**IN THE APPELLATE DIVISION OF**
**THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2025] SGHC(A) 5**

Appellate Division / Civil Appeal No 21 of 2024

Between

J. G. Jewelry Pte Ltd

… *Appellant*

And

(1) Shree Ramkrishna Exports Pvt Ltd
(2) The Jewelry Company
(3) TJC Jewelry, Inc
(4) Govind Dholakia
(5) Rahul Dholakia
(6) Nirav Narola
(7) Amit Shah
(8) Ashish Shah

… *Respondents*

Appellate Division / Civil Appeal No 22 of 2024

Between

(1) Shree Ramkrishna Exports Pvt Ltd
(2) The Jewelry Company

… *Appellants*

And

J. G. Jewelry Pte Ltd

… *Respondent*

Appellate Division / Civil Appeal No 23 of 2024

Between

(1) Michael Bernard Kriss
(2) David Miles Kriss

… *Appellants*

And

Shaileshkumar Manubhai Khunt

… *Respondent*

Appellate Division / Civil Appeal No 24 of 2024

Between

J. G. Jewelry Pte Ltd

… *Appellant*

And

Shaileshkumar Manubhai Khunt

… *Respondent*

In the matter of Suit No 418 of 2018

Between

Shree Ramkrishna Exports Pvt Ltd

… *Plaintiff*

And

J. G. Jewelry Pte Ltd

… *Defendant*

And Between

J. G. Jewelry Pte Ltd

*… Plaintiff in counterclaim*

And

(1) Shree Ramkrishna Exports Pvt Ltd
(2) The Jewelry Company
(3) TJC Jewelry, Inc
(4) Govind Dholakia
(5) Rahul Dholakia
(6) Nirav Narola
(7) Amit Shah
(8) Ashish Shah

*… Defendants in counterclaim*

In the matter of Suit No 475 of 2018

Between

Shaileshkumar Manubhai Khunt

*… Plaintiff*

And

(1) Michael Bernard Kriss
(2) David Miles Kriss
(3) J. G. Jewelry Pte Ltd

*… Defendants*

And Between

J. G. Jewelry Pte Ltd

*… Plaintiff in counterclaim*

And

Shaileshkumar Manubhai Khunt

*… Defendant in counterclaim*

# JUDGMENT

[Contract — Formation — Certainty of terms]
[Restitution — Unjust enrichment — Failure of consideration — Counter-restitution]
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# v
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**[2025] SGHC(A) 5**

Appellate Division of the High Court — Civil Appeals Nos 21 to 24 of 2024
Woo Bih Li JAD, Debbie Ong Siew Ling JAD and See Kee Oon JAD
11–12 September 2024

7 March 2025 Judgment reserved.

**Woo Bih Li JAD (delivering the judgment of the court):**

## Introduction

1 This dispute centres around a business collaboration between Shree Ramkrishna Exports Pvt Ltd ("SRK") and JDM Import Co Inc ("JDM"), as well as various companies associated with each of them. Pursuant to this arrangement, SRK and its related companies supplied tens of millions of dollars' worth of diamonds and various kinds of jewellery (collectively, the "Goods") to the US-based affiliated companies of SRK and JDM. The Goods were however invoiced to J. G. Jewelry Pte Ltd ("JGJ"), a company which was incorporated in Singapore by the parties as a vehicle for their collaboration. Half of the shareholding in JGJ is held by Mr Michael Kriss ("Michael") and Mr David Kriss ("David") (collectively, the "Kriss Brothers"), who own and control JDM and its related companies. The other half is held by one

Mr Shaileshkumar Manubhai Khunt ("Shailesh"). As we elaborate later, we affirm the finding of the learned judge below (the "Judge") that Shailesh held his shares in JGJ as SRK's nominee.

2 The business collaboration between the parties broke down in August 2017 after a period of only about two years (see *Shree Ramkrishna Exports Pvt Ltd v JG Jewelry Pte Ltd* [2024] SGHC 10 (hereafter, the "Judgment") at [27]).

3 SRK then commenced HC/S 418/2018 ("Suit 418") on 23 April 2018, claiming that it was entitled to be paid sums of moneys totalling US$23,400,456.25 on invoices which it had issued to JGJ between 2 September 2016 and 2 August 2017 (the "23M Invoices"). JGJ's response was that the parties never intended that JGJ would have to pay for the Goods. Instead, the supply of the Goods by SRK to JGJ under the invoices represented SRK's contributions toward capital pursuant to a joint venture ("JV") between the parties.

4 Hence, JGJ brought a counterclaim in Suit 418 against SRK for a declaration that it was not liable to make payment of the 23M Invoices and for an order for counter-restitution that SRK repay JGJ US$42,994,312.66, being JGJ's payments of other invoices from SRK between 15 September 2015 and 14 April 2017 (the "42M Invoices"). JGJ's counterclaim also included claims for counter-restitution of other benefits received by SRK and entities related to SRK and claims against SRK and several individuals and entities related to SRK for breach of or inducing breaches of the alleged JV agreement and for conspiracy to injure. For ease of reference, we will refer to the alleged JV agreement as the "JVA".

5 One of SRK's related entities, The Jewelry Company ("TJCI"), then brought its own counterclaim against JGJ for payment of moneys under unpaid invoices totalling US$2,211,077.91 allegedly owed to TJCI for the Goods it had supplied to JGJ. The invoices were issued to JGJ between 8 October 2016 and 1 August 2017 (the "2.2M Invoices").

6 We will refer to the amount claimed under the 23M Invoices as the "SRK Unpaid Sum" and the amount claimed under the 2.2M Invoices as the "TJCI Unpaid Sum".

7 Separately, Shailesh commenced a minority oppression claim in HC/S 475/2018 ("Suit 475") on 4 May 2018 pursuant to s 216 of the Companies Act (Cap 50, 2006 Rev Ed) (the "CA") against the Kriss Brothers and JGJ. He complained that after the parties' business collaboration was terminated, the Kriss Brothers sought to pass resolutions authorising themselves to, *inter alia*, commence legal proceedings on behalf of JGJ against TJCI and SRK in the US on JGJ's behalf for moneys which TJCI and SRK allegedly owed to JGJ. No efforts were made, however, to recover moneys owed by JDM and its related companies to JGJ. Other resolutions were also passed to make four allegedly unjustified adjustments to JGJ's financial statements for 2016 (the "2016 Revised FS"). These adjustments were reflected in JGJ's financial statements for 2017 and 2018 (the "2017 FS" and "2018 FS" respectively). We elaborate later on the adjustments. JGJ counterclaimed in Suit 475, alleging that Shailesh had breached his duties as a director of JGJ by refusing or failing to sign three resolutions relating to the commencement of legal proceedings against SRK and its related entities, the approving of the 2016 Revised FS and the calling of an Annual General Meeting ("AGM"). We will refer to these resolutions collectively as the "Three Resolutions".

8 The Judge issued the Judgment on 18 January 2024 in respect of both suits. The Judge found that the Goods which were the subject of the claims in Suit 418 were supplied as equity contributions in the parties' joint venture and that the invoices were never intended to attract payment liability. Nonetheless, he allowed SRK's and TJCI's claims in unjust enrichment against JGJ and dismissed JGJ's counterclaim in Suit 418. As for Suit 475, the Judge allowed Shailesh's claim in part and dismissed JGJ's counterclaim.

9 There are now four appeals before us which may be categorised into two sets. The first set comprises AD/CA 21/2024 ("AD 21") and AD/CA 22/2024 ("AD 22"), which are appeals against the Judge's decision in Suit 418 by JGJ and by SRK and TJCI respectively. The second set comprises AD/CA 23/2024 ("AD 23") and AD/CA 24/2024 ("AD 24"), which were brought by the Kriss Brothers and JGJ respectively against the Judge's decision in Suit 475.

## Background facts

### *The parties in Suit 418 and Suit 475*

10 We provide some background to the suits, much of which is already set out in the Judgment. We begin with the parties to Suit 418.

11 The plaintiff, SRK, is an India-incorporated company which is in the business of manufacturing and trading in jewellery and precious stones, including diamonds. SRK's business includes a sales office in Mumbai and a jewellery manufacturing factory in Sachin in India (Judgment at [7]). JGJ, the defendant, is a Singapore-incorporated company in the business of trading jewellery and precious stones.

12 JGJ's counterclaim in Suit 418 was brought against the following parties (collectively, the "Suit 418 Counterclaim Defendants"):

(a) SRK;

(b) TJCI, a partnership registered in India and in the business of manufacturing, sales and marketing of diamond studded jewellery. SRK owns a minority stake in TJCI through its subsidiary, Ramkrishna Goldi Pvt Ltd. TJCI is the jewellery arm of SRK and is known in the market as a company affiliated with SRK;

(c) TJC Jewelry, Inc ("TJCNY"), a US-incorporated company in the business of sales and marketing of jewellery. TJCNY is the marketing affiliate of TJCI and helps to market TJCI's products in the US;

(d) Mr Govind Dholakia ("Govind"), an Indian national and the founder, chairman and director of SRK;

(e) Mr Rahul Dholakia ("Rahul"), an Indian national and the Managing Director of SRK and a partner of TJCI. Rahul is Govind's nephew;

(f) Mr Nirav Narola ("Nirav"), an Indian national who is an employee of SRK and a partner of TJCI. Nirav is Govind's grandson and Rahul's nephew;

(g) Mr Amit Shah ("Amit"), an Indian national and the Chief Executive Officer and a partner of TJCI; and

(h) Mr Ashish Shah ("Ashish"), a US national and the sole shareholder and president of TJCNY.

Of the Suit 418 Counterclaim Defendants, only TJCI brought a counterclaim against JGJ in Suit 418.

13 In respect of Suit 475, the plaintiff, Shailesh, is an Indian national resident in Hong Kong and is a director and a 50% shareholder of JGJ. He worked for SRK from 2005 to 2007 and is a director of S Goldi (Asia) Limited ("S Goldi"), a Hong Kong-incorporated company which serves as the marketing arm of SRK (Judgment at [13]). The first and second defendants in Suit 475 are the Kriss Brothers, who are US nationals and directors of JGJ. The third defendant in Suit 475 is JGJ. Apart from the Kriss Brothers each holding 25% of the shares in JGJ, they also own and control the following entities in the US. Collectively, these US entities are referred to as the "JDM Entities" (Judgment at [11]):

(a) JDM;

(b) MG Worldwide LLC ("MG Worldwide");

(c) Miles Bernard, Inc; and

(d) Asia Pacific Jewelry, LLC ("AP Jewelry").

The JDM Entities, which operate under the trade name "Instock" or "Instock Programs", run a New York family-owned jewellery business selling jewellery wholesale to major retailers in the US and abroad. The counterclaim in Suit 475 was brought by JGJ against Shailesh for alleged breaches of his fiduciary duties owed to JGJ.

***The parties' dealings from 2015 to 2017***

14 For approximately 15 years leading up to 2015, SRK supplied diamonds to the Kriss Brothers. In December 2014, the Kriss Brothers met with Rahul in

Mumbai. According to Michael, Rahul proposed the JV between the JDM Entities on the one hand and SRK, TJCI and TJCNY (collectively, the "SRK Entities"), in which both sides would contribute selected assets, liabilities and activities. Michael claimed that both sides shook hands on this agreement and uttered the word "mazal" (or "mazel"), which is a recognised practice of entering into contracts in the diamond industry. In contrast, Rahul, claimed that the parties to the collaboration were only exploring the opportunity of working together in a closer partnership.

15 In early January 2015, Nirav, Amit and Ashish met up with the Kriss Brothers for further discussions in New York. Michael claimed that they agreed at this meeting that the JV would commence operations on 1 April 2015. On 13 January 2015, Amit sent an e-mail to the Kriss Brothers, attaching a document titled "Joint Venutre [*sic*] Between JDM Group and The Jewelry Co. (SRK Group)" (the "13 January Memo"). The Kriss Brothers then made a trip to Mumbai at the end of January 2015, purportedly to obtain Govind's "blessings" for the JV.

16 JGJ was then incorporated in Singapore on 31 March 2015 with an issued share capital of US$100 comprising 100 ordinary shares. One issue was whether JGJ was incorporated as a *party* to the putative JV, or whether JGJ was merely the *subject of* such a JV. We address that later. At the very least, JGJ was incorporated as a vehicle for the parties' collaboration, although counsel for JGJ stressed at the hearing before us that JGJ was *not* to be equated to the putative JV itself. In any event, Shailesh was issued 50 shares in JGJ and Michael and David 25 each. The number of shares issued by JGJ has not changed since the time of its incorporation. A nominee resident director, Mr Ng Chee Wooi Michael ("Ng"), was also appointed. According to a Resident Director Indemnity Agreement, Ng was to act on the instructions of Mr Jim

Goldsborough ("Jim") – the Chief Financial Officer ("CFO") of JDM – as the "Authorized Person" designated by Shailesh and the Kriss Brothers. Shailesh and the Kriss Brothers were appointed as directors of JGJ on 15 April 2015 (Judgment at [19(c)]).

17 In April 2015, TJCNY moved to the JDM Entities' office in New York and operated from there until 8 October 2017. The bookkeeping, accounting and other back-office functions of JGJ and the JDM Entities were, to the extent possible, transferred to and undertaken by a team employed by TJCI in India. In May 2015, JGJ opened a bank account with the Israel Discount Bank in New York (the "IDBNY"). The signatories of this account were Amit, Ashish, Jim and the Kriss Brothers; *any* one of them could authorise payments to be made from the account (Judgment at [22]).

18 Given these events and more, there was evidently *some* close collaboration between the JDM Entities and the SRK Entities. However, the precise nature of this collaboration between the JDM Entities and the SRK Entities from 1 April 2015 was (and continues to be) heavily disputed. On one hand, JGJ pleaded that the collaboration was based upon a JVA entered into among the SRK Entities, the JDM Entities *and JGJ* itself on 13 January 2015. We have referred to the alleged JV agreement as the "JVA", but this description does not necessarily mean that we accept that JGJ has established all the alleged terms of the JVA. According to JGJ, under the JVA, the Goods supplied by the SRK Entities to JGJ would be treated as capital. In other words, the invoices issued by SRK and TJCI to JGJ were not intended to attract any payment liability on JGJ's part. On the other hand, SRK pleaded that the collaboration was based on a non-committal business arrangement (the "BA") under which SRK sold the Goods to JGJ while the parties negotiated concurrently on the terms of a potential JV.

19 This disagreement on the nature of the collaboration aside, the parties acknowledge that their broad arrangement was for SRK and TJCI to supply the Goods directly to the JDM Entities and TJCNY in the US and to invoice JGJ for these Goods. The JDM Entities and TJCNY would then sell the Goods to third party retailers (such as Macy's, Zales and JCPenney) on a consignment basis; payment would only be received by the JDM Entities or TJCNY when these Goods were sold to the end-consumer by the retailers. The Goods were therefore never physically transported to or from JGJ in Singapore. Hence, when we refer to the supply of Goods to JGJ, we mean that the supply was for the account of JGJ and not that JGJ physically received them.

20 Sometime in May 2016, a total sum of US$700,000 was injected into JGJ and described in the remittance forms as "Capital Introduction". The background to the injection of US$700,000 was that on 11 May 2016, S Goldi had transferred US$500,000 to Shailesh. In turn, Shailesh transferred US$200,000 and US$300,000 to JGJ on 11 May 2016 and 13 May 2016 respectively. On 19 May 2016, S Goldi transferred another US$200,000 to Shailesh. On the same day, Shailesh transferred US$200,000 to JGJ (Judgment at [24]). We will return to the significance of this US$700,000 injection later (see [206] below).

21 The parties also embarked on an accounting exercise in 2016. The *reason* for this exercise is however disputed by them. JGJ, on one hand, claimed that it was intended as an accounting reconciliation exercise conducted pursuant to the JVA to adjust the value of the Goods supplied and to determine and apportion the JV's profits and/or losses. SRK, on the other hand, claimed that the exercise was intended to determine if the BA was a success and, if so, whether the arrangement could be replicated in a potential future joint venture. KPMG, an Indian partnership and member of the KPMG international network,

was engaged by JGJ in September 2016 to carry out this exercise. However, it eventually withdrew in October 2017, citing difficulties in obtaining the required support and data (Judgment at [26]). According to JGJ, the exercise failed because SRK had failed to cooperate with KPMG in providing the relevant information. SRK, however, attributed this failure to the unavailability of data from the JDM Entities and the parties' disagreement over the methodology and approach for accounting.

***Termination of the parties' collaboration in August 2017***

22 In August 2017, Rahul, Amit and Nirav informed the Kriss Brothers of SRK's decision to terminate the collaboration (Judgment at [27]). The parties agree that the collaboration was officially terminated on 31 August 2017. By this time, SRK had supplied the Goods to JGJ in respect of which the invoiced amounts totalled US$66,394,768.91 comprising the Goods supplied under the 42M Invoices and the 23M Invoices.

***Litigation in the US***

23 Following the termination of the collaboration but prior to the commencement of Suit 418 in Singapore, TJCNY commenced action against the JDM Entities in New York (Case Index No. 657583/2017) on 28 December 2017 to, among other matters, recover diamonds and jewellery inventory which were allegedly stored in the JDM Entities' vault at their New York office (the "2017 US Proceedings"). TJCNY claimed that the goods belonged to them while the JDM Entities claimed that they were subject to the claims of the JV.

24 On 27 March 2018, the JDM Entities and JGJ commenced action in New York against the SRK Entities and Ashish (Case Index No. 651469/2018) (the "2018 US Proceedings"). This action included claims for the recovery of the

JDM Entities' alleged excess contributions of capital and payment of expenses, together with half of JGJ's profits earned during the term of the JV.

25 We understand that at the time of the hearing of the four appeals before us, the 2017 and 2018 US Proceedings were still ongoing.

***The First, Second, Third and Fourth Resolutions and the Singapore actions***

26 We now elaborate on the conduct of the Kriss Brothers following the termination of the parties' collaboration and the Singapore actions.

27 On 12 January 2018, Michael sent to JGJ's auditors, M/s AT Adler ("AT Adler"), a copy of JGJ's 2016 Revised FS and explained that the initial copy of the financial statements did not correctly reflect the financial position of JGJ. Jim claimed to have sent a copy of the letter to Shailesh on the same day via e-mail, but Shailesh stated that he did not see this e-mail until April 2018 (Judgment at [33]).

28 On 22 January 2018, the Kriss Brothers and Ng signed a directors' resolution (the "First Resolution") authorising them to commence and manage legal proceedings against TJCNY on behalf of JGJ to recover an amount of US$3,733,503.43 owing by TJCNY (the "TJCNY Debt"). This resolution was not signed by Shailesh on the purported basis that it was, *inter alia*, not supported by relevant background documents or information (Judgment at [34]–[35]).

29 On 15 February 2018, the Kriss Brothers and Ng signed a directors' resolution authorising the Kriss Brothers to commence and manage legal proceedings against SRK and TJCI to recover excessive charges that the Kriss Brothers believed were the responsibility of SRK or its affiliates (the "Second

Resolution"). This resolution was not signed by Shailesh as he considered the allegations that he was SRK's nominee and that SRK and/or TJCI had manipulated the prices to be baseless (Judgment at [36]–[37]).

30 On 6 March 2018, the Kriss Brothers and Ng signed a directors' resolution approving JGJ's 2016 Revised FS and resolving that the second AGM of JGJ be convened (the "Third Resolution"). Shailesh did not sign this resolution, which he received from Jim on 11 April 2018 (Judgment at [41] and [45]) as he alleged that he had not been provided with the relevant documents and information pertaining to the 2016 Revised FS.

31 On 4 April 2018, notice was given that an AGM of JGJ would be held on 19 April 2018 to adopt the 2016 Revised FS. Shailesh objected to the 2016 Revised FS. However, the AGM took place on 19 April 2018 and the 2016 Revised FS were adopted. Shailesh did not attend the AGM personally or by proxy (Judgment at [44] and [46]).

32 SRK filed Suit 418 against JGJ on 23 April 2018 for the SRK Unpaid Sum. JGJ filed its defence and counterclaim in Suit 418 on 5 February 2020. This was subsequently amended on 20 December 2021. TJCI's counterclaim against JGJ in Suit 418, which was brought on 6 November 2020 was for the TJCI Unpaid Sum. It is not disputed that all of the Goods under the 42M Invoices, the 23M Invoices and the 2.2M Invoices were delivered and received; there is also no dispute over the quality of the Goods (Judgment at [29] and [30]).

33 Jim sent another resolution to Shailesh for his signature on 30 April 2018, which sought to appoint solicitors to act for JGJ and to authorise the Kriss

Brothers to act on behalf of JGJ in relation to Suit 418 (the "Fourth Resolution"). This resolution was not signed by Shailesh (Judgment at [48]).

34 Shailesh proceeded to file Suit 475 on 4 May 2018. JGJ filed its defence and counterclaim in Suit 475 on 30 May 2018, alleging that Shailesh had breached his fiduciary duties to the company in relation to the Three Resolutions. JGJ sought declarations, an injunction and damages in respect of the legal fees incurred in responding to Shailesh's solicitors' letters on the Three Resolutions.

35 It is useful to mention at this juncture that following the breakdown of the collaboration in late 2017, the persons behind the litigation – in so far as JGJ is concerned – are the Kriss Brothers. This was confirmed by counsel for JGJ at the hearing before us.

**The parties' cases**

36 We now outline the parties' cases in the court below.

***Suit 418***

37 SRK's primary case in Suit 418 was that it had *sold* the Goods to JGJ from September 2016 to August 2017. To this end, it issued 958 invoices for these Goods and was consistently paid on these invoices up until 2 August 2017. JGJ, however, stopped payments in August 2017. A total of 205 invoices were left unpaid, comprising the SRK Unpaid Sum (*ie*, the 23M Invoices). SRK therefore argued that it was entitled to this sum of money from JGJ.

38 In the alternative, SRK pleaded that JGJ was unjustly enriched at SRK's expense as it received the benefit of the Goods without providing payment for

those Goods. It was therefore unjust and/or unconscionable for JGJ to retain such a benefit.

39 Pertinently, SRK denied JGJ's assertion that the JVA was concluded. SRK instead explained that the parties were simply working together in a non-binding arrangement which it termed the BA. This arrangement was intended as a way for the parties to evaluate whether there was potential to enter into a joint venture subsequently. According to SRK, the key features of this purported BA were as follows:

(a) The parties would incorporate an entity in Singapore for tax benefit purposes (*ie*, JGJ). SRK would sell the Goods to JGJ, which would then sell it to companies controlled and/or owned by the Kriss Brothers.

(b) The book-keeping and accounting for the sale of the diamonds and jewellery pertaining to the BA would be kept in India and administered by persons reporting to and taking instructions from the Kriss Brothers.

(c) JGJ would operate a bank account with the IDBNY from which payment for the Goods would be made to SRK immediately after the credit period. To ensure timely payment, the parties established a two-step process: (i) the Kriss Brothers or their representatives would set up the payment requests on IDBNY's web portal for payments to be made to SRK; and (ii) these payments could then be released by any of the persons holding a security token issued by IDBNY *(ie*, Amit, Ashish, Jim and the Kriss Brothers).

40 In sum, SRK's case in Suit 418 was that SRK and JGJ were operating on a supplier-customer basis whilst SRK and the Kriss Brothers concurrently carried on negotiations on the terms of a potential joint venture which did not eventually materialise.

41 JGJ's pleaded defence to SRK's claim in Suit 418 was that the JDM Entities, the SRK Entities and JGJ entered into a binding JVA in the first quarter of 2015. The alleged terms of the JVA were as follows:

(a) The shares of JGJ would be held equally between the JDM Entities and the SRK Entities.

(b) All income and expenses generated by each of the JDM Entities and the SRK Entities pursuant to the JV were to be for the account of the JV.

(c) Any Goods supplied by the SRK Entities or the JDM Entities pursuant to the JV would be treated as the respective parties' capital in the JV. The supplying party would issue an "invoice" to JGJ for the Goods priced at cost plus a specified mark-up to cover other related costs (*eg*, marketing, duties and taxes) and some profit (the "Cost-Plus Pricing"). The Cost-Plus Pricing was for the purposes of complying with any applicable tax requirements (including transfer pricing treatment) as well as to enable the parties to maintain proper records of the Goods supplied. Pertinently, the invoices were *not intended to create any payment liability on the part of JGJ*. The invoices were also necessary to enable SRK to export and ship the Goods out of India.

(d) At the end of each year, the SRK Entities would carry out a full accounting reconciliation of the JV which would involve, *inter alia*,

adjusting the aggregate values of the Goods supplied as between the parties to correctly reflect the Cost-Plus Pricing (the "Accounting Reconciliation"). Separately, the net profits or losses generated under the JV were to be determined and apportioned equally between the SRK Entities and the JDM Entities. This would be done by valuing the Goods supplied to the JV at cost. In other words, the net profits or losses would be determined by deducting the cost of the Goods (as reflected on the SRK Entities' end) as well as any other relevant expenses from the revenue obtained by the JDM Entities from selling the Goods to the eventual consumer.

(e) The JDM Entities and SRK Entities would each maintain a capital account with the JV. The contributions of the parties to the JV, including all cash injections and the Goods supplied to the JV (valued at cost) would go into these capital accounts and would represent each of the parties' equity contributions to the JV. Both the JDM Entities and the SRK Entities were permitted to make cash withdrawals from the JV with the knowledge and/or consent of the other side – such withdrawals would reduce the balance of the capital account of the party making the withdrawals.

(f) From the second year of the JV, if either of the SRK Entities' or the JDM Entities' equity in their respective capital accounts was more than 50% of the combined sum in both the capital accounts, the party who contributed more than 50% of the total equity sum would be entitled to receive a monthly interest payment of a sum equivalent to 1% of the equity surplus from the other party.

(g) JGJ's backroom and accounting matters would be undertaken by the SRK Entities at their back-office in India. To this end, SRK's representatives, Amit and Ashish, were appointed as authorised signatories to JGJ's IDBNY account and were authorised to review and approve transactions and to release payments under the account.

42 JGJ pleaded that the 23M Invoices were issued by SRK at prices which were manipulated and erroneous. Specifically, the cost of the Goods supplied was inflated and these prices were not based on the agreed-upon Cost-Plus Pricing. This was exacerbated by the fact that the SRK Entities had also failed to conduct the Accounting Reconciliation, which meant that the cost of the Goods supplied was not adjusted to correctly reflect the Cost-Plus Pricing and that the net profits or losses generated under the JV were not determined and apportioned between the SRK Entities and the JDM Entities. In any event, the 23M Invoices did not create or give rise to any liability on the part of JGJ.

43 In the alternative, JGJ pleaded that it was understood between the parties to the JV, following the termination of the JV or the JVA in August 2017, that there was to be a final reconciliation and settlement of accounts to be carried out (the "Termination Settlement Exercise"). This would involve determining and quantifying the capital contributions to be returned and any other payments and/or set-offs to be made by/to each of the parties to the JV. Until the Accounting Reconciliation and the Termination Settlement Exercise were carried out, JGJ was not liable to make payment in relation to the 23M Invoices. We shall refer to this argument as JGJ's "alternative pleaded defences".

44 JGJ also pleaded that SRK was not entitled to its claim in unjust enrichment because SRK was estopped from doing so. SRK had come to court with unclean hands. Also, JGJ had changed its position. Further, and

alternatively, JGJ was entitled to counter-restitution in respect of (a) the benefits received by SRK under the 42M Invoices, (b) the benefits received by the SRK Entities pursuant to their withdrawals from the JV capital accounts and (c) any other payments and/or set-offs to be made by each party to the JV.

45 We need only say that JGJ's counterclaim for the last two benefits were rejected by the Judge (Judgment at [223] and [224]) and as they are not the subject of the appeals before us, we need not say any more about them.

46 In its counterclaim in Suit 418, JGJ claimed that Amit and/or Ashish had fraudulently misused their access to JGJ's IDBNY account to cause JGJ to pay out US$42,994,312.66 to SRK in purported settlement of JGJ's alleged liability under the 42M Invoices. These payments were initiated at the instructions of Govind, Rahul, Nirav, Amit or Ashish, and the majority of these payments were approved for release by Ashish. SRK had therefore breached the JVA as it had (a) issued the 23M Invoices and the 42M Invoices at manipulated and erroneous prices; and (b) demanded payment of invoices which were not intended to give rise to any liability. JGJ also alleged that any one or more of the Suit 418 Counterclaim Defendants, excluding SRK, had induced these breaches of the JVA or conspired to procure such breaches. JGJ alleged that SRK had been unjustly enriched and that JGJ was entitled to the return of the moneys paid under the 42M Invoices, *ie*, US$42,994,312.66.

47 TJCI counterclaimed against JGJ for the payment of the TJCI Unpaid Sum and, in the alternative, for fair value of the Goods supplied under these invoices. TJCI's pleadings mirror those of SRK's above. JGJ's defence to TJCI's counterclaim relied on the JV and/or JVA and was similar to its defence against SRK's claim on the 23M Invoices.

48 As for TJCNY and Ashish, who are two of the Suit 418 Counterclaim Defendants, their case was that TJCNY was not a party to the alleged JV, and that their roles were merely to facilitate and assist administratively in the commercial arrangement between SRK/TJCI and the JDM Entities. They also denied that JGJ was incorporated pursuant to the JV or JVA and their pleadings mirror SRK's in that the parties were simply operating on the basis of a "possible commercial arrangement" (*ie*, the BA). TJCNY and Ashish took the position that they had not induced SRK to issue the 23M Invoices and the 42M Invoices at prices that were manipulated or erroneous. The parties' inability to carry out the Accounting Reconciliation was also not due to the fault of TJCNY or Ashish. Finally, TJCNY and Ashish denied that they had breached the JVA or conspired to procure breaches of the JVA or to otherwise injure JGJ and put JGJ to strict proof of its alleged loss and damage. The position of the other Suit 418 Counterclaim Defendants is similar to that of TJCNY and Ashish.

***Suit 475***

49 Shailesh's pleaded case in Suit 475 was as follows. As a shareholder of JGJ, he possessed legitimate expectations pursuant to s 157 of the CA that the Kriss Brothers – as directors of JGJ – would, *inter alia*, act honestly and diligently in the interests of JGJ, avoid being in positions of conflict of interests and ensure that JGJ's financial statements gave a true and fair view of JGJ's financial position. However, the Kriss Brothers had instead exercised their powers as directors and/or shareholders in a manner oppressive to Shailesh and/or prejudicial to his interests as a shareholder of JGJ.

50 Shailesh's pleaded case took issue with several acts by the Kriss Brothers. In his closing submissions for Suit 475, however, Shailesh pursued

only his complaints against the following acts of the Kriss Brothers, which he alleged demonstrated commercial unfairness:

(a) passing the First Resolution (which authorised the commencement of legal proceedings against TJCNY to recover the TJCNY Debt) and the Second Resolution (which authorised the commencement of legal proceedings against SRK and TJCI for overcharging JGJ). Shailesh asserted that he was not provided sufficient information and that these resolutions sought to accord preferential treatment to the JDM Entities as debtors of JGJ, given that JGJ had only sought to recover the debts owed by the SRK Entities and not the US$23,051,737 owed by the JDM Entities. Shailesh also asserted that there was no basis for the Second Resolution as SRK and TJCI did not overcharge JGJ; and

(b) manipulating JGJ's accounts by making four unjustified adjustments to JGJ's financial statements for 2016 and failing to provide documentary evidence and explanations to JGJ's auditors, thereby resulting in a disclaimer of opinion for JGJ's 2016 Revised FS and adverse opinions for JGJ's 2017 FS and 2018 FS. These four adjustments comprised:

(i) the addition of an amount of US$6,056,501.46 (described as "Sales Promotion – Rebate") as an operating expense (the "Commission Rebate Adjustment");

(ii) the reduction of the amount recorded as "Purchases– Finished Goods" by US$7,540,283 (the "Accounts Payable Reduction Adjustment");

(iii) the addition of US$15,488,893 as "Due from SRK" (the "SRK Payable Adjustment"); and

(iv) the addition of two equal amounts of US$7,744,446.50 each as "Due to Michael Kriss" and "Due to David Kriss" respectively (the "Capital Repayment Adjustment").

The Kriss Brothers also refused to provide further information to Shailesh and/or engage Shailesh regarding the adoption of JGJ's 2016 Revised FS. By failing to ensure that JGJ's accounts presented a true and fair view of the company's financial position, the Kriss Brothers failed to act in JGJ's interests and breached their fiduciary duties.

51 While Shailesh sought various remedies in his pleadings, he pursued only the following reliefs in his closing submissions below:

(a) an order that the Kriss Brothers do all that is necessary to effect a restatement of the 2016 Revised FS, 2017 FS and 2018 FS such that the four adjustments in JGJ's 2016 Revised FS are removed, and that the Kriss Brothers re-submit the restated financial statements to the auditors for a fuller audit, with the audited accounts to be filed with the relevant authorities;

(b) an order that the Kriss Brothers procure and/or cause the JDM Entities to pay US$23,051,737 to an escrow agent (at the Kriss Brothers' expense) to be held in escrow until further order; and

(c) alternatively, an order that Shailesh be authorised to commence, on behalf of JGJ, legal proceedings against the JDM Entities to recover debts owed to JGJ.

52 In response, the Kriss Brothers' pleaded case was as follows:

(a) Shailesh was the SRK Entities' nominee shareholder and nominee director in JGJ and was not involved in the management of JGJ at any material time.

(b) The First and Second Resolutions were validly passed in accordance with JGJ's Articles of Association.

(c) Shailesh himself does not dispute the TJCNY Debt, the recovery of which was authorised by the First Resolution. It was in the interests of JGJ to recover the TJCNY Debt from TJCNY and to take action against SRK and TJCI for overcharging JGJ in respect of the Goods sold to JGJ.

(d) In the 2018 US Proceedings, JGJ together with the JDM Entities are seeking, among other things, their share of the profits owed by the SRK Entities under the JVA. Accordingly, the issues to be determined in the 2018 US Proceedings would also include the veracity of any alleged debts due and owing as between JGJ, the JDM Entities and the SRK Entities. They had therefore not preferred the JDM Entities' interests in commencing the US Proceedings.

(e) The four adjustments in the 2016 Revised FS were made to address inaccuracies that the Kriss Brothers discovered in the 2015 financial statements ("2015 FS"). The Kriss Brothers' inability to produce sufficient documentary evidence to the auditors was solely the result of the SRK Entities having wrongfully and improperly retained JGJ's and the JV's accounting books and records upon the termination of the JV.

(f) The resolutions pertaining to JGJ's 2016 Revised FS were validly passed in accordance with JGJ's Articles of Association.

53 JGJ also brought a counterclaim in Suit 475 that Shailesh had breached his fiduciary duties by:

(a) refusing and/or failing to sign the First, Second and/or Third Resolutions and, in the alternative, refusing and/or failing to abstain from voting on these resolutions; and

(b) requesting the following information and documents for collateral and/or ulterior purposes:

(i) documents in relation to the TJCNY Debt and any other claims;

(ii) details of the then-current signatories of JGJ's IDBNY account, details of the transactions pertaining to the account, monthly bank statements and details of any other bank accounts in JGJ's name; and

(iii) a copy of the legal opinion that Ng (JGJ's nominee resident director) should have obtained on the validity and strength of the claim to recover the TJCNY Debt and other claims, purchase orders or other similar documents and invoices in relation to transactions among JGJ, SRK and TJCI.

54 JGJ sought an order restraining Shailesh from seeking information or participating in decisions relating to JGJ's claims against the SRK Entities or its defence against the SRK Entities' claims. It also sought damages from Shailesh in respect of the legal fees that JGJ incurred for responding to

Shailesh's solicitors' letters in connection with the Three Resolutions. For completeness, while JGJ's pleaded counterclaim in Suit 475 also sought a declaration that Shailesh had acted in breach of his fiduciary duties to JGJ, counsel for JGJ confirmed at the hearing before us that JGJ is only seeking the injunction and damages on appeal, and not the declaration. In any event, Shailesh denies JGJ's counterclaim.

## Decision below

### *Suit 418*

55 The Judge made the following findings and conclusions in relation to Suit 418:

(a) The parties operated on the basis of the JV/JVA and the alleged BA was a concoction by the SRK Entities and/or their representatives (Judgment at [63], [155] and [242(a)]). Under the terms of the JV/JVA (Judgment at [194]):

(i) the Goods supplied by the parties pursuant to the JV would be treated as equity contributions to the JV and valued at cost for this purpose; and

(ii) the invoices were not intended to create any liability to pay on the invoices.

We shall refer to these two terms collectively as the "Equity Terms". On the other hand, we note that JGJ refers to the terms that the Goods supplied should be treated as "capital" in the JV and that the invoices were not payable as, collectively, "the Capital Term".

(b) JGJ was incorporated as a tax-efficient vehicle for the JV through which capital flow and eventual profit distribution could be effected to the JV partners; in addition, it was a convenient vehicle to handle purchases by the JV from non-JV parties (Judgment at [95] and [97]).

(c) TJCNY was a party to the JV. The Judge rejected Ashish's claim that his role in the JV was purely to provide administrative assistance (Judgment at [161]).

(d) However, the Judge found that the JVA was *not legally enforceable* because (Judgment at [172] and [242(b)]):

(i) JGJ had failed to prove that the JV/JVA was entered into on 13 January 2015 as pleaded (Judgment at [174]). In addition, the Judge had dismissed JGJ's application – that was made after the commencement of the trial – to amend its pleadings in relation to the date of the JV (Judgment at [181]);

(ii) regardless of the date that the JV was entered into, JGJ also failed to prove material terms of the JVA as pleaded (Judgment at [183]); and

(iii) no agreement had been reached on the manner in which the profits made by the JV were to be distributed to the alleged parties to the JV (Judgment at [188]).

(e) It therefore followed that the question of JGJ's standing to enforce the JVA did *not* arise (Judgment at [193] and [242(b)]). In any event, following JGJ's pleaded case that the JVA was entered into on 13 January 2015, JGJ could not enforce the JVA because JGJ was

incorporated after 13 January 2015 and was thus not a party to the JVA (Judgment at [193]).

(f) There was no agreement for JGJ to pay for the Goods supplied by SRK and TJCI based on the amounts stated in the 23M Invoices, 42M Invoices and 2.2M Invoices. The amounts on the invoices were to comply with tax and regulatory requirements (including transfer pricing) (Judgment at [194]–[195] and [242(c)]).

(g) Nonetheless, SRK and TJCI were entitled to reasonable compensation for the Goods supplied by them, subject to JGJ's claim for counter-restitution (Judgment at [204] and [242(c)]). JGJ was enriched at the expense of SRK and TJCI (Judgment at [209]–[210]). There was a total failure of consideration as the basis for the supply of the Goods had failed, *ie*, the JVA was unenforceable (Judgment at [212]). The defences of estoppel and change of position failed (Judgment at [216] and [219]). The Judge declined to make a finding that SRK and TJCI had come to court with unclean hands (Judgment at [225]). JGJ's claim for counter-restitution in respect of the 42M Invoices *succeeded* in principle but was restricted to an amount that exceeded the reasonable compensation for the Goods supplied under those invoices (Judgment at [242(c)(i)]).

(h) As to what the reasonable amounts payable under the 23M Invoices, the 42M Invoices and the 2.2M Invoices were, the Judge held that the best proxy for the market value of the Goods supplied was the Cost-Plus Pricing (Judgment at [228]). The Judge adopted the calculations of JGJ's expert, Mr Robert Golden, which were based on the total cost-plus amounts, and held (Judgment at [229]–[233]):

(i) The reasonable compensation under the 42M Invoices was US$40,526,969.99. As US$42,994,312.66 had been paid to SRK, JGJ was entitled to a counter-restitutionary claim of US$2,467,350.67 in respect of the 42M Invoices (Judgment at [229(a)], [231] and [242(c)(i)]).

(ii) The reasonable compensation under the 23M Invoices was US$20,210,267.04. Taking into account JGJ's counter-restitutionary claim (*ie*, recovery of the excess paid on the 42M Invoices), JGJ was liable to pay SRK US$17,538,999.49 in respect of SRK's restitutionary claim under the 23M Invoices (Judgment at [230], [233(a)] and [242(c)(ii)]).

(iii) The reasonable compensation under the 2.2M Invoices was US$2,027,846.91. JGJ was liable to pay this amount in respect of TJCI's restitutionary claim under the 2.2M Invoices (Judgment at [233(b)] and [242(c)(iii)]).

(i) As the JVA was not legally enforceable, JGJ failed in its counterclaims in Suit 418 for the inducement of breaches of the JVA (Judgment at [237] and [242(d)]). Presumably, the Judge also intended to find that JGJ failed in its counterclaim against SRK for breach of the JVA.

(j) JGJ also failed in its counterclaim for conspiracy to injure (Judgment at [240] and [242(e)]).

56 In summary:

(a) JGJ was liable to pay SRK the sum of US$17,538,999.49, in respect of SRK's restitutionary claim under the 23M Invoices;

(b) JGJ was liable to pay TJCI the sum of US$2,027,846.91, in respect of TJCI's restitutionary claim under the 2.2M Invoices; and

(c) JGJ's counterclaims were dismissed.

***Suit 475***

57 As for Suit 475, the Judge made the following findings and conclusions (see, generally, Judgment at [328]):

(a) Shailesh was SRK's nominee shareholder and director in JGJ. That said, he had the necessary standing to bring a claim under s 216 of the CA (Judgment at [251], [267] and [328(a)]).

(b) Although the Kriss Brothers were aware of and had accepted the nominee arrangement, Shailesh had failed to plead his s 216 claim on the basis that he was a nominee shareholder for SRK (Judgment at [270] and [271]). Accordingly, in deciding whether the acts complained of were commercially unfair to *Shailesh*, the interests of *SRK* (as the beneficial owner of Shailesh's shares in JGJ) could not be considered by the court (Judgment at [271]).

(c) Shailesh could not claim a legitimate expectation that the Kriss Brothers would fulfil their duties as directors (Judgment at [275], [276] and [328(b)]).

(d) Shailesh's claim based on the First Resolution failed. The complained-of conduct in relation to the First Resolution affected Shailesh primarily in his capacity as a director of JGJ. It did not affect his interest *qua* shareholder as he did not plead any legitimate

expectation to be involved in the management of JGJ as a director and the evidence did not support such a legitimate expectation (Judgment at [279]). The complaint that the Kriss Brothers decided to go after the TJCNY Debt but not the other debts (*ie*, the debts owed by the JDM Entities) related to a *corporate* wrong, not a personal wrong (Judgment at [282]).

(e) Shailesh's claim based on the Second Resolution failed. The allegation that SRK and TJCI manipulated the prices of the Goods sold to JGJ related to a *corporate* wrong and Shailesh did not show how he had suffered an injury as a shareholder (Judgment at [289]). The complaint that Shailesh did not have access to or information about JGJ's IDBNY account affected Shailesh in his capacity as a *director*, and thus fell outside the scope of s 216 (Judgment at [290]).

(f) With respect to Shailesh's claim pertaining to the four adjustments made by the Kriss Brothers in the 2016 Revised FS:

(i) The Commission Rebate Adjustment was not commercially unfair because it was made pursuant to volume rebate agreements that had been discussed and agreed upon (Judgment at [297] and [328(d)(i)]). However, the other three adjustments, *ie*, the Accounts Payable Adjustment, SRK Payable Adjustment and Capital Repayment Adjustment *were* commercially unfair (Judgment at [299], [301], [302], [304] and [328(d)(i)]). We will refer to these adjustments as the "Three Adjustments".

(ii) Shailesh's complaint that the Kriss Brothers had failed to provide documents and/or explanations to JGJ's auditors was

based on the Kriss Brothers' duties to JGJ as directors to ensure that JGJ's financial affairs were properly managed. It thus fell outside the scope of s 216 of the CA (Judgment at [309] and [328(d)(ii)]).

(iii) Shailesh's complaint that the Kriss Brothers had failed to provide him with documents or to engage him with respect to the four adjustments in the 2016 Revised FS was not substantiated and therefore failed (Judgment at [312] to [315]). Furthermore, in so far as Shailesh's complaint related to the resolution to approve the 2016 Revised FS, that affected him in his capacity as a director and thus fell outside the scope of s 216 of the CA (Judgment at [311]).

(g) Shailesh therefore succeeded in his s 216 claim only to the extent that it was based on the Three Adjustments (Judgment at [328(e)]).

(h) JGJ's counterclaim against Shailesh was dismissed (Judgment at [328(f)]). With respect to the First Resolution, the facts did not support JGJ's claim that Shailesh acted in breach of his director's duties (Judgment at [319]). With respect to the Second Resolution, there was no price manipulation because the parties had agreed for the Goods to be invoiced based on Sell-Minus Pricing (Judgment at [323]). With respect to the Third Resolution, as the Judge found that the Three Adjustments made by the Kriss Brothers in the 2016 Revised FS were unjustified, Shailesh had not acted in breach of his director's duties in connection with the Third Resolution (Judgment at [324]). With respect to JGJ's counterclaim that Shailesh had acted in breach of his fiduciary duties by requesting certain information and documents, JGJ had failed to prove that the purpose of Shailesh's requests was to defeat, frustrate

and/or stymie JGJ's claims against one or more of the SRK Entities (Judgment at [327]).

58 In summary, with respect to Suit 475:

(a) Shailesh succeeded in his claim under s 216 of the CA only to the extent that it was based on the Three Adjustments. The Judge ordered the Kriss Brothers to effect a restatement of the 2016 Revised FS, 2017 FS and 2018 FS such that the Three Adjustments were removed (Judgment at [329]); and

(b) JGJ failed in its counterclaim.

***Costs and interest***

59 The Judge heard the parties on costs and interest on 27 February 2024 and issued his decision on interest (on 27 February 2024) and costs (on 28 February 2024).

60 With respect to the issue of interest in Suit 418, the Judge ordered JGJ to pay:

(a) SRK interest on the sum of US$17,538,999.49 at the rate of 5.33% per annum from the date of the Writ of Summons (23 April 2018) until the date of the Judgment (18 January 2024); and

(b) TJCI interest on the sum of US$2,027,846.91 at the rate of 5.33% per annum from the date of TJCI's counterclaim (6 November 2020) until the date of the Judgment (18 January 2024).

61 The Judge also made the following costs orders, which covered both the main claim and the counterclaims in Suit 418:

(a) The Judge fixed the costs for SRK, TJCI, Govind, Rahul, Nirav and Amit at $650,000 excluding disbursements and then reduced the award by 25%. The reduction accounted for their failed claim that the parties were in the BA and not the JV, which the Judge found to be unreasonable and unnecessarily lengthened the trial. Therefore, the Judge ordered JGJ to pay SRK, TJCI, Govind, Rahul, Nirav and Amit costs fixed at $487,500. They were also awarded disbursements with such disbursements reduced by 25% to be fixed if not agreed.

(b) The Judge fixed the costs for TJCNY and Ashish at $325,000 excluding disbursements and then reduced the award by 25% on account of his rejection of TJCNY's allegation that TJCNY was not a party to the JV and his rejection of Ashish's allegation that his role was purely to provide administrative assistance for the collaboration. Therefore, the Judge ordered JGJ to pay TJCNY and Ashish costs fixed at $243,750. They were also awarded disbursements with such disbursements reduced by 25% to be fixed if not agreed.

(c) The Judge declined to order the Kriss Brothers to be jointly and severally liable for the costs that JGJ had to pay.

62 With respect to Suit 475, the Judge determined that Shailesh was entitled to costs against the Kriss Brothers. The Judge also held that JGJ was liable for costs in Shailesh's s 216 claim as well as JGJ's counterclaim which was dismissed. The Judge made the following costs orders which covered both the main claim and the counterclaim in Suit 475:

> In my view, Shailesh should be awarded 50% of costs as he has succeeded on only two of his allegations of oppressive conduct. The Kriss Brothers and JGJ are jointly and severally liable to pay Shailesh costs fixed at $279,750 plus disbursements to be fixed by me if not agreed. The disbursements that the Kriss Brothers and JGJ have to pay are also to be reduced by 50%.

## The appeals arising from Suit 418 (namely, AD 21 and AD 22)

### *The parties' cases*

*JGJ's case*

63 JGJ is the appellant in AD 21 and the respondent in AD 22.

64 In AD 21, JGJ contends that the Judge erred in finding that the JVA was unenforceable. The parties intended to be bound by the Capital Term, which sufficed to create a valid and enforceable agreement. JGJ also argues that the Judge erred in finding that JGJ failed to prove certain "material" terms, which included (a) the term relating to whether the Goods supplied pursuant to the JV would be invoiced on Cost-Plus Pricing; (b) the term relating to the valuation of such Goods for the purpose of determining the respective equity contributions of both sides; and (c) the term relating to the manner of distribution of the JV's profits. These terms were not essential such as to render the JVA uncertain and unworkable without them.

65 JGJ was also able to enforce the JVA as it became a party to the JVA *after* it was incorporated on the basis of the doctrine of implied contracts. JGJ also argues that SRK is estopped from denying that JGJ is a party to the JVA and that, in any event, JGJ can enforce the terms of the JVA pursuant to the Contracts (Rights of Third Parties) Act 2001 (Cap 53B, 2002 Rev Ed) (the "CRTPA").

66 Even if the Court finds that the JVA is unenforceable, SRK's claim in unjust enrichment should nevertheless be dismissed. JGJ was not the party enriched as it neither received the Goods nor earned a profit from them. The Judge also erred in dismissing JGJ's defences of change of position and estoppel.

67 JGJ submits that its counterclaim against SRK for counter-restitution on the 42M Invoices should have been allowed and the Judge should have found that SRK and TJCI breached the JVA when they claimed payment of the 42M Invoices and 23M Invoices and the 2.2M Invoices respectively. In so far as JGJ's claims for conspiracy are concerned, it submits that the Judge should have allowed its claim for the costs of defending the claims for the SRK Unpaid Sum and the TJCI Unpaid Sum.

68 Even if JGJ fails in its substantive appeal in AD 21, it submits that the Judge erred in his orders pertaining to pre-judgment interest and costs. JGJ argues that the costs awarded ought to have been reduced by 70% instead of 25%, in order to properly reflect the true shape of the litigation and to adequately convey the Court's disapproval of dishonest litigants.

69 In AD 22, JGJ's case as the respondent is that SRK has wrongly contended that the Judge was not entitled on the pleadings to find that the parties had conducted themselves on the basis of the JV. According to JGJ, the Judge had *impliedly* found that the parties began operating on the basis of the JV on or around 13 January 2015. The Judge found that the terms by which the JV operated included the Capital Term. The evidence also supported the finding that the parties were operating on the basis of a JV.

*SRK Parties' case*

70 SRK and TJCI are the first and second appellants in AD 22 respectively. SRK, TJCI, Govind, Rahul, Nirav and Amit (which we will refer to collectively as the "SRK Parties") are the first, second and fourth to seventh respondents in AD 21 respectively.

71 In AD 22, SRK and TJCI appeal against:

(a) the Judge's decision to dismiss SRK's primary claim for the SRK Unpaid Sum;

(b) the Judge's decision that SRK is liable to JGJ for counter-restitution of US$2,467,350.67;

(c) the Judge's decision to dismiss TJCI's primary claim for the TJCI Unpaid Sum; and

(d) the Judge's decision on costs and interest in so far as affected by the findings in (a) to (c) above.

In the event that this Court dismisses the appeal in AD 22, SRK and TJCI do not appeal against the Judge's finding on their alternative claim (*ie*, the restitutionary claim), which they contend should be allowed to stand.

72 In summary, the SRK Parties contend in AD 21 and AD 22 that the Judge was correct in (a) rejecting JGJ's case on the purported JVA entered into on 13 January 2015 with the terms set out at para 10 of JGJ's Defence and Counterclaim (Amendment No. 1); and (b) finding that even if JGJ had successfully amended its pleaded case to change the date of the JVA, JGJ would still have failed in its case. However, the Judge erred in making a finding on an

unpleaded case involving the unenforceable JVA that the parties were purportedly collaborating on, and consequently in finding that this somehow meant that the invoices did not create any payment liability. The evidence does not support the Judge's finding of a JV. In any event, JGJ has no standing to enforce the JV that the Judge found to exist.

73 The SRK Parties submit that if the Judge was correct in not allowing the claim on the 23M Invoices, the Judge was correct in finding that SRK and TJCI were entitled to reasonable compensation for the Goods supplied to JGJ and had rightly rejected JGJ's counterclaims for breach of the alleged JVA and for conspiracy. Finally, they argue that the Judge did not err in making his orders on interest and costs, save that he should have held the JDM Entities and the Kriss Brothers jointly and severally liable to the SRK Entities for 62.5% of the costs ordered.

*TJCNY's and Ashish's case*

74 TJCNY and Ashish are the third and eighth respondents in AD 21 respectively; they are not parties to AD 22. They argue that Ashish did not act wrongfully in releasing payments from JGJ's account as, even on JGJ's case, the release of payments against the invoices was the agreed-upon mechanism for capital to flow within the JV. JGJ's case also failed to show any wrongdoing by TJCNY or Ashish in relation to SRK's demand for payment on the 23M Invoices. Indeed, TJCNY and Ashish were not involved in seeking any payment on the invoices.

75 TJCNY and Ashish also echo the SRK Parties' position that the Judge had erred in finding that the collaboration between the SRK Entities and the JDM Entities was based on a JV and that TJCNY was a party to this JV. While

the Judge found that there was an unenforceable JV in respect of certain matters, none of those matters involved TJCNY.

76 In any event, TJCNY and Ashish submit that the Judge did not err in dismissing JGJ's counterclaim in Suit 418 in its entirety on the basis that there was no legally enforceable JVA and that in any event, JGJ had no standing to enforce the JVA. It follows that JGJ's counterclaim for inducing breaches of the JVA must fail. Even if the Court finds that there was a legally enforceable JVA and JGJ had standing to enforce it, TJCNY and Ashish submit that JGJ's counterclaim against them would have been dismissed. JGJ's case in AD 21 against the Judge's dismissal of its counterclaim is focused on its counterclaim on conspiracy to injure JGJ, which is a clearly unmeritorious claim.

77 Lastly, with regard to the Judge's costs order for JGJ to pay TJCNY and Ashish costs fixed at $243,750 plus disbursements with such disbursements reduced by 25% to be fixed if not agreed, there is no reason to reduce the award even if the Court finds that the Judge was correct in finding, contrary to TJCNY's assertion, that TJCNY was a party to the JV.

***Issues to be determined***

78 At the outset, we observe that much time was spent by the parties and, consequently, the Judge on the distinction between the BA and the JV/JVA and on which label ought to be properly accorded to the nature of the parties' business collaboration. Both the parties and the Judge proceeded on the assumption that this was a material distinction and, specifically, that if the Judge agreed that the parties had operated on the basis of the JV/JVA, the Goods must have been supplied as "capital" and there would be no liability on JGJ's part to pay for these Goods. As we will elaborate later in this judgment, that is not

necessarily the case. In our view, the main issues which require determination in AD 21 and AD 22 are instead as follows:

(a) whether JGJ is *prima facie* liable to pay SRK and to pay TJCI for the Goods supplied under the 23M Invoices and the 2.2M Invoices respectively;

(b) if so, whether JGJ can rely on its alternative pleaded defences;

(c) if not, what the quantum of JGJ's liability in relation to the 23M Invoices and the 2.2M Invoices is; and

(d) whether the Judge erred in dismissing JGJ's conspiracy counterclaim in Suit 418.

### *Issue 1: Whether JGJ is* **prima facie** *liable to pay SRK and to pay TJCI for the Goods supplied under the 23M Invoices and the 2.2M Invoices respectively*

79 The parties' arguments pertaining to SRK's primary claim on the 23M Invoices, TJCI's claim on the 2.2M Invoices and JGJ's counterclaim on the 42M Invoices, are ultimately concerned with the issue of whether JGJ is contractually liable to pay for the Goods supplied. If so, the question then arises whether JGJ is liable to pay the sums reflected in the invoices. If JGJ is so liable, there would be no basis for JGJ's counterclaim on the 42M Invoices given that SRK would have rightly received the full sums stated therein.

80 As alluded to above, the bulk of the parties' arguments on this issue is premised on their respective characterisations of the nature of their business collaboration. SRK's case, simply put, is that the invoices, which reflect the sale of goods to JGJ, have yet to be paid. These sales were made in the context of the BA, which by SRK's pleaded case was a non-committal commercial

arrangement serving as a "trial" period for a potential joint venture that never materialised. This BA was terminated on 31 August 2017. TJCI's case on the 2.2M Invoices proceeds on the same basis.

81 On the other hand, JGJ's case is that the JDM Entities, the SRK Entities and JGJ itself had on 13 January 2015 entered into a JV and a binding JVA, and agreed on certain terms of the JVA by that date. Although JGJ subsequently recognised that it had yet to be incorporated as of 13 January 2015, it nonetheless submits that this should not prevent the Court from finding that the terms and parties to the JVA "was a subset of that pleaded". According to JGJ, the terms of this JVA included the Capital Term and that there would be the annual Accounting Reconciliation to adjust the aggregate value of the goods supplied and to determine the net profits or losses generated under the JV. The *crux* of JGJ's defence is that the invoices simply served as a means to transfer capital between the SRK Entities, the JDM Entities and JGJ, and there is thus no payment liability on JGJ's part. The Capital Term therefore forms the main plank of JGJ's defence. For completeness, we mention that although JGJ also pleaded that the invoices would be billed at Cost-Plus Pricing pursuant to the Capital Term, the Judge found at [186] and [241] of the Judgment – based on Michael's own testimony – that the parties agreed to the Goods being invoiced based on Sell-Minus Pricing (and not Cost-Plus Pricing) and this finding was not challenged on appeal.

82 Further and/or in the alternative, JGJ pleaded that it is not liable to make payment on the 23M Invoices and the 2.2M Invoices because the Accounting Reconciliation was not conducted. Still further and/or in the alternative, JGJ also contends that following the termination of the JV/JVA on 31 August 2017, it was understood between the parties to the JV that the Termination Settlement Exercise would take place. JGJ's alternative case is that unless and until this

exercise is conducted, JGJ is not liable to make payment of the 23M Invoices. JGJ adopts the same position in respect of the 2.2M Invoices. We deal with JGJ's alternative pleaded defences on the Accounting Reconciliation and the Termination Settlement Exercise later.

83 As set out above at [55(a)], the Judge rejected the BA as a "concoction" and found that the collaboration between the JDM Entities and the SRK Entities was on the basis of a "JV/JVA" (Judgment at [63], [155] and [242(a)]). However, the Judge held that the JVA was *not* legally enforceable because JGJ failed to prove that the JV/JVA was entered into on 13 January 2015 as pleaded: JGJ failed to prove two of the material terms of the JVA as pleaded (*ie*, the term that the goods supplied pursuant to the JV would be invoiced at Cost-Plus Pricing, and the term that the goods supplied were to be valued at cost for the purposes of the parties' respective equity contributions to the JV) and no agreement had been reached on the manner in which the profits made by the JV were to be distributed to the parties to the JV (Judgment at [175], [183], [187] and [188]). Given the structure of the JV, the Judge considered that the manner of distribution of the JV's profits was a material term of the JV/JVA since it involved tax and regulatory considerations (Judgment at [192]). As the JVA was not legally enforceable by JGJ, JGJ could not rely on its defence that it was not liable to pay on the invoices until either the Termination Settlement Exercise or the Accounting Reconciliation had taken place.

84 Nonetheless, the Judge proceeded to find that "[u]nder the terms of the JV/JVA", the parties had agreed on the Equity Terms. The Judge concluded that it "follow[ed] from the [Equity Terms] that there was no agreement by JGJ to pay for the goods supplied by SRK and TJCI based on the amounts stated in the 23M Invoices, 42M Invoices or 2.2M Invoices" and found that the amounts on

the invoices were only "to comply with tax and regulatory requirements" (Judgment at [194] and [195]).

85 In our view, the key question underlying the parties' lengthy arguments as to whether they had collaborated on the basis of the BA or the JV/JVA is whether the Goods were supplied by SRK/TJCI to JGJ as sales. As a starting point, the existence of the invoices suggests, on a *prima facie* basis, that the Goods were sold to JGJ and, accordingly, that contractual liability arose on JGJ's part to pay for the Goods supplied by SRK and TJCI. This is for the simple reason that an invoice is often considered as evidence that goods have been delivered pursuant to a contract of sale and consequently there is an underlying obligation to pay for them. It is important to bear in mind that JGJ did not question the issuance of the invoices addressed to JGJ. Accordingly, the evidential burden shifts to JGJ to prove that the parties never intended for JGJ to be contractually liable for the Goods, *ie*, the transactions were not in fact sales.

86 We agree with the Judge that the evidence does not support the SRK Entities' narrative that the parties were only cooperating on the basis of a non-committal arrangement like the BA, in which they were merely "exploring" the possibility of a future joint venture. This narrative sits uncomfortably with, among other things, (a) the parties' access to JGJ's IDBNY account (see [17] above), (b) the combining of insurance policies between the JDM Entities and the SRK Entities, (c) the parties' joint participation at business events and (d) the streamlining of back-office functions, which would inevitably have involved the sharing of highly confidential information. For these reasons, and for the other reasons given by the Judge in finding that there was a JV (Judgment at [63]–[160]), we accept that there was some sort of JV between the parties and that they *had* entered into a JVA.

87 While it is not clear what all the terms of the JVA were, and even who all the parties thereto were, we agree that some, if not all, of the SRK Entities and of the JDM Entities were parties to the JVA. Steps were taken pursuant to the JVA which gave rise to rights and obligations, although it is not clear what *all* the rights and obligations under the JVA were. It is apparent, for example, that JGJ was incorporated as a 50-50 set-up and the Goods were to be, and were in fact, supplied by SRK and/or TJCI. However, we take the view that it is not necessary for us to decide on *all* the terms of the JVA and all the parties thereto as the present dispute only concerns the question of whether *JGJ* is liable to pay SRK and TJCI for the Goods and the quantum of such liability. For present purposes, we need only say that the existence of a JVA does not necessarily mean that JGJ had no liability to pay for the Goods. Indeed, even if the Goods were supplied as "capital", that too is not determinative of the key question as we proceed to explain.

*Deficiencies in JGJ's case regarding the Capital Term*

88 To start off, we are of the view that the Judge erred in concluding that because there was a JVA (albeit unenforceable for the reasons provided at [172]–[192] of the Judgment), the Goods were necessarily supplied as equity contributions and hence did not need to be paid for by JGJ. As mentioned, JGJ defines "the Capital Term", which it claims forms part of the terms in the JVA, as "the term that the Goods supplied shall be treated as capital in the JV *and* the invoices were not payable" [emphasis added]. The two parts to JGJ's definition are not necessarily causally related. In other words, even if the Goods were supplied as "capital", whether JGJ is liable to make payment for them will ultimately depend on the meaning of the term "capital". JGJ will therefore need to show that the Goods were supplied as equity contributions (*ie*, share capital) or were otherwise supplied as "capital" which it did not need to repay. We add

that the invoices themselves do not create a cause of action. They are, at most, evidence of a contract of sale, who the parties thereto were, the relevant goods and/or services and the prices they were supplied at. The real question is whether the Goods were supplied as sales and thus whether JGJ is liable to pay for the Goods.

89 We now turn to JGJ's case that the Goods supplied by each party were to be treated as its respective "capital" injections into the JV. In short, we do not find this narrative to be a coherent one.

90 Although the Judge concluded that the Goods were supplied as "equity contributions" (Judgment at [194(a)]), JGJ is unclear in its pleadings on what the term "capital" is intended to refer to. In its Defence and Counterclaim (Amendment No. 1) dated 20 December 2021 in Suit 418 ("Suit 418 DCC"), JGJ states at para 10(2)(c) that any goods supplied pursuant to the JV would represent and be treated "as capital in the Joint Venture". On the other hand, at para 10(2)(e), JGJ then states that the goods supplied, including those under the 23M Invoices and 42M Invoices, represented and were to be treated as each party's "*equity* contributions to the [JV]" [emphasis added]. The use of the term "equity" suggests that "capital" as pleaded refers to *share capital*. Moreover, the implication is that any share capital would be share capital in *JGJ*, as that was the vehicle for the JV and no share capital of any other corporate entity was suggested to be relevant.

91 On the other hand, counsel for JGJ confirmed at the hearing before us that "capital" did not refer to JGJ's share capital. Mr Joseph Lee ("Mr Lee"), who appeared with Mr Lok Vi Ming SC ("Mr Lok") for JGJ, clarified that JGJ's share capital never increased to reflect what was, on JGJ's case, "the capital in the terms of goods that were being injected into the JV" for FY 2015.

Specifically, in JGJ's audited financial statements for 2015, only the initial US$100 issued share capital and JGJ's retained earnings for 2015 comprised JGJ's equity for FY 2015. In JGJ's audited financial statements for 2016 (*ie*, the 2016 Revised FS), JGJ's issued share capital of 100 shares was reflected at a total value of US$100 plus the US$700,000 injection in May 2016 (see [20] above). Both financial statements were authorised for issue by JGJ's board, which would have included the Kriss Brothers. This means that the Kriss Brothers, who are now giving instructions to counsel on JGJ's behalf, were aware all along that these "capital" contributions were not injections into JGJ's share capital.

92 Instead, Mr Lee sought to explain that the parties' injections of "capital" were recorded entirely independently of JGJ's share capital, and that this "capital" need not have been held by JGJ and was capital in the JV. However, this explanation was nebulous and he stopped short of suggesting that it was equity in any other entity. His oral explanation was therefore inconsistent with the Judge's conclusion that the Goods were to be treated as "equity contributions" to the JV. On the contrary, Mr Lee's explanation suggested that the contribution of such "capital" was in essence working capital or loans made by the respective parties to the JV. We find this explanation problematic for JGJ for three reasons.

93 First, even if the Goods were supplied by SRK/TJCI to JGJ as working capital, there must be a party who has to be liable for these Goods. If this were not so, that means that SRK/TJCI would in essence have provided these Goods to JGJ for free without obtaining anything (be it shares or money) in return. In our view, the party who is liable must be JGJ. This is because the invoices were addressed to and sent to JGJ without protest and, in turn, JGJ invoiced the JDM Entities and TJCNY. The analysis in this regard may be made clearer by way of

a hypothetical illustration. Suppose SRK had supplied a sum of US$23m (*ie*, cash) to JGJ to buy the Goods and JGJ had used the sum to buy the Goods which were then supplied to the JDM Entities and TJCNY. JGJ would still be liable to SRK for that sum of money even though it was supplied as working capital for JGJ to buy the Goods. In this hypothetical scenario, the sum of US$23m would be a loan from SRK which JGJ would need to repay unless the sum was tendered in exchange for shares issued by some entity.

94 Returning to the facts of the present case, although SRK and TJCI supplied the Goods to JGJ instead of (as in the hypothetical example) providing JGJ with the money to acquire the Goods, the same principle applies – JGJ would still be liable for the Goods. These Goods were not supplied as gifts. Neither were they sent to JGJ in exchange for equity or share capital in JGJ or, for that matter, any other corporate entity. They were also not supplied on a consignment basis and indeed JGJ has not offered to return (or to arrange for the return of) the Goods. On this basis, simply describing the supply of the Goods to JGJ as the supply of working capital cannot mean that JGJ owes no liability to SRK/TJCI. The inevitable conclusion is that the Goods were sold to JGJ and JGJ therefore has to pay SRK and TJCI for them. Whether JGJ may defer such payment is a separate question, which we address later.

95 Second, Mr Lee stated that this "capital" would have kept "flowing throughout the JV" whenever the Goods were transferred from one entity to another.

96 He explained that the moneys received "at the end" by JDM as well as TJCNY, *ie*, the moneys received by these entities by selling the Goods to other third-party retailers such as Macy's, could be "remitted" back to JGJ as "capital". This contradicts JGJ's pleaded case. JGJ pleaded that all *income*

generated by the parties would be for the account of the JV. Mr Lee's suggestion that the income earned by JDM and TJCNY could be counted as "capital", and thereby credited to the respective accounts of JDM and TJCNY, runs counter to this proposition. It is clear from JGJ's pleadings that the profits and/or losses of the JV are *distinct* from the alleged "capital" which the parties contribute to the JV.

97 Third, the narrative that the Goods were intended to be "capital" – thereby giving rise to no liability on JGJ's part – is not found in any of the contemporaneous documents at the time of the discussions leading up to the JV.

*Further evidence that the Goods were supplied to JGJ as sales*

98 Our conclusion that the Goods were supplied to JGJ as sales is also bolstered by the following evidence.

(1) JGJ's daily trial balances

99 First, a critical piece of evidence which the Judge below had, with respect, failed to give adequate weight to was JGJ's daily trial balances (also referred to in some of the documents as the "general ledger"). These balances were sent by one Mr Pradeep Navale, who was in charge of handling back-office matters for the JDM Entities, by e-mail to AT Adler (JGJ's auditors) in May 2017, with Mr Vikas Ashokkumar Padhya ("Vikas"), the accountant for the parties' business collaboration, Mr Vibhor Jain ("Vibhor"), who was formally employed by SRK as its CFO, and one Mr Shashikant Mahadev Aienkar (an accounts executive of JGJ) copied. The balances provided a running account of JGJ's purchase accounts and payables for 2016 and from January to August 2017. This general ledger clearly recorded the supply of the Goods from SRK to JGJ not as capital but as *purchases*. This contradicts JGJ's assertion that

these invoices were never intended to attract payment liability. For example, in the trial balance for the period 1 April 2015 to 14 October 2016, the Goods supplied by SRK to JGJ were not only recorded as purchases, but were more importantly recorded *alongside* other purchases of the same Goods which JGJ had made from other third parties such as "Dinal Diamond", "K. Chandrakant & Co" and "H. Dipak & Co.", who were *undisputedly* not a part of the JV. The supply of Goods by TJCI to JGJ was recorded in a similar fashion, with counsel for SRK confirming that TJCI was referred to as "The Jewelry Co-Seepz" in JGJ's trial balances.

100 The fact that the supply of Goods by SRK and TJCI to JGJ was recorded alongside those of other third parties to JGJ strongly suggests that SRK and TJCI were treated on the same footing as other third-party suppliers in their transactions with JGJ, at least in the sense that the supply of Goods from these entities was intended to attract a corresponding payment liability. As counsel for SRK, Mr Harpreet Singh Nehal SC ("Mr Singh"), pointed out at the hearing before us, these transactions with SRK and TJCI were also listed in the trial balances with reference to specific invoice numbers corresponding to the 23M Invoices. Mr Lee, on the other hand, did not provide any cogent explanation as to why the supply of Goods from SRK and TJCI was reflected in the trial balances as purchases and not capital.

101 Vikas, who was employed by TJCI as the accountant for the parties' business collaboration, was confronted with JGJ's trial balances under cross-examination and confirmed that the supply of Goods by the SRK Entities to JGJ was recorded as purchases. He also confirmed that an auditor reviewing the general ledger would believe that the Goods were obtained as purchases from SRK. We find Vikas's evidence to be persuasive given that he was not only copied on the contemporaneous e-mail to the auditors which contained the trial

balances, but was also an accountant trusted by the Kriss Brothers and who worked for TJCI.

(2) JGJ's request for a comfort letter

102 Second, the correspondence between the parties pertaining to JGJ's request for a "comfort letter" indicates that JGJ was not truly of the view that the invoices created no payment liability. The comfort letter was supposed to say that SRK agreed for payment by JGJ for the goods supplied to it to be deferred until JGJ regained "sufficient cash flow". The comfort letter was required because JGJ's liabilities exceeded its assets at that point in time in 2017 and there would therefore have been a "going concern" qualification on JGJ's financial statements if no comfort letter was issued by SRK. Pertinently, JGJ's liabilities were made up largely of JGJ's account payables to TJCI and SRK. In seeking the comfort letter, JGJ would therefore have *acknowledged* – at least for the purposes of its accounts – that it owed a liability to TJCI and SRK for sums of money pursuant to the supply of the Goods. In an e-mail sent by Jim to Mr Jeffrey Sacks ("Sacks"), a tax advisor to JGJ and the JDM Entities, on 5 July 2017, Jim also recognised that SRK was one of JGJ's large suppliers who was "*selling* to JGJ" [emphasis added]. All of this supports the conclusion that contractual liability attached to JGJ to pay for the supply of Goods by SRK to JGJ.

103 In Michael's reply to Vibhor's e-mail dated 9 August 2017, which informed Michael that SRK would not be able to provide the comfort letter, Michael stated that he was "not sure that [he would be] able to lie to the auditor". Michael explained in cross-examination that this "lie" referred to the pretence that Shailesh was not SRK's nominee. JGJ disagrees with Michael's explanation and argues that this was Michael saying that he did not know how to "keep up

[the] charade with the auditor" to conceal the fact that the transfers were in fact capital, now that SRK had refused to provide the comfort letter.

104 Whether Michael's explanation is accepted or not, it does not support JGJ's assertion that the "lie" referred to the transfers being capital. In any event, even if Michael's reply suggested that JGJ is not liable to pay SRK, that is undermined by JGJ's inconsistent conduct referred to below.

(3) JGJ's inconsistent conduct

105 Third, JGJ's initial response in Suit 418 suggests that JGJ regarded itself as *prima facie* liable to pay for the Goods.

106 As Mr Singh emphasised during the hearing, JGJ's initial response to SRK's claim was not that the Goods were supplied as capital and/or that the invoices created no payment liability. It was instead that any amounts which JGJ owed SRK were *offset* by amounts due from SRK to JGJ. This implicitly accepted that there were amounts payable to SRK for the Goods supplied.

107 The first letter sent on 11 March 2018 by JGJ's US counsel, Moses & Singer LLP, to counsel for SRK (the "Moses & Singer Letter") was issued in response to SRK's letter of demand dated 1 March 2018. That letter of demand had been for the "repayment of dues of [SRK]" and was essentially for the sum due under the 23M Invoices plus interest in respect of the Goods sold to JGJ. In the Moses & Singer Letter, JGJ did not claim that the Goods supplied were intended as "capital" and that there was no payment liability. Instead, the basis on which JGJ rejected SRK's stated demand for payment was that "*any amounts due from JGJ to SRK are offset* and are far exceeded by the amounts due from SRK to JGJ" [emphasis added] (the "Set Off defence"). This was repeated again in the letter: "[o]ur conclusion above that *any payables for merchandise* that

may be due to SRK from its related company, JGJ *are offset* and far exceeded by the amounts due from SRK to JGJ/Joint Venture ...” [emphasis added]. The Moses & Singer Letter also claimed that there was to be a full accounting reconciliation at the end of each year of the joint venture, culminating in an equal distribution of net profits or apportionment of net losses between the SRK and JDM groups of companies.

108 JGJ’s response in the Moses & Singer Letter was echoed in its initial Defence and Counterclaim (the “initial DCC”) filed on 5 February 2020 in Suit 418. JGJ pleaded at para 11(3) of its initial DCC that the SRK Entities had failed to conduct the Accounting Reconciliation during the course of the JV and had that been conducted, “the profits generated by SRK for the goods supplied under the 23M Invoices would have been allocated to the account of JGJ, and would therefore have been off-set *against the payment to be made by JGJ under the 23M Invoices*” [emphasis added]. Nowhere in its initial DCC did JGJ deny that there was contractual liability to pay on the part of JGJ. It also appeared that the relief originally sought in JGJ’s initial DCC, which included a declaration that JGJ was liable to make payment on the 23M Invoices “only in the sums found to be due from [JGJ] to [SRK] on the conduct of [the inquiries to be conducted and accounts to be taken of the Goods]”, was premised on JGJ being *prima facie* liable to pay for the Goods supplied.

109 Likewise, when SRK applied for summary judgment for the SRK Unpaid Sum in HC/SUM 1750/2020 filed on 17 April 2020, JGJ did not allege that there was no liability for the SRK Unpaid Sum because the Goods were supplied as capital.

110 It was only when JGJ applied to amend its pleadings by way of HC/SUM 4497/2021 filed on 27 September 2021 that JGJ alleged that it was

not even liable to pay for the Goods. The amendment was allowed and hence this issue came into play. Under cross-examination at trial, Michael accepted that JGJ's subsequent defence – that JGJ had no contractual liability to pay – was only raised one year and ten months after SRK commenced Suit 418. There was no explanation as to why this was never raised as a defence *earlier*.

111 JGJ argues that the Capital Term was not belatedly raised with no explanation. It states that the concept of capital was already pleaded at paras 10(2)(e)–(f) of JGJ's initial DCC, where JGJ pleaded, as a term of the alleged JVA, that the JDM Entities and the SRK Entities would each maintain a capital account with JGJ. This is, in our view, insufficient to show that JGJ had relied on the Capital Term from the start. These paragraphs do not deny liability to pay for the Goods as such. It therefore cannot be said that the Capital Term was pleaded in clear terms in JGJ's initial DCC.

112 JGJ also contends that the pleadings filed by JGJ and the JDM Entities in the 2018 US Proceedings against the SRK Entities (including TJCNY) contain numerous references to the Capital Term. While that may be so, there is no explanation as to why that defence is found there but not in the Moses & Singer Letter or in the initial DCC or in JGJ's allegations to resist SRK's summary judgment application.

*Other evidence*

113 We also address the other pieces of evidence on the issue of whether JGJ is liable to pay for the Goods.

(1) The parties' conduct in relation to the payment requests sent by the SRK Entities to JGJ

114 First, considerable weight was placed by the parties and by the Judge on the parties' conduct in relation to the payment requests sent by the SRK Entities to JGJ during the course of the JV. In this regard, the Judge and the parties referred to "Exhibit P6", which was a table prepared by counsel for SRK and the Suit 418 Counterclaim Defendants at the trial below. Exhibit P6 sets out the various requests for payment and matched those payments (which were made pursuant to each request) to the 42M Invoices.

115 The Judge found that the following matters supplemented his conclusion that there was no agreement for JGJ to pay the amounts stated on the invoices for the Goods:

(a) First, the Judge relied on Vikas's testimony that he was not concerned about the due dates on invoices issued by the SRK Entities because he acted on requests from Amit. Vikas also testified that the invoices were the "mechanism for [the] transfer of fund[s] from one JV party to [the] other JV party". This supported JGJ's case that it had no obligation to pay on the invoices and that SRK had no expectation of receiving payment on them (Judgment at [196]).

(b) Second, the Judge referred to Exhibit P6 and considered that "there were several requests by SRK for funds from JGJ for the express and specific purpose of *purchasing gold*. Payments were then made pursuant to these requests, purportedly as payment of invoices" [emphasis in original] (the "Purchasing Gold Requests") (Judgment at [198]).

(c) Third, still referring to Exhibit P6, the Judge considered that there were "several requests by SRK to JGJ for payment of lump sums that were in round numbers and had no direct link to any invoice. Payment was again then made pursuant to these requests, purportedly as payment of invoices" (the "Lump Sum Requests") (Judgment at [199]).

(d) Fourth, the Judge considered that Exhibit P6 showed that "the invoices selected for payment pursuant to requests for funds were not always selected in chronological order" (the "Non-Chronological Payments") (Judgment at [200]).

Accordingly, the Judge found that the invoices were merely the mechanism for the transfer of funds from JGJ to SRK (Judgment at [202]).

116 As a preliminary point, we observe that, at this stage of his analysis (Judgment at [194]–[195]), the Judge had *already* concluded that the Goods were to be supplied as equity contributions to the JV and valued at cost for this purpose, and that the invoices were not intended to create any payment liability. He relied on the parties' conduct above only to support his finding that there was no agreement between the parties for JGJ to pay *the invoiced amounts* (Judgment at [196]). It is therefore not clear whether the Judge relied on such conduct in relation to the question of JGJ's liability or the question of the quantum of this liability, or both. In so far as these matters may lend some weight to the argument that there was no liability for JGJ to pay for the Goods, we disagree for the reasons below.

117 In relation to Vikas's testimony, his statement that the invoices were intended to be the "mechanism for [the] transfer of fund[s] from one JV party to [the] other JV party" does not assist JGJ's case that SRK had supplied the

Goods as capital to *JGJ*. This is because, according to Vikas himself, JGJ was not a party to the JVA – the JV was only between the JDM Entities and the SRK Entities. Moreover, the transfer of funds or goods in itself cannot demonstrate that there is no liability to account or pay for them. As we have already mentioned earlier, the Goods were not supplied as gifts.

118 On the other hand, we accept that SRK raised no complaint on late payments for the duration of the parties' business collaboration. Some of the invoices were paid a few months after payment was overdue. For instance, Mr Lok pointed to a payment request made on behalf of the SRK Entities on 18 August 2016 for JGJ to "make payment of US$ 450K from JGJ to SRK – Sachin for buying GOLD on urgent basis". The payment request referred to the following invoices:

| Party Name | Invoice No. | Invoice Value ($) | Required Amount ($) |
|---|---|---|---|
| J G Jewelry Pte Ltd | 2155323 | 435,686.33 | **327,023.71** |
| | 2155324 | 12,910.05 | **12,910.05** |
| | 2155325 | 8,985.84 | **8,985.84** |
| | 2155332 | 148,881.21 | **101080.40** |
| | | **Total Required $** | **450,000.00** |

Mr Lok pointed out that the invoice bearing the number 2155323 was dated 18 December 2015 and stated on its face "180 days from the date of shipment" under its terms of delivery and payment. SRK however only sought partial payment on the invoice eight months *after* the date of the invoice.

119 With respect to the payment request above, Mr Lok added that the SRK Entities had picked four invoices and that they were not even asking for the full amount of the four invoices in relation to that payment request. *Prima facie*, it

therefore appeared that the SRK Entities were not really chasing for payment on the invoices as such but merely wanted to transfer funds within the JV and used the invoices as the mechanism to make up the requested round figures.

120 However, in our view, the mere fact that SRK, or the SRK Entities, did not press JGJ for payment does not mean that there was no obligation on the part of JGJ to pay SRK for the Goods. The latitude which the SRK Entities accorded to JGJ is consistent with the fact that the parties were indeed collaborating on the basis of a JV. In any event, counsel for SRK also pointed to other payment requests made by SRK which made clear reference to specific invoices and indicated the precise number of dates for which payment was overdue for each invoice. This demonstrated that the SRK Entities did not, as JGJ sought to argue, adopt an entirely *laissez-faire* approach toward the payment requests.

121 We also place little weight on the fact that SRK had included in some of its payment requests the reason why it was making those requests, *ie*, the Purchasing Gold Requests. The provision of such a reason must not be confused or conflated with the existence of any contractual obligation which subsists on the part of JGJ. In any case, counsel for JGJ clarified at the hearing that not every request for payment was accompanied by the "purchasing gold" reason, only that these requests followed a "trend" of being raised after the invoices were allegedly due. In fact, most of the payment requests by SRK did *not* include any reason for the requests and simply sought payment on the invoices. Michael agreed under cross-examination that "a bulk of those payment requests said nothing about gold-buying". In any event, we do not find it surprising that, in the context of the JV between the parties, SRK chose to provide reasons for its payment requests.

122 In relation to the Lump Sum Requests, Mr Singh for SRK submitted that even if the requests were made for a payment in a lump sum, the fact of the matter was that each payment request was referable to specific invoices and that it was undisputed that JGJ had a system for tracking paid and unpaid (including partially paid) invoices. To this end, Exhibit P6 also showed that the vast majority of the 42M Invoices could be matched to payment requests right down to the cent, with minor discrepancies mostly due to bank charges.

123 As for the Non-Chronological Payments, Mr Singh submitted that only the three cited instances by the Judge – out of the 191 invoices listed in Exhibit P6 – were *not* paid out in chronological order. In other words, the vast majority of the 42M Invoices *were* paid in chronological order. In any event, the fact that some invoices were not paid in chronological order did not mean that there was no liability to pay.

124 For these reasons, we find that the parties' conduct in relation to the payment requests does not suggest that JGJ had no liability to pay SRK for the Goods.

(2) 13 January Memo

125 Second, the 13 January Memo (see [15] above) did not comprise "clear evidence" that the parties had agreed to enter into a JV or a JVA, in particular one which contained the Capital Term or even the Equity Terms. This memorandum was prepared by Amit following the meeting between Nirav, Amit, Ashish and the Kriss Brothers in New York in early January 2015. In our view, the fact that the 13 January Memo makes repeated reference to the term "joint venture" or "JV" is inconclusive with respect to the question of whether the Capital Term or the Equity Terms existed. This is because the memorandum

makes no reference to them – a point which was not disputed by counsel for JGJ. Instead, the memorandum clearly stated that excess inventory could be *purchased* by JGJ from SRK or JDM. The SRK management had also stressed that the points contained therein were "only guidelines". The 13 January Memo therefore does not provide support for JGJ's case that the parties had entered into a contractual arrangement which included terms to the effect that all goods supplied from one party to another would comprise "capital".

(3) References to a JV in the parties' correspondence

126 Third, we do not place much weight on the fact that the parties had described their arrangement as a "joint venture" or "JV" in their correspondence. This is because we agree that the parties were in fact operating on the basis of a JV/JVA. More importantly, the parties did not mention the Capital Term – in the manner which JGJ now seeks to advance – in their correspondence. In this regard, the e-mails which JGJ relies on in support of its argument that the Capital Term was discussed by the parties do not in fact go so far. We deal with each of these e-mails in turn:

(a) An e-mail dated 29 January 2015 captioned "Capital Investment" sent by Michael to Amit and David stated that the parties were to begin discussions about the capital investment needed to finance the JV. This would include a discussion on the broad expenses to be incurred by the JV, the capital required for the production of the goods, the accounts receivable by the JV and the inventory. This e-mail does not show that the parties had intended for the goods to be supplied by SRK (or indeed by any party to the supposed JV) to JGJ to be considered as capital. It simply stated that there was a need for the parties to discuss how the project was to be financed.

(b) An e-mail dated 30 March 2015 from Michael to Amit and David titled "discussion and points" contained a document with the header "Capital". Under this header, there was a bullet point stating that all assets (gold, diamonds or cash) needed to be transferred from the "original company" to JGJ as an invoice and payment, an intercompany agreed upon offset, or a wire transfer. This does not show that such a transfer of goods was not to attract any liability. On the contrary, it clearly indicated that there was to be a legal transfer of such goods from their original companies to JGJ.

(c) An e-mail dated 7 September 2016 from Michael to David and one Mr Ajay Matta ("Ajay") of the JDM Entities, with Vikas, Jim, Vibhor, Amit, Nirav and one Mr Vinay Vaghani copied, stated that Michael was concerned about a shortfall in funding faced by the parties. This does not show that the parties had agreed to the Capital Term, but rather that the JV was using up more funding than what the parties originally agreed upon.

(4) Streamlining of the parties' functions

127 Fourth, we accept that the various measures which the parties undertook in streamlining their functions – such as the transferring of the back-office functions of JGJ and the JDM Entities to India by a team employed by TJCI, the combining of the parties' insurance policies and the holding of security tokens for JGJ's IDBNY account by, *inter alia*, the SRK Entities' representatives – demonstrate that there was a JVA between the SRK Entities and the JDM Entities. However, even these measures demonstrate that the precise parameters of the JVA are unclear. For example, entities which JGJ accepts are *not* involved in the JV were also included in the combined insurance

policies but not included in the streamlining of back-office functions. More importantly, these measures do not, in themselves, show that the parties had agreed that JGJ did not need to pay for the Goods.

(5) The draft JVAs

128 Fifth, the evidence indicates that the two draft JVAs which the parties had instructed a law firm in India to draw up were intended by them simply to bypass tax requirements in the various jurisdictions. This much is evident from the contemporaneous e-mails from Michael. We are therefore careful not to accord these draft documents, which were in any event not signed by the parties, undue weight in assessing JGJ's liability to SRK or TJCI for the Goods.

(6) The 2016 spreadsheets

129 Sixth, we do not agree with the Judge's finding and JGJ's submission that the 2016 spreadsheets circulated by Vibhor to Jim and Vikas are evidence that the Goods were supplied as "capital" and that that suggests no liability to pay for the Goods. The mere fact that the spreadsheets indicate that the Goods were supplied as "capital" to the JV is neither here nor there given the uncertainty surrounding what meaning the parties accorded to the word "capital". This therefore does not assist us in deciding whether JGJ was indeed obliged to pay for the Goods.

130 In these spreadsheets, the entries pertaining to the "Capital Balances" were parked under the broad header of "Liabilities". This suggests that despite the label attached to these transfers, there was still a contractual obligation on the party holding the relevant sums to return them to the "SRK Group" or the "JDM Group". In addition, Mr Lee, counsel for JGJ, was unable to explain *how* the specific figures amounting to the "Capital Balances" were tabulated and

whether they properly corresponded to the Goods supplied under the invoices in question. While JGJ's position was that these figures reflected the Goods supplied valued at cost, JGJ was unable to provide any evidence in this regard. Another unexplained point was the fact that certain entities in the purported JV had their capital balances in the 2016 spreadsheets attributed to *Michael* instead of the "JDM Group". This contradicts JGJ's pleaded case that the JVA contained the Capital Term – *ie*, that the goods or cash provided by the *entities* would constitute the capital in the JV.

131 These balance sheets also include entities which were not pleaded by JGJ to be parties to the JV or JVA, such as "Kings Resources Ltd" and "Jewel Lux Mfg Group Co Ltd". This exacerbates the difficulty we face in determining who the true parties to the alleged JV or JVA were.

132 Furthermore, accompanying these balance sheets was a spreadsheet tallying intercompany payables and receivables among all these companies, which were each affiliated with either SRK or JDM (but not all of which were necessarily one of the JV parties as pleaded by JGJ). However, these intercompany payables were not included in the tabulation of the accounts payable attributable to each of the alleged companies which were part of the JV or JVA. This, according to JGJ, demonstrates that there was no payment liability as between the companies in the JV. We are not convinced by this argument. In our view, the exclusion of such intercompany payables simply allowed the parties to assess the overall profitability of their collaboration at a glance. The fact that the 2016 balance sheets were structured in this way does not necessarily mean that these intercompany payables were not legitimately owed by one party to another within the alleged JV.

(7) The 2017 balance sheets

133 Seventh, we consider the 2017 balance sheets which were prepared by Ajay and edited by one Mr Rajiv Shah ("Rajiv"), the CFO of SRK. These balance sheets, which were also referred to as the "JV Computations" by the Judge (Judgment at [140]), were prepared *after* the business collaboration between the parties had been terminated. The 2017 balance sheets included a running balance pertaining to JGJ's payables, which we reproduce here:

| PARTICULARS | USD (Million) | BALANCE | |
|---|---|---|---|
| SRK GROUP PROFIT PAYABLE TO JGJ | 17.19 | 17.19 | |
| TJC NY PAYABLE TO JGJ | 3.75 | 20.94 | |
| SRK GROUP A/P | -25.62 | -4.68 | |
| LOAN BY SRK GROUP IN JGJ AT SINGAPORE | -0.70 | -5.38 | |
| OTHER PAYABLE ON ACCOUNT OF STOCK RESERVE | -0.53 | -5.91 | BALANCE BELONGS TO SRK GROUP TOWARDS CAPITAL INTRODUCED |

134 It is not disputed that this spreadsheet was prepared in the context of the parties' settlement discussions following the termination of their business collaboration. It therefore sought to determine how the parties would part ways. The table shows that the SRK Entities owed JGJ US$17.19m but this was offset by accounts payable due to the SRK Entities of US$25.62m from JGJ. Counsel for JGJ confirmed at the hearing that the sum of US$17.19m due from the SRK Entities to JGJ had nothing to do with the Goods which were supplied under the invoices but that the sum of US$25.62m included the sums claimed for under the 23M Invoices.

135 JGJ argues that the 2017 balance sheets are relevant because they refer to a "JV" and they show that the balance amount left in JGJ was to be provided to the SRK Entities as the capital which they had introduced to the JV. This constituted clear evidence of the Capital Term.

136 We disagree. As stated above at [126], mere reference to the terms "joint venture" or "JV" is insufficient to prove the existence of the Capital Term and

to show that JGJ was not liable to pay for the Goods. As to the statement in the 2017 balance sheets that the balance amount left in JGJ was to be provided to the SRK Entities as the capital they introduced, it should be noted that this amount was arrived at by Rajiv *after* accounting for the sums under the invoices as sums which were payable under the 23M Invoices. In other words, even though the final figure (*ie*, the amount left in JGJ) was to be treated as capital belonging to the SRK Entities, this figure was arrived at by first treating the sums under the 23M Invoices as accounts payable. This serves to reinforce the conclusion that payment was to be made on the Goods supplied.

137 We note that the Judge had placed weight on Nirav's testimony that the 2017 balance sheets demonstrated that it was JDM (not JGJ) which had to pay SRK for goods it supplied. In the Judge's view, this confirmed that the Goods were not meant to be paid for by JGJ as invoiced. In our view, however, the Judge had erred in this regard. It was neither SRK's case nor JGJ's case that JDM is liable for the Goods. Indeed, at the hearing before us, counsel for JGJ maintained that JGJ is not liable but he did not say that anyone from or related to the JDM Entities is liable instead. Nirav's testimony is therefore inconsistent with JGJ's case. Bearing in mind the other evidence we have considered, especially the fact that the Goods were supplied for the account of JGJ, any liability to pay for the Goods would attach to JGJ.

138 For these reasons, we reject the 2017 balance sheets as evidence that JGJ did not need to pay for the Goods.

(8) The volume rebate agreements

139 Eighth, the evidence shows that volume rebate agreements were entered into between JGJ and JDM, MG Worldwide, AP Jewelry and TJCNY to avoid

reporting a loss on their books. Specifically, the parties wanted to avoid questions by the auditors as to why they had reported an increase in inventory and net sales but a decrease in profits. The agreements therefore came at the expense of *JGJ* reporting a loss on its books instead. In our view, however, the volume rebate agreements, which were effected between JGJ and the JDM Entities in the US, do not show that JGJ was not liable to pay SRK for the Goods. On the contrary, these agreements were simply a scheme devised to avoid reporting losses in the US, which were occasioned by the very fact that the relevant goods were *billed* by JGJ to the JDM Entities as *sales*. By the same logic, the invoices issued by SRK to JGJ reflected genuine sales as well.

(9) The accounting manual

140 Ninth, counsel for JGJ pointed us to an accounting manual which was prepared by Vibhor in May 2016. Vibhor referred to this accounting manual as the "understanding for [the] preparation of [JGJ's] balance sheet". In particular, Section "O" of the accounting manual, titled "Capital Balances", stated that cash capital (and other forms of capital in kind) introduced by the parties on 1 April 2015 would be taken as the parties' opening capital. The capital accounts of the "partners" would be adjusted upon the occurrence of several listed transactions. Pertinently, "any finished goods outright inventory sale/memo sales of old SKU [stock keeping unit] made during the period in any of the entity [would] be added as [the] respective partners' capital with the value of 95% of the sales value". Counsel for JGJ argued at the hearing before us that the Goods referred to in the 23M Invoices and 42M Invoices would fall under this category of transactions.

141 We do not find this argument persuasive. It contradicts JGJ's assertion that the goods supplied by the parties were to be valued at *cost* for the purposes

of accounting for the parties' capital contributions. The guidance pertaining to the abovementioned category of transactions clearly indicates that the goods would be valued at 95% of the sale value, not cost. In addition, Section "F" of the accounting manual provides for finished goods inventory which was to be transferred to the joint venture to be valued differently depending on the type of inventory in question. For example, diamonds were to be valued at the certified intercompany list price, gold and metals were to be valued at market price at the valuation date and only colour stones were to be valued at the last purchase price or at real cost. The accounting manual therefore does not support JGJ's account that the parties had agreed that goods supplied to JGJ would be consistently valued at cost to constitute their capital contributions to the JV.

(10) MIS Memo

142 Tenth, the memorandum prepared by KPMG on the parties' request in March 2016 (the "MIS Memo") does not show that the parties had agreed to the Capital Term. Counsel for JGJ pointed to para 2.3 of the memo, titled "Year-end inventory valuation", which states that the markup on the sale of each piece of inventory from one entity to another would need to be eliminated on the year-end inventory to show the correct profit figures. The Judge found that this was consistent with JGJ's case that all goods supplied by the SRK Entities and the JDM Entities pursuant to the JV were to be treated as capital in the JV and that for the purposes of determining the net profits and/or losses under the JV, the goods supplied were to be valued at cost (Judgment at [150]).

143 We disagree with the Judge in this regard. The MIS Memo states that it was prepared with the intention of finding out the overall profit of the various entities arising from the collaboration. It would therefore be unsurprising, for the purposes of this exercise, for the elimination of the markup for each sale

because this would allow the overall profits arising from the parties' collaboration to be assessed. Pertinently, we note that the MIS Memo could also be said to have characterised these transactions on the supply of the Goods as *sales*. Paragraph 1 of the MIS Memo states that JGJ was incorporated to act as a "global sourcing entity" for diamond jewellery and to "sell the same to customers in US" — this is consistent with our conclusion that the Goods were sold to JGJ by SRK. More importantly, the MIS Memo did not state that the Goods were to be supplied to JGJ as "capital" or that JGJ would not bear any liability for these Goods. We add that no one from KPMG gave evidence.

*Summary*

144 For the reasons above, we find that SRK and TJCI have proved that JGJ is liable to pay for the Goods supplied for its account. Therefore, we do not adopt the Judge's analysis and decision based on an alternative claim of unjust enrichment against JGJ. Accordingly, JGJ is *prima facie* contractually liable to pay SRK and TJCI for the Goods supplied under the 23M Invoices and 2.2M Invoices respectively unless any of its alternative pleaded defences succeed. We thus turn to JGJ's alternative pleaded defences.

### *Issue 2: Whether JGJ can rely on its alternative pleaded defences of the Accounting Reconciliation and the Termination Settlement Exercise*

145 In our view, JGJ cannot avail itself of its alternative pleaded defences because the evidence does not show that JGJ's liability on the relevant invoices was premised on the prior occurrence of the Accounting Reconciliation or the Termination Settlement Exercise. In the first place, we are not satisfied that JGJ was a party to the JVA such that it could enforce the terms therein.

*Whether JGJ was a party to the JVA*

146 As a preliminary point, we find that JGJ cannot rely on these defences because it was not a party to the JVA. JGJ was the subject of the JV, being incorporated pursuant to the JVA. As it was not a party to the JVA, it cannot enforce the terms therein and/or subsequently agreed upon by the parties to the JV as pleaded by JGJ. This also means that JGJ's counterclaim, which is premised on a purported breach of the JVA, must fail (see [176] below). We elaborate on our reasons for concluding that JGJ is not a party to the JVA.

147 At the outset, we note that the Moses & Singer Letter mentioned that the SRK Entities and the JDM Entities were the parties to the JVA. There was no mention that JGJ was a party to the JVA.

148 As set out above, JGJ pleaded at para 10 of the Suit 418 DCC that the JV was entered into "in or around the first quarter of 2015" between the SRK Entities, the JDM Entities and JGJ. JGJ further pleaded at para 10(1) of the Suit 418 DCC that the *terms* of the JVA were agreed upon between Govind, Rahul, Nirav and Amit and the Kriss Brothers "sometime in the first quarter of 2015". As noted by the Judge, in particulars served pursuant to an order of court, JGJ then pleaded that the JV was entered into on 13 January 2015 and confirmed via Amit's e-mail dated 13 January 2015 attaching the 13 January Memo (see [15] above).

149 The Judge found that JGJ could *not* have been a party to the JVA on 13 January 2015 (because it was only incorporated on 31 March 2015) and JGJ's pleadings do not state how or when it subsequently became a party to the JVA (Judgment at [193]). Indeed, in our judgment, it is telling that in JGJ's Defence and Counterclaim (Amendment No. 4) in Suit 475 dated 8 December

2021 ("Suit 475 DCC") (*ie*, against Shailesh's oppression claim), JGJ pleaded at para 3 that it was incorporated *pursuant to* "a joint venture between two groups of companies", namely, the JDM Entities and the SRK Entities. It then referred at para 4(a) of this pleading to a JVA entered into between these two groups of entities, and JGJ is not mentioned as a party to the JVA. Separately, at para 9 of this pleading, JGJ referred to the SRK Entities and the Kriss Brothers as the partners of the JV – again, JGJ is not mentioned as a party.

150 Likewise, the Kriss Brothers' Defence (Amendment No. 3) in Suit 475 dated 8 December 2021 pleaded at para 3 that JGJ was incorporated pursuant to a joint venture between the JDM Entities and the SRK Entities. It states at para 4 that a JVA was entered into between these entities. However, JGJ was not mentioned as a party to the JVA.

151 JGJ argues that even though it was not incorporated as of 13 January 2015, all this means is that JGJ was not a party to the JVA as of that date. It submits that the JVA as between the SRK Entities and the JDM Entities did come into existence as of that date. However, this still does not address the question as to how and when it became a party. JGJ argues that it became a party to the JVA later or is in any event entitled to rely on the JVA pursuant to the following three grounds:

(a) first, JGJ contends that it became a party to the JVA after it was incorporated and relies on the doctrine of implied contracts;

(b) second, and in the alternative, JGJ contends that SRK is estopped from denying that JGJ was a party to the JVA; and

(c) third, and in any event, JGJ contends that it is entitled to rely on the CRTPA to enforce the terms of the JVA which are for JGJ's benefit.

152 In our view, none of the three grounds are borne out.

153 First, JGJ contends that the SRK Entities and the JDM Entities clearly intended for JGJ to be a party to the JVA. According to JGJ, the facts show that it was specifically incorporated for the purpose of the JV and was jointly managed by the parties in a manner consistent with the Capital Term. The parties also made no clear demands for payment on the invoices to JGJ and caused JGJ to issue the volume rebate agreements to the JDM Entities and TJCNY. Finally, even after SRK terminated the JV, the settlement spreadsheets prepared by Ajay set out the fact that the "SRK Group Profits" were to be paid to JGJ. According to JGJ, this was evidence that JGJ was a party to the JVA as the only reason why these profits were to be paid to JGJ was that they represented capital in the JV which had to be returned to the JDM Entities. JGJ contends that the conduct of the parties was thus such as to clearly regard it as a party to the JVA.

154 However, this is not the way JGJ's case was pleaded in Suit 418 (see [148] above). JGJ also did not plead that the parties' intention was that the JVA was to be a pre-incorporation contract which JGJ was to be a party to and how this was achieved. In this regard, we note that s 41(1) of the CA provides that any contract purporting to be entered into by a company prior to its formation may be ratified by the company after its formation and thereupon the company becomes bound by and entitled to the benefit thereof as if it had been in existence at the date of the contract and had been a party thereto. That said, JGJ's pleaded case regarding its standing to enforce the terms of the JVA was not premised on ratification, whether express or implied.

155 Furthermore, and more importantly, the arguments raised by JGJ to support its contention that it was intended to be a party to the JVA *do not*

invariably lead to this conclusion as those arguments could also lead to *another*, wholly different conclusion that JGJ was the subject of the JVA but not a party to the JVA. Even if JGJ was in fact specifically incorporated for the purpose of the JV and even if one assumes that it was managed by the JV partners in a manner consistent with the Capital Term, this does not show that JGJ was a party to the JVA. It is more likely that the SRK Entities and the JDM Entities had entered into the JVA, pursuant to which JGJ was incorporated. Similarly, the fact that the parties made no demands for payment on the invoices issued to JGJ does not show that JGJ had agreed in any way to be bound by the JVA. The volume rebate agreements were also *separate* agreements that JGJ had entered into with, *inter alia*, JDM and TJCNY and do not reflect that JGJ was a party to the JVA. Finally, the payment of the "SRK Group Profits" and various sums from TJCNY to JGJ does not necessarily show that JGJ was a party to the JVA. It was equally consistent with the position that the spreadsheets sought to apportion the profits earned by JGJ in respect of its equity holders, namely, the SRK Entities and the JDM Entities.

156 In light of the above, the parties' conduct which JGJ has pointed to does not show that it was a party to the alleged JVA. This is especially so as the court will not lightly imply a contract from conduct: see *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [50].

157 Second, JGJ relies on estoppel by convention, *ie*, that the SRK Entities and JGJ (being the party raising the estoppel) have acted on the premise that JGJ was a party to the JVA as opposed to merely being the subject of the JVA. We reiterate that estoppel by convention was not pleaded. In any event, the arguments that JGJ raises to support estoppel by convention do not necessarily lead to this conclusion, as they could also lead to the other conclusion that JGJ

was the subject of the JVA but not a party to it. The fact that JGJ was closely involved in the JV, as argued by JGJ, also does not necessarily mean that it was a party to the JVA.

158 Third, JGJ argues that it is entitled under s 2(1) of the CRTPA to enforce the terms of the JVA in so far as these terms purport to confer a benefit on JGJ. Again, the allegation that the terms purport to confer a benefit on JGJ was not pleaded — instead, JGJ's pleaded case was that it *was* a party to the JVA.

159 In conclusion, we find that JGJ was not a party to the JVA and cannot enforce its terms, even if the terms were proved. JGJ thus cannot rely on the terms of the JVA as a defence or sue upon them.

*The merits of JGJ's alternative pleaded defences*

160 In any event, we find JGJ's alternative pleaded defences to be without merit.

161 We agree with the Judge that JGJ has failed to prove that its liability would only arise upon the occurrence of the Accounting Reconciliation and/or the Termination Settlement Exercise. With respect to the Accounting Reconciliation, JGJ has failed to adduce any evidence to show that the parties had indeed intended for its liability to SRK and TJCI to be deferred pending the Accounting Reconciliation. Pertinently, JGJ pleaded that the main purpose of the Accounting Reconciliation was to (a) adjust the prices on the invoices to accurately reflect Cost-Plus Pricing and (b) assess the net profits or losses of the JV. It was *not* JGJ's pleaded case that the Accounting Reconciliation was required to value the goods at *cost* so as to determine the parties' respective capital contributions to the JV and thus their liability. No such submissions were made by JGJ in the appeals before us as well. As such, all that the evidence

bears out is that the parties had embarked on the Accounting Reconciliation to determine the overall profitability of their collaboration.

162 The argument that liability on JGJ's part would only arise upon the occurrence of the Accounting Reconciliation leads to the outcome that JGJ would be able to postpone such liability indefinitely by deciding not to embark on this exercise. It is highly doubtful that the persons behind SRK, as commercially savvy businessmen, would have been prepared to wait until the Accounting Reconciliation was done each year before payment would be made while, in the meantime, supplying the Goods. We reject this argument accordingly.

163 Likewise, JGJ cannot assert that the Termination Settlement Exercise must take place before it incurs any liability to pay. The 2017 balance sheets – which constituted the parties' efforts at a final settlement – show that the parties had treated the 23M Invoices as attracting payment liability on JGJ's part (see [133]–[136] above). Moreover, there is inadequate evidence to show there was such a term at the time the JVA was entered into.

***Issue 3: What is the amount that JGJ is liable to SRK and TJCI for***

164 Having determined that JGJ is liable to pay SRK and TJCI for the Goods and that it cannot rely on its alternative pleaded defences to avoid that liability, we now address the quantum of JGJ's liability for the Goods.

165 In JGJ's Suit 418 DCC, it alleged at para 10(2)(c) that the Goods were intended to be invoiced at Cost-Plus Pricing, *ie*, the cost of the Goods plus a specified mark-up. It further alleged in its defence (at para 11(2)) and its counterclaims on breach of contract and inducement of breach of contract and conspiracy (at paras 20, 24 and 27) that SRK had inflated the price of the Goods

in the invoices because they were not based on the Cost-Plus Pricing. However, in reality, the Goods were in fact sold to JGJ at Sell-Minus Pricing, *ie*, at prices discounted against the JDM Entities' selling price to their customers (see [81] above).

166 JGJ further alleged at para 10(2)(d) of its Suit 418 DCC that, as a *separate* matter, the net profits or losses generated under the JV were to be determined and apportioned equally between the SRK Entities and the JDM Entities, and that for this purpose, the Goods supplied to the JV were to be valued *at cost*. It bears highlighting that pricing "at cost" would result in a different figure from Cost-Plus Pricing, which by JGJ's definition referred to the cost of the Goods *plus* a specified mark-up.

167 Based on these pleadings, there are three prices which are of potential relevance to the question of the quantum of JGJ's liability:

(a) Cost-Plus Pricing, which JGJ pleaded ought to have been the prices at which the invoices were to be issued at;

(b) Cost, which JGJ pleaded was the value at which the parties' "capital" contributions were to be valued at; and

(c) Sell-Minus Pricing, which JGJ pleaded the invoices were erroneously priced at.

168 The Judge rejected JGJ's allegation that the Goods were intended to be invoiced at Cost-Plus Pricing because it was not proven what was the specified mark-up that had been agreed, if at all (Judgment at [185]). Instead, the Judge accepted Michael's evidence that the parties had *agreed* that the goods would be invoiced based on Sell-Minus Pricing (Judgment at [186] and [241]). On the

other hand, the Judge also found, as part of the Equity Terms, that "the goods supplied by the parties pursuant to the JV would be treated as equity contributions to the JV and *valued at cost for this purpose*" [emphasis added] (Judgment at [194(b)]).

169 On appeal, however, JGJ appears to have abandoned the argument that SRK/TJCI had inflated the price of the Goods in the invoices. In fact, at the hearing before us, counsel for JGJ conceded that regardless of how the Goods were priced on the invoices, its case was simply that the parties had agreed in the JVA for JGJ to bear no liability in relation to the Goods supplied. We add that JGJ does not appear to challenge the Judge's finding premised on Michael's evidence that the parties had agreed that the goods would be invoiced based on Sell-Minus Pricing. It is clear from Michael's testimony at trial that the invoices were priced at Sell-Minus Pricing and that the parties had *agreed* that they were to be so priced. On this basis, it follows from our conclusion above that the Goods were sold by SRK and TJCI to JGJ that JGJ is liable for the full amounts stated on the invoices. For completeness, however, we find that JGJ cannot argue that it is liable to SRK and TJCI for anything less than the invoiced sums.

170 First, the Kriss Brothers were aware of the prices stated in the invoices addressed and sent by SRK and TJCI to JGJ in respect of the Goods. Indeed, on the occasions when JGJ made payment to SRK on the 42M Invoices (*ie*, the total sum of US$42,994,312.66 on invoices issued between 15 September 2015 and 14 April 2017), the amounts were referrable to the prices stated in the invoices. Given that Jim (the CFO of JDM) was copied on payment requests by SRK, the Kriss Brothers (the owners and controllers of JDM) must have been aware of these payments and that the payment requests were being fulfilled pursuant to the amounts stated on the invoices, which were priced at Sell-Minus Pricing. Michael testified under cross-examination that he knew that JGJ had

paid over US$42m to SRK in the course of their business collaboration and that to make these payments, JGJ would first need to receive funds from the JDM Entities. He agreed that the JDM Entities must have known of the US$42m in payments to SRK. In addition, it is pertinent that the JDM Entities' representatives were copied on SRK's payment requests and had access to the payment instructions. This included Jim and Ajay (who was the financial controller of JDM). At times, they personally approved those payments. At no point in time during the subsistence of the JV did the Kriss Brothers protest that there was price manipulation.

171 Second, the invoices addressed and issued to JGJ were *prima facie* evidence that a sale had taken place at the values stated on the invoices, *ie*, at Sell-Minus Pricing. The invoice prices were also reflected in JGJ's daily trial balances showing its purchase accounts and payables for 2016 and from January to August 2017 (see [99]–[100] above), which listed among its transactions those that referred to the specific invoice amounts under the 23M Invoices. In the face of this, the evidential burden was on JGJ to show the contrary; however, no documentary evidence such as a credit note was produced to show that the parties intended the Goods to be priced at any amount other than what was reflected on the 23M Invoices.

172 Third, we do not find that the MIS Memo, which had been prepared by KPMG on the parties' request in March 2016, suggests that JGJ is only liable to SRK and TJCI for the *cost* of the Goods and not the full amounts stated on the invoices. We note that the Judge referred specifically to para 2.3 of the memorandum, which stated that the finished goods were to be valued "at cost or net realizable value, which every [*sic*] is lower, for the purposes of the collaboration".

(a) First, this section in the MIS Memo referred to the valuation of the *finished goods* inventory; however, it was clear that the Goods encompassed both diamonds and various forms of jewellery and did not include only finished goods.

(b) Second, the MIS Memo stated by way of background that it was prepared for the purposes of documenting the JV parties' "understanding of the profits / expenses which would be allocated to [their] collaboration and which profits / expenses would keep aside from this collaboration". It thus appeared that *even if* the MIS Memo could be taken as evidence of the parties' intention to value the Goods at cost, this valuation at cost was *only* for the purpose of determining the net profits or losses generated under the JV for the eventual purpose of apportioning these equally between the SRK Entities and the JDM Entities (see [166] above). In other words, it related exclusively to the accounting exercise that was to take place as between the JV partners (*ie*, the SRK Entities and the JDM Entities), who were the parties to the JVA. However, we have earlier found that JGJ was not a party to the JVA but was merely the subject of the JV between the SRK Entities and the JDM Entities (being incorporated pursuant to the JV). Furthermore, as the question of whether the SRK Entities have to account to *the JDM Entities* for the Goods supplied pursuant to the JV for profits arising therefrom is *not* before this Court, it is thus a point that is not necessary for us to decide. Even if the JV parties intended for the Goods to be valued at cost for the purpose of determining the net profits or losses of the JV, this says nothing about what the JV parties intended as regards the pricing of the Goods for the purpose of quantifying JGJ's liability to SRK for the Goods supplied.

173 In the round, we are satisfied that JGJ's liability to pay SRK for the Goods supplied is for the full quantum of the SRK Unpaid Sum. Likewise, JGJ is liable to TJCI for the entirety of the TJCI Unpaid Sum.

174 In so far as the Judge considered that SRK and TJCI were entitled to reasonable compensation on their alternative restitutionary claims and had concluded that SRK and TJCI were not entitled to the amounts as invoiced but only a reasonable quantum, this was on the premise that JGJ had no liability to pay for the Goods as sales to JGJ. For the reasons we have given, we are of the view that JGJ is liable to pay for the Goods at the prices stated in the invoices. Hence, the alternative restitutionary claims and the question of a reasonable amount to be paid are academic. So too are the defences which JGJ raise against the alternative claims.

### ***Issue 4: Whether the Judge erred in dismissing JGJ's counterclaims in Suit 418***

175 JGJ confirmed at the hearing that it is *only* pursuing its counterclaim in conspiracy and the counterclaim regarding the 42M Invoices on appeal, and not its counterclaim on inducement of breach of contract.

#### *42M Invoices counterclaim*

176 For JGJ's counterclaim on the 42M Invoices, JGJ argues that (a) first, SRK and TJCI had breached the Capital Term when both these parties claimed that the past flows of capital constituted payment for the 42M Invoices and further claimed payment on the 23M Invoices and 2.2M Invoices and (b) second, JGJ's counterclaim in unjust enrichment should be allowed, *ie*, that SRK and TJCI should return the entirety of the sums paid under the 42M Invoices.

177 JGJ's first argument is premised on the existence of the Capital Term. In the light of our finding above that JGJ has failed to prove the existence of the Capital Term, JGJ's arguments as to the alleged breach of the JVA containing these terms fall away. In any event, JGJ was not a party to the JVA and would not have standing to enforce the Capital Term.

178 On the second argument, to the extent that JGJ seeks the return of the *entire* amount which it paid pursuant to the 42M Invoices, this is on the basis that the Judge had found that the JVA was unenforceable and hence JGJ argues that there was no basis for it to have paid SRK, even on the basis of reasonable compensation, as the Goods were supplied on the basis of the unenforceable JVA. We find this an egregious argument. It is clear to us that what JGJ is attempting to do is to keep the Goods supplied by SRK under the 42M Invoices at no cost. However, as set out at [144] above, we are satisfied that JGJ is liable to pay SRK for the Goods supplied based on the prices stated in the invoices. Hence there is no basis for JGJ to claim counter-restitution for anything paid for the Goods supplied under the 42M Invoices.

*Conspiracy counterclaim*

179 In its counterclaim for conspiracy, JGJ argues that one or more of the Suit 418 Counterclaim Defendants had conspired, through lawful or unlawful means, to injure JGJ and to procure:

(a) SRK to issue the 23M Invoices and the 42M Invoices at prices that were not based on Cost-Plus Pricing; and

(b) JGJ to pay the 42M Invoices and SRK to demand payment of the 23M Invoices, despite knowing that JGJ was not liable to make payment on the 42M Invoices and 23M Invoices.

180 In so far as JGJ appeals on its counterclaim against the Suit 418 Counterclaim Defendants for conspiracy, this is confined to JGJ having to incur legal fees in defending the allegedly unmeritorious claims on the invoices by SRK and TJCI. It was not satisfied if SRK's and TJCI's claims were simply dismissed with costs to be paid by them. Instead, it sought damages to be assessed by which all the Suit 418 Counterclaim Defendants would be liable for its costs in those claims as well. It also appears to seek an order that the Suit 418 Counterclaim Defendants jointly and severally bear the costs of the action. It relies on the decision of the Court of Appeal in *Singapore Shooting Association and others v Singapore Rifle Association* [2020] 1 SLR 395 ("*Singapore Shooting Association*"). However, as JGJ itself recognises, the Court of Appeal in that case held as a general rule that the legal fees incurred in investigating, detecting, unravelling and/or mitigating a conspiracy, and/or defending an action, would *not* constitute actionable loss or damage in the tort of conspiracy: *Singapore Shooting Association* at [92] and [100]. We are of the view that the case does not afford JGJ a cause of action in conspiracy just because JGJ seeks to make parties, other than SRK and TJCI respectively, liable for the costs of a purportedly invalid claim.

181 In this regard, the observation of the Court of Appeal in *Singapore Shooting Association* at [101] is not a licence for any and every party who seeks to recover costs to pursue a conspiracy claim against a wide set of parties. After all, the objective of costs is generally to *compensate* the successful party and not to punish the losing party: see *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 4 SLR(R) 155 at [7]. In the present case, permitting the legal costs incurred by JGJ to constitute actionable loss in the tort of conspiracy would subvert the costs regime which is in place to regulate the recoverability of such

costs. The proper course of action, as was indicated to counsel for JGJ at the hearing, would instead have been for JGJ to apply to the court, pursuant to the costs regime, for these persons it alleges to have combined to make false claims against it to be personally liable for JGJ's costs in Suit 418.

182 As a final observation, we find this counterclaim to be entirely without merit. The crux of unlawful means conspiracy is to prevent one from combining and undertaking an unlawful course of action with the intention of harming another: see *EFT Holding, Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [96]. In the present case, parties such as TJCNY were added as a party to Suit 418 solely because JGJ chose to bring a counterclaim against them. We could however see no meritorious reason for JGJ to have brought this counterclaim given that there is no evidence to show that TJCNY had embarked on a concerted course of action together with SRK to injure JGJ. This is especially so given our conclusion that JGJ is in fact liable to pay SRK and TJCI the full quantum of the SRK Unpaid Sum and the TJCI Unpaid Sum respectively (see [173] above). It also appears to us that given the 2017 US Proceedings brought by TJCNY against the JDM Entities were afoot at the time, JGJ's true motivation behind the conspiracy counterclaim was a retaliatory one. Such conduct not only achieves no real purpose but also wastes valuable judicial time and resources.

183 Given our conclusion above that JGJ's appeal on its conspiracy counterclaim is entirely without merit, the question of whether TJCNY was a party to the JVA is rendered academic. So too are the questions of whether Ashish's role was purely to provide administrative assistance and whether he had acted wrongfully in releasing payments from JGJ's account.

***Conclusion, interest and costs***

184 Following from our conclusions above, we allow SRK and TJCI's appeal in AD 22 and dismiss JGJ's appeal in AD 21. We dismiss JGJ's appeal for a declaration that it is not liable for the SRK/TJCI Unpaid Sums and for an order for restitution of any sum already paid to SRK under the 42M Invoices.

185 As for interest on the sums, JGJ contends that if it does not succeed in AD 21, SRK and TJCI should not have been awarded pre-judgment interest of 5.33% *from the date of writ/counterclaim* until judgment. However, JGJ's contention is essentially that it is perverse to award interest when doing so "would suggest that JGJ should have made payment for [the Goods] at an earlier point in time despite the false basis [*ie*, the invoices issued under the BA] upon which those claims were made" and that, in any event, interest should not be ordered earlier than the date the unjust enrichment claim by SRK and TJCI was made. As we have found that JGJ's liability to pay on the amounts stated in the invoices arises by way of the *sale* of the Goods, this contention is without basis. We order that JGJ is to pay SRK interest on the SRK Unpaid Sum at the rate of 5.33% per annum from the date of the Writ of Summons (23 April 2018) until the date of our judgment and to pay TJCI interest on the TJCI Unpaid Sum at the rate of 5.33% per annum from the date of TJCI's counterclaim (6 November 2020) until the date of our judgment.

186 On the matter of costs, the Judge below awarded costs of $487,500 excluding disbursements in favour of the SRK Parties and costs of $243,750 excluding disbursements in favour of TJCNY and Ashish. He arrived at these figures by applying a reduction of 25% to the quantum of costs which he found reasonable for these two groups. The Judge also ordered JGJ to pay these two groups disbursements, which were also to be reduced by 25% and which were

to be fixed (by the court) if not agreed. The Judge also declined to find the Kriss Brothers jointly and severally liable for the costs which JGJ has to pay.

187 There should be some variation of the costs order below in respect of the SRK Parties as SRK and TJCI have succeeded on their main appeal in AD 22 even though Govind, Rahul, Nirav and Amit are not appellants. In any event, any adjustment we make on that set of costs against JGJ will not be unduly prejudicial to it because it is still liable for only one set of costs for the SRK Parties. We will vary the Judge's order on costs for the SRK Parties by reducing the adjustments to be made to 15% (from 25%). This reduction will also apply to the disbursements.

188 We make no adjustment on the costs below awarded to TJCNY and Ashish as they have not filed any appeal.

189 For the appeals in AD 22 and AD 21, the SRK Parties had initially asked for the Kriss Brothers to be made jointly and severally liable for 62.5% of the costs ordered against JGJ but at the hearing of the appeals, Mr Singh clarified that SRK was only seeking for the Kriss Brothers to be jointly and severally liable for the costs incurred in defending JGJ's counterclaim. In so far as JGJ was claiming in counter-restitution for payments made under the 42M Invoices, this overlaps with its stance that it was not liable to pay any invoice whether as part of the 23M Invoices, the 2.2M Invoices or the 42M Invoices. The counterclaim for breach of the JVA or inducement of such a breach also overlaps with that stance. The same applies to JGJ's counterclaim for conspiracy. In so far as JGJ says that its conspiracy claim was to make the Suit 418 Counterclaim Defendants liable for its costs in defending the claims of SRK and TJCI, this is a very small part of the overall claims and counterclaims of all the parties. In the circumstances, we will not order the Kriss Brothers to

be jointly and severally liable with JGJ for any of the costs in Suit 418 or, for that matter, any of the costs in AD 21 and 22.

190 For the costs of AD 21 and AD 22, the SRK Parties seek $100,000 (excluding disbursements) and TJCNY and Ashish seek $70,000 (excluding disbursements) in the event AD 21 is dismissed. JGJ seeks $100,000 (excluding disbursements) in the event AD 22 is dismissed. We bear in mind that: (a) there is overlap between the appeals by SRK and TJCI on the one hand and by JGJ on the other hand; and (b) some of the arguments about the BA were unnecessary. Moreover, SRK and TJCI are represented by the same counsel and TJCI's arguments are largely the same as SRK's.

191 We order JGJ to pay costs of both appeals to (a) the SRK Parties, fixed at $100,000 all-in and (b) TJCNY and Ashish fixed at $30,000 all-in.

**The appeals arising from Suit 475 (namely, AD 23 and AD 24)**

***The parties' cases***

*Kriss Brothers' case*

192 The Kriss Brothers' case on appeal in AD 23 is that Shailesh cannot claim or assert any legitimate expectation that the Kriss Brothers would fulfil their duties as directors of JGJ as he was at all times a mere *nominee* shareholder in JGJ. As such, the Judge erred in finding that Shailesh was entitled to complain about the Three Adjustments on the basis that they were commercially unfair to him. Even if the making of any of the adjustments constituted a breach by the Kriss Brothers of their duties as directors of JGJ, this would be a corporate wrong occasioned to JGJ and not a personal wrong suffered by Shailesh in his personal capacity as a shareholder of JGJ. The making of the adjustments was

a management decision taken by the Kriss Brothers based on what they considered to be in the best interests of JGJ and they did not cause any financial detriment to JGJ in any event. Finally, the Judge ought to have considered the fact that there is a viable exit mechanism under Art 21 of JGJ's Articles of Association, which Shailesh could have but failed to invoke to exit the company and bring to an end the matters complained of.

193 Following the Kriss Brothers' position that Shailesh's oppression claim should be dismissed in its entirety, the Kriss Brothers argue that the costs order below against them should be reversed and that they should be awarded the costs of Shailesh's claim in Suit 475.

*JGJ's case*

194 JGJ's counterclaim in Suit 475 was for breaches of Shailesh's fiduciary duties arising from his refusal to sign and/or to abstain from voting on three board resolutions, *ie*, the First, Second and Third Resolutions (see [28]–[30] above) and his requests for documents in connection therewith.

195 The crux of JGJ's submissions on appeal in AD 24 is that Shailesh was SRK's nominee shareholder and director and Shailesh ought to have abstained from voting on the resolutions in question because he was in a position of conflict. Should the Court allow JGJ's appeal, JGJ argues that the costs orders below should be reversed. Even if JGJ's appeal is dismissed, JGJ takes the position that it should not have been made jointly liable with the Kriss Brothers for the costs of Shailesh's oppression claim and that the quantum of costs awarded by the Judge was excessive.

*Shailesh's case*

196 With respect to AD 23, Shailesh makes the following arguments. He first asserts that he is not SRK's nominee shareholder or director in JGJ. In other words, he is the legal and beneficial owner of the shares registered in his name.

197 Shailesh argues that a shareholder such as himself is entitled to rely on legitimate expectations based on the duties which directors owe to a company. That being the case, he submits that the Kriss Brothers' arguments on whether he possessed any legitimate expectations "misses the point" – the real question is whether there was any commercial unfairness to Shailesh. On the facts, there *was* such commercial unfairness as he was entitled to true and fair accounts which properly and correctly reflected the financial position of the company. He also had an interest to ensure that the company's accounts were correct and was entitled to complain about any inaccuracies. The Judge was thus correct to find that Shailesh succeeded in his oppression claim with respect to the Three Adjustments. It was also clear on the evidence that the Kriss Brothers had made the Three Adjustments arbitrarily and in an unsubstantiated manner. Finally, any utilisation of the exit mechanism by Shailesh would have been inadequate in bringing to an end the matters complained of.

198 With respect to AD 24, Shailesh argues that he genuinely believed, in good faith and to the best of his knowledge, that the passing of the Three Resolutions was detrimental to JGJ's interests. He was entitled to, and in fact did, act in line with his duty to seek information pertaining to JGJ's affairs, by making the various requests for information. Furthermore, the board of JGJ (which Shailesh says was effectively controlled by the Kriss Brothers) never indicated at any point that Shailesh was excluded from voting on account of a conflict of interest.

199 Shailesh argues that the Court should uphold the Judge's order for JGJ and the Kriss Brothers to be jointly and severally liable for the costs of Shailesh's claim and JGJ's counterclaim in Suit 475. These costs should be assessed at $559,000 without the 50% reduction ordered by the Judge.

***Issues to be determined***

200 The following issues arise in relation to AD 23 and AD 24:

(a) whether the Judge erred in allowing Shailesh's oppression claim with respect to the Three Adjustments;

(i) whether Shailesh was a nominee of SRK and, if so, whether this barred Shailesh's claim with respect to the Three Adjustments;

(ii) whether the Three Adjustments were commercially justified; and

(iii) whether the Three Adjustments were commercially unfair to Shailesh *qua* shareholder;

(b) whether the Judge erred in dismissing JGJ's counterclaim against Shailesh for breaches of his fiduciary duties in respect of the Three Resolutions; and

(c) matters pertaining to costs.

***Issue 1: Whether the Judge erred in allowing Shailesh's oppression claim in respect of the Three Adjustments***

*Shailesh held his shares in JGJ as SRK's nominee*

201 The Judge found that Shailesh was a nominee of SRK. He provided seven reasons in support of this conclusion (see Judgment at [251]–[264]).

202 Shailesh has withdrawn AD/CA 25/2024 ("AD 25") which was the appeal he had brought against the Judge's finding that he was SRK's nominee in JGJ. The Kriss Brothers argue that Shailesh is not entitled to resist their appeal in AD 23 on the basis that he is not a nominee shareholder for SRK since he has withdrawn AD 25. We do not agree. Shailesh was not entitled to pursue AD 25 solely on the basis that the Judge found that he was a nominee shareholder for SRK because the Judge eventually concluded, notwithstanding the finding, that he had made out a case of oppression in respect of the Three Adjustments. In other words, his claim for oppression in respect of these adjustments still *succeeded* even though he was found to be a nominee shareholder of SRK. Furthermore, Shailesh was not appealing against the dismissal of his other claims. There was therefore no basis to pursue AD 25 just to challenge a finding about his status where the eventual outcome was still in his favour on these adjustments. His decision to withdraw AD 25 does not preclude him from challenging that finding in AD 23 (which is the appeal by the Kriss Brothers) when that finding is relevant to AD 23. In other words, he is entitled to argue in AD 23 that the Judge's conclusion in respect of the Three Adjustments should be upheld on the additional basis that in fact he is the true legal and beneficial owner of the shares in question, and thus, is entitled to complain about the Three Adjustments. However, having considered the evidence before us, we agree with the Judge that Shailesh was SRK's nominee shareholder and director in JGJ.

203 The common understanding of a "nominee shareholder" is that of one who holds the legal title to the shares on trust and has "no beneficial interest whatsoever in the [s]hares": see, for example, *Kotagaralahalli Peddappaiah Nagaraja v Moussa Salem and others* [2023] SGHC 6 at [8]. A bare trustee (*ie*, the nominee) has no duties to perform and must deal with the trust property in accordance with the instructions of the beneficiary: see *Marten, Joseph Matthew and another v AIQ Pte Ltd (in liquidation) and others* [2023] SGHC 361 at [116].

204 Shailesh raises the following arguments in support of his contention that he is not SRK's nominee shareholder or director in JGJ:

(a) the US$700,000 loan to JGJ in May 2016 came from Shailesh and not SRK;

(b) the fact that he was disinterested in JGJ's affairs does not *ipso facto* equate to him being SRK's nominee;

(c) the fact that he did not have authority to operate, or access to, JGJ's IDBNY Account does not suggest that he is SRK's nominee;

(d) Shailesh was content not to receive any director's fees, and he did not receive dividends because no dividends have been declared since JGJ's incorporation;

(e) Shailesh was content to let the Kriss Brothers run JGJ from the time of JGJ's incorporation and did not take on an executive role. However, with respect to his later objections to JGJ's board resolutions, there is nothing to stop an otherwise inactive director from speaking up when he is of the view that "something is amiss";

(f) there are other pieces of evidence which show that Shailesh is not SRK's nominee:

(i) the Kriss Brothers raised the nominee shareholder narrative belatedly by way of the Second Resolution;

(ii) JGJ's 2016 Revised FS did not refer to Shailesh as a nominee director, and the Kriss Brothers' correspondence with Sacks referred to Shailesh as "truly independent"; and

(iii) only Ng's name was listed as a nominee director of JGJ in the Register of Nominee Directors.

205 These arguments have already been considered by the Judge below, as they were put before him by way of Shailesh's closing submissions in Suit 475. In other words, Shailesh has failed to raise any new point that has not already been considered and dealt with by the Judge. More importantly, there is nothing on the merits to show that the Judge had erred in rejecting these arguments. We need address only some of the arguments.

206 First, there is clear evidence to show that the sum of US$700,000 came from SRK and not Shailesh personally (see [20] above). The Judge did not rely solely on Michael's testimony; rather, this was corroborated by the objective documentary evidence. In particular, a spreadsheet prepared by Rajiv (*ie,* SRK's CFO) and sent to Mr Anish Mehta ("Anish") (an external consultant) and Nirav on 5 October 2017 contained a comment by Rajiv describing the amount of US$700,000 as "*Loan by SRK Group in JGJ at Singapore*". Anish forwarded the spreadsheet to Ajay (*ie,* JDM's Financial Controller), for his review via e-mail on 5 October 2017. In that e-mail, Anish made clear reference to the sum of US$700,000 as being contributed by the "Singapore JV Partner". This could

not have been a reference to Shailesh as there is no evidence to show that Shailesh was intended to be or was ever a party to the JV. Further, while Rajiv and Anish were not called as witnesses, Nirav testified under cross-examination that Anish's comment referred to the US$700,000 that Shailesh transferred to JGJ across 11 and 19 May 2016.

207 Shailesh, however, asserted that the US$700,000 was *his* money, which he had *borrowed as a loan from S Goldi* in order to invest in JGJ. Shailesh claimed to have since repaid the US$700,000 to S Goldi at the end of 2016 or at the beginning of 2017. Yet, no evidence has been adduced of any alleged repayment to S Goldi for the US$700,000, as conceded by Shailesh's counsel at the trial below. It is also worth noting that at the material time, in 2016, Shailesh was merely an employee of S Goldi, whose sole shareholder was one Mr Mansukhbhai Bhikhabhai Budheliya. In the absence of any credible explanation by Shailesh, it is not likely that S Goldi would agree to lend such a large sum to an employee for investment purposes. There is no evidence to show that the purported loan taken from S Goldi was recorded in S Goldi's books; no evidence of any resolution passed by S Goldi or document to authorise the purported loan of US$700,000; and no evidence of repayment of the loan, which Shailesh claimed to have repaid in 2016 or 2017.

208 Second, Shailesh's lack of interest in JGJ's affairs, lack of knowledge of JGJ's operations and lack of a major or active role in JGJ may be equivocal in determining if Shailesh is SRK's nominee shareholder or director when considered in isolation. However, it is undisputed that SRK's representatives participated and were actively involved in JGJ's business, but Shailesh was not similarly involved. As such, this was not a case where Shailesh had taken over the initial intended participation of the SRK Entities in the JV as Shailesh was suggesting. Further, Shailesh even copied e-mails pertaining to routine internal

matters of JGJ to SRK's representatives. For example, Shailesh copied Amit in his reply on 4 May 2015 to an e-mail sent to him by Jim regarding the opening of JGJ's IDBNY account. Such evidence supports the inference that Shailesh was SRK's nominee shareholder and director in JGJ.

209 Third, Shailesh relies on Michael's and Jim's correspondences with Sacks in around July to August 2017 to show that he was not a nominee of SRK. Specifically, Shailesh points to an e-mail dated 12 July 2017 from Sacks to Jim, where Sacks states that Michael had informed him that Shailesh was "not a nominee" acting on behalf of TJCI or related entities and that Shailesh was "truly independent". In an e-mail from Sacks to Jim on 2 August 2017, Sacks states that "Shailesh is not a nominee acting on behalf of SRK (or one of their related entities)." For the reasons below, we do not find these correspondences persuasive in supporting Shailesh's assertion that he was not a nominee shareholder or director in JGJ.

210 When Michael was cross-examined on this correspondence, he asserted that, *under advice from Sacks*, he and Jim had initially kept up the pretence and facade to JGJ's auditor that Shailesh was a beneficial shareholder and not a nominee. Michael explained that this was done for the sake and benefit of SRK because of its tax problems. It is apparent that the issue of whether Shailesh was related to SRK had a significant bearing on the parties' business collaboration because it determined whether the transactions between the parties would be subject to specific transfer pricing rules. This is evident from the e-mails sent from Sacks to Jim. For example, Sacks' assertion that Shailesh was not a related party to SRK was set out under the heading "Related Party and Transfer Pricing". Such an assertion also ensured that the transactions could not amount to overpayments to related parties. Tellingly, in Jim's e-mail to Sacks on 5 July 2017, he asked how the relations between the relevant parties would be viewed

by the Singapore tax authorities and on transfer pricing. It therefore appears to us that it was a strategic move on the part of the parties to refer to Shailesh as an unrelated party so as to avoid any issues pertaining to tax or transfer pricing. Accordingly, we do not find the correspondence persuasive in our determination of whether Shailesh was SRK's nominee shareholder or director.

211 Fourth, the fact that only Ng's name was formally listed as a nominee director of JGJ in the Register of Nominee Directors is neither here nor there. While the presence of Shailesh's name would have been strong evidence that he was a nominee director, the *absence* thereof does not necessarily mean that Shailesh was not a nominee especially if, as appears to be the case, SRK wanted to be discreet about its involvement in JGJ. We therefore place little weight on this factor.

212 Separately, it is also telling that in the letter sent by Shailesh's lawyer to the Kriss Brothers in response to Jim's e-mail dated 19 February 2018 attaching the proposed Second Resolution, despite denying that Shailesh was SRK's nominee director, Shailesh's lawyer equated Shailesh with SRK:

> 2. Our Client strongly objects to the 2nd Draft Resolution for the following reasons:
>
> …
>
> (f) Our Client also emphatically denies your baseless allegation that "*SRK and [TJCNY] manipulated the pricing of goods manufactured and billed to [the Company] … charges in excess of US15,000,000 were erroneously recorded in the books and records of* [the Company]". Firstly, the Company's books and records have been maintained in the same way since April 2015, and yet, it is only now that you have decided to make these allegations, which our Client feels is more of an afterthought in the wake of our 6 Feb Letter. Secondly, ***it is ludicrous for you to allege fraud when, as stated above, our Client does not even have the ability to manipulate, or even access, the***

> ***Company's bank accounts or financial/management accounting systems and records***. These spurious and vexatious allegations are nothing more than a blatant attempt on your part to deny the existence of the Other Claims (as defined in the 6 Feb Letter) and thereby dodge your responsibilities as directors to act in the Company's best interests by pursuing the Other Claims, particularly since the Other Claims are against companies that you own, control or in which you have substantial business interests.

[emphasis in italics in original; emphasis in bold italics added]

The suggestion of manipulation and fraud was made against SRK and TJCI, yet the letter expressed umbrage on Shailesh's behalf as though the suggestion had been made against Shailesh personally. The fact that Shailesh strongly objected against the allegation that SRK and TJCI had manipulated the pricing of the goods on the invoices as if he were in SRK's position suggests that he was SRK's nominee.

213 For the reasons above, we do not think that the Judge had erred in finding that Shailesh was SRK's nominee shareholder and director. Nonetheless, this does not in itself prevent Shailesh from proceeding on his oppression claim in relation to the Three Adjustments. As the Judge observed at [267] of the Judgment, Shailesh, as the registered owner of shares in JGJ, has *locus standi* to bring the oppression claim: see also Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017) at para 4.189. Accordingly, Shailesh is legally entitled to pursue his complaint about the Kriss Brothers' conduct – which he considers to be commercially unfair – via a minority oppression claim. However, whether he can succeed on his pleaded complaint is a separate issue, which turns on whether such conduct was indeed carried out in disregard of *Shailesh's* interests as a shareholder of JGJ. In this regard, we agree with the Judge's conclusion at [271] of the Judgment that Shailesh's failure to plead the fact that he was SRK's nominee shareholder prevents him

from arguing that SRK's interests may now be considered for the purpose of his oppression claim. Shailesh's pleaded case has always been that he was the legal and beneficial owner of the shares in JGJ registered in his name, and that he was an "independent investor". It is therefore on this basis that our analysis proceeds.

*Our views on the Three Adjustments*

214 Shailesh's *pleaded* minority oppression claim was founded solely on the Kriss Brothers' alleged breaches of their duties as directors to act honestly, diligently and in the interests of JGJ, to avoid being in positions of conflict of interests and to ensure that JGJ's financial statements give a true and fair view of JGJ's financial position. Although Shailesh's pleaded case complained about several acts by the Kriss Brothers, the Judge found that Shailesh partially succeeded on his minority oppression claim only to the extent that it was based on the Three Adjustments. The Kriss Brother's appeal in AD 23 is thus confined to the issue of the Three Adjustments, specifically, that the Judge erred in finding that Shailesh was entitled to complain about the Three Adjustments on the basis that they were "commercially unfair" to him. As mentioned, Shailesh has not filed any cross-appeal against the Judge's dismissal of his other claims.

215 To recapitulate, the Three Adjustments which are the subject of the Kriss Brothers' appeal are as follows:

(a) the Accounts Payable Adjustment, which reduced the amount recorded as "Purchases-Finished Goods" by US$7,540,283;

(b) the SRK Payable Adjustment, which added an amount of US$15,488,893 as "Due from SRK"; and

(c) the Capital Repayment Adjustment, which added two equal amounts of US$7,744,446.50 each as "Due to Michael Kriss" and "Due to David Kriss" respectively.

These adjustments, which were made by the Kriss Brothers in JGJ's 2016 Revised FS, resulted in a disclaimer of opinion for that same financial statement and adverse opinions for JGJ's 2017 FS and 2018 FS.

216 We preface our analysis by emphasising that the Three Adjustments were made by the Kriss Brothers in JGJ's 2016 Revised FS in an *arbitrary* and *unsubstantiated* manner.

217 In relation to the Accounts Payable Reduction Adjustment, the Judge correctly found that this adjustment was unjustified. The Kriss Brothers assert that the Accounts Payable Reduction Adjustment was a "management decisio[n], based on and driven by commercial considerations". Their submissions repeat Jim's evidence in his affidavit of evidence-in-chief that the adjustment was made to decrease the amount payable to SRK *because SRK had overbilled* JGJ for 2016 and that the reduction was an *estimated* amount. The Judge had considered and rightly rejected this argument, holding that there could not have been any overbilling given that SRK and TJCI invoiced JGJ based on Sell-Minus Pricing, which was agreed upon by the parties (Judgment at [299]). On appeal, the Kriss Brothers have not shown any reason why the Judge's factual finding – that there could not have been any overbilling – ought to be disturbed. We agree with the Judge that the Accounts Payable Reduction Adjustment was not commercially justified.

218 In relation to the SRK Payable Adjustment and the Capital Repayment Adjustment, the Judge correctly found that these two adjustments were *not*

justified. As noted by the Judge, Jim explained that this adjustment represented an estimate of the profits of the JV retained by SRK, which should have been distributed to JGJ to be distributed to the shareholders (Judgment at [300]). Yet Jim, who was the one who had calculated the adjustments, also admitted under cross-examination that the sum of US$15.48m was simply a "convenient number" as the true number was indeterminable at the time:

> Q: Just explain to us more simply, why did you put a number 15.48 million there, or "Due from SRK"?
>
> A: It was a convenient number. It could have been 20 million, it could have been 12 million, it could have been 30 million. It was just a convenient number to use at the time, knowing that there were some level of profits, but the true number was indeterminable at the time.

219 Apart from the arbitrary manner in which the sum of US$15.48m had been calculated, there was also the submission that the SRK Payable Adjustment was the "flipside" of the Capital Repayment Adjustment, in the sense that the SRK Payable Adjustment was intended to return the excess capital retained by SRK back into the JV, and having done so, that excess capital would then be divided equally between the Kriss Brothers. In similar fashion, Michael testified that "the 15 million is the capital that [SRK] retained, … the 15 [million] also relates to the 7.5 [million], and 7.5 [million] that me and my brother contributed which equals 15 [million]" and accepted that he would adopt Jim's evidence in this regard, as Jim was the one who did the calculations. However, Jim could not explain why, if the Kriss Brothers' case was that JDM had contributed US$15.48m *more* than SRK in capital, the adjustment was not for a commensurate sum of US$15.48m to be owed by SRK *to JGJ only*, but for the sum of US$15.48m to be due from SRK to JGJ and then from JGJ to *the Kriss Brothers*. All this raised the legitimate question as to why a payable sum had been created on the part of SRK essentially in favour of the Kriss Brothers.

The Judge was therefore correct in noting that the basis for these two adjustments was unclear (Judgment at [303]).

220 Therefore, the issue is not so much whether JGJ suffered any loss by any of the Three Adjustments in so far as the adjustments suggest that moneys are payable to JGJ. The point is that accounts are expected to be fair and accurate. They are not to be adjusted just because directors feel like doing so.

*Whether the Three Adjustments were commercially unfair to Shailesh* qua *shareholder*

221 However, the Kriss Brothers argue that the Three Adjustments are, in any event, corporate wrongs, being derivative in nature, and any loss or injury suffered by Shailesh as a result of the Three Adjustments is merely reflective of any injury allegedly suffered by the company. Their position is that Shailesh is unable to show how the making of the adjustments would constitute wrongs occasioned to him personally as a nominee minority shareholder, which are distinct from the wrongs done to JGJ. The specific relief sought by Shailesh (*ie*, the restatement of financial statements of JGJ to remove the Three Adjustments) is also a remedy for and pertaining to JGJ alone. As such, even if the adjustments were commercially unjustified, Shailesh's claim must fail because they were not commercially unfair to him.

222 We are of the view that Shailesh has not suffered injury from the Three Adjustments that is distinct from and not merely incidental to the injury which JGJ has suffered. Counsel for Shailesh submitted that the majority's failure to keep accounts which provide a true and fair view of the company's affairs could amount to commercial unfairness. Counsel relied on the case of *Lian Hwee Choo Phebe and another v Maxz Universal Development Ground Pte Ltd and others and another suit* [2010] SGHC 268 ("*Lian Hwee Choo Phebe*") for this

proposition. In *Lian Hwee Choo Phebe*, Andrew Ang J recognised (at [96]) that "[o]rdinarily, the denial of a company's financial information to a shareholder may not, in and of itself, suggest oppression". Nonetheless, Ang J accepted in that case that the majority's conduct was "quite egregious" and had revealed a pattern of behaviour that was dismissive of the minority shareholders' concerns and marginalised their participation once they began probing into suspicious transactions. In other words, the denial of information formed a *key element* in the overall oppression and unfair treatment of the plaintiffs: *Lian Hwee Choo Phebe* at [96] and [97]. Although this case suggests that the failure of the majority to maintain true and fair accounts of the company *may* in exceptional circumstances amount to a wrong that is occasioned to the minority, it should however be borne in mind that this is ultimately fact-specific and the accounting irregularities in that case were analysed as but one factor within the wider matrix of the majority's overall conduct.

223 We accept that shareholders generally have an interest to ensure that the company's accounts are correct and that they are a true and fair reflection of the company's financial accounts. That said, we cannot see how JGJ's failure to maintain such accounts, which was allegedly a result of the Kriss Brothers' actions, can be said to have disregarded Shailesh's interests as a *nominee* shareholder, when (as mentioned above at [213]) SRK's interests are not taken into account. There is nothing before us to suggest that, as a nominee shareholder, Shailesh's interests should not be regarded as being *co-extensive and wholly aligned with* SRK's interests as the beneficial owner of the shares. It is meaningless to speak of Shailesh's interests as a shareholder without taking into account SRK's interests in JGJ – after all, it is clear to us that the entire reason why Shailesh holds his shares in JGJ is because he holds it on a bare trust for SRK, who is the true party to the JV/JVA. On these facts, there is no

independent interest of Shailesh that has been disregarded as a result of the Kriss Brothers' conduct.

224 Even if such an independent interest on Shailesh's end exists in relation to the keeping of accounts, we cannot see how any injury suffered by Shailesh is *distinct from* and not merely incidental to the injury which would have been occasioned to JGJ by the Three Adjustments. Pertinently, the High Court in *Lian Hwee Choo Phebe* did *not* have to address the question as to whether the majority's failure to maintain proper records would, *by itself*, result in a distinct harm to the minority shareholder(s). It is well established that s 216 of the CA should not be used to vindicate wrongs which are in substance wrongs committed against a company, and which are thus corporate rather than personal in nature: see *Suying Design Pte Ltd v Ng Kian Huan Edmund and other appeals* [2020] 2 SLR 221 ("*Suying Design*") at [30]. As the Court of Appeal explained in *Suying Design*, the legislative scheme in the CA makes clear that s 216 and s 216A are ultimately intended to have distinct spheres of application. Thus, even where the very same facts may be relied on to found a derivative action or an action from oppression, the evidence must be "examined critically to ensure that there is no blurring of the two different statutory regimes": *Suying Design* at [31] and [32]. The central inquiry for the court is whether the plaintiff shareholder is relying on unlawful conduct and conduct that constitutes commercial unfairness to found his claim of oppression: *Suying Design* at [32]. In this regard, the court must critically consider (a) the real injury complained of and (b) the essential remedy that is being sought by the complainant: see *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 at [116]; *Suying Design* at [33]. Furthermore, an aggrieved minority shareholder may not sue under s 216 of the CA if his loss lies in the diminution of the value of his shares in the company which merely reflects the

company's loss, which can be made good if the company were able to and did enforce its rights. This is also known as the "no reflective loss" principle: *Suying Design* at [30]; see also *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 ("*Ng Kek Wee*") at [61] and [70].

225 In the present case, the real injury caused by the Three Adjustments is *to JGJ*, as a result of the directors' failure to keep accounts which provide a true and fair view of the company's affairs. However, such injury can be adequately addressed if JGJ was able to and did enforce its rights against the Kriss Brothers for a breach of their directors' duties: *Suying Design* at [30]. While Shailesh submits that the "shareholders of a company… would rely on the statements for the financial information they require", there has been no evidence before us to show that *Shailesh himself* had relied on the erroneous statement of JGJ's affairs to his own detriment, nor has there been any evidence that Shailesh was personally affected by any or all of the Three Adjustments. While *SRK* might have suffered an injury as a result of the adjustments, given that the adjustments and the manner in which they were made indicated conduct of JGJ's affairs in disregard of SRK's interests, this question was not squarely before us given Shailesh's failure to plead that he was a nominee representing SRK's interests in JGJ (see [213] above). We therefore find that the Three Adjustments have not caused Shailesh any injury in his personal capacity.

226 Our conclusion in this regard is buttressed by the remedy that is being sought by Shailesh in relation to the Three Adjustments. Shailesh seeks the restatement of the financial statements of JGJ to remove the Three Adjustments (which the Judge granted). *Prima facie*, this is a remedy for and pertaining to JGJ.

227 Even assuming that the wrong occasioned to Shailesh was a personal wrong, we do not think it appropriate to find, on the facts of the present case, that JGJ's inaccurate accounts are sufficient to amount to the oppression of Shailesh's interests as a shareholder of JGJ. As the Court of Appeal observed in *Ng Kek Wee* at [69], the wrongdoer's conduct, *eg*, in manipulating the company's accounts or in the deliberate denial of the company's financial information to its shareholders (as in *Lian Hwee Choo Phebe*), must be shown to be evidence of the manner in which the wrongdoer has conducted the company's affairs in disregard of the complainant's interest as a minority shareholder. We do not find this to be the case at present.

228 For the above reasons, we find that the Three Adjustments pertain to corporate wrongs committed against JGJ rather than personal wrongs against Shailesh. Accordingly, Shailesh's claim based on the Three Adjustments fails. It is for the Kriss Brothers to consider whether they wish to revoke these adjustments voluntarily.

*Summary*

229 We therefore allow the Kriss Brothers' appeal in AD 23 on the basis that Shailesh has not suffered a wrong in his personal capacity *qua* minority shareholder of JGJ. It follows that Shailesh's oppression claim based on the Three Adjustments fails, resulting in Shailesh's s 216 claim being dismissed in its entirety.

230 Given this conclusion, there is no need for us to consider whether Shailesh should have invoked any exit mechanism available to him.

***Issue 2: Whether the Judge erred in dismissing JGJ's counterclaim against Shailesh for breaches of his fiduciary duties with respect to the Three Resolutions***

231 As set out above at [194], JGJ's counterclaim in Suit 475 pleaded breaches of fiduciary duty by Shailesh in connection with his refusal and/or failure to sign the Three Resolutions and, in the alternative, his refusal to abstain from voting on the same, and his requests for information and documents in connection thereto. The first two resolutions (*ie*, the First Resolution and the Second Resolution) involved the legal proceedings in the US or in Singapore against TJCNY or SRK and TJCI. The Third Resolution dealt with the approval of the 2016 Revised FS and the calling of JGJ's second AGM.

232 On appeal, JGJ submits that, as SRK's nominee director, Shailesh ought to have *abstained* from voting on all of the resolutions in question *because he was in a position of conflict*. His failure to do so was a breach of his fiduciary duties.

233 We agree with the Judge that there is no merit to JGJ's counterclaim against Shailesh. Accordingly, there is no reason to order an injunction or damages in favour of JGJ. Additionally, *even if* the merits to JGJ's counterclaim were made out, we would not find it appropriate to order the injunction or damages sought.

234 Before we turn to address the merits of JGJ's counterclaim against Shailesh in relation to the Three Resolutions, we think it appropriate to make certain preliminary observations to set the stage for the analysis which will follow. JGJ's complaint is in essence that Shailesh had sacrificed JGJ's interests in favour of SRK's. This much was recognised by the Judge, who found in the context of the nominee question that Shailesh's conduct was aimed at protecting

the interests of the SRK Entities rather than his own interest as shareholder (Judgment at [257]–[258]). However, the Judge stopped short of finding that Shailesh had acted in breach of his director's duties (Judgment at [319], [323] and [324]). As we observed above at [201]–[213], we agree that Shailesh was in fact SRK's nominee. We are also of the view that his responses took into account the interests of the SRK Entities. That said, it is likewise clear that the Kriss Brothers were similarly acting in the interests of the JDM Entities. JGJ's counterclaim must therefore be considered in the light of the breakdown of the JV between the parties and the inevitable consequence that the parties were looking to advance or protect their own interests in the ensuing aftermath.

*The First and Second Resolutions*

235 The First Resolution dated 22 January 2018 was a board resolution to authorise the commencement of legal action to recover the TJCNY Debt. Jim had asked Shailesh via e-mails dated 26 January 2018 and 27 January 2018 to "sign where indicated" on the attached proposed resolution and, when Shailesh did not respond, Jim told Shailesh that the resolution was considered as passed since there was majority approval. On 6 February 2018, Shailesh objected to the First Resolution by way of his lawyer's letter to the Kriss Brothers (the "Collyer Law 6 February Letter"). The reasons for his objection were set out in this letter and are as follows:

(a) he did not have sufficient time to consider the matter;

(b) the proposed resolution was not supported by any relevant background documents or detailed information regarding the subject-matter of the resolution;

(c) he did not have any opportunity to discuss and clarify the purpose and rationale for passing the resolution as it was circulated as a written resolution rather than being tabled at a regular meeting of the board; and

(d) there were larger amounts payable to JGJ by other customers and Shailesh did not understand why some of JGJ's directors seemed to be pursuing a claim only against TJCNY. In his view, this was a misuse of the company's resources.

The Judge found that Shailesh did not act in breach of his director's duties in relation to the First Resolution (Judgment at [319]).

236 The Second Resolution was a board resolution dated 15 February 2018 to authorise the commencement of legal proceedings against SRK and TJCI to recover charges in excess of US$15m which were the alleged result of the SRK Entities manipulating the prices of goods supplied to JGJ. The proposed Second Resolution was sent by Jim to Shailesh on 19 February 2018 for his signature to be returned within two days; again, Jim advised him that "since there is a majority approval, the attached Resolution is considered as passed". The Judge found that Shailesh could not be said to have breached his director's duties as the Judge had found that there was no price manipulation and that the parties had agreed that the goods were to be invoiced based on Sell-Minus Pricing (see Judgment at [323]).

237 On appeal, JGJ argues that Shailesh was never genuinely interested in approving either resolution. For the First Resolution, Shailesh's immediate reaction was to engage solicitors to dispatch an aggressively worded letter (*ie*, the Collyer Law 6 February Letter) to the Kriss Brothers where he demanded

that the passage of the resolution be revoked. Pertinently, in the Collyer Law 6 February Letter, Shailesh took the position that as there were larger amounts payable to JGJ by other debtors, JGJ should not be pursuing a claim only against TJCNY and that doing so was an egregious misuse of JGJ's resources. On the other hand, Shailesh argues that his request for supporting documents was legitimate as the authorisation of commencement of legal action by JGJ against TJCNY was a significant matter. As for the Second Resolution, JGJ contends that Shailesh was fundamentally conflicted *ab initio* and ought to have abstained from voting. JGJ also contends that Shailesh could not have known at the time of the Second Resolution that it would be possible for SRK to contend that there was no overpricing or that the goods were indeed invoiced at Sell-Minus Pricing.

238 As a nominee director, it is trite that Shailesh owes the same responsibility to the company (*ie*, JGJ) as a whole, and is not entitled to sacrifice the interests of the company in favour of his nominator's, or plead any instructions from the nominator as an excuse for breach of duties owed to the company: see *Overseas-Chinese Banking Corp Ltd v Justlogin Pte Ltd* [2004] 2 SLR(R) 675 ("*OCBC v Justlogin*") at [31]; see also *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187 at 222. Nonetheless, a nominee director may also take into account the interest of his nominator as long as such interest *does not conflict* with those of the company: *OCBC v Justlogin* at [31]. A nominee director is obliged to exercise *his judgment* in the best interest of the company. This duty is a subjective one and the court will only interfere if it is of the view that no reasonable director would consider the action taken to be in the interest of the company: *OCBC v Justlogin* at [31].

239 We accept that Shailesh appears to have been motivated by a desire to protect SRK's interests in his objection to the passage of the two resolutions.

That said, it cannot be that a nominee director in Shailesh's position is precluded from voicing his concerns on the resolutions simply because he is at the same time representing the interests of the beneficial shareholder (*ie*, SRK). In our view, the scope of a nominee director's role in this context is difficult to circumscribe. As mentioned earlier, the parties had fallen out following the termination of the JV, and resolutions which adversely impacted the SRK Entities' interests were then passed by the Kriss Brothers. We find that it was *not* a breach of Shailesh's fiduciary duties as director for him to have provided his views on the merits of the resolutions. We are fortified in our conclusion by considering a hypothetical scenario: suppose Shailesh had sought to pass a resolution authorising the commencement of legal action by JGJ to recover debts which the JDM Entities owe to JGJ or against the JDM Entities for alleged price manipulation by the JDM Entities. In such a situation, it is likely that the Kriss Brothers would have either voiced their objections and/or asked for more information. Doing so similarly cannot, *ipso facto*, be considered a breach of their fiduciary duties.

240 We also note that the two resolutions, which terms were undisputedly prejudicial to the SRK Entities' interests, were sprung on Shailesh at short notice. As alluded to above, Shailesh was provided a draft of the First Resolution via Jim's e-mails on 26 and 27 January 2018. Jim informed Shailesh to return the signed resolution by 30 January 2018 and, when Shailesh did not respond, Jim told Shailesh on 27 January 2018 that the resolution was considered as passed since there was majority approval. Similarly, Jim asked Shailesh to revert on the proposed Second Resolution within the span of only two days. In our view, the pressing timelines foisted upon Shailesh were intended to pressure him to approve the passage of the resolutions. Shailesh cannot be faulted for failing to sign the draft resolutions in the circumstances.

241 Finally, we address JGJ's point that Shailesh ought to have *abstained* from voting on the proposed resolutions because he was SRK's nominee director and was therefore in a position of conflict. As set out above, the proposed resolutions were sent to Shailesh for his signature by Jim, who was acting on the Kriss Brothers' instructions. We observe that Jim had not only presented the resolutions for Shailesh's approval, but also did *not* at any time indicate to Shailesh that he was conflicted and ought to abstain from voting. Indeed, the request for Shailesh's approval suggested that JGJ did not at that time consider Shailesh to be in a conflict-of-interest situation. Against this backdrop, it is an afterthought for JGJ to subsequently assert that Shailesh should have rejected Jim's request and abstained from voting. We also note that eventually Shailesh did not cast any vote against the First and Second Resolutions.

242 In the circumstances, we consider that Shailesh's conduct, as SRK's nominee, in questioning the reasons behind the passing of the First Resolution and the Second Resolution does not comprise action which no reasonable director would consider to be in the interest of the company. We therefore find that Shailesh has not breached his fiduciary duties in relation to these resolutions.

*The Third Resolution*

243 The Third Resolution dated 6 March 2018 was to adopt the 2016 Revised FS and to convene the AGM. The 2016 Revised FS contained the four adjustments made by the Kriss Brothers. As mentioned, the Judge found that three of the four adjustments were unjustified and he concluded that Shailesh did not act in breach of his fiduciary duties in connection with the Third Resolution (Judgment at [324]).

244 JGJ argues on appeal that Shailesh should have approved the Third Resolution in so far as it related to the calling of the AGM as there were legal consequences and penalties for not complying with the statutory requirement to conduct an AGM within a certain timeframe. JGJ also argues that Shailesh's request for documents on 4 April 2018 was also not a reasonable one to make, and particularly in light of the urgency to hold the AGM as JGJ was already "extremely late" in holding its AGM and filing its annual returns.

245 We are of the view that Shailesh did not breach his fiduciary duties in relation to the Third Resolution. It is clear from looking at the matter in the round that Shailesh's request for documents and his concerns with the four adjustments reflected in the 2016 Revised FS flowed from the position he took that the AGM ought to be postponed. This was to ensure that all necessary information and documents in relation to the 2016 Revised FS were disseminated and that all concerns and assumptions of the auditors were addressed. In Shailesh's e-mail to JGJ's corporate secretary dated 16 April 2018, he stated:

> 1. … I wish to convey my objection to the Proposed AGM, and request *that the Proposed AGM is postponed to a date after all relevant information and documents are made available to me* so that I am able to make informed decision about the Company.
>
> …
>
> 6. Further, the AGM Notice dated 4 April 2018 was sent on 3 April 2018 which I received on 9 April 2018, and about 10 days before the Proposed AGM, and without any supporting documents for me to make an informed decision about the 2016 Financial Statements which is the main agenda for the Proposed AGM …
>
> [emphasis added in italics]

He therefore urged JGJ's corporate secretary "*to take all necessary steps to postpone the Proposed AGM to such time till all necessary information and*

*documents in relation to the 2016 Financial Statements, particularly all concerns and assumptions of the Auditors are addressed*".

246 In Shailesh's e-mail to AT Adler dated 16 April 2018 requesting for further information pertaining to JGJ's 2016 Revised FS, he likewise voiced his concern that "material variations are being made to the financial statements of [JGJ] without any reason, or basis", and listed, in particular, the four adjustments, three of which were the Three Adjustments. It was in this context that Shailesh urged AT Adler "not to take any further steps in relation to the [2016 Revised FS] (or any other financial statements of [JGJ]) on the filing of any annual returns without the express written authorisation of *all* of [JGJ's] directors" [emphasis in original removed, emphasis added], and requested further information from AT Adler about JGJ's bank account details, management accounts and financial statements.

247 Although Shailesh did not go further to raise these concerns directly with JGJ's board, it cannot be said that the course of action taken by Shailesh, namely, to object to the Third Resolution pending the provision of further information and documents relating to the 2016 Revised FS, was so unreasonable such that no reasonable director would consider it to be in the interest of the company. After all, his concerns relating to the adjustments were not entirely unfounded and the Three Adjustments were eventually found to be not commercially justified. His actions in relation to these adjustments therefore cannot be said to be a breach of his fiduciary duties.

248 We acknowledge that there was some indication that Shailesh appeared to be fighting SRK's case on its behalf after the business relationship between the JV partners soured following the termination of their collaboration in August 2017. As noted above at [212], Shailesh even adopted the persona of SRK in

relation to the allegations contained in the proposed Second Resolution. The Judge found, in the context of his finding that Shailesh was the SRK Entities' nominee in JGJ, that the "irresistible inference" was that Shailesh's objections in relation to the Three Resolutions were aimed at protecting the interests of the SRK Entities (Judgment at [257]–[258]). Similar remarks were made in the Judgment at [289]. However, in so far as the Judge's remarks may also be relevant to the question of Shailesh's breach of fiduciary duties, we reiterate that the context in which the Three Resolutions were sent to Shailesh for his signature as set out above militated against a finding that he had breached his fiduciary duties. While his strongly-worded letters were hostile, they do not constitute a breach of the duties which Shailesh owed to JGJ.

249 Our attention was also drawn to a letter which Shailesh's lawyers had sent to Ng, which cautioned Ng that he was JGJ's nominee director and thus expected to act in line with his statutory and fiduciary duties to the company. However, while the Judge made no express finding on how Ng was accustomed to vote, we would observe that Jim had advised Shailesh that the First Resolution was "considered as passed" since there was majority approval *despite* attaching the draft resolution that only bore the Kriss Brothers' signatures (and *not* Ng's or Shailesh's signatures). Coupled with Ng's testimony that he would sign a directors' resolution as long as he was asked to do so by Jim, it was clear to us that Ng was not truly independent. The Kriss Brothers and Shailesh knew or must have known this. They and Shailesh had signed an agreement dated 1 April 2015 acknowledging that Ng could act on the instruction of Jim (solely). Hence, the letter which Shailesh's lawyers had sent to Ng need not have been as robustly worded as it was. Nevertheless, that did not mean that Shailesh had acted in breach of his fiduciary duties.

250 JGJ argues that even if Shailesh truly had doubts about the correctness of the adjustments made in the 2016 Revised FS, given that the auditors had already expressed their reservations about those adjustments, the 2016 Revised FS could have been filed first with further adjustments made thereto at a later stage. This would at least have satisfied the statutory filing requirements while not misleading any third party. In so far as Shailesh had already made clear his objectives, he could not be held responsible for the adjustments.

251 In short, JGJ's position is that Shailesh should not have raised any query or objection to the adjustments which caused JGJ to further delay the satisfaction of statutory requirements about the holding of an AGM and/or the filing of financial statements. Instead, he should just have allowed the AGM to proceed since he had already made his views known.

252 However, if the main concern was to meet the statutory requirements, then the Kriss Brothers should have considered whether the adjustments should have been raised after the AGM was held and the financial statements were filed (without the adjustments). Once there was more breathing room away from the pressure of any statutory deadline, the adjustments could then have been raised for discussion. There was no evidence that the Kriss Brothers considered this alternative. As it turned out, this whole situation arose because the Kriss Brothers wanted to make the adjustments at that point in time.

253 Hence, it seems to us that JGJ is taking a one-sided view to blame Shailesh for holding up the meeting and the filing of the financial statements when the Kriss Brothers should have done their part by not insisting on the adjustments at that point in time.

254 For the reasons above, we conclude that Shailesh has not acted in breach of his fiduciary duties in connection with the Three Resolutions. We thus conclude that there is no basis to grant the injunction sought by JGJ to restrain Shailesh from seeking information or participating in any decision relating to the prosecution of claims against the SRK Entities and/or the defence of JGJ against claims brought against it by the SRK Entities, or to grant damages in the form of the legal fees JGJ has incurred (directly or in reimbursement to its directors) in responding to Shailesh's solicitors' letters in connection with the Three Resolutions.

*The relief sought by JGJ*

255 In any event, *even if* Shailesh was found to have acted in breach of his duty to JGJ, we are also not satisfied that it would be appropriate to grant the injunction and damages sought by JGJ. According to JGJ, the injunction is required because there remains litigation between the SRK Entities and JGJ in the US and possibly also in Singapore, depending on the outcome of these appeals. The second relief addresses the costs incurred in having to respond to Shailesh's solicitors' letters.

256 It is trite that an injunction is an equitable remedy which will be granted only in the discretion of the court, not as of right: see *I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others* [2020] 1 SLR 1130 at [67]; see also *Gonzalo Gil White v Oro Negro Drilling Pte Ltd and others* [2024] 1 SLR 307 at [59]. In the present case, it is open to JGJ to refuse access to Shailesh for information which may be used by SRK against JGJ. In fact, it appears that this was precisely what was done – JGJ did not accede to Shailesh's various requests for information and documents in connection with the Three Resolutions. The Three Resolutions were also passed despite Shailesh's solicitors' letters

requesting for information and documents. In this regard, Michael accepted under cross examination that nothing Shailesh did in relation to the Three Resolutions affected JGJ's ability to implement the subject matter of those resolutions, because those resolutions were already signed by three out of the four directors by the time they were sent to Shailesh for his vote. While JGJ may argue that it does not want the state of affairs occasioned by Shailesh's conduct to continue, there is no evidence that Shailesh has continued to pursue his requests for information. Given these circumstances, there appears to us to be no useful purpose for the court to grant an injunction against Shailesh, even if he had acted in breach of his duties.

257 As for damages, the amount claimed by JGJ is $19,655.50. This is supposed to be for legal fees incurred by JGJ in responding to Shailesh's solicitors' letters in connection with the Three Resolutions. This amount does not warrant the legal costs expended to bring the counterclaim which appears to be retaliatory in nature. We would have been disinclined to grant this relief or to grant costs of such a counterclaim, even if it had been successful.

***Issue 3: Costs***

258 In the suit below, having held in Shailesh's favour in relation to both his minority oppression claim and JGJ's counterclaim on breach of fiduciary duty, the Judge ordered costs of $559,000 before applying a 50% discount as Shailesh had succeeded on only two of his allegations of oppressive conduct. He therefore ordered the Kriss Brothers and JGJ to be jointly and severally liable to pay Shailesh costs of $279,750. The disbursements which were to be paid by the Kriss Brothers and JGJ were also reduced by 50%.

259 We have decided that the Kriss Brothers' appeal against the Judge's finding as to Shailesh's minority oppression claim should be allowed although we found that the Three Adjustments were not commercially justified. We have also decided that JGJ's appeal on its counterclaim should be dismissed. We are also of the view that it is the Kriss Brothers who are behind JGJ's counterclaim, which is more akin to a storm in a teacup. In the circumstances, we set aside the Judge's costs orders in relation to Suit 475 and we order that the parties bear their own costs in Suit 475 and in AD 23 and AD 24.

Woo Bih Li
Judge of the Appellate Division

Debbie Ong Siew Ling
Judge of the Appellate Division

See Kee Oon
Judge of the Appellate Division

Lok Vi Ming SC, Lee Sien Liang Joseph, Chan Junhao Justin (Chen Junhao) and Chia Bing Da Edric (LVM Law Chambers LLC) for J. G. Jewelry Pte Ltd as the appellant in AD/CA 21/2024 ("AD 21") and AD/CA 24/2024 ("AD 24"), and the respondent in AD/CA 22/2024 ("AD 22");
Harpreet Singh Nehal SC, Tan Zhengxian Jordan (Chen Zhengxian Jordan), Leong Hoi Seng Victor (Liang Kaisheng) and Lim Jun Heng (Audent Chambers LLC) (instructed); Bazul Ashhab bin Abdul Kader, Chan Cong Yen Lionel (Chen Congren), Cheung Le Ying Lorraine and Tan Jing Yan (Oon & Bazul LLP) for Shree Ramkrishna Exports Pvt Ltd and others

as the first, second and fourth to seventh respondents in AD 21, and Shree Ramkrishna Exports Pvt Ltd and The Jewelry Company as the first and second appellants in AD 22; Moiz Haider Sithawalla, Samantha Tan Sin Ying and Wong Jing Shen Darren (Tan Rajah & Cheah) for TJC Jewelry, Inc. and Ashish Shah as the third and eighth respondents in AD 21; Ling Daw Hoang Philip, Lim Haan Hui, Priscilla Kang Hui Wen and Nur Afiqah binte Mohamed Ashefjah (Wong Tan & Molly Lim LLC) for Michael Bernard Kriss and David Miles Kriss as the first and second appellants in AD/CA 23/2024 ("AD 23"); and Pillai Pradeep G, Simren Kaur Sandhu and Wong Yong Min (PRP Law LLC) for Shaileshkumar Manubhai Khunt as the respondent in AD 23 and AD 24.

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