IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 68

Civil Appeal No 160 of 2016

Between

Centre for Laser and Aesthetic Medicine Pte Ltd

… *Appellant*

And

(1) GPK Clinic (Orchard) Pte Ltd
(2) Goh Pui Kiat
(3) Wong Hwee Leng

… *Respondents*

Civil Appeal No 47 of 2017

Between

(1) Goh Pui Kiat
(2) Wong Hwee Leng
(3) GPK Clinic (Orchard) Pte Ltd

… *Appellants*

And

Centre for Laser and Aesthetic Medicine Pte Ltd

… *Respondent*

JUDGMENT

[Civil Procedure] — [Costs] — [Principles]

[Contract] — [Contractual terms] — [Express terms] — [Interpretation]

[Equity] — [Fiduciary relationships] — [Duties]

[Tort] — [Confidence] — [Breach]

[Tort] — [Conspiracy] — [Unlawful means conspiracy]

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v
GPK Clinic (Orchard) Pte Ltd and others and another appeal

[2017] SGCA 68

Court of Appeal — Civil Appeal Nos 160 of 2016 and 47 of 2017
Sundaresh Menon CJ, Tay Yong Kwang JA, Steven Chong JA
19 October 2017

1 December 2017 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

Introduction

1 It is not uncommon to find clauses in an agreement which seemingly conflict with each other. When that arises, how should the conflict be resolved, especially if the consequence of giving effect to one clause would defeat or emasculate the substance of another clause? Should the court take into account the parties' subjective understanding of the ambit of such clauses or the parties' subsequent conduct in order to reconcile the discord as contended by the parties? Curiously, the parties seek to rely on these matters to achieve opposing interpretations.

2 This conundrum lies at the heart of the two cross appeals before us. Two doctors specialising in aesthetic treatment co-owned and operated two clinics, one of which is the appellant company, the Centre for Laser and Aesthetic

Medicine Pte Ltd ("CLAM"). In 2013, a dispute arose between the two doctors which led to the commencement of an earlier set of legal proceedings. Thereafter, a settlement agreement ("the Agreement") was concluded between the two doctors on 14 February 2014 to resolve the dispute following a successful mediation.

3 The Agreement is essentially an exit arrangement whereby the two doctors were to procure the sale of the two clinics at a minimum price of $6m by 31 December 2016. Pending the sale of the two clinics, the two doctors were obliged to continue to fulfil their respective responsibilities to the two clinics on their assigned days. However, recognising the impending parting of ways, both doctors agreed that they would, in the meantime, be allowed to set up their own competing clinics.

4 It will be immediately apparent that the presence of a clause in the Agreement which obliged the doctors to continue with their responsibilities to the two clinics together with a clause which permitted them to operate competing clinics was a recipe for further disputes. This was precisely the root cause of the present action. Ironically, perhaps in anticipation of such disputes, a further provision was drafted into the Agreement to prevent the doctors from raising any allegation or claim in respect of diversion of patients from the two clinics to the new clinics.

5 One of the two doctors, Dr Goh Pui Kiat ("Dr Goh PK" or "the first defendant"), set up his new clinic, GPK Clinic (Orchard) Pte Ltd ("GPK Clinic"), two doors away from the clinic operated by CLAM. This was permitted under the Agreement. He then copied the patient and inventory database of CLAM without the permission of the other doctor, Dr Kelvin Goh

Yong Chiang ("Dr Kelvin Goh"). Using the information in the database, the first defendant actively diverted patients from CLAM to GPK Clinic. Thereafter, CLAM, which is strictly not a party to the Agreement, commenced the present action against the first to third defendants: respectively, Dr Gok PK, his wife Wong Hwee Leng ("Mdm Wong") and GPK Clinic (collectively, "the defendants").

6 The High Court Judge ("the Judge") found the first and third defendants liable to CLAM for breach of confidence and for conspiracy to injure with regard to the unauthorised copying of the database. However, he dismissed the claim in respect of the diversion of patients on the basis that the Agreement *expressly* permitted such diversion (see *Centre for Laser and Aesthetic Medicine Pte Ltd v Goh Pui Kiat and others* [2017] SGHC 72 at [34] ("the GD")).

7 Both parties appealed against the decision though the defendants' appeal is only against the costs order. CLAM's principal argument on appeal is that the clause which precludes the parties under the Agreement from raising any allegation or claim for diversion of patients cannot be read to mean that the parties are at liberty to *actively* divert patients to their new clinics with impunity. That is because the effect of such a construction would deplete the two clinics of their patients and thereby defeat the main purpose of the Agreement, which was to facilitate the disengagement of the doctors' existing relationship in a controlled and mutually beneficial manner over a period of almost three years, culminating in a sale of the two clinics at a minimum price of $6m. The defendants, on the other hand, maintain that diversion of patients is inherent in the competition which is expressly permitted under the Agreement and, accordingly, CLAM's interpretation is untenable.[1] The defendants further

accept that the impact of their submission is that the parties "did not owe the *same duties* to CLAM as they did prior to the [Agreement]" and that "[t]hey could *harm* CLAM by competing against it" [emphasis added].[2]

8 This is precisely the tension which this Judgment will address. The court's role is to examine the clauses so as to give effect to the Agreement construed as a whole. In doing so, we will examine the utility, if any, of the parties' subjective understanding of the clauses as well as their subsequent conduct in order to derive the proper construction and interpretation of the Agreement. In the final analysis, the pivotal inquiry is whether the terms of the Agreement permitted the parties to "harm" CLAM notwithstanding their fiduciary duties to CLAM.

Material Background Facts

9 Dr Kelvin Goh and Dr Goh PK (collectively, "the doctors") worked at Orchard MD Clinic & Surgery Singapore ("the Orchard Clinic") on different days, such that one of them would be on duty at the Orchard Clinic on any given day of the week.[3] The Orchard Clinic was owned by CLAM, which in turn was owned in equal shares by the doctors' wives: Dr Kelvin Goh's wife, Goh Sok Ngoh Jacqueline ("Ms Jacqueline Goh"), and Dr Goh PK's wife, Mdm Wong. Ms Jacqueline Goh and Mdm Wong are registered directors of CLAM, while Dr Kelvin Goh and Dr Goh PK are *de facto* directors of CLAM.[4]

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1 The defendant's case in CA 160/2016 at para 81; the defendant's skeletal arguments at para 7.

2 The defendant's skeletal arguments at para 19.

3 Joint Core Bundle ("JCB") Vol II at p 90–91, para 6.

4 JCB Vol II at p 89, para 3.

10 The doctors also worked at 8-11 Clinic & Surgery ("8-11 Clinic"), which they co-owned through Medical Practice Consultants Pte Ltd ("MPC"). Both 8-11 Clinic and the Orchard Clinic ("the Clinics") focused on providing aesthetic treatments.

11 On 8 November 2013, Dr Goh PK commenced Suit No 1023 of 2013 ("Suit 1023/2013") against Dr Kelvin Goh. In this suit, Dr Goh PK alleged, *inter alia*, that Dr Kelvin Goh had diverted the business of the Clinics to his own business, SkintechMD Pte Ltd ("Skintech"). Skintech is an online shop which allegedly sold products that were similar to the products sold by the Clinics.[5]

12 On 14 February 2014, to settle Suit 1023/2013, the doctors and their wives entered into the Agreement.[6] The Agreement provided, in essence, that the parties would attempt to sell MPC and CLAM ("the Companies") by 31 December 2016 at a price of no less than $6m, failing which a closed auction between the parties would be conducted in January 2017. Clause 7 of the Agreement ("cl 7") provided that in the interim, the parties "shall duly continue with and fulfil their full responsibilities, arrangements and operations of [the Clinics]". On the other hand, cl 10 of the Agreement ("cl 10") also provided that the parties "shall be entirely at liberty to set up any other business or clinics in any location in Singapore. For the avoidance of doubt, none of the Parties shall make any allegations or make any claim in respect of diversion of patients/customers from [the Companies]".[7]

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5 JCB Vol II at pp 91–92, para 8.

6 JCB Vol II at p 92, para 9.

7 JCB Vol II at pp 92–93, paras 10–11.

13 Subsequently, Dr Goh PK set up GPK Clinic two units away from the Orchard Clinic. GPK Clinic commenced operations on 19 May 2014.[8] Dr Goh PK diverted patients from the Orchard Clinic to GPK Clinic, where he worked even on his assigned days at the Orchard Clinic. He also used confidential information from the Orchard Clinic to divert its patients to GPK Clinic. GPK Clinic was owned by Dr Goh PK and Mdm Wong through GPK Clinic (Orchard) Pte Ltd ("GPKPL").[9]

14 In response, Dr Kelvin Goh caused CLAM to commence the present action, Suit No 672 of 2015 ("Suit 672/2015"), against Dr Goh PK, Mdm Wong and GPKPL.[10] The following claims were brought by CLAM (the GD at [4]):

> (a) [Dr] Goh PK breached his fiduciary duties and/or duty of good faith and fidelity by (i) failing to perform his work at Orchard Clinic since May 2014, (ii) diverting Orchard Clinic patients to GPK Clinic and (iii) poaching and/or soliciting employees away from CLAM.
>
> (b) [Dr] Goh PK knowingly procured and/or induced CLAM's employees to breach their contracts of employment by instructing them to direct patients and prospective patients of CLAM to GPKPL.
>
> (c) [Dr] Goh PK, [Mdm] Wong and GPKPL breached their duty of confidentiality to CLAM by improperly copying, using, reproducing, disclosing and/or disseminating CLAM's information relating to its patients and its products.
>
> (d) [Mdm] Wong breached her fiduciary duties to CLAM in connection with the above matters.
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> (e) [Dr] Goh PK, [Mdm] Wong and GPKPL conspired with intent to injure CLAM by the above unlawful acts.

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8 JCB Vol II at p 98, para 25; the GD at [23(b)].

9 JCB Vol II at p 95, para 16.

10 JCB Vol II at pp 93–94, paras 13–15.

The Decision Below

15 The Judge made the following findings (the GD at [5]):

(a) Dr Goh PK and GPKPL were liable for breach of confidentiality and for conspiracy to injure CLAM through Dr Goh PK's breach of confidentiality.

(b) All of CLAM's other claims were dismissed.

(c) Parties were to compute the amount of damages to be paid to CLAM based on certain parameters set out by the Judge (reproduced below at [78]). The parties subsequently agreed on the computation of damages at $193,481.38.

(d) Information relating to patients who had not seen Dr Goh PK at GPK Clinic as of the date of the Judge's decision was to be deleted from the defendants' computers and/or other electronic devices, or destroyed if the information was in hardcopy. The Judge also granted an injunction restraining the defendants from using any such information without prior authorization from CLAM.

16 In relation to costs, the parties agreed on the sum of $120,000 as the full party and party costs excluding disbursements (the GD at [62]). The Judge then made the following costs orders:

(a) CLAM was entitled to recover 40% of its costs, inclusive of the fees paid to its expert, Mr John Temple-Cole ("Mr Temple-Cole") (the GD at [69]–[70]).

(b) Party and party costs paid by Dr Goh PK and GPKPL to CLAM were to be used to satisfy CLAM's outstanding obligations for solicitor and client costs. Any balance thereafter was to be used to reimburse Dr Kelvin Goh for any costs that he had paid on behalf of CLAM (the GD at [72]).

17 Dissatisfied with the outcome, both CLAM and the defendants appealed against the Judge's decision.

The Issues

18 Civil Appeal No 160 of 2016 ("CA 160/2016") is CLAM's appeal against the dismissal of its claims, save for its claim relating to the poaching of its employees. These claims relate to its allegations that Dr Goh PK wrongfully failed to work at the Orchard Clinic on his assigned days and wrongfully diverted patients from the Orchard Clinic to GPK Clinic on those days (collectively, "the Diversion Claims"), GPKPL's conspiracy with Dr Goh PK to injure CLAM through the Diversions Claims, as well as Mdm Wong's involvement in both the Diversion Claims and Dr Goh PK's breach of confidentiality.[11]

19 On the premise that CLAM succeeds in these appeals, CLAM also appeals against the order in respect of the damages awarded amounting to $193,481.38 and the order awarding CLAM only 40% of its costs and disbursements for the trial below.[12]

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11 CLAM's case in CA 160/2016 at [7] and [123].

12 CLAM's case in CA 160/2016 at paras 7, 138 and 161(b).

20 Civil Appeal No 47 of 2017 ("CA 47/2017") is the defendants' appeal against the costs orders of the Judge as summarised above at [16]. Specifically, the defendants contend that:[13]

(a) CLAM should only be awarded 20% of the costs, instead of 40%;

(b) costs awarded to CLAM should exclude Mr Temple-Cole's fees; and

(c) CLAM should not be ordered to reimburse Dr Kelvin Goh for expenses that he incurred on behalf of CLAM.

Our Decision

The Diversion Claims

21 As defined above at [18], the Diversion Claims consist of, first, a claim in respect of Dr Goh PK's failure to work at the Orchard Clinic and, secondly, a claim in respect of his diversion of patients to GPK Clinic. The facts underlying both claims are closely related. The material facts are described together in the parties' Agreed Statement of Facts as follows. After describing the duties that Dr Goh PK *did* perform at the Orchard Clinic on his assigned days (set out below at [29]), the Agreed Statement of Facts states:[14]

> [Goh PK] would also spend time at GPK Clinic seeing patients there. If a patient arrived at the Orchard Clinic, the staff of the Orchard Clinic would inform him and he would then either attend to them at the Orchard Clinic, or ask the staff of the Orchard Clinic to send the patients to GPK Clinic.

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13 The defendants' case in CA 47/2017 at paras 9 and 47–48.

14 JCB Vol II at p 98.

22 Thus, the two claims are factually intertwined. Additionally, in terms of legal analysis, it is also clear from the GD (at [24] and [33]) and the parties' respective cases on appeal that the interpretation of the same clause, *ie*, cl 10, is central to both claims. Both claims turn on whether cl 10 permitted Dr Goh PK to act in the manner described above (and as elaborated below at [58]).[15]

23 Additionally, the alleged losses suffered by CLAM under both claims are the same: the loss of profits from Dr Goh PK's failure to work at the Orchard Clinic on his assigned days overlaps with CLAM's loss of profits from Dr Goh PK's diversions, since the underlying allegation is that Dr Goh PK failed to work at the Orchard Clinic *while* he diverted the Orchard Clinic's patients to GPK Clinic and treated them there. This observation is supported by the fact that the expert reports adduced by both parties for the purposes of assessing CLAM's losses did not distinguish between the two claims in their computation of losses.[16] For the foregoing reasons, we will treat both claims collectively as the Diversion Claims.

Were the parties permitted to actively divert patients from CLAM?

24 Ordinarily, *any* diversion of CLAM's business to GPKPL would *necessarily* constitute a breach of Dr Goh PK and Mdm Wong's duties to CLAM. It would *still* be a breach if the doctors were merely permitted under the Agreement to set up competing clinics pending the completion of the sale of the Companies; that would by implication cover the parties' treatment of patients

15 For the claim for failure to work on assigned days, see defendants' case in CA 160/2016 at para 16 and CLAM's case in CA 160/2016 at paras 75–77. For the claim for diverting patients, see the defendants' case in CA 160/2016 at paras 23–63 and CLAM's case in CA 160/2016 at paras 78–113.

16 JCB Vol II at pp 74–79 (CLAM's expert report); JROA Vol III Part B at p 228 (the defendants' expert report).

who patronised the competing clinics without any solicitation by the doctors, but it would not, without more, cover active diversion. A defence based on that alone would be unsustainable. In the present case, however, the contract goes further than that by including the rather unusual proviso, in cl 10, that "[f]or the avoidance of doubt, none of the Parties shall make any allegation or make any claim in respect of diversion of patients/customers from MPC or CLAM" ("the cl 10 proviso"). Moreover, it is common ground between the parties that, even though CLAM is not a party to the Agreement, the Agreement can alter the contents of the directors' duties to CLAM.

25 Consequently, the key inquiry in these cross appeals is whether the cl 10 proviso altered Dr Goh PK and Mdm Wong's obligations to CLAM such that they were effectively permitted to cause harm to CLAM notwithstanding their continuing fiduciary duties.

The competing interpretations of cl 10 of the Agreement

26 For ease of reference, we reproduce, in full, cl 10 and cl 7 of the Agreement. Clause 10 provided:[17]

> The Parties shall be entirely at liberty to set up any other business or clinics in any location in Singapore. For the avoidance of doubt, none of the Parties shall make any allegations or make any claim in respect of diversion of patients/customers from MPC or CLAM.

27 Clause 7 provided:[18]

> For as long as the Clinics have not been sold pursuant to Clauses 2 or 4 above, the Parties shall duly continue with and

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17 JCB Vol II at pp 116–117.

18 JCB Vol II at p 116.

> fulfil their full responsibilities, arrangements and operations of [8-11 Clinic] and [the Orchard Clinic]. [Abbreviations omitted]

28 In interpreting cl 10, it is necessary to reconcile the tension between cl 10 and cl 7. The latter obliged the parties to "fulfil their *full* responsibilities" [emphasis added] to the Clinics, while cl 10 allowed them to start competing businesses and contemplates that patients/customers may be diverted from the Companies. Ordinarily, if a doctor (who is a director of one clinic) diverts its patients to another clinic, he would, *ipso facto*, be in breach of his "full responsibilities" as a director to the first clinic. Clearly, it would not be possible to ascribe both clauses their ordinary and literal meanings. How then should these two clauses be read harmoniously in light of each other?

29 The Judge resolved this conundrum by ascribing a minimalist interpretation to cl 7 to justify his expansive reading of cl 10. The Judge held that cl 7 only applied "where patients chose to continue to be treated at Orchard Clinic. In such cases, [Dr] Goh PK was obliged to attend to these patients at Orchard Clinic on his assigned days" (the GD at [33]). In addition, although the Judge did not state this expressly, he presumably also considered that cl 7 obliged Dr Goh PK to perform the following basic tasks at the Orchard Clinic which Dr Goh PK in fact performed (the GD at [23(b)]):

> … report for work at Orchard Clinic on his assigned days, attend to administrative tasks, see certain patients who had made appointments to see him and sign the daily cash ledgers of Orchard Clinic against the figures showing the takings of the clinic on his assigned days.

30 Apart from the foregoing, under the Judge's expansive interpretation of cl 10, the parties were permitted to "to set up competing clinics and to also divert patients from CLAM and MPC" (the GD at [32]). This meant that Dr Goh PK

could work at GPK Clinic even on his assigned days at the Orchard Clinic (the GD at [24]).

31 Against this, CLAM submits that the clauses should be interpreted in a manner that gave cl 7 precedence over cl 10.[19] Clause 7 should be interpreted broadly to mean that the "parties had to continue to comply with their responsibilities and earlier arrangements".[20] This meant that Dr Goh PK was obliged to be at work and see patients at the Orchard Clinic during his assigned days, and consequently could not work at GPK Clinic on those days.[21]

32 Correspondingly, under CLAM's interpretation, cl 10 is to be interpreted narrowly to mean that the "parties would not, by mere reason of starting a competing business, *ipso facto* be in breach of their duties to CLAM or MPC if diversion occurs".[22] This kind of "passive diversion"[23] (which was permitted) is to be contrasted with "active diversion", which refers to promoting or selling of a competing product or service in preference to the Orchard Clinic.[24] Active diversion was not permitted under cl 10, and was prohibited under cl 7.

The underlying purpose of the Agreement

33 In *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR

19 CLAM's case in CA 160/2016 at para 52.

20 CLAM's case in CA 160/2016 at para 94.

21 CLAM's case in CA 160/2016 at paras 75–76.

22 CLAM's case in CA 160/2016 at para 49.

23 CLAM's skeletal arguments at para 25.

24 CLAM's case in CA 160/2016 at para 99.

1187, this court made clear (at [32]) that "although the relevant context is also important, the text ought always to be the first port of call" [emphasis omitted] for the purposes of interpreting the terms of a contract. Where "the text concerned might itself be ambiguous (*ie*, without even considering the relevant context) … the relevant context will generally be of the first importance" [emphasis omitted] (at [34]). This court also warned against taking the preceding propositions too far, as the "text and context would often interact with each other", and that the "process of contractual interpretation is a dynamic one" [emphasis omitted] (at [35]). Finally, it was observed (at [31]) that "there may be *exceptional cases* where the text is so clearly plain and unambiguous that the court is compelled to give effect to the meaning contained therein, *notwithstanding* that an *absurd* result would ensue" [emphasis in original].

34 To address this tension between cll 7 and 10, which at first sight might appear to give rise to some ambiguity, it is crucial to examine the underlying purpose of the Agreement. In *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR (R) 1029 ("*Zurich Insurance*") at [131], this court endorsed the application of the usual canons and techniques of contractual interpretation, as summarised in Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2007) at paras 1.124 to 1.133. Two principles are particularly relevant in the present case. The first is that "due consideration is given to the *commercial purpose* of the transaction or provision. The courts have regard to the overall purpose of the parties with respect to a particular transaction" [emphasis added in original], and the second is that "a construction which leads to very unreasonable results is to be avoided *unless it is required by clear words and there is no other tenable construction*" [emphasis added]. In our view, it is clear that the underlying purpose of the Agreement is to

facilitate the exit arrangement of the two doctors *via* the sale of the Companies as going concerns. This can readily be discerned from the text of the Agreement itself. In undertaking the examination of cl 10, two critical inquiries must be borne in mind. Did the text of cl 10 provide in "plain and unambiguous" terms that active diversion of patients by the parties was permitted? And did the text or context of cl 10 amount to an "exceptional case" to permit the parties to take steps to cause actual harm to the Companies?

35 Clauses 2 to 5 of the Agreement set out the process as well as the details of a prospective sale of the Companies. Clause 2 of the Agreement provided that the parties "shall have up to 31 December 2016 to procure a sale of MPC and CLAM to any prospective purchaser that *meets a minimum agreed consideration price of S$6,000,000.00* …" [emphasis added], while cl 3 of the Agreement obliged the parties to enable a sale pursuant to cl 2 of the Agreement. If the sale under cl 2 of the Agreement did not take place, cll 4 and 5 provided for the Companies to be sold by way of a closed auction amongst the parties.[25]

36 From the foregoing, it is plain that the underlying purpose of the Agreement was to procure the sale of the Companies as going concerns. The corollary to this purpose would oblige the parties to preserve the value of the Companies in the interim. Otherwise, if the parties were free to extract or destroy the value of the Companies in the meantime, the object of selling the Companies at the minimum price of $6m would be in serious jeopardy. Indeed, this purpose was borne out by cl 7 which obliged the parties to continue working for the Companies at the Clinics until the Companies were sold. That obligation

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[25] JCB Vol II at pp 114–116.

only ceased, under cl 6 of the Agreement, *upon the sale of the Companies* and not any earlier.[26]

37 The defendants dispute this characterisation of the Agreement. They submit that the clear and predominant purpose of the Agreement "was for the parties to end their partnership and carry on practising in new clinics separately from each other". The sale of the Companies was, in the defendants' submission, "simply a by-product of [this purpose] … [t]hey were in existence and therefore had to be sold".[27]

38 The defendants' submission ignores the fact that cl 2 of the Agreement did not just contemplate *any* sale: a minimum price of $6m was stipulated. As earlier stated, the target sale price indicates the importance of preserving the value of the Companies in the interim.

39 Seen in this light, the Judge's expansive reading of cl 10 would do impermissible violence to the underlying purpose of the Agreement. As we elaborate below at [42], the court will be slow to conclude that such an outcome was intended unless it was expressed in explicit language. For this reason, we turn our attention to examine the language of cl 10.

The proper construction of the cl 10 proviso

40 It is significant to note that nowhere in cl 10 did it expressly state in *positive language* that the parties were entitled to divert any patient from CLAM. The crux of the dispute was whether such an entitlement can be read

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[26] JCB Vol II at p 116.

[27] The defendants' case in CA 160/2016 at para 45.

into cl 10 as a matter of construction. As a starting point, the cl 10 proviso was situated within cl 10, which provided that the parties were at liberty to set up competing clinics, and began with the words "[f]or the avoidance of doubt". Further, the cl 10 proviso must be read in the light of the reality that if either of the doctors set up a competing clinic, some of their existing patients would inevitably end up being served in that new clinic. For reasons we explore in detail below, we find that on its true construction, the cl 10 proviso was intended only to preclude both parties from making any allegation or claim in respect of diversion of patients *in those circumstances*, recognising that it was unavoidable that existing patients of the Clinics may choose to be treated in the new clinics. In other words, the cl 10 proviso was to serve a very limited purpose to prevent the parties from making allegations or claims from the mere fact of patients being served by the new clinics – in other words, "passive diversion", as CLAM put it (see above at [32]).

41 This construction was rejected by the Judge because he opined that if patients, on their own accord, sought treatment in the new clinics, that would not be diversion to begin with (the GD at [30]).With respect, this is where the Judge fell into error. He assumed that the cl 10 proviso presupposed a right to divert patients. This is not correct. The cl 10 proviso instead was to prevent the parties from raising allegations or making diversion claims against each other given the inevitability of patients being treated in the new clinics arising from the right of the parties to set up competing clinics.

42 The defendants accept that the effect of their submission is that the cl 10 proviso not only changed their duties to CLAM but in fact permitted them to wilfully harm CLAM. Once the stark reality of the defendants' submission is

placed in this light, it will be immediately apparent that it will require very clear language in the Agreement to support such a construction.

43 Such clear language is not present. On the contrary, the language of cl 10 clearly points *away* from the defendants' proposed interpretation. The cl 10 proviso begins with the phrase "[f]or the avoidance of doubt". This is an indication that the proviso was either unnecessary (see *Phoenix Media Ltd v Cobweb Information Limited* (High Court (England and Wales), 16 May 2000 (unreported)) at [37], *per* Neuberger J (as he then was), cited with approval in *City of York Council v Trinity One (Leeds) Ltd* [2017] EWHC 318 (Ch) at [50]) or was included to avoid or dispel doubts which may have been created by the preceding sentence. In the latter scenario, the proviso would be interpreted in light of the doubt that it was intended to avoid (*Shailesh Gondhia & Others v Esso Petroleum Company Limited* [2001] EWCA Civ 1070 at [52]–[60], *per* Chadwick LJ).

44 In the present case, the first sentence of cl 10 merely permitted the parties "to set up any other business or clinics in any location in Singapore"; no mention was expressly made of any right to divert patients. We acknowledge that disputes may arise in relation to possible claims for passive diversion (see above at [41]). Given the limited scope of the first sentence, no doubt arises at all as to whether parties could, pursuant to the first sentence, be permitted to *actively* divert patients from CLAM with the consequent harm to CLAM. We are therefore unable to agree with the Judge (the GD at [32]) that the cl 10 proviso was "to remove any doubt about whether the liberty to compete included the liberty to divert patients from CLAM and MPC". Instead, we find that since the first sentence of cl 10 does not give rise to any doubt as to whether the clause permitted active diversion, the cl 10 proviso cannot be construed to

confer on the parties a contractual right to disregard their existing responsibilities and obligations to CLAM and hence a licence to actively harm CLAM.

45 The Judge held (the GD at [33]) that a finding that cl 10 permitted active diversion would not render cl 7 meaningless because "[cl 7] continued to apply where patients chose to continue to be treated at Orchard Clinic", whereupon Dr Goh PK was obliged to attend to them. The Judge (the GD at [35]) added that cl 10 permitted active diversion because the defendants "must have understood that [cl 10] could affect the potential sale of [the Companies]". With respect, we disagree. Such a construction does not sit well with the plain language of cl 7 which required the doctors "to continue with and fulfil their *full responsibilities*, arrangements and operations" [emphasis added]. In addition, confining to this narrow meaning would in effect render cl 7 otiose because if the patients insisted on being treated at the Orchard Clinic, there would be no need for an express clause to state that the services would have to be provided there. Finally, it is one thing to say that competition might affect the sale or even the value of the Companies and another to say that the parties were expressly permitted to employ *deliberate steps* to strip the Companies of their core business, *ie*, the patients, which would invariably destroy the value of the Companies and in turn defeat the underlying purpose of the Agreement to sell the Companies as going concerns. The latter interpretation requires clear words to arrive at that construction. The cl 10 proviso does not come close to achieving that outcome.

46 In summary, the analysis of the text and context of the Agreement alone demonstrate definitively that cl 10 did not permit active diversion. However, since both parties have made extensive submissions on the parties' subsequent

conduct and their subjective understanding of the Agreement in aid of their respective cases, we should explain why we did not find them relevant or helpful in the present case. Before descending into the substance of the parties' opposing submissions, we think it is apt to make this immediate observation. The fact that both parties rely on different aspects of subsequent conduct and the other party's subjective understanding to support their respective *diametric* interpretations in itself demonstrates that the evidence is neither cogent nor unequivocal, and is thus of little or no assistance to the court in interpreting the ambit of cl 10.

The relevance of the parties' subsequent conduct

47 It is common ground that after the Agreement was entered into on 14 February 2014, Dr Kelvin Goh (with Ms Jacqueline Goh's assistance) sold Skintech products to patients at the Orchard Clinic on his assigned days.[28] However, the parties disputed whether such acts constituted active diversion.[29] The defendants submit that Dr Kelvin Goh's subsequent conduct in relation to the sale of Skintech products supports the defendants' interpretation that cl 10 permitted active diversion.[30]

48 CLAM, for its part, also relies on the parties' subsequent conduct to support its interpretation of cl 10. On 24 April 2014, in response to Dr Kelvin Goh's sale of Skintech products at the Orchard Clinic, Dr Goh PK executed a statutory declaration for purposes of making a complaint against Dr Kelvin Goh

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28 The defendants' case in CA 160/2016 at paras 31–33; CLAM's reply in CA 160/2016 at para 50.

29 CLAM's case in CA 160/2016 at para 111; the defendants' case in CA 160/2016 at para 31.

30 The defendants' case in CA 160/2016 at para 31–33.

to the Medical Council under s 39(1) of the Medical Registration Act (Cap 174, 2014 Rev Ed) ("the Declaration").[31] The Declaration alleged that Dr Kelvin Goh had promoted Skintech products in a manner that created a conflict between his financial interest and his duties to his patients. In the Declaration, Dr Goh PK also stated that the Agreement showed that "it is anticipated that [Dr Goh PK and Dr Kelvin Goh] shall continue to work together" until the Companies are sold. CLAM relies on this statement to support its interpretation of cl 10, but does not fully explain why it supports its case beyond submitting generally that the Declaration reflected Dr Goh PK's understanding of the Agreement.[32]

49 Shortly thereafter, on 7 May 2014, Dr Goh PK and Mdm Wong's previous solicitors, Joo Toon LLC, sent a letter to Dr Kelvin Goh and Ms Jacqueline Goh demanding a sum of $3m (being half of the targeted sale price of $6m) in exchange for Dr Goh PK and Mdm Wong's shares in the Companies ("the Letter"). The Letter alleged various wrongdoings arising from Dr Kelvin Goh and Ms Jacqueline Goh's involvement in Skintech. It alleged, *inter alia*, that by "inducing patients to purchase [Dr Kelvin Goh and Ms Jacqueline Goh's] own products to the detriment of CLAM", Dr Kelvin Goh and Ms Jacqueline Goh were "clearly in breach of [their] duties to [CLAM]" and also in breach of cl 7.[33] Further, the Letter alleged that Dr Kelvin Goh and Ms Jacqueline Goh were in breach of cl 3 of the Agreement because they had jeopardized the sale of the Companies for $6m by reducing the profitability and reputation of the Orchard Clinic.[34] CLAM contends that the Letter represents

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31 JROA Vol V Part F at pp 68–69.

32 CLAM's reply in CA 160/2016 at paras 7–8 and 20.

33 CLAM's case in CA 160/2016 at para 24(a).

34 CLAM's case in CA 160/2016 at para 24(b).

evidence of Dr Goh PK's understanding "that the parties were obliged under the [Agreement] to work towards selling the Clinics at a minimum sum of S$6 million (i.e. as going concerns), and were not to act in a manner that would jeopardize that".[35]

50 The courts have traditionally been cautious about using events subsequent to the formation of a contract to interpret the contract. As this court warned in *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corrina* [2016] 2 SLR 1083 ("*Corrina Chin*") at [54]–[55]:

> 54 … *post-contractual conduct* … must be viewed with the utmost scrutiny as well as concern. Although the Singapore courts have not ruled out such conduct as evidence that might aid them in the ascertainment of the relevant context, there has been no definitive view expressed by way of a positive endorsement (see *Zurich Insurance* at [132(d)]). This is because consideration of such conduct would tend to lead the court away from the *objective* exercise of interpretation and, *on the contrary*, tend to introduce a great deal of *subjectivity and uncertainty instead*.
>
> 55 Pursuant to the *objective* principle of interpretation, the court is concerned with the *expressed intentions of the parties*, and *not* their *subjective intentions*. The standpoint adopted is that of a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were *at the time the contract was formed*. The extrinsic material sought to be admitted must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. The conduct of the parties *post-contract*, in so far as they reveal the *subjective intention* of the parties, will generally be *irrelevant* in this exercise. It is for this reason, amongst others, that the courts have precluded the reference to subsequent conduct of the parties in the construction of contracts. …
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> [emphasis in original]

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[35] See CLAM's case in CA 160/2016 at para 35.

51 While there is no blanket prohibition in the use of subsequent conduct in contractual interpretation (*Corrina Chin* at [56] and *Zurich Insurance* at [132(d)]), it is in general only of relevance if the subsequent conduct provides *cogent evidence* of the parties' agreement at the time when the contract was concluded. In the recent decision of *Ngee Ann Development Pte Ltd v Takashimaya Singapore Ltd* [2017] 2 SLR 627 ("*Ngee Ann Development*"), this court referred to subsequent conduct to determine the parties' agreement on the meaning of a term of the contract. *Ngee Ann Development* concerned a lease in which the tenant was to lease the premises for an initial term of 20 years. After the first five years, a rent review was to be conducted to determine the rent payable for each of the successive five-year periods up to the end of the initial 20-year term. The parties were to endeavour to agree on the "prevailing market rental value of the [premises]", which would represent the new rent for each rent review period, but if they failed to agree then the "prevailing market rental value of the [premises]" would be determined by a licensed valuer.

52 The disputes over the rent reviews were resolved by the appointed valuer, who adopted the existing configuration of the leased premises as the basis for determining the prevailing market rental value. Subsequently, the tenant sought to exercise its option to renew the lease for a further 10-year term. Under the lease, in a procedure similar to that which governed the rent reviews, the parties were to endeavour to agree on the "prevailing market rental value of the [premises]" which would be the renewal rent for the option period, failing which the prevailing market rental value was to be determined by a licensed valuer. The tenant took the position that the valuation should take place on the existing configuration of the premises but the landlord contended that the valuer was permitted to posit a different and hypothetical configuration – more specifically, a configuration that would reflect the "highest and best use" of the

premises. The type of configuration used would result in substantial variations in the valuation. This court was thus faced with two competing case theories *ie*, either the *existing* or *hypothetical* configuration.

53 This court, having considered the unique features of the parties' relationship, which was more akin to that of a joint venture, coupled with, *inter alia*, the breadth of the tenant's wide discretion to decide on the configuration of the premises, found (at [103]) that the application of a *hypothetical* configuration to yield "the highest and best possible use" of the premises would be inconsistent with the nature of the parties' agreement. Having ruled out the landlord's *hypothetical* configuration, this court was left to consider whether the "prevailing market rental value" for the purposes of the lease renewal should be determined based on the *existing* configuration. In this connection, this court then referred to the parties' subsequent conduct in relation to the valuations which were carried out for the second and third rent reviews. It is important to note that the subsequent conduct was relied upon because this court found that the landlord's failure to object to the prior and consistent usage of the *existing* configuration by the valuer was "*cogent* evidence that the application of such a configuration for the purposes of valuation is entirely in line with the parties' agreement" [emphasis added] *ie*, at the time when the lease was concluded (at [103]).

54 In the present case, the subsequent conduct relied on by both parties does not shed any light on the parties' agreement as to the nature of diversion permitted under cl 10 *at the time when the Agreement was signed*. The parties have sought to cherry-pick aspects of subsequent conduct that bolstered their respective cases as if they were unconnected events, but the parties' subsequent conduct are in fact inter-related: Dr Kelvin Goh and Ms Jacqueline Goh's

involvement in Skintech led to the execution of the Declaration and the Letter. Once the subsequent conduct is analysed holistically, it will be apparent that it does not form cogent evidence of the parties' intention as regards the nature of the permitted diversion under cl 10 at the time when the Agreement was concluded.

55 Contrary to the defendants' submissions, Dr Kelvin Goh and Ms Jacqueline Goh's involvement with Skintech cannot be said to be cogent evidence of the parties' agreement that cl 10 permitted active diversion. To begin with, the contents of the Letter pointed to the contrary. The Letter (as quoted above in part at [49]) suggests that Dr Goh PK and Mdm Wong were at that point in time opposed to Dr Kelvin Goh and Ms Jacqueline Goh's involvement with Skintech because, in their view, the Agreement did not permit actions which would jeopardise the agreed sale of the Companies at a minimum sum of $6m (*ie*, as going concerns).

56 Additionally, on the evidence before us, it is not clear to us that Dr Kelvin Goh's and Ms Jacqueline Goh's involvement with Skintech amounted to active diversion. It should be noted that what we must decide, for the purposes of the Diversion Claims, is not whether the offering of Skintech products was *in fact and in law* (*ie*, as a matter of the Agreement's construction) an active diversion. Rather, the relevant question is whether the offering of Skintech products was so clearly an active diversion that the parties' acceptance of it (if there was such acceptance) *showed that active diversion was, in the first place, understood to be permissible*. On that note, the defendants submit that the question should be answered in the affirmative, because Dr Kelvin Goh's "very act of offering patients [Skintech] products amounted to active diversion".[36]

57 We find this to be, at the least, far from clear. As discussed above at [32], active diversion refers to the promoting or selling of a competing product or service in preference to those of the Orchard Clinic. Arguably, Dr Kelvin Goh's act of *offering* Skintech products did not, on its own, amount to him selling Skintech products in *preference* to the Orchard Clinic's products. Patients appear to have had a free choice between Skintech products and Orchard Clinic's products; they were informed about Skintech products, but not pressured to choose them over Orchard Clinic's products. Even if it could be said that Dr Kelvin Goh *actively* offered the Skintech products knowing that *some* patients would choose them over Orchard Clinic products, it does not follow that *active diversion had been agreed to be acceptable*. It could just as plausibly show that active diversion was unacceptable, but that the parties did not consider the offering of Skintech products, in those circumstances, to *cross the threshold of active diversion*.

58 Moreover, even if it could be said that the parties accepted that the offering of Skintech products did not cross the threshold of active diversion, that would still not assist the defendants. In contrast to the offering of Skintech products, Dr Goh PK's conduct was an *obvious and blatant* example of diverting patients from the Orchard Clinic (and the defendants did not contend otherwise). As Dr Goh PK himself accepted, when he was at GPK Clinic on his assigned days, patients who went to the Orchard Clinic were left with the choice of *waiting* at the Orchard Clinic to see him, or going over to GPK Clinic and seeing him *immediately*.[37] Any sensible patient who valued his or her time would choose the latter course. Thus, Dr Goh PK's actions all but compelled

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[36] The defendants' case in CA 160/2016 at para 32.

[37] JCB Vol II at p 47, lines 2–8.

his patients to divert their business to GPK Clinic, and the comparison to Dr Kelvin Goh's and Ms Jacqueline Goh's involvement with Skintech is of no assistance to the defendants.

59 It also could not be said that the Letter provides cogent evidence of the parties' agreement that cl 10 did not permit active diversion. This is because there was no response from Dr Kelvin Goh and Ms Jacqueline Goh indicating that they accepted the correctness of the Letter which they now purport to rely on. Bearing in mind the acrimonious context under which the Letter (which was essentially a letter of demand) was sent, we find it difficult to draw any inference from their silence that there was such an agreement.

60 We do not find the Declaration relevant to the interpretation of cl 10 either. Dr Goh PK's statement in the Declaration that he and Dr Kelvin Goh shall continue to work together until the Companies are sold was in substance not dissimilar to cl 7, and simply raises the question as to the precise *manner* in which the doctors are to continue to work together.

61 Finally – and this point cuts across the Skintech issue, the Letter, and the Declaration – the subsequent conduct cited by both sides merely reflected the parties' positions *after* the dispute arose to advance their respective interests. There is nothing in it which can be referred, in concrete and specific ways, to the understanding between the parties at the time the Agreement was formed. Consequently, the reference to subsequent conduct is neither necessary nor helpful. In any event, as discussed above at [33]–[46], the purpose and ambit of the Agreement (in particular cll 7 and 10) can be objectively ascertained from the express language of the Agreement alone, without resorting to subsequent conduct.

The significance of the parties' understanding of the Agreement

62 In the GD, the Judge referred to the oral evidence given by Dr Kelvin Goh and Dr Goh PK during the trial in connection with their subjective understanding of cl 10 to support his interpretation that cl 10 permitted the parties to divert patients from the Companies. The relevant evidence was summarised by the Judge, as follows (the GD at [31]):

> (a) [Dr Kelvin Goh] himself agreed that the word "diversion" in Clause 10 referred to the case where a doctor took steps to ask the patient to go to his new clinic and that the purpose of Clause 10 was to prevent any disputes over diversion in such cases.
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> (b) Both [Dr Kelvin Goh] and [Ms Jacqueline Goh] testified that Clause 10 permitted them to sell Skintech products to patients at Orchard Clinic. Initially, both took the position that by offering to sell Skintech products at Orchard Clinic, they did not compete with the latter and they were just offering patients a wider range of products to choose from. However, their explanation that Skintech products gave patients a wider choice only served to confirm that Skintech products *did* compete with those sold by Orchard Clinic. [Dr Kelvin Goh] had to admit on the stand that if a patient chose to buy Skintech products, that would result in a loss of income to Orchard Clinic. It must have been clear to [Dr Kelvin Goh] and [Ms Jacqueline Goh] that selling Skintech products to patients at Orchard Clinic was tantamount to diverting those patients away from Orchard Clinic, at least where the purchase of products was concerned. Nevertheless, they were of the view that Clause 10 permitted them to do so.

63 On appeal, the defendants maintain their reliance on Dr Kelvin Goh's and Ms Jacqueline Goh's oral testimonies.[38] The defendants highlight that Dr Kelvin Goh had agreed when it was put to him at the trial that *if* he could sell Skintech's products on his assigned days, then Dr Goh PK would *also* be permitted to see patients at GPK Clinic on his assigned days.[39]

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38 The defendants' case in CA 160/2016 at paras 29 and 32.

64 CLAM, on the other hand, also seeks to rely on Dr Goh PK's understanding of the Agreement to augment its case. CLAM refers to Dr Goh PK's acknowledgment at the trial that the Agreement contemplates that the Companies would be sold as going concerns by 31 December 2016, and that the parties would have to put in good faith attempts to ensure that the Companies continue as going concerns.[40]

65 In our view, the parties' subjective understanding of the Agreement should be treated with caution. As Judith Prakash J (as she then was) observed in *Pacific Autocom Enterprise Pte Ltd v Chia Wah Siang* [2004] 3 SLR(R) 73 at [31]:

> … It has long been established that in construing contractual provisions, the court takes an objective view based on the language used and is not guided by the subjective understanding of either party unless there is clear evidence that the agreement was to be interpreted in accordance with a particular subjective intention.

66 Furthermore, insofar as the parties' testimony on their understanding of the Agreement is based on their subjective intentions when entering into the contract, it is settled law that such evidence will only be admissible where there was ambiguity in the contract which could not be resolved by reference to the surrounding circumstances of the contract (*Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [55]).

67 More generally, this court in *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206 ("*OCBC*") (at [41]) also cautioned against

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39 The defendants' case in CA 160/2016 at para 33; Joint Supplementary Core Bundle ("JSCB") at p 32, lines 7–20.

40 CLAM's skeletal arguments at para 9(a); JSCB at p 60, lines 17–24.

reliance on oral testimonies under cross-examination to aid in the interpretation of the terms of a written contract.

> 41 Much emphasis was placed (especially by the Respondent) on the oral testimony given by various witnesses in the court below. Unfortunately, very little of the testimony relied upon by the Respondent was in fact helpful, being neutral at best and either irrelevant or ambiguous at worst. It bears mention that the first port of call for any court in determining the existence of an alleged contract and/or its terms would be the relevant documentary evidence. *Where (as in the present case) the issue is whether or not a binding contract exists between the parties, a contemporaneous written record of the evidence is obviously more reliable than a witness's oral testimony given well after the fact, recollecting what has transpired. Such evidence may be coloured by the onset of subsequent events and the very factual dispute between the parties.* In this regard, *subjective statements of witnesses alone are, in the nature of things, often unhelpful.* … This is not to state that oral testimony should, ipso facto, be discounted. On the contrary, credible oral testimony can be helpful to the court, especially where (as we shall see below in relation to supporting the Appellant's case) such testimony is given for the purpose of clarifying the existing documentary evidence. There is, however, no magic formula in determining the appropriate weight that should be given to witness testimony. Much would depend on the precise factual matrix before the court. However, it bears reiterating that the court would always look first to the most reliable and objective evidence as to whether or not a binding contract was entered into between the parties and such evidence would tend to be documentary in nature. [emphasis in original omitted; emphasis added in italics]

68 We acknowledge that evidence adduced from witnesses under cross-examination may shed light in situations where the parties' agreement has not been expressed in the written text. In *OCBC*, the dispute concerned the very existence of a binding oral contract. This court considered the oral evidence of the party who denied the existence of a contract to be useful, as he gave evidence to the effect that he was "wholly in agreement with the terms set out in the [term sheet]" [emphasis omitted] (at [47]). Here, apart from the obvious judicial reluctance to refer to the parties' subjective understanding as an aid for

contractual interpretation, the dispute concerns the express wording of cl 10 read with cl 7 which we find clearly did not permit active diversion. In any event, we do not consider the parties' oral evidence to be useful for the following reasons:

(a) First, in relation to Dr Kelvin Goh's evidence, we consider his evidence to have been coloured by the onset of subsequent events, in particular, his involvement with Skintech. We note that his apparent concession that Dr Goh PK was entitled under cl 10 to see patients at GPK Clinic on his assigned days was made after he was confronted with his own involvement in Skintech, which he had justified by relying on cl 10 (see above at [62]–[63]). We do not think that the cross-examination undertaken by counsel to explore what the parties *subjectively* understood the terms of the Agreement to mean in order to rationalise their own conduct can be substituted for the Agreement's *objective* interpretation.

(b) Second, the concession that Dr Goh PK was entitled to see patients at GPK Clinic on the days when he was assigned to work at the Orchard Clinic does not translate into an acknowledgment that active diversion of patients is therefore permissible under cl 10. At best, it suggests that the two doctors were permitted to work at the new clinics in addition to the Orchard Clinic on any given day.

(c) Third, Dr Kelvin Goh and Dr Goh PK's oral testimonies neither disclosed a subjective understanding that formed part of a clear and obvious context to the contract, nor were they useful in clarifying the existing documentary evidence concerning the Agreement. As we have explained above at [33]–[46], we consider the interpretation of cl 10 to

be clear and unambiguous in its text, and therefore the need for clarification with reference to the parties' subjective understanding does not even arise.

69 Accordingly, we find that cl 10 did not permit Dr Goh PK to actively divert patients from the Orchard Clinic to GPK Clinic. We therefore allow the Diversion Claims against Dr Goh PK. As a consequence, we also find – on a straightforward application of the principles governing conspiracy by unlawful means, which were correctly stated (so far as is relevant to the present case) by the Judge at [48]–[49] of the GD – that GPKPL is liable for conspiracy to injure CLAM by unlawful means in relation to Dr Goh PK's acts which formed the subject matter of the Diversion Claims. We turn now to consider Mdm Wong's liability in relation to the Diversion Claims alongside her liability for the other claims.

Liability of Mdm Wong

70 CLAM brought claims against Mdm Wong in relation to both breach of confidentiality and the Diversion Claims. First, CLAM submits that Mdm Wong was in breach of her fiduciary duties to CLAM because she "essentially did nothing as a director of CLAM",[41] failing to "at least exercise a modest level of scrutiny as to the going-on of CLAM"[42] or to "disclose to CLAM any information of concern to CLAM, any potential threats or competitive risks posed to its business, and any activity which could damage CLAM's interests".[43]

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41 CLAM's case in CA 160/2016 at para 116.

42 CLAM's case in CA 160/2016 at para 117.

43 CLAM's case in CA 160/2016 at para 118.

71 Second, CLAM submits that Mdm Wong was involved in a conspiracy with Dr Goh PK and GPKPL in relation to both the Diversion Claims[44] and the breach of confidentiality claim[45] because she had "omitted to do anything to stop Dr Goh PK or to actively act in CLAM's interests despite her clear knowledge of Dr Goh PK's conduct and breaches".[46] Finally, relying on *Vestergaard Frandsen A/S and others v Bestnet Europe Ltd and others* [2013] 1 WLR 1556 at [26], CLAM also submits that Mdm Wong should be held liable for her own breach of confidentiality to CLAM in a secondary sense as she had actual knowledge of Dr Goh PK's breach of confidentiality.[47]

72 We begin by considering Mdm Wong's liability in relation to Dr Goh PK's breach of confidentiality. The Judge made the following findings (the GD at [46]) regarding Mdm Wong's involvement in this regard:

> As for [Mdm] Wong, she did not work at CLAM or Orchard Clinic. It was not disputed that she was informed of [Dr] Goh PK's actions after he had carried them out and that she did not object to any of these actions or take any steps to prevent them. I accepted [Mdm] Wong's evidence that she had no knowledge of the business plans or operations of GPK Clinic. …

73 CLAM submits that the Judge erred in dismissing its claims, and argue in the main that Mdm Wong should be held liable as she knew that Dr Goh PK was abusing CLAM's confidential information and allowed this to continue unchecked and uncorrected.[48] CLAM pointed to the parties' Agreed Statement of Facts, which stated that "Mdm Wong was at all material times informed of

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44 CLAM's case in CA 160/2016 at para 129.

45 CLAM's case in CA 160/2016 at para 128.

46 CLAM's case in CA 160/2016 at para 135.

47 CLAM's case in CA 160/2016 at paras 122–127.

48 CLAM's case in CA 160/2016 at para 125.

Dr Goh PK's actions as stated herein *after* he had carried out the said actions" [emphasis added].[49]

74 Based on the Agreed Statement of Facts, it is not clear *when* exactly was Mdm Wong informed of Dr Goh PK's actions. Mdm Wong's position at the trial was that she only knew about Dr Goh PK's copying of confidential information from CLAM "when this lawsuit began", and her evidence on this point was not challenged.[50] Therefore, it has not been shown that Mdm Wong had the requisite knowledge at the material time to support any of the claims raised against her in relation to the breach of confidentiality claim. Thus, the claim against Mdm Wong in this regard cannot succeed. In any event, this claim is academic since CLAM has already recovered this head from Dr Goh PK.

75 The position in relation to the Diversion Claims is different. It is apparent from Mdm Wong's oral evidence that she knew that Dr Goh PK had diverted patients from CLAM, although she was not privy to the details of how GPK Clinic was run:

> Q. Okay. In terms of him diverting patients, I mean did you know anything about it?
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> A. Before the settlement agreement, during the settlement agreement it was already stated, yes.
>
> Q. Did you know that he was engaging -- after he opened his clinic on 19 May 2014, did you know that he had started to divert patients?
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> A. Yes, I am aware because he explicitly told me that he is allowed to do so.
>
> Q. And you knew that -- did you know that a lot of cards were sent out to his patients?

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49 JCB Vol II at p 100.

50 JSCB Vol II at p 80 line 24 to p 81 line 6.

> A. No. The details about how the clinic go about running all this, no, he did not tell me.

In other words, Mdm Wong knew that Dr Goh PK was diverting patients from CLAM, but did not stop him because she was informed by Dr Goh PK that he was justified in so doing under cl 10. Neither did she report this information to CLAM.

76 It was this failure to *at least* report Dr Goh PK's actions to CLAM which CLAM relied on as being a breach of Mdm Wong's fiduciary duty, citing *ABB Holdings Pte Ltd v Sher Hock Guan Charles* [2009] 4 SLR(R) 111 at [7] and [42]. The defendants did not challenge the proposition that such a fiduciary duty existed but merely argued that the cl 10 proviso afforded Mdm Wong a defence.[51]

77 Given our finding that cl 10 did not permit Dr Goh PK's manner of diversion, it follows that Mdm Wong's inaction was a breach of her fiduciary duties to CLAM. Mdm Wong cannot rely on Dr Goh PK's belief that he was entitled to divert patients to justify her own inaction. In our view, their defences must stand or fall together since they have aligned themselves to each other in their reliance on the cl 10 proviso. While Mdm Wong professed not to know the details of how GPK Clinic was run, it did not require much to know the facts that constituted Dr Goh PK's breach – she simply had to ask whether he was seeing his patients at GPK Clinic on his assigned days, or not. Thus, it is clear to us that Mdm Wong breached her fiduciary duties to CLAM in relation to the Diversion Claims and is liable for the damage thereby caused. In light of this

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[51] The defendants' Defence (Amendment No 1) at para 3.

finding, it is not necessary for us to make separate findings as to whether the corresponding claim in conspiracy is also made out.

Damages

78 We turn now to consider the issue of damages to be awarded to CLAM. As mentioned above at [15(c)], the Judge had awarded CLAM $193,481.38 for the breach of confidentiality claim. This sum represented the profits made by GPK Clinic from the Orchard Clinic patients over a period of six months from 19 May 2014 (the date when operations commenced at GPK Clinic) to 19 November 2014. The Judge (at [54]–[55]) considered it "fair and reasonable" to limit the computation period to six months because he recognised that Dr Goh PK would have been able to divert the patients even without misusing the confidential information; such information merely *accelerated* the diversion of patients. Damages was computed by the parties using the following parameters provided by the Judge, who had in turn adopted the method of computation proposed by the defendants' expert, subject to the following modifications (the GD at [61(a)–(c)]):

> (a) An Orchard Clinic patient was someone who was already registered as a patient of Orchard Clinic when [Dr] Goh PK copied the Clinic Information on 25 April 2014. Those who became patients of Orchard Clinic after 25 April 2014 would be excluded since the Clinic Information that [Dr] Goh PK copied would not have included their information. If any such patient subsequently became a patient of GPK Clinic, that would not have been caused by the breach of confidentiality.
>
> (b) Profits earned by GPK Clinic from Orchard Clinic patients were to include all products sold to the patients at GPK Clinic. No distinction was to be drawn between CLAM and non-CLAM products.
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> (c) Profits earned from all Orchard Clinic patients were to be included regardless of the day in the week on which they were treated by [Dr] Goh PK at GPK Clinic.

79 The award arrived at on that basis was not challenged on appeal.[52]

80 The parties have, however, not been able to agree on the appropriate damages should the appeal in respect of the Diversion Claims be allowed. In particular, they are unable to agree on the appropriate approach to quantifying CLAM's losses, and also the relevant period for which the loss should be quantified.

81 Two approaches to quantifying CLAM's loss are proposed. CLAM argues that the court should adopt an approach based on projections of CLAM's revenue by its expert witness, Mr Temple-Cole.[53] The defendants, on the other hand, argue that the method proposed by their expert, as modified by the Judge, should be utilised instead.[54]

82 The difficulty with CLAM's proposal is that Mr Temple-Cole's projections of CLAM's revenue assume that CLAM's revenue would remain substantially the same in the future, despite legitimate competition from GPK Clinic (the GD at [58]). CLAM acknowledges this shortcoming but suggests that it may be addressed by applying a percentage reduction of Mr Temple-Cole's projections to take into account the effects of legitimate competition.[55] However, no expert evidence was adduced to provide any basis to derive the appropriate percentage reduction. Indeed, as CLAM's counsel, Mr Thio Shen Yi SC, conceded during the oral hearing before us, this is an "extremely difficult exercise" because the court would have to "anticipate what would happen and

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52 The defendants' case in CA 160/2016 at para 75.

53 CLAM's case in CA 160/2016 at paras 140–148.

54 The defendants' case in CA 160/2016 at para 90.

55 CLAM's case in CA 160/2016 at para 148.

that is by necessity speculative". Accordingly, we decline to adopt CLAM's proposal, and hold that the Judge's method of computation is more appropriate, subject to the observations that we make below at [89]–[91].

83 We turn now to the issue of the relevant period of loss. CLAM's position in this regard is straightforward: it submits that CLAM's loss should be calculated "from 21 May 2014 (when GPK Clinic commenced operations) to 31 December 2016, the date by which [the Companies] were to be sold under the [Agreement]".[56] For completeness, we observe that CLAM appears to be mistaken as to the date on which GPK Clinic was opened: as mentioned above at [13], GPK Clinic commenced operations on 19 May 2014, not 21 May 2014. However, nothing turns on this error.

84 The defendants, on the other hand, propose two alternative positions. Their primary position is that the loss period should be six months. If they are correct, then the quantum of damages will remain at $193,481.38 since the *same* approach would be adopted to compute the loss over the *same* period.[57]

85 The defendants justify their position on the basis that the losses suffered by CLAM after six months would be due to the effects of lawful competition permitted under cl 10.[58] In support, the defendants refer to the Judge's finding that "[Dr] Goh PK would have been able to divert patients to GPK Clinic within six months, without misusing [confidential information that belonged to CLAM]" (the GD at [56]).[59]

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56 CLAM's case in CA 160/2016 at para 155.

57 The defendants' case in CA 160/2016 at para 90.

58 The defendants' case in CA 160/2016 at para 84.

59 The defendants' case in CA 160/2016 at para 90.

86 However, it is crucial to bear in mind that the Judge's finding was made in relation to Dr Goh PK's breach of confidentiality. Furthermore the period was limited to six months on the premise of his other finding that *active* diversion was permitted and that Dr Goh PK would have been able to divert patients to his new clinic *post* the six months period without misusing the confidential information. It follows that the six months computation period obviously cannot apply in light of our finding that active diversion was not permitted under the Agreement.

87 The defendants' secondary position is that damages should not be assessed beyond 31 March 2016, the date on which the Orchard Clinic ceased operations upon the expiry of the lease for its premises.[60] However, this argument is not persuasive in light of the fact that Mdm Wong (on Dr Goh PK's instructions) had written to the Orchard Clinic's landlord to inform the landlord that Mdm Wong and Dr Goh PK did not consent to a fresh tenancy agreement being entered into by CLAM.[61] This was done despite the fact that at that point in time, the Orchard Clinic was generating revenue and not losing money.[62]

88 The defendants argue that Mdm Wong and Dr Goh PK were entitled to withhold their consent to the renewal of the Orchard Clinic's lease because "there was no contractual obligation under the [Agreement] to renew the lease".[63] While there was indeed no such express requirement for the renewal of the Orchard Clinic's lease, Mdm Wong and Dr Goh PK were still obliged under cl 7 to "duly continue with and fulfil their full responsibilities, arrangements

60 The defendants' case in CA 160/2016 at paras 86–87.

61 The defendants' skeletal arguments at para 38.

62 CLAM's case in CA 160/2016 at para 157.

63 The defendants' case in CA 160/2016 at para 87.

and operations of the [Clinics]". We consider this clause to oblige parties to, *inter alia*, take steps to enable the existing arrangements and operations of the Clinics to continue until the sale of the Companies. In this context, we find that Mdm Wong and Dr Goh PK's withholding of consent for the renewal of the lease was a breach of cl 7 of the Agreement. As Dr Goh PK himself accepted, "the renewal of the lease [was] necessary for CLAM to continue as a going concern".[64] In other words, if the lease was not renewed, the Orchard Clinic could not operate and all existing arrangements would have to come to an end. Thus, by withholding their consent to the renewal of the lease, Mdm Wong and Dr Goh PK breached their duty under cl 7 to "continue with … arrangements and operations of [the Clinics]". Mdm Wong and Dr Goh PK should not be allowed to benefit from their breach of cl 7. CLAM's loss should thus be calculated up to the period of 31 December 2016, notwithstanding the Orchard Clinic's cessation of operations on 31 March 2016.

89 The period for computing the loss in respect of the Diversion Claims should commence from 20 November 2014 because CLAM has already been awarded the sum of $193,481.38 for breach of confidentiality for the period from 19 May 2014 to 19 November 2014. To compute the loss from the date GPK Clinic commenced operations (*ie*, 19 May 2014) as contended by CLAM would entail double recovery over the overlapping period. Thus, we are minded to award CLAM damages for the Diversion Claims to be computed using the Judge's method of computation, for the period from 20 November 2014 to 31 December 2016. We observe that the Judge's method of computation of CLAM's losses included the profits earned by GPKPL from all the Orchard Clinic patients treated at GPK Clinic *regardless of the day in the week that the*

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64 JCB Vol II at p 58, line 20–22.

patients saw Dr Goh PK at GPK Clinic (the GD at [60]). This differed from the method proposed by the defendants' expert, which only computed profits earned from the Orchard Clinic patients who *visited GPK Clinic on Dr Goh PK's assigned days at the Orchard Clinic*.

90 We are of the view that this method of computation must be modified for the purposes of computing losses for the Diversion Claims, which stretches over a period of around two years and one month. In such circumstances, if we are to adopt the Judge's method of computation for the Diversion Claims, we will be making an unrealistic assumption that GPK Clinic would not be able to legitimately attract any of the Orchard Clinic patients at all for the entire period prior to 31 December 2016. The effect of legitimate competition is not negligible, given that GPK Clinic was only two units away from the Orchard Clinic, and CLAM accepts that "if Orchard Clinic patients who preferred to see Dr Goh PK over Dr Kelvin Goh wanted to see him on a non-assigned day, and therefore went to GPK Clinic", this would be considered legitimate competition.[65]

91 Therefore, to take into account the likelihood that through legitimate competition, Dr Goh PK would likely have been able to attract some of the Orchard Clinic patients to visit him at GPK Clinic (without active diversion) on his non-assigned days, we consider it more realistic to compute damages on the basis of profits made from the Orchard Clinic patients who visited GPK Clinic on Dr Goh PK's assigned days *only*. In effect, we are applying a discount to take into account legitimate competition. This is in line with CLAM's

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[65] CLAM's case in CA 160/2016 at para 61.

submission that some percentage reduction ought to be factored into the assessment.

92 Accordingly we find the defendants liable to CLAM for the damages in respect of the Diversion Claims to be computed using the Judge's method of computation, as modified above at [91] for the period from 20 November 2014 to 31 December 2016. The defendants are to provide the relevant records of GPK Clinic for this purpose, if not already provided. Parties are to work out the amount of damages based on the above parameters, failing which the matter is to be remitted to the Judge for his assessment.

Costs

Percentage of costs and disbursements

93 We turn now to the issue of costs and disbursements. The Judge awarded CLAM 40% of costs below as the Judge had dismissed most of the claims against Dr Goh PK and GPKPL (save for the claim for breach of confidentiality and conspiracy) and dismissed the claims against Mdm Wong altogether. CLAM submits that the costs should be increased to 80% should it succeed on its appeal.[66]

94 In CA 47/2017, the defendants appeal against the Judge's costs order on the assumption that the Judge's findings on liability is upheld. In light of our findings above, CLAM succeeds in its appeal in relation to the Diversion Claims, but fails in its appeal against Mdm Wong's liability *only* in respect of breach of confidentiality. Nevertheless, we are of the view that CLAM is in substance the successful party and award CLAM 80% of the costs of the trial

66 CLAM's case in CA 160/2016 at para 161(b).

below as claimed. This sum is fixed at $96,000 (exclusive of disbursements) given parties' agreement of $120,000 (exclusive of disbursements) for the full party and party costs in the court below (as mentioned above at [16]).

Costs and disbursements relating to Mr Temple-Cole

95 The defendants contend in CA 47/2017 that the Judge erred in awarding part of the fees and disbursements of Mr Temple-Cole to CLAM. They submit that Mr Temple-Cole's fees were not reasonably incurred because Mr Temple-Cole was engaged by CLAM for the Diversion Claims and CLAM was "wholly unsuccessful" for these claims.[67] Given that we have allowed CLAM's appeal in respect of the Diversion Claims, the defendants' objection falls away.

96 The defendants also argues that Mr Temple-Cole's fees were unreasonably incurred because the Judge rejected Mr Temple-Cole's method of computing damages.[68] In our view, the fact that an expert's views were ultimately not accepted in full by the court does not mean that the costs of engaging the expert was unreasonably incurred. The Judge, who had the full benefit of hearing Mr Temple-Cole's testimony, found his costs to be reasonably incurred, and we see no reason to disturb the Judge's finding.

Reimbursement

97 The defendants argue that the Judge erred in ordering that the party and party costs awarded to CLAM be used to satisfy CLAM's outstanding obligations for the solicitor and client costs, and that any balance thereafter be used to reimburse Dr Kelvin Goh for any fees that he had paid on behalf of

67 The defendants' case in CA 47/2017 at para 42.

68 The defendants' case in CA 47/2017 at para 42.

CLAM ("the reimbursement order").[69] They make two arguments in this regard. First, the defendants argue that there was no evidence that Dr Kelvin Goh had paid the solicitor and client costs of CLAM in Suit 672/2015.[70] Second, the defendants submit that Dr Kelvin Goh had no legal entitlement to be reimbursed for expenses incurred by him on behalf of CLAM for Suit 672/2015.[71] In our view, neither submission has any merit.

98 We find the first argument to be overly technical and contrary to common sense. The irresistible inference on the facts is that Dr Kelvin Goh must have paid for CLAM's legal fees in Suit 672/2015: it is clear that neither CLAM nor the defendants paid for such costs.[72] In fact, during the oral arguments, the defendants' counsel, Mr Pereira George Barnabas, clarified that he was not suggesting that Dr Kelvin Goh did not pay for such costs.

99 The second argument assumes that Dr Kelvin Goh needs to have an independent legal entitlement to reimbursement of the costs which he incurred for CLAM, before the Judge may make the reimbursement order. This is contrary to the established principle that the court's discretion on costs extends to the award of costs in favour of non-parties (*DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd and another appeal* [2010] 3 SLR 542 at [22]–[23]). In other words, it was within the Judge's discretion to award costs to Dr Kelvin Goh even if Dr Kelvin Goh had no other legal entitlement to such costs.

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69 The defendants' case in CA 47/2017 at para 31.

70 The defendants' case in CA 47/2017 at paras 33–36 and 39.

71 The defendants' case in CA 47/2017 at paras 32 and 37–39.

72 CLAM's case in CA 47/2017 at para 46.

100 We also find that the Judge's discretion was properly exercised. Since CLAM did not pay for the solicitor and client costs in the first place, there was no reason for it to benefit from the costs order, which was meant "to reimburse CLAM, at least partially, for its solicitor and client costs" (the GD at [72]). Therefore, after costs awarded to CLAM were used to satisfy CLAM's outstanding obligations for the solicitor and client costs, the balance should be used to reimburse the party (*ie*, Dr Kelvin Goh) who had paid (and would pay) for CLAM's solicitor and client costs. To hold otherwise would be to grant CLAM an unjustified windfall. The defendants' appeal against the reimbursement order is therefore dismissed.

Conclusion

101 For the reasons given above, we allow CA 160/2016 in part and dismiss CA 47/2017 in the entirety. Our decision, in summary, is as follows:

(a) We find Dr Goh PK liable for breach of fiduciary duties in relation to the Diversion Claims. We also found GPKPL liable for conspiracy to injure CLAM through Dr Goh PK's breach of fiduciary duties. Additionally, Mdm Wong is also liable for breach of fiduciary duties in relation to the Diversion Claims. The damages for the Diversion Claims are to be computed in the manner set out above at [91]–[92].

(b) We dismiss CLAM's claims against Mdm Wong for conspiracy to injure CLAM through Dr Goh PK's breach of confidentiality.

(c) We award CLAM 80% of the costs of the trial below, fixed at $96,000 (exclusive of disbursements). Reasonable disbursements shall

include the fees and disbursements of Mr Temple-Cole to be taxed if not agreed.

(d) The reimbursement order is upheld.

102 We award costs and disbursements of the appeals to CLAM, fixed at $50,000 inclusive of disbursements.

Sundaresh Menon	Tay Yong Kwang	Steven Chong
Chief Justice	Judge of Appeal	Judge of Appeal

Thio Shen Yi SC, Wee Yu Ping Nicole, Ngo Shuxiang Nicholas and Goh Qian En Benjamin (TSMP Law Corporation) for the appellant in Civil Appeal No 160 of 2016 and the respondent in Civil Appeal No 47 of 2017;
Pereira George Barnabas (Pereira & Tan LLC) for the respondents in Civil Appeal No 160 of 2016 and the appellants in Civil Appeal No 47 of 2017.