IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 44

Civil Appeal No 168 of 2015

Between

(1) TURF CLUB AUTO EMPORIUM PTE LTD
(2) SINGAPORE AGRO AGRICULTURAL PTE LTD
(3) KOH KHONG MENG
(4) TURF CITY PTE LTD
(5) TAN CHEE BENG

… *Appellants*

And

(1) YEO BOONG HUA
(2) LIM AH POH
(3) TEO TIAN SENG

… *Respondents*

Civil Appeal No 171 of 2015

Between

TAN HUAT CHYE

… *Appellant*

And

(1) YEO BOONG HUA
(2) LIM AH POH
(3) TEO TIAN SENG

… *Respondents*

In the matter of Suit No 27 of 2009

Between

(1) YEO BOONG HUA
(2) LIM AH POH
(3) TEO TIAN SENG

… Plaintiffs

And

(1) TURF CLUB AUTO EMPORIUM PTE LTD
(2) SINGAPORE AGRO AGRICULTURAL PTE LTD
(3) KOH KHONG MENG
(4) TURF CITY PTE LTD
(5) TAN HUAT CHYE
(6) NG CHYE SAMUEL
(7) TAN CHEE BENG
(8) ONG CHER KEONG

… Defendants

JUDGMENT

[Contract] — [Remedies] — [Damages]
[Equity] — [Fiduciary relationships]
[Tort] — [Conspiracy]
[Tort] — [Inducement of breach of contract]

TABLE OF CONTENTS

Turf Club Auto Emporium Pte Ltd and others
v
Yeo Boong Hua and others and another appeal

[2018] SGCA 44

Court of Appeal — Civil Appeals Nos 168 and 171 of 2015
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA, Tay Yong Kwang JA and Steven Chong JA
15 August 2017; 2 March 2018

2 August 2018 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 As the late Prof S F C Milsom perceptively observed, the common law system developed in a strikingly systematic fashion notwithstanding the absence of a clear blueprint as such (see generally S F C Milsom, "Reason in the Development of the Common Law" (1965) 81 LQR 496). This is an observation that carries the greatest of weight – if nothing else, because Prof Milsom has been described as being "the most distinguished legal historian of the twentieth century" (see David Ibbetson, "Milsom's Legal History" [2017] CLJ 360 at p 360). Indeed, the system of common law and equity that constitutes the foundation of the Singapore legal system may be viewed as an integrated as well as interwoven tapestry. This is especially the case in the law of contractual damages. The basic principles have remained clear and stable

throughout almost two centuries, drawing their source from the corresponding English jurisprudence. It is true that the Singapore principles have not always followed the English lead (see, for example, in relation to the doctrine of remoteness of damage, the decisions of this Court in *MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another appeal* [2011] 1 SLR 150 ("*MFM Restaurants*") and *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363). However, the basic legal contours have nevertheless remained well-settled. In particular, it is a deeply enshrined principle of both English and Singapore contract law that the general aim of damages for breach of contract is to *compensate* and that such compensatory damages are ordinarily to be assessed by reference to *the plaintiff's loss* (see the famous English decision of *Robinson v Harman* (1848) 1 Exch 850 ("*Robinson*") at 855, and the recent decision of this Court in *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal* [2017] 2 SLR 129 ("*PH Hydraulics*") at [62]).

2 The present appeals, however, concern a *challenge* to this long established principle of the law of contractual damages. This challenge arises from the developments in the English common law following two significant authorities – the English High Court's judgment in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd and Others* [1974] 1 WLR 798 ("*Wrotham Park*") and the decision of the House of Lords in *Attorney-General v Blake (Jonathan Cape Ltd Third Party)* [2001] AC 268 ("*AG v Blake*"). These authorities, which have been construed by many as *departing* from the fundamental compensatory principle, require us to consider whether the legal landscape in relation to contractual damages should now take on – in part at least – a somewhat different shape. They give rise to the possibility that there is a distinct head of "restitutionary damages" that may be awarded in the law of contract, not to

compensate the plaintiff for the loss caused by the breach of contract, but premised on the *gains* made by *the defendant* as a result of the breach. To add to the complexity that faces the Singapore courts, the principles governing the novel heads of damages recognised in these two cases – which we shall refer to as "*Wrotham Park* damages" and "*AG v Blake* damages", respectively – were unsettled in English law and not as clear as they might be, at least at the time when we heard these appeals and prepared our initial draft of the present judgment. Since then, the UK Supreme Court has released its decision in *One Step (Support) Ltd v Morris-Garner and another* [2018] 2 WLR 1353 ("*One Step (SC)*"), which sets out the legal position in the UK. In this judgment, we will address these decisions and set out the principles that apply in Singapore when a court seeks to *depart* from the orthodox compensatory measure of damages by reference to these authorities, with a focus on *Wrotham Park* damages.

Scope of the present judgment

3 To set the context, these appeals, which concern breaches of a contractual consent order ("the Consent Order") between the Respondents and some (but not all) of the Appellants, were first heard by this Court in March 2016. Following that hearing, we delivered judgment on 22 March 2017 (reported as *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal and other matters* [2017] 2 SLR 12) ("*Turf Club (No 1)*") finding that the Consent Order had been breached. In that judgment, we directed the parties to submit on three issues which arose from that finding, including the appropriate remedies to be ordered for the breach of the Consent Order, and which of the Appellants ought to be subject to those orders. Subsequent to the release of our judgment, it transpired that other causes of action for breach of fiduciary duty and in tort – which had not been decided by

the Judge and which were not the subject of the first hearing – had to be determined. We thus heard the parties on two occasions: once on 15 August 2017 and the second on 2 March 2018. We will detail the procedural history of the appeals in the next section, but it may be helpful to summarise, at the outset, the outstanding issues that will be dealt with in the present judgment (which uses the same terms as defined in *Turf Club (No 1)*):

(a) Did the Appellants owe fiduciary duties to the Respondents and, if so, were these duties breached ("the Fiduciary Duties Issue")?

(b) Which parties are liable in contract, and therefore subject to any contractual remedies that the court may order, for the breaches of the Consent Order ("the Party Issue")?

(c) What remedies should follow from the repudiatory breaches of the Consent Order which this Court found were committed in *Turf Club (No 1)* and is there scope for the imposition of *Wrotham Park* damages ("the Remedy Issue")?

(d) Are the Appellants who are not party to the Consent Order, and therefore not liable in contract, liable under the tort of conspiracy to procure the breaches of the Consent Order and/or the tort of inducing the breaches of the Consent Order ("the Tort Issue")? If so, what are the remedies that should flow from such tortious liability?

4 Before we address these issues, we provide a brief summary of the dispute which gave rise to these proceedings, our findings in *Turf Club (No 1)* as well the relevant procedural developments which followed the delivery of that first judgment.

Background

Summary of the dispute

5 These appeals arise out of a dispute between two groups of parties who entered into a joint venture in 2001 to develop a large plot of land in Bukit Timah referred to as "Turf City". The first group, the Singapore Agro Agricultural Pte Ltd ("SAA") Group ("SAA Group"), comprises five individuals: Tan Senior, Tan Chee Beng ("Tan CB"), Koh Khong Meng ("Koh KM"), Samuel Ng and Ong Cher Keong ("Ong CK"). The three Respondents make up the second group. Two members of the SAA Group – Samuel Ng and Ong CK – are not parties to the present set of appeals although they were defendants in the underlying suit ("Suit 27") from which these appeals arose.

6 Pursuant to the joint venture between the SAA Group and the Respondents, two companies, Turf City Pte Ltd ("TCPL") and Turf Club Auto Emporium ("TCAE") (collectively referred to as "the JV Companies"), were incorporated. The shares in the JV Companies were held as follows:

(a) the three Respondents each held 12.5%, and thus 37.5% of the shares in total; and

(b) the SAA Group held the remaining 62.5% of the shares, although Tan CB and Ong CK held their shares indirectly through SAA, a company in which they were shareholders and that was controlled by the SAA Group.

7 The site was leased from the Singapore Land Authority ("the SLA") by SAA under a "2001 Head Lease". SAA then granted corresponding sub-tenancies to the JV Companies, which in turn granted sub-sub-tenancies of the

units in the site to ultimate tenants. The main source of revenue of the JV Companies came from the rent or fees payable by the ultimate tenants.

8 While the site was being developed, the two groups fell into disputes. The Respondents consequently commenced two actions, Suit 703 and OS 1634, based on, among other things, allegations that they had been oppressed as minority shareholders of the JV Companies. The two actions were later consolidated; we hence refer to Suit 703 and OS 1634 collectively as "the Consolidated Suits". The Consolidated Suits were brought against some members of the SAA Group. Notably, Tan CB and Ong CK, who are both parties to the present proceedings, were not parties to the Consolidated Suits. The six defendants to the Consolidated Suits were TCPL, TCAE, SAA, Samuel Ng, Koh KM and Tan Senior (collectively, "the Defendants (Consolidated Suits)"). The parties, however, dispute whether Tan Senior continued to be a party to the Consolidated Suits after his bankruptcy in 2003.

9 In the meantime, in 2004, the 2001 Head Lease between SAA and the SLA expired and was renewed for three years through a fresh head lease ("the 2004 Head Lease"). SAA correspondingly granted sub-tenancies to the JV Companies. Before the Consolidated Suits proceeded to trial, in February 2006, the parties reached a settlement that was recorded by the High Court and encapsulated in the Consent Order. The parties named in the Consent Order were the Respondents and the Defendants (Consolidated Suits). Tan Senior denies being party to the Consent Order, even though he is named therein, on the basis of his lack of involvement in the Consolidated Suits following his bankruptcy in 2003. He also alleges that he had at no point participated in the settlement negotiations which led to the Consent Order and was not privy to the correspondence that was exchanged between counsel over its terms.

10 The Consent Order was intended to settle the disputes which were the subject-matter of the Consolidated Suits and end the joint venture by extricating either the Respondents or the SAA Group from the JV Companies (see *Turf Club (No 1)* at [29]). It provided for a bidding exercise ("the Bidding Exercise") to be conducted within stipulated timelines to bring the joint venture to an end. Both groups agreed that the higher bidder would purchase the shares of the lower bidder, and that those behind the lower bid would then resign as directors of the JV Companies. It was also agreed that if the Respondents were the higher bidder, the Defendants (Consolidated Suits), in particular SAA, would use their best endeavours to transfer the lease with the SLA, which was in SAA's name, to the JV Companies. Two external entities, collectively referred to as "the KPMG Entities", were engaged to investigate the financial affairs of the JV Companies, conduct an independent and fair valuation of the shares in the companies and supervise the Bidding Exercise.

11 As a result of disagreements over the engagement of, and payment for, a quantity surveyor, the valuation reports for the JV Companies were issued 13 months after the envisaged timeline. During the period of delay, unbeknownst to both the KPMG Entities and the Respondents, SAA renewed the 2004 Head Lease with the SLA for another three years. The new head lease, which is pertinent to these appeals, is referred to as "the 2007 Head Lease". Crucially, unlike in the case of the previous two head leases, SAA did not grant corresponding sub-tenancies to the JV Companies.

12 The valuation reports prepared by the KPMG Entities did not take into account the 2007 Head Lease or the earning capacities of the JV Companies in the period after the expiry of the 2004 Head Lease. This was because neither KPMG Entities nor the Respondents had been informed of the 2007 Head Lease after it was entered into on 22 May 2007. As a result, the valuation reports

reflected a very pessimistic outlook on the two companies: TCPL was valued at $1.33 per share and TCAE was assigned a "nil" value.

13 The 2007 Head Lease eventually came to light after the valuation reports were issued. The Respondents responded by calling for revised valuation reports to be issued. In response, the Defendants (Consolidated Suits) maintained, through their counsel, that there was no need to revise the valuation reports to take into account the 2007 Head Lease because, while the 2004 Head Lease had been renewed, SAA was not obliged to, and therefore would not, renew the sub-tenancies with the JV Companies.

14 This led the Respondents to file an application ("SUM 4117") seeking, among others, an order to clarify and/or vary the Consent Order to oblige SAA to renew the sub-tenancies with the JV Companies and for a revaluation exercise to be conducted on the new terms. The application was dismissed by Choo Han Teck J, who held that the High Court had no jurisdiction to vary the Consent Order. In the same judgment, Choo J also observed that the allegations of breaches of the Consent Order were unfounded. Thereafter, each side filed further applications against the other group revolving around the question of whether the Bidding Exercise ought to proceed.

15 Eventually, the Respondents commenced Suit 27. In this suit, the Respondents brought a number of claims against the individual members of the SAA Group (*ie*, Tan Senior, Tan CB, Koh KM, Samuel Ng and Ong CK), of which only the following are pertinent to the present appeals:

(a) Contractual breaches of the following terms of the Consent Order, pursuant to which the Respondents sought a setting aside of the Consent Order and a revival of the Consolidated Suits:

(i) an express term in cl 11, which required the parties to preserve the *status quo* during the implementation of the Consent Order, because SAA acquired the 2007 Head Lease without granting sub-tenancies to the JV Companies;

(ii) an implied term that SAA would not appropriate for itself the benefit of the 2007 Head Lease pending full performance of the Consent Order; and

(iii) an express term in cl 5, which stated that the Defendants (Consolidated Suits) were not to interfere, impede, obstruct or do anything to prevent or hinder one of the KPMG Entities' discharge of its duties in respect of the valuation exercise, by omitting to inform the KPMG Entities of the 2007 Head Lease.

(b) In the alternative, a claim that the individual members of the SAA Group breached the fiduciary duties they owed to the Respondents, and are therefore liable to account to the Respondents for the profits made since the 2001 Head Lease, including but not limited to the profits made under 2007 Head Lease; and

(c) In the alternative, two claims in tort that the individual members of the SAA Group are liable for having conspired to breach the Consent Order and/or having induced the breaches of the Consent Order.

16 Choo J dismissed the action without a trial after hearing the parties on some preliminary issues in October 2012. The Respondents appealed to the Court of Appeal (*vide* "CA 156"), and succeeded in reversing Choo J's decision. Suit 27 was remitted to the High Court to be tried by the Judge.

The Judge's findings in Suit 27

17 The Judge heard the parties in the first half of 2015 and delivered his judgment on 6 August 2015 ("the HC Judgment"). He first held that Choo J's earlier observations in SUM 4117 – namely, that the allegations of breaches were unfounded (see [14] above) – did not give rise to an issue estoppel in respect of the construction of the Consent Order and the allegations of breaches. The Judge then held that the Consent Order ought to be set aside (and the Consolidated Suits be revived) for two reasons:

(a) The Consent Order was inoperative.

(b) The Defendants (Consolidated Suits) had committed repudiatory breaches of the three terms (as summarised at [15] above).

18 The Judge made consequential orders granting leave to the Respondents to add Tan CB, Tan Senior and Ong CK as defendants in the Consolidated Suits. In doing so, he dismissed the latter two's attempt to raise laches, estoppel by conduct, waiver by election and abuse of process as defences in order to avoid being named as defendants in the reinstated suits on the ground of a substantial delay before the Respondents commenced legal proceedings against them.

19 In addition, the Judge dismissed the counterclaim that was brought by three of the defendants to Suit 27 asking for the Bidding Exercise to be proceeded with. The Judge did not deal with the alternative claims that the defendants had (a) committed breaches of fiduciary duties, and (b) conspired to procure and/or induced the breaches of the Consent Order. Instead, he held that these claims were to be dealt with alongside the revived Consolidated Suits.

20 All the defendants in the action, save for Samuel Ng who never took part in the proceedings but against whom judgment was entered, appealed against the Judge's decision. Three appeals were filed. Ong CK's appeal, however, was deemed withdrawn after the time for the filing of the requisite documents lapsed. Samuel Ng and Ong CK are thus not party to these appeals.

This Court's findings in Turf Club (No 1)

21 In *Turf Club (No 1)*, this Court upheld the Judge's finding that the Defendants (Consolidated Suits) had breached cl 11, the implied term, and cl 5 of the Consent Order (in the manner summarised at [15(a)] above), and that all three breaches ("the Repudiatory Breaches") were repudiatory in nature.

22 While we agreed with the Judge that the Consent Order had been breached, we disagreed that the Consent Order could thus be set aside and the Consolidated Suits could be revived. The Repudiatory Breaches only had the effect of prospectively terminating the Consent Order and releasing the parties from *future* obligations. Further, the original causes of action in the Consolidated Suits had been superseded upon the making of the Consent Order, and the original claims had been discharged. The Consent Order did *not* provide for the revival of the claims in the event of a breach. In addition, contrary to the Appellants' submission, the court did not retain a residual discretion to set aside or not enforce a contractual consent order. There was also no basis to find that the Consent Order could be set aside on the ground that it was inoperative. We therefore reversed the Judge's finding that the Consent Order ought to be set aside as well as his order that the Consolidated Suits be revived.

23 In our judgment in *Turf Club (No 1)*, which was delivered on 22 March 2017, we directed the parties to address several issues that the Judge did not

have to deal with, but which were now material due to our ruling that the Consent Order should not be set aside (at [175]). In particular, parties were asked to submit on (a) what remedies should be ordered for the Repudiatory Breaches of the Consent Order, and (b) which of the Appellants would be subject to such remedies. These gave rise to *the Remedy Issue* and *the Party Issue*, respectively.

24 Thereafter, in July 2017, the Respondents obtained leave to file further submissions on, among other issues, *the Fiduciary Duties Issue*. This alternative claim for breach of fiduciary duties had been advanced at the trial below, but had not been decided on by the Judge on the basis that it could be determined together with the revived Consolidated Suits (see [19] above). Given that we had reversed the Judge on this point, it was only fair to allow them to address this issue before us.

Subsequent remission of question to the Judge

25 We heard the parties' submissions on the three issues on 15 August 2017. During the course of that hearing, it became clear that there were two other causes of action that should be addressed: the Respondents' alternative claims that the Appellants were liable for the tort of conspiring to procure the breaches of the Consent Order and/or the tort of inducing the breaches of the Consent Order (see [15(c)] above). These alternative claims are more relevant to those Appellants who are found to *not* be liable in *contract* (not being parties to the Consent Order), as they may nonetheless be liable in *tort* for the damage caused by the breaches of the Consent Order. As with the claim in breach of fiduciary duties, these claims in tort had not been dealt with by the Judge on the basis that they could be determined together with the revived Consolidated Suits (see [19] above).

26 Following the hearing of 15 August 2017, we remitted a question to the Judge on the tortious claims and, in particular, whether the defendants in Suit 27 who were not parties to the Consent Order, namely Tan CB, Ong CK and/or Tan Senior (who is arguably not a party to the Consent Order), had conspired to procure and/or had induced the breaches of the Consent Order by the other relevant defendants. The Judge heard the parties on this question in September 2017 and delivered a supplementary judgment on 17 October 2017 ("the Supplementary Judgment"), in which he found:

> (a) Tan CB, Koh KM, Tan Senior, and Ong CK liable for conspiracy to injure the Respondents by unlawful means, *ie*, by procuring or otherwise enabling the breach of the Consent Order; and
>
> (b) Tan CB, Tan Senior, and Ong CK liable for the tort of inducing the breach of the Consent Order by SAA.

27 We heard the parties on the correctness of the Judge's findings on these claims in tort on 2 March 2018.

28 With the above background in mind, we move on to consider, in turn, the four issues (set out at [3] above) – namely, the Fiduciary Duties Issue, the Party Issue, the Remedy Issue and the Tort Issue.

Fiduciary Duties Issue: Are the Appellants liable for breach of fiduciary duties?

29 We begin with the Fiduciary Duties Issue.

Parties' submissions on the Fiduciary Duties Issue

The Respondents' submissions

30 The Respondents argue that the SAA Group – by which they mean the Appellants, save for the JV Companies (TCAE and TCPL) – owed them fiduciary duties as partners in their joint venture, which was a quasi-partnership. While it was disputed at trial whether Tan CB was a party to the joint venture in his own right rather than as a representative of SAA, the Respondents rely on the finding made by the Judge – which they argue had not been reversed on appeal – that he was a party to the joint venture. According to the Respondents, the joint venture between the parties was an agreement to exploit the head lease from the SLA for the joint benefit of all parties, and the JV Companies were vehicles of the joint venture that was formed. The Respondents argue that the parties were not merely fellow shareholders, but were partners who each had a role and a voice in the JV Companies' operation.

31 The Respondents take the position that the SAA Group continued to owe them fiduciary duties even after the Consent Order was entered into and even till today because their fiduciary relationship would only have been terminated if one side had bought out the other side's shares in the JV Companies – an event that never materialised. Further, at least in their pleadings, the Respondents appear to take the position that in addition to, and independent of, their earlier fiduciary relationship as partners in a joint venture, the SAA Group may have been subject to fiduciary duties *pursuant to the Consent Order*.

32 The Respondents argue that the SAA Group breached their respective fiduciary obligations when they did the following:

(a) failed to account for payments made by the joint venture to Goodland Development Pte Ltd ("Goodland"), a company controlled by Tan CB, and Architects Group Associates Pte Ltd ("AGA"), a company controlled by Ong CK, for construction costs and architectural fees in relation to the building of the site;

(b) unfairly removed the Respondents as the directors of TCPL;

(c) failed to account for the funds of the JV Companies;

(d) failed to distribute dividends to the Respondents; and

(e) breached the Consent Order, depriving the JV Companies of the benefit of the head lease with the SLA from 2007.

33 The Respondents seek an account of profits or alternatively, the imposition of a constructive trust, as remedy for these breaches.

The Appellants' submissions

(1) Submissions by TCAE, TCPL, SAA and Koh KM

34 Mr Kelvin Poon ("Mr Poon"), who represents TCAE, TCPL, SAA and Koh KM, argues that the Respondents' case in respect of the Fiduciary Duties Issue lacks credibility and is untenable in law. Mr Poon points out the following problems with the Respondents' case:

(a) First, the Respondents' case that the SAA Group owed them fiduciary duties because they are partners in a quasi-partnership is not pleaded. Mr Poon points out that the Respondents have departed from their case at the trial below, where they asserted that the SAA Group owed the Respondents fiduciary duties because there was an

understanding between the parties, flowing from alleged oral agreements and the Memorandum of Understanding ("the MOU"), that as long as SAA had obtained a head lease with the SLA, the JV Companies would be granted sub-tenancies on identical terms. This is referred to by parties, and in *Turf Club (No 1)*, as "the Back-to-Back Arrangement". Neither the Judge nor this Court made a finding on whether such an arrangement existed.

(b) Second, the Respondents are precluded from alleging the existence of a partnership because the court had earlier in 2010 struck out all references to a "partnership" in the Respondents' original statement of claim for this suit. He submits that it would be an abuse of process for the Respondents to attempt to resurrect these claims now.

(c) Third, the Respondents' submission is wrong as a matter of law because it (i) wrongly conflates the concepts of quasi-partnerships (which Mr Poon submits do not give rise to a fiduciary relationship) and partnerships; and (ii) wrongly assumes that all joint ventures are partnerships.

(d) Fourth, the parties' course of dealing evidences a relationship between shareholders, and not partners of either a partnership or a quasi-partnership. This was not only clear from the setting up of the JV Companies, as well as the distribution of the benefit of the head lease through the shareholdings of the companies, but also from the fact that the Respondents themselves had sued for minority oppression within the Consolidated Suits but never alleged that the parties were in a quasi-partnership or a partnership, when the disputes between the parties first

arose. The parties did not share a "personal relationship of mutual trust and confidence" on which a quasi-partnership is based.

35 Mr Poon further argues that even if the SAA Group was found to owe fiduciary obligations to the Respondents, those obligations had not been breached. He submits that the Respondents' case in respect of the breaches – apart from the final breach that relates to the breaches of the Consent Order (see [32(e)] above) – is, again, not pleaded and should therefore be disregarded. He further submits that these alleged breaches substantially overlap with the Respondents' claims in the Consolidated Suits, and had been compromised with the entry into the Consent Order. He argues that the Respondents cannot be allowed to re-litigate these matters.

36 Likely for completeness, Mr Poon also responds to allegations made in passing by the Respondents in their submissions that Koh KM and Tan CB had breached their *directors'* duties in renewing the 2007 Head Lease without renewing the sub-tenancies with the JV Companies. Mr Poon argues that this claim must fail given that it was not pleaded and that the Respondents had no standing to bring such a claim.

(2) Submissions by Tan CB and Tan Senior

37 Mr Irving Choh ("Mr Choh"), counsel for Tan CB and Tan Senior, also argues that the Respondents' claim on the Fiduciary Duties Issue is problematic in many ways and should be dismissed.

38 First, Mr Choh submits that the SAA Group could not have owed the Respondents fiduciary duties by virtue of their relationship in the joint venture because the joint venture was not a quasi-partnership and was instead a commercial agreement between parties who were newly acquainted and "virtual

strangers". Further, the Respondents neither had an equal say nor participated fully in the joint venture. Specifically in respect of Tan CB, Mr Choh argues that he was not a party to the joint venture, being involved only in his capacity as SAA's director, and therefore could not have been subjected to any fiduciary obligations. In this regard, Mr Choh invites this Court to reverse the Judge's finding that Tan CB had entered into the joint venture in his personal capacity (a point that was not addressed in *Turf Club (No 1)*).

39 Second, Mr Choh argues that the SAA Group's breaches of the Consent Order cannot be regarded as a breach of their fiduciary obligations because a consent order does not give rise to fiduciary duties on the parties. Further, neither Tan Senior nor Tan CB is a party to the Consent Order.

40 Third, Mr Choh submits that even assuming the SAA Group owed the Respondents fiduciary duties, there was no breach of such duties.

41 Finally, Mr Choh argues that the allegations of breaches of fiduciary duties had been compromised by the Consent Order because the alleged breaches – save for the final two pertaining to the misappropriation of the JV Companies' assets and the repudiatory breaches of the Consent Order – overlapped with the claims in the Consolidated Suits.

Our decision

The parties were not in a fiduciary relationship

42 We begin our analysis of this issue by discussing when a fiduciary relationship may arise. The term "fiduciary" is often said to be one of the most ill-defined, if not altogether misleading, terms in our law (see PD Finn, *Fiduciary Obligations* (Law Book Company, 1977) ("*Fiduciary Obligations*")

at para 1). There is no universal definition for the term, though we note that there appears to be growing judicial support for the view that a fiduciary is "someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence" (see *Snell's Equity* (John McGee gen ed) (Sweet & Maxwell, 33rd Ed, 2015 ("*Snell's Equity*") at para 7-005, making reference to cases such as *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18 and *FHR European Ventures LLP and others v Cedar Capital Partners LLC and others* [2014] 3 WLR 535 at [5]). It has also been said that "[f]iduciary duties are obligations imposed by law as a reaction to particular circumstances of responsibility assumed by one person in respect of the conduct of the affairs of another" (see the English High Court decision of *F&C Alternative Investments (Holdings) Ltd v Barthelemy and another (No 2)* [2012] Ch 613 at [225], as well as the decision of this Court in *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 ("*Tan Yok Koon*") at [194]). The concept of a fiduciary has also been described as one that "encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal" (see the Privy Council decision (on appeal from the Court of Appeal of New Zealand) of *Arklow Investments Ltd and Another v Ian Duart Maclean and Others* [2000] 1 WLR 594 at 598). It is now widely accepted that a fiduciary is not subject to fiduciary obligations because he is a fiduciary; instead, it is because he is subject to such obligations and rules that he is a fiduciary for those purposes (see *Fiduciary Obligations* at para 3). This reflects the way in which equity has developed, somewhat similar to the law of torts, in imposing particular obligations on particular persons because they are carrying on

particular activities that require the law's regulation (*Fiduciary Obligations* at para 3, as well as *Tan Yok Koon* at [193]).

43 While there are settled categories of fiduciary relationships – such as the relationship of a trustee-beneficiary, director-company, solicitor-client, between partners – it does not mean that all such relationships *are* invariably fiduciary relationships. In these relationships, there is a strong, but rebuttable, presumption that fiduciary duties are owed. Equally, the categories of fiduciary relationships are not closed or limited only to the settled categories. Fiduciary duties may be owed even if the relationship between the parties is not one of the settled categories, provided that the circumstances justify the imposition of such duties (see *Snell's Equity* at paras 7-004–7-005). For instance, parties in a joint venture may or may not share a fiduciary relationship, depending on the circumstances of their relationship (see John Glower, *Commercial Equity – Fiduciary Relationships* (Butterworths, 1995) at paras 3.90–3.96 and *Snell's Equity* at para 7-006). Therefore, contrary to the approaches adopted by the parties (in particular the Respondents), whether the parties are in a fiduciary relationship depends, ultimately, on the nature of their relationship and is not simply a question of whether their relationship can be shoe-horned into one of the settled categories (*eg*, a partnership) or into a non-settled category (*eg*, a joint venture or quasi-partnership).

44 Even leaving aside the issue that this is a departure from their pleaded case, the Respondents' submission that the SAA Group owed them fiduciary duties as parties in a joint venture which was a quasi-partnership has its problems. As pointed out by the Appellants, the parties' relationship was that of shareholders in joint venture companies. These were two groups of parties, who were at best acquaintances, who met each other by chance at the SLA's office and eventually entered into the joint venture to profit from the leasing of the site

to sub-tenants through the JV Companies. Their relationship has always been formal and commercial, as evidenced by the entry into the MOU governing the joint venture and the eventual incorporation of the two JV Companies with a clear proportioning of shareholding between the parties. This was also not a case where the parties had run the two JV Companies as partners.

45 In short, the parties were *not* in a relationship of mutual trust and confidence that would give rise to a legitimate expectation on the Respondents' part that the SAA Group would not utilise their position to act in a way adverse to the Respondents' interests. It would also be inaccurate to say that the SAA Group had, by entering into the joint venture, assumed any responsibility in respect of the conduct of the *Respondents'* affairs (though there may arguably be such a responsibility *vis-à-vis* the *JV Companies* in so far as the member of the SAA Group is a director of the company). Courts will, and should, be slow in imposing fiduciary obligations on parties to a purely commercial relationship because it is normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party. Both the SAA Group and the Respondents were commercial parties capable of advancing and protecting their own interests. Further, even if the Respondents had indeed been victim of the SAA Group's poor or unfair management of the JV Companies, the correct forum is to bring a minority oppression suit, as they had sought to do in the Consolidated Suits, or through a derivative action as shareholders.

46 We add for completeness that contrary to the Respondents' pleaded case (see [31] above), we agree with Mr Choh (see [39] above) that the Consent Order, being only a settlement agreement between disputing parties, could not have *imposed* any fiduciary obligations on the parties as such.

Majority of the alleged breaches were not pleaded and have been compromised by the Consent Order

47 Even if the Respondents succeed in their submission that the SAA Group owed them fiduciary duties, they run into problems at the next stage when we examine whether the fiduciary obligations had been breached.

48 First, as submitted by Mr Poon, the breaches alleged by the Respondents in their further submissions – save for the final breach that pertained to the breaches of the Consent Order – were not pleaded. The Respondents' pleadings on this cause of action were very brief. There was only one short paragraph on the alleged breaches in the statement of claim, which reads as follows:

> 66. The [SAA Group] breached their fiduciary duties. The [Respondents] repeat paragraphs 34-38 and 47-53 above.

Paragraphs 34 to 38 and 47 to 53 of the statement of claim set out only the repudiatory breaches of the Consent Order. None of the paragraphs set out the acts of the SAA Group *before* the entry into the Consent Order. In other words, none of the alleged breaches in [32(a)] to [32(d)] above is pleaded. In these circumstances, these claims should be disregarded.

49 Second, as submitted by both Mr Poon and Mr Choh, the same claims (that is, all the alleged breaches save for those pertaining to the breaches of the Consent Order) had been pleaded as part of the minority oppression action in the Consolidated Suits, and had thus been extinguished with the entry into the Consent Order. It would be an abuse of process for the Respondents to re-characterise these claims as breaches of fiduciary duties and to re-litigate them.

Conclusion on the Fiduciary Duties Issue

50 For the above reasons, we find that the Respondents' claim for breach of fiduciary duties cannot succeed.

Party Issue: Which of the Appellants are liable for the contractual breaches of the Consent Order?

51 We turn now to the Party Issue. This issue relates to which of the Appellants are liable for each of the three Repudiatory Breaches as found by this Court in *Turf Club (No 1)*. More specifically, this issue concerns which of the Appellants are liable in *contract* for the breaches of the Consent Order, and is therefore subject to the contractual remedies that this Court may impose. However, it bears mention that those Appellants who are not liable in contract may nonetheless be liable in *tort* for conspiring to procure or inducing the breaches of the Consent Order. This will be considered in the section relating to the Tort Issue below.

Parties' submissions on the Party Issue

The Respondents' submissions

52 The Respondents' overarching submission is that the Appellants who breached the Consent Order and those who conspired to cause the breaches ought to be made jointly and severally liable under the remedial orders imposed by this Court. These parties are Tan CB, Tan Senior, Koh KM, Samuel Ng, Ong CK and SAA.

53 In so far as Tan CB is concerned, the Respondents submit that he should be liable for breaching the Consent Order because he is party to the joint venture, and has taken the position in this set of proceedings that he has an

interest in, or is a party to, the Consent Order. The Respondents highlight that the Consent Order was intended to settle the Consolidated Suits and bring the joint venture to a close. Therefore, although Tan CB was not named as a party to the Consent Order, he had obligations and benefits under the Consent Order through SAA. That was why Tan CB had advanced a counterclaim against the Respondents seeking an order that the Bidding Exercise – arguably, the main point of the Consent Order – proceed. According to the Respondents, in taking the position that he had *locus standi* to make such a counterclaim, Tan CB was admitting that he was in fact a party to, or had an interest in, the performance of the Consent Order.

54 As for SAA and Koh KM, the Respondents submit that both were named parties in the Consent Order and therefore had obligations thereunder. SAA was involved in the Repudiatory Breaches. It breached cl 5 of the Consent Order by concealing the 2007 Head Lease from the KPMG Entities. It also breached cl 11 and the implied term by misappropriating the benefit of the 2007 Head Lease for itself. Koh KM was a party to the MOU and to the joint venture. He was also a director of SAA and of the JV Companies. The Respondents submitted that Koh KM was a puppet that did not exercise independent judgment as a director, but instead rubber-stamped whatever decisions Tan CB made in relation to the Head Lease, SAA and the JV Companies.

55 Finally, with regard to Tan Senior, the Respondents submit that he was explicitly named as a party to the Consent Order. Further, the action against him in the Consolidated Suits was never discontinued and his name was never deleted from the writ.

56 For completeness, the Respondents did not make any specific submissions regarding Samuel Ng and Ong CK. However, the Respondents

recognise that these two parties are unlikely to be able to contribute in any meaningful way – even if they are held to be jointly and severally liable for the remedial orders imposed by this Court – given their status as bankrupts.

The Appellants' submissions

(1) Submissions by TCAE, TCPL, SAA and Koh KM

57 Mr Poon submits that SAA is the only party that should be liable in contract for the breaches of cl 11 and the implied term. The breach of cl 11 concerned *SAA's* acquisition of the 2007 Head Lease without subsequently granting sub-tenancies to the JV Companies. In other words, SAA was the sole party responsible for that breach. As for the implied term, it imposed an obligation *solely* on SAA not to appropriate for itself the benefit of the 2007 Head Lease; likewise, only SAA could have breached the implied term.

58 In so far as Koh KM is concerned, Mr Poon submits that Koh KM could *possibly* be in breach of cl 5 if he had withheld knowledge that hindered the KPMG Entities' discharge of their duties. However, since there is no evidence that Koh KM knew of the 2007 Head Lease at the material time or that he knew that it would be material to the KPMG Entities' discharge of their duties, Koh KM should not be liable in contract.

(2) Submissions by Tan CB and Tan Senior

59 Mr Choh argues that neither Tan CB nor Tan Senior is liable for breaching the Consent Order. As regards Tan CB, Mr Choh disputes the Respondents' submission that Tan CB has an interest in or is a party to the Consent Order *through SAA* because it wholly disregards the doctrine of separate legal entity. Additionally, Mr Choh submits that the mere fact that Tan CB instituted a counterclaim against the Respondents does not relieve the

Respondents of their burden of proof to show why Tan CB should be held personally liable for the breaches of the Consent Order, nor can it be construed as an admission by Tan CB of his personal liability.

60 Finally, as regards Tan Senior, Mr Choh submits that the mere fact that Tan Senior was a named party to the Consent Order is *insufficient* to found contractual liability arising from breach. There is a well-settled principle that a contract can confer benefits on third parties but cannot generally impose liabilities on third parties. Mr Choh submits that Tan Senior is, at best, a party who derived a benefit from the Consent Order. Further, given Tan Senior's lack of participation in the formation of the Consent Order, no liability should be imposed on him in so far as the Repudiatory Breaches are concerned.

Our decision

Tan Senior was not a party to the Consent Order and thus cannot be liable in contract

61 We begin with Tan Senior. In our view, the mere fact that Tan Senior was *named in* the Consent Order does not *necessarily* mean that he is *party to* it, let alone liable for committing any of the Repudiatory Breaches. The fact that a person is named in a contract is not, in and of itself, sufficient to prove that he had consented to its terms such as to be privy to the agreement.

62 In our view, there is insufficient evidence to show that Tan Senior was a party to the Consent Order. After Tan Senior's bankruptcy, he stopped participating in the Consolidated Suits even though he was never removed as a party to those suits. The parties in the Consolidated Suits continued fighting for another five years without Tan Senior's participation. While he was named in the Consent Order that was eventually entered into by the parties, he did not

participate in any related discussions at any point in time. Rajah & Tann Singapore LLP ("R&T"), which represented SAA and the others in the negotiations for the settlement, did not act for Tan Senior. The correspondence that was exchanged between counsel over the terms of the Consent Order was also at no point forwarded to Tan Senior. He was also not present at the hearing on 22 February 2006, when the Consent Order was recorded. Nor was he asked to approve the draft Consent Order before it was extracted. Tan Senior may well have *known about* the Consent Order but that is clearly an insufficient basis for finding that he was *party* to the same.

63 In these circumstances, we find that Tan Senior is *not* a party to the Consent Order and cannot be liable in contract for the Repudiatory Breaches. In a later section of this judgment, we will consider Tan Senior's liability in tort.

Tan CB and Ong CK are likewise not parties to the Consent Order and thus cannot be liable in contract

64 We come now to consider Tan CB and Ong CK. Neither of them was named in the Consent Order. In fact, neither of them was party to the Consolidated Suits, which the Consent Order purported to settle.

65 Notwithstanding this, the Respondents submit that Tan CB *should* be held liable in contract. They say so on the basis that Tan CB is a party to the joint venture, and has taken the position that he has an interest in, or is a party to, the Consent Order by pursuing the counterclaim in which he asked for the Bidding Exercise to continue (see [53] above). We reject this submission. Whether Tan CB is a party to the *joint venture* is irrelevant to whether he is a party to the *Consent Order*. In so far as Tan CB's pursuit of a counterclaim in which he attempted to enforce a term of the Consent Order is concerned, this does not and cannot make him a party to the Consent Order. All it does is to

provide a very strong basis for dismissing the counterclaim, which was our decision in *Turf Club (No 1)* at [176].

66 Thus, we find that both Tan CB and Ong CK are not parties to the Consent Order and are thus not liable in contract for the Repudiatory Breaches. We will consider their liability in tort in a later section of this judgment.

67 This leaves us with the following Appellants: (a) SAA; (b) Koh KM; (c) Samuel Ng and (d) the JV Companies. We will consider each in turn.

SAA breached cl 11 and the implied term of the Consent Order

68 We agree with Mr Poon's submission that SAA alone should be subject to any remedial order involving breaches of cl 11 and the implied term (as opposed to cl 5) because those terms concern *SAA's* acquisition of the 2007 Head Lease without subsequently granting sub-tenancies to the JV Companies. Only SAA can be said to have breached both these terms because the allegation is that *SAA* – a legal entity in itself with a separate corporate personality from those in control of it – had appropriated the benefit of the 2007 Head Lease. In any event, neither Koh KM nor Samuel Ng was in control of SAA, as they were neither its directors nor shareholders. Thus they would not have had the means to procure SAA to act accordance with cl 11 and the implied term.

SAA and Koh KM breached cl 5 of the Consent Order

69 We come now to cl 5, which requires parties to the Consent Order not to hinder the KPMG Entities in the discharge of their duties. On this basis, *any* party to the Consent Order who knew of the 2007 Head Lease but did not disclose its existence to the KPMG Entities would be in breach of cl 5 for withholding information that they ought reasonably to have contemplated

would be material to the KPMG Entities' discharge of their duties, thereby hindering the KPMG Entities.

70 We first address SAA's liability. It is indisputable that SAA is in breach of cl 5 because it had failed to disclose to the KPMG Entities the 2007 Head Lease, which was granted to it by the SLA on 22 May 2007. SAA thereby hindered the KPMG Entities in the discharge of their duties.

71 In so far as Koh KM's liability is concerned, the main argument advanced was that Koh KM *did not know* about the 2007 Head Lease at the material time. In his oral submissions, Mr Poon further submitted that even if Koh KM *later* came to know of the 2007 Head Lease, his failure to disclose such information would not constitute a breach of cl 5 because the party that bore the duty to make such disclosure pursuant to cl 5 was SAA.

72 We first address Mr Poon's second argument that the duty of performance under cl 5 is imposed solely on SAA. In our view, this argument is a non-starter. It is clear that on an objective construction of cl 5, the obligation imposed thereunder applies equally to *all* parties to the Consent Order. No part of cl 5, or indeed the Consent Order as a whole, can be understood as having the effect of limiting the obligation to notify the KPMG Entities of any information material to the discharge of their duties to SAA only. We would further add that it is clear that the parties must have intended that the obligation under cl 5 operate on an *on-going basis* until the KPMG Entities completed the discharge of their duties. Thus, if Koh KM came to know of the 2007 Head Lease at any time prior to the KPMG Entities' completion of the valuation reports (which were issued on 10 August 2007), he would have been under an obligation to disclose that information then so as to not hinder their duties.

73 This brings us to the more crucial question of whether Koh KM in fact knew of the 2007 Head Lease at the material time such that his non-disclosure of the same constituted a breach of cl 5. Mr Poon points to the fact that under cross-examination, Koh KM had denied knowledge of the 2007 Head Lease:

> Q: Now, when the SLA renewed the head lease in 2007 to SAA, you knew about it, correct?
>
> A: This is SAA's power. I do not know.
>
> Q: I'm not talking about whether it's SAA's power, Mr Koh. I'm talking about whether you knew that the head lease was renewed in 2007. Did you know?
>
> A: *I did not know.*
>
> Q: Did you ask?
>
> A: *No.*
>
> [emphasis added]

74 In cross-examination, Koh KM was also shown a letter dated 9 July 2007 sent by TCAE to one of its tenants, Hua Hua Credit Pte Ltd. The relevant portion of the letter reads as follows:

> Dear Sir
>
> **TRANSFER OF RENTAL DEPOSIT FOR LOT A02 TURF CLUB AUTO EMPORIUM**
>
> 1. We refer to the above.
>
> 2. From the commencement of our new term with the ultimate landlord, your lease will be assigned to our parent company, Singapore Agro Agricultural Pte Ltd (SAA).
>
> 3. As such, your rental deposit of S$10,500.00 placed under TURF CLUB AUTO EMPORIUM PTE LTD will be transferred to SAA with effect from 1 September 2007.
>
> …
>
> Yours faithfully,
>
> For TURF CLUB AUTO EMPORIUM PTE LTD
>
> [signature]

CAROLINE LIM

Contracts Department

This led to the following line of questioning in which Koh KM denied knowing whether SAA paid TCAE for taking over the latter's tenants:

Q: Did SAA pay TCAE anything for taking over TCAE's tenants?

A: *For this, you would have to ask Chee Beng.*

Q: You would expect SAA to pay valuable consideration for taking over TCAE's tenants, correct?

A: *I don't know.*

[emphasis added]

75 Koh KM was also shown TCPL's financial statements for the year ended 2007, and was cross-examined as to whether he knew what happened to the rental deposits paid by TCPL's sub-tenants (recorded as assets in TCPL's financial statements) after the expiry of the sub-lease. Again, Koh KM denied knowledge, on the basis that "it was not handled by [him]".

76 Finally, Koh KM was cross-examined on what happened to TCAE's sub-tenants after the sub-lease expired.

Q: What happened to these tenants after the sublease to TCAE ended in 2007?

A: Some of them could not continue, so they moved away, and some of them were owing rental, so they left.

Q: And others were assigned to SAA, correct?

A: *This was handled by Chee Beng.*

Q: So you're a director for TCAE, in charge of getting tenants for TCAE. After the sublease ended, would these tenants have spoken to you about it?

A: *No, they mostly spoke to our manager.*

Q: Who is that?

A: Mr Ang and the rest.

Q: Would Mr Ang and the rest speak to you as a director?

A: *Mostly to Chee Beng.*

Q: "Mostly to Chee Beng" means some would speak to you?

A: Because the managers were mostly under him.

Q: Are you expecting the court to believe, Mr Koh, that you were completely oblivious as to the fate of the tenants of Turf Club Auto Emporium?

A: I was mainly in charge of renting out the units to the people, and there were managers who were collecting the rental, and there were people handling the accounts under Chee Beng.

[emphasis added]

77 As can be seen from the above excerpts, Koh KM's position was that he did not know about the 2007 Head Lease. He also claimed that he did not know anything about the arrangements that had been put in place to facilitate the transfer of the sub-tenancies and the rental deposits from the JV Companies to SAA, saying that such matters were handled by Tan CB or other members of management.

78 This method of distancing himself was very much in keeping with the general tenor of Koh KM's cross-examination. He consistently denied knowledge of the JV Companies' affairs, despite having been a director of TCPL from 25 June 2001 and of TCAE from 28 February 2004 (HC Judgment at [22]). He said that he "was only in charge of the car centre", or "in charge of renting out units to the car dealers". Under the agreed business model for the joint venture, it was TCAE which was to operate the used car centre (HC Judgment at [17]). Thus by his own evidence, Koh KM should have at least been familiar with TCAE's operations. However, he was unable to state something as simple as whether TCAE had employees:

Q: TCAE had no employees, correct?

A: I don't know, but I should think there are.

Q: Really? How many?

Q: This is because the employees of Turf City Pte Ltd and Turf Club Auto Emporium were all mixed together, so I do not know which company was issuing the salaries. *This was handled by Chee Beng.*

Q: But there were only two directors in Turf Club Auto Emporium, correct?

A: *Yes, that's correct, but paperwork I had never been involved at all.*

[emphasis added]

79 It should also be mentioned that counsel for the Respondents had cross-examined Koh KM about the various businesses which he had interests in. These included Turf City Production Pte Ltd, Turf City Superstore Pte Ltd and Turf City Management Pte Ltd. Koh KM was unable to provide much detail on what these companies did. He claimed that Tan CB registered the companies and asked him to sign, and so he did. Yet, in the same breath, Koh KM denied being Tan CB's "puppet":

Court: Are you telling the court that you have been involved with so many companies or businesses that you cannot recognise the English name of some of them?

A: Your Honour, I know Turf City, but most of these works were done by them, and so they registered the companies and they asked me to sign. *Because I do not know how to do paperwork.*

Mr Tan: When you say "them", do you mean Mr Tan Huat Chye?

A: No.

Q: Who do you mean?

A: *Tan Chee Beng, your Honour.*

Q: So what you're telling the court is that Mr Tan Chee Beng had asked you to sign various documents, and you simply obeyed him?

A: No, your Honour.

…

Q: Mr Koh, I will be suggesting that instead of being a director who exercised independent judgment, you were a puppet of others.

A: I disagree, your Honour.

Q: And you basically obeyed what Mr Tan Huat Chye or Mr Tan Chee Beng instructed you to do.

A: Not possible.

Q: That is why you are unable to tell the court the business of Turf City Production Pte Ltd, despite being a shareholder and director of it.

A: *Your Honour, this is because most of the paperwork were done by them. I do not really know.*

[emphasis added]

80 Throughout his cross-examination, Koh KM consistently disclaimed knowledge of various matters on the basis that he did not handle any "paperwork", and that it was Tan CB who handled the "paperwork" and who was therefore familiar with those matters. In a similar vein, Koh KM said in his affidavit of evidence-in-chief ("AEIC") that he was, by nature, "not good with documents and paperwork", but "very good at dealing with people and making business contacts". He further mentioned in his AEIC that as director, he was "responsible for signing cheques", "actively marketed TCAE to get tenants for the used car centre" and also "resolved disputes amongst the tenants at TCAE". In sum, if Koh KM's story is to be believed, despite being a director of the JV Companies, the true extent of his role was actually narrowly confined to just managing the car centre, and even then he did not handle any related paperwork, but only dealt with people and business contacts.

81 It seems to us that Koh KM weaves a story that all too conveniently distances him from the heart of the dispute. In our judgment, it is implausible

that Koh KM did not know about the 2007 Head Lease at the material time. First, as this Court has already found, all parties had from the outset contemplated a nine-year arrangement in respect of the head lease with the SLA, barring any exigency or change in policy or circumstances (*Turf Club (No 1)* at [119]–[120]). Koh KM was involved in the SAA Group's bid for Turf City from the very outset. He must have known about the nine-year lease arrangement.

82 Secondly, Koh KM's AEIC did not deny that he knew about the 2007 Head Lease. As the Judge pointed out, Koh KM did not dispute in his AEIC that he knew what Tan CB was doing through SAA and the JV Companies (Supplementary Judgment at [38]). He only stated as follows: "I understand that the [Respondents] have taken issue with the fact that the head-lease was renewed in 2007, and further that this was allegedly not disclosed to KPMG".

83 Thirdly, the reality is that Koh KM was one of two directors of the JV Companies, which only had one business: sub-letting units in Turf City. Against this backdrop, it is difficult to imagine that Koh KM could have been entirely oblivious as to the existence of the 2007 Head Lease. As noted above, from at least 9 July 2007, TCAE was sending out letters to its sub-tenants indicating that their leases would be assigned to SAA from the commencement of the "new term with the ultimate landlord" and that their rental deposits would accordingly be transferred to SAA (see [74] above). As one of the two directors of TCAE, Koh KM must have been directly involved in the issue of these letters, or at the very least, known that such letters were being issued to the sub-tenants. In these circumstances, Koh KM must have been aware of the 2007 Head Lease and his non-disclosure of the same to the KPMG Entities amounts to a breach of cl 5.

84 Even if Koh KM had not been directly involved in or did not know about the issue of these letters because he did not handle "paperwork", he must have nonetheless been informed of the new leasing arrangement, perhaps orally, by Tan CB or other members of the management team. This is because by his own testimony, Koh KM was "mainly in charge of renting out the units to the people" (see [76] above). It would therefore be *necessary* for him to be made aware of the latest leasing arrangement in order for him to properly carry out his scope of work.

85 We thus find, on balance, that notwithstanding his denial under cross-examination and his repeated attempts to distance himself from the JV Companies' affairs, Koh KM must have known of the 2007 Head Lease at the material time. We reject any explanation to the effect that he did not know because he was not involved in "paperwork". Such involvement is only needed to understand details and intricacies. But non-involvement in paperwork does not mean that Koh KM did not know of the existence of the 2007 Head Lease itself. In our view, it must have come up for discussion between him and Tan CB, the two directors of the JV Companies. In the circumstances, we are of the view that it is ***implausible*** that Koh KM did not know of the 2007 Head Lease prior to the KPMG Entities' issuance of the valuation reports on 10 August 2007. Indeed, given Koh KM's involvement in the SAA Group and the fact that he was one of the two directors of the JV Companies, we find that he must have known of the 2007 Head Lease at the time when it was granted to SAA on 22 May 2007, or shortly thereafter.

86 In our view, the Judge arrived at the same conclusion when he held that Koh KM, as a director of the JV Companies, "was in a position to object when SAA declined to grant the sub-tenancies for the third tranche and when SAA took over the contractual arrangements with the ultimate sub-tenants", but

instead "stood by and acquiesced in Tan CB's decision to appropriate to SAA the whole benefit of the 2007 Head Lease" (Supplementary Judgment at [43]). Thus, although the Judge did not expressly state so, it is clear to us that the Judge disbelieved Koh KM's evidence that he did not know about the 2007 Head Lease at the material time. We see no reason to disturb this finding on appeal.

87 To conclude, Koh KM was aware of the 2007 Head Lease and thus breached cl 5 in hindering the KPMG Entities' discharge of their duties by failing to disclose such information to them. Accordingly, it is not strictly necessary to determine his liability for the tort of conspiracy. Nonetheless, for completeness, we will do so in the section concerning the Tort Issue.

No findings made as to Samuel Ng's or the JV Companies' liability in contract

88 As for Samuel Ng, it will be recalled that he did not take any substantive role in the proceedings from the outset and judgment was entered against him. Given that he is not a party to these appeals, it would not be appropriate for this Court to determine his liability in contract for the Repudiatory Breaches.

89 While the JV Companies are clearly parties to the Consent Order, they are only nominal parties in the present proceedings (*Turf Club (No 1)* at [7]). Any order that this Court makes in relation to the Repudiatory Breaches will not apply to them. In the circumstances, it is not necessary to determine the JV Companies' liability in contract for the Repudiatory Breaches.

Conclusion on the Party Issue

90 In conclusion, Tan Senior and Tan CB are not liable for the Repudiatory Breaches as they were not parties to the Consent Order. Only SAA is in breach

of cl 11 and the implied term. SAA and Koh KM are in breach of cl 5. We also make no findings as to Samuel Ng's and the JV Companies' liability in contract.

Remedy Issue: On what basis should contractual damages be assessed?

91 The next question is what contractual remedies ought to flow from the breaches of the Consent Order. Despite this being a general question, the parties have focussed on the nature and applicability of *Wrotham Park* damages as well as a disgorgement of gains based on *AG v Blake*. This is chiefly because, as all parties accept, it is difficult to assess the pecuniary loss caused by the Repudiatory Breaches. Hence, we will commence with the principles governing these remedies and their availability in the present case.

Amicus Curiae*'s submissions on* Wrotham Park *damages*

92 There are three parts to the submissions on the law by the *amicus curiae*, Assoc Prof Goh Yihan ("Prof Goh"), which are comprehensive and scholarly. We summarise them briefly here and will consider his views in greater detail as part of our analysis.

Conceptual foundation of Wrotham Park *damages*

93 First, after tracing the judicial evolution of *Wrotham Park* damages – from damages in lieu of an injunction to a general head of damages that can be awarded as a "just response" where the plaintiff is not able to establish direct financial loss – Prof Goh outlines the conceptual foundation of *Wrotham Park* damages. This is the most contentious part of this area of law, as Prof Goh acknowledges. Prof Goh's submission is that, while most of the cases, including local ones, have treated such damages as compensatory in nature, they are best seen as an example of gain-based damages. They are akin to but less exceptional than the account of profits awarded in *AG v Blake* (which allow for a

disgorgement of the defendant's profits in *contract*, and should not be confused with an account of profits in *equity* for breaches of fiduciary duties). In particular, Prof Goh relies on the work of Prof Ralph Cunnington and Prof James Edelman (now a judge of the High Court of Australia) to posit that *Wrotham Park* damages are an *objective gain-based award* concerned with reversing *the defendant's gain* rather than the plaintiff's loss. They are to be assessed not by reference to the subjective or actual gains, but by reference to *the objective value of the benefit received by the defendant*.

When Wrotham Park *damages can be awarded*

94 Second, Prof Goh tackles the more practical question of when *Wrotham Park* damages can be awarded. Here, he starts by identifying the *rationale* behind *Wrotham Park* damages and other gain-based remedies, such as a disgorgement of profits, which he submits all serve the same purpose of protecting the plaintiff's interest in performance. In particular, gain-based damages: (a) serve a "deterrent" function by requiring the defendant to disgorge his gains; and (b) fulfil a "value" function by requiring the defendant to return "the value of his breach, equal to the value of specific relief or the value to the defendant of non-performance". *Wrotham Park* damages, because they do not compel the defendant to disgorge all of his actual profit, *serve mainly to protect the plaintiff's performance interest*.

95 Keeping this rationale in mind, Prof Goh suggests that *Wrotham Park* damages should be available as a *tertiary* remedy if damages are inadequate and specific relief is not available. The requirement of inadequacy of damages (and other contractual remedies) will be met in cases where: (a) it is difficult to assess financial loss, (b) where there is no market substitute for performance, or

(c) where damages are nominal because the plaintiff has suffered non-financial loss.

96 Prof Goh also is of the view that there is no need for the additional requirement, taken from *AG v Blake*, that the plaintiff must demonstrate a legitimate interest in preventing the defendant from profiting from his breach of contract given that *Wrotham Park* damages are not as strongly deterrent as a full account of profits. However, if some legitimate interest is required as a way of limiting the scope of *Wrotham Park* damages, then this requirement should be easier to satisfy relative to the similar requirement in respect of a full disgorgement of profits under *AG v Blake*. In any event, Prof Goh submits that a limit based on a legitimate interest is not needed because *Wrotham Park* damages are "self-limiting" and are simply an example of "the vast armo[u]ry of measures that a court has to effectively protect the plaintiff's performance interest, when the plaintiff does not suffer a traditionally-quantifiable financial loss".

97 On the type of contractual breaches for which *Wrotham Park* damages ought to be available, Prof Goh's views are that:

(a) *Wrotham Park* damages can be awarded regardless of whether the breach of contract entails a violation of a property right, although the violation of property rights would make it easier for the plaintiff to show a legitimate interest in preventing the defendant from profiting from its breach.

(b) The *Wrotham Park* measure more naturally applies to negative covenants (broadly referring to any negative obligation in a contract) because it involves an assessment of what the plaintiff would have demanded from the defendant as a licence fee to relax the covenant,

> which does not make sense for positive obligations. However, theoretically, it is always possible to justify such damages even for breaches of positive covenants. Nevertheless, Prof Goh's view is that such an extension of the doctrine should be rejected because it would be difficult to apply and would mean that *every* breach of contract could potentially attract *Wrotham Park* damages.

Assessment of Wrotham Park *damages*

98 Prof Goh adopts the orthodox view that *Wrotham Park* damages are to be measured by such a sum of money as might reasonably have been demanded as a *quid pro quo* for relaxing the covenant. Given the objective nature of the damages, the calculation is by reference to a hypothetical bargain rather than the actual conduct and position of the parties.

99 Prof Goh's specific submissions on the assessment of *Wrotham Park* damages are as follows:

> (a) The negotiation is between a willing buyer and a willing seller, and the fact that a party would have refused to make a deal is to be ignored. Events subsequent to the hypothetical bargain, "such as that the contract-breaker's profit turned out to be much smaller than expected, should not normally be taken into account".
>
> (b) Relevant factors that may be taken into account include (i) the likely parameters given by ordinary commercial considerations bearing on each of the parties; (ii) any factor affecting the balance to be struck between the competing interests; and (iii) the need to ensure that the award does not provide a relief out of proportion to the real extent of the plaintiff's interest in proper performance judged on an objective basis.

(c) The quantum of the defendant's actual gain does not itself form the basis of the award, as *Wrotham Park* damages are not partial disgorgement, but are relevant as a matter of evidence in providing a good estimate of the anticipated profit at the time of breach.

(d) The date of assessment is as at the date of breach.

(e) The plaintiff must demonstrate that the defendant would not have obtained the benefit but for the breach. In addition, considerations of remoteness (whether the defendant could reasonably foresee the gain) and mitigation (whether the plaintiff has unreasonably delayed in initiating the claim) may well apply.

Whether Wrotham Park *or* AG v Blake *damages should be awarded in the present case*

100 Prof Goh submits that *Wrotham Park* damages ought to be awarded in this case because the parties have acknowledged that any traditional assessment of damages is fraught with uncertainty. Therefore, the sole requirement of "inadequacy of damages and other contractual remedies" is satisfied.

101 However, if, contrary to Prof Goh's views, there is an additional requirement of "legitimate interest", then he is of the view that the Respondents may not have shown that they have an interest in preventing the Appellants from making a profit that goes beyond mere performance of the contract. Hence, whether *Wrotham Park* damages should be awarded in the present case may well turn on whether "legitimate interest" is a requirement and, if so, whether it is satisfied on the facts.

102 Prof Goh is also of the view that an account of profits (*ie*, a full disgorgement of profits) should not be awarded because the present case

concerns a commercial transaction, with no need for strong deterrence, and is nowhere near as exceptional as *AG v Blake*.

Parties' submissions on the Remedy Issue

The Respondents' submissions

103 The Respondents argue that *Wrotham Park* damages are the most appropriate remedy and that the present case is "an almost textbook example of when the *Wrotham Park* remedy is justified". In the alternative, they submit that a disgorgement of profits based on *AG v Blake* should be ordered.

104 They agree with Prof Goh that *Wrotham Park* damages are a gain-based remedy and that the sole requirement for such damages put forward by him – that damages are inadequate – is satisfied in this case. In particular, they contend that damages are inadequate in this case for the following reasons:

> (a) Damages are difficult to quantify because any traditional assessment of damages, assessed by reference to the Respondents' pecuniary loss, is fraught with uncertainty. The Respondents' loss could either be:
>
> > (i) if the Respondents succeeded in the bid – the loss in profits earned from the JV Companies' businesses for the remaining tenure of the head lease as well as their assets at the point of purchase, less the fair price for buying out SAA Group's shares with the bid; or
> >
> > (ii) if the SAA Group succeeded in the bid – the fair price of the Respondents' shares that the SAA Group would have to pay them.

The Respondents submit that the calculation of such damages is highly problematic because we cannot even begin to guess the bid prices, or the proper valuation had the 2007 Head Lease been taken into account.

(b) As it is too late to recreate the Bidding Exercise, it is impossible for damages to be used to obtain a market substitute.

(c) The lost opportunity to participate in the Bidding Exercise is a non-financial loss for which traditional damages would be nominal.

105 If there is a requirement that legitimate interest must be demonstrated, the Respondents submit that this requirement is met because the breaches were: (a) cynical and deliberate; (b) of a settlement contract, recorded in court, rather than an ordinary commercial agreement; and (c) also constituted breaches of the SAA Group's fiduciary obligations to the Respondents.

106 In so far as the assessment of the *Wrotham Park* award is concerned, the Respondents submit that this court can either: (a) assess the damages based on the projected profit figures in the report of Mr Timothy James Reid ("Mr Reid"), a director at Ferrier Hodgson Pte Ltd, which the Respondents tendered in the trial below ("the Ferrier Hodgson report"); or (b) remit the assessment of damages to the Judge with guidelines for him to carry out the hypothetical negotiation after determining and taking into account the actual profits made by the JV Companies.

107 In the alternative, the Respondents submit that this is a case that is sufficiently exceptional to warrant a disgorgement of profits. They, however, only seem to be seeking a *partial* disgorgement of profits based on the 37.5% share which they hold in the JV Companies. The Respondents place particular weight on the nature of the Consent Order as an order of court which was

disrespected. In response to Prof Goh's position that the case is not sufficiently exceptional to warrant a disgorgement of profits, the Respondents argue that he proceeded on the wrong assumption that the parties were not fiduciaries.

108 The Respondents also point out that an account of profits (in equity) is available for a breach of fiduciary duty. This point has already been dealt with as part of our discussion on the fiduciary issue.

The Appellants' submissions

(1) Submissions by TCAE, TCPL, SAA and Koh KM

109 The submissions of Mr Poon – who represents TCAE, TCPL, SAA and Koh KM – focus on refuting the Respondents' claim that *Wrotham Park* damages and a disgorgement of profits based on *AG v Blake* are suitable remedies.

110 In so far as *Wrotham Park* damages are concerned, Mr Poon adopts the three requirements laid down in the English Court of Appeal decision of *One Step (Support) Ltd v Morris-Garner and another* [2017] QB 1 ("*One Step (CA)*") which was cited in *obiter dicta* by this Court in *PH Hydraulics* (at [80]). The three requirements are as follows: (a) there must be a deliberate breach by the defendant of its contractual obligations for its own reward; (b) the plaintiff would have difficulty in establishing financial loss therefrom; and (c) the plaintiff must have a legitimate interest in preventing the defendant's profit-making activity in breach of contract.

111 Mr Poon's position is that only the second requirement (difficulty in establishing financial loss) is met. He submits that the first requirement is not met as the breaches of the Consent Order were not deliberate or premeditated.

While this Court may have found that SAA was obliged under the Consent Order to grant sub-tenancies to the JV Companies, this was not an express term of the Consent Order. Further, SAA had acted only after it obtained legal advice that the Consent Order did *not* oblige SAA to grant fresh sub-tenancies to the JV Companies. He argues it is also crucial to note that Choo J did not think that this was a breach of the Consent Order as set out in his judgment for SUM 4117, even if this Court had not agreed with those observations. Lastly, he submits that SAA was in no way furtive. Quite on the contrary, SAA had openly sent documents to the ultimate tenants and communicated with them before it entered into direct sub-leases with them, bypassing the JV Companies.

112 Mr Poon submits that the third requirement is also not met because the Respondents did not have a legitimate interest in preventing the profit-making activity. He argues that this requirement is not simply asking if the plaintiff has an interest in preventing the breach of contract *per se*, or it would be a moot question. Instead, this requirement would only be satisfied where the profit-making activity caused the plaintiff *direct* loss and damage. In this case, the loss was to the JV Companies and not the Respondents, and the latter thus cannot be said to have a legitimate interest in preventing the profit-making activity.

113 Mr Poon further submits that even if the three requirements were met, there are still two reasons that militate against the granting of *Wrotham Park* damages:

> (a) First, the Respondents had by their own inaction failed to obtain injunctive or other relief that could have prevented their loss. Had the Respondents taken effective action timeously, there may have been *actual* negotiations whereby the parties could have agreed on a sum to release SAA from its obligation to grant fresh sub-tenancies to the

JV Companies while allowing the bidding exercise to proceed in accordance with the terms set out in SUM 4117, which would have obviated the loss.

(b) Second, given the commercial considerations bearing on each of the parties, it is unlikely that a bargain would have been reached between the parties even in a hypothetical negotiation. In this regard, Mr Poon relies on the decision of the Singapore High Court in *JES International Holdings Ltd v Yang Shushan* [2016] 3 SLR 193 ("*JES International*") (at [212]) for the proposition that, while the fact that a party may have been unwilling to negotiate in reality is irrelevant to the granting of *Wrotham Park* damages, such damages would not be awarded if the hypothetical negotiation would produce a result that is outside the bounds of realistic commercial acceptability and it would thus have been impossible, even hypothetically, for an agreement to have been reached.

114 In response to Prof Goh's submissions, Mr Poon argues that the fact that damages are difficult to quantify cannot, in and of itself, justify *Wrotham Park* damages. Such a position would effectively "swallow" up the primary remedy for breach of contract and create difficulties due to the inherently uncertain and arbitrary nature of the hypothetical negotiation assessment. Therefore, he submits that the court should adopt the requirements laid down in *One Step (CA)*, including the requirement for there to be a deliberate breach and a legitimate interest. Alternatively, the court should only award *Wrotham Park* damages if it is difficult to establish financial loss *and* there are special circumstances to do so.

115 In addition, Mr Poon argues that the present case *in substance* involves the breach of a positive covenant, namely the "overt action" of granting fresh

sub-tenancies to the JV Companies after the 2007 Head Lease was acquired by SAA, for which *Wrotham Park* damages are inappropriate.

116 In the event that *Wrotham Park* damages should be awarded, Mr Poon submits that this Court should determine the quantum of the damages instead of remitting it to the Judge.

117 As for the Respondents' alternative claim for a full disgorgement of profits based on *AG v Blake*, Mr Poon argues that such a remedy, being one that is draconian and meant for highly exceptional cases as reiterated in *AG v Blake* itself, is clearly inappropriate in this case.

(2) Submissions by Tan CB and Tan Senior

118 The submissions by Mr Choh – who represents Tan CB and Tan Senior – are less clear. Mr Choh commences with the premise that *Wrotham Park* damages and *AG v Blake* damages are merely different *methods* of assessing compensatory damages where the loss is not easily quantifiable in monetary terms. No matter which method of assessment is employed, he argues that damages cannot be punitive even if the breach is seen to be a cynical one. Somewhat strangely, he argues that because *Wrotham Park* damages and *AG v Blake* damages are both compensatory in nature, there ought to be no difference in the quantum of damages awarded regardless of which is chosen as a method to assess damages. Mr Choh submits that the method of assessment adopted simply ought to be the one which is the easiest to implement, and which will assist in reducing legal costs for the parties involved. On this basis, Mr Choh submits that *Wrotham Park* damages (or a hypothetical bargain) may not be the best method of assessment in the present case.

119 In response to Prof Goh's submissions, Mr Choh maintains his position that *Wrotham Park* damages and *AG v Blake* damages merely constitute *methods* of assessing compensatory damages which can be used when the traditional methods of assessment fail. He therefore disagrees with Prof Goh that *Wrotham Park* damages are a gain-based remedy distinct from orthodox compensatory damages.

120 On the facts, Mr Choh's position is that because pecuniary loss "cannot easily be identified", it is possible in law for the Respondents to obtain "damages … in respect of the disappointment of their expectation interest". This "expectation loss" is characterised as loss arising from the share which the Respondents "hold as shareholders of the JV Companies and indirectly the 2007 Head Lease". However, Mr Choh argues that there is no need to embark on a hypothetical bargain to assess this "expectation loss" and that compensatory damages can still be granted. All that is necessary is for the court to examine the breach and non-breach positions of the parties. He points out that had the sub-tenancies been granted to the JV Companies, the Respondents, by virtue of their shareholding in the JV Companies, would have been entitled to some of the profits which would have been earned by the companies. Thus, to that extent, the plaintiff's loss can indirectly be referenced by the defendant's gain, "albeit on a premise closer to a partial account of profits [*ie*, a partial disgorgement of profits]".

121 Mr Choh submits that the result is likely to be the same even if the court adopts the *Wrotham Park* measure. According to him, the inquiry in the hypothetical bargain would be what the parties would have each wanted for their share of the JV Companies and their share of the expected profits from the 2007 Head Lease, which "in all practical terms still comes back to the same measure" (as that set out in the preceding paragraph). But he argues that the hypothetical

bargain should not be resorted to because it would result in an overly complicated fictional process, which may result in the imposition of punitive damages.

122 Hence, in essence, Mr Choh's position is that the damages that should be awarded – no matter what basis this is said to be premised upon, given that *Wrotham Park* damages and *AG v Blake* damages have the same juridical basis and are just different methods of assessing the innocent party's "expectation loss" – are a portion of profits that SAA had earned from the 2007 Head Lease (proportionate to the Respondents' shareholding in the JV Companies).

The relevant legal issues and principles

The compensatory principle

123 As we noted at the outset of our judgment, the basic legal contours of the law of contractual damages are well-settled and centre on the fundamental principle that the general aim of damages for breach of contract is to ***compensate***. Such orthodox compensatory damages are generally assessed by reference to ***the plaintiff's pecuniary loss***. In this regard, the classic formulation is that of Parke B in *Robinson* (at 855):

> The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

124 And, in a similar vein, it was observed by this Court in *PH Hydraulics*, as follows (at [62]):

> We take as our starting point the well-accepted proposition that "***the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance***" (see the House of Lords decision of Co-*operative Insurance Society v Argyll Stores (Holdings) Ltd*

> [1998] 1 AC 1 at 15, *per* Lord Hoffmann). That is why ***the general aim of damages for breach of contract is to compensate***: ***the plaintiff is to be placed, as far as a payment of money allows, in the same position as if the contract had been performed*** (see the oft-cited English decision of ***Robinson v Harman*** (1849) 1 Exch 850 at 855). Besides orthodox compensatory damages, which are assessed by reference to the plaintiff's pecuniary loss, there are other measures by which contractual damages can be assessed, which we will return to later. But it suffices to note that ***these other remedial options serve also to protect the plaintiff's interest in contractual performance*** and *remain primarily compensatory in purpose*. [emphasis in italics in original; emphasis in bold italics and underlined bold italics added]

125 The formulation in *Robinson* is embodied, among others, in s 50 of the Sale of Goods Act (Cap 393, 1999 Rev Ed). It is well-established in modern-day contract law. Put simply, damages to compensate the plaintiff for his loss are intended to put him in the position he would have been ***had the contract been performed*** (*ie*, had the breach of contract not occurred). This is often termed compensation for the plaintiff's ***expectation loss***. Such expectation loss would encompass the plaintiff's *total (or gross)* loss – including the expected (or net) *profit* that the plaintiff would have received had there been no breach of contract as well as his expected *expenses*, which he would have recouped if the contract had been performed.

126 Alternatively, the plaintiff could elect to recover his ***reliance loss***. This constitutes the loss which the plaintiff has suffered as a result of the breach of contract identified by reference to his ***actual expenditure*** *pursuant to* the performance of the contract concerned. In contrast to damages for expectation loss, reliance loss puts the plaintiff in the position ***as if the contract had never been entered into in the first place***. This measure of damages is usually awarded by the court where it is *impossible* to ascertain the expectation loss. The oft-cited case in this regard is that of the High Court of Australia in *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, where the

contractual subject-matter was, in fact, non-existent. The plaintiff, however, is ***not*** permitted to claim both total (or gross) loss *as well as* reliance loss as to permit such recovery would be to permit a kind of ***double-recovery*** on the part of the plaintiff (the phrase "a kind" is used because reliance loss involves *actual* expenditure whereas expectation loss, which constitutes total (or gross) loss, includes only *expected* expenditure; hence, whilst there would be some measure of double-recovery, there would be no double-recovery in the literal sense, except to the extent that, in a given fact situation, the actual expenditure is *the same* as the expected expenditure (which is in fact often the case)).

127 The crucial point to note is that both measures of damages are ***compensatory*** and based on the plaintiff's ***loss***. Indeed, as observed by the English High Court in *Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd* [2010] EWHC 2026 (Comm) ("*The Mamola Challenger*"), the two measures are *not* awarded on a different juridical basis, and reliance loss may be characterised as an application of the compensatory principle laid down in *Robinson*, premised on the *assumption* that the plaintiff would have, at the very least, recouped his expenditure had the contract been performed (at [42]–[57]). This analysis explains why, although the plaintiff generally has an unfettered choice to claim either expectation loss or reliance loss, he will *not* be permitted to claim *reliance* loss where he has made *a bad bargain* (*ie*, where the reliance loss exceeds the expectation loss). The leading decision on this principle is that of the English Court of Appeal in *C & P Haulage (a firm) v Middleton* [1983] 1 WLR 1461 ("*C & P Haulage*") (see also the Singapore High Court decision of *Van Der Horst Engineering Pte Ltd v Rotol Singapore Ltd* [2006] 2 SLR(R) 586). As Ackner LJ (as he then was) put it in *C & P Haulage* (at 1467−1468):

> It is not the function of the courts where there is a breach of contract … to put a plaintiff in a better financial position than if the contract had been properly performed.

128 The onus of proof, however, is on the defendant to prove that the expenditure incurred by the plaintiff is irrecoverable because the plaintiff would not have recouped his expenditure (*ie*, that the plaintiff had, in fact, made a bad bargain) (see *The Mamola Challenger* at [47] citing *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16 ("*CCC Films*")). In *CCC Films*, Hutchison J explained (at 40) that the imposition of the onus of proof on the defendant was necessary, lest the general object of permitting the plaintiff the alternative method of formulating his claim as wasted expenditure (*ie*, for reliance loss) be defeated. But this does not undermine the analysis that damages based on the plaintiff's expectation loss and reliance loss are ***both* premised on the loss-based, compensatory principle laid down in Robinson** as well as the more fundamental proposition, which this Court reiterated in *PH Hydraulics*, that ***the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance*** (see [124] above).

"Restitutionary damages" as a distinct category?

129 The present case, however, raises the possibility that there is a distinct head of "***restitutionary** damages*" that may be awarded in the law of contract. Such damages are not meant to compensate *the plaintiff* for the *loss* caused by the breach of contract, but are instead premised on the ***gains*** made by ***the defendant*** as a result of the breach. In this regard, it has been contended that there are at least ***two*** possible sub-categories of such "restitutionary damages".

130 The main remedy which the parties have focussed on in the present appeal centres on the ***first*** – damages awarded based on the English High Court's decision in *Wrotham Park*. In essence, *Wrotham Park* damages are an exceptional remedy awarded in situations involving a breach of contract where the award of orthodox compensatory damages either by way of expectation loss

or reliance loss is not possible. The court, in applying the *Wrotham Park* doctrine, awards the plaintiff damages measured by such a sum of money as might reasonably have been demanded by him from the defendant as a *quid pro quo* for relaxing the covenant between them. This is the "licence fee" which the plaintiff could reasonably have extracted in return for his consent to the defendant's actions that would otherwise constitute a breach of contract. This is an ***objective*** calculation by reference to a ***hypothetical bargain*** rather than the actual subjective conduct and position of the parties

131 In the context of the present appeal, the question arises whether such damages are a part of Singapore law and, if so, what their nature and conceptual foundation is. What is germane for present purposes (and which impacts the issue as to the *nature* of such damages) is that, at least at first glance, what the court appears to be doing in awarding *Wrotham Park* damages in most cases is ***stripping (albeit only in part)*** the ***gain or profit*** that has accrued to the defendant. This is done on the premise that the reasonable sum or licence fee which the parties would have agreed to under the hypothetical bargain would be *a percentage* of the defendant's anticipated profits. This would, at first blush at least, appear to suggest that such an award of damages is ***restitutionary*** in nature. An alternative view, which may be seriously controverted, is that *Wrotham Park* damages are in fact ***compensatory***. This gives rise to a ***conceptual question*** as to the ***nature*** of *Wrotham Park* damages. Apart from this question, the further issues that arise are the ***requisite legal requirements*** that need to be met before *Wrotham Park* damages can be awarded and how the ***quantum*** of such an award should be determined.

132 There is, in addition to *Wrotham Park* damages, a ***second*** possible sub-category of "restitutionary damages" based on the House of Lords' decision in *AG v Blake*, in which a court awards damages to the plaintiff (in a situation

involving a breach of contract) by way of ***an account of profits*** ***based on the actual gain or profit*** *that has accrued to the defendant as result of his breach*. This award typically captures the ***entirety*** of the profits made by the defendant. Just as with *Wrotham Park* damages, such an account of profits can be awarded *only* in situations where the award of compensation for breach of contract either by way of expectation loss or reliance loss is not possible. It is important to note, at this juncture, that the House of Lords in *AG v Blake* did not expressly use the term "restitutionary damages", preferring to classify such an award as ***an account of profits*** *instead* (see *per* Lord Nicholls of Birkenhead at 284). However, we should stress that *AG v Blake* damages are a *contractual* remedy and should not be confused with an account of profits in *equity* for breaches of fiduciary duties.

133 On at least a superficial review of the cases, ***both*** *Wrotham Park* damages and *AG v Blake* damages appear to involve the ***stripping*** of the ***gain or profit*** that has accrued to the defendant as a result of his breach of contract. However, from a normative (and not merely descriptive or factual) perspective, the ***significant difference*** is this: whereas an award of *Wrotham Park* damages involves the stripping of the defendant's gain or profit based on a ***hypothetical or objective measure***, an award of *AG v Blake* damages involves stripping ***the actual*** gain or profit that has accrued to the defendant. This is *not merely* a *technical* difference as we shall seek to elaborate upon below.

134 The overarching question which faces us, therefore, is this: whether we should recognise that there is a distinct head of "***restitutionary*** *damages*" that may be awarded in the law of contract in Singapore which would allow the court, in some cases at least, to depart from the fundamental compensatory function of contractual damages by granting an award premised on *the defendant's profits or gains* rather than *the plaintiff's loss*. To answer this

question, we first examine the authorities and principles governing *Wrotham Park* damages, which is the primary remedy sought by the Respondents in the present case. That will be followed by some tentative observations on *AG v Blake* damages, which are arguably also relevant due to the Respondents' alternative submission that a disgorgement of gains (albeit on a *partial* basis) is justified in the present case (see [107] above).

The law on Wrotham Park *damages*

(1) Judicial development of *Wrotham Park* damages

135 *Wrotham Park* damages are a creature of the common law. They are, at least arguably, part of a wider genus of damages – falling within what has been termed the "user principle" – which are assessed by reference to the fee that the defendant would have reasonably had to pay for a licence by the plaintiff to act (see the decision of Judith Prakash J (as she then was) in *Yenty Lily (trading as Access International Services) v ACES System Development Pte Ltd* [2013] 1 SLR 577 ("*Yenty Lily (HC)*") at [43]–[67]) (see [210]–[214] below where we elaborate on the relationship between *Wrotham Park* damages and user damages in other contexts). Such damages are available in torts involving breaches of property rights such as trespass, conversion and wrongful detention (see, *eg*, *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713; *The Owners of the Steamship "Mediana" v The Owners, Master and Crew of the Lightship "Comet"* [1900] AC 113; *Strand Electric and Engineering Co Ld v Brisford Entertainments Ld* [1952] 2 QB 246), breaches of intellectual property rights (see, *eg*, *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809), and equitable wrongs such as breach of confidence (see, *eg*, *Universal Thermosensors Ltd v Hibben and others* [1992] 3 All ER 257), amongst others.

(A) *WROTHAM PARK ESTATE CO LTD V PARKSIDE HOMES LTD*

136 In the law of contract, damages assessed by reference to the licence fee measure were first awarded in the eponymous decision of the English High Court in *Wrotham Park*. The case concerned a covenant between a buyer and a seller of land that the buyer and his successors-in-title would not develop the land except in accordance with the layout plan approved by the buyer. The defendant, who were successors-in-title to the buyer, developed their land into a housing estate in breach of the covenant. The plaintiffs, who had taken on the rights of the seller, sought a mandatory injunction that the houses be demolished. Brightman J (as he then was) refused to grant the injunction on the basis that this would result in unpardonable economic waste. However, he regarded it as unjust that the plaintiffs should be left without any compensation, particularly as the defendant had proceeded with their breaches despite clear and early protest by the plaintiffs and the issue of proceedings. He thus considered whether *damages in lieu of the mandatory injunction* could be ordered. The learned judge considered that he did have the jurisdiction to award such damages in lieu of an injunction under the Chancery Amendment Act 1858 (c 27) (UK), better known as the Lord Cairns' Act ("the LCA").

137 The next consideration was how the quantum of damages should be measured. This was the most significant part of the judgment, and Brightman J's analysis can be broken down as follows. First, he reiterated the basic compensatory measure based on *Robinson*; but he rejected the argument that no damages or nominal damages ought to be awarded despite the plaintiffs' concession that the value of the estate was "not diminished by one farthing in consequence" of the breach (at 812). That would be a result of questionable fairness (at 812), and "justice will manifestly not have been done" (at 815). The learned judge then noted that a "comparable problem" arose in the cases on the

user principle in tort and intellectual property (see [135] above). Although he acknowledged that the facts of those cases were "a long way from the facts of the case before [him]" (at 814), Brightman J judged that the like principle could be applied in *Wrotham Park* where the defendant, in defiance of protest and writ, had invaded the plaintiffs' rights in order to reap a financial profit for itself.

138 He hence held in the following famous passage that the approach to be applied was this (at 815):

> [T]he general rule would be to measure damages by reference to *that sum which would place the plaintiffs in the same position as if the covenant had not been broken.* [The defendant] … could have avoided breaking the covenant in two ways. One course would have been not to develop the allotment site. *The other course would have been for [the defendant] to have sought from the plaintiffs a relaxation of the covenant. On the facts of this particular case the plaintiffs, rightly conscious of their obligations towards existing residents, would clearly not have granted any relaxation, but for present purposes I must assume that it could have been induced to do so. In my judgment a just substitute for a mandatory injunction would be* ***such a sum of money as might reasonably have been demanded by the plaintiffs from [the defendant] as a quid pro quo for relaxing the covenant****.* [emphasis added in italics and bold italics]

139 In calculating the award, Brightman J first rejected the plaintiffs' argument that the sum should be a substantial proportion of the development value of the land. The breach which had actually taken place was over a very small area and its impact was insignificant. Instead, he judged that a landowner in the plaintiffs' position would have reasonably required a certain percentage of the anticipated profit as a price for the relaxation of the covenant. In arriving at this finding, he ruled that he must assume that the plaintiffs would have felt obliged to relax the covenant although, on the facts of the particular case, "the plaintiffs, rightly conscious of their obligations towards existing residents, would clearly not have granted any relaxation" (at 815). Exercising moderation,

Brightman J assessed that a sum equal to five percent of the defendant's *anticipated* profits would be fair, in all the circumstances. He also assessed that a developer with "the benefit of foresight" would have anticipated to profit by £50,000, which was the profit that the defendant conceded that it had made.

(B) EARLY CASES ON *WROTHAM PARK* DAMAGES

140 From the case of *Wrotham Park* itself as well as subsequent early decisions which considered the decision, notably the English Court of Appeal's decision in *Jaggard v Sawyer and Another* [1995] 1 WLR 269 ("*Jaggard*"), it is apparent that this head of damages was initially conceptualised as ***compensation*** *under the LCA in lieu of an injunction*, which such damages are meant to replace (see Alvin W-L See, "Unlocking *Wrotham Park* Damages: Lord Cairns' Act and Loss of the Ability to Sue for Future Infringements" [2017] Conv 339 for an account of the early development of *Wrotham Park* damages as a remedy awarded in lieu of an injunction to achieve finality in the settlement of disputes).

141 As an aside, we should observe – parenthetically – that notwithstanding observations as far back as 1887 in the decision of *Tan Seng Qui v Palmer* (1887) 4 Ky 251, the Singapore High Court in *Shiffon Creations (Singapore) Pte Ltd v Tong Lee Co Pte Ltd* [1987] SLR(R) 730 rejected the argument that the Singapore courts had the jurisdiction to award equitable damages under the LCA. One writer, however, perceptively pointed out that the issue was left open as to whether equitable damages could nevertheless still be awarded on a more general basis and advocated, in any event, a clarification via statute (see Soh Kee Bun, "Jurisdiction to Award Equitable Damages in Singapore" (1988) 30 Mal LR 79). The subsequent decision of this Court in *Shiffon Creations (Singapore) Pte Ltd v Tong Lee Co Pte Ltd* [1990] 2 SLR(R) 472 did not cast

any further light on this issue. In any event, legislative clarification did in fact arrive in the form of para 14 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) (read with s 18(2) thereof), which gives the High Court the "[p]ower to grant all reliefs and remedies at law and equity, including damages in addition to, or in substitution for, an injunction or specific performance".

142 Returning to the early decisions on *Wrotham Park* damages, Sir Thomas Bingham MR (as he then was) held as follows in *Jaggard* at 281–282:

> *I cannot, however, accept that Brightman J's assessment of damages in the Wrotham Park case was based on other than compensatory principles.* The defendants had committed a breach of covenant, the effects of which continued. The judge was not willing to order the defendants to undo the continuing effects of that breach. He had therefore to assess the damages necessary to compensate the plaintiffs for this continuing invasion of their right. ***He paid attention to the profits earned by the defendants, as it seems to me, not in order to strip the defendants of their unjust gains, but because of the obvious relationship between the profits earned by the defendants and the sum which the defendants would reasonably have been willing to pay to secure release from the covenant.*** [emphasis added in italics and bold italics]

143 The following passage from Sir Robert Megarry VC's English High Court decision in *Tito and Others v Waddel and Others (No 2)* [1977] Ch 106 ("*Tito v Waddel (No 2)*") at 355, which the learned Master of the Rolls relied on in *Jaggard* at 282, is also instructive:

> *If the plaintiff has the right to prevent some act being done without his consent, and the defendant does the act without seeking that consent, the plaintiff has suffered a loss in that the defendant has taken without paying for it something for which the plaintiff could have required payment, namely, the right to do the act.* The court therefore makes the defendant pay what he ought to have paid the plaintiff, for that is what the plaintiff has lost. The basis of computation is not, it will be observed, not in any way directly related to wasted expenditure or other loss that the defendant is escaping by reason of an injunction being

> refused: it is the loss that the plaintiff has suffered by the defendant not having observed the obligation to obtain the plaintiff's consent. Where the obligation is contractual, that loss is the loss cause to the plaintiff by the breach of contract. [emphasis added]

144 From these authorities, a ***narrow conception*** of the *Wrotham Park* damages may be discerned under which such damages are rationalised as ***compensation for the loss of the sum which the plaintiff could have exacted from the defendant as the price of his consent*** (see also Lord Hobhouse's discussion of *Wrotham Park* in *AG v Blake* at 298–299, as well as Robert J Sharpe and S M Waddams, "Damages for lost opportunity to bargain" (1982) 2 OJLS 290). The early cases, which involved negative or restrictive covenants in relation to property, also seemed to suggest that *the contractual breach must involve a* ***proprietary right*** of the plaintiff before damages could be awarded based on the hypothetical bargain measure. Lord Hobhouse thus observed in *AG v Blake* that *Wrotham Park* damages arise from cases which "usually involve a proprietary right of the plaintiff which he is *prima facie* entitled to enforce" (at 298). On this view, *Wrotham Park* damages are *a sub-species of orthodox compensatory damages* as applied to *a particular type of loss* (*ie*, the lost opportunity to bargain for the plaintiff's consent) and in *a particular context* (*ie*, cases involving a contractual breach of a proprietary right), with the jurisdiction to award such damages being premised on the LCA.

145 This narrow conception of the doctrine, however, was then overtaken in English law. Notably, in the seminal judgment of Lord Nicholls in *AG v Blake*, the learned judge cited *Wrotham Park* with approval and took the view that the principle applied in that case extends generally to any breach of contract where the plaintiff's contractual rights have been "expropriated" without causing financial loss, and the defendant must make reasonable payment in respect of the benefit he has gained through his breach (at 283–284).

(C) *ATTORNEY GENERAL V BLAKE*

146 *AG v Blake* was a truly exceptional case. It concerned a UK intelligence agent, the defendant, who had also acted as a "double agent" for the USSR. He then entered into a publishing deal for his autobiography, thereby breaching his contractual undertaking not to divulge any official information gained during his employment as a member of the UK intelligence service. He was paid significant sums for entering into the deal, and the Attorney General brought a civil claim in contract for a *full* account of the defendant's wrongfully begotten profits. The majority of the House of Lords held that there was sufficient basis to depart from the ordinary compensatory principle and allowed the Attorney General's claim.

147 The key passage in Lord Nicholls's judgment on the case of *Wrotham Park* bears close reading (at 283–284):

> In reaching his conclusion [Brightman J in *Wrotham Park*] applied by analogy the cases mentioned above concerning the assessment of damages when a defendant has invaded another's property rights but without diminishing the value of the property. I consider he was right to do so. Property rights are superior to contractual rights in that, unlike contractual rights, property rights may survive against an indefinite class of persons. *However, it is not easy to see why, as between the parties to a contract, a violation of a party's contractual rights should attract a lesser degree of remedy than a violation of his property rights. As Lionel D Smith has pointed out in his article "Disgorgement of the profits of Breach of Contract: Property, Contract and 'Efficient Breach'" (1995) 24 Can BLJ 121,* ***it is not clear why it should be any more permissible to expropriate personal rights than it is permissible to expropriate property rights.***
>
> …
>
> ***The* Wrotham Park *case, therefore, still shines, rather as a solitary beacon, showing that in contract as well as tort damages are not always narrowly confined to recoupment of financial loss.*** *In a suitable case damages for breach of contract may be measured by the benefit gained by the*

> *wrongdoer from the breach. The defendant must make a reasonable payment in respect of the benefit he has gained.*
>
> [emphasis added in italics and bold italics]

148 From the above passage, two points can be distilled. First, Lord Nicholls's judgment stands for the proposition that *Wrotham Park* damages may be awarded for a simple breach of contract, without any pre-requisite that the contractual right breached must be of a proprietary nature. This follows from his observation that "it is not clear why it should be any more permissible to expropriate personal rights than it is permissible to expropriate property rights." Second, it is clear that the learned judge viewed *Wrotham Park* damages as restitutionary or gain-based, with the damages premised directly on the benefit gained by the wrongdoer from the breach. This is why Lord Nicholls was able to rely on *Wrotham Park* as a stepping stone for the award of the *full* disgorgement of the defendant's gains in *AG v Blake* itself, although it was emphasised that the latter award would only be appropriate in "exceptional circumstances" (at 285).

149 The latter point, that *Wrotham Park* damages are restitutionary in nature, is deeply controversial and has not gained judicial traction. Indeed, it was rejected by Lord Hobhouse in *AG v Blake* itself, where he held as follows (at 298):

> What has happened in such cases [as *Wrotham Park*] is that there has either actually or in effect been a compulsory purchase of the plaintiff's right of refusal. … *What the plaintiff has lost is the sum which he could have exacted from the defendant as the price of his consent to the development.* ***This is an example of compensatory damages.*** *They are damages for breach. They do not involve any concept of restitution and so to describe them is an error.* ***The error comes about because of the assumption that the only loss which the plaintiff can have suffered is a reduction in the value of the dominant tenement.*** [emphasis added in italics and bold italics]

150 On the other hand, Lord Nicholls's view that *Wrotham Park* damages are an independent head of damages that are, in principle, available for an ordinary breach of contract even if the contract concerned did not involve a proprietary right, gained widespread acceptance. *Wrotham Park* damages were thus divorced from their initial roots as an award in lieu of an injunction under the LCA.

151 A review of the key decisions following *AG v Blake* on the *Wrotham Park* doctrine elucidates both of the above points.

(D) CASES ON *WROTHAM PARK* DAMAGES AFTER *AG V BLAKE*

152 The first of these decisions decided after *AG v Blake* is the English Court of Appeal case of *Experience Hendrix LLC v PPX Enterprises Inc and another* [2003] 1 All ER (Comm) 830 ("*Experience Hendrix*"). The case concerned a settlement agreement between the assignee of the artist Jimi Hendrix's estate and the defendant under which the latter agreed not to use Hendrix's recordings without his estate's consent. The defendant breached this agreement, and the issue was whether damages could be awarded notwithstanding the concession by Hendrix's estate that it could not prove any financial loss. In this regard, Mance LJ (as he then was) observed that "damages may be said to be an inadequate remedy, because of the practical impossibility in each case of demonstrating the effect of a defendant's undoubted breaches on the appellant's general programme of promoting their product" (at [38]). Hence, he judged that a *Wrotham Park* award was justified. In arriving at this ruling, the learned judge relied on the decision in *AG v Blake* to reject the argument that the award in *Wrotham Park* was only possible where the court was refusing an injunction (at [34]).

153 At the same time, Mance LJ cast doubt on the restitutionary analysis of

Wrotham Park damages in the following illuminating passage (at [26]):

> *Whether the adoption of a standard measure of damages represents a departure from a compensatory approach depends upon what one understands by compensation and whether the term is only apt in circumstances where an injured party's financial position, viewed subjectively, is being precisely restored.* The law frequently introduces objective measures (*e.g.* the available market rules in sale of goods) or limitations (*e.g.* remoteness). The former may increase or limit a claimant's ability to recover loss actually suffered. … ***In a case such as* Wrotham Park *the law gives effect to the instinctive reaction that, whether or not the appellant would have been better off if the wrong had not been committed, the wrongdoer ought not to gain an advantage for free, and should make some reasonable recompense****. In such a context it is natural to pay regard to any profit made by the wrongdoer (although a wrongdoer surely cannot always rely on avoiding having to make reasonable recompense by showing that despite his wrong he failed, perhaps simply due to his own incompetence, to make any profit).* The law can in such cases act either by ordering payment over of a percentage of any profit or, in some cases, by taking the cost which the wrongdoer would have had to incur to obtain (if feasible) equivalent benefit from another source. [emphasis added in italics and bold italics]

154 The next decision is *WWF-World Wide Fund for Nature and another v World Wrestling Federation Entertainment Inc* [2008] 1 WLR 445 ("*WWF*"), which was another decision of the English Court of Appeal. In that decision, Chadwick LJ expressly held that "*[t]he power to award damages on a* Wrotham Park *basis does not depend on Lord Cairn[s'] Act: it exists at common law*" [emphasis added] (at [54]). Hence, such damages could be awarded "notwithstanding that there is no claim for an injunction – and notwithstanding that there could be no claim for an injunction" (at [54]).

155 *WWF* is an important authority as the issue of whether *Wrotham Park* damages are compensatory or restitutionary was squarely before the court. The case concerned breaches by the defendants of a global settlement agreement that the parties had reached, after extensive litigation, on the use of the initials

"WWF". The inquiry was what remedy ought to be ordered against the defendants. The English High Court had earlier dismissed a claim for an account of profits based on *AG v Blake* made by the plaintiff; and the plaintiff subsequently sought to amend its pleadings to include a claim for *Wrotham Park* damages. The defendant argued that this claim was barred by the doctrine of *res judicata* because it was juridically highly similar to the claim for an account of profits that had already been rejected. Chadwick LJ, in determining the issue, carefully reviewed the authorities on *Wrotham Park* damages before finding that such damages are essentially compensatory; he relied on, in particular, Lord Hobhouse's speech in *AG v Blake* (at [47]–[57]). He went on to elaborate that "the underlying feature, in both [*Wrotham Park* and *AG v Blake* damages], is that the court recognises the need to compensate the claimant in circumstances where he cannot demonstrate identifiable financial loss" (at [59]).

156 Specifically, Chadwick LJ held as follows (*WWF* at [59]):

> When the court makes an award of damages on the *Wrotham Park* basis it does so because it is satisfied that *that is* ***a just response to circumstances*** *in which the compensation which is the claimant's due cannot be measured (or cannot be measured solely) by reference to identifiable financial loss.* [emphasis added in italics and bold italics]

In the same vein, the learned judge endorsed the analysis in *Experience Hendrix* that an award of *Wrotham Park* damages gives rise to "the instinctive reaction that, whether or not the claimant would have been better off if the wrong had not been committed, the wrongdoer should make some reasonable recompense" (at [56]). He also reiterated that the doctrine, together with *AG v Blake* damages, should "be seen as a flexible response to the need to compensate the claimant for the wrong which has been done to him" (at [59]). On the facts, the court held that the plaintiff was not entitled to pursue its claim for *Wrotham Park* damages

as it could have raised this claim earlier but had deliberately declined to do so.

157 This brings us to the Privy Council's decision (on appeal from the Court of Appeal of Jersey) in *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd and others* [2011] 1 WLR 2370 ("*Pell Frischmann*") in which the Board endorsed an award of *Wrotham Park* damages made by the courts of Jersey for *a non-proprietary breach of contract*. The case concerned an oilfield development project which the plaintiff had obtained a tender for from the oil company managing the oilfield. The plaintiff needed a partner with expertise in drilling oil wells and a source of finance, and approached the defendants for this reason. The two parties then entered into a commercial agreement that the defendants work exclusively on the oilfield with the plaintiff, without directly approaching the oil company. The defendants, in breach of the agreement, made direct contact with the oil company, and expropriated for themselves the business opportunity which the plaintiff had secured. Lord Walker of Gestingthorpe JSC delivered the judgment of the Board and endorsed the principle that "it is not necessary that an injunction should actually have been claimed in the proceedings, or that there should have been any prospect, on the facts, of it being granted" before *Wrotham Park* damages could be awarded (at [48] citing *Jaggard, AG v Blake* and *WWF*).

158 The Board in *Pell Frischmann* also provided guidance on the principles governing the application of the hypothetical negotiation measure. Lord Walker held at [49] that: "It is a negotiation between a willing buyer (the contract-breaker) and a willing seller (the party claiming damages) in which the subject-matter of the negotiation is the release of the relevant contractual obligation. Both parties are to be assumed to act reasonably. The fact that one or both parties would in practice have refused to make a deal is therefore to be ignored." He also ruled that such damages are normally to be assessed or valued at the date

of breach, and that post-valuation events are normally irrelevant (at [50]). Applying these principles, the Board ruled that an award *greater than the actual profits made by the defendants ought to be awarded* as the parties clearly expected, at the time of their negotiations, that the project would be much more profitable than it turned out to be.

159 The final key authority which was cited to us is the decision of the English Court of Appeal in *One Step (CA)*. That case concerned a contract entered into between the plaintiff and the defendants after a joint venture between them concerning a business to provide supported living care for vulnerable children and adults had broken down. The plaintiff purchased the defendants' shares in the relevant company and the defendants agreed not to engage in any business that would be in material competition with the plaintiff for a period of 36 months, and not to solicit the plaintiff's clients without its consent. The defendants, in breach of these restrictive covenants, secretly set up a rival business. The plaintiff sued for damages and other remedies, including *Wrotham Park* damages. At first instance, the High Court held that the plaintiff could elect between ordinary compensatory damages, or damages assessed on a *Wrotham Park* basis. The plaintiff elected in favour of *Wrotham Park* damages, and the defendants appealed.

160 The Court of Appeal affirmed the finding that an award of *Wrotham Park* damages was available on the facts. It held that the broad question is whether such an award was "the just response in this case" (*per* Christopher Clarke LJ at [119]). Clarke LJ identified three relevant factors (at [115]): "(a) a finding that [the plaintiff] was incapable of establishing identifiable financial loss; (b) a finding that such damages needed to be available to avoid manifest injustice; and (c) sufficient factors to justify the grant of an exceptional remedy."

161 Crucially, both Clarke and Longmore LJJ ruled that it was not only where it was *impossible* to identify any financial loss that *Wrotham Park* damages should be available; such damages could also be awarded where the plaintiff would have *difficulties in* "*establishing damages on the ordinary basis*" [emphasis added] (at [122]) or "*if it will be difficult to prove any damages*" [emphasis added] (at [145]).

162 In addition, relying on *Experience Hendrix*, Longmore LJ identified three further relevant factors: (a) that there was a deliberate breach by the defendant of its contractual obligations for its own reward; (b) that the plaintiff would have difficulty in establishing financial loss therefrom; and (c) the plaintiff has a legitimate interest in preventing the defendant's profit-making activity in breach of contract (at [147]). The learned judge also considered it relevant to ask whether the result of the defendant's breach of contract has been that it is doubtful that interim relief could be obtained, which would be a feature to be taken into account in cases of the sale of a business (at [151]).

163 The defendants appealed further to the UK Supreme Court. At the time when we heard these appeals, the UK Supreme Court's decision had yet to be released. On 18 April 2018, the court handed down its decision in *One Step (SC)*, allowing the defendants' appeal and reversing the decision of the courts below that the plaintiff was entitled to have damages assessed on a *Wrotham Park* basis. As *One Step (SC)* was delivered after we had completed our initial draft of the present judgment, the authority is dealt with in a separate section from our analysis on what the Singapore position on *Wrotham Park* damages is (see [256]–[288] below).

164 Leaving aside *One Step (SC)* for the time being, it is clear from the above post-*AG v Blake* authorities that, under English law, there was a ***broader***

conception of *Wrotham Park* damages as a "just response" to a breach of contract in cases where orthodox compensatory damages, calculated by reference to the plaintiff's pecuniary loss, are unavailable or even difficult to prove (at least until the decision in *One Step (SC)*). Under this conception, *Wrotham Park* damages were an independent head of damages in contract, which were available regardless of the availability of injunctive relief and whether or not the contractual right breached was of a proprietary nature. The doctrine, on this view, essentially operates to fill the remedial lacuna which arises whenever the traditional measure of loss gives rise to an "unjust" outcome.

(E) SINGAPORE AUTHORITIES ON *WROTHAM PARK* DAMAGES

165 There has been no case in Singapore in which an award of *Wrotham Park* damages has been granted. There have been a few cases in which the decision has been cited. The most recent of these was the judgment of this Court in *PH Hydraulics*, where it was noted that "*Wrotham Park* damages are largely accepted to be *compensatory* in nature, although they are different, in substance, from a traditional award of compensatory damages" [emphasis in original] (at [80]). In the same judgment, reference was made to the earlier decision of this Court in *MFM Restaurants*, where it was suggested (at [55]) that *Wrotham Park* damages are a head of compensatory loss.

166 The few High Court cases in which the doctrine has been cited, such as *ARS v ART and another* [2015] SGHC 78 and *JES International*, did not involve any discussion of its conceptual foundation or legal requirements. Hence the present case is the first time these issues are squarely before this Court. But first, we have to consider whether *Wrotham Park* damages should even be recognised as a part of Singapore law.

(2) Should *Wrotham Park* damages be recognised in Singapore?

167 As stated above, the threshold issue before us is whether *Wrotham Park* damages ought, in principle, to be recognised as a head of contractual damages in our jurisdiction. A closely-related issue concerns the underlying rationale of such an award.

168 In our judgment, *Wrotham Park* damages should be accepted as a part of the law of contractual remedies in Singapore. There are four points which we make in this regard.

169 *First*, as outlined above, such damages are ***well-supported by authority***. The principle in *Wrotham Park* has been endorsed by the House of Lords in *AG v Blake*, the Privy Council in *Pell Frischmann* and in several English Court of Appeal decisions. We will deal with *One Step (SC)* later, but we note that the UK Supreme Court in that decision has also accepted the principle, albeit in a modified form. This Court also referred to the doctrine in *PH Hydraulics* and *MFM Restaurants*. Although it was observed that the precise contours and conceptual basis of the doctrine are uncertain, that is an issue that goes to the scope and nature of *Wrotham Park* damages. There was no suggestion in either decision that such damages should be excluded from Singapore law altogether.

170 *Second*, as a matter of *principle*, such damages are well-founded if we take the view that the ***overarching rationale*** of *Wrotham Park* damages is ***to protect the plaintiff's interest in performance***. In this regard, we agree with Prof Goh that, just as with other contractual remedies, *Wrotham Park* damages are awarded to protect and vindicate the interest of *the plaintiff* in obtaining the promised performance (see the seminal articles by Daniel Friedmann, "The Performance Interest in Contract Damages" (1995) 111 LQR 628 and by Brian

Coote, "Contract Damages, *Ruxley*, and the Performance Interest" [1997] CLJ 537 at pp 544–545, where the phrase "performance interest" was popularised). Indeed, we alluded to this very point in *PH Hydraulics* where we observed that although *Wrotham Park* damages are "*a departure from the traditional loss-based measure of damages,* ***their primary purpose can still be said to be compensatory, in that they protect a plaintiff's interest in contractual performance***" [emphasis added] (at [82]). We will return to this point later, when we discuss the conceptual basis of *Wrotham Park* damages.

171 Moving to our *third* point, our view is that the doctrine does meet a real concern, namely ***the remedial lacuna which arises in cases where the court is unable to award orthodox compensatory damages or grant specific relief, but where there is still a need to provide the plaintiff with a remedy to protect the plaintiff's performance interest (*ie*, the primary right to performance of the defendant's obligations)***. The facts of the cases, starting from *Wrotham Park* itself, amply demonstrate this. They are all instances where the plaintiff would otherwise have been entitled to no, or nominal, damages, and "justice will manifestly not have been done", to quote Brightman J in *Wrotham Park* (see [137] above). On this point, we acknowledge Prof Goh's perceptive observation that the difficulty is particularly acute in the context of *negative covenants* where the logic of the orthodox expectation and reliance loss measures, which are both calculated by reference to a counterfactual in which the plaintiff receives the promised performance, often breaks down due to the *unavailability* of a market substitute for performance as well as the *irrelevance* of such a measure. There are two sub-issues here. First, where a defendant has breached what he has contracted *not* to do, as opposed to having breached a positive obligation to *do* something, there will be no market substitute for performance as such. Indeed, in many cases, the plaintiff may well find himself in the *same*

position he would have been in had the breach not occurred. In other words, a breach of a negative obligation *may* ***not*** *cause an identifiable financial loss*, unlike a situation involving a positive obligation where the plaintiff has to incur expenses (and as a result suffer losses) in obtaining substitute performance. Second, where the promisor has breached a negative undertaking, there is no longer any overt action to be taken by any party; hence the traditional measures based on performing the obligation contracted for are often *irrelevant* (see James Edelman, *McGregor on Damages* (Sweet & Maxwell, 20th Ed, 2018) at para 27-052).

172 This neatly brings us to our *fourth* point, which is that ***our main concern is over the extent to which the court ought to protect the plaintiff's performance interest (and thereby fill the remedial lacuna outlined in the previous paragraph) through the* Wrotham Park *doctrine as well as the breadth of the doctrine itself***. Here, and unlike the view taken by some commentators, we do ***not*** accept that *Wrotham Park* damages are a panacea that can address all situations where injustice arises due to the purported unavailability or "inadequacy" of orthodox compensatory damages. This is for two key reasons.

173 To begin, ***the court must be careful to ensure that there is, in fact, a remedial lacuna in the first place due to the unavailability of orthodox compensatory damages (measured by reference to either the plaintiff's expectation or reliance loss) and specific relief***. This lacuna will typically be present where ***the plaintiff has not suffered any financial loss at all due to the defendant's breach and specific relief is also not available because the court cannot or will not grant such relief***. This was the case in *Wrotham Park* itself, where an injunction was not a viable remedy, and the plaintiffs conceded that the value of the estate was not diminished "by one farthing" as a result of the

defendant's breach (see [137] above). In such instances, the *Wrotham Park* doctrine gives effect to the instinctive reaction that, whether or not the plaintiff would have been better off if the wrong had not been committed, the wrongdoer ought not to gain an advantage for free, and should make some reasonable recompense, as Mance LJ succinctly put it in *Experience Hendrix* (see [153] above).

174 We do not, however, accept that *Wrotham Park* damages should *also* be available whenever orthodox compensatory damages are "difficult" to assess or "inadequate". As we will elaborate later at [221]–[224] below, such a broad approach ignores the reality that the courts, invariably, face difficulties in the assessment of damages in the face of incomplete evidence. If adopted, it would undermine the established principle that the court must do the best it can on the evidence available and adopt a flexible approach where it is clear that some substantial loss has been incurred (see the decision of this Court in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 ("*Robertson Quay*") at [30]). Having said that, we accept that the remedial lacuna just described will also be present in exceptional cases where the plaintiff has suffered some financial loss, but ***it is (practically) impossible, on the facts and circumstances of the case, to assess compensatory damages based on either expectation loss or reliance loss***. We would suggest that these situations will, in the nature of things, be ***very rare***; in the ***vast majority*** of cases, it would be possible to award orthodox ***compensatory*** damages to the plaintiff. Admittedly, the line between mere difficulty and (practical) impossibility may be a very fine one and will depend on a nuanced consideration of all the facts and circumstances of the case.

175 Next, ***the nature of the hypothetical bargain measure itself***, which requires the court to determine what the plaintiff might have reasonably

demanded of the defendant for releasing him from his covenant, ***would only make sense in certain type of cases***. In the context of *positive obligations*, in particular, it would be strange to ask what sum the plaintiff would have accepted to agree to the defendant *not* performing a promise for which, *ex hypothesi*, the plaintiff has *already* paid a certain amount (*ie*, the contract price). It would make eminently more sense to instead apply the traditional expectation and reliance loss measures by reference to the cost of obtaining substitute performance. Put simply, ***the logic and nature of the hypothetical bargain measure applies primarily to negative covenants***.

176 In other cases, ***even if the obligation was a negative one, it may be irrational or totally unrealistic to expect the parties to bargain for the release of the relevant covenant, even on a hypothetical basis***. ***Or such a bargain may have been legally impermissible***. Chadwick LJ alluded to this point in *WWF* where he considered the application of the *Wrotham Park* measure to the facts of *AG v Blake*. As he noted, "[t]he concept of a notional bargain between the Crown (as employer) and a double agent – under which the Crown was to be taken as having agreed (for a suitable sum) to release the agent from an undertaking not to publish official secrets – was, perhaps, *too bizarre to contemplate*" [emphasis added] (at [46]). ***This is not to say that the parties must actually have been willing to reach a bargain***; that there is *no such requirement* is evident from Brightman J's judgment in *Wrotham Park* as well as subsequent cases where it had been held that the court must assume that the hypothetical negotiation is between willing and reasonable parties. Rather, our view, which we elaborate upon further at [230]–[237] below, is that the courts must acknowledge that the *Wrotham Park* measure will not sensibly apply to every case where there is a remedial lacuna, for *there will be instances where applying the measure would simply be irrational*.

177 ***To summarise***, our judgment is that **Wrotham Park** ***damages should, as a matter of principle, be recognised as a head of contractual damages in Singapore law***. However, they play a ***limited role*** and apply only in ***a specific type of case***, namely where there is a ***remedial lacuna*** due to the *unavailability of orthodox compensatory damages and specific relief* (which is a difficulty that primarily arises in the context of ***negative covenants***), and *where this lacuna can be* ***rationally and sensibly filled by reference to the hypothetical bargain measure*** (which requires the court to determine the sum which the plaintiff could have reasonably extracted from the defendant as the price or licence fee to obtain the plaintiff's consent to act).

178 The next issue, regarding which we note *the most controversy* exists, is whether such damages are ***compensatory or restitutionary*** in nature. This question is not purely academic because the determination of the conceptual basis of the doctrine has an impact on its legal requirements and the principles governing the quantification of such damages, as we will explain later in our judgment.

(3) Are *Wrotham Park* damages compensatory or restitutionary?

(A) WHY *WROTHAM PARK* DAMAGES ARE *COMPENSATORY* IN NATURE

(I) THE VARIOUS MEANINGS OF "RESTITUTION"

179 We start by stating at the outset that, in our view, *Wrotham Park* damages are ***compensatory*** and *not* restitutionary in nature. There are several reasons for our view. However, before elaborating on these reasons, we deal with an important preliminary point that centres on the fact that the same word can have several meanings depending on the precise context. The word we are concerned with here is "***restitution***".

(a) Restitution for unjust enrichment distinguished from restitution for wrongs

180 At the *most general level*, we must distinguish what has been termed "restitution for ***unjust enrichment***" from "restitution for ***wrongs***". Indeed, in its embryonic stages, restitution lawyers perceived "the ***law*** of ***restitution***" as comprising ***both*** "restitution for unjust enrichment" ***as well as*** "restitution for wrongs". This was evident from the leading treatise on the subject by Lord Goff of Chieveley and Prof Gareth Jones, the first edition of which was published as Robert Goff & Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 1966).

181 Since then, however, it has been generally accepted that "restitution for ***unjust enrichment***" is a ***distinct*** and ***new*** branch of the law of obligations (the other two great branches being the law of ***contract*** and the law of ***tort***, as part of the common law, and the law of ***equity*** constituting yet another distinct branch that developed separately from the common law). This is because the law of unjust enrichment comprises a separate ***cause of action*** (with ***restitution as*** the ***remedial response***), which is made out when there is *no civil wrong* but the defendant is *unjustly enriched* at the expense of the plaintiff. Unjust enrichment is thus a ***distinct branch of the law of obligations***. Hence, parenthetically, we should make clear that the view expressed in one recent authority that unjust enrichment is a discretionary equitable relief is, with respect, mistaken (see *Ong Lu Ling v Tan Ho Seng* [2018] SGHC 65 at [11]). It is (arguably, at least) also a ***completely new*** area of the private law (we use the word "arguably" because many (in particular, academic) lawyers are of the view that this branch of the law relating to *unjust enrichment* merely comprises principles that had *already existed* in the law of contract, tort and equity). In this regard, it is significant that the leading treatise by Lord Goff and Prof Jones has now been given a *new title*, *The Law of Unjust Enrichment* (the latest edition is published as Charles Mitchell, Paul Mitchell & Stephen Watterson,

Goff & Jones: The Law of Unjust Enrichment (Sweet & Maxwell, 9th Ed, 2016)).

182 On the other hand, "restitution for ***wrongs***" relates ***only*** to the ***remedial response*** to *a* ***civil wrong*** (including breaches of contract, torts and breaches of fiduciary duty). It is a shorthand for any ***gain-based remedy*** awarded for a civil wrong where damages are assessed not by reference to the loss caused to the plaintiff by the wrong, but by reference to the gain which the defendant received from his wrongdoing. Such civil wrongs ***already existed*** in the law ***prior to*** the development of the law of restitution for unjust enrichment. This point is important, particularly in the context of the present case, when one considers that the ***law of contract*** is *a* ***well-established branch of law***. Hence, its ***nature and framework must be borne in mind so that there is no disconnect between the principles of (contractual) liability on the one hand and the (contractual) remedies that follow on the other.*** What this means in the context of *Wrotham Park* damages is that ***there must be persuasive reasons to justify a departure from the fundamental compensatory nature of contractual damages***.

(b) Normative versus descriptive restitution

183 Focussing on the operation of "restitution" as a ***remedial response***, there is ***yet another*** point that should be noted in relation to the word: a distinction should, in our view, be drawn between what we would term "***descriptive***" (or "*factual*", or "*literal*") "restitution" on the one hand and "***normative***" (or "*legal*") "restitution" on the other.

184 To elaborate, "*descriptive*" (or "factual", or "literal") restitution *merely* ***describes*** ***the fact that*** *part or all of* ***the defendant's gain or profit*** *has been awarded by the court to the plaintiff*. Such a ***descriptive*** account is only part of

the story, so to speak, as it tells us ***nothing*** about the ***normative (or legal) nature*** of the award itself. The *literal* fact that the award was measured by reference to the defendant's gains, without more, does not shed any light on ***why*** *the gains were disgorged as well as* ***the conceptual basis*** *of the relevant head of damages.*

185 In ***contrast***, where there has been "*normative*" (or "legal") restitution, then the *literal* fact that part or all of the defendant's gain or profit has been awarded by the court to the plaintiff is ***normatively relevant***. In such a situation, the disgorgement of gains is ***directly connected to the purpose or rationale*** of the award, which would generally be to punish as well as deter the defendant's wrongdoing by stripping away his ill-gotten gains. As noted by Lord Hobhouse in *AG v Blake* (at 649), gain-based awards are "essentially punitive" and the motivation for stripping the defendant of his profits is that he "should be *punished* and deprived of any fruits of conduct connected with his former criminal and reprehensible conduct" [emphasis added]. Such an award would be "restitutionary" in the ***true legal sense***.

186 At this juncture, we would also refer to the stimulating thesis of Prof Edelman (now a judge of the High Court of Australia) that the category of "restitution for wrongs" comprises two distinct remedial measures: (a) "restitutionary damages", calculated by reference to the hypothetical bargain measure and which rests on *corrective justice*; and (b) "disgorgement damages" which operate to strip a defendant of the actual gains received from a wrong, acting *solely to deter* (see James Edelman, *Gain-Based Damages* (Hart Publishing, 2002) ("*Edelman*") at ch 3; see also *ACES System Development Pte Ltd v Yenty Lily (trading as Access International Services)* [2013] 4 SLR 1317 ("*Yenty Lily (CA)*") at [30], where this Court referred to Prof Edelman's thesis with approval in the context of the user principle in tort). Although we have used different labels, Prof Edelman's two categories neatly correspond to the

distinction we have drawn between "descriptive restitution", where the damages may *literally* be "gain-based" but premised on *other* normative rationales, and "normative restitution", where profit-stripping, and consequently punishment and deterrence, are the central aims of the award. It is only the latter that would fall within Prof Edelman's category of "disgorgement damages".

187 The distinction we have set out is of specific relevance as well as significance to the nature of *Wrotham Park* damages. This is because a mere ***descriptive*** *restitutionary account of* Wrotham Park *damages* ***would not be inconsistent with a normative concept of the doctrine as being compensatory in nature***. Indeed, as the authorities indicate, *the defendant's gain or profit* in the context of a *Wrotham Park* award ***is merely a method of quantifying or assessing the damages rather than the basis of the award itself***.

188 In *Wrotham Park* itself, for instance, Brightman J was clear that the award was premised on the sum of money as might reasonably have been demanded by the plaintiffs from the defendant as a *quid pro quo* for relaxing the covenant. He only used the defendant's *anticipated* profits in calculating this sum as he judged that a landowner in the plaintiffs' position would have reasonably required a certain percentage of those profits as a price. Indeed, Brightman J expressly considered and rejected ***other measures of quantifying the damages***, including a proportion of the development value of the land (see [139] above). This suggests that the award is not invariably based on the defendant's gains.

189 In *Jaggard*, Sir Thomas Bingham MR likewise observed, in the passage cited at [142] above, that the court pays attention to the profits earned by the defendants "***not in order to strip the defendants of their unjust gains****, but because of the obvious relationship between the profits earned by the defendants*

and the sum which the defendants would reasonably have been willing to pay to secure release from the covenant" [emphasis added].

190 The very same point was made by Mance LJ in *Experience Hendrix*, where the learned judge noted that, in determining the "reasonable recompense" that the wrongdoer should make, "it is natural to pay regard to any profit made by the wrongdoer". But he observed that the law can also take reference from ***other metrics*** such as "the cost which the wrongdoer would have had to incur to obtain (if feasible) equivalent benefit from another source" (at [26]). In addition, and crucially, the learned judge suggested that such recompense should have to be made even if the wrongdoer made ***no profits from his breach at all*** because "*a wrongdoer surely cannot always rely on avoiding having to make reasonable recompense by showing that despite his wrong he failed, perhaps simply due to his own incompetence, to make any profit*" [emphasis added] (at [26], cited at [153] above). Mance LJ's view that *Wrotham Park* damages ought to be awarded even when the defendant has made *no profit at all* fortifies the analysis that such damages are *not* restitutionary in the normative or legal sense. Indeed, in such a situation, it could be argued that *the award would not be restitutionary* ***even in the descriptive sense*** as, *ex hypothesi*, the defendant would have ***no gains to disgorge***. Finally, the above analysis is also supported by Chadwick LJ's judgment in *WWF*, where he noted that, although the sum award in *Wrotham Park* was in a sense "gain-based" as it was based on a percentage of the actual profit, "there is little or no support in the reasoning for the view that Brightman J saw himself as making a gains-based award" (at [29]).

191 Therefore, it seems to us that a "restitutionary" approach toward *Wrotham Park* damages ***conflates descriptive*** *(or factual, or literal) restitution with* ***normative*** *(or legal) restitution*. In this regard, we accept that in most

cases, an award of *Wrotham Park* damages would be "restitutionary" *in a* ***descriptive*** *sense.* However, for the reasons which we will provide shortly, we are of the view that the ***normative basis*** of such an award ***remains compensatory in nature***. This is ***not*** to say that a *descriptive conception of "restitution"* is "***empty***" – it does point to the fact that the gains of the defendant are relevant *in* ***quantifying or assessing*** *the amount of* ***compensation*** *that should be awarded to the plaintiff where the requirements of the* Wrotham Park *doctrine are made out*. However, the disgorgement or restitution of gains is not, *in and of itself*, the reason why the court orders such damages.

192 With the above *clarification* in mind, let us now turn directly to the ***conceptual basis*** of *Wrotham Park* damages and the reasons why, in our judgment, *Wrotham Park* damages are ***compensatory*** in nature.

(II) WROTHAM PARK *DAMAGES AS COMPENSATORY*

193 Prof Goh argued strenuously (in both his written and oral submissions) that *Wrotham Park* damages are restitutionary in nature. In particular, he posited that *Wrotham Park* damages are an *objective gain-based award* concerned with reversing *the defendant's gain* rather than the plaintiff's loss. They are to be assessed, in his submission, not by reference to the subjective or actual gains, but by reference to *the objective value of the benefit received by the defendant*. As we have already stated, and with the greatest respect, we do not agree and are of the view that *Wrotham Park* damages are ***compensatory*** *in nature*.

194 To begin, we should record that we fully agree with Prof Goh that the award is ***objective***. This should be readily apparent from our earlier observation that *Wrotham Park* damages are measured, not by reference to the actual or subjective gains or losses of the parties, but on an *objective measure* calculated by reference to a *hypothetical* bargain between them (at [130] above). This is

why Brightman J referred in *Wrotham Park* to the defendant's *anticipated* rather than actual profits, and disregarded the fact that the plaintiffs would not have subjectively given permission for the release of the covenant on any terms. The objective nature of the award also explains the Privy Council's award in *Pell Frischmann*, where the Board ignored the fact that the defendant's actual profits were lower than anticipated and granted an award *in excess of the defendant's actual gains*. In addition, the objective analysis is supported by the suggestion by Mance LJ in *Experience Hendrix* that an award of *Wrotham Park* damages should be available *even if the defendant made no profits at all* (see [190] above). Therefore, put simply, *Wrotham Park* damages are ***objective awards which are not premised on any actual (subjective) loss made by the plaintiff or actual (subjective) gains made by the defendan*****t**.

195 Next, before we consider the positive reasons mooted by Prof Goh as to why *Wrotham Park* damages should be viewed as a *restitutionary* response, we outline five difficulties with the view that *Wrotham Park* damages are gain-based. These difficulties point us towards the conclusion that *Wrotham Park* damages are *compensatory*.

196 The ***first*** reason why *Wrotham Park* damages should not be viewed as restitutionary but as compensatory instead, is the ***overarching rationale*** of the award. As noted above at [170], Prof Goh himself accepts that the *overarching aim* of *Wrotham Park* damages is *to protect the plaintiff's* ***performance interest***. Importantly, the very concept of the performance interest focuses on the loss suffered by ***the plaintiff***. Restitutionary (or gain-based) damages, on the other hand, focus on *the defendant's* gain and seek to reverse the effect that the wrong has had with respect to *the defendant* by removing the benefit he has acquired by virtue of the wrong. Hence, there is a ***mismatch or disconnect*** between the plaintiff-focussed rationale of *Wrotham Park* damages and the conceptual

nature of gain-based remedies, which are centred on the defendant instead. However, this mismatch or disconnect ***disappears completely*** if we understand the award of *Wrotham Park* damages as being ***descriptively*** *"restitutionary" or "gain-based" but* ***normatively compensatory in nature***.

197 ***Second***, if *Wrotham Park* damages are indeed "restitutionary" in a legal or normative sense, it would follow that the stripping of (at least some of) the defendant's gains would be a central aim of the doctrine (see [185] above). If so, it would follow that such damages ***necessarily*** involve ***a punitive element – at least in so far as such an award of damages purports to deter a wrong where compensatory damages are inadequate to do so*** (see *Edelman* at pp 81–86; Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) at p 6). Prof Goh does not deny this, and contends that *Wrotham Park* damages do perform a "deterrent" function, although they are "not as strongly deterrent as" a full disgorgement of profits.

198 ***However***, the ***law of contract generally eschews*** the concept of ***punishment***. That is why, in *PH Hydraulics*, this Court held that there is a general rule that punitive damages *cannot* be awarded for a breach of contract, as follows (at [135]):

> We have set out the arguments both for as well as against the award of punitive damages in a purely contractual context. It is clear, in our view, that the arguments *against* the award of such damages ***far outweigh*** the arguments in favour of such an award. Indeed, the case authority which most strongly supports the making such an award is itself afflicted with no small measure of difficulties. Not only is *Whiten* the only case in the sea of Commonwealth authorities that supports such an award, it is also subject to a number of very persuasive criticisms. In the circumstances, we are of the view that ***there ought to be a general rule that punitive damages cannot be awarded for breach of contract***. [emphasis in original]

In this regard, the following observations by this Court (at [72]) bear mention:

> … [I]t would, in our view, be ***anomalous or even inappropriate*** for the court to ***regulate the contracting parties' conduct by imposing an award of punitive damages on the party in breach by way of what is in effect an external standard***. The standard is an external one because, with the award of such damages, the court goes further to signify its own outrage at the contract-breaker's conduct, and to communicate its own view of what proper commercial behaviour should be. The court is no longer giving effect to the standard set by the contracting parties. Such an ***external*** standard may be said to be ***antithetical*** to the very nature and function of the law of contract in general and its remedial structure in particular (which is, in the main at least, to *compensate*, and *not to punish*). The concept of *punishment* connotes the (related) concept of *deterrence* and, looked at in this light, ***sits very uneasily*** with the concept of a ***contract*** which, as we have just noted, is ***a voluntary agreement entered into between willing parties who,* ex hypothesi*, would regulate their legal relationship themselves***. Punishment and deterrence are quintessentially part of the legal landscape of ***the criminal law***. [emphasis in original]

Although this Court did not rule out *completely* the possibility of an award of punitive damages for breach of contract, it was made clear, at [136], that this possibility would be extremely rare indeed. Crucially, the above passages highlight one of the central objections to the (normative) restitutionary analysis of *Wrotham Park* damages – it runs the risk of placing undue weight on deterrence and punishment, which are ***highly problematic*** remedial goals in the field of contract law. We pause to note that this is ***an extremely weighty objection*** indeed.

199 ***Third***, the analysis of *Wrotham Park* damages as gain-based is based on the premise that the doctrine is closely related to, and has the same juridical basis as, the disgorgement of profits remedy that was awarded in *AG v Blake*, albeit being less exceptional in nature. In our judgment, this may not be the case. Whilst we have noted that there is arguably a common thread between *AG v Blake* damages and *Wrotham Park* damages to the extent that they share the characteristics of what we have termed "*descriptive* restitution", it ***does not***

necessarily follow that they share the characteristics of what we have termed "*normative* restitution". Indeed, that the two are ***not normatively (or legally) the same*** is evidenced by the fact that the authorities have made it clear that *Wrotham Park* damages are measured ***objectively*** by reference to a hypothetical bargain for the plaintiff's consent, while the disgorgement of profits remedy awarded pursuant to *AG v Blake* damages clearly responds to the ***actual*** gain or profit made by the defendant (and the precise nature of the latter remedy is less clear, as noted in *PH Hydraulics* at [81]). Indeed, Prof Goh accepts that *Wrotham Park* damages are *not* partial disgorgement as the quantum of the defendant's actual gain does not itself form the basis of the award, but is relevant *merely* ***as a matter of evidence in providing a good estimate*** *of the anticipated profit* at the time of breach. This last-mentioned point brings us back to our observation earlier that *Wrotham Park* damages may be *"descriptively restitutionary"* as the profits of the defendant are considered in *the quantification or assessment of damages*, but the doctrine ***nevertheless remains, on a normative (or legal) basis, compensatory in nature***.

200 ***Fourth*** (and on a related note), a restitutionary approach is, with respect, unprincipled in so far as it implies that *Wrotham Park* damages should be available only where the defendant concerned derives a benefit from his or her breach of contract. As Prakash J held in *Yenty Lily (HC)* at [66]):

> … [T]he user principle cannot be purely restitutionary in nature since it does not lie in the mouth of the defendant to argue that he had failed to derive actual benefit or make a profit from his tort (*Andrew Grubb* at paras 12.39–12.40). As Romer LJ pointed out in *Strand Electric* ([40] supra) at 256, one does not have to evaluate the actual benefit to the defendant in order to assess the plaintiff's loss. Along the same lines, the Privy Council observed in *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713 ("*Inverugie*") at 718 that if a man hires a concrete mixer, he must pay daily hire, even though he may not in the event have been able to use the mixer because of the rain; a

> trespasser who takes a mixer without the owner's consent must pay the going rate even if he has derived no benefit from its use.

201 Whilst the observations just quoted were made with regard to the user principle in the context of the law of tort, they are equally applicable (as a matter of general logic as well as principle) to the contractual sphere. Indeed, Prakash J's views echo the similar *dicta* by Mance LJ which we referred to above at [190].

202 ***Fifth*** (and finally), as our review of the cases indicates, the restitutionary analysis runs contrary to the preponderance of decisions both in England and Singapore which have taken the view that *Wrotham Park* damages are compensatory in nature. Prof Goh readily acknowledges this in his written submissions to this Court. Admittedly, the English authorities are not binding on this Court and the comments in previous Singapore cases were *obiter dicta*. However, taken together with the other difficulties set out above, the authorities indicate that the restitutionary analysis of *Wrotham Park* damages should ***not*** be adopted.

203 We now turn to the ***counter-arguments in favour*** *of a* ***restitutionary*** analysis of *Wrotham Park* damages (and which, correspondingly, ***militate against*** *a* ***compensatory*** analysis of the same). In this regard, ***three*** *main objections* were identified by Prof Goh.

204 *First*, Prof Goh submits that the compensatory view of *Wrotham Park* damages is difficult to reconcile with the requirement that such an award is only available where compensatory damages are shown to be inadequate. Citing the work of Prof Davies (see Paul S Davies, "*One Step* Forwards: The Availability of *Wrotham Park* Damages for Breach of Contract" [2017] LMCLQ 201 at p 202), he states that it is odd for *Wrotham Park* damages to supplement

"normal" compensatory damages if both are compensatory in nature. This argument, with respect, ***conflates*** the ***purpose*** of the doctrine with the ***measure* or *method of assessment*** – a point which we have already emphasised above. The requirement that compensatory damages must be shown to be inadequate before *Wrotham Park* damages may be awarded is a reference to the traditional loss-based ***measure*** of damages based on pecuniary loss. It does not undermine the point, made by this Court in *PH Hydraulics*, that although *Wrotham Park* damages are a departure from the traditional loss-based measure, their primary ***purpose*** can *still* be said to be ***compensatory***. In this regard, we reiterate *the need to keep distinct the concepts of "**normative** restitution" and "**descriptive** restitution" and the corresponding difference between the **purpose** of* Wrotham Park *damages and their **measure** or **method** of assessment.*

205 *Second*, in response to the compensatory analysis, Prof Goh argues that it is false to say that the plaintiff has suffered any "loss" in cases where a *Wrotham Park* award has been granted. *However*, this submission presupposes that "loss" must be a reference to an identifiable loss (pecuniary or otherwise) *consequent* on the breach of contract. But, in our analysis, the loss in such cases can be identified by reference to ***the loss of the performance interest itself*** (*ie*, the *primary right* to performance of the defendant's obligations) which the plaintiff has been deprived of due to the defendant's breach. To put it in another way, *Wrotham Park* damages are ***objective compensatory awards*** aimed at restoring the value of the lost right *per se* ***regardless of*** any consequential loss suffered by the plaintiff.

206 Support for the analysis proffered in the preceding paragraph can be found in a learned article by Prof McInnes (see Mitchell McInnes, "Gain, Loss and the User Principle" [2006] RLR 76 ("*McInnes*")) and the judgment of Prakash J in *Yenty Lily (HC)*, in which she cited Prof McInnes with approval (at

[53]). The question in *Yenty Lily (HC)* was whether the defendant could escape liability for wrongful detention under the user principle on the basis that it had not derived any gain from the use of the goods which had been wrongfully detained. Prakash J, in answering this question in the negative, held that the user principle protects property rights *in themselves* and is compensatory in nature (although it may also contain some restitutionary elements) because the defendant's "abstraction or invasion" of the plaintiff's right is a loss which yields proper recompense under the law (at [51]). The relevant passages from Prakash J's judgment in *Yenty Lily (HC)* are as follows (at [43], [49] and [50]−[53]):

> 43 … [***T]he user principle protects property rights in themselves*** and therefore triggers compensation where the owner's mere right to exclude others at his own discretion has been infringed. As observed in Andrew Grubb, *The Law of Restitution* (LexisNexis Butterworths, 2002) ("Andrew Grubb") at para 12.35:
>
> > The user principle … protects property rights in themselves. The claimant's property right is protected not because of what the claimant might or could have done with the property, but because the claimant had the right to exclude others from using the property at the claimant's own discretion. The concept of property protected by the user principle is one in which what is important is the owner's exclusion of others from use and the owner's discretion to use or not to use, rather than the owner's enjoyment of the use. The defendant's wrong consists of disregarding the claimant's right to exclude. The damages recognise the nature of the wrong.
>
> …
>
> 49 The exact scope of the user principle, *viz*, whether it applies to cases such as the present, may depend on the juridical basis of awards of such damages.
>
> 50 Restitutionary analysis focuses on the benefit obtained by the defendant by virtue of his wrong and is unlikely to be engaged where the defendant fails to put the detained property to use since there would have been no real benefit to the defendant. On the other hand, compensatory analysis seeks to reverse the causative effects of the defendant's wrong by

> focusing on the plaintiff's loss. ***This "loss" may be construed in nonfinancial terms, viz, the "abstraction or invasion of property"*** (*Watson, Laidlaw & Co Ld v Pott, Cassels, and Williamson* (1914) 31 RPC 104 per Lord Shaw).
>
> 51 *Adopting a purely compensatory approach thus allows one to argue that as long as* ***the defendant's "abstraction or invasion" is a loss which yields proper recompense*** *under the law, it should not matter whether or not the defendant actually uses the property.* The plaintiff's loss remains the same and the defendant must in any event compensate the plaintiff under the user principle.
>
> 52 The rationale of this approach is very clearly enunciated by Mitchell McInnes, "Gain, Loss and the User Principle" (2006) 14 RLR 76 ("*McInnes*") at 88:
>
> > [A]ll three judges in Strand Electric questioned, albeit to different degrees, whether substantial relief would be available if, instead of using the claimant's property, the defendant had simply detained it. Given his gain-based perspective, Denning LJ unsurprisingly said that relief in such circumstances would be limited to compensatory damages for financial loss or nominal damages. *The better view, however, is that the user principle ought to apply regardless of what the defendant did with the detained property. The loss of dominium in Strand Electric would have been the same, from the claimant's perspective*, whether the defendant had used the switchboards to make its theatre marketable or simply hid them in a closet. Moreover, just as the law respects the owner's right of dominium regardless of the choices that she exercises, so too it should hold the tortfeasor responsible regardless of the choices that he exercised. Having appropriated property to its control, the defendant should not escape loss-based liability simply by showing that he chose not to put the item to commercial use.
>
> 53 *The analysis in McInnes is attractive and applies to the situation here. …*
>
> [emphasis added in italics and bold italics]

207 The observations in *Yenty Lily (HC)* in the preceding paragraph were made in relation to the tort of wrongful detention, and hence breaches of property rights. When the judgment went on appeal, this Court in *Yenty Lily (CA)* cast some doubt on the High Court's analysis, in so far as the user

principle ***in tort*** is concerned, and suggested that the principle may well be restitutionary in nature *in that particular context*. We will return to *Yenty Lily (CA)* shortly, and explain why the reasoning in *Yenty Lily (CA)* does *not* undermine our analysis in this case that *Wrotham Park* damages are compensatory in nature (see [210]–[214] below). In any event, our view is that the observations of Prakash J – that user damages may be conceptualised as compensatory because the abstraction or invasion of a right is *in itself* a loss that yields proper recompense – are particularly apposite in the present ***contractual*** context. When applied to *Wrotham Park* damages, the analysis indicates that such damages can be rationalised as ***compensation*** for ***the loss of the performance interest*** which the plaintiff has been deprived of due to the defendant's breach of contract. In other words, the doctrine protects *contractual* rights ***in themselves***. We emphasise, however, that *Wrotham Park* damages only fulfil this purpose in ***a specific and limited category of cases***, namely where there is a ***remedial lacuna*** in the protection of the plaintiff's performance interest due to the unavailability of orthodox compensatory damages and specific relief, ***and*** *where this lacuna can be* ***rationally and sensibly filled by reference to the hypothetical bargain measure***. This limited role of the *Wrotham Park* doctrine has already been outlined above (at [177]).

208 This brings us to the *third* counter-argument which has been identified by Prof Goh. He argued that the objective compensatory analysis opens the door to more radical theories such as that of Prof Robert Stevens, who has argued in favour of abandoning the conventional understanding of damages altogether (see Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) at ch 4 especially at pp 67−68); see also Robert Stevens, "Rights and Other Things", in *Rights and Private Law* (Hart Publishing, 2012) (Donal Nolan & Andrew Robertson eds)). Thus, Prof Goh argues that the courts might think twice about

adopting it. This concern may apply to Prof Stevens's broad theory of "substitutive damages", which seeks to overhaul the orthodox compensatory principle through the thesis that *all* damages in the law of contract are *neither* compensatory *nor* restitutionary but are, instead, awarded in substitution for the *right* which has been infringed. However, there is nothing in our analysis that supports this broad thesis; on the contrary, our reasoning is, in the final analysis, premised on a *limited* rationalisation of *Wrotham Park* damages as a means of protecting the plaintiff's performance interest in only *a specific and limited category of cases*. In other words, *Wrotham Park* damages are a *residual* remedy. This is not that different from Prof Goh's view in his written submissions to this Court that *Wrotham Park* damages should be broadly available as a *tertiary* remedy for breach of contract where damages and specific relief are unavailable. Our analysis and consequent support of a ***compensatory*** analysis of *Wrotham Park* damages are thus far from heterodox.

209 Finally, there is the (practical) question of whether the compensatory and restitutionary analyses of *Wrotham Park* damages are, in reality, all that different. Prof Cunnington has opined that "in every situation where there is a bilateral monopoly over the right in issue, the objective value of the right infringed will be exactly the same as the objective value of the benefit received by the defendant. … Since all contract cases necessarily involve a bilateral monopoly over the right to performance, the assessment of *Wrotham Park* damages will be the same regardless of whether an objective compensatory or an objective gain-based approach is adopted" (see Ralph Cunnington, "The Assessment of Gain-Based Damages for Breach of Contract" (2008) 71 MLR 559 ("*Cunnington*") at pp 566–567). The learned author may, with respect, be putting the point too strongly. His analysis may be theoretically valid. However, as alluded to earlier, the identification of the correct rationale and conceptual

basis of *Wrotham Park* damages does have an impact on the determination of the specific legal principles on *when* such damages may be awarded, and *how* they ought to be assessed.

(B) THE BROADER UMBRELLA CATEGORY OF DAMAGES FALLING UNDER "*THE USER PRINCIPLE*" – A CLARIFICATION

210 We conclude our analysis of this particular conceptual issue with a reference to the *broader umbrella* category of damages falling under what has been termed "*the user principle*". As noted above at [135], such damages are assessed by reference to the fee that the defendant would reasonably have had to pay for a licence by the plaintiff to act. They have been awarded in respect of torts involving breaches of property rights, breaches of intellectual property rights, and equitable wrongs such as breach of confidence, amongst others.

211 As this Court noted in *Yenty Lily (CA)*, there is indeed a controversy surrounding the nature of the user principle, which is analogous to the debate over whether *Wrotham Park* damages are restitutionary or compensatory. In that decision, which concerned a claim in ***tort*** for wrongful detention of the plaintiff's goods (see [206] above), the court did not express a definitive view on this question. This was because there was sufficient evidence to award the plaintiff substantive damages based on the orthodox compensation measure and, as a result, there was no need to turn to the user principle. In particular, it was found that the plaintiff had suffered *loss* as it had been deprived of the use of the relevant goods that had been detained, and was therefore entitled to compensatory damages calculated by reference to the reasonable market hire of the goods during the period of detention (at [18] and [59]–[60]).

212 Nevertheless, this Court in *Yenty Lily (CA)* did make certain observations on the conceptual basis of user damages. In particular, it was

suggested, by way of *obiter dicta*, that the user principle may be regarded as a wholly *separate principle* premised on a *restitutionary basis* (at [37]–[41]). At first glance, this may appear to *contradict* our analysis above that *Wrotham Park* damages are *compensatory* and not restitutionary in nature in so far the user principle is perceived as an *umbrella* category that encompasses *Wrotham Park* damages. A closer examination of this Court's judgment in *Yenty Lily (CA)*, however, reveals that any contradiction would be more apparent than real.

213 Crucially, there is a need to unpack the concept of "restitution" which this Court in *Yenty Lily (CA)* relied on. It will be recalled that the main issue at first instance in that case was whether user damages could be awarded even though there was allegedly no evidence that the defendant had derived any gain from the use of the wrongfully detained goods (see [206] above). This Court, on this issue, affirmed Prakash J's ruling in the High Court that there was *no* requirement of *actual* use by the wrongdoer of the goods concerned. The court did so by characterising the benefit gained by the defendant as the detention *of* the property *per se*, without payment of a fee, rather than any *actual profits* gained by the tortfeasor through his wrongdoing (see [28]–[32] and [43]). It was also made clear that ***a claim for the disgorgement of profits might thus be beyond the scope of the user principle*** (at [32]). In other words, this Court's analysis of the "user principle" was ***not*** that it entailed what we have termed ***normative*** *restitution*, through the stripping away of the defendant's (actual) ill-gotten gains or profits, but rather that the principle responded directly to the interference with the plaintiff's *dominium* over his goods (see [44]). This was ***in line with*** Prakash J's analysis in the High Court that the user principle ***protects property rights in themselves*** where there is an "abstraction or invasion" of the plaintiff's right (see [206] above). The distinction made by this Court in *Yenty Lily (CA)* between a claim for disgorgement of profits and user

damages, as well as the rationalisation of user damages as responding to the detention *of* the property, without payment of a fee, *per se*, also supports our judgment that although *Wrotham Park* damages may be "*descriptively restitutionary*", they can nevertheless be rationalised as ***compensation*** for *the loss of the performance interest* which the plaintiff has been deprived of due to the defendant's breach of contract and therefore as protection of *contractual* rights ***in themselves***.

214 We have spent a little bit of time on the user principle because one of the main arguments Prof Goh proffered in order to justify a *restitutionary* approach towards *Wrotham Park* damages was that to hold otherwise would lead to ***a disconnect*** between damages awarded under the user principle on the one hand and the award of *Wrotham Park* damages on the other. For the reasons set out above, our view is that there is ***no*** such ***disconnect***.

(C) SUMMARY ON THE CONCEPTUAL BASIS OF *WROTHAM PARK* DAMAGES

215 ***In summary***, our view is that *Wrotham Park* damages are ***objective compensatory awards*** aimed at compensating the plaintiff for the loss of the performance interest (*ie*, the primary right to performance of the defendant's obligations) which he has been deprived of due to the defendant's breach of contract. They fulfil this purpose, however, only in ***a specific and limited category of cases***, namely where there is a ***remedial lacuna*** in the protection of the plaintiff's performance interest due to the unavailability of orthodox compensatory damages and specific relief, ***and*** *where this lacuna can be* ***rationally and sensibly filled by reference to the hypothetical bargain measure***.

216 We now turn to consider the ***legal requirements*** which must be met before *Wrotham Park* damages can be awarded as well as how the ***quantum*** of

such an award should be arrived at, noting that, in the process of our analysis, we have in fact already ***touched on*** (albeit in part) these issues in examining the rationale as well as conceptual basis of the doctrine.

(4) When can *Wrotham Park* damages be awarded?

217 In our judgment, and in line with our analysis above, there are ***three legal requirements*** that need to be satisfied before a court can award *Wrotham Park* damages:

> (a) First, as a threshold requirement, the court must be satisfied that orthodox compensatory damages (measured by reference to the plaintiff's expectation or reliance loss) and specific relief are ***unavailable***.
>
> (b) Second, it must, as a general rule, be established that there has been (in substance, and not merely in form) a breach of a ***negative covenant***.
>
> (c) Third, and finally, the case must ***not*** be one where ***it would be irrational or totally unrealistic to expect the parties to bargain for the release of the relevant covenant, even on a hypothetical basis***. In other words, it must be possible for the court to construct a hypothetical bargain between the parties in a *rational* and *sensible* manner.

We will elaborate on each of these requirements in turn.

(A) UNAVAILABILITY OF ORTHODOX COMPENSATORY DAMAGES AND SPECIFIC RELIEF

218 The ***first legal requirement*** is briefly discussed at [173]–[174] above. This is that the court must be satisfied that orthodox compensatory damages

(measured by reference to the plaintiff's expectation or reliance loss) and specific relief are ***unavailable***. Put simply, the case must be one where the plaintiff would otherwise be entitled to no, or only nominal, damages.

219 This threshold requirement ***necessarily flows from*** our analysis that *Wrotham Park* damages are a ***limited*** remedy to address ***the remedial lacuna which arises in cases where the court is unable to award orthodox compensatory damages or grant specific relief, but where there is still a need to provide the plaintiff with a remedy to protect the plaintiff's performance interest*** (see [171] above). What this means is that if it is possible at all to award compensatory damages measured by reference to the plaintiff's expectation loss or reliance loss (*ie*, the traditional heads of compensatory loss for breach of contract) or grant specific relief, then *Wrotham Park* damages ***cannot*** be awarded.

220 As stated earlier, where the plaintiff has ***not suffered any financial loss at all*** as result of the breach of contract and ***specific relief is also not available*** (because the court cannot or will not grant such relief), this requirement would generally be met. In such instances, and unless the case is an exceptional one where the plaintiff has suffered a type of non-pecuniary loss for which substantial damages can be awarded based on established principles (see, for example, the House of Lords decision of *Farley v Skinner* [2001] 3 WLR 899, cited in the Singapore High Court decision of *Kay Swee Pin v Singapore Island County Club and others* [2008] SGHC 143 at [68]), there would be a remedial lacuna as the plaintiff would be otherwise confined to an award of nominal damages.

221 More difficult, however, is the situation where the plaintiff seeks to persuade the court that orthodox compensatory damages are "unavailable"

because the plaintiff's losses are "difficult" to assess or "inadequate". In the English Court of Appeal's decision in *One Step (CA)* (discussed at [159]–[162] above), Clarke LJ held that *Wrotham Park* damages are "a flexible response to the need to compensate the claimant for the wrong that has been done to him" (at [106]) and that such flexibility of approach "may justify the award of *Wrotham Park* damages where it would be *very difficult* for the claimant to establish "ordinary" compensatory damages" [emphasis added] (at [117]). Prof Goh agrees with this approach and submits that damages may be inadequate in protecting the performance interest when it is "difficult" to assess such damages. With the greatest respect once again, we do not agree.

222 In our judgment, the views of Clarke LJ and Prof Goh ignore the practical reality that the courts invariably face difficulties in the assessment of damages in the face of incomplete evidence. In such situations, the court does not demand that the plaintiff prove with complete certainty the exact amount of damage that he has suffered. In this regard, it is of the first importance to emphasise that ***mere difficulty in assessing the amount of compensatory contractual damages to be awarded does not justify an award of*** **Wrotham Park** ***damages***; instead, the court must ***simply do the best it can on the evidence available*** and adopt a ***flexible approach*** where it is clear that some substantial loss has been incurred to assess a specific sum to be awarded to the plaintiff for his loss (the *locus classicus* here being the decision of the English Court of Appeal in *Chaplin v Hicks* [1911] 2 KB 786).

223 The following observations by this Court in *Robertson Quay* are particularly apposite and worth setting out in full (at [28]–[31]):

> 28 The law, however, does not demand that the plaintiff prove with complete certainty the exact amount of damage that he has suffered. Thus, the learned author of *McGregor on Damages* continues as follows (at para 8-002):

> [W]here it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. As Vaughan Williams L.J. put it in *Chaplin v Hicks* [1911] 2 KB 786], the leading case on the issue of certainty: "The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages." *Indeed if absolute certainty were required as to the precise amount of loss that the claimant had suffered, no damages would be recovered at all in the great number of cases. This is particularly true since so much of damages claimed are in respect of prospective, and therefore necessarily contingent, loss.* [emphasis added]

29 In this regard, we find that the following observations by Fletcher Moulton LJ in the English Court of Appeal decision of *Chaplin v Hicks* [1911] 2 KB 786 ("*Chaplin*") (at 793–795) are also instructive:

> Mr. McCardie [counsel for the defendant] does not deny that there is a contract, nor that its terms are as the plaintiff alleges them to be, nor that it is enforceable, but he contends that the plaintiff can only recover nominal damages, say one shilling. To start with, he puts it thus: where the expectation of the plaintiff depends on a contingency, only nominal damages are recoverable. Upon examination, this principle is obviously much too wide; everything that can happen in the future depends on a contingency, and such a principle would deprive a plaintiff of anything beyond nominal damages for a breach of contract where the damages could not be assessed with *mathematical accuracy*.
>
> …
>
> … I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case.
>
> [emphasis added]

30 Accordingly, a court has to adopt a flexible approach with regard to the proof of damage. Different occasions may call for different evidence with regard to certainty of proof, depending on the circumstances of the case and the nature of the damages claimed. There will be cases where absolute

> certainty is possible, for example, where the plaintiff's claim is for loss of earnings or expenses already incurred (*ie*, expenses incurred between the time of accrual of the cause of action and the time of trial), or for the difference between the contract price and a clearly established market price. On the other hand, there will be instances where such certainty is impossible, for example, where the loss suffered by the plaintiff is non-pecuniary in nature, or is prospective pecuniary loss such as loss of prospective earnings or loss of profits (see generally *McGregor on Damages* at paras 8-003–8-064). The correct approach that a court should adopt is perhaps best summarised by Devlin J in the English High Court decision of *Biggin & Co Ld v Permanite, Ld* [1951] 1 KB 422 ("*Biggin*"), where he held (at 438) that:
>
> > [W]here precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can.
>
> This is in fact the approach that this court has adopted (see *Raffles Town Club Pte Ltd v Tan Chin Seng* [2005] 4 SLR(R) 351 at [17]–[19], where both *Chaplin* and *Biggin* were cited with approval and the above observation by Devlin J emphasised by this court).
>
> 31 To summarise, a plaintiff cannot simply make a claim for damages without placing before the court sufficient evidence of the loss it has suffered even if it is otherwise entitled in principle to recover damages. On the other hand, where the plaintiff has attempted its level best to prove its loss *and* the evidence is cogent, the court should allow it to recover the damages claimed. …
>
> [emphasis in original]

224 The need for the court to adopt a flexible approach with regard to the proof and assessment of damage emphasised in the above passages would be severely undermined if *Wrotham Park* damages were available whenever it is "difficult" to assess damages. In such cases, the court must do the best it can on the evidence available rather than too readily turn to *Wrotham Park* damages.

225 Having said that, we recognise that there will be cases where the assessment of damages based on the traditional compensatory measures will be far too speculative an enterprise such that the plaintiff's financial loss cannot be

assessed in any meaningful way. In such situations, the traditional position is that the plaintiff, having failed to discharge his burden to prove his damage, would be entitled to nominal damages only (see *Robertson Quay* at [27]). Therefore, this is another scenario where a remedial lacuna arises due to the limitations of the orthodox compensatory measures of expectation and reliance loss (and assuming that specific relief is also unavailable). *Experience Hendrix* was such a case, where Mance LJ noted that damages were an inadequate remedy because of the "practical impossibility" in each case of demonstrating the effect of the defendant's undoubted breaches on the plaintiffs' general programme of promoting their product (at [38]). In such instances – where damages are ***practically impossible*** to quantify – we accept that an award of *Wrotham Park* damages will also be justified. However, we should emphasise that this is a ***high threshold*** which will ***not be easily met***.

(B) BREACH OF A NEGATIVE COVENANT

226 The ***second*** legal requirement arises from our judgment that the award of *Wrotham Park* damages should, as a general rule, be ***limited to breaches of negative covenants*** **(ie*, a promise not to do something)***.

227 Earlier, in setting out our views on the rationale and scope of the *Wrotham Park* doctrine, we alluded to two key reasons for this requirement. To recapitulate:

> (a) First, as we noted at [171] above, the remedial lacuna arising from the unavailability of orthodox compensatory damages (which justifies a *Wrotham Park* award) is most acute in the context of negative covenants. When a negative covenant is breached, there may be *no financial loss* suffered by the plaintiff, as in cases such as *Wrotham Park*. The traditional measures based on performing the obligation

contracted for are often *irrelevant* in such circumstances as well. In contrast, in most cases involving a breach of a positive obligation, there would be *no need* to resort to *Wrotham Park* damages because the plaintiff can typically obtain substitute performance when a defendant fails to do what he has promised to do, and the difference in value between the substitute performance and the performance which was promised would represent pecuniary loss.

(b) Second, as outlined at [175], in cases of positive obligations, the hypothetical bargain measure cannot easily be applied as the question of what sum the plaintiff would have accepted to release the defendant from his obligation to *do* what he has promised is less intuitive and natural than the question of what the plaintiff would have accepted as a licence fee for allowing the defendant to relax a negative covenant *not* to do a particular act. Put simply, it would not make sense to apply the hypothetical bargain measure, which is central to *Wrotham Park* damages, in the context of positive obligations.

228 In addition to the above two reasons, which flow ***from the nature of the hypothetical bargain measure itself***, we note that extending the doctrine to positive covenants would mean that every breach of contract could potentially attract *Wrotham Park* damages, which is an important ***practical consideration*** given the concern with ensuring that the doctrine does not subvert the long established framework of compensatory damages for breach of contract (see the English High Court decision of *Giedo Van der Garde BV and another v Force India Formula One Team Ltd (formerly Spyker F1 Team Ltd (England))* [2010] EWHC 2373 (QB) at [505]). In this regard, the court should be careful to ensure that the obligation breached is ***in substance*** a negative covenant, and not merely a positive obligation that has been "dressed up" as a negative covenant in form.

229 Finally, it also bears noting that this requirement of a breach of a negative covenant operates as a general rule, but is ***not*** an ***absolute or inviolable*** *condition* as such. This is because it is *theoretically* possible to include positive obligations within the scope of *Wrotham Park* damages. As Prof Goh points out, there would be a reasonable sum which the plaintiff would accept for a variation of the contract to release the defendant from his positive covenant. However, for the reasons stated above, our view is that the doctrine, at least at the present time, should be limited to a breach of negative covenants. That having been said, we would not rule out entirely the possibility that a case may one day come before this Court which necessitates the award of *Wrotham Park* damages even in the situation of a positive obligation. However, this would need to be a truly exceptional case in order to persuade this Court to depart from the present legal requirement (which would, in any event, remain as the default rule).

(C) HYPOTHETICAL BARGAIN BETWEEN THE PARTIES FOR THE RELEASE OF THE RELEVANT COVENANT MUST NOT BE IRRATIONAL OR INCREDIBLE

230 This brings us to the ***third*** (and ***final***) ***legal requirement***. This is that the case must ***not*** be one where ***it would be irrational or totally unrealistic to expect the parties to bargain for the release of the relevant covenant, even on a hypothetical basis***. In other words, it must be possible for the court to construct a hypothetical bargain between the parties in a *rational* and *sensible* manner.

231 This requirement is a ***practical*** and ***principled*** limitation on the doctrine. It is ***practical*** for the court *cannot* – in its quest to do justice – arbitrarily pluck a figure out of thin air, so to speak, in a situation where the hypothetical bargain

measure cannot be rationally or sensibly applied. The measure presupposes that it is possible in the first place to construct a hypothetical bargain between the parties for the release of the relevant covenant. Otherwise, the assessment of the *Wrotham Park* award would be an entirely artificial and indeterminate enterprise.

232 The limit set out above is also ***principled*** because it flows from ***the nature of the hypothetical bargain measure itself***. As we explained at [175]–[176], the measure ***would only make sense in certain type of cases***. In particular, it will not apply to cases where it would be *irrational* or *totally unrealistic* to expect the parties to bargain for the release of the relevant covenant, *even on a hypothetical basis*. A clear situation where the hypothetical measure would not apply would be one where an agreement to release the relevant covenant would be ***legally impermissible***. The facts of *AG v Blake* are an instance of this, as Chadwick LJ suggested in *WWF* (at [46]). An agreement between the Crown and a double agent to permit the latter to divulge official secrets of the State cannot possibly be conceived, even hypothetically.

233 Greater difficulty, however, will arise from less extreme situations, especially in the commercial context. At this point, it is necessary to consider the decision of the Singapore High Court in *JES International*. That case concerned a share swap deal between the plaintiff company and the defendant under which the plaintiff borrowed shares in itself ("the JES Shares") from its principal shareholder ("JESOIL") under a lending agreement ("the Share Lending Agreement"). The plaintiff then transferred the borrowed JES Shares to the defendant. The transfer, however, took place even before key condition precedents for the deal, including shareholder approval and satisfactory due diligence, had been completed by the plaintiff. Therefore, there was a clear and substantial risk that the deal would not be completed, at which point the plaintiff

would have to return the borrowed JES Shares to JESOIL. The plaintiff and the defendant therefore entered into a moratorium ("the Moratorium") under which the defendant undertook not to transfer or dispose of the JES Shares until 12 months after completion of the transfer. As noted by the court (at [42]), the fundamental purpose of the Moratorium was to safeguard the plaintiff's interest by ensuring that the defendant was in a position to return the JES Shares in the event that the transaction did not complete or JESOIL demanded their return. As part of this arrangement, the Securities Industries Council ("the SIC") additionally required the plaintiff to procure an undertaking from the defendant ("the SIC Undertaking"). The SIC Undertaking echoed the language of the Moratorium and was geared to ensure that, in the event that the loaned JES Shares needed to be returned, the defendant would duly do so.

234 In breach of the Moratorium, the defendant transferred 60m of the JES Shares to a third party lender under a "Collateral Security Agreement". The relevant issue was the remedy which the plaintiff was entitled to for this breach of contract. One of the remedies sought was damages on a *Wrotham Park* basis. Kannan Ramesh JC (as he then was) rejected this claim on the principal basis that compensatory damages were available and were a more appropriate remedy on the facts of that case (at [217]). However, he also suggested that the case was not an appropriate one for a *Wrotham Park* award because it was one where, realistically speaking, no commercially acceptable agreement could have been reached, even hypothetically. He expounded on this point as follows (at [214]):

> ***Examining the circumstances at that time, it would seem to me that realistically speaking, no commercially acceptable agreement could hypothetically have been reached.*** I do not see how the Plaintiff, ***even hypothetically***, would have agreed to release the Defendant from the Moratorium. I say this given the purpose of the Moratorium and the fact that the [JES Shares] had been borrowed from JESOIL under the Share Lending Agreement. Moreover, the SIC had required the Plaintiff to procure the SIC Undertaking from the

> Defendant and YN. *It must be remembered that the hypothetical negotiations would be for the Moratorium to be lifted to enable the Defendant to perform the Collateral Security Agreement. If the Plaintiff allowed that to happen, it would have put the entire transaction in jeopardy.* Further, from a purely risk-perspective, to do so would effectively have put the Plaintiff at serious risk of not having the [JES Shares] returned by the Defendant. As a matter of commercial reality, the Plaintiff would not have run that risk as regards the [JES Shares] for the reasons I have mentioned. I am also convinced that the Plaintiff would not have agreed to this given the position of the SIC. [emphasis added in italics and bold italics]

235 In our judgment, Ramesh JC's reasoning is entirely sound. On *the specific facts* of *JES International*, an application of the hypothetical negotiation measure would have been inappropriate as it was *irrational and totally unrealistic* that any party in the plaintiff's position would have agreed to the defendant transferring the JES Shares to a third party, *even hypothetically*, for the reasons identified by Ramesh JC, namely: (a) the JES Shares themselves were borrowed and did not belong to the plaintiff; (b) such an agreement would have undermined the purpose of the Moratorium, which was to mitigate the risk that the defendant would not be able to return the JES Shares in the event that the transaction fell through; (c) the release of the covenant would also have militated against the position of the SIC, which had specifically required the SIC Undertaking to address the very same risk; and (d) it would have placed the entire share swap deal, of which the transfer of the JES Shares was only a preliminary step, in jeopardy. The facts of *JES International* therefore aptly demonstrate the point that there will be cases where the court cannot envision an agreement for the release of the relevant covenant, even on a hypothetical basis.

236 We should emphasise, however, that our analysis above should ***not*** be seen to be as a departure from the ***objective*** nature of *Wrotham Park* damages or the well-established principle that ***the fact that one or both parties would in***

practice have refused to make a deal is to be ignored (see *Pell Frischmann* at [49]). In this regard, it is our view that there is a crucial ***distinction*** between a case where the parties would have been ***unwilling to enter into an agreement for the release of the relevant covenant (whether reasonably or otherwise)*** and a situation where such ***an agreement would have been simply irrational or totally unrealistic, on the particular circumstances of the case, even on a hypothetical basis***. Take the case of *Wrotham Park* for instance. As noted above, Brightman J was aware that the plaintiffs would clearly not have granted any relaxation of the relevant covenant. He also observed that this refusal would have been entirely reasonable and justified because the plaintiffs, as owners of the estate, were "rightly conscious of their obligations towards existing residents" (at 815). However, this *unwillingness* by the plaintiffs to relax the covenant (though reasonable), did *not* mean that an agreement to relax the relevant covenant, and thereby allow the building of the housing estate by the defendant, would have been *irrational* or *incredible*. Such an agreement would have been wholly within the bounds of commercial reality. The subsequent cases in which *Wrotham Park* damages were awarded, such as *Experience Hendrix* and *Pell Frischmann*, were also instances where a hypothetical bargain for the release of the relevant covenant was conceivable, even if the parties themselves would not have willingly entered into such a bargain. In *Experience Hendrix*, for instance, it would not have been irrational for Hendrix's estate to have permitted the use of the recordings for a percentage of the defendant's profits. Similarly, in *Pell Frischmann*, although the plaintiff would have no doubt been reluctant to give up the valuable business opportunity which it had gotten, a bargain under which it gave up this opportunity in return for a substantial proportion of the profits to be made under the same project would not have been totally unrealistic, and was certainly conceivable on a hypothetical basis.

237 In stark contrast is the situation in *JES International* (which we have described above) where it would have been absurd for the plaintiff to have agreed to the disposal of the JES Shares to a third party where this would have undermined the entire purpose of the contract itself as well as placed the broader commercial transaction in jeopardy. It is ***only*** in such a case that a *Wrotham Park* award will be denied on the basis of this third requirement. This is because, as outlined earlier, to apply the hypothetical measure despite the bargain being irrational would be both unprincipled and entirely artificial, necessitating the court to effectively pluck a figure from the air.

(D) REASONS FOR REJECTING OTHER POSSIBLE LEGAL REQUIREMENTS

238 Having set out the legal requirements that, in our judgment, need to be met in order to justify an award of *Wrotham Park* damages, we briefly provide the reasons why we do *not* accept some of the other legal requirements for a *Wrotham Park* award which have been suggested.

239 The first is that *Wrotham Park* damages should only be awarded where there has been a breach of a "proprietary right". We reject such a limitation for two reasons. First, as a matter of authority, while such a limitation may have been part of the English common law in the early stages of the development of the *Wrotham Park* doctrine, it is clear that it has been rejected by the courts in the decisions thereafter (see [150]–[164] above, and [280] below on the impact of the UK Supreme Court's decision in *One Step (SC)* on this issue). Second, we cannot identify a *principled* basis for such a restriction. As Lord Nicholls noted in *AG v Blake* (at 283), it is not clear why it should be any more permissible to expropriate personal rights than it is permissible to expropriate property rights (see [147]–[148] above). In particular, the fact that the contractual right breached was of a personal nature does not detract from the

need to protect the plaintiff's performance interest by addressing the remedial lacuna which arises where orthodox contractual remedies are otherwise unavailable through an award of *Wrotham Park* damages (assuming that the other requirements set out above are also met).

240 Second, it has been suggested in several cases that there must be a deliberate or cynical breach of contract and that the plaintiff must establish a legitimate interest in preventing the defendant's profit-making activity in breach of contract (see *Experience Hendrix* at [58] and *One Step (CA)* at [147]). These requirements have been extracted from Lord Nicholls's judgment in *AG v Blake* (at 285–286), and arguably make sense in the context of an award that is truly gain-based and focussed on profit-stripping as a means of punishment and deterrence (*ie*, one that is "*normatively restitutionary*" as defined earlier). However, as explained above, our view is that *Wrotham Park* damages are *not restitutionary*, but rather are plaintiff-centric and *compensatory in nature*. Hence, the conduct of the defendant cannot, in our judgment, be a material consideration when the court decides whether to award *Wrotham Park* damages (although it is a factor that may be taken into account in *quantifying* the award (see [245(b)] below)). Indeed, this is an example of how identifying the correct conceptual basis of the doctrine does have a tangible impact on the applicable legal principles. In addition, we agree with Prof Goh that the controlling factor of "legitimate interest" is too vague and uncertain. It is also unnecessary to meet the concern that the wide availability of *Wrotham Park* damages may upset the settled principles of contractual remedies and give rise to uncertainty, especially in commercial cases, given our rationalisation of *Wrotham Park* damages as a *limited doctrine* which applies in a *specific context* (see [177] above).

241 Finally, we note that the other requirements which have been put forward, such as the need to "avoid manifest injustice" and "sufficient factors

to justify the grant of an exceptional remedy" (see *One Step (CA)* at [119]), are *already* built into the three legal requirements we have set out above, particularly the requirement that the court must be satisfied that orthodox contractual remedies, namely compensatory damages (measured by reference to the plaintiff's expectation or reliance loss) and specific relief, are ***unavailable***.

242 Before leaving this point, we acknowledge that there may be cases which do ***not*** meet the criteria set out above (particularly, the second and third requirements). In such cases where there is a remedial gap in the judicial armoury, although an award of *Wrotham Park* damages based on the hypothetical bargain measure would ***not*** be appropriate, the court should nevertheless carefully assess whether there is *some other way* by which the plaintiff may be compensated for the loss of his performance interest. In other words, the hypothetical bargain measure ***need not be the only means*** by which the injury to the plaintiff's performance interest can be valued in the limited category of cases where there is a remedial lacuna arising from the unavailability of orthodox contractual remedies, although it would *usually* be the first legal port of call. As this issue does not arise before us in the present case, we need not take the point any further. However, we note that a similar point was made by Mance LJ in *Experience Hendrix* where he observed that, in giving effect to the instinctive reaction that the wrongdoer ought not to gain an advantage for free, and should make some reasonable recompense, the court need not necessarily order payment over of a percentage of any profit, but can also adopt other measures such as by taking the cost which the wrongdoer would have had to incur to obtain equivalent benefit from another source (at [26], cited at [153] above).

(5) How should *Wrotham Park* damages be assessed?

243 The next issue is ***how*** *Wrotham Park* damages should be ***assessed***. This issue is much less controversial than the questions considered above. In the main, we agree with Prof Goh's submissions on this issue (as summarised at [98]–[99] above), which are in line with the authorities.

244 To reiterate, it is well-established that *Wrotham Park* damages are to be measured by ***such a sum of money as might reasonably have been demanded as a* quid pro quo *for relaxing the covenant*** (see *Wrotham Park* at 815). The assessment is ***objective*** and by reference to a ***hypothetical bargain rather than the actual conduct and position of the parties***. To restate the ruling of the Privy Council in *Pell Frischmann* at [49]:

> … It is a negotiation between a willing buyer (the contract breaker) and a willing seller (the party claiming damages) in which the subject matter of the negotiation is the release of the relevant contractual obligation. Both parties are to be assumed to act reasonably. The fact that one or both parties would in practice have refused to make a deal is therefore to be ignored.

245 In determining the outcome of the hypothetical negotiation, we agree with Prof Goh that guidance can be taken from the English High Court decision of *Vercoe and others v Rutland Fund Management Ltd and others* [2010] EWHC 424 (Ch) ("*Vercoe*"), where it was held that how the notional negotiation would have taken place must be determined "bearing in mind the information available to the parties and the commercial context at the time that notional negotiation should have taken place" (at [291]). Sales J (as he then was) also held, at [292], that the fair price for the release of the relevant negative covenant must be assessed having regard to:

> (a) the likely parameters given by ordinary commercial considerations bearing on each of the parties;

(b) any additional factors particularly affecting the just balance to be struck between the competing interests of the parties (such as the conduct of the parties or any extraordinary and unexplained delay by the plaintiff); and

(c) the court's overriding obligation to ensure that an award of damages for breach of contract – which falls to be assessed in light of events which have now moved beyond the time the breach of contract occurred and which may have worked themselves out in a way which affects the balance of justice between the parties – does not provide relief out of proportion to the real extent of the plaintiff's interest in proper performance judged on an objective basis by reference to the situation which presents itself to the court.

246 It is also well-established that the date of assessment is at the date of breach and that post-breach events are generally irrelevant (see *Pell Frischmann* at [50]–[51] and *WWF* at [53]).

247 In addition, we emphasise once again that the quantum of the defendant's actual gain does not *itself* form the basis of the award, but is only relevant *as a matter of evidence* because, in assessing the sum which the wrongdoer should pay as a reasonable recompense to the plaintiff, it is natural to have regard to any profit to be made by the defendant (see [187]–[191] and [199] above). However, as alluded to above at [188] and [190], the authorities indicate that other metrics besides a proportion of the anticipated profits may be adopted such as the costs which the defendant would have had to incur to obtain (if feasible) equivalent benefit from another source. At this juncture, it is useful to refer to the facts and result in *Vercoe* as well. In that case, the plaintiffs approached the defendants, which were venture capitalists, with an opportunity

to acquire certain companies. The defendants, in breach of contract and confidentiality, went on to acquire the companies themselves without the involvement of the plaintiffs. Sales J found that *Wrotham Park* damages were justified. He did not, however, assess the award based on a proportion of the defendants' anticipated profits arising from their breach. Instead, he calculated the *Wrotham Park* award on the basis that the plaintiffs would have allowed the defendants to buy out their rights in return for the grant of rights equivalent to a percentage of equity in the target companies (at [361]).

248 The only points on the issue of quantification of *Wrotham Park* damages that we differ from Prof Goh are in relation to the doctrines of causation and remoteness of damage. In his written submissions, he suggested that both doctrines may be applicable. However, in our judgment, given that the rationale of *Wrotham Park* damages is to protect the plaintiff's interest in performance through ***an objective award*** assessed by reference to the hypothetical bargain, rather than the disgorgement of subjective gains, it is not clear why the tests of causation and remoteness of damage – which are premised on the need to establish a sufficient link between the defendant's breach and the subjective loss of the plaintiff (or perhaps the subjective gain of the defendant) – would be relevant. Tentatively, our view is that these doctrines are *simply not relevant* to *Wrotham Park* damages. In addition, we note Prof Goh's reference to Prof Cunnington's suggestion (see *Cunnington* at p 578 (citing the English High Court's decision in *WWF-World Wide Fund for Nature and another v World Wrestling Federation Entertainment Inc* [2006] EWHC 184 at [174])) that the doctrine of mitigation may have a limited role to play where the plaintiff has unreasonably delayed in initiating the claim and prosecuting the action. This seems, at first blush, more arguable. However, it might be more appropriate for such considerations to be taken into account in quantifying the award instead

(see [245(b)] above) rather than under the doctrine of mitigation. But these are narrow issues which, as far as we are aware, have not arisen in any of the cases. They are not relevant to the facts of the present case either and we will address them when they arise directly for decision.

249 A final point which we would make is that whilst the general legal principles on how *Wrotham Park* damages ought to be assessed are relatively uncontroversial, the practical application of these principles undeniably involves a degree of difficulty and indeterminacy due to the inherently artificial nature of the hypothetical negotiation measure. Hence, and as the courts have accepted, a rough and ready approach, as opposed as a precise one, has to be adopted (if nothing else, as a matter of practical necessity).

Some tentative observations on AG v Blake *damages*

250 Before we conclude our analysis of the law, we think that it is appropriate to consider – in the briefest of fashions – the issue of *AG v Blake* damages. Our observations in this respect will be tentative in nature, because it is common ground that *AG v Blake* damages are an exceptional remedy and, in our judgment, there is *simply no basis* for such damages to be awarded in the present case *even if* they were a part of the Singapore law of contract (see [302] below). Nevertheless, it would not be amiss, in our view, to set out some provisional observations that may form the basis for further submissions in the future.

251 We have set out an overview of the facts and decision in *AG v Blake* at [146]–[150] above. It should be emphasised that the case was *truly exceptional*, as Lord Nicholls repeatedly stressed in his leading judgment. He thus held that "[a]n account of profits will be appropriate only in *exceptional circumstances*"

and that "[i]t will be only in *exceptional cases*, where [ordinary] remedies are inadequate, that any question of accounting for profits will arise" [emphasis added] (at 285). In addition, he ruled that a "useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit" (at 285). Beyond that, however, he did not provide any specific guidance on when a disgorgement of the defendant's gains would be a justified response to a breach of contract.

252 In our judgment, the primary difficulty with recognising *AG v Blake* damages as a part of Singapore law is the ***uncertainty of the legal criteria*** to be applied in awarding such damages. This is a point which this Court observed in *MFM Restaurants* in the following passage (at [52] and [54]–[55]).

> 52 It should be noted that the present appeals centre on the issue of damages to be awarded in a purely contractual context. No arguments were made in relation to the award of punitive damages or the award of damages pursuant to the principles laid down in the seminal House of Lords decision in *Attorney General v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268 ("*Blake*"). This is perhaps understandable in light of the fact that both these areas of the law of damages are still – to put it mildly – in a state of flux.
>
> …
>
> 54 *The second is less controversial, but no less problematic.* … Put very simply, the principles set out in *Blake* permit the court to award damages to the plaintiff (in a situation relating to the breach of a contract) on the basis of the gains or profits made by the defendant even though the plaintiff could not otherwise be awarded any damages based on traditional contractual principles (for example, because there has been no difference in value of the contractual subject matter and, hence, no justification for the award of expectation loss). Such damages would, however, be awarded only in *exceptional* cases. This category of damages has sometimes been termed as "restitutionary damages", although the House in *Blake* preferred to classify such an award on the basis of an account of profits.

> 55 Apart from the various conceptual as well as (as referred to at the end of the preceding paragraph) terminological difficulties [with *AG v Blake* damages], *there are (concurrent)* ***practical difficulties*** *as well in so far as the award of damages under the principles set out in Blake are concerned. In Blake, for example, in the leading judgment of Lord Nicholls of Birkenhead, the statement of principle (at 284–285) does not really furnish concrete guidance as to when the power to award such damages will arise.* ***That the award of such damages is (as already noted in the preceding paragraph) exceptional still leaves the (very practical) issue as to the criteria which will enable the court to ascertain whether or not a given fact situation is indeed exceptiona*****l***. …
>
> [emphasis added in italics and bold italics]

253 Although the above observations were made some seven years ago, the argument from *uncertainty of legal criteria* continues – not surprisingly – to hold good even today. In particular, the concept of "legitimate interest" referred to by Lord Nicholls in *AG v Blake* is, with respect, rather general and perhaps even vague, as we noted earlier (at [240]) (*cf* also the difficulties surrounding the same concept that was raised by Lord Reid in the House of Lords decision of *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 in the somewhat different context of determining the possible exceptions to the general proposition that there is no duty to mitigate one's loss in relation to a claim for a fixed sum, as opposed to a claim for unliquidated damages (see generally Andrew Phang & Yihan Goh, "Encounters with History, Theory and Doctrine: Some Reflections on Discharge by Breach of Contract" in *Contract in Commercial Law* (Thomson Reuters (Professional) Australia Limited, 2016) (Simone Degeling, James Edelman & James Goudkamp eds) at pp 292−294 (as well as the literature and case law cited therein)).

254 It can thus be seen that there are in fact quite significant objections to the recognition of *AG v Blake* damages in the Singapore context. Having said that, the decision may perhaps be rationalised as an example of a case where the

law has a ***legitimate basis*** *for* ***punishing*** *the defendant and* ***deterring*** *non-performance because the contract involves* ***a public interest*** *which goes beyond the private interests of the parties themselves*. This would be an ***exceptional*** class of contracts, but the contract between the Government and the intelligence agent in *AG v Blake* provides a classic illustration that this category of cases does exist. In such instances, there is broader public interest in the performance of the contract, which may consequently necessitate a ***departure from the compensatory principle***, and justify a ***restitutionary*** award so as to *punish* the defendant for the breach, and *deter* future breaches of a similar nature as a matter of ***policy***. Indeed, it is plausible that this was the nature of the award in *AG v Blake* itself: the court was not seeking to compensate the Government by providing it with a remedy in economic terms, but was in fact upholding the "non-pecuniary interest" or "governmental interest" in the performance of an intelligence agent's duties of confidentiality by the wholesale stripping of the wrongdoer's profits (see *One Step (SC)* at [111] and [132]). If this rationalisation of *AG v Blake* damages is accepted, then such damages may perhaps be recognised as an ***exceptional remedy confined to this unique category of cases where the law has a legitimate basis for punishing the defendant and/or deterring non-performance***. We stress, however, that our observations in this regard are only ***tentative***, and that this is only ***one possible rationalisation*** of *AG v Blake* damages to overcome the significant difficulties with the decision outlined above.

255 Parenthetically, we observe that the remedy that the plaintiff obtained in *AG v Blake* was, in fact, labelled "***an account of profits***" (*per* Lord Nicholls at 284). However, an account of profits is *quintessentially an* ***equitable remedy*** that would typically follow from a breach of fiduciary duty. Therefore, while the plaintiff's claim in *AG v Blake* was for *breach of contract*, it may be possible

to rationalise the remedy on the basis that the undertaking by the defendant, though not a fiduciary obligation as such, "was closely akin to a fiduciary obligation" (*per* Lord Nicholls at 287). Again, this is only another possible rationalisation for the decision in *AG v Blake*. For now, it suffices for us to tentatively suggest that if *AG v Blake* damages are to be recognised, their availability should be *confined to truly* ***exceptional*** *cases*. The exact status and scope of this category of damages in our jurisdiction is an issue which will have to be determined on a future occasion.

Addendum – the recent UK Supreme Court decision in One Step (Support) Ltd v Morris-Garner and another

256 As we alluded to earlier, after our initial draft of the present judgment had been completed, the UK Supreme Court handed down its decision in *One Step (SC)* on 18 April 2018 (see [159]–[163] above). In this addendum, we briefly summarise the judgment and set out our views on the impact of the decision (if any) on the governing principles set out above on *Wrotham Park* and *AG v Blake* damages.

(1) Summary of the judgment

257 For present purposes, we will focus on the judgment of the majority, which was delivered by Lord Reed (with whom Lady Hale, Lord Wilson and Lord Carnwath agreed), and refer to the minority judgment of Lord Sumption and the concurring judgment of Lord Carnwath only where relevant.

258 Lord Reed pointed out at the outset of his judgment (at [1]), that *One Step (SC)* "raises an important question in relation to the law of damages: in what circumstances can damages for breach of contract be assessed by reference to the sum that the claimant could hypothetically have received in return for

releasing the defendant from the obligation which he failed to perform?" He noted that such damages have sometimes been described as *Wrotham Park* damages. But he disapproved – perhaps too strongly, in our view – of the term "*Wrotham Park* damages" and preferred the term "negotiating damages" instead (which had been introduced by Neuberger LJ (as he then was) in the English Court of Appeal decision of *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] 2 EGLR 29).

259 In tracing the development of the doctrine, Lord Reed analysed negotiating damages together with the broader category of user damages in tort. User damages, in Lord Reed's analysis, were *compensation for loss*, albeit of an unconventional kind. He held (at [30]):

> … Where … unlawful use is made of property, and the right to control such use is a valuable asset, the owner suffers a loss of a different kind, which calls for a different method of assessing damages. In such circumstances, the person who makes wrongful use of the property prevents the owner from exercising his right to obtain the economic value of the use in question, and should therefore compensate him for the consequent loss. Put shortly, he takes something for nothing, for which the owner was entitled to require payment.

260 Lord Reed subsequently turned to negotiating damages, and divided the development of these damages into two phases – an earlier period where the award of such damages was based on the exercise of the jurisdiction under the LCA and the later period "in which [such] awards … were made at common law on *a wider and less certain basis*" (at [48]) [emphasis added]. On the cases which involved the statutory jurisdiction to award damages in lieu of an injunction under the LCA, including *Wrotham Park*, Lord Reed's assessment was that the purpose of the awards "was to provide the claimant with an appropriate monetary substitute for an injunction in the circumstances of the particular case" (at [62]). He focussed on the *equitable nature* of this

jurisdiction, and noted that every reported case in this category appeared to have concerned either a tortious interference with property rights, or the breach of a restrictive covenant over land.

261 The learned judge turned next to *AG v Blake*, which he saw as dividing the two phases of development of negotiating damages. Lord Reed was critical of Lord Nicholls's analysis in *AG v Blake* of user damages in tort and negotiating damages awarded under the LCA as gain-based. Lord Reed similarly disapproved of the connection which Lord Nicholls drew between *Wrotham Park* damages and an account of profits for breach of fiduciary duty. Lord Reed therefore *rejected the restitutionary analysis of negotiating damages*, and did *not* accept that damages assessed on the basis of a hypothetical release fee and an account of profits "are similar remedies (partial and total disgorgement of profits, respectively), at different points along a sliding scale" (at [81]).

262 On the second phase of the development of negotiating damages as awards for breach of contract at common law, Lord Reed considered cases such as *Pell Frischmann*, *Vercoe*, *Experience Hendrix* and *WWF* (which we have discussed in some detail above). The learned judge construed those authorities as instances where the award of negotiating damages was based on "the commercial value of the right infringed … of which the claimant had been effectively deprived" (at [83]).

263 Lord Reed then set out the majority's conclusions on negotiating damages. He started by reiterating the compensatory nature of such damages, and held that "*[t]here are certain circumstances in which the loss for which compensation is due is the economic value of the right which has been breached, considered as an asset*" [emphasis added] (at [91]). In his judgment, the

imaginary negotiation was merely a tool for arriving at that value, and the real question was as to the circumstances in which that value constituted the measure of the claimant's loss.

264 In the following important passage, the learned judge set out the circumstances in which the right that had been breached would be considered an economically valuable "asset" such as to justify an award of negotiating damages (at [92]–[94]):

> 92 As the foregoing discussion has demonstrated, such circumstances can exist in cases where ***the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed, as for example in cases concerned with the breach of a restrictive covenant over land, an intellectual property agreement or a confidentiality agreement***. Such cases share an important characteristic with the cases in which Lord Shaw's "second principle" and Nicholls LJ's "user principle" were applied. *The claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the asset in question. The defendant has taken something for nothing, for which the claimant was entitled to require payment.*
>
> 93 It might be objected that there is a sense in which any contractual right can be described as an asset, or indeed as property. In the present context, however, ***what is important is that the contractual right is of such a kind that its breach can result in an identifiable loss equivalent to the economic value of the right, considered as an asset, even in the absence of any pecuniary losses which are measurable in the ordinary way***. That is something which is true of some contractual rights, such as a right to control the use of land, intellectual property or confidential information, but by no means of all. For example, the breach of a non-compete obligation may cause the claimant to suffer pecuniary loss resulting from the wrongful competition, such as a loss of profits and goodwill, which is measurable by conventional means, but in the absence of such loss, it is difficult to see how there could be any other loss.
>
> 94 *It is not easy to see how, in circumstances other than those of the kind described in paras 91–93, a hypothetical release fee might be the measure of the claimant's loss. It would be going too far, however, to say that it is only in those*

> *circumstances that evidence of a hypothetical release fee can be relevant to the assessment of damages.* If, for example, in other circumstances, the parties had been negotiating the release of an obligation prior to its breach, the valuations which the parties had placed on the release fee, adjusted if need be to reflect any changes in circumstances, might be relevant to support, or to undermine, a subsequent quantification of the losses claimed to have resulted from the breach. It would be a matter for the judge to decide whether, in the particular circumstances, evidence of a hypothetical release fee was relevant and, if so, what weight to place upon it. *However, the hypothetical release fee would not itself be a quantification of the loss caused by a breach of contract, other than in circumstances of the kind described in paras 91-93 above.*
>
> [emphasis added in italics and bold italics]

265 Lord Reed summarised his conclusions in the following twelve legal propositions (at [95]):

> (1) Damages assessed by reference to the value of the use wrongfully made of property (sometimes termed "user damages") are readily awarded at common law for the invasion of rights to tangible moveable or immoveable property (by detinue, conversion or trespass). The rationale of such awards is that the person who makes wrongful use of property, where its use is commercially valuable, prevents the owner from exercising a valuable right to control its use, and should therefore compensate him for the loss of the value of the exercise of that right. He takes something for nothing, for which the owner was entitled to require payment.
>
> (2) Damages are also available on a similar basis for patent infringement and breaches of other intellectual property rights.
>
> (3) Damages can be awarded under Lord Cairns's Act in substitution for specific performance or an injunction, where the court had jurisdiction to entertain an application for such relief at the time when the proceedings were commenced. Such damages are a monetary substitute for what is lost by the withholding of such relief.
>
> (4) One possible method of quantifying damages under this head is on the basis of the economic value of the right which the court has declined to enforce, and which it has consequently rendered worthless. Such a valuation can be arrived at by reference to the amount which the claimant might reasonably have demanded as a quid pro quo for the relaxation of the obligation in question. The rationale is that, since the

withholding of specific relief has the same practical effect as requiring the claimant to permit the infringement of his rights, his loss can be measured by reference to the economic value of such permission.

(5) That is not, however, the only approach to assessing damages under Lord Cairns's Act. It is for the court to judge what method of quantification, in the circumstances of the case before it, will give a fair equivalent for what is lost by the refusal of the injunction.

(6) Common law damages for breach of contract are intended to compensate the claimant for loss or damage resulting from the non-performance of the obligation in question. They are therefore normally based on the difference between the effect of performance and non-performance upon the claimant's situation.

(7) Where damages are sought at common law for breach of contract, it is for the claimant to establish that a loss has been incurred, in the sense that he is in a less favourable situation, either economically or in some other respect, than he would have been in if the contract had been performed.

(8) Where the breach of a contractual obligation has caused the claimant to suffer economic loss, that loss should be measured or estimated as accurately and reliably as the nature of the case permits. The law is tolerant of imprecision where the loss is incapable of precise measurement, and there are also a variety of legal principles which can assist the claimant in cases where there is a paucity of evidence.

(9) Where the claimant's interest in the performance of a contract is purely economic, and he cannot establish that any economic loss has resulted from its breach, the normal inference is that he has not suffered any loss. In that event, he cannot be awarded more than nominal damages.

(10) Negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. That may be the position where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed. The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant was entitled to require payment.

> (11) Common law damages for breach of contract cannot be awarded merely for the purpose of depriving the defendant of profits made as a result of the breach, other than in exceptional circumstances, following *Attorney General v Blake* [2001] 1 AC 268.
>
> (12) Common law damages for breach of contract are not a matter of discretion. They are claimed as of right, and they are awarded or refused on the basis of legal principle.

266 Applying these principles, Lord Reed held that negotiating damages assessed by reference to the hypothetical release fee were not available on the facts of *One Step (SC)*. The case was brought by a commercial entity "whose only interest in the defendants' performance of their obligations under the covenants was commercial", and the loss suffered by the plaintiff was a loss of profits, which ought to be quantified in a conventional manner (at [98]). The learned judge also found that the case was "not one where the breach of contract has resulted in the loss of a valuable asset created or protected by the right which was infringed" (at [99]).

(2) Our observations on *One Step (SC)*

(A) INTRODUCTION AND RECAPITULATION

267 We now turn to consider what impact, if any, the decision in *One Step (SC)* has on the Singapore legal position on *Wrotham Park* and *AG v Blake* damages as set out in the present judgment.

268 We start with a brief recapitulation of the legal principles which we detailed earlier in this judgment. It will be recalled that we endorsed *Wrotham Park* damages as constituting an independent head of contractual damages, which are *objective* ***compensatory*** *awards* aimed at compensating the plaintiff for the loss of the performance interest which he has been deprived of due to the defendant's breach of contract. We held that there are ***three legal requirements***

that need to be satisfied before a court can award *Wrotham Park* damages (at [217]–[241]):

> (a) First, as a threshold requirement, the court must be satisfied that orthodox compensatory damages (measured by reference to the plaintiff's expectation or reliance loss) and specific relief are ***unavailable***.
>
> (b) Second, it must, as a general rule, be established that there has been (in substance, and not merely in form) a breach of a ***negative covenant***.
>
> (c) Third, and finally, the case must ***not*** be one where ***it would be irrational or totally unrealistic to expect the parties to bargain for the release of the relevant covenant, even on a hypothetical basis***. In other words, it must be possible for the court to construct a hypothetical bargain between the parties in a *rational* and *sensible* manner.

269 On *AG v Blake* damages, we suggested that, if *AG v Blake* damages are to be recognised at all, they should be confined to truly ***exceptional*** cases (at [254] above).

(B) OF DIFFERENCES AND SIMILARITIES

(I) TERMINOLOGY

270 We first consider a relatively straightforward point. It will be recalled that Lord Reed did not approve of the term "*Wrotham Park* damages" and preferred the term "negotiating damages" instead. With respect, we are of the view this is more a matter of form as opposed to substance. We see no real prejudice in continuing with the term "*Wrotham Park* damages", which we have

used in this judgment, although we would also have no objections to the term "negotiating damages" being used ***interchangeably*** with the term "*Wrotham Park* damages".

(II) SIMILARITIES

271 It will be apparent that there are many similarities between the analyses in both judgments. In particular, both judgments reject the restitutionary analysis of *Wrotham Park* damages, and view such damages as *compensation* for *value of the contractual right* which has been breached, assessed on an objective basis. Consequently, neither court accepts the thesis that *Wrotham Park* damages and *AG v Blake* damages have a similar juridical basis, and which effect disgorgement of profits at different points along a continuum.

272 Due to the rejection of the gain-based analysis of *Wrotham Park* damages, both the UK Supreme Court in *One Step (SC)* and this Court are *ad idem* that defendant-centric considerations – such as the breach being deliberate or self-interested, or the plaintiff having a legitimate interest in preventing the defendant's profit-making activity – are not relevant to an award of such damages (see [240] above; and *One Step (SC)* at [35] and [90]).

273 Both decisions also stress the limits and artificiality inherent in the hypothetical bargain measure. To cite Lord Reed, "the premise of the hypothetical negotiation – that a reasonable person in the claimant's position would have been willing to release the defendant from the obligation in return for a fee – breaks down in a situation where any reasonable person in the claimant's position would have been unwilling to grant a release" (at [75]). This echoes our third legal requirement for an award of *Wrotham Park* damages that the case must not be one where it would be irrational or totally unrealistic to expect the parties to bargain for the release of the relevant covenant, even on a

hypothetical basis.

274 Significantly, both the UK Supreme Court in *One Step (SC)* and this Court agree that the inherent difficulties in the measurement of damages do not constitute a reason, by itself, to justify an award of *Wrotham Park* damages. Accordingly, both decisions reiterate the principle that, where it is clear that the plaintiff has suffered substantial loss, the court has to assess damages as best it can on the available evidence (see [221]–[225] above; and *One Step (SC)* at [38]). Indeed, this was the basis on which the appeal to the UK Supreme Court was allowed, with the majority ruling that the Court of Appeal in *One Step (CA)* was mistaken in treating the difficulty of establishing financial loss as justifying damages based on a hypothetical release fee (*One Step (SC)* at [96]).

275 Finally, both judgments recognise the difficulties with the nature of the remedy that was awarded in *AG v Blake* and make clear that damages "merely for the purpose of depriving the defendant of profits made as a result of the breach" (which we have termed *normatively restitutionary* damages) *cannot* be awarded for breach of contract other than in exceptional circumstances (see [255] above; *One Step (SC)* at [95(11)]).

276 On the above issues, the decision of the UK Supreme Court in *One Step (SC)* is in line with, and fortifies, our reasoning in the present judgment.

(III) DIFFERENCES

277 At the same time, it cannot be denied that there are significant differences between the principles set out in both decisions.

(a) Legal requirement for *Wrotham Park* damages at common law

278 For one, the legal requirement for an award of *Wrotham Park* damages

outlined in *One Step (SC)* is clearly different from that set out in the present judgment. The primary limiting criteria for an award of negotiating damages at common law laid down in *One Step (SC)* is that the contractual right breached must be considered to be an economically valuable "asset". Lord Reed held that this would be the case where the breach results in *the loss of a valuable asset created or protected by the right which was infringed*, such as in cases involving a restrictive covenant over land, intellectual property or confidential information. In the absence of the parties' submissions on this point, our present view is that such a requirement should not be part of Singapore law for the following reasons.

279 First, it not entirely clear from Lord Reed's judgment in what *other circumstances* a contractual right can be considered to be an "asset", and whether negotiating damages can be awarded at common law *only* in situations where the contractual right breached related to the control and use of land, intellectual property or confidential information. Lord Carnwarth, in his concurring judgment, indicated that negotiating damages may indeed be so limited. His summary of the majority's judgment was that such damages could only be supported in two groups of cases: (a) cases involving damages in lieu of an injunction under the LCA; and (b) cases involving "the abstraction or invasion" of "property and analogous rights" (at [128]).

280 If Lord Carnwarth's summary of the majority's judgment is accurate, then *One Step (SC)* limits the availability of negotiating damages at common law to cases involving the abstraction or invasion of property and analogous rights. This, it seems to us, *unduly narrows* the scope of the *Wrotham Park* doctrine. Such an approach comes close to reviving the narrow proprietary conception of the doctrine (see [144] above), which was expressly rejected in the authorities leading up to *One Step (SC)*. Apart from the authorities, we have

already set out the reasons why, in our judgment, such a limitation should be rejected as a matter of *principle* (see [239] above). To reiterate, it is not clear to us why it should be any more permissible to expropriate personal rights than it is permissible to expropriate property rights; and the fact that the contractual right breached was of a personal nature does not detract from the need to protect the plaintiff's performance interest by addressing the remedial lacuna which arises where orthodox contractual remedies are otherwise unavailable. For the same reason, we do not accept that a hard line should be drawn to exclude from the scope of the *Wrotham Park* doctrine cases where the plaintiff's interest in the performance of a contract is "purely economic" (see, by contrast, *One Step (SC)* at [95(9)]).

281 Second, if the test laid out by Lord Reed in *One Step (SC)* is in fact broader than Lord Carnwarth thought it to be, then it seems to us, with respect, to suffer from the malaise of *vagueness and uncertainty*. The enquiry in each case would then be whether the contractual right breached is an economically valuable "asset". But as Lord Reed himself noted, there is a sense in which any contractual right can be described as an asset. To deal with this difficulty, the learned judge suggested that negotiating damages may only be awarded in cases where the breach of contract has resulted in "the loss of a valuable asset created or protected by the right which was infringed" (at [95(10)]). However, this too is a difficult test to apply.

282 Take the leading Privy Council authority of *Pell Frischmann*, which we earlier discussed at [157]–[158] above, for example. That was a case involving a joint venture between the parties and the breach of a commercial agreement that the defendants work exclusively on an oilfield development project with the plaintiff. To rationalise the award of *Wrotham Park* damages in that case, Lord Reed suggested that the relevant "commercially valuable asset" of which

the plaintiff had been deprived due to the defendants' breach of contract was the plaintiff's "right to participate in a business opportunity under a joint venture agreement" (*One Step (SC)* at [83]). This analysis of *Pell Frischmann* highlights the elasticity of, and uncertainty inherent in, the requirement that the relevant contractual breach must have "resulted in the loss of a valuable asset created or protected by the right which was infringed". If a business opportunity under a joint venture agreement may be a "valuable asset" for the purposes of the *One Step (SC)* test, then it is difficult to see why contractual rights intended to secure other ordinary commercial interests cannot likewise fall within the scope of the *Wrotham Park* doctrine. Indeed, on the facts of *One Step (SC)* itself, while the majority were unequivocally of the view that the case was "not one where the breach of contract has resulted in the loss of a valuable asset created or protected by the right which was infringed" (at [99]), one could argue that the non-compete and non-solicitation covenants breached did protect valuable assets of the plaintiff, namely the goodwill of its business, and its right under the covenants to control the level of competition in the unique market in which the parties operated. It is thus not surprising that Lord Sumption took a different view from the majority on this issue. In his minority judgment, he held that the rights which the plaintiff asserted were "analogous to a right of property", and that the effect of the defendants' breach of the restrictive covenants was "to appropriate to themselves part of the goodwill of the business which they had sold" (at [125]). This divergence in analysis is telling, and reveals the limitations of the majority's test.

283 Finally, in so far as the concern is over the breadth of the *Wrotham Park* doctrine and the broad *dicta* in some authorities that such damages should be available whenever that is a "just response", that concern is already addressed in our judgment through the three legal requirements that we have laid out above

(at [217]–[241]). These requirements are: first, in line with the underlying rationale of *Wrotham Park* damages which are intended to address the remedial lacuna arising in instances where "the defendant has taken something for nothing" for which the plaintiff is entitled to recompense, but orthodox contractual remedies are unavailable (see *One Step (SC)* at [95(10)]); and, second, recognise the limitations of the hypothetical negotiation measure by limiting such damages to cases where this lacuna can be rationally and sensibly filled by reference to damages assessed on the basis of a hypothetical release fee. Thus, we find that there is no compelling reason for us to adopt the test for *Wrotham Park* damages at common law laid down by the majority in *One Step (SC)*.

(b) Relationship between *Wrotham Park* damages under the LCA and at common law

284 The second main difference between the two judgments is the emphasis placed by the majority in *One Step (SC)* on the distinction between *Wrotham Park* damages awarded in the exercise of the court's equitable jurisdiction under the LCA, and those awarded at common law.

285 In his judgment, Lord Reed bifurcated the two categories of cases, and suggested that they were governed by different principles and perhaps even different rules of assessment. In particular, the learned judge held that damages in lieu of an injunction under the LCA are a monetary substitute for an injunction, and that the power to award such damages was dependent on "the court's having jurisdiction to grant an injunction, determined as at the commencement of the proceedings" (at [45]). This ruling represents a departure from Lord Walker's pronouncement in *Pell Frischmann* that "it is not necessary that an injunction should actually have been claimed in the proceedings, or that there should have been any prospect, on the facts, of it being granted" before

Wrotham Park damages may be awarded (see [157] above). Lord Reed also suggested that the date, and hence knowledge and other circumstances, by reference to which the hypothetical release fee is to be measured under the LCA and at common law "is not necessarily the same" (*One Step (SC)* at [56]).

286 While we recognise the equitable roots of damages in lieu of an injunction under the LCA, we are not persuaded that this historical lineage justifies a sharp distinction between *Wrotham Park* damages awarded under the LCA (in our case, under para 14 of the First Schedule to the Supreme Court of Judicature Act (read with s 18(2) thereof)) and the same measure of damages awarded at common law. In our judgment, the principles that we have outlined above should apply equally to both categories of cases. In this regard, we point out that the availability of an injunction is a factor that is already encapsulated within our first threshold legal requirement that the court must be satisfied that orthodox compensatory damages *and specific relief* are unavailable.

(3) Concluding remarks on *One Step (SC)*

287 For the above reasons, we are of the view that the decision in *One Step (SC)* does not affect the the governing principles on *Wrotham Park* and *AG v Blake* damages which we have set out in the present judgment. To a substantial degree, there is harmony between the two decisions, particularly on the conceptual nature of *Wrotham Park* damages as compensatory, and the difficulties with the gain-based award rendered in *AG v Blake*.

288 In so far as the analysis of the UK Supreme Court in *One Step (SC)* diverges from ours, we are not persuaded, at least for now, that there is any cogent reason for us to depart from the principles set out in the present judgment. Having said that, we recognise that this is a novel and still developing

area of the law of contractual remedies, and do not entirely foreclose the possibility that these issues may have to be revisited by this Court one day. As we noted at the very beginning of this judgment, the common law is an integrated as well as interwoven tapestry, which develops over time. Thus, it would not be surprising in the least if the last word on the difficult legal issues which we have explored in this judgment is yet to be pronounced.

What is the appropriate remedy in the present case against the parties liable in contract?

289 We now turn to the application of what we have stated to be the law in Singapore on *Wrotham Park* damages to the present case. In our judgment, *Wrotham Park* damages are ***not*** an appropriate remedy on the present facts because the ***first*** and ***third*** legal requirements set out at [217] above are not satisfied.

Availability of orthodox compensatory damages

290 First, on the ***unavailability of orthodox compensatory damages***, both the Respondents and the Appellants accept that any traditional assessment of damages, assessed by reference to the Respondents' loss is fraught with uncertainty. But this merely indicates that the losses are *difficult to quantify*, which, in our judgment, is *not* sufficient to justify an award of *Wrotham Park* damages (see [174] and [221]–[225] above). In this regard, we observe that this is clearly not a case where there has been *no financial loss* at all, and it is indisputable that the Respondents did, in fact, suffer some financial loss. So the question is whether the Respondents' losses are ***(practically) impossible to quantify***. We find that this high threshold has *not* been met in the present case.

291 To begin with, the financial losses flowing from the Repudiatory Breaches have to be identified. There are two possible analyses. First, one could argue, as the parties have sought to do, that the relevant financial losses are those suffered by the Respondents as a result of being deprived of the opportunity to participate in the Bidding Exercise. We accept that these financial losses are indeed difficult to quantify. As the Respondents submit, the outcome of the Bidding Exercise is uncertain and the Respondents, had they been able to bid for the JV Companies, could have either: (a) if they succeeded in the bid, obtained the full profits from the business for the remaining tenure of the head leases, less the price they would have had to pay for buying out the SAA Group's shares; or (b) if the SAA Group had succeeded, gotten the fair price for their shares in the JV Companies. The calculation of the financial loss which the Respondents would have suffered but for the loss of their opportunity to participate in the Bidding Exercise is therefore fraught with evidential difficulties. This brings into play the important principle that, when faced with such difficulties, the court must do the best it can on the evidence available and adopt a flexible approach to assess a specific sum to be awarded to the plaintiff for his loss.

292 That leads us to the alternative analysis that the Respondents' financial loss can, instead, be identified as *the loss of the value of their 37.5% shares in the JV Companies caused by the breaches of the Consent Order*. We find that such a characterisation of the loss is entirely permissible given that the Respondents entered into the Consent Order in their capacity as shareholders of the JV Companies, and one of the express commercial considerations under the settlement was that the Respondents would, even if they did not succeed in the bid, at least receive the price of their shares.

293 It is undeniable that the Repudiatory Breaches of the Consent Order, in particular the acquisition by SAA of the 2007 Head Lease without granting sub-tenancies to the JV Companies and the appropriation by SAA of the benefit of the 2007 Head Lease for itself, deprived the JV Companies of their main source of revenue and rendered them "empty shells" (*Turf Club (No 1)* at [127]). This resulted in the shares in the JV Companies losing their value entirely. The loss of the value in the shares was a type of loss which would not have occurred but for the breaches of the Consent Order. It is also a type of loss which would have been entirely within the contemplation of the parties at the time they entered into the Consent Order. This is the reason why cl 11, which was intended to preserve the *status quo*, was agreed upon. In fact, it can be said that the Repudiatory Breaches were committed precisely in order to denude the JV Companies of any value, and thereby render the Bidding Exercise nugatory. In such circumstances, there is no reason why this Court, adopting the orthodox compensatory measure of expectation loss, cannot award substantial damages to the Respondents assessed by reference to the value of their shares in the JV Companies at the time the Repudiatory Breaches occurred. This loss, which is clearly pecuniary in nature, is far from impossible to quantify.

294 There is, however, one main objection to quantifying the Respondents' loss by reference to the loss in the value of their shares alone – such damages do not appear to fully capture the Respondents' expectation loss. This is because the performance of the Consent Order would, in all likelihood, have given the Respondents *more* than the value in the shares, which they already held prior to the Repudiatory Breaches. Even if they had lost the Bidding Exercise, it is probable that SAA's winning bid price would have been more than the market value of the shares. And, of course, if the Respondents had won the bid, then they would have had an opportunity to make substantial profits from the

JV Companies. In our judgment, this is an entirely valid concern. This concern, however, can be addressed by awarding the Respondents *a premium* in excess of the value of their 37.5% share in the JV Companies as part of the compensatory award. In our judgment, a reasonable premium would be 15%. Such a premium would better reflect the true expectation loss of the Respondents, which was not merely the loss of the value in the shares, but also the loss of the opportunity to participate in the Bidding Exercise due to the Repudiatory Breaches.

295 Accordingly, we find that the Respondents can and should be awarded compensatory damages, assessed by reference to the value of their 37.5% shareholding in the JV Companies at the time of the Repudiatory Breaches, with a premium of 15% to more accurately reflect their expectation loss. This conclusion means that it is unnecessary to resort to *Wrotham Park* damages in this case, and that the crucial requirement that orthodox compensatory damages must be shown to be ***unavailable*** is not met.

Breach of a negative covenant

296 Although we need not consider this issue, we are satisfied that the requirement that there must be a breach of a ***negative covenant*** for an award of *Wrotham Park* damages to be made is met in this case because the relevant contractual obligations which were breached were, *in substance*, negative rather than positive in nature. In essence, the three provisions that were breached (see [15] above) all centred around an obligation on SAA to refrain from upsetting the *status quo* so that the Bidding Exercise could proceed as contemplated. To persuade us that the covenants were positive rather than negative, Mr Poon focussed on the finding that the Repudiatory Breaches included a failure to perform the "overt action" of granting fresh sub-tenancies to the JV Companies

after the 2007 Head Lease was acquired by SAA. However, this Court found that the parties contemplated a nine-year lease with the SLA, barring any change of circumstances, and that they never saw the head lease as being three distinct tenancy agreements (*Turf Club (No 1)* at [119]–[121]). In other words, the positive duty to grant fresh sub-tenancies to the JV Companies was merely the logical corollary of the core *negative obligation* not to depart from the *status quo*, and SAA breached that core obligation by appropriating the 2007 Head Lease for itself.

Hypothetical bargain between the parties would have been irrational

297 In the present case, the third requirement for an award of *Wrotham Park* damages is also not made out because it is ***irrational and totally unrealistic to expect the parties to enter into a bargain for the release of the relevant obligation*** (*ie*, the obligation on SAA to refrain from upsetting the *status quo* so that the Bidding Exercise could proceed as contemplated), ***even on a hypothetical basis***.

298 The main factors which lead us to this finding are: (a) ***the nature and purpose of the Consent Order***, which was a *negotiated settlement* between the parties following the previous litigation between them and the acrimony following the collapse of the joint venture; and (b) ***the mechanics of the Bidding Exercise***, which *already provided for the possibility of the SAA Group buying out the Respondents' interests in the joint venture*.

299 Starting with the Consent Order, we note that it was intended to fulfil two purposes. First, it provided for an ordered annulment of the joint venture through the Bidding Exercise. Second, and crucially, it compromised the previous allegations that had been made in the Consolidated Suits that, among

other things, the Respondents had been oppressed as minority shareholders of the JV Companies. As we found in *Turf Club (No 1)*, the Consent Order therefore superseded the original causes of action in the Consolidated Suits and discharged the original claim. The Bidding Exercise was an essential part of this compromise. Consequently, the relevant negative covenants that were breached – which were in substance the obligation on SAA to refrain from upsetting the *status quo* so that the Bidding Exercise could proceed as contemplated – were essential to the Consent Order. That is why we held in *Turf Club (No 1)* that the breaches were *repudiatory* in nature and terminated the Consent Order. In such circumstances, it is totally unrealistic to expect any party in the Respondents' shoes to allow SAA to repudiate the Consent Order by circumventing the Bidding Exercise and usurping the 2007 Head Lease for itself, for the sole benefit of the relevant Appellants. That would have ***defeated the purpose of the Consent Order and rendered the settlement of the Consolidated Suits which the parties had reached nugatory***.

300 Second, there are the mechanics of the Bidding Exercise itself. If the court were to construct a hypothetical bargain between the parties in this case, the bargain would be for the Respondents' consent for SAA to upset the *status quo* by keeping the 2007 Head Lease for itself and thereby circumvent the Bidding Exercise. Such an agreement would result in the SAA Group taking over the joint venture entirely. Hence, in effect, the hypothetical negotiation would be for the SAA Group to buy-out the Respondents' interests in the joint venture. However, ***the possibility of such a buy-out was already provided for under the Bidding Exercise***. Therefore, it would have been wholly irrational for the parties to have entered into such a negotiation on the eve of the Bidding Exercise.

301 For the above reasons, we find that this is a case where to construct an

agreement between the parties for the release of the relevant covenants through the *Wrotham Park* measure would be an exercise in futility for this is not a case where the measure can be rationally and sensibly applied.

AG v Blake *damages*

302 In so far as the Respondents' alternative claim for *AG v Blake* damages is concerned, we agree with Prof Goh that, on the present facts, there is no room for a disgorgement of gains (even on a *partial* basis) to be ordered based on *AG v Blake* given that it is an exceptional remedy which is best left to be considered in a future case. The present case, which arises from an ordinary commercial dispute following the collapse of the joint venture between the parties, falls far below the threshold which would justify stripping away the Appellants' gains, as an end in itself, even if such a remedy was a part of Singapore law.

Quantification of the damages

303 The final question is whether the damages to be awarded should be quantified by this Court, or whether the matter should be remitted to the Judge for him to assess the value of the shares in the JV Companies at the time of the Repudiatory Breaches. On this issue, and after some equivocation, the parties now appear to be *ad idem* that this Court ought to determine the quantum of damages. We agree that this would be the best course of action in the interests of the expedient determination of these appeals.

304 In addition, we find that there is no need for us to remit the matter to the Judge and further prolong these already protracted proceedings because he would simply be valuing the shares based on the very same evidence which is before this Court. The Appellants, however, have suggested that the parties be given leave to tender further submissions and/or *evidence* on the quantification

of damages. In our judgment, and in so far as *further evidence* is concerned, there is no basis for us to permit the parties to adduce any further evidence on the value of the shares in the JV Companies, or any other issue which may concern the quantification of damages. We briefly explain the reasons for our view.

305 At the oral hearing of 15 August 2017, Mr Poon, on behalf of TCAE, TCPL, SAA and Koh KM, suggested that further evidence on the quantification of damages may be necessary because the issues of liability and quantification had been bifurcated at first instance. The Respondents initially disputed that the trial had been bifurcated in this manner. But their counsel later informed us, by way of a letter to the court, that their clients' position was that the trial of Suit 27 was on the issue of liability, and not on the quantum of damages. None of the parties, however, was able to produce any proof that an order of bifurcation had, in fact, been made. Indeed, the Appellants acknowledged that they were unable to locate any such court order, and instead simply relied on the Respondents' unsubstantiated assertion on this issue. We find this to be deeply unsatisfactory. In our judgment, absent an order for bifurcation we should not in effect now make an order bifurcating the proceedings by permitting the parties to adduce further evidence on the issue of quantification. Such evidence should have been adduced at the trial below, and the parties have no one but themselves to blame for any failure to do so. Hence, we do not grant leave for the parties to adduce any further evidence on this issue.

306 Having said that, we agree that further written submissions on the precise time of the Repudiatory Breaches and the quantification of damages are necessary, and therefore invite the relevant parties, namely the Respondents and the Appellants whom we have found to be liable for the Repudiatory Breaches (*ie*, SAA and Koh KM) (see [90] above), to file further written submissions

limited to 20 pages on the narrow issue of the value of the shares in the JV Companies, at the time of the Repudiatory Breaches, within 21 days of the present judgment.

Tort Issue: Are the Appellants liable for the tort of conspiracy and/or inducement of breach of contract?

307 Finally, we address the Tort Issue. In the Supplementary Judgment, the Judge found that several of the Appellants (some of whom are *not* parties to the *Consent Order*) and Ong CK (who is *not* a party to these *appeals*) are liable in tort for conspiring to procure the breaches of the Consent Order and/or for inducing the breaches of the Consent Order. Before considering the Judge's findings, we deal with a preliminary point concerning the sufficiency of the pleadings.

308 In our view, and as we indicated to parties at the hearing on 15 August 2017, the torts of conspiracy and inducement of breach of contract were sufficiently pleaded. Although the pleadings on their face referred to the defendants in Suit 27 conspiring to procure or inducing breaches of the *fiduciary duties* that they allegedly owed to the Respondents, the averments in this respect in fact referenced earlier paragraphs in the statement of claim that set out the various *contractual breaches* by the Defendants (Consolidated Suits) (see [48] above). In other words, although the term "fiduciary duties" had wrongly been used to describe the relevant obligations, the pleadings in substance encompassed the tort of conspiracy to procure breaches of the Consent Order and the tort of inducing breaches of Consent Order. The rules of pleading only require that the relevant *facts* underpinning the claim be pleaded; the use of the word "fiduciary" does not preclude the Respondents from characterising those facts *within* the torts of conspiracy and inducement of breach of contract. Therefore, in substance, the two claims in tort in respect of the contractual

breaches ought to be decided upon if there was sufficient evidence and argument before the Judge in the trial below. It was on this basis that we remitted a question to the Judge on these two claims in tort (see [25]–[26] above).

309 Having dealt with the preliminary point on pleadings, we set out the relevant legal principles before turning to consider the tortious liability of Tan CB, Tan Senior and Koh KM, each of whom the Judge found liable for the tort of conspiracy to injure by unlawful means and/or the tort of inducement of breach of contract. We also briefly address Ong CK's liability.

The relevant legal principles

310 It is not disputed that to establish the tort of conspiracy to injure by unlawful means, the plaintiff must show the following (see the decision of this Court in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 ("*EFT Holdings*") at [112]):

(a) there was a combination of two or more persons to do certain acts;

(b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;

(c) the acts were unlawful;

(d) the acts were performed in furtherance of the agreement; and

(e) the plaintiff suffered loss as a result of the conspiracy.

311 It is also not disputed that to establish the tort of inducement of breach of contract, the plaintiff must establish the following (see Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) ("*Gary*

Chan") at paras 15.005–15.025, as well as the decision of this Court in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 ("*Tribune Investment*") at [17]–[18]):

(a) the alleged tortfeasor knew of the existence of the contract;

(b) the alleged tortfeasor intended to interfere with the plaintiff's contractual rights;

(c) the alleged tortfeasor directly procured or induced a third party to breach the contract;

(d) the contract was in fact breached; and

(e) the plaintiff suffered injury as a result of the breach of contract.

312 In addition to considering whether the elements of each tort are established, it is relevant to consider whether a defendant who is also a director of a company (in this case, Tan CB) can avail himself of the immunity under the principle in *Said v Butt* [1920] 3 KB 497 ("the *Said v Butt* principle"). In that case, McCardie J stated, by way of *obiter dicta*, as follows (at 506):

> I hold that if a servant acting *bona fide* within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken.

313 Flowing from this, the orthodox understanding of the *Said v Butt* principle was that two conjunctive requirements had to be satisfied for a defendant-director to avail himself of the immunity thereunder: the director must have (a) acted *bona fide* and (b) within the scope of his authority (see the Singapore High Court decision of *Chong Hon Kuan Ivan v Levy Maurice and others* [2004] 4 SLR(R) 801 at [49]). Additionally, the *Said v Butt* principle was

said to only apply to "protect persons in authority within corporate entities who genuinely and honestly endeavoured to act in the company's best interests" (see the Singapore High Court decision of *Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2008] 1 SLR(R) 80 ("*Nagase*") at [9]).

314 More recently, this Court in *PT Sandipala Arthaputra and others v STMicroelectronics Asia Pacific Pte Ltd and others* [2018] 1 SLR 818 ("*PT Sandipala*") had the occasion to clearly demarcate and define the scope of the *Said v Butt* principle. The following key principles were set out in that decision:

(a) Under the *Said v Butt* principle, directors will *ordinarily be immune* from personal liability for authorising, procuring or participating in the contractual breaches of their company (whether through the tort of inducement of breach of contract or unlawful means conspiracy) *unless* their acts, in their capacity as directors, are in breach of any fiduciary or other personal legal duties owed to the company (at [62], [65] and [72]).

(b) This principle operates as a *requirement of liability* and not a defence; in other words, the onus is on the plaintiff to prove that the defendant-directors' acts were in breach of their personal legal duties to the company (at [65]).

(c) The applicability of the principle focuses on the director's conduct and intention in relation to his duties to *his company*, and not to the third party. Thus if the director acted in the best interests of the company and not in breach of any of his other duties owed to the company, notwithstanding that he also possessed the intention to injure the third party or to induce a breach of contract as against the third party

(as the case may be), he would still be entitled to the protection of the *Said v Butt* principle (at [66]).

315 It should be noted that the judgment in *PT Sandipala* was handed down on 6 April 2018, *after* we had heard parties on 2 March 2018. For that reason, the parties' written and oral submissions on the Tort Issue were largely framed in terms of the orthodox understanding of the *Said v Butt* principle. In the light of *PT Sandipala*, counsel for Tan CB (and Tan Senior) requested leave to file further written submissions to address, among other issues, how Tan CB in his capacity as director did not breach any of his fiduciary or other personal legal duties owed to SAA. The Respondents and the other Appellants did not object to this proposal.

316 We disallowed this request as we did not think further written submissions were necessary. In our view, *PT Sandipala* did not materially change the legal principles applicable to the present case. As stated at [65] in *PT Sandipala*, "the onus is on the plaintiff to prove that the defendant-directors' acts were in breach of their personal legal duties to the company. *Such breach may be a breach of a fiduciary duty to act in the best interests of the company* …" [emphasis added]. In other words, as long as it can be shown that a defendant-director failed to act in the best interests of the company (*ie*, failed to act "*bona fide*" within the context of the orthodox understanding of the *Said v Butt* principle), this would by definition mean that he has breached his personal legal duties owed to the company. Thus, a finding that Tan CB had not acted *bona fide* would be equivalent to finding that he had breached a fiduciary or other personal legal duty owed to SAA. As will become apparent from our analysis below, we are of the view that the Respondents have successfully proved that Tan CB had acted in breach of his fiduciary duty to act in the best interests of SAA.

Tan CB

317 We begin with Tan CB, whom the Judge found liable for *both* the tort of conspiracy to injure by unlawful means and the tort of inducement of breach of contract.

The Judge's findings in relation to Tan CB

(1) Tort of conspiracy to injure by unlawful means

318 The Judge found that Tan CB, as a director of SAA, "decided" that SAA would not grant the sub-tenancies to the JV Companies. As this Court held in *Turf Club (No 1)*, affirming the Judge, SAA's failure to grant the sub-tenancies constituted a breach of the Consent Order. The Judge added that this was not a case of an "innocent breach". The Judge rejected Tan CB's evidence that he had genuinely believed that SAA was not obliged to grant the sub-tenancies, and/or that he had genuinely sought and relied on legal advice to that effect. The Judge also rejected Tan CB's explanation that he had done so out of concern about the impact of the possible liquidation of the JV Companies on the ultimate tenants. The Judge held that Tan CB must have *known* at all material times that that if sub-tenancies were not granted, this would undermine the Bidding Exercise envisaged by the Consent Order and cause injury to the Respondents (Supplementary Judgment at [30]).

319 Noting that intention could be inferred from knowledge, the Judge held that Tan CB's *intention* was to cause injury to the Respondents. Tan CB had continued with the pretence that the valuation of the JV Companies and the Bidding Exercise would proceed as envisaged under the Consent Order, without informing the Respondents of his intention to deprive the JV Companies of the sub-tenancies. This would likely have caused the Respondents to overbid for

the SAA Group's shares in the JV Companies; but even if the Respondents realised the truth in time, they would nevertheless be deprived of the opportunity to participate in the JV Companies' business since there would be little purpose in submitting a bid when the existing sub-tenancies were coming to an end. Thus the Judge held that the irresistible inference from Tan CB's conduct was that he intended to injure the Respondents in a targeted manner by causing them to either (a) overbid for the JV Companies' share held by the SAA Group, or (b) be deprived of the opportunity to continue participating in the development and operation of the Site, and to be unable to obtain fair value for their shares in the JV Companies (Supplementary Judgment at [31]).

320 The Judge also held that even if Tan CB had acted with the desire to benefit himself, SAA and/or members of the SAA Group, this would not negate his intention to injure the Respondents. In fact, it would all the more evidence his intention to cause injury to the Respondents, as depriving the Respondents of all benefits of the 2007 Head Lease was the necessary means by which Tan CB could satisfy such a desire (Supplementary Judgment at [32]).

321 Next, the Judge found that Tan CB's decision for SAA not to grant the sub-tenancies to the JV Companies, being a repudiatory breach of the Consent Order, was an "unlawful act" as required to establish a claim in unlawful means conspiracy (Supplementary Judgment at [33]).

322 Finally, the Judge considered the question of whether Tan CB had acted alone or in concert with other individuals. The Judge observed that while there might be a legal issue of whether SAA can conspire with its own director, it was not necessary to decide the issue as he had found a conspiracy among the *individual* defendants (*ie*, Tan CB, Tan Senior, Koh KM and Ong CK) (Supplementary Judgment at [34]).

(2) Tort of inducement of breach of contract

323 The Judge found that Tan CB intended to interfere with the Respondents' contractual rights, represented by the Consent Order, by deciding that SAA would not grant the sub-tenancies to the JV Companies, and thereby appropriate the whole benefit of the 2007 Head Lease to itself. The same analysis relating to Tan CB's intention to injure the Respondents applied to the issue of whether Tan CB had intended to interfere with the Respondents' contractual rights (Supplementary Judgment at [86]).

324 On the element of procurement, the Judge found that Tan CB had directly procured SAA's breach of the Consent Order, based on Tan CB's admission that he had made the decision for SAA (Supplementary Judgment at [87]).

325 The Judge then considered whether the *Said v Butt* principle applied to exonerate Tan CB of liability for the tort of inducing breach of contract, and concluded that it did not because Tan CB had not decided to procure SAA's breach of the Consent Order *bona fide* in SAA's interests. The Judge relied on the following (Supplementary Judgment at [90]):

> (a) There was a clear degree of dishonesty on Tan CB's part. He had not just intended to procure a breach, but sought to deceive the Respondents into a course of conduct that ran contrary to the letter and spirit of the Consent Order, and would result in the SAA Group benefitting from an unmerited windfall. Tan CB abused SAA as the vehicle for his questionable conduct.
>
> (b) In any event, it was Tan CB's own position that he had procured the breach of the Consent Order not in SAA's interests, but because he

was concerned about the impact of a possible liquidation of the JV Companies on the ultimate tenants at the site.

326 The Judge briefly observed that it was doubtful, as a matter of law, that a director would be entitled to immunity under the *Said v Butt* principle whenever he procures the company of which he is a director to breach a contract so long as there is some benefit that accrues to the company. In his view, that would render the exception too broad, since all or most breaches would lead the party-in-breach to benefit in the sense that that company would thenceforth be released from its contractual obligations (Supplementary Judgment at [91]).

Parties' submissions

(1) Tan CB's submissions

327 Mr Choh, counsel for Tan CB, raises the following arguments in his written submissions. First, the *Said v Butt* principle ought to have been considered in the context of Tan CB's liability for the tort of conspiracy, and not only for the tort of inducement of breach of contract. On that basis, Tan CB cannot be held liable for the tort of conspiracy because the requirements to establish immunity under the *Said v Butt* principle are satisfied, *ie*, Tan CB acted *bona fide* within the scope of his authority.

328 Second, even if Tan CB cannot avail himself of the immunity under the *Said v Butt* principle, he is not liable for the tort of conspiracy because the following elements of the tort are not satisfied:

(a) Tan CB did not combine with Roger Koh and/or Tan Senior to do certain acts;

(b) Tan CB did not have the intention to cause injury to the Respondents by those acts; and

(c) those acts were not unlawful.

329 As for the tort of inducement of breach of contract, Tan CB's sole argument is that he can avail himself of immunity under the *Said v Butt* principle. He has not challenged the Judge's findings on the individual elements of the tort.

(2) The Respondents' submissions

330 The Respondents accept that the *Said v Butt* principle applies in the conspiracy context, but argue that the *bona fide* requirement is not satisfied because Tan CB had knowingly caused SAA to breach its contractual obligations. In this regard, it was immaterial that Tan CB subjectively believed his actions to be in SAA's best interests. The Respondents submit that the Judge was correct in finding that all elements of both torts are established.

Our decision

(1) Tan CB is not entitled to immunity under the *Said v Butt* principle because he breached his fiduciary duty to SAA to act *bona fide* in the best interests of the company

331 The *Said v Butt* principle is directly relevant to the question of whether Tan CB can be made personally liable in tort for conspiring to procure or for inducing SAA's breaches of the Consent Order because Tan CB is a director of SAA. We agree with the parties that the Judge should have considered the *Said v Butt* principle in relation to both torts, and not only the tort of inducement of breach of contract. Nonetheless, even if the Judge had done so, the Judge would simply have arrived at the same conclusion – that Tan CB was not entitled to

immunity under the *Said v Butt* principle because he had not acted *bona fide*. Thus, the critical issue is whether Tan CB had acted *bona fide* in the best interests of SAA when he procured SAA to breach the Consent Order by not granting the sub-tenancies to the JV Companies.

332 In this regard, Mr Choh raises two main arguments. First, he argues that Tan CB's concern regarding the potential liquidation of the JV Companies was not the end in and of itself. Rather, as explained in Tan CB's AEIC, Tan CB was concerned about the effect of any such liquidation on SAA. SAA was responsible for paying the monthly rental for the site to the SLA out of the funds it received from the JV Companies pursuant to the sub-leases; any delay in the collection of rent from the ultimate tenants by the JV Companies meant that SAA would be correspondingly out-of-pocket. There was also uncertainty over whether there would be any recovery from the JV Companies if they were liquidated. Mr Choh argues that this explanation demonstrates that Tan CB had acted in SAA's interests, and that the Judge had erred by failing to take this explanation into account.

333 Second, Mr Choh argues that Tan CB's decision to procure SAA not to grant the sub-tenancies to the JV Companies (and thereby breach the Consent Order) had been done with the benefit of legal advice given by Mr Ernest Balasubramaniam ("Mr Balasubramaniam"), Tan CB's family lawyer. Mr Balasubramaniam had advised Tan CB that on his reading of the Consent Order, there was no obligation on SAA to grant fresh sub-tenancies to the JV Companies if SAA obtained the 2007 Head Lease (see HC Judgment at [149]). Accordingly, this cements the *bona fide* nature of Tan CB's actions.

334 In our view, neither of these arguments stands up to scrutiny. We begin with the first argument. Essentially, the argument made on behalf of Tan CB is

that in view of the possible liquidation of the JV Companies, SAA would be better off breaching the Consent Order rather than risk being out-of-pocket with uncertain prospects of recovery. Although the Judge did not expressly consider this explanation in his Supplementary Judgment, we consider that it cannot be accepted. As the Judge found, there was *no* evidence that the JV Companies would be liquidated – on the contrary, the disputing parties *were* intending to bid for the shares in the JV Companies and carry on with the business of the JV Companies. It was precisely for this reason that the Judge found Tan CB's concern about the impact of the purported liquidation to be a sham (see HC Judgment at [151]). This finding was not disturbed on appeal by this Court in *Turf Club (No 1)*, and we see no reason to disturb this finding now.

335 Further, in the hearing before us, Mr Choh conceded that there was no objective evidence showing that the JV Companies would not pay the rental monies over to SAA such that it would become necessary for SAA to undermine the Bidding Exercise by appropriating the benefit of the 2007 Head Lease for itself. Mr Choh also conceded that the weight of the objective evidence went against Tan CB's alleged belief that no one would participate in the Bidding Exercise. In the end, Mr Choh's argument was simply that at that time, Tan CB *subjectively believed* that he was acting in SAA's interests when he procured SAA to not grant the sub-tenancies to the JV Companies. However, this was a bare and self-serving assertion and, for the reasons elaborated at [342]–[343] below, we do not accept that Tan CB held the honest belief that his actions were in SAA's best interests.

336 We turn now to address the second argument. Essentially, the argument is that because Tan CB had sought and received legal advice from Mr Balasubramaniam to the effect that SAA would not, by not granting the sub-tenancies to the JV Companies, be in breach of the Consent Order and therefore

become liable for damages, Tan CB genuinely believed that SAA would only stand to benefit from not granting the sub-tenancies to the JV Companies.

337 The Respondents take issue with the fact that Tan CB sought legal advice from Mr Balasubramaniam. Relying on the Judge's observation in the HC Judgment (at [151]–[152]), they argue that if Tan CB had truly wanted to know the extent of SAA's obligations under the Consent Order, he should have consulted R&T. This was because R&T had been heavily involved in the negotiations for and the drafting of the Consent Order. However, we do not think that it was unreasonable for Tan CB to have sought legal advice from Mr Balasubramaniam. An outsider to the negotiations and drafting process could have potentially provided a neutral and objective perspective as to how a reasonable person would interpret the Consent Order. Seeking advice from R&T might have led to a potential situation of conflict. Further, Tan CB has explained that Mr Balasubramaniam was his trusted, long-time family lawyer. Therefore, in our view, Tan CB should not be faulted for having chosen to consult Mr Balasubramaniam instead of R&T.

338 The more critical inquiry is whether and to what extent the fact that a defendant-director acted on legal advice before adopting a certain course may be relied on to prove that he had acted *bona fide* in the interests of the company. In our view, that mere fact cannot necessarily mean that the defendant-director *had* acted *bona fide* – this would, as the Respondents submit, encourage and enable directors to use their lawyers as "legal cover". Rather, it is simply one factor to be considered in the overall analysis. Further, where a person attempts to rely on the fact that he had acted on legal advice to prove his *bona fides*, it is necessary for the court to be given sufficient information about the circumstances under which such advice was provided so as to be able to evaluate the appropriate *extent* to which that person can rely on that fact.

339 To this, the Respondents point out that there is no real clarity as to what Mr Balasubramaniam had been consulted on, nor what background information Tan CB had given him. The exact terms of the advice given by Mr Balasubramaniam are also unclear because it was not given in written form. In the hearing before us, Mr Choh said that there were no briefs, instructions, letters or attendance notes on this matter (if any at all) in evidence. In the absence of important background information, we are of the view that little to no weight can be placed on the fact that Tan CB had allegedly acted on Mr Balasubramaniam's legal advice when he decided to procure SAA to not grant the sub-tenancies to the JV Companies.

340 In any event, Tan CB would not be entitled to rely on such legal advice because he *subjectively* knew that SAA's failure to grant the sub-tenancies to the JV Companies constituted a breach of the Consent Order. In *Turf Club (No 1)*, in the context of determining whether cl 11 of the Consent Order had been breached, this Court affirmed the Judge's findings that the parties had, from the outset, contemplated a nine-year lease with the SLA, and that this was a common understanding. This Court held that the *status quo* enjoyed by the JV Companies included the benefit of the 2007 Head Lease, and that the Defendants (Consolidated Suits) had breached cl 11 when they altered this *status quo* by acquiring the 2007 Head Lease for themselves without granting sub-tenancies to the JV Companies (at [119]–[126] and [132]). Thus, the issue of whether Tan CB knew that SAA's failure to grant sub-tenancies to the JV Companies was a breach of the Consent Order has *already* been decided by this Court, and can no longer be disputed. For the foregoing reasons, the arguments raised by Tan CB must be rejected.

341 In our view, there are two main factors showing that Tan CB had ***not*** acted *bona fide* in the best interests of SAA when he caused it to fail to grant

the sub-tenancies to the JV Companies as required under the Consent Order, caused the transfer of assets (*eg*, security deposits) from the JV Companies to SAA, and failed to disclose the fact of the renewal of the 2007 Head Lease to the KPMG Entities thereby allowing the valuation exercise and the Bidding Exercise to continue on a false premise.

342 First, as already mentioned, Tan CB subjectively *knew* that SAA would be in breach of a *consent order*. Such a breach can properly be considered graver and more significant than a breach of an ordinary commercial contract because, on a fundamental level, the breaching party has demonstrated its complete disregard for an *order of the court*. The repercussions of such a breach on SAA are not insignificant from a qualitative perspective; they go beyond the fairly quotidian scenario of being made to pay damages for a breach.

343 Second, and more critically, the Consent Order was no run-of-the-mill consent order. As the Respondents point out, it was the culmination of years of litigation between multiple parties. The settlement reached through the Consent Order was one in which the parties – through invoking the court's mechanism – were to settle their disputes once and for all. Breaching the Consent Order completely unravelled this hard-fought progress, and arguably went beyond that by depleting whatever goodwill (however little) that might have been accumulated by virtue of the cooperation leading up to the entry into the Consent Order. It is difficult to see how breaching the Consent Order could be objectively better for SAA than merely being out-of-pocket with (allegedly) uncertain prospects of recovery following the extremely unlikely liquidation of the JV Companies.

344 In sum, we find that Tan CB breached his fiduciary duty to SAA because in procuring SAA to breach the Consent Order, he failed to act *bona fide* in the

best interests of SAA. Therefore, Tan CB ***cannot*** avail himself of the immunity under the *Said v Butt* principle. Accordingly, if the elements of the torts are met, Tan CB will be personally liable in the tort of conspiracy to injure by lawful means and/or in the tort of inducement of breach of contract for causing SAA to breach the Consent Order.

(2) Tan CB is liable for the tort of conspiracy to injure by unlawful means

345 We begin with the tort of conspiracy. As mentioned earlier, Mr Choh in his written submissions disputed three elements of the tort: combination, intention to injure and the unlawful nature of the act. However, in the oral hearing before us on 2 March 2018, Mr Choh appeared to abandon these arguments – he accepted that if Tan CB was not entitled to immunity under the *Said v Butt* principle, then his case on both causes of action would fail. Nevertheless, for completeness, we explain below why in our view, these three elements are satisfied.

(A) TAN CB COMBINED WITH OTHER PERSONS TO DO CERTAIN ACTS

346 The first element to be considered is whether there was combination, or agreement, between two or more persons to do certain acts. As mentioned earlier, the Judge found that Tan CB had combined with Koh KM, Tan Senior and Ong CK to effect a conspiracy to injure the Respondents by breaching the Consent Order. In this section, we deal only with the question of whether Tan CB was part of any combination – the arguments for Koh KM and Tan Senior will be discussed in their respective sections below.

347 Mr Choh accepts that the court may infer the existence of a combination from the circumstances and the acts of the alleged conspirators, but such an inference can only be drawn from overt acts. However, Mr Choh argues that the

pleadings made little or no reference to *any* of his overt acts from which such combination could be inferred. He points out that the pleading of conspiracy is broad, and is only particularised in respect of Tan Senior and Ong CK (who the Respondents alleged were the "masterminds" of the scheme to deprive them of the benefits under the 2007 Head Lease). The trial before the Judge had thus proceeded on this basis. He submits that such lack of particularisation was prejudicial to Tan CB, who would have been unable to respond to the "mastermind" case against him.

348 As can be seen, the crux of the case for Tan CB essentially concerns the sufficiency of pleadings. It is true that the Respondents' pleaded case is that Tan Senior and Ong CK were the masterminds, and that the Respondents did not specifically particularise their conspiracy claim against Tan CB as they did for Tan Senior and Ong CK. However, the Respondents' pleadings on the conspiracy claim encompass all the defendants to Suit 27, including Tan CB, and aver that they conspired with each other with the intent to injure the Respondents. The evidence that was adduced at trial on Tan CB's complicity in the conspiracy clearly falls within the scope of these pleadings. Tan CB also had the opportunity to explain and submit on this evidence, and this was not a matter which took him by surprise. Therefore, the court was and is fully entitled to draw its conclusions based on the full range of evidence available. In this connection, we note that Tan CB's objection appears to be purely procedural in nature. He does not, for instance, deny having committed those overt acts from which the Judge found a conspiracy. Indeed, it would have been difficult for him to do so given that he was indisputably the one in control of SAA.

349 For completeness, it does not matter whether it was pleaded that Tan CB was a "mastermind". The question is not whether he was a "mastermind" of the conspiracy but whether he was *complicit* in it. The allegation of Tan CB being

a "mastermind" is not itself a material fact that goes towards the elements of the tort of conspiracy to injure by unlawful means; and the omission to plead it does not prevent the court from making that factual finding as long as there is evidence to that effect. As we reiterated in our decision in *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 at [187], the rules of pleadings, at the end of the day, are not meant to be technical defences, and the court should not allow them to be turned into engines of oppression to prevent the true version of events from coming to light. In the premises, we see no reason to disturb the Judge's finding that Tan CB had combined with other persons in a conspiracy.

(B) TAN CB HAD THE INTENTION TO INJURE THE RESPONDENTS

350 We turn now to the second disputed element – whether Tan CB had the intention to injure the Respondents.

351 Mr Choh raises three main arguments as follows:

(a) Tan CB did not have any intention to injure the Respondents. In support, Mr Choh points to (i) the fact that Tan CB had sought legal advice from Mr Balasubramaniam; and (ii) the fact that Tan CB had "other considerations", *ie*, the ultimate tenants and licensees, as well as the fact that SAA would still be liable for monthly rental.

(b) The Judge contradicted himself in finding that Tan CB had the intention to injure the Respondents because the Judge had at [40] of the Supplementary Judgment accepted that "Tan CB decided to renew the sub-tenancies as he was hopeful that the relationship between the two groups would mend."

(c) The Respondents' argument that the present case involves a "zero sum game" is wrong. The Respondents say that in a "zero sum game", the alleged conspirators must be taken to have the intention to injure when they undertake actions knowing that any gain to themselves cannot be brought about without a corresponding loss to the other side. Here, the SAA and the JV Companies were competing for a single resource (*ie*, the benefit derived by exploiting the 2007 Head Lease through the sub-tenancies). If SAA takes the benefit, it necessarily injures the JV Companies by depriving them of the same. Therefore Tan CB cannot say that although he knowingly caused SAA to deprive the JV Companies of the sub-tenancies, he did not intend to harm the Respondents. As mentioned, it is submitted on behalf of Tan CB that this argument is wrong. Mr Choh argues that the true participants in the "zero sum game" are SAA and the JV Companies. Any gain would be enjoyed by SAA, and not Tan CB; likewise, any loss would be suffered by the JV Companies, with the Respondents only being affected indirectly. Thus the Respondents' "zero sum game" argument does not show that Tan CB had an intention to injure the Respondents – there is no direct nexus between the two.

352 We can dispose of the first two arguments quickly:

(a) We have already considered the two points that Tan CB had acted on legal advice and in view of "other considerations" in the context of the *Said v Butt* principle, and found that those arguments do not stand up to scrutiny (see [334]–[340] above). They therefore do not assist Tan CB's case that he did not intend to injure the Respondents.

(b) The Judge did not contradict himself. All the Judge did at [40] of the Supplementary Judgment was simply to set out what Koh KM had said in his AEIC. The Judge did not by doing so thereby make a factual finding that Tan CB had decided to renew the sub-tenancies in 2004 because Tan CB was hopeful that their relationship would mend.

353 We also reject the third argument on the "zero sum game". Mr Choh's point that there is no direct nexus between Tan CB and the Respondents is purely theoretical, and completely divorced from the practical reality of the situation. There are essentially two camps in this dispute. For all intents and purposes, Tan CB is in SAA's camp – in fact, by Tan CB's own case on the *Said v Butt* principle, Tan CB was acting *bona fide* in SAA's interests when he caused the breach of the Consent Order. Mr Choh had argued there that as a result of this breach, SAA benefitted because it was in a position to exploit the 2007 Head Lease through the sub-tenancies; correspondingly, this was the JV Companies' loss. In addition to that, and as the Judge held, the Respondents would *also* suffer a loss, either by (a) overbidding for the JV Companies' shares held by the SAA Group or (b) being deprived of the opportunity to continue participating in the development and operation of the site, and being unable to obtain fair value for the shares in the JV Companies (see Supplementary Judgment at [31]). While Mr Choh argues that the Respondents will only be affected indirectly, it is clear that such injury is but a logical consequence of the loss suffered by the JV Companies, and a real consequence that this Court cannot turn a blind eye to. Thus, we accept the "zero sum game" analysis of the situation put forth by the Respondents.

354 In the context of the tort of conspiracy, the inquiry into the defendant's intention to injure involves an examination of the defendant's *subjective* knowledge and intention at the relevant time. The Judge found that Tan CB

must have subjectively known at all material times that if the sub-tenancies were not granted to the JV Companies following the renewal of the 2007 Head Lease, it would cause injury to the Respondents by undermining the Bidding Exercise (see Supplementary Judgment at [30]). The Judge also reiterated his finding at [151] of the HC Judgment that Tan CB's assertion of having acted out of concern for the impact of a possible liquidation of the JV Companies on the ultimate tenants appeared to be a sham. We do not see any reason to reverse these factual findings.

355 In our view, it would have been abundantly clear to the Appellants – in particular Tan CB who was indisputably privy to and highly involved in SAA's affairs – that misappropriating the benefit of the 2007 Head Lease by not granting sub-tenancies to the JV Companies would detrimentally affect the Respondents. It would derail the Bidding Exercise, undermine the Consent Order, and deprive the Respondents of the chance to take over the JV Companies in their healthy form (if the Respondents won the bid) or to have their shares bought out at a fair value inclusive of the value of the sub-tenancies (if the Respondents lost the bid). In the circumstances, we affirm the Judge's finding that Tan CB had the requisite intention to injure the Respondents.

(C) BREACHING OF THE CONSENT ORDER IS AN UNLAWFUL ACT

356 We come now to the final element in dispute – whether there was an unlawful act. Mr Choh's submissions on this point were brief. It was asserted that it is an "open question … whether a breach of contract can lend itself to 'unlawful means'". This submission is patently incorrect. As the Respondents point out, it has been accepted by the Singapore courts and academics alike that a conspiracy to injury by unlawful means may arise in connection with a breach of contract (see *eg*, *Gary Chan* at para 15.068; *Nagase*; and the Singapore High

Court decision of *Esso Singapore Pte Ltd v Ang Chuah Nguan (trading as Nanyang Electric Co) and another suit* [1998] 1 SLR(R) 165).

357 In the circumstances, we find that Tan CB is liable for the tort of conspiracy to injure the Respondents by unlawful means, *ie*, procuring SAA's breaches of the Consent Order.

(3) Tan CB is liable for the tort of inducement of breach of contract

358 We turn now to the tort of inducement of breach of contract. As mentioned, Tan CB does not challenge the Judge's findings on the individual elements of the tort, but raises only the argument that he is entitled to immunity under the *Said v Butt* principle (see [329] above). Given our findings above that Tan CB breached his fiduciary duty owed to SAA by failing to act in SAA's best interests and is therefore not entitled to immunity (see [331]–[344] above), we uphold the Judge's finding that Tan CB is liable for the tort of inducement of breach of contract, *ie*, by inducing SAA to breach the Consent Order.

Tan Senior

359 We turn now to Tan Senior, whom the Judge found liable for *both* the tort of conspiracy to injure by unlawful means and the tort of inducement of breach of contract.

The Judge's findings in relation to Tan Senior

(1) Tort of conspiracy to injure by unlawful means

360 Although Tan Senior raised arguments to distance himself from the breaches of the Consent Order, the Judge rejected these arguments and made

the following key factual findings leading to his eventual conclusion that Tan Senior was complicit in the conspiracy:

(a) Tan Senior still had an interest and a continued involvement in SAA and the JV Companies even though he had purportedly intended to allow Tan CB to take over his businesses (Supplementary Judgment at [46]–[52]).

(b) Tan Senior continued to be involved with affairs of the joint venture even after 29 August 2003, when he was made a bankrupt and ceased to be a director of the JV Companies (Supplementary Judgment at [53]–[65]).

(c) Although the Respondents did not have direct evidence of Tan Senior's complicity, Tan CB likely consulted Tan Senior before and after the Consent Order, and both agreed that SAA should appropriate the benefit of the 2007 Head Lease to itself even though that would mean breaching the Consent Order (Supplementary Judgment at [66]).

361 In coming to this decision, the Judge assessed Tan Senior to be an unreliable witness who pretended to be less involved in the joint venture before the bankruptcy order than was truly the case. The Judge also assessed Tan Senior to be an untruthful witness who pretended that he thought that he was doing nothing wrong after the Consent Order was made. In the circumstances, the Judge disbelieved Tan Senior's evidence that he was not involved in SAA and the JV Companies at all after his bankruptcy, or in particular, the decision for SAA not to grant sub-tenancies to the JV Companies (Supplementary Judgment at [64]).

(2) Tort of inducement of breach of contract

362 The Judge largely relied on his findings in relation to the tort of conspiracy. He held that Tan Senior had agreed with Tan CB to procure SAA not to grant the sub-tenancies to the JV Companies (Supplementary Judgment at [95]). The Judge then held that Tan Senior's inducement took the form of influence or persuasion targeted at SAA (through Tan CB) to cause SAA to breach the Consent Order (Supplementary Judgment at [103]).

Parties' submissions

(1) Tan Senior's submissions

363 Mr Choh – who acts for Tan Senior – makes the following arguments in relation to the tort of conspiracy to injure by lawful means:

(a) The Judge erred in finding that Tan Senior remained active in the joint venture even after his bankruptcy in 29 August 2003.

(i) There was little or no evidence concerning Tan Senior's involvement with SAA and/or the JV Companies post-August 2003, and when SLA renewed the 2007 Head Lease. Evidence relating to Tan Senior's involvement during the early days of the joint venture in 2001 to 2003 is not relevant to the question of whether he was part of a conspiracy to breach the Consent Order.

(ii) Rather, the facts show that Tan Senior had begun distancing himself from SAA's corporate matters from as early as 23 February 2001 when he sold his shares in SAA to Tan CB and also ceased to be a director thereof. Subsequently on 8 March 2001, Tan Senior signed the MOU governing the joint venture in his personal capacity (and not on behalf of SAA), and

on 1 November 2002, he sold his shares in the JV Companies to SAA. Tan Senior was not involved in the drafting of the Consent Order and was not a party to it.

(iii) The Judge erred in rejecting Tan Senior's evidence in his AEIC and relying instead on the evidence of his daughter, Tan Bee Bee. Her AEIC only shows that Tan Senior was involved in the joint venture from 2001 to 2003, but does not affirmatively show his active involvement post-bankruptcy. The fact that Tan Bee Bee did not explicitly state in her AEIC that Tan Senior had ceased involvement thereafter ought not to be taken against her as it would be attempting to prove a negative. Further, questions regarding Tan Senior's involvement in SAA and/or the JV Companies were not put to Tan Bee Bee at all. To extrapolate and reach a finding that Tan Senior had been actively involved in decision making in 2007 would be "quite a stretch".

(b) The Judge erred in finding that it was likely that Tan CB had consulted Tan Senior for business guidance at the time the Consent Order was entered into or breached. Here, there was no contemporaneous evidence to that effect.

(c) Even if Tan Senior had given business advice to Tan CB, that would not amount to a combination or agreement. Further, while it is possible to infer a combination, such inference must be drawn from overt acts. Here, there was little or no evidence of any overt acts from which a combination involving Tan Senior could be inferred.

(d) The Judge erred in finding that Tan Senior had the intention to injure the Respondents at the time he had purportedly given business advice to Tan CB. Again, there was little or no evidence to that effect.

364 As for the tort of inducement of breach of contract, Mr Choh raises arguments in relation to the elements of inducement and intention:

(a) The Judge erred in finding that Tan Senior had induced SAA to breach the Consent Order.

(i) There is no evidence of Tan Senior's acts and involvements or even his participation in SAA and/or the JV Companies after his bankruptcy in 2003. The Judge reached his conclusion by "leaps of logic".

(ii) Tan Senior is not literate in English but can read, write and speak Mandarin. There was no evidence of any documents that had been translated for Tan Senior's benefit for the post-bankruptcy years.

(iii) If inducement could be inferred, it had to be inferred from a specific set of facts that have been proved, and not merely what was likely to have happened at the time.

(b) The Judge erred in finding that Tan Senior had intended to interfere with the Respondents' contractual rights under the Consent Order.

(i) Inducement must take the form of persuasion and enticement. Thus, even if the Judge was correct in finding that it was likely that Tan Senior had given advice to Tan CB, such

communication of advice would not amount to inducement in the absence of an indication that there was any persuasion.

(ii) Further, Tan CB had not been cross-examined on whether he had received advice from Tan Senior. Tan CB maintained that in deciding to procure SAA to breach the Consent Order, his two main considerations were the "fates of the ultimate sub-tenants" and "the liability that SAA would have to bear if they were unable to collect any rentals from the JV Companies to pay the rentals due to SLA". None of these considerations would have been aligned with Tan Senior's interests in any way, given that in 2007, he was still an undischarged bankrupt.

(2) The Respondents' submissions

365 On the tort of conspiracy to injure by unlawful means, the Respondents submit that:

(a) Tan Senior must have remained involved in SAA and/or the JV Companies post-bankruptcy because he was a party to the MOU, the Consolidated Suits and the Consent Order.

(b) It was not likely that with his transfer of shares in SAA to Tan CB on 23 February 2001, Tan Senior had relinquished his business interests completely to Tan CB. This is because Tan CB was at the time only 33 years old and was a "greenhorn in business matters".

(c) Although Tan Senior claims that he ceased his involvement with the joint venture after he was made a bankrupt in August 2003, the circumstances under which he was made bankrupt are suspicious.

Tan Senior owed the relatively trivial amount of $97,000 and was evasive when asked about the bankruptcy during cross-examination. He also claimed he could not remember if he had paid off the debt.

366 On the tort of inducement of breach of contract, the Respondents submit that:

(a) The Judge was correct to infer that Tan Senior had induced or procured the breach of the Consent Order.

(b) The Judge was correct to find that it was likely that Tan CB had consulted Tan Senior before and after the Consent Order, and that the two had agreed that SAA should appropriate the benefit of the 2007 Head Lease for itself. In this respect, the arguments applying to Tan CB's liability apply with equal force to Tan Senior.

Our decision

367 As can be seen, Mr Choh's submissions on behalf of Tan Senior centre around the alleged insufficiency of evidence supporting the Judge's various factual findings, which form the substratum for Tan Senior's liability in both torts. We therefore begin by considering the correctness of the Judge's findings that Tan Senior remained involved in the joint venture even after his alleged retirement and bankruptcy, and that he likely gave advice to and agreed with Tan CB that SAA should appropriate the benefit of the 2007 Head Lease to itself in breach of the Consent Order.

368 In his written submissions and before us, Mr Choh emphasised that these findings were based on circumstantial evidence and "leaps of logic". But Mr Choh also readily and correctly accepted that this Court should be slow to

overturn the findings of fact made by a trial judge. Having had the benefit of hearing the witnesses in person, which would have had an impact on the trial judge's assessment of the credibility and veracity of the witnesses, the trial judge's findings of fact should be overturned only where it can be established that his assessment is plainly wrong or against the weight of the evidence (see the decision of this Court in *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562 at [37]). Bearing this principle in mind, we turn now to consider the Judge's findings on Tan Senior.

369 It is clear to us that the Judge was mindful of and gave due consideration to the fact that Tan Senior had, over time, relinquished his formal positions as shareholder and director. The Judge was also mindful of the fact that such stepping down was, in a sense, forced upon Tan Senior in that he had been made a bankrupt and therefore was disqualified from holding certain positions. However, the critical inquiry was whether Tan Senior's withdrawal from involvement in SAA and the JV Companies was genuinely a withdrawal in *substance*, or whether it was merely a *formal* withdrawal where, in truth, Tan Senior remained involved in the affairs of SAA and/or the JV Companies.

370 In this connection, it is clear that the Judge's eventual finding that it was merely a *formal* withdrawal turned on his assessment of Tan Senior as an unreliable and untruthful witness (see Supplementary Judgment at [64]). As the Respondents correctly point out, the Judge had the opportunity to hear the witnesses and assesses their evidence over 37 days of trial. Having done so, the Judge was not convinced that Tan Senior had ceased his involvement in the joint venture after his bankruptcy in August 2003. The Judge was also not convinced by Tan Senior's evidence that he was "tired" and wanted to retire. These findings are, in our view, far from against the weight of evidence. In the

circumstances, the threshold for appellate intervention has not been crossed.

371 It follows that we agree with the Judge's conclusions that Tan Senior was part of a combination with Tan CB, had the intention to injure the Respondents by procuring SAA to breach the Consent Order, had induced SAA to breach the Consent Order, and had the intention to interfere with the Respondents' contractual rights under the Consent Order.

372 We therefore uphold the Judge's findings that Tan Senior is liable for the tort of conspiracy to injure the Respondents by unlawful means, and the tort of inducement of breach of contract.

Koh KM

373 We move on to consider Koh KM, whom the Judge found liable for the tort of conspiracy to injure by unlawful means. As mentioned in the above section concerning the Party Issue, it is not strictly necessary to consider whether Koh KM is liable in *tort* because we have already found that he is liable in *contract* for his breach of cl 5 of the Consent Order (see [71]–[87] above). Nonetheless, we do so for completeness. However, as the Judge did not consider Koh KM's liability for the tort of inducement of breach of contract, we do not venture to do so either.

The Judge's findings in relation to Koh KM

374 The Judge found that Koh KM – notwithstanding the fact that he was neither a shareholder nor director of SAA – had acted in concert with Tan CB to partake in the breach of the Consent Order, intending to thereby cause injury to the Respondents. The Judge held that Koh KM had not only passively stood by and allowed Tan CB to do as he wished with the JV Companies, but had also

been consulted by Tan CB and had given his agreement to Tan CB's acts. In coming to this conclusion, the Judge relied on the following:

(a) Koh KM's evidence that he was a successful businessman in his own right (Supplementary Judgment at [39]).

(b) An inference that Tan CB would have consulted Koh KM because the acts of Tan CB and SAA would cause Koh KM, who was a party to the Consent Order, to be in breach of the Consent Order as well (Supplementary Judgment at [39]).

(c) Koh KM's evidence that he had advised Tan CB not to issue fresh sub-tenancies to the JV Companies in 2004 (though Tan CB had not taken up the advice). The Judge held that this showed that Koh KM had a say in and played an active role in the decision for SAA to not grant sub-tenancies to the JV Companies following the renewal of the 2007 Head Lease (Supplementary Judgment at [40]).

375 In the alternative, the Judge found that even if Koh KM had not expressly agreed to or actively participated in the conspiracy, he was nonetheless liable by reason of his acquiescence. In the Judge's view, the JV Companies must have assisted SAA on the conspired course of conduct, at the very least by acquiescing in the state of affairs, because SAA took over the contractual arrangements which the JV Companies had with the ultimate tenants (Supplementary Judgment at [35] and [43]). Building on this, the Judge found that Koh KM – who was a shareholder and director of the JV Companies at the material time – was in a position to object when SAA declined to grant the sub-tenancies in 2007 and took over the JV Companies' contractual arrangements with the ultimate tenants. The Judge held that Koh KM's acquiescence in Tan CB's decision to appropriate the whole benefit of the 2007 Head Lease to

SAA constituted "unlawful means" and reflected his intention to cause injury to the Respondents (Supplementary Judgment at [43]).

Parties' submissions

(1) Koh KM's submissions

376 Mr Poon – who acts for Koh KM – makes four broad submissions. First, he argues that the Judge drew inferences on matters that had neither been raised in the pleadings nor in evidence. In particular, the issue of the JV Companies being involved in the conspiracy was never pleaded or argued by the Respondents.

377 Second, contrary to the Judge's findings, Koh KM was not consulted on and played no part in SAA's decision not to grant sub-tenancies to the JV Companies. The Judge placed undue weight on the fact that Koh KM was a successful businessman in his own right, and wrongly surmised that Tan CB would have consulted Koh KM simply because SAA's decision not to grant the sub-tenancies would lead to Koh KM being in breach of the Consent Order. Mr Poon further submits that the Judge had erred in relying on the fact that Koh KM had, in 2004, suggested to Tan CB that SAA not enter into fresh sub-tenancies with the JV Companies. Mr Poon argues that events from 2004 should not be relied on to surmise what occurred in 2007 given the lapse of three years and the very different circumstances that confronted the parties in each of the two periods. Further, the very fact that Tan CB had not taken up the advice amply demonstrated that Koh KM had no influence over SAA's decisions concerning Turf City. Lastly, these issues had not been put to Koh KM.

378 Third, it is rare for a court to infer a combination to injure from a person's inaction, and the Judge erred in doing so in this case.

379 Fourth, the Judge had erred in finding that Koh KM had the requisite intention to injure the Respondents. Mr Poon argues that Koh KM's evidence was always that he had understood the head lease to belong to SAA, and that he had thought that there was no agreement or obligation that SAA would always grant sub-tenancies to the JV Companies.

(2) The Respondents' submissions

380 The Respondents' arguments primarily centre on Koh KM's role as a director of the JV Companies. The Respondents argue that as a director of the JV Companies, Koh KM not only must have known what was going on, but was also in a position to block or allow the transfer of assets from the JV Companies to SAA but did not do so. The Respondents take the position that Koh KM was a delinquent director who was not acting in the JV Companies' interest, but was instead aligned with SAA.

Our decision

381 It is apparent from the Supplementary Judgment that the Judge characterised the conspiracy as one to injure the Respondents through SAA's acquisition of the 2007 Head Lease without the corresponding grant of sub-tenancies to the JV Companies (in breach of cl 11 and the implied term of the Consent Order). The Judge found that Koh KM had either expressly agreed to or participated in this conspiracy, or that he had acquiesced in this state of affairs. We agree with the Judge's conclusion that Koh KM is liable for the tort of conspiracy, and supplement his reasoning as follows.

382 In our view, the conspiracy to injure the Respondents through SAA's appropriation of the 2007 Head Lease for itself necessarily involved the *concealment of the 2007 Head Lease from the Respondents* (and by extension

the KPMG Entities, through whom the Respondents might have been made aware of the 2007 Head Lease). In other words, the conspiracy required all persons who knew that the SLA had granted SAA the 2007 Head Lease on 22 May 2007 to *agree not to disclose this information to the Respondents or to the KPMG Entities*. Therefore, the conspiracy did not merely involve breaches of cl 11 and the implied term, but *also* a breach of cl 5, under which the parties to the Consent Order were required to disclose all material information, including the existence of the 2007 Head Lease, to the KPMG Entities. In the final analysis, these breaches are inter-related: compliance with cl 5 would have jeopardised SAA's enjoyment of its breach of cl 11 and the implied term.

383 As found above, Koh KM had breached cl 5 of the Consent Order because he knew of the 2007 Head Lease and yet did not disclose such information to the Respondents or to the KPMG Entities. Having been involved in the joint venture from the outset, he knew that SAA had a nine-year arrangement in respect of the Head Lease with the SLA. He also did not deny knowing what Tan CB was doing through SAA and the JV Companies (see [73]–[87] above). In light of the above, we hold that Koh KM's non-disclosure of the 2007 Head Lease to the Respondents and/or the KPMG Entities was not merely a form of inaction or acquiescence. Instead, Koh KM's non-disclosure can properly be considered the *means* by which he *actively* participated in the conspiracy to injure the Respondents through SAA's appropriation of the benefit of the 2007 Head Lease for itself. These same facts demonstrate that he had the intention to injure the Respondents. Thus we uphold the Judge's finding that Koh KM is liable for the tort of conspiracy.

Ong CK

384 Finally, we turn to consider Ong CK, whom the Judge found liable for

both the tort of conspiracy to injure by unlawful means and the tort of inducement of breach of contract (see Supplementary Judgment at [67]–[82] and [107]–[110]). However, unlike Tan CB, Tan Senior and Koh KM, Ong CK is *not* a party to the present appeals. In view of this, it is not appropriate or necessary for this Court to make any finding or order against Ong CK. In any event, we note that the Respondents are not pursuing any claim against Ong CK (see Supplementary Judgment at [67]).

Conclusion on the Tort Issue

385 In summary:

(a) We affirm the Judge's findings that Tan CB and Tan Senior are both liable for the tort of conspiracy to injure by unlawful means and the tort of inducement of breach of contract by causing SAA to appropriate the benefit of the 2007 Head Lease for itself in breach of the Consent Order.

(b) For completeness, we affirm the Judge's finding that Koh KM is liable for the tort of conspiracy to injure by unlawful means.

(c) We make no finding or order against Ong CK given that he is not a party to the present appeals.

What is the appropriate remedy in the present case against the parties liable in tort?

386 Given that Tan CB and Tan Senior are liable for the torts of conspiracy and inducement of breach of contract for causing SAA to breach the Consent Order, the Respondents are entitled to damages suffered as a result. The question then arises as to how these damages should be quantified.

387 Damages in *tort* are generally intended to place the plaintiff in the same position as he would have been in ***had the tort not been committed***. This stands in contrast to damages in *contract*, which are – as expounded upon at length above – generally intended to place the claimant in the same position as he would have been in ***had the contract been performed***. Despite these different theoretical starting points, there will be cases where the quantification of damages on *either* basis would be *identical* because the tort arises from a breach of contract, and the position of the plaintiff had the contract been performed would be identical to that he would have been in but for the tort. The present case is one such case. The breaches of the Consent Order are at the heart of the claims in tort for conspiracy to injure by unlawful means and inducement of breach of contract; and the position that the Respondents would have been in had the tort (which was to thwart the proper performance of the Consent Order) not been committed is ***identical*** to the position they would have been in had the Consent Order been performed. It follows that the quantum of damages due to the Respondents on the contractual claim would be ***identical*** to that due under the tortious claims.

388 Accordingly, we hold that Tan CB and Tan Senior (together with SAA and Koh KM, in contract) are jointly and severally liable for damages caused by the breaches of the Consent Order.

389 On the issue of quantification of damages, we have invited the Respondents, SAA and Koh KM to file written submissions limited to 20 pages on the narrow issue of the value of the shares in the JV Companies at the time of the Repudiatory Breaches, within 21 days of the present judgment (see [306] above). We invite Tan CB and Tan Senior to do the same.

Conclusion

390 To conclude, these are the orders which we make in relation to the remaining issues in these appeals:

(a) The Respondents' claim for breach of fiduciary duties is dismissed.

(b) The Respondents are to be awarded compensatory damages, assessed by reference to the value of their 37.5% shareholding in the JV Companies at the time of the Repudiatory Breaches, with a premium of 15%. SAA and Koh KM (in contract) together with Tan Senior and Tan CB (in the torts of conspiracy and inducing breaches of contract) are jointly and severally liable for these damages. The relevant parties (*ie*, the Respondents, SAA, Koh KM, Tan Senior and Tan CB) are to file further submissions limited to 20 pages on the value of the shares in the JV Companies, at the time of the Repudiatory Breaches, within 21 days of the present judgment.

(c) The parties are also to file submissions on the appropriate costs orders to be made in relation to these two appeals, limited to 10 pages, within 21 days of the present judgment.

391 We would also like to express our deepest gratitude to Prof Goh for his astute and erudite submissions, which greatly assisted us in navigating a complex and contentious area of law.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal

Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal

Kelvin Poon, Kevin Tan and Alyssa Leong (Rajah & Tann Singapore LLP) for the first to fourth appellants in Civil Appeal No 168 of 2015;
Irving Choh, Melissa Kor Wan Wen and Christine Chuah Hui Fen (Optimus Chambers LLC) for the fifth appellant in Civil Appeal No 168 of 2015 and the appellant in Civil Appeal No 171 of 2015;
Adrian Tan, Ong Pei Ching, Yeoh Jean Wern, Lim Siok Khoon, Joel Goh Chee Hsien and Hari Veluri (Morgan Lewis Stamford LLC) for the respondents in Civil Appeals Nos 168 and 171 of 2015;
Assoc Prof Goh Yihan (School of Law, Singapore Management University) as *amicus curiae*.