Swiss Butchery Pte Ltd *v* Huber Ernst and others and another suit [2013] SGHC 151

Case Number	: Suit No 222 of 2008 consolidated with Suit No 245 of 2008 (Registrar's Appeal No 428 of 2012 and No 433 of 2012)
Decision Date	: 13 August 2013
Tribunal/Court	: High Court
Coram	: Woo Bih Li J
Counsel Name(s)	: Hee Theng Fong and Clare Lin Ying (RHTLaw Taylor Wessing LLP) for the plaintiff; Johnny Cheo (Cheo Yeoh & Associates) for the defendants.
Parties	: Swiss Butchery Pte Ltd — Huber Ernst and others

DAMAGES – assessment – compensation and damages – breach and post-breach losses – continuing effect of tortious conduct post-breach

Tort – business opportunity – actual loss of profit or loss of chance to profit

13 August 2013

Woo Bih Li J:

1 This matter concerns two appeals (the "Appeal") – Registrar's Appeal No 433 of 2012 ("RA 433") by the plaintiff and Registrar's Appeal No 428 of 2012 ("RA 428") by the defendants against an Assistant Registrar's (the "AR") decision on the assessment of damages for Suit No 245 of 2008 ("Suit 245") which was consolidated with Suit No 222 of 2008 ("Suit 222").

Background

2 I will now set out a summary of the facts and judgment on liability that I gave for Suit 245. The plaintiff Swiss Butchery Pte Ltd ("SB") was in the business of retail and wholesale butchery and production operations at 30 and 32 Greenwood Avenue ("Greenwood Avenue"). In Suit 245, SB and two of its directors, Wong Chow Kim ("Alex") and Foo Chee Tan ("Don Foo"), claimed against the first defendant, Huber Ernst ("Ernst"), and second defendant, Huber Ryan Ernst ("Ryan"), for breach of their duties as a director and an executive of SB respectively, and for the tort of conspiracy. Further, SB claimed against the other four defendants, Huber Andre Rudolf ("Andre"), Huber's Butchery ("HB"), Huber's Pte Ltd ("HPL") and Thomas Norbert Kreissl ("Thomas") for, *inter alia*, conspiracy and dishonest assistance. In Suit 222, Ernst claimed against the other shareholders of SB for relief under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") for oppression against him as a minority shareholder. By an Order of Court dated 7 July 2008, both suits were consolidated and the trial of Suit 245 proceeded before Suit 222.

3 SB made numerous allegations in Suit 245 which centred around SB's allegation that Ernst diverted SB's wholesale and production operations to HPL for the benefit of Ernst and his two children, Ryan and Andre.

4 In my judgment, I concluded that based on my findings of fact, both Ernst and Ryan had breached their fiduciary duties owed to SB and had also engaged in a conspiracy to injure SB. After the rejection by Alex and Don Foo of Ernst's bid to obtain a majority shareholding in SB for his family

in June and July 2005, Ernst and Ryan, and eventually, Andre, embarked on a series of steps, *inter alia*, to injure SB:

(a) Ryan incorporated HPL in September 2005 with a paid-up capital of $100,000, and Andre joined HPL in March 2006;

(b) Ernst, Ryan and Andre viewed properties for a factory outlet from January to March 2006;

(c) HPL's paid-up capital increased to $400,000 in March 2006, with 200,000 shares to Ryan and Andre each to make HPL fully operational;

(d) HPL purchased a property at 161 Pandan Loop in July 2006 as a food factory;

(e) Ernst, Ryan and Andre took active steps from September 2006 [note: 1] to mislead employees of SB and third parties who had dealings with SB to think that SB was related to HPL in order to facilitate the divestment of some of SB's operations to HPL and to facilitate the start-up of HPL's own operations;

(f) Ernst misled NTUC FairPrice Co-operative Limited ("NTUC FairPrice") representatives to believe that HPL and SB were related to each other and began discussions on behalf of HPL in October 2006 to set up a butchery counter at NTUC FairPrice Finest's Bukit Timah Plaza ("BTP") outlet thereby usurping SB's business opportunity to operate the BTP outlet;

(g) HB, a sole proprietorship wholly owned by HPL registered on 30 May 2007, is and was at all material times in the business of retail of sale of meat, and operated the BTP outlet; and

(h) Ernst wrongfully divested SB's wholesale and production operations to HPL in March 2007 by ceasing SB's wholesale and production operations which were then taken over by HPL.

5 I granted judgment against the first to fifth defendants in Suit 245 for damages to be assessed or an account for profits, with interest and costs of the assessment or accounting to be determined by the Registrar. I dismissed SB's claim against Thomas. SB eventually elected to have damages assessed before the Registrar. As Thomas is no longer in the picture for the assessment of damages, I will refer to the first to the fifth defendants collectively as "the defendants".

6 The AR awarded damages of the following amounts to SB under the following heads of claim:

(a) Diversion of SB's wholesale business to HPL ("Issue 1"): $1,907,590. This was based on various components which I shall elaborate on later.

(b) Diversion of SB's production operations to HPL ("Issue 2"): $151,817.

(c) Usurpation of business opportunity to operate six NTUC Fairprice Finest retail outlets ("Issue 3"): $826,835.60.

(d) Sale of SB's lorry to HPL ("Issue 4"): $13,000.

7 Each side filed an appeal against that assessment. After hearing counsel and accounting experts, I decided as follows on 9 May 2013:

1. Damages from the diversion of wholesale business

1.1(a)	Time period of claim for loss of customers. There is no distinction between existing and new customers as new customers would have become existing ones in the next year.	15 months (April 2007 to June 2008)
(b)	Compounded Annual Growth Rate	18.15%
(c)	Attrition rate	20%
(d)	Base Revenue (FY 2006)	$1,813,848
(e)	Gross Profit Margin ("GPM")	34.53%
(f)	Discount rate	13.52%
(g)	Costs to be deducted: (i) Delivery charges	 3%
	(ii) Staff costs and increments	To deduct Mike Tan's salary + employer's CPF contribution + 3 months' bonus + 3% increment
	(iii) Packaging costs	$12,000 per annum
	(iv) Utilities	0.2%
	(v) Rental	No deduction
1.2	The experts are to compute and agree on the quantum of damages based on the components stated at 1.1 above. If they fail to agree, the quantum will be fixed by the court.	

2. Damages from the diversion of production operations

   This is assessed at $151,817. However, if Mr Chee agrees that this quantum should be reduced because the GPM for wholesale business has been determined by the court to be 34.53%, then the quantum of damages under this head will be reduced to the reduced amount as computed by him.

3. Damages arising from the usurpation of business opportunity (NTUC Finest outlets)

   This is assessed as Nil. [Later varied to $1,000 as nominal damages].

4. Damages from the sale of a lorry from [SB] to [HPL]

   This is assessed at $13,000.

5. Parties are to revert as soon as possible with the computation of the experts as stated above and provide the overall quantum which is to be confirmed by the court.

6. Liberty to apply.

7. For the avoidance of doubt, the time to file any appeal from my decision will begin to run only when the overall quantum is confirmed by the court.

8. I will hear the parties on interest and costs.

8 Unfortunately, the parties still could not agree on what the quantum of damages should be for Issue 1 even though I had decided on the components. It appeared from the correspondence between the solicitors of the parties that the reason for the disagreement was that SB was attempting to persuade me to vary my decision under the guise of implementing my decision. Consequently, counsel had to attend before me again on 1 July 2013 (also with experts) for the computation for Issue 1 to be resolved. At that hearing, counsel for SB, Mr Hee Theng Fong ("Mr Hee"), finally accepted the defendants' position that based on my earlier decision on 9 May 2013, the quantum for Issue 1 should be $509,922. However, he still sought to persuade me to vary my decision on the components in which case the quantum would be $603,145. It was a pity that Mr Hee had conflated his duty to implement my decision with his desire to persuade me to vary my decision. Had he not done so, it would not have been necessary for counsel to attend before me on 1 July 2013. In any event, I decided not to vary my decision on the components for Issue 1. Hence the quantum for Issue 1 should be $509,922.

9 By 1 July 2013, parties had agreed that the quantum for Issue 2 should be $135,682.

10 Accordingly, I confirmed the quantum to be:

(a)	Issue 1	$509,922
(b)	Issue 2	$135,682
(c)	Issue 3	(Nil)
(d)	Issue 4 (which had already been decided on 9/5/2013)	$ 13,000
Total:		$658,604

11 I also delivered my oral judgment on costs and interest on 1 July 2013. However, on 26 July 2013, I varied my decision on Issue 3 to $1,000, making the total $659,604 instead because I was of the view that SB should be granted nominal damages of $1,000 instead of nothing for Issue 3.

12 SB has filed an appeal against my decision in respect of Issues 1 and 3. I set out my reasons for my substantive decision below.

Issues on Appeal before me

13 SB had appealed against the damages awarded for Issue 3, while the defendants had appealed against the damages awarded under all the heads. Before I deal with each head of claim, I will set out the law on assessing damages for tort.

Assessment of damages for Torts

14 The tort of conspiracy is part of a broader category of economic torts. It is an intentional tort in respect of economic interests. In tort, the purpose of damages is to put the claimant back into the position in which he would have been, if the tort had not been committed. It is a compensation for loss and was first stated by Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 ("*Livingstone*"). This is trite law as seen in *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009)

("*McGregor on Damages*") at 1-023, and was reiterated in the Court of Appeal decision of *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909; [2008] SGCA 17 ("*Wishing Star*") at [28]. On the other hand, damages for breach of contract, are to put the claimant in the same position he would have been if the contract had been performed, see *McGregor on Damages* at 1-023.

Issue 1: Diversion of SB's wholesale business to HPL

15 SB's expert was Mr Chee Yoh Chuang ("Mr Chee") and the expert for the defendants was Mr Kon Yin Tong ("Mr Kon"). Mr Chee and Mr Kon applied a multiplicand to a multiplier and arrived at their respective opinions on the quantum of damages for Issue 1. The multiplicand was itself derived from various components. The multiplier was described as the time period of the claim for damages. Mr Chee also divided his calculation between existing and new wholesale customers whereas Mr Kon did not. It is helpful to set out the components and the respective figures of Mr Chee and Mr Kon as set out in p 20 of the submission of Mr Hee for RA 428 of 2012:

	Key Assumption Used	**Plaintiff**	**Defendant**
(a)	Time period of claim for ex-customers	5 years (April 2007 – March 2012)	1 year 3 months (April 2007 – June 2008)
(b)	Time period of claim for new customers	5 years (limited to those new customers for the period from April to December 2007)	-
(c)	Revenue growth rate of existing customers (CAGR)	21.38%	18.15%
(d)	Revenue growth rate of new customers (CAGR)	6.20%	- (did not take into account new customers)
(e)	Attrition Rate	20%	20%
(f)	Base Revenue (FY 06)	1,813,848	1,812,109
(g)	Gross Profit Margin (COGS)	36.06%	33%
(h)	Discount Rate	14.38%	12.65%
(i)	Costs to be deducted	Only delivery charges	(i) Delivery charges (ii) labour (iii) Annual salary increments (iv) Utilities (v) Packaging costs (vi) Rental for storage
	(i) Delivery charges	3%	4.4%
	(ii) Staff cost	-	151,200
	(iii) Salary increments	-	4.0%
	(iv) Packaging costs	-	12,000

	(v) Utilities	-	0.4%
(vi) Rental		-	33,000
Total Claim Value		**$1,907,590**	**$232,000**

16 The AR preferred the evidence of Mr Chee to the evidence of Mr Kon on the components of the multiplicand and on the multiplier. However, I preferred the evidence of Mr Kon for most of the components of the multiplicand and on the multiplier. I will elaborate first on the components making up the multiplicand and then address the multiplier.

Multiplicand

17 As regards the Compounded Annual Growth Rate ("CAGR"), Mr Chee had distinguished between existing customers and new customers. Using that approach and SB's wholesale revenue from FY 2000 to FY 2006, he derived a CAGR of 21.38% for existing customers and 6.2% for new customers. Mr Kon however was of the view that all the customers of one year became existing customers of the next year. Under Mr Kon's approach, there was no reason to distinguish between existing and new wholesale customers to determine SB's CAGR. Therefore, he used SB's wholesale revenue figure from FY1999 (and not just from FY 2000 as Mr Chee did) to FY 2006. SB's wholesale revenue for FY 1999 was $581,788 which was much lower than the one for, say, FY 2006 which was $2,065,543. Including that FY 1999 figure would reduce the CAGR and excluding it would increase the CAGR. That was how Mr Chee and Mr Kon arrived at different CAGR figures.

18 I was of the view that Mr Kon's approach was correct. The new customers in one year would become the existing customers in the following year. Since the wholesale revenue figure for FY 1999 was available, it ought to have been used. As such, I also decided that there was no separate CAGR for new customers.

19 On the attrition rate of wholesale customers even if there was no breach by the Hubers, both experts agreed on the rate of 20%.

20 As for the base revenue for FY 2006, Mr Kon was prepared to accept Mr Chee's figure of $1,813,848 (which was slightly more than his own figure of $1,812,109). Accordingly, I adopted Mr Chee's figure but I should reiterate that this figure excluded new customers.

21 As regards the Gross Profit Margin ("GPM"), Mr Chee and Mr Kon agreed that it would be sensible to adopt the average of their figures. The average between their figures of 36.06% and 33% was 34.53%. However, Ms Clare Lin ("Ms Lin"), co-counsel for SB, pointed out that in an earlier report of Mr Kon's, he had derived a figure of 34% instead of 33% for the GPM. She was suggesting that I should use 36.06% and 34% (instead of 33%) to determine the average. Mr Kon said that his earlier figure of 34% was when he lacked some information. As the experts thought the average of 36.06% and 33% was a sensible approach and in the light of Mr Kon's explanation as to why he had used a slightly higher figure initially, I decided to adopt the average between their latest figures which worked out to 34.53%.

22 The next component was the discount rate to be applied. This was the discount to be given to the defendants because the damages were being crystallised at one go and SB would be paid the damages immediately instead of having the payment stretched over a number of years. Again, the experts thought that it would be sensible to take the average of their figures since neither could

clearly establish that his figure was more accurate. Mr Chee's discount rate was 14.38% and Mr Kon's was 12.65%. The average was 13.52% which I adopted.

23 The last component of the multiplicand comprised various costs to be deducted. These costs were costs which had not been taken into account to determine the GPM. There were various sub-components and I will deal with them below.

24 The first sub-component was the delivery charges. Mr Chee arrived at a figure of 3% of revenue. He used figures from FY 1999 to FY 2006. Mr Kon arrived at a figure of 4.4% of revenue. He used figures from FY 2007 and FY 2008. He was of the view that these were current figures as at the time of the breach. On the other hand, Mr Chee thought that these figures should not be used as the breach occurred in the first half of FY 2007 which extended to January of FY 2008.

25 I was of the view that figures from FY 2007 should not have been used for the reason stated by Mr Chee. Perhaps a better approach would have been to use the figures in FY 2006 and FY 2008. As neither expert had confined his calculation to those figures, I adopted Mr Chee's figure of 3% for delivery charges as the more accurate one of the two.

26 The second and third sub-components were staff costs and salary increment. Mr Kon was of the view that SB had saved staff costs because of the diversion of the wholesale business and the production operations. He arrived at a figure of $151,200. Mr Chee initially did not think that there was any saving of staff costs. However, SB was eventually prepared to agree that it saved on the cost of one staff by the name of Mike Tan. While SB was prepared to agree on only one month's bonus for Mike Tan since that was a discretionary item, Mr Kon used three months' bonus on the basis that it was the bonus which SB had paid out to staff generally in 2007 or 2008. Mr Kon also added an annual wage supplement ("AWS") and a 4% increment. SB was not able to say whether there was AWS and an increment.

27 I was of the view that the quantum of bonus and AWS and increment should be based on what had been paid to other staff of SB at the end of 2007 and at the beginning of 2008. Since Mr Kon had proceeded on that basis (except for his figure of a 4% increment which appeared to be different from a general 3% increment) and in the absence of evidence to show that his figure for bonus was factually incorrect or that there was no AWS or increment generally, I adopted his approach for Mike Tan. Therefore, there was to be a deduction for Mike Tan's salary (for the period which Mr Kon had computed which was not in dispute) plus three months' bonus, AWS and a 3% increment.

28 As regards the cost of some other staff which Mr Kon had included, he did so on the basis that in view of the diversion of the wholesale business and the production operations, SB could and should have released some staff. Alternatively, the retail profit of SB would have been increased by the additional staff.

29 I took into account the fact that Ernst was managing SB's operations, including retail, at the time of the breach. He did not release any staff when he diverted the wholesale business and the production operations. Accordingly, it did not lie in his mouth to suggest, through Mr Kon, that SB should have released some staff.

30 I was also of the view that there was no evidence that the additional staff led to an increase in retail sales. The additional staff could have just reduced the workload of the others, a point which Mr Kon did not really challenge.

31 In the circumstances, I allowed a deduction only for Mike Tan to the extent stated above.

32 The fourth sub-component was packaging cost which SB eventually agreed to be $12,000 per year.

33 The fifth sub-component was the utilities charge. Mr Kon attributed a saving of 0.4% of revenue as a result of the diversion mentioned above. Mr Chee was of the view that there was no saving for utility charges because power was based on the space used by SB and SB was still using the same space at Greenwood Avenue notwithstanding the diversion. He was of the view that any drop in the cost of utilities was due to a change in electricity tariffs at the material time. However, counsel for the defendants, Mr Johnny Cheo ("Mr Cheo"), countered this by saying that Don Foo had indicated in his affidavit of evidence-in-chief ("AEIC") that utilities cost went up after SB recommenced wholesale business.

34 Bearing in mind the change in electricity tariffs and the fact that SB's utilities cost did go up after SB recommenced wholesale business, I was of the view that there were some savings in utilities cost. In the absence of any further evidence, I adopted the average between Mr Kon's 0.4% and Mr Chee's nil assessment. The average is 0.2%.

35 The sixth sub-component was rental. Mr Kon was of the view that since some space was freed up as a result of the diversion mentioned, this space would have been used for retail business. Mr Chee's view was that the same rent was still being paid. I agreed with Mr Chee that since the same rent was being paid (for the premises at Greenwood Avenue) there was no saving on rent. Whether there was an increase in retail sales or not was a separate matter. In fact, there was no separate sub-component for any increase in retail sales and so I did not consider that allegation any further.

Multiplier

36 I come now to the multiplier. The experts agreed that even though Ernst's employment as managing director and his directorship were terminated in January 2008 and his breaches and conspiracy had ceased then, the effect of his conduct (and those of the other defendants) or the advantage he had obtained did not cease immediately. I will refer to this as the continuing effect. As regards wholesale customers who had been diverted from SB, SB would have to:

(a) identify them;

(b) inform them that Ernst was no longer the managing director and introduce them to the new management team;

(c) inform them that the defendants were not connected with SB; and

(d) try and win back the custom of such diverted wholesale customers.

37 Mr Chee identified wholesale customers who had stopped purchasing from SB between February and April 2007 (the "ex-customers"). He did an analysis of the attrition rate of wholesale customers based on historical data of SB. He concluded that about 42% of the ex-customers accounted for about 50% of the revenue from the ex-customers. This 42% of the ex-customers had been with SB for five to nine years. The other ex-customers started purchasing from SB less than five years before March 2007 so he did not take them into account to determine the multiplier.. Mr Chee concluded that it would not have been unreasonable to assume that the ex-customers would have stayed with SB for at least five years and he therefore used the multiplier of five years to determine SB's damages for the diversion of wholesale business by Ernst. The five years was for the period of April 2007 to March 2012.

38 Mr Chee did also take into account that some wholesale customers did start to place orders with SB within a few months after Ernst's services were terminated.

39 In some instances, the returned customers had increased their orders with SB. Mr Chee deducted SB's sales to returned customers but where the sales exceeded the estimated revenue for a particular returned customer, he did not take into account the excess. His view was that no credit should be given for the excess because that was not due to the defendants in any event. The defendants took the position that they should have been given credit for any excess orders in order to reduce the quantum of damages payable. I did not agree with the defendants on this point. I saw no reason to do so since the excess was not due to any effort on the part of the defendants. On the contrary, the excess would have been due to the efforts of SB.

40 Coming back to the multiplier, Mr Kon was of the view that the multiplier should be 15 months. Like Mr Chee, he used April 2007 as the starting month to calculate the multiplier. As Ernst's services as Managing Director and his directorship were terminated in January 2008 (see [137] of my judgment on liability), Mr Kon considered the nine months from April to December 2007 as the breach period. He then considered what the duration of the post-breach period should be so as to take into account the continuing effect of the breaches. He also took into account the fact that Ernst could legitimately compete with SB after he ceased to be Managing Director and a Director of SB. Using the case of *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150; [2010] SGCA 36 ("*MFM*") as a guide, he was of the view that the post-breach period should be 12 months. As the continuing effect would taper off over the 12 months, he used the average of six months as the post-breach period. The total of the breach and post-breach periods was therefore 9 + 6 months = 15 months.

41 SB disputed the length of the post-breach period. Mr Hee argued that *MFM* was not applicable because that was a case of a breach of contract and not a tort as was the case before me. The principles for assessing damages were different. In a breach of contract case, the damages were to put the plaintiff in the position he would have been if the contract had been complied with by the defaulting party. In a tort case, the damages were to put the plaintiff in the position as though the tort had not been committed.

42 In my view, this difference had no bearing in the case before me. Mr Kon was not applying a principle of assessment which was confined to a breach of contract only. He was dividing the period for assessing damages between the breach period and the post-breach period as was done in *MFM*. The purpose of this division was to take into consideration the point that the effect or the consequence of a tort may not cease immediately, even when the tort had ceased. Such a consideration may apply to both a breach of contract case and a tort case. The fact that it was applied in a breach of contract case like *MFM* did not in itself mean that it could not be applied in a tort case where the circumstances allowed such an application.

43 Mr Hee however referred to [18] of the Court of Appeal ("CA") decision in *MFM*. He submitted that this paragraph suggested that the CA was not in favour of dividing the period of assessment of damages between a breach and a post-breach period even in a breach of contract case.

44 I was of the view that he had misinterpreted the paragraph he was referring to. The CA did not say that the use of a breach period and a post-breach period was inappropriate. They said that these terms were not, strictly speaking, accurate. I set out the paragraph below:

> 18 Before the AR, the Respondent claimed damages for two time periods. The first was the period between August 2005 and January 2007 ("the Breach Period"), *ie*, when the breaches occurred. The second was the period thereafter ("the Post-Breach Period"), *ie*, when the

breaches had ceased but its effects continued to result in losses to the Respondent. However, as noted above, the Slogans and Phrases undertakings were complied with by the first week of November 2005 (*ie*, before January 2007). In the circumstances, therefore, the terms "the Breach Period" and "the Post-Breach Period" are not, strictly speaking, accurate. However, given the way in which the arguments were made as well as for convenience of exposition, we will make reference to these two time periods.

45 Considering the paragraph in context, what the CA meant was that the plaintiff there had not calculated the breach period accurately and therefore each of the duration of the alleged breach period and of the post-breach period was inaccurate. Indeed, notwithstanding the inaccuracy, the CA proceeded to apply the descriptions "breach period" and "post-breach period".

46 Mr Hee also stressed that the appropriate date for assessing damages for the torts before me was as at the date of the breach, *ie*, April 2007. By this, he was saying that no account should be taken of future facts or developments after April 2007. Therefore, the court should not take into account the possibility or likelihood that Ernst may compete with SB in the future or the fact that Ernst did in fact compete and/or assist the other defendants to compete with SB after his services and directorship were terminated. I should point out that it was not entirely accurate for Mr Hee to say that the date of the breach was April 2007 only. The misconduct was continuing until the date of termination.

47 In any event, I was of the view that Mr Hee had misapplied the "date of breach" rule. Ultimately, what the court must do is to give effect to the overriding principle of compensation, which is to put the party who had suffered the tort in the same position as if the tort had not been sustained.

48 Mr Hee appeared to have overlooked the fact that SB itself was not restricting its claim to damages from the date of commencement of the defendants' misconduct to the date of Ernst's termination. SB was claiming future or prospective damages after that termination to take into account the continuing effect of the conduct of the defendants. Having done so, it was not open to Mr Hee to say that no consideration should be given to facts which are likely to occur or have in fact occurred after the date of termination.

49 Mr Hee even submitted that SB would not gain a windfall or be over-compensated by assessing damages as at the date of the breach. By that he meant that there was no such windfall or over-compensation if the court were to ignore the fact that Ernst would and did validly compete with SB after the date of termination. In my view, that submission was wrong and there would be over-compensation to SB.

50 I add that I also rejected Mr Hee's submission that post-breach factors would be relevant only for the question of mitigation.

51 The following examples below will illustrate why I rejected Mr Hee's attempt to persuade the court to disregard the fact that Ernst could and did validly compete with SB after the date of termination.

52 If a plaintiff in an accident was claiming for the loss of use of his right hand for the rest of his life, but it transpires during the assessment of damages stage that he had fully recovered the use of his right hand, surely the parties and the court must take into account the fact of the complete recovery of his hand in assessing damages to be awarded to him. Likewise, if a plaintiff claims the total loss of custom of identifiable customers for several years in the future as a result of a

defendant's tort, then if all of such customers have returned to the plaintiff within three months of cessation of the tort, it would be a material fact which must be taken into account during the assessment of damages. Indeed that is what SB's own expert did as Mr Chee did take into account the fact that some wholesale customers had returned to SB.

53 What Mr Chee omitted to do was to take into account the fact that Ernst was not bound by any restraint of trade provision and could and did legitimately compete with SB after the date of termination. The AR had also omitted to take this into account when she adopted Mr Chee's multiplier of five years.

54 To Mr Chee's credit, he accepted his omission candidly in the hearing before me. He even said that the attrition rate would then be more than 20% but he did not say specifically whether the multiplier should remain as five years or be less. It will be recalled that Mr Kon used a multiplier of six months for the post-breach period. He also stuck to an attrition rate of 20% in determining the multiplicand. That was the rate both experts had used. I did not change it. In my view, the fact that Ernst could and did validly compete with SB should be taken into account when assessing the multiplier.

55 In my view, SB's wholesale customers formed a small pool of identifiable customers unlike the general public in *MFM*. It would not take long for the new management of SB to take the steps mentioned above at [36]. Indeed, as stated above, some of the wholesale customers returned to SB within a few months. Also, the continuing effect of the breaches would not be consistently strong throughout the post-breach period. It would trail off and that is why Mr Kon applied six months, being the average between one and 12 months for the post-breach period.

56 On the other hand, I also took into account the fact that this was not a case where Ernst had only solicited SB's wholesale customers, before he left SB, to give the defendants business after he left SB. He had in fact already diverted the wholesale business even before he left SB. Therefore, the defendants had an additional advantage because after SB learned of his misconduct, it would have had to win back customers who had already begun to be accustomed to dealing with the Hubers.

57 I would have adopted a multiplier of three months for the post-breach period if the defendants did not have the additional advantage mentioned above. In the light of that advantage, I was of the view that a six-month post-breach period was fair. Therefore, I adopted a total multiplier of 15 months (being nine and six months for the breach and post-breach periods respectively) as used by Mr Kon.

58 As mentioned above, I granted $509,922 as damages for Issue 1.

Issue 2: Diversion of SB's production operations to HPL

59 In March 2007, SB ceased its wholesale and production operations which were taken over by HPL. [note: 2] On 21 March 2007, Ernst caused SB to sell its MADO Mincer to HPL on the grounds that it was of no further use to SB after the cessation. [note: 3] In my judgment on liability for Suit 245 at [144], I found that the transfer of the MADO Mincer, amongst other equipment, was a wrongful divestment of SB's production operations. SB claimed for the loss of profit from retail customers arising from the diversion of production operations between March 2007 and February 2008, as SB purchased a replacement mincing machine on 19 February 2008 to restart its production operations sometime in March 2008. [note: 4] SB calculated this by finding the difference in profits earned from the re-sale of sausages and cold-cuts purchased from HPL and profits it could have earned if its

production operations had continued to operate. [note: 5] The AR awarded $151,817 to SB for the diversion. The defendants contested this award.

60 SB claimed that the diversion of production operations caused production of sausages and cold-cuts to cease entirely because it was the only heavy-duty mincing machine that SB used to manufacture sausages and cold-cuts. [note: 6] Therefore, SB had no choice but to purchase from HPL to sell to its retail customers. The defendants alleged that there was no loss caused by the diversion of production operations because they were of the view that SB was in possession of a small table top mincer which was sufficient for SB to operate production operations for its retail business. [note: 7] However, it is not disputed that from March to December 2007, Ernst was still managing the company. He admitted that irrespective of the capacity of the tabletop mincer, SB bought sausages and cold-cuts from HPL. [note: 8] I concluded that Ernst did so because the table top mincer was not sufficient for SB's retail business. Indeed that was why I found at trial on the issue of liability in Suit 245 that SB's production operations had been wrongly diverted to HPL.

61 However, the defendants alleged that even if SB had suffered damages of $151,817, which was the quantum derived by Mr Chee from the diversion of the production facilities, the amount of profits which SB earned from sales of products to HPL should be set-off against the $151,817. According to the defendants, HPL had bought $661,000 worth of wholesale products in 2007. They argued that assuming that SB's GPM was 30%, SB would have made $197,000 from the sale of $661,000 and the $197,000 would be more than enough to be set-off against SB's claim for $151,817.

62 Mr Chee said that this argument was not raised in Mr Kon's report. Ms Lin added that the argument was only raised in closing submissions before the AR. Although Mr Chee said it was raised by Mr Kon in re-examination, Mr Kon himself said that he mentioned it then in the context of the diversion of SB's wholesale business and not in the context of the diversion of SB's production operations.

63 I was of the view that the argument that there should be a set-off of SB's profits from its sales to HPL against SB's damages from the diversion of production operations was not a valid one. I accepted that it was not raised by Mr Kon in his report or in his oral evidence before the AR. Furthermore, since the production facilities had been diverted to HPL, it seemed to me that the purchases from HPL were unconnected to the diverted production facilities. The defendants did not make any such connection clear to me nor did they explain to the court why HPL had to purchase from SB when the production facilities had been diverted to HPL. The fact that Mr Kon did not raise the argument in his report reinforced the point that HPL's purchases were unconnected to the diverted production facilities.

64 Mr Kon also took the view that because wholesale and production operations were diverted, this freed up more space at Greenwood Avenue. The additional space would translate into additional retail sales although he did not say how much more. Mr Chee did not agree that retail sales were increased because more space was freed up. Additionally, Mr Kon said that he did try to work out SB's cost for producing the products which they had to buy from HPL but was not able to do so. Mr Chee disagreed that Mr Kon was not able to work out SB's cost for producing the products it had bought from HPL and suggested that if Mr Kon had really attempted to do so, his figure would not be far from Mr Chee's.

65 As there was no concrete evidence, aside from Mr Kon's surmise, that the space freed up did translate into increased retail sales, and as there was no evidence to establish the quantum of increased retail sales attributable solely to the freed up space, I rejected that argument too.

66 As for the issue whether SB's cost for producing products could be worked out by Mr Kon, I was of the view that it could have been worked out. In my view, Mr Kon did not have a figure for such a cost because he did not really try to calculate that figure: he did not ask for the source documents which Mr Chee relied on, nor did he question Mr Chee's methodology beyond saying that he could not calculate SB's cost of production.

67 In the circumstances, I was of the view that Mr Chee's opinion that SB had suffered damages of $151,817 from the diversion of the production operations was tentatively correct. However, as this figure was likely to have been based on Mr Chee's figure for the GPM component, the overall quantum for Issue 2 might have to be varied if I decided on a different figure for the GPM. As elaborated above at [21], I found the GPM to be 34.53%. As such, the experts agreed that the overall quantum for Issue 2 should be reduced to $135,682 and I concluded accordingly.

Issue 3: Usurpation of business opportunity to operate retail outlets

68 At [171] of my judgment for Suit 245, I found that Ernst had usurped the business opportunity for SB to open a BTP outlet for the benefit of HB, a wholly-owned sole proprietorship of HPL registered in May 2007 for the business of retail sale of meat, and for operating the BTP outlet from August 2007. This opportunity had come to SB while Ernst was still the managing director of SB and the exploitation constituted a breach of Ernst's fiduciary duties and was also a step in the overall conspiracy to injure SB.

69 SB claimed that it would have taken up the opportunity from NTUC Fairprice to operate the BTP outlet had Ernst not usurped the opportunity for HPL and HB in August 2007. Subsequently, between July 2008 to April 2010, NTUC Fairprice offered outlets at five other NTUC FairPrice Finest's locations which SB said would have been offered by NTUC Fairprice to it if SB had been operating the BTP outlet. I will specify the five locations later below. SB's claim was for damages for the initial period to operate and an option to extend for both the BTP outlet and the other five outlets. This head of damages comprised the largest quantum claimed by the plaintiff. Mr Chee initially calculated the damages under this heading to be $4,165,297 but revised it to $3,131,670 upon learning certain facts like a shorter contractual duration available for the other five outlets.

70 As it transpired, HB did not even complete one year at the BTP outlet. HB had given notice to NTUC Fairprice to terminate its agreement with NTUC Fairprice for that outlet in or about April 2008 and its operations ceased at the end of June 2008. A one year term would have expired at the end of July 2008. The BTP outlet and the other five outlets were eventually operated by another party, *ie*, Culina Pte Ltd.

71 The AR's award of $826,835.60 as damages for Issue 3 comprised:

(a) the actual loss of profit arising from the defendants' usurpation of business opportunity to operate the BTP outlet: $448,150; and

(b) the loss of profit arising from the loss of chance to operate five other outlets with NTUC Fairprice:

(i)	Thomson Plaza	$594,617
(ii)	Junction 8	$379,882
(iii)	Marine Parade	$497,093

(iv)	Tampines Century Square	$248,800
(v)	Orchard Triple One Somerset	$238,010

Both SB and the defendants appealed the sum awarded with the defendants arguing that the quantum should be nil.

Actual loss of profit or loss of chance to profit?

72 At this juncture, it is important to bear in mind that SB proceeded under Issue 3 on the basis that it *would* have taken up the BTP outlet opportunity. It also proceeded on the basis that it *would* have operated the other five outlets as well if those five outlets were offered to it. In my finding at the trial on liability, I had concluded that NTUC Fairprice had intended to offer the BTP outlet to SB but was misled by Ernst into thinking that HPL was connected with SB. As mentioned above at [68], I had concluded Ernst had usurped the opportunity to operate at the BTP outlet. However, this did not necessarily mean that SB *would* have taken up that opportunity had Ernst informed the other shareholders of SB about it.

73 It is pertinent to note also that Mr Chee appeared to have assumed that because the opportunity for operating the BTP outlet was intended for SB, SB would have taken up that opportunity. Mr Chee was also instructed to apply a probability of 100% as regards the other five outlets. In other words, he was instructed that SB *would* have operated all six outlets (see paras 7.3.5 and 7.3.8 of Mr Chee's first report). Therefore, Mr Chee did not assess for himself whether SB would indeed have operated all six outlets. He then proceeded to assess whether a profit would have been made for each outlet and the quantum of the profit.

74 When I asked Mr Hee whether this was no more a case of a loss of a chance to operate the BTP outlet and the other outlets, Mr Hee said that he had proceeded on the basis of a loss of a chance although he had attributed the chance of SB operating the six outlets at 100%. I would add that he had also submitted that the other five outlets would have been offered to SB for reasons which I will elaborate on later.

75 Para 35(d) of SB's Statement of Claim (Amendment No 5) claimed: "Damages arising from the loss of business opportunity to conduct retail operations in [the six outlets]." It was not clear to me whether by this pleading, SB was claiming that it would have operated all six outlets or that it had lost the chance to operate the outlets or a combination of these points.

76 Mr Hee's reply submission for RA 428 was more telling, and stated:

> 294. [SB] is claiming for the damages arising from:-
>
> (a) the *actual loss of profit* arising from the Defendant's usurpation of business opportunity to run the [BTP outlet]; and
>
> (b) the *loss of chance* to operate a Deli Counter in the (i) Thomson Plaza Outlet; (ii) Junction 8 Outlet; (iii) Marine Parade Outlet; (iv) Century Square Outlet and (v) TripleOne Outlet.
>
> ...

1. **ACTUAL LOSS OF PROFIT: BUKIT TIMAH OUTLET**

296. Both [SB] and the Defendants agree with the Assistant Registrar that, in order for [SB] to succeed in its claim for loss of profit, [SB] would need to show on a balance of probabilities that:-

(a) [SB] would have taken up the opportunity to operate the Bukit Timah Outlet; and

(b) [SB] would have made profits from operating the Bukit Timah Outlet.

[emphasis added]

77 Therefore, Mr Hee had applied the loss of a chance argument only in respect of the other five outlets. In order for SB to succeed in its claim for the actual loss of profits for the BTP outlet, he had to first establish on a balance of probabilities that SB would have taken up the opportunity to operate the BTP outlet. If he succeeded, he would then have to establish that the BTP outlet would have made a profit and the quantum of the profit.

The BTP Outlet

78 I will first deal with the question whether SB would have taken up the opportunity to operate the BTP outlet.

79 Various arguments were raised for the defendants to establish that SB would not have taken up that opportunity:

(a) Ernst said that when NTUC Fairprice first approached SB in 2001 to operate a meat counter at an NTUC Fairprice outlet, this opportunity was rejected by the other shareholders (see my judgment on liability at [52] and the Notes of Evidence ("NE") 25 July 2012 for assessment at pp 38 and 39;

(b) Mr Kon said that an outlet at BTP would cannibalize business from the premises at Greenwood Avenue because of the close proximity of the BTP outlet to Greenwood Avenue;

(c) Mr Kon also said that NTUC Fairprice Finest did not contain the same "up market" profile which SB had. Operating an outlet at NTUC Fairprice Finest would dilute SB's brand; and

(d) Even though SB ought to have been aware of HB's outlet at BTP which was reported in the Business Times on 18 August 2007, SB did not approach NTUC to open any outlet. It was NTUC itself who approached SB within one month after I had issued my judgment on the issue of liability on 27 April 2010 (as Don Foo himself had said at para 119 of his AEIC of 4 August 2011 on damages although I should mention that discreet inquiries were made a few months earlier in 2010 by SB which I will elaborate on later).

80 On the other hand, Don Foo's AEIC of 4 August 2011 on damages used only one paragraph to explain why SB would have taken up the opportunity:

123. [SB] was, in 2007, and still is intending to expand its presence locally. Operating the Deli Counters in NTUC Fairprice Finest stores would have allowed [SB] to enhance and spread its brand name whilst increasing its market share in the high-end markets. [SB] would definitely have agreed for [SB] to operate the Deli Counters at all six (6) NTUC Fairprice Finest outlets had it

been given the opportunity to do so.

In fact, para 123 was inserted under the heading of why SB would have been granted the contracts to operate the six outlets. It appeared that SB had not paid much attention, if at all any, to give valid reasons to establish that it would have taken up the opportunity to operate the BTP outlet first.

81 In cross-examination, Don Foo said that there would not be total cannibalisation of customers for SB even if it had operated at BTP. Mr Hee sought to reinforce this argument by pointing out that in 2010, SB was operating an outlet with NTUC Fairprice at Coronation Plaza.

82 Don Foo also said in cross-examination and re-examination that it was only in 2009 that SB found a man named Ricky Ng who had worked for NTUC Fairprice for 20 years. SB managed to persuade Ricky Ng to join them in late 2009. Ricky Ng then made discreet inquiries of NTUC Fairprice in early 2010 as a result of which NTUC Fairprice approached SB in 2010 to offer two NTUC Fairprice outlets to SB at Orchard Grand and Coronation Plaza. The offer was made in or about June 2010. [note: 9]

83 Don Foo further explained that SB did not approach NTUC earlier about operating in any of NTUC outlets after Ernst's services were terminated in January 2008 because SB was aware that NTUC Fairprice would favour the incumbent operator, *ie*, HB for other outlets.

84 Mr Hee also gave some reasons in submissions before me. I will not repeat those already mentioned above. He added:

(a) SB had to deal with an immediate issue when Ernst's services were terminated. Any delay in approaching NTUC Fairprice should not be finely judged;

(b) Lack of steps on SB's part to contact NTUC Fairprice should not be equated with an absence of interest in the offer to operate at BTP;

(c) Common sense and logic would indicate that in normal circumstances, when a business opportunity presents itself, the opportunity would be welcome; and

(d) As there were legal proceedings between SB and the defendants, it was difficult for SB to approach NTUC Fairprice.

85 Having considered the evidence and submissions before me, I found that the most important evidence against SB on the question of whether it would have taken up the opportunity to operate the BTP outlet was that it did not take any step to contact NTUC Fairprice soon after the other shareholders had learned that HPL was operating an outlet at NTUC Finest at BTP. This piece of evidence was not mentioned in the AR's judgment.

86 There was initially some suggestion from Mr Hee that the other shareholders learned about HPL's operations at the BTP outlet much later after the Business Times article of 18 August 2007. However, Mr Hee did not pursue this point and he appeared to accept that they had learnt about it on or about 18 August 2007. After all, Mr Hee drew my attention to Don Foo's AEIC for the trial on liability where Don Foo said, at para 232, that Alex and he found out about that outlet when they read the Business Times article. There was no suggestion then that they read the article much later after it was published.

87 Mr Hee however attempted to suggest that the other shareholders did not realise that NTUC

Fairprice had approached Ernst (again) in 2007 to offer the BTP outlet to SB. I was of the view that even though the other shareholders did not know all the details, they must have realised that Ernst had a role to play as it was unlikely that NTUC Fairprice would have allowed Ryan and Andre, who were relative newcomers, to operate the BTP outlet without Ernst's support. In any event, the point was that the other shareholders did not try to find out more from NTUC Fairprice, after they read the Business Times article.

88 Furthermore, the decision by the shareholders of SB, other than Ernst, to terminate Ernst's services and directorship in January 2008 was not a sudden one. They had already planned for it after being dissatisfied with him (see my judgment on liability at [137]-[138]). If they were truly interested in operating the BTP outlet or any other outlet under the NTUC banner, whether under the upmarket brand of NTUC Fairprice Finest or the less upmarket brand of NTUC Fairprice, they would have gone to NTUC Fairprice to register their interest in doing so. At the very least they would have introduced the new management to NTUC Fairprice and inform them that Ernst was no longer connected with SB. Apparently they did not even do this as NTUC Fairprice indicated in an affidavit that was executed for the assessment of damages hearing that they were not aware that Ernst and SB had gone separate ways until after I had issued my judgment on liability.

89 Yet, apparently, the new management promptly approached the wholesale customers after terminating Ernst's services, as they managed to win back some customers as stated above for Issue 1.

90 The fact that the new shareholders did not approach NTUC Fairprice soon after the Business Times article was published or soon after they terminated Ernst's services strongly suggested that they were not interested at that time to operate an outlet at any supermarket of NTUC Fairprice.

91 In these circumstances, the bare allegation that SB wanted to expand then did not help SB. The bare allegation that a business would welcome a business opportunity also did not help SB.

92 Mr Hee's argument that SB had to deal with an immediate crisis and so it delayed approaching NTUC Fairprice was not a piece of evidence raised by Don Foo in his AEIC or in oral evidence. Furthermore, neither Mr Hee nor Mr Don Foo said how long it would take to deal with the immediate crisis before they approached NTUC Fairprice. By February or March 2008, SB had already bought another mixer to replace the one which Ernst had diverted. By March or April 2008, they were receiving orders from wholesale customers. In my view, they would have at least introduced the new management to NTUC Fairprice by April 2008 if they were as interested in the supermarket outlet route as they wanted the court to believe.

93 As for Mr Hee's argument that because of legal proceedings between SB and the defendants, it was difficult for SB to approach NTUC Fairprice, this was again not raised by Don Foo as a reason. Furthermore, there was no logic in Mr Hee's argument. Why was it difficult for SB to approach NTUC Fairprice because of the legal proceedings? SB was the substantive plaintiff and SB was the one who believed Ernst was guilty of misconduct. If the legal proceedings did not deter SB from approaching wholesale customers, why should the proceedings deter SB from approaching NTUC Fairprice? It is one thing for NTUC Fairprice to hold off any approach to SB during the legal proceedings while they awaited the outcome, as NTUC Fairprice suggested they did, but another to argue that SB had to wait. Whether NTUC Fairprice would have responded favourably to an approach from the new management would then have been a separate question.

94 I was of the view that SB itself was not, at the material time, keen to operate at a supermarket. They had no such experience then. For all the allegations about how SB would have

made a profit if it had operated at BTP, the truth of the matter was that the other shareholders would not have been prepared to take the risk then. On this point, Don Foo's oral evidence that they sourced for the right man and eventually in 2009 found Ricky Ng, who had worked for NTUC Fairprice for 20 years, was telling. It supported the point that SB was not prepared to operate an outlet at a supermarket before 2009. In my view, that was why the new management did not approach NTUC Fairprice before 2009.

95 I also considered whether SB might have started to source for the right man in 2007 if Ernst had disclosed the opportunity then but there was no evidence that SB would have done so. Indeed there was no concrete evidence as to when SB began to source for the right man.

96 Additionally, I asked counsel whether either side had represented to the valuer, who was valuing Ernst's shares for purchase by the other shareholders, that the valuer should take into account SB's business opportunity in respect of outlets at supermarkets. I was informed that neither Ernst nor the other shareholders did. Yet, when it suited the other shareholders who were controlling SB, SB was claiming damages in respect of this business opportunity. The omission to make the representation to the valuer reinforced my view that SB would not have taken up the opportunity to operate the BTP outlet even if the opportunity had been made known to the other shareholders in 2007.

97 In the circumstances, I concluded that SB failed to establish on a balance of probabilities that it would have taken up the opportunity to operate the outlet at BTP.

98 In view of this, it was unnecessary for me to decide whether SB would have made a profit at the BTP outlet and the quantum of that profit. Notably, HB was about break-even from its operations at the BTP outlet. Also, it is not disputed that HB gave up the BTP outlet after less than one year.

99 As regards the other five outlets, SB's premise was that if it had operated the BTP outlet, it would have been offered the opportunity to operate the other five outlets as the incumbent. SB's premise was also that it would have made a decent profit at the BTP outlet and, having done so, it would have accepted the offer to operate those five outlets. As discussed above, SB's claim in respect of the five outlets was based on a loss of a chance. As determining whether SB would have taken up the opportunity to operate the BTP outlet was a threshold question, and as I have concluded that SB failed to establish that it would have, it was not necessary for me to decide:

(a) whether SB lost the chance to operate the five outlets and to make a profit;

(b) what the quantification of the loss of chance should be; and

(c) what the profit would be.

100 I decided initially that SB was not entitled to any damages for Issue 3. However, subsequently, I was of the view that SB should be granted nominal damages which I fixed at $1,000.

Issue 4: Sale of SB's lorry to HPL

101 SB had purchased a lorry, inclusive of a refrigerator unit installed at the back of it, in 2004 for $60,000. [note: 10] The lorry was sold together with the refrigerator unit to HPL at a price of $25,000 in 2007. SB claimed that the lorry was sold to HPL at an undervalue and on unduly favourable credit terms. [note: 11] I found in my judgment on the liability issue at [148] that the sale of the lorry to HPL was unjustified as it was part of the plan for the divestment of SB's operations to HPL. SB claimed a

loss of $14,000 arising from the sale of the lorry at an undervalue to HPL.

102 In my judgment on the liability issue, I also found that the defendants' expert assessment of the lorry to be unjustifiable for the reasons stated in [147]. The AR, having regard to this, accepted SB's expert assessment of the value of the lorry and assessed the undervalue as $13,000. [note: 12] The defendants contested the amount while SB did not contest the AR's award of $13,000.

103 The defendants asserted that the lorry was involved in a major accident. However as the AR correctly found, no evidence was adduced at the assessment hearing to substantiate this allegation, [note: 13] and this remained a bare assertion.

104 The defendants also alleged that SB's expert assessment was inaccurate because he had referred only to one advertisement of a sale of a 2005 Tipper Daihatsu lorry at $45,800 to arrive at his valuation, and the Daihatsu lorry in this suit was very different.

105 During the cross-examination, the expert said that he had over ten years of experience in valuing lorries with refrigerator units. [note: 14] Furthermore, the lorry in the advertisement was of a same make and model as the one before me today, with only a one year difference in the age of the vehicle. [note: 15] It was also stated in his affidavit and during cross-examination that he had checked with two other dealers for a quote before he quoted the price to SB. [note: 16]

106 No expert evidence was given for the defendants at the assessment hearing.

107 In the circumstances, I rejected the defendants' arguments under this head. I therefore agreed with the AR's finding that the damages to be awarded for the loss arising from the sale of lorry to HPL to be $13,000.

Other observations

108 When Mr Hee realised that I might not allow a multiplier of five years on Issue 1, he requested that the valuer of Ernst's shares in SB be required to state his general steps in valuing the shares. Mr Hee was concerned that the valuer might have taken into account the potential of SB's business for the next five years or more. He thought that this would be unfair to the other shareholders who were purchasing Ernst's shares if SB was, on the other hand, awarded a multiplier of less than five years for its damages.

109 I disallowed Mr Hee's request. Firstly, the valuation of Ernst's shares was a different exercise from the assessment of damages. Secondly, the valuation was on a non-speaking basis and was meant to be final. Mr Hee was attempting to go behind that basis when it suited SB's other shareholders' interest to do so. Both sides had taken the risk of a non-speaking and final valuation. When Mr Hee was submitting for a multiplier of five years for the assessment of damages before the AR, it did not concern him that the valuer might have taken a shorter period when valuing Ernst's shares.

110 In the absence of agreement by Ernst, I did not allow Mr Hee's request. Even if Ernst had agreed, the valuer's consent should be obtained too because he was engaged on the basis that his valuation would be on a non-speaking basis.

111 I should however mention that the parties agreed that the valuer be asked to address a more limited point. In the course of the hearing of the appeal on assessment of damages, a question arose

as to whether Ernst, being a one-third shareholder of SB at the time of the breaches, should be entitled to one-third of the damages granted to SB since he would be selling his shares subsequent to the date the breaches occurred. There was a concern that he might be short-changed if he was not granted one-third of the damages or that he might get a windfall if he was granted one-third of the damages. The valuer agreed to assist on the point and explained that he valued Ernst's shares on the basis that no damage had been caused to SB as he knew that damages would be assessed separately and he was in no position to say what the quantum of damages would be. Accordingly, it became clear that Ernst would not be entitled to one-third of the damages granted and I stated so after I delivered my oral judgment on 9 May 2013.

112 In the light of this experience, it may be that in the future, parties and their solicitors should consider whether the same person should be appointed as the valuer of shares and as the assessor of damages, where both these exercises would be undertaken, to avoid any concern that there may be some discrepancy in the approaches. It may also be that a multi-disciplinary approach be taken so that a professional from more than one discipline be appointed to form a team to conduct the valuation and the assessment. Other terms will also have to be worked out, for example, whether the valuation and the assessment are final and binding or not.

113 I would also like to mention that although I urged the parties to try and resolve as many of the issues or sub-issues as possible, they could only agree on one minor point, *ie*, that the packaging costs which SB had saved was $12,000 per annum (see [32] above). Yet, when the experts appeared before me, they were prepared to agree that the average of their calculations for the GPM and the discount rate (see [21]-[22] above) should be adopted. The willingness of the experts to do so saved time although I stress that it is not in every issue that one can or should simply take the average of the calculations. It was a pity that the parties could not reach a similar conclusion before the experts appeared before me.

114 I should also mention that the experts had already appeared as witnesses before the AR. However, at the appeal before me, it became apparent that their further assistance was necessary. Hence, with the agreement of counsel, they both appeared before me to render their assistance. This was done in the form of a hot tubbing exercise where each expert gave his reasons to support his conclusions and challenge the opposing expert's conclusions, and the opposing expert had the opportunity to respond immediately. This was done with the court and counsel asking questions on the reasons and counsel providing facts to support or challenge the reasons given. The exercise was fruitful.

[note: 1] Judgment at [84].

[note: 2] Judgment at [103]

[note: 3] Judgment at [142]

[note: 4] AR's GD at [19]

[note: 5] AR's GD at [23]; Plaintiff's Closing Submissions (27/08/2012) [193]

[note: 6] Plaintiff's Closing Submissions (27/08/2012) [180]

[note: 7] AR's GD at [20]; Defendants' Reply Submissions (19/09/2012) at para 55

[note: 8] NE 25/07/2012 108:8-12

[note: 9] NE 16/7/2012, pp 74-75, 17/7/2012 p 49

[note: 10] Judgment at [146]

[note: 11] Judgment at [145]

[note: 12] AR's GD at [26]

[note: 13] AR's GD at [24]-[26]

[note: 14] NE 19/07/2012 5:5-7

[note: 15] NE 19/07/2012 7:13-27

[note: 16] NE 19/07/2012 8:8-11

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