Cherie Hearts Group International Pte Ltd and others *v* G8 Education Ltd [2012] SGHC 70

Case Number : Suit No 211 of 2011

Decision Date : 09 April 2012

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Ang Cheng Hock SC, Vincent Leow, Jacqueline Lee, Joel Lim and Michelle Yap (Allen & Gledhill LLP) for the plaintiffs; Harry Elias SC, Philip Fong, Joana Teo and Vikneswari d/o Muthiah (Harry Elias Partnership LLP) the defendant.

Parties : Cherie Hearts Group International Pte Ltd and others — G8 Education Ltd

Contract – Formation

Contract – Breach

Contract – Termination

9 April 2012 Judgment reserved.

Judith Prakash J:

Introduction

1 This case concerns an attempted acquisition of a Singapore business by an Australian listed company. The Australian company still wishes to buy the Singapore business and in fact has taken over the running of much of its operations. The Singaporeans involved, however, no longer want to proceed and wish to take back the business.

Parties to the dispute

2 The Australian company, which is listed on the Australian Securities Exchange, is G8 Education Limited ("G8"), the defendant in this action. It is in the business of operating childcare centres in Australia. The officers of G8 who generally controlled and conducted G8's dealings in Singapore are Jennifer Joan Hutson ("Ms Hutson"), the chairman of G8, and Christopher John Scott ("Mr Scott"), G8's managing director.

3 The business which G8 wished to acquire was that conducted in Singapore by Cherie Hearts Group International Pte Ltd ("CHG"). CHG is the first plaintiff in this action. The second and third plaintiffs are Yap Soon Guan ("Dr Yap"), and Gurchran J Singh s/o Amer Singh ("Dr Singh") respectively, who are the founders of CHG and two of its directors and shareholders. The third director of CHG is Wenda Ng Li Ha ("Ms Ng").

4 CHG was incorporated in Singapore on 18 September 2007. It is the holding company of a large chain of childcare centres, identified as "Cherie Hearts" childcare centres. Its subsidiaries include the wholly owned Cherie Hearts Child Development Pte Ltd ("CHCD") which is in turn the sole shareholder of Cherie Hearts Childcare Services Pte Ltd ("CHCCS"). In addition, CHG had franchise arrangements with other childcare centres which were entitled to use the words "Cherie Hearts" as part of their

names and to adopt CHG's style of operation in return for payment of a franchise fee. In the action, the plaintiffs referred to the various entities which operated under the "Cherie Hearts" banner and which were the subject of the transaction with G8 as "the Cherie Hearts Group".

5 G8 owns three Singapore companies which were set up for the purposes of its takeover of the business of CHG. The first of these is G8 Education Singapore Pte Ltd ("G8 Singapore") which was incorporated on 19 October 2010. G8 Singapore in turn has two subsidiaries, Cherie Hearts Corporate Pte Ltd ("G8 CHC") which was incorporated on 11 November 2010 and Cherie Hearts Holdings Pte Ltd ("G8 CHH") which was incorporated on 22 October 2010.

Background

Negotiations and documentation

6 In 2001, Dr Yap and Dr Singh set up a childcare centre. This business thrived and in the years that followed they acquired more childcare centres and expanded their business to include franchised childcare centres, childcare teaching and training centres and enrichment centres. In 2007, CHG became the holding company for all their businesses; by that time, they had acquired other directors and shareholders but the majority of the shares remained held by Dr Yap, Dr Singh and Ms Ng.

7 In June 2010, discussions started between Dr Yap and Mr Scott on the possibility of G8 acquiring CHG. At that time, Dr Yap represented that the Cherie Hearts Group was profitable, although it owed approximately $4.5m to private equity funds namely, Tembusu Growth Fund Limited ("Tembusu") and The Enterprise Fund II Limited ("Crest").

8 Negotiations followed which led to various agreements over the following months. The nature of the transaction changed as the months wore on. The earlier agreements were superseded but it may be helpful, in view of the parties' submissions, to give an account of them as well as of those that presently govern the parties' relationship.

9 The first of these agreements was a document dated 30 June 2010 entitled "Heads of Agreement". It was made between G8 and Dr Yap in respect of a "Proposed Transaction" (defined as the acquisition by G8 of all the ordinary shares in CHG and its related companies). The Heads of Agreement provided that no legal obligation would arise until transaction documents which would implement the Proposed Transaction were signed. The Heads of Agreement indicated that G8 would pay the following in relation to the Proposed Transaction: a sum of $36.2m for the shares (of which $14.7m would be used to settle certain "Excluded Liabilities" (*ie* indebtedness of the Cherie Hearts Group)) and a sum of $13.8m to Dr Yap and Dr Singh in consideration of their agreement to remain and manage the operation for three years. The total amount payable by G8 would, therefore, be $50m.

10 The Heads of Agreement was followed in August 2010 by a "Share Sale Agreement" between G8 as purchaser and Dr Yap and Dr Singh as sellers. By this agreement, the sellers agreed to sell 100% of the ordinary shares in the Cherie Hearts Group for $32m which included a sum of $18.06m to be used to pay the "Excluded Liabilities". Another $13m was to be paid as bonus to Dr Yap and Dr Singh in the event that certain earnings targets were met. A separate document (the "Bonus Deed") was signed between the same parties to reflect this agreement. Accordingly, the total value of the transaction was reduced to $45m.

11 The parties knew that CHG needed funds to pay off Tembusu and Crest so that these parties would no longer have any interest in the Group. Therefore, it was provided by cl 2.1 of the Share Sale

Agreement that completion under that agreement was conditional upon, *inter alia*, G8 advancing $5m to CHG for agreed purposes not later than 21 September 2010 provided that a satisfactory loan agreement and security documents were executed prior to disbursement of the loan. On 17 September 2010, an agreement ("the Loan Agreement") between CHG and G8 was executed. This agreement provided for G8 to extend a loan facility of up to $5m to CHG for the purpose of repaying its existing liabilities to Tembusu. As security for this facility, on the same day, CHG executed a debenture (the "Debenture") in favour of G8 whereunder it granted fixed charges and legal mortgages over various specified assets to G8 as well as a floating charge over all its undertaking and its assets, both present and future. The assets pledged included shares in CHG's subsidiaries. Dr Yap and Dr Singh also provided a personal guarantee to G8 in respect of the indebtedness. The Loan Agreement provided that the loan was to be repaid on the Repayment Date, which was defined as "31 December 2010, or such earlier date as may be agreed in writing between the Parties, or such earlier date pursuant to a notice issued by the Borrower to the Lender to repay the loan".

12 On 7 October 2010, CHG and G8 entered a document entitled "Variation of Loan Agreement" ("First Loan Variation"). This document provided, *inter alia*, that the loan facility would be increased from $5m to $6,888,000. About a week later, on 15 October 2010, another document entitled "Variation of Loan Agreement" ("Second Loan Variation") was concluded. By the Second Loan Variation, the loan facility was increased to $16,044,000 and further amendments were made to the Loan Agreement.

13 In the meantime, G8's auditors were undertaking a review of the accounts of CHG and its related companies in order to satisfy the due diligence requirements of the Share Sale Agreement. It became clear that certain accounts could not be verified and this would make it difficult for CHG to meet the conditions for completion. The parties then renegotiated the terms of the acquisition and it was decided that instead of taking over the shares of the various companies, G8 would purchase the businesses of the Cherie Hearts Group. This agreement was embodied in a document called the "Business Acquisition Contract" ("the BAC") which was signed sometime in mid October 2010 and dated 28 October 2010. The parties to this document were CHG and 19 other entities listed in Schedule 1 as sellers (collectively, "the Sellers"), G8 as buyer, and Dr Yap and Dr Singh as covenantors. At about the same time, G8, Dr Yap and Dr Singh entered into a separate agreement to assist G8 in acquiring the businesses of childcare centres that were not part of the Cherie Hearts Group. This agreement, the "M&A Deed" was dated 27 October 2010. The premise of the M&A Deed was that Dr Singh and Dr Yap had a business network which would help G8 acquire additional childcare centres. The Share Sale Agreement was thus superseded.

14 The change in structure and documentation was not intended to affect the maximum consideration to be paid by G8. The BAC provided for the sale of all of the businesses of the Cherie Hearts Group by CHG to G8 for a purchase price of $24,610,027 (the "Purchase Price"). Under the M&A Deed, G8 was to pay Dr Yap and Dr Singh a sum of up to $7.39m for identifying and assisting G8 finalise other childcare centre acquisitions in Singapore. Finally, under the Bonus Deed, amounts of up to $13m would continue to be payable. Under the new arrangements, the total amount to be paid by G8 could still come up to $45m provided certain targets were met.

15 The Sellers under the BAC were, at the time, operating 18 childcare centres. In the documentation, these were divided into one centre operated by CHCD (referred to as the Limau Centre), 10 Other Centres which were operated by companies in which CHCD had an interest and 7 AO Centres which were operated by companies in which CHCCS had an interest. It was agreed in the BAC that CHCD would acquire the rest of the shares in each of the entities that operated the Other Centres so that they would become wholly owned subsidiaries of CHCD. It was also agreed that CHCCS would acquire the legal and equitable ownership of all the shares in the entities operating the

AO Centres so that they would become wholly owned subsidiaries of CHCCS.

16 The structure contained in the BAC was the final structure adopted by the parties to implement their intentions regarding the sale of the businesses of the Cherie Hearts Group to G8. Later, a number of supplemental and amending documents were concluded to modify details of the structure.

17 On 22 November 2010, CHG and G8 executed the "3rd Deed of Variation of Loan Agreement" ("Third Loan Variation") which reduced the loan facility to $10,804,082 from $16,044,000. The Loan Agreement was also further amended. On the same date, the various parties to the BAC executed a "Deed of Variation to Business Acquisition Contract" ("First BAC Variation") amending various terms of the BAC. A third document was executed on 22 November 2010 *ie* a "Deed of Assignment of Franchise Agreements" ("Franchise Deed") made between CHCD and G8 CHH.

18 The next set of changes came in January 2011. On 22 January 2011, the relevant parties executed, *inter alia*, a "2nd Deed of Variation of the Business Acquisition Contract" ("Second BAC Variation") and a "Deed of Variation to Deed to the M&A Deed" ("M&A Variation Deed"). On 27 January 2011, G8 and Dr Yap and Dr Singh entered into a new deed (the "New Bonus Deed") to provide for the payment of the bonus to the two men as the Bonus Deed had been rendered ineffective when the Share Sale Agreement was superseded by the BAC.

Relevant terms of the documentation

19 I will start with the loan documentation. The initial purpose of the loan facility was to help CHG pay off its indebtedness to Tembusu. The First Loan Variation increased the facility so that CHG would additionally be able to repay its indebtedness to Crest. Thus, by the Loan Agreement and the First Loan Variation, G8 agreed to advance monies to CHG to settle its indebtedness to the private equity funds who had financed it.

20 The Second Loan Variation increased the facility further for the following additional purposes:

(a) a total of $4,970,000 was to be advanced to CHG to help it "finalise the acquisition of 100% of the AO Centres";

(b) a total of $2,186,000 was to be advanced to CHG to help it "finalise the acquisition of 100% of the issued share capital in the Cherie Hearts Group Subsidiaries that own the Other Centres"; and

(c) a total of $2m was to be advanced to CHG for working capital.

In the Second Loan Variation, the term "Cherie Hearts Group" was defined to mean CHG and all companies which CHG owned or was entitled to own 20% or more of the issued share capital. Thus, the Second Loan Variation documented G8's willingness to assist CHG in acquiring certain businesses which the Sellers had agreed to sell to G8 under the BAC.

21 Under the BAC, the Sellers agreed to sell the "Businesses" to the buyer. The "Businesses" meant:

> [A]ll of the businesses of the Cherie Hearts Group including the child care centre businesses both owned and franchised, the child care teaching businesses, and all other related businesses including product sales and consulting undertaken by the Cherie Hearts Group or one of its Related Entities, including each of the child care centre businesses carried on by the Sellers from

the various Premises under the relevant Business Name, as set out in Schedule 2.

22 The BAC provided that G8 must buy the Businesses for "the Purchase Price" on "Financial Close" and free of security interests. Clause 2.2 dealt with the Purchase Price and provided as follows:

> The Purchase Price is S$24,610,027, to be satisfied in the following manner:
>
> (a) firstly, by way of set off of the Total Indebtedness under the Loan Agreement in partial satisfaction of the Purchase Price;
>
> (b) secondly, by payment to [Tembusu] of $300,000 on the first day of every calendar month from 1 November 2010 inclusive and payment of $372,000 on 1 October 2011;
>
> (c) thirdly, by assumption of current financial liabilities of [CHG] to a maximum of $3,560,000 or in the event that consent from the relevant financiers is not received before Financial Close to the assumption of the relevant liability by [G8], then [G8] will make a payment in cleared funds to discharge the relevant liabilities; and
>
> (d) fourthly, the balance Purchase Price is payable in Immediately Available Funds.

The BAC defined "Financial Close" as 1 January 2011 or such earlier date as might be agreed by the parties. The term "Total Indebtedness" was defined as the sum total of CHG's liabilities to G8 arising out or in connection with the loan under the Loan Agreement.

23 It should be noted that in order to operate a childcare centre in Singapore, the operator needs a Child Care Centre Licence ("Licence") issued by the Ministry of Community Development, Youth and Sports ("MCYS"). CHG and its related companies held such Licences and at the time that the parties contemplated a sale of shares, there was no need to apply for new Licences although an application had to be made to MCYS for approval of the proposed changes in the shareholders of the various childcare centres. Once it was decided, however, that the businesses were to be acquired, new Licences had to be applied for in the name of the intended operator of the childcare centres. It was therefore provided that completion under the BAC was conditional on MCYS providing written approval for G8 to hold a Licence to operate each relevant childcare centre. Two other conditions precedent were first, that the sellers had to acquire the seven AO Centres for $4,970,000 (at cl 3.1(d)) and, second, that the sellers had to acquire and pay for "all the currently unpaid shares in the Other Centres" for $2,160,000 (at cl 3.1(e)).

24 Another important condition precedent had to do with payment of loan monies. Under cl 3.1(a) it was provided that completion was conditional upon:

> **Loan**: the Buyer advancing up to S$16,018,000 to Cherie Hearts Group for agreed purposes provided however that a satisfactory Loan Agreement dated 17 September 2010 and security in the form of a first ranking charge over the Sellers and personal guarantees from the directors of the Sellers are in place. All money due under the Loan Agreement will be discharged at Financial Close by way of offset against the Purchase Price at Financial Close or on the Sunset Date, whichever is earlier.

It should be noted that the Sunset Date was defined as "31 March 2011".

25 There are various other clauses of the BAC which parties invoked in the course of the submissions. It is, however, sufficient at this stage to note that the BAC included a clause stating

that it could only be amended by written document signed by the parties or their solicitors and another stating that it superseded all previous agreements about the subject matter and embodied the entire agreement between the parties.

26 About a month later, the documentation was revised with parties executing the Franchise Deed, the Third Loan Variation and the First BAC Variation.

27 The First BAC Variation changed the manner of payment of the purchase price. Clause 2.2 of the BAC was amended to read as follows:

> The Purchase Price is S$24,610,027, to be satisfied in the following manner:
>
> (a) firstly, by way of payment of S$1.5 million to [CHG] upon execution of the Deed of Assignment of Franchise Agreements for the legal assignment of the royalties due under the Franchise Agreements as detailed out in Schedule 2 of the [BAC] to [G8 CHH] effective from 1 December 2010;
>
> (b) secondly, by way of set off of the Total Indebtedness under the Loan Agreement in partial satisfaction of the Purchase Price;
>
> (c) thirdly, by payment to [Tembusu] of $300,000 on the first day of every calendar month from 1 November 2010 till 1 September 2011 inclusive and payment of $372,000 on 1 October 2011;
>
> (d) fourthly, by assumption of current financed liabilities of [CHG] to a maximum of $3,560,000 or in the event that consent from the relevant financiers is not received before Financial Close to the assumption of the relevant liability by the Buyer, then the Buyer will make a payment in cleared funds to discharge the relevant liabilities; and
>
> (e) lastly, the balance Purchase Price is payable in Immediately Available Funds.
>
> In relation to clause 2.2(b) above, the parties acknowledge that:
>
> - An offset of Total Indebtedness under the Loan Agreement may occur through the assignment of the Franchise Agreements as set out in the Third Deed of Variation of Loan Agreement.
>
> - In relation to the *Corporate Owned Child Care Centres* and *Cherie Hearts Owned Centres* as listed [*sic*] Schedule 2 of this Deed, the Buyer will receive the profits of those Businesses upon the legal transfer of such Business to the Buyer or its nominated entity on satisfaction of all conditions precedent (including lease assignment and child care licences.). In the meantime, monies advanced under the Loan Agreement shall incur interest as provided therein.

I will for convenience refer to the last paragraph quoted above as the "Original Second Rider".

28 Clause 3.1(a) of the BAC was amended to provide that the amount which G8 had to advance to CHG for agreed purposes was $10,804,082 instead of $16,018,000. The amended cl 3.1(a) also provided:

> ... All money due under the Loan Agreement will be discharged:

(i) in the manner set out in the Loan Agreement as amended by the Third Deed of Variation of Loan Agreement; and

(ii) otherwise at Financial Close by way of offset against the Purchase Price at Financial Close or by cash payout on the Sunset Date, whichever is earlier.

At this stage, there was no change in the definitions of "Financial Close" or "Sunset Date".

29 The parties had also agreed at this point that CHCD would assign all its rights, entitlement and interest in respect of 48 franchised childcare centres to G8 CHH and this was reflected in the Franchise Deed. Clause 4.1.1 of the First BAC Variation provided for a setoff of $7,172,504 owing to G8 on the assignment of the franchise agreements to G8 CHH. The clause read:

4.1.1. Set off under the Third Deed of Variation of Loan Agreement

Under the Third Deed of Variation of Loan Agreement, the amount of $7,172,504 (being S$6,904,682 in principal and $267,822 in accrued interest owing under the Loan Agreement as at 30 November 2010) will be deemed to be fully paid and off set against the Total Indebtedness, upon the legal assignment of the Franchise Agreements to [CHG] (or such other entity nominated by the Buyer) effective 1 December 2010.

30 The Franchise Deed was made between CHCD as assignor and G8 CHH as assignee. It dealt with the Franchise Agreements (*ie* the franchise agreements between CHG and the owners of the franchise child care centres set out in Schedule 2 of the First BAC Variation). It provided that in consideration of G8 CHH releasing the sum of $1.5m to CHCD as part of the Purchase Price as defined in the BAC, CHCD assigned to G8 CHH all its rights, entitlement and interest in the Franchise Agreements with effect from 1 December 2010.

31 The Third Loan Variation reflected the changes which were contained in the First BAC Variation. First, it reduced the maximum loan amount from $16,044,000 to $10,804,082. Clause 4.1(d) of the Loan Agreement was amended to provide that the maximum amount to be advanced to CHG to acquire 100% of the shares in the entities owning the AO Centres was $2,155,000 (instead of the earlier amount of $4,970,000). Clause 4.1(e) of the Loan Agreement was amended to provide that the maximum amount to be advanced to CHG to acquire the shares of the subsidiaries owning Other Centres was $734,400 (instead of $2,186,000). Additionally, G8 agreed to lend CHG a sum of $350,000 to enable the latter to finalise the acquisition of the remaining issued share capital in a company called "Our Juniors' School House Pte Ltd".

32 Second, the Third Loan Variation also provided for a partial repayment of the Total Indebtedness by a set off to be effected when CHG caused 48 Franchise Agreements to be assigned to G8 CHH or another entity nominated by G8. The new cl 5.2 which was inserted into the Loan Agreement repeated what had been said in the First BAC Variation *ie* that in the event that CHG caused 48 Franchise Agreements to be assigned to G8 CHH with effect from 1 December 2010, the sum of $7,172,504 would be deemed to be fully paid and off-set against the Total Indebtedness.

33 Due to developments which I will recount below, further changes were made to the documentation in January 2011. Three documents were executed but only the Second BAC Variation needs to be dealt with at this juncture.

34 First, there were some changes in the definitions of terms in the BAC. The term "Financial Close" was amended to mean "the earliest date where all the AO Centres and Other Centres have

been given OBLS approval for the transfer to the Buyer's nominated entity, or such other date as agreed by the parties". Similarly, the Sunset Date was amended to mean "30 April 2011".

35 Second, cl 2.2 of the BAC relating to payment of the Purchase Price was further amended to read as follows:

> The Purchase Price is S$24,610,027 to be satisfied in the following manner:
>
> (a) firstly, by way of payment of S$1.5 million to [CHG] upon execution of the Deed of Assignment of Franchise Agreements for the legal assignment of the royalties due under the Franchise Agreements as detailed in Schedule 2 of the [BAC] to [G8 CHH] effective from 1 December 2010;
>
> (b) secondly, by way of set off of the Total Indebtedness under the Loan Agreement in partial satisfaction of the Purchase Price which includes all amounts paid by the Buyer directly to the vendors of the AO Centres and the Other Centres;
>
> (c) thirdly, by payment to [Tembusu] of $300,000 on the first day of every calendar month from 1 November 2010 till 1 September 2011 inclusive and payment of $372,000 on 1 October 2011.
>
> (d) fourthly, by assumption of current financial liabilities of [CHG] to a maximum of $3,560,000 or in the event that consent from the relevant financiers is not received before Financial Close to the assumption of the relevant liability by the Buyer, then the Buyer will make a payment in cleared funds to discharge the relevant liabilities; and
>
> (e) lastly, the balance Purchase Price is payable in Immediately Available Funds.
>
> In relation to clause 2.2(b) above, the parties acknowledge that:
>
> - An offset against Total Indebtedness under the Loan Agreement has occurred through the assignment of the Franchise Agreements as set out in Third Deed of Variation of Loan Agreement.
>
> - *In relation to the AO Centres and Other Centres, the Buyer will receive the profits and bear the expenses of those Businesses from 1 March 2011, subject to the legal transfer of such Business to the Buyer or its nominated entity on satisfaction of all conditions precedent (including lease assignment and lodgement of the child care licences with the Department by 28 February 2011). In the meantime, monies advanced under the Loan Agreement shall incur interest as provided therein provided that on 1 March 2011 an offset against the Total Indebtedness under the Loan Agreement shall occur in partial satisfaction of the Purchase Price.*
>
> (emphasis added)

This was an important amendment as one of the central issues to be determined in this case is the true interpretation of this amended cl 2.2 and in particular that of the second proviso reproduced above in italics. This proviso was referred to by the parties as "the Amended Second Rider" and I will use that term in this judgment as well.

36 Third, another significant amendment was made by the addition of a new cl 3.3 to the BAC.

This new clause provided:

> **Completion of AO Centres and Other Centres**
>
> 3.3 Notwithstanding any other provision of this agreement the AO Centres and Other Centres will be transferred to the Buyer on 28 February 2011 and the Buyer will commence additional acquisitions of child care centres presented by Dr Sam Yap Soon Guan and Dr Gurchran J Singh under the terms of the Deed between each of them and the Buyer immediately following the application for the transfer of the AO Centres and the Other Centres to the Department.

37 The new cl 3.3 of the BAC was also reflected in amendments made to the M&A Agreement on 22 January 2011. The Deed amending the M&A Agreement (the "M&A Variation") which was signed by Dr Yap, Dr Singh and G8 provided that:

> (a) The performance of the M&A Deed by both parties would commence upon any part performance of the BAC or after 1 February 2011 whichever was the earlier;
>
> (b) G8 would purchase the business of each childcare centre identified and presented by Dr Singh and Dr Yap on the basis of a purchase price determined according to a prescribed formula unless after carrying out due diligence over 14 days G8 rejected the childcare centre on reasonable grounds;
>
> (c) G8 would pay Dr Singh and Dr Yap $1m when an aggregate consideration of $5m had been achieved for executed sale and purchase agreements for childcare centres purchased pursuant to the M&A Deed or upon Financial Close whichever was the earlier; and
>
> (d) Dr Singh and Dr Yap would be entitled to receive a maximum consideration of $7.39m for identifying childcare centres which G8 subsequently successfully acquired.

Events and attitudes after November 2010

38 It is not possible at this stage to give a completely objective account of the reasons that led to the contents of the documents which were concluded in November 2010 and January 2011. Each party has proferred a version. Therefore, in what follows, I will indicate where I am putting forward the perspective of any particular party.

39 The plaintiffs say that it is clear that under the BAC read together with the Second Loan Variation it was agreed that:

> (a) G8 would advance a total of $4,970,000 for the payments required to finalise the acquisition of all shares in the entities owning the AO Centres and $2,186,000 for the payment required to finalise the acquisition of all shares in the entities owning the Other Centres;
>
> (b) Licences required to operate each of the AO Centres and the Other Centres would be issued to the relevant "Cherie Hearts companies" meaning the companies that owned the OA Centres and the Other Centres prior to the BAC; and
>
> (c) Consents from landlords would only be required for the relevant Cherie Hearts companies to operate the AO Centres from the landlords' premises.

40 As a consequence of this understanding, in mid October 2010, CHG began to lodge applications

on the Online Business Licensing Service ("OBLS") for the issue of the Licences to Cherie Hearts companies for the operation of the child care centres.

41 Then, on or about 8 November 2010 G8 informed the plaintiffs that it wanted to reduce the amounts that it had agreed to disburse under the Second Loan Variation and also wanted its subsidiary G8 CHC to be issued with the Licences and to be given the respective landlords' consents to operate the AO Centres and the Other Centres from the landlords' premises. G8 also wanted CHG to provide, as security, executed but undated share transfer forms and share certificates for 100% of the issued share capital in the entities that owned the AO Centres and the Other Centres. Ms Hutson's explanation for the changes in the transactions was that at about that time G8 had discovered that CHG had serious cashflow difficulties and therefore, for its own protection, G8 wanted to convert the loans that it had extended up to that point into hard assets. Consequently, G8 proposed that the 48 Franchise Agreements be transferred as consideration to be set off against the existing loan. The set off amount of about $7m was, Ms Hutson maintained, not a valuation of the Franchise Agreements but based on the amount which had been lent to CHG and interest which had accrued thereon as of November 2010. Dr Yap agreed that the $7m did not reflect the true value of the 48 franchised child care centres.

42 The plaintiffs say that although G8 wanted to reduce the amounts that it had agreed to disburse and also wanted further security, CHG had no choice but to go along with the changes because it had been in negotiation with the shareholders of the entities that owned the Other Centres and had already reached in principle agreements with them to acquire the rest of the shares in those entities.

43 It was against this background that the various amending documents were executed on 22 November 2010.

44 The MCYS has "Guidelines on Transfer of Ownership" which lay down the requirements to be fulfilled when a new Licence has to be issued because the ownership of a childcare centre has been transferred. Typically, it takes approximately two to three months to fulfil these requirements because not only does an application (accompanied by many supporting documents) have to be made under the OBLS but also there is generally a pre-licensing visit by a child care officer from MCYS who will check if the childcare centre meets the prescribed standards. The evidence was that generally, if an application was acceptable, it would at first be approved on the OBLS ("OBLS Approval") but that the hard copy Licence would not be issued until after a satisfactory visit to the childcare centre by an MCYS officer had taken place. In some cases, however, the MCYS would waive the requirement for a physical inspection of the childcare centre concerned.

45 On 3 December 2010, the plaintiffs' representative met officers from MCYS to find out how they could expedite the application process in respect of the new Licences. They were told that the Transfer of Ownership procedure had to be followed and that because of the approaching holiday season, MCYS did not have sufficient manpower to process the applications for new Licences for 18 childcare centres. The net effect of this, according to Dr Yap, was that even though the plaintiffs started as early as they could to collate the documents necessary for the applications, it was not realistic to expect the Licences to be issued to G8 CHC by 1 January 2011 even though Financial Close remained scheduled for that date.

46 In December 2010, the parties' relationship became difficult. From the plaintiffs' point of view, G8 was evincing reluctance to proceed with its contractual obligation to consider and purchase the childcare centre businesses (referred to by the parties as "the second batch of acquisitions") which Dr Yap and Dr Singh had sourced for under the M&A Deed. G8's view was that CHG was not entitled

to push for the second batch of acquisitions when it had yet to obtain Licences and lease assignments in respect of the AO Centres and Other Centres. As far as G8 was concerned, the M&A Deed would come into effect only after Financial Close. The parties exchanged correspondence expressing their respective concerns but it is not necessary to go into that correspondence at this point.

47 New Year's Day in 2011 came and went without Financial Close taking place. Parties were aware that they had not been able to meet the requirements of the amended BAC and that further amendments needed to be made to the documentation if the transaction was to proceed.

48 Between 19 and 22 January 2011, the parties entered into negotiations for the second variation of the BAC. The persons present during the negotiations were, from G8, Ms Hutson (who came to Singapore for the meetings) for all meetings and Mr Scott (who was already based in Singapore) for some meetings, and from the plaintiffs, Dr Yap, Dr Singh, Ms Ng and Mr Jimmy Yap for different parts of the meetings. The Second BAC Variation was drafted by Ms Hutson and reviewed by G8's lawyers.

49 The more significant provisions of the Second BAC Variation have been described above. In particular, it amended the definition of Financial Close and also the provision governing payment of the Purchase Price. The Sunset Date became 30 April 2011 and a new clause 3.3 was inserted in the BAC to provide for the timing of the second batch of acquisitions. One of the major disputes between the parties arising from the amendments effected by the Second BAC Variation is whether it required CHG to effect legal transfer of the AO Centres and the Other Centres to G8 on 28 February 2011 and whether the conditions precedent to Financial Close would be met simply by lodgement of the applications for the Licences on the OBLS by 28 February 2011 or whether the requirement was for the Licences to be issued in G8 CHC's name by that date.

50 The next development related to the proposed replacement of three childcare centres. According to Dr Yap, in December 2010, CHG became aware that two centres were not performing as well as the others and in one case, there would be problems in effecting a transfer of the tenancy agreement to G8 CHC. The plaintiffs therefore wanted these three centres ("Withdrawn Centres") to be removed from the BAC and replaced by four other centres ("Replacement Centres") at no additional cost to G8. On 9 February 2011, Dr Singh sent G8 an email in which he stated that the plaintiffs had two centres that needed to be replaced with new centres because "doing a replacement ... is in the essence of time". He then gave details of the Replacement Centres.

51 On 11 February 2011, Mr Scott informed CHG that he had no objections in principle to replacing the Withdrawn Centres with the Replacement Centres and that G8 would require basic due diligence checks on the Replacement Centres. In the second half of February 2011, G8 entered into sale and purchase agreements directly with the Replacement Centres to acquire their businesses. It should also be mentioned that on 4 March 2011, Ms Hutson wrote that the proposal made by CHG that the Withdrawn Centres be replaced by the Replacement Centres did not raise any conceptual issues. CHG prepared a draft third deed of variation of the BAC to reflect, *inter alia*, the change in centres and this was sent to G8 on 3 March 2011. It was, however, never signed. The parties are now in dispute over whether there had been an agreement to replace the Withdrawn Centres with the Replacement Centres.

52 It may be recalled that under cl 2.2 of the BAC as amended, it was provided, *inter alia*, that:

> In relation to the AO Centres and Other Centres, the Buyer will receive the profits and bear the expenses of those Businesses from 1 March 2011 subject to the legal transfer of such Business to the Buyer ... on satisfaction of all conditions precedent (including lease assignment and lodge of

the child care licences with the [MCYS] by 28 February 2011) ...

In his affidavit, Dr Yap explained what the plaintiffs had done prior to 1 March 2011 in relation to the matters covered by this provision.

53 In particular, the centres to be transferred to G8 CHC (excluding the Withdrawn Centres) operated under two different types of leases. Seven of the centres had leases from the Housing and Development Board ("HDB"). The other eight centres operated in premises leased from private landlords. Dr Yap asserted that CHG had successfully arranged for the novation or transfer of all these tenancies to G8 or G8 CHC by the end of February 2011.

54 In relation to the seven centres which were tenants of the HDB, the direction of MCYS was that it would inform G8 CHC and CHG to apply to the HDB for the leases to be assigned and that, after the Licences were approved, MCYS would work with HDB to issue the new tenancy agreements to G8 CHC. As for the other eight childcare centres, CHG arranged for G8 CHC to enter into new tenancy agreements for tenancies commencing from 1 March 2011, with all the respective landlords. CHG also arranged for G8 CHC to enter into tenancy agreements with the landlords of the premises from which the Replacement Centres operated.

55 In relation to its employees who were involved in the direct operations of the childcare centres, CHG had arranged with G8 for the latter to take over the employment contracts of these staff members by 1 March 2011. By 1 March 2011, CHG had also already provided G8 with the entire set of curriculum materials that it had developed for use in all the centres.

56 In relation to the Licences, Dr Yap pointed out that under cl 11.1 of the BAC, it was G8's obligation to apply for the Licences and to do all things reasonably necessary to secure approval for the issue of the same. CHG assisted G8 by preparing the applications and filing them. CHG managed to lodge applications for Licences in respect of 15 centres by 16 February 2011. In fact altogether 16 applications were submitted on that date as CHG had also applied for a Licence for one of the Replacement Centres on behalf of G8.

57 On 25 February 2011, Dr Singh instructed his subordinate, Mr Edmund Phang Chin Sian ("Mr Phang"), to inform MCYS that he did not want the Licences for the AO Centres to be issued. Subsequently, he asked MCYS if it could issue all the remaining Licences on 15 March 2011. CHG's explanation for this action was that it wanted to streamline the issue of the rest of the Licences so that they would bear the same issue dates and expiry dates.

58 On 1 March 2011, MCYS approved two applications and issued two Licences. One more application was approved and a further Licence was issued on 2 March 2011. By that date, G8 CHC had Licences for the operation of the child care centre owned by Teeny Tiny Childcare & Development Pte Ltd ("Teeny Tiny") and the two childcare centres owned by Our Juniors' Schoolhouse Pte Ltd. The applications for the other Licences remained outstanding. No further Licences were issued on 15 March 2011 nor were further OBLS approvals given by that date.

59 On 1 March 2011, G8 and/or G8 CHC employed a number of CHG's former employees including Mr Phang. They also took over the operations of a number of centres. G8, however, took the view that Financial Close had not occurred on 1 March 2011 because of alleged breaches on the part of CHG in failing by that date to procure OBLS approvals of Licences for all 18 centres that should have been transferred and the transfer of the leases for all these centres. To G8, this meant that the Total Indebtedness had not been set off against the Purchase Price on 1 March 2011 and that it remained outstanding.

60 By March 2011, G8 no longer trusted the plaintiffs. On 2 March 2011, Mr Scott told Ms Hutson that CHG was using the delay in OBLS approval as leverage against G8. He had learnt from Mr Phang that Dr Singh had asked the HDB to date the new tenancy agreements from 15 March 2011 instead of from 1 March 2011. Tensions had arisen between Mr Scott and Dr Singh over the fact that G8 had not taken over all of CHG's employees. G8 considered that CHG was not prepared for Financial Close and was attempting to delay it. G8 thought that it had to take serious steps to secure its position.

The action

Commencement of legal proceedings

61 On 10 March 2011, G8's solicitors, Messrs Harry Elias Partnership, sent a letter of demand to CHG. This letter stated that pursuant to cl 5.1 of the Loan Agreement, CHG had agreed that the loan and other sums owing under the Agreement would be "repaid on the Repayment Date (31 December 2010)". The letter gave CHG notice that as repayment had not been made by the Repayment Date, pursuant to cl 14.3 of the Loan Agreement, G8 declared the occurrence of an event of default and the Total Indebtedness was immediately due and payable and G8 was entitled to exercise its rights as set out in the Loan Agreement. CHG responded immediately to this letter and stated its position that a valid set off of the Total Indebtedness against the Payment Price had occurred on 1 March 2011 and that there were no monies owing to G8 under the Loan Agreement read with the BAC.

62 Further correspondence followed. G8 stated its position that without the legal transfer of the businesses of the AO Centres and the Other Centres, there could be no off set against the Total Indebtedness under the Loan Agreement and no partial satisfaction of the Purchase Price. By its letter of 14 March 2011, CHG maintained that it was ready able and willing to effect Financial Close in March 2011 when all the OBLS approvals had been procured. CHG did not disclose that shortly before that date it had requested the MCYS to "hold back" the Licences.

63 On 22 March 2011, G8 exercised its rights under the Debenture. It appointed receivers of CHG. At the same time, it transferred all shares in 12 subsidiaries of CHG to itself. Simultaneously G8 removed Dr Singh, Dr Yap and one Mr Johnny Phua as directors of said companies and appointed Mr Scott and his wife in their place.

64 CHG fought back. On 28 March 2011, it filed the writ in this action and applied for an injunction requiring G8 to withdraw the appointment of the receivers. In his affidavit in support of this application, Dr Yap explained that there was what he termed an "Overarching Agreement" between the parties. He stated that the application arose out of the Heads of Agreement concluded on 30 June 2010. Pursuant to subsequent negotiations, G8, CHG, Dr Singh and Dr Yap had entered into an agreement for, *inter alia*, CHG to sell and for G8 to acquire CHG's childcare businesses for approximately $50m and this constituted the "Overarching Agreement". In order to carry out the Overarching Agreement, the parties had later entered into various transaction documents including the BAC which was subsequently varied in November 2010 and January 2011, the Loan Agreement, the M&A Deed and the Bonus Deed.

65 After hearing the parties, on 14 April 2011, Lee Seiu Kin J made orders to the following effect:

(a) The appointment of the receivers was set aside.

(b) G8 was restrained from appointing receivers pursuant to the debenture dated 17 September 2010 until the trial of the action or until further order.

(c) The transfers of shares in the 12 subsidiaries of CHG were set aside.

(d) All changes in directorships in the subsidiaries were set aside and the directors holding office immediately prior to the date of the purported share transfers were to continue as directors of the subsidiaries.

(e) The plaintiffs were to deliver to G8 in respect of the shares in the subsidiaries share transfer forms executed in blank, directors' resolutions and share certificates.

(f) G8 was restrained from exercising its security in respect of the shares in the subsidiaries until the trial of the action or further order.

(g) The plaintiffs were to:

(i) collect and pay such monies as they received for the operation of the childcare centres owned by the subsidiaries from 1 March 2011, including, without limitation to the generality thereof, the subsidies from MCYS and the fees from parents, to G8 as soon as practicable and, in any event, within two weeks from the receipt of such monies; and

(ii) allow G8, within one week of G8's request, reasonable access to all records of the subsidiaries to establish that the monies received for the operation of the childcare centres by the subsidiaries from 1 March 2011 were paid to G8 in accordance with court order.

66 On 21 April 2011, G8's solicitors wrote to CHG's solicitors giving notice that G8 was ready, willing and able to complete the BAC on the Sunset Date, *ie*, 30 April 2011. The letter also stated that pursuant to cl 3.2(c) of the BAC, CHG's failure to satisfy the conditions precedent to completion by the date specified in the condition or by Sunset Date would entitle G8 to terminate the BAC.

67 On 25 April 2011, CHG's solicitors wrote to G8's solicitors referring to the Overarching Agreement and the specific agreements that were entered into on the basis of the Overarching Agreement as set out in Dr Yap's first affidavit dated 28 March 2011. The letter asserted that G8 had committed various acts in or around March 2011 in breach of the Overarching Agreement.

68 The letter went on to state that the plaintiffs regarded G8's acts to be repudiatory breaches of the Overarching Agreement. Further, these repudiatory breaches had led to a complete breakdown of the trust and confidence between the parties necessary for the performance of the M&A Deed and the Bonus Deed. On this basis, the plaintiffs accepted the repudiatory breaches and considered the Overarching Agreement and the BAC to be terminated. This was contained in paras 5 and 6 of the letter which read:

5. The Plaintiffs have instructed us to inform you that they accept [G8's] repudiatory breaches and the Overarching Agreement, including the [BAC], is therefore hereby terminated. As the Plaintiffs have already initiated Suit No. 211 of 2011/F (the **"Suit"**) against [G8] in the Singapore High Court, they will be seeking damages and the necessary consequential reliefs in that action in respect of [G8's] repudiatory breaches. For the avoidance of doubt, the above acts are not exhaustive and the Plaintiffs will elaborate on [G8's] acts in the Suit.

6. For the avoidance of doubt, parties are hereby discharged from the further performance of their respective obligations under the Overarching Agreement.

The pleadings

The plaintiffs' case

69 The reliefs sought by the plaintiffs in this action are the following:

(a) A declaration that G8 is in repudiatory breach of "the Overarching Agreement including the BAC";

(b) A declaration that the Overarching Agreement was terminated on 25 April 2011 by the plaintiffs' solicitors' letter of that date to the defendant's solicitors;

(c) Damages to be assessed, interest and costs; and

(d) All necessary and consequential orders arising from the termination of the Overarching Agreement.

70 It is necessary to recite or paraphrase parts of the Statement of Claim so that the way in which the plaintiffs have framed their case can be appreciated.

71 In para 9, the plaintiffs state:

9. From September 2010, [CHG], Yap, Singh and [G8] entered into an agreement that contains the following components (the "**Overarching Agreement**"):

(1) acquisition of the business of [CHG] and those of the entities set out at paragraph 11 below (collectively referred to herein as the "**Cherie Hearts Group**");

(2) acquisition of other childcare centres that are not part of Cherie Hearts Group but in respect of which Yap and Singh have the business network to enable [G8] to acquire them; and

(3) bonus payouts to Yap and Singh as founders of the Cherie Hearts Group.

72 In para 10, it was pleaded that it was on the basis of the Overarching Agreement that the BAC, the First BAC Variation, the Second BAC Variation, the Loan Agreement, the First Loan Variation, the Second Loan Variation, the Third Loan Variation, the Debenture, the M&A Deed, the M&A Variation Deed, the Bonus Deed and the Deed of Restraint (dated 22 January 2011) were concluded.

73 Paragraphs 11 to 26 of the statement of claim set out the plaintiffs' case in relation to the BAC as amended on the basis that the BAC was entered into to carry out the first component of the Overarching Agreement. It set out various relevant terms of the BAC and the various amendments thereto. I need not rehearse these. These paragraphs also dealt with the 48 franchised childcare centres and the Franchise Deed. In para 25, the plaintiffs set out their stand that under cl 2.2(b) of the BAC there was, on 1 March 2011, to be an automatic set off of the monies advanced by G8 against the Purchase Price. Para 25 reads:

Clause 2.2(b) of the [BAC], the Acknowledging Provision and Clause 2.8 of the [Third Loan Variation] dated 22 November 2010 expressly provide that the set off of the monies advanced by [G8] under the Loan Agreement shall occur in the following manner, in partial satisfaction of the Purchase Price:

(1) first, the sum of $7,172,504 (being the summation of the sum of $6,904,682 advanced by

[G8] and $267,822 in accrued interest owing under the Loan Agreement as at 30 November 2010) shall be deemed to be fully paid and set off against the Purchase Price, in partial satisfaction of the Purchase Price, upon the assignment of all of CHCD's rights, entitlements and interests in the franchise agreements in respect of the 48 franchise centres with effect from 1 December 2010; and

(2) secondly, all monies advanced by [G8] shall be set off against the Purchase Price on 1 March 2011, in partial satisfaction of the Purchase Price.

In para 26, the plaintiffs assert that it is an implied term of the BAC that no monies can be due and owing to G8 as long as there has not been complete satisfaction of the Purchase Price.

74 Paragraphs 27 to 28 of the statement of claim set out the plaintiffs' contention that the M&A Deed and the M&A Variation Deed were entered into to carry out the second component of the Overarching Agreement.

75 Paragraphs 29 and 30 of the statement of claim set out the plaintiffs' contention that the Bonus Deed was entered into to carry out the third component of the Overarching Agreement.

76 The plaintiffs then move on to deal with loan monies disbursed by G8. By para 33 they state that as at 30 November 2010, the total amount disbursed by G8 was $6,904,682 and this carried interest amounting to $267,822. In para 34, they assert that the total sum of $7,172,504 was deemed to be fully paid and set off against the Total Indebtedness on 1 December 2010 upon the assignment of CHCD's rights, title and interest in and to the 48 franchised childcare centres to G8 CHH.

77 Paragraphs 35 and 36 set out the amounts disbursed by G8 between November 2010 and March 2011 to assist CHG in becoming the registered shareholder of all the shares in the entities which owned the AO Centres and the Other Centres. Paragraph 37 sets out details of other amounts disbursed by G8 pursuant to the BAC. In para 38, the plaintiffs aver that the total amount disbursed by G8 was $15,365,362 of which the amounts set out in para 33 of the Statement of Claim had been deemed to be fully paid and set off in connection with the assignment of the franchised childcare centres.

78 In para 39, the plaintiffs aver that G8 did not disburse monies for CHG to become the 100% registered shareholder of a company called "Cherie Hearts School House Pte Ltd" ("CH School House") despite being reminded to do so.

79 Paragraph 40 deals with the three Withdrawn Centres. After reciting certain facts, the plaintiffs plead that G8 was estopped from insisting on the transfer of the Withdrawn Centres.

80 In para 41, the plaintiffs aver G8 took various actions in breach of the Overarching Agreement, including the BAC, in March 2011. The specified acts included the appointment of receivers and the wrongful transfer of shares into G8 CHC's name.

81 In para 42, the plaintiffs aver that the appointment of the receivers was done in bad faith and give particulars of this allegation. These breaches by G8 were repudiatory breaches of the Overarching Agreement and had led to a complete breakdown of the trust and confidence between the parties necessary for the performance of the M&A Deed and the Bonus Deed. In para 44, the plaintiffs say that given the above, CHG had, by way of its solicitors' letter of 25 April 2011, given G8 notice that it accepted the repudiatory breaches and elected to terminate the Overarching

Agreement.

The defence

82 G8's position is that there is no such thing as an Overarching Agreement. It also denies that it has been in breach of the BAC and that CHG was entitled to repudiate it. It asserts that CHG itself was in breach of certain warranties in the BAC and has set out a counterclaim on this basis. In the account that follows, I will only highlight certain portions of the defence and counterclaim.

83 In para 2 of the defence and counterclaim, G8 denies the existence of an Overarching Agreement and asserts that all the documents entered into between the parties were separate and distinct agreements. In para 3, G8 denies that the agreements were into to implement "components" of the Overarching Agreement. There was no Overarching Agreement and each of the agreements set out in para 10 of the Statement of Claim were entered into at different times for different purposes incidental to G8's acquisition of CHG's childcare business.

84 In para 4, G8 avers that the Loan Agreement was not initially contemplated by the parties as part of the acquisition process. G8 agreed to lend money to CHG at its request because first, CHG required financial assistance to discharge its outstanding liabilities to Tembusu and Crest so that it could enter into an acquisition arrangement with G8; and second, because by its own means, CHG was unable to acquire the childcare centres for subsequent acquisition by G8.

85 In para 7 of the defence, G8 asserts that the Purchase Price ($24,610,027) was derived from the plaintiffs' valuation of the 18 childcare centres set out in para 11 of the Statement of Claim and the 48 franchise agreements (set out in schedule 1 of the Statement of Claim).

86 In para 6 of the defence, G8 avers that the acquisition was initially intended by the parties to be an acquisition of the shares of CHG. However, due diligence revealed that CHG's accounts for the years 2008 and 2009 were qualified and the plaintiffs and G8 therefore agreed in the BAC that the acquisition would be of specific businesses and assets of CHG only and not a share acquisition.

87 Regarding the set off on 1 December 2010 in respect of the 48 franchise agreements, G8 states (para 15) that there was no valuation of the rights, entitlement and interest in the agreements and it had accepted the assignment in exchange for a set off of $7,172,504 advanced to CHG under the Loan Agreement as CHG had no other means to repay the sums due.

88 G8's reply to one of the main planks of the plaintiffs' case *ie* that the Total Indebtedness was set off on 1 March 2011 is contained in para 16 of the defence and counterclaim. This reads:

> 16. In relation to the set off of the balance of the Total Indebtedness which was to take place on 1 March 2011 referred to at paragraph 25(2) of the Statement of Claim, [G8] avers that:
>
> (1) Pursuant to Clause 3.3 of the BAC, the parties had agreed that "notwithstanding any other provision of this agreement the AO Centres and Other Centres will be transferred to the Buyer on 28 February 2011 ..." Based on the Acknowledging Provision to Clause 2.2(b) of the BAC, parties had also agreed that in order for the set off on 1 March 2011 to take place, the Plaintiffs must effect a legal transfer of the AO Centres and Other Centres to [G8] on 28 February 2011;
>
> (2) [G8] agreed to a set off of the remaining Total Indebtedness on the basis that a legal transfer of the AO Centres and Other Centres was to be duly effected by 28 February

2011. Sometime in mid-January 2011 before the [Second BAC Variation] was entered into, during a face-to-face meeting between the Plaintiffs' representatives including [Dr Singh] and [G8's] Jenny Hutson in Singapore, [Dr Singh] orally represented to Jenny Hutson that it was possible for the legal transfer to occur by 28 February 2011 as the [OBLS] Approvals could be obtained by that time;

(3) In order for the legal transfer to occur, it was necessary for the OBLS Approvals to be given to [G8's] nominated entity, [G8 CHC]. The childcare licences were needed in order to enable [G8 CHC] to be able to collect fees from the parents of the children, to bear the expenses and receive the profits, as set out in the Acknowledging Provision. Without being issued with the childcare licences, [G8 CHC] cannot receive the revenues in its name;

(4) As [G8] did not receive OBLS Approvals and [Licences] for any of the AO Centres and Other Centres by 28 February 2011, the AO Centres and Other Centres were not transferred to [G8] by 28 February 2011 and the set off of the remaining Total Indebtedness did not occur on 1 March 2011;

(5) By reason of the matters set out in paragraph 46(7) below, there was no legal transfer of the Gloryland Centres (as defined at paragraph 22A below) by 28 February 2011 and therefore the set off of the remaining Total Indebtedness did not occur on 1 March 2011 or at all.

89 G8 denies (para 17) that there was any implied term in the BAC and refers to cl 20.11 of that document which is the entire agreement clause. It also contends that such an implied term would be contrary to the parties' intentions.

90 G8 disagrees with the plaintiffs' calculations as to how much had been advanced under the Loan Agreement. According to it (para 38), excluding the amounts set off at the time of the Franchise Deed, the Total Indebtedness as at 30 April 2011 was $6,187,949.72 including interest (if interest is excluded, the amount advanced came to $5,703,180).

91 G8 avers that with regard to two AO Centres (referred to as "the Gloryland Centres"), the money disbursed by it to CHG under cl 4.1(d) of the Loan Agreement had not been paid or relayed by CHG to the beneficial owners of the Gloryland Centres by 28 February 2011 in full or at all (para 22A). It explains in para 24 why it had not disbursed monies for the purchase of shares in CH School House.

92 Regarding the Withdrawn Centres, G8's position (para 25) is that it had not agreed to replacing them with the four Replacement Centres. CHC had entered into the sale and purchase agreements with the owners of the Replacement Centres on the basis that they were acquisitions under the M&A Deed and not that they were replacements for the Withdrawn Centres. G8 denies that it was estopped from exercising its contractual rights under the BAC to demand the legal transfer of all 18 OA Centres and Other Centres including the Withdrawn Centres.

93 G8 denies (para 26) that its actions in demanding repayment of the Total Indebtedness and enforcing its security for the same were in breach of contract. Its position is that it was entitled to effect such actions because the Total Indebtedness was outstanding and had not been set off on 1 March 2011 due to CHG's inability to satisfy the conditions for Financial Close. It also denies that these acts amounted to repudiatory breaches of the BAC.

94 In relation to the plaintiffs' allegation of bad faith, G8 denies this and avers, *inter alia*, (para

28):

(a) The appointment of receivers only served to protect G8's legitimate commercial interest in seeking repayment of the Total Indebtedness;

(b) The 18 AO Centres and Other Centres were not legally transferred to G8 by 1 March 2011 as required by cl 3.3 of the BAC;

(c) CHG had failed to deliver the Withdrawn Centres and the purported transfers of Other Centres were incomplete as the leases had not been assigned and the Licences had not been issued by the specified date;

(d) G8 did not obtain substantial benefit of the acquisition that had been unilaterally aborted by the plaintiffs.

95 The rest of the defence contains the allegations which G8 has made in support of its counterclaim. I do not need to deal with those in this judgment.

96 The plaintiffs filed a reply and defence to counterclaim. I do not need to set out the particulars of the same.

Bifurcation of the trial

97 The proceedings were conducted on an expedited basis because the plaintiffs wanted to recover total control of the childcare centres and CHG's business from G8 as soon as possible. At a pre-trial conference held on 4 July 2011, directions were given for the exchange of affidavits and trial dates were fixed between 5 and 16 September 2011. Subsequently, G8 applied for the trial dates to be vacated because it needed more time to obtain discovery from the plaintiffs in relation to the counterclaim. G8 was not successful in having the whole trial vacated but, on 18 August 2011, the court ordered that only the plaintiffs' claim would proceed for trial between 7 and 16 September 2011 and G8 would be given further dates for the trial of the counterclaim.

98 Accordingly, the proceedings conducted before me from 7 September 2011 onwards dealt only with the plaintiffs' claim and this judgment will be restricted to that claim without any consideration of the counterclaim.

Issues, submissions and analysis

Issues

99 The plaintiffs have, more or less but not completely clearly, identified the issues in these proceedings as follows:

(a) The central issue is whether there had been a set off of the Total Indebtedness as at 1 March 2011 (this is the only issue clearly formulated as an issue by the plaintiffs);

(b) If there was no set off as at 1 March 2011, whether the Total Indebtedness had become due and owing;

(c) Whether G8 was in repudiatory breach of the BAC; and

(d) Whether the Overarching Agreement, including the BAC, had been terminated by reason of

G8's breaches.

100 G8 contended that the issues are as follows:

(a) Was there an Overarching Agreement in fact or in law;

(b) Was the Total Indebtedness under the Loan Agreement due and outstanding;

(c) Did a legal set off occur on 1 March 2011; and

(d) Did the plaintiffs lawfully terminate the Loan Agreement, BAC, M&A Deed and Bonus Deed on 25 April 2011?

101 Although the Overarching Agreement was emphasised in the plaintiffs' pleadings, in their closing submissions, they used it as background to explain the various transactions. They did not deal in detail with whether this construct of the "Overarching Agreement" met the legal requirements necessary for it to be a binding contract. That issue was assumed to have been decided in its favour. However, I think that I should consider that issue first as its outcome may affect consideration of the other issues. As regards the other issues, it appears to me that they should be formulated as follows and considered in the following order:

(a) What is the true construction of cl 2.2(b) of the BAC and in particular the Second Amended Rider;

(b) Whether on that true construction, there was a set off of the Total Indebtedness against the Purchase Price on 1 March 2011;

(c) If there was no set off of the Total Indebtedness on 1 March 2011, was the Total Indebtedness then due and payable;

(d) Were G8's actions after 1 March 2011 in breach of contract and if so would such breaches be considered to be repudiatory breaches of the BAC;

(e) Did the plaintiffs lawfully terminate the BAC, Loan Agreement, M&A Deed and Bonus Deed on 25 April 2011?

Was there an Overarching Agreement?

102 As all lawyers know, for a contract to exist, the following elements must be present: identified parties, agreed terms, consideration and an intention to create legal relations. I will consider the issue of whether the Overarching Agreement exists by reference to these elements.

103 The plaintiffs' position is that the parties to the Overarching Agreement are CHG, Dr Yap, Dr Singh and G8. As for the terms, the plaintiffs did not identify terms as such. Instead, they identified "components" which they elaborated referred to as being:

(a) The acquisition of the business of the Cherie Hearts Group;

(b) The acquisition of other childcare centres; and

(c) Bonus payouts to Dr Singh and Dr Yap.

According to the plaintiffs, it was in order to effect those components that the various written agreements were concluded subsequently. The plaintiffs did not specify any other terms of the Overarching Agreement though one might have expected there to be some basic details of pricing, amounts payable and in what stages, and completion targets. The absence of agreed and identifiable terms is, in my opinion, a significant pointer to the non-existence of the Overarching Agreement. As for consideration, though the plaintiffs did not deign to specify the same, it is possible they would argue that the consideration would be mutual promises by each set of parties to the other to take the necessary action to give effect to the components. Since they made no such contention, however, I will not examine it further.

104 Then we come to the requirement of intention to create legal relations. The plaintiffs have not clearly specified how this intention was manifested. First, the plaintiffs did not specify a date on which the parties agreed that the Overarching Agreement had been concluded with its agreed terms. It was only pleaded that "from September 2010" the parties had entered into the Overarching Agreement. This is vague to say the least since the parties were in talks from June 2010 onwards and had no difficulty signing documents to reflect their negotiations in June, September, October, and November 2010 and in January 2011. If the plaintiffs want to establish the existence of the Overarching Agreement, it is incumbent on them to show when the parties were *ad idem* on the terms so that that Agreement came into existence. They did not do so.

105 In this vein, it is significant that, as G8 pointed out, there was no reference to the existence of the Overarching Agreement before the litigation started. No one mentioned this agreement during the negotiations nor was it mentioned in any piece of correspondence prior to the litigation. Even in March 2011 when CHG was disputing the defendant's right to declare an event of default under the Loan Agreement, it did not invoke the Overarching Agreement as a contract which prohibited the defendant from acting as it sought to do. The "Overarching Agreement" first saw the light of day in the writ in this action filed on 28 March 2011. It is also interesting that when the plaintiffs' witnesses were asked in court the date on which the Overarching Agreement came into existence, they gave different responses. Dr Yap said at one point that it was formed in 2010 whereas at another point he said it came about in August 2010. Dr Singh and Ms Ng also gave two dates. Dr Singh said 30 June 2010 and 15 October 2010 while Ms Ng said August 2010 and June 2010. As G8 submitted, if the plaintiffs' witnesses are unable to give one coherent date when the Overarching Agreement commenced, then more than likely, it does not exist.

106 Second, the absence of any intention to enter legal relations in the form of an oral Overarching Agreement is manifested by the presence in the BAC, the M&A Deed and the Bonus Deed of an "entire agreement" clause. None of these agreements contain any term indicating that they were entered into as a component of the Overarching Agreement. Instead, the recitals of these agreements spell out the specific purposes for which the same were concluded and do not either expressly or impliedly mention the Overarching Agreement. In fact, the purpose and effect of an "entire agreement" clause negates the existence of an overarching agreement in the terms asserted by the plaintiffs. The purpose of such a clause is to show that the full contractual terms to which the parties have agreed are contained in the written document. This was well put by Lightman J in *Inntrepreneur Pub Co (GL) v East Crown Ltd* [2000] All ER (D) 1100 when he said at [8]:

> ... [T]he formula [of words] used [in the clause] is abbreviated to an acknowledgement by the parties that the Agreement constitutes the entire agreement between them. That formula is in my judgment amply sufficient to constitute an agreement that the full contractual terms to which the parties agreed to bind themselves are to be found in the Agreement and nowhere else. That can be the only purpose of the provision.

107 In the present case, cl 20.11 of the BAC provided that it superseded all previous agreements about its subject matter and embodied the "entire agreement" between the parties. All the plaintiffs (in addition to the other 19 Sellers) and G8 were parties to the BAC; accordingly, as between the plaintiffs and G8, the "entire agreement" clause must have the effect of superseding any other oral agreement amongst them regarding the acquisition of the businesses of the Cherie Hearts Group. The same observation can be made in respect of the M&A Deed and the New Bonus Deed. Indeed the "entire agreement" clauses in the M&A Deed and the New Bonus Deed go even further in that the same also state that any previous understanding or agreement relating to the subject matter of the M&A Deed/New Bonus Deed has been replaced by the M&A Deed/New Bonus Deed and has no further effect. If an overarching agreement did exist which contained a term relating to the acquisition of other childcare centres or to the payment of bonus, then that agreement would have ceased to have any effect when, respectively, the M&A Deed and the New Bonus Deed were concluded.

108 Bearing in mind that all the parties had access to legal advice, if the Overarching Agreement existed and had been intended to continue to have effect, it would either have been mentioned in subsequent agreements or, at the very least, the respective entire agreement clauses would have been left out or modified in some fashion. Further, the parties had painstakingly and purposefully entered into multiple deeds of variation of the specific agreements in order to record the agreed variations to the original terms. There was no initial term let alone a variation to reflect that the parties were contracting on the fundamental basis of an overarching agreement.

109 It appears to me on the evidence and on the law that G8 and the plaintiffs never entered into an oral agreement in terms of the Overarching Agreement. The factual situation was that G8 was extremely interested in getting into the childcare industry in Singapore and Dr Singh and Dr Yap were similarly extremely interested in selling their childcare business for a good figure to G8. That was why the Heads of Agreement was signed in June and the Share Sale Agreement was entered subsequently. That was also why when the Share Sale Agreement could not be completed due to the absence of audited accounts, the parties negotiated to find a different way of accomplishing their aim. In the course of these negotiations, the structure of the deal changed, the amounts involved changed and the parties involved changed. The fact that the parties were eager to accomplish a transfer of the childcare business from one to the other does not lead to a finding that there was an oral agreement to accomplish this when the parties were at the same time very careful to document all the terms on which they agreed and to execute such documentation. When parties are so concerned with proper documentation that all agreed variations are cast into the form of an amending deed, it is against the balance of probabilities that such parties would at the same time be operating under the umbrella of an oral Overarching Agreement. I agree with the defendant's submission that the "three components" of the Overarching Agreement were constructed *ex post facto* and that there was no evidence to show that the parties had intentionally entered into such an agreement at any time.

How should the Second Amended Rider be construed?

110 In order to assist understanding of the discussion that follows, I think it helpful to set out again the relevant portions of cl 2.2 of the BAC as amended by the Second BAC Variation:

> The Purchase Price is S$24,610,027 to be satisfied in the following manner:
>
> ...
>
> (b) secondly, by way of set off of the Total Indebtedness under the Loan Agreement in partial satisfaction of the Purchase Price which includes all amounts paid by the Buyer directly to the vendors of the OA Centres and the Other Centres;

...

In relation to clause 2.2(b) above, the parties acknowledge that:

...

- In relation to the AO Centres and Other Centres, the Buyer will receive the profits and bear the expenses of those Businesses from 1 March 2011, subject to the legal transfer of such Business to the Buyer or its nominated entity on satisfaction of all conditions precedent (including lease assignment and lodgement of the child care licences with the Department by 28 February 2011). In the meantime, monies advanced under the Loan Agreement shall incur interest as provided therein provided that on 1 March 2011 an offset against the Total Indebtedness under the Loan Agreement shall occur in partial satisfaction of the Purchase Price. [the "Amended Second Rider"]

111 The principles of construction of contracts were considered by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029. In that case, the court found helpful the summary of principles in an academic text, *The Construction of Contracts: Interpretation, Implication, and Rectification* by Gerard McMeel (Oxford University Press, 2007) at paras 1.124, 1.133 and endorsed their application in Singapore. The cited principles relevant to the present case are as follows:

The aim of construction

First, the aim of the exercise of construction of a contract or other document is to ascertain the meaning which it would convey to a reasonable business person.

The objective principle

Secondly, the *objective principle* is therefore critical in defining the approach the courts will take. They are concerned usually with the expressed intentions of a person, not his or her actual intentions. The standpoint adopted is that of a reasonable reader.

The holistic or 'whole contract' approach

Thirdly, the exercise is one based on the *whole contract* or an *holistic approach*. Courts are not excessively focused upon a particular word, phrase, sentence, or clause. Rather the emphasis is on the document or utterance as a whole.

The contextual dimension

Fourthly, the exercise in construction is informed by the *surrounding circumstances* or *external context*. Modern judges are prepared to look beyond the four corners of a document, or the bare words of an utterance. It is permissible to have regard to the *legal, regulatory, and factual matrix* which constitutes the background in which the document was drafted or the utterance was made.

Business purpose

Fifthly, within this framework due consideration is given to the *commercial purpose* of the transaction or provision. The courts have regard to the overall purpose of the parties with

respect to a particular transaction, or more narrowly the reason why a particular obligation was undertaken.

...

Avoiding unreasonable results

Eighthly, a construction which leads to a very unreasonable result is to be avoided unless it is required by clear words and there is no other tenable construction.

[Emphasis added]

Bearing the above principles in mind, I will now consider the parties' arguments.

112 The plaintiffs submit that the proper construction of the Amended Second Rider is as follows:

(a) that the parties agreed that the remainder of the Total Indebtedness under the Loan Agreement was to be set off on 1 March 2011, in exchange for which G8 would be entitled to receive the profits from the businesses of the AO Centres and the Other Centres generated from 1 March 2011;

(b) the plaintiffs were only required to perform the following by 28 February 2011;

(i) Assign to G8 CHC the leases of the premises from which the AO Centres and the Other Centres operate; and

(ii) Lodge the applications for Licences to be issued to G8 CHC.

(c) G8 would only "physically receive the profits of the businesses of the AO Centres and the Other Centres generated from 1 March 2011 upon the '*legal transfer*' of the AO Centres and the Other Centres" which would occur after MCYS approved the applications for the Licences via the OBLS and therefore the "legal transfer" was not a condition precedent to set off of the Total Indebtedness under the Loan Agreement.

113 The plaintiffs submitted that this interpretation was consistent with the revised definition of Financial Close, which was not defined with reference to 28 February 2011 or any particular date. This interpretation was also consistent with cl 2.3 of the BAC which provided that title "to the Business Assets and risk in the Business Assets will pass to the Buyer on Financial Close". The plaintiffs further said that their interpretation was consistent with the context within which the Amended Second Rider was inserted in cl 2.2(b) of the BAC on 22 January 2011.

114 G8's interpretation of the Amended Second Rider was that it did not effect an automatic set off of the Total Indebtedness on 1 March 2011. Instead, the rider has to be construed in the context of cl 2.2(b) as a whole and of cl 3.3. Pursuant to cl 3.3, the parties had agreed that "notwithstanding any other provision of this agreement the AO Centres and Other Centres will be transferred to the Buyer on 28 February 2011 ...". Based on the Amended Second Rider, the parties had also agreed that in order for the set off on 1 March 2011 to take place, the plaintiffs must effect a legal transfer of the AO Centres and the Other Centres to G8's nominee, G8 CHC on 28 February 2011. In order for the legal transfer to occur, it was necessary for the OBLS approvals to be given to G8 CHC and, in order for G8 CHC to receive the revenues of the childcare centres, it had to be issued with the Licences. As no OBLS approval or any Licence was issued by 28 February 2011, the AO Centres and

Other Centres were not transferred to G8 CHC by that date and the set off of the Total Indebtedness did not occur on 1 March 2011.

115 There is no doubt, looking at the Amended Second Rider itself, that this is a dense and rather poorly drafted provision which does not lend itself to easy interpretation or understanding. In order to construe it, whilst the exercise needs to be an objective one, knowledge of the factual matrix is essential in ascertaining what the parties were attempting to achieve by this clause. The rider must be read in the context of cl 2.2 and of the BAC as a whole as well.

116 The first thing to note is that the rider is part of a payment provision *ie* cl 2 of the BAC. Clause 2.4 deals with the date of payment which is specified as being "on or before Financial Close". Clause 2.2 as a whole deals with the method of payment and specifies five ways in which payment is to be made. The second method of payment, in cl 2.2(b), is "by way of set off of the Total Indebtedness under the Loan Agreement". One of the reasons G8 gave for saying that there could be no automatic set off was that under the Loan Agreement, the right of set off was at G8's discretion. I do not accept, however, that G8 could exercise such discretion without regard to cl 2.2(b) because by agreeing to that wording, G8 fettered its own discretion, at least to the extent that, assuming there was no breach of the BAC when Financial Close took place, G8 would be obliged to set off whatever amount comprised the Total Indebtedness as at that date against the Purchase Price and would not be able to ask for payment of the Total Indebtedness in cash.

117 The question that arises is how the Amended Second Rider is to work in this context. The plaintiffs' argument basically is that after the Second BAC Variation, Financial Close became irrelevant and the set off would take place on 1 March 2011 provided certain things were done. The plaintiffs have not gone so far as to contend that they did not need to meet any conditions at all before 1 March 2011 and that set off would take place regardless of what had happened in respect of the transfer of the AO Centres and the Other Centres to G8 or its nominee.

The plaintiffs' arguments in favour of their interpretation

118 The circumstances leading up to this amendment showed, the plaintiffs said, that the commercial purpose of the same was "to address the uncertainty arising from when the OBLS approvals would obtained and to allow G8 Education to be entitled to the profits generated from 1 March 2011". The plaintiffs said that this was because there would be a lapse of time (the precise length of which could not be predetermined) between the lodgement of the applications for Licences and the approval of those applications. The amendment was to accommodate G8's desire to be paid the profit generated from 1 March 2011 despite the fact that the OBLS approvals might not be issued prior to that date.

119 The plaintiffs' argument is based on their interpretation of the events that occurred between November 2010 and January 2011. Some of the facts that they rely on are, however, not correct.

120 In their closing submissions, the plaintiffs said that under the BAC, the initial agreement was for G8 to acquire the childcare centre businesses by the acquisition of the shares in the subsidiary companies of CHG which owned those businesses. That was wrong. From the time it was signed, it was plain from the provisions of the BAC that G8 was buying the businesses of the Cherie Hearts Group and not the shares in any subsidiary company. The second error of fact related to the plaintiffs' contention that G8 proposed in November 2010 that it should acquire the businesses directly instead of acquiring those businesses through the acquisition of shares in the companies. That was wrong too. What G8 proposed in November 2010 was that the businesses should be transferred to G8 CHC instead of to itself.

121 The plaintiffs said that this change of position necessitated fresh applications being lodged with MCYS for the Licences to be issued to G8 CHC. That was also wrong. It was not the change in the proposed licence holder from G8 to G8 CHC that necessitated the lodging of fresh applications. What caused the lodging of fresh applications was the MCYS' insistence that the "Transfer of Ownership" procedure had to be followed. MCYS told CHG that it could not utilise the simpler procedure that applied when there was a change in the shareholding of a licence holder.

122 The plaintiffs said that G8's change of mind required them to follow the more time consuming "Transfer of Ownership" approval. In my view, the plaintiffs cannot, however, blame G8 for this. G8 was not the party who dealt with MCYS. It was clear from the evidence that G8 relied on the plaintiffs to deal with MCYS and on their advice as to what was required to effect the transfer. It was the plaintiffs who tried to persuade MCYS not to insist on the Transfer of Ownership procedure but to accept the other simpler procedure which MCYS did not agree to. Accordingly, it was the change in the method of acquisition when the BAC replaced the Share Sale Agreement that resulted in a change in the MCYS application procedure and not the change of proposed licence holder to G8 CHC rather than G8 itself. The plaintiffs were aware of the two different procedures at the time of signing because under cl 5.5 of the BAC, the sellers (including CHG) undertook that at Financial Close they would give G8:

> [T]he necessary properly executed Authorisation from [MCYS] ... to transfer the existing [Licence] or alternatively to issue a new [Licence] in respect to [*sic*] the Business in favour of [G8] and/or its nominee to allow [G8] and/or its nominee to operate the Business from the Premises;

That clause also shows that the plaintiffs were aware when the BAC was signed that G8 could nominate another entity to hold the Licences. I do not accept the plaintiffs' efforts to make G8 responsible for the fact that in the end the Transfer of Ownership procedure had to be adopted.

123 The plaintiffs relied on evidence from Dr Yap and Dr Singh that they had explained to G8 that the Transfer of Ownership procedure was more time consuming than the other procedure and that typically it took approximately two months from the time an application for a Licence was lodged on the OBLS for MCYS to grant the Licences. They said that the parties were aware that the timing of the issue of the Licences, especially whether they would be issued to G8 CHC in time for Financial Close (which then meant 1 January 2011), was entirely dependent on MCYS. Thus, the parties agreed that G8 would only be entitled to the profits of the childcare centres upon legal transfer of the centres. The BAC was therefore amended by the First BAC Variation which inserted the following original second rider to cl 2.2(b):

> In relation to the Corporate Owned Child Care Centres and Cherie Hearts Owned Centres as listed [*sic*] Schedule 2 of this Deed, [G8] will receive the profits of those Businesses upon the legal transfer of such Business to [G8] or its nominated entity on satisfaction of all conditions precedent (including lease assignment and child care licences). In the meantime, monies advanced under the Loan Agreement shall incur interest as provided therein. [The "Original Second Rider"]

124 G8 submitted that the plaintiffs' assertion that the parties had entered into an agreement which they knew would not be performed or was not capable of being performed was an absurd assertion. At the time the First BAC Variation was entered into, there was no indication that the plaintiffs would not be able to effect Financial Close by 1 January 2011. If the plaintiffs had known this, they would surely have asked for the definition of Financial Close to be amended to a more practical date. The defendant too would have taken a practical approach to this, had it been aware

of the difficulty. Mr Scott's evidence that when G8 became aware of the impossibility of meeting the existing Financial Close provision, it decided that it had to renegotiate the deal rather than call it off, did not mean that G8 had from the time of the conclusion of the First BAC Variation known that the goal set there was illusory.

125 I accept G8's submission to an extent. The evidence was clear that throughout the course of the transaction, parties were willing to renegotiate the deal when circumstances changed. That willingness to renegotiate does not mean that at any time they were not sincere in accepting the terms of the agreements signed or that they signed them thinking that the terms would be illusory. However, the wording of the Original Second Rider indicates a realisation by both parties that it might not be possible to have Financial Close on or before 1 January 2011.

126 I will explain. Under the Loan Agreement, it was provided that the loan would be repaid by the Repayment Date *ie* 31 December 2010 or earlier if agreed. This date was not changed by the amendments of the Loan Agreement prior to 22 November 2010. The various documents signed on 22 November 2010 made major changes in that it was anticipated and provided that $7,172,504 being the amount of principal and interest calculated to be due as at 30 November 2010 would be fully paid off on 1 December 2010 when the assignment of the Franchise Agreements took effect. The Loan Agreement was amended by the insertion of a clause providing for such set off. The documents also provided that, thereafter, the further amounts owing (being the additional amounts advanced by G8 to fund CHG's acquisition of the shares of the subsidiary companies) would be repaid on Financial Close (still 1 January 2011) or on the Sunset Date (still 31 March 2011) whichever was the earlier. This change was effected by the First BAC Variation via its amendment of cl 3.1(a) of the BAC. Whilst no direct amendment was made to the Repayment Date under the Loan Agreement, there was thus a provision that the latest date for repayment of the loan amounts would be 31 March 2011 if Financial Close did not take place on 1 January 2011. Therefore, in providing in the Original Second Rider that G8 would receive the profits of the AO Centres and the Other Centres upon the legal transfer of these businesses to it (*ie* upon Financial Close) and "in the meantime" monies advanced under the Loan Agreement would incur interest as provided therein, the parties were recognising the possibility that Financial Close might take place some time after 1 January 2011 and ensuring that interest would continue to accrue on the Total Indebtedness at the usual rate despite non-repayment on the Repayment Date.

127 On 3 December 2010, MCYS informed CHG that it did not have sufficient manpower in December to process the applications for new Licences for 18 childcare centres by the end of that month. The plaintiffs must have been aware then that Financial Close definitely could not take place on 1 January 2011 but they only informed G8 of this by letter on 16 December 2010. G8 did not make an issue of this at that time and the parties then went on to renegotiate terms in the third week of January 2011.

128 The plaintiffs contended that during these negotiations Dr Singh told Ms Hutson that the lodgement of an application for a Licence on OBLS was as good as getting the Licence and that meant that it was just "a matter of time" for the OBLS approval to be obtained. He said that this statement did not mean that OBLS approval could be obtained within 14 days after lodgement of the application. The plaintiffs submitted that G8's evidence that Ms Hutson and Mr Scott were told that OBLS approvals could be obtained within 14 days from the lodgement of applications for Licences on the OBLS should not be accepted.

129 The plaintiffs' point was that the net effect of the evidence was that parties recognised towards the end of January 2011 that there was no certainty that OBLS approvals would be granted by 28 February 2011 or any other particular date. Given this uncertainty, the parties agreed to amend

the definition of "Financial Close" by removing the specified date and instead stating that it meant "the earliest date where [*sic*] all the AO Centre and Other Centres have been given OBLS approval for the transfer to the Buyer's nominated entity or such other date as agreed by the parties". They pointed out that during cross-examination Ms Hutson had confirmed that this meant that Financial Close would not be a fixed date but would depend on when OBLS approvals were granted.

130 The plaintiffs argued that arising from the lack of a definite date for Financial Close, it could not be pre-determined when title to the businesses of the AO Centres and the Other Centres would pass to G8. G8 had, however, insisted that the profits of all these centres should from 1 March 2011 be earmarked for it regardless of when title vested. Therefore, the parties agreed that in the interim, G8 would be entitled to such profits even if Financial Close had not taken place. In exchange for G8's entitlement to the profits, parties also agreed that the remaining Total Indebtedness under the Loan Agreement would be set off on 1 March 2011, in partial satisfaction of the Purchase Price. This was important because the plaintiffs would no longer have an income stream and should not continue to pay interest on the remaining Total Indebtedness. This was the commercial objective of the Amended Second Rider.

131 Since the parties were aware that there was no certainty that the Licences could be obtained by 28 February 2011 or any particular date, they amended the Original Second Rider in various ways. First, the words "lodgement of" were inserted before "child care licences" in the rider to indicate that CHG was only required to lodge the applications for the Licences by 28 February 2011 and was not obliged to obtain the OBLS approvals by that date. Secondly, the date "28 February 2011" was inserted within the parentheses which made reference to two matters *viz* the "lease assignment" and "lodgement of the child care licences". This meant, the plaintiffs said, that only the lease assignments and the lodgement of the applications had to be completed before 28 February 2011. Thirdly, specific reference was made to set off the Total Indebtedness on 1 March 2011 and fourthly, the phrase "from 1 March 2011" was inserted after the phrase "[G8] will receive the profits and bear the expenses of those Businesses".

132 The plaintiffs also submitted that the set off of the remaining Total Indebtedness under the Amended Second Rider could not depend on the "legal transfer" of the AO Centres and the Other Centres being effected by 28 February 2011. They said that cl 3.3 was inserted into the BAC for reasons pertaining to when the acquisitions of additional childcare centres under the M&A Deed should commence. It had nothing to do with the "legal transfer" of the businesses of the AO Centres and the Other Centres. If the parties had agreed to have cl 3.3 circumscribe the time by which Licences or OBLS approvals for the operation of the AO Centres and the Other Centres were to be obtained, the parties would have stated so. However, the Amended Second Rider did not provide for that restriction as the date "28 February 2010" was inserted only within the parentheses found in the Amended Second Rider and only two matters were specifically mentioned within the same parentheses.

G8's arguments in support of its interpretation

133 G8 did not agree that the definition of Financial Close was amended because the parties recognised that there was no certainty that OBLS approvals would be granted by 28 February 2011.

134 G8 submitted that the portion of the Amended Second Rider stating:

> In the meantime, monies advanced under the Loan Agreement shall incur interest as provided therein provided that on 1 March 2011 an offset against the Total Indebtedness under the Loan Agreement shall occur in partial satisfaction of the Purchase Price.

had to be read together with the preceding sentences which provided for G8 to receive the profits and bear the expenses of the businesses from 1 March 2011 *subject to* the legal transfer of the businesses to G8 *on satisfaction of all conditions precedent*. The clear intent of parties was that 28 February 2011 was a significant date by which the plaintiffs had to effect legal transfer of the businesses. There would only be a set off on 1 March 2011 *if* the plaintiffs complied with the obligations under the BAC by 28 February 2011. In G8's view, the plaintiffs had erroneously sought to amplify the phrase "in the meantime" to bolster their case that set off occurred independently of legal transfer on 28 February 2011. This phrase was already present in the First BAC Variation and therefore did not signify what the plaintiffs implied in relation to the set off.

135 G8 argued that the plaintiffs' construction of "lodgement" to mean mere lodgement of the applications with MCYS was not tenable. This construction was in conflict with the express provisions of cl 3.3 of the BAC which stated that the businesses had to be *transferred* and not merely lodged by 28 February 2011. The plaintiffs had not explained why cl 3.3 talked about the centres being transferred on 28 February 2011 and then employed a different phraseology in relation to G8 being able to commence acquisitions under the M&A Deed by stating "immediately following the application for the transfer of the AO and Other Centres". Clearly, G8 said, cl 3.3 itself distinguished the "transfer" on 28 February 2011 from the mere act of applying for the Licences *ie* lodgement in the sense of the word as used by the plaintiffs. Furthermore, the plaintiffs' interpretation of "lodgement" had the effect of negating the words "condition precedent" that preceded the parentheses.

136 G8 argued that the intention of the parties that set off would only occur upon legal transfer was also borne out of the factual context of the amendment and the parties' subsequent conduct in seeking to comply with the deadline of 28 February 2011. G8's case was that during a meeting on 19 January 2011 between Dr Yap, Dr Singh, Ms Hutson and Mr Scott, Dr Singh represented that MCYS approval for the Licences could be obtained within 14 days *ie* by way of the OBLS approvals instead of the hardcopy licences which parties had been proceeding on when concluding the First BAC Variation. This representation resulted in parties agreeing to the new deadline of 28 February 2011. This new deadline was 37 days from the date of execution of the Second BAC Variation and gave more than sufficient time for the OBLS approvals.

137 It submitted that Ms Hutson had originally wanted Financial Close to be on 28 February 2011 or a date to be agreed by the parties. It was the plaintiffs who wanted the flexibility of being able to effect transfer on a date that was earlier than 28 February 2011. It was for this reason that Financial Close was defined as "the earliest date" on which the OBLS approvals had been obtained. The plaintiffs wanted Financial Close as quickly as possible in order to reduce the interest payable by them and to receive the Purchase Price as soon as possible. G8 submitted that parties envisaged the possibility of a two-stage process which OBLS approvals were issued first and Financial Close would follow later. This was in contrast to the First BAC Variation in which Financial Close was specifically defined as 1 January 2011 because at that point, the parties envisaged only a one-stage completion.

138 After the Second BAC Variation, G8 acted on the same. It offered contracts to staff, rented office space and set up its office for G8 CHC and also signed lease agreements for some of the childcare centres. These agreements were to take effect from 1 March 2011 (*ie* after the intended legal transfer on 28 February 2011). The plaintiffs also acted in reliance on the new date. Dr Singh confirmed by an email on 9 February 2011 that they had "been moving fast to hit the deadline for the new financial closure date". Further, internal emails sent by Mr Phang (who was still employed by the plaintiffs and was in charge of getting the Licences) to CHG's operation team repeatedly emphasised the target deadline as being 28 February 2011 or 1 March 2011. This deadline was also given to MCYS who referred to it in an email.

139 G8 pointed out that Ms Ng had confirmed on the stand that she was well aware that the agreed target takeover date was 1 March 2011. She stated that prior to the lodgement, CHG's representatives had many meetings with MCYS and had asked them to expedite the applications because it was a business deal and CHG needed to transfer the businesses to G8 on 1 March 2011. The plaintiffs had also conceded in evidence that they were expediting approval of the Licences and not merely lodgement of the applications.

140 G8 argued that its interpretation fulfilled the business purpose of the contract. First, the overriding intent of the parties to make legal transfer of the businesses (by way of OBLS approvals) by 28 February 2011 was enshrined in cl 3.3 which begins with the words "Notwithstanding any other provision of this agreement ...". Second, although the definition of Financial Close did not refer to a specific date, this was only because the plaintiffs wanted the flexibility to have Financial Close before 28 February 2011. It nevertheless remained the intention of the parties that OBLS approvals would have to be obtained at the latest by 28 February 2011. Financial Close could occur on a later date depending on when parties were available to conduct the settlement process. The parties had also inserted cl 3.3 as the overriding provision to avoid dispute. Third, the parties incorporated the set off provision on the premise that it could only occur upon the fulfilment of all the conditions precedent *ie* the legal transfer of the centres by 28 February 2011. If there was no set off, G8 would not, under the BAC be entitled to receive the profits from the AO Centres and the Other Centres.

141 The next plank in G8's case was that its interpretation of Amended Second Rider would avoid unreasonable results. The plaintiffs' interpretation on the other hand meant that a set off would occur on 1 March 2011 independently of the plaintiffs complying with their obligations under the BAC. Taking the plaintiffs' argument to its logical conclusion would mean that from 1 March 2011:

(a) There would be no interest accruing under the Loan Agreement;

(b) The Personal Guarantee and the Debenture would no longer be valid and enforceable; and

(c) G8 would not be entitled to recover its monies disbursed under the Loan Agreement in the event that the plaintiffs did not comply with their obligations under the BAC or failed to complete under the BAC, because the monies had been automatically set off on 1 March 2011.

My decision

142 Looking at the BAC as amended, it provides for the Sellers to sell the Businesses to the Buyer (as therein defined) and for the sale to take place on Financial Close or as otherwise provided in the BAC. Title and risk in relation to the Businesses are to pass to the Buyer on Financial Close. Clause 3 sets out various conditions precedent to completion. Among these are the acquisition by the Sellers of seven AO Centres for a specified price and the acquisition of all unpaid for shares in the Other Centres for another specified price. In addition, under cl 3.1(c), MCYS has to provide written approval for the Buyer to hold a Licence to operate each relevant business. Similarly, under cl 3.1(g), the Landlord of each centre must consent in writing to the assignment of the lease to the Buyer. The manner of completion is set out in cl 5 and it provides for various documents to be given by the Sellers to the Buyer at Financial Close. These documents include properly executed assignments of the leases from the Sellers to the Buyer and all necessary Authorisations (as defined in the BAC but basically the Licences) from MCYS required to allow the Buyer to operate the Businesses from the premises.

143 There are two parts to the Amended Second Rider. The first deals with G8's entitlement to receive the profits and expenses of the AO Centres and the Other Centres. The second deals with the

set off of the Total Indebtedness due under the Loan Agreement. Just looking at the wording, it can be argued that there would be an automatic set off of the Total Indebtedness on 1 March 2011 *but* that as far as G8 was concerned, it would only receive the profits and bear the expenses of those Businesses (*ie* the AO Centres and the Other Centres) from 1 March 2011 if they were legally transferred to it on satisfaction of all conditions precedent. Not even the plaintiffs take that extreme view. Their position is that as long as the Sellers completed the assignment of the leases and the lodgement of the applications for the Licences by 28 February 2011, on 1 March 2011, the Total Indebtedness would be set off against the Purchase Price *and* G8 would be entitled to receive the profits from those Businesses except that such profits could only be paid physically to it when legal transfer was completed. Whilst there are suggestions in the closing submissions that perhaps the extreme view is the correct one, I cannot accept it as a reasonable construction of the BAC in the circumstances. The parties cannot have intended there to be an automatic set off on 1 March 2011 regardless of whether the Sellers had done anything at all to pass title and interest in the relevant Businesses to the Buyer - which would be the result if the extreme view is accepted as the correct interpretation. That would not be in accordance with reasonable business practice or commercial expectations. Whilst G8 had shown a willingness to set off part of the Total Indebtedness before Financial Close in relation to the Franchise Agreements, it insisted on having these effectively assigned to it as a *quid pro quo* for the set off. Similarly, it must have intended to get something from the Sellers in return for the further set off contemplated in March 2011 and the plaintiffs knew that and accepted that as the position.

144 The question is what was G8 intended to receive in return for set off of the Total Indebtedness against the Purchase Price. The plaintiffs say only the assignments of the leases and lodgement of the applications for the Licences whilst G8 says legal transfer of the Businesses meaning assignment of the leases, OBLS approvals and the plaintiffs being in a position to transfer the Gloryland Centres. As far as the assignments of the leases are concerned, both parties are agreed on that requirement. They differ only as to whether it was met. It is in relation to the OBLS approvals that they are in conflict. The difficulty here is that the wording of the relevant phrase *ie* "lodgement of the child care licences" does not really make sense. The Licences could not be lodged with MCYS. They were to be issued by it. If on the other hand, what was meant was issue of the OBLS approvals, the word "lodgement" would not have been used either. I think that this conundrum can be resolved by reference to the definition of Financial Close.

145 It must be recalled that the BAC originally provided for completion on 1 January 2011. By the time of the amendments in January 2011, about three months had passed since the BAC had been executed and G8 had advanced in the region of $5m to CHG to finance its acquisition of the childcare centres. G8 was eager to complete, pay the balance of the Purchase Price, recover the loan it had made through the set off procedure and also take ownership and control of the Businesses. The only uncertainty at that time was as to when the Licences could be issued. In this respect, I accept the evidence of Ms Hutson and Mr Scott that Dr Singh represented that once the applications had been lodged, OBLS approvals could be granted within 14 days (or at least a relatively short time) and thereafter it was only a matter of time before the Licences themselves were issued.

146 Under the original scheme, Financial Close was to take place on a specified date unless otherwise agreed and it followed that, in order for that to happen, all the Licences had to be issued by such date. The amendment of the definition of "Financial Close" to mean the earliest date when all the AO Centres and Other Centres had been given OBLS approvals for transfer to G8 CHC (which must have been agreed because G8 accepted the plaintiffs' assurances that OBLS approvals were as good as actual Licences) meant that Financial Close would take place as soon as all the OBLS approvals were granted and before the issue of the Licences themselves. This in turn meant that the condition precedent in cl 3.1(c) relating to the Licences would be satisfied by the OBLS approvals and on

Financial Close, the Sellers would no longer be required to give the Licences to G8. Although theoretically Financial Close could occur before, on or after 1 March 2011, the parties must have thought that it was possible that it would occur after 1 March 2011 (and this is in line with the evidence that the parties were aware that they could not control the date of the OBLS approvals) because if Financial Close definitely happened before that date, there would be no need to provide for the Buyer to receive the profits and bear the expenses of the AO Centres and Other Centres from 1 March 2011. This would happen automatically as a result of Financial Close.

147 I accept that having agreed to a movable date for Financial Close, G8 was not willing to wait until that happened to take over and run the Businesses and receive the profits from the same. It must also have wanted to put the pressure on CHG to complete the acquisitions of the AO Centres and the Other Centres by a specific date. That was why the two specific dates of 28 February 2011 and 1 March 2011 were included in the Amended Second Rider. If G8 had wanted to ensure that the set off of the Purchase Price against the Total Indebtedness did not take place until full legal transfer of the AO Centres and the Other Centres to G8 CHC, it would simply have maintained a specific date for Financial Close and not amended it in the way that it did in the Second BAC Variation. Accordingly, although the words "legal transfer" were used in the first part of the Amended Second Rider, I do not read them as being intended to impose the condition that OBLS approvals needed to be given before the first part of the Amended Second Rider could be complied with. Accordingly, I accept that under the Amended Second Rider insofar as the Licences were concerned, all that the plaintiffs needed to do was to lodge all the applications by 28 February 2011.

148 I therefore accept that a reasonable construction of the Amended Second Rider would be that if Financial Close did not take place on or before 1 March 2011, then as long as:

(a) the lease assignments had been accomplished and the applications for Licences had been lodged on the OBLS by 28 February 2011;

(b) the conditions precedent for the transfer of the Businesses to G8 CHC had been satisfied; and

(c) the AO Centres and Other Centres were transferred to G8 CHC by 1 March 2011;

on 1 March 2011, there would be a set off of the Total Indebtedness against the Purchase Price in partial satisfaction of the Purchase Price. The words "[i]n the meantime" that begin the second sentence of the Amended Second Rider are a meaningless carryover from the Original Second Rider and must be disregarded.

149 Drawing on the wording of cl 3.3 which said that notwithstanding any other provision of the BAC, the AO Centres and the Other Centres had to be transferred to G8 by 28 February 2011, the plaintiffs argued that this supported their interpretation of a purely physical transfer being all that was necessary. I agree that this clause does support a transfer of the AO Centres and the Other Centres to G8 CHC by 28 February 2011 but I do not agree that it means only a physical takeover of the centres. It must imply the ability to legally transfer those Businesses to G8 CHC as well (apart only from OBLS approvals). The agreement was that G8 was to receive the profits and bear the expenses of those Businesses from 1 March 2011 and this could not be the case if there was only a physical transfer. In this connection, it was specifically provided by the Amended Second Rider that the conditions precedent needed for transfer had to be satisfied and these were still in place except to the extent necessary to accommodate the agreement that the transfer would take place before the OBLS approvals were issued. I should also note that the construction that I have given to the Amended Second Rider is reinforced by the fact that parties proceeded with the takeover by G8 CHC

of most if not all of the centres covered by the BAC on 1 March 2011 despite the fact that OBLS approvals had not come in for all those centres by 28 February 2011.

Did a set off of the Total Indebtedness take place on 1 March 2011?

150 G8 contended that the plaintiffs had not satisfied all the conditions necessary for set off to occur on 1 March 2011 because:

(a) They had failed to show that the parties had agreed to the replacement of the Withdrawn Centres by the Replacement Centres;

(b) The plaintiffs had not met the requirement for the transfer of the leases to G8 by 28 February 2011 because only six leases were properly transferred by that date;

(c) The plaintiffs were not in a position to transfer the business of CH School House to G8 by 28 February 2011;

(d) The plaintiffs were not in the position to transfer the business of the Gloryland Centres to G8 free from encumbrances by 28 February 2011;

(e) As at 1 March 2011, the plaintiffs had given G8 physical control over, at most, only ten of the 18 centres;

(f) In any event, the plaintiffs had not complied with the 28 February 2011 deadline for the lodgement of applications for Licences in respect of all the childcare centres to be transferred to G8 CHC; and

(g) The key employees had not all been transferred to G8's employment by 28 February 2011.

151 I will consider these allegations in turn.

The Replacement Centres

152 On this point, G8's submission was that it had not agreed that the Withdrawn Centres could be withdrawn from the BAC and replaced by the Replacement Centres. It pointed out that under cl 20.4 of the BAC, the same could only be amended by a written document signed by the parties and that the waiver of a provision of the BAC or any right arising under the BAC was to be in writing and signed by the party granting that waiver or its solicitors. No such written document was signed in respect of any agreement to substitute the Replacement Centres for the Withdrawn Centres.

153 The plaintiffs submitted that the evidence showed that by mid February 2011, the parties had agreed not to proceed with the acquisition of the Withdrawn Centres. The proposal to replace them with the Replacement Centres was made by Dr Singh in early February 2011 and Mr Scott replied on 11 February 2011 that he had no objection in principle to this proposal. This was important because, as Mr Scott testified, he had the authority to decide on behalf of G8 whether or not to continue with the acquisition of the Withdrawn Centres. In the same email, Mr Scott mentioned that G8 should "void the cheque in payment for TS71". TS71 was the parties' code name for the Other Centre owned by Cherie Hearts Kids Haven Pte Ltd, one of the Withdrawn Centres. In the event, G8 did not lend CHG money for the purchase of the shares in any of the companies running the Withdrawn Centres. Further, whilst Mr Scott stated that basic due diligence on the four Replacement Centres was required, this requirement must have been satisfied because G8 CHC had subsequently entered into

four agreements for the purchase of the Businesses of the Replacement Centres.

154 I accept the plaintiffs' arguments. The evidence does establish that G8 agreed to release the Withdrawn Centres from the BAC. Apart from Mr Scott's email of 11 February 2011, and the conclusion of agreements for the purchase of the Replacement Centres, G8's consent was clearly evidenced in Ms Hutson's letter of 4 March 2011. She said:

> Your proposal that the "Removed Entitles" be replaced with "Replacement Centres" does not raise any conceptual issues. I note that Share Purchase Agreements were signed with each of them on 15 February 2011. I am anxious to ensure that I understand the potential timing impact and whether your current variation requires that those agreements be re-signed? I assume that OBLS was lodged for the 15 centres rather than the 18 originally contemplated because, as you quite properly point out, 3 centres have been removed.
>
> If we are not expecting licences to issue for Cherie Hearts Precious Tots Pte Ltd, Jolly Tots Preschool and Intellect Monte Pal Schoolhouse and Intellect Childcare and Development Centre at the same time, it makes sense that, as you suggest, $2,020,000 be set aside out of the purchase price for those centres and we move to Financial Close with that money set aside for those purposes from the original amount of $24,610,027. I would appreciate your comments in relation to this.

This letter shows that G8 was taking $2.02m from the Purchase Price to pay for the Replacement Centres. It would not have done this if it was insisting that the Withdrawn Centres still formed part of the Businesses sold under the BAC. In my view, the fact that there was no formal agreement signed to reflect this change does not negate the agreement. In any event, in my judgment, cl 20.4 of the BAC was satisfied because CHG had made a written proposal in the form of Dr Singh's email and G8 had accepted it in writing emanating from both Mr Scott and Ms Hutson.

The transfer of the leases

155 In its submissions, G8 asserted that the Amended Second Rider required the leases to be legally transferred to G8 by 28 February 2011. It was also a condition precedent under cl 3.1(g) that the landlord of each centre give written consent for the assignment of the lease to G8 CHC. Despite this, only six leases were properly transferred by 28 February 2011 and CHG failed to obtain approval for the assignment of leases or subletting to G8 CHC by Cherie Hearts @ Limau Pte Ltd, Cherie Hearts Preschool Pte Ltd ("CH Preschool") and CH School House. G8 pointed out that in court Ms Ng had confirmed that the plaintiffs had lodged applications on OBLS in respect of the centres run by these three companies despite knowing that there was a condition in the respective tenancy agreements that the consent of the respective landlords was required for subletting and that such consent had not been obtained. G8 also noted that in respect of the six centres operating out of HDB premises, there had been no assignment of those leases as at 28 February 2011.

156 The plaintiffs took the position that no breach had taken place. In respect of the HDB leases, they relied on the evidence that in January 2011, there had been a change in the HDB policy in terms of the applications to be made for the assignment of HDB leases. As a result of this change, all applications to the HDB for assignment of leases would be subject to the approval of MCYS. If the prospective lessee met MCYS' licensing requirements, MCYS would notify the prospective lessee and the seller of the centre concerned to apply to the HDB for assignment of the lease. At the same time, MCYS would work with the HDB regarding the date of commencement of the new lease. Accordingly, no application for assignment of an HDB lease could be made until MCYS indicated that its licensing requirements had been met.

157 In the present case, CHG had done all that it could do to ensure that the leases for the six childcare centres run in HDB premises were assigned to G8 CHC by 28 February 2011. The HDB leases would be transferred to G8 CHC as a matter of course, after MCYS' indication that all licensing requirements had been met. Mr Phang had also testified that by 28 February 2011, CHG had applied to HDB for all the leases to be assigned to G8 CHC. In any event, G8 CHC had been able to manage the operations of five of the childcare centres since 28 February 2011. It had not complained that it could not enter or use the premises of those centres or that it was served with a notice to quit by HDB. The only exception was in respect of the centre owned by Teeny Tiny which G8 alleged it could not control but this allegation had nothing to do with the assignment of the lease.

158 I accept the plaintiffs' arguments in relation to the childcare centres operating in HDB premises. The evidence was clear that assignment of those leases was contingent on MCYS approval and that if such approval was given, the assignment was a matter of course. Since G8 had agreed that transfer of the centres could take place when the applications for Licences were lodged and need not wait until the OBLS approvals were issued, they must have agreed that in respect of the HDB premises, as long as they could take over the premises by 28 February 2011, they would do so and would only require the assignment of the leases subsequent to OBLS approval.

159 As for the leases for the centres previously run on private premises by Cherie Hearts @ Limau Pte Ltd, CH Preschool and CH School House, the plaintiffs argued that there was no breach because this issue only emerged during the trial and G8 had not pleaded that these leases had not been assigned to G8 CHC because the consents of the landlords of those premises had not been obtained prior to the sublease of the same to G8 CHC. Second, G8's allegation in respect of the centre (the "Limau Centre") run by Cherie Hearts @ Limau Pte Ltd was a complete non-starter because according to the Amended Second Rider, Cherie Hearts was only required to assign the leases occupied by the AO Centres and the Other Centres by 28 February 2011. The assignment of the Limau Centre lease was not subject to the same deadline because the Limau Centre was not an "AO Centre" or "Other Centre". Third, in relation to CH Preschool, G8 must have known as early as 28 January 2011 that the landlord's consent could not be obtained. This is because the due diligence report on the acquisition of the childcare centres within the Cherie Hearts Group, which was dated 28 January 2011 and prepared by G8's solicitors, specifically stated that this was a centre in respect of which a tenancy agreement could not be assigned. G8 considered that the lease could be assigned provided the landlord agreed, as Mr Scott testified, and that was why it entered into a sublease in respect of these premises before 28 February 2011. Even if the assignment of the lease did not comply with the Amended Second Rider, it would be inequitable for G8 to turn around and accuse CHG of acting in breach of the Amended Second Rider because it has had full control of the operations of the centre formerly run by CH Preschool since 1 March 2011.

160 The plaintiffs also submitted based on Ms Ng's testimony that it was Mr Scott's suggestion that the premises occupied by CH Preschool and CH School House be sublet to G8 CHC instead of the leases being assigned as G8 was concerned that the landlords might take the opportunity to increase the rents. Even if the assignment of the lease of the premises occupied by CH School House did not comply with the Amended Second Rider, the evidence at trial showed that G8 had control of that company and this must include control of the premises. As far as the point about control is concerned, I do not agree that physical control over the premises of any centre is equivalent to legal transfer of that centre as required by the Amended Second Rider.

161 Dealing first with the pleading point, in para 28(2) of the defence, G8 had averred that whilst CHG had purportedly tried to effect a legal transfer of the AO Centres and the Other Centres to the defendant, this legal transfer was incomplete because of "the state of lease assignment and issuance [*sic*] of child care licences". As particulars for this assertion, G8 provided a table in which it set out

the state of affairs as at 28 February 2011 as G8 saw it. According to this table, no transfer of lease was effected by 28 February 2011 in respect of the Limau Centre, CH School House centre or the CH Preschool centre. G8 did not go on to plead that this failure to transfer the leases arose from the respective landlords' failure to give consent.

162 I do not accept the plaintiffs' argument. They were fully aware that no consents to assignment had been given and that subleases had been signed instead. These could not qualify as assignments of existing leases. In response to G8's assertion that no transfers had been effected, the plaintiffs in their reply merely repeated their assertion in para 45(2)(a)(i) of the Statement of Claim that CHG had arranged for the novation and transfer of the tenancies of the premises of all the centres (apart from those leased from the HDB) by 28 February 2011. They did not assert that the execution of the subleases estopped G8 from insisting on assignments of the leases.

163 The Amended Second Rider expressly requires that lease assignments be effected, without exception, for all the AO Centres and Other Centres by 28 February 2011. This includes the lease for CH Preschool. The plaintiffs undertook to assign this lease as well and it was up to them to achieve this by persuading the landlord to do so despite his having provided in the lease that no assignment would be allowed. The "no assignment" provision in the lease did not, in legal terms, prevent the landlord from subsequently changing his mind and agreeing to an assignment as Mr Scott asserted this in his testimony. The fact that it was pointed out in the due diligence report that the lease did not permit assignment could not result in G8 knowing that the landlord could never be persuaded otherwise. CHG did not protect its position by exempting the CH Preschool centre from the requirement to procure a lease assignment. It was therefore obliged to meet this requirement.

164 As far as the Limau Centre is concerned, I accept that it was not an AO Centre or an Other Centre and therefore not covered by the words in parentheses in the Amended Second Rider. However, cl 3.1(g) which required the landlord's consent to assignment and which applied the Limau Centre as well was a condition precedent and therefore was covered by the phrase "on satisfaction of all conditions precedent" which appeared before the parentheses and which required these conditions precedent to be satisfied by 1 March 2011 at latest. CHG was therefore in breach of the assignment obligation in respect of the Limau Centre as well.

165 The plaintiffs argued that it would not be equitable for G8 to insist that they had breached cl 2.2(b) because G8 CHC had been able to take over and operate the three centres concerned notwithstanding the lack of the legal assignments. They relied on the case of *Lam Chi Kin David v Deutsche Bank Ag* [2011] 1 SLR 800. It was held there that where a promisor had obtained an advantage from giving a promise to the promisee, he should not be allowed to resile from that promise. As G8 submitted, however, that case does not apply to the present circumstances. The principle of promissory estoppel is based on the presence of three elements: (1) representation, (2) reliance; and (3) detriment. In this case, the plaintiffs did not rely on any representation made by G8 to their detriment. It was their responsibility to obtain the assignments and to give possession of the centres to G8 CHC and they carried out that responsibility partially only by passing physical possession of the centres. Since they would have had to do this in any case in order to fulfil their obligations under the BAC, there was no change in their position or any detriment to them. Indeed, the plaintiffs obtained an advantage when G8 CHC moved into the centres and started bearing the expenses thereof.

CH School House

166 CH School House was one of the sellers named in the BAC and the childcare centre run by it in Lorong Melayu was one of the Other Centres. At the time of the BAC, CHG owned 51% of the shares

in CH School House. In respect of the Other Centres, the condition precedent specified by cl 3.1(e) as amended by the First BAC Variation read:

> Other Centres: The Sellers acquiring and paying for all the currently unpaid [*sic*] shares in the Other Centres for $2,186,000. The manner in which this is to occur, and the funding for this acquisition, is as set out in the Third Deed of Variation of Loan Agreement.

167 It was G8's position that this meant that CHG had to own and pay for the shares in CH School House. G8 submitted that CHG was not in a position to transfer the business of CH School House to G8 by 28 February 2011 because as of that date:

(a) CHG did not own 100% of the issued share capital of CH School House;

(b) CHG had not paid in full for the 51% of the share capital that was in its name; and

(c) CHG did not have a valid agreement for the purchase of the remaining 49% of the share capital of CH School House.

Further, G8 was never given control over the centre owned by CH School House.

168 One of the witnesses at the trial was Ms Susan Loke ("Ms Loke"), who at the time of testifying was the deputy chief operating officer and general manager of G8 CHC. Prior to 1 March 2011, she was the senior vice-president of business development for CHG. Ms Loke was one of the founding shareholders in CH School House (holding 51% of the share capital) and in February 2008, she entered into an agreement with CHG to sell her shares to the former. Ms Loke's evidence was that she transferred her shares in CH School House to CHG in January 2009 when she received part payment of the purchase price. A further part payment was made in November 2009 but thereafter, a sum of $277,500 remained payable to her. This sum had not been paid by the time of the trial.

169 G8 relied on evidence given by Ms Loke that she was surprised when she found out that under the BAC, CHG had purported to sell 100% of the shareholding of CH School House to G8 since at that time it did not own the other 49% and no agreement had been made for the purchase of these shares. She also confirmed that it was only in the fourth week of February 2011 that she met with Dr Yap to discuss the purchase of the remaining 49%. As a consequence, the agreement between the shareholders and CHG to sell their 49% stake to CHG was only signed by the shareholders between 3 March 2011 and 7 March 2011. G8 asserted that the plaintiffs had tried to transfer this 49% shareholding to CHG/CHCD without making payment for it although they had promised Ms Loke that the share transfer form would only be lodged after payment for the 49% shareholding was made.

170 G8 also argued that under cl 3.4 of the Sale and Purchase Agreement for the 49% shareholding in CH School House, CHG was required to make payment for the shares on completion date. As it failed to do so, no completion of the sale of the shares could take place and therefore the plaintiffs had no legal basis to transfer the business of CH School House to G8 by 28 February 2011.

171 The plaintiffs' response was that it was preposterous for G8 to fault the plaintiffs for not effecting the legal transfer of the business of CH School House by 28 February 2011 when it was G8 that breached the BAC read together with the Loan Agreement by failing to advance the monies required for the purchase of the remaining shares in CH School House. The fact that the purchase price for Ms Loke's 51% shareholding in that company had not been paid in full was not an impediment to the plaintiffs' agreement with the other shareholders that they would also sell their 49% stake to CHG's wholly-owned subsidiary, CHCD. Ms Loke had testified that an agreement had been reached for

the sale of these shares. The fact that these shares were not paid for was G8's fault. Mr Scott had agreed to meet Ms Ng on 8 March 2011 to settle the payment due to the 49% shareholders but he did not turn up for the meeting. Nor did G8 pass the cheque to Ms Ng in any other way. It was G8 that was obliged pursuant to the Loan Agreement to advance the money for the purchase of the 49% and its failure to do so led to CHG's alleged inability to gain title in the shares and make a legal transfer to G8 CHC.

172 Whilst the plaintiffs' argument that G8 is to blame for the failure to pay for the 49% stake is superficially attractive, I do not accept it. I have found that the plaintiffs had to effect a legal transfer of, *inter alia*, the centre run by CH School House by 28 February 2011. At that stage, they were not in a position to transfer that business to G8 because they did not own all the shares in CH School House. They did not receive an equitable interest in the remaining shares of CH School House until 7 March 2011 and therefore they missed the deadline. Under cl 4.1(e)(i) of the Loan Agreement as amended, G8's obligation to advance monies to CHG to assist it in acquiring the remaining shares of CH School House was conditional upon the existence of a legally binding contract to acquire these shares and CHG providing executed but undated share transfer forms and share certificates for 100% of the issued share capital. Before 28 February 2011, CHG could not and did not meet these conditions and therefore G8 was not obliged to advance the purchase price to it. CHG cannot grumble that the money was not advanced on 8 March 2011 since by then it was already too late for CHG to meet its obligation to transfer the centre by 28 February 2011. I conclude therefore that as of 28 February 2011, CHG was in breach of the condition precedent in relation to the CH School House centre because it had not acquired and paid for all the shares in that company.

The Gloryland Centres

173 The Gloryland Centres were a childcare centre in Toh Tuck Road run by Gloryland Learning Centre@Toh Tuck Pte Ltd ("GLTT") and one in Cashew Road run by Gloryland Learning Centre Pte Ltd ("GLC"). These companies had common shareholders and directors. Under the BAC, the Gloryland Centres were classified as AO Centres. In relation to the Gloryland Centres, G8 asserted that CGH was in breach of its obligation under cl. 2.1(c) of the BAC to sell them to G8 "free of Security Interests or other Rights or interests of third parties". This was because as at 28 February 2011:

(a) The plaintiffs had not made payment in full for the Gloryland Centres; and

(b) G8 was not given control over these centres.

In this section, I will deal with the first of these contentions.

174 G8 emphasised that it had advanced to CHG the sum of $1m, in two instalments of $500,000 each, to pay to the owners of the Gloryland Centres including one Mr Gary Lim ("Mr Lim"). These payments were made on 7 December 2010 and on 25 January 2011. It was only after trial of the action commenced and the plaintiffs made further discovery that G8 learnt that this money had not been used to pay the owners of the Gloryland Centres for their shares. G8 then amended its Defence and Counterclaim to allege that CHG was in breach of the Amended Second Rider in relation to the Gloryland Centres.

175 Dr Yap then filed a supplementary affidavit setting out the circumstances under which CHG's subsidiary, CHCCS, had acquired GLTT and GLC. In September 2009, GLTT was incorporated to hold the childcare centre in Toh Tuck Road and 95% of the shares were issued to CHCCS and 5% to Mr Lim and his wife on the basis of an investment agreement under which CHCCS agreed to pay Mr and Mrs Lim for that 95% shareholding. Subsequently, all the shares in GLTT were registered in the name

of CHCCS. On 20 October 2010, CHCCS and Mr Lim agreed that CHCCS would pay him and his wife $300,000 for all the share capital of GLTT.

176 As regards GLC, the childcare centre at Cashew Road, which was owned by Mr Lim and his two sisters, was transferred to GLC in September 2009 pursuant to an investment agreement with CHCCS. As with GLTT, on GLC's incorporation, 95% of its shares were held by CHCCS and the remaining 5% were held by the Lim siblings. Subsequently, CHCCS became the sole shareholder of GLC. On about 20 October 2010, CHCCS and Mr Lim agreed that the price for GLC would be $700,000.

177 Dr Yap said that the total amount of money which CHCCS had to pay for 100% of the shares in GLC and GLTT was $1m. While Mr Lim and his relatives had filed a writ of summons (Suit 551 of 2011) alleging that the total purchase price was $1.4m, this claim was inaccurate. The extra $400,000 had nothing to do with acquisition of the shares but related to two separate agreements between Dr Yap and Mr Lim. These provided for the payment of the total sum of $400,000 to Mr Lim himself in consideration of Mr Lim helping Dr Yap find additional childcare centres for CHG to buy and resell to G8.

178 G8's allegation of failure on the part of CHG to fulfil cl 3.1(b) of the BAC related to both instalments which it had paid CHG for onward transmission to GLC and GLTT. First, in relation to the $500,000 paid in November 2010, contrary to their assertions on affidavit, the plaintiffs had used a sum of $200,000 from this amount for their own benefit and not for the benefit of the sellers of the Gloryland Centres.

179 Dr Yap denied this allegation. In his supplemental affidavit, he said that because of some disagreement over the amount CHG could borrow from G8, CHG had not been able to pay the amounts due for the shares in GLC and GLTT in November 2010 as scheduled. The monies were disbursed by G8 to CHCD only on 7 December 2010 and on 9 December 2010, CHCD issued two cheques one for $200,000 and the other for $300,000 in favour of Mr Lim. These monies were duly paid to Mr Lim. Dr Yap pointed out that the cheque for $200,000 was cleared on 10 December 2010 while the cheque for $300,000 was cleared on 17 December 2010.

180 Mr Lim's evidence was that he received the two cheques on separate occasions. He was first given the cheque for $200,000. Mr Lim disputed that this cheque was meant as part payment for the Gloryland Centres and asserted that Dr Yap had given it to him to settle loans made to Dr Yap by friends of Mr Lim. He agreed that he had subsequently been given the cheque for $300,000 and that that was intended as a partial payment for the shares in GLTT and GLC.

181 Dr Yap's oral explanation of why the sum of $500,000 had been divided into two cheques when both were to be handed to Mr Lim who was the front man for all shareholders of the Gloryland Centres was interesting. He said that Mr Lim had requested him to issue a payment voucher only for the $300,000 cheque so that Mr Lim could represent to Mr Lim's brother-in-law that he had received only 50% of the payout of $1m for the Gloryland Centres and that Dr Yap had complied with this request. When it was pointed out to him that the payment voucher did not mention 50%, Dr Yap said that he did not comply with Mr Lim's request. Dr Yap was unable to explain why in December 2010 CHG had not prepared a payment voucher in respect of the $200,000 cheque to show that it was being paid to Mr Lim as part of the settlement for the shares. It turned out that such this payment voucher was only prepared some six months later on instructions given by Dr Yap to one of CHG's employees.

182 On a balance of probabilities, I find that CHG did not pay the full $500,000 to the shareholders of GLTT and GLC in December 2010. Dr Yap's evidence is very difficult to believe. Given that CHG had $500,000 which was meant for these shareholders, there was no logical reason why it could not have

issued one cheque for this amount and given it to Mr Lim on 9 December 2010, the day when the two cheques were issued. If the sum of $500,000 had to be divided into two cheques because there were different shareholders of GLTT and GLC, then it would have made sense to make one cheque for $150,000 being 50% of the amount payable for GLTT and the other cheque for $350,000 being 50% of the amount payable for GLC. There was no reason to divide the sum of $500,000 into $200,000 and $300,000. Further, only one voucher was prepared in December 2010 in respect of the payments to Mr Lim and this voucher stated that it was for $300,000 being "Partial payment to acquire (1) Gloryland Learning Ctr; (2) Gloryland Learning Ctr @Toh Tuck". This voucher was approved on 17 December 2010 which was the day the cheque was handed to Mr Lim. There was another voucher for the $200,000 cheque purportedly prepared on 31 December 2010 but the evidence established that actually that voucher was prepared months later. Similarly, the story that Dr Yap came up with for the preparation of the first voucher was incredible. Finally, Mr Lim was able to produce documents showing the loans that Dr Yap had taken from his friends and that he had settled these debts on Dr Yap's behalf after 9 December 2010.

183 As stated, G8 disbursed the second instalment of $500,000 in late January 2011. Dr Yap admitted that this amount had not immediately been forwarded to the shareholders of GLC and GLTT. He stated that it was paid over only on 25 March 2011 because Mr Lim had asked him to defer payment until 28 February 2011. The purported reason was that Mr Lim wanted to continue to receive the profits of the Gloryland Centres until that time. Mr Lim himself denied this. His evidence was that he had not been told in January or February 2011 that CHG had received funds from G8. He said that he had been anxious to receive the balance due as soon as possible. He heard nothing about this payment until 25 March 2011 and even then he was not told that the sum of $500,000 being paid to him was the balance due for the two centres.

184 I do not believe Dr Yap. Assuming that CHCCS was entitled to take over the profits of the Gloryland Centres from the time of payment, he would have wanted 50% of the profits in December 2010 and 100% of the profits in January 2011 in order to defray the interest that he would have to pay G8 on the $1m. It does not make sense that he would be willing to allow Mr Lim and his co-owners to keep this profit while CHG was incurring interest charges. It also seems improbable to me that Mr Lim and his co-owners who had been waiting their money for some time would pass it up so easily. Even if Mr Lim had agreed to defer payment up till 28 February 2011 when the centres had to be transferred and the opportunity to earn profits would have ended, this does not explain why payment was not made on 28 February 2011 itself or within a few days thereof. It was not until 25 March 2011 that the cheque was banked into Mr Lim's account. Mr Lim himself was not in Singapore at that time and he testified that Ms Ng had called him to tell him about the cheque being banked in. Ms Ng denied making this call, a denial that was subsequently contradicted by her telephone records. There is a dispute between Mr Lim and the plaintiffs as to whether he was aware that this cheque represented payment for the shares or whether he thought that he was being used as a channel to finance CHG and agreed to this course without knowing that the money belonged to him and the other shareholders.

185 It is not for me at this stage to make any finding regarding the relationship between CHG and the shareholders of GLC and GLTT. There is ongoing suit between these parties in which these issues will be decided and Mr Lim was only a witness in the present action. He was not a party to this action and no submissions were made on his behalf. Therefore while my findings here would not bind Mr Lim in the other action, it is prudent to refrain from making any findings that are not strictly necessary in the context of the dispute between the plaintiffs and G8.

186 I find that CHG had not paid the shareholders of GLC and GLTT in full by 28 February 2011.

187 G8's submission was since the shares in GLTT and GLC had not been fully paid for, the plaintiffs could not transfer the businesses of the Gloryland Centres to G8 by 28 February 2011 free of the interest of third parties. The owners of the Gloryland Centres were also entitled under their contracts with CHCCS to terminate the same, refund the payments and ask for the Centres back. At the least, such a claim meant that the businesses were not free of the rights or interests of third parties as required by the BAC. In this respect, the BAC defined a "Right" to include "a legal, equitable, contractual, statutory or other right, power, authority, benefit, privilege, remedy, discretion or cause of action". I accept G8's submission and hold that as at 28 February 2011, CHG was in breach of the BAC because it was not able to transfer the Gloryland Centres to G8 free from any right or interest of the shareholders of GLC and GLTT.

Physical control over the childcare centres, lodgement on the OBLS and transfer of employees

188 G8 complained that it was given physical control of, at most, only ten of the 18 centres on 1 March 2011. Since I have found that G8 had agreed to the removal of the Withdrawn Centres, this complaint must be considered on the basis that it was only entitled to control of 15 centres on that date. In its submissions, however, G8 only specified three centres which it had not gained control of *viz* the Gloryland Centres and the centre run by Teeny Tiny ("the TT Centre"). In relation to the Gloryland Centres, it noted that Mr Lim had confirmed in court that after 1 March 2011, he and his partners continued to run the centres and did not give control of the same to G8.

189 The plaintiffs submitted that the issue of control of the Gloryland Centres was not substantial. The evidence adduced at the trial showed that G8 was keenly aware that it was able to take over the operations of the Gloryland Centres. A text message from Mr Phang to Mr Lim showed that Mr Lim did not object to the transfer of the Centres and that it was Mr Phang who had agreed to defer the takeover of their operations. The plaintiffs did not, however, give any response on the physical transfer of the TT Centre.

190 The plaintiffs' submission regarding the interpretation of cl 3.3 of the BAC was that the type of transfer contemplated by the parties under this clause was simply to allow G8 to have physical control of the businesses of the AO Centres and the Other Centres, pending the grant of the OBLS approvals. Even on the plaintiffs' own interpretation, therefore, CHG was in breach of the BAC when it did not give G8 physical possession of the Gloryland Centres or the TT Centre. In the case of the Gloryland Centres, this omission may have been waived subsequently but there was no waiver in the case of the TT Centre. I am giving the plaintiffs the benefit of the doubt *viz.* the rather ambiguous text message that Mr Lim sent Ms Ng on 16 March 2011. This read:

> Hi Wenda, sms from Edmund after I told him to postpone e handover & i hope u k clarify w him on wat probs is he referring to:
>
> *No prob, we postpone then. We will deal w Wenda directly. A word of caution: u should know your contractual obligations. Wenda is not gg to help u if u or Gloryland is in trouble.*
>
> [Italics added to denote message from Mr Phang]

It would seem from this message that Mr Lim asked Mr Phang to postpone the handover of the Gloryland Centres and Mr Phang agreed. There is, however, no indication how long a postponement Mr Lim had asked for and therefore whether there was a complete waiver or a short postponement of the requirement for physical transfer.

191 Consequently, I find that CHG was in breach of the BAC because it did not give physical

possession of the TT Centre to G8 although ironically, this was one of the centres in respect of which a Licence had been issued by 2 March 2011.

192 In relation to the lodgement of applications on the OBLS, G8 submitted that CHG was in breach because only 16 applications had been lodged by the deadline of 28 February 2011. Even if there was a valid agreement to replace the Withdrawn Centres with the Replacement Centres, this would mean there would be 19 centres for which applications had to be lodged. I cannot accept this argument. CHG had lodged all necessary applications by the deadline apart from those relating to the Replacement Centres. It was clear from Ms Hutson's correspondence that the requirement to lodge applications for the Replacement Centres by the deadline had been waived.

193 G8 also argued that the plaintiffs could not assert that they had lodged the applications when they took steps to prevent MCYS from issuing the OBLS approvals. Since the applications were lodged in time and none of those lodgements were withdrawn on or before 28 February 2011, I consider that the BAC had been complied with in relation to the lodgement. I will deal with the plaintiffs' conduct from 25 February 2011 vis-a-vis the issue of the Licences later.

194 G8 also argued that while key personnel from CHG were transferred to it on 1 March 2011, it did not have contracts with the staff of the childcare centres because the Licences were never approved by MCYS. I do not see this as an independent breach of the BAC. There was no condition precedent relating to employment of staff. Additionally, as Mr Scott recognised, for G8 CHC to employ the staff of the childcare centres, it needed the Licences or, at the least, the OBLS approvals. The clause in the BAC dealing with the employment of the employees of the various childcare centres (cl 9) makes it clear that such employment with G8 or G8 CHC was to commence from Financial Close. Since Financial Close had not occurred on 1 March 2011, there could be no breach at that stage of the sellers' obligations under the BAC to encourage their employees to accept G8's offer of employment.

Conclusion

195 I have found that CHG was in breach of the conditions precedent in the BAC in several respects on 28 February 2011. As a result, I hold that no set off of the Total Indebtedness against the Purchase Price took place on 1 March 2011. As of 1 March 2011, CHG was still indebted to G8 in the principal sum of $5,703,180 (excluding interest).

Was the Total Indebtedness due and payable on 1 March 2011 or on 22 March 2011?

196 G8's position was that under the Loan Agreement, the Total Indebtedness had to be repaid on 31 December 2010, the Repayment Date. As it was not repaid on that date, it became and remained due and outstanding thereafter. Clause 18.2 of the Loan Agreement required all amendments to be effected in writing and none of the three deeds of variation of the Loan Agreement contained any amendment to the Repayment Date. Accordingly, the original date remained valid and enforceable.

197 The plaintiffs submitted that the Loan Agreement was ancillary to G8's acquisition of the Cherie Hearts Group and was not a standalone agreement that exclusively governed the parties' rights and obligations vis-a-vis one and another. In the event that the Total Indebtedness was not set off on 1 March 2011 pursuant to the Amended Second Rider, cl 3.1(a) of the BAC applied to govern when those monies became due and payable. It also pointed out that G8 did not demand repayment of the loans on 31 December 2010, the Repayment Date, but instead continued to advance money to CHG even after that date. Therefore, the Repayment Date had been superseded by cl 2.2(b) of the BAC and the Amended Second Rider read with cl 2.8 of the Third Loan Variation.

198 It is a basic legal principle that any contract can be amended by mutual consent of the parties. In this case, cl 18.3 of the Loan Agreement required that when the Loan Agreement was to be amended, such consent would have to be signified in writing. This did not mean, however, that the Loan Agreement had to be amended by a document which was specifically identified as being executed for the purpose of amending the Loan Agreement. Any document signed by the parties which indicated their intention to amend one of the clauses of the Loan Agreement could have that effect.

199 The parties to the Loan Agreement, CHG and G8, were also parties to the BAC and they signed the BAC and various amendments thereto. I have no difficulty in accepting the terms of the BAC, executed as it was after the Loan Agreement, as effecting an amendment to the Repayment Date in the Loan Agreement. The parties, in particular G8, were legally advised and must have realised that by agreeing to cl 3.1(a) of the BAC as varied by the First BAC Variation, they had agreed that the remainder of the Total Indebtedness was to be discharged at Financial Close or on the Sunset Date whichever was earlier. It was quite clear from the reference to the Loan Agreement in the clause that the parties had in mind the obligations under that contract and were not simply effecting a change by a side wind without a direct intention of doing so.

200 The parties then further amended cl 3.1(a) by the Second BAC Variation. The amended cl 3.1(a) is set out in [28] above. Here again, there was a specific reference to the Loan Agreement making it plain that the clause was intended to vary the Loan Agreement by providing that if the Total Indebtedness was not repaid "in the manner set out in the Loan Agreement" (*ie* by 31 December 2010) it was to be repaid by set off at Financial Close or by cash on the Sunset Date whichever was earlier. As mentioned above at [34], in the Second BAC Variation, the Sunset Date was changed to 30 April 2011.

201 The Total Indebtedness was not repaid on 31 December 2010. Knowing this, the parties entered the Second BAC Variation on 22 January 2011. Having clearly provided there that the money due under the Loan Agreement was to be repaid at Financial Close or on the Sunset Date and having changed the Sunset Date to 30 April 2011, G8 cannot now be allowed to say that the Total Indebtedness was due any earlier than 30 April 2011. Accordingly, I find that the Total Indebtedness was not due on 31 December 2010 or on 1 March 2011 or on 22 March 2011 when the receivers were sent in.

Did G8 repudiate the BAC?

202 In light of my findings above, I conclude that G8 acted in breach of the Loan Agreement when it demanded repayment of the Total Indebtedness on 10 March 2011 and then took action on 22 March 2011 to enforce its security in various ways. These actions could not be, and were not, a breach of the Overarching Agreement since that was determined above to not exist. The question that arises is whether they were breaches of the BAC which entitled the plaintiffs to repudiate the BAC.

203 It is common ground that the situations in which an aggrieved party would be entitled to terminate a contract are, as the Court of Appeal stipulated in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413, the following:

(a) Where a contract clearly and unambiguously provides for the events pursuant to which a party would be entitled to terminate the contract, the innocent party might elect to do so ("Situation 1").

(b) Where a party, by his words or conduct, clearly conveys to the other party that it would not perform its contractual obligations at all, the innocent might elect to terminate the contract ("Situation 2").

(c) Where there is a breach of a term which the parties have designated as so important that any breach of it would entitle the innocent party to terminate the contract, the innocent party may do so ("Situation 3").

(d) Where the breach in question would deprive the innocent party of substantially the whole benefit of the contract, that party may terminate ("Situation 4").

204 It is the plaintiffs' position that the evidence adduced at trial clearly shows that on account of various repudiatory breaches of BAC by G8, CHG is, under any of the four limbs set out above, entitled to terminate.

205 The first step in this discussion is to list what the plaintiffs say are the repudiatory breaches. These are:

(a) G8's refusal to acknowledge that there had been a set off of the Total Indebtedness as at 1 March 2011 and its allegations of outstanding debts.

(b) A series of breaches connected with the purported enforcement of the Debenture and other security for the Loan Agreement.

(c) G8's failure to pay Tembusu the 1 April 2011 instalment of $300,000.

(d) G8's failure to disburse the monies required for the acquisition of the shares of CH School House.

The next step is to consider whether these were breaches and if so whether any of them fell within the situations set out in [203] above. Sub-paragraph (d) above can be dealt with immediately. In view of my finding in [171] above, G8's failure to disburse money for the acquisition of the shares of CH School House was not a breach of the BAC, let alone a repudiatory breach thereof.

G8's refusal to acknowledge that there was a set off and allegations of outstanding debts

206 In the light of my finding that CHG was in breach of the BAC in relation to various terms that had to be met on or before 28 February 2011, there is no substance in the allegation that G8's refusal to acknowledge that a set off had taken place constituted a breach of the BAC. The assertion that the Total Indebtedness was due and payable was, however, misplaced. In itself, an assertion that an amount was due and payable under the Loan Agreement when in fact it was not could not be regarded as falling within Situations 1, 3 or 4. It also did not amount to a clear indication to the plaintiffs that G8 was not going to perform its contractual obligations under the BAC at all (*ie* Situation 2). The sending of the letter to CHG on 10 March 2011 demanding payment of the Total Indebtedness indicated that G8 wanted cash payment of this amount but did not indicate that it was not willing to complete the BAC and pay the balance of the Purchase Price in cash at Financial Close.

Enforcement of the security for the Loan Agreement

207 The plaintiffs submitted that the various steps taken to enforce G8's security for the Total Indebtedness showed its intention to repudiate the BAC. Basically, what the plaintiffs were saying

was that G8's actions showed that it was conveying to CHG that it, G8, would not perform its contractual obligations at all (Situation 2).

208 The plaintiffs developed their argument as follows. First, there was no justification to transfer the shares of the subsidiary into G8 CHC's name as the Total Indebtedness was not yet due. G8's arguments that this transfer would enable G8 CHC to operate the centres, receive the profits and bear the expenses was incorrect. Under the BAC, G8 was to receive the profits generated from 1 March 2011 upon the grant of the OBLS approvals. Clause 2.3 of the BAC provided that title to the assets would pass to the buyer on Financial Close and by transferring and registering the shares in G8 CHC, G8 was seeking to circumvent this clause.

209 Second, the appointment of the receivers emphatically conveyed to the plaintiffs that G8 would not perform its obligation under the BAC to make full payment of the Purchase Price. This appointment was made in bad faith and/or was actuated by improper motive or done with some dishonesty or was exercised in such a wilful and reckless manner that the interests of CHG were sacrificed. They based this submission on the following:

(a) The total amount disbursed under the Loan Agreement and the BAC was only $15,365,362 which was only a part of the agreed purchase price of $24,610,027.

(b) G8 had taken substantial benefit from the acquisition in that:

(i) the plaintiffs had lodged the applications for the Licences and assigned the leases of the various premises to G8 CHC;

(ii) further, CHG had provided G8 with the entire set of its curriculum materials for use by all the childcare centres; and

(iii) G8 was also able to engage all the employees that it wanted by 1 March 2011.

(c) G8 had unilaterally amended the Purchase Price by announcing on the Australia Securities Exchange on 24 March 2011 that its total outlay in Singapore was AUD$16m (or $20.48m at the exchange rate of $1.28 = AUD$1).

(d) G8's allegation that the remainder of the Total Indebtedness due and owing in March 2011 was premised on its further allegation that there was no legal transfer of all AO Centres and Other Centres in total disregard of its agreement to replace the three Withdrawn Centres.

(e) There was no basis for G8 to be concerned about the financial state of CHG so as to justify its appointment of the receivers. G8 was acquiring the businesses of CHG's subsidiaries and not the shares of CHG. Hence, CHG's liabilities did not matter. Indeed, G8 had known about CHG's financial health from the start and was nonetheless prepared to sign the Share Sale Agreement on 27 August 2010.

(f) G8 had specifically agreed to discharge CHG's non-trading liabilities in particular those to Tembusu and Crest. Further, under cl 2.2(c) of the BAC, G8 had agreed to pay Tembusu $300,000 on the first day of every month from November 2010 to September 2011 and to pay a further $372,000 on 1 October 2011. Under cl 2.2(d), G8 had also agreed to assume the financed liabilities of CHG up to a maximum of $3,560,000.

(g) G8 must have known that the appointment of the receivers would, and did, trigger a cross

default in CHG's other liabilities which would likely to lead to the insolvency and winding up of CHG.

210 The plaintiffs said that the appointment of the receivers was a repudiatory breach of the BAC which was conceived in bad faith and executed knowing the financial repercussions that would befall CHG. The irresistible inference was that G8 was simply seeking to take over the 18 directly operated childcare centres and 48 franchised childcare centres for less than the agreed Purchase Price. G8's letter to parents dated 25 March 2011 in which it claimed that G8 CHC now "owns and operates the centres acquired by G8" was telling. G8's position in that letter contrasted with its present claim that it was merely enforcing its security.

211 To assess whether G8's actions in enforcing its security indicated an intention not to perform under the BAC, one has to analyse the position that G8 was in as at 22 March 2011. At that time, G8 did not have physical control of all 15 AO and Other Centres that were supposed to be with it from 1 March 2011 onwards. Second, it had received only three OBLS approvals as of 2 March 2011 and even then did not have physical possession of one of the centres covered by such approvals. Third, CHG was in breach of certain conditions precedent in the BAC as noted earlier. Fourth, events had occurred which gave G8 reason to believe that CHG itself was either not intending to complete the sale or was attempting to put pressure on G8 in relation to the employment of certain of CHG's employees by dragging out the completion process. It was also clear from the evidence that, by that time, the parties no longer trusted each other.

212 G8 alleged that the plaintiffs had taken calculated steps to prevent MCYS from issuing the OBLS approvals. Whilst it does not appear that in late February 2011 the plaintiffs were trying to stop the issue of the OBLS approvals entirely, some steps that they took were very odd. On 25 February 2011, Dr Singh instructed Mr Phang to contact the MCYS and inform the latter that his immediate instructions were that MCYS should "NOT" issue the Licences for the new AO Centres that CHG had applied for and that Dr Singh would contact MCYS to confirm the dates of issue. On the same day, he sent Mr Phang an SMS explaining that he was not asking the latter to stop filing in respect of the HDB lease assignments. Instead, it was the issue of the final licence by MCYS that he was referring to. A further email sent three days later stated that Dr Singh would be contacting the MCYS to discuss the issue of the Licences for the 19 centres (*ie* the original 15 plus the four Replacement Centres).

213 The background to these instructions given by Dr Singh was an altercation that he had had with Mr Scott on 24 February 2011. According to Mr Scott, that afternoon, Dr Singh had told him that G8 CHC had to employ six more staff members and Mr Scott had refused to do so. Dr Singh stormed out of Mr Scott's room and told other people in the office that he was cancelling the contract with G8. Then early the next morning (4.10am to be exact), Dr Singh had sent out his email to Mr Phang about telling the MCYS not to issue the Licences and had sent a copy of this email to Mr Scott which was not something he usually did. Mr Scott took the view that Dr Singh was telling him that if he did not negotiate and take over the six employees, the contract would be cancelled. Thus, the email was a veiled threat. On 2 March 2011, Mr Scott informed Ms Hutson that Dr Singh had asked MCYS to "hold back Licences" and suggested that Dr Singh might be thinking that the delays would force G8 to change its views on staff. It should be noted that Ms Loke testified that during the first week of March 2011, Dr Singh told her that he was going to cancel the deal with G8. When she asked him why, his response was that he was angry that G8 was not taking on all CHG's staff members.

214 The action of 25 February 2011 was not all that CHG did. On 3 March 2011, Dr Singh contacted MCYS directly and followed up the discussion with an email which stated:

As spoken we would like all licences to be dated from 15 March 2011.

> As Directors of [G8 CHC], the new company, Sam [*ie* Dr Yap] and I will continue to liaise with you directly on this whole new application.
>
> Only Sam and I are authorised to discuss this with you.

This email is important for three reasons. First, it was asking MCYS not to issue OBLS approvals or Licences as and when they were ready. Second, it gave the impression that Dr Yap and Dr Singh were authorised by G8 CHC to discuss the whole new application process on its behalf when in fact they had not spoken to G8 about this and had not been given any such authority. Third, the plaintiffs did not send a copy of this email to G8. At that stage, all that G8 knew was that the MCYS had been told not to issue the Licences for the new AO Centres. It was not aware that the plaintiffs wanted all the Licences to be issued on 15 March 2011. If the plaintiffs had kept G8 informed, they could possibly have avoided what happened later.

215 On 3 March 2011, the plaintiffs sent G8 a draft of a proposed third Deed of Variation of the BAC. This set out some amended terms that the plaintiffs wanted G8 to agree to. It would appear now that the plaintiffs were trying to delay the issue of Licences to 15 March 2011 so that they would have some time within which to persuade G8 to change certain terms of the BAC. At that time, however, the plaintiffs' intentions would not have been apparent to G8 which was in a state of considerable uncertainty as to the status of the transaction.

216 On the same day, MCYS responded to Dr Singh's email and noted the request that the transfer of ownership of the centres should take effect from 15 March 2011. MCYS pointed out that up to then it had been liaising with Mr Phang and Ms Ng with regard to submission of documents and follow-up on outstanding matters. It asked for clarification as to whether it should continue liaising with these persons or liaise only with Dr Yap and Dr Singh. I should point out that by this time, Mr Phang was already working for G8 and therefore if MCYS had continued to liaise with him, G8 would have been fully aware of what was going on in regard to the licensing process. It would therefore seem that Dr Singh and Dr Yap wanted to keep control of this process for CHG and cut G8 out of it entirely. That was not the right decision to make. I note that the conduct of the plaintiffs in interfering with the issue of the Licences is a rebuttal to their argument that G8 had taken benefit from the acquisition because the plaintiffs had lodged the applications and assigned leases to G8. Whatever benefit G8 might have obtained from these actions was under threat.

217 In court, Dr Singh gave an explanation for the emails that he had sent out. He said that he wanted to streamline the process of future renewals. He thought that it would be good if all the Licences were issued on the same day so that when they expired, the renewals would take effect on the same day too. It is surprising to me that if this was such an important or convenient matter it had not been thought of much earlier and MCYS had not been asked from the beginning to issue all the Licences on the same day. Instead, it was only after three of the Licences had come out and the plaintiffs were in some conflict with G8 that they put the proposal forward. I accept G8's submission that the explanation was afterthought to rationalise the plaintiffs' actions in jeopardising the approval of the Licences. Mr Phang testified that MCYS did not have a practice of streamlining the issue of Licences and this evidence made that explanation more dubious.

218 The plaintiffs' intentions to force G8 to renegotiate certain terms of the BAC may also be inferred from their reaction when they received G8's letter of demand of 10 March 2011. At that stage, they could have shown G8 the correspondence with MCYS asking for the Licences to be issued all together on 15 March 2011. This would have served to allay G8's fears and given the parties a basis on which to discuss when Financial Close could be achieved and the set off effected. Instead, they kept silent *vis-a-vis* G8 and instead on about 12 March 2011, asked MCYS to consider holding off

the issue of the rest of the Licences. As a result, no further OBLS approvals or Licences were issued between then and 22 March 2011 when G8 appointed the receivers. The plaintiffs did not reveal the steps they took to interfere with the issue of the Licences when they applied in April 2011 for the receivers to be discharged and it only came to light in the course of the subsequent action.

219 In my view, the plaintiffs' actions were in breach of the Sellers' obligation under cl 11.2 of the BAC under which they were obliged to "do all things necessary to assist the Buyer in the transfer or the re-issuing of the Child Centre Licences". That obligation similarly implies that they would not do anything to impede the re-issue of the Licences. They were also in breach of the obligation imposed on each party under cl 20.9 of the BAC to do all things necessary to give full effect to the BAC. That obligation implies that the parties would not do anything that would impede or prevent the other party from obtaining the full benefit of the BAC. This finding applies in particular to the instruction given by the plaintiffs to MCYS on or about 12 March 2011 to hold off on the issue of the Licences.

220 In the situation where despite the assurances that the plaintiffs had given them, only three OBLS approvals had been issued by 22 March 2011 and Dr Singh and Mr Scott were on extremely bad terms and G8 knew that the plaintiffs had the connections with MCYS to delay the approval process, I accept that G8 must have been extremely concerned about the plaintiffs' intentions regarding fulfilment of the BAC. Dr Singh's declaration to Ms Loke that he wanted to cancel the contract cannot have helped. By the time he made that declaration, she too was working for G8 and he must have expected her to pass on the message to G8.

221 In these circumstances, I find that G8's intention in enforcing its security was as a means to protect itself against the deal being called off at the last minute. G8 had performed its obligations very substantially, though not wholly. It had paid $8,672,504 (including $1.5m in cash) for the Franchise Agreements which were part of the Businesses sold under the BAC. It had advanced a further $5m plus thereafter and in return had received OBLS approvals for only three centres. It was bearing the expenses of the centres under its physical control and had employed many of CHG's employees and taken premises in order to house its administrative staff. At the same time it was not able to receive all the fees because the Licences had not been issued. I do not agree that G8's actions, shocking as they may have been to the plaintiffs, signalled an intention not to complete. It is significant that shortly after the receivers were removed, G8 indicated to the plaintiffs that it was ready, willing and able to complete the transaction. In my judgment, G8 was not acting in bad faith. It was attempting to protect itself in circumstances in which the plaintiffs were already in breach of the BAC albeit that the steps that G8 took arose from a mistaken belief as to its legal rights under the Loan Agreement.

222 It should also be noted that at the time the receivers were appointed, G8 was of the view that because OBLS approvals had not been issued by 28 February 2011 and legal transfer had not happened, the Total Indebtedness had not been set off and was outstanding and due and payable. G8 was mistaken as its legal rights in regards to recovery of the Total Indebtedness at that time but this does not mean that in exercising its rights under the Loan Agreement, it was renouncing the BAC. There was a genuine dispute at that time as to whether G8 was entitled to take such action. If G8 had been correct legally then there would be no question of repudiation of the BAC as a result of enforcement of the Loan Agreement. I do not think it would be correct for me to hold that G8 was repudiating the BAC when its intention was to protect itself and, arguably, was justified in doing so.

223 There was no evidence that G8 was not willing to pay the full balance of the Purchase Price on completion. The plaintiffs argued that G8's announcement to the Australia Securities Exchange on the price amounted to a unilateral amendment of that price. I do not agree. Whatever G8 told the Australia Securities Exchange (and Ms Hutson's explanation was that it did not refer to the acquisition

of the same 18 centres as mentioned under the BAC) could not effect a change in the consideration payable under the BAC. No unilateral amendment of price is legally possible. The plaintiffs were assuming that following G8's appointment of receivers, such officers or any liquidators that might replace them would somehow come to a settlement with G8 on the basis of a lower purchase price. That was speculative and there is no basis for holding that any professional receivers or liquidators would not attempt to enforce the BAC against G8 in accordance with its terms since to do so would reap the best return. It should also be remembered that the receivers were appointed only in respect of CHG and the shares of only 12 companies were transferred to G8 CHC. There are other sellers under the BAC who were not affected by these actions and who would be able to attempt to enforce the BAC in full should G8 prove reluctant.

Failure to pay Tembusu on 1 April 2011

224 The plaintiffs submitted that G8's failure to make payment of the instalment due to Tembusu on 1 April 2011 was a breach of cl 2.2(c) of the BAC which provided for payments of $300,000 each to be paid on various dates including 1 April 2011. The plaintiffs argued that cl 2.2(c) was a fundamental term of the BAC because:

(a) Even before the BAC came into existence, the proposed transaction for the acquisition of the Cherie Hearts Group already provided for the discharge of CHG's liabilities to Tembusu and Crest.

(b) The terms of cl 2.2(c) were substantially the same as the payment terms set out under the Settlement Deed dated 2 September 2010 between Tembusu and CHG which Ms Hutson had reviewed and was satisfied with.

(c) Ms Hutson had informed Mr Scott to make payment of the January 2011 instalment in order "to remove the only legal argument they may have" and this showed that G8 was aware that if it failed to make payment to Tembusu, this would give the plaintiffs cause for terminating the BAC.

This breach on the part of G8 was a repudiatory breach because it clearly demonstrated that G8 had no intention to make payment of the Purchase Price.

225 G8's explanation for not making payment of the 1 April 2011 instalment was that this date fell within the period of the receivers' appointment and it took the view that any further action by it had to be pursuant to the receivers' instructions. According to Ms Hutson, at that stage it was clear to G8 that CHG was not taking steps to ensure that the BAC be carried out. Once the appointment of receivers was reversed, G8 had written to indicate that it was willing to complete the BAC on the Sunset Date of 30 April 2011. Instead of requesting G8 to pay Tembusu before the Sunset Date, the plaintiffs responded on 25 April 2011 terminating the "Overarching Agreement including the BAC". The plaintiffs cited G8's failure to make the Tembusu payment as one of the reasons why the Overarching Agreement was being terminated.

226 I agree with the plaintiffs that G8 was in breach of the BAC when it did not pay Tembusu on 1 April 2011. I do not agree, however, that this breach of contract was a repudiatory breach of the BAC. Whilst the settlement of Tembusu's debts was one of the ways in which the Purchase Price was to be settled, the fact was that G8 had regularly met that obligation. At the time of the default, G8 had already made five monthly payments to Tembusu and it had disbursed about $7m altogether to assist CHG in satisfying its obligations to Crest and Tembusu. In the circumstances that existed at the time *ie* the insistence by the plaintiffs that the Total Indebtedness had been set off and no monies were owing to G8 so that G8 had taken steps to enforce payment of that disputed amount,

followed by the plaintiffs' termination of the BAC and legal action to effect this, G8's failure to make the further payment, though a breach, did not indicate that it did not want to fulfil all its obligations under the BAC.

227 In any event, even if the failure to pay one instalment to Tembusu amounted to the breach of a condition, it would not, in my view, be correct to allow the plaintiffs to terminate the BAC due to this breach as CHG itself was in breach of certain conditions precedent as I have already pointed out. In *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] SGCA 34, the court held that where both parties were in breach of contract and one party sought to terminate the contract, a breach by the terminating party would not affect its right to terminate the contract unless the breach by the terminating party was a continuing breach of an obligation in the nature of a condition precedent. Well before 1 April 2011, the plaintiffs had not only breached the conditions precedent, they had also taken steps to delay if not prevent entirely the satisfaction of those conditions. The plaintiffs had at first delayed the issue of the OBLS approvals to 15 March 2011 and had subsequently asked the MCYS to hold off indefinitely on this matter. That request was made about ten days before the receivers were appointed. Instead of working towards a solution, the plaintiffs were ensuring a stalemate.

228 The evidence shows that the plaintiffs had no qualms in manipulating situations to their advantage. This was shown not only in their dealings with the MCYS but also in the way they dealt with the money that G8 had lent them to pay for the shares in the Gloryland Centres. They should have paid both instalments of $500,000 over upon receipt. Instead, in respect of the first instalment, only $300,000 was paid towards settlement of the purchase and in respect of the second instalment, the amount was withheld for two months; and even when it was paid to Mr Lim, the circumstances of the payment were a matter of dispute between Mr Lim and CHG.

Conclusion on breach

229 For the reasons given above, I hold that G8 did not commit any repudiatory breach of the BAC and therefore CHG was not entitled to terminate the BAC on 25 April 2011.

Specific performance

230 As a consequence of my findings above, CHG acted wrongly in purporting to terminate the BAC. The BAC is, in my judgment, still in effect and enforceable between the parties.

231 By cl 20.10 of the BAC, the sellers (including CHG) acknowledge that monetary damages alone would not be adequate compensation to G8 for the Sellers' breach of their obligations under the BAC and that specific performance of those obligations is an appropriate remedy. G8 submitted that the plaintiffs should be ordered to specifically perform the BAC. I agree. However, I would need further submissions on the actual form of the orders to be made in this respect since the situation is complicated.

232 Accordingly, the plaintiffs' claim is dismissed with costs. The defendant is granted specific performance of the BAC and I will hear the parties on what form the orders necessary to effect this decision should take.