IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 162

Suit No 1268 of 2016
(Assessment of Damages No 19 of 2021)

Between

Borneo Ventures Pte. Ltd.

… *Plaintiff*

And

Ong Han Nam @ Edward Ong

… *Defendant*

JUDGMENT

[Damages - Assessment]

Version No 1: 08 Jul 2022 (17:09 hrs)

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Borneo Ventures Pte Ltd
v
Ong Han Nam

[2022] SGHC 162

General Division of the High Court — Suit No 1268 of 2016 (Assessment of Damages No 19 of 2021)
Lai Siu Chiu SJ
20–24 September, 8 November, 6 December 2021

8 July 2022 Judgment reserved

Lai Siu Chiu SJ:

Introduction

1 The assessment of damages ("the AD hearing") in this suit is a follow-up of this court's earlier decision in *Borneo Ventures Pte Ltd v Ong Han Nam* [2020] SGHC 91 ("the first judgment") and the Court of Appeal's decision in *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 ("the Appeal judgment"). The first judgment followed from an eight days' trial to determine liability that took place before this court in July 2019 ("the first trial"). Where abbreviations are used, they would be those used in the first judgment unless otherwise stated.

2 In the first trial, this court had *inter alia* found the defendant, Ong Han Nam("Ong") liable to the plaintiff, Borneo Ventures Pte Ltd ("Borneo"), for breach of various warranties in a share subscription agreement dated 30

December 2013 ("the SA"), pursuant to which Borneo acquired 77.5% of the share capital in the Sutera Harbour Group ("SH Group") of companies for a consideration of about RM700m. The acquisition was completed on 26 March 2014.

3 Ong appealed against the first judgment. In Civil Appeal No 78 of 2020 ("the Appeal"), the Court of Appeal partially allowed Ong's appeal and varied the first judgment. It held that Ong was only liable for breach of what it termed the Land Warranty under the SA, namely that Borneo's subsidiary Sutera Harbour Golf & Country Club ("SHGCC") was the sole legal and beneficial owner of 236.18 acres (or 95.58 hectares) of land in Sembulan ("the Sembulan Land") including a portion measuring 1.459 acres ("the Subject Land") when it was not. Ong had sold the Subject Land to one of his companies Omega Brilliance Sdn Bhd ("OBSB") for RM1,000 consideration without the knowledge of Borneo.

4 The Court of Appeal disallowed the injunction that this court had granted restraining Ong from transferring the land to OBSB and held at [80] that damages would be an adequate remedy for Ong's breach of the Land Warranty. The appellate court then said (at [81]):

> In our view, the appropriate amount of damages should be based on the fair market value of the Subject Land at the time of purchase, with interest. This would have been the amount that would have been deducted from the acquisition price if GSH had been properly apprised of the fact that the Subject Land was not part of the deal. The award of damages should also have regard to any tax liability incurred by SHGCC on account of the S&P, and any tax penalties that SHGCC would be required to pay due to the S&P. Based on the figure so arrived at, Ong should only pay to Borneo Ventures 77.5% of the same, as under the SA, Borneo Ventures only acquired 77.5% of the shares of SH Group and the remaining still belong to Ong.

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5 This court was tasked with assessing damages due to Borneo based on the above extract from the CA judgment.

The assessment

6 There were four witnesses for the assessment. The witnesses who testified for Borneo were Gilbert Ee ("Gilbert"), who had given evidence at the trial on liability, and Borneo's expert Wong Chaw Kok ("Wong"), a chartered surveyor and registered valuer. On Ong's part, he was a witness together with his expert Ms Yen Sie Fui ("Ms Yen"), who like Wong is also a registered valuer.

(i) Borneo's case

7 To recapitulate, Gilbert is the group Chief Executive Officer ("CEO") of GSH Corporation Ltd ("GSH"), the ultimate holding company of Borneo. In his affidavit of evidence-in-chief ("AEIC"), Gilbert deposed[1] that had Borneo been apprised by Ong that the Subject Land was not part of Borneo's acquisition under the SA, GSH/Borneo would have insisted on a reduction of the consideration payable under the SA. GSH/Borneo would have looked into all matters pertaining to the Subject Land to derive the appropriate fair market valuation of the Subject Land at the material time.

8 Through such investigations, GSH/Borneo would have known of the letter dated 28 January 2014 ("the 28 January letter") which Ong had sent to the Land and Surveys Department Sabah ("LSDS")[2] and realised that in the subdivision of the whole piece of land, the Subject Land was to be an individual

[1] At paras 30 - 33 of his AEIC

[2] See 1AB300

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lot without being subject to the restrictions that it may only be transferred to Sabah Electricity Sdn Bhd ("SESB") or surrendered to the Sabah State government. This meant that once the Subject Land was carved out of and subdivided from the Sembulan Land, the registered owner of the Subject Land could deal with it privately as an individual lot without any particular restrictions subject to the conversion of its use.

9 Gilbert understood that the registered owner of the Subject Land could easily apply for a change of use to convert the use of the Subject Land from "Industrial (Co-Gen Plant)" ("Co-Gen" is short for co-generation) to that of "Mixed Use" (namely commercial, tourism, residential, golf, resort, hospitality) to realize its development potential.

10 Gilbert deposed that there was significant potential for the Subject Land due to its size and prime location. The Subject Land has its own access to and from the main road, has a good frontage and is situated in a convenient and accessible area of Kota Kinabalu ("KK") just at the fringe of the city centre, 10 minutes away from the airport.

11 He deposed that in 2014, in the immediate vicinity of the Subject Land, there were completed and/or ongoing developments with commercial, office and residential use, including:

(a) Gleneagles Hospital;

(b) Riverson, a mixed development comprising of a shopping mall with 247 retail outlets, 152 residential/small office units and larger corporate offices;

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(c) Imago KK Times Square Shopping Mall which had a total floor space of about 1,400,000 sq ft and a net retail area of 800,000 sq ft spanning four levels with a trade mix of about 300 tenants like a departmental store, a supermarket, shops selling fashion, accessories and electronic gadgets, a cinema, an indoor kid's playground, bookstores, toy stores, karaoke, gaming arcade as well as a range of dining outlets, cafes and bars;

(d) Imago KK Times Square Loft, a commercial strata property of service residences comprising of 44 units; and

(e) rows of restaurants and food and beverage outlets just a short walk away from the Subject Land.

12 Consequently, Borneo obtained from Wong a valuation of the Subject Land based on the development value of the Subject Land for "Mixed Use".

13 During cross-examination,[3] Gilbert accepted that the use of the Subject Land as at 1 October 2014[4] was changed from "Tourist Complex" to "Industrial/Co-Gen". Gilbert explained he accepted that change of use offered by the LSDS on 1 October 2014 because the Subject Land was then being used as "Co-Gen" land and the change of use was aligned to that usage. However, that did not mean that the change of use in October 2014 was cast in stone and could not be changed subsequently. He disclosed that when SHGCC was negotiating the SA with Ong, the latter himself had indicated that a portion of

[3] See transcripts on 20 Sep 2021 at p 20

[4] Date of the offer letter from Lands & Surveys Department Sabah at AB2550 or DCB36

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the land occupied by 27 holes of the golf course could be converted into 18 holes and the balance land occupied by the 9 holes could be redeveloped.

14 Gilbert reminded counsel for Ong ("Mr Lem") that Borneo bought *assets* from Ong, not *land.* Moreover, GSH is a land developer and is not in the hotel business. In re-examination,[5] Gilbert explained that GSH did negotiate with Ong (as Mr Lem suggested to him) to acquire Ong's companies which owned the physical assets on an "as is where is" basis. The physical assets not only included buildings, plant and machinery in the Sutera Harbour Resort, but also land. As a developer, GSH would look at the redevelopment potential of land it acquires and add value to it to earn a return. Clearly, whatever GSH buys must have development potential. In the case of the Subject Land, the co-generation plant ("the Co-Gen Plant") situated thereon had ceased functioning permanently.

15 In the Malaysian Suit between SHGCC and OBSB/Ong, SGHCC had relied on a valuation report dated 27 April 2017 by Taylor Hobbs[6] (the "Taylor Hobbs' valuation") in which the market value for the Subject Land as at 1 March 2014 was RM12.7m as a tourist complex and RM8.9m for industrial use. No valuation was provided for "Mixed Use". Cross-examined, Gilbert explained that was because the issue in the Malaysian Suit was Ong's breach of fiduciary duties where he sold the Subject Land to himself for RM1,000. The person who instructed for the Taylor Hobbs valuation to be prepared was not him but the CFO and the lawyers; he had limited involvement in the Malaysian Suit. In fact, Gilbert was not a witness in those proceedings.

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[5] See transcripts on 20 Sep 2021 at pgs 72-75

[6] See AB1935 -1947

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16 In the AD hearing, Wong was Borneo's main witness, just as Ms Yen was Ong's main witness. Credentials-wise, there is little doubt that Wong is well qualified to be an expert and his curriculum vitae was impressive. He is registered with the Board of Valuers, Appraisers, Estate Agents and Property Managers ("the Valuers' Board") and has been conducting valuations since 1982. He founded Azmi & Co (Sabah) Sdn Bhd ("Azmi & Co") in 2009 and is its director/shareholder to-date.

17 Wong's valuation report of the Subject Land dated 27 July 2021 ("Wong's report") was based on a market value as at 26 March 2014, that being the date of completion of the SA;[7] he arrived at a figure of RM34,954,700 rounded up to RM35m ("Wong's valuation") or RM550 per sq ft (RM35m ÷ 63,554 sq ft).

18 Wong's report was prepared in accordance with the 2011 4th edition of the Malaysian Valuation Standards ("2011 MVS")[8] issued by the Valuers' Board. In accordance with his instructions from Borneo, he only valued the Subject Land without regard to the building and structures thereon. He inspected the Subject Land on 23 March 2021 using adjoining landmarks and features to identify the plot as well as aerial viewing through drone photography. He did not carry out soil investigations.

19 Wong's report looked at the areas surrounding the Subject Land and identified the buildings listed in Gilbert's AEIC set out at [11] above. Wong described the land on which the buildings listed in [11] are located as part of the

[7] See [2] *supra*

[8] See 2SAB1817-1883

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extended central business district ("CBD") of KK, which is about 550 acres in area and is almost fully developed save for about 115 acres of which approximately 95 acres are government related sites. Wong opined that there is upward pressure on prices for all types of real estate end-products as joint ventures on government-owned sites take a very long time to develop. He cited a number of projects that were built on government-owned sites. One reason was because government-owned sites are on reclaimed land.

20 It is to be noted that when Ong was cross-examined[9] on the Subject Land, he did not disagree it was in a prime location, with easy access by major roads and near the landmark developments listed by Gilbert at [11] above.

21 As an example of current prices of land, Wong cited a beach front site at Tanjong Aru about 2.8km by road south-west from the Subject Land which was sold for RM35m or RM749 per sq ft notwithstanding the nation-wide lockdown due to the Covid-19 pandemic.

22 Wong stated utilities such as electricity, public water supply and fixed line communications are available to the whole of Sutera Harbour and can easily be extended to the Subject Land. Public transport also plies along the main roads Jalan Coastal and Jalan Coastal Bypass.

23 Wong had obtained from the Kota Kinabalu City Hall (known as "DBKK", which is the abbreviation for Dewan Bandahara Kota Kinabalu[10] or Kota Kinabalu City Hall in Malay) the draft KK Local Plan 2020 ("the KK Draft

[9] See transcripts on 22 September 2021 at p 410-411

[10] See 2SAB2096

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Plan")[11] prepared by the Town and Regional Planning Department. He ascertained therefrom that in or around 2010, the Subject Land was zoned for "Mixed Use" (*ie*, tourism, resort, retail, commercial, residential). The KK Draft Plan was released for public consultation from 26 September to 16 December 2011. Although to-date it has not been gazetted. Wong said it has nonetheless been used as the basis for planning decisions under the interim planning powers provided under the Sabah Town and Planning Ordinance.

24 Wong opined that conversion of the Subject Land from Industrial to "Mixed Use" is almost certain since the co-gen station ceased operations in 2014. The authorities are unlikely to permit industrial use of the Subject Land in the city centre in order to avoid issues such as noise, smell and traffic. It was also part of the Sembulan land and Sutera Harbour site that is zoned for tourist complex use. Even if a piece of land is zoned for a specific purpose such as industrial, Wong was of the view that rezoning would be reasonably attainable. He cited examples of properties that had been rezoned from industrial to mixed/commercial use in KK's CBD. He added that since a premium had already been paid for approval of the SH Resort site for commercial use (under tourism), no additional premium would be levied for the Subject Land.

25 Wong's report contained five comparable transactions that were used in arriving at Wong's valuation (referred to respectively as "Wong's Comparable No 1–5"), and these are as follows:

(a) Wong's Comparable No 1 is a town lease for hotel use in an area dominated by old shophouses and warehouse and is located in a fringe area of the city area in a standalone position with poor connectivity to

[11] See 2SAB2097-2204

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the city area. The transaction for the vacant land zoned for commercial city centre at RM9,810,788, or RM225 per sq ft, took place on 11 July 2014;

(b) Wong's Comparable No 2 is also a town lease and is a piece of vacant land in an old shophouse precinct where a number of shophouses have been converted to budget hotels. Its road frontage is a six-lane carriageway in the city centre. Planning proposal for a hotel was submitted after the transaction and its zoning is also commercial city centre. It was transacted at RM21,912,000, or RM550 per sq ft, on 8 July 2014;

(c) Wong's Comparable No 3 is a town lease located in the city centre's Central Business District fronting and across a four-lane road. It is zoned for commercial city centre with commercial use and was transacted on 20 January 2014 at RM83m, or RM792 per sq ft;

(d) Wong's Comparable No 4 is a plot of vacant land with a country lease located at the south end of the city centre and is diagonally across and on the opposite side of Jalan Coastal from the Subject Land. Jalan Coastal is the main thoroughfare leading into and out of the city centre, at the south end. Hence, the plot of land enjoys prime advertising frontage. Its locality is dominated by shopping malls, offices and hotels which are a short drive away. However, the remnants of the Sembulan water village which is in a squalid state is at its rear. It is zoned for commercial city centre and was transacted on 28 August 2018 at RM10,713,129 or RM420 per sf ft; and

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(e) Wong's Comparable No 5 is an old bungalow with a country lease situated next to the Kota Kinabalu Golf Club in Tanjong Aru in a tourism belt and is a stone's throw away from the Yacht Club and the five-star Shangri-La Resort. It fronts Jalan Aru.

26 In cross-examination, Wong was questioned on the definition of market value set out under clause 1.3.1 of the 2011 MVS. The clause states:

> *Market value* is defined for the purpose of these Standards as follows:
>
> Market value is the estimated amount for which a property should be exchange (sic) on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion.

27 Wong was also taken to para E[12] of the 2011 MVS headed "Highest and Best Use" which states:

> (a) Highest and best use is defined as the most probable use of a property which is physically possible, appropriately justified, legally permissible, financially feasible and which results in the highest value of the property being valued.
>
> (b) A use that is not legally permissible or physically possible cannot be considered a highest and best use. A use that is both legally permissible and physically possible may nevertheless require an explanation by the Valuer justifying why that use is reasonably probable. Once analysis establishes that one or more uses are reasonably probable uses, they are tested for financial feasibility. The use that results in the highest value, in keeping with the other tests, is the highest and best use.

28 Mr Lem also drew Wong's attention to the 2019 6th edition of the MVS where "market value" set out in clause 4.3.2[13] states:

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[12] AT 2SAB1828

[13] See 2SAB1903-1904

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> The definition of Market Value shall be applied in accordance with the MVS, as follows:
>
> (a) "The estimated amount" refers to a price expressed in terms of money payable for the asset in an arm's length market transaction. Market value is the most probable price reasonably obtainable in the market on the valuation date in keeping with the market value definition…
>
> (c) "On the valuation date" requires that the valuation is time specific.

29 The court does not see the relevance of the 2019 6th edition of the MVS to a valuation done as at 26 March 20214, and said as much to Mr Lem when he revisited this edition with Wong later in the course of his cross-examination.[14]

30 Wong's attention was also drawn to the 1st edition (October 2019)[15] of the guidance note of the Royal Institute of Chartered Surveyors (of which Wong is a member) and to para 3.3.2[16] which referred to retrospective and projected valuations. The court also does not find this document relevant for the determination of the meaning of market value.

31 Mr Lem took issue with Wong's report where he stated that the Co-Gen Plant ceased operation in 2014[17] and the plant on-site is defunct. This was because in the first judgment, this court said (at [155]):

> However, under cross-examination, [Ong] conceded that OBSB only supplied electricity to SESB and it was SESB that supplied electricity to SH Resort. Further, after one year of operation, OBSB ceased supplying electricity in 2015 and the Co-Gen Facility became dormant.

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[14] At transcripts on 21 September 2021 at p 165

[15] At DBD27- 56

[16] At DBD38

[17] At pg 22 (P 38 PF HOIS aeic)

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The court agreed with counsel for Borneo ("Ms Teh") that the above extract of the first judgment was taken out of context. The plant was dormant or defunct in 2014 when the owner of the Subject Land was Profound Heritage Sdn Bhd (PHSB) and *before* OBSB bought it over and supplied electricity to SESB.

32 Mr Lem drew Wong's attention to the licence issued by SESB to OBSB dated 15 April 2015[18] to operate the Co-Gen Plant ("the SESB licence") which was valid for one year. Mr Lem pointed out that as the said licence was valid for one year, the plant could not have been defunct as at 26 March 2014 as stated in Wong's report. Wong responded[19] that he was not privy to the information on the licensing.

33 Wong was certain that a separate title would be issued for the Subject Land. He testified that it was a question of costs, and the separate title would be issued once a letter of offer was given and accepted and a subdivision done. The application would be processed naturally and the separate title would be issued in due course.

34 Mr Lem had raised the point during his cross-examination of Wong of the importance of having a separate title being issued for the Subject Land before it can be transacted noting that Wong's four comparable transactions all had their own titles issued. Wong opined that the lack of a separate title for the Subject Land was not an important consideration.

35 What is clear from Wong's testimony is that while the current use of the Subject Land is for industrial purposes, the KK Draft Plan and the proposed

[18] See AB305-306

[19] See transcripts on 21 September 2021 at p 117

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planning is for "Mixed Use". Wong maintained his view that conversion would be permitted for the Subject Land from "Industrial" to "Mixed Use".

36 It was in cross-examination[20] that Wong disclosed that his valuation of the Subject Land was on a vacant land basis without regard to the power plant situated thereon. He acknowledged that there would be a cost which he had not factored into his valuation, should the power plant need to be demolished. Questioned by the court, Wong estimated[21] that such demolition costs would approximate RM200,000–RM300,000.

37 Wong's Comparable No 5 was dated 25 February 2021 and was said by Mr Lem to be not in accordance with the MVS standards[22] as it was transacted after 26 March 2014. Wong disagreed – he pointed out that Comparable No 5 was most appropriate due to its size (73.137 sq ft) and its location adjoining a golf course with excellent sea views similar to the Subject Land. Wong made a total adjustment of 37.5% for Comparable No 5.

38 Wong had also carried out a valuation of the Subject Land on the basis it was industrial land and arrived at figure of RM17.68m. He did a similar comparative analysis of the Subject Land with four other plots of industrial land[23] all of which had titles issued but were located in various districts different from that of the Subject Land. Mr Lem noted that Wong's Comparable No 3 was zoned[24] for general industry and not commercial "Mixed Use". Wong

[20] At transcripts on 21 September 2021 at p 159

[21] Ibid p 160

[22] See transcripts o 21 September 2021 at p 192

[23] See table at PSB209.

[24] See PSB252

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explained[25] that was due to the fact that its title was issued for industrial use like the Subject Land but it was zoned for commercial "Mixed Use". If an adjustment was made to Wong's Comparable No 3, and its zoning changed to commercial "Mixed Use", then its value should be adjusted downwards. Apparently general use purpose commands a higher premium than commercial "Mixed Use" and the latter commands a slight premium over tourism use[26] as "Mixed Use" has more flexibility.

39 In re-examination,[27] Wong explained that conversion of title is subservient to zoning. Only after a landowner has the right zoning and has its development plan approved will he apply for conversion. A buyer of land however will not have a development plan ready or in mind when he buys a piece of land – that comes later after his purchase.

40 Mr Lem also questioned Wong on the transaction dates of four comparables which transacted after 26 March 2014 (namely Wong's Comparable No 1, 2, 4 and 5). In re-examination,[28] Wong explained that the 2011 MVS provided no guidance on choosing comparables. He thus selected Comparable No 5 (dated 25 February 2021) as the most appropriate comparable because of the factors he listed out in his analysis[29] which were akin to the Subject Land.

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[25] See transcripts on 21 September 2021 at p 214-215

[26] See Wong's re-examination on 21 September 2021 at p 243

[27] See transcripts on 21 September 2021 at p 234

[28] At transcripts on 21 September 2021 at p 252

[29] See [36] *supra*

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41 As for the fact that the comparables dated after 26 March 2014, Wong explained[30] that he chose Comparable No 4 dated 28 August 2018 because the land in question is located a stone's throw away from the Subject Land and hence provided good guidance to him.

42 In his report[31] in relation to Comparable No 5, which was transacted on 25 February 2021, Wong had stated

> [Comparable No 5] was transacted during Covid 19 pandemic suggesting that market interest is strong for scarce property despite bearish conditions.

During re-examination, he said the price would have been much higher during a more buoyant or bullish period.

43 As for locality, Mr Lem had also questioned Wong why he had added 50% in value to the four comparables transacted after 26 March 2014 instead of reducing their values. Wong explained that the Subject Land was not located near the comparables which were near or in, industrial areas. In fact, the Subject Land is located at a prominent junction and has dual frontages being accessible by a road called Jalan Coastal Link as well as a six-lane carriageway that leads to the city centre.

44 It was during re-examination that Wong explained[32] there were a scarcity of sites that had main road frontages like the Subject Land. Accessibility for industrial use land is important because industrial sites would usually have the presence of large 20ft or 40ft containers and easy accessibility

[30] Ibid at p 253-254 of the transcripts

[31] At p 25 which is p 42 of his AEIC

[32] Ibid p 263-264

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is convenient. Hence, Wong added a premium for the locations of the four comparables transacted after 26 March 2014.

45 Mr Lem criticised these four comparables on the basis that because Wong had to make such large adjustments ranging from 46% (Comparable No 3) to 125% (Comparable No 4), they should not even be used as comparables. Wong disagreed.

46 During re-examination, Wong disclosed[33] that the KK property market peaked between 2013-2014 but turned cautious from mid or the latter half of 2014. The cautious trend continued into 2016 and up to 2018.

(ii) Ong's case

47 Ong's AEIC in large part repeated the evidence he presented for the first trial on liability. In his AEIC, Ong went into great detail[34] on the subdivision exercise to carve out the Subject Land from the Sembulan Land. He referred to the correspondence exchanged between SGHCC and LSDS between the period August 1999 and October 2014. Ong also placed emphasis on the valuation reports[35] that SGHCC had either been given during the period leading up to the signing of the SA or had itself commissioned, in particular that from Azmi & Co dated 2 September 2014 ("Azmi's 2014 report") that was carried out by Wong.

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[33] Ibid p 256

[34] At paras 27 to 42

[35] CH Williams, Talhar & Wong's report dated 24 April 2013 and Azmi & Co's report dated 2 September 2014.

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48 For this judgment, it is not necessary to repeat Ong's earlier testimony. Instead, the court turns to review the evidence that was adduced from Ong in the course of his cross-examination.

49 Questioned by Ms Teh, Ong confirmed he had instructed Ms Yen to value the Subject Land on the basis it was for "Industrial Use (Co-Gen Plant)". His justification for doing so was the letter dated 1 October 2014,[36] where the LSDS agreed to convert the Subject Land from the existing tourism complex to "Industrial (Co-Gen Plant)". However, as Ms Teh rightly pointed, that change of use was offered *after* 26 March 2014 and the said letter did not exist on the completion date.

50 It bears remembering that PHSB went into liquidation on 11 January 2012[37] and its liquidators gave notice to SESB that it would cease providing power supply by 30 September 2013. However, Ong refused to accept that the Co-Gen Plant was dormant as of 30 September 2013 – he insisted it was 'on standby'.[38] H added that to-date, he had seven staff maintaining the plant[39]. He did agree with Ms Teh that after 30 September 2013,[40] all the customers of PHSB including the SH Resort, were transferred to SESB. Further, all the assets of PHSB were taken over by OBSB from 1 October 2013. As of October 2013, no agreement had been reached between SESB and OBSB for the latter to resume supplying electricity. It was only later that OBSB reached agreement with SESB to supply electricity for one year commencing from 15 April 2014.

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[36] See [13] and AB2550

[37] See [11] of the first judgment

[38] See transcripts on 22 September 2021 at p 292

[39] Ibid p 378

[40] Ibid p 293

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51 However, the agreement turned out to be an unprofitable venture, so OBSB decided not to and did not, renew the contract with SESB upon its expiry. Ong confirmed that thereafter OBSB ceased the business of electricity generation. Yet, he would not agree that the plant became defunct – he maintained it was still on standby to-date with seven staff.

52 Questioned by the court[41] whether in the six years since 2015, OBSB had actually supplied electricity to SESB, Ong answered no. Indeed, in answer to Ms Teh, Ong disclosed that since October 2013, SH Resort had obtained its electricity supply from SESB. In further cross-examination by Ms Teh,[42] Ong finally admitted that after the agreement between OBSB and SESB ended in April 2015 and up to the AD hearing, the Co-Gen Plant did not resume operations. Yet, Ong instructed Ms Yen to value the Subject Land on the basis it was a co-gen plant and for industrial use.

53 It was also adduced from Ong that by February 2015, he had decided to relocate the power plant on the Subject Land outside Malaysia, as can be seen from the minutes of a board meeting of SH Resort held on 2 February 2015[43] where he announced his intention in the presence of board members which included Sam Goi Seng Hui and Gilbert.

54 It is a known fact that by October 2013, Ong had commenced negotiations with GSH/Borneo on the proposed SA. He admitted that by then

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[41] Ibid p 300

[42] Ibid p 377

[43] At 2AB688-689

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he knew the Subject Land could be put to better use than to operate a co-gen plant[44] although he had not firmed up any change of plans yet.

55 It was in evidence from the first trial[45] that Ong's letter dated 28 January 2014 ("the 28 January letter") to the LSDS[46] on behalf of SHGCC was only sent to the department on 12 February 2014 as shown by the endorsement of receipt on the letter. The winding-up petition filed against SH Holdings[47] on 29 January 2013 had been adjourned to 12 February 2014. After considerable prevarication and repeated questioning by Ms Teh, Ong finally admitted[48] that he waited until after GSH had paid the RM70m deposit ("the deposit") under the SA to MTB to stave off the winding-up proceedings before he arranged for the 28 January letter to be delivered to LSDS. However, he disagreed with Ms Teh that his letter to LSDS would have been pointless if the deposit was not made as there would then have been no acquisition by GSH.

56 It should also be noted at this juncture that the contents of the 28 January letter were patently untrue as Ms Teh put to Ong[49]. Ong had stated therein:

> Apart from the electricity sub-stations, Sutera Harbour Resort also contains a Co-Generation Facility in the way of an independent power plant ("the Co-Gen Plant") to supply electricity to the Resort and some parts of Kota Kinabalu vide a Licence granted to Profound Heritage Sdn Bhd by the Energy Commission under the Electricity Supply Act 1990...

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[44] Ibid p 305

[45] See the first judgment at [204]

[46] At AB2501-2502

[47] See the first judgment at [135]

[48] See transcripts on 22 September 2021 at p 344

[49] Ibid p 356-357

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PHSB had already been wound up on 11 January 2012 (see [50]). Yet, Ong insisted he did not mislead LSDS, maintaining it was a fact that PHSB had a licence to operate the plant as of 28 January 2014 notwithstanding that the company no longer existed.

57 The 28 January letter pointed out to the SESB that the authority had failed in its letter of offer dated 27 July 2007 to address the sub-division for the site of the of the Co-Gen Plant as an individual lot. Nothing was said about the removal of the restriction of the transfer of the Subject Land to SESB. Yet, in SESB's letter dated 1 October 2014,[50] the transfer restriction to SESB was removed. Despite Ong's repeated denials, the court accepts as valid Ms Teh's surmise that either Ong or his lawyers must, in the interval between 28 January and 1 October 2014, have spoken to the addressee of the 28 January letter to ask for the restriction to be removed and it was. Removal of the restriction on transfer of the Subject Land only to SESB was crucial as it meant that the plot could be transferred to any party for good consideration or, it could be redeveloped by the owner for any commercial "Mixed Use" purpose, subject to change of use.

58 Ong had admitted[51] that if LSDS had removed the restrictions on transfer from the title of the Subject Land, the plot could be sold to any third party and such third party would pay a reasonable market price for it. However, he disagreed that if GSH/Borneo had known of the removal of transfer restrictions and the exclusion of the Subject Land from the acquisition deal, it would not

[50] See AB2550

[51] Ibid p 348

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have agreed to the SA or, it would have insisted on deducting from the deal the value of the Subject Land based on its potential use as prime development land[52].

59 Despite the fact that the first trial before this court took place less than two years ago, Ong's answers during cross-examination were frequently peppered with "I don't know", "I'm not sure" and "I can't remember" and often times his answers contradicted the testimony he gave during the first trial. An example would be his admission on 26 July 2019 where he testified[53] that OBSB would definitely get the approval when Ms Teh said the transfer of the Subject Land to OBSB could not take place with the transfer restriction. Yet, when the same question was asked of him by Ms Teh on 22 September 2021[54] on whether he would have obtained approval for the transfer of title based on the 28 January letter at [51], Ong replied "I really don't know".

60 When the court questioned him[55] whether he was telling the truth on 26 July 2019 or on 22 September 2021 since his answers were inconsistent, Ong sought to explain away his July 2019 response by claiming that he meant the approval came with a lot of conditions which he was unsure about. Questioned further by the court, he added that his July 2019 answer was hence qualified. He then changed his testimony from "I really don't know" to "We would get the approval but I don't know what condition they are going to put on".[56]

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[52] Ibid p 349

[53] See extracts from the transcript at SAB803

[54] See transcripts on 22 September 2022 at p 351 lines 12-15

[55] See trancripts on 22 September 2021 at p 353

[56] Ibid p 354 lines 1-2

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61 Ong's professed lack of recollection included not remembering he had instructed an architectural firm subsequent to the OSBS's purchase of the Subject Land to prepare development plans for a block of serviced residences and hotel on the Subject Land[57]. He denied giving such instructions. He further denied he was responsible for SHGCC's application for change of the Subject Land to "Mixed Use" before OBSB bought the plot, since GSH did not make the application. He also claimed he was not aware of the current change of use of the Subject Land to "Mixed Use" or of the KK Draft Plan. The court has no doubt Ong feigned ignorance of the same.

62 It is undisputed from Wong's evidence and admitted by Ong[58] that he instructed Wong to exclude the Subject Land from Azmi's 2014 report in [47]. That being the case, the Azmi valuation report has no relevance to the Subject Land more so when Ong agreed (after being pressed by the court[59]) that the valuation was of the club's entire assets excluding its memberships. The same comment is equally applicable to a subsequent report by Azmi dated 8 January 2016 ("Azmi's 2016 report").

63 The court cannot understand Ong's justification for his surreptitious conduct *vis a vis* selling the Subject Land to OBSB for a nominal RM1,000 on the basis that he/PHSB invested RM155m in the Co-Gen Plant. His testimony during re-examination[60] that it was "prudent" for that reason for PHSB to own the Subject Land is inconsistent with his conduct of selling the plot to OBSB

[57] Ibid p 380

[58] Ibid p 398

[59] Ibid p 405

[60] Ibid p 426

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for a song. For the same illogical reason, Ong claimed it was not necessary for change of use to be effected for the Subject Land. His further testimony that the Subject Land "is very strategic for power plant" rings hollow against his own admission that the plant is no longer in operation since April 2015, regardless of whether it is on standby (indefinitely) according to him or dormant/defunct according to Borneo.

64 The undisputed evidence before the court shows clearly that the Co-Gen Plant on the Subject Land is no longer in use and will not be revived in the future to generate electricity because that purpose is now academic since SESB generates enough electricity for the whole of KK including the SH Resort.

65 The court moves next to consider the evidence of Ms Yen, Ong's expert. Her valuation could not be more different from Wong's. She valued the Subject Land at RM3.4m ("Ms Yen's valuation") as at 26 March 2014 as well as at 30 December 2013, a far cry from Wong's figure of RM35m. The date 30 December 2013 was the date of the SA. Ms Yen's valuation was roundly criticised by Borneo in its closing submissions. The court will return to those criticisms in the later part of this judgment.

66 Ms Yen is from VPC Alliance (Sabah) Sdn Bhd ("Alliance") and according to her letter dated 20 July 2021 addressed to Ong (which was attached to her AEIC), her brief from him was "to exclude the Co-Gen Plant and other improvements on the site and to assess the subject property as vacant land". Like Wong, Ms Yen's valuation was based on the 2011 MVS. Ms Yen inspected the Subject Land on 21 June 2021 for purposes of her valuation exercise. During

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her site inspection[61], Ms Yen noted that "the subject property is utilised as an industrial site for a power station known as Co-Generation Plant (Co-Gen Plant). The Co-Gen plant was constructed in 1997 solely for the purpose of supplying power supply to the SH Resort. The Co-Generation Plant has since ceased operation".

67 Like Wong, My Yen's valuation looked at the size and location of the Subject Land, its approach/accessibility, the surrounding developments as well as town planning provisions. She used the comparison method approach by considering three transactions as guidelines. Two of the three transactions were zoned for general industrial use and the third, although described by Ms Yen as being zoned for industrial use, was actually zoned for agricultural use. Ms Yen considered the three comparables to be appropriate as they had similar land use to the Subject Land which was intended for industrial use[62].

68 Under Salient Facts in Ms Yen's valuation, she stated the following:

> Permitted use of the main title: Tourist Complex
>
> Zoning of the main title: Hotel & Resort under Kota Kinabalu Local Plan 2020 (South Region) [draft]
>
> Intended Use of the Subject Property: Co-Gen Plant (Industrial Use).

69 Amongst the documents that Ms Yen's valuation relied upon were:

(a) LSDS's letter of offer to SHGCC dated 29 October 2004;[63]

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[61] See p 7 para 6.0 of Ms Yen's valuation

[62] See p 14 para 16,03 of Ms Yen's valuation.

[63] See 1AB1975-1976

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(b) LSDS's letter of offer to SHGCC dated 27 July 2007;[64]

(c) SHGCC's letter to LSDS dated 12 January 2005;[65]

(d) the licence granted to PHSB by the SESB for 10 years (commencing 1 October 2006 and expiring on 30 September 2016) to operate and maintain the power station and to supply electricity to the SH Resort;

(e) SHGCC's letter dated 28 January 2014 to LSDS[66] requesting amendment of the letter of offer in (a) for the Subject Land's zoning to be changed from SESB reserve to industrial land;

(f) LSDS's letter dated 1 October 2014 to SHGCC[67] amending the terms of its letter of offer dated 27 July 2007 in (b) above; and

(g) the licence granted to OBSB by SESB dated 15 April 2014 to operate and maintain the power station and to supply electricity to SH Resort for one year from the date of issuance of the licence.

70 Ms Yen had applied to court for leave which was granted on 16 August 2021, to file and admit into evidence her supplementary AEIC that was subsequently filed on 23 August 2021 ("Ms Yen's supplementary AEIC"). In Ms Yen's supplementary AEIC, she exhibited the titles to her three comparable transactions set out earlier at [67].

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[64] See 1AB1983

[65] See 1AB1979

[66] See [55]-[56] *supra* and 1AB2501-2502

[67] See 1AB2550

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71 Ms Yen's report was the subject of vigorous cross-examination by Ms Teh. As alluded to earlier at [65], Ms Yen's report was heavily criticised by Borneo in its closing submissions. It would be appropriate at this juncture for the court to turn to the evidence that was adduced from Ms Yen in the course of her cross-examination that prompted Borneo's criticisms.

72 Under para 2 of Ms Yen's valuation, she had said:

> The property under assessment is a parcel of land intended for industrial use presently constructed with a power plant (Co-Gen plant) and other improvements.

73 Ms Teh took issue with Ms Yen's reliance in her Terms of Reference ("TOR")[68] on the licence granted to PHSB in [69(d)] when Ms Yen herself confirmed that as at the date of her valuation, she knew that PHSB was no longer generating electricity from the Co-Gen Plant. Questioned by Ms Teh as well as the court,[69] Ms Yen agreed that she should have stated in her TOR that PHSB no longer operated the plant.

74 Another issue raised during her cross-examination was Ms Yen's reference[70] to SHGCC's letter in [69(e)] stating it requested amendment of the latter's letter of offer dated 29 October 2004 from SESB reserve to industrial land. Pressed by Ms Teh and the court, Ms Yen admitted there was no such request stated in the letter. What SHGCC wanted was stated in the following extracts[71] from paras 3 to 5 of the letter:

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[68] At item 7 of the TOR

[69] See transcripts on 23 September 2021 at p 485-486

[70] At item 8 of her TOR

[71] See 1AB2501

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> .....The Co-Gen Plant has a different ownership and operating model as compared to the electricity sub-stations sited within the Resort. It is to be privately owned and independently operated, and not intended to be treated in the same manner as the sub-stations.
>
> We have recently discovered that the Letter of Offer does not address the terms of sub-division for the site of the Co-Gen Plant as an individual lot...
>
> In view of the foregoing, we should be grateful if you could kindly look into the discrepancy and make the necessary amendment to the Letter of Offer.

The court finds it unprofessional and misleading on her part for Ms Yen to give an incorrect interpretation of the above letter.

75 At item 9 of the TOR, Ms Yen had said the Letter of Offer from LSDS dated 1 October 2014 at [69(f)] amended its previous accepted Letter of Offer dated 27 July 2007. The Letter of Offer dated 27 July 2007[72] was for subdivision/conversion of the Subject Land (part of the Sembulan Land) at a premium of RM4,000 for erection and use as an electricity substation. The Letter of Offer dated 1 October 2014 from LSDS requested payment from SGHCC of an annual rent of RM31,800 for the use of the land as Industrial Co-Gen Plant. Since the usage of the Subject Land remained unchanged, there was no amendment of change of use. What did change was that the restriction on transfer and sublease of the title only to SESB was removed from the 1 October 2014 letter.[73]

76 Eventually. Ms Yen agreed that the only change between the two letters was the decrease in annual rent from RM117,500[74] in the July letter to

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[72] At 1AB1983

[73] See transcripts on 23 September 2021 at p 500

[74] See 1AB1986

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RM31,800 in the October letter.[75] She admitted that the removal of the restriction on transfer to SESB was a very relevant factor but, when questioned by the court, she was unable to explain why that she omitted that important factor from the TOR. However, she disagreed with Ms Teh's suggestion that she omitted that fact so as to justify her low valuation of the Subject Land.

77 Ms Yen testified she had conducted a search in DBKK in March 2021 and ascertained therefrom (verbally from the staff) that the Subject Land was zoned for infrastructure and utilities use. However, when she returned to DBKK in July 2021 and obtained a plan, she was told that the Subject Land was zoned for "Mixed Use".

78 Cross-examined why she did not submit to court her search results, Ms Yen explained for her first visit to DBKK, she was given the information scribbled on a piece of paper. On the second occasion, she requested for a plan but was not provided with one.

79 What made Ms Yen's testimony in regard to her alleged difficulties in obtaining a copy of KK Draft Plan less than credible was Ms Teh's disclosure[76] that Borneo and/or its solicitors could and did, download the KK Draft Plan from the website of DBKK without difficulty. Ms Teh even provided Ms Yen with the link.

80 Ms Yen's two visits to DBKK were not mentioned in her valuation report. She denied Ms Teh's suggestion that she failed to disclose the fact that

[75] See transcripts 23 September 2021 p 498

[76] See transcripts at p 564

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the DBKK had zoned the Subject Land as "Mixed Use" to justify her valuation of the same as for industrial use.

81 Ms Yen was referred to the KK Draft Plan[77] that Wong had obtained from DBKK in September 2011. The printed copy dated 30 March 2012 was endorsed with a stamp of City Hall[78]. She agreed that she could also have obtained the same printed plan and that it showed the Subject Land was zoned for "Mixed Use". However, she denied she had deliberately withheld the document from the court because it would go against her valuation that the Subject Land was for industrial use[79]. The plan that Ms Yen obtained did not have any stamp/endorsement by DBKK affixed thereon. Repeated attempts by Ms Teh and the court to obtain an explanation from her for the difference were futile as what Ms Yen said made no sense[80].

82 After she was shown that the version of the KK Draft Plan she herself obtained from DBKK[81] showed the Subject Land had been re-zoned for "Mixed Use", Ms Yen agreed[82]. Further, when Ms Teh pointed out to Ms Yen that the Subject Land's zoning was different from that of the Sembulan Land which was for hotel and resort, Ms Yen agreed. Despite such concession however, Ms Yen denied that it was incorrect for her to state in her valuation report that the intended use of the Subject Land was "Industrial Use (Co-Gen Plant)". She also would not agree that the owner of the Subject Land can submit a development

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[77] See [23] *supra*

[78] See PSB149

[79] See transcripts on 23 September 2021 at p 536

[80] Ibid pg 538-539

[81] At PSB147-148

[82] See transcripts at p 546.

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plan for the Subject Land on the basis of "Mixed Use" and there would be a high chance it would be approved by the LSDS.[83]

83 However, Ms Yen conceded that if the owner of the Subject Land is willing to pay a higher premium to the LSDS, it would not be difficult to have the Subject Land converted from industrial use to "Mixed Use"[84]. Despite this concession however, Ms Yen disagreed such conversion would be reasonably attainable in December 2013 or March 2014. She opined that LSDS may not approve the conversion because at that time, the licence to supply electricity from the Co-Gen Plant was still valid until 2015.

84 Ms Yen's answer conveniently overlooked the fact that the licence in favour of OBSB was an unprofitable venture for OBSB who hardly used the licence as, since October 2013, SH Resort had obtained its electricity supply from SESB.[85]Who else would OBSB supply electricity to? By 30 December 2013 and more so by 26 March 2014, the Co-Gen Plant was at least dormant if nor defunct. Yet Ms Yen failed to take this material factor into account raising serious questions on the accuracy of her valuation and report.

85 Ms Yen did concede that if the Subject Land is zoned for "Mixed Use", it would be worth substantially more than her valuation of RM3.4m.

86 The court now turns to the three comparable transactions used in Ms Yen's valuation report (referred to as Ms Yen's Comparables No 1–3). Based

[83] Ibid p 550

[84] Ibid p 551

[85] See [48] *supra*

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on those transactions, Ms Yen arrived at a valuation for the Subject Land at RM54 per sq ft.

87 Ms Yen's Comparables No 1 and 3) were located in the north region of Kota Kinabalu in Inanam while her Comparable No 2 is in the Kolombong area. All are in remote areas whereas the Subject Land is at the fringe of the city centre. When the court told Ms Yen she was not comparing like with like, she disagreed.[86] Cross-examined why she did not select comparables that were nearer to the city centre, Ms Yen said there were none. It should be noted that Ms Yen withdrew her Comparable No 3 during cross-examination on the ground it was inappropriate, that being agricultural land[87].

88 When Ms Yen was taken to task for using her Comparable No 1, as its land title has no specific use stated and it would thereby by default under the Sabah Land Ordinance be used for agricultural purposes, Ms Yen agreed. She had arrived at a price per sq ft for her Comparable No 1 of RM73 based on the transacted price of RM11,885,422 and land area of 162,814 sq ft.

89 During cross-examination, it was revealed that a conversion premium had to be paid to convert the land in Ms Yen's Comparable No 1 to general industrial land. Based on a conversion formula[88] of 10% x 70% of vacant industrial land value, Ms Teh came to a figure of RM831,979 as the premium payable which Ms Yen failed to take into account in her valuation.

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[86] See transcripts on 23 September 2021 at p 570

[87] Ibid at p 576

[88] Shown at 2SAB2208

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90 Ms Yen was further informed that the owner of her Comparable No 1 (Harmony Broadway Sdn Bhd) had purchased the land with an approved development plan. Indeed, she herself had requested leave from court to correct her classification of the land from "vacant land" to "development land". Common sense dictates that land slated for development would be more valuable than vacant land (to which Ms Yen agreed)[89].

91 Ms Teh also pointed out to Ms Yen that her Comparable No 1:

(a) has a proposed local distributor road running through its centre and there would be two road reserves one of which would occupy 13,345 sq ft;

(b) has a drainage reserve which would take up 4,279 sq ft;

(c) is required by law to keep 10% of the development land vacant for open space; and

(d) is required to keep another 10% of the development land vacant for a detention pond for flood mitigation purposes.

The acreage calculations in (a) and (b) were done by Wong. Taking all the non-usable factors in (a) to (d) into account (which Ms Yen did not), Ms Teh put it to Ms Yen that the area available for actual development in her Comparable No 1 would only approximate 55% of the 162,814 sq ft stated in its land title. That being the case, the price transacted would be RM133 per sq ft instead of Ms

[89] See transcripts on 23 September 2021 at p 591

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Yen's figure of RM73 per sf ft, amounting to a gross undervalue of RM60 per sq ft. Surprisingly, Ms Yen disagreed with Ms Teh.[90]

92 Moreover, Ms Yen's Comparable No 1 comprises of hilly or undulating terrain, according to Borneo's search result using Google Maps.[91] Ms Yen, who visited the site, claimed she saw flat land. If the terrain is not flat land, costs would have to be incurred to carry out hill cutting to level the land. It was also located 200m away from a cemetery based on a search done by Google Maps.[92] Yet, Ms Yen would not agree that these two negative factors meant she should not use her Comparable No 1 as a benchmark to value the Subject Land. She confirmed she did not take into account the two negative factors in the value of her Comparable No 1 and make the necessary adjustments.

93 The court moves next to consider Ms Yen's Comparable No 2 in Ms Yen's valuation report. She used that transaction as it was zoned for general industrial use. However, that was an error as under the KK Draft Plan;[93] that plot of land was zoned for government use. It was also not located in the north region as she had stated in her valuation report but near a cemetery and funeral parlour[94] both of which were omitted from her report. She did not make adjustments for those two negative factors nor for the fact that the land in question had no direct access to a nearby main road called Jalan Lintas. Indeed, not only did Ms Yen not make a downward adjustment to her valuation due to the three negative

[90] See transcripts on 23 September at p 604

[91] See photograph at PSB296

[92] See PSB182A

[93] See PSB188

[94] See map at PSB185A

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factors in [91], in her table at para 15.0 of her valuation report, she added 10% to her valuation as a plus factor. This is wholly erroneous.

94 Under the special terms of the lease[95] for Ms Yen's Comparable No 2, the purpose was restricted to industry, whilst subleasing was prohibited and the owner had covenanted to complete construction of a building thereon before January 2007. As the covenant was not fulfilled (as at 28 March 2013), the land registry title[96] showed that the government imposed on the land an additional premium and increased the annual rent payable. In return for the additional premium and increased annual rent, the covenant to build was first extended to 2019 and then further extended to 2022.[97] Ms Yen failed to take these factors into account in her analysis of her Comparable No 2.

95 During her further cross-examination,[98] Ms Yen was informed that the vacant land in her Comparable No 2 had still not been developed since it was transacted on 28 March 2013. She was told (to which she disagreed) that it was because the owner could not get his development plan approved as the permitted use of the land under the current zoning is for government use.

96 I turn next to Ms Yen's testimony on her Comparable No 3. Questioned on why she used her Comparable No 3 which Special Term decreed it can only

[95] Ibid p 19

[96] Ibid pg 19

[97] Ibid p 22

[98] See transcripts on 24 September 2021 at p 656-657

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to be used agricultural land,[99] Ms Yen's excuse was that in 2009, there was an industrial building situated thereon,[100] namely a bus terminal.

97 As a premium is payable to convert agricultural land to industrial purpose land based on the formula[101] of 10% x 70% (referred to earlier at [89]) and based on the transacted price of RM2.5m, a premium of RM175,000 would have been imposed by the relevant authorities. Ms Yen did not take this into account in her use of her Comparable No. 3. It did not assist Ms Yen that she made another mistake: Ms Yen's Comparable No 3 is in fact zoned for commercial group centre according to Borneo's search[102] (which Ms Yen conceded) and not for industrial use. She further made an unjustified downward adjustment by 10% in her table[103] for the Subject Land for the reason its title was not yet issued.[104]

98 In relation to the lease for Ms Yen's Comparable No. 3, in Ms Yen's supplementary AEIC[105] it was shown that the lease for 99 years commenced on 17 September 1970, which meant that the lease would expire in 2069. As at March 2014, the lease had a balance tenure of 55 years. In her table, Ms Yen failed to take that into account and stated that the land had a 99 years' lease while at the same time understating the lease of the Subject Land by 6 years for which she gave a 10% discount.

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[99] See p 25 of Ms Yen's supplementary AEIC

[100] See transcripts on 24 September 2021 at p 633

[101] See SAB2207

[102] At PSB193

[103] At p 26 of her valuation report

[104] See transcripts on 24 September 2021 at p 637

[105] At p 24

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99 Despite being aware that the Subject Land was zoned for "Mixed Use", Ms Yen failed to take that factor into account in her choice of using for comparison transactions that involved industrial use land. She said it was because she relied on the letter to SHGCC from LSDS dated 1 October 2014 at [69(f)] above. Both counsel and the court pointed out to Ms Yen (who disagreed) that LSDS is in charge of change of use, not zoning. There was no rational basis for her to rely on a letter which did not deal with zoning but reduced the quantum of annual rent in its original offer letter dated 27 July 2007 listed at [69(b)].

100 Borneo had taken, via Google Street View, a photograph of the road leading to the entrance to Ms Yen's Comparable No 3 in October 2014[106]. It showed a ticketing booth at the entrance and on the court's inquiry, Ms Teh confirmed it was the side extension of a bus station/terminal. That meant access was restricted and would be a negative factor in its value which again, was not taken into account in Ms Yen's valuation. However, she conceded that her Comparable No 3 was not a reliable comparison as it had been acquired by and surrendered to the government in August 2011[107] for the extension and construction of a bus terminal.

101 It was noted that the gazette notifications for the acquisition[108] were dated 3 and 10 September 2009. Ms Yen's Comparable No 3 was transacted on 30 March 2009 and sold to Inai Rampai Sdn Bhd. Ms Yen disagreed with Ms Teh's suggestion that it was likely the said purchaser would have known of the

[106] See PSB192.

[107] See transcripts on 23 September 2021 at p 646 and PSB200

[108] At PSB203

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impending acquisition at the time of its purchase and not paid a full but discounted price for the land.[109] Apparently, she did not take the acquisition factor into consideration.

102 During cross-examination,[110] Ms Yen explained she wanted her Comparable No 3 to be deleted not because of its impending acquisition but because it was zoned as agricultural land. Ms Teh pointed out her Comparable No 2 was also wrongly zoned as industrial land when it should be for government use and yet Ms Yen did not ask for its deletion. Ms Yen sought to explain that, in relation to the fact that the title for her Comparable No 2 was industrial use even though it was zoned for government use, she had wanted to change the title but the court disallowed her request (because she was prompted to do so after having sight of the PSB[111]).

103 Ms Yen was shown graphs[112] from the Malaysian National Property Information Centre Annual Property Report 2014, which showed a 50% increase in prices for industrial properties from 2009 to 2014. She had only made a 21% adjustment for the same time lapse in her Comparable No 3 which Ms Teh described as "grossly inadequate";[113] Ms Yen disagreed.

104 Contrary to her denial,[114] the court accepts as valid Borneo's surmise that Ms Yen deliberately failed to take into factors that would have allowed for a

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[109] See transcripts on 23 September 2021 at p 648

[110] Ibid p 649

[111] See transcripts on 23 September 2021 at pg 576

[112] At PSB180

[113] See transcripts on 23 September 2021 at p 653

[114] See transcripts on 24 September 2021 at p 661-662

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greater upward adjustment on a per sq ft basis of her three comparables because she wanted a good outcome for Ong. Had she done so, her values would have been significantly higher for land for industrial use. In addition, her comparables were not the correct ones to be used because the Subject Land is not zoned for industrial use under the KK Draft Plan but for "Mixed Use".

105 On the other hand, Wong's comparables for industrial use land (termed "Wong's industrial Comparables No 1 to 3") were far more appropriate, if indeed the Subject Land was to be compared to industrial use land. The locations of Wong's industrial Comparables were shown in maps and photographs in PSB 210, 212, 222 to 256. Wong's industrial Comparables were comparing with like with like in terms of zoning, accessibility (being close to dual carriageway in the case of Wong's industrial Comparable No 1). Yet Ms Yen did not use any of them in her valuation report.

106 Cross-examination of Ms Yen on Wong's industrial Comparables No 1 to 3 did not improve Ms Yen's credibility with the court. Her repeated reaction was to disagree with Ms Teh even when the latter's questions called for other answers and/or explanations.

The submissions

(i) Borneo's submissions

107 Borneo was critical of Ong's testimony[115] as it was of Ms Yen's. The court considers Borneo's criticisms as justified in the light of the court's own dim view of his evidence (see [130]).

[115] Ibid paras 11-18, 48- 61.

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108 As alluded to earlier at [63], Borneo was highly critical of Ms Yen's valuation/testimony. Indeed, Borneo submitted[116]that her valuation report should not be relied upon. Some of Borneo's lengthy criticisms of her evidence[117] mirrored the court's own observations of Ms Yen's testimony as set out earlier at [73] to [106] and need not be repeated.

109 In summary, Borneo submitted[118] that Ms Yen's valuation report cannot be relied upon for the following reasons:

(a) she failed to take into consideration the nature and characteristics of the Subject Land;

(b) she took no care to ensure the accuracy of the information in her valuation report;

(c) she did not use suitable or appropriate comparables and did not make appropriate adjustments for her comparables;

(d) she deliberately chose not to highlight the deficiencies of her comparables in her valuation report;

(e) she was not consistent in the manner she treated her comparables; and

(f) she failed to use comparables which are more appropriate.

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[116] See paras 129-204 of Borneo's closing submissions

[117] Ibid paras 31, 62- 105, 129-204.

[118] Ibid at para 129

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110 Borneo submitted that the court should instead accept Wong's evidence and valuation report. Hence, the Subject Land ought to be valued on the basis of "Mixed Use" and the same was in all probability zoned as "Mixed Use" as at 26 March 2014 based on Wong's valuation and circumstantial evidence (citing *Chua Kok Tee David v DBS Bank Ltd* [2015] 5 SLR 231).[119]

111 Borneo urged the court to accept that the fair market value of the Subject Land should be fixed at Wong's valuation of RM35m arguing that Ong's attempts via his counsel to find flaws in Wong's valuation had no merit.[120] Borneo submitted that Wong's valuation was well supported by logic and evidence.

112 In regard to Ms Yen's shortcomings listed at [109] above, Borneo made copious reference in its submissions to the transcripts[121] to buttress their criticisms of her testimony.

113 Borneo further submitted[122] that there was no bar to using as comparables transactions that took place after 26 March 2014. The 2011 MVS applicable to this case did not contain any prescribed standards as to the transaction dates of comparables that can be used by a valuer in his valuation, according to Wong's testimony.[123] Wong was mindful that the 2011 MVS applied but where he could find no guidance therefrom, he would look at other guidance (which in this case was in the 6th edition).

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[119] See Borneo's closing submissions paras 23-48

[120] Ibid paras 106 -107.

[121] Ibid paras 132 - 204

[122] Ibid paras 108 -117

[123] At transcripts on 21 September 2021 at p 251-252

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114 Borneo submitted it was irrelevant that no separate title was issued for the Subject Land[124] pointing out that Ms Yen's valuation did not take that factor into account. The same submission was made for the fact that there was no development plan for "Mixed Use".[125]

115 Even if "Industrial Use" is determined to be the correct basis for valuing the Subject Land, Borneo submitted that Ms Yen's valuation cannot be relied upon[126] due to the factors listed at [109] above.

116 Borneo also argued that the previous valuation reports of the Sembulan Land that Ong referred to should not be relied upon either. Borneo pointed out that none of the following four valuation reports were commissioned for the purpose of ascertaining the fair market value of the Subject Land as at 26 March 2014:

(a) The valuation report of SHGCC dated 24 April 2013 of CH Williams Talhar & Wong ("CH William's valuation");

(b) Azmi's 2014 report;

(c) Azmi's 2016 report; and

(d) the Taylor Hobbs' valuation dated 27 April 2017.[127]

As such, these reports should be disregarded.

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[124] See Borneo's closing submissions at paras 118 – 120

[125] Ibid paras 121 -125

[126] Ibid paras 129 -204.

[127] See [15] *supra*

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117 Earlier at [62], the court had already expressed the view that Azmi's two reports are irrelevant. Hence, the court accepts Borneo's submission in [116 (b) and (c)].

118 As regards CH William's valuation, Borneo[128] pointed out that it specifically excluded the Subject Land and was commissioned to value the Sembulan Land. As for Taylor Hobbs' valuation, it was prepared for the purpose of and adduced in, the Malaysian proceedings to determine whether the dispute fell within the monetary limits of the Malaysian High Court.

(ii) Ong's submissions

119 Ong argued that GSH/Borneo negotiated and purchased the assets of SH on an "as is where is" basis which meant that the highest and best use of the Subject Land under the MVS[129] as at 26 March 2014 was that of "industrial co-gen plant", its legally permissible use at the material time. Ong alleged that Borneo's request to assess damages based on the development potential of the Subject Land as "Mixed Use" was an afterthought which was contradicted by the objective facts.

120 Wong's testimony was alleged to be biased and not independent. It was said[130] that Wong's valuation report was unreliable, unfair and partial to the interests of GSH. Wong was accused of biasness because he conducts valuations (which he listed in his curriculum vitae) for GSH and/or its related companies on a yearly basis for five developments (including three hotels).

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[128] At paras 207-209

[129] See [27] *supra*

[130] See paras 310 of Ong's closing submissions

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121 Wong's valuation was criticised as being based on "Mixed Use" of the Subject Land when it was zoned for industrial use. He did so on the instructions of Borneo. Wong's valuation was also said to be premised on numerous unfounded assumptions. It was said that Borneo had no proof that the Subject Land was zoned as "Mixed Use" as of 26 March 2014.[131] It was a leap of logic on Borneo's part to rely on the KK Draft Plan. The 2011 version of the KK Draft Plan indicated that the Subject Land was zoned (in blue) under public utilities, for drainage, water bodies *etc*, but it was not zoned for "Mixed Use". There was no evidence that SHGCC or Ong had applied to the KK City Hall for a change in zoning of the Subject Land to "Mixed Use" at the material time.

122 It was submitted[132] that Wong's industrial Comparables valuing the Subject Land on Industrial Use basis were unsuitable and inapplicable due to the following (non-exhaustive) factors:

(a) Wong's Comparables had their own individual titles;

(b) the transactions should not be considered as they took place after 26 March 2014;

(c) Wong's Comparable No 4 is located in the Penumpang district whereas the Subject Land is located in the KK district;

(d) Wong's Comparable No 3 was wrongly zoned as "General Industry" when it should be "Commercial Mixed Use" and Wong had conceded he needed to make a downward adjustment in value;

[131] Ibid at paras 189 - 203

[132] Ibid at Section B para 258

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(e) Wong erred in giving a 50% uplift to his comparables – he should have made a downward adjustment. This was due to the position taken by Wong that the Subject Land was not suitable for use as "Industrial (Co-Gen Plant)" given its location near the city centre. That being the case, the Subject Land would be in an inferior position compared to Wong's comparables;

123 Additionally, Wong was said to be mistaken in his assumption that the Co-Gen Plant was defunct[133] as well as in his baseless assumption that development plan approval for "Mixed Use" for the Subject Land would be readily forthcoming.[134]

124 Ong submitted that the lack of a separate title would have been a significant factor that would have reduced the fair market value of the Subject Land. Wong was also criticised for failing to take into account that a conversion premium was payable to change the zoning of the Subject Land to "Mixed Use" if it was assumed to be zoned tourism due to being part of the Sembulan Land's title. Wong had also overlooked demolition costs for the Co-Gen Plant sitting on the Subject Land.

125 Ong left no stone unturned in his closing submissions. He urged the court not to admit Borneo's documents found in the Plaintiff's Supplemental Bundle of Documents ("PSB") as their authenticity had not been proven. Since they were not part of the agreed documents, Borneo must satisfy ss 66 and 67 of the Evidence Act 1893 ("the EA") before those documents can be considered

[133] See Ong's closing submissions at paras 320 - 325

[134] Ibid para 326.

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as part of the evidence before the court (citing *Jet Holdings Ltd and Others v Cooper Cameron (Singapore) Pte Ltd* [2005] 4 SLR(R) 417). As the PSB documents were not formally proven, Ong urged the court to exclude them pursuant to the inherent powers of the court under O 92 r 4 of the Rules of Court (Cap 322 r 5) ("the Rules") and s 47(4) of the EA.

126 By the same token, Ong submitted the court should exclude Wong's rebuttal report that formed part of the PSB[135] as no leave was sought or granted for Borneo to file or adduce additional expert report to rebut Ms Yen's report, and Ong would be wholly prejudiced if the same was allowed into evidence.

127 In short, Ong submitted that Wong's valuation report should be rejected in its entirety. On the other hand, Ong urged the court to accept Ms Yen's valuation report and testimony for the following (non-exhaustive) reasons:

(a) she had only factored relevant considerations in her valuation;[136] and

(b) Ms Yen's comparables were appropriate and suitable to derive the fair market value of the Subject Land.[137]

Nothing was said in Ong's submissions on the shortcomings in Ms Yen's valuation including those in the three comparables she used, or how her credibility was undermined in the course of her cross-examination. These

[135] At PSB209

[136] See Ong's closing submissions at Section B at para 204 onwards

[137] Ibid at Section C para 245 onwards

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factors were addressed at length in Borneo's closing submissions and also noted by the court earlier at [73] to [104] above.

128 Ong concluded his closing submissions with a request to the court to accept Ms Yen's valuation and that damages be assessed at 77.5% (that being Borneo's interest) of RM3.4m or RM2,635,000.

129 Both parties filed Reply submissions to counter/rebut the other side's closing submissions.

130 Borneo pointed out in its Reply submissions[138] in response to Ong's objections at [125] to [126], that the documents pertaining to Ms Yen's comparables were to give her advance notice of what she could expect to be asked in cross-examination. It is an undisputed fact that Ms Yen withdrew her Comparable No 3 after she had had sight of the documents in PSB.

131 Boneo pointed out that some documents such as PSB 268-295 originated from Ong's documents in the defendant's bundle of documents.[139] They were Wong's version of Ong's slides.

132 In any case, as Borneo pointed out in its Reply submissions,[140] Mr Lem had indicated[141] on the first day of trial that the documents in the PSB were largely agreed save for Wong's rebuttal report. For that reason, the court marked the entire bundle for convenience as Borneo's/the plaintiff's documents instead

[138] At paras 228-242

[139] DBD 27-56

[140] See para 225-226

[141] See transcripts on 20 September at pg 4-5

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of as an agreed bundle as the documents were partly agreed and partly not agreed. Moreover, Ong did not specifically challenge the authenticity of the documents in the PSB during the trial.

133 Borneo added[142] that Ong himself had tendered to court on the first day of trial his own supplementary bundle of documents. Hence, what is sauce for the goose is sauce for the gander.

134 In its Reply submissions, Borneo argued that Wong's rebuttal report (to which Ong did object at the start of trial) was not an expert report. Rather, the documents were prepared for the purpose of cross-examination – hence no leave was required. Wong's Comparables were used to cross-examine Ms Yen to demonstrate how unreliable and biased her valuation was.

135 Borneo submitted[143] that Ong's challenge to the authenticity of the documents in the PSB is belated and should not be entertained by this court.

The issues

136 The only issues the court needs to determine are:

(a) What is the correct date to assess the damages due to Borneo?

(b) What is the fair market value of the Subject Land as at the date of assessment?

[142] At para 226 p 92 of Boneo's Reply submissions

[143] Para 224 of Borneo's Reply submissions

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The findings

(i) The factual witnesses

137 Between Gilbert and Ong, the court preferred the testimony of the former. As at the first trial, Ong's evidence was riddled with untruths and contradictions. He was again an unreliable witness at the AD hearing as can be seen from the court's earlier observations at [52] to [61]. Consequently, the court disregards his evidence as being wholly unreliable.

(ii) The experts' testimony

138 The court turns next to the testimony of the parties' experts. Before doing so, it would be helpful to look at the provisions in the Rules of Court pertaining to expert witnesses.

139 Order 40A r 2 of the Rules of Court Cap 322 R 5 ("the Rules") states:

> **Expert's duty to the Court**
>
> (1) It is the duty of an expert to assist the Court on the matters within his expertise.
>
> (2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

140 Wong came across as an experienced and professional valuer who adhered to the requirements of O 40A r 2 of the Rules. This can be seen from the fact that the credibility of his valuation report was not undermined and his testimony was not shaken in the course of cross-examination. Unlike Ms Yen, he did not have to make any concessions or material corrections to his valuation when questioned by Mr Lem. In this regard, the court rejects as unjustified, Ong's criticisms of Wong's testimony and valuation set out at [120] to [124] above or that he was biased merely because his firm Azmi & Co had carried out

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valuations for SHGCC and or its associated companies which Wong disclosed in his curriculum vitae attached to his valuation[144]. As this court said in *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd and Another* [2007] SGHC 50 at [206] (citing *Macro v Thompson No 3* [1997] 2 BCLC 36), it is actual partiality, rather than the appearance of partiality, that is the crucial test in deciding whether the evidence of an expert should be discounted.

141 It is the court's finding that the five comparables that Wong used were fair and he had given logical explanations as to why he used them.

142 On the other hand, and contrary to her repeated denials when the suggestion was put to her, the court has no doubt whatsoever that Ms Yen compromised her independence as a valuer and put the interests of her client Ong first when she prepared her valuation. She was beholden to him so much so that she paid lip service to O 40A r 2 of the Rules and failed to act independently and impartially. She was totally biased in favour of Ong in her AEIC, in her valuation report and in her oral testimony.

143 Ms Yen came across as unprofessional and her evidence was sometimes incomprehensible, if not incoherent. She even miscalculated the unexpired term of the lease of the Subject Land (71 years as of 26 March 2014 when it should be 77¾ years) and that for her comparable no 3.[145] Despite that error, Ms Yen had the temerity to insist that it did not affect her valuation[146] which answer the court rejects as untrue – her answer is inconsistent with her arbitrary discount

[144] See p 9 of Wong's AEIC

[145] See [96] *supra*

[146] See transcripts on 23 September 2021 at p 511

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of 10% on the value of the Subject Land at [98] because she mistakenly thought the tenure of its lease was 71 years instead of 77¾ years. She cannot blow hot and cold when it suits her purpose to do so.

144 Under the KK Draft Plan, zoning for "Mixed Use"[147] gave the owner/developer of such zoned land a wide discretion to develop the land for myriad purposes/uses including building flats and condominiums, all types of commercial buildings such as supermarkets, cinemas, banks, clinics, restaurants, barbers, pharmacies (including museums) and hotels/resorts. None of these factors were taken into account by Ms Yen in her valuation exercise and report. While her answer during cross-examination[148] was that she did not spell out such potential usage in her valuation report, the court entertains no doubt that she never took those factors into consideration. She was bent on complying with Ong's instructions and valuing the Subject Land as "Co-Gen" or industrial land. Although she was unable to justify her valuation, Ms Yen adopted what the court described as a pugnacious attitude.[149]

145 At table 14.0 in her valuation, instead of making an upward adjustment for its prime location, Ms Yen discounted the Subject Land by 10% even though it has dual access by Jalan Coastal and a six-lane carriageway and is situated at a prominent junction.

146 Despite Ms Yen's disagreement with Wong's views, the court accepts his opinion and believes it is highly unlikely that the Sabah authorities would agree to allow the owner of the Subject Land to develop it for industrial use

[147] See PSB143-146

[148] See transcripts on 23 September 2021 at p 558

[149] Ibid at p 498

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when it has such a prime location and frontage, with good and easy access and is situated on the fringe of the city centre as at 26 March 2014, when it is currently zoned for "Mixed Use".

147 It bears noting that the Taylor Hobbs' valuation that Ong relied on[150] had stated the market value of the Subject Land as at 1 March 2014 was RM12.7m as a tourist complex and it was RM9.8m for industrial use. Yet Ms Yen's valuation 25 days later of the Subject Land showed a drastic drop of RM6.4m! That cannot be right. Nowhere, either at the first trial or at the AD hearing, did the court hear from Ong or his counsel that Taylor Hobbs' valuation should be ignored; indeed, they relied on it in the cross-examination of Gilbert as noted at [15] above.

148 Ms Yen's three comparables were not a useful or fair comparison for the Subject Land. They were either zoned as agricultural or industrial land and/or had restrictive covenants on their titles whereas the Subject Land was zoned for "Mixed Use" and no longer had any restrictions on transfer of its title.

149 Despite being discredited in the course of cross-examination as set out earlier at [84] to [99], Ms Yen did not have the professionalism to admit she was not comparing like with like in her choice of the three comparables. She was either wrong and/or had no basis for many of the assumptions/adjustments she made in her tables at paras 14.0 and 15.0 of her report.[151] It bears noting that her arbitrary discount (twice) of 10% for the Subject Land for lack of a separate

[150] See [15] *supra* and AB19350-1947

[151] See [93] *supra*

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title and its 71 years' lease (which was in any case wrong) are not factors to be considered in the 2011 MVS.

150 Sometimes, the court had the distinct impression that Ms Yen disagreed with Borneo's counsel only because she was unable to explain what was stated in her valuation report. In the light of the court's own assessment of Ms Yen's evidence, the court affirms its earlier view at [108] that Borneo's criticisms of her testimony are not unjustified. Indeed, in the eyes of the court, Ms Yen lost all credibility due to her inconsistent and contradictory and sometimes downright untruthful answers in cross-examination.

151 Even though the Subject Land was initially zoned for industrial use, the court accepts Wong's testimony that it is more likely than not that if SGHCC had owned the Subject Land and had applied to convert it to "Mixed Use", SLDS would have granted approval for the reasons Wong gave as set out at earlier at [23] to [24].

(iii) Other findings

152 It would be appropriate at this juncture to address the objections raised by Ong at [125] and [126] respectively on the admissibility of the documents in PSB and on Wong's rebuttal report.

153 It is noted that documents in the PSB comprised *inter alia* of colour maps of the Sembulan Land and Subject Land in the KK Draft Plan as well as Ms Yen's comparables and the zoning of the lands. The maps also had legends showing what the various colours represented in terms of usage including various blue shades for public utilities, drainage, waterbodies, government and orange for "Mixed Use". The court found the maps and colour coding for usage

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very useful as at a glance, a reader knows immediately the zoning for a particular plot of land.

154 The KK Draft Plan was incorporated into the Supplementary Agreed Bundle of Documents[152] ("SAB") for the AD hearing. Ms Yen herself had applied for a copy from the KK City Hall except that the court could not understand why she was unable (as she claimed) to obtain a copy, as her garbled explanation made no sense. The blown-up portions and legends in the KK Draft Plan were included in the PSB.

155 It seems to the court that Ong objected to the admission of sections of the KK Draft Plan in the PSB only at the submissions stage because it suited his purpose to do so. The court further notes that Ong himself had referred to the KK Draft Plan in his submissions and also produced blown up extracts therefrom. Ong stated:[153]

> There is no dispute as to the authenticity of the 2011 Draft KK Local Plan exhibited at p 2202 which was produced by the Defendant's expert Ms Yen. DBD 4, 5 are blown up portions of the said 2011 Draft KK Local Plan.

156 Borneo had included in the PSB the title deeds, searches and related documents pertaining to Ms Yen's comparables and which were the subject of Ms Teh's cross-examination set out earlier at [87] to [98]. Those documents should rightly have been included in Ms Yen's report as part of her valuation report but were not.

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[152] As 2SAB2097-2204

[153] Para 195 at p 98

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157 Ong's objections to the title searches and related documents produced by Wong is akin to objections being taken to the admissibility in court without formal proof, of title searches and other documents extracted from the Singapore Land Authority.

158 The court accepts Borneo's submission in [135] that Ong's belated objections to the documents in the PSB are without merit.

159 Even if the court were to exclude the Wong's industrial Comparables (or Wong's rebuttal report as Ong's closing submissions described Wong's analysis), it would not make one iota of difference to the court's findings that Wong's valuation is to be preferred to Ms Yen's as being more sound and logical based on his Comparables No 1 to 5.

160 The court notes that Ong's Reply Submissions merely repeated in large part what was stated in Ong's Closing submissions – that Ms Yen had only factored relevant considerations into her valuation. No attempts were made to repair the damage done to Ms Yen's credibility and the doubts cast on her valuation, from her evidence/admissions given during cross-examination.

The decision

(i) What is the date the damages due to Borneo should be assessed?

161 The court holds that the damages due to Borneo should be assessed as at the completion date of the SA namely 26 March 2014. No other date would be more appropriate. This is impliedly accepted by Ong as he had instructed Ms Yen to carry out a valuation as at 26 March 2014. The date was also not disputed in Ong's Closing or Reply submissions.

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(ii) What is the fair market value of the Subject Land as at 26 March 2014?

162 There is little doubt that the Subject Land should be valued for "Mixed Use" as at 26 March 2014 since on that day, its zoning for "Industrial Use (Co-Gen Plant)" was academic. The Co-Gen Plant on that date was either defunct (as the court said at [155] in the first judgment[154]) or even using Ong's word, it was on "standby". This was a permanent state of affairs as to-date; it has not resumed operations.

163 Borneo had submitted that the Subject Land was likely zoned for "Mixed Use" whereas Ong had argued[155] that it was in all probability zoned as "*public utilities"* or *"infrastructures and utility use*" as of 26 March 2014 or 16 December 2011 and not zoned "Mixed Use".

164 At this juncture, the court turns to consider Ong's argument in his closing submissions that GSH/Borneo bought the assets of SH Group on an "as is where is" basis. Ong argued that such a purchase meant that the Subject Land would have been acquired as a co-gen plant as that was then its use at the material time.

165 With respect, Ong's argument conflates two issues namely what GSH/Borneo *acquired* under the SA transaction and what they *intended to do* with their acquisition. As Gilbert had clarified,[156] the "as is where is" condition applied to the physical assets and the land that GSH/Borneo purchased. Any land that the group bought has potential which comes from change of use. The

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[154] See [31] *supra*

[155] At Section B at p 12 of Ong's Reply submissions

[156] See transcripts on 20 September 2021 at pg 24

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SA was an investment and the investment included redevelopment potential.[157] Gilbert had explained that GSH is a land developer and it had never purchased a hotel prior to the SA; it was also not in the hotel business.[158] Buying assets and land on a "as is where is" basis did not mean that the situation remained static. GSH bought the Sembulan Land and SH Resort with a view to redevelopment (which has since taken place, according to Gilbert's testimony[159]). He pointed out that his company "don't [sic] buy a business to break even; we don't buy a business at valuation; we buy a business so that we can add value and that we can get a return from it. Clearly, anything that we buy must have a development potential".[160]

166 Gilbert disclosed that Ong himself when negotiating the SA had indicated to GSH that some part of the golf course could be redeveloped.[161] He was able to produce the slides that Ong used when Ong made the presentation to that effect.[162]

167 Gilbert revealed[163] that the plot of land referred to in the first judgment[164] as plot A with an area of about 12 acres had been developed with 400 plus units and SHGCC was looking to develop plot B as well. Gilbert further disclosed that SGHCC acquired an island called Mantanani of about 6 acres with a 30

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[157] See Gilbert's re-examination at transcripts on 20 September 2021 at p 72

[158] Ibid p 38

[159] See [15] supra and transcripts on 20 September 2021 at p 23

[160] See transcripts on 20 September 2021 at p 24

[161] Ibid p 23

[162] See 2SAB2209-2218.

[163] Ibid at pg 47-49

[164] At [145] – [146]

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years' lease and 40 villas situated thereon. SGHCC had managed to convert the native title of the island to country title and changed its zoning from coconut plantation to tourism.[165]

168 Even using Ong's test as to the highest and best use of the Subject Land,[166] the court is of the view that it is highly improbable that the KK City Hall would have allowed the Subject Law to revert to its former use as an industrial co-gen plant as of 26 March 2014. The court takes into consideration the factors Wong had raised at [24] above, namely it is highly unlikely that the authorities would allow the Subject Land to be used for industrial purposes given its proximity to and fringe location to, the city centre and the attendant issues of noise, smell and traffic associated with industrial use.

169 Moreover, Wong's valuation report[167] stated:

> Continued usage of the site by a potential bidder as a power plant for electricity supply to the general public is unlikely to be a viable option as it is not sufficiently large enough and there are cheaper and larger sites available elsewhere especially at Kota Kinabalu Industrial Park where there are now three independent power suppliers.

The above comment explains why the Co-Gen Plant has been continuously on "standby"[168] since 2015 when the licence to OBSB expired and was not renewed.

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[165] Ibid p 49

[166] As defined under para E of the 2011 MVS at [27] *supra*

[167] At p 26 para (c)

[168] Using Ong's word

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170 Although Wong's Comparable No 5 was transacted on 25 February 2021 and criticised in Ong's submissions for that reason[169], the court notes that it was a like for like comparison as it was located in Tanjong Aru, had an area of 73,087 sq ft and was transacted at RM35m or RM479 per sq ft[170]. Save for the transaction date, it is an ideal comparison.

171 The court takes judicial notice of the fact that the above February 2021 transaction took place in the midst of the Covid-19 pandemic in Malaysia which worsened and peaked in mid-2021/the third quarter of 2021. The state election in Sabah in September 2020 was the catalyst for the spread of Covid-19 infections in the state. The pandemic may have been a factor that affected the market value of Comparable No 5. Consequently, the court accepts Wong's statement set out at [42] that despite the bearish sentiment in 2021, there was still market interest for scarce property.

172 It is a fact that valuation is not an exact science. Even two valuers valuing the same piece of property may not arrive at the same or similar figures. The court in this case can only look at the comparable transactions that the parties put forward and select what can be considered the closest comparable to the Subject Land.

173 In light of the court's earlier adverse findings against Ms Yen's testimony and her valuation which was largely if not totally discredited in cross-examination, the court is of the view that the best comparable would be Wong's Comparable No 5.

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[169] See [37] *supra*

[170] See p 28 of Wong's valuation report

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174 The court therefore accepts that the Subject Land should be valued as zoned for "Mixed Use" and Wong's valuation of RM35m. However, taking into account that the Co-Gen Plant located thereon has to be demolished before redevelopment, the court accepts that a deduction should be made for demolition costs for which Wong gave a range of RM200,000–300,000.[171]

175 In the event Wong is wrong and a development charge would be payable on change of use of the Subject Land from "Industrial" to "Mixed Use", notwithstanding that such a charge had already been paid previously (according to Wong for approval of SH Resort to commercial purpose use[172]), the court looks to the conversion table[173] and it would be based on the formula 15% x 50% of vacant commercial land.

176 The court is in no position to determine how the formula is applied nor what the figure for development charge would be. Erring on the side of caution, the court will deduct from Wong's valuation RM300,000 for the demolition costs of the Co-Gen Plant and a further RM1m for possible development charge and thereby reduce the net value of the Subject Land to RM33.7m. As Borneo acquired 77.5% of the SH Group under the SA[174], its share of RM33.7m is RM26,117,500.00 (33,700,000.00 x 77.5%).

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[171] See [36] *supra*

[172] See [24] *supra*

[173] At SAB2208.

[174] See [2] *supra*

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Conclusion

177 The court therefore awards to Borneo the sum of RM26,117,500.00 as 77.5% of the value of the Subject Land as of 26 March 2014. It follows therefrom that Borneo is also entitled to statutory interest at the rate of 5.33% per annum on the sum from 26 March 2014 until payment. Costs on a standard basis are also awarded to Borneo to be taxed unless otherwise agreed.

Lai Siu Chiu
Senior Judge

Teh Guek Gor Engelin SC, Yeo Yian Hui Mark and Charmaine Lim
(Engelin Teh Practice LLC) for the plaintiff;
Andy Lem, Sharmini Sharon Selvaratnam, Poon Pui Yee &
Cherrilynn Chia (Harry Elias Partnership LLP) for the defendant.

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