Colliers International (Singapore) Pte Ltd v Senkee Logistics Pte Ltd
[2007] SGHC 18

Case Number : Suit 862/2005

Decision Date : 01 February 2007

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Kenneth Tan SC (Kenneth Tan Partnership) (instructed), Lim Tat and Krishnan Nadarajan (Tan Lim & Wong) for the plaintiff; Edmund Kronenburg, Leong Kit Wan and Joan Sim (Tan Peng Chin LLC) for the defendant

Parties : Colliers International (Singapore) Pte Ltd — Senkee Logistics Pte Ltd

Agency – Appointment requirements – Plaintiff claiming to be marketing agent for sale of defendant's property – Whether contractual relationship between plaintiff and defendant established such that plaintiff entitled to commission under terms of contract – Whether lack of agreement between parties as to quantum of commission integral consideration in determining whether valid contract concluded – Whether plaintiff discharging requisite burden of proof to show it was effective cause of sale of defendant's property and entitled to commission on sale

1 February 2007 Judgment reserved.

Lai Siu Chiu J:

Introduction

1 This action was in respect of the plaintiff's claim against the defendant for the sum of $300,000 being the commission purportedly due to the plaintiff for its assistance in effecting the sale of two of the defendant's properties located at No 19 Pandan Avenue and No 21 Pandan Avenue respectively (collectively referred to as "the Property"), to Ascendas-MGM Fund Management Ltd ("A-Reit"), the manager of Ascendas-Real Estate Investment Trust, a business and industrial Real Estate Investment Trust ("REIT").

2 By way of preliminary observation, the plaintiff had, in its statement of claim, initially contended that 1% of the sale price of the Property (*i.e.* $1,061,000) had been due to it as commission based on standard market custom. The parties agreed at the commencement of this trial, however, that the quantum of the contractual debt be limited to $300,000 in the event that I rule in favour of the plaintiff on its claim. Accordingly, the trial before me was confined solely to the question of liability.

The facts

3 The defendant is a family-run Singapore company in the business of providing logistics and moving services. The defendant's day-to-day affairs are supervised generally by two brothers, namely Richard Yong Chin-Wee[note: 1] ("Richard") and Terence Yong Chin-Ming[note: 2] ("Terence"), both of whom are directors of the defendant, although the defendant's managing director is their father (Yong Siow Yong). The plaintiff is a Singapore company which is in the business of, *inter alia*, acting as a marketing agent in the sale and purchase of properties.

4 The defendant first entertained the possibility of entering into a sale and leaseback arrangement for the Property sometime in early 2004. To that intent and purpose, the defendant, in

or around April 2004, entered into preliminary negotiations with Mapletree Investments Pte Ltd ("Mapletree"), a real estate investment company, in connection with the possible sale and leaseback of the Property.

5 On or about 25 May 2004, however, the defendant received an unsolicited mailer from one Ng Ee Kiat[note: 3] ("Ng"), an employee of the plaintiff, asking for an appointment so as to be given the opportunity to sell the plaintiff's services as the defendant's marketing agent in any property transaction. This was followed by a meeting on 16 June 2004 between Ng and the defendant's representatives. At that meeting, the possibility of a sale and leaseback of the Property to A-Reit was discussed (although the party that had raised the subject of A-Reit as a prospective buyer in that meeting remains in dispute, with both parties claiming the credit for doing so in court). Suffice it to say, however, that nothing materialised from the meeting, save that the defendant's representatives promised to revert to Ng should they require the plaintiff's services.

6 Sometime in late June or early July 2004, however, A-Reit approached the defendant, through another property marketing agency, CB Richard Ellis ("CBRE"), expressing its interest in the sale and leaseback of the Property. It would be useful to note that by that time, Ng had left the plaintiff's services and had joined CBRE together with one Daniel McDonald[note: 4] ("McDonald").

7 In furtherance of A-Reit's interest, one of its employees, Philip Pearce[note: 5] ("Pearce") visited the Property with both Ng and McDonald to conduct a site review. Although there had been no formal appointment of CBRE as the defendant's agent until then, CBRE continued to facilitate the discussions and negotiations between A-Reit and the defendant in relation to a possible sale and leaseback of the Property.

8 In recognition of such assistance, the defendant, on or about 9 September 2004, signed an Appointment Letter ("agency agreement") in favour of CBRE making the latter its exclusive agent to market the Property to prospective buyers with the sole exception of Mapletree. The parties had agreed to exclude Mapletree from any such agency agreement since the defendant was already in direct contact with Mapletree prior to CBRE's involvement. Although CBRE initially proposed a commission of 1.2% of the eventual sale price for the work rendered in connection with and in consideration of, being the defendant's exclusive agent, it was eventually agreed that CBRE was to be remunerated 0.5% of the sale price for assisting in any successful deal.

9 Between 9 September 2004 and 30 October 2004, both Mapletree and A-Reit negotiated and exchanged tentative proposals with the defendant for the purchase of the Property. By 30 October 2004, it appeared that A-Reit had the upper hand and was going to be the successful purchaser of the Property, and in that context, entered into a two-week exclusive negotiation period with the defendant. Although the period of exclusivity lapsed on 14 November 2004, negotiations between A-Reit and the defendant had by then reached an advanced stage, and indeed, by 16 November 2004 (with the assistance of CBRE), the parties had agreed, in principle, to the broad terms of an agreement in relation to a possible sale. The parties therefore began drafting a Memorandum of Understanding ("MOU") that would be expected to form the basis of the agreement between them. Although the MOU was ready for execution on 17 November 2004, the defendant requested the postponement of its execution for three days.

10 Unbeknownst to A-Reit, on 18 November 2004, the defendant received a revised Letter of Offer ("the Letter of Offer") from Mapletree, one which provided more favourable terms than those offered by A-Reit. Upon receiving the Letter of Offer, Richard and Terence met with representatives from Mapletree, and after some discussion, decided to accept the Letter of Offer on behalf of the defendant and duly executed the same on 19 November 2004.

11 At this juncture, it is pertinent to note that in the context of such sale and leaseback transactions, it appeared to be established practice that the transaction would be first carried out *via* the initialling of some form of skeletal memorandum of understanding (in this case, the Letter of Offer), followed by further negotiations, which, if fruitful, would culminate in a more comprehensive agreement such as a Put and Call option. It is the latter agreement that effects the actual sale and purchase of the property in question. Put simply, the initialling of some form of preliminary agreement *per se*, would not be tantamount to a contract for the sale and leaseback transaction.

12 Reverting back to the facts before me, although Richard and Terence were the defendant's representatives in their negotiations with Mapletree, in his e-mail dated 19 November 2004[note: 6] to Pearce informing Pearce of the defendant's acceptance of the Mapletree offer and calling off negotiations with A-Reit, Richard had suggested, misleadingly, that their father was the cause of the defendant's agreement with Mapletree. He did so with the untrue excuse that although both siblings wanted to sell the Property to A-Reit, Mapletree had, unbeknownst to them, directly contacted their father and after a meeting with the Mapletree representatives, their father had agreed to execute the Letter of Offer immediately.

13 Even though Pearce was disappointed over the development, over the course of the next few days, he attempted to revive negotiations between the defendant and A-Reit by making an unsolicited offer for the Property at a price that was substantially better than that offered by Mapletree in the Letter of Offer. Nonetheless, although Pearce's offer was not explicitly rejected (as the Letter of Offer stipulated that the defendant could not engage in any other negotiations in relation to the sale of the Property), the plaintiff ceased all communications and negotiations with A-Reit and CBRE

14 From then on, until sometime in March 2005, the defendant's solicitors entered into correspondence with Mapletree's solicitors so as to come to further agreement on the precise terms that would govern the proposed sale and leaseback of the Property by the defendant to Mapletree.

15 In the interim (sometime on or about 27 January 2005), Ng left the employment of CBRE and rejoined the plaintiff. On 1 February 2005, the defendant's corporate lawyer, one Douglas Leong ("Douglas") met up with Pearce for drinks and to discuss the possible marketing of other unrelated properties to A-Reit. In the course of their conversation, Pearce remarked that A-Reit remained willing to recommence negotiations for the sale and leaseback of the Property with the defendant should the negotiations with Mapletree fall through. Although Douglas relayed the news of A-Reit's continued interest in the Property to both Terence and Richard, neither sibling pursued the matter, their steadfast refusal no doubt motivated by the understanding that the re-commencing of negotiations with A-Reit may well put the defendant in breach of its obligations under the Letter of Offer.

16 On 14 February 2005, however, in order to pursue A-Reit's continued interest in the Property, Pearce contacted one Dennis Yeo[note: 7] ("Yeo"), the Managing Director of the plaintiff, informing Yeo that he had heard that the negotiations between Mapletree and the defendant had encountered problems. Pearce therefore instructed Yeo to study the possibility of recommencing negotiations with the defendant in relation to the sale and leaseback of the Property to A-Reit. At about the same time too, Richard and Terence were beginning to entertain doubts about the attractiveness of a sale and leaseback of the Property with Mapletree, in the light of the slow pace at which the negotiations between them were proceeding.

17 The sequence of events that took place subsequent to the above events and prior to the conclusion of the sale of the Property to A-Reit was the subject of considerable dispute between the plaintiff and the defendant. So as to place the dispute in its proper context, I propose to set out

each party's version of what happened next *seriatim*, beginning first with the plaintiff's version of events.

The plaintiff's version

18 Pursuant to Pearce's request, on or about 14 February 2005, Ng had, on behalf of the plaintiff, contacted Terence to inform the defendant that A-Reit remained keen on negotiating the sale and leaseback of the Property. According to Ng, during that telephone conversation, Terence had enquired about the price that A-Reit would have been willing to pay for the property, a query that Ng eventually conveyed to Pearce. Notwithstanding the fact that the negotiations between Mapletree and the defendant were ongoing at the time and remained at an advanced stage, Terence nonetheless agreed to meet Ng on 17 February 2005 to discuss the matter further.

19 At the meeting on 17 February 2005 between Ng, Yeo and Terence, the plaintiff's representatives aggressively highlighted the reasons the defendant should entertain the possibility of recommencing negotiations with A-Reit and how the plaintiff could assist in facilitating the process of any eventual sale to A-Reit. The plaintiff also highlighted the reasons why A-Reit would represent a better buyer than Mapletree and provided the defendant with a detailed track record of A-Reit's acquisitions (since its listing on the Stock Exchange of Singapore Limited ["SGX"]) to accentuate its reliability as a purchaser and its own track record in working with A-Reit. So as to assuage Terence's concerns that the agency agreement with CBRE remained binding, Yeo advised that the same should have lapsed as a result of the Letter of Offer and the subsequent negotiations with Mapletree. Significantly, both Ng and Yeo alleged that there was explicit mention of a possible commission to the defendant during the meeting, although both of them conceded that Terence did not give any positive response to such a statement.

20 On 3 March 2005, Ng followed up on the earlier discussion by informing Terence that as a result of tax concessions unveiled in the 2005 Budget, a REIT listed on the SGX would be entitled to a waiver of the 3% stamp duty that would otherwise be levied on the purchase of any such industrial property. I pause here to note that Ascendas-Real Estate Investment Trust was then listed on the SGX, whilst Mapletree was not (until much later).

21 In response, Terence requested details on the implications of such a tax concession and how it would affect any sale to A-Reit by the defendant. Accordingly, Ng sent an email on 4 March 2005 with information on the tax concessions and suggested a meeting between the prospective buyer and the defendant. Significantly, in Ng's email to Terence on the matter, neither A-Reit's nor Ascendas-Real Estate Investment Trust's name was explicitly mentioned – instead, the beneficiary of the tax concessions was merely described as "our prospect". Ng suggested in court[note: 8] that there was no specific mention of A-Reit in the email at Terence's request. While the bidder was not explicitly named, the import of the message that was being conveyed appeared beyond dispute: the "prospective" bidder would be prepared to offer a more competitive bid as a result of passing onto the defendant cost savings which directly resulted from the tax concessions.

22 On 10 March 2005, Ng called Terence again to check on the status of negotiations between Mapletree and the defendant. Thereafter, in a bid to demonstrate A-Reit's commitment to seeing the deal through, the plaintiff also advised Pearce to contact Terence to inquire on the progress of negotiations with Mapletree. This was followed by yet another telephone call to Terence on 15 March 2005, during which Terence informed Ng that there had been no developments on the deal with Mapletree since.

23 On 17 March 2005, Terence contacted Ng twice to discuss the possibility of a sale of the

property to A-Reit as well as the specifics of such sale. Ng recommended that a meeting be arranged by the plaintiff for A-Reit and the defendant to discuss the matter further, a proposal Terence appeared to be amenable to. However, when Ng next called Terence, on 18 March 2005, the latter informed Ng that he had already scheduled a meeting with Pearce three days later, *viz.* 21 March 2005 ("the lunch meeting"). Ng was, at that time, under the impression that the plaintiff was scheduled to be present at the meeting as well.

24 On 20 March 2005, when Ng contacted Terence to confirm the lunch meeting, Terence insisted that there was no need for the plaintiff's attendance as the meeting was preliminary in nature. Sensing that something was amiss in that the defendant may be attempting to cut the plaintiff out of a commission for any subsequent sale to A-Reit, Yeo and Ng met Richard and Terence before the lunch meeting. At that meeting, Yeo and Ng reiterated the virtues of A-Reit as a prospective purchaser and the fact that an agency fee would be due to the plaintiff in the event that the Property was sold to A-Reit. According to the plaintiff, Richard assured Yeo and Ng that the defendant had no intention of "cutting it [*i.e.* the plaintiff] out". After receiving such assurance, Yeo contacted Pearce to encourage him to bid aggressively at the lunch meeting with the defendant. It should be noted that both Ng and Yeo contended that there was no discussions on the exact quantum of commission that the plaintiff should receive, in the event of a sale of the Property to A-Reit, during the course of the meeting.

25 As a follow-up, on 22 March 2005, Ng contacted Terence for an update on the meeting. Later that same evening, upon being informed by Pearce that the defendant had scheduled another meeting with A-Reit the following day ("the second meeting"), Ng contacted Terence yet again to confirm the plaintiff's attendance at the second meeting. This was followed by another telephone call that very evening during which Richard informed Ng that there was no need for the plaintiff's attendance at the second meeting either as the second meeting, like the lunch meeting, was still preliminary in nature. Sensing again that something was amiss, Ng then broached the question of compensation, highlighting that the proposed agency fee payable to the plaintiff should be about $300,000. Richard immediately objected on the basis that the figure was too high. Significantly, the plaintiff did not assert that a counter-offer was made by the defendant.

The defendant's version

26 At this juncture, it would be appropriate to turn to the defendant's understanding of the events that took place from 14 February 2005 to 22 March 2005.

27 Although the defendant agreed that Ng did make a "cold-call" to Terence on 14 February 2005, the latter recalled the meeting as a "no-obligation" meeting with Ng and Yeo to allow the plaintiff to market its services to the defendant. Terence had felt obliged to agree to the meeting as a result of the defendant's good relationship with Ng (*qua* employee of CBRE). At no time was A-Reit explicitly mentioned and when Ng inquired about the progress of the negotiations with Mapletree, Terence refused to discuss the same.

28 In the meeting that took place at the defendant's office on 17 February 2005, the plaintiff had offered its services on a "no-obligation" basis to negotiate the commercial terms of a sale and leaseback with a "prospective" buyer, without stating the name of the buyer. According to Terence, there was no mention, at any time, of any possible commission being payable to the plaintiff. Indeed, the defendant appeared to take the position that the reference to "no obligation" in both instances meant that notwithstanding the work that was being undertaken on its behalf, the defendant need not compensate the plaintiff at all, even if a sale resulted from the plaintiff's efforts. According to Terence, the plaintiff's two representatives also did not provide him with any documents purporting to

detail the track record of acquisitions made by A-Reit since it was listed on the SGX. I should also add that on 1 March 2005, Terence sent a letter to CBRE purporting to confirm that the parties' respective obligations under the agency agreement had ended. When asked in court why he had decided to send such a letter at that juncture, Terence explained he was suddenly reminded of CBRE's continued appointment as the defendant's agent *vis-á-vis* the sale of the Property and saw it fit to "tie up loose ends".

29 As already alluded to earlier ([20] above), Ng contacted Terence to inform Terence of the various tax concessions that had been declared in relation to REITs. However, the conversation had been brief, as Terence indicated that he would just take note of the changes once it was reported in the media. Ng, however, followed up on the matter, contacting Terence once more on 3 March 2005, reiterating the tax concessions made in that year's budget and highlighting his intention to forward some material on the matter to Terence *via* e-mail. Terence agreed and ended the call. As stated earlier ([21] above), the email from Terence was sent on 4 March 2005 and suggested that the plaintiff's "prospect" had been willing to provide a better offer and that the plaintiff should arrange for a non-obligatory meeting. At no time during the entire matter was A-Reit mentioned as the said "prospect".

30 In relation to the telephone conversation between Terence and Ng on 10 March 2005, Terence claimed that he had informed Ng that the deal between Mapletree and the defendant was still on-going but provided no further details. In his conversation with Pearce the following day, Terence once again refused to discuss the matter of the sale to Mapletree, highlighting, in no uncertain terms, that he could not discuss the matter because of the defendant's obligations under Mapletree's Letter of Offer. The same response was also given to Ng when he attempted to call again on 15 March 2005. It was the defendant's case that until that time, it had no interest whatsoever in entering into any transaction with A-Reit as it felt that it had a binding agreement with Mapletree.

31 That situation, however, was to change on 16 March 2005. On that day, the defendant received a letter from Mapletree which highlighted the latter's disagreement to various points in the proposed sale and leaseback. As a result of the differences that were becoming evident, the defendant wondered whether A-Reit would have been a better prospect to negotiate with. It was with that thought in mind that Terence initiated the call to Ng to ask how A-Reit would be dealing with the tax concessions *vis-à-vis* their other properties. As Ng was unable to provide information on the issue, Terence had to contact Pearce directly to discuss the matter. In that connection, Terence denied that Ng proposed or initiated the meeting of 21 March 2005 – in his view, the lunch meeting was solely arranged by the defendant with A-Reit.

32 Notwithstanding its exclusion therefrom, once it got wind of the lunch meeting, the plaintiff contacted the defendant to seek a chance to make a pitch to be the defendant's agent. Although Terence and Richard agreed to meet the plaintiff, ultimately they refused to appoint the plaintiff as the defendant's agent. Consequently, the siblings informed Ng and Yeo that they should not attend the meeting. While the directors conceded that the subject of the agency fee was indeed discussed, and a quantum of $300,000 was quoted by Yeo and Ng, Terence and Richard said that they counter-proposed to appoint the plaintiff thenceforth for a fee of $50,000. According to the defendant, Yeo and Ng left at that juncture as they were dissatisfied with the defendant's counter-offer.

33 With the two differing versions out of the way, it would be appropriate to briefly touch upon the events that took place after the lunch meeting, none of which appeared to be the subject of any significant dispute between the parties.

34 At the lunch meeting, Pearce reiterated A-Reit's interest in the Property and the parties,

after some discussion, arranged for the second meeting (on 23 March 2005) between Pearce and the defendant. In the second meeting, the parties agreed to renew negotiations in relation to the sale and leaseback of the Property, taking, as a starting point for negotiations, the MOU that was drafted back in November 2004. After several rounds of talks, the parties signed the revised MOU. On the very same day, the defendant sent a letter to Mapletree highlighting that it was not proceeding with the proposed sale of the Property to the latter, citing that in the light of the existing disagreements between the parties, any further discussions would have been pointless.

35 Curiously, even though the MOU had, in fact, been executed on 23 March 2005, it was dated the day after, *viz.* 24 March 2005. Although the defendant was, at first, evasive about the reason for such post-dating, it later conceded that it had requested the post-dating in a bid to mislead Mapletree into believing that it had not been in breach of its obligations under the Letter of Offer not to negotiate with other parties. Since its letter purporting to terminate the Letter of Offer (and consequently, its attendant obligations) was only sent on 23 March 2005 to Mapletree, the defendant wanted to convey the impression that it had begun negotiating with A-Reit only after purportedly terminating its relationship with Mapletree.

36 In the interest of completeness, I should add that on the same day (*viz.* 23 March 2005), the plaintiff had sent a letter to the defendant reiterating its claim that $300,000 would be due to it as agency fees or commission should the Property be sold to A-Reit ("the commission letter"). On 28 March 2005, the defendant sent an email reply to the plaintiff, highlighting that it was "puzzled" by the commission letter and adding that should the latter's services be required in future, the defendant would consider appointing the plaintiff. The plaintiff never responded to the email.

37 Pursuant to the executed MOU, in or about July 2005, the defendant sold the Property to A-Reit after agreeing to the terms of a Put and Call Option. In aggregate, the Property was sold to A-Reit for a sum of $106,100,000.

38 It would also be appropriate to briefly mention that sometime later, on or about 23 November 2005, CBRE sent a letter to the defendant, demanding professional fees in the sum of $530,500 (being 0.5% of $106,100,000) as commission for the eventual sale of the Property to A-Reit. After protracted negotiations, the defendant agreed (very close to this trial) to pay CBRE $220,000 in full and final settlement of any claims that CBRE may have against the defendant in relation to the sale of the Property to A-Reit.

39 I should point out that evidence on the payment of this commission to CBRE was adduced both from the company's managing-director, one Ms Pauline Goh [note: 9], who was called to testify as a court witness, as well as from McDonald, who had been called as the defendant's witness. It would also be apposite to note that the settlement agreement between the defendant and CBRE dated 13 June 2006 ("Settlement Agreement") acknowledged the defendant's *purported* acceptance of CBRE as the *effective cause* of the sale of the Property. In particular, the salient part of Recital (ii) of the Settlement Agreement reads as follows:

> …[The defendant] has, in the course of negotiations, informed CBRE that it accepts that CBRE is the effective cause of [the sale of the Property between the defendant and A-Reit].

I shall revert to the Settlement Agreement later ([93] below).

My findings

40 In this case, as indeed is often invariably the case, two highly inconsistent versions of the

same facts have emerged from the opposing camps. As the findings that this court have to make are predicated upon the existence of certain facts, it would therefore be apposite for me to make a few preliminary observations on the divergent accounts proffered by both parties before proceeding to determine the merits of the plaintiff's claim.

41 In deciding which version to accept, or indeed, which parts of each version to accept, I sieved through the evidence carefully and, *inter alia*, took into account the internal inconsistency of such evidence as well as how each particular part of each respective version stood *vis-à-vis* independent evidence. As a result, I am inclined to believe the account of the chronology of events contended by the plaintiff.

42 To begin, the defendant's suggestion that it was in discussions with the plaintiff only in relation to an unnamed and undisclosed principal until 17 March 2005 appeared somewhat far-fetched and went against the weight of the evidence adduced. It would, in my view, not accord with logic for the plaintiff to have dropped hints as to the identity of the prospective buyer, such as its tax status and whether it was listed on the SGX, without then proceeding to name A-Reit as the prospective buyer in question. Such a factual matrix would be internally consistent with the plaintiff's admission that it is conventional business practice to reveal the names of prospective buyers very early on in any such negotiations. The motivations underlying such a *modus operandi* accords very much to common sense: in not revealing the name of the prospective purchaser upfront, an agent (in this case, the plaintiff) risks finding out, very late in the day, that the prospective buyer is, for some inexplicable reason, already in contact with the seller or is otherwise an unsuitable buyer *vis-à-vis* the transaction. Given that such marketing agents are only paid for facilitating successful deals, it would seem to follow that it would be to the benefit of all parties concerned to be appraised of the details of the other party as early in the negotiations as possible. To that end, I am inclined to believe that the parties had, on and after 14 February 2005, explicitly considered and discussed A-Reit as a possible prospective buyer.

43 In that regard, given that it was readily accepted by all the parties in this case that A-Reit and Mapletree were, realistically, the only parties who were interested in the Property, I am of the view that any reasonable person would, upon being informed of the possibility of dealing with a "prospect" (as was the case with the email dated 4 March 2005), under such a factual matrix, immediately enquire of the other party as to its identity. In the light of the paucity of any other evidence that would serve to provide substance to the defendant's contention, the only reasonable inference from this must surely be this - that the failure to name A-Reit in the email had been motivated by a surreptitious attempt by the defendant to avoid leaving behind any possible paper trial that would form evidence of prohibited indirect dealing (arising from its obligations under the Letter of Offer with Mapletree) with A-Reit. Indeed, this would appear to be corroborated by Terence's candid, albeit damning, admission that any negotiations with A-Reit was confidential and could not be acknowledged on paper, even with the plaintiff.

44 The plaintiff's version of events would, in my view, also succinctly explain the timing of the delivery of the defendant's confirmation note to CBRE (on 1 March 2005). The defendant's contention on that point, *i.e.* that it suddenly remembered the appointment of CBRE and saw it fit to confirm the termination of its services at that juncture, was not only too coincidental to be plausible but also begs the question: if Richard and Terence were still of the view that the defendant would enter into an eventual sale with Mapletree, what would it matter if the agency agreement, which excluded any eventual deal with Mapletree, subsisted? Given that the only marketing done by CBRE had been in relation to A-Reit, one is invariably drawn to the inexorable conclusion that the defendant must have been contemplating a sale of the Property to A-Reit even at that early stage. This not only lends credence to the plaintiff's case that A-Reit had been expressly discussed throughout the course of

their negotiations but also reinforces the plaintiff's contention that the parties had raised the efficacy of an agency arrangement during the meeting on 17 February 2005.

45 On this note, I find the accounts given by both Richard and Terence of what transpired riddled with inconsistencies, unconvincing and highly implausible in their entirety. Three examples would serve to explain my reluctance to give any weight to either brother's account.

46 First, if Richard and Terence had no intention whatsoever to enter into negotiations with another third party (at least until 16 March 2005), it would not accord to reason that they would nonetheless have entertained the numerous telephone calls from the plaintiff, not to mention attending the meeting on 10 March 2005, especially when they appeared to be well aware that such actions may be construed as a contravention of the defendant's obligations under the Letter of Offer.

47 Second, it was clear to me that the siblings were not beyond the use of ingenious explanations and interpretations to suit their ends and to downplay the plaintiff's legal rights. As mentioned earlier ([28] above), when asked about what Ng must have meant when he highlighted that the meetings would be on a "no obligation" basis, Terence suggested that this meant that the plaintiff was representing that it was not seeking a commission should the sale go through, when, on any objective view, it was clear that what must have been meant was that such meetings did not entail the obligation to enter into an agreement with A-Reit.

48 Finally, and perhaps most crucially, I found that both Richard and Terence were more than willing to bend the truth when it suited their purposes. The most telling sign of the questionable (and hence unreliable) nature of their evidence can perhaps be gleaned from their ready, if disturbing, confession that they had been willing to tell "white lies" (which was how Terence blithely described his fictional account of how the execution of the Letter of Offer came to take place in his email to Pearce) as and when it suited their purposes.

49 In the result, I had every reason to believe that both Richard and Terence's entire accounts appeared to be embellished not only by a desire to assiduously maintain that there was no intention whatsoever to enter into negotiations with A-Reit in relation to the Property (a stance no doubt motivated by the understanding that any other position would put them in clear breach of their contractual obligations to Mapletree), but was also further calculated to downplay the efforts of the plaintiff.

50 Accordingly, taking an objective view of the competing version of events as was canvassed by both sides, the weight of the evidence supports only one conclusion – the only reasonable inference that can be drawn in the circumstances is to accept the plaintiff's version of the chronology of events. In particular, I find that the parties did explicitly discuss the status of A-Reit as a prospective buyer on 14 February 2005, and that any absence of mention in the correspondence between the parties after that date was no more than the result of the defendant's attempts to ensure there was no incriminating paper trail to evidence such discussion.

The law

51 It would be appropriate at this juncture to consider the law pertaining to the plaintiff's claim. The position at law in relation to such a claim is clear. As highlighted in *Deans Property Pte Ltd v Land Estates Apartments Pte Ltd & Anor* [1995] 2 SLR 371 ("*Deans Property*") at [17]:

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

relationship is sometimes established in a situation where there has been little or no express discussion of contractual terms. The relationship between a vendor and a real estate agent is often of such a character. In such a case, the agent's entitlement to any commission for the sale of property is dependant on his being the '*effective cause*' of the sale; this being an implied term of the agency contract.

[emphasis added]

52 Accordingly, to succeed in any claim for any agency fees or commission (as is the case here), the plaintiff, as the purported agent, must show two things, namely an agency or contractual relationship between itself and the defendant and second, in the absence of any contrary term, that it was the "effective cause" of the sale.

53 I now deal with each issue *seriatim* to consider the merits of the plaintiff's claim.

Was there a contract between the parties?

54 As was apparent from its statement of claim, the plaintiff based its claim on the purported existence of a contractual relationship between the parties. In this connection, notwithstanding its length, the relevant paragraphs of the plaintiff's statement of claim warrant reproduction in their entirety given their significance in the present context. The salient part of the statement of claim reads as follows (with the plaintiff and defendant both being referred to in the plural in the extract):

13 The Plaintiffs aver that the Defendants and the Plaintiffs entered into an agreement in or about February or March 2005 whereby the Plaintiffs were to be paid a commission of 1% of the sale price of the Property, alternatively $300,000.00, by the Defendants should the property be sold by the Defendants to the party introduced by the Plaintiffs to the Defendants (i.e. A-Reit).

14 The said agreement was made *partly orally, partly in writing and partly by conduct* in the circumstances set out, *inter alia*, in paragraphs 15, 16 and 17 below.

15 In oral conversations between Ng Ee Kiat (acting on behalf of the Plaintiffs) and Richard Yong (acting on behalf of the Defendants), on 22 March 2005 and 23 March 2005, the Plaintiffs took the position that should the Defendants desire to use their introduction of A-Reit to sell the Property to them, the Defendants had to pay the Plaintiffs a commission or agency fee.

16 The Plaintiffs reiterated their position in their letter to the Defendants sent on 23 March 2005.

17 Insofar as it was made by conduct, the conduct consisted of or is to be inferred from the following:

(a) At all material times, the Defendants were or ought to have been aware of market practice whereby estate agents such as the Plaintiffs charged commission or agency fee at the rate of 1% of the sale price of the property concerned should the purchaser introduced by the estate agent to the seller purchases the seller's property. Further, during the meeting between the Plaintiffs and the Defendants on 17 February 2005, the Plaintiffs had specifically informed the Defendants that commission or agency fee was payable by the Defendants to the Plaintiffs if the Property was sold by the Defendants to the party introduced by the Plaintiffs to the Defendants (i.e. A-Reit).

(b) On 22 March 2005, after the Plaintiffs' introduction of A-Reit to the Defendants, the Plaintiffs' Ng Eng Kiat verbally proposed commission or agency fee of S$300,000.00 payable by the Defendants to the Plaintiffs in the event that the Property was sold by the Defendants to A-Reit…On 23 March 2005, the Plaintiffs sent a letter to the Defendants reiterating their proposed agency fee of S$300,000.00 to be paid by the Defendants to the Plaintiffs if the Property was sold by the Defendants to A-Reit.

(c) Although the Plaintiffs had verbally disagreed with the Defendants' objection to the Plaintiffs' claim for commission or agency fee during telephone conversations between the Plaintiffs' Ng Ee Kiat and the Defendants' Richard Yong on 22 March 2005 and 23 March 2005, the Defendants proceeded with the sale of the Property to A-Reit.

(d) In doing so, the Plaintiffs aver that the Defendants thereby have agreed to and accepted the agreement and/or signified their acceptance of the same to the Plaintiffs.

[emphasis added]

55 As is evident from para 14 of the statement of claim, the plaintiff's case hinged on the legal conclusion that this court must draw that a contract had been formed between the parties as a result of the circumstances set out in paras 15 to 17 of the same.

56 In my view, the circumstances highlighted in para 15 to 17 of the statement of claim were insufficient to found a contract between the parties. By way of preliminary observation, given that the plaintiff accepted that the defendant had explicitly disagreed upon the amount of compensation payable, this rendered untenable any suggestion that there had been any implied agreement as to the quantum of compensation. As such, it is a necessary corollary of the plaintiff's argument that it must show that an enforceable bargain had been struck notwithstanding the lack of agreement on price. In that context, whilst it is an immutable principle that the absence of agreement on price is, in and of itself, not an insurmountable impediment to the formation of a contract, the most natural inference one has to draw from the lack of an agreement on price on the facts here is, that the parties objectively did not intend to be bound until they had agreed on the precise quantum of remuneration.

57 To elaborate, it may be useful to briefly consider the applicable principles in the law of contract. While the principles underlying the ascertainment of the precise moment when a contract is formed is generally clear, its application is often fraught with obvious difficulty, not least because it requires the court to critically analyse and question the precise point at which a meeting of the minds appeared to have taken place: see *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 3 SLR 405 at [40]. That said, in order to take into account the invariable fact that parties may strike a bargain before coming to full agreement on relatively minor details, the courts are averse to paying anything more than lip service to any attempt to negate any agreement reached *via* highly technical arguments tot the effect that some subsidiary or legally inessential term had not yet been fully agreed upon: see *Tan Yeow Khoon v Tan Yeow Tat & Another (No 1)* [2000] 3 SLR 341.

58 While I agree fully with the principles enunciated in the above cases, it warrants reiteration that the much disputed term here was by no means minor or subsidiary in nature. Indeed, that both Ng and Yeo readily admitted that it was industry practice for the quantum of commission to constitute an integral consideration in deciding whether to appoint an agent only served to reinforce this point. If the plaintiff itself accepted that an agreement on the amount of commission lies at the very heart of whether parties in the industry would wish to contract with one another, it would not lie in its mouth to assert, quite contradictorily in my view, that an agreement had been reached notwithstanding such disagreement as to price.

59 Indeed, on the facts itself, I would go even further to find that the plaintiff was, in the circumstances, itself acutely aware that there had been no binding agreement between the parties at law. It is for that reason that the plaintiff placed continued emphasis on the discussion of commission as highlighted in paras 15 and 16 of its statement of claim. Such dogged insistence, in my view, does not support the argument that the plaintiff subjectively believed that a contract existed between the parties – instead, to the contrary, it is a reflection of cognisance on the part of the plaintiff that the parties had yet to agree on a fundamental term of the contract and that, absent such agreement, no contract would have existed between the parties. In this connection, it did not escape my attention that when Ng was in CBRE, he had taken the precaution to ensure the execution of the agency agreement.

60 In any event, even if we assume that the plaintiff was indeed subjectively of the view that there was a contract *inter se* (although I stress that my actual finding is that the plaintiff knew that the parties had yet to come to an agreement), there would nonetheless have clearly been no *consensus ad idem* between the parties that would form the basis of a contract. It is trite and an established principle of contract law that an objective test would be applied to determine whether an agreement had been reached between any two prospective contracting parties and that, accordingly, the parties' subjective belief, *ipso facto,* is irrelevant unless it assists in ascertaining the objective understanding between them: see, for example, *Projection Pte Ltd v The Tai Ping Insurance Co Ltd* [2001] 2 SLR 399 at [15]. As such, even if one prospective party was of the subjective view that a contract had been concluded *inter partes*, if, on an objective analysis, no such contract was in existence, there would be, in law, no concluded agreement and either side would be free to walk away completely unfettered by any previous negotiations.

61 This was, in my view, the defendant's position in the present case *vis-à-vis* the arguments made by the plaintiff in paras 15 and 16 of its Statement of Claim. It is significant that in relation to the particulars found therein, in each instance, the defendant had, whenever asked about its willingness to pay the sum of $300,000 as commission or agency fees for the plaintiff's assistance in the sale, remained resolute in its continued objection to such claim and continually insisted that it did not require the plaintiff's services.

62 The above conclusion is further fortified by a closer perusal of the statement of claim. When looked at closely, the plaintiff's contention that there was a contractual agreement can be broken down into three constituent parts, namely an oral agreement, a written agreement and an agreement by conduct.

63 Insofar as it was alleged that the contractual relations between the parties was allegedly in writing (at para 16 of the statement of claim), it was suggested that the commission letter constituted written evidence of a contractual agreement between the parties. It is difficult to see why this is so. It would not be reasonable to infer the existence of an agreement from the letter – indeed, a letter that evidences the *subjective* belief of one party as to the negotiations between them would hardly be conclusive evidence of *ad idem* between the parties. I would hasten to add that the letter's utility in the circumstances in supporting the claim of an agreement between the parties is further diminished by the defendant's email response on 28 March 2005 that it did not require the plaintiff's services.

64 In the light of this analysis, it would be superfluous to give further consideration to the claim that an oral agreement had been arrived at notwithstanding the defendant's undisputed refusal to accept the price quoted (at para 15 of the statement of claim) – suffice it to say that such a contention would fall victim to the same argument as that canvassed above. Indeed, the plaintiff appears to have accepted that its contention that its claim was, in part, predicated upon the

existence of a written and oral contract is bound to fail, as encapsulated by Yeo's admission[note: 10] in cross-examination that there was no oral nor written agreement, and that the contract (if any) would have to be based solely on the defendant's conduct.

65 Accordingly, the sole leg that the plaintiff's claim in contract can stand on would be the purported agreement *via* conduct. It would appear that the conduct complained of by the plaintiff was the refusal to stop the sale of the property to A-Reit by the defendant notwithstanding its refusal to pay a commission to the plaintiff. Yet, even on the plaintiff's testimony and even if we take the plaintiff's case at its highest, such a claim could not be supported on the facts for it assumes that the act of completing a sale to a party with whom the establishing of relations had been made by a third party, would, *ipso facto*, be sufficient to form the basis of a contract.

66 As Yeo appeared to admit in cross-examination, the very nature of the consultancy business and the *modus operandi* of the plaintiff meant that it risked being taken advantage of by parties who could avoid entering into contractual relations with the plaintiff and proceed to negotiate with the actual buyer and for it to be cut out. On cross-examination, Yeo conceded as follows:[note: 11]

> Q: Mr Yeo, I come to the point. Isn't it very dangerous to tell someone "I have a buyer," naming the buyer, and after that, only after that ---
>
> A: Mm.
>
> Q: --start talking about whether commission is payable.
>
> A: It is not. It is not. *It is part of the business risk that we do take…So in our practice, we do take a risk.* I appreciate what you said, it's definitely risky, but it is something that in business, that's the risk we take. Like I say, the meeting could last 5 minutes and he says that, "Oh, if it is A-Reit, thank you very much, you know, bugger off, don't come and disturb me any more."…
>
> Q: Isn't it also --- you mentioned business risk, isn't it also a business risk that upon hearing the buyer's name, the person you are speaking with says, "Thank you very much, please leave my office" and then contacts the buyer straight.
>
> A: I said that.
>
> Q: It is, huh?
>
> A: I said that. It is a risk.
>
> Q: In that case, would you be entitled to any commission?
>
> A: In that case, if I can have the buyer to --- you see --- if we told ---
>
> Q: Mr Yeo, please answer the question.
>
> A: Yah, yah, yah. *Yes, our risk will be on the commission*…Yes there is still some risks. Some buyers may say that, "No, I am not prepared to support you in this case because it will affect my price or whatever." Yes, we lose some of those deals.
>
> Q: Okay, let me understand you. So it really --- after that, you are really at the mercy of the buyer. The buyer can either say, "Well, I'm not going to talk to you unless you go through

Colliers", or the buyer may say, "Well, I will talk to you but you please do --- please give Colliers something"

…

A: The buyer, if they felt that we were the effective cause of the transaction happening, would, I think…tell the vendor, "Eh, please pay the broker, they were instrumental". Okay. But failing that, they may feel obliged to put aside some money in order that the brokers get paid a fee.

Q: I see, if they don't put aside that money, then the brokers don't get paid a fee?

A: It's a risk. It's a risk that do take. You know, in this sort of approach.

[emphasis added]

67 This was, in my view, a case in which such a risk did indeed materialise. Even though the conduct of the defendant was admittedly very opportunistic, it was clear to me that the failure of the plaintiff to secure a firm commitment from the defendant for a commission in any eventual sale to A-Reit was not the result of some form of oversight on its part to reduce the agreement between the parties into writing, but was no more than a situation of the plaintiff placing a bet on the wrong horse. In hoping that the defendant would agree to remunerate the plaintiff after the eventual sale notwithstanding the absence of a binding agreement between the parties, the defendant had taken a commercial (albeit on hindsight, unwise) decision to assist in bringing about the eventual sale to A-Reit without any assurance of being adequately compensated. As highlighted by McDonald, it was not unusual in the industry for a marketing agent to attempt to form a working relationship and to spend considerable time and effort assisting and adding value to the transaction to gain the trust of a vendor before executing an agency agreement and therefore, before getting any assurance of being paid. Accordingly, notwithstanding the plaintiff's protestations to the contrary, only one conclusion appears to be open to me, namely that there was no contract between the parties.

68 Given that the gravamen of the plaintiff's claim appeared to lie in the existence of a valid contract between the parties, in the absence of any circumstances that would substantiate the existence of such a contract, the plaintiff's claim, as framed in its pleadings, must fail.

Was the plaintiff the effective cause of the sale?

69 The above discourse would, *ipso facto*, be sufficient to dispose of this action. If, however, I am wrong in finding that no contractual relationship existed between the parties, I would have, in any event, dismissed the suit on the basis that the plaintiff had not been the effective cause of the sale of the Property in the circumstances.

70 In considering this matter, I noted, at the outset, that there were no express contractual terms that dealt with the plaintiff's purported entitlement to commission under the contract. Accordingly, as highlighted in *Bowstead & Reynolds on Agency* (18th ed, 2006) at para 7-027, remuneration would be dependent upon the satisfaction of the following principle:

Subject to any special terms or indications in the contract of agency, where the remuneration of an agent is a commission on a transaction to be brought about, he is not entitled to such commission unless his services were the effective cause of the transaction being brought about.

71 That the above principle operates as part of Singapore law is not disputed: see, *inter alia*, *Ong Kee Ming (trading as FL Development and Property Consultants) v Quek Yong Kang and Another* [1991] SLR 562 at 564, [13] and *Deans Property* ([51] *supra*) at [17]. Accordingly, if the plaintiff was not the effective cause of sale, the mere existence of a contractual agreement between the parties would not, *ipso facto,* confer to an agent an unreserved right to a commission in the event of any sale.

72 On this point, the plaintiff contended that it was indeed the effective cause of the sale. In essence, it argued that it had played a crucial facilitative role and was instrumental in reinitiating the contact in February 2005 between the defendant and A-Reit. It also placed some emphasis on the fact that without its intervention, A-Reit would only have been willing to pay $95,500,000, thus attempting to substantiate its claim that its intervention had resulted in a windfall of $10,600,000 to the defendant.

73 The defendant, not surprisingly, urged this court to arrive at a diametrically opposite conclusion. Its arguments, in essence, centred on its view that this court should, in determining whether the plaintiff was the effective cause of the sale here, be guided by the observations of CR Rajah JC (as he then was) in *Grandhome Pte Ltd v Ng Kok Eng and Another* [1996] 1 SLR 775 ("*Grandhome*") (at [31]) where he held:-

> Where…it is established that (a) an owner agreed to pay an agent a commission for finding a buyer for a property; (b) the agent engendered the interest of a buyer in the property; (c) the buyer made an offer for the property which the agent conveyed to the owner; (d) the owner eventually sold the property to the same buyer at the same price offered through the agent; and (e) events (b) and (d) took place within a short space of time; the agent would have discharged the necessary burden of proof to establish a *prima facie* case for being the *causa causans* or effective cause of the sale. The owner could, of course, seek to show why, despite all this, the agent was not the effective cause. But if he failed to do so the agent would succeed.

74 In the defendant's view, the above five requirements amounted to *necessary elements* (as opposed to being merely a useful guide) to establish a *prima facie* case of "effective cause". It would appear that by this argument the defendant was suggesting that if the five elements were not cumulatively satisfied, the claim to be the "effective cause" cannot even, *prima facie*, be made out.[note: 12] It was the defendant's case that even on the assumption that there had been an agreement between the parties, the plaintiff would still not have been the effective cause of the sale as none of the other elements had been satisfied. Two examples would serve to highlight this: first, in relation to the requirement that the purported agent had to engender the interest of the buyer, it was suggested that the plaintiff could not have engendered A-Reit's interest since A-Reit had never lost interest in the property from the time discussions ended in November 2004. Furthermore, as A-Reit never technically made an offer through the plaintiff and as the discussions on price were made by A-Reit and the defendant to the exclusion of the plaintiff, it would also follow that requirements (c) and (d) would similarly not have been satisfied.

75 At the outset, while I agree with the defendant that the five elements in *Grandhome* ([73] *supra*) had not been made out, I disagree with the defendant as to the test's applicability here. Admittedly, as the learned judge correctly observed in that decision, if the five elements had been made out, a very strong case could clearly be made to suggest that some form of compensation in the form of an agency fee or commission was in order. That is, however, not to suggest that a *prima facie* case can only be made out *via* seeking recourse to the test. In so suggesting, the defendant elevated what is undeniably a useful guide to a principle or test in law and, in the process, accorded too much weight to a mechanical formula in an area of law which, by its very nature, has to be fact-

centric.

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

77 Indeed, a closer scrutiny of *Grandhome* showed it was never the intention of the learned judge there for the test enunciated to constitute the sole *de facto* test that would be applicable in all circumstances. In particular, it is significant that the learned judge mentioned that where the five limbs are established, the agent would have discharged the necessary burden of establishing a *prima facie* case, as opposed to the principle that the defendant was advocating, namely that the five limbs are the *necessary elements* to the establishment of a *prima facie* case.

78 Accordingly, notwithstanding the useful guidance that is afforded by the pronouncements made in *Grandhome* ([73] *supra*), given the necessarily fact-specific nature of inquiries such as the one before me, the resolution of the question of whether the plaintiff in this case was indeed the effective cause of the sale cannot be decided in *vacuo* with little regard for the facts. In arriving at this conclusion, I am guided by the perceptive reasoning of the Court of Appeal in *Emporium Holdings (Singapore) Pte Ltd v Knight Frank Cheong Hock Chye & Baillieu (Property Consultants) Pte Ltd* [1994] SGCA 147 ("*Emporium Holdings*") (at [22]) in which it was highlighted that:

> No precise definition of "effective cause" has been attempted in any of the authorities cited to us. Indeed, it would not be possible or desirable to attempt a precise definition. Much will depend on the facts of each case and the cases on the topic can only serve as illustrations on their particular facts.

79 Consistent with the above observations, no mechanistic formula can, in my view, be laid down as determinative of whether a party had been the effective cause of sale or otherwise. Instead, the very nature of the inquiry itself depends on the precise factual matrix in question.

80 That is not, however, to say that case law could not go any way into assisting me in my determination here. While no seminal threshold definition exists as to what amounts to "effective cause", a significant body of case law has served to distil various principles that serve to guide a court in its determination of whether a party's contribution, on the facts of the case, would be sufficient to amount to being the "effective cause" of such a transaction. For one, it would be insufficient on the part of any agent (and thus, the plaintiff here) to merely show that it was one of the causes of the sale; instead, it would have to show that it was the critical cause: see *Grandhome* ([73] *supra*) at [7]. For that reason, in *Deans Property* ([51] *supra*), the Court of Appeal, at [18], noted as follows:

> …for the appellants to succeed, they have to show that they were the effective cause of the sale. This means that their efforts to market the property must have operated to produce a ready and willing buyer for the property. In this respect, the cases are clear that it is insufficient for the appellants to show that the sale and purchase would not have taken place but for their efforts. It is not enough for the agent's labours to be a *causa sine qua non*. His services must

actually be the *causa causans* of the sale before commission is payable

81 Given that the plaintiff must establish that it is the critical cause or *causa causans* of the sale, it is unsurprising that the mere introduction of a potential buyer to his principal, without more, would not be sufficient to render such an agent to be the effective cause of a sale. As reasoned in *Millar, Son & Co v Radford* (1903) 19 TLR 575, which was quoted with approval in *Emporium Holdings* ([78] *supra*) at [22]:

> It was, therefore, important to point out that the right to commission did not arise out of the mere fact that agents had introduced a tenant or a purchaser. It was not sufficient to show that the introduction was a *causa sine qua non.* It was necessary to show that the introduction was an efficient cause in bringing about the letting or the sale.

82 In a related vein, the same proposition was also advanced in *Powers v Nashwaak Pulp & Paper Co* [1937] 4 DLR 631 at 640, in which Baxter CJ observed, citing *Stratton v Vachon* (1911) 44 SCR 395 as authority, as follows:

> Was the relation of buyer and seller really brought about by the act of the plaintiff? The plaintiff's act must be the *causa causans* of the transaction. It is not enough that it should merely be a *causa sine qua non*. There was much argument as to whether the plaintiff's act should be an efficient cause or the efficient cause. In the cases these expressions are used somewhat indiscriminately and it does not appear that the exact point has ever been resolved. I think the plaintiff's act must be the efficient cause. If there were more than one cause operating, then one of them must have been the efficient cause and the others mere *causae sine qua non*. If, on the other hand, more than one was required to produce the result, then no one of them can have been the efficient cause or to put it in another way, one of them could not, of itself, have produced the result.

83 It would be apposite at this juncture to apply the above principles to the facts before us. At the outset of such an analysis, it is clear to me that the facts here were somewhat unusual in that they did not fit nicely into the conventional factual matrix that would typically arise out of an agency/principal relationship. In particular, unlike most factual matrices that arise out of agency agreements of this sort, the history of negotiations between A-Reit and the defendant was somewhat lengthy and involved numerous intervening parties. Given the long-drawn negotiations that took place over the course of more than one year, it would be highly misleading to attempt to assess the contribution of the plaintiff in a vacuum or, to take a snapshot of the plaintiff's contribution at a certain point of time as one would tend to do in most discrete agency situations. Instead, in the light of the peculiar circumstances here, it would be more appropriate to consider the plaintiff's contribution by making a holistic analysis of each party's contribution in the context of the entire transaction.

84 Further, it has to be admitted that the facilitative role played by the plaintiff from February to March 2005 had clearly been a factor in the resultant sale to A-Reit. During that time, the plaintiff played a particularly significant part in ensuring that A-Reit put together a competitive bid, while keeping the defendant apprised as to the possibility of getting a deal that was significantly better than the one on the table with Mapletree. Given the defendant's acute awareness of its obligations under the Letter of Offer, it would have probably hesitated to have taken such bold accelerated steps towards an agreement with A-Reit without the assistance of the plaintiff in the background. Therefore it goes without saying that the plaintiff was *a factor* in the sale.

85 Nonetheless, as analysed earlier, it warrants reiteration that it would not be sufficient for the

plaintiff to show that it was *a factor* in the eventual sale – the plaintiff must show that it was *the crucial factor* that resulted in the sale. It is significant that in the overall context of the negotiations, as even the plaintiff readily conceded, CBRE was the marketing agent that had laid much of the initial groundwork for the prospective sale and leaseback of the Property to A-Reit. Indeed, CBRE had been instrumental in the initial part of the negotiations to the stage where the parties had almost executed the MOU on 17 November 2005 in not only acting as an intermediary between A-Reit and the defendant, but in attending and contributing in numerous meetings between the parties and in structuring the transaction in such a manner so as to provide the best possible deal to the defendant. Indeed, in my view, the fact that the second tranche of negotiations between the defendant and A-Reit (on 21 and 23 March 2005) were completed in just two meetings before the MOU was executed represents a clear reflection of the significant groundwork that was already put in place by CBRE as of 17 November 2004. In the circumstances, I am inclined to venture to suggest that in light of its involvement in the transaction from its infancy, a more effective cause (though not necessarily the effective cause at law) of the sale would be CBRE as opposed to the plaintiff.

86 While there is little doubt that the plaintiff's assistance throughout the second tranche of negotiations accelerated the path towards agreement between the parties, I also note that by the time the conversation between Ng and Terence took place on 14 February 2005, the defendant was already patently aware, through Douglas, that A-Reit's interest in the Property remained unabated and that it was waiting in the wings should the deal with Mapletree fall through. Indeed, it is noteworthy that it is not in dispute that the plaintiff was not basing its claim on its purported initial introduction of A-Reit to the defendant in June 2004. Even a cursory glance at its statement of claim as reproduced above ([54] above) makes it abundantly clear that the plaintiff's claim was limited to its facilitation of the parties' discussions after Douglas' meeting with Pearce on 1 February 2005. Indeed, under cross-examination, Yeo admitted as much, expressing the view that the plaintiff was not claiming credit for the work done before the purported re-introduction of A-Reit in February 2005 and that credit in relation to work before that should be given to CBRE.[note: 13]

87 Accordingly, although it would be conjecture to speculate as to whether the deal would have come to fruition *sans* the plaintiff, the circumstances render it likely that even if the plaintiff had not assisted in the transaction, A-Reit would still have eventually negotiated the deal with the defendant, albeit only at a much later stage. To arrive at any other conclusion would be to conveniently ignore two facts that were apparent to me by the conclusion of this case: first, that it was clear beyond peradventure that the only parties that were aggressively bidding for the Property were A-Reit and Mapletree and second, that the defendant's resolute determination to obtain the best possible deal (as evidenced time and again by its use of what can only be politely described as sharp business practices and as encapsulated by Richard's revealing admission that he was aware that the defendant was in breach of the obligations under the Letter of Offer by negotiating with A-Reit), meant that it would have been only a matter of time before discussions between A-Reit and the defendant resumed in the light of A-Reit's willingness to put up a competitive bid at the time.

88 Finally, I should also highlight that notwithstanding the assistance rendered by the plaintiff, much of the work that resulted in the eventual deal represented the fruits of negotiations between A-Reit and the defendant themselves. Although admittedly not by its own fault, given that the plaintiff was barred from the meetings on 21 and 23 March 2005, I had to take into account the fact that it had no influence or part to play in the actual negotiations of the parties and in ensuring that the parties arrived at the terms that they did in relation to the final agreement. I also took into account the fact that such agreements tend to be dual-tiered in nature ([11] above) and that the plaintiff had no part to play in the discussions that resulted in the Put and Call option that was executed in July 2005.

89 For those reasons, in my view, the plaintiff's contributions to the eventual sale, when viewed in the round, while substantial, could hardly be said to be crucial enough to be the "effective cause" of the sale to A-Reit. Put another way, and using the terminology utilised in the cases, though the plaintiff was clearly a *causa sine qua non* in the circumstances, I am not persuaded that the plaintiff's acts constituted the *causa causans* of the sale of the property. In the light of the above analysis, I am of the view that the plaintiff has failed to discharge the requisite burden of proof to show that it was the effective cause of the sale.

90 Accordingly, even if I am mistaken in my earlier finding that there was no contract/agreement between the parties, I am of the view that the plaintiff's claim would still fail for the reason that the plaintiff was not the "effective cause" of the sale of the Property in the factual matrix. As such, the plaintiff is not entitled to any commission for the sale of the Property to A-Reit.

Observations

91 Three other matters warrant mention. First, the plaintiff had, in its written submissions and in the course of these proceedings, made repeated reference to the sum of $220,000 paid by the defendant to CBRE, arguing that the payment to CBRE could not be justified since, in its view, CBRE had not been the "effective cause" of the sale of the Property and that the defendant had decided to pay the sum in a bid to mount a more credible defence against this action.

92 With respect, I fail to see the relevance of such a contention. Whether the plaintiff's payment to CBRE can or cannot be justified on the basis of CBRE being the "effective cause" of the transaction is not a matter that arises for determination in these proceedings and I would therefore hesitate to make any pronouncement on it. In any event, it is difficult to see how any payment made to CBRE could, objectively, have any impact on the result of this case. It would certainly not detract from any potentially rightful claim for a contractual commission brought by the plaintiff for the defendant to argue that it was of the opinion that CBRE was the actual "effective cause" of the sale of the Property. As should be apparent from the discussion above, the test to be applied in the circumstances is objective, not subjective.

93 Accordingly, while I accepted the plaintiff's argument that it was in the defendant's interest to include such a self-serving statement ([39] above) in the settlement agreement, that fact had no probative value whatsoever in my findings given that I ascribed no weight at all to the fact that the settlement agreement between the defendant and CBRE acknowledged the defendant's purported acceptance of CBRE as the effective cause of the sale of the Property.

94 I would hasten to add that, in any event, the theory advanced as central to the plaintiff's argument on this point appeared quite untenable. Given that the difference between the amount ($220,000) that CBRE received and what the plaintiff claimed it should receive ($300,000) is not substantial when compared with the sale price to A-Reit ($106,100,000), I find it highly implausible that the defendant would orchestrate the entire settlement and its eventual payment to CBRE purely to avoid incurring the commission fee demanded by the plaintiff, especially when one takes into account the fact that both parties would, in all likelihood, incur substantial legal fees in instructing solicitors to resolve the claim.

95 Second, the plaintiff had, in the course of the proceedings before me, in the words of the defendant, attempted to portray the defendant as "scoundrels".[note: 14] In particular, the plaintiff appeared to place much emphasis on the suggestion that the defendant had initially entered into the first tranche of negotiations from June to November 2004 with A-Reit (and CBRE) with no real interest in concluding a deal with it and that the defendant used A-Reit (and CBRE) merely as a vehicle to

increase the price that Mapletree was willing to pay. In a related vein, the plaintiff also highlighted that the postponement of the signing of the MOU between A-Reit and the defendant was deliberately timed so as to allow Mapletree to place a bid that would exceed A-Reit's at the time. The main thrust of the plaintiff's argument appeared to be as follows: the defendant cannot be trusted and had no initial intention to sell the property to A-Reit.

96 While, as already mentioned ([87] above), the defendant's two aforementioned directors were guilty of sharp business practices which conduct leaves much to be desired, the plaintiff's argument is, in my view, wholly irrelevant. Suffice it to say that any such attempted analysis of the matter would merely obfuscate the substantive issues that had to be decided here. Even if I were to assume that the defendant was acting underhandedly, it was not up to this court to act as the moral arbiter of parties – contracting parties are always free to, and indeed would, be at liberty within the boundaries of the law, to attempt to seek the best bargain possible. To that end, I would remind the plaintiff that even if "money and more money steered the conduct of the defendant in the sale of the property,"[note: 15] the commercial motivations of the directors of the defendant are hardly the matter being put on trial here. As such, in the light of its irrelevance to the issues that had to be determined by this court, I would express no further opinion on it.

97 Finally, I should note that during Pearce's cross-examination, it transpired that after being shown the commission letter by Richard during the meeting on 23 March 2005, he (*i.e.* Pearce) had purportedly agreed to add $400,000 to the sale price to take into account CBRE's and the plaintiff's agency fees. Quite apart from the fact that Pearce's recollection of the matter appears slightly inconsistent with the testimonies of the other parties at the said meeting, I felt that there was no necessity to consider the matter in depth in light of the uncontested fact that even if such an exchange took place, there had been no understanding whatsoever as to how the monies would be used by the defendant. When one sifts the wheat from the chaff, it is evident that, even at its highest, all it shows is that the defendant would be willing to accept that it, as opposed to A-Reit, would be responsible for making payments to CBRE and/or the plaintiff if the two or either one of them had been appointed agents for the sale of the Property. Simply put, the entire exchange was irrelevant *unless* the plaintiff was able to establish the existence of a contract of agency.

Conclusion

98 Given the defendant's unmeritious conduct and the efforts no doubt expanded by the plaintiff to facilitate the eventual agreement between A-Reit and the defendant, this case should serve as an invaluable reminder of the need to observe the desirable practice of reducing an agreement into writing. Given its position as at 10 February 2005, there was every likelihood that the defendant would have agreed to a pre-determined payment (albeit, one that is likely to be smaller in quantum than the sum in dispute here) to utilise the plaintiff's services in its dealings with A-Reit. In taking the risk of providing its services to the defendant without having some form of written commitment from the outset, the plaintiff must unfortunately accept the legal consequences of failing to take the precautionary step of committing in writing its potential contracting party.

99 Although it is not without some regret that I arrive at this conclusion, in the result, the plaintiff's claim is dismissed. In the light of the fact (so I have been informed) that Offers to Settle were exchanged between the parties pursuant to Order 22A of the Rules of Court (2006 Rev Ed) I will hear arguments on costs from the parties.

100 Accordingly, the parties are directed to apply for a hearing date from the Registrar to address me on the issue of costs.

26 March 2007

Costs

101 After I had released the Judgment on 1 February 2007, the defendant's solicitors requested a hearing to address the court on the issue of costs, as the parties had exchanged Offers to Settle, pursuant to Order 22A of the Rules of Court (2006 Rev. Ed.) (hereinafter referred to as "O22A of the Rules").

102 At the hearing on costs, counsel for the parties revealed the following Offers to Settle:

(a) On 2 December 2005 the plaintiff made an Offer to Settle to the defendant on these terms:

(i) the plaintiffs will accept payment of a sum of $299,999.00;

(ii) costs on a standard basis from the date of the writ of summons to the date of this Offer to Settle;

(iii) this Offer to Settle will remain open for acceptance for fourteen (14) days from the date of receipt of this Offer by the defendants' solicitors. Thereafter, acceptance of this Offer to Settle by the defendants shall be subject to payment by the defendants to the plaintiffs of the plaintiffs' costs on an indemnity basis calculated from the fifteenth (15^{th}) day of the receipt of this Offer to Settle by the defendants' solicitors.

(b) On 27 April 2006, the defendant made an Offer to Settle to the plaintiff on these terms:

In order to avoid the unnecessary expenditure of time and legal costs, the defendants offer to settle all claims, disputes and issues in and/or in connection with the above Suit fully and finally, without any admission of liability, on the following terms:

(i) The defendants shall pay the plaintiffs an ex-gratia lump sum of S$10,000 within fourteen (14) days from the date that the defendants and/or their solicitors receive a valid acceptance of this Offer to Settle in accordance with Order 22A of the Rules of Court (2004 Rev. Ed.).

(ii) The plaintiffs shall file and serve a Notice of Discontinuance of the Suit within seven (7) days from the date that the Plaintiffs and/or their solicitors receive the Defendants' payment in compliance with paragraph 1 hereof.

(iii) If the Plaintiffs serve their acceptance of this Offer to Settle in accordance with Order 22A of the Rules of Court (2004 Rev. Ed.) before or at 12 noon on Friday 5 May 2006, each party shall bear its own costs of, and/or incidental to, the Suit.

(iv) If the Plaintiffs serve their acceptance of this Offer to Settle in accordance with Order 22A of the Rules of Court (2004 Rev. Ed.) after 12 noon on Friday 5 May 2006, the Plaintiffs shall pay the Defendants their legal costs of the Suit (to be taxed on a standard basis, if not agreed) incurred from the date of this Offer to Settle to the date of the Plaintiffs' service of a valid acceptance of this Offer to Settle in accordance with Order 22A of the Rules of Court (2004 Rev. Ed.).

Neither Offer to Settle was accepted.

The plaintiff's submissions

103 Counsel for the plaintiff Kenneth Tan pointed out that the defendant's Offer to Settle did not comply with O22A r 9(3) and the format did not comply with Form 33 as stipulated under O22A r 1. He pointed out that in *SBS Transit v Koh Swee Ann* [2004] 3 SLR 365, Judith Prakash J had held that the prescribed format in Form 33 was obligatory. Consequently, notwithstanding that the plaintiff's claim was dismissed, the defendant should only be awarded costs on a standard and not on an indemnity basis after 27 April 2006.

104 Mr Tan submitted that the defendant's Offer to Settle in any case was not a genuine or serious offer to settle but was a tactical move to obtain indemnity costs. In support of his submission, he cited Court of Appeal decisions in *The Endurance* [1999] 1 SLR 661 and *Singapore Airlines Ltd v Fujitsu Microelectronics (Malaysia) Sdn Bhd No 2* [2001] 1 SLR 532. Even in a case where the defendants struck out the plaintiff's claim as being frivolous and vexatious and the defendants had made an Offer to Settle that the plaintiff withdraws it claim, the court in *Peter Goutha v BDO Binder* [1997] SGHC 85 (unreported) refused to award indemnity costs.

105 Mr Tan also referred to extracts from the textbooks *Singapore Court Practice 2006* and *Singapore Civil Procedure 2003* on O22A to support his arguments.

The defendant's submissions

106 The defendant's submissions not unexpectedly adopted a stand opposite to that of the plaintiff's. Mr Kronenburg, counsel for the defendant, argued that the defendant's Offer to Settle was in compliance with O22A r 1; the fact that it contained more wording than Form 33 did not detract from the fact that the offer did comply with the requisite format. As the offer was not accepted by the plaintiff and its claim was dismissed, the plaintiff did not obtain a more favourable judgment than the terms of the defendant's Offer to Settle. Consequently, the defendant was entitled to costs on an indemnity basis after 27 April 2006 under O22A r 9(3).

107 In addition to Singapore Airlines Ltd v Fujitsu Microelectronics (Malaysia) Sdn Bhd No. 2, Mr Kronenburg relied on Man B &W Diesel S E Asia Pte Ltd & Anor v PT Bumi International Tankers & another appeal [2004] 3 SLR 267 to support his submissions.

108 A further submission put forward by Mr Kronenburg was for the award of a certificate for three counsel to the defendant and that the plaintiff should also pay the costs on an indemnity basis for its refusal to agree to certain facts listed in the defendant's Notice to Admit Facts filed on 19 December 2005. Those facts were all proved by the defendant in the course of the trial. The case of *Teo Siew Peng v Neo Hock Pheng* [1999] 1 SLR 293 was cited in support of this submission.

109 The defendant also asked for costs against the plaintiff for its withdrawal of two claims on the first day of trial, referring to [2] of my Judgment. Mr Tan had informed the court on the first day of trial that the plaintiff had decided to confine its claim to $300,000 instead of computing it at 1% of the sale price of $106,100,000, equivalent to $1,061,000, obtained by the defendant. Mr Kronenburg complained that had his client known of the plaintiff's decision much earlier, time and costs could have been saved by the defendant in the preparation for trial, relying on *Lin Securities (Pte)(in liquidation) v Official Assignee of the Property of Tan Koon Swan* [1992] 1 SLR 1017.

The decision

110 I did not award costs on an indemnity basis to the defendant after 27 April 2006 based on the defendant's Offer to Settle. Neither did I award the defendant costs on an indemnity basis for having to prove the Facts stated in its Notice to Admit Facts or accede to its request for a certificate for three counsel.

111 I shall deal first with the defendant's Offer to Settle. Compared with the plaintiff's claim of $300,000, the defendant's offer of $10,000 can only be described as derisory. It was equivalent to 20% of the $50,000 offer that the defendant's directors previously made to the plaintiff to settle its claim for commission. It would have been obvious to any reasonable person let alone the defendant that its offer of $10,000 would not be accepted by the plaintiff in the light of the fact that its earlier *ex-gratia* offer of $50,000 had already been rejected outright. Why would the plaintiff accept a far lower offer after going to all the trouble and expense of suing the defendant? The defendant's offer to settle was plainly neither serious nor genuine and it was absurd for the defendant to submit otherwise. As such, the defendant's Offer to Settle could only be a tactical ploy used to secure indemnity costs from the plaintiff in the event it lost the case. However, I was not at all surprised by the defendant's act as it was a reflection of how the defendant's two directors conducted business, which I had referred to in [87] of my Judgment.

112 My ruling was reinforced by the cases cited by the parties. In *Singapore Airlines Ltd v Fujitsu Microelectronics (Malaysia) Sdn Bhd No. 2*, the Court of Appeal held that for O22A to apply, the Offer to Settle should be a serious and genuine offer and not just to entail the payment of costs on an indemnity basis.

113 In that case, the defendant/appellant offered S$347.00 to settle the claim of US$286,344.14 made by the plaintiff/respondent for the loss of a package which the appellant carried from Tokyo to Kuala Lumpur via Singapore. The appellant succeeded in its appeal that it was entitled to the protection of limitation of liability laid down under the Warsaw Convention as amended by the Hague Protocol ("the amended Convention") under which the appellant's liability was limited to S$312.00. It was ludicrous to suggest that any sensible litigant would go through trial of some 20 days only to defend a claim for S$312.00.

114 Chao Hick Tin JA who delivered the judgment of the appellate court held that an offer having the effect contemplated in O22A must contain in it an element which would induce or facilitate settlement. The appellant's offer to settle dated 20 January 1999 was not really an offer to settle as it did not contain any incentive to settle. Nor was there a genuine effort to settle the crux of the dispute which was related to the difference between the actual value of the lost package and the sum laid down in the amended Convention. Consequently, Chao JA awarded costs on a solicitor basis against the respondent for the action (from the date of the offer) as well as the appeal.

115 In *Man B &W Diesel S E Asia Pte Ltd & Anor v PT Bumi International Tankers*, the Court of Appeal similarly refused to award costs on an indemnity basis to the successful appellants. In that case, the defendants/appellants made an offer of US$1.5m to the plaintiffs/respondents to settle their claim after trial had started; the offer was open for acceptance within 14 days. The plaintiffs rejected the offer. The trial judge ruled in favour of the plaintiffs and awarded damages in the sum of US$2,979,589.

116 Chao JA who delivered the appellate court's judgment held at [15] that the offer of US$1.5m (without mentioning costs) was broadly about half the actual award made by the trial judge. Noting that the question of liability was complex and to an extent novel (the issue being economic loss), he was of the view that the defendants' offer to settle could not be said to be anything other than serious and genuine. It was a substantial offer with a view to seeking a speedy and amicable solution.

117 Yet, the Court of Appeal refused to award the defendants their costs of the trial against the plaintiffs on an indemnity basis. The reasons were set out in the following extracts from Chao JA's judgment:

> 19 ….For a defendant to be entitled to indemnity costs from the date of the offer to settle, two conditions must be satisfied. First, the offer must be on the table up to the disposal of the claim. Second, the plaintiff has obtained a judgment which is not more favourable than the terms of the offer. In our present case, the appellants' offer to settle was valid for 14 days. Thus the first condition is not satisfied. However, the appellants say that r 9(3) is not applicable to a case like the present where the plaintiff fails completely. There appears to be some merit in this point as r 9(3) talks about the plaintiff being "entitled to costs on the standard basis to the date the offer was served". The appellants aver that they are relying on the general discretionary powers of the court under O22A r 9(5) and r 12…
>
> 20 The question which remains is whether the court, in the exercise of its discretionary power, should have regard to the fact that the offer made by the appellants was valid only for 14 days and had lapsed long before the trial judge rendered her verdict and even longer still by the time the action was concluded on appeal. The term "disposal of the claim" in O22A r 9(3) must refer to the final disposal of the claim where there is an appeal. The corresponding provision applying to an offer to settle emanating from a plaintiff, which is set out in O22A r 9(1), also contained a similar condition. Therefore, the question is whether the court should apply a different consideration where the plaintiff fails completely. We are unable to see any rational basis for waiving that condition just because a plaintiff fails completely instead of partially. It seems to us that the rationale for requiring an offer to remain on the table until judgment, before penalising the offeree party with indemnity costs, is that that party would have been able to accept the offer at all times but had refused to do so.

118 Chao JA's reasoning above is equally applicable to our case. It would be appropriate at this juncture to review the terms of the defendant's offer to settle at [102]. Contrary to the submission of the defendant, the offer did not comply with Form 33 of the Rules of Court. Paragraph 1 referred to the offer of $10,000 as an *ex-gratia* lump sum; it was preceded by an opening paragraph couched in confusing and unnecessary verbiage which included qualifying the defendant's offer as "without any admission of liability". Paragraph 3 was no less confusing. There was no explicit deadline that the defendant's offer was open for acceptance for 14 days from the date of its receipt. Instead, the plaintiff was told that if its acceptance was served by 5 May 2006 (which was 14 days from the date of the offer of 27 April 2006), each party would bear its own costs of the suit. However, should the plaintiff accept the offer after 5 March 2006, then under paragraph 4 of the offer, the plaintiff would have to pay the defendant taxed costs on a standard basis from 27 April 2006 to the date of service of the plaintiff's acceptance, purportedly in accordance with O22A; neither the rule(s) nor sub-rules were identified.

119 The defendant's offer to settle quite simply did not comply with O22A. An offer to settle cannot be qualified as a non-admission of liability nor can it be an *ex-gratia* offer. It has to be made to settle the proceedings in a suit or a claim or counterclaim as the case may be. Moreover, paragraph 4 of the defendant's offer appeared to be in conflict with O22A r 9(3).

120 As our Court of Appeal in all the three cases cited by counsel (including *The Endurance*) relied on the Canadian case of *Data General (Canada) Ltd v Molnar Systems Group Inc* (1991) 85 DLR (4^{th}) 392 ("*Data General*"), I turn now to that case. The second action in the case was a claim by the Canadian Imperial Bank of Commerce ("the Bank") against the town of Lindsay ("the town").

121 In *Data General*, the Ontario Court of Appeal dealt with the application of the Rules of Civil Procedure O Reg. 560/84 in particular rule 49.10(1). Rule 49.10(1) states:

> Where an offer to settle,
>
> (a) is made by a plaintiff at least seven days before the commencement of the hearing;
>
> (b) is not withdrawn and does not expire before the commencement of the hearing; and
>
> (c) is not accepted by the defendant,
>
> and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to party and party costs to the date the offer to settle was served and solicitor and client costs from that date, unless the court orders otherwise.

122 I shall next set out the facts of the case. The first defendant entered into a contract to supply computer equipment and software to the town; the plaintiff was the supplier of the equipment. When the first defendant exceeded its line of credit with the plaintiff, the plaintiff entered into an agreement with the town under the terms of which the town agreed to pay the balance owing to the plaintiff of $103,412 plus prejudgment interest. The purpose of the agreement was to enable the equipment and software to be delivered to the town. The town was held liable to the Bank in the second action as a result of an assignment of book debts by the first defendant to the Bank. The town admitted liability for the full price of the equipment and the software but took the position that it should not have to pay the sum twice over. Soon after the plaintiff commenced its action, it served an offer to settle on the town; the offer was to settle the action for the full amount of the plaintiff's claim plus prejudgment interest.

123 At first instance, the plaintiff obtained judgment for the full amount awarded. However, because the offer to settle was for the full sum, it was found not to amount to a compromise offer and therefore party-to-party costs instead of solicitor-to-client costs were awarded from the date the offer to settle was served. The town appealed and the plaintiff cross-appealed on the issue of costs.

124 In dismissing the plaintiff's cross-appeal, Morden A.C.J.O held:

> Settlement does not necessarily require a compromise. It brings a dispute to an end by an arrangement of the parties as opposed to a judgment of a court on the merits. The purpose of Rule 49 of the Rules of Civil Procedure is to encourage the termination of litigation by agreement of parties – more speedily and less expensively than by judgment of the court. In the case of a liquidated claim, there is no reason why the plaintiff's offer to settle must be something less than the full amount of the claim.
>
> The defendant town admitted liability but maintained that it should not have to pay the same amount twice. The issue raised was complex and difficult, therefore reasonably giving rise to uncertainty as to the outcome. As a result, the fact that the plaintiff's offer to settle included no element of compromise justified a departure from the general rule that solicitor-and-client costs were to be awarded from the time the offer to settle was served.

Applying the principles in *Data General* to this case, it was obvious that the defendant should not be entitled to indemnity costs after 27 April 2006.

125 I also rejected the request that the defendant be awarded a certificate for three (not two)

counsel. The Court of Appeal in *Singapore Airlines Ltd v Fujitsu Microelectronics (Malaysia) Sdn Bhd No. 2* had similarly rejected the appellant's request for a certificate for two counsel. In that regard Chao JA said:

> 16 We do not think the nature and circumstances of the case warrant the issue of a certificate for two counsel for the appeal. The central issues in the appeal related to the construction of the relevant provisions of the amended Convention and the application of the appropriate construction of those provisions to the facts. In this regard, we concur with the views of Barwick CJ in *Stanley v Phillips* (1966) 115 CLR 470 where he said:
>
> > The question is whether the services of more than one counsel are reasonably necessary for the adequate presentation of the case.

126 Applying the same test here, one counsel would have been more than sufficient for the defendant's case. There was only one issue in this case – was the plaintiff the effective cause of the sale of the defendant's property? The defendant was even more undeserving of a certificate for two let alone three counsel than the appellant in *Singapore Airlines Ltd v Fujitsu Microelectronics (Malaysia) Sdn Bhd No. 2*.

127 Finally, there was no justification to award the defendant indemnity costs on its Notice to Admit facts merely because the plaintiff adopted an unreasonable stand (so the defendant alleged) in not admitting to the facts therein contained before the trial. The defendant would be adequately compensated for its time and trouble in proving those facts by costs on a standard basis, with the quantum thereof being determined by the Registrar at taxation.

[note: 1] DW5.

[note: 2] DW2.

[note: 3] PW2.

[note: 4] DW1.

[note: 5] PW3.

[note: 6] At AB 310.

[note: 7] PW1.

[note: 8] N/E at 338 (13 September 2006).

[note: 9] CW1

[note: 10] N/E at 43 (11 September 2006).

[note: 11] N/E at 21 - 23 (11 September 2006).

[note: 12] Defendant's Closing Submissions at para 178(d).

[note: 13] N/E at 149 (12 September 2006).

[note: 14] Defendant's Closing Submissions at para 1.

[note: 15] Plaintiff's Closing Submissions at para 38.

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