IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 234

Suit No 1057 of 2013

Between

Lim Geok Lin Andy

… *Plaintiff*

And

Yap Jin Meng Bryan

… *Defendant*

JUDGMENT

[Contract] — [Oral Agreement] — [Variation]

[*Res judicata*] — [Extended doctrine]

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v
Yap Jin Meng Bryan

[2016] SGHC 234

High Court — Suit No 1057 of 2013
Lai Siu Chiu SJ
29 February; 1–4, 7–8, 11 March; 25 April; 13 June 2016

21 October 2016 Judgment reserved.

Lai Siu Chiu SJ:

Introduction

1 This is yet another chapter in the dispute between Yap Jin Meng Bryan ("the defendant") and his former partners in his 2008 investment in properties located at 428 and 434 River Valley Road ("the Properties"). The defendant's two partners in that venture were Lim Koon Park ("Park") and Lim Geok Lin Andy ("the plaintiff").

2 The Properties were purchased in April 2008 for $48.5m and sold for $60.08m in 2009 using Riverwealth Pte Ltd ("Riverwealth") as the investment vehicle. Park sued the defendant and Riverwealth in Suit No 184 of 2010 ("the 2010 Suit") for a share of the profits made from the sale of the Properties. On 7 August 2012, this court dismissed Park's claim and allowed the defendant's

counterclaim based on Park's misrepresentation (see *Lim Koon Park v Yap Jin Meng Bryan and others* [2012] SGHC 159).

3 In September 2012, Park appealed against the dismissal of his claim (in Civil Appeal No 107 of 2012) and his appeal was allowed on 22 July 2013; see *Lim Koon Park and another v Yap Jin Meng Bryan and another* [2013] 4 SLR 150 ("the CA judgment"). The appellate court held that the defendant, Park and the plaintiff had a profit-sharing arrangement in the ratio 2:1:1 ("the Initial Agreement") for the Properties when sold. The appellate court ordered that an inquiry be conducted to determine Park's 25% share of the profits from the gross sale proceeds less specified deductions.

4 The inquiry was held by this court at the conclusion of which on 29 October 2015, the court allowed deductions amounting to $5,408,676.58 to be made from the gross sale proceeds of the Properties (see *Lim Koon Park v Yap Jin Meng Bryan and others* [2015] SGHC 284).

5 A further hearing was held by this court to determine the rate and amount of interest to be awarded to the defendant for his personal loan of $22.58m (rounded down for ease of reference) extended to Riverwealth to help fund the purchase price of the Properties. The interest due to the defendant was quantified on 3 March 2016 at $2,990,263.79 (see *Lim Koon Park v Yap Jin Meng Bryan* [2016] SGHC 29). That enabled this court in turn to quantify Park's 25% share of profit as amounting to $794,569.87. Both Park and the defendant have appealed against this court's assessment in Civil Appeals No 44 and No 51 of 2016 respectively.

6 In this suit, the plaintiff sought to rely on the CA judgment to contend that like Park, he is entitled to 25% share of the net profits made from the sale

of the Properties. The defendant disputed his claim, contending that unlike the CA judgment's finding in relation to Park, the Initial Agreement *vis-à-vis* the plaintiff had been varied. The defendant contended that the plaintiff had relinquished his 25% profit share in exchange for being released from all liabilities of Riverwealth including being a guarantor for the $30m loan ("the loan") to Riverwealth from Hong Leong Finance Ltd ("HLF"). This agreement was termed the "Varied Agreement" by the defendant in his pleadings in the 2010 Suit and "the Varied Oral Agreement" in his pleadings in this suit.

The pleadings

(i) The plaintiff's pleaded case

7 It would be appropriate at this juncture to look at the pleadings. The plaintiff pleaded that the threesome (namely the defendant, Park and himself) orally made the Initial Agreement in or about September 2007. He relied on the CA judgment for his claim that the defendant must account to him for 25% of the net profits made from the sale of the Properties based on the Initial Agreement.[1]

8 The plaintiff denied there was a Varied Oral Agreement. Even if it existed, the plaintiff contended that the transfer of all his shares in Riverwealth to the defendant had nothing to do with the profit-sharing arrangement and his entitlement to 25% share of the profits.

9 Over and above the terms of the Initial Agreement found by the appellate court, the plaintiff alleged for the first time[2] that the defendant had

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[1] Statement of Claim filed on 21 November 2013

[2] The plaintiff's Reply (Amendment No 1) filed on 4 June 2014 at para 4

assured him that his profits pursuant to the Initial Agreement would not be less than $1.55m ("the Minimum Profit Assurance") projecting a land sale of the Properties at $60m which was the minimum price at which the Properties were to be sold. The plaintiff pleaded he had no reason to doubt the defendant's promise of payment as they had known each other since junior college days and they had carried out a property investment together. More will be said of this investment property later.

10 In Further and Better Particulars that he furnished pursuant to the defendant's request, the plaintiff alleged that the Minimum Profit Assurance was made in an email dated 1 August 2008 from the defendant to Park and the plaintiff and orally after a meeting at the Uluru Restaurant on 17 December 2008 ("the Uluru meeting"). The plaintiff alleged:

(a) That under the terms of the Initial Agreement, the defendant had in or about the first quarter of 2008, agreed to bear the holding costs for the Properties for a period of at least 18 months from the date of purchase of the Properties ("the Minimum Financing Period"). The term was re-confirmed at a meeting on 9 July 2008 at Park's office;

(b) That he had transferred his (remaining) shares in Riverwealth to the defendant over two tranches (on 30 January 2009 and 27 March 2009) pursuant to a request from the defendant in order to assist the defendant's re-financing of the Properties with a private bank at a lower holding cost. The terms of the re-financing according to the defendant were:

(i) Riverwealth was required to be 100% owned by the defendant in order to be pledged as collateral;

(ii) The loan to be extended was to be $32m secured by land held by Riverwealth and other assets provided by the defendant;

(iii) Interest payable was to be cost of funds plus 1.5%.

(c) The defendant's request in (b) was made to the plaintiff by way of an email dated 2 August 2008 and by an email to the plaintiff and Park dated 24 November 2008. The transfer of shares was not intended to affect the plaintiff's profit share under the Initial Agreement;

(d) In the alternative, the plaintiff alleged that even if he had agreed to the Varied Oral Agreement, the defendant gave no consideration for the variation such as to enable the defendant to enforce the same against the plaintiff.

(ii) The defendant's pleaded case

11 The defendant averred that with the onset of the global financial crisis ("the GFC") in 2008, it became clear by end-August 2008 that the Properties could not be sold for the target price of $60m to $80m. The inability to sell the Properties resulted in a longer than anticipated holding period (against an original estimate of four months) with correspondingly higher costs.

12 The GFC peaked following the collapse of Lehman Brothers on 15 September 2008. This prompted HLF to review the loan to Riverwealth as which result a serious risk arose that HLF would withdraw the loan. HLF had raised the following issues:

(a) It valued the Properties at $48.5m as of 17 December 2008 which meant that Riverwealth was in negative equity which HLF required Riverwealth's shareholders/directors to address and;

(b) HLF's loan requirements (in its letter of offer dated 26 March 2008) had not been fulfilled including the placement of a fixed deposit of $1m with HLF.

13 The above developments placed Riverwealth at risk as, if the loan was withdrawn by HLF, it could result in all parties to the Initial Agreement losing their investment and being held personally liable as joint and several guarantors of the loan. There was therefore an urgent need to renegotiate the loan or find alternative sources of financing. On behalf of Riverwealth, the defendant negotiated with HLF which resulted in an extension of the loan without further conditions being imposed save for a $1m fixed deposit which HLF agreed could be placed in the defendant's personal name.

14 The defendant averred that throughout the period until the sale of the Properties, he provided and continued to provide for Riverwealth's holding costs for the Properties. However due to the continuing bearish property market caused by the GFC, the holding costs for the Properties continued to grow. To address the situation and to reduce his risk exposure, the defendant made a capital call to the plaintiff and to Park to either:

(a) inject capital into Riverwealth ("Option 1") or;

(b) transfer their shares to the defendant and surrender their respective shares of profit under the Initial Agreement ("Option 2").

(The two options are henceforth referred to "the Exit Offer"). In his closing submissions, the plaintiff stated that in substance the "Varied Agreement" pleaded in the 2010 Suit, the "Varied Oral Agreement " pleaded in this suit and the "Exit Offer" described above are the same.

15 Park did not accept either Option in the Exit Offer. Instead, he commenced the 2010 Suit. The plaintiff was unwilling and/or unable to inject cash into Riverwealth to meet the anticipated additional holding costs. He therefore accepted Option 2 of the Exit Offer, duly transferred all his shares in Riverwealth to the defendant by 27 March 2009, resigned his directorship by letter dated 27 March 2009 and thereafter was no longer involved in the decision making of Riverwealth.

16 The defendant contended that the plaintiff's claims (which he denied) of (i) the Minimum Profit Assurance and (ii) the Minimum Financing Period were an abuse of process as they amounted to a collateral attack on the CA judgment.[3] This was denied by the plaintiff. The plaintiff further pleaded that "*the effect of the decision in CA 107 is that the [d]efendant was obliged to bear holdings costs for a period beyond 18 months from the date of purchase of the Properties.*"[4]

17 Before I address the evidence that was adduced by the parties, it should be noted that the plaintiff attempted to shortcut and/or expedite his legal proceedings by applying to intervene in the 2010 Suit (*vide* Summons No 299 of 2014) as a defendant at the inquiry stage. His supporting affidavit for the application stated that Park's claim and his claim were the same in substance.

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[3] The defendant's Rejoinder filed on 29 February 2016.

[4] The plaintiff's Surrejoinder filed on 29 February 2016 at para 3

The plaintiff's application was opposed by the defendant (but not Park) and was dismissed with costs.

The evidence

The plaintiff's case

18 Besides himself, the plaintiff called Park as his witness while the defendant was the only witness for his case.

19 The plaintiff deposed he was instrumental in introducing Park to the defendant in September 2006. He had known Park since 2000 whilst his friendship with the defendant went back to their student days together. The plaintiff is a director in his family company Kim Hup Lee Pte Ltd ("KHL"), a property developer that also owns industrial and other properties.[5]

20 The plaintiff deposed that the threesome decided to enter into the Initial Agreement to bring together their different expertise for investment purposes. The plaintiff was experienced in the real estate market, Park was/is an architect whilst the defendant was familiar with banking and finance being then the managing-director of a division of a foreign bank.

21 Park found the Properties for Riverwealth, the defendant did the financing while Park took care of the architectural and planning aspects. The plaintiff deposed he and Park delivered to the defendant and/or Riverwealth the Properties that were worth $80m at a price of $48.5m.

22 Taking the cue from the CA judgment (at [3] above) the plaintiff contended that the transfer of his shares in Riverwealth was independent and

[5] The plaintiff's affidavit of evidence-in-chief ("AEIC")

separate from the equity structure of Riverwealth. In this regard the plaintiff relied on his email to the defendant dated 9 November 2007 copied to Park and Clarence Tan ("Clarence") where he stated:

> As a matter of record, we first revised our initial equity structure of 40 30 30 to 50 25 25 for the inclusion of [Clarence] as your proxy.
>
> In view of the risk you are personally bearing for this project, we have further agreed to revise the structure for profit sharing to 47.5 22.5 22.5 & 7.5 (CT) on a Land Sale Only basis irrespective of the actual physical equity structure of Riverwealth Development Pte Ltd.

(Clarence was in charge of administration at Riverwealth).

23 The plaintiff added that it was agreed under the Initial Agreement that the defendant would provide financing for a period of at least 18 months from the purchase of the Properties. As the purchase of the Properties was completed around late April 2008, the 18-month deadline would expire in October 2009. By then the Properties had been sold (on 8 October 2009).

24 The plaintiff denied there was any Exit Offer as alleged by the defendant. He deposed he transferred his shares in Riverwealth to the defendant to enable the defendant to arrange re-financing with a private bank at lower holding costs. He was told by the defendant that the new financier required the defendant to hold 100% of the shares in Riverwealth. The plaintiff relied on two emails from the defendant dated 1 August 2008 and 24 November 2008 to support his position. In addition, he said there were telephone calls as well as a meeting between himself, Park and the defendant in the period from August to December 2008.

25 The shareholding in Riverwealth as of April 2008 was as follows:

S/No	Name	Percentage
1.	The defendant	50%
2.	Wee Pek Joon ("Park's wife")	25%
3.	The plaintiff	25%

26 On or about 19 November 2008, the plaintiff and Park's wife each transferred 12% of their shares to the defendant and the shareholding then became the following:

S/No	Name	Percentage
1.	The defendant	74%
2.	Park's wife	13%
3.	The plaintiff	13%

27 After the above transfer, there was an exchange of emails between the defendant and Park regarding the transfer of the remaining shares held by the plaintiff and Park's wife in Riverwealth. Park wanted certain conditions to be met before Park's wife transferred her remaining shares to the defendant to which the defendant apparently disagreed. As a result, the Uluru meeting took place. The Uluru meeting played a crucial role in both sides' case. The parties gave conflicting versions of what transpired there.

28 According to the plaintiff, the defendant again requested the plaintiff and Park to transfer to him all the shares held by the plaintiff and Park's wife in order to facilitate re-financing of the Properties. He assured them that the profit sharing arrangement remained intact after the transfer and this was confirmed in the defendant's subsequent email exchanges with Park between 24 and 28 November 2008, which was addressed or copied to the plaintiff. The relevant extracts from the three emails read:

(i) The 24 November 2008 email (from the defendant to Park and the plaintiff)

> Andy, Park,
>
> Have made some head way.
>
> got an in principal private bank facility at cost of funds + 1.5%
>
> higher spread due land as collateral (but deemed an illiquid collateral)
>
> valuation at 53m but loan extended is only 55%
>
> (29.15m)
>
> BUT
>
> because I have other assets with the Private bank, they will increase my lending facility to 32m in total.
>
> PRE-Requisite
>
> RWPL needs to be 100% owned by me in order to be pledged as collateral.
>
> As such I will need to have remaining shares transferred to my name preferably by end of the month…

(ii) The 27 November 2008 email (from Park to the defendant, copying Clarence and the plaintiff)

> H[i] Bryan,
>
> Thanks for the update on the progress to migrate the loan away from [HLF].
>
> I am happy to effect the transfer with your assurance that our profit sharing agreement shall be honoured, and that there

> will be a firm binding deadline for the discharge of guarantee upon my transfer.
>
> I hope you understand that I would like to avoid a position where my share holding is zero and bank's guarantee remains in full effect, albeit due to circumstance beyond your control.

(iii) The 28 November 2008 email (from the defendant to Park)

> Thanks so much for your reply .
>
> The spirit of the profit share is intact and is not different from the last email exchange.
>
> Please understand that the effort to migrate the loan does not lie [e]ntirely in my hand despite provision of additional collateral BY ME, not you nor Andy!!!!
>
> So [I] am not able to give a definitive deadline when not in total control …

29 It was the plaintiff's case that after Park left the Uluru meeting, the defendant assured him that the plaintiff's share of the profit would be not less than $1.55m given a land sale of the Properties at the projected minimum price of $60m. This was consistent with an email that the defendant sent to the plaintiff and Park (copying Clarence) on 1 August 2008 that stated:

> $5,955,137 24.47 4.65 1,553,306 4.65 1,553,306
>
> Guys pls see the 'progressive worksheet.
>
> I just completed this as was suggested by Park some time back
>
> This payout matrix has a much smoother payout ratio for land value of 60m (current bank valuation) all the way to the 90m level that we once dared to dream about.

30 Subsequent to the Uluru meeting, the plaintiff executed two transfer deeds in favour of the defendant, the first on or about 30 January 2009 when Clarence brought him the transfer form and the second occasion on or about 27 March 2009 when he met the defendant at Lavender MRT station (near his

KHL office). Altogether, the plaintiff transferred to the defendant 130,000 shares in Riverwealth equivalent to 13% of the shareholding.

31 On the second occasion (*ie*, 27 March 2009), the defendant sent the following email to Park copied to the plaintiff (which intent the plaintiff testified was to "scare" Park):

> Dear Park,
>
> The holding of RPL and the two plots of land, namely 428 and 434 River Valley Road is going to be a much longer holding period than originally envisaged.
>
> As such I will need to do the following:
>
> I will require all shareholders to contribute/top-up/make good payment their commensurate share of expenses to date as dictated by their current shareholdings.
>
> With respect to mdm Wee Pek Joon's current shareholding of 13%, this will translate to
>
> a) 13% of paid up capital of Sgd 1 million dollars as borne by me: ie. Sgd 130,000/-
>
> b) 13% of the company expenditures to date for the purchase of the land and all other related expenditures as per the company accountant's record up to and including this month whereby we will file the financial reports to comply with AGM requirements.
>
> This works out to be (50,187,812-30,000,000) x 13% = SGD 3,924,415.56

The plaintiff claimed that he did not reply to the above email because he had acceded to the defendant's request to "*stay out of his actions against Park*".[6]

32 To buttress his allegedly continued involvement in Riverwealth and in "*the venture*" notwithstanding his withdrawal as a shareholder and director, the plaintiff referred to his email to Clarence (copying Park and the defendant)

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[6] The plaintiff's AEIC at para 42

on 22 March 2009 where he offered his views on the agenda etc for Riverwealth's forthcoming AGM. I should point out that the plaintiff's email was sent five days *before* his transfer to the defendant of his remaining shares in Riverwealth on 27 March 2009.

33 The plaintiff's AEIC (at para 46) referred to another property investment he had with the defendant at about the time of the Riverwealth venture. This was an apartment at 2 Marina Boulevard #41-11, The Sail at Marina Bay ("the Sail property"), which was purchased in May 2007 and sold in January 2010 with the net profits split equally between them.

34 After the transfer of his shareholdings in Riverwealth to the defendant on 27 March 2009, the plaintiff subsequently held 1,000 shares on trust for the defendant as, on 14 May 2009, the defendant transferred 1,000 shares to the plaintiff. (This was to enable the defendant subsequently to have a casting vote to remove Park's wife as a director and to sanction the sale of the Properties).

35 On 25 September 2009, the defendant emailed to the plaintiff a draft of a proposed letter (prepared with lawyers' input) addressed to the plaintiff which contained the following extracts:

> (f) It is agreed that you shall on [insert date] transfer the Subsequent Nominee Shares (ie the 1,000 shares) to my name for the nominal sum of S$1;
>
> (g) With the transfer of the Subsequent Nominee Shares referred to in paragraph (f) above, it is acknowledged that you shall cease to be a shareholder on record in the Company as of the date of such transfer and in light of such transfer, after such date:
>
> > (i) I shall procure that the Company unconditionally and irrevocably agrees to forever waive, release and discharge you from any and all claims, liabilities, actions, suits, causes of action (including under statute), claims….whatsoever which the

> Company now has or may at any time hereafter have against you…
>
> (ii) You shall unconditionally and irrevocably agree to forever waive, release and discharge the Company and its respective officers from any and all claims (including, but not limited to any dividends paid out to any shareholders), liabilities, actions, suits, causes of action (including under statute), claims, complaints, demands, claims for costs or expenses whatsoever which you may have against the Company now or may at any time hereafter.
>
> 3. Please acknowledge receipt of this letter by signing and acknowledging your acceptance to the terms above.

36 The plaintiff did not acknowledge by signing and returning a copy of the draft letter to the defendant. However, he did return to the defendant the remaining 1,000 shares he held which transfer was effected on 29 September 2009. Instead, the plaintiff wrote to the defendant on 13 October 2009 as follows:

> I refer to your email of 24 Sep 09 and our conversations. I cannot understand the attachment as it is inconsistent with what we agreed all along.
>
> I now understand from market sources that the property has been sold. Can you please let me have the details and let me know the amount due to me when you have worked it out?

The above exchange of correspondence was omitted from the plaintiff's affidavit of evidence-in-chief ("AEIC").

37 Questioned by counsel for the defendant and the court on the 1,000 shares transferred, the plaintiff explained[7] that he did it notwithstanding his unhappiness with cl g(ii) of the draft letter in [35] because the defendant had assured him in a telephone conversation (around that time) that "the profit-sharing is intact". He disagreed with counsel's suggestion his act of transfer

[7] At N/E 462

was inconsistent with cl g(ii) of the draft letter. The plaintiff added[8] that he sent the email in [36] after consulting his lawyer as he wanted to put his claim on record.

38 As to why he had heard about the sale of the Properties from "market sources" instead of from the defendant if he was still involved with Riverwealth, the plaintiff explained that he did hear about the intended sale from the defendant in that he knew the sale price was above $60m but not the exact number or details of the seller although he was aware it was a listed company. This explains the inquiry he made of the defendant in his email at [36]. The plaintiff said[9] that his reference to "market sources" in his email was to his nephew.

The 2010 Suit

39 While the plaintiff was cross-examined, counsel for the defendant referred him to his earlier testimony in the 2010 Suit. The plaintiff had testified *viva voce* on 5 and 6 March 2012[10] for Park as he declined to file any AEIC.

40 In the 2010 Suit, the plaintiff had referred to the Uluru meeting at [27] and said the defendant had then assured him that the profit-sharing arrangement remained intact. During cross-examination, it was drawn to the plaintiff's attention that between 27 March 2009 (when he resigned his directorship and transferred his shares to the defendant) and 25 September 2009 (when he transferred the remaining 1,000 shares to the defendant), there

[8] At N/E 463

[9] At N/E 466

[10] At N/E 126–339 of the 2010 Suit

were no emails from the plaintiff to the defendant. The plaintiff asserted[11] that he had verbally asked the defendant about his share of the profit but the latter kept deferring the issue. He decided to write the letter in [36] when the defendant suddenly sent him the letter at [35] which was something totally new and not what they had agreed. He testified he was never the defendant's nominee and save for the 250,000 shares transferred on 30 January 2009, he did not return his shares to the defendant on that basis.

41 At a later stage[12] when he was questioned by the court, the plaintiff explained he was not entirely clear why the defendant wanted him to hold a token 1,000 shares as he had "*minimal contact or time with [Riverwealth]*" but understood from the defendant that the latter had some concerns with HLF. The plaintiff confirmed[13] he had never paid for his shares in Riverwealth.

The Minimum Profit Assurance

42 It is noteworthy that for the 2010 Suit, the plaintiff did not mention his claim that the defendant had given him the Minimum Profit Assurance or that the defendant was obliged to meet the Minimum Financing Period at [10(a)]. In this regard it is also noted that the defendant's email dated 19 December 2008 which recorded which transpired at the Uluru meeting made no mention of the Minimum Profit Assurance. The full text of that email addressed to Park and the plaintiff and copied to Clarence states:

> Hi guys below are the 3 points as discussed on Wed evening
>
> They lay the principal by which I will make best efforts to have Park's gurantee [*sic*] for the HL extinguished asap....pls try to

[11] At N/E 335 of the 2010 Suit

[12] At N/E 338 of the 2010 Suit

[13] At N/E 339 of the 2010 Suit

> have this transalted [*sic*] to a simple doc. by your lawyer…Thanks n regards
>
> Quote:
>
> [I]n return for Park/wife agreeing to assign/sell his share holding of 13% to me for a nominal $1
>
> I agree to relinquish his personal gurantee [*sic*] for RWPL by one of the following methods
>
> 1) retiring the HL loan by way of outright sale of RWPL
>
> 2) accepting new JV partners into RWPL resulting in the renogiation [*sic*] of the HL financing facility wrt the project loan quantum and re-establishing the new set of gurantors [*sic*] in consideration of the revised financing facility proposed by HL
>
> 3) migration of the RWPL financing to another financier
>
> It is understood that Park/wife will agree to stand down/resign from RWPL in his/her position of company director should any one of the above scenarios take place.
>
> I also agree that Park/wife has recourse back to me (ie idemtity [*sic*]) in the event that after having transferred his shares to me whereby he no longer holds any equity stake in RWPL, a situation arises whereby HL decides to pursue Park's personal gurantee [*sic*].
>
> If such a situation arises, I agree to idemify [*sic*] Park of this claim arising from from [*sic*] HL
>
> Unquote

43 There was no response from the plaintiff either to deny the contents of the above email or to point out that the defendant had a separate understanding with the plaintiff on the transfer of the latter's shares to the defendant.

44 In the 2010 Suit, Park did not advert to the Uluru meeting at all. Cross-examined at this trial on his omission, Park explained that it was because "*it wasn't deemed important to prove the origination of 25:25:50*." Pressed further by counsel for the defendant, the following extracts appear in the transcripts of the notes of evidence[14] immediately after Park's above italicised answer:

> Q: On the contrary, when you went to trial for Suit 184 [*ie,* the 2010 Suit], Mr Yap [*ie,* the defendant] was saying you are not entitled to profits at all, so any evidence you have where Mr Yap allegedly repeats "You still have your profit share" surely, you would have raised it.
>
> A: We have raised all that we could thought -- where we thought was important, under the lawyer's advice.
>
> Q: But you are telling us that at the December Uluru meeting, Mr Yap is still promising you some profit.
>
> If that were so, why does it not appear in your Suit 184 affidavit of evidence-in-chief?
>
> A: I have -- I don't know how to answer that.
>
> Ct: I certainly didn't hear about it in Suit 184. I would have liked to hear about it. This is the first time I'm hearing it.
>
> MS CHIN: There was no mention of it in the affidavit at all.
>
> Ct: No, not at all.

45 Another portion of Park's evidence[15] reads as follows:

> Q: You would remember, in Suit 184 there was also an allegation about you exiting the venture, right?
>
> A: Yes.
>
> Q: If Mr Andy Lim [*ie,* the plaintiff] did sit there and agree, if only by silence, then surely it would support your version of events that the transfer was purely for refinancing and not an exit correct?
>
> A: Can you explain your question again?
>
> Q: Because, between you and Mr Andy Lim you seem to be saying that the proposal put on the table on December 2008 is strictly because of refinancing, it has nothing to do with an exit; right?
>
> A: Yes

---

[14] At N/E 872

[15] At N/E 878–879

> Q: If your version of events is to be believed, then one would have expected you to present this same version about the Uluru meeting in your Suit 184 affidavit of evidence-in-chief instead of utter silence about that meeting.
>
> A: The fact is we have enough evidence, and these emails, whatever to do with Uluru, that meeting, the offer, whatever we could discover were all in the discovery already.
>
> Q: But you had Mr Andy Lim also coming to court. Didn't you go through the evidence and say, "We are going to get Bryan Yap, he is telling an untruth. There is the Uluru meeting, certain things happened which can support our case. We must bring this up to the attention of the court"?
>
> Didn't that occur to you?
>
> A: No, we have enough evidence and it --
>
> Q: It didn't occur to you because it didn't happen? Correct?
>
> A: Disagree.
>
> Q: Your version of the Uluru meeting is entirely a concoction.
>
> A: Disagree.

46 Although the defendant's email at [42] clearly showed the Uluru meeting only concerned Park and Park's wife, Park claimed under further cross-examination[16] that the plaintiff's position was also part of the discussion. In Park's AEIC filed for this suit where he referred to the Uluru meeting, he had deposed:[17]

> Andy had however agreed to accede to Bryan's request to transfer his remaining shares in Riverwealth to Bryan at this meeting and I understand that he did transfer his shares to Bryan.

---

[16] At N/E 874

[17] Park's AEIC at para 23

47 However, in cross-examination, Park denied the focus of the defendant's proposal was on him. He said it was a "*three-way discussion*" and he surmised that was the only reason for the plaintiff's presence. He added that the plaintiff accepted the defendant's proposal and agreed to the transfer. He recalled that the plaintiff neither agreed nor disagreed, "*[h]e was very quiet through the meeting*".[18] The following exchange then took place between Park and counsel for the defendant:[19]

> A: If you ask me, I had the impression that he has already agreed with Bryan Yap [*ie,* the defendant].
>
> Q: Simply because of his silence, is it?
>
> A: Through whatever that we have spoken about --
>
> Q: Who is "we"? Both of you only, I suppose?
>
> A: Bryan, Andy. And we had a discussion across the dinner. I have come to the impression that Andy has already agreed with Bryan; I'm the only one that's difficult.
>
> Q: That is very curious. What is it that was discussed at this point in time to give you this impression that Mr Andy Lim has agreed?
>
> A: Because Bryan just kept talking to me, and I keep refusing to.
>
> Q: Didn't you turn round to your fellow shareholder, also holding only 13 per cent, to say, "Andy, what's your view on this"?
>
> A: I don't remember doing that.

48 The above exchange would appear to corroborate the defendant's email on 19 December 2008 at [42] and his case – that there was no discussion in relation to the plaintiff's position as the Uluru meeting only concerned Park.

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[18] At N/E 874

[19] At N/E 874–875

49 It was the plaintiff's own evidence that until his email to the defendant dated 13 October 2009 at [36], there was no contemporaneous correspondence or documents that referred to his claim to a share of the profits from the sale of the Properties, let alone to the Minimum Profit Assurance. The plaintiff agreed in the course of cross-examination that he never told Park about the Minimum Profit Assurance, not even after the 2010 Suit was dismissed or after the CA judgment nor after the assessment exercise before this court.

50 It is equally noteworthy that when the plaintiff attempted to ride on the success of Park's CA judgment by applying to intervene in the 2010 Suit and to join in the assessment of profit exercise, he never once raised the subject of the Minimum Profit Assurance. It was not mentioned in either of his two supporting affidavits nor that of his solicitor filed for the application.

51 The plaintiff had testified on 6 March 2012 before this court in the 2010 Suit.[20] In answer to the question from counsel for the defendant as to what payment he was seeking from the defendant the plaintiff then answered "*From the final accounts, 25 per cent of profits*".

52 It is equally noteworthy that Park's evidence in the 2010 Suit did not refer to the Minimum Profit Assurance. There was no mention of it either in Park's AEIC for this or the 2010 Suit. Neither was it pleaded by Park in the 2010 Suit. Indeed, Park testified[21] that he heard it for the first time during cross-examination by counsel in this suit on 4 March 2016. The plaintiff on the other hand said he told Park when the latter was interviewed to be his

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[20] At N/E 334 of the 2010 Suit

[21] At N/E 719

witness. I should point out that the plaintiff's opening statement did not refer to the Minimum Profit Assurance or the figure of $1.55m either.

53 Notwithstanding the fact that his solicitors had never made a demand on his behalf of the defendant based on the Minimum Profit Assurance, the plaintiff claimed he had told his solicitors about the $1.55m profit assurance (after initially testifying he did not).

54 If indeed the plaintiff had apprised his solicitors of the Minimum Profit Assurance, it is strange that there was no mention of it in his solicitors' letter dated 29 August 2013 to the defendant's (then) solicitors; the letter reads as follows:

> 1 As you know, we act for Lim Geok Lim Andy.
>
> 2 We refer to the Judgment of the Court of Appeal in Civil Appeal No. 107 of 2012/E.
>
> 3 The Court's finding therein was that there was an oral agreement between our client, your client, Yap Jin Meng Bryan and Lim Koon Park to share the profits from the sale of the properties known as 434 and 428 River Valley Road. Paragraph 79 of the judgment refers.
>
> 4 Kindly let us know whether your client is agreeable to recording a consent judgment by our client against him in the same terms as awarded to Lim Koon Park in the judgment.
>
> 5 Please have our client revert hereon within the next seven (7) days failing which our client will proceed to take such steps as are necessary to enforce his rights.
>
> 6 Thank you.

55 When he was cross-examined on the above letter, the plaintiff explained his omission by saying "*I have been advised [by] my lawyer to put it in this manner-- to put the claim in this manner and I took his advice for that*".[22]

56 It appeared from the plaintiff's own testimony that he was unsure whether the Minimum Profit Assurance was even enforceable. At one stage of his cross-examination, he said "*I'm not chasing $1.55m if that is your question*".[23] Yet in the next breath, he gave the following answers to counsel's questions:

> Q: In your mind at this time were you expecting a minimum of $1.55 million?
>
> A: Expecting, yes.
>
> Q: In your mind, this is legally enforceable, you can sue Yap for it?
>
> A: Possibly, yes.

At a later stage of his cross-examination on 1 March 2016 however, the plaintiff testified "*I'm not going for the $1.55 million, I'm going for assessment and 25 per cent profit*". To say that the plaintiff's stand on this claim is ambivalent would be an understatement.

The Minimum Financing Period obligation

57 The court's observation on the lack of mention of the Minimum Profit Assurance by the plaintiff (until his Reply (Amendment No 1) filed on 4 June 2014) is equally applicable to the plaintiff's other contention – the defendant was obliged to provide funding for the Minimum Financing Period.

58 Apart from his own testimony, the plaintiff provided no substantiation for this second claim. It was also not in Park's evidence either for this or the 2010 Suit. Consequently, the defendant's closing submissions described the plaintiff's account of the Minimum Financing Period as a fiction.

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[22] At N/E 47–48

[23] At N/E 45

59 As the defendant rightly pointed out, it was not clear from the plaintiff's Reply (Amendment No 1)[24] whether he meant the defendant was obliged to provide financing for the Properties for a minimum or a maximum of 18 months. The same confusion appears in his AEIC[25] where he had deposed:

> 17 The Agreement between the parties was that Bryan would provide financing for a period of at least 18 months from the purchase of the Properties. The purchase of the Properties was completed on or around late April 2008 so the 18-month period would only run out in October 2009.
>
> 18 At the time the Agreement was reached in or about September 2007, this point actually was not expressly discussed but was agreed on only in early 2008….

Further cross-examination of the plaintiff clarified that he meant the defendant must be able to hold the Properties for a maximum period of 18 months from the date of purchase on 28 April 2008, namely until 28 October 2009. (The defendant's closing submissions pointed out it was all too convenient that the Properties were sold on 8 October 2009, just shy of the 18-month deadline).

60 In the Further and Better Particulars, the plaintiff stated the Minimum Financing Period term was agreed orally "*[i]n or about the 1st quarter of 2008 and reconfirmed at a meeting on 9 July 2008*" at Park's office.[26]

61 During cross-examination however the plaintiff said the Minimum Financing Period was agreed in September 2007.[27] The plaintiff added that it

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[24] The plaintiff's Reply (Amendment No 1) filed on 4 June 2014 at para 9

[25] The plaintiff's AEIC at para 17

[26] Further & Better Particulars filed by the Plaintiff on 21 January 2015 pertaining to para 9 of his Reply (Amendment No 1)

[27] At N/E 492

was a guarantee that the defendant would bear the holding costs of the Properties for a target of 18 months. In the 2010 Suit the plaintiff had testified on 5 March 2012 (and which he reconfirmed in this suit on 5 March 2016[28]) that "*[t]here was no talk about a holding period*" when he, Park and the defendant discussed the profit-sharing ratio in July 2007. When his attention was brought to this earlier testimony, the plaintiff said[29] the Minimum Financing Period was agreed upon after the Initial Agreement was made.

62 In the 2010 Suit, the plaintiff had testified[30] that he had asked the defendant at a meeting on 1 August 2008 whether the latter could still hold the project and the defendant had then indicated that he could at least hold it for 18 months more. In these proceedings, the plaintiff did not mention the meeting of 1 August 2008. Instead, the defendant's oral confirmation of his holding power for about 18 months had morphed into the Minimum Financing Period obligation. Confronted with his testimony in the 2010 Suit, the plaintiff's excuse was that he may have got the dates confused and it may have been given in September 2007 instead.

63 This court accepts the defendant's submission that it would have been highly improbable that the Minimum Financing Period obligation could have been agreed in September 2007. Riverwealth had then not even obtained the options for the Properties. The option for No 434 River Valley Road was only signed on 18 December 2007. When he was pressed by counsel for the defendant to explain this inconsistency, the plaintiff could give no answer.[31] Neither did his counsel seek his clarification during re-examination.

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[28] At N/E 190

[29] At N/E 524

[30] At N/E 282 of the 2010 Suit

The defendant's case

64 In the judgment for the 2010 Suit, this court stated at [11]:

> The erstwhile marriage of convenience between the parties soon crumbled under the stress and vicissitudes of the market. Given the extra cash he had to inject and his increased risk exposure, the first defendant wanted the shares held by Andy and the third defendant to be returned to him, or for them to pay for those shares. The honeymoon, so to speak, was over. Andy decided to give up his shares and completed the transfer of all his shares to the first defendant on 27 March 2009. The third defendant returned 12% of her shareholding to the first defendant but refused to return the remainder.

65 In the CA judgment, the appellate court noted (at [16]):

> Due to the extra cash injection and increased risk exposure, Bryan wanted Andy and Madam Wee to either pay for, or transfer to him, their remaining allotments of shares in Riverwealth. Andy opted for the latter, and transferred his allotment to Bryan on 27 March 2009. Madam Wee did neither, and requested information on the financial records and account books of Riverwealth. She was then removed as a director of Riverwealth at an extraordinary general meeting ("EGM") on 12 August 2009. The remaining directors of Riverwealth – Bryan and Clarence – passed a directors' resolution on 4 September 2009 to sell the Properties to Oxley JV Pte Ltd ('Oxley JV"). On 19 September 2009, another EGM was held where a shareholder's resolution was passed to authorise the sale of the Properties to Oxley JV. Madam Wee, via a proxy, voted against the resolution.

66 In his AEIC, the defendant relied on the above extracts of the two judgments to say the plaintiff and Park were not and could not be placed on the same footing. Park/Park's wife had rejected both options whereas the plaintiff had accepted Option 2 of the Exit Offer. Consequently, his claim should be rejected.

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[31] At N/E 492

67 The defendant had pleaded[32] that the CA judgment did not address the consequences and implications of the plaintiff's surrender of his shares in Riverwealth to the defendant. This was clear from [16] of the CA Judgment set out above.

68 In his closing submissions, the defendant accused the plaintiff of contriving this claim in order to obtain an undeserved windfall noting that this suit was belatedly commenced on 21 November 2013 after the CA judgment was released on 22 July 2013.

69 Unbeknownst to the defendant, this court as well as the Court of Appeal in the 2010 Suit, the plaintiff and Park had connived to engineer an early and lucrative exit from the joint venture between August and December 2008. Without the defendant's knowledge, the twosome had been communicating in private about their interest in Riverwealth. It was only in these proceedings that the plaintiff gave (selective) disclosure of emails exchanged between the twosome which showed that Park had consulted lawyers who helped him to draft emails to the defendant with the plaintiff's full knowledge. This observation is elaborated on below.

70 On 5 August 2008, the plaintiff had sent an email to Park and Park's lawyer Tan Jee Ming ("Tan") giving his views on Riverwealth's asset values. The plaintiff then gave his views on the strategy going forward in negotiating with the defendant. The following extracts from the email are pertinent:

> The book value of our shares is $7.5M each irrespective of how much BY capitalize his new cash injections. The paid up merely gets bigger and our share percentage shrinks but not absolute dollar value.

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[32] The defendant's defence at para 25

> Therefore by offering him your shares at $2.5M park, you are offering him at 33 cents to the dollar.
>
> We should not get drawn in to his ROE computations nor profit dynamics as:
>
> (i) He is holding on to company, reducing his equity by refinancing and therefore enjoy higher ROE on harvest (when he divest).
>
> (ii) Profit dynamics is a function of land sale in which we split the profits. This is a buy out and therefore an equity transaction.
>
> In view of our stand on Equity Valuation
>
> You may want to consider recrafting the section "I look back & register the following to…..In view of the aforesaid…."

71 Neither the plaintiff nor Park was willing to disclose their private communication in particular the draft email that Park then proposed to send to the defendant. When the defendant administered Interrogatories on 7 January 2015 to the plaintiff requesting those private communications, his solicitors applied (*vide* Summons No 310 of 2015) for and was granted a withdrawal of the Interrogatories.

72 The plaintiff's solicitor had then informed the Assistant Registrar that "*[i]f at all there were these discussions, then [plaintiff's] position is that this will come out on AEICs. It's a tangential point and doesn't really relate to the issues*." On appeal by the defendant to a judge against the order of court for withdrawal, the plaintiff's solicitors informed the court (on 19 March 2015) that "*I state on record that we will call Park. [Defendant' counsel] is invited to request for an adverse inference to be drawn. [Defendant's counsel] may also subpoena the witness*." The judge then dismissed the defendant's appeal.

73 However, neither the AEIC of the plaintiff or Park referred to their private exchange of emails. Neither did they produce other versions of the draft email (of which the plaintiff himself estimated there were three to four).

The plaintiff claimed that some of his emails had gone missing from his inbox while Park testified he had found no trace of that email in his mailbox despite the court's direction to him to conduct a search. The plaintiff further disassociated himself from his lawyer's comments (at [72]) regarding the Interrogatories.

74 Undoubtedly, both Park and the plaintiff had something to hide. In accordance with the plaintiff's solicitor's own comment in [72], this court draws an adverse inference against both of them pursuant to s 116 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act") that the draft email(s) if produced, would have constituted unfavourable evidence to the plaintiff and/or Park.

75 In this connection, there was another email dated 29 September 2008 that Park sent to the plaintiff at 5.43pm being a draft of Park's email to the defendant that was sent at 6.04pm.[33] Cross-examined, neither the plaintiff nor Park seemed able to remember why Park would first send to the plaintiff a draft of his proposed email to the defendant.

76 On 17 October 2008, the defendant had sent an email to the plaintiff and Park copied to Clarence. He had attached a spread-sheet in which the defendant had computed, premised on exit values ranging from $95m to $55m of the Properties, the profit share due to the defendant, the plaintiff and Park, based on equity and return on equity. This was termed the progressive payout model ("PPM") in the defendant's closing submissions. Under the PPM, if the net profits were less than $5m, the defendant calculated that the plaintiff and Park would share 10% of the profits.

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[33] AB 637

77 On 23 October 2008, Park forwarded to the plaintiff a draft of his proposed reply to the defendant's email in [76].[34] It states:

> Hi Bryan,
>
> Sorry for not getting back earlier. I am happy to proceed with the share transfer with the principal understanding of the profit sharing schedule you sent (vide your email dated 17th October, attached). I have a couple of points that I would like to request and if you are agreeable, I shall get the transfer documents ready for Clarence's collection.
>
> 1 Personal guarantee with HLF:
>
> I would like an undertaking from you, to be discharged from the guarantee if:
>
> a) there is a change in Majority Shareholder. Meaning if there is a new Majority shareholder other than yourself;
>
> b) If there should be further dilution of my shareholding in percentage term after this round of transfer.
>
> 2 Scenario where profit falls below $5million. There is a clause where at this point, quote: "Protection for BY when sum of all profits is 5m or less, P+A share 10%;" I am not quite sure what you meant to say. However I would like to maintain that I retain a 10% share of the gross profit from $5million downwards.
>
> I hope the above are agreeable and I look forward to your favourable reply.

("P" in the defendant's email was a reference to Park, "A" was a reference to the plaintiff and "BY" was a reference to the defendant).

78 It was obvious that the plaintiff and Park must have discussed the defendant's email of 17 October 2008. Other than making that concession however, Park claimed he could not recall whether he had discussed the defendant's email before he prepared his draft to the plaintiff, whether the

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[34] AB 645

plaintiff had given any input or views on Park's draft and whether the twosome had had telephone conversations in relation thereto.

79 The inability to recall was the plaintiff's excuse when he was cross-examined on Park's draft in [77]. Hence the court is none the wiser on what the twosome sought to extract from the defendant in exchange for returning to him the plaintiff's and Park's wife's shares in Riverwealth.

The Alternative Financing Proposal

80 I turn next to the defendant's version of facts in regard to the plaintiff's pleaded case that the transfer of his shares to the defendant was for the purpose of alternative financing for Riverwealth. In his closing submissions,[35] the defendant accused the plaintiff and Park of actively sabotaging the venture by amongst others, obstructing his attempts to obtain cheaper refinancing for Riverwealth. The defendant contended that they did so in order to leverage an early lucrative exit from the venture. The evidence of Park's manoeuvres and those of the plaintiff only emerged in the course of this trial. Neither this court nor the Court of Appeal was aware of it in the 2010 Suit. The question then arises, would the Court of Appeal have arrived at different conclusions had such evidence been known?

81 On 2 August 2008, the defendant had informed Park and the plaintiff by email that HLF had re-valued the Properties to $60m. He had some discomfort with HLF's loan due to: (i) its high interest servicing cost of $126,700 per month (solely borne by the defendant) and a requirement to place a fixed deposit of $1m with HLF; (ii) the need to submit development plans by October 2008 followed by (iii) construction of the project by

[35] The defendant's closing submissions at para 9

December 2008. There was also the appearance of a HLF-related entity waiting to pick up the Properties on the cheap.

82 The defendant therefore proposed to migrate the loan from HLF to a cheaper one with a private bank with fewer restrictions. The proposed loan was from Standard Chartered Bank ("SCB") and it would be extended to the defendant personally. However, this required the defendant to be the sole shareholder of Riverwealth. In return, Park and the plaintiff would be released from their personal guarantees given for the HLF loan.

83 On 24 November 2008, the defendant informed the plaintiff and Park by email that SCB's loan would be at a significantly reduced rate of interest of cost of funds plus 1.5% as compared with the 5% interest rate charged by HLF. The offer was 55% of $53m (based on SCB's valuation of the Properties) and amounted to $29.15m. However, because he had other assets with the bank, SCB would increase the loan amount to $32m. In the same email, the defendant informed the plaintiff and Park that HLF had been pressurising him which he resisted, to place the fixed deposit of $1m. The defendant's reluctance was due to the possibility that HLF could use the amount to set-off against Riverwealth's debt should the loan be withdrawn. The defendant repeated that he needed the two of them to transfer back to him their shares preferably by the end of the month.

84 Counsel for the defendant alleged that because the plaintiff and Park knew the defendant had more to lose than them, they dug in their heels and Park refused to transfer his wife's shares to the defendant pursuant to the Alternative Financing Proposal. Hence, the twosome engaged in the private correspondence referred to earlier at [69].

85 In the event, the defendant did not/could not migrate the loan from HLF to SCB to take advantage of its lower financing cost because of Park's refusal to transfer his wife's shares. The defendant was at the mercy of Park (who had the plaintiff's backing). Although Park, the plaintiff and the defendant were guarantors of the HLF loan, Park's and the plaintiff's risk were minimal because it was only when the Properties were sold for less than $30m that HLF would call upon their guarantees. The defendant was at far greater risk as he had sunk more than $22.58m of his own money into Riverwealth which monies he would lose if Riverwealth defaulted on the loan.

86 As the court pointed out to him during his cross-examination[36] to which Park agreed, his selfish attitude was akin to shooting himself in the foot. Had the HLF loan been transferred to SCB and lower interest charges incurred thereon, the net sale proceeds of the Properties and the net profit arising therefrom would have been higher for purposes of division to Park. In cross-examination, the defendant testified that $62,000 per month would have been the cost savings. Over 18 months, those savings would have amounted to $1,116,000. The Alternative Financing Proposal came to nought because of Park.

87 The loan remained in place and the defendant placed a deposit of $1m with HLF in his and not Riverwealth's name. He also managed to persuade HLF not to insist on Riverwealth submitting development and construction plans for the Properties in December 2008 in view of the poor market conditions.

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[36] At N/E 914

The valuation of the Properties

88 I now turn to the hotly disputed valuation of the Properties prior to their sale which was the subject of lengthy cross-examination of the plaintiff and Park.

89 During cross-examination, the plaintiff confirmed he was aware of the collapse of Lehman Brothers on 15 September 2008. That event exacerbated the GFC which had commenced in March 2008 with the failure of Bear Stearns. Notwithstanding those two catastrophic events, the plaintiff and Park held fast to their views that the Properties were still worth $60m as of August 2008.

90 The defendant had in his email dated 7 May 2008[37] to Park, the plaintiff and Clarence, attached a report from Credit Suisse ("the CS report") giving a negative view of the Singapore property market. In essence the report forecast a bursting of a property bubble with a potential economic slowdown and a lack of liquidity that would last through 2009. The CS report also downgraded the stocks of prominent public property companies.

91 At the material time Riverwealth had given the property agency CBRE an exclusive agency of four months to market the Properties. Given the GFC, the defendant's AEIC deposed that a selling price of between $60m to $80m was no longer achievable, pointing out that CBRE had in July 2008 only obtained one verbal and merely indicative expression of interest at $55m (from a related company of HLF). This was a far cry from the valuation report dated 11 March 2008 by Jones Lang LaSalle[38] that valued the Properties at $80m, before the failure of Bear Stearns.

[37] AB 429

92 Moreover, prior to the CS report, HLF had informed the defendant that instead of a loan of $36m, it was only prepared to extend a loan of $30m to Riverwealth (which was confirmed in HLF's letter of offer dated 26 March 2008). The defendant had to and did fund the loan shortfall of $6m himself.

93 The optimistic view of the Properties' worth in mid-2008 by Park and the plaintiff totally ignored market conditions even though the plaintiff himself had on 20 March 2008, referred to "*market uncertainty"* in his email to the defendant.

94 On 26 March 2008, the defendant had met representatives from two financial institutions in Singapore and reported back to Park and the plaintiff that the general consensus was that the Properties should be 'flipped' for a quick profit due to the uncertainties in the market. By then Bear Stearns had collapsed. In his reply to the defendant on the same day, the plaintiff agreed.

95 During cross-examination, the plaintiff alluded to "*some problems overseas"* but not in Singapore in 2008.[39] He acknowledged that there was "*softening slightly, but not to the same extent that was the bloodbath that was to come in the US*".[40]

96 Questioned on whether the softening market meant it would be more difficult for Riverwealth to find a joint-venture partner to develop the Properties, the plaintiff prevaricated. He said he considered the question hypothetical since he was not asked to look for financial partners, it might not

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[38] AB 264–265

[39] At N/E 84

[40] At N/E 85

have been more difficult to find a partner for 80–90% financing from a listed company and he ended with opining that difficulty in getting financing may not necessarily mean it would be more difficult to get a partner. At another stage of his cross-examination, the plaintiff testified that people with money might want to come in to buy a controlling stake but that would not happened as the defendant wanted to retain control and hold the project for a certain amount of time. It was difficult to follow the plaintiff's (oftentimes rambling) evidence on the Properties' value in 2008 let alone his illogical reasoning. I should add that I reject the plaintiff's surplus valuation methodology for the values of the Properties which even Park said would have been unfair to the defendant.

97 Park concurred with the plaintiff's optimistic views on the market value of the Properties in 2008. He opined that the CS report did not represent his or the market's general view at the time. Park's view was based on his "*every day dealing with property developers, watching the buyers' interest in the market for property units, contractors' volume of work, all the things that come through as a professional architect*".[41] He added that properties (flats) were still being snapped up at end July 2008. Further, the CS report was a bit more aggressive than the general other reports he had read (not disclosed) which came from brokers. Park asserted he was entitled to his own read just as the defendant was entitled to his read.[42] If the market was so detrimental he wondered why the defendant did not bail out on the offer of $55m for the Properties.

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[41] At N/E 656

[42] At N/E 124

98 Under further cross-examination, Park eventually agreed[43] that there was no firm offer for the Properties at $55m, only an expression of interest. Even so, he said he was not concerned as he had faith in the market. He admitted he had no valuation in August 2008 to support his figure of $70m for the Properties. He clarified this was based on the Properties' potential for development. However, he never told the defendant his figure of $70m. While Park agreed that the collapse of Lehman Brothers affected his positive outlook, he opined it was "*somewhat not much*". According to Park's reasoning, the fact there were no buyers in the property market did not equate to a drop in price.

99 Although he did not expect the Properties to fetch $80m as valued by Jones Lang LaSalle, Park opined his feasibility study showed the Properties were still worth about $72m, which was still a huge buffer from the purchase price. However, no substantiation was provided for this optimistic figure. Eventually, in answer to the court's questions, Park acknowledged that market sentiment had taken a turn for the worse but he would not agree that market sentiment was poor.

100 Park drew a distinction between a valuation made by a bank and commercially. He said the former was based on the lowest of the commercial valuations versus the purchase price. Hence he argued, HLF's internal valuation of $55m in 2008 might not be the true value of the Properties.

101 I turn next to the testimony of the defendant adduced in cross-examination and which was heavily criticised in the plaintiff's closing submissions.

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[43] At N/E 127

102 In relation to the Exit Offer, the catalyst would be the letter from HLF dated 3 December 2008 which contained conditions that the defendant found discomforting. The relevant extracts of the letter state:

> Pursuant to clause 26.h) of our aforesaid letter of offer, you shall place a Fixed Deposit of not less than $1,000,000/- upon receipt of GST refund (expected by end October 2008). You may use the Fixed Deposit for payment of loan interest of the Facility or any cost in relating to the proposed development. The said Fixed Deposit may be released to you at our absolute discretion if you are not in breach of any terms of the Facility.
>
> You have requested to place the Fixed Deposit in 4 tranches of $250,000/- each to be placed every 3 months. We regret to inform that we are unable to accede to your request.
>
> Please be informed we require you to place a one time placement of the Fixed Deposit of not less than $1,000,000/- within 14 days from the date hereof.
>
> Please also let us have your final plans for the proposed development as stipulated in clause 26.a) of our letter of offer dated 26 March 2008 within 14 days from the date hereof.

103 Since August 2008, the defendant had raised to the plaintiff and Park the subject of HLF's restrictive loan conditions. It would be fair to say that the collapse of Lehman Brothers which exacerbated the GFC and caused the already bleak property market in Singapore to worsen further may well have prompted HLF to send the above letter.

104 There was growing pressure on the defendant to try to reduce the cost of financing the Properties (borne by him alone) by finding cheaper alternative financing; he did so by SCB's offer. However, his efforts fell on deaf ears where Park was concerned.

105 The correspondence at the material time showed and the defendant's pleaded case was that the Exit Offer was concluded with Park at the Uluru meeting, 14 days after HLF's letter in [102]. As regards the plaintiff, the

defendant said the Exit Offer was impliedly offered to the plaintiff at the Uluru meeting because his focus then was on settling with Park who was the more difficult party to negotiate with. The plaintiff was present, heard what the defendant offered to Park and said nothing. He seemed to go along with whatever was agreed. It was the defendant's case that the terms offered to Park were subsequently offered to the plaintiff.

106 The defendant said he never had the impression from the plaintiff that the latter was not supportive of cheaper financing if they could persuade Park to transfer his shares. Because the external environment was becoming bleaker, there were also discussions on the implied valuations of the Properties getting lower and lower and what would happen to the profit-sharing arrangement in a negative equity environment. Despite Park's assurance that he would transfer his shares to the defendant to achieve cheaper financing, the defendant said he had his doubts as Park's words were not matched by his deeds.

107 The defendant confirmed that as of the date of Park's email to him dated 27 November 2008 in [28(ii)], the profit-sharing arrangement was still intact. What changed it was the source of contention between counsel for the plaintiff and the defendant in cross-examination.

108 The defendant pointed out to counsel for the plaintiff that the subject of cheaper financing had been broached by him four months earlier in August 2008. He had no inkling that Park (assisted by Tan) and the plaintiff (see [69]) were scheming to engineer their buy-out from Riverwealth possibly at an exit price of $2.5m each from the defendant. Because of the constant toing and froing especially with Park, the defendant said he became increasingly irritated particularly with Park's insistence on a firm date for the discharge of

Park's personal guarantee to HLF. The plaintiff and Park kept badgering the defendant about their profit share despite the fact that market conditions made the prospect of profit increasingly dim. While the defendant had acknowledged to Park on 27 November 2008 that the profit sharing arrangement was still intact, he pointed out that in a negative equity scenario it was meaningless as 25% of zero profit is still zero.

109 The defendant had sent Park and the plaintiff his email of 27 November 2008 stating such matters (namely the guarantee) were beyond his control. His second email of 28 November 2008 added that if HLF did not get the fixed deposit soon, it would be knocking on their doors. The defendant felt that the threesome were getting closer to having HLF recall the loan, due to loan to value ("LTV") of the Properties dropping to 80% and below. In other words, if the value of the Properties dropped to $37.5m and below, the loan would be recalled, based on clause 25 of HLF's letter of offer. The figure was based on the LTV equation namely $30m ÷ $37.5m = 80%.

110 Through Clarence, the defendant obtained from HLF a valuation letter dated 19 February 2009 stating that the Properties were valued at $48.5m (as of 17 December 2008) with planning approval and development charge paid. This was a far cry from $60m–$80m that the plaintiff and Park had estimated and maintained in their evidence before this court.

111 Counsel for the plaintiff contended repeatedly that the defendant had shifted his position *vis-à-vis* when the Exit Offer was made to the plaintiff. Indeed, this allegation canvassed extensively in cross-examination was the *gravamen* of the plaintiff's closing submissions. Counsel's cross-examination extended to questioning the defendant on what had triggered off his memory that some material dates he had previously pleaded were incorrect.

112 First, counsel drew the defendant's attention to his Defence (Amendment No 2) where it was pleaded that the Exit Offer was made orally to the plaintiff (who denied it) between the end of January 2009 and 27 March 2009. Then in the 2010 Suit, the defendant's case was that the Exit Offer was made to the plaintiff in October or November 2008. In his AEIC, the defendant had amended the timelines in the 2010 Suit to "on or after 17 December 2008" (namely after the Uluru meeting).

113 The defendant explained he had made a mistake in the dates for the 2010 Suit and he only realised it before this trial started in February 2016. He elaborated that the discrepant dates were due to the position taken by his solicitors in the 2010 Suit – they opted for the period when the defendant made the formal capital call on his fellow shareholders which was in March 2009. This was encapsulated in the defendant's email to Park dated 27 March 2009 copied to the plaintiff and Clarence which text was set out earlier at [31]. I should point out that the defendant was represented by different solicitors/firm of solicitors for the 2010 Suit, for the inquiry and for this suit.

114 The defendant added that he took the position he did in his email dated 27 March 2009 because of Park's change of heart. He thought he had reached an agreement in principle with Park at the Uluru meeting and that Park would transfer all of the shares of Park's wife to him. Park however reneged on the agreement by email on 2 January 2008 after obtaining legal advice – Park refused to return the balance 13% shares held by Park's wife to the defendant until HLF's prior clearance on the change in shareholding was obtained and Park's guarantee was resolved.

115 Park's *volte-face* prompted the defendant to make the formal capital call by his email dated 27 March 2009. Riverwealth had by then gone into

negative equity not to mention that the defendant had placed the requisite $1m fixed deposit demanded by HLF (as Riverwealth had received the GST refund on 1 September 2008, a precondition to the fixed deposit requirement). Park not only refused to return the balance of Park's wife's shares but also refused to comply with the capital call. He directed the defendant to write to Park's wife instead with whom the defendant had never had dealings previously.

116 Although the plaintiff had indicated in August 2008 he would return the shares in Riverwealth, the defendant began to entertain doubts due to the plaintiff's inaction in that regard between August and December 2008.

117 By 27 March 2009, the plaintiff had returned all his shares to the defendant. Before Park's change of heart, the defendant testified[44] that both Park and the plaintiff did attempt to assist him to obtain better alternative financing. In turn, the defendant agreed that their profit-sharing arrangement remained intact. (The court believes that would probably have been before Tan came into the picture to advise Park behind the scenes).

118 In the defendant's email to Park on 23 October 2008 (copied to the plaintiff and Clarence) the following extracts appeared relating to Park's questions and the defendant's answers:

> Scenario where profit falls below $5million.
>
> There is a clause, quote: "Protection for BY [the defendant] when Sum of all profits is 5m or less P [Park] + A [the plaintiff] share 10%;". I am not quite sure what you meant to say. However I would like to maintain that I retain a 10% share of the gross profit from $5milion downwards.

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[44] At N/E 1039

> BY: This point was discussed many times with respect to protecting the downside of the parties that put ALL OF THE CASH on the table.
>
> Both yourself and Andy did not disagree. As such if you now want 100% (or all) of this 10% then it is up to yourself and Andy work this point out between yourselves.

119 Counsel for the plaintiff drew the defendant's attention to para 7.3.3 of his AEIC filed on 31 January 2012 in the 2010 Suit where the defendant had deposed (after making oral amendments):

> From April 2008 to 17 December 2008, Park, Andy and I were in discussions in relation to the return of their shares in Riverwealth to me. It was agreed between Park, Andy and me on or after 17 December 2008, that:
>
> a. Wee and Andy would transfer their remaining shareholding in Riverwealth to me; or
>
> b. Alternatively, if Wee or Andy wished to remain as shareholders, they would have to pay for their shares in Riverwealth and shoulder their commensurate share of the shareholder's loan.
>
> (the "Varied Agreement").

120 Counsel for the plaintiff contended that the timing of the transfer of shares by his client to the defendant proved that it could not have been pursuant to the Exit Offer as the defendant claimed but due to the requirements of HLF or of SCB for the alternative financing proposal. It had nothing to do with the Varied Agreement in the 2010 Suit or the Exit Offer here.

121 The defendant not surprisingly disagreed. He said by December 2008, as a result of HLF's letter dated 3 December 2008, the position had changed from (i) exiting from profit-sharing to (ii) exiting Riverwealth with profit sharing intact to (iii) exiting the company and exiting the project. He

contended that the last scenario was what was discussed with Park at the Uluru meeting in the plaintiff's presence.

122 In this regard, the defendant's email to Park and the plaintiff dated 19 December 2008 set out earlier at [42] is telling; it encapsulated what had been discussed and agreed. Unfortunately, no agreement was drawn up by lawyers as a follow-up because Park changed his mind on 2 January 2009.

123 In his AEIC for the 2010 Suit, the defendant had deposed that there was no longer a need to pursue the SCB proposal or any other alternative financing proposal after he placed his $1m fixed deposit with HLF. This was an unfortunate choice of words as the defendant acknowledged in answer to the court's question – the defendant clarified that he meant he could not pursue the SCB proposal because of Park's refusal to transfer to him the remaining 13% shares held by Park's wife in Riverwealth.

124 The defendant revealed he did not and could not afford to be highhanded with Park let alone the plaintiff between October 2008 and February 2009. He had managed to get HLF to hold their hand; he did not want to jeopardise that relationship by having a spat with his fellow shareholders let alone resort to legal proceedings with the attendant publicity that could result in adverse consequences such as the loan being recalled by HLF.

125 An inordinate amount of time was also spent in cross-examination of the defendant on a meeting that supposedly took place between him and the plaintiff at a restaurant at Millenia Walk and why the defendant had changed the timeframe for that meeting from "before 2 March 2009" to an earlier period namely "end January to about 27 March 2009". With respect, I did not

see the relevance. The defendant gave his explanation for the changes he made and I see nothing sinister therein, bearing in mind that the events in this and the 2010 Suit go back to 2008. As the court repeatedly reminded counsel for the plaintiff, once pleadings are amended, the court would be concerned with the latest set of pleadings as the earlier ones would generally no longer be relevant (save in certain circumstances).

126 Although it was not directly relevant to this suit, the defendant was also cross-examined on the Sail property investment which the plaintiff had alluded to in his AEIC (see [33] above). The defendant gave a completely different account from the plaintiff of that transpired in that investment.

127 The Sail property was a 50-50 investment between the defendant and the plaintiff but purchased in the plaintiff's sole name as he wanted to fund it using his Central Provident Fund savings without any cash outlay. The defendant testified that because of the stalling by the plaintiff and Park in the transfer of shares in Riverwealth, he required the Sail property to be sold. If the plaintiff disagreed, he wanted the plaintiff to pay him for his half share. The defendant explained he no longer trusted the plaintiff. It took the plaintiff more than one year from the time of the defendant's request (in May 2007) for the plaintiff to sign a simple agreement (drafted by the defendant's solicitors in June 2007) to confirm the defendant held a half interest in the apartment. The defendant also discovered that the plaintiff had not complied with his request to maintain books of account for the investment but had instead passed the task to Clarence. The sale of the Sail property was completed in January 2010 with the entire proceeds of sale paid to the plaintiff who then issued two cheques totalling $243,458.26 to the defendant for his 50% share.

128 The plaintiff had cited the Sail property as one reason why he was silent throughout the period from the time he signed the transfers to the defendant for his shares in Riverwealth until after the CA judgment.[45] He averred he had no reason to doubt the defendant's promise of payment of his 25% profit share as he trusted the defendant due to their investment in the Sail property.

129 However, in the defendant's closing submissions, it was pointed out that for the Sail property investment, the defendant had to repose trust in the plaintiff and not *vice versa* as the property was purchased solely in the plaintiff's name. If indeed the plaintiff was entitled to 25% share of profit, the plaintiff could have and should have requested of the defendant in January 2010 to be allowed to retain the defendant's profits of $243,458.26 to set-off against whatever sum that would be due to the plaintiff from the sale of the Properties.

The issues

130 The court has to determine the following issues in this suit:

(a) Did the plaintiff transfer all his shares in Riverwealth to the defendant because of the Alternative Financing Proposal?

(b) Did the defendant make the Exit Offer to the plaintiff?

(c) Did the plaintiff transfer his shares pursuant to his exercise of Option 2 the Exit Offer?

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[45] The plaintiff's Reply (Amendment No 1) filed on 4 June 2014 at para 4

(d) Does the plaintiff's claim amount a collateral attack on the CA judgment and/or an abuse of the court?

The findings

131 As noted earlier at [111], the plaintiff's counsel made much of the fact that the defendant's pleadings and AEIC kept changing the dates when the Exit offer was made. The plaintiff submitted that it meant the defendant was not a credible witness whose testimony should not be believed. Indeed, the plaintiff's closing submissions went so far as to argue[46] that if the defendant failed to discharge the burden to prove there was an Exit Offer, then under s 105 of the Evidence Act, this court must enter judgment for the plaintiff by virtue of the defendant's admission to the Initial Agreement and by reason of the CA judgment.

132 Not surprisingly, the plaintiff's startling proposition of law was disputed by the defendant whose reply submissions contended (which this court accepts) that the legal burden of proof lies throughout on the plaintiff to prove his claim. Equally, the plaintiff bears the evidential burden to prove that he is entitled to a profit share of 25% under the Initial Agreement made with the defendant, he and Park in the ratio 50:25:25. It is only after the plaintiff has discharged the onus of establishing *prima facie* that the Initial Agreement was not superseded by the defendant's Exit Offer (which this court and the CA were of the view he accepted) that the burden then shifts to the defendant to prove that the plaintiff did indeed accept the Exit Offer. The burden of proof under s 105 of the Evidence Act lies squarely on the plaintiff – the defendant

[46] The plaintiff's closing submissions at paras 30 and 31

does not have to disprove the plaintiff's case until *after* the plaintiff has discharged his burden of proof.

133 I should observe at this juncture that there was no attempt made to address the inconsistencies in the plaintiff's own case. Nothing was said in his closing submissions of the plaintiff's previous testimony for Park in the 2010 Suit. Neither did the plaintiff explain why he raised his allegations of the alleged Minimum Profit Assurance and the Minimum Financing Period at the eleventh hour. In earlier paragraphs (at [57]-[62]), the court has already highlighted the various inconsistencies in the plaintiff's testimony.

134 The optimistic view of the Properties' value in mid-2008 by Park and the plaintiff was in total disregard of actual market conditions and their evidence cannot be accepted. The plaintiff forgot that on 20 March 2008, he himself had referred to "*market uncertainty*" in his email to the defendant.

135 It was also in evidence that on 26 March 2008, the defendant had met representatives from two financial institutions in Singapore and reported back to Park and the plaintiff that the general consensus was that the Properties should be 'flipped' for a quick profit due to the uncertainties in the market. By then Bear Stearns had collapsed. In his reply to the defendant on the same day, the plaintiff agreed.

136 Against the backdrop of the demise of Bears Stearns and more so Lehman Brothers, the stubborn insistence of Park and the plaintiff that the Properties were still worth $60m in 2008 if not more lacks credibility. Their claim that they had faith in the market rang hollow as the collapse of the two financial institutions sent shockwaves around the world and caused a recession; Singapore was not unaffected. Governments intervened in their

countries' capital markets to stem panic and to ensure financial stability. For the three investors in Riverwealth and more so the defendant, it meant that the anticipated holding period of the Properties of four months was no longer accurate. It became 18 months (until the grant of the option to the buyer in October 2009) and 20 months (until completion of the sale) respectively.

137 In the words of the defendant's closing submissions,[47] neither the plaintiff nor Park had the stomach (or the resources) to weather a (financial) meltdown in 2008. They relied on and left it entirely to the defendant to manage the financial crunch caused to Riverwealth by market conditions – no doubt conscious of the fact that unlike the defendant, they had nothing to lose financially, save in the unlikely event that their personal guarantees were called upon by HLF if the value of the Properties dropped to $30m and below.

138 It was clear to this court that Park and the plaintiff deliberately withheld disclosure of the Uluru meeting from this court in the 2010 Suit.[48] Could it be because they knew it would have made a difference to the findings particularly in the CA judgment? There is no question that the defendant had made an unequivocal Exit Offer to Park at the Uluru meeting of a clean exit from Riverwealth which *Park had accepted but subsequently reneged upon*. It is not the function of this court to comment on the judgment call made by the defendant's then solicitors in the 2010 Suit not to rely on the Uluru meeting but instead to focus on the formal capital call of 27 March 2009 as the basis for Park's exit from Riverweath and the profit-sharing arrangement. As noted earlier (at [113]), the defendant has engaged three law firms to-date in relation to the dispute surrounding the Properties.

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[47] The defendant's closing submissions at para 29

[48] As shown in the N/E referred to at [44]-[45] above

139 Earlier, this court had noted that the defendant was unaware of the behind-the-scenes manoeuvres between Park and the plaintiff. Before 2 January 2009, he did not know that Tan (and sometimes the plaintiff) was vetting drafts of Park's emails before Park forwarded them to the defendant. One such email was Tan's to Park of 2 January 2009 which this court believes prompted Park to email the defendant on the same evening to say he had changed his mind. Apparently, Park had forwarded to Tan a copy of HLF's loan agreement (which was never signed). Tan's message reads:

> Dear Park,
>
> I have vetted the documents forwarded in the context of your instructions.
>
> At least 3 issues come to mind immediately.
>
> (1) THE ISSUE OF CHANGE OF SHAREHOLDINGS (VIA TRANSFER OF SHARES)
>
> You will note from clause 4(g) of the loan agreement that "the Borrower shall not, without the Lender's prior written consent, permit any change in its shareholding (such consent not to be unreasonably withheld), whether registered or beneficial, or any change in the composition of its board of directors".
>
> Even though the Loan Agreement was not signed by parties, I will advise that, for the purpose of prudence, HLF should be consulted over the issue before any change in the shareholdings take place.
>
> You do not wish to deal with a situation where HLF may commence proceedings for a 'breach". The litigation will be (to say the least) unnecessary.
>
> (2) THE ISSUE OF PROFIT SHARING
>
> Assuming that the transfer of shares is permitted by HLF, my advise [*sic*] is for parties to come to a written agreement as to how this can be computed and the event(s) that trigger the payment of the computed sum. This ought to be sorted out as a preliminary issue by parties to avoid any future misunderstanding
>
> (3) THE ISSUE OF THE GUARANTEES
>
> The guarantees also ought to be discharged contemporaneously with the issues in (1) and (2) above.

> If you need to discuss in detail, please let me know.

140 The issue of profit sharing referred to by Tan is not a confirmation (as the plaintiff sought to submit) that as of 2 January 2009 that arrangement still existed. A perusal of the email chain between Park and Tan revealed that Park *did not* send to Tan the defendant's email of 19 December 2008 at [42] or disclose to Tan that the Uluru meeting had taken place let alone what transpired thereat. What Tan received from Park was the defendant's email dated 28 November 2008 set out at [28(iii)] where the defendant had said "*the spirit of the profit share is intact and is not different from the last email exchange*". Hence, Tan's advice to formalise the profit sharing arrangement by way of a written agreement.

141 The plaintiff's closing submissions also contended that the defendant had raised for the first time in court that the Exit Offer was formally made to the plaintiff by a telephone call on 30 January 2009 and described that as absurd. The defendant's reply submissions refuted this allegation. The transcripts of the defendant's testimony[49] do not support the plaintiff's submission. The word "formally" was used in regard to Park when the defendant made the capital call on 27 March 2009, not to the defendant's telephone call to the plaintiff to transfer the balance of his shares to the defendant.

142 The above example was not the only instance where the plaintiff's closing submissions misread the evidence or overlooked the lack of evidence in support.

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[49] At N/E 1150–1154

143 Another instance was the plaintiff's submission that bank valuations are more conservative than commercial valuations. This was a rehash of the plaintiff's evidence and ignored the defendant's exhibit D6. The exhibit is a comparison chart which shows the valuations/offer prices of the Properties versus holding costs at various timelines between 11 March in 2008 and 23 December 2009. Exhibit D6 showed that Riverwealth likely entered into negative equity around 27 November 2008 when holding costs were about $51.4m against an estimated value of $53m for the Properties. The plaintiff's submission that bank valuations are always the lower of purchase price and commercial valuations was not part of the plaintiff's testimony in regard to Riverwealth going into negative equity. All that he said was that "*the bank valuation does not equal a commercial valuation*".[50]

144 The plaintiff's evidence[51] that bank valuation is based on the lowest of the commercial valuation versus the purchase price was given during his cross-examination on the defendant's email of 2 August 2008. In that email, the defendant had prepared a progressive worksheet with payout matrix based on various values of the Properties. In fact, at a later stage during that same cross-examination session, the plaintiff agreed with counsel for the defendant that he had no basis for asserting that HLF had valued the Properties at $60m in 2008 (after asserting the figure was in some valuation that had been produced which was incorrect).

145 The court has noted earlier (at [133]) that the allegations regarding (i) the Minimum Profit Assurance and (ii) the Minimum Financing Period surfaced very late in the day and apart from the plaintiff's bare assertions, not

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[50] At N/E 424

[51] At N/E 667

one iota of evidence was produced by him to substantiate either claim. Clearly, these claims were afterthoughts. My view is reinforced by the following events:

(a) 22 July 2013 – date of the CA judgment;

(b) 4 June 2014 – date of filing of the plaintiff's Reply (Amendment No 1) raising the two claims for the first time.

146 Without a doubt, Park would have passed to the plaintiff a copy of the CA judgment after its release. The plaintiff would have realised therefrom that the numerous deductions the Court of Appeal allowed from the sale proceeds meant that what was left for division in the ratio 2:1:1 would not amount to much should he succeed. Hence, he concocted the claim of $1.55m based on an alleged Minimum Profit Assurance made by the defendant; he was trying his luck for a higher pay-out.

147 It bears repeating that nothing was said by the plaintiff (or Park) of the Minimum Profit Assurance in the 2010 Suit. Indeed, in the 2010 Suit, the plaintiff's evidence set out earlier in [51] was that his claim was for 25% share of the profits. If (so he claimed) the plaintiff had told his solicitors of this assurance by the defendant, the allegation would have found its way into his pleadings earlier than 4 June 2014. Far more telling was Park's evidence that until he was told while on the stand, he was not aware there was a Minimum Profit Assurance. If indeed Park had been told by the plaintiff as claimed by the plaintiff in cross-examination, there was no reason for Park not to have raised it in the 2010 Suit.

148 The comments in the foregoing paragraph are equally applicable to the plaintiff's other assertion of a Minimum Financing Period obligation by the

defendant. It is highly unlikely that a former banker like the defendant would have undertaken such an obligation in 2008 let alone in September 2007 (as the plaintiff claimed) when the options for the Properties had not even been obtained by Riverwealth.

149 My earlier comments at [57]–[62] also showed how unsatisfactory the plaintiff's evidence was on this second assertion. Such a term as the Minimum Financing Period would have varied the Initial Agreement but this was not the plaintiff's pleaded case. In any event, no consideration was provided by the plaintiff for this term.

150 Consequently, the court finds that (i) the Minimum Profit Assurance and (ii) the Minimum Financing Period were figments of the plaintiff's imagination – the defendant did not give the assurance in (i) nor undertake the obligation in (ii).

151 I move now to address the four issues in this case.

(a) Did the plaintiff transfer all his shares in Riverwealth to the defendant because of the Alternative Financing Proposal?

152 On the evidence adduced, I find that the plaintiff transferred his shares in Riverwealth to the defendant because the plaintiff wanted a clean exit from the company; he therefore accepted Option 2 of the Exit Offer at [14].

153 Just like Park, the plaintiff had neither the wherewithal nor the inclination to accept Option 1. The plaintiff's entire conduct after the Uluru meeting was consistent with that of a person who was no longer a shareholder of Riverwealth or had any other interest in the company. If indeed he was still involved in Riverwealth and had a share of profits, the plaintiff would have

known instead of having to find out from third parties about the sale of the Properties.

154 The plaintiff's assertion that his transfer of shares was for the Alternative Financing Proposal overlooked the fact that the proposal never came to fruition in any case. The defendant was unable to migrate the loan from HLF to SCB or to any other bank because of Park's refusal to transfer Park's wife's shares in Riverwealth to the defendant. The defendant to-date is not the sole shareholder of Riverwealth. I further note that HLF's pre-conditions under clause 8 of its letter of offer dated 26 March 2008 did not include a requirement that the defendant needed to hold all the issued shares in Riverwealth – the percentage required was 75%; the defendant held 74% as of 19 November 2008 (at [26]). He was only 1% short of HLF's pre-condition.

(b) Did the defendant make the Exit Offer to the plaintiff?

155 Following upon my findings on the first issue, the answer to this second issue is in the affirmative. Counsel for the plaintiff had put it to the defendant that even if the plaintiff had accepted the Exit Offer, it was not enforceable since the defendant did not provide consideration for the transfer of shares. The quick retort from the defendant was that when those same shares were transferred to the plaintiff, the latter did not give any consideration to the defendant either.

156 It is of no consequence to this court as it has no effect on the outcome as to when the Exit Offer was made to the plaintiff, an issue for which an unnecessary amount of time was spent in cross-examining the defendant. Suffice it to say that by 27 March 2009 the Exit Offer had not only been made to but had been accepted by the plaintiff. This was clear from the subsequent

email of the defendant to the plaintiff on 25 September 2009 (at [35]) headed "Letter Accompanying Share Transfer", which was four days before the plaintiff's transfer to the defendant of the remaining 1,000 shares he held in Riverwealth. Whatever doubts there may have been on the reason for the transfer are removed by the contents of this email. The fact that the plaintiff failed to sign and acknowledge the letter does not detract from the fact that the defendant wanted to place on record what the parties had agreed.

(c) Did the plaintiff transfer his shares to the defendant pursuant to the Exit Offer?

157 It follows from my earlier findings that the answer to this third issue is also in the affirmative.

(d) Does the plaintiff's claim amount to a collateral attack on the CA judgment and/or an abuse of the court?

158 This last issue pleaded in the defendant's Rejoinder merits a closer examination of the 2010 Suit and the CA judgment. In this regard, the defendant had as stated in [65] above, pleaded [16] of the CA judgment, which observation was similar to this court's judgment at [11] in the 2010 Suit set out at [64] earlier.

159 The defendant relied on the seminal decision in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*") for his argument that the extended doctrine of *res judicata* or defence of abuse of process precluded the plaintiff from raising his claim in this suit, in the light of this court's finding in the 2010 Suit (confirmed by the CA judgment) that he had given up his shareholdings and profit interest in Riverwealth by electing for Option 2 of the Exit Offer.

160 Notwithstanding that the plaintiff was not a party to the 2010 Suit, the defendant cited *Kwa Ban Cheong v Kuah Boon Sek and others* [2003] 3 SLR(R) 644 to argue that the plaintiff was still estopped. The defendant's closing submissions relied on the following passage from the case:

> 32 In principle, the doctrine [of abuse of process] is applicable even where the plaintiff in the second action is not the same plaintiff as the first. In such a situation, it may be easier for him to rebut the charge that his proceedings are an abuse of process than it would be for the original plaintiff to do so. In my judgment, the doctrine of abuse of process is applicable where the same defendant (like the defendants in the present case) is sued twice by different plaintiffs on the identical issues which have already been determined in the earlier action. As Lord Bingham said in *Johnson v Gore,* an important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. In the present action, the same defendants are being sued for the same shares and litigation would involve reopening a question that has been adjudicated upon in previous proceedings against the same defendants.

161 Unless the plaintiff could point to "special circumstances" as an exception, the defendant argued this suit was an abuse of process as the plaintiff was suing the defendant on identical issues that had already been determined in the 2010 Suit. The defendant also cited the following extracts from the Court of Appeal's decision in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104:

> 103 It is important to determine precisely which of the three *res judicata* principles – cause of action estoppel, issue estoppel or the "extended" doctrine of *res judicata* – applies on the facts of a given case because they call for different approaches. With *cause of action* estoppel, "the bar is absolute in relation to all points decided unless fraud or collusion is alleged": see the opinion of

> Lord Keith of Kinkel in the House of Lords decision of *Arnold v National Westminster Bank plc* [1991] 2 AC 93 ("*Arnold*") at 104D-104E. In contrast, Lord Keith considered that issue estoppel was a less rigid principle, in that there might be an exception to it "in the special circumstances that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings", provided that the further material in question "could not by reasonable diligence have been adduced in those [earlier] proceedings" (at 109A-109B)…
>
> 104 This may be contrasted with the higher degree of flexibility available to the courts when faced with the "extended" forms of cause of action and issue estoppel…

162 The defendant submitted that there was not a shred of fresh evidence that might warrant re-litigation. It was said the plaintiff did not even present new arguments but only hackneyed excuses for why he belatedly raised the issues of the Minimum Profit Assurance and the Minimum Financing Period. As for the handful of new documents disclosed in this suit which were not previously disclosed in the 2010 Suit, these related to (i) the Sail property and (ii) the plaintiff's telephone records, neither of which strengthened the plaintiff's case.

163 Further, the plaintiff was aware of and participated (as a witness) in the 2010 Suit as well as made an (unsuccessful) attempt to intervene in the inquiry on profits. He knew as early as 13 October 2009 (when he wrote to the defendant) of the sale of the Properties but chose to sit and wait instead of pressing the defendant for payment. In court,[52] he had admitted there were common issues between himself and Park. Yet, he watched by the sidelines because he wanted to hedge his bets, so that with the benefit of hindsight, he

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[52] At N/E 24

could manoeuvre a claim for profits which he had already surrendered via the Exit Offer.

164 In his closing submissions, the plaintiff contended that his claim was not an abuse of the process of court. He argued that unlike *res judicata*, abuse of process is not an absolute bar to re-litigation. The following extract from *Goh Nellie* was relied on:

> 53 …In determining whether the ambient circumstances of the case give rise to an abuse of process, the court should not adopt an inflexible or unyielding attitude but should remain guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant. In the context of cases such as the present, the inquiry is directed not at the theoretical possibility that the issue raised in the later proceedings could conceivably have been taken in the earlier but rather at whether, having regard to the substance and reality of the earlier action, it reasonably ought to have been…

165 The plaintiff argued that the Minimum Profit Assurance was not a collateral attack on the CA judgment as it did not amount to varying the Initial Agreement between the parties as was found by the CA judgment. He added that the effect of the CA judgment was that the defendant was obliged to bear the holding costs for a period beyond 18 months from the date of purchase of the Properties. While this was not explicitly stated by the Court of Appeal, it was to be implied from the CA judgment.

166 The plaintiff cited the following passage from Lord Denning's judgment in the Privy Council case of *Nana Ofori Atta II Omanhene of Akyem Abuakwa and another v Nana Abu Bonsra II as Adansehene and as*

Representing the Stool of Adanse and another [1957] 3 All ER 559 ("*Nana Ofori*") (at 561):

> The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence; but this general rule admits of two exceptions. One exception is that a person who is in privity with the parties, a "privy" as he is called, is bound equally with the parties, in which case he is estopped by res judicata; the other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct. Their Lordships propose in this case to consider first estoppel by conduct.

Notwithstanding it is an old case, *Nana Ofori* was relied upon by the Malaysian Supreme Court in *Toh Seow Ngan and Ors v Toh Seak Keng and Ors* [1990] 2 MLJ 303.

167 The above passage from *Nana Ofori* does not support the plaintiff's case. Instead, it lends support to the submission of the defendant (who also cited the same passage from the case) that the plaintiff is estopped from pursuing this claim. The plaintiff was a "privy" to Park and he had so acted as to preclude himself from challenging the CA judgment as well as this court's judgment in the 2010 Suit.

168 The defendant had relied on another extract from Lord Denning's judgment in *Nana Ofori* where he cited (at 561) the following passage by Lord Penzance in *Wytcherley v Andrews* (1871) LR 2 P&D 327 ("*Wytcherley*") at 328:

> …there is a practice in this court by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed

> to re-open the case. That principle is founded on justice and common sense and is acted upon in courts of equity, where, if the persons interested are too numerous to be made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the court that everything has been done bona fide in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be re-opened.

169 The defendant submitted that the plaintiff's claim is an abuse of process as he is suing the defendant on identical issues which have already been determined in the 2010 Suit. In addition, the terms of the Initial Agreement are *res judicata* having already been conclusively determined in the CA judgment where it was held that the Initial Agreement was a "cast iron" profit sharing arrangement between the defendant, Park and the plaintiff who were to share the profits from the sale of the Properties in the ratio 2:1:1 respectively. The Court of Appeal did not find that the Minimum Profit Assurance and the Minimum Financing Period were terms of the Initial Agreement.

170 The defendant rebutted the plaintiff's assertion that the Minimum Profit Assurance was not "*intended to vary the terms of the [Initial Agreement]*". It amounted to a collateral attack on the Initial Agreement as the Minimum Profit Assurance was inconsistent with this court's assessment that quantified Park's share of the profits at $794,569.87 (see [5] above). If the PPM in [76] was applied, the plaintiff and Park would share 10% of the net profit finalised by this court as $3,178,279.49. The plaintiff's assertion of the Minimum Profit Assurance would also be inconsistent with a PPM computation of 10% of the net profits, amounting to $317,827.95.

171 The defendant pointed out that the plaintiff's argument in [165] that the effect of the CA judgment implied there was a Minimum Financing Period was baseless.

172 I would add that in his closing submissions[53], the plaintiff for the first time raised the excuse that he had a *bona fide* reason for not intervening in the 2010 Suit and cannot be considered to have stood by as someone else fought his battle. This was due to the fact that until the trial of the 2010 Suit (in March 2012), the defendant had assured him that he would be paid his profit share in accordance with the Initial Agreement once matters were sorted out with Park. He added that the defendant had explained to him that if the defendant were to pay him, it could potentially jeopardise the defendant's defence in the 2010 Suit. The defendant described this allegation as "new and scandalous" not to mention it was a complete fabrication as it was not found in any of the plaintiff's pleadings, his AEIC or any of his affidavits nor in his oral testimony; the court agrees.

173 Equally unsupported was the plaintiff's submission that the defendant's position had changed in the course of the trial of the 2010 Suit. It was alleged that the defendant's solicitors had told the plaintiff that any payment from the defendant would be out of goodwill. I note this allegation should have been but was not part of the plaintiff's pleaded case. Further it cannot be true in any case as the plaintiff well knew by 25 September 2009 (when the defendant sent him the email at [35]) that the defendant's position was that the plaintiff had no more entitlement to any claim in Riverwealth because he had accepted and acted on the Exit Offer by 27 March 2009.

174 There is no doubt on the evidence (adopting the words of Lord Penzance in *Wytcherley*) that as the plaintiff was content to stand by and see his battle fought by somebody else (Park) in the same interest, he should be bound by the result and not be allowed to reopen the case. The plaintiff could

[53] The plaintiff's closing submissions at para 155

have sued the defendant separately for his profit share or participated in the 2010 Suit as Park's co-plaintiff; he did neither. He did nothing when Park appealed against this court's decision in the 2010 Suit.

175 The plaintiff waited until the outcome of the CA judgment was in Park's favour and then immediately tried to take advantage thereon by requesting the defendant to consent to judgment on his claim without going through the legal process.

176 The plaintiff's conduct is nothing less than opportunistic. He subsequently realised from this court's assessment exercise that his alleged share would not amount to very much. Hence he concocted the Minimum Profit Assurance (to try to obtain $1.55m) and the Minimum Financing Period obligation for good measure.

177 Accordingly, this court is of the view that to allow the plaintiff his claim would amount to an abuse of process and it would be tantamount to a collateral attack on the CA judgment's finding in [16] as set out at [65] above.

178 There is one final point to be dealt with in this judgment. At the close of the trial, the court had directed parties to file and exchange their closing submissions by a certain deadline. Both parties then applied for and were granted leave to file and exchange further submissions (by 13 June 2016). Despite the concession, counsel for the plaintiff applied (repeatedly) for leave to file additional submissions over and above the plaintiff's reply submissions. The reason that was given (in the letter from counsel dated 20 June 2016) was that "*there were issues raised in [the defendant's solicitors' letter] of 6 May 2016 which necessitated [the plaintiff] having sight of their submissions*

before being able to address them in any meaningful manner, and as a result, we were unable to address these in the Plaintiff's Reply Closing Submissions."

179 Counsel for the plaintiff then attempted to put in his further submissions by way of his letter to court dated 20 June 2016. The plaintiff's request was denied as it would have amounted to an abuse of this court's indulgence. It was clear that what the plaintiff wanted was to have the last word in regard to submissions.

180 My view is reinforced by the plaintiff's Reply Closing Submissions where the sentence "*the plaintiff is unable to respond…without having sight of the defendant's reply closing submissions*" appeared twice. This was a poor excuse as the defendant's solicitors' letter dated 6 May 2016 requesting the court's leave to file reply submissions had set out in table format the paragraphs in the plaintiff's closing submissions to which the defendant wanted to respond *as well as the defendant's reasons for responding*. Unlike the defendant who would have had no inkling beforehand of the contents of the plaintiff's Reply closing submissions, the plaintiff had a preview of the defendant's reply submissions.

181 Submissions are not meant to be a game of one-upmanship between litigants or their counsel. It is not for a court to advise parties on how they should craft their submissions but having filed their submissions, parties should live with and abide by them. They should not be given a second let alone third bites of the cherry when the opposing party point out shortcomings in what they have filed.

Conclusion

182 As the plaintiff failed to discharge the burden to prove:

(i) there was a Minimum Profit Assurance from the defendant;

(ii) there was a Minimum Financing Period obligation on the defendant, and

(iii) he had not accepted the Exit Offer as found by this court and the Court of Appeal in the 2010 Suit,

his claim is dismissed with costs. The court will decide whether the costs awarded to the defendant should be on a standard or on an indemnity basis (as the defendant requested) after receiving the parties' further submissions on costs. Parties will be notified in due course of the timelines for such further submissions to be filed.

Lai Siu Chiu
Senior Judge

Tan Kheng Ann Alvin and Os Agarwal (Wong Thomas & Leong) for the plaintiff;
Chin Li Yuen Marina, Liang Hanwen Calvin and Eugene Jedidiah Low Yeow Chin (Tan Kok Quan Partnership) for the defendant.