, they would, in law, be duty-bound to embark on the task of valuing the Demised

Premises *de novo*. While the methodologies involved in, respectively, the Toshin valuations and the fresh valuations to be made might be similar, the fresh valuations would have to take into account consequential changes in market circumstances since property values in Singapore can and do often change substantially over short periods of time. Indeed, the three valuation firms appointed as the Designated Valuers under the Rent Review Mechanism are directed to determine "the *prevailing* market rental value of the Demised Premises" [note: 53] [emphasis added]. Under the SISV's *Valuation Standards and Guidelines*, a valuation of the market value of a property is time-specific. This is clear from para 1.3.2(c) of the SISV's "Valuation Standard 1: Market Value Basis of Valuation)", which states: [note: 54]

> '… on the date of valuation …' requires that the estimated Market Value is time-specific as of a given date*. Because markets and market conditions may change, the estimated value may be incorrect or inappropriate at another time. The valuation amount will reflect the actual state of the market and circumstances as of the effective valuation date, not as of either a past or future date.* … [original emphasis omitted; emphasis added in italics]

60 The five Shortlisted Valuers, which were issued RFPs before the Appellant found out about the Toshin valuations (see [16] above), have confirmed in writing their ability to participate in the Rent Review Exercise independently without being compromised by the Toshin valuations (see [18] above). In our view, given these five valuation firms' good standing, it is most improbable that they would have issued such confirmation unless they were absolutely certain of their ability to act independently.

61 The Appellant has also failed to convince us that any of the seven 2010 Valuers are afflicted by any conflict of interest or bias. The case of *Re Benfield Greig Group plc, Nugent and another v Benfield Greig Group plc and others* [2002] 1 BCLC 65 ("*Nugent*"), which was relied on by the Appellant, is plainly not on point here. *Nugent*, a striking-out application made in the context of a minority oppression dispute, involved a valuation made by auditors (*viz*, PricewaterhouseCoopers ("PWC")) of shares in a company held by the executors of a minority shareholder who had died in a helicopter crash ("the minority shares"). The company's articles provided that an offer of the minority shares to the other shareholders at a price to be determined by PWC ("the share offer") had to be made. It transpired, however, after the valuation of the minority shares by PWC, that PWC had previously been engaged by the company:

> (a) to value its shares, with the direction that the valuation should be as low as possible for the purposes of negotiations with the Inland Revenue of the United Kingdom; and
>
> (b) to advise the directors of the company as to the approach to be taken *vis-à-vis* the minority shares in another similar matter that was in dispute between the parties.

62 The English Court of Appeal (for the purposes of an appeal against an order of summary judgment) found at [37] that there was a reasonable argument that PWC was not "independent" as:

> … [T]hey could not reasonably approach the task of valuer without restrictions imposed by the advice that they had given in very different circumstances. In particular advice for the purposes of persuading the Inland Revenue to disregard the placements at £4.00 and to accept the low value at which they had arrived. Secondly, they had also acted as adviser to Benfield [the company] upon another, but similar matter that was in dispute between Benfield and the petitioners. In so doing it is arguable that they had compromised their ability to be an independent valuer. …

63 The situation in *Nugent* is vastly different from that in the present case. In *Nugent*, PWC had assumed the role of a strategic advisor to the company both in the company's negotiations with the Inland Revenue of the United Kingdom and in advising the company's directors as to how to deal with the minority shares. As such, PWC could not perform its subsequent role as independent valuer of the minority shares for the purposes of the share offer without being placed in a position of serious professional embarrassment. A different valuation might have exposed PWC to an allegation that it had earlier misled the United Kingdom Inland Revenue authorities. Further, as PWC had given strategic advice to the company and its directors, PWC plainly could not reasonably approach the task of independent valuation of the minority shares without being unduly restricted by the prior advice given. The existence of "confirmation bias" was a legitimate concern on the established facts of *Nugent*.

64 In contrast, the seven 2010 Valuers here were tasked *vis-à-vis* the Toshin valuations not to offer strategic advice to the Respondent, but rather, to render a professional and accurate estimation of the prevailing market rent of the Demised Premises as at 8 June 2010 (or, in the case of JLL, as at 31 December 2010). The Respondent might have intended to use the Toshin valuations to get a better estimation of what the new rent for the Last Rental Term might be, but that does not detract from the fact that the seven 2010 Valuers themselves were only asked to provide an independent assessment of what they thought the market rent of the Demised Premises was as at 8 June 2010 (or, in the case of JLL, as at 31 December 2010), and not to render particular advice in relation to the Rent Review Exercise. In addition, we note that there is no suggestion by the Appellant that the Toshin valuations were not honestly prepared by the seven 2010 Valuers, or in any way indicated that any of these valuers had professionally compromised itself by manifesting a lack of integrity in exercising its judgment. Each of the seven 2010 Valuers would have owed the Respondent a duty of care to make an honest and accurate valuation assessment. This earlier duty would not conflict with their joint obligation to the Parties (if appointed as the Designated Valuers for the Rent Review Exercise) to prepare a fresh valuation assessment honestly and accurately.

65 As the seven 2010 Valuers are both willing and perfectly capable of carrying out independent valuations of the new rent for the Last Rental Term, the Rent Review Mechanism remains operable and the Parties therefore ought to proceed in accordance with the agreed procedure to determine the new rent. There would be no actual bias in the appointment of the three valuation firms which are to act as the Designated Valuers if the appointment is made by a third party – specifically, by the President of the SISV, who will be aware of the history of this matter and the complaints made by the Appellant (see [66]–[67] below). The question is whether the seven 2010 Valuers can be said to have "confirmation bias" (a form of apparent bias). We think not for the reasons stated above at [64]. We would add that because the new rent as determined under Stage Two of the Rent Review Mechanism is based on the *average of three valuations* and not merely on one valuation, it is also unlikely that the relevant new rent will prejudice either of the Parties. Further, the remedy sought by the Appellant – a court determination of the new rent for the Last Rental Term – is neither practical nor desirable. The court will still end up considering the opinions of the same valuation firms, leading to an unnecessary wastage of time, effort and legal costs.

Directions to the Parties

66 The current impasse can be resolved if the Parties jointly request the President of the SISV to appoint three valuation firms to act as the Designated Valuers to determine the new rent for the Last Rental Term, and we so direct. This procedure would be entirely consistent with the process provided for under the Rent Review Mechanism, *ie*, the Parties are to be taken as progressing to Stage Three after the failure of Stage Two. We note that this was the course of action which the Respondent earlier proposed, but which the Appellant brusquely rejected before commencing OS 376. [note: 55] In

determining the allocation of legal costs between the Parties, this ought to be a relevant consideration.

67 We would further direct that the Respondent provide to the President of the SISV full and complete versions of all the valuation reports produced *vis-à-vis* the Toshin valuations, as well as copies of the instructions which it gave to the seven 2010 Valuers. This information is to be provided in confidence without any redaction. Additionally, the President of the SISV is to issue written instructions to the three valuation firms appointed as the Designated Valuers directing that in determining the new rent for the Last Rental Term, they shall not be constrained by any previous valuations which they have carried out for either of the Parties in respect of the Demised Premises. The Designated Valuers must in turn, prior to commencing their engagement, provide written confirmation of their current independence and willingness to comply with the instructions of the President of the SISV. It bears reiteration that the Designated Valuers thus appointed owe a duty of care to both of the Parties to act independently and fairly in the discharge of their professional responsibilities throughout the duration of their engagement. All the costs and expenses incurred as a result of these processes are to be equally shared by the Parties.

Observations

68 Before we conclude this judgment, we wish to make some observations in relation to the Parties' conduct in the events leading to these proceedings. Parties in similar circumstances – that is to say, where there is an express obligation to act in good faith – ought to act with circumspection and ensure that they comply with ethical commercial standards *vis-à-vis* any unilateral dealings with experts. There is often no clear line between seeking an advantageous but legitimate position in business dealings and negotiations on the one hand, and offending the basic standards of commercial fair play on the other. However, as a matter of prudence, parties in similar circumstances ought to err on the side of caution and reveal their cards openly. In such circumstances, voluntary and timely disclosure of all material information would often go a long way towards ameliorating or rectifying any information deficits. In our view, the Parties' dispute is a matter that ought to have been resolved by the application of commercial common sense in good faith through the mediation process, rather than through the adversarial curial process. Regrettably, each of the Parties has, in no small measure, contributed to this unhappy situation that has unnecessarily jeopardised a long-standing commercial relationship.

69 On the one hand, the Respondent plainly did not act in good faith in initially concealing the existence of the Toshin valuations during the early stages of the Rent Review Exercise. While this breach was belatedly remedied, the Parties' relationship had by then soured. On the other hand, the Appellant appears to have taken an unjustifiably obdurate stance in insisting that the Rent Review Mechanism had irretrievably broken down, and in thereafter taking an unduly combative all-or-nothing stance in addressing the Parties' existing differences. Whilst the Appellant's initial unhappiness with the Respondent apropos the Toshin valuations is entirely understandable, the Appellant could also have sensibly resolved the impasse by turning to the President of the SISV to make the necessary appointment of the Designated Valuers for the Rent Review Exercise, with the appropriate safeguards to protect both of the Parties' interests against any perception of "confirmation bias". Instead, it appears that the Appellant was, at one stage, keen to take advantage of the situation by attempting to secure the appointment of a valuation firm that might have been more favourably inclined to its interests (see [14] above). The Appellant's entire conduct in this matter, particularly the haste with which it initiated OS 376, is certainly not beyond reproach.

70 In this matter, we have found that the Respondent ought to have disclosed the Toshin valuations as soon as negotiations on the new rent for the Last Rental Term commenced so as not to

have an unfair hidden advantage over the Appellant. Although the Respondent initially had such an advantage, this advantage was lost after the Respondent made disclosure – albeit belatedly – of the Toshin valuations. We would add that in any event, the existence of these valuations ought to have been disclosed by the seven 2010 Valuers if and when any of them were approached to be one of the Designated Valuers for the Rent Review Exercise.

71 We think that as a matter of legal principle, if an expert or an adjudicator has, prior to the relevant appointment, been recently approached by one of the directly-interested parties to give a professional opinion or adjudicate on a matter, the expert or adjudicator concerned *ought* to make this known as soon as practicable to the others involved in the appointment process. Additionally, if the expert or adjudicator concerned either has or has previously had a significant relationship with any interested party, particulars of this too ought to be disclosed without any prompting. A failure to make proper disclosure in a timely manner may raise serious concerns about apparent or actual bias on the part of the expert or adjudicator.

Conclusion

72 For the reasons given above, this appeal is dismissed. However, in the light of the questionable conduct of both of the Parties that has in turn stoked sterile litigation, we order that each of the Parties is to bear its own costs for all the proceedings here and below. The Appellant's appeal deposit should be returned.

[note: 1] See Core Bundle Vol II (Part 1) at p 31.

[note: 2] *Ibid*.

[note: 3] See Core Bundle Vol II (Part 1) at pp 31–33.

[note: 4] See Core Bundle Vol II (Part 1) at p 31.

[note: 5] *Ibid*.

[note: 6] See Core Bundle Vol II (Part 1) at p 32.

[note: 7] The Toshin valuations are summarised at Core Bundle Vol II (Part 2), pp 242–245.

[note: 8] See the Appellant's Skeletal Submissions at para 4.

[note: 9] See Core Bundle Vol II (Part 1) at pp 54–55.

[note: 10] *Ibid*.

[note: 11] *Ibid*.

[note: 12] *Ibid*.

[note: 13] See Core Bundle Vol II (Part 1) at p 106.

[note: 14] See Core Bundle Vol II (Part 1) at p 109.

[note: 15] See Core Bundle Vol II (Part 1) at p 108.

[note: 16] See Core Bundle Vol II (Part 1) at p 117.

[note: 17] See Core Bundle Vol II (Part 2) at p 172.

[note: 18] *Ibid*.

[note: 19] See Core Bundle Vol II (Part 1) at p 118.

[note: 20] *Ibid*.

[note: 21] *Ibid*.

[note: 22] See Core Bundle Vol II (Part 1) at pp 133 and 140.

[note: 23] See Core Bundle Vol II (Part 1) at pp 134–136.

[note: 24] See Core Bundle Vol II (Part 1) at p 147.

[note: 25] See Core Bundle Vol II (Part 1) at p 150.

[note: 26] *Ibid*.

[note: 27] See Core Bundle Vol II (Part 1) at p 151.

[note: 28] See Core Bundle Vol II (Part 2) at p 53.

[note: 29] See Core Bundle Vol II (Part 2) at pp 58–65 and 68–69.

[note: 30] See the Appellant's Case at pp 52–55.

[note: 31] See the Appellant's Case at pp 35–36.

[note: 32] See the Supplemental Appellant's Case at pp 12–13.

[note: 33] See the Respondent's Case at p 41.

[note: 34] *Ibid*.

[note: 35] See the Respondent's Case at p 42.

[note: 36] See the Respondent's Case at p 43.

[note: 37] See Core Bundle Vol II (Part 1) at p 31.

[note: 38] *Ibid*.

[note: 39] See the Respondent's Case at p 99.

[note: 40] See Core Bundle Vol II (Part 1) at p 31.

[note: 41] *Ibid*.

[note: 42] *Ibid*.

[note: 43] *Ibid*.

[note: 44] *Ibid*.

[note: 45] *Ibid*.

[note: 46] See Core Bundle Vol II (Part 1) at p 32.

[note: 47] See Core Bundle Vol II (Part 1) at p 31.

[note: 48] *Ibid*.

[note: 49] *Ibid*.

[note: 50] *Ibid*.

[note: 51] See Core Bundle Vol II (Part 1) at pp 163, 184, 219 and 251.

[note: 52] See Core Bundle Vol II (Part 1) at p 32.

[note: 53] See Core Bundle Vol II (Part 1) at p 31.

[note: 54] See the Respondent's Bundle of Authorities Vol II at Tab 8.

[note: 55] See the Respondent's letter dated 11 April 2011 (Core Bundle Vol II (Part 1) at pp 142–143).

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