Isabel Redrup Agency Pte Ltd
v
A L Dakshnamoorthy and others and another suit

[2016] SGHC 30

High Court — Suit Nos 755 and 381 of 2011
Lee Seiu Kin J
18-21, 25-28 August; 30 October 2015

Agency — Estate agents

Tort — Defamation — Defamatory statements

Tort — Defamation — Justification

Tort — Defamation — Absolute privilege

Tort — Defamation — Qualified privilege

Tort — Defamation — Damages

Tort — Defamation — Injunction

Tort — Malicious falsehood

Tort — Conspiracy

3 March 2016 Judgment reserved.

Lee Seiu Kin J:

Introduction

1 This matter concerns two suits that arise largely out of the same set of facts, and were consolidated with the consent of the parties. Broadly speaking,

Suit No 381 of 2011 ("S 381") concerns claims in defamation, malicious falsehood and conspiracy. Suit No 755 of 2011 ("S 755), at its core, is a claim for commission for the collective sale of properties.

Background facts

Dramatis personae

2 The sole plaintiff in S 755, who is also the first plaintiff in S 381, is Isabel Redrup Agency Pte Ltd ("Isabel Redrup"). It carries on the business of estate agency, and specialises in heritage and older properties. Its managing director is Ms Susan Eleanor Prior ("Susan"), who is the second plaintiff in S 381.

3 The first to eighth and 11th to 12th defendants in S 755 were the owners of the properties formerly located at 110, 112, 114, 116, 118, 120, 122 and 126 Sophia Road. The property located at 124 Sophia Road, which is also the subject of this dispute, was legally owned by the ninth and tenth defendants, who held it for the benefit of the 14th defendant, the Sikh Business Association ("the SBA"). The SBA was represented in the present proceedings by Mr Balbeer Singh Mangat, the President of the SBA, and Mr Bhupinder Singh, who was the Vice-President of the SBA at the material time. I shall refer to the Sophia Road properties as "the Properties" and their respective owners (legal or beneficial) as "the Owners".

4 The 13th defendant in S 755, who is also the 1st defendant in S 381, is Mr Simon Loh ("Simon"). He is a businessman who deals in building and construction supplies, and was the original owner of 120 Sophia Road, having first purchased the property in 1991. In 1998, 120 Sophia Road was sold to his

sister, who is the 6th defendant in S 755, and her husband. Notwithstanding the transfer of his title in 120 Sophia Road, Simon continued to live in the property from 2000 to 2011, and plays an integral role in the present suits by virtue of his appointment as the representative of the Owners in the negotiations over the sale of the Properties.

5 Ms Michelle Yong ("Michelle") is a director of Aurum Land Pte Ltd ("Aurum"), a Singapore-registered company in the business of developing residential property. Aurum was the party that eventually purchased the Properties from the Owners.

The Properties

6 The Properties comprise a row of nine shophouses located along Sophia Road. Immediately adjacent to the Properties was Lot 99987V of Town-Subdivision 19 – an L-shaped plot of land of approximately 505 square metres ("the L-shaped Lot"). Just behind that was Lot 99988P – a triangular- plot of land of approximately 270 square metres ("the Triangular Lot"). I refer to these plots of land collectively as "the Lots". The site plan showing the Properties and the adjacent land is shown below:

The Owners engage Susan as their agent

7 The Owners had formed the intention to put the Properties up for collective sale in as early as 2008. Sometime in that year, they agreed that Simon would represent them in the collective sale of the Properties.

8 It was in his capacity as the Owners' representative that Simon met with Michelle sometime in 2008 to negotiate the sale of the Properties to Aurum. Those negotiations reached the stage where the terms of an option to purchase the Properties at $31.5m were discussed; however no agreement was concluded. This was because the Properties were subject to certain development restrictions that Aurum felt made redevelopment unfeasible.

9 Nevertheless, the Owners were not dissuaded from pursuing the sale of the Properties. Sometime in June 2009, Simon approached Susan and invited Isabel Redrup to market the Properties. This culminated in a Letter of Appointment dated 26 August 2009 ("the Letter of Appointment"), signed by

Simon on behalf of the Owners, which appointed Isabel Redrup as the "sole and exclusive marketing agent for the project for a period of 6 months [from] 25 August 2009". However, an email enclosing an unsigned copy of the Letter of Appointment shows that this arrangement was not exclusive in nature:

> … Please note that as per our discussion, this letter is purely meant as a marketing tool and as such, we have your understanding that [you] will not hold the contents of the letter of appointment against us should the other agent, who is a friend of the owner of 3 of the units, be able to close the deal at an acceptable price before you do, something that I feel is unlikely anyway. …

The initial negotiations over the sale of the Properties

10 Susan started to market the Properties by contacting investors and developers directly and through advertising. One of these advertisements caught the attention of Michelle, who contacted Susan on 31 December 2009. Michelle discovered, through inquiries conducted by Aurum's architect, that the developmental restrictions that the Properties were subject to had been removed by URA. She contacted Susan and expressed Aurum's interest in the Properties. This resulted in a letter of offer ("Letter of Offer") dated 20 January 2010 executed by the Owners and Aurum, as well as a commission agreement dated 21 January 2010 ("the Commission Agreement") by which it was agreed that Susan would be paid 2% of the sale price plus GST upon the successful completion of the sale of the Properties. However, there was no final agreement within the period stipulated in the Letter of Offer. The Owners, represented by Simon, nevertheless continued negotiations with Michelle through Susan over the next few months. In the meantime, Susan also continued to work with Simon as well as Simon's cousin, Ms Kay Swee Tuan ("Kay"), whom the Owners had engaged as their solicitor. Susan was also assisted by an architect friend of

Simon, Mr Cyril Seah, who would meet the prospective buyers and inform them of the developmental potential of the Properties.

11 While negotiations with Aurum carried on, other parties also showed interest in the Properties. In particular, there was a pair of potential buyers, Mr Tan Cheng Siong and his daughter Jessica, whom the 11th plaintiff in S 755 (known by the Owners as "Arthur") introduced to Simon in June 2010. Parallel negotiations were conducted by Simon with Jessica at the same time that Susan was trying to reach an agreement with Michelle. Simon's discussions with Jessica proved to be fruitful at first, to the extent that a draft option agreement to purchase the Properties at $32.5m was circulated between Simon and Jessica ("the Jessica Option"). A copy of the Jessica Option was sent by Simon via email to Susan on 10 August 2010, the email stating "[a]s per your agreement, it is not to be shown to anyone".

12 As at 12 August 2010, the state of affairs was as follows: Kay had been liaising with the Singapore Land Authority ("SLA") to ensure that the L-shaped Lot, which belonged to an estate the administrator of which was deceased, would be converted to state land. There was also an issue in respect of the SBA's power to sanction the sale of 124 Sophia Road because at that time it was held in the name of trustees who had passed away. Aurum was nonetheless willing to purchase the Properties at $33.8m subject to SLA's approval to alienate the Lots to them, with a 4% deposit for the grant of the option to purchase. A major sticking point was the Owners' insistence that 1% of the sale price be released to them upon *grant* of the option ("the 1% Option Release"). This was the issue that precipitated the fallout between the parties. In her email to Susan on

12 August 2010, Michelle set out Aurum's position on the 1% Option Release in the following terms:

> Hi Susan,
>
> [Aurum's] Board is firm on not releasing the 1% to the [owners] until we have received SLA's in-principle approval to alienate [the Lots] to us. The request to release the 1% is very unorthodox in collective sales cases. It is only commonplace in individual unit transactions (which is where the HSR and Propnex agents may be confused).
>
> …
>
> In addition, I would like to highlight that we have already agreed to pay a 4% deposit upfront (instead of the usual 1%) in a show of good faith. This means that we are bearing the opportunity cost on $1.352m for at least 6 months with no guarantee that SLA will successfully forfeit the land or alienate it to us. Further, we will need to pay another $338k when we sign the Option hopefully early next year, and the remaining 95% = $32.1m upon completion hopefully by mid next year. However, we will not be able to take possession of the land and commence sales until 2012! This is a very long period for us to have locked in so much money.
>
> …

Negotiations with Aurum intensify

13 Despite a declaration on 18 August 2010 by the Collector of Land Revenue that the L-shaped Lot would be deemed to be forfeited to the state within six months if no claim was laid, the negotiations with Aurum made little progress. Aside from the issue of the 1% Option Release, there remained some disagreement over matters such as whether the purchase should be conditional on the Lots being alienated on a fee simple basis or simply upon forfeiture of the L-shaped Lot, and whether the land premium payable should be based on a set formula. In an attempt to get Aurum to come to a decision, Susan forwarded

the Jessica Option, which did not contain those conditions, to Michelle on 23 August 2010, saying:

> To be fairer than fair to you, I am (CONFIDENTIALLY) enclosing the Jessica Option. [Please] do not tell anyone (not even Simon). I will get into BIG trouble.

14 While this did not have an immediate effect, Michelle did eventually waive those conditions. On 2 September 2010, Michelle sent to Susan a draft option agreement that had been adapted from the Jessica Option, thanking Susan for the right of "first refusal". This draft option agreement was forwarded to Simon by Susan on the same day, attached to an email that simply stated "[a]s spoken Michelle wants last refusal". This appeared to spark off an intense bout of negotiations between Simon and Michelle via Susan – by 4 September 2010, another six drafts were exchanged between them. Of particular significance are the draft options sent on 2 September 2010 at 4.56pm from Susan to Simon ("the 2 September Draft Option"), on 3 September 2010 at 4.48pm from Michelle to Susan ("the 3 September Draft Option"), and on 3 September 2010 at 5.22pm ("the Alleged Forged Option") from Susan to Simon (which was resent at 6.51pm). The 3 September Draft Option is also significant for the reason that it is the first draft from Michelle which includes the 1% Option Release. It was attached to an email from Michelle to Susan that read:

> Hi Susan,
>
> Please find attached revised Option reflecting 1% Option money to be released to the [owners] but remaining 4% Option deposit payable only upon exercising the Option.
>
> I cannot guarantee that the Board will accept these terms and suggest that you get all the [owners] to sign this and present to our Board ASAP.

> We are also working on other deals at the moment and if they go through before Sophia we may not have the funds to invest in Sophia as well.
>
> …

15 Although Michelle's email seemed to suggest that there was a 1% "Option money" followed by a 4% "Option deposit", the 3 September Draft Option, which was entitled "Sophia Road Option - Jessica (vMY edited 03.09.10)", in fact provided for a 4% deposit and 1% of that 4% was to be released to the Owners upon grant of the option. It should be noted that the sticking point between them remained the issue of the 1% Option Release, which Michelle had agreed to put before the Aurum board for consideration after the Owners had signed on the 3 September Draft Option which contained the 1% Option Release.

16 Susan amended the 3 September Draft Option by inserting a clause to provide for an agency commission to Isabel Redrup. She renamed it "Sophia Road Option – MY – 03.09.10" and this is the Alleged Forged Option. This was attached to an email from Susan to Simon at 5.22pm on the same day, and it states as follows:

> Hi Simon
>
> Please find attached revised Option reflecting 1% Option money to be released to the [owners] but remaining 4% Option deposit payable only upon exercising the Option.
>
> Your clause is deleted (re forfeiture). She spotted it on her own.
>
> Michelle said they are also working on other deals at the moment and if they go through before Sophia they may not have the funds to invest in Sophia as well.
>
> So they [*sic*] you get all the other [owners] to sign this and show to the Board ASAP with the signatures and I will hold the Option until the [SBA] can sign.

> [emphasis in original]

The negotiations break down

17 The final draft option that was sent to Michelle through Susan ("the Final Draft") was attached to an email dated 8 September 2010. In this email Susan informed Michelle that Simon would be recommending to the SBA that Aurum's offer be accepted and requested that she should provide an offer on Aurum's letterhead on those terms. Michelle responded by email on 9 September 2010 (which was the day before the Hari Raya public holiday on Friday 10 September 2010), saying that she would give her substantive response by the following Wednesday. However, Simon did not take too well to this response when informed of it by Susan:

> I don't see what there is to consider. If she is seriously interested in buying the property, I just don't see why there is a problem to have the letter of offer issued. Isn't it obvious that a letter of offer should accompany an OTP for such a sale??? Anyway, if [it's] such [an] insurmountable problem, just forget it, we don't want or more accurately, I don't want to sell or commit to the sale until I have the [SBA's unit's] title deeds issue as well as the state land issue sorted out before doing anything.

18 He confirmed this change in sentiment when asked by Susan if she should tell Michelle that the deal was off, saying in his email of 9 September 2010:

> Yes, since [it] seems so hard to get even a letter of offer. I don't want to waste my time anymore, I will explain to my neighbours and just go ahead to transact with the other buyer.

19 In any event, Aurum was not agreeable to the terms in the Final Draft. On 15 September 2010, Michelle told Susan that the transaction was off and that the Owners should proceed with the other buyer. Susan nevertheless

persisted, but to no avail. She informed Simon on 20 September 2010 that "Michelle said her board not so keen to meet your terms now due to lull in market", to which he replied that he was not interested in what her board thought. This was followed within minutes by a lengthier email that read:

> And really, she can drop out now for all I care, I have no problems with it as I have already got a back up buyer who has been wanting to commit but I have held back simply because I agreed to give her the 1st bite. Anyway, I will give her till [W]ednesday to decide before I start getting Tuan to negotiate with the new party's lawyer. Aurum may think that there is a lull in the market, but as far as the other players are concerned, there is still a great potential for a quick pick up in the market.

Simon deals directly with Michelle

20 Finally, Susan emailed Simon on 22 September 2010 at 1.19pm, saying "Michelle said her Board is walking away from the deal". Simon then contacted Michelle later that day, asking her why Aurum was no longer interested in the Properties. Michelle informed him that Aurum could not agree to the 1% Option Release and that they would be prepared to revive their interest in the Properties without this condition. Simon expressed to Michelle his surprise at this. He informed her that there was no other buyer for the Properties and that the 1% Option Release had always been open for discussion. He then proposed continuing negotiations without Susan, to which Michelle agreed. The revised arrangement was affirmed by Simon's email to Michelle the following day, which read:

> Hi Michelle,
>
> Further to our tele-conversation of 22 Sept 2010, attached please find a copy of [the Alleged Forged Option] that Susan claimed was from you. I am going to keep this matter away from her until everything is concluded as I have now come to realise that like all the other agents who have come our way in the past, she is as unscrupulous or even more so, now that I have

> found out the lies and false claims that she has made. And if she is able to do what she has done after claiming that she is well known in the market to be totally honest in all her dealing, I really wonder what other underhanded things she can be capable of.
>
> As such, I am now cutting her off and will be dealing only directly with you. I trust that you would assist by [not] letting her in on this arrangement until everything is settled.
>
> Regards,
>
> Simon

21 As the email suggests, Susan was not made aware of this new arrangement. Having confirmed on 30 September 2010 (the very same day that the Owners and Aurum entered into an agreement to purchase the Properties at $33.8m on "terms and conditions to be agreed") that "Aurum Land is now totally out of the picture" unless the Owners were willing to go back to "OLD terms" [emphasis in the original], all that was communicated to her by Simon was the following:

> … I am pulling the collective sale out of the market for the time being until the forfeiture of land is completed before deciding what to do. Please do not do anymore marketing and take our property out of the market as I have wasted too much time and am no longer interested to sell, at least for the present moment.

22 There was no subsequent contact between Susan and Michelle for the rest of the year. Susan nonetheless continued to monitor developments in respect of the Properties and resumed marketing the Properties as the date of forfeiture of the L-shaped Lot by SLA neared. This included a viewing of the Properties on 4 January 2011, which was conducted by Simon with the participation of the first, second and eighth defendants in S 755. Susan also resumed contact with Michelle on 6 January 2011 by way of an email, informing her that the SBA had "kicked out the troublesome trustee" and that

the prices of the Properties had reached $2,000 per square foot. Her attempts garnered interest among some potential buyers – on 10 January 2011, she forwarded to Simon a draft option agreement to purchase the Properties at $34m for his approval. Again, Simon did not inform her of his arrangement with Aurum, instead replying:

> … Anyway, what is more important is the offer price, at $34m in this present market situation, I don't think we will be interested. We will take a wait and see approach as we will not be keen to sell at this moment of time unless we get a fantastic offer that we cannot refuse. As mentioned before, please do not offer the property for sale until we as owners again collectively decide that we want to sell the property.

23 When reminded by Susan that this was the best offer that they had received for the Properties, Simon had this to say:

> … And why did you approach Michelle from Aurum Land again? I already told you since [S]eptember when you told us that her board is backing out that we are not interested to deal with any developer who don't keep their word or who backs out after agreeing to the terms and coming out with the options that states the terms so clearly? Why did you get back to her again after I explicitly told you not to, and also to take our property off the market and not to market it anymore? If they have backed out before, what makes you so sure that it will not happen again?
>
> As to taking your clients proposal to the other owners, I have done so to the few key owners and they have totally shown no interest at all. They are all of the view that unless we get an offer that is of sufficient interest, we will not want to sell the property at this point of time.
>
> Simon

24 This again did not appear to discourage Susan, who sought confirmation from Simon as to whether there had in fact been a written valuation of the Properties and whether it had been made public. This resulted in a firm response

from Simon, which appeared to express a firm intention on the part of the Owners *not* to sell the Properties for the time being:

> … Let me once again reiterate, as I have mentioned countless number of times to you since Sept 2010, when you said that Aurum Land had walked away unless we reinstate all the original conditions, both by email and verbally, that we have already decided to take [the Properties] out from the market and just take a wait and see position. Simply put, the 9 properties are no longer up for sale, so please stop marketing it. We will not entertain any more offers or site show round anymore.

25 Notwithstanding the apparent finality that this email conveyed, Simon continued to correspond over the next day with Susan on the redevelopment restrictions of the Properties, although these communications did not go any further than that.

The sale of the Properties and the subsequent events

26 On or about 23 February 2011, the Owners granted Aurum the option to purchase the Properties ("the Final Option") on the following terms:

(a) The sale price was $33.8m.

(b) The purchaser would pay 4% of the sale price for the grant of the option, with all 4% being held by the Owners' solicitor as stakeholders pending completion of the sale of the property.

(c) The grant of the option was subject to SLA's forfeiture of the L-shaped Lot.

(d) 1% out of the 4% option fee would be released to the Owners upon exercise of the option.

Notably, the 1% Option Release was not in the Final Option. On 5 September 2011, Aurum exercised the Final Option.

27 The sale of the Properties was discovered by Susan on 4 March 2011, who immediately informed Simon that she would be claiming her commission of 2% of the sale price plus GST. Simon was dismissive in his reply:

> Good try. Asking for a commission for a sale that you botched up totally??? In your dreams!!! Let's meet in court and see what the judge and the real estate agents' controlling body has to say about this.

28 Susan was not deterred by this. On 5 March 2011, she sent emails and letters to the Owners, informing them of her intention to claim her commission for the sale of the Properties and asking for a copy of the Final Option and other documents relevant to the sale of the Properties. She also sent on the following day an email to Simon with a number of questions. One question that has taken on particular importance in these proceedings is:

> What is your status? You are not the legal owner of any unit. You have told me before that, owing to your status as a bankrupt, you wanted to deceive your creditors and the Official Assignee by asking your sister to purchase the unit 120 Sophia Road on your behalf. Is this true?

29 This was categorically refuted by Simon, who at around the same time embarked on what could best be described as a series of highly antagonistic short messaging services ("SMS") messages. In the meantime, Simon sent a letter to the Straits Times complaining about his experience with unethical real estate agents (who were unnamed) ("the ST Letter"), lodged a complaint with the Council for Estate Agencies ("the CEA") in respect of Susan ("the CEA Complaint"), and filed a police report in respect of Susan's purported forgery of the Alleged Forged Option ("the Police Report"). The ST Letter, the CEA

Complaint and the Police Report were provided by Simon to Ms Jessica Cheam ("Cheam"), a reporter with the Straits Times. These acts form the basis of Susan's claims in S 381, and are discussed in further detail below.

The parties' pleaded cases

S 755

30 Susan's case in S 755 is straightforward. She claims that she is entitled to $723,320 – 2% of the sale price plus GST – from the first to 12th and 14th defendants in S 755 as commission as she was the effective cause of the sale of the Properties. Alternatively, she avers that she suffered damage of $723,320 by virtue of Simon's fraudulent misrepresentations to her that there had been no deal to sell the Properties and that the Owners had lost interest in selling the Properties from September 2010, which caused her omission from the eventual sale of the Properties to Aurum. Further and in the alternative, she pleads that she is entitled to claim in damages this sum against all the defendants for conspiring to deprive her of her commission.

31 The defendants say that Susan is not entitled to claim commission from them as she had failed or had not been successful or effective in causing a sale to be concluded between the parties, and because she had breached her duties as the marketing agent of the Properties. They also plead that Susan is estopped from claiming that she was the effective cause of the collective sale of the Properties by reason of her representations to Simon set out at [19]–[20] above. They deny that that the representations made by Simon as to the sale of the Properties after September 2010 were false and untrue, and say in any case that

Susan had not acted on or was not induced by these representations. Finally, the defendants deny that there had been any conspiracy among them.

S 381

32 In S 381, Susan says that the contents of the Police Report, the CEA Complaint and the ST Letter ("the Defamatory Words") were defamatory, since they meant and were understood to mean that:

(a) Susan had behaved unethically in her capacity as a property agent and/or as the key executive officer of Isabel Redrup by committing forgery ("Allegation 1").

(b) Isabel Redrup is dishonest and/or unfit to carry out the business of real estate agency because it improperly allowed or is vicariously liable for the alleged forgery ("Allegation 2").

33 Further or in the alternative, she says that the Police Report, the CEA Complaint and the ST Letter were false and published maliciously. Her claims in defamation and malicious falsehood also form the basis for her alternative claim in conspiracy – that the defendants had unlawfully conspired to defame or maliciously publish falsehoods against her. She claims for damages to be paid to her, as well as an injunction restraining the defendants from further communicating words defamatory of her.

34 Three separate defences were filed – one by the first to ninth and 12th to 13th defendants; one by the tenth and 11th defendants; and one by the 14th defendant. Nevertheless, they do not differ in substance. Their case, essentially, is that:

(a) Simon's acts were a proportionate response to Susan's actions in order to stop further defamatory attacks on him and the continued harassment of the Owners by Susan.

(b) The Defamatory Words cannot found a defamation action or an action for malicious falsehood.

(c) That the Defamatory Words, in any case, are true in substance and fact.

(d) The Defamatory Words are fair comment.

(e) Simon's communications to Cheam were made on an occasion of qualified privilege.

(f) The CEA Complaint was made on an occasion of absolute privilege or, alternatively, qualified privilege.

(g) The Police Report was made on an occasion of absolute privilege or, alternatively, qualified privilege.

(h) There was no conspiracy among the defendants.

S 755 - The claim for commission

35 Susan bases her claim on the doctrine of "effective cause", which was explained by the Court of Appeal in *Deans Property Pte Ltd v Land Estates Apartments Pte Ltd and another* [1994] 3 SLR(R) 804 at [17]–[18]:

> 17 It is clear that the relationship between an agent and a principal is a contractual one with any entitlement to commission being governed by the terms of that contract. However, an agency relationship is sometimes established in a

> situation where there has been little or no express discussion of contractual terms. The relationship between a vendor and a real estate agent is often of such a character. *In such a case, the agent's entitlement to any commission for the sale of property is dependant [sic] on his being the "effective cause" of the sale; this being an implied term of the agency contract.* The law in this respect was stated concisely by Chan Sek Keong J (as he then was) in *Ong Kee Ming v Quek Yong Kang* [1991] 1 SLR(R) 330 at [13]:
>
> > The law is not in dispute. In the absence of any special contractual terms, the general principle is that the agent must be the effective cause of the sale. It is a question of fact in each case. …
>
> 18 In the present case, there were no express contractual terms governing the entitlement to commission. *Therefore, for the appellants to succeed, they have to show that they were the effective cause of the sale. This means that their efforts to market the property must have operated to produce a ready and willing buyer for the property.* In this respect, the cases are clear that it is insufficient for the appellants to show that the sale and purchase would not have taken place but for their efforts. It is not enough for the agent's labours to be a *causa sine qua non*. His services must actually be the *causa causans* of the sale before commission is payable …
>
> [emphasis added]

36 It is therefore clear that the doctrine is *contractual* in nature, implying a term for the agent's entitlement to commission into the agreement (written or otherwise) underlying the relationship of agency between principal and agent. If there is a finding that a commission is due, it is recoverable as a contractual debt. The issues to be determined in S 755 therefore fall within three broad categories:

(a) Whether a term of effective cause can be implied into the agency contract.

(b) Whether Susan was the effective cause of the sale.

(c) Whether the relationship of agency had been terminated by the material time.

Can a term of "effective cause" be implied into the agency contract?

37 The defendants note that Susan had been appointed on a "non-exclusive basis to sell the [Properties] without any fixed term and without any **standing confirmation** that [Susan] would be entitled to 2% commission" [emphasis in original]. They do not elaborate on what significance the absence of any standing confirmation is supposed to bear. As I understand it, they do not dispute that Susan's appointment as their estate agent extended beyond the term specified in the Letter of Appointment. Their contention lies in the terms of that engagement. Presumably, their submission is that the Commission Agreement was only valid for the term of the Letter of Appointment. Nevertheless, that does not preclude a term of "effective cause" from being implied into the agency relationship that subsisted between them after the Letter of Appointment had expired.

38 In their closing submissions, the defendants stress the non-exclusive nature of Susan's appointment, submitting that "the terms of engagement as agreed by [Susan] was that the [defendants] could, at any time, procure the ultimate sale of the [Properties] by any other agent or directly, without [Susan] having any recourse whatsoever", and that there was "no duty on the part of the [defendants] to allow [Susan] to sell the [Properties] at any given time". I do not think this to be particularly controversial. What is of dispute is the defendants' submission that "[t]he doctrine of "effective cause" cannot be used as a back-door for the Court to re-write the contract between the parties". As I understand it, their argument is that a term that provides for Susan's entitlement to a 2%

commission if she were the effective cause of a sale cannot be implied because of the non-exclusive nature of her appointment.

39 With respect, the defendants appear to have misconstrued the nature of Susan's claim. An "effective cause" term, where implied, does not preclude the principals from terminating the engagement or completing the sale themselves. As discussed above at [35], the effect of such a term is that the estate agent will be entitled to commission where he or she is the effective cause of a sale of property, *regardless* of whether the agent actually completed the sale. Whether the agency relationship is exclusive in nature has no bearing on the implication of an "effective cause" term.

40 The defendants point to the case of *Luxor (Eastbourne), Limited and others v Cooper* [1941] AC 108 ("*Luxor*") at 120–121, where Viscount Simon LC stated:

> … But there is a third class of case (to which the present instance belongs) where, by the express language of the contract, the agent is promised his commission only upon completion of the transaction which he is endeavouring to bring about between the offeror and his principal. As I have already said, there seems to me to be no room for the suggested implied term in such a case. The agent is promised a reward in return for an event, and the event has not happened. He runs the risk of disappointment, but if he is not willing to run the risk he should introduce into the express terms of the contract the clause which protects him.

41 It is nevertheless critical to note the context in which that holding was made. *Luxor* involved a claim by an agent against two companies which had engaged him to find a ready and willing purchaser for properties owned by the companies in return for commission to be paid to him. While the agent did manage to find a ready and willing purchaser, the properties in that case were

eventually sold to another party. The court found on the evidence that the express bargain was for commission to be paid *on completion* of the sale of the properties to parties introduced by the agent. The agent therefore could not claim on the express terms of the agreement.

42 The term which the House of Lords declined to imply was therefore one that provided that the defendant companies would not do anything to prevent the agent from earning his commission. The factual scenario in the present case and the term of "effective cause" that Susan seeks to imply into her agency agreement with the Owners is of a different nature. She does not argue that the Owners had breached an implied term of good faith or a duty not to do anything to deprive her of her commission – there is no need for her to. Unlike *Luxor* and contrary to what the defendants appear to suggest, there is no evidence that the agreement underlying the relationship of agency between Susan and the Owners expressly provided that she would only get her commission if she had *actually sold* the Properties.

43 In any case, there is evidence to suggest that there had in fact been an agreement that Susan would be entitled to a commission of 2% of the sale price plus GST in the event of a successful sale of the Properties. As Susan highlights, her entitlement was not disputed by Simon when he was cross-examined about his defence in S 755 filed on 2 December 2011:

> Q: Right. Now you read paragraph 5.
>
> A: [Reads] "Upon the expiry of the Plaintiff's appointment as sole and exclusive agent, the 1st to 8th and 11th and 12th Defendants and the SBA allowed the Plaintiff and their representative" … "Susan Prior … to continue to market the Properties for collective sale on the basis that a commission of" … "2% of the sale price would be paid to the Plaintiff if the Properties were successfully sold

> and completed and the Plaintiff was the effective cause of the collective sale."
>
> Q: Is your statement in this paragraph 5 true or false?
>
> A: True.
>
> Q: Thank you very much. So you would agree it says upon the expiry, that means let's say from March onwards, if Susan managed to sell the property and she is the effective cause, after March, she may get a commission of 2%? Am I correct?
>
> A: Yes.

44 The defendants say that Simon's concession was procured through trickery. He subsequently claimed during cross-examination that he had "no choice" but to concede that Susan was potentially entitled to the 2% commission as he had been shown the Commission Agreement without the Letter of Offer, and the Commission Agreement had no temporal limit on its face. Nevertheless, as Susan points out and is obvious from the above exchange, Simon's account of events is patently untrue. He had never been questioned on the basis of the Commission Agreement; he had been questioned solely on his defence filed on 2 December 2011 (which was explicitly stated to have been superseded), to which he gave unqualified responses.

45 I am satisfied on the evidence that Susan's entitlement to commission had not come to an end or indeed, been reduced from the 2% plus GST stipulated in the Commission Agreement even after the Commission Agreement had ceased to be valid in March 2010. Out of the 20 draft option agreements that Susan sent to Simon between 23 April 2010 and 10 September 2010, 19 of them contained a clause for commission of 2% of the sale price plus GST to be paid to Susan upon the successful sale of the Properties. Not only did Simon not object to the inclusion of these clauses, an option that had been drafted by him

contained the very same clause. Further, he had also told Susan in his email dated 19 January 2011 that "[you] are the one asking for the 2% commission, I am getting zero, so work for it and find out how [it] can be done". Irrespective of the sincerity of Simon's correspondence with Susan at that stage, it is still indicative of the fact that both parties continued to operate under the impression that terms in the Commission Agreement continued to apply.

46 It is also noteworthy that there were no signs that the relationship of agency underwent any change after March 2010 – with the knowledge and approval of Simon (at least until September 2010), Susan continued to market the Properties and maintained her efforts to facilitate the sale of the Properties as if the Letter of Appointment had never expired. It would be preposterous to suggest that that Susan had worked with no expectation of remuneration. I am therefore satisfied that the arrangement between Susan and the Owners was such that she would be entitled to the commission if she were the effective cause of the sale of the Properties.

Was Susan the effective cause of the sale?

47 In *Grandhome Pte Ltd v Ng Kok Eng and another* [1996] 1 SLR(R) 14 ("*Grandhome*") at [31], C R Rajah JC held that an agent will discharge the necessary burden of proof to establish a *prima facie* case for being the effective cause of the sale if he is able to establish:

(a) The owner(s) agreed to pay the agent a commission for finding a buyer for the property.

(b) The agent engendered the interest of a buyer in the property.

(c) The buyer made an offer for the property which the agent conveyed to the owner.

(d) The owner eventually sells the property to the same buyer at the same price offered through the agent.

(e) (b) and (d) take place within a short space of time.

48 Nevertheless, while the test in *Grandhome* has been described in *Colliers International (Singapore) Pte Ltd v Senkee Logistics Pte Ltd* [2007] 2 SLR(R) 230 ("*Colliers*") at [75] as a "useful guide to a principle or test in law", the court in *Colliers* was careful to warn against a rigid application of the *Grandhome* test and according too much weight to a "mechanical formula in an area of law which, by its very nature, has to be fact-centric". I have accordingly eschewed a step-by-step application of the *Grandhome* factors in favour of a broader consideration of the facts. In this regard, Susan highlights the following ways in which she contributed to the sale of the Properties so as to constitute the effective cause of the sale:

(a) She advised the Owners to enter into a collective sale agreement, which they eventually did.

(b) She recaptured Aurum's interest in the Properties through her advertising campaign and by advising Michelle of the changes to development restrictions that had caused Aurum to lose interest in 2008.

(c) She discovered that the L-shaped Lot was not state land, and had advised Simon accordingly.

(d) She arranged for the Owners and Aurum to enter into the Letter of Offer, which enabled Aurum to liaise with the authorities to assess the developmental potential of the Properties.

(e) She discovered that the original trustees in which the title to 124 Sophia Road was vested had passed away, and advised the SBA accordingly. Her advice was followed and the title to 124 Sophia Road was subsequently vested in the ninth and tenth defendants in S 755.

(f) She discovered that the administrator of the estate that owned the L-shaped Lot had passed away, and informed Kay about it.

(g) She discovered that the Properties had a right of way over the L-shaped Lot and informed Michelle and Simon about it.

(h) She sustained Michelle's interest in the Properties from January to September 2010 and facilitated the "long, winding and tough negotiations" between Simon and Michelle, resulting in agreement on the material terms.

49 Simon did not dispute Susan's contributions as set out at [48(a), (b), (c), (d) and (e) during his cross-examination, and I note that the defendants' submissions dispute only Susan's contributions to the negotiations between the Owners and Aurum. Nevertheless, given that Susan's role in Aurum's acquisition of the L-shaped Lot was heavily contested during cross-examination, I also address it briefly.

The L-shaped Lot

50 In his affidavit of evidence-in-chief ("AEIC"), Simon claimed that it was through the efforts of Kay and himself that led to the discovery that the L-shaped Lot was not state land. He initially repeated this during his cross-examination, but later asserted that it had been Aurum who discovered it. When confronted with his AEIC, he again changed tack, stating that Aurum had discovered at the beginning of 2010 that the L-shaped Lot was unregistered land while he had discovered by 20 April 2010 that it was not state land. He cited his email to Kay dated 20 April 2010 ("the 20 April 2010 email") as evidence of this. It is baffling to me why he considers the 20 April 2010 email to support his case; in this email, he expressly stated that the L-shaped Lot had belonged to someone who was now deceased but was subsequently acquired by the Singapore Land Authority ("SLA"), concluding that it was either "no-man's land" or belonged to the state.

51 He continued to maintain, even in the face of such overwhelming evidence to the contrary, that he had known by 20 April 2010 that the L-shaped Lot was not state land. This was until he was confronted with his email dated 23 April 2010 to Susan, to which he attached a legal requisition from Land Transport Authority purporting to confirm the land as a public road. He then conceded that he had in fact been told of the status of the L-shaped Lot by Susan, but focused on his earlier evidence on how it was Aurum who had found out and told Susan. This was also conceded to be untrue when he was shown Susan's email to him dated 22 December 2009 (predating Susan's contact with Michelle) enclosing a fee quotation for an application for the state to acquire unregistered land.

52 It was also pleaded in Simon's defence that he was the one who had found out and informed Susan that the Properties had the right of way over the L-shaped Lot. During cross-examination, he gave evidence to the contrary, at first saying that he had been informed of this either by Arthur or Susan before returning to his original account when confronted with his AEIC. I set out in detail the relevant parts of the exchange in court:

> Q I accept that. I've never called you a liar yet. Now let's talk about the right of way. Who first discovered that the properties or rather the owners of the properties had a right of way over the L-shaped land?
>
> A I do not know who but two people mentioned it. Okay, I mean, who mentioned it first, I do not know. One was Arthur because he said that that was a driveway, okay. And Michelle also did---not Michelle, Susan also did mention it, okay, after getting the documents from me.
>
> …
>
> Q Now look at (c). Can you read (c) to the Court?
>
> A "The 13th defendant, Ng had found out that the 1st to 8th and 8th to 12th defendants and the 14th defendants as owners of the properties had right of way over lot 999987 and Susan was informed about the right of way by the 13th defendant."
>
> Q Is this statement that you put into the Court document for the Court to read true or false?
>
> A I cannot confirm. As I said two---
>
> Q I will not accept this answer.
>
> A ---two persons have told me. Okay, two people have told me. As to the dates---
>
> …
>
> Court: ---but just now, you didn't say it was you, right?
>
> A Yes.
>
> Court: So Mr Yeoh points to this point---this paragraph which says that it was you. You found out.

A I found out from Aurthur. I mean, Arthur told me and I tell Susan.

…

Q Now I'm totally confused. It doesn't matter who told you first. You are saying that Susan---did Susan tell you? All right, let's make it simple. Did Susan tell you?

A Susan did tell me as well.

Q Yes.

A Which I said I---

Q You told Susan first or Susan told you first? Let's keep it simple that way.

A I do not know. I cannot remember who---who told first.

Q All right. Now you go to 464 and read (c), and you tell me what you say there, who told who foos---who told who first, sorry. All right, yes. What did you say in 464(c)? Who told who first?

A On this, Susan told me first.

Q So now, I ask you again. Your statement in the Court document---

A Oh, sor---sorry, sorry. Wait. Based on this, I told Susan first.

53 That was not the end of his flip-flopping. He later claimed to have forgotten exactly what had transpired but when he was shown Susan's email dated 21 April 2010 in which she informed him that the Properties had a right of way over the L-shaped Lot, he immediately sought to rely on the 20 April 2010 email. I am not persuaded. It is clear from that email that he sought to convey that the Triangular Lot, and not the Properties, had a right of way over the L-shaped Lot.

54 In my view, the above is not only illuminating as to the lack of merit of Simon's claims in respect of the L-shaped Lot, but is significant for the

wholesale departures from his pleadings and AEIC as well as the alarming ease with which he changed his evidence. This was by no means an isolated incident; when first asked why he had told Michelle on 22 September 2010 that there was no other interested party despite telling Susan otherwise in his email set out at [19] above, his initial reply was to tell the court that he had stopped all negotiations with Jessica from 2 September 2010. He explained that Jessica had assumed that the Owners were no longer interested when she had not heard from the Owners for a week. Yet when it was pointed out to him that his evidence was still contradictory, he claimed that he had gone back to Jessica on 22 September 2010 after being told by Susan that the deal with Aurum was off, and it was then that he was told Jessica's investors had pulled out. This was later found to be at odds with an email he sent to Jessica on 30 September 2010 in which he requested for a letter of offer from her on an urgent basis. It should be noted that many of these changes in his evidence were made in response to documents shown to him that were inconsistent with his oral testimony. It indicated to me that they were improvisations rather than genuine recollections of events, a description that could fairly be levelled at much of his evidence.

55 This is consistent with how matters in general had developed and the manner in which the defendants ran their case. For instance, it is clear from the evidence, including the CEA Complaint, the Police Report and Simon's emails to Michelle in March 2011 that the commission clause had never been Simon's reason for alleging forgery – it was the 1% Option Release. Susan's pleaded case, even as early as 9 July 2012, has been that she was defamed by Simon's allegations of forgery. Yet it was only on 29 July 2014, approximately four months after the correspondence between Michelle and Simon were made the subject of disclosure, that the defendants amended their pleadings to make

reference to the inclusion of the commission clause and the commission agreement in the Alleged Forged Option. The timing of this disclosure also suggests that it was not entirely voluntary, being made a week after Simon had been informed by Michelle's solicitors that Michelle would be disclosing those documents to Susan. Simon had no credible explanation for his delayed disclosure, weakly claiming that "part of it went into [his] gmail" and disappeared thereafter.

The negotiations with Aurum

56 Susan submits that she had contributed in two ways. One of these ways, she says, was by her sustaining Michelle's interest in the Properties by various means, including responding to her requests in a timely manner, constantly apprising her of developments in respect of the Properties and promptly relaying the draft options and comments from Simon to assure her that the Owners were serious about the sale. The defendants' submissions do not address this point but I find it to be of little weight in any case. It does not seem realistic to me that Aurum's interest in the Properties, particularly given their prior interest in them, would have been influenced to any significant extent by Susan's actions.

57 What is of far greater importance is her role in getting the Owners and Aurum to come to an agreement on the material terms on which the Properties were eventually sold, which Susan identifies as:

(a) The amount of the option money.

(b) The price for the sale of the Properties.

(c) The amount of the retention sum (*ie*, the sum that Aurum would receive if possession were not delivered within six months after completion).

(d) The conditions for exercise of the option (*eg*, that it be conditional upon forfeiture of the L-shaped Lot and not alienation).

(e) The conditions for completion (*eg*, that Aurum had to obtain in-principle approval to purchase the Lots at less than $5.56m, pay less than $165,000 in development charges and obtain planning permission in accordance with certain requirements).

(f) The amount of the option money that would be stakeheld.

58 In their closing submissions, the defendants do not address this issue in any great detail, merely stating that the "evidence shows that it was … far from a 'done deal' as at 30 September 2010" and that "the deal was finally confirmed on terms which were far different from that which was on the table when [Susan] was involved". They do not submit that there are other material terms which are present in the Final Option that were not in the earlier drafts that involved Susan. As for the material terms identified by Susan above, their only ground of contention is the amount of option money that would be stakeheld, referring to Simon's evidence as given in his AEIC:

> … [T]here are very material differences between [the 2 September Draft Option] and [the Final Option]. We now managed to get Aurum to agree to pay the entire 4% upon the issuance of the Option (something which they did not agree to before) and as a trade-off, the owners agreed to have a further 1% paid in by Aurum upon exercise of Option and upon exercise of Option, the 1% would be released to the owners.

59 I find it surprising that the Owners consider this to be a matter of dispute given Simon's evidence in court, where he admitted that "the material terms [of the Final Option] are the same as [that of the 2 September Draft Option]". Although the 1% Option Release was a term that Simon had insisted on, there was, as a matter of fact, no difference in material terms between the Final Option and the 2 September Draft Option. Specifically, the 1% Option Release – the main reason for the impasse between the parties – was not present in both. Instead, the parties agreed for 1% out of the 4% option fee to be released to the Owners upon *exercise* of the option.

60 Simon also conceded during cross-examination that Susan had played a role in getting the Owners and Aurum to agree on these essential terms. In fact, he agreed that by 2 September 2010, Susan had brought the Owners and Aurum to "agree on all the material terms upon which the option was finally granted and upon which, the sale was finally completed", an entirely reasonable concession given the evidence before me. While Simon's contributions cannot be underplayed, to reduce Susan's role in the negotiations to that of a mere intermediary does great disservice to the facts before me. Even if I were to put little weight on Susan's contributions to the agreement on the sale price, she had, *inter alia*, rekindled Aurum's interest in the Properties, got Michelle to waive certain conditions by forwarding (possibly in breach of confidence) the Jessica Option to her, persuaded both parties to compromise by agreeing on an option fee of 4% of the sale price, advised the Owners to accept the retention sum of 5% and persuaded Michelle to accept an exercise of the option on condition of SLA's forfeiture of the L-shaped Lot.

61 The defendants, perhaps relying on the last of the *Grandhome* factors, also highlight that the Final Option was only entered into months after the 2 September Draft Option. Aside from the fact that the *Grandhome* factors are to be taken as a guide and not elements to be satisfied (see [48] above), as the following example in *Colliers* at [76] show, an unstinting adherence to the *Grandhome* factors could lead to absurd results:

> A quick example would serve to accentuate this point. Let us assume that an agent introduced a prospective buyer to a seller of industrial property and otherwise satisfied all the other conditions in the five-limb *Grandhome* test, save that in the final discussions involving the buyer and seller (which, for some inexplicable reason, the agent had failed to attend), the buyer increased its bid ever so slightly, precipitating the acceptance of such bid by the seller. Technically speaking, a steadfast adherence to the requirement that all the limbs of the *Grandhome* test must be satisfied would appear to deny the agent in such circumstances of what one would have thought should be his rightful commission. Needless to say, such a result would be inimical to the interests of justice and fair play.

62 In the present case, to find that Susan was not the effective cause simply on the basis that the sale only went through months later seems to me to be an even more unjust result given that there was no change in material terms between the 2 September Draft Option and the Final Option. As the circumstances set out at [12] suggest, once the 1% Option Release was waived by the Owners, the main obstacles to the sale of the Properties were the vesting of the title to 126 Sophia Road in new trustees by the SBA and the forfeiture of the L-shaped Lot by the state, the latter of which would only be completed on 18 February 2011. Indeed, it is telling that the Final Option was executed by the Owners and Aurum within days of that forfeiture. It cannot be that this delay (which would have arisen anyway even if Susan had brokered the deal) or the Owners' intransigence as to the 1% Option Release would preclude a finding

that she was the effective cause. Neither of these factors can be attributed to Susan. As far as she is concerned, she had done all that she could by 2 September 2010 to entitle her to the commission.

63 I am also of the view that little significance should be placed on the fact that Aurum was already familiar with the Properties prior to Susan's involvement. As I have stated above, it cannot be disputed that Aurum had ceased all interest in the Properties prior to Susan's advertisements and her informing Michelle of the changes in the development restrictions. Regardless, as *Emporium Holdings (Singapore) Pte Ltd v Knight Frank Cheong Hock Chye & Baillieu (Property Consultants) Pte Ltd* [1994] SGCA 147 shows, a buyer's familiarity with a property does not prevent an agent from being the effective cause of the sale.

64 The defendants' alternative argument is that Susan cannot claim she was the effective cause because she had informed Simon that Aurum was out of the picture. They do not state any legal basis for this argument beyond their assertion that "this fact … establishes that [Susan] is not the *causa causans* of the ultimate sale". At its core, the deal breaker for Aurum was the 1% Option Release term, which Simon had so firmly insisted upon in his instructions to Susan. Yet, the minute he spoke to Michelle directly, he waived it. I cannot see any logical nor equitable basis for stating that Susan was not the effective cause in this situation.

65 For the reasons stated above, I find that Susan was the effective cause of the sale of the Properties.

Whether the relationship of agency had been terminated by the material time

66 The defendants submit that they were "entitled to proceed with negotiations and finalization of terms without [Susan's] further participation" as she had breached her duties as their agent. These duties include the duty to act with reasonable care and skill and in good faith: see *Keppel v Wheeler and another* [1927] 1 KB 577. What is the standard of skill and care required of the agent is to be assessed with reference to what is usual or necessary in or for the ordinary or proper conduct of the profession or business in which he is employed, or is reasonably necessary for the proper performance of the duties undertaken by him: see Peter Watts and F M B Reynolds, *Bowstead and Reynolds on Agency* (2014, 20th Ed, Thomson Reuters) ("*Bowstead*") at para 6–017. In this regard, the defendants direct me to the duties of honesty, fidelity and integrity set out in reg 6 of the Code of Ethics and Professional Client Care ("Code of Ethics") found in the First Schedule of the Estate Agents (Estate Agency Work) Regulations 2010 (S 644/2010). The duties include:

(a) A duty to act according to the instructions of the client and protect and promote the client's interest.

(b) A duty not to mislead the client or provide any false information or misrepresent any relevant law or fact to the client.

(c) A duty to keep the client informed of any material or relevant development or issue in respect of the property of the client.

(d) A duty not to withhold any relevant fact or information from the client.

(e) A duty not to act against the interests of the client in any manner, including collaborating in any form or manner with any other person.

67 As I understand it, their case is that even if Susan had been the effective cause of the sale, her breaches of her duties owed to the Owners brought their relationship of agency to an end. Accordingly, her entitlement to commission, being one arising out of that contractual relationship, extinguishes. As is apparent from the following paragraphs, this submission is fatally flawed in many different aspects.

The nature of the breaches

68 In their submissions, the defendants focus on what they consider to be the more egregious of Susan's purported breaches.

69 First, they say that Susan had unreasonably delayed informing the defendants that Aurum had pulled out of the transaction in September 2010. As set out above at [19]-[20], Susan was informed by Michelle on 15 September 2010 that Aurum was pulling out of negotiations over the Properties. That Aurum was "walking away" was only relayed to Simon on 22 September 2010, though Susan did inform Simon on 20 September 2010 of Aurum's reluctance to meet the Owners' terms.

70 Susan's evidence is that she had informed Simon orally of what she had been told by Michelle on 15 September 2010 itself, and subsequently in writing by way of her email dated 20 September 2010. She points to her email to Michelle dated 16 September 2010, in which she says: "Simon is asking are you sure? He will still give you first refusal and can buy you some time to speak to

your board till the end of this week?". Her point, as I understand it, is that she would not have sent out this email without having consulted Simon.

71 On my part, I am of the view that even if a term for the timely communication of a potential purchaser's lack of interest could be implied and Susan's oral evidence were to be disbelieved, there was no breach of this implied term, and certainly not one that entitled the defendants to terminate the agency agreement. It is clear, in the context of the ongoing negotiations and Michelle's email to Susan on 15 September 2010, that Aurum had lost interest *as they could not agree on the 1% Option Release*. This much had been made known to Simon by 20 September 2010, three working days after Susan had been told by Michelle of Aurum's discontinued interest in the Properties. It should also be noted (as set out at [18] above) that by 9 September 2010, Simon had already expressed in no uncertain terms that he was willing to let Aurum walk away, and had in fact told Susan to relay this to Michelle. Yet, there is no evidence that he had followed up with Susan to check on Aurum's response. In these circumstances, there was no pressing need for her to have communicated to Simon that Aurum was "walking away" from the deal.

72 Second, the defendants say Susan had been "dishonest and practi[s]ed deception against Simon" by sending the Jessica Option to Michelle despite explicit instructions not to do so. Susan's response is that the instructions were "silly", she had done so in the Owners' best interests, and that it did in fact benefit the Owners by getting Michelle to drop some of her terms. I do not find this to be persuasive. While it may well negate a finding that she acted against the interests of the Owners or even that she had not acted in good faith, it does not detract from the fact that she had acted in breach of confidence and failed to

adhere to explicit instructions from her principal, a fundamental duty of an agent: see *Bowstead* at para 6–008.

73 What I find to be more persuasive is Susan's argument that Simon subsequently approved of her actions or did not even consider it to be a breach at that time. Her evidence is that Simon had instructed her on 1 September 2010 to show the Jessica Option to Michelle. She then divulged to Simon that she had already done so. Not only was Simon not upset, he even instructed her to mark up on the Jessica Option the terms that Aurum wanted. The Jessica Option was forwarded in an email which read: "They want to use the Option I sent you so please if you like have Su Ean mark up on this Option what you can live with? (cat out of the bag on this one)". Simon denies that this happened. On the evidence before me, I prefer Susan's account of events, which is backed by contemporaneous documentary evidence. There was no reason for Susan to have informed Michelle that Simon had found out about the Jessica Option had it not actually occurred.

74 Third, the Owners say that Susan had deliberately misrepresented Aurum's position to bind the Owners to Aurum. Simon's evidence is that Susan had, through a "combination of deliberate amendments and omissions", created the impression that the Alleged Forged Option correctly represented Aurum's position at that time. This was not the case as Aurum had not agreed to the 1% Option Release or expressly approved a clause that provided for Susan to receive commission in the event the Properties were successfully sold. The clause was added on Susan's own accord together with a separate commission agreement. I address the alleged forgery of the Alleged Forged Option in greater detail in respect of the defendants' plea of justification in S 381 – all that needs

to be said at this juncture is that I find that there had been no misrepresentation or forgery.

75 Fourth, the defendants say that Susan had wilfully failed to obtain the best price possible. They refer to Susan's negotiations with a representative from Oxley Holdings, during which she informed him that a bid of $28m for the Properties would be considered even though it was well below the Owners' asking price. There is no merit to this argument. I can think of no reason why Susan would engineer a sale at a lower price given her commission would be assessed as a proportion of the sale price. Further, as Simon himself conceded, he had been apprised of these negotiations and was told of the possible offer of $28m that resulted in an offer of $26m. Yet, he made no attempt to stop negotiations during that time, only objecting to the purported sale price two weeks after the offer price of $26m was mooted. In fact, Simon admitted that he had asked Susan to obtain a formal offer from Oxley Holdings. That being the case, it does not lie in the defendants' mouth to say that Susan's efforts in obtaining that offer were in breach of their agency agreement.

76 Finally, the defendants say that Susan had dishonestly misrepresented to Michelle in her email of 6 January 2011 that the Owners had approached her to market the Properties again when they had not in fact done so. As Susan highlights, this can be dismissed summarily on the grounds that it was not pleaded and Susan had not been cross-examined on this matter. Regardless, given that Susan had successfully arranged with Simon for a viewing on the Properties on 4 January 2011 (see [22] above), I find that there was no dishonest misrepresentation by Susan. The state of affairs, as she understood it then, was that the Owners were once again open to selling the Properties. I find this to be

a most audacious position on the part of the defendants as it was they who had misrepresented to Susan that the Properties were still for sale when they had already agreed in principle to sell them to Aurum.

The effect of the breaches

77 I have found that none of the alleged breaches, even if committed, was sufficient for the defendants to terminate the agency agreement. I nevertheless consider the effect of these breaches in the event I am wrong on the above.

78 Susan's case, which I have accepted above, is that she had brought the parties to agree on the material terms by 2 September 2010. I accept that to be the date from which she could be said to be the effective cause of the sale. However, some of the alleged breaches, the most serious of which being Susan's alleged forgery of documents, occurred after that day. It appears that the defendants' arguments are premised on the assumption that a breach that goes to the root of the agency agreement between Susan and the Owners can deprive her of her commission as long as it was committed before the sale of the Properties. They refer me to the High Court decision of *Indulge Food Pte Ltd v Torabi Marashi Bahram* [2010] 2 SLR 540 ("*Indulge Food*") as authority for the proposition that Susan "can no longer seek to enforce whatever claims [she] alleges [she] has in law pursuant to the doctrine of reciprocity".

79 *Indulge Food* involved an agreement for the plaintiff ("Indulge") to invest in the defendant's ("Marashi") company in exchange for shares in that company. This investment of $1m would be carried out in four instalments of $250,000 each. The first two instalments were made and the shares in Marashi's company were duly issued to Indulge. However, Indulge refused to pay the third

and fourth instalments as it claimed that the pre-conditions for these transfers had not been satisfied. The judge held that the pre-conditions had been satisfied, but nevertheless went on to make some observations on what could have been the outcome had Marashi's company brought an action in its own name to recover a fixed sum arising from the agreement. The judge in *Indulge Food* opined that Marashi's company would have been unlikely to succeed given its failure of what she terms as the requirement of reciprocity, which she extended to monetary claims (at [53]):

> 53 Specifically, it is far from obvious to me that a contractual promise to pay money is necessarily enforceable once its conditions precedent have been met, without regard to the rest of the contract. Certainly, such an approach would not be congruent with the position in relation to the grant of specific performance of non-monetary obligations, which is subject to the condition [of reciprocity] described … in Edward Fry, *A Treatise on the Specific Performance of Contracts* (George Russell Northcote ed) (Stevens and Sons, Limited, 6th Ed, 1921) ("*Fry on Specific Performance*") at §922 …
>
> 54 … But it seems to me that the requirement of reciprocity can – and should – be divorced from the equitable concepts of conscience and discretion and rationalised in accordance with the principles of contract. *Specifically, the requirement of reciprocity as a principle of contract law recognises that, when the several obligations of a contract are on their true construction* ***part of one indivisible bargain, a party cannot expect to enforce his counterparty's obligations when he himself did not, cannot, or is unwilling or able to, perform his own obligations***. In other words, it prevents the plaintiff from recovering the covenanted benefit free from the covenanted burden. It ensures that the whole bargain is recovered, the good with the bad, no less, and certainly no more. ***This is certainly a principle that applies with equal force to the enforcement of monetary as well as non-monetary primary obligations***.
>
> [emphasis in italics in original, emphasis in bold italics added]

80 In this regard, Susan's attempt to circumscribe the observations of the judge to claims for specific performance and not contractual debts is of little

force. It should nevertheless be noted that the above statements were *obiter dicta* and have been subject to some degree of academic criticism: see "Contract Law" (2010) 11 SAL Ann Rev 239 at paras 11.187 to 11.196; *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract*") at paras 23.064 to 23.066. I do not make any comment on the applicability of the doctrine of reciprocity (as conceived in *Indulge Food*) to monetary claims; it suffices in this present case to say that even if the doctrine were to apply, the breaches in question would not deprive Susan of her entitlement to commission. Unlike Marachi and his company in *Indulge Food*, Susan had already fulfilled all of the obligations which formed the consideration for the Owners' undertaking to pay her commission – that is, she had done all that she could for the Properties to be sold to Aurum.

81 With particular reference to an agent's claim for commission, there is also case authority that suggests that an agent's entitlement to commission may not be affected by a subsequent end to the agency. In *Sellers v London Counties Newspapers* [1951] 1 All ER 544 ("*Sellers*"), the plaintiff was engaged by the defendants as a travelling sales representative and was contractually entitled to commission in respect of orders placed or secured by him for advertisements in the defendants' newspapers. He was subsequently dismissed, and claimed for the commission in respect of orders effected by him before his employment was terminated and executed by the defendants thereafter. The majority of the English Court of Appeal allowed his claim in the absence of an express term that his right to commission would end with the termination of his employment.

82 While Sir Raymond Evershed MR dissented on whether such a claim should be allowed in respect of contracts for services, it is noteworthy that even he would have allowed such claims in respect of a commission agent. In *Sellers* at 548, he said:

> In my judgment, the first point to observe on the character of the agreement as alleged and proved is that in the present case the plaintiff was the whole–time servant of the defendants. Whether he is properly called a commercial traveller or an advertising representative his position is, I think, essentially different from that of an independent contractor like a broker or house agent who is engaged by a principal on commission terms to transact some single piece of business or a specified and limited number of pieces of business. *In the latter class of case, if the agent is promised a commission provided that he produces for his principal, eg, a person ready and willing to buy his house, then, if he does the work for which commission was promised, he becomes entitled to that commission although his principal afterwards purports to put an end to the agency*. … [emphasis added]

83 I agree with the holding of the English Court of Appeal in *Sellers*. Where the contract provides that commission be paid where the agent is the effective cause of the sale *and that occurs before the contract is terminated*, the commission becomes due and is payable: see *Bowstead* at para 7-041. The critical question is therefore when the contract was terminated, if at all.

84 It is well-established that a breach of contract does not automatically discharge or bring a contract to an end; the innocent party must elect to discharge the contract through *clear and unequivocal* words or actions: see *The Law of Contract* at paras 17.221 and 17.223. I also accept the defendants' submission that a party may rely on a previously unknown repudiatory breach to justify its termination of a contract: see *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [63]. However, I am

unaware of any principle in law which allows a subsequent act of termination to be given retrospective effect from the time of the *breach*. The defendants do not identify when they terminated the agency agreement with Susan. Perhaps that is because there appears to be no occasion on which they did – on the contrary, Simon's conduct in relation to some of those alleged breaches (*eg*, continuing with Susan's services despite her attempts to obtain a bid of $26m) could be construed as an election to affirm the agreement.

85 As the facts set out at [21]–[25] show, rather than terminating the agency agreement with Susan, Simon's actions after dealing directly with Michelle were calculated to lead her to think that their relationship of agency continued to subsist, albeit in a state of suspension. The earliest of Simon's actions that could be conceived as an act of termination is his email to Susan on 30 September 2010 telling her to take the property out of the market. Even that, it was followed by the important qualifier that Simon was no longer interested to sell *at that moment*. This was similarly the case for his subsequent communication with Susan as set out at [23] and [24] above. More importantly, there was simply no act which could have been construed as an election to discharge the contract before 2 September 2010, the latest date by which Susan's actions were sufficient to render her the sufficient cause of the sale of the Properties.

My conclusion on S 755

86 In view of the foregoing I find that Susan is entitled to recover her commission of 2% of the sale price of the Properties and GST, amounting to $723,320, from the Owners – the first to 12th and 14th defendants in S 755. As her alternative claims in conspiracy are premised on her loss of entitlement to

the commission, there is no need for me to consider them. Accordingly there shall be judgment in the sum of $723,320 in favour of Susan against the 1st to 12th and 14th defendants.

S 381 – The claim in defamation

87 As stated above at [29], Simon's acts of filing the CEA Complaint, the Police Report and forwarding them to Cheam form the basis for Susan's claims in S 381, the most prominent of which is her claim for defamation. It is perhaps useful to set out in greater detail the contents of these documents and the context in which they were made.

88 The prospect of Simon filing a complaint against Susan first arose in his SMS message to her on 5 March 2011, which read:

> Susan, one more call from [you] to any of the owners or another word from u saying that we went behind yr back to close the deal with aurum land, I promise u this, we will lodge a complain[t] against u and yr company to the CEA together with all yr email[s] to me as well as yr email to aurum without any delay and we will see whether u still hv a license to practice … *Will be interesting how the CEA view it esp after I write into the ST Forum to highlight of the dishonest practice among the real estate agents as a precursor to our complaint to the CEA …* [emphasis added]

89 Susan clearly did not heed Simon's threat. The next day, Simon sent an SMS message to her stating that "as promised, I will go ahead with my letter to the ST Forum followed by an official complain[t] to the CEA". He was true to his word, sending out the ST Letter on 7 March 2011. He then told her to "say goodbye to [her] estate agent license" before filing the CEA Complaint on or about 17 March 2011, a day or so after Susan maintained that she had been the effective cause of the sale of the Properties. It is unclear if the CEA Complaint

was post-dated given that a number of SMS messages were sent by Simon to Susan on 16 March 2011, one of which makes reference to him having lodged a complaint to the "relevant authorities". In the last of these SMS messages, he said:

> The moral of the story is to 'never challenge someone who keeps 100% of all emails and religiously downloads every sms into the pc daily and keeps all records for 7 full yrs. Not only that at the end of 7 yrs, i go through every single record and retain those that may still be relevant. Not only that, all records are backed-up to prevent accidental deletion … I hate taking people on and i rarely do, but once i do, i will do a [devastatingly] complete job.

90 That was not the end of the matter. In fact, things escalated further, with an SMS message sent by Simon to Susan on 21 March 2011 telling her that "life [in] the women's prison will be no fun". On the same day, he also forwarded the ST Letter to Cheam to give her "an idea of what [he was] experiencing". This was followed by a couple of SMS messages on 24 March 2011, in which he said that he was asked by the relevant authority to file a police report, and that he would do so despite his initial reluctance. The second of these SMS messages carried a slightly more ominous tone:

> … And I guarantee you this, both u and isabel redrup will lose their license and be barred permanently and also, u will experience life in a prison cell. And also, u will see a series of articles in the newspaper soon abt u and isabel redrup agency which is now being prepared. And u can only blame all these misfortune on no one but yrself. I will be extremely [vicious] in bringing u to justice.

91 On 29 March 2011, Simon filed the Police Report. The SMS messages and emails to Susan nonetheless continued. One of these SMS messages, which was sent on 15 April 2011, sought to persuade Susan to abandon her claim:

> Still hv the appetite to take me on? The choice is yrs, I can either stop all actions or proceed with all the options that are available to me. And dun doubt me.

92 Again, this did not seem to have its desired effect on Susan. On 18 April 2011, Simon met with Cheam and on her request and on condition of confidentiality, he provided her with the Police Report and the CEA Complaint. Susan says that this also constituted an act of publication of the alleged defamatory material (*ie*, the Police Report and the CEA Complaint).

The defamatory meaning

93 The parts of the CEA Complaint which are said to be defamatory are set out as follows:

> 03/09/2010 (Doc 8) – Email from Susan with OTP supposedly from Aurum, which on 22 Sept 2010 was found out was never issued by Aurum Land.
>
> …
>
> … It was then that I realised that Susan, in all probability, out of desperation to prevent us from closing the deal with the other party, forged the OTP in the hope that she could [persuade] Aurum to agree …

94 As for the Police Report, Susan says that the defamatory sting lies in the following portions of the report:

> … Sometime in 28/08/2009, I engaged the services from Susan Ye of Isabel Redrup Agency Pte Ltd to find us a buyer for our 9 units collectively. On 03/09/2010, Susan sent me an email with an option document attached purportedly from the buyer … We as such suspect that Susan might have forged the option document.

95 In their submissions, the defendants do not contest that the words complained of were defamatory in nature. It is nevertheless necessary to

determine from the outset what their defamatory meaning is given its implications on the defences that the defendants seek to avail themselves of. The defendants have characterised Susan's pleaded case as one based on the CEA Complaint and the Police Report imputing that she had behaved unethically and was dishonest and unfit to act as an estate agent. They rely on *Gatley on Libel and Slander* (Sweet & Maxwell, 12th ed, 2013) (Prof Alastair Mullis and Richard Parkes QC eds) ("*Gatley*") at para 11.11 for the proposition that where a specific allegation carries a broader imputation of misconduct, the general charge may be justified by reference to other examples of his conduct which may be found to be true, referring to *Rothschild v Associated Newspapers Ltd* [2013] EMLR 18 ("*Rothschild*") as an example. Presumably, what the defendants would have me do is to find that despite any specific allegations of forgery, the broader imputation is one of unethical and dishonest behaviour and it is only that broader imputation that needs to be justified.

96 I decline to do so. First, as far as Susan's pleadings are concerned, her pleaded case (as set out at [32] above) is that the words complained of convey the natural and ordinary meaning that she behaved unethically and was dishonest *because* she had forged an option to purchase. Second, as the case of *Bookbinder v Tebbit* [1989] 1 WLR 640 ("*Bookbinder*") demonstrates, specific allegations do not automatically attract a wider meaning. In *Bookbinder*, the plaintiff's pleaded case was that the offending words were understood to mean that he had "acted irresponsibly in squandering £50,000 of public money on printing statements supportive of nuclear free zones on its stationery". The defendant pleaded justification, averring that the plaintiff had "acted irresponsibly in causing large scale squandering of public funds" (at 646). The defence was struck out as the court held that the ordinary man would regard the

defamatory charge in the words used as being limited to the spending of stated sums on the stated project. Ultimately, as *Gatley* highlights at para 11.11, every case depends on its own facts.

97 It is therefore necessary to examine the context in which the words complained of were made. I note that the CEA Complaint, in addition to the allegation of "falsification of Option Documents", referred to six other acts by which Susan breached the Code of Ethics, including lack of competency and refusal to stop marketing the Properties despite explicit instructions to do so. Nevertheless, the attachment to the CEA Complaint, entitled "Chronological Chain of Events", makes passing reference to these events, but focuses on the alleged forgery. Similarly, the Police Report only refers to the alleged forgery. Indeed, it could only refer to the alleged forgery given that that was the only act of criminal misconduct which Susan is said to have committed. Further, an act of forgery is not merely an unethical and dishonest act that breaches the Code of Ethics, but is a criminal offence punishable by a lengthy jail term. In particular, an allegation of forgery of an option agreement is a calumny on an estate agent, who largely operates on his or her professional reputation. In these circumstances, I am satisfied that the defamatory sting relates to the specific allegation of forging the Alleged Forged Option.

98 However, I do not accept that the CEA Complaint and the Police Report were defamatory of Isabel Redrup as an entity independent of Susan, at least in the manner pleaded at [32(b)]. The allegations are clearly directed at Susan; they do not detail how Isabel Redrup is implicated in her wrongdoing or even specify that it had sanctioned her acts. There is no allegation of wrongdoing on the part of Isabel Redrup and therefore no defamatory imputation as far as it is

concerned. As Sedley LJ held in *Jameel v Times Newspapers Ltd* [2004] EMLR 31 at [35]:

> It has to be kept well in mind that a limited liability company is a distinct legal person, not an extension of its proprietor (if I may adopt an imprecise but useful term). *To defame the proprietor, even in an article which identifies the business as his, is not to defame the company unless the article also suggests that the company is itself implicated in the wrongdoing or suspicion of wrongdoing attributed to the individual, or that it merits investigation for the same reasons as its proprietor.* This article suggests none of these things. At most it suggests that the profits derived by Mr Jameel from his financial interest in Hartwell—in other words money which is his, not the company's—has found its way into terrorist hands. That is not a pleasant thing for any company to contemplate, but it implies no wrongdoing on its part, nor even grounds for investigation. [emphasis added]

99 I pause here to note that the allegations of wrongdoing that form the basis of Susan's claims in S 381 were not unequivocal assertions that Susan had in fact forged the Alleged Forged Option. The terms "in all probability", "suspect" and "might" suggest that the words complained of mean that there are *reasonable grounds to suspect* that Susan had committed such an act, and not that she *had in fact committed* that act. That is not to say an allegation of this nature is not defamatory – in *Chase v News Group Newspapers Ltd* [2003] EMLR 11 ("*Chase*"), which was cited in *Low Tuck Kwong v Sukamto Sia* [2014] 1 SLR 639 at [42], the English Court of Appeal held at [45]:

> The sting of a libel may be capable of meaning that a claimant *has in fact committed* some serious act, such as murder. Alternatively it may be suggested that the words mean that there are *reasonable grounds to suspect* that he/she has committed such an act. A third possibility is that they may mean that *there are grounds for investigating* whether he/she has been responsible for such an act. [emphasis added]

100 In this regard, there can also be little dispute that the Police Report and the CEA Complaint did carry explicit allegations concerning the Alleged Forged Option. Nevertheless, I am of the view that the Police Report and the CEA Complaint carried the second, and not the first defamatory meaning in *Chase*. I therefore go on to consider the defences that are the focus of the defendants' submissions – justification, absolute privilege and qualified privilege. The defendants do not pursue the defence of fair comment in their submissions.

The defences

Justification

101 It is well-established that a defamer need not prove the truth of every detail in the words published, but that the justification must meet the sting of the charge: see *Arul Chandran v Chew Chin Aik Victor* [2001] 1 SLR(R) 86 ("*Arul Chandran*") at [29]. The defendants' submissions focus extensively on Susan's alleged breaches of duty as an estate agent, which are discussed above at [69]–[76], as justifying the complaints of unethical and dishonest behaviour in the CEA Complaint and the Police Report. But that is not the defamatory sting that I have found them to carry. Nor is it the case, as Susan has proceeded on, that the defamatory sting was that she had in fact committed the act of forgery alleged. In order for the defence of justification to succeed, the defendants must show that there were in fact reasonable grounds to suspect that she had committed the offence of forgery by forging the Alleged Forged Option and not merely committed unethical and dishonest acts. As stated by Laws LJ in *Rothschild* at [24]: "the sting of the instance or instances which are proved must in essence be as sharp as the published, unproved libel".

102 In their submissions, the defendants refer to ss 463 and 464 of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code"), saying that "the facts and circumstances clearly show a prima facie case of forgery". The provisions read:

> **Forgery**
>
> **463.** Whoever makes any false document or electronic record or part of a document or an electronic record with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.
>
> **Making a false document or false electronic record**
>
> **464.**—(1) A person is said to make a false document or false electronic record —
>
> (*a*) who dishonestly or fraudulently —
>
> (i) makes, signs, seals or executes a document or part of a document; [or]
>
> (ii) makes any electronic record or part of any electronic record;
>
> …
>
> with the intention of causing it to be believed that such document or electronic record or part of a document or electronic record or electronic signature was made, signed, sealed, executed or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed, or at a time at which he knows that it was not made, signed, sealed, executed or affixed; [or]
>
> (*b*) who without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with an electronic signature, either by himself or by any other person, whether that person is living or dead at the time of the alteration;
>
> …

103 The defendants say that Susan's acts of using the subject header "Option from Michelle – subject to contract" in her email to Simon enclosing the Alleged Forged Option, and renaming the Alleged Forged Option as "Sophia Road Option – MY – 03.09.10" clearly shows her intention to cause the defendants to believe that the altered document/data was indeed from Michelle. They also say that the *actus reus* of the offence of forgery is "plain and obvious", a sentiment that is clearly not shared by Susan given her extensive submissions on this point.

104 Susan's submissions seek to rely on the authority of the Indian decisions of *Re Riasat Ali* [1881] ILR 7 Cal 352 and *Jawala Ram* [1895] PR No 12 of 1895 ("*Jawala Ram*") on the offence of forgery under the Indian Penal Code, as well as the Australian decision of *Brott v The Queen* (1992) 173 CLR 426 ("*Brott*") on the common law offence of forgery. The core of her submissions is that the offence of forgery under the Penal Code is not made out where there has been no affixing of a mark, seal or signature on that document without authority. She says that illustrations (*a*) and (*c*) to s 464 of the Penal Code, to which the defendants refer in support of their argument, are consistent with this requirement.

105 I have serious reservations as to whether s 464 of the Penal Code should be interpreted in such a restricted manner, particularly given that the offence of forgery was amended to incorporate acts involving false electronic records. Susan argues, in relation to electronic records, that the falsity would lie in the affixing of an electronic logo or mark. She refers to *Public Prosecutor v Rudy Lim* [2010] SGDC 174 ("*PP v Rudy Lim*"), in which the accused person was found to have forged a payslip that showed a salary higher than what he was actually drawing. The judge held at [49] that the forged payslip, as a document

that carried the DLAS logo, "obviously bore an imprimatur of authenticity and would go a long way towards supporting the information given" by him. But there is nothing to suggest that the affixing of an electronic logo or mark is a *necessary* condition for the *actus reus* of forgery to be made out. Indeed, it was not disputed in *PP v Rudy Lim* that the accused had created the offending document and that it was false; the only question was whether he had the intention to cheat. What is more important is that the false document must appear to be or in fact be one which is, if true, *legally* capable of effecting the fraud intended: see *Jawala Ram* at 42-43.

106 It is not necessary for me to find on this issue. Even if I were to accept that Susan's purported act of forgery (*ie*, inserting the commission clause and adding in a commission agreement in the Alleged Forged Option) constitutes reasonable grounds to suspect that Susan had committed the *actus reus* of forgery, I find that there are no reasonable grounds to suspect that she had done so with a dishonest or fraudulent intent. On the contrary, as I have discussed above at [45]–[46], there are strong grounds for her to have believed that she was in fact entitled to the commission in the event of the successful sale of the Properties and that she had acted accordingly to record that right in writing.

107 I also do not think that the email enclosing the Alleged Forged Option, as set out at [16] above, demonstrates any dishonest or fraudulent intent on the part of Susan. On the face of that email, I fail to see how it even conveyed the message that this was a draft that had been approved by Aurum. First, the email clearly stated that the draft option would still have to be shown to Aurum's board, signifying that it had yet to be approved by them. This is reinforced by the inclusion of the phrase "subject to contract" in the subject heading of the

email. Second, the Alleged Forged Option is referred to in the subject heading of the email as an option from *Michelle* and not the board of Aurum, a distinction that Simon admitted to appreciating during cross-examination (even if he did not seem to do so at the material time). If anything, the email shows that Susan had accurately and truthfully conveyed what had been told to her by Michelle.

Absolute privilege

108 At common law, occasions of absolute privilege include statements made in judicial or quasi-judicial proceedings, parliamentary proceedings and official state proceedings: *Evans on Defamation in Singapore and Malaysia* (Keith R Evans gen ed) (LexisNexis, 3rd Ed, 2008) ("*Evans on Defamation*") at pp 149–157. The rationale for this defence, at least in the context of judicial proceedings, has been explained by Lord Diplock in *Trapp v Mackie* [1979] 1 WLR 377 at 379:

> … [T]he rule of law is one which involves the balancing of conflicting public policies, one general: that the law should provide a remedy to the citizen whose good name and reputation is traduced by malicious falsehoods uttered by another; the other particular: that witnesses before tribunals recognised by law should, in the words of the answer of the judges in *Dawkins v. Lord Rokeby*, L.R. 7 H.L. 744, 753 "give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice."

109 The defendants submit that the filing of the Police Report and the CEA Complaint were made on occasions of absolute privilege. They refer me to *Lee Yoke Yam v Chin Keat Seng* [2013] 1 MLJ 145 ("*Lee Yoke Yam*") and *Westcott v Westcott* [2009] QB 407 ("*Westcott*"), which are decisions of the Malaysian Federal Court and the English Court of Appeal respectively. These cases

extended the scope of the defence of absolute privilege beyond its traditional confines of statements made *in the course* of judicial and quasi-judicial proceedings to out-of-court statements *leading to* judicial proceedings, such as statements made in a police report. In doing so, the courts were swayed by an overriding public interest of having members of the public report alleged criminal conduct without fear of being embroiled in civil litigation: *Lee Yoke Yam* at [32]; *Westcott* at [36].

110 In particular, the court in *Westcott* adopted the test laid down in *Evans v London Hospital Medical College (University of London) and others* [1981] 1 WLR 184 ("*Evans*") at 192 that was endorsed by the House of Lords in *Taylor and another v Director of the Serious Fraud Office and others* [1999] 2 AC 177 ("*Taylor*") – can the offending statement fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or possible prosecution in respect of the matter being investigated? The court in *Westcott* held that the making of an oral complaint and a subsequent written complaint to the police could, since "immunity must be given from the earliest moment that the criminal justice system becomes involved".

111 Susan submits that *Tang Liang Hong v Lee Kuan Yew and another and other appeals* [1997] 3 SLR(R) 576 ("*Tang Liang Hong*") binds me to find otherwise. *Tang Liang Hong* involved a defamation action against a member of an opposition party who had lodged a police report against the respondents claiming that they had defamed him in his standing as a politician, which the court found to be defamatory. However, the court did not appear to have considered the offending police report to have been made on an occasion of absolute privilege, finding that "such an occasion would *ordinarily* be protected

by qualified privilege" [emphasis added]: *Tang Liang Hong* at [174]. I do not agree that *Tang Liang Hong* is binding on me. As the defendants point out, the question of whether complaints to the police could be protected by absolute privilege did not fall to be determined by the court. In addition, the court did not find that such statements would *necessarily* be protected by qualified privilege and not absolute privilege.

112 I also note that *Taylor* has been considered in our courts. In *D v Kong Sim Guan* [2003] 3 SLR(R) 146 ("*Kong Sim Guan*"), the plaintiff had filed a complaint against a consultant psychiatrist to the Singapore Medical Council ("SMC"), which was then referred to its Complaints Committee. The defendant was asked to respond to the complaint, and his response was alleged to comprise defamatory statements. S Rajendran J held that the defence of qualified privilege applied, but nonetheless went on to find that the defamatory statements were also protected by absolute privilege. The learned judge drew an analogy between persons who provide information during the course of investigations, who were held to be protected by absolute privilege in *Taylor*, and the role of the Complaints Committee in the disciplinary process. He held at [111] that it would be "somewhat illogical if the practitioner had the benefit of absolute privilege in respect of that explanation at the Disciplinary Committee stage but denied that privilege in respect of the same explanation at the Complaints Committee stage".

113 Nevertheless, I agree with Susan's submissions that the finding relating to absolute privilege in *Kong Sim Guan* is *obiter dicta* and appears to have assumed that the test in *Evans* was part of Singapore law without the benefit of full arguments. Further, it could be said that the statements in *Kong Sim Guan*

were made at the preliminary stages of a tribunal hearing as opposed to being volunteered to initiate investigations, and the statements in the present case are further removed from that tribunal setting which, if quasi-judicial in nature, has more traditionally been considered to be subject to absolute privilege. It thus falls for me to consider whether our courts, as a matter of policy, should follow the position taken by the English and the Malaysian courts.

114 With respect, I do not find the reasons given in *Westcott* to be persuasive. As Lord President Inglis observed in *Williamson v Umphray and Robertson* (1890) 17 R 905 at 911, the policy justifying immunity for statements made in the course of judicial proceedings is intended not only to encourage freedom of speech, but to prevent actions against people who are *merely discharging their public duty*:

> It is essential to the ends of justice that persons in such positions should enjoy freedom of speech without fear of consequences, in discharging their public duties in the course of a judicial inquiry. But the motive of the law is not to protect corrupt or malevolent Judges, malicious advocates, or malignant and lying witnesses, but to prevent persons acting honestly in *discharging a public function* from being harassed afterwards by actions imputing to them dishonesty and malice, and seeking to make them liable in damages. [emphasis added]

115 In a similar vein, the High Court of Australia notes in *Mann v O'Neill* (1997) 145 ALR 682 ("*Mann*") at 686:

> … [A]bsolute privilege attaches to statements made in the course of judicial proceedings because it is an indispensable attribute of the judicial process. It is necessary that persons involved in judicial proceedings, whether judge, jury, parties, witnesses or legal representatives, be able to discharge their duties freely and without fear of civil action for anything said by them in the course of the proceedings. Were civil liability to attach or be capable of attaching, it would impede inquiry as to

> the truth and justice of the matter and jeopardise the "safe administration of justice".

116 It therefore seems to me that any expansion in the ambit of the defence of absolute privilege must relate to this underlying aim of facilitating the effective discharge of the shared public duty in court proceedings – to ascertain the truth of the matter. As *Mann* observed at 689, this is distinct from the public duty that is exercised by investigators:

> It is not necessary that statements to prosecuting authorities be absolutely privileged. The function of an authority charged with investigation and prosecution, whether in the courts or elsewhere, is not to ascertain the truth and justice of the matter in a final or binding way, but to decide whether the circumstances warrant the institution of proceedings to ascertain the truth of the matter. Absolute privilege is not required for the effective discharge of that function. …

117 The logic in conferring absolute immunity at a later stage of prosecution (but not earlier) thus lies in the difference in the duties performed by the participants at each stage despite the fact that the same things may be said. In this regard, an informant does not even perform the investigative duty of deciding at the threshold stage whether proceedings should be instituted, but merely a civic duty to report wrongdoing. While I appreciate the appeal of this broader policy consideration, I do not find it to be sufficiently compelling. I fail to see how the balance between the proper administration of justice and the reputational interests of individuals is not sufficiently protected by finding such statements to be protected by qualified privilege; a plaintiff would still be required to prove malice to defeat this defence, a not-insignificant obstacle to surmount. On the other hand, there is little benefit to encouraging false and malicious reporting of crimes which ultimately hinder, rather than assist, the

fight against crime. I am therefore of the view that the Police Report and the CEA Complaint were not made on occasions of absolute privilege.

Qualified privilege

118 On the other hand, I have little difficulty finding that the Police Report and the CEA Complaint were made on occasions of qualified privilege. As the Court of Appeal in *Chan Cheng Wah Bernard and others v Koh Sin Chong Freddie and another appeal* [2012] 1 SLR 506 ("*Chan Cheng Wah*") observed at [86], these arise in circumstances where the grounds of public policy and convenience are less compelling than those which give rise to absolute privilege. Ultimately, the test is that set out by Lord Carswell in *Seaga v Harper* [2009] 1 AC 1 ("*Seaga*") at [5] (which *Chan Cheng Wah* cites at [87]):

> … [whether] there is a duty, legal, social or moral, or sufficient interest on the part of the [defendant] to communicate [the offending words] to recipients who have a corresponding interest or duty to receive them, even though they may be defamatory …

119 The defendants say that Simon's duty to communicate the offending words to the police arose once he was directed by the CEA to file a police report, and that his duty is set out in s 202 of the Penal Code. I have my doubts as to whether forgery is an offence for which he is "legally bound" under s 202 to report. It is not one of the offences specified in s 424 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) for which a duty is prescribed. Nevertheless, it is clear from *Seaga* that the duties which give rise to the defence of qualified privilege need not necessarily be legal in nature; it may be a social or moral duty, or even just a sufficient interest. It should be apparent from my discussion above that there is a strong public interest, albeit not one that warrants absolute immunity, in ensuring that people who come forward to assist in addressing a

wrong need not be burdened by having to prove the truth of their statements. It is this civic duty and the corresponding duty of the police to investigate such leads that give rise to the protection of qualified privilege. This is entirely consistent with *Tang Liang Hong* as well as the position in England prior to *Westcott*: see *Gatley* at para 14.37.

120 Similarly, while I find the fact that all complaints and proceedings before the CEA are confidential to be irrelevant, I am satisfied that the CEA Complaint, being a complaint to a statutory board regulating the license and registration of estate agents, is sufficiently analogous to statements made to the police to warrant the protection of qualified privilege. As *Gatley* notes at para 14.59:

> **Complaints and redress.** Just as statements made in order to recover stolen property or find a criminal may be seen as made out of duty and in aid of public justice or in furtherance of the interests of the victim, so too complaints about the conduct of those in authority or with responsibilities to the public may be seen as made from a duty to bring the facts to the attention of those who control or are concerned with the conduct in question, or in furtherance of the interests of those affected in securing redress. …

121 *Gatley* further states at para 14.62 that this is not confined to persons in authority, but extends to "any person who has responsibilities to the public for the way in which he deals with them". I am of the opinion that the defendants had a social or moral duty and an interest in informing the CEA of errant estate agents, and that the CEA correspondingly had a duty and interest in receiving such complaints.

122 On the other hand, I am unable to see why Simon's act of sending the Police Report and the CEA Complaint to Cheam should be protected by

qualified privilege. The defendants say that he did so "out of moral and social duty as well as on the basis of public interest as the events and conduct complained of took place during the period where the Estate Agents Act was being passed by Parliament and there was public discussion in Parliament and via the press on the conduct of estate agents and the need to regulate their activities in order to afford protection to the public". They purport to rely on *Stuart v Bell* [1891] 2 QB 341 ("*Stuart*") and *James Gilbert Limited and another v MGN Limited* [2000] EMLR 680 ("*James Gilbert*"), though they do not say exactly how.

123 In my view, neither of the cases supports a finding that Simon's act of forwarding the Police Report and the CEA Complaint to Cheam is an occasion of qualified privilege. In particular, none of them concern the making of defamatory statements *to* the media; *James Gilbert* involved a statement *by* the media while *Stuart* concerned the social or moral duty to inform an employer of his employee's suspected dishonesty. Likewise, *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 ("*Review Publishing*"), to which Susan refers, also relates to when a publication by the media could be said to attract qualified privilege. To find that Simon had a duty or interest to communicate the contents of the Police Report and the CEA Complaint to members of the press simply on the basis that the regulation of estate agents was in the public focus would be to broaden the ambit of the defence too far. In this regard, I find the observations of L P Thean J in *Jeyaretnam Joshua Benjamin v Goh Chok Tong* [1983-1984] SLR(R) 745 at [30] to be apposite:

> I now turn to the fourth issue: whether the words complained of were uttered on an occasion of qualified privilege? Mr Grimberg referred to the categories of qualified privilege as set

> out in *Duncan & Neil* (2nd Ed) p 92 para 14.01 and feebly argued that the defendant's statement fell within category (a) thereof, *ie* a statement made in pursuance of a legal, social or moral duty to a person who has a corresponding duty or interest to receive them, and cited *Stuart v Bell* [1891] 2 QB 341 in support. He sought to found the defence of qualified privilege on the fact that at the material time there was a by-election and that the defendant as a politician had a social duty to inform representatives of the media his assessment of the political opponents and that such representatives had a corresponding duty or interest to receive it. Such an argument I am unable to accept; it is really stretching the limits of the occasion of qualified privilege and extravagantly attributing to the defendant a social duty to make the statement complained of and to the representatives of the media a corresponding duty or interest to receive it. Assuming that the defendant, being at the material time "the principal PAP strategist for the Anson by-election" (as Mr Grimberg very attractively put it), had a social duty to make that statement to the representatives of the media, it is difficult to see how the latter had a corresponding duty or interest to receive it. Clearly they do not have …

124 I therefore find that the defendants are not entitled to the defence of qualified privilege in relation to the publication of the Police Report and the CEA Complaint to Cheam.

125 I turn to the question of malice. The defence of qualified privilege is defeated if the plaintiff can prove that the defendant was actuated by malice in the publication of the defamation. Malice can be taken to mean not just spite or ill-will, but any wrong or improper motive: see *Lee Kuan Yew v Davies Derek Gwyn and others* [1989] 2 SLR(R) 544 at [112]. This can be inferred by Simon's conduct at any time, such as his demeanour and attitude at trial or simply from the publication of allegations which are patently false: see *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2009] 1 SLR(R) 642 at [104] and [140].

126 Susan submits that the improper motive with which the defamatory statements were made was to improperly deprive her of her commission. She says that intention was formed as early as 25 August 2010, when Simon sent an email to Kay telling her to send him the Letter of Consent for the sale of the Properties to Jessica as soon as possible as he "really want[s] to close the deal before Susan Prior comes back with an alternative offer from Aurum Land". This was despite the fact that Jessica's offer of $32.5m was lower than that of Aurum's. She submits that the only logical explanation for this was that he wanted the commission from the sale for himself. This, she says, is a conclusion that is supported by Simon's subsequent conduct, which includes requesting Michelle not to let Susan know that they were dealing directly with each other and allowing her to continue marketing the property (as evidenced by his conduct of the viewing of the Properties on 4 January 2011). She also refers to the SBA's Minutes of Annual General Meeting & Extra Ordinary General Meeting held on 22 October 2011, which makes reference to a "Provision for Agents Commission up to a maximum of 2% of sales value" despite there being no estate agent involved at that time.

127 It is clear from Simon's actions that he deliberately wanted to keep Susan in the dark with regard to his direct dealings with Michelle. Simon did not deny this in cross-examination, explaining instead that Susan was not entitled to know as she was already out of the picture and had "breached the trust in the first place", and that he simply "play[ed] along". Such an ostensibly principled stand appears completely at odds with his conduct. He provided no credible explanation as to why he could not simply have confronted Susan about her purported forgery and terminated the agency then, or why he strung her along by leading her to believe that the Properties would not be sold in the

immediate future. As for the provision for a sales commission in the SBA's minutes of their general meeting, Mr Bhupinder Singh, who represented the SBA in their dealings with Simon, was highly evasive during cross-examination, only conceding that he had no knowledge of any other agents on the deal after repeated questioning. Even then, I found his evidence that the management committee had approved the commission agreement without having seen it to be incredible and at odds with what was presented in the minutes.

128 In any case, it is not necessary for me to find that Simon had defamed Susan for the improper motive of obtaining the commission for himself. I am satisfied, on the evidence, that he had at very least defamed her with the knowledge that those allegations were untrue, and probably with the motive of depriving her of her commission. Susan relies on *Basil Anthony Herman v Premier Security Co-operative Ltd and others* [2010] 3 SLR 110 ("*Basil*"), where the Court of Appeal held at [63] that a defamer cannot have formed an honest belief about his defamatory comments on the basis of facts which he could not have known at the time of the defamation. Accordingly, the allegations of forgery relating to Susan's acts of adding the commission clause and the commission agreement could not have been honestly believed since it did not even cross his mind at that time (see [55] above). I note, however, that it is possible for Simon to have had an honest belief that Susan had forged the Alleged Forged Option in another manner (*ie*, dishonestly including the 1% Option Release in Michelle's draft when none existed), which would militate against a finding of malice. That he subsequently sought to justify his defamatory statements by referring to the inclusion of the commission clause

and the commission agreement in the Alleged Forged Option is not inconsistent with that honest belief.

129 However, that is not the defendants' submission. They instead argue that the filing of the CEA Complaint could not have been malicious as Simon had first sought out CEA's views and only filed the complaint when CEA made clear that a complaint was in order. Similarly, they say that the filing of the Police Report could not have been malicious as he had been directed to do so by the CEA. To the extent that the defendants submit that he had only filed the CEA Complaint and the Police Report because he was directed to do so, I find that the facts do not support that conclusion. As discussed at [89] above, Simon had already indicated to Susan on 6 March 2011, prior to his correspondence with CEA on 9 March 2011 that led CEA to advise him that a complaint was in order, that he would be filing a complaint with the CEA. Likewise, even if the Police Report and the CEA Complaint were provided by him in response to a request by Cheam, the request was likely to have been for him to substantiate his allegations against Susan, as Simon's email to Cheam on 19 April 2011 telling her that she could "safely write a factual report against Susan without any worries" suggests. It would be perverse to find that one could insinuate wrongdoing and then claim that any defamatory material provided thereafter in support of those insinuations should be protected on the sole basis that they were given in response to a request.

130 Further, the CEA's advice was based solely on the facts given to them by Simon which included the defamatory allegation and even then, they were hardly unequivocal in telling Simon to lodge a complaint:

> On the other [hand], if you allege that the agent had fraudulently produce[d] documents and made unsubstantiated claims as to the authenticity of the documents, you may lodge a complaint with CEA and be prepared to produce/substantiate your allegation. …

131 The SMS messages referred to at [90] above also show that despite his claimed reluctance to file a complaint with the police, he was hardly coerced. If anything, he appeared to relish doing so. What I find to be most damning is his SMS message of 15 April 2011, which I have reproduced above at [91]. It is indicative of how he viewed the CEA Complaint and the Police Report – not as actions borne out of a civic duty, but as leverage to force Susan to abandon her claim for commission. In fact, Simon conceded in court that he had done so to "threaten her to get her off [his] back". Contrary to what the defendants submit, regardless of whether he had done so to get Susan to drop her claim for commission or simply to stop her from harassing him (as he claimed), either of these reasons would be sufficient to establish malice.

132 Even if I am wrong as to either of these motives, I am prepared to infer that his acts were malicious on the ground that he had no genuine belief in his claims of forgery. Even taking the defendants' case at its highest, I do not think that Simon had any genuine belief that Susan had forged the Alleged Forged Option in any way, at least at the time he made the defamatory statements. On 29 September 2010, he forwarded an email he received from Susan to Michelle, saying that "this is the email that was sent to me by Susan, with the Option attached, purportedly from you". That email contained Michelle's reply to Susan's email dated 8 September 2010 to which the Final Draft was attached, and it appears that he had done so to show Michelle evidence of what he believed to be (or was trying to represent as) Susan's act of forgery. Any such

belief he had would have been dispelled by Michelle's reply, which clarified that the Final Draft was in fact from Susan and that this was clear from the email itself. Indeed, his reply to Michelle and his evidence in court were that he understood Michelle's explanation. Yet he persisted in his claims.

133 More significantly, any remaining suspicions Simon had must surely have been put to rest by Michelle's emails to him on 30 March 2011 in response to receiving a copy of the Police Report, in which she corrected him on his account of events and expressly told him that "[t]o say that she forged the Option is probably not fair". He appeared to concede the lack of merits of his allegations in his reply, telling Michelle that he "fully agree[d]" with her. He attempted to qualify that statement during cross-examination by saying that he only fully agreed with her observation that the evidence was not watertight, an explanation that does not convince given that it goes against the plain meaning of his words. Having known of the falsity of his allegations, he not only made no attempt to withdraw his complaints but even escalated matters by forwarding them to Cheam. Clearly, malice on the part of Simon can be inferred in these circumstances and I so find. Therefore the defence of qualified privilege in relation to the Police Report and the CEA Complaint cannot stand.

Reply to attack

134 The defendants refer me to the case of *Penton v Calwell* (1945) 70 CLR 219, in which the High Court of Australia held that a person whose character or conduct has been attacked is entitled to respond and any defamatory statements made in that response will be privileged, provided they are relevant to the accusations levelled against him and are made *bona fide*. This right-of-reply privilege is a form of qualified privilege, and my finding of malice above is

sufficient to defeat this defence. I nevertheless make a few comments as to why this pleaded defence is fundamentally flawed.

135 The scope of the right-to-reply privilege is set out in *Review Publishing* at [155]–[156], where the Court of Appeal held that a defendant loses the protection afforded to him if he "goes *beyond defence* and proceeds to *offence*" [emphasis in original]. In this regard, even if I were to accept that Susan's actions at [28] constituted an attack on Simon and the Owners, his response by falsely alleging forgery clearly had no relevance to any allusions she made in respect of his purported deceit of the Official Assignee. As held in *Dwyer v Esmonde* (1878) 2 LR Ir 243 at 254 (cited in *Review Publishing* at [155]), the privilege "extends only so far as to enable him to repel the charges brought against him – not to bring fresh accusations against his adversary".

136 More critically, I have strong doubts as to whether the right-to-reply privilege applies where the reply is made to an attack that is addressed only to the respondent. This was not a case where Simon was responding to allegations made against him that were published to the public or indeed, any other person. This was a private email to which only one other person, who was likely Susan's solicitor at that time, was copied. It is again unnecessary for me to make any finding on this; even if the privilege were to apply, aside from the fact that Simon's replies were irrelevant to the attacks on him, the nature of his replies (in particular, by addressing them to third parties such as the media) would clearly be disproportionate.

The liability of the Owners

137 Susan refers to *Duncan and Neill on Defamation* (Rt Hon Sir Brian Neill *et al* eds) (LexisNexis, 3rd Ed, 2009) at para 8.10 for the following proposition:

> Every person who knowingly takes part in the publication of defamatory matter is prima facie liable in respect of that publication. Thus, for example, in the case of a libel in a newspaper the writer of the article and the proprietors, the editor and the printers of the newspapers are liable and so too, subject to any defence of innocent dissemination, are persons such as newsagents who sell the newspaper to the public. *A person who authorises or ratifies publication by another will be taken to have participated in it.* … [emphasis added]

138 But as the paragraph makes clear, that is not to say that a person who knowingly participates in the publication of defamatory material cannot avail himself of defences which the primary defamer may not be able to rely on. Specifically, on the facts of the present case, it may be argued that just because the defence of qualified privilege is defeated by Simon's malice may not necessarily mean that the Owners are precluded from this defence. That is, the Owners' participation in the publication of the defamatory material in respect of the filing of the CEA Complaint and the Police Report could be protected by qualified privilege if there is no evidence of malice on their part.

139 Neither party addressed me on this point. However the onus lies on Susan to prove malice in relation to any defendant who has otherwise established the defence of qualified privilege. The evidence of malice comes from acts carried out by Simon. Although the Owners had confirmed that Simon was authorised to act for them, such authorisation does not normally extend to malicious acts and there is no evidence that it has in this case. Indeed, the

evidence of the Owners was that they did not have personal knowledge of the dealings between Simon and the other parties; they state that they had been informed by Simon that Susan had forged a draft option and were told by Simon that "for the purposes of protecting [their] interests and to have the entire matter … thrashed out, it would be best to lodge a complaint against Susan with the [CEA]". Accordingly, they signed a letter authorising Simon to "take all necessary steps to protect [their] interests":

> RE: 110-126 (Even Numbers Only) Sophia Road – Letter of Authority
>
> Reference is made to the above. We the undersigned, who are the legal owners of the 9 properties hereby confirm that we authorise [Simon] to represent us with regards to the claim for commission by [Isabel Redrup]. And we are stating that the sale to Aurum Land was not brought about by [Isabel Redrup] and as such, no commission will be payable.
>
> With this letter, we also authorise [Simon] to [liaise] with our lawyers with regards to the claim of commission *as well as the filing of charges and complain[t]s with the [CEA], the Singapore Police Force as well as to any other governmental agencies and public media as may be deem[ed] appropriate*.
>
> [emphasis added]

140 I find that Susan has failed to prove that the Owners had acted with malice in authorising Simon's acts of filing the CEA Complaint and the Police Report. Consequently, they are not liable in relation to that publication. However, as the defence of qualified privilege is not available in relation to the publication to Cheam, the Owners are liable in relation to that act. All of the defendants in S 381 are therefore jointly liable in defamation in relation to the publication to Cheam of the Police Report and the CEA Complaint. In relation to the publication of the defamation to the police and the CEA, I find Simon to be liable as he was actuated by malice.

141 While this is sufficient to dispose of S 381, I nonetheless wish to record some brief observations in respect of Susan's alternative claims.

Malicious Falsehood

142 The elements that must be established for a claim in malicious falsehood to succeed are set out in *WBG Network (Singapore) Pte Ltd v Meridian Life International Pte Ltd and others* [2008] 4 SLR(R) 727 at [68], and are as follows:

(a) the defendant published to third parties words which are false;

(b) they refer to the claimant or his property or his business;

(c) they were published maliciously; and

(d) special damage has followed as a direct and natural result of their publication.

143 I have already held in respect of the claim for defamation that the offending statements in the Police Report and the CEA Complaint were false and made maliciously. Clearly, there can be no doubt that they refer to Susan given that she is referred to in those documents by name. The only issue that has to be addressed is whether special damage has followed as a direct and natural result of their publication.

144 Susan submits that she is not required to prove special damage given that the elements of s 6(1)(*b*) of the Defamation Act (Cap 75, 2014 Rev Ed) ("Defamation Act") are made out. That is, the words were "calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling,

trade or business held or carried on by [her] at the time of the publication". It should be pointed out that the words "calculated to" do not refer to an intention by the statement-maker to cause pecuniary damage, but have been interpreted to mean "likely to produce the result": see *Low Tuck Kwong v Sukamto Sia* [2014] 1 SLR 639 at [112]. I also note that Susan could also have availed herself of s 6(1)(*a*) of the Defamation Act given that the offending words are in writing, but I do not think that makes a material difference in this case. As she highlights, "to [allege] that the Plaintiffs forged an option [agreement] – the contractual document at the core of the real estate agency business conducted by the Plaintiffs – strikes at the heart of the Plaintiffs' competence and integrity as experienced practitioners in real estate agency". There is therefore no doubt that the CEA Complaint and the Police Report were likely to cause pecuniary damage to Susan, whether in respect of her profession, trade or business, or otherwise.

Conspiracy

145 The elements required to establish a conspiracy by unlawful means are set out in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [112]:

(a) there was a combination of two or more persons to do certain acts;

(b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;

(c) the acts were unlawful;

(d) the acts were performed in furtherance of the agreement; and

(e) the plaintiff suffered loss as a result of the conspiracy.

146 Susan states that the S 381 conspiracy claim is materially similar to that for S 755. I agree, but only to the extent that she says the defendants conspired to defame or publish malicious falsehoods of her *in order to* deprive her of her commission. Much of the evidence which she says is proof of a conspiracy between Simon and the Owners in fact relate to a conspiracy to deprive Susan of her commission independent of the defamatory statements. They include:

(a) Simon's instructions for Michelle not to communicate any further with Susan as set out at [20] above.

(b) Simon's purported lie to Michelle that there were no other interested buyers as set out at [54] above.

(c) Simon's conduct of the viewing of the Properties on 4 January 2011 with the participation of some owners.

(d) Simon's emails to Susan in January 2011 which deceived Susan into thinking that he and the Owners were not selling the Properties anymore and had stopped negotiations with Aurum.

(e) The defendants' act of keeping Susan in the dark about the negotiations with Aurum.

(f) Simon's correspondence to Susan (some of which are set out at [88]–[91]) which were "designed to intimidate her into backing down on her claim for commission".

(g) Simon's acts of filing the CEA Complaint and the Police Report and forwarding the same to Cheam, which was done with the authority of the Owners.

(h) The defendants' refusal to pay the commission, which was unlawful as it amounted to breach of contract.

(i) The provision for a sales commission in the SBA's minutes of their general meeting referred to at [126] above, which is evidence that the Owners had conspired to deprive Susan of her commission so that it could be awarded to Simon instead.

147 The defendants, on the other hand, say that Susan has not provided any evidence to contradict their position that they had left all dealings to Simon and that they had signed the authorisation form to protect their interest. It escapes me as to what the significance of the latter is, but it is clear that the former is incorrect. Even putting aside the facts highlighted above, there is strong evidence as set out at [139]–[140] that the defendants had conspired to injure Susan. The difficulty for Susan, however, lies in proof of loss. As far as a conspiracy to defame Susan is concerned, it has been held that a claimant cannot claim for damage to reputation and feelings in an action for conspiracy: see *Lonrho PLC and others v Fayed and others (No. 5)* [1993] 1 WLR 1489. As for a conspiracy to deprive Susan of her commission, as I allude to at [86], there is no loss suffered by Susan given that I have found that she has not lost her entitlement to the same, a finding that also disposes of her claim for misrepresentation in S 755.

Remedies

148 Susan refers me to the damages awarded in four defamation cases, which comprise *Arul Chandran, Ei-Nets Ltd and another v Yeo Nai Meng* [2004] 1 SLR(R) 153 ("*Ei-Nets*"), *Yeap Beng San Louis v Choo Pit Hong Peter* [1999] 1 SLR(R) 397 ("*Louis Yeap*") and my decision in *ATU and others v ATY* [2015] 4 SLR 1159 ("*ATU*"). The damages awarded (inclusive of both general and aggravated damages) in these cases range from $40,000 to $150,000. However, Susan says the exceptional facts in this case warrant an award of general damages of at least $400,000 and aggravated damages of at least $200,000, an award which they admit to be exceptional.

149 With respect, I fail to see how the facts of the present case warrant an award that not only dwarves the damages that have been awarded to professionals for defamation but even exceeds those awarded to the Prime Minister, to whom damages for defamation have been awarded on a consistently higher basis: see *Lim Eng Hock Peter v Lin Jian Wei and another and another appeal* [2010] 4 SLR 357 ("*Peter Lim*") at [12], [15] and [17].

150 First, as I observed in *ATU* at [44], the damages falling at the higher end of the spectrum to non-politician plaintiffs were justified on the basis that the plaintiffs were prominent businessmen. While I do not seek to downplay Susan's professional standing, I note that the plaintiff in *Peter Lim* was a business luminary who was a prominent figure in the stockbroking industry and was frequently cited by Forbes Asia as one of the richest men in Singapore and Asia. He was awarded $140,000 for general damages and $70,000 for aggravated damages. To a lesser extent, the plaintiff in *Ei-Nets* was a businessman holding positions of responsibility in public and private

organisations. He was awarded $80,000 for false allegations of fraud and dishonesty that were distributed only to a limited number of other directors and staff. The plaintiff in *Arul Chandran* was also of significant standing, being an advocate and solicitor of more than 30 years and who was then the vice-president of the Tanglin Club. He was awarded $100,000 as general damages and $50,000 as aggravated damages for statements that portrayed him as an extremely vicious and dangerous fraud. As established as Susan may be as a real estate agent, I do not think it could be seriously contended that her standing approaches that of these plaintiffs.

151 Second, the reach of the defamatory statements in the present case is highly restricted. The evidence shows that the defamatory statements would only have been published to the investigating police officer, the officer who dealt with the CEA Complaint and Cheam. The reach of the defamatory material is therefore far more limited than that in *Arul Chandran* and *Peter Lim*.

152 Third, as heinous as the nature of the allegations in the present case may be, I note that the allegations in *Arul Chandran* and *Ei-Nets* similarly involved allegations of dishonesty and fraud, which is also a criminal offence. Indeed, one might say that the egregiousness of the alleged conduct is less than that alleged in *ATU*, which involved allegations of sexual abuse of children.

153 Fourth, the facts are far more analogous to those of *Louis Yeap*, which involved a complaint to the Council of the Association of Singapore Realtors ("ASR") as well as letters to the plaintiff's solicitors, for which the ASR, the Singapore Institute of Surveyors & Valuers and the Association of Singapore Real Estate Agents were copied. The complaint and the letters alleged that the managing director of a real estate agency had breached the code of conduct and

ethics of housing agents by conspiring to deprive the defendant of his commission. They also alleged that the plaintiff had unjustifiably disparaged the defendant and lied. The defence of qualified privileged was found not to apply as the publications had been actuated by malice. The plaintiff was awarded $40,000 by way of damages and costs.

154 In relation to the publication by Simon to the police and the CEA, I find that damages in the sum of $30,000 to be the appropriate sum in the circumstances. As for the publication to Cheam, it being to one person, I find that the appropriate amount would be $10,000. I therefore order Simon to pay damages in the sum of $30,000 and all of the defendants to pay damages in the sum of $10,000.

155 With regard to the prayer for an injunction, Susan has not established that the defendants have or are likely to repeat the defamatory statements. This is a one-off case of publication and the circumstances are such that there is little likelihood of any such repetition. And any further publication would render the defendants liable to damages under a new cause of action. There is therefore no need for an injunction to issue in the present case.

156 I will hear counsel on the question of costs.

Lee Seiu Kin
Judge

Yeoh Oon Weng Vincent (Malkin & Maxwell LLP) for the plaintiff in S 755/2011;
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Suresh s/o Damodara (Damodara Hazra LLP) for the defendants in both suits.
