IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 78

Suit No 294 of 2017 (Summonses Nos 4610 of 2019 and 793 of 2020)

Between

Viking Engineering Pte Ltd

… *Plaintiff*

And

(1) Bjornar Feen
also known as Bjoernar Feen
(2) Feen Marine Pte Ltd
(3) Viking Inert Gas Pte Ltd
(4) Scanjet Feen IGS Pte Ltd
(5) Feen Marine Scrubbers Pte Ltd

… *Defendants*

Originating Summons No 1324 of 2019 and Summons No 751 of 2020

Between

(1) Bjornar Feen
also known as Bjoernar Feen
(2) Feen Marine Pte Ltd
(3) Viking Inert Gas Pte Ltd
(4) Scanjet Feen IGS Pte Ltd
(5) Feen Marine Scrubbers Pte Ltd

… *Plaintiffs*

And

Viking Engineering Pte Ltd

… *Defendant*

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GROUNDS OF DECISION

[Companies] — [Oppression] — [Minority shareholders]
[Professions] — [Valuer] — [Judicial review of valuation]

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Viking Engineering Pte Ltd
v
Feen, Bjornar and others and another matter

[2020] SGHC 78

High Court — Suit No 294 of 2017 (Summonses Nos 4610 of 2019 and 793 of 2020) and Originating Summons No 1324 of 2019 and Summons No 751 of 2020
Valerie Thean J
2 March 2020

27 April 2020

Valerie Thean J:

1 Arising out of a minority oppression action in Suit No 294 of 2017 ("S 294/2017"), I ordered, on 9 April 2018, that the first defendant, Mr Bjornar Feen, purchase the shares of the plaintiff, Viking Engineering Pte Ltd ("Viking Engineering"), in the third defendant, Viking Inert Gas Pte Ltd ("VIG") ("the Buyout Order"). The fair value of the shares in VIG ("the Shares") was to be ascertained by an independent valuer appointed by agreement of the parties. Pursuant to the Buyout Order, parties agreed to appoint Mr Richard Hayler of FTI Consulting (Singapore) Pte Ltd ("FTI"), with agreed terms of reference. Mr Hayler subsequently completed the valuation and produced a report ("the Report").

2 The Report was the subject of the present applications. On 16 September 2019, Viking Engineering filed Summons No 4610 of 2019 ("SUM 4610/2019") seeking an order pursuant to O 45 r 6 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") for Mr Feen to pay the sum of S$13.2 million, being the valuation of the Shares stipulated by the Report, within 7 days of the order. On 22 October 2019, Mr Feen and the remaining defendants in S 294/2017 filed Originating Summons No 1324 of 2019 ("OS 1324/2019") challenging the Report. On 2 March 2020, I dismissed OS 1324/2019 and ordered that the purchase price of Viking Engineering's shareholding in the third defendant, VIG, be fixed at the price set by the Report.[1] The defendants have appealed against my decision and I now set out my reasons in full.

Background

3 Viking Engineering and Mr Feen were joint venture partners in VIG. On 4 April 2017, Viking Engineering commenced S 294/2017, as minority shareholders of VIG, for minority oppression under s 216 of the Companies Act (Cap 50, 2006 Rev Ed). In these grounds, the term "the defendants" refers to the defendants in S 294/2017, notwithstanding that they are the plaintiffs in OS 1324/2019.

4 S 294/2017 arose out of a sale and purchase agreement dated 10 September 2013 between Viking Engineering and Mr Feen in relation to VIG. By this agreement, Viking Engineering, at that time a 51% shareholder in VIG, sold a 21% shareholding in VIG to Mr Feen, thereby giving Mr Feen a 70% shareholding in VIG. This resulted in Viking Engineering holding a remaining 30% shareholding in VIG. Mr Feen was obliged to abide by various

[1] Moh Liang Teng Evelyn's 1st Affidavit (OS 1324/2019) at p 126.

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undertakings in return, including an undertaking to change the corporate name of VIG to Feen Marine Pte Ltd, the same name that was later used for the second defendant ("Feen Marine"). Mr Feen is the sole director of Feen Marine, the fourth defendant, Scanjet Feen IGS Pte Ltd ("Scanjet Feen"), and the fifth defendant, Feen Marine Scrubbers Pte Ltd ("Feen Marine Scrubbers"), collectively referred to as "the Feen Companies".

5 Viking Engineering's initial claim in S 294/2017 included contentions that, in breach of the sale and purchase agreement, Mr Feen failed to change the name of VIG to Feen Marine and instead incorporated a company of the same name. This is the second defendant. Mr Feen thereafter transferred his entire shareholding in VIG to Feen Marine. The business and corporate opportunities of VIG were said to have subsequently been diverted to Feen Marine and Scanjet Feen. In particular, these corporate opportunities related to the supply of oil discharge monitors, contracts for the supply of inert gas systems ("IGS") and exhaust gas cleaning services ("ECGS").

6 Viking Engineering then followed on with Summons No 4101 of 2017 seeking summary judgment in S 294/2017. On 24 November 2017, leave was given to Viking Engineering to amend its prayers in the summons to include a buy-out of Viking Engineering's shares in VIG by Mr Feen. After considering the augmented arguments on 14 February 2018, I granted an injunction to restrain Mr Feen and his agents from using the name "Viking" in any manner which may compete with the business of Viking Engineering or be associated with or perceived to be associated with Viking Engineering or the business of Viking Engineering. I also ordered Mr Feen to purchase Viking Engineering's entire shareholding in VIG, with an independent valuer to be appointed by agreement within 14 days of final judgment to ascertain the fair value of the shares. Unconditional leave to defend was given on the remainder of the claims.

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These claims were subsequently settled by parties on 6 July 2018[2], and VIG's name was changed Stokke Engineering Pte Ltd on 24 July 2018.[3].

7 Counsel for the defendants asked for time to submit on whether a discount ought to be applied by the valuer to Viking Engineering's minority holding in VIG.[4] At the same time, in the course of proceedings, after Viking Engineering contended that there was also evidence of diversion of business opportunities from VIG to Feen Marine Scrubbers, the latter was added by consent as the fifth defendant.

8 On 9 April 2018, after hearing parties on the question of whether a discount for Viking Engineering's minority shareholding should apply, I held that no discount should be applied. I also ordered that the valuer make adjustments, as part of his valuation, for Mr Feen's conduct and the diversion of opportunities to the Feen Companies. On the same date, in the course of finalising the form of the final orders, parties agreed that the cost of the valuation exercise would be borne by Mr Feen.

9 Subsequently, on or around 21 May 2018, the parties agreed on the draft Terms of Reference for the valuer.[5] On 8 June 2018, the parties agreed to appoint Mr Hayler of FTI to conduct the valuation. The next day, Mr Hayler wrote to the parties to confirm his appointment. Mr Hayler circulated a Letter of Engagement dated 13 June 2018 ("the LOE") to the parties, which all parties

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2 Bjornar Feen's 1st Affidavit (OS 1324/2019) at para 14: Plaintiff's Bundle of Cause Papers (OS 1324/2019) ("PBCP"), Vol 1, p [12].

3 Moh Liang Teng Evelyn's 1st Affidavit (OS 1324/2019) at p 294.

4 Notes of Argument 14 February 2018, p 10 ln 19–20.

5 Moh Liang Teng Evelyn's 1st Affidavit (OS 1324/2019) at para 8: PBCP, Vol 2, p [6].

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duly signed and returned in counterparts.[6] The terms of FTI's appointment reflected that the first defendant, Mr Feen, was to bear the costs of the valuation exercise. On 12 November 2018, FTI issued an invoice for the Report to Mr Feen's solicitors.

10 Notwithstanding that the 9 April Buyout Order and 13 June LOE reflected the parties' consent for Mr Feen to pay for the Report, Mr Feen failed to do so. As a result, FTI withheld the Report pursuant to its rights under cl 33 of the LOE. On 8 March 2019, pursuant to Viking Engineering filing Summons No 5784 of 2018, I set a timeframe for Mr Feen to pay pursuant to O 45 r 6(2) of the ROC: see *Viking Engineering Pte Ltd v Feen, Bjornar and others* [2019] SGHC 158 ("*Viking Engineering v Feen (No 1)*"). Mr Feen appealed but later withdrew his appeal. The Report was released to parties on or around 28 July 2019 after Mr Feen paid the requisite sums.[7] The Report formed the subject matter of these present applications.

The applications: context and issues

11 On 16 September 2019, Viking Engineering took out an application in SUM 4610/2019 for Mr Feen to pay the purchase price at the valuation set by the Report for the Shares within seven days of the order.

12 On 22 October 2019, the defendants filed OS 1324/2019 seeking a declaration that the Report was not final and binding, or that it be set aside or otherwise disregarded. They argued that Mr Hayler had departed from his

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6 Moh Liang Teng Evelyn's 1st Affidavit (OS 1324/2019) at para 13: PBCP, Vol 2, p [8].

7 Bjornar Feen's 1st Affidavit (OS 1324/2019) at para 17.

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instructions and that there were manifest errors in the valuation, raising specific complaints that will be addressed in detail below. In support, they also tendered a report from Mr Mark Collard ("Mr Collard") of KPMG. In their view, the valuer's mandate was to be determined from the Buyout Order primarily. Further, they argued that their conduct in the valuation process could not be held against them. In response to SUM 4610/2019, the defendants argued that Viking Engineering had not proved that Mr Feen had no intention to pay and, further, that Mr Feen lacked the financial ability to pay S$13.2 million. They argued therefore that no order under O 45 r 6(2) of the ROC should be made.

13 At the hearing, parties had also made respective applications for leave to admit further affidavits in support of their respective cases. In Summons No 751 of 2020 ("SUM 751/2020"), the defendants filed two further affidavits from Mr Feen to put in VIG's annual financial statements in order to illustrate their points on the financial position of the company. I granted leave to admit these affidavits and Viking Engineering decided not file an affidavit in response, preferring for the hearing to carry on as scheduled. In Summons No 793 of 2020 ("SUM 793/2020"), Viking Engineering sought leave to file a further affidavit to elaborate on Mr Feen's conduct. The defendants had a right of response and Viking Engineering decided not to pursue the application in the interests of having SUM 4610/2019 dealt with on the same date. I thus granted leave for Viking Engineering to withdraw SUM 793/2020.

14 The single central issue in this case was whether the Report is binding between the parties or whether it should be set aside. It was common ground that the Report, being an expert determination, may only be set aside on one or more of the following three grounds (see *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2009] 2 SLR(R) 385 ("*Oriental Insurance*")

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at [47]; and also *Poh Cheng Chew v K P Koh & Partners Pte Ltd and another* [2014] 2 SLR 573 at [36]):

(a) where the expert materially departed from instructions;

(b) where there is a manifest error in the expert's determination that justly requires judicial intervention; or

(c) there was fraud, corruption, collusion, dishonesty, bad faith, bias, or the like.

In the present case, only the first two grounds were in issue.

Decision

15 For the reasons that follow, I decided that Mr Hayler had not materially departed from his instructions, nor was there any manifest error in the Report. In the result, I dismissed OS 1324/2019 and fixed the price for the purchase of Viking Engineering's shares in VIG at S$13.2 million, the valuation stated in the Report.

Was there material departure from instructions?

16 The defendants contended that Mr Hayler had departed from his instructions. In *Oriental Insurance* at [48], Chan Seng Onn J adopted the *dictum* in *Jones v Sherwood Computer Services Plc* [1992] 1 WLR 277 at 287, which provides a two-step approach to this issue (see also *Evergreat Construction Co Pte Ltd v Presscrete Engineer Pte Ltd* [2006] 1 SLR(R) 634 ("*Evergreat*") at [41]):

(a) first, the court should determine what the parties had agreed to remit to the expert; and

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(b) second, the question is whether "the expert departed from his instructions in a material respect".

17 The defendants' contentions went to both aspects of the two-step test. Various aspects of Viking Engineering's arguments related to the LOE which, the defendants argued, formed the context for Mr Hayler's mandate. The second aspect was the issue of whether Mr Hayler departed from his mandate in a material aspect. Once it is established that there was a departure from instructions, it would be considered material "unless it can truly be characterised as trivial or de minimis in the sense of it being obvious that it could make no possible difference to either party": *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2002] 1 All ER 703 ("*Veba Oil*") at [26], quoted by *Oriental Insurance* at [57]. In this context, the defendants contended that there were several departures. Further, the defendants submitted that Mr Hayler's determination was qualified, and therefore not a binding determination made in compliance with his mandate: see *Yashwant Bajaj v Toru Ueda* [2020] 1 SLR 36 ("*Bajaj*") at [66]–[68]. I deal with these points in turn.

What had parties agreed to remit to Mr Hayler?

18 When a court makes an order under s 216 of the Companies Act for the shares of the minority to be purchased, the court also has the power to determine the "manner in which the value of the shares is to be assessed", and the overriding principle is that the price should be "fair, just and equitable as between the parties": *Poh Fu Tek and others v Lee Shung Guan and others* [2018] 4 SLR 425 at [31]. In the present case, an independent valuer was appointed to determine the price that was fair, just and equitable between the parties, and terms of reference were framed for the purpose. As counsel had indicated to the court that the parties would be able to agree to a valuer, the

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Buyout Order contained the direction that the parties were to appoint a valuer by agreement. Parties then agreed to appoint Mr Hayler. It was undisputed by the parties that the primary source of Mr Hayler's instructions was the Buyout Order. Its relevant terms read as follows:

> 2. The 1st Defendant shall purchase the [Viking Engineering]'s entire shareholding in the 3rd Defendant on the following basis:
>
> (a) An independent valuer is appointed by agreement within 14 days of final judgment.
>
> (b) The valuer shall ascertain the fair value of the shares as at the date of the final judgment and on the basis that the 3rd Defendant is a going concern.
>
> (c) The valuer shall not apply any discount to the purchase price to account for the fact that the shares represent a minority shareholding in the 3rd Defendant.
>
> (d) The valuer shall have regard to any and all financial information and records of the 3rd Defendant from the time of its [in]corporation until the valuer completes the exercise contemplated by the Order as the valuer may deem necessary, relevant or desirable for the purposes [of] ascertaining the purchase price or otherwise for carrying out the termination of this order.
>
> (e) The valuer shall adjust the purchase price to reflect the value of the shares on the assumption that the 3rd Defendant had undertaken all of the business which was diverted away from it to any one or more of the following companies or individuals from the date on which such company was incorporated until the date on which the valuer completes the exercise contemplated by this order:
>
> (i) Feen Marine Pte Ltd
>
> (ii) Scanjet Feen IGS Pte Ltd
>
> (iii) Bjornar Feen
>
> (iv) Feen Marine Scrubbers Pte Ltd
>
> (f) The valuer shall make adjustments referred to at (e) above on the following bases:
>
> (i) The valuer shall only take into account the business of inert gas systems (including inert

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> gas generators, flue gas system, nitrogen generators) and exhaust gas cleaners.
>
> (ii) All the goodwill and revenue earned by the companies or individuals identified at (e) above in relation to the business defined in (f)(i) are to be attributed to the 3rd Defendant unless the goodwill or revenue arose from a contract which would have been physically impossible for the 3rd Defendant to have earned.
>
> (iii) That regard be given to the financial information and records of the companies and individual identified at (e) above from the respective dates of incorporation until the time the valuer completes the exercise contemplated by this order as the valuer may deem necessary, relevant or desirable for the purposes of ascertaining the purchase price or otherwise for carrying out the terms of this order.
>
> (g) By agreement, the costs of the valuation exercise are to be borne by the 1st Defendant.
>
> (h) There be liberty to apply.

19 Further, parties added agreed terms in the LOE. The defendants, as part of their arguments, disputed these additional terms. I held, however, that so long as the LOE did not contradict the Buyout Order, parties would be at liberty to agree. In principle, parties may resolve aspects of any existing litigious dispute as they see fit. Such delineation would form a compromise on the areas thus agreed. As Lord Mustill stated in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 353 (quoted in *Evergreat* at [34]):

> [T]hose who make agreements for the resolution of disputes must show good reasons for departing from them …

20 Therefore, so long as there is no contradiction with the Buyout Order, Mr Hayler cannot be said to have departed from his instructions if he had exercised his authority and discretion as given by the LOE. I dealt with the contentions of material departure in this context.

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Was there a material departure from his remit?

21 The defendants alleged several departures from instructions. Their primary assertion was that Mr Hayler had given a qualified determination, and I deal with that issue first.

Did Mr Hayler give a qualified determination?

22 It was common ground that a qualified determination would be a material departure from instructions. It was important here, to first consider what Mr Hayler was to furnish under the Buyout Order and LOE. This was an expert's determination of the value of the Shares, which was to be the price at which Mr Feen was to purchase those Shares.

23 The defendants relied on *Shorrock Ltd and another v Meggit plc* [1991] BCC 471 ("*Shorrock*"), where the experts, the joint auditors, were asked to provide a certificate on a value described as the "October net deficit". The certificate itself, however, stated the joint auditors were "unable to determine" a key component of the accounts, specifically a provision of monies in respect of potential legal claims. The English Court of Appeal held that because the qualification meant that the requirement of certainty under the agreement was not met, the determination was therefore not binding on the parties.

24 Similarly, in *Bajaj* ([17] *supra*), an accountant furnished a qualified report. The case concerned the issue of whether a statutory demand should be set aside on the basis that the debts stated therein had not yet accrued: *Bajaj* at [1]. Mr Bajaj sought to set aside the statutory demand. The parties had entered into a settlement agreement, which provided for an independent accountant to calculate the final sum due from one party to the other. However, the report was qualified, in that the independent accountant concluded that the values reached

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in his report were *subject to adjustments*. The Court of Appeal held that the values arrived at were not "final" and therefore did not satisfy the settlement agreement in that case: *Bajaj* at [65]. At [77], the Court of Appeal concluded:

> Ultimately, *it was the assessor's decision* to give a qualified opinion, presumably because he felt that he was unable to rely wholly and solely on the documents submitted by Mr Ueda. He could have very well given an unqualified determination based on the documents submitted by Mr Ueda. [emphasis in the original]

It was therefore clear from *Bajaj* that it was the expert's qualification that was crucial.

25 In this case, unlike the experts in *Bajaj* or *Shorrock*, Mr Hayler did not claim that he was not able to proceed with the valuation exercise. Instead, he simply stated that he lacked certain pieces of information, and then proceeded to make assumptions that enabled him to complete his valuation.

26 The defendants relied primarily on a number of statements made by Mr Hayler in the Report, which I set out here:[8]

> 2.7 I consider these issues and impediments to the expert determination process have affected the accuracy of my valuation exercise adversely.
>
> …
>
> 3.77 Overall, I consider that the expert determination process has been impeded…
>
> …
>
> 3.78 I consider these issues and impediments to the expert determination process have affected the accuracy of my valuation exercise.

[8] Moh Liang Teng Evelyn's 1st Affidavit (OS 1324/2019) at pp 59–87.

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27 The defendants argued that these statements amounted to qualifications of Mr Hayler's determination. I rejected these arguments for the following reasons.

28 First, the statements relied upon were made in the Report's summary (Section 2) and the description of the procedural background (Section 3). When Mr Hayler proceeded with his analysis and came to his determination, however, his statements were unqualified:[9]

> 6.29 Based on my DCF analysis, the equity value of VIG as at the Valuation Date is SGD 50.9 million …
>
> …
>
> 7.11 Based on the average sales trading multiple (EV/2018 sales multiple) of two publicly listed comparable companies, the equity value of VIG is SGD 37.1 million as at the Valuation Date.
>
> …
>
> 8.3 I conclude that, based on the Parties' submissions, as at the Valuation Date:
>
> > (1) the value of VIG, on a going concern basis, was SGD 44.0 million, based on the mid-point of the values implied by my DCF and comparative analysis; and
> >
> > (2) [Viking Engineering]'s 30% equity interest in VIG was SGD 13.2 million.

It is clear that these conclusions were unqualified, when taken on their own terms. When stating his conclusions, Mr Hayler did not add any qualifications whatsoever, and provided his valuation categorically.

29 In response, the defendants argued that the Report should be read as a whole. I found that this did not assist their case. When the Report was read as a

[9] Moh Liang Teng Evelyn's 1st Affidavit (OS 1324/2019) at pp 119–126.

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whole, and the statements relied on by the defendants viewed in context, it was clear that Mr Hayler's statements were not qualifications. These statements were made in the context of explaining the process by which the valuation was conducted. The purpose of those statements was to set out the gaps in information provided, which set the context for explaining how the valuation process compensated for those gaps. The gaps required articulation as part of the process because clauses 7 and 14 of the LOE expressly gave various discretionary powers to Mr Hayler where such gaps existed. For example, para 2.7 of the Report, which was cited by the defendants, was immediately followed by a number of paragraphs which detailed the assumptions that needed to be made in the absence of information.[10] Paragraphs 3.77 and 3.78 were the concluding paragraphs of a section dedicated to the procedural background of the valuation. As such, the statements cited by the defendants were not qualifications but served as a explanatory preface to remedial steps that were then taken by Mr Hayler in his valuation process.

Remaining alleged departures from instructions

30 The defendants advanced three other arguments to contend that Mr Hayler materially departed from his instructions, which they argued were governed strictly by the Buyout Order. First, Mr Hayler failed to apply a discount for lack of marketability. Second, Mr Hayler made various assumptions that were not in accordance with his mandate. Third, Mr Hayler did not consider what business was diverted from VIG. In this context of the diverted contracts, he also failed to consider what contracts were physically impossible for VIG to have performed. I deal with each in turn.

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10 Report at paras 2.8–2.12: PBCP, Vol 1, p [77].

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(1) No discount for lack of marketability

31 The defendants highlighted that Mr Hayler did not apply a discount for the lack of marketability. At para 5.35 of the Report, Mr Hayler explained:

> The Court Order directs that no minority discount or discount for lack of marketability should apply to the valuation of the [Viking Engineering]'s shares in VIG. I therefore do not consider this issue in my report.

32 It was not disputed that this stated source was erroneous: the Buyout Order did not in fact direct that no discount for lack of marketability was to be applied. It was silent on that issue. Mr Hayler made a mistake as to the source of that condition. Nevertheless, there was a valid source of this condition in cl 5(c) of the LOE, to which the parties had agreed, as follows:

> 5. The valuation, for the purposes of the Determination, will be based on the following assumptions:
>
> …
>
> (c) That no discount should be applied to the value of the [Viking Engineering]'s shares in the Company to reflect that these shares represent a minority shareholding in the Company *or the lack of marketability of the shares*.
>
> [emphasis added]

33 The defendants first took the position in submissions that the LOE was irrelevant. At the hearing, they then took the position that the LOE was inconsistent with the Buyout Order. I did not see any such inconsistency. The discount for minority interest and the discount for lack of marketability are two different issues, as the factors to be determined in relation to each are distinct and separate. Whereas the court would usually deal with whether a discount for minority interest should be applied, the question of whether to apply a discount for non-marketability, as Judith Prakash JA stated in *Thio Syn Kym Wendy and others v Thio Syn Pyn and another* [2018] SGHC 54 ("*Thio Syn Kym*") at [32],

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"should ordinarily be left to be determined by the independent valuer in his expertise." In *Liew Kit Fah and others v Koh Keng Chew and others* [2019] SGCA 78 at [59], the Court of Appeal explained that the lack of marketability was industry specific and for that reason agreed with the view expressed in *Thio Syn Kym*. That being the legal context, given that no direction on a discount for marketability was given by the court, parties were able to decide and agree with each other on this question of whether or not the discount for lack of marketability should apply. They were in the best position to understand their own industry, it was open to them to refine and narrow the remit of the valuer, and they did so. "It is simply the law of contract", as Lord Denning MR explained in *Campbell v Edwards* [1976] 1 WLR 403 at 407 (cited by V K Rajah J (as he then was) in *Evergreat* ([16] *supra*) at [27]). Plainly, Mr Hayler's decision not to apply a discount for the lack of marketability could not be said to constitute a departure from his remit.

(2) Reliance on assumptions

34 The defendants then argued that Mr Hayler was not entitled to rely on assumptions in order to arrive at his determination. In particular, they highlighted para 6.3 of the Report, which stated:[11]

> To assess the value of VIG, I have:
>
> (1) estimated VIG's revenue over the period from 2018 to 2028;
>
> (2) estimated VIG's operating profit over the same period;
>
> (3) made assumptions for other components of VIG's free cash flows, and considered the terminal value of VIG;
>
> (4) discounted the free cash flows using a discount rate; and
>
> (5) considered other non-operating assets and liabilities to arrive at VIG's equity value.

[11] PBCP, Vol 1, p [127].

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35 In their submission, Mr Hayler was instructed to determine the value of the Shares, not to engage in estimation or to assume the value of the Shares. Relying on Mr Collard's report, the defendants argued that Mr Hayler was effectively "valuing his own numbers", which was not what he was mandated to do.

36 The first step is to consider what the parties remitted to Mr Hayler to determine. I agreed with Viking Engineering that neither the Buyout Order nor the LOE dictated what methodology the expert was to use. As to the specific sources of information that Mr Hayler was to have regard to, the Buyout Order stated at para 2(d) that:

> The valuer shall have regard to any and all financial information and records of [VIG] from the time of its [in]corporation until the valuer completes the exercise contemplated by the Order *as the valuer may deem necessary, relevant or desirable* for the purposes of ascertaining the purchase price or otherwise for carrying out the termination of this order. [emphasis added]

The Buyout Order clearly gave the valuer a wide discretion to determine how he was to have regard to the financial information and records of VIG. As for other assumptions, there was nothing in the Buyout Order that mandated or excluded certain assumptions, other than the conditions expressly stated at para 2(c) (the minority discount), and paras 2(e)–2(f) (the diverted business).

37 Similarly, the LOE granted the valuer wide discretion. As cl 6 of the LOE provided:[12]

> The Expert shall have the power to determine the appropriate basis and approach for the valuation of the [Viking Engineering]'s equity interest in the Company once the Expert has obtained a good understanding of the Company's business,

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12 PBCP, Vol 1, p [52].

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> assets and liabilities, as well as the information that will be available for the purposes of this valuation exercise.

In my view, cl 6 provided Mr Hayler with a discretion to determine how the valuation exercise was to be conducted. The only pre-conditions were that he "obtained a good understanding" of VIG's business, assets and liabilities, and that he had the information "that [was] available" for the exercise. I did not find any reason to doubt – and the defendants did not submit otherwise – that these preconditions were met.

38 Further, the LOE provided a process for the provision of information and Mr Hayler had accordingly furnished a timetable for the information that he considered necessary. Under cl 7 of the LOE, Mr Hayler was to inform parties of first, the information he believed he needed, and second, his reservations or qualifications before rendering his decision. This should be read together with cl 14 of the LOE:[13]

> The Expert reserves the right to record any instances of any withholding, concealment or misrepresentation from the Defendants which he believes will have material implications for the performance of his work in his valuation report, and to take such inferences into account in adjusting the value of the Parties shares in the Company.

The LOE clearly allowed Mr Hayler to proceed in the *absence* of information, since there is provision for the drawing of adverse inferences in such circumstances. Therefore, the LOE did not mandate Mr Hayler to abandon the valuation if he determined that necessary or useful information was still missing.

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13 PBCP, Vol 1, p [53].

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39 Having determined the scope of Mr Hayler's instructions, I turn to the issue of whether the assumptions made amounted to a material departure. I found that they did not. Mr Collard, in his report, stated that he agreed in principle with the Discounted Cash Flow ("DCF") and comparative analysis approaches. The use of these various methodologies would require the use of assumptions in application. It was the application of the methodology and specific assumptions used that Mr Collard criticised.[14] In this regard, it was not the court's role to assess if the assumptions were correct, but whether Mr Hayler had materially departed from his instructions by making the assumptions. In light of the discretion given to Mr Hayler described above, I could not agree that there were departures. Mr Hayler had decided, well within the bounds of his discretion, to use the DCF and comparative approaches which themselves required the use of assumptions and estimations.

40 I deal with two more of the defendants' arguments here. First, they argued that the timelines under the LOE were mere guidelines, and therefore, there was no real need for Mr Hayler to have proceeded with the valuation without the necessary information. In my view, Mr Hayler could not be criticised for seeking to complete the valuation with regard to the timeline that the parties had themselves agreed to. While clauses 31 and 32 of the LOE provided that Mr Hayler "will aim" to complete the valuation within six weeks, and to complete the report within three weeks after the end of valuation, it was also envisaged that Mr Hayler would have to inform parties of any delay and to provide an explanation. In any case, it is clear that cl 14 allowed Mr Hayler to proceed in the absence of information and even to draw adverse inferences. Second, the defendants argued that Mr Hayler should have applied to court

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14 Mark Collard's Report at paras 5.2.2–5.2.3: PBCP, Vol 1, p [545].

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directly for directions when it was clear that information was not forthcoming. I did not find this argument relevant at all, since I had already determined above that Mr Hayler had the discretion to proceed as he did. Mr Hayler's actions were therefore unobjectionable.

(3) Diversion of business

41 In accordance with para 2(e) of the Buyout Order and cl 5(d) of the LOE, Mr Hayler was required to ascertain the fair value of the Shares, with the assumption that VIG had undertaken all the business of IGS and ECGS that was diverted away from it to any one or more of the Feen Companies from the date of each of their incorporations until the date on which the valuation exercise was completed.[15] The defendants argued that Mr Hayler had departed from these instructions as he had failed to assess this diverted business, given his admission that he was not able to identify "the exact dates, amounts, and the entities involved, for the diversion of business by [Mr Feen] from VIG to the Feen Companies".[16] Further, they argued that Mr Feen did in fact have sufficient information on the basis of the Statement of Claim in S 294/2017[17] and the Viking Engineering's submission to Mr Hayler dated 13 July 2018, together with a copy of a contract which was submitted as a supporting document,[18] but failed to engage the issue.

42 In this context, I was concerned only with determining if Mr Hayler had departed from his instructions and not whether Mr Hayler had made any errors

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15 PBCP, Vol 1, p [52].

16 Report at para 4.26: PBCP, Vol 1, p [114].

17 PBCP, Vol 2, p [299].

18 PBCP, Vol 2, p [139].

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in his approach to the assumptions regarding the diverted businesses. As Chan J stated in *Oriental Insurance* ([14] *supra*) at [54]:

> As a general proposition, so long [as] the expert has answered the question put to him; his determination is binding even if he may have answered it wrongly.

The pertinent issue for me to decide is therefore whether Mr Hayler had directed himself to value VIG on the assumption that the diverted business was performed by VIG. In my view, there was no doubt that he had done so.

43 The first step is to consider the scope of the instructions. Neither the Buyout Order nor the LOE contained specific instructions as to the method by which the adjustment was to be made, other than conferring upon the independent valuer the broad discretion to have "regard" to the "financial information and records" of the relevant entities "as the valuer may deem necessary, relevant or desirable".

44 The next question, then, is whether Mr Hayler did adjust the purchase price on the required assumption. I found that he did. First, at para 4.27 of the Report, Mr Hayler had regard to the various figures and documents provided to conclude that there were business diversions in 2016.[19] Second, at paras 5.15 and 5.16 of the Report, after noting the defendants' failure to comply with his information requests, Mr Hayler explained how he proceeded to value VIG taking into account the diverted business.[20] Third, Mr Hayler considered whether VIG's revenue was attributable to the businesses stated at para 2(f)(i) of the Buyout Order. He then implemented the adjustment by taking a broad

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19 Report at para 4.27: PBCP, Vol 1, p [114].

20 Report at paras 5.15–5.16: PBCP, Vol 1, p [121].

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assumption that VIG's revenue in 2015, the year before the diversions started, would have grown in line with industry growth.[21] These steps were all directed at answering the question of how the purchase price should be adjusted to account for the diverted business. Therefore, there was no basis for the defendants' assertion that Mr Hayler departed from his instructions here.

45 An assessment of physical impossibility also formed a part of Mr Hayler's consideration of this issue. As noted above, under para 2(f)(ii) of the Buyout Order, all the goodwill and revenue earned from the diverted business was to be attributed to VIG, unless the goodwill or revenue arose from a contract that would have been physically impossible for VIG to have earned. The defendants argued that Mr Hayler had not considered this at all. I disagreed, for reasons that follow.

46 First, I found the defendants' characterisation of the instructions to the valuer to be misconceived.[22] In my view, no particular methodology was prescribed under the Buyout Order or LOE. In other words, para 2(f)(ii) of the Buyout Order did not necessarily require Mr Hayler to ask, as the defendants claimed, whether a particular contract was physically impossible to perform. All it required was for him to exclude the goodwill and revenue from contracts that were physically impossible to perform.

47 Second, on that basis, I found that Mr Hayler had turned his mind to consider what goodwill and revenue was to be excluded. At paras 5.25 and 5.26 of the Report, Mr Hayler set out the parties' respective positions on this issue.[23]

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21 Report at paras 6.10–6.11: PBCP, Vol 1, p [129].

22 Plaintiff's Written Submissions (OS 1324/2019) at para 58.

23 Report at paras 5.25–5.26: PBCP, Vol 1, p [125].

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At para 5.27, he stated the condition found in cl 5(g) of the LOE, which reflected para 2(f)(ii) of the Buyout Order, stating, "I therefore consider that I am required to address it for the purposes of my determination". His conclusion was stated at paras 5.28–5.31 of the Report. First, he found that the defendants had failed to provide sufficient evidence to prove that the relevant business was physically impossible. I saw no reason to disagree with Mr Hayler's application of the burden of proof. Second, Mr Hayler considered that a contemporary business does not need to conduct of all its own operations but can outsource parts of the process. Third, financing would have been available given the growth in the sector.[24]

48 The defendants then argued that Mr Hayler's analysis was in error, primarily on the basis that he had failed to consider the contents of the letter sent by the defendants' then-solicitors on 7 September 2018. I was not persuaded by this submission. Mr Hayler clearly quoted from the 7 September 2018 letter and addressed what he saw to be the key issues. It was not for the court to look behind Mr Hayler's report to consider the adequacy of his treatment of the evidence. Mr Hayler's disagreement with the defendants' submissions to him, namely that VIG did not have the capacity to engage in engineering work, that Viking had previously refused to give a capital injection, that VIG was perceived to be a racist organisation, and that VIG had been blacklisted by major clients[25], do not reflect points of departure (or show any manifest error) on Mr Hayler's part. He was entitled to assess and to reject the defendants' claims. This was entirely within Mr Hayler's remit.

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24 PBCP, Vol 1, p [125].

25 Plaintiffs' Written Submissions (OS 1324/2019) at para 62.

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Conduct of the defendants in the valuation

49 The defendants' contentions in respect of Mr Hayler's assumptions and methodology raised issues concerning Mr Feen's conduct, which I turn now to consider.

(1) Lack of co-operation

50 The conduct of parties in respect of the submission of documents was set out by Mr Hayler in Appendix 3 to the Report.[26] I highlight here the key facts. On 22 June 2018, Mr Hayler wrote to parties with his information request, pursuant to cl 20 of the LOE.[27] Mr Hayler gave the parties two weeks for the provision of documents, from 25 June to 9 July 2018 ("the document provision period"). By agreement of parties, the document provision period was extended to 13 July 2018. This deadline was again breached, and Mr Hayler gave the parties another extension to 31 August 2018. Yet another extension was given to the parties until 7 September 2018, and then once again until 4 October 2018, nearly three months after the close of the initial document provision period. Despite these extensions, there remained significant gaps in the documents provided to Mr Hayler.

51 I previously dealt with Mr Feen's failure to co-operate with the valuation process in *Viking Engineering v Feen, Bjornar (No 1)* ([10] *supra*) at [23]. Mr Feen is the sole director of the remaining defendants, who were party to the same LOE. All were subject to the same obligation to co-operate, specified in

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26 Report at p 76: PBCP, Vol 1, p [149].

27 See Tab 6 to Moh Liang Teng Evelyn's 1st Affidavit (OS 1324/2019): PBCP, Vol 2, p [203].

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FTI's standard terms and conditions, at Annexure A to the LOE.[28] I detail here the following instances of failure to co-operate:

(a) As recounted above, there were numerous delays due to the failure of the defendants to provide documents and information that should have been within their possession and control. Despite the numerous extensions, the submissions "failed to include most of the documents [Mr Hayler] requested".[29]

(b) Further, there were significant doubts over the information that *was* provided. As Mr Hayler noted in the Report, there were electronic files containing unaudited financial statements that were created and last modified on dates *before* the end of the relevant period (*eg* the file containing statement for the *full year* of 2017 was created on 20 April 2016 and last modified on *29 March* 2017).[30] There were also questionable entries for "Subcontractor services" for which Mr Hayler sought explanations. Despite repeated reminders, no explanations were forthcoming.[31]

(c) Specific information requests from Mr Hayler were not fulfilled by the defendants:

(i) On 27 July 2018 and 31 August 2018, Mr Hayler requested information relating to the defendant companies, including general ledgers, sales ledgers, journal entries and trial

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28 PBCP, Vol 1, p [60].

29 Report at para 3.23: PBCP, Vol 1, p [87].

30 Report at para 3.47, see footnote n 41: PBCP, Vol 1, p [96].

31 Report at para 3.48: PBCP, Vol 1, p [97].

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balances. Notwithstanding Mr Hayler's six repeated reminders, none of this information was forthcoming.[32]

(ii) In the course of attempting to obtain the bank statements and tax records for the defendant companies from third parties, Mr Hayler required authorisations to do so. After obtaining Mr Feen's signature, the third parties requested further authorisations from Mr Feen. Mr Hayler relayed the requests to the defendants' counsel at the time on 15 October 2018, and requested the authorisation to be done by 19 October 2018 so that the information would be obtained within the time period for the valuation exercise. This was not done.[33]

(d) In their submissions, the defendants tried to argue that they had in fact co-operated, citing in particular the fact that they had provided contact details to Mr Hayler for the purpose of meeting with the accountants on 7 September 2018, but which meeting never took place.[34] This was a mischaracterisation of the facts. Mr Hayler first suggested the idea of a site visit to the accountants to look at the accounting system on 27 July 2018. The defendants' solicitors at the time replied that they would try to arrange an appointment. Mr Hayler responded to ask for the appointment to be arranged within the next two weeks, which the solicitors acknowledged.[35] However, despite seven reminders, this was

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32 Report at para 3.52: PBCP, Vol 1, p [98].

33 Report at paras 3.54–3.62: PBCP, Vol 1, pp [98]–[99].

34 Plaintiffs' Written Submissions (OS 1324/2019) at paras 79–81.

35 Report at paras 3.63–3.65: PBCP, Vol 1, p [99].

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never done.[36] The next update came on 7 September 2018, when the defendants' solicitors provided contact details to Mr Hayler as follows:[37]

> … [W]e have been instructed that you can communicate directly with their accountants to access the documents required as they are not in a form which can be easily sent from what we understand. Your points of contact would be Mr Sawar of Navig8 ([xxx]@navig8shipmanagement.com) (for documents relating to VIG) and Ms Carine from Wan Consultants ([xxx]@wanconsultants.com.sg) (for documents relating to all the other companies referenced in the Court Order). Our clients have instructed them to provide the relevant documents and accounts to you and we understand that you can liaise with them to make the necessary arrangements. They should also be able to provide you with the necessary inputs you require regarding the preparation of the documents.

This last-minute attempt at co-operation came on 7 September 2018 when the information had been requested much earlier, on 27 July 2018. More importantly, Mr Hayler rightly felt the information was not reliable: "Navig8" was elsewhere identified by the defendants' then-solicitors as one of the companies that had decided not to contract with Mr Feen or VIG or other associated companies since 2016, suggesting that it was a client, not an accountant. Mr Hayler justifiably exercised his discretion, given that that particular document provision period had ended, to continue with the valuation exercise without arranging a meeting.[38]

52 The defendants' excuse was that they did not have the available documents because VIG did not have a proper office and there was an absence of a proper accounting and document management system, and further, because

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36 Report at para 3.66: PBCP, Vol 1, p [100].

37 Report at para 3.67: PBCP, Vol 1, p [100].

38 Report at paras 3.69–3.70: PBCP, Vol 1, p [101].

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Mr Feen had not been resident in Singapore since 2014.[39] These arguments were attempted but failed in *Viking Engineering v Feen (No 1)* and did not become more persuasive on repetition. First, the defendants were almost entirely passive throughout the process, and failed to request extensions of time even though that was provided for under cl 20 of the LOE, as Mr Hayler observed in his email dated 15 July 2018 to the parties.[40] Further, I noted that this explanation did not arise in the email dated 14 July 2018 from the defendants' solicitors at the time to Mr Hayler. Rather, the explanation there was that the defendants needed more time to obtain the documents, not that these were not available.[41] Second, these fact, if true, must have been known by the defendants prior to their agreement to the appointment of an independent valuer, the design of the procedure, and the terms of the LOE. They cannot now seek to undermine the bargain simply because of their later failures to comply with the agreed procedures.

53 Viking Engineering has raised two points in relation to the above sequence of events. First, that the defendants were estopped from complaining about how the valuation exercise continued because they had failed to apply to court when they had represented that they would. Second, that the defendants could not now rely on their lack of co-operation to complain about alleged assumptions made in Mr Hayler's determination and the Report. I deal with each possible implication in turn.

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39 Plaintiff's Written Submissions (OS 1324/2019) at para 78.

40 PBCP, Vol 2, p [208].

41 PBCP, Vol 2, pp [209]–[210].

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(2) Estoppel

54 Three elements are necessary in order to ground an estoppel: (a) representation; (b) reliance; and (c) detriment: *United Overseas Bank Ltd v Bank of China* [2006] 1 SLR(R) 57 at [18]. Any representation must be clear and unequivocal. Although it may be implied, mere silence would not normally suffice unless there was a duty to speak: see *Tacplas Property Services Pte Ltd v Lee Peter Michael (administrator of the estate of Lee Ching Miow, deceased)* [2000] 1 SLR(R) 159 at [62]–[63].

55 The facts said to amount to a representation were these. In an email dated 15 July 2018, Mr Hayler wrote to the solicitors for both sides, expressing his frustration at the defendants' repeated failures to abide by the timelines and to provide the requested documents. He then stated:[42]

> **Moving forward**
>
> Essentially I have two choices:
>
> (1) wait until all documents are provided and commence my work. This will delay the rendering of my award but incur no additional cost; or
>
> (2) commence work based on the submissions I have received and deal with new documents as they are received, this will minimise the delay but be more expensive than the estimate in LOE clause 40 as some work along the way will be wasted.
>
> Per LOE clause 31 I am to aim to complete the Valuation Stage within six weeks of the end of the Document Provision Period. As such I believe that I am required by the procedure provided by [*sic*] me by the Parties to adopt (2) and commence work immediately. The sooner the outstanding documents are provided the lower the additional expense incurred is likely to be.

42 Moh Liang Teng Evelyn's 1st Affidavit (OS 1324/2019) at p 207 (Tab 9).

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> If any of the Parties representatives would like to comment on my conclusion or any part of this email, please provide your responses by COB Wednesday 18 June [*sic*].
>
> [emphasis in original]

56 On 18 July 2018, solicitors for Viking Engineering replied to Mr Hayler, expressing support for Mr Hayler's proposal to proceed with the valuation. They further stated that where information was lacking, Mr Hayler should draw the appropriate inferences necessary and incorporate those into the valuation.[43] That same day, then solicitors for the defendants replied, explaining that they were not in possession of the documents and they were seeking information from those who did have the documents on the state of the requested information. They reiterated that the defendants were not withholding documents and would arrange for the documents to be available to Mr Hayler. In relation to the proposed course of action, they wrote:[44]

> In view of the present situation, and while our clients would prefer that option (1) you presented would be taken, we will be seeking directions from the Court as to how best to proceed in the interests of all concerned.

57 On 19 July 2018, Mr Hayler replied, acknowledging that the parties had liberty to apply to court to seek directions "on the timetable or provision of documents", and asked only that he be "kept appraised of any such application and the outcome".[45] On the same day, the defendants responded by providing additional documents, and noting: [46]

> As for the rest of your email below, we will take our clients' instructions on the same and confer with Mr Rai and his team

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43 Moh Liang Teng Evelyn's 1st Affidavit (OS 1324/2019) at p 215.

44 Moh Liang Teng Evelyn's 1st Affidavit (OS 1324/2019) at p 213.

45 Moh Liang Teng Evelyn's 1st Affidavit (OS 1324/2019) at p 220.

46 Moh Liang Teng Evelyn's 1st Affidavit (OS 1324/2019) at p 219.

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> accordingly and will keep you appraised of any updates or possible changes to the scope of your engagement.

58 The defendants, however, did not apply to court for directions. Instead, they proceeded to provide some documents on 31 August 2018,[47] and on 7 September 2018, provided submissions in the form a letter.[48] This failure to apply to court, contended Viking Engineering, gave rise to an estoppel by representation.

59 In order for an estoppel to apply to preclude challenge to the Report, there must have been a clear and unequivocal representation that the defendants were willing to accept the result of the valuation that proceeded after the defendants failed to apply to court, *however that Report might turn out*. But the defendants' conduct suggested, at most, that they were not going to dispute Mr Hayler's decision to commence the valuation process *at that time* in July 2018. They would expect that subsequent documents could be introduced and Mr Hayler would revise the valuation accordingly. What Mr Hayler had stated in his email dated 15 July 2018 was that he would proceed with the valuation and deal with additional documents *as they came in*, rather than postpone the valuation process; his point was that he was going to commence work based on what he had, *and* "deal with new documents as they are received". In that context, even if the defendants' conduct in response to that email represented that they accepted Mr Hayler's decision communicated on 15 July 2018, this was not a representation that they would accept whatever valuation Mr Hayler arrived at when he took into account the various documents later made available.

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47 Moh Liang Teng Evelyn's 1st Affidavit (OS 1324/2019) at p 249.

48 Moh Liang Teng Evelyn's 1st Affidavit (OS 1324/2019) at pp 232–236..

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60 The fact that Mr Hayler decided to commence the valuation process at that time is not the subject of dispute in the present case. Rather, the defendants' complaints deal with the substance of Mr Hayler's valuation *after* further information was given in later submissions. Their complaint was that, having seen all the information available at the end of the last deadline in September 2018, that Mr Hayler should not have made the determination that he did. I turn then to deal with this aspect of the arguments.

(3) Effect of lack of co-operation

61 What then is the effect of the defendants' lack of co-operation? Viking Engineering relies on *Evergreat* ([16] *supra*), to contend that the defendants may not take advantage of their own wrong to set aside the determination. In *Evergreat*, Rajah J explained at [51]–[52] as follows:

> … The courts accept that in general, a party in default under a contract cannot take advantage of his own wrong: *Chitty on Contracts* vol 1 (Sweet & Maxwell, 29th Ed, 2004) at para 1-025. This long established principle may be relevant in a contractual dispute either as a principle of construction or as a rule of law depending on the circumstances; *Kensland Realty Ltd v Whale View Investment Ltd* (2001) 4 HKCFAR 381. …
>
> In order to invoke this principle, it must be shown that the contractual right or benefit that a party is asserting or claiming is a direct result of that party's prior breach of contract. The relevant breach, the factual consequences flowing from that breach, and the advantage the contract breaker is seeking to raise must be identified.

62 In contrast, the defendants argued, citing *Bajaj* ([17] *supra*), that this principle did not apply in the present case.

63 Again, the exact scope of the decision in *Bajaj* is important. The Court of Appeal there accepted the *Evergreat* principle, but decided that it was not applicable in that case, because the accountant chose to qualify his report: [65].

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The Court of Appeal concluded that the contractual benefit that Mr Bajaj asserted was not a direct result of his breach of his duty to co-operate: *Bajaj* at [77]–[78]. As I had found that Mr Hayler had not qualified his report in this case, the issue of the defendants' conduct became potentially relevant to the other complaints that Mr Hayler departed from his instructions. I turn then to these specific complaints.

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64 The decision in *Evergreat* stands for the proposition that a defendant would not be able assert a contractual right if the right arose from the direct result of its own misconduct: at [52]. Coming to the present case, the contract between parties did not furnish the defendants a right to set aside a validly made determination. In so far as the defendants sought to argue that Mr Hayler's valuation was manifestly in error or a material departure from instructions, I observe that Viking Engineering had not one rejoinder but two. In my judgment, the parties' contract in this case allowed for Mr Hayler to use his discretion, and his exercise of such discretion was entirely reasonable. First, his use of discretion was the direct result of the defendants' own breaches of the duty to co-operate. Second, clauses 7 and 14 of the LOE allowed Mr Hayler to make suitable adjustments in the absence of information. The adjustments Mr Hayler made were the result of the defendants' conduct, and were effected reasonably:

(a) In relation to the use of assumptions, aspects of Mr Hayler's reliance on assumptions were a direct result of the defendants' failure to co-operate and to provide the necessary documents. This is clear from the Report itself, where Mr Hayler discussed the limitations of the information at paras 6.10 and 6.11. The defendants could not complain about Mr Hayler's use of assumptions to set aside the Report, insofar as the assumptions were necessitated by the absence of information due to the defendants' breach of the duty to co-operate in the very first place.

(b) In relation to the diversion of business, again the absence of information arose from the defendants' failure to co-operate. Mr Hayler's approach was the direct result of the absence of information about the contracts, VIG, and the Feen Companies.

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(c) In relation to the issue of physical impossibility, the defendants' failure to provide information on the contracts and the Feen Companies meant that Mr Hayler was constrained to assess the issue of diversion in relatively broad strokes, which also prevented him from undertaking the specific analyses that the defendants now argue he should have done.

65 I return to the fundamental point in this case. The LOE and the Buyout Order allowed for Mr Hayler to exercise his discretion in the way that he did. His exercise of his discretion was a direct result of the defendants' lack of co-operation and breaches of their duties under the parties' agreed LOE. Therefore, the defendants here, similar to the defendants in *Evergreat*, could not raise complaints about assumptions or conclusions that arose directly out of their own misconduct.

Was there manifest error in the Report?

66 I turn then to the arguments on manifest error. In *Geowin Construction Pte Ltd (in liquidation) v Management Corporation Strata Title Plan No 1256* [2007] 1 SLR(R) 1004 ("*Geowin*"), Rajah J summarised the applicable principles as follows (at [19]):

> If the parties agree that an expert's decision is final, a court should not inquire (in the absence of a charge of fraud or collusion):
>
> (a) how a decision has been reached;
>
> (b) into the basis for the decision; or
>
> (c) whether the decision was indeed correct.
>
> To do so would be entirely contrary to the parties' contractual intentions to be bound by an expert's decision – particularly if the agreement itself expressly stipulates that the decision of the expert is final. I respectfully concur with Lord Denning MR's view in *Campbell v Edwards* ([16] *supra*) that the only errors that can be corrected by the court are those that appear on the "*face*" of the award or report (see at [17] above). In the context

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> of a speaking award, the court should not stray beyond the actual report or award in considering how or why the decision was reached. The underlying evidence ought not to be re-examined or referred to as this would be tantamount to an appellate hearing and to that extent contrary to what the parties had solemnly agreed to. ***The right of review should be confined to correcting apparent mistakes that appear on the face of the report or award (eg apparent mathematical miscalculations) and to determining whether the expert has complied with the terms of his appointment. If an expert answers the right question in the wrong way his decision will nevertheless be binding:*** see the decision of Knox J in *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 2 EGLR 103 at 108.
>
> [emphasis in original in italics; emphasis added in bold italics]

67 At the outset, I note that there is a difference of opinion in the High Court on whether underlying sources may be examined. On one hand, in *Oriental Insurance* ([14] *supra*), the court had regard to underlying sources to understand the IA's reasoning. On the other hand, the courts in *Geowin* and *Teo Lay Gek and another v Hoang Trong Binh and others* [2019] SGHC 84 ("*Teo Lay Gek*") preferred the view that in considering the report, the court should not stray from errors appearing on "the face of the report".

68 In the present case, irrespective of the approach I adopted, this would not make a difference to the end result. In my view, the difference between the two approaches only goes to the narrow issue of what the court should look at in deciding if there is a manifest error. In *Oriental Insurance* at [89], the court's reference to other sources was made only in order to understand the IA's approach and reasoning, not to expand the scope of what constituted a manifest error. *Oriental Insurance* certainly did not go so far as to suggest that the court was to decide if the expert was correct in his approach and reasoning, but only that it would be useful for the court, at times, to consider other documents to assist it in comprehending the expert's determination.

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69 On *both* approaches, the threshold for a manifest error remains a high one. I summarise the applicable principles as follows:

(a) a manifest error is an error that is obvious (*Veba Oil* ([17] *supra*) at [33]), or patent (*Geowin* at [16]);

(b) a manifest error is an error that is "obviously capable of affecting the determination" (*Veba Oil* at [33]; *Oriental Insurance* at [86]);

(c) a manifest error is an error that admits "of no difference of opinion" (*Veba Oil* at [33]); and

(d) arithmetic miscalculations (*Oriental Insurance* at [90]), mistakes as to the identity of parties (*Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 ("*Legal & General Life*") at 335 quoted by *Geowin* at [17]) or a reference to a building that does not exist (*Walton Homes Ltd v Staffordshire County Council* [2013] EWHC 2554 (Ch) ("*Walton Homes*") at [46]) are all examples of manifest errors.

70 In contrast, a failure to take into account relevant considerations or a decision to take into account irrelevant considerations (*Legal & General Life* at 335, cited by *Geowin* at [17]), errors in judgment (*eg* treating as good debts that turn out to be bad, or omitting losses that were not known at the time: *Walton Homes* at [9] citing *Lindley & Banks on Partnership* (Sweet & Maxwell, 19th Ed, 2010) at para 10-73), mistakes in the expert's reasoning process (*Holt v Cox* (1997) 23 ACSR 590 at 596, quoted by *Geowin* at [18]) and even negligent valuations (*Evergreat* ([16] *supra*) at [28]; *Teo Lay Gek* at [46]) are not regarded as manifest errors.

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Criticism of valuation methodology

71 The defendants argued that Mr Hayler's approach to valuation was a manifest error. In the Report, Mr Hayler first conducted a DCF analysis, arriving at the figure of S$50.9 million,[49] then conducted a comparative analysis and arrived at a value of S$37.1 million,[50] before proceeding to use the mid-point (or average) between the two, concluding with a valuation of S$44 million.[51] Relying on a report prepared by Mr Collard, the defendants argued that this was inconsistent with the International Valuation Standards Council ("IVSC") guidelines, which stated that the averaging of valuations is "not acceptable".[52] Further, the IVSC guidelines appeared to provide that even the process of "weighting", that is, "the process of analysing and reconciling differing indications of values, typically from different methods and/or approaches", and excludes averaging,[53] was not acceptable where different methods "result in widely divergent indications of value",[54] which was, according to the defendants, the situation here.

72 I did not accept the defendant's submission. There was, noticeably, no provision in the Buyout Order and the LOE that required Mr Hayler to perform the valuations in accordance with the IVSC guidelines. The guidelines were not binding in the present case. Mr Collard thought they were crucial; Mr Hayler plainly did not. There was no basis for the court to embark on an inquiry as to

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49 Report at para 6.29: PBCP, Vol 1, p [136].

50 Report at para 7.11: PBCP, Vol 1, p [142].

51 Report at paras 8.2–8.3: PBCP, Vol 1, p [143].

52 IVSC Guidelines at p 5: PBCP, Vol 1, p [696].

53 IVSC Guidelines at p 5: PBCP, Vol 1, p [696].

54 IVSC Guidelines at p 30, para 10.6: PBCP, Vol 1, p [720].

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whether the guidelines should be applied. As Tan Siong Thye J stated in *Teo Lay Gek* ([67] *supra*) at [41], it would not be "proper for the court to adjudicate between the *merits* of the contrasting opinions in deciding whether or not to set aside an expert's determination".

Criticism of DCF analysis

73 The defendants made various criticisms about Mr Hayler's DCF analysis. First, the defendants argued that the Report was erroneous as it represented in the diagram at page 33 that Mr Feen owned 50% of Scanjet Feen. However, there was no error on the face of the Report, as there was no indication of inconsistency. Even considering the company search tendered, I noted that the company search was generated on 22 October 2019,[55] while Mr Hayler's chart was stated expressly to be correct as at 30 September 2017 for Scanjet Feen.[56] I was not convinced that there was an error. In any case, the defendants have not shown how the error would have affected the valuation in such a way that justified judicial intervention: *Oriental Insurance* ([14] *supra*) at [86].

74 Second, the defendants took issue with Mr Hayler's use of a Compound Annual Growth Rate ("CAGR") of 20% to estimate the growth in VIG's revenue from 2015 to 2018. The defendants complained that Mr Hayler had only used the estimates stated in the summaries to the reports, and that Mr Hayler had failed to distinguish between the different sectors (marine, industrial and aviation) and between the different geographic sectors. The defendants argued that Mr Hayler should have used estimates that were more relevant instead.

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55 PBCP, Vol 1, p [215].

56 Report at Figure 4.2: PBCP, Vol 1, p [106].

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75 In his analysis, Mr Hayler first identified the "major global players" in the global IGS market at paras 4.28–4.29 of the Report. He then noted that the global IGS and EGCS markets were projected to have strong growth of at least 20% per year from 2017 to 2025. He noted that the global IGS market was projected to grow at a CAGR of 21% and 24.1% up to 2022 and 2026 respectively, and the EGCS market was projected to grow at a CAGR of around 45.8% and 40% up to 2022 and 2025 respectively.[57] Mr Hayler also provided reasons for these strong projections.[58] He then found that these projected growth rates were consistent with material prepared for the Feen Companies as well as in the news.[59] In Appendix 4 of the Report, Mr Hayler set out a more detailed analysis of the IGS and EGCS markets, showing how he derived the figures that he relied on in the body of the Report.

76 I was unable to find any manifest error in Mr Hayler's valuation. The defendants' criticisms revealed a difference in opinion, which is not a matter within the court's purview. The defendants argued that the CAGR was mistaken because there were better estimates that were more relevant for VIG's business, but Mr Hayler had proceeded on a different basis based on his professional judgment. The question of what rates to use in projecting revenue, as well as adjustments to make, are matters of professional expertise. In particular, I noted that Mr Hayler provided justification for his use of the reports. For example, in his view, the projected growth rate for the marine sector, which the defendants argued is the relevant one, would have been higher than the estimated rates for the overall IGS market, but he decided to rely on the overall IGS market rates

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57 Report at para 4.30: PBCP, Vol 1, p [115].

58 Report at para 4.31: PBCP, Vol 1, p [115].

59 Report at paras 4.32–4.33: PBCP, Vol 1, pp [116]–[117].

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in the exercise of his judgment.[60] That was not something that the court should interfere with in this context.

77 I was buttressed in my conclusions by considering Mr Collard's report. I noted that Mr Collard's views on the CAGR of 20% were couched in terms of his own professional judgment. In his view, Mr Hayler should have purchased the reports or relied on the accounts of comparable companies. Mr Collard noted that Mr Hayler did not consider whether a small company would have the same access to growth in the market. He concluded that "[g]rowth at 20% per annum sustained for 20 years would be unusual in an industry without some element of new technology".[61] On his analysis, there was nothing wrong on the face of the valuation, but his views on the appropriate rates and applications differed. The defendants' arguments did not reveal manifest error but merely disclosed a preference for one expert opinion over another.

Criticism of comparative analysis

78 The defendants criticised Mr Hayler's comparative analysis because he used two listed companies, Alfa Laval AB ("Alfa Laval") and Wartsila Oyj Abp ("Wartsila") as comparable companies. They argued that these two companies were listed companies with significantly larger market capitalisations, that the fact that they were competitors did not mean that they were comparable, and that, relying on Mr Collard's report, Mr Hayler had erred in failing to apply any adjustments to the multiples used in the analysis. The defendants submitted that even if Mr Hayler was relying on the competitors identified by Mr Feen at VIG's Annual General Meeting on 1 August 2016, there were also four other

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60 Report at para A4.14: PBCP, Vol 1, p [166].

61 Mark Collard's Report at para 5.24: PBCP, Vol 1, p [546].

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companies identified, two of which were local private companies that should have been relied upon instead.

79 I did not find the defendants' arguments compelling. The question of which companies to use as comparable companies for the purpose of the comparative analysis is plainly one for the expert to exercise his judgment on and on which there may be a difference in opinion. The same goes for what adjustments should be made to the data to account for differences between the comparable companies and the company being valued. In this case, the decisions against which the defendants are mounting their complaint were within the scope of Mr Hayler's discretion, given that the parties had tasked him to value the shares in VIG. He made the decision to rely on Alfa Laval and Wartsila, and applied adjustments accordingly. Even if there were more appropriate companies to use as comparators, Mr Hayler's decision not to do so does not amount to a manifest error.

Other contentions of manifest error not supported by expert evidence

80 The defendants also submitted that as at 10 September 2013, when Viking Engineering sold its 21% shareholding to Mr Feen, the valuation of VIG was S$1.14 million. FTI's analysis which valued VIG at S$44 million, meant that VIG would have grown more than 38.5 times in just 5 years. This scepticism should have been expressed by expert opinion, but it was not. It did not feature in Mr Collard's analysis. Nor would that fact have escaped Mr Hayler or Mr Collard. It was only asserted by Mr Feen and repeated by counsel in oral argument. As a general matter, it is not impossible for companies to grow by more than many times the growth rate attributed to VIG: without expert evidence, it was impossible to conclude that such growth was not possible. Indeed, Mr Hayler's expert evidence indicated the contrary.

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81 The accounts exhibited in Mr Feen's two additional affidavits did not assist the defendants either. The 2014 accounts had been available in October 2018 but were not made available to Mr Hayler, nor Mr Collard for that matter. In any case, that set of accounts was ultimately not audited as the independent auditor found insufficient evidence for the auditing process to proceed.[62] As for the remaining accounts for 2015 and 2016 found in Mr Feen's 3rd and 4th Affidavits, although these appear to have been completed around 30 November 2019 or later, whatever documents they were based upon could and ought to have been shared with Mr Hayler. The defendants did not do so. In addition, there was no legal basis shown by the defendants that would enable the court to consider such financial statements in preference to My Hayler's determination as parties' appointed expert.

82 I noted also that while Mr Collard criticised Mr Hayler's analysis, he did not attempt to put a competing valuation before the court.

Conclusion

83 While, in each case where the court orders a valuation, it retains judicial supervision over the expert, the court will be slow to find that the valuation is in error, since by appointing an expert in the first place the court has taken the position that the matter is best left to the expert: *NK v NL* [2010] 4 SLR 792 at [6], in the context of the valuation of a court-appointed independent expert, which the Court of Appeal considered as analogous to that of a party-appointed expert. In this case, parties have by agreement further delineated the expert's scope in the LOE, and by that same LOE, permitted the valuer to make the determination which he has reasonably made. The defendants, after choosing to

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62 Bjornar Feen's 3rd Affidavit (OS 1324/2019) at p 10.

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tarry and failing to co-operate, wished to set aside a Report that was clearly envisaged in parties' agreed LOE and entirely consistent with the Buyout Order; and to appoint a new valuer. While they have adduced expert evidence, such evidence only related to preferences in valuation methodology, and did not indicate any material departure from instructions or manifest error, nor was any other valuation suggested. There was no proper or substantial basis for the defendants' application to set aside the Report.

84 Having decided the central issue against the defendants, I dismissed OS 1324/2019. I would also note that the more appropriate means for parties seeking to set aside an expert's determination would have been through an application within S 294/2017 to seek the court's directions under the Buyout Order.

85 SUM 4610/2019, on the other hand, was an application for a court order pursuant to O 45 r 6(2) of the ROC for Mr Feen to make the purchase within 7 days. The power to grant such an order is discretionary, premised on sufficient evidence to justify the requested order: see *Mok Kah Hong v Zhong Zhuan Yao* [2016] 3 SLR 1 at [45]–[46]. The defendants made the point that Mr Feen's lack of an intention not to comply with the order directing purchase of the Shares was not clearly shown. By the time of the hearing, he had filed OS 1324/2019 to set aside the Report. At the hearing, in the light of my indication that I would set the price at the valuation determined in the Report, Viking Engineering decided not to pursue an order under O 45 r 6(2) of the ROC.[63] The purchase price of the Shares was set in accordance with the valuation determined in the Report. Parties were given liberty to apply.

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63 Notes of Argument 2 March 2020.

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86 Viking Engineering was entitled to costs of both applications, in addition to the application by the defendants to admit two additional affidavits in SUM 751/2020. Leave had been granted for Viking Engineering to withdraw SUM 793/2020. Taking the various matters into consideration, costs were awarded to Viking Engineering and fixed, inclusive of disbursements, at S$20,000.

Valerie Thean
Judge

Mahesh Rai s/o Vedprakash Rai and Yong Wei Jun Jonathan (Drew & Napier LLC) for the plaintiff in SUM 4610/2019 and the defendant in OS 1324/2019;
Wong Soon Peng Adrian, Ang Leong Hao and Sara Sim (Rajah & Tann Singapore LLP) for the defendants in SUM 4610/2019 and the plaintiffs in OS 1324/2019.

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