Eller, Urs *v* Cheong Kiat Wah

[2021] SGHC 253

Case Number	: Suit No 176 of 2019
Decision Date	: 10 November 2021
Tribunal/Court	: General Division of the High Court
Coram	: Philip Jeyaretnam J
Counsel Name(s)	: Cai Enhuai Amos, Tian Keyun and Yong Ying Jie (Yuen Law LLC) for the plaintiff; Pang Khin Wee (Peng Qinwei) (Hoh Law Corporation) for the defendant.
Parties	: Urs Eller — Cheong Kiat Wah

Trusts – Breach of trust – Remedies

Evidence – Admissibility of evidence – Hearsay – Section 32(1)(j)(iv) of the Evidence Act (Cap 97, 1997 Rev Ed)

10 November 2021

Judgment reserved.

Philip Jeyaretnam J:

Introduction

1 The plaintiff and defendant both invested equally in a Malaysian company that was to take over distribution of a line of hearing aids manufactured by the principal for whose corporate group they had worked. Of the company's 100 shares, the defendant held 50 as express trustee for the plaintiff pursuant to a trust deed. It follows that the defendant was obliged to exercise the voting rights attached to those shares in accordance with the plaintiff's instructions, but in addition the trust deed recorded the defendant's express promise that he would on certain reserved matters including any increase in share capital exercise his rights, including those attached to other shares in the company beneficially owned by him, "in agreement with the instructions of the" plaintiff.

2 Without the plaintiff's knowledge, the defendant issued 350,000 additional shares to himself, turning the plaintiff from a 50% shareholder into a 0.0143% shareholder only.

3 The trial judge held that the plaintiff succeeded on the issue of liability but not on the issue of quantum as claimed. He ordered that a separate assessment be held to ascertain the quantum of compensatory relief (if any) payable by the defendant to the plaintiff: see *Eller, Urs v Cheong Kiat Wah* [2020] SGHC 106 at [3].

4 The trial judge (whom, for sake of clarity, I will refer to as the liability trial judge) framed the issue for assessment of damages as follows:

> 134 The plaintiff submits that his loss must be calculated "on the basis of what [his] 50% beneficial shareholding in the Company should be worth", as the defendant has deprived him of the same by diluting his shareholding in breach of the Trust Deed.
>
> 135 I disagree with the plaintiff's proposed measure of loss. The purpose of a reparative remedy is to compensate the plaintiff for the losses he would not have suffered *had the breach of trust not taken place.* Consequently, I agree with the defendant that the plaintiff's loss should instead be equivalent to:

(a) the value that the plaintiff's beneficially-owned 50 shares in the Company would have been *had the Share Issuance not occurred* ("Value A"); less

(b) the *current* value of the 50 shares in the Company which are beneficially owned by the plaintiff ("Value B").

If Value B is higher than Value A, the plaintiff cannot be said to have suffered any loss and therefore would not be entitled to any form of compensatory relief for the defendant's breach.

5 The liability trial judge contemplated assessment by the registrar, but, in view of the amount claimed, the assessment was fixed before me. I will adopt the abbreviations used by the liability trial judge.

Findings of the liability trial judge

6 The plaintiff, a Swiss national, and the defendant, a Malaysian citizen, first met each other in mid-2011. During this time, the plaintiff was employed by Sonova Holding AG ("Sonova"), a Switzerland-incorporated company which specialises in manufacturing and distributing hearing aid devices.[note: 1] The defendant was employed by Phonak Singapore Pte Ltd ("Phonak"), Sonova's Singapore-incorporated subsidiary.[note: 2] The defendant managed Sonova's Malaysian sales and reported directly to the plaintiff, who was one of Sonova's regional managers.[note: 3]

7 In or around April 2014, the defendant decided, on the advice of Sonova's headquarters, to incorporate a company in Malaysia to take over the distribution of Sonova's products in the Malaysian region.[note: 4] The defendant began to explore how to finance this company as he knew that its start-up costs would be substantial.

8 The plaintiff wished to invest in the defendant's company. After discussion, both parties agreed that they would each invest RM 350,000 in the company as start-up capital.[note: 5] Based on this agreement, the defendant proceeded to register Swiss Medicare Sdn Bhd ("the Company") on 19 September 2014.[note: 6] The Company had 100 shares at the time of its incorporation, which were allotted as follows:[note: 7]

(a) 80 shares to the defendant;

(b) ten shares to the defendant's wife, Ms Tan Poh Guan; and

(c) ten shares to the defendant's mother, Ms Tan Kim Siew.

9 Subsequently, the parties separately consulted their solicitors on the possible ways in which they could formalise their joint investment in the Company. In or around early November 2014, the defendant instructed his solicitors, to draft a partnership agreement ("the Proposed Partnership Agreement"), which was presented to the plaintiff for his consideration. Among other things, the terms of the Proposed Partnership Agreement provided that the plaintiff and the defendant would each hold 350,000 shares in the Company.[note: 8]

10 At that time, the plaintiff owed a contractual non-compete duty to Sonova which prohibited him from, among other things, directly holding shares in the Company until end-2015.[note: 9] Consequently, the plaintiff did not accept the Proposed Partnership Agreement. Instead, he proposed

an alternative arrangement with the defendant holding 50 of the Company's 100 issued shares on trust for the plaintiff.[note: 10] The plaintiff would then lend a sum of RM 350,000 to the defendant in his personal capacity.[note: 11] It was mutually understood that the parties would use the loan to further the Company's business.

11 The defendant agreed to the plaintiff's proposal. Accordingly, the parties executed a loan agreement ("the Loan Agreement") for a sum of RM 350,000 ("the Loan Sum"), as well as a trust deed ("the Trust Deed"), dated 29 November 2014 and 30 November 2014 respectively.[note: 12]

12 The Trust Deed created an express trust in favour of the plaintiff. Among its terms were the following:[note: 13]

> **1. DECLARATION OF TRUST**
>
> The Nominee declares that he:
>
> (a) holds 50 ordinary shares in the Company (the "Shares") as nominee and on trust for the Beneficial Owner; and
>
> (b) has no beneficial interest in the Shares.
>
> …
>
> **3. DIRECTORSHIP**
>
> …
>
> 3.3 The Nominee shall, in relation to the Reserved Matters, exercise his rights as the legal and beneficial shareholder of the ordinary shares in the Company *in agreement with the instructions of the Beneficial Owner.*
>
> 3.4 For the purposes of this clause 3, "Reserved Matters" shall mean:
>
> …
>
> (b) Increase the amount of the Company's issued share capital [except as provided in this agreement], granting any option or other interest (in the form of convertible securities or in any other form) over or in its share capital, redeeming or purchasing any of its own shares or *effecting any other reorganisation of its share capital*, including and not being limited to the transfer of the legal and/or beneficial interests in the shares of the Company held in the Nominee's name from the Nominee to any other person, including existing shareholders;
>
> …
>
> [emphasis added]

13 Shortly after receiving the Loan Sum from the plaintiff, the defendant caused the Company to allot an additional 350,000 shares to himself through an ordinary resolution dated 15 January 2015 ("the Share Issuance").[note: 14] Consequently, the Company's share capital was increased from 100 shares to 350,100 shares.

14 The liability trial judge held, at [69] and [70], that the plaintiff only learned of the Share Issuance about 13 months later. In coming to this conclusion, he specifically rejected, at [60], the defendant's claim to have told the plaintiff about his intention in December 2014, before the Share Issuance. Accordingly, it was unauthorised, and the defendant had committed a breach of Clause 3.3 read with Clause 3.4(b) of the Trust Deed. He went on to consider and reject the defendant's defences of unclean hands, laches, acquiescence, estoppel and waiver.

15 The liability trial judge, at [54] made no finding on the question of whether both parties intended that the plaintiff would hold a 50% share as opposed to 50 shares, because in his view this question only affected the quantum of relief and not liability. This question thus remains for me to answer.

16 When the liability trial judge turned to remedies, he considered, at [121], that the plaintiff had conflated the substitutive remedy of falsification with the reparative remedy of equitable compensation. The liability trial judge held at [132]–[133] that the defendant owed a non-custodial duty not to issue the additional shares (without the plaintiff's agreement) and so would be liable to pay equitable compensation if this breach caused a fall in the value of the trust assets (the 50 shares beneficially owned by the plaintiff).

17 On this basis, it was important that the plaintiff prove that the Company would have been able to find potential purchasers such as hospitals and medical centres if its share capital had not been increased from RM 100 to RM 350,100.

18 The liability trial judge decided, at [144], that it would be fair and just to give the plaintiff the opportunity to prove this in a separate assessment, rather than proceeding to give only a declaratory judgment in his favour.

19 A trustee is the steward of the property entrusted to him, with a custodial stewardship duty not to misuse or misapply that property as well as a management stewardship duty to administer the property in accordance with his equitable duties. A share in a company is a chose in action that carries with it the right to vote in general meetings in accordance with the statutory contract that is the articles of association. The unauthorised exercise by a trustee of voting rights attached to shares held on trust for a beneficiary in order to cause the company to issue shares to the trustee with the immediate intended result of turning the trustee into the majority owner of the company is in substance the trustee treating the trust property as his own. Such unauthorised use of trust property mandates potential options of restorative or substitutive remedies to return the beneficiary to the position he was in before the misuse occurred, or, as ordered by the liability trial judge, a reparative remedy to compensate him for the difference between the position he is in today and the position he would have been in if the breach of trust had not occurred. In this case, the position of the plaintiff prior to the misuse of the voting rights was that of a 50% shareholder of the Company, entitled to 50% of its profits via the declaration of dividends. Moreover, by virtue of his having 50% of the Company, the plaintiff could block even an ordinary resolution, such as that required to issue additional shares. The trustee's surreptitious and unauthorised misuse of the voting rights in the shares circumvented the beneficiary's veto.

20 I proceed to assess equitable compensation in accordance with the issue framed by the liability trial judge and reproduced at [4] above.

The plaintiff's case

21 The plaintiff's case is that it was always understood and agreed that he and the defendant

would be equal shareholders in the Company. The Trust Deed restricted the defendant from altering the proportion of shareholding without the plaintiff's consent, and so it follows that unless and until the plaintiff agreed to a change, they would be equal shareholders.[note: 15] The plaintiff buttressed this point by reference to the defendant's own evidence at the trial on liability that he treated the plaintiff "equally" as a shareholder.[note: 16]

22 The plaintiff contended that if the defendant had told him that it was necessary or desirable to increase the share capital then this could have been done without diluting him, given that he had lent RM 350,000 to the Company. Leaving aside whether their financial contributions were classed as equity or debt, the plaintiff and defendant each provided the same amount of funds to the Company, namely RM 350,000 each.[note: 17]

23 The plaintiff also contended that in any case the amount of share capital was not material to the value of the Company, contrary to the defendant's allegation. First, the plaintiff pointed out that Maybank granted credit facilities to the Company based on personal guarantees from him and the defendant.[note: 18] The fact that an applicant has to fill in the amount of share capital in a bank's due diligence checklist does not mean credit facilities would not have been granted even if the Company had kept its share capital at RM 100. The plaintiff relied on the defendant's admission that nothing in the documents relating to the credit facilities showed any requirement of minimum share capital.[note: 19]

24 Secondly, turning to suppliers, the plaintiff pointed out that the most important part of its business was the exclusive distributorship under its agreement with Phonak for the territories of Malaysia and Brunei on 22 September 2014 for a fixed term of four years from 1 December 2014 to 31 March 2019. [note: 20] This was put in place before the Share Issuance (which was resolved upon on 15 January 2015) when the share capital was only RM 100.

25 Thirdly, and in general, the plaintiff pointed out that there was no evidence from any bank, supplier, service provider or customer (including government hospitals and medical centres) that they required any particular level of share capital for the Company, other than a testimonial from one customer, and so the defendant's allegation that the Company would be worth much less with a lower share capital was merely speculative.

26 Fourthly, the plaintiff pointed out the specific nature of the Company's business, which was not capital intensive. The Company is simply a distributor. He noted that the warranties on the products distributed are performed by the principal.[note: 21]

27 The plaintiff called Mr Aditya Gupta ("Mr Gupta") as its expert valuer. In his report dated 21 January 2021, he adopted 31 October 2020 as the date for valuation, but principally relied on Company's audited financial statements for financial year 2018 ("FY2018"). These were the latest financial statements made available to him. He compared a valuation of 50% equity interest on a significant influence basis with the valuation of a 0.0143% equity interest on a minority interest basis using a market approach cross-checked against an income approach. For the market approach he referred to listed public companies in a comparable industry from whose publicly traded market value and publicly available accounts he could derive an EV/EBITDA multiple. EV stands for enterprise value which means the market value of the company as a whole. EBITDA stands for earnings before interest, tax, depreciation and amortisation. He described this as the Guideline Public Company or GPC method.

28 For the income approach that he used by way of cross check, Mr Gupta adopted the discounted cash flow or DCF method, referring to the free cash flow to firm, being the cash flows left over after covering capital expenditure and working capital needs, and then discounting that to present value. This required him to make supportable cash flow forecasts, which he based on financial projections, to estimate the terminal value at the end of the forecast period and then apply an appropriate discount rate.

29 Using the GPC method, Mr Gupta arrived at the value of a 100% equity interest in the Company on a significant influence basis as ranging from RM 6,953,081 to RM 7,355,972 and on a minority interest basis as ranging from RM 6,782,383 to RM 7,148,647.

30 Under the DCF cross check, Mr Gupta arrived at lower values, which he ascribed to the impact of the COVID-19 pandemic incorporated in the projected FY2020 earnings.[note: 22] The value under the DCF method of a 100% equity interest in the Company was, on a significant influence basis a range from RM 5,798,591 to RM 6,055,686 and on a minority interest basis a range from RM 5,491,545 to RM 5,705,790.

31 Mr Gupta did not average the values arrived at by the two methods or otherwise moderate the figures arrived at by the GPC method. He took the GPC method as having been validated by the cross-check and so put the economic loss at between RM 3,475, 572 and RM 3,676,965.

32 On this basis the plaintiff submits that it has established a loss of RM 3.5–3.7 million and seeks an award of RM 3.7 million.[note: 23]

The defendant's case

33 The defendant's case is that in assessing quantum (based on the formula that it proposed and which was accepted by the liability trial judge) the court should find that in the absence of the increase in share capital the Company would not be what it is today, as it would not have been able to secure business from medical centres or hospitals, nor participate in government tenders.[note: 24]

34 The defendant also contended that the plaintiff's evidence that, if asked, he would have agreed to an increase in share capital so long as he continued to beneficially own 50% of the Company should be rejected as a convenient and self-serving declaration.[note: 25]

35 Accordingly, Value B should be ascertained based on the Company's current success, while Value A would have to assume that the Company's business would have been severely impaired by having a low share capital.

36 The defendant also argued that the date for valuation should be the end of FY2018. The main contention in support of this date was an evidentiary one, that the Company's audited financial reports for FY2018 were the latest ones provided to the experts.[note: 26]

37 On this basis, while noting that the court does not necessarily have to choose either expert's evidence,[note: 27] the defendant contended that his expert's evidence was more reliable.[note: 28]

38 The defendant's expert was Mr Arul Gunendran ("Mr Arul"). He considered three possible approaches, namely an assets-based approach, a market approach and an income approach. He opined that the income approach was the most reliable in the circumstances of the Company. He adopted what he described as the Price Earnings ("PE") ratio method for this purpose. He referred to

certain Malaysian private companies as comparables for the purpose of calculating an appropriate PE ratio to apply to the Company. He used the past year earnings of the Company, but when considering Value A he discounted those earnings on the basis that certain sales would not have been achieved if the Share Issuance had not happened. He assumed that without the increased share capital, the Company would not have achieved those sales.[note: 29]

39 Ultimately, he concluded that Value A was negative, and therefore the plaintiff was not entitled to any compensatory relief.[note: 30]

Issues to be determined

40 There are three issues for me to determine:

(a) whether the plaintiff and defendant both intended that the plaintiff should be a 50% shareholder;

(b) whether, if not for the Share Issuance, the Company would have achieved its current level of sales; and

(c) what Values A and B should be.

Issue 1: Plaintiff as 50% shareholder

41 In my view, this issue can be very simply dealt with. When a party agrees that no new shares will be issued without the consent of the other, this must reflect an intention that the other's percentage shareholding will remain the same, unless and until agreed otherwise. Here, the defendant declared a trust over 50 of the 80 shares held in his name in favour of the plaintiff and promised that he would not increase the share capital without the plaintiff's agreement. It is straight-forward that unless and until the plaintiff agreed to a change in his percentage of the shareholding he would beneficially own 50% of the Company, namely 50 out of the 100 issued shares.

42 This conclusion is all the more compelling given that regardless of what was in the Trust Deed, the Company's share capital could only be increased if 51 of the 100 shares were voted in favour of an increase. In other words, without the vote of at least one of the plaintiff's 50 shares, it was not possible to increase the share capital anyway. The plaintiff's beneficial ownership of 50% of the Company thus gave him the power to block any increase in share capital. Even without the express language of the Trust Deed, a trustee of shares must vote in accordance with any directions of the beneficiary or beneficiaries: see *Butt v Kelson* [1952] 1 Ch 197, per Romer LJ at 207. Romer LJ considered that:

> …the beneficiaries are entitled to be treated as though they were the registered shareholders in respect of trust shares… and can compel the trustee directors if necessary to use their votes as the beneficiaries… think proper…

43 This also means that a trustee of shares in a company should certainly inform the beneficiary or beneficiaries of upcoming shareholders' meetings and proposed resolutions, in order that he may obtain their directions, when the trustee has an interest in the subject matter of such resolution that may conflict with the interests of the beneficiary or beneficiaries. Moreover, in this case, the terms of the Trust Deed made clear the defendant had no discretion in relation to the exercise of the voting rights attached to the 50 shares he held on trust for the plaintiff when it came to the issuance of new shares in the Company.

44 For completeness, I should also add that there is other evidence apart from the Trust Deed that clearly shows that the intention was always one of equal shareholding. For example, in an email of 15 September 2016,[note: 31] the defendant described himself and the plaintiff as equal shareholders. He wrote: "As equal ownership shareholder of [Swiss Medicare Sdn Bhd] – I hope to see more fairness between both of us." Equality of shareholding also underpinned clauses 2.1 and 2.2 of the Proposed Partnership Agreement that was circulated prior to the Trust Deed but not executed.[note: 32]

45 Accordingly, I find and hold that the parties always intended the plaintiff to be a 50% shareholder and not merely the beneficial owner of 50 shares regardless of the total number of shares issued from time to time. Of course, such intention was subject to later variation by agreement, which in itself presupposes that the defendant would first inform the plaintiff and seek his agreement before causing any share issuance that would change the plaintiff's proportion. Moreover, it presupposes that the defendant would not proceed without the plaintiff's knowledge and agreement.

Issue 2: Level of sales if the Share Issuance had not happened

46 This question is also quite simple to answer. The first point to make is that if the defendant genuinely believed that the Company needed additional share capital to be successful or more successful, he would have raised it with the plaintiff. He never did so, and instead surreptitiously issued additional shares to himself. This in itself supports the conclusion that he caused the Share Issuance because he wanted to own (virtually all) of the Company rather than because he considered that the Company needed additional share capital to secure customers or otherwise aid the Company's business prospects.

47 The defendant also did not adduce evidence of even one instance of a supplier or customer insisting on a higher share capital prior to the Share Issuance. By contrast, the plaintiff pointed out that, with the original share capital, the Company was able to take on the 18 customers that Sonova migrated to it. It was also able to secure the exclusive distributorship of the hearing aid products.

48 The closest the defendant came to a third party's expression of concern about the Company's share capital was an out-of-court statement[note: 33] from one Woo Wan Kui. Mr Woo describes himself as the managing director of Hearlife Centre Sdn Bhd and says that his company "views seriously the supplier's financial health and adequate capital setup… We would have no confidence in working with any supplier that do not show enough financial strength, for example a 'RM2' company or companies with very low paid up capital which may imply or have risk of their short existence in the market".

49 In seeking the admission of this statement despite Mr Woo's not being called as a witness and so not being subject to cross-examination, the defendant relies on Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act") s 32(1)(*j*)(iv), which provides that the statement of a person who is competent to give evidence but not compellable to do so, and who refuses to give evidence, is a relevant fact. Mr Woo is a Malaysian residing in Malaysia and so not compellable to give evidence. The defendant also testified that he had invited Mr Woo to give evidence but he had declined to do so.[note: 34]

50 Ordinarily, a party should adduce correspondence with such a potential witness so as to clearly establish the refusal to give evidence and the reasons for that refusal. Nonetheless, I am prepared to admit this document, which has been referred to as the Hearlife Testimonial. However, I am unable to give it much weight because, in the absence of cross-examination, it remains vague. It does not, for

example, say that Hearlife would not have used the Company as a supplier if the Share Issuance had not taken place, let alone provide cogent reasons why Hearlife would not have done so. All it does is express the truism that a businessman would only have confidence in working with a supplier that has adequate financial strength. This begs the question of what adequate financial strength was for a mere distributor such as the Company, as well as whether, for example, such financial strength can be shown by shareholders' loans rather than shareholders' equity.

51 I also find that the Company's business was not a capital-intensive one, and accept that the warranties on the products were to be performed by the principal and not by the distributor.

52 For completeness, I also find that if the defendant had convinced the plaintiff of the need for an increase in share capital, this would have happened on the basis of the plaintiff remaining the 50% shareholder of the Company. The contention of the defendant that the plaintiff would not have had the funds to subscribe for additional shares is belied by the fact that the plaintiff was owed RM 350,000 by the Company. Half of that could have been converted into equity, with the other half of the increase coming from the defendant.

Issue 3: Values A and B

53 It follows from my decision on the first two issues that there is no reason to assess Value A on the basis that the Company would have prospered to a lesser degree had the Share Issuance not taken place. I find that the increase in share capital had no bearing on the overall sales achieved by the Company.

54 Turning to Mr Arul's evidence first, I derived no assistance from it at all. His evidence was illogical and unsupported. Plaintiff's counsel began his cross-examination by pointing out that Mr Arul had very little experience in valuation. I agree that his experience in valuation is thin to say the least, but of much more concern to me was the quality of his evidence.

55 Mr Arul adopted the PE ratio method. PE is calculated by dividing share price by earnings per share. He chose private companies in Malaysia as comparables from which he wished to derive an appropriate PE ratio to apply to the Company's earnings so as to calculate a price for the Company. This posed problems for both the P (price) and the E (earnings) components. For determining any comparable private company's earnings, the quality and quantity of accounting information available were necessarily constrained, as compared to using public listed companies as comparable companies. But he was also unable to determine in any objective way the market value of any of these comparable private companies because he did not have any information of the price at which their shares might be bought and sold. He did not attempt to establish their market value. Instead, he assumed that the value of each comparable private company was the same as its share capital, taking par value as the market value for its issued shares. Thus, if a company had 100 shares of par value RM 1, its value was taken to be RM 100. Whether it had average annual earnings of RM 100, RM 1,000 or RM 10,000, its value and price per share would be taken to remain the same. What would change would be the PE ratio of that assumed share price to its earnings per share: if it earned RM 100 per year its PE ratio would be 1, if RM 1,000, then 0.1 and if RM 10,000 then 0.01. This is obviously illogical. In fact, all else being equal, if a private company had higher earnings its value would go up and the price that potential buyers might offer for its shares would also go up, because they would consider the company's past performance relevant to its likely prospective performance following their purchase of it. His method treated the value of each company as remaining the same regardless of its performance. Mr Arul had no response when I pointed out to him this illogicality.[note: 35]

56 For completeness, I add that I do not hold against Mr Arul his initial mistaken formulation of how to calculate the PE ratio as he may just have been momentarily confused.[note: 36]

57 Mr Gupta's general approach was, by contrast, sound. He sought to establish market value by referring to comparable companies that were publicly listed so that there was information from which to establish both enterprise value and EBITDA. He then cross-checked that by considering the Company's cash flows.

58 Nonetheless, there are specific steps within his approach that need to be considered more carefully, to determine whether any adjustment should be made. I would comment before doing so that the defendant has not put forward any adjusted or reduced number to which the plaintiff's expert's opinion should be recalculated in the light of his criticisms of that opinion. Instead, the defendant asks me to disregard the entirety of the plaintiff's expert's evidence as unsafe. I do not agree with the defendant that I should disregard Mr Gupta's evidence as unsafe. Rather, I accept it as sound in principle but possibly subject to some adjustments that I will proceed to consider.

59 The first is whether his opinion of an EV/EBITDA multiple of 7.5x to 8.0x is correct. This depends on two things, first his establishment of the EV/EBITDA average and median multiples (excluding outliers) in the comparable companies of 16.2x and 19.0x's smaller size of business and secondly his application of a discount to take account, among other things, of the Company's smaller size, key man risk and private company status (requiring a discount for lack of marketability).[note: 37]

60 As Mr Gupta noted:[note: 38]

> Valuation is not a science. It's an opinion. It's an opinion based on analysis and valuer's judgment which is exactly what it is.

61 I accept that the companies chosen by him were reasonably comparable and that his working of the average and median multiples is supportable. However, I consider that the discount applied when carrying over the multiple to the Company is somewhat low, especially given the difference in size between the comparable companies and the Company. I would apply a slightly higher discount and arrive instead at an EV/EBITDA multiple for the Company of 7x.

62 Secondly, I agree that Mr Gupta fairly deducted the amount of RM 350,000 when considering Value A[note: 39] (where no Share Issuance would have occurred and the Company would not have had this money as equity).

63 Thirdly, I do not agree with his applying a significant influence premium to raise the value of the plaintiff's shareholding. In the context of a private company, it may be more appropriate to apply a discount for lack of control rather than a premium for influence. Where a private company has two equal shareholders, an outside buyer of one of those two equal stakes may be more struck by the potential for deadlock than the prospect of significant influence. Consequently, I will remove the significant influence premium from Value A, and instead apply a discount of 10% for lack of control to Value B.

64 Fourthly, I agree with Mr Gupta's treatment of surplus assets, specifically the investment fund of RM 1,225,398.

65 Accordingly, I would adjust Mr Gupta's calculation under the GPC method as shown in the following table:

All figures in RM	Without Share Issuance	With Share Issuance
Historical EBITDA – FY 2018	732,529	732,529
EV/EBITDA multiple (*times*)	7	7
Enterprise Value	5,127,703	5,127,703
Less (net debt) / Add (net cash)	(286,983)	63,017
Add surplus asset	1,225,398	1,225,398
Equity value	6,066,118	6,416,118

66 I then cross-check this value against the value derived from the DCF method. It is closer to that value than Mr Gupta's original number derived by his GPC method. The midpoint for his DCF method is RM 6,055,686. While I also acknowledge that Mr Gupta had some errors in his projections used for the DCF method, I consider that the result of his cross-check lends support to the number I have arrived at.

67 Applying the equity values from the table above, I calculate Values A and B as follows:

(a) Value A is 50% of RM 6,066,118, namely RM 3,033,059.

(b) Value B is 0.0143% of RM 6,416,118 x 90%, namely RM 825.75.

68 The reference to multiplication by 90% reflects the application of a 10% minority discount.

69 The difference between Value A and Value B is therefore RM 3,032,233.25. This is the amount that the defendant should pay to the plaintiff as compensatory relief.

70 I turn to the date for valuation. Generally, when equitable compensation operates as a reparative remedy for a non-custodial breach, the date for assessing loss should be the date of judgment or as close to it as the evidence and the course of proceedings allow, unless justice requires the clock to be stopped earlier, for example where there is evidence that the beneficiary intended to sell the asset at an earlier time. Here, Mr Gupta conducted his valuation based on the FY2018 audited accounts which were the latest available to him, with some updating of certain aspects to about October 2020.[note: 40] I am satisfied by this approach as being practical and accept it.

Conclusion

71 I award the plaintiff equitable compensation in the sum of RM 3,032,233.25. I will hear parties on interest and costs.

[note: 1]Affidavit of Evidence-in-Chief ("AEIC") of Urs Eller, dated 16 September 2019, at p 2, para 3; Notes of Evidence ("NE"), 11 November 2019, p 4, ln 19.

[note: 2]AEIC of Cheong Kiat Wah, dated 17 September 2019, at pp 1–2, para 3; AEIC of Urs Eller, dated 16 September 2019, at p 4, para 17.

[note: 3]AEIC of Urs Eller, dated 16 September 2019, at p 2, para 4.

[note: 4]AEIC of Cheong Kiat Wah, dated 17 September 2019, at p 2, para 4.

[note: 5]AEIC of Urs Eller, dated 16 September 2019, at p 5, para 21; AEIC of Cheong Kiat Wah, dated 17 September 2019, at pp 2–3, para 7.

[note: 6]AEIC of Urs Eller, dated 16 September 2019, at p 4, para 17.

[note: 7]AEIC of Urs Eller, dated 16 September 2019, at p 4, para 18.

[note: 8]Agreed Bundle of Documents, Vol 2 ("2LAB"), at p 385, cl 2.1.

[note: 9]AEIC of Urs Eller, dated 16 September 2019, at p 11, paras 32–33; NE, 11 November 2019, p 13, ln 22.

[note: 10]AEIC of Urs Eller, dated 16 September 2019, at p 11, para 35.

[note: 11]AEIC of Urs Eller, dated 16 September 2019, at p 11, para 37.

[note: 12]AEIC of Urs Eller, dated 16 September 2019, at p 13, para 50 and p 14, para 52.

[note: 13]2LAB, at pp 510–511.

[note: 14]AEIC of Urs Eller, dated 16 September 2019, at p 17, para 67; AEIC of Cheong Kiat Wah, dated 17 September 2019, at p 7, para 28.

[note: 15]Plaintiff's closing submissions, dated 23 September 2021, paras 58–59.

[note: 16]NE, 13 September 2019, p 100, ln 7–10.

[note: 17]AEIC of Urs Eller, dated 16 September 2019, p 5, para 21; AEIC of Cheong Kiat Wah, dated 17 September 2019, at p 3, paras 10–11; *Eller, Urs v Cheong Kiat Wah* [2020] SGHC 106 at [8].

[note: 18]Plaintiff's closing submissions, dated 23 September 2021, paras 81 and 85.

[note: 19]Plaintiff's closing submissions, dated 23 September 2021, para 76.

[note: 20]Plaintiff's closing submissions, dated 23 September 2021, paras 87–92.

[note: 21]Plaintiff's closing submissions, dated 23 September 2021, para 128.

[note: 22]AEIC of Aditya Gupta, p 16.

[note: 23]Plaintiff's closing submissions, dated 23 September 2021, paras 205 and 207.

[note: 24]Defendant’s closing submissions, dated 23 September 2021, paras 37.11–37.12.

[note: 25]Defendant’s closing submissions, dated 23 September 2021, paras 82–86.

[note: 26]Defendant’s closing submissions dated 23 September 2021, paras 101–103.

[note: 27]Defendant’s closing submissions dated 23 September 2021, para 112.

[note: 28]Defendant’s closing submissions dated 23 September 2021, para 122.

[note: 29]AEIC of Arul Gunendran, p 10.

[note: 30]AEIC of Arul Gunendran, pp 40–41.

[note: 31]2LAB, at p 766.

[note: 32]2LAB, at p 385.

[note: 33]AEIC of Cheong Kiat Wah, dated 9 April 2021, at pp 785–786.

[note: 34]AEIC of Cheong Kiat Wah, dated 9 April 2021, at p 18, para 46.

[note: 35]NE, 26 August 2021, pp 62–64.

[note: 36]NE, 26 August 2021, pp 60–61.

[note: 37]NE, 25 August 2021, p 15, ln 17 to p 16, ln 30.

[note: 38]NE 25 August 2021, p 15 lns 17–19.

[note: 39]AEIC of Aditya Gupta, p 43, para 124.

[note: 40]AEIC of Aditya Gupta, p 14 and 24.