IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 14

Civil Appeal No 42 of 2018

Between

Abhilash s/o Kunchian Krishnan

… *Appellant*

And

(1) Yeo Hock Huat
(2) JCS-Vanetec Pte Ltd

… *Respondents*

JUDGMENT

[Companies] — [Oppression] — [Minority shareholders]

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v
Yeo Hock Huat and another

[2019] SGCA 14

Court of Appeal — Civil Appeal No 42 of 2018
Judith Prakash JA, Steven Chong JA and Quentin Loh J
29 January 2019

26 February 2019 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

Introduction

1 This appeal arises from a dispute in relation to the valuation of shares in a private company in the context of a settled oppression suit which resulted in a consent order for the majority shareholder to buy out the minority shareholder at "fair market value".

2 Not unexpectedly, both parties engaged their own valuation experts who provided very disparate and divergent valuations using different bases. Three valuation methodologies were advanced before the court below – the income approach, the net assets value approach, and the investment value approach. The appellant relied primarily on the income and investment value approaches, while the respondents relied primarily on the net assets value approach. The valuations ranged from a low of $109,589 to a high of $75,699,572.

3 The Judge below, having disagreed with the appellant's two valuations, eventually adopted the respondent's net assets basis. For the appeal, the appellant is no longer relying on the two bases which were used below and has instead opted to use a third-party offer as the "best evidence" of the "fair market value" of the shares. It is axiomatic that valuation of shares in private companies is largely fact-sensitive in nature and typically reliant on expert evidence to assist the court. In deciding whether the Judge below was correct to have arrived at the "fair market value" of the shares on the net assets basis, it is essential to bear in mind the valuation bases which were advanced by the parties and crucially, the evidence before the court. This is especially so when the valuation basis put forward for the purposes of the appeal is quite different from the bases which were rejected below.

4 The key issue which confronts us in this appeal is whether a third-party offer in fact represents the best evidence of the fair market value of the shares and if not, what probative weight, if any, should be ascribed to such an offer.

Facts

Parties to the dispute

5 The appellant, Mr Abhilash s/o Kunchian Krishnan ("Mr Abhilash") is a minority shareholder of the second respondent, a company incorporated in Singapore called JCS-Vanetec Pte Ltd ("JCSV"). The first respondent, Mr Yeo Hock Huat ("Mr Yeo"), is the majority shareholder of JCSV.

6 Mr Abhilash is a businessman in the aerospace industry who had set up two companies, Vanilla International (S) Pte Ltd and Vanilla Aviation Pte Ltd ("Vanilla Aviation"). Sometime in 2003, he intended to launch a business to

manufacture stator vanes and other related parts for the aerospace industry in India.[1]

7 Mr Yeo is an engineer and entrepreneur, with more than 20 years of experience in the equipment and machine manufacturing industry. Over the years, he started up and developed several engineering companies. One such company was JCS Automation Pte Ltd, which specialised in the manufacture of precision cleaning ultrasonic equipment. Its business was eventually transferred to JCS-Echigo Pte Ltd ("JCS-Echigo") in 1999.[2]

8 At the end of 2003, Mr Abhilash was introduced to Mr Yeo by some common friends. Mr Yeo was keen on branching into the aerospace industry. The two decided to do business together, setting up JCSV in 2004 (named JCS-Vanilla Pte Ltd at the time of incorporation).[3]

9 Initially, the 10,000 shares in JCSV were held as follows: 50.99% by Mr Yeo, 49% by Mr Abhilash (through Vanilla Aviation), and 0.01% by Ms Elise Hong (an officer of JCS-Echigo). Thereafter, JCSV issued more shares, resulting in changes in the parties' respective shareholdings. Currently, JCSV has 550,000 issued shares. Mr Yeo holds 78.8%, Mr Abhilash holds 13.9%, while one of Mr Yeo's companies, JCS Group Co Ltd ("JCS Group"), holds the balance 7.3%.[4] Mr Abhilash claims that this dilution in his shareholding was an attempt by Mr Yeo to cut him out of JCSV, but Mr Yeo claims that this was due to capital injections that he had made into JCSV.[5]

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1 Mr Abhilash's AEIC: ROA Vol III (Part 1), pp 4–5.

2 Mr Yeo's AEIC: ROA Vol III (Part 4), pp 187–188.

3 Mr Yeo's AEIC: ROA Vol III (Part 4), p 189; Mr Abhilash's AEIC: ROA Vol III (Part 1), pp 6, 9–11.

4 Mr Yeo's AEIC: ROA Vol III (Part 4), pp 215–217; Mr Abhilash's AEIC: ROA Vol III (Part 1), p 28.

10 One capital injection is of particular interest in this appeal. On 20 November 2015, Mr Yeo (through JCS Group) injected $1.5m into JCSV in exchange for 40,000 shares.[6] This capital injection was significant because Mr Abhilash, both below and on appeal, claimed that the subscription of the 40,000 shares for payment of $1.5m was at an "implied price" of $37.50 per share.

11 Historically, JCSV has been a loss-making company. The audited financial statements for financial year 2007 to financial year 2015 show that JCSV has had negative earnings after tax in every single year except two – 2011 and 2015. The earnings after tax for these two years were fairly modest – $32,879 and $113,661 respectively – while the annual net losses between 2010 and 2014 were more substantial averaging around $400,000.[7] The unaudited management accounts for financial year 2016, and January to May 2017 also indicate losses.[8] Mr Abhilash does not contend otherwise.

Procedural history

12 Mr Abhilash initially brought this action against JCSV and Mr Yeo, alleging that Mr Yeo had conducted the affairs of JCSV in a manner oppressive to him, and in disregard of his interests as a shareholder within the meaning of s 216(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"). Mr Abhilash sought an order that his shareholding in JCSV be purchased by Mr Yeo on a fair market valuation.[9]

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5 Mr Yeo's AEIC: ROA Vol III (Part 4), pp 212–217; Mr Abhilash's AEIC: ROA Vol III (Part 1), p 28.

6 Mr Yeo's AEIC at para 53: ROA Vol III (Part 4), p 211.

7 Mr Yeo's AEIC at para 12: ROA Vol III (Part 4), p 191.

8 Mr Yeo's AEIC: ROA Vol III (Part 4), pp 191–192.

9 Statement of Claim: Appellant's Core Bundle, pp 52 and 59.

13 On the first day of the trial, the parties reached an agreement that Mr Yeo would purchase Mr Abhilash's shares. The trial on Mr Yeo's liability for oppression under s 216(1) of the Act thus did not proceed. The parties recorded a consent order dated 19 October 2017 to the effect that the issue of liability for minority oppression would be dispensed with, and that the court shall proceed to determine, at the trial, the fair market valuation of JCSV for the purposes of sale and purchase of Mr Abhilash's shares in JCSV ("the Consent Order"). Consequently, the trial proceeded for the sole purpose of examining the expert evidence that the parties had adduced to determine the valuation of JCSV, and flowing from that how much Mr Yeo ought to pay Mr Abhilash for his shares in JCSV.[10]

The Shanghai Ossen offer

14 Mr Abhilash's case on appeal is largely premised on an offer by a third-party to purchase all the shares in JCSV for $50m. Mr Abhilash claims that this offer was the best evidence of JCSV's market value, and that the Judge erred in disregarding it.[11]

15 The offer was from a Chinese entity named Shanghai Ossen Aviation Technology Co, Ltd ("Shanghai Ossen"). Shanghai Ossen was described by Mr Yeo as part of a conglomerate with annual sales exceeding RMB10b, and which has won major scientific and technological awards.[12] Between 2015 and 2016, Mr Yeo was involved in discussions with Shanghai Ossen regarding the possibility of the latter acquiring JCSV. As a result of their discussions, two key documents were produced.

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10 GD at [2].

11 Appellant's Case at paras 4–5.

12 ROA Vol III (Part 7), p 5.

16 The first is a Memorandum of Understanding sent by way of email on 10 September 2015. Among other things, the Memorandum of Understanding provided as follows:[13]

(a) Mr Yeo and Mr Abhilash, as sellers, intended to sell "certain percentage shares" of JCSV, while Shanghai Ossen, as buyer, intended to acquire such shares.

(b) Shanghai Ossen would be permitted to carry out an exhaustive due diligence over JCSV and its subsidiaries as to "legal, tax and financial, technical, labour and environmental matters".

(c) Neither party was under any legal obligation to enter into any form of legally binding transaction document.

(d) Shanghai Ossen's "expected price for the sale of 100% shares of [JCSV]" was $50m, which was "subject to the results of Due Diligence".

17 The Memorandum of Understanding was followed by a document titled "Investment Framework Agreement". A version in Chinese was sent by way of email on 3 June 2016, and an English version was sent four days later on 7 June 2016.[14] Although it was contemplated in the Memorandum of Understanding that due diligence checks would be carried out by Shanghai Ossen, no such steps were in fact taken.[15] Mr Abhilash does not contend that due diligence had in fact been done.[16]

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13 ROA Vol III (Part 7), pp 124–128.

14 ROA Vol III (Part 7), pp 10, 26.

15 Transcripts, 31 Oct 2017, p 63 at lines 3–5: ROA Vol III (Part 15), p 134.

16 Appellant's Case at para 51.

18 The Investment Framework Agreement set out the proposed structure for the acquisition of the JCSV shares. It included three parties in addition to Shanghai Ossen and JCSV. They were Shanghai Jiashi Aerospace Power Technology Co, Ltd ("Shanghai Jiashi"), JCS INVB Pte Ltd ("JCS INVB"), and JCS Aero Technology Pte Ltd ("JCS Aero"). Shanghai Jiashi is a wholly-owned subsidiary of Shanghai Ossen. The Investment Framework Agreement contemplated that Shanghai Jiashi would own 100% of the shares in JCS Aero, which in turn would own 100% of the shares in JCSV. Among other things, the Investment Framework Agreement provided as follows:[17]

(a) Shanghai Jiashi would acquire 100% of the shareholding in JCS Aero from JCS INVB. This would give Shanghai Jiashi indirect control over 100% of the shareholding in JCSV.

(b) In consideration of JCS INVB transferring 100% of the shares in JCS Aero to Shanghai Jiashi, Shanghai Jiashi would pay $50m to JCS INVB as the transfer price. The transfer price was stipulated to consist of two parts. The first part was 20% of the transfer price (*ie*, $10m), which would be transferred to JCS INVB's bank account and could be drawn down by JCS INVB. The second part, the other 80% of the transfer price (*ie*, $40m), had to be used by JCS INVB to acquire equity in Shanghai Jiashi.

(c) The transfer price of $50m was expressed to be a "tentative price" which "may be adjusted according to the results of due diligence conducted or to be conducted by Shanghai Jiashi on finance, technology and law".

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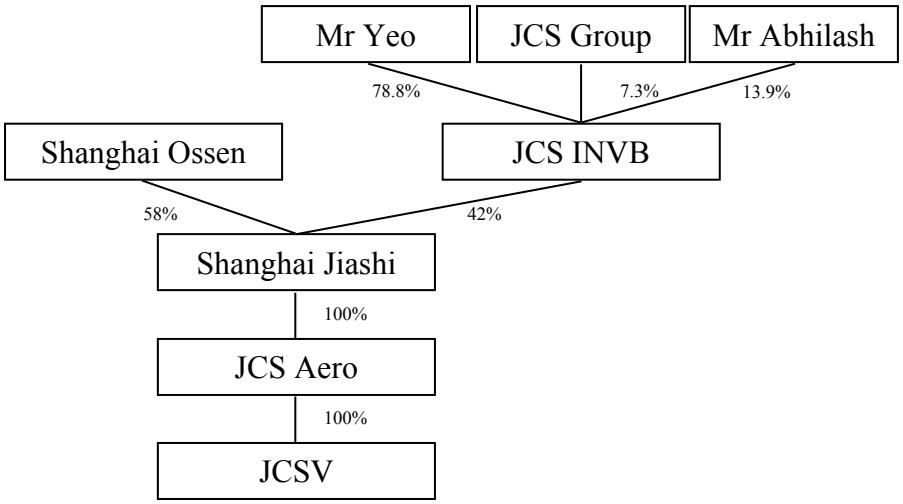
17 ROA Vol III (Part 7), pp 27–35.

(d) JCS INVB, using $40m out of the transfer price, would acquire a 42% stake in Shanghai Jiashi. The other 58% stake would be held by Shanghai Ossen.

(e) Among other things, it was a condition precedent for the transfer of shares in JCS Aero to Shanghai Jiashi that Shanghai Jiashi complete its due diligence, and that no material adverse difference would be found between the result of the due diligence and the information previously disclosed to it or Shanghai Ossen.

A diagram of the corporate structure of the companies contemplated under this transaction is set out below.



19 In summary, the Investment Framework Agreement contemplated a purchase price of $50m for the shares in JCSV (indirectly through JCS Aero). The $50m comprised $10m in cash and $40m in equity in Shanghai Jiashi, which would be a joint venture company with Shanghai Ossen. Ultimately, neither the Memorandum of Understanding nor the Investment Framework Agreement was signed. Nevertheless, the transaction that was contemplated (as set out in this paragraph) is what was referred to by the Judge and the appellant

as "the Shanghai Ossen offer". We will adopt this term. For present purposes, it is important to highlight two significant features of the Shanghai Ossen offer. First, it was *not an unconditional* offer – it was always subject to due diligence and second, the consideration is not $50m in cash but *$50m in two components* – $10m in cash and the balance $40m to be reinvested into the joint venture company. The significance of these two features in considering Mr Abhilash's new argument for the appeal will be elaborated below.

20 By a letter dated 21 July 2016, Mr Yeo informed Mr Abhilash of the Shanghai Ossen offer, and sought his views as to whether he was agreeable to selling his shares to JCS Aero as part of the plan. Mr Yeo explained that under the terms of the offer, the existing shareholders of JCSV would receive $10m in cash, and a 42% stake in Shanghai Jiashi. This would require that the current shareholders of JCSV sell their shares to JCS Aero. They would in turn own shares in JCS INVB in the same proportion as their shareholding in JCSV. The $10m received by JCS INVB would be distributed to the shareholders in proportion to their shareholding. Mr Yeo went on to state that JCSV was in a weak financial position, having made net losses over the past three years.[18]

The experts

21 The parties procured experts to give evidence at the trial on the valuation of JCSV. Mr Abhilash called Mr Bakthavatsalam Sridhar Rao ("Mr Rao") as his expert on the valuation of JCSV, while Mr Yeo called Mr Thio Khiaw Ping Kelvin ("Mr Thio"). Each of the experts filed a report in support of their respective positions. In brief, Mr Rao valued JCSV at $39,649,308 on an income method, $24,633,006 on a net assets basis, and $75,699,572 on an investment value basis. Mr Thio's valuation yielded a mere $109,589 on a net assets basis,

[18] ROA Vol III (Part 7), pp 4–8.

and, in his view, an income approach was simply not viable given JCSV's loss-making history. Both experts also gave evidence at the trial. It is evident that there was a huge gulf between the experts' positions.

Decision below

22 As mentioned above, the Consent Order required the court to determine the fair market value of JCSV. Mr Abhilash's principal submission before the Judge was that JCSV should be valued on an *income basis*. He argued that the income basis was appropriate because JCSV was a going concern, and had a significant amount of goodwill as evidenced by existing contracts, past investment offers, and certifications which qualified it to manufacture components for well-known companies. He submitted that the true value of the company was between $39,649,308 and $75,699,572 – the income value and the investment value that Mr Rao had arrived at.[19]

23 Mr Yeo's main submission below was that JCSV should be valued on a *net assets basis*. He rejected the investment basis of valuation because that would be contrary to the terms of the Consent Order (which specified fair market value). He also rejected the income basis of valuation because JCSV was a historically loss-making company and Mr Rao's projection of JCSV's future cash flows was predicated on speculation, and therefore could not be relied upon.[20]

24 The Judge held that although the Consent Order provided that JCSV was to be valued on a "fair market value" basis, and not an investment basis, it also envisaged that the court would have the discretion to make adjustments in

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19 GD at [17] and [18].

20 GD at [19].

arriving at the final determination. In particular, the Consent Order provided that the court should consider whether the Shanghai Ossen offer had any effect on the valuation of the shares.[21] Nevertheless, the Judge saw no factual basis for adopting the investment approach. Although Shanghai Ossen made an initial proposal in 2015 to invest in JCSV, that offer was subject to a due diligence check which was never carried out (which the Judge found was due to Mr Abhilash's failure to cooperate in accepting the proposal).[22] She thus found that the offer had "evaporated", and it was "entirely speculative" as to whether another company might have a similar interest.[23]

25 The Judge then turned to consider the market value of JCSV. As between the income approach and the net assets approach, she took the view that the latter was applicable. She found that the income approach was inapplicable because JCSV was not a going concern, in the sense that it was not self-sustaining from its operating turnover.[24] She also did not accept Mr Abhilash's submission (and Mr Rao's opinion) that JCSV's intangible assets could generate future revenue for the company. At [32]–[48] of the Grounds of Decision, the Judge examined the evidence in respect of each of the three intangible assets relied upon by Mr Abhilash, and concluded that they could not reasonably be said to be sources of future revenue for JCSV. It should be noted that Mr Abhilash is not challenging this finding on appeal. Consequently, the Judge accepted Mr Thio's assessment that, on the income approach, JCSV would have a nil valuation. She rejected Mr Rao's valuation on the income approach as it was tainted by his projection of future sales, which formed a core part of his

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21 GD at [24] and [25].

22 GD at [26].

23 GD at [26].

24 GD at [31].

valuation. Left with a company with an undisputed loss-making record, the Judge took the view that the net assets basis of valuation was the applicable approach.[25]

26 The Judge held that there was no reason to adjust the valuation that Mr Thio had reached on a net assets basis.[26] She first noted that Mr Rao provided no counter-valuation on a net assets basis, and Mr Abhilash therefore had no basis to critique Mr Thio's valuation. We note that although Mr Rao did initially provide a valuation on a net assets basis in his valuation report, this was not eventually relied upon, either by Mr Abhilash in his closing submissions or by Mr Rao in cross-examination when asked to comment on Mr Thio's valuation on a net assets basis. As for the criticism that Mr Thio's valuation failed to account for JCSV's intangible assets, this was not correct as Mr Thio had factored them in, albeit by giving them a limited value.[27]

27 The Judge also rejected the related submission that JCSV could not possibly be worth only $109,589 (on Mr Thio's net assets basis) because Shanghai Ossen had expressed an interest to buy the company for $50m. Mr Abhilash had argued that Shanghai Ossen would not have come up with such an offer if it was not reasonably satisfied that the offer was justified. The Judge disagreed for three reasons:

> (a) It was speculative to contend that Shanghai Ossen would not have suggested the figure unless they had done their checks. No evidence on this was led by Mr Abhilash.

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25 GD at [50] and [51].

26 GD at [52].

27 GD at [53] and [54].

(b) The offer was subject to a due diligence check which was never carried out.

(c) The price was an offer by a specific entity at that particular time. No evidence was led on their particular reasons for doing so, and there was also no evidence that any *other* entities had valued JCSV in the same way.[28]

28 As for Mr Abhilash's submission that Mr Yeo had valued the company's shares at $37.50 per share in his capital injection of $1.5m on the basis that he would be allotted 40,000 shares for that sum, the Judge did not accept that this represented the value of JCSV for two reasons:

(a) First, Mr Rao did not challenge Mr Thio's view that the share price for a share allotment does not necessarily reflect the value of every share in a company, especially where the company is a private company.

(b) Second, the Judge accepted Mr Yeo's explanation for the price of $37.50 per share. Specifically, Mr Yeo had explained that the $1.5m capital injection into JCSV was made because JCSV needed funds, and the number of shares issued was calibrated so as to ensure that after the capital injection Mr Abhilash's shareholding would not be diluted excessively.[29]

29 We should add that Mr Abhilash did not use the price of $37.50 per share arising from Mr Yeo's capital injection as a proxy for the fair market value under the Consent Order. Instead, it was used to suggest in a general sense that JCSV must be worth more than the net assets valuation proposed by Mr Thio.

[28] GD at [55] and [56].

[29] GD at [57] and [58].

However, it does not follow that just because there is some indication that the shares might be worth more than Mr Thio's net assets valuation, their value must necessarily be either of Mr Rao's valuations.

30 Finally, the Judge held that there was no reason to adjust the valuation on the basis of transactions which were impugned as being improper. Essentially, she found that those transactions were either immaterial to the valuation of JCSV, or were not improper.[30] These findings have also not been challenged by Mr Abhilash on appeal.

The parties' cases on appeal

31 Mr Abhilash focuses his appeal on the narrow issue of whether the Shanghai Ossen offer should be relied upon as the basis for valuing the shares in JCSV.[31] This is how Mr Abhilash has framed his case on appeal:

> (a) Fair market value is a measure of what a company can fetch in the market, and in determining this, the court is required to take into account offers made by a third-party to purchase the shares of a company, unless the offer is not genuine.[32] Such offers are the "best evidence" of fair value.[33]
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> (b) The Judge erred in disregarding the Shanghai Ossen offer on the basis that it had "evaporated". There was no suggestion that it was not a genuine offer, and there was nothing to suggest that had the due diligence been carried out, the offeror would have found anything of

30 GD at [60]–[64].

31 Appellant's Case at paras 5 and 6.

32 Appellant's Case at para 17.

33 Appellant's Case at paras 21–24 and 42.

concern to cause it to withdraw or reduce its offer.[34] It is irrelevant whether the offer had evaporated as that does not diminish the informational value of the offer.[35]

(c) There are compelling grounds to find that the Shanghai Ossen offer remains alive.[36] Among other points, Mr Abhilash contends that the letters from Shanghai Ossen and Shanghai Jiashi purporting to set a deadline of 31 December 2016 for the acquisition of JCSV to be completed are "highly dubious", and there is "good reason to doubt their authenticity".[37]

32 At the hearing before us, we queried counsel for Mr Abhilash, Mr Davinder Singh SC, whether it was strictly necessary for him to persuade us that the Shanghai Ossen offer remains alive. Mr Singh replied that while he was not conceding the point, it was ultimately irrelevant to Mr Abhilash's success on appeal. The argument which he crystallised during the appeal hearing was that by the terms of the Consent Order, JCSV was to be valued as of 30 April 2016. It is undisputed that the Shanghai Ossen offer was alive *as of that date*. Consequently, regardless of the events which *subsequently* transpired, the court is obliged to look at the relevance of the Shanghai Ossen offer having been made then. Further, although the offer then was still subject to due diligence, there was nothing as of 30 April 2016 to indicate that due diligence would turn up any adverse findings. In short, this court should take cognisance of the *mere fact* of the Shanghai Ossen offer being in and of itself the best evidence of JCSV's fair market value.

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34 Appellant's Case at para 51.

35 Appellant's Case at para 79.

36 Appellant's Case at paras 74.

37 Appellant's Case at paras 67–73.

33 Before us, counsel for Mr Yeo, Mr Suresh Divyanathan, made two principal submissions:[38]

(a) First, the Shanghai Ossen offer is at best an indication of the investment value *to Shanghai Ossen*, and not an indication of JCSV's fair market value. The $50m offer was therefore entity-specific.

(b) Second, the Shanghai Ossen offer cannot be relied upon as a concrete offer, as it was at all relevant times subject to due diligence.

Issues to be determined

34 In our view, the substantive issue to be determined in this appeal is whether the Shanghai Ossen offer should be accepted as the "best evidence" of JCSV's fair market value and what significance, if any, should be attached to the date specified in the Consent Order for the purposes of the valuation.

35 However, before examining this issue, it is first necessary to decide whether Mr Abhilash should be granted leave to raise the new points on appeal.

New points on appeal

36 Mr Abhilash acknowledges that the points raised in relation to the relevance of the Shanghai Ossen offer (at [31(a)], [31(b)] and [32] above) are "new points" on appeal. In essence, there are really two remaining new points that are being made – Mr Singh has acknowledged that for the purposes of Mr Abhilash's new case, it is strictly not necessary to establish that the Shanghai Ossen offer is still alive. First, that the Shanghai Ossen offer is directly relevant to the fair market value of JCSV, even if it had subsequently evaporated. Second, it is in any event irrelevant whether the Shanghai Ossen offer had

[38] Respondents' Case at para 59.

evaporated because the Consent Order mandates that JCSV be valued as at 30 April 2016. It is common ground that the Shanghai Ossen offer was still alive as of that date.

37 Mr Abhilash seeks leave to introduce these new points pursuant to O 57 r 9A(4) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules of Court"). Mr Yeo submits that Mr Abhilash should not be granted leave.

38 Order 57 r 9A(4) of the Rules of Court provides as follows:

> (4) If a party –
>
> (*a*) is abandoning any point taken in the Court below; or
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> (*b*) intends to apply in the course of the hearing for leave to introduce a new point not taken in the Court below,
>
> this should be stated clearly in the Case, and if the new point referred to in sub-paragraph (*b*) involves the introduction of fresh evidence, this should also be stated clearly in the Case and an application for leave must be made under Rule 16 to adduce the fresh evidence.

39 The principles governing the granting of leave to raise new points on appeal was considered by this court in *Feoso (Singapore) Pte Ltd v Faith Maritime Co Ltd* [2003] 3 SLR(R) 556 ("*Feoso*"), which at [28] endorsed the following passage from *Connecticut Fire Insurance Company v Kavanagh* [1892] AC 473 at 480:

> When a *question of law* is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if

> fully investigated, would have supported the new plea. [emphasis added]

40 The principles in *Feoso*, as well as the broader issue of when leave to introduce new points on appeal will be granted, were recently considered again by this court in *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 ("*Grace Electrical*"). This court held that there is strictly speaking no legal impediment to an appellant raising new points of law on appeal even if they were not specifically pleaded *provided* that the existing pleadings were sufficiently wide to permit the new points to be raised. Further, the mere fact that the new point sought to be raised *contradicts* the case as pleaded below would not invariably lead to the denial of leave. We explained that in *Feoso*, leave was denied not merely because the new point contradicted the appellant's pleaded case, but, more importantly, because further findings might well have been made or raised had the arguments been raised below. In such a case, the court would thus be "deprived of any findings and reasoning" of the court below (at [36]).

41 On the facts of *Grace Electrical*, the new arguments did not require any amendments to the pleadings, nor was there any need to adduce fresh evidence. The central question was whether there were other causes to a fire that had broken out, and in this regard, the court below had carefully considered the other possible causes of fire raised in the expert reports. This court held that the fact that the appellant had renounced the expert reports in the court below did not alter whatever probative value the reports might otherwise have on the issue of the appellant's alleged negligence; the appellant was entitled to rely on all the evidence already before the court (at [37]). That said, the appellant had to contend with the fact that certain conclusions in the expert reports on the cause of the fire had not been tested in cross-examination, and the appellant equally

could not ignore its own submissions below when it described the reports as "speculative". However, these difficulties were separate and distinct from the question of whether the appellant could raise the new arguments on appeal and we concluded by stating that the following principles would apply when considering whether leave should be granted to introduce new points on appeal (at [38]):

> [W]hether a party is granted leave under O 57 r 9A(4)(*b*) of the ROC to introduce on appeal new points not taken in the court below – in particular, points that represent a substantial departure from the position taken below by that party – will be the subject of careful consideration in each case, having due regard to factors including (a) the nature of the parties' arguments below; (b) whether the court had considered and provided any findings and reasoning in relation to the new point; (c) whether further submissions, evidence, or findings would have been necessitated had the new points been raised below; and (d) any prejudice that might result to the counterparty in the appeal if leave were to be granted.

42 In our view, applying the principles as set out in *Grace Electrical*, Mr Abhilash is not precluded from raising these new points on appeal. Crucially, both points essentially involve *questions of law*, *ie*, the probative value of an offer by a third-party in the context of a valuation exercise. To that extent, any objection that these new points contradict Mr Abhilash's pleaded case at trial is misplaced – it is trite that pleadings state facts. Further, to the extent that these are points that this court can decide without further evidence, the approach in *Feoso* and *Grace Electrical* indicates that such points would generally be allowed. In our view, there is sufficient material before us to reach a view on these points. The Shanghai Ossen offer was explored during the trial, albeit not from the same perspective, and the Consent Order is on the record before us. Mr Singh submits that he is merely relying on the fact of the Shanghai Ossen offer and nothing more. Needless to say that in reviewing the offer, this

court must take into account the terms and nature of that offer to decide whether it was indeed the "best evidence" of JCSV's fair market value.

43 That said, although a new point may be allowed, a party's case may nonetheless be undermined or compromised by its treatment of the very point in the court below – both as a matter of submissions, and how it dealt with the point in evidence. That is the caution that this court had sounded in *Grace Electrical*. Consequently, while Mr Abhilash may be allowed to cast the relevance of the Shanghai Ossen offer in new light on appeal, he is nonetheless constrained by the evidence that has been adduced at the trial below. In particular, he is limited by the questions that have been put to the experts on the relevance of the Shanghai Ossen offer to the valuation of JCSV, as well as questions that were *not put to the experts*. Such an approach helps mitigate against any prejudice that might be caused to the respondents in this case. Mr Singh's point is that the expert evidence cannot change the fact of the offer. While there is some force in the argument, it is incorrect to suggest that the experts' treatment of the Shanghai Ossen offer in the court below is inconsequential to the ultimate question pertaining to JCSV's fair market value.

Valuation date of JCSV

44 The second issue is a seemingly simple one, although it gave us some cause for unease. In any valuation process, typically a date has to be fixed by reference to which the company's value is ascertained. In the present case, the Consent Order fixed this date as 30 April 2016. However, Mr Singh's submission which was developed before us during the appeal hearing that the Shanghai Ossen offer was *still alive as of 30 April 2016*, meant that the particular date that was identified in the Consent Order assumes not only

paramount significance but is now placed on the centre stage of the valuation exercise. The unease we felt with this seemingly attractive point was compounded by the fact that both Mr Singh and Mr Divyanathan were unable to point to any evidence as to *why* this particular date was selected. Furthermore, it is common ground that both experts did not attach any weight or significance to the date even though their mandate was to assist the court on the fair market value of the shares as at 30 April 2016.

45 In our view, this warranted a comprehensive construction of the Consent Order. The Consent Order stated as follows:[39]

> 1. The Parties shall dispense with the determination of the issue of liability for minority oppression under Section 216 of the Companies Act which needs no longer be ventilated and decided in this action.
>
> 2. The determination of the Honourable Court at the trial of this action shall be confined to the *fair market valuation* of the 2nd Defendant *as at 30.4.16* ("Valuation") for the purposes of the sale and purchase of the Plaintiff's 76,500 ordinary shares in the 2nd Defendant ("Subject Shares") by the Plaintiff and the 1st Defendant respectively. The Plaintiff shall sell and the 1st Defendant shall buy the Subject Shares at the said fair market valuation.
>
> 3. The Valuation shall be on a pro-rata basis without any discount being made for a minority interest.
>
> 4. At the trial of this action, the Court shall hear parties and decide whether the Valuation referred to in paragraph 3 should take into consideration the following matters:
>
> > 4.1 Whether the purchase price of equipment from Echigo should be adjusted for the purposes of the Valuation.
> >
> > 4.2 Whether the payments made to and from the 2nd Defendant as follows should be adjusted for the purposes of the Valuation:
> >
> > > 4.2.1. The payment of insurance premiums in respect of JCS Biotech Pte Ltd (formerly known

[39] Consent Order: Appellant's Core Bundle, pp 62–63.

> as JCS Automation Pte Ltd), 2 Woodlands Sector 1, #01-07 Woodlands Spectrum 1, Singapore 738068, by the 2nd Defendant for 5 June 2014 to 4 June 2015, and for 5 June 2015 to 4 June 2016.
>
> 4.2.2. The payment of employment passes of Low Yin Mei on 12 April 2016 and 13 April 2016, and Selvaraj Rajkumar on 28 October 2014 by the 2nd Defendant.
>
> …
>
> 4.4 Whether the Chinese Proposal has *any effect* on the Valuation of the Subject Shares.
>
> 5. Any adjustments made pursuant to paragraph 4 above and the subsections thereto should be made without any finding as to whether the reason for the adjustment amounts to oppression pursuant to Section 216 of the Companies Act and/or impropriety on the part of the 2nd Defendant or its officers.
>
> 6. There shall not be a nil or negative Valuation of the Subject Shares and Court's discretion must be exercised bearing this in mind.
>
> …
>
> [emphasis added]

46 We first note that the Consent Order was formulated on the basis of this court's decision in *Hoban Steven Maurice Dixon and another v Scanlon Graeme John and others* [2007] 2 SLR(R) 770 ("*Hoban*"). In *Hoban*, the parties indicated that they did not wish for their oppression dispute to be determined by the court, and were concerned only with finding an exit mechanism for the appellants. They therefore agreed, by way of a consent order, on the terms of reference for an expert to determine the fair market value of the appellant's shares, which the first and second respondents agreed to "purchase" (the "June 2004 Order"). The expert valued the subject shares at nil value. The issue thus arose as to whether the expert's nil valuation of the shares, as a matter of interpretation, rendered the June 2004 Order inoperative, considering the use of the word "purchase" when referring to the options open to the first and second

respondents upon the court's determination of the value of the shares (at [23]). Chan Sek Keong CJ, delivering the judgment of the court, had this to say as to how such court orders are to be interpreted (at [38]–[41]):

> 38 Given the factual matrix as constituted by these objective facts, it is abundantly clear that the trial judge contemplated or intended that the word "purchase", which he had used three times, to mean "purchase using money or its equivalent" and not "acquire without payment". He was using the word "purchase" in its ordinary sense as understood in business as this was a business transaction between business people. …
>
> 39 … It is well established that where a court order is intended to substantially give effect to the parties' intentions, it would be relevant to consider these intentions even when giving consideration to the express wording of the order. …
>
> 40 By analogy with [*David Freud Ltd v Vickbar Ltd* [2006] EWCA Civ 1622], the use of the word "purchase" in the June 2004 Order and the terms of the option to purchase given to the First and Second Respondents must imply that the parties and even the court thought that the subject shares had some value and that they should be subject to acquisition at that value. In our view, this is a reasonable interpretation of the word "purchase", bearing in mind that it was the intention of the trial judge to provide an *equitable* exit mechanism for the appellants. …
>
> ***Interpretation of court order***
>
> 41 In *Sujatha v Prabhakaran Nair* [1988] 1 SLR(R) 631, I articulated, in a different context, the principle applicable to the interpretation of court orders. At [16], I said:
>
> > [W]here an order of court is capable of being construed to have effect in accordance with or contrary to established principles of law or practice, the proper approach, in the absence of manifest intention, is not to attribute to the judge an intention or a desire to act contrary to such principles or practice but rather in conformity with them. …
>
> In our view, this principle is applicable to the interpretation of the June 2004 Order. It would be wholly unreasonable and unjust to attribute to the trial judge an intention that in circumstances where the subject shares are valued at nil value, the Second Appellant is under an obligation to effectively give away its shares to the First and Second Respondents. Such an

> interpretation would not be consistent with the intention and the express terms of the June 2004 Order. Adopting a contrary interpretation would also go against the weight of decisions that have interpreted the expression "purchase" to have its ordinary meaning of acquiring ownership of a thing for money or for valuable consideration when used in an ordinary commercial context. There could be no sale or purchase of a thing as ordinarily understood in a legal or commercial context if no monetary consideration, whatever the amount might be, was given for the sale or purchase of the thing. It is implicit in the "purchase" of shares that money or its equivalent must be paid for them before such an act can qualify as a purchase.
>
> [emphasis in original]

47 We adopt these principles as set out in *Hoban* and apply them to the present case. We start our analysis with para 2 of the Consent Order. Other than stipulating the date on which JCSV is to be valued, it provides what we see as the controlling direction set by the Consent Order – namely, to determine the "fair market valuation" of JCSV. The subsequent paragraphs – paras 3 to 6 – specify the qualifications and limitations to what is meant by the "fair market valuation" under para 2. For instance, para 6 stipulates that there shall not be a nil valuation of the shares to be bought out, which means that the fair market valuation of JCSV must exclude any valuation which results in a nil value. Similarly, para 3 expressly excludes any discount on account of the shares being of a minority stake.

48 Paragraph 4 is another instance of a qualification to the "fair market valuation" of JCSV, although it is far more extensive than the other qualifications. Paragraph 4 specifies in some detail an entire list of transactions for the court to decide *whether* they should be taken into consideration for the valuation of JCSV. In other words, the Consent Order makes no prescription as to the relevance of those transactions on the valuation of JCSV; that is something that the court has to decide for itself with the assistance of the experts or the parties' evidence. Paragraph 4.4 of the Consent Order pertains to the

Shanghai Ossen offer, and is framed in similar terms. It merely poses a query to the Judge as to *whether* the Shanghai Ossen offer has "*any effect*" on the valuation of the shares.

49 In the absence of any explanation as to how and why these terms were agreed upon in the Consent Order, the most reasonable explanation, it seems to us, is that the parties sought to reach an agreement on the *oppression* claim, by hiving off all remaining disagreements into the *valuation* stage. We note that a significant number of the transactions referred to in para 4 of the Consent Order, including the Shanghai Ossen offer, were pleaded by Mr Abhilash as instances of minority oppression by Mr Yeo.

50 In our view, what is clear from the Consent Order is that it does not *direct* the court either way on the relevance of the various transactions, including the Shanghai Ossen offer. That decision is left entirely to the court based on the evidence led by the parties. The Consent Order says nothing about which way the court ought to construe the relevance, if any, of the Shanghai Ossen offer.

51 Coming back to the crux of the issue, namely, whether the Consent Order should be applied strictly such that JCSV has to be valued as of 30 April 2016, we are of the view that there is no basis for us to depart from the clear wording of the Consent Order. The wording of para 2 is clear – the court shall determine "the fair market valuation of [JCSV] as at 30.4.16". We note that there is simply no indication as to what the parties had intended when settling on this date for the valuation of JCSV. Unlike *Hoban*, in which the interpretive exercise could be premised on the ordinary meaning of the word "purchase", the clause here merely identifies a date. Devoid of context, the choice of a date does not ordinarily mean anything – it is an arbitrary choice. That difficulty is

compounded by the fact that when we look at the chronology of events in the present appeal, 30 April 2016 does not seem to be related to any significant event. Both counsel were unable to point to any event of note occurring on that date. We infer from the absence of any reference to the date in the experts' reports or their oral testimonies that the experts were equally oblivious as to the choice of the date. Therefore, we are unable to find or conceive of any possible intention on the part of the parties in stipulating 30 April 2016 as the operative valuation date.

52 While we may agree that the valuation should be assessed as of 30 April 2016 – the date specified in the Consent Order – it does not follow that the Shanghai Ossen offer would *ipso facto* constitute the "best evidence" of JCSV's fair market value just because the Shanghai Ossen offer was still alive then. It must be borne in mind that the offer was *always* subject to the two crucial features outlined at [19] above, the import of which will be explained below.

The relevance of the Shanghai Ossen offer

53 We turn now to the main issue that arises in this appeal, namely, whether JCSV ought to be valued on the basis of the Shanghai Ossen offer. In brief, our view is that the Shanghai Ossen offer does not have the significance which Mr Singh is seeking to advance for the appeal. Although we accept Mr Singh's general submission that an offer to acquire a company's shares may provide some evidence of the value of those shares, that is not a rule that applies invariably. As we have highlighted above, the Shanghai Ossen offer was not an unconditional offer capable of immediate acceptance. It was subject to due diligence which, significantly, was never carried out irrespective of whose fault it was which prevented the due diligence exercise. Further, the offer was not on a cash basis but Mr Abhilash's new argument effectively seeks a payout on the

basis of an *immediate* payment of $50m. It is therefore unsurprising to us that neither expert attached any significance or relevance to the Shanghai Ossen offer for the valuation of JCSV. In fact, as elaborated below at [78]–[87], the experts, in particular Mr Rao, went further to explain why the offer was of no assistance in the expert valuations of JCSV's fair market value.

The relevance of third-party offers

54 Mr Singh's submission that offers made by third-parties to acquire a particular property, such as shares in a company, are the best evidence as to the fair market value of that property is a simple one. "Fair market value", he contends, refers to the price that a seller is willing to accept, and a buyer is willing to pay, in an arm's length transaction, citing *Re Howie and others and Crawford's arbitration* [1990] BCLC 686. Mr Divyanathan accepts this definition, though he submits that it has been misapplied by Mr Singh. We will address this point below. For now, taking this definition of "fair market value", Mr Singh submits that evidence of an actual offer made by a third-party is the best evidence of fair market value because it is precisely an offer that a buyer is willing to pay in an arm's length transaction (assuming that the seller is also willing to accept).

55 In support of this proposition, Mr Singh cites several authorities from Australia and Canada. We consider these in turn.

The Canadian authorities

56 Reference is made to the decision of the British Columbia Supreme Court in *Nelson v Vanier* [2013] BCJ No 2939 ("*Nelson v Vanier*"), in particular Schultes J's comment at [28] that the "absolute gold standard" for valuers is to ask what a genuine purchaser is willing to pay in the open market. It was argued

that this decision supports the proposition that even in a case where an offer is made but not eventually accepted, the significance of the offer, in terms of indicating the true value of the shares, is not diminished.[40] As a legal proposition, we have no difficulty with this submission.

57 This however neglects to paint a full picture of the facts in that case. The parties in *Nelson v Vanier* were in a "marriage-like relationship", and had by a consent order asked the court to determine the value of shares in a company they had operated together. It was agreed in the consent order that the value of the shares at which the parties may purchase the other's interest should be the share value as determined by the expert report of one Ron Hooge, but if they did not agree on the share value after reviewing the expert report, they may apply to court to determine a fair share value (at [9]). Mr Hooge initially valued the company at $1.32m. There was also several offers by a third-party to purchase the business and his *final* offer was for $1.45m, but subject to the condition that neither vendor would work as a fishing guide within a 400km radius for four years. Mr Vanier, however, rejected the offer as he was not agreeable to the restraint of trade. The offer was subsequently withdrawn. A supplementary expert report was then called in which Mr Hooge explained that he was fully informed of the third-party offer, including the requirement of a non-competition clause, wherein he concluded that the offer was a *bona fide* one that met the accepted definition of fair market value. Consequently, Mr Hooge expressed the opinion that the fair market value of the shares, if sold, was the same as the third-party's offer, *ie*, $1.45m.

58 It was in those circumstances that Schultes J had to decide on the fair market value of the shares. Schultes J considered that the supplementary expert

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[40] Appellant's Case at paras 11 and 22–27.

report was the "best starting point" for the fair market value of the shares (*Nelson v Vanier* at [27]). He noted that the *report showed* that the "absolute gold standard" for valuers of shares in a business is what a genuine purchaser is willing to pay for them. The rationale behind this, he explained, was that the order to permit one party to buy out the other only made sense if the price paid corresponds to the amount for which *they could collectively sell the business to a third-party* (at [28]).

59 Accordingly, the court's acceptance of a third-party offer as an indication of the market value of the shares even when it has been withdrawn must be understood in the context of that case. In particular, the expert had specifically spoken to the third-party who had made the offer, and the expert had *himself* accepted that the offer price was an indication of the fair market value of the shares. It was *not* a situation, as in the present appeal, where the expert had valued the company differently from the third-party offer. Further, it appears that the third-party offer in *Nelson v Vanier*, unlike the offer in the present case, was *not* subject to due diligence and was capable of acceptance but for the restraint of trade clause. It was described as the "final offer". In other words, the value of the shares had already properly crystallised into an offer capable of acceptance, unlike in the present case. Seen in this light, the fact that the offer was not accepted because Mr Vanier did not agree to be bound by the non-competition clause was understandably also irrelevant – the expert had already determined the market value of the shares (at [32]). We also observe that this shows that *even* when presented with evidence of a third-party offer, the court will have regard to the evidence of the expert valuer in reaching its decision.

60 Mr Singh also relies on *Grandison v NovaGold Resources Inc* [2007] BCJ No 2639 ("*Grandison*") in which the court held that an asset value

approach to the determination of fair value was inappropriate given that the company did not have significant assets as at the valuation date, and therefore had resort to market transactions as an indicator of the value of the company.

61 *Grandison* concerned a shareholder of Coast Mountain exercising his right of dissent to a plan of arrangement under which NovaGold would acquire the shares of Coast Mountain. The shareholder, Mr Grandison, applied to court for a determination of the payout value of his shares, which was defined in the relevant statute as the "fair value" that the shares had prior to the adoption of the arrangement. Coast Mountain was in the business of generating hydro-electricity and had at the valuation date identified three potential hydro-electric sites in British Columbia. Significant costs had been incurred on those sites. In the plan of arrangement, NovaGold would acquire the shares of Coast Mountain at $2.20 per share. Mr Grandison's expert testified that the fair value of the shares was between $6.135 and $8.51 per share. This was premised on a discounted cash flow method of valuation (at [72]–[75]). The court noted that such a valuation method was "particularly difficult" in the case of a company such as Coast Mountain where the project was in development stages without any *operating history*. The components of revenue and cost were thus uncertain, and the manner in which and the time within which the undertaking was likely to be brought to fruition were affected by a variety of factors (at [80]).

62 In choosing between the experts, the court noted that it was not bound to adopt any particular approach towards the valuation. On the facts, "an asset value approach to the determination of fair value [was] not appropriate". This was because Coast Mountain did not have any significant assets as at the valuation date, and its value "lay in the potential to earn income" in the event any of its projects was carried to fruition (*Grandison* at [158]). The court also rejected the discounted cash flow method as the valuations were "rife with

speculation and uncertainty"; it provided "some evidence", but was "not determinative" of value (at [159]). It was in this context that the court turned towards the initial offer made by NovaGold in the plan of arrangement (which Mr Grandison had objected to). We note that the offer in the plan of arrangement appears to have been made on the basis of a *completed* due diligence process – NovaGold was permitted to carry out due diligence up till 14 April 2006, while the announcement regarding the plan of arrangement was made on 26 May 2006 (at [42] and [53]). The court concluded that the transaction itself was the appropriate starting point in that case. Market transactions, like that one, are "indicators of prices at which parties have been prepared to buy and sell the shares", and "*depending on the circumstances*, it may be the best evidence of fair value" [emphasis added]. The court went on to note that there were no circumstances in that transaction to suggest that adopting the initial offer made by NovaGold would have been unfair to a shareholder in Coast Mountain (at [165] and [166]).

63 In our view, *Grandison* does not stand for the expansive proposition that any third-party offer is *invariably* the best evidence of the value of a company. The court made it plain that the relevance of any offer would depend on the circumstances of the case. Significantly, the offer was made by NovaGold, the *same* party who was acquiring the shares under the plan of arrangement. In that sense, it was not strictly speaking a third-party offer. The court in *Grandison* resorted to the offer by NovaGold because there were issues in applying the other alternatives. We are therefore of the view that *Grandison* merely opens the door for the court to consider offers to purchase in certain circumstances; there is no *rule* that any offer, much less a *third-party* offer, is invariably the best evidence in all cases. Ultimately, the court will have to look at the basis of

and the assumptions made by the valuers, as the court did in *Grandison*. There can be no dispute that this must include the terms and the nature of the offer.

The Australian authorities

64 Mr Singh also relies on the decision in *MMAL Rentals Pty Ltd v Bruning* (2004) 63 NSWLR 167 ("*MMAL Rentals*"), a decision of the New South Wales Court of Appeal, for the proposition that "a contemporaneous offer established a 'floor' for the value or price" of a company's shares. Spigelman CJ was quoted as stating that it would be "absurd" to exclude the evidence of a third-party offer.[41]

65 It is correct that in *MMAL Rentals*, the court disregarded *both* parties' expert valuations, and instead relied heavily on a prior offer made for the acquisition of the company's shares. But it is important that the facts of the case be fully fleshed out in order to fully appreciate the context of the court's decision. In that case, Mitsubishi held 81.25% of the shares in a company named MMAL Rentals, while one Mr Bruning held the balance 18.75%. MMAL Rentals had a subsidiary named Kingmill. Under a share allotment agreement in relation to shares in MMAL Rentals, Mitsubishi asserted its right to purchase Mr Bruning's shares for "fair market value" pursuant to an option clause. Two experts gave their valuations of the shares. Mitsubishi's expert applied a net assets approach. He valued the company at $58,911 and Kingmill at nil value. On the other hand, Mr Bruning's expert valued his indirect interest in Kingmill at $6m based on a computation of profits a subsidiary of MMAL Rentals would make. The trial judge rejected both experts' evidence. Mr Bruning's expert's valuation was based on unverified assumptions and was without foundation,

41 Appellant's Case at paras 29–35.

while Mitsubishi's expert's valuation was simply the value of MMAL Rental's real estate, which entailed valuing Kingmill as nil.

66 On appeal, Spigelman CJ endorsed the trial judge's approach, and held that the shares had to be valued after taking into account what Mitsubishi would be prepared to pay (*MMAL Rentals* at [32]). The trial judge considered the fact that Mitsubishi had been willing to pay a substantial amount for the goodwill of the subsidiary, and that Mitsubishi had previously offered to take over Mr Bruning's shares at $535,000. The trial judge concluded that a "realistic" value of the shares was $600,000 (at [36]–[44]). In Spigelman CJ's view, this was not a different basis of valuation, but was simply an application of the net assets approach – the trial judge had simply given the goodwill in Kingmill a value (at [65]–[68]).

67 Spigelman CJ went on to consider the relevance of an offer to purchase the shares. The trial judge had used the previous offer by Mitsubishi as a "signpost", but appeared to have used it to determine the "floor" of the fair market value of the shares, eventually awarding a sum higher than the Mitsubishi offer. Spigelman CJ held that the trial judge was right to have relied on the offer as determining the fair market value "to a very substantial degree" (*MMAL Rentals* at [83]). In his view, where a valuation "must refer to the special potentiality of particular property for a specific purchaser, an offer by *that* purchaser to purchase *that* property is relevant" [emphasis in original]. Such an offer was not only relevant but "highly probative". While expert evidence may establish that such an offer is inadequate, unless there are special considerations, the offer "clearly establishes a floor". On the facts of that case, where a particular purchaser has manifested its intention to acquire the particular property in a context where, on normal valuation principles it may appear that

the value is nil, the exclusion of the evidence of an offer by *that* purchaser would be "absurd" (at [96]–[98]).

68 Two points about *MMAL Rentals* must be emphasised. First, although framed as a rejection of the Mitsubishi's expert's valuation, Spigelman CJ made it clear that in substance, it was more of an *adjustment*, insofar as the court disagreed with the valuation of an *asset* of MMAL Rentals (*ie*, the nil valuation of the subsidiary, Kingmill). Spigelman CJ (at [68]) affirmed that the valuation basis was still that of a net assets basis. Second, both the circumstances of the decision and the language used by Spigelman CJ narrow the type of third-party offers which may be relevant. The core of Spigelman CJ's decision is that in the case of an offer by a *particular* purchaser for that *particular* property, which has special potentiality to *that purchaser*, *that offer* should be taken into account when *that* purchaser is seeking to acquire the shares. On the facts, the party seeking to acquire the shares was the *same party* who had previously made the offer, *ie*, Mitsubishi in both instances. It was not a third-party offer. Furthermore, it would appear that the offer was not subject to any due diligence given Mitsubishi was then an existing shareholder of MMAL Rentals. However, in the present case, the third-party who made the offer, *ie*, Shanghai Ossen, is not the party who is acquiring the shares from Mr Abhilash. There is simply no evidence whatsoever that the "special potentiality" of JCSV, if any, to Mr Yeo was the same as that to Shanghai Ossen.

69 Finally, Mr Singh also relies on the decision of the Federal Court of Australia in *Goold v Commonwealth of Australia* (1993) 114 ALR 135 ("*Goold*"). This was a decision regarding the valuation of land and not shares, but Mr Singh submits that the principles are similarly applicable.

70 In *Goold*, the applicants were owners of two parcels of land which were compulsorily acquired. They claimed compensation under statute, and the issue that arose was the valuation of each of the properties. Experts were called to value the properties. An aspect of the case described as "unusual" was that there was evidence of an offer to purchase each of the properties. The respondents objected to the admission of evidence concerning the offers, contending that evidence of an offer (as distinct from evidence of a concluded contract) was never admissible in connection with the assessment of value. The court held that it would be "anomalous and unjust" for the court to adopt a "blanket rule excluding offer evidence". Such a rule might exclude "cogent evidence of the interest of a particular purchaser" in the land being valued, "a person who was willing to pay more than ordinary market price" (at 143).

71 However, the court cautioned that before placing reliance upon a mere offer, the court must consider the genuineness of the offer. The offer might be a sham or an attempt to manipulate the market for some ulterior purpose. It might have been genuine when made, but might not have led to a concluded contract, and may have been withdrawn. Hence the court cautioned that "even a genuine offer cannot be regarded as direct evidence of value", but it is something for the court to "take into account". How much weight is to be given to the offer is something to be determined on the facts of each case (*Goold* at 144).

72 As we understand it, *Goold* sets out the sensible proposition that an offer is evidence, but not necessarily the "best evidence". We should add that *Goold* does not hold that a third-party offer forms a floor for the value of the property. *Goold*, though decided in the context of valuation of land, was cited in *MMAL Rentals* for the proposition that evidence of an offer could be considered by the court even for the valuation of shares. Indeed, there is no principled reason why

it would not similarly apply to shares. That said, all that *Goold* and *MMAL Rentals* establish is that the court would not *exclude* evidence of a third-party offer.

73 In our view, the cases cited set out the general principle that the court will not exclude evidence of a third-party offer, such as the Shanghai Ossen offer, to be admitted. But that is a non-issue here since the Shanghai Ossen offer was specifically referred to in the Consent Order. The cases also show that such offers do have some informational value as to the fair market value of an asset. But they do not go so far as to compel the court to give determinative weight to such offers. As we have stated at the outset, any fair market valuation is necessarily a fact-sensitive exercise. *Goold* makes clear that the weight of the evidence is to be determined on the precise facts of each case. *Grandison* similarly advocates a fact-specific approach. *MMAL Rentals* is arguably the strongest indication that the court will give significant weight to evidence of a third-party offer. But even that has to be read in the context, as we have observed at [68], of the circumstances of the case and the language used. *MMAL Rentals* illustrates the point that an offer by a *particular purchaser* to acquire a particular asset will be given significant weight in the context of that asset's value to *that purchaser*. It does not go so far as to say that *any* third-party offer is necessarily the best evidence of that asset's value to *any* purchaser.

74 In our view, evidence of a third-party offer is relevant but the appropriate weight to be ascribed to such offers has to be determined on the facts of each case – specifically, the terms and nature of the offer. Although, the "absolute gold standard" for valuers is what a genuine purchaser is willing to pay, a distinction has to be drawn between (a) what a (hypothetical) genuine purchaser is willing to pay; and (b) what the *specific offeror* (who made the offer which is the subject of consideration) was prepared to pay on the facts of a particular

case. The two are conceptually distinct. The latter might be *indicative* of the former while the former is a conceptual approach to determining fair market value based on objective data before the court together with appropriate input from expert witnesses. Consequently, the evidence of an offer that is before the court must, in each case, be evaluated before it can be determined whether, and how much, that offer accurately indicates what a "genuine purchaser" would be willing to pay.

75 This point was brought up by Mr Divyanathan before us, albeit couched in slightly different terms. While accepting the general definition of "fair market value" as the price reached between a willing buyer and willing seller, Mr Divyanathan points out that a "willing buyer" is a hypothetical concept, and not any particular buyer who has made an offer which is accepted. He submits that it cannot be ruled out that there could be buyers who are willing to purchase an asset at a huge premium to what is the fair market value of that asset, perhaps due to special synergistic considerations which that buyer might have. In principle, we agree with this submission.

76 To conclude on this point, we accept that where there is evidence of a third-party offer to acquire shares, and that offer is shown to have been made at arm's length, is genuine, and not speculative or *conditional*, the court can, and ought to, take that offer into account in determining the fair market value of the shares. These conditions are merely pre-conditions *before* the court can even attribute *any* informational value to a third-party offer – for instance, an offer that is not genuinely made would obviously be lacking in any informational value. However, we do not accept the elevation of the evidential value of such offers to the level that they invariably represent the "best evidence" of the shares' fair market value.

Expert evidence on the Shanghai Ossen offer

77 As we have found above, a third-party offer can in principle constitute *relevant evidence* of the value of a company. Consequently, it follows that the informational value of such an offer is something that expert valuers should be well placed to consider. What then was the weight placed by the experts on the relevance or effect of the Shanghai Ossen offer in arriving at their respective valuations of JCSV? It is especially germane to examine the experts' treatment of the Shanghai Ossen offer in their valuations since the Consent Order specifically invited the parties to consider whether the offer had *any effect* on the fair market value of JCSV.

Mr Thio's evidence

78 Mr Thio made no mention of the Shanghai Ossen offer in his expert report. This was probably understandable given that his valuation approach was on a net assets basis. Under cross-examination, he explained that while he was aware of the Shanghai Ossen offer when he prepared his valuation, he had been instructed that the offer had lapsed, and was thus not provided with the documents in relation to the offer. On that basis, he opined that it had no relevance to his valuation.[42]

79 When queried by the Judge on how he would regard offers in the market, such as the Shanghai Ossen offer, Mr Thio explained that it would involve a different type of valuation approach – he would be valuing the company based on the additional information of the investor, such as the synergies, contacts, or know-how that such an investor might bring in. Due to such considerations, the value of the company may be significantly higher to that investor. If, however,

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42 Transcripts, 3 November 2017, pp 26–27: ROA, Vol III (Part 18), pp 29–30.

one is purely valuing the company, then it is the value of the company as it is that has to be assessed, and assumptions cannot be made on the basis of a *particular* investor coming in.[43]

80 He also explained that he had understood that the offer was subject to certain terms and conditions. He was also instructed that Shanghai Ossen had not been given any numbers to view when they made the offer of $50m. Therefore, in his view, the $50m figure could eventually be significantly higher or lower.[44]

81 Finally, following questions posed by the Judge, Mr Thio accepted that if it is an existing offer backed by a Memorandum of Understanding with *concrete terms*, he may consider that in his valuation. However, he did not say *how* he would consider such an offer for the purposes of his valuation. Nor was he asked to clarify or elaborate by counsel for Mr Abhilash at the trial.[45]

Mr Rao's evidence

82 Mr Rao similarly made no mention of the Shanghai Ossen offer in his expert report. In fact, at the trial, Mr Rao confirmed that his valuation of JCSV did not take into account the Shanghai Ossen offer.[46] It is immediately apparent that this is in stark contrast to Mr Abhilash's case on appeal.

83 When both experts were giving their concurrent evidence, Mr Rao provided his views on how he would view an offer to acquire JCSV. He explained that there was a crucial distinction to be made between the *market*

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43 Transcripts, 2 November 2017, pp 153–155: ROA, Vol III (Part 17), pp 156–158.

44 Transcripts, 2 November 2017, pp 155–156: ROA, Vol III (Part 17), pp 158–159.

45 Transcripts, 2 November 2017, pp 157–158: ROA, Vol III (Part 17), pp 160–161.

46 Transcripts, 2 November 2017, p 132: ROA, Vol III (Part 17), p 135.

value of a company, and its *investment value*. In particular, he used the example of a company which has been awarded a massive contract. However, if such a company lacks the capacity to deliver on that contract, it would hit a ceiling in terms of its market value. That is where investment value comes in. An investor who is able bring in capital and increase the company's capacity to deliver on the contract would then be able to reap greater value from that same company. This latter value is what he terms as an "investment value", and exists only from the perspective of that investor.[47]

84 With this understanding of investment value and market value, Mr Rao added that it follows that no buyer would ever transact at investment value. Such a transaction would mean that the buyer is left with no gains. The flipside of this is that, in general, transactions are entered into at a "premium to market value". This is because the investment value is usually much higher than market value. A buyer or investor would typically apply a discount from the investment value as a buffer for its own gains. In his view therefore, offers made by potential investors or buyers are not made on a "market value basis".[48] In other words, Mr Rao was implying that the Shanghai Ossen offer was not representative of the "market value" of the JCSV.

85 We note that despite the fact that the thrust of Mr Rao's evidence was that an offer by a third-party would be closer to a valuation of a company on an investment value basis rather than on a market value basis, counsel for Mr Abhilash at the trial below did not seek any clarification from Mr Rao on his evidence. Consequently, the state of the evidence, it seems to us, is that Mr Rao did not ascribe any weight to the Shanghai Ossen offer for the purposes

47 Transcripts, 2 November 2017, pp 158–159: ROA, Vol III (Part 17), pp 161–162.

48 Transcripts, 2 November 2017, pp 159–161: ROA, Vol III (Part 17), pp 162–164.

of determining the fair *market value* of JCSV. In his view, the figure of $50m would be a premium to JCSV's market value (or a discount from its investment value). However, Mr Rao did not offer any explanation as to *how much* of a premium (or discount as the case may be) was factored into the offer by Shanghai Ossen. It may well be that this information only resides with Shanghai Ossen. Nonetheless, it remains a fact that we have no basis to arrive at a suitable discount.

Conclusion on the experts' views towards the Shanghai Ossen offer

86 The state of the expert evidence may thus be summarised as follows:

(a) Neither expert considered the Shanghai Ossen offer in their respective expert reports.

(b) In Mr Rao's case, he did not think that the Shanghai Ossen offer was relevant to the fair market value of JCSV as a matter of principle.

(c) In Mr Thio's case, he did not consider the Shanghai Ossen offer on account of several reasons – he thought it had lapsed, he was not provided the documents, and he was told it was subject to terms. Although he accepted that he would consider a sufficiently concrete offer in his valuation, this tentative view has to be measured against his evidence that an offer by a third-party would be an indication of the value of the company from the perspective of *that particular* investor. In any event, the Shanghai Ossen offer was not a "concrete" offer.

87 It therefore seems to us that while Mr Thio remained open in principle to *consider* the relevance of the Shanghai Ossen offer if it had been sufficiently concrete, Mr Rao was opposed to such an approach altogether. The difficulty

however is that there is no indication as to *how* Mr Thio would consider the Shanghai Ossen offer had it been sufficiently concrete. On balance, it would appear to us that neither expert is of the view that the Shanghai Ossen offer is *determinative* of the fair market value of JCSV.

88 It is well established that while the court is not obliged to unquestioningly accept expert evidence, even if it is unchallenged, the court would be slow to substitute its views for those of the expert's in the absence of good grounds: *Lo Sook Ling Adela v Au Mei Yin Christina and another* [2002] 1 SLR(R) 326 at [48]; *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983 at [76]. We see no good grounds on which to reject the unchallenged and consistent evidence of *both experts* that the Shanghai Ossen offer is not determinative of the fair market value of JCSV and more pertinently, none has been suggested by Mr Abhilash. This is to be contrasted with the approach adopted in *Grandison* and *MMAL Rentals* where the court rejected both valuations by the parties' experts and instead accepted the earlier offers as the best evidence of the shares. It is, however, important to bear in mind that in those cases, the offers were preferred over the expert valuations because the court was satisfied that the offers were indeed "concrete", *ie*, not subject to any due diligence, and that the offers were made by the *same party* who were seeking to buy out the other shareholder. In short, the court in those cases unlike the present case, had very good reasons to disregard the expert valuations. The fact that the Shanghai Ossen offer was genuine and serious does not impel us to disregard the experts' assessment that the offer was not relevant to determine JCSV's fair market value. The genuineness of an offer should not be confused with the conditional nature of the offer. We can accept that the Shanghai Ossen offer was indeed genuine and serious but the inquiry does not end there. For reasons elaborated below, when the terms of the Shanghai Ossen offer are

properly examined, it is clear to us that the offer had remained conditional at all material times and was made by a third-party who saw an investment value in JCSV beyond its fair market value.

89 We note that the difficulty in Mr Abhilash's case on appeal arises directly from the manner in which he chose to address this issue in the court below. In this regard, we reiterate the caution sounded above that while a party may well be given leave to run a new point on appeal, the state of the evidence as adduced in the court below may ultimately have an adverse impact on the new case. Had it been Mr Abhilash's case from the start that the Shanghai Ossen offer was determinative, or the best evidence, of JCSV's fair market value, we have little doubt that both experts would have been tested more stringently on this point. Mr Rao would also have needed to revise his report. His own testimony suggests that he would not have been minded to change his views on the relevance of the Shanghai Ossen offer. As it is however, it is Mr Abhilash's burden to prove that the Shanghai Ossen offer is good evidence of the fair market value of JCSV. This he has failed to do. His own expert had effectively excluded or at the very least substantially diminished the relevance of the Shanghai Ossen offer.

The Shanghai Ossen offer was subject to due diligence

90 Finally, even if we were to accept that an offer made by a third-party to acquire a company can in principle represent the "best evidence" of that company's value, it remains critical to examine the terms and nature of the offer in question in order to ascribe it with the appropriate weight, if any. In our view, the features of the Shanghai Ossen offer preclude us from treating it as reliable evidence of JCSV's "fair market value".

91 The most obvious difficulty is that the Shanghai Ossen offer was at all material times *expressly* subject to due diligence. This was the case in the Memorandum of Understanding and in the Investment Framework Agreement. Clause 3.1 of the Memorandum of Understanding states that the seller's "*expected* price" [emphasis added] was $50m, "which is subject to the results of due diligence".[49] In the Investment Framework Agreement, cl 2.1 provides that the buyer agrees to transfer $50m "which is a *tentative price*, and *may be adjusted according to the results of due diligence conducted*" [emphasis added].[50] The clear wording of the relevant clauses in both documents therefore shows that the price had in fact never been firmly fixed. Mr Singh may well be right that as of 30 April 2016, there was nothing to suggest that due diligence would turn up any adverse findings. After all, he stressed that everyone expected the deal to go through. Mr Yeo himself had in November 2015 injected $1.5m capital into JCSV, which displayed a certain degree of optimism in JCSV's continued survival and that the deal with Shanghai Ossen would likely go through.[51]

92 However, we cannot accept that, simply because nothing *appeared* to be amiss at that time, the Shanghai Ossen offer ought therefore to be taken as a definitive or concrete offer to acquire JCSV for $50m. Further, optimism by Mr Yeo, whatever its degree, does not change the nature and terms of the offer. It is at best an expression of confidence. In that regard, it must be recognised that the Shanghai Ossen offer was *always* only a *conditional* offer. Had Mr Abhilash come to court on or about 30 April 2016, presenting the court with evidence that there was a *conditional* offer by Shanghai Ossen, expressed as

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49 Memorandum of Understanding: ROA, Vol III (Part 7), p 125.

50 Investment Framework Agreement: ACB, p 112.

51 Appellant's Case at para 65.

subject to due diligence, to acquire JCSV for $50m, it is difficult to imagine that the court would have valued JCSV at $50m on that basis alone.

93 In any event, we disagree with Mr Singh's submission that it would be for Mr Yeo to show that the due diligence would have identified matters of concern to cause the offer to be reduced or withdrawn. It is apparent to us that the Shanghai Ossen offer was undoubtedly at a significant premium when compared with the net assets valuation of JCSV. In addition, the offer could not possibly have been based on JCSV's existing income stream given that it had been loss-making for a number of years. While there is no insight as to how the indicative price of $50m was arrived at, what is clear to us is that Shanghai Ossen obviously saw value in JCSV *beyond* its net assets valuation. However, it is unclear to us what that intrinsic value was in the eyes of Shanghai Ossen. So in the due diligence exercise, Shanghai Ossen would be examining matters which have a bearing on their assessment of the value given their plans for JCSV. That is something which may not be apparent to Mr Yeo or to JCSV and more importantly is outside the control of Mr Yeo and/or JCSV. Therefore, it would be unfair to place any burden on Mr Yeo to explain and identify what would be regarded as negative in the eyes of Shanghai Ossen for the purposes of their due diligence to decide on the eventual price for the JCSV shares.

94 We should highlight that in each of the cases referred to by Mr Singh – *Nelson v Vanier, Grandison, MMAL Rentals* and *Goold* – unlike the present case, none of the offers were subject to any due diligence. Instead, in each of those cases, the offers were definitive and concrete.

The Shanghai Ossen offer was not a cash offer

95 A further difficulty with the Shanghai Ossen offer is the nature, or structure, of the offer. Although we have thus far referred to it as an offer to acquire JCSV for $50m, it would be more precise to refer to it as an offer for $10m in cash coupled with $40m in equity in Shanghai Jiashi.

96 Mr Abhilash's case based on the Shanghai Ossen offer proceeds on the assumption that the entire $50m is liquid and if accepted, would translate into an *immediate windfall* for Mr Abhilash as it would be much better than if the deal had gone through. That cannot be right. The difficulty with this submission is that the court seeking to value JCSV as at 30 April 2016 would effectively *also* have to value the equity in Shanghai Jiashi – the fact that the equity in Shanghai Jiashi was to be acquired for $40m does not mean that it has a fair market value of $40m as at *30 April 2016*. That would in turn require appointing expert valuers who would conceivably have to apply certain discounts to account for the probability of Shanghai Jiashi succeeding or failing. Conceivably, a discount might also be warranted for the lack of marketability of the shares. When this point was highlighted to Mr Singh, he proposed that the solution is for the court to apply a suitable discount. Again we decline to do so because it would be speculative in the absence of any evidence on the applicable discount rate or its basis. For completeness, we should add that it is not even clear to us whether Shanghai Jiashi had been incorporated as at 30 April 2016.

Special potentiality of the Shanghai Ossen offer

97 The other difficulty with applying the Shanghai Ossen offer is that the Shanghai Ossen offer would at best indicate the investment value of JCSV *to Shanghai Ossen*. In this regard, we note that this is rather similar to what

Spigelman CJ observed in *MMAL Rentals* as the "special value" to a particular purchaser. In this case, the offer of $50m may well represent Shanghai Ossen's valuation of JCSV, bearing in mind the investment plans that they might have had for JCSV. In this regard, Mr Singh similarly suggests that we could apply a discount to the value of $50m, so as to bring it down to the market value. He contends that this would be consistent with the principle as explained by Mr Rao. We however do not see how *any* discount would be anything other than entirely arbitrary in the absence of evidence from the experts.

98 We reiterate that it is for Mr Abhilash to prove that the Shanghai Ossen offer represents the fair market value of JCSV, and he cannot do so merely by suggesting a starting figure, and inviting the court to apply an arbitrary discount without any input from the experts. This is precisely why any proper evaluation of the Shanghai Ossen offer needed to be examined at the trial with the experts providing their views on its relevance and whether any adjustments in terms of discount should be factored in. Mr Abhilash had his chance to do this in the court below but he elected not to ascribe the weight to the Shanghai Ossen offer then which he is now seeking to impress upon this court.

99 We also reject the suggestion by Mr Singh for the matter to be remitted to the trial judge to ascertain an appropriate discount. It will be recalled that we allowed the new point to be raised on appeal on the premise that all the relevant material is before us, and that no further evidence would be required.

Conclusion

100 Bearing in mind the quality and nature of the expert evidence on the relevance of the Shanghai Ossen offer, and the inherent difficulties arising from its precise terms and nature, we are satisfied that Mr Abhilash has not proven

that JCSV had a fair market value of $50m as at 30 April 2016. In the absence of any other credible figure, we order that the valuation arrived at by the Judge shall remain. Unfortunately for Mr Abhilash, there is no basis for this court to arrive at a sum which is *above* Mr Thio's net assets valuation but *below* the Shanghai Ossen offer. Any attempt by this court to do so would be speculative and arbitrary. Specifically, it would be unsafe for this court to use Mr Yeo's $1.5m capital injection for the allotment of 40,000 shares at an "implied price" of $37.50 per share as a proxy for the fair market value of JCSV. Apart from the fact that Mr Singh duly acknowledged during the appeal hearing that he was not seeking to rely on the "implied price" of $37.50 per share as a proxy, we do not see any reason or basis to disturb the Judge's acceptance of Mr Yeo's evidence and Mr Thio's unchallenged expert evidence that the capital injection did not reflect JCSV's fair market value – see [28]–[29] above. This is also consistent with the fact that Mr Rao did not rely on the capital injection *at all* in his valuation report.

101 The appeal is therefore dismissed with costs which we fix at $50,000 inclusive of disbursements.

Judith Prakash Judge of Appeal	Steven Chong Judge of Appeal	Quentin Loh Judge

Davinder Singh SC, Jaikanth Shankar, Tan Ruo Yu, Yee Guang Yi and Darren Low (instructed counsel, Drew & Napier LLC) and Liew Teck Huat (Niru & Co LLC) for the appellant;
Suresh Divyanathan, Kristine Koh and Clarissa Chow (Oon & Bazul LLP) respondents.
