**IN THE APPELLATE DIVISION OF**
**THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2023] SGHC(A) 30**

Appellate Division / Civil Appeal No 60 of 2022

Between

Ong Han Nam

… *Appellant*

And

Borneo Ventures Pte. Ltd.

… *Respondent*

In the matter of Suit No 1268 of 2016

Between

Borneo Ventures Pte. Ltd.

… *Plaintiff*

And

Ong Han Nam

… *Defendant*

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# JUDGMENT

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[Damages — Assessment]

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# v
# Borneo Ventures Pte Ltd

**[2023] SGHC(A) 30**

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Woo Bih Li JAD and Aedit Abdullah J
9 March 2023

30 August 2023 Judgment reserved.

**Aedit Abdullah J (delivering the judgment of the court):**

## Introduction

1 In the hearing leading to the present appeal, the parties were to have their dispute on the quantum of damages determined according to the parameters laid down by the Court of Appeal in its decision in *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 ("the CA Judgment"). Unfortunately, that hearing appears to have proceeded on a wrong approach, with parties and the judge below ("the Judge") misapprehending how the damages were to be measured. The arguments on appeal were also largely formulated by adopting the wrong approach. Nonetheless, there is sufficient material for this Court to give effect to the Court of Appeal's directions as best as it can.

**Background to the dispute**

2 We derive the background facts partly from the Introduction section of the CA Judgment.

3 The core of the dispute centres on a plot of land of approximately 1.459 acres ("the Subject Land"). It is part of a larger piece of land situated in the Sembulan District, Kota Kinabalu, Sabah, spanning an area of about 95.58 hectares (238.63 acres) with title number 017544875 ("the Sembulan Land"). The leasehold interest in the Sembulan Land is vested in Sutera Harbour Golf and Country Club Sdn Bhd ("SHGCC"). The Subject Land housed a power plant ("the Co-Gen Facility").

4 In March 2014, the ownership of the ultimate parent company of SHGCC, Sutera Harbour Group Sdn Bhd ("SH Group"), changed hands with 77.5% of the shareholding in SH Group being acquired by the Respondent, Borneo Ventures Pte Ltd, from the Appellant, Mr Ong Han Nam, otherwise known as Edward Ong ("the Appellant") pursuant to a Subscription Agreement dated 30 December 2013 ("the SA"). The acquisition was completed on 26 March 2014.

5 In the SA, the Appellant had given the following warranties to the Respondent:

(a) that SHGCC was the sole legal and beneficial owner of the Sembulan Land which included the Subject Land ("the Land Warranty");

(b) that the assets held by the SH Group at the time would not be disposed of except in the ordinary course of business ("the Asset Disposal Warranty");

(c) any transactions involving disposal of the SH Group's assets would be conducted at arm's length ("the Arm's Length Warranty").

6 However, on 12 July 2013, ownership of the plant and machinery of the Co-Gen facility on the Subject Land was transferred by a tenant of the Subject Land to one of the Appellant's companies, Omega Brilliance Sdn Bhd ("OBSB") in exchange for OBSB paying off certain debts. Subsequently, pursuant to a sale and purchase agreement dated 1 March 2014, SHGCC sold the Subject Land to OBSB for Malaysian Ringgit (RM) 1,000. The date of 1 March 2014 appears to have been inserted in that agreement pursuant to an email from one Ms Wong Lee Ken ("Ms Wong") dated 20 March 2014 to one Timothy Soo from a firm of solicitors practising in Kota Kinabalu, Sabah, Malaysia. However, nothing turns on this backdating and we will say more about Ms Wong later. Both the Subject Land and assets of the Co-Gen Facility were consolidated under OBSB's ownership: see CA Judgment at [7].

7 The Appellant acknowledged that the existence of this sale and purchase agreement was never disclosed to the Respondent.

8 The Respondent sued the Appellant for breach of the three warranties. The Judge allowed the Respondent's claim: *Borneo Ventures Pte Ltd v Ong Han Nam* [2020] SGHC 91. On appeal, however, the Court of Appeal found that the Appellant was liable for breach of only the Land Warranty under the SA, specifically, that the Appellant had warranted that SHGCC was the sole legal and beneficial owner of the Sembulan Land when this was not so because the

Subject Land, which was supposed to be part of the Sembulan Land, had been sold in the earlier agreement involving OBSB and was no longer part of the Sembulan Land.

9 The Court of Appeal found that damages would be an adequate remedy for the Appellant's breach of the Land Warranty and reversed an injunction which the Judge had granted restraining the Appellant from transferring the land to OBSB. In particular, on the issue of damages, the Court of Appeal held (CA Judgment 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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> [emphasis added]

10 This was the basis on which the assessment of damages was to be conducted. Any issue of tax liability was not considered because parties had reached a common landing on this issue and formalised it in a consent order.

11 Four witnesses gave evidence at the assessment of damages hearing. The Respondent's witnesses were Mr Gilbert Ee, CEO of GSH Corporation, which was the ultimate holding company of the Respondent, and an expert witness: Mr Wong Chaw Kok ("Wong"), a chartered surveyor and valuer. The Appellant testified and he had an expert witness, Ms Yen Sie Fui who was also a chartered surveyor and valuer.

12 In assessing damages, the Judge considered two issues:

(a) What was the correct date to assess the damages due to the Respondent?

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

13 The Judge also had to determine a preliminary point on the admissibility of documents. The Respondent sought to admit documents, including a rebuttal report by Wong, in its supplemental bundle of documents ("the PSB"). The Appellant objected, arguing that because these documents were not part of the agreed documents, the Respondent had to satisfy ss 66 and 67 of the Evidence Act (Cap 97, 1997 Rev Ed) before these documents could be admitted into evidence. Because the PSB documents were not formally proven, the Appellant urged the Judge to exclude them, pursuant to the inherent powers of the court under O 92 r 4 of the Rules of Court (2014 Rev Ed).

14 These objections carried no weight with the Judge. It is unnecessary to elaborate on her reasons because ultimately the PSB documents were not material to this Court as we elaborate later.

***Date for assessing damages due to the Respondent***

15 The Judge held that damages due to the Respondent should be assessed at the completion date of the SA: 26 March 2014. The Appellant had impliedly accepted this date as he had instructed his expert to carry out the valuation as at 26 March 2014 (*Borneo Ventures Pte Ltd v Ong Han Nam* [2022] SGHC 162 ("the Judgment") at [161]). The Appellant did not dispute that this was the appropriate date for assessing damages in his closing or reply submissions.

***Fair market value of the Subject Land as at 26 March 2014***

16 The main dispute between the parties was whether the Subject Land was to be valued based on its then existing use as "Industrial use (Co-Gen) Plant" or on its potential future "Mixed Use". The Appellant said it was the former while the Respondent said it was the latter. In particular, the Respondent's case was that what it was prepared to accept as a valuation of any particular asset for the acquisition of shares under the SA was different from the value that it would ascribe to that same asset if it were to voluntarily dispose of it under normal circumstances.[1] Once the correct use was determined, the next step would be to determine the value of the Subject Land based on that use.

17 The Judge was of the view that the Subject Land should be valued for "Mixed Use" as at 26 March 2014 because, on that day, its zoning for "Industrial us (Co-Gen Plant)" was academic. The plant was either defunct or on "standby" and, up to the date of the Judgment, had not resumed operations (Judgment at [162]).

18 Second, even if the assets of the target company or companies were acquired on an "as is where is" basis as contended by the Appellant, any land that was part of the acquisition had potential that came from a change of use. The SA was an investment and the investment included redevelopment potential (Judgment at [165]).

19 Based on the evidence before her, the Judge's final valuation of the Subject Land was RM 33.7 million, and the Respondent was entitled to 77.5% of this amount which came up to RM 26,117,500.00. This was because the Respondent had acquired only 77.5% of the shares in the company which owned

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1 Respondent's Case at para 11.

the Sembulan Land. The Judge also awarded the Respondent interest on this sum at the rate of 5.33% per annum from 26 March 2014 until payment (Judgment at [177]).

## Our Decision in Respect of the Appeal

### *The issues*

20 The primary issue was the valuation of the Subject Land. However, the approach taken below was at odds with the directions of the Court of Appeal. The parties' focus was on the first portion of the Court of Appeal's holding at [81] of the CA Judgment. In doing so, the parties overlooked the second sentence in [81] of the CA Judgment. We repeat both sentences below:

> 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.

21 The parties and the experts had proceeded on the basis that the Subject Land was to be valued in isolation. There was no regard to the value of the Sembulan Land which the parties had used *in order to determine the acquisition price of the shares.* For convenience, we will refer to that value as "the Applicable Value". This is the *material* value for determining the fair market value of the Subject Land, regardless of whether the value of the Subject Land was based on one use or another. While it is true that other assets and liabilities would also be considered in determining the acquisition price, the Applicable Value is the starting point. Indeed, since no other issue was raised in respect of other assets and liabilities, the Applicable Value would have been the only value to be considered to assess the damages to be awarded. Once the Applicable

Value was ascertained by the court, the next step would then be to use it to ascribe a value to the Subject Land.

22 Accordingly, while we accept the Respondent's argument that a value ascribed by it to a particular asset for the acquisition was different from the value to be ascribed based on potential future use, that is not the point. Likewise, while we agree with the Judge that any land acquired would have potential which comes from change of use, that is also not the point. The point is simply the basis on which the Court of Appeal had directed the assessment to be done. It was the amount that would have been deducted from the acquisition price if the Respondent had been properly apprised of the fact that the Subject Land was not part of the deal. We also clarify that references by the Court of Appeal to a company referred to as "GSH" is to the parent company of the Respondent.

23 The Respondent argues that if the Respondent (or GSH) had been properly apprised on completion that it would not get the Subject Land, it would have been reasonable and justifiable for it to deduct the fair market value of the Subject Land. This deduction would have been based on the Subject Land's potential future use, taking into account the forceful deprivation of the Respondent's opportunity to exploit that land commercially.

24 We do not agree. First, it is important to bear in mind that the Subject Land was never considered in isolation as a discrete piece of land. The Respondent was interested in the Sembulan Land as a whole and there was no evidence that the Respondent had considered the Subject Land separately from the rest of the Sembulan Land. Indeed, there was no reason to do so as it was not aware that the Subject Land had been sold to OBSB.

25 Second, if the Respondent had known of the exclusion of the Subject Land, the first port of call would be to refer to the value of the Sembulan Land, or the balance of the Sembulan Land, which the parties had used in their negotiations for the acquisition price. There would have been no logical reason for the Respondent or the Appellant to use any other value based on future development unless the future development had already been factored into the value to determine the acquisition price. Otherwise, it would mean that the Respondent was paying the acquisition price based on a lower value but when it came to reimbursing the Respondent a portion of the price for the exclusion of the Subject Land, a higher value would be used.

26 Third, the Respondent's argument would mean that the acquisition price was irrelevant, contrary to the direction from the Court of Appeal. In other words, whatever the value that parties had used in order to determine the acquisition price, the Respondent would be entitled to damages based on a future development use.

27 As mentioned, no attempt was made to ascertain the Applicable Value. Instead, the parties and their experts appeared to focus on the value of the Subject Land if it were sold on the market at the relevant date without regard to the Applicable Value, and also as though the Subject Land was a discrete piece of property instead of being part of a much larger piece of land, *ie*, the Sembulan Land.

28 Given what had transpired, one option for us would have been to remit the matter back to the Judge to determine the Applicable Value first and then to ascribe a value to the Subject Land.

29 However, fortunately, there was evidence before us that made it unnecessary to remit the assessment back to the Judge, as we elaborate below.

***The correct approach and the measure of damages***

30 When the Court informed the parties that the approach they had taken below and initially on appeal was not correct as the correct approach was to first determine the Applicable Value, neither party suggested that it was not open to the court to ascertain the Applicable Value.

31 As the Court of Appeal noted in *CSDS Aircraft Sales & Leasing Inc v Singapore Airlines Limited* [2023] SGCA(I) 5 at [32]–[35]:

> 32 The court's determination as to whether it should accept parts of an expert's evidence is guided by considerations of consistency, logic and coherence – and this requires a scrutiny of the expert's methodology and the objective facts which he relied on to arrive at his opinion (*Armstrong, Carol Ann (executrix of the estate of Peter Traynor, deceased, and on behalf of the dependents of Peter Traynor, deceased) v Quest Laboratories Pte Ltd and another and other appeals* [2020] 1 SLR 133 at [90]).
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> 33 It is axiomatic that the process of valuing assets is largely fact-sensitive in nature and is typically reliant on expert evidence to assist the court (*Abhilash s/o Kunchian Krishnan v Yeo Hock Huat and another* [2019] 1 SLR 873 ("*Abhilash*") at [3]). Evidence of a genuine third-party offer to acquire an asset, made at arm's length, and which is not speculative or conditional should be taken into account when determining fair market value (*Abhilash* at [76]; *Lim Chong Poon v Chiang Sing Jeong* [2020] SGCA 27 ("*Lim Chong Poon*") at [20]), although such offers would not invariably represent the best evidence under all circumstances.
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> 34 **In other words, the court must factor into its analysis all categories of evidence (both factual and expert) when arriving at its conclusion on valuation. These pieces of evidence must be tested against one another, having regard to logic and common sense.** For example, in *Kiri Industries Ltd v Senda International Capital Ltd and another* [2023] 3 SLR 140 (at [27]–[29]), the SICC rejected certain assumptions made by the expert in her valuation report on the

> value of a production licence as those assumptions did not square with the factual matrix and there was no evidential basis to support them. Thus, the expert's calculations were found to be incorrect and unreliable.
>
> 35 Contrary to CSDS' assertions, **there is no binary choice to be made in only considering one category of evidence to the exclusion of the other. The weight to be ascribed to each category of evidence depends on the issue in question, the nature of the evidence and its inherent reliability. The court should be guided by the particular needs of the case in deciding how to apportion weight between the factual and expert evidence** (Tristram Hodgkinson and Mark James, *Expert Evidence: Law and Practice* (Sweet & Maxwell, 5th Ed, 2020) ("*Expert Evidence*") at [12-011]). In doing so, the court is at liberty to decide which class of evidence it prefers, and there is no hierarchy of evidence on particular issues including the determination of the market value of an asset (*Expert Evidence* at [12-010]).
>
> [emphasis added]

32 In the present case, given the approach taken by the parties and their experts, we could not accord any weight to the expert evidence as to the value of the Subject Land. The issue of valuation thus turned on the factual evidence, which was available to us on the record. We add that under s 41(6) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed), the Appellate Division may draw any inference of fact, give any judgment and make any order.

33 Furthermore, O 19 r 7(4) of the Rules of Court 2021 states that:

> (4) The appellate Court may make any order relating to any part of the decision of the lower Court and for any reason although that part is not the subject of any appeal and that reason is not stated by anyone in the appeal.

34 As can be seen, the appellate court may make any order for a reason that is not stated by anyone in the appeal even in respect of a part of the decision of the lower court that is not the subject of an appeal. *A fortiori*, the appellate court may apply a reason that is not stated by anyone in the appeal for an issue which is in fact the subject of an appeal. As intimated above, neither party questioned

the wide powers of the appellate court to adopt an approach which neither had advocated.

35 In its Appellant's Case, the Appellant had referred to a valuation report by CH Williams Tahar & Wong dated 24 April 2013 ("the 2013 Valuation Report") which had valued the Sembulan Land based on its existing condition.[2]

36 At page 8 of Appendix A of that report, there were two values which could be applicable. The value of the Sembulan Land, which was said to be 94.9 hectares or 234.5 acres, was stated to be RM 379,600,000. After taking into account a golf course on the land and other assets and deducting the memberships sold, the market value of SHGCC was stated to be RM 324,105,000. Neither party was able to assist the court as to which of these two figures was the correct one, although counsel for the Appellant, Mr Andy Lem ("Mr Lem") appeared to accept that the higher value, being the value of the land, was the correct one. In the absence of such assistance, we are of the view that the value attributed to the land was the correct one to apply as the issue before us was the value of the Sembulan Land and not the value of SHGCC as such. We refer to the former value, *ie*, RM 379,600,000 as "the 2013 Valuation".

37 There was another valuation report prepared in 2017 by Taylor Hobbs, but that report is irrelevant to the issue, since it was prepared after the date of the SA and could not have been used by the parties as the Applicable Value to determine the acquisition price.

38 The question then was whether the parties had used or relied on the 2013 Valuation Report or the 2013 Valuation as the Applicable Value.

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2 Appellant's Case at paras 19(a) and 25.

39 Mr Lem took the position that the 2013 Valuation was the basis on which parties eventually arrived at the acquisition price of RM 700 million and the Appellant was entitled to use it to determine the Applicable Value for the assessment of damages payable by the Appellant to the Respondent.

40 Mr Lem provided two reasons. First, the Appellant did adopt the affidavit of evidence-in-chief ("AEIC") of Ms Wong at the liability stage of the proceedings. She was an accountant by training and was Chief Financial Officer in various companies in the Sutera Harbour group of companies. In Ms Wong's AEIC, she had stated that the 2013 Valuation Report was used to determine the value of assets for the acquisition of the shares under the SA. This aspect of her evidence was not challenged at the liability stage of the trial.

41 Second, the 2013 Valuation Report was a key document and named as such in the "due diligence that was conducted by Borneo Ventures as part of the acquisition".

42 On the other hand, counsel for the Respondent, Ms Engelin Teh *S.C.* ("Ms Teh"), took the position that the 2013 Valuation Report had been prepared earlier for a different purpose and not for the purpose of determining the value of the Sembulan Land for the acquisition. The 2013 Valuation Report was not intended to be evidence of how much the Sembulan Land was worth, but it was "one of the preliminary documents that was presented to the Borneo Group to convince them, or to interest them into the acquisition", and had been used as a reference or guide as to the value of the shares being acquired under the SA.

43 There was no evidence below as to the details of how the final figure of RM 700 million was arrived at for the acquisition of the shares, and what part the value of the Sembulan Land, as a whole, played. Ms Teh had suggested that

parties arrived at the acquisition price of RM 700 million without much regard for the value of the Sembulan Land because RM 700 million was the sum which was required to pay various creditors. In our view, whatever the sum that was required to pay creditors, it is logical to infer that the parties would still have considered the value of the Sembulan Land and that that value was material in determining the acquisition price for the shares. If they had considered the amount owing to the creditors as the main factor to determine the acquisition price, then there would have been no need to consider the 2013 Valuation Report at all and it would not have been used as a reference or guide in the acquisition exercise. In any event, it is simply illogical to suggest that the parties considered the amount owing to the creditors without much regard to the value of the Sembulan Land.

44 At this juncture, we pause to mention that the 2013 Valuation Report excludes the Subject Land. It states that the net land area taken for the valuation of the Sembulan Land is 234.5 acres, after deducting the area of the Subject Land.

45 This, however, does not necessarily mean that the parties did not use the 2013 Valuation Report to derive the Applicable Value. We note that while the Respondent's position was that the 2013 Valuation Report is not evidence of the Applicable Value, the Respondent also said that the 2013 Valuation Report had been used as a reference or guide to determine the acquisition price. Moreover, if the 2013 Valuation Report had not been used, what other report or value did the parties or the Respondent use in order to determine the acquisition price for the shares? Some value or valuation must have been used by the parties for the exercise. The Appellant says it was a value stated in the 2013 Valuation Report. The Respondent says it was not but, significantly, the Respondent does not say what other value was used at that time. Accordingly, we infer that the

2013 Valuation Report was relied upon by both parties and the 2013 Valuation was the Applicable Value.

46 Having ascertained the Applicable Value, the next step is to use it to ascribe a value to the Subject Land.

47 The balance of the Sembulan Land (*ie*, excluding the Subject Land), measured 234.5 acres. As mentioned, it was valued at RM 379,600,000 in the 2013 Valuation Report. This works out to approximately RM 1,618,763 per acre.

48 The area of the Subject Land, as stated in the 2013 Valuation Report, is 1.68 acres. There was, however, some discrepancy as regards the area of the Subject Land. The figure of 1.459 acres was used in the sale and purchase with OBSB. A letter of demand sent by lawyers for the Respondent to OBSB on 25 September 2015 referred to the Subject Land as "measuring about 1.459 acres".[3] In the Respondent's statement of claim dated 30 November 2016, the area of the Subject Land was also stated as 1.459 acres.[4] This was not disputed by the Appellant in his Defence.[5]

49 Parties do not appear to have noticed the discrepancy between 1.68 and 1.459 acres. Given the parties' pleadings, we are of the view that the area of the Subject Land should be taken as 1.459 acres.

50 There is no evidence that at the material time of negotiations for the acquisition of the shares, the Subject Land was ascribed a higher proportionate

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3 Record of Appeal Vol 5 Part 10 at p 259.

4 Statement of Claim at para 6.

5 Defence and Counterclaim at para 4(1).

value than the rest of the Sembulan Land. As alluded to above, for all intents and purposes, it was simply part of the Sembulan Land. Accordingly, it is logical and just to use a proportionate value of the 2013 Valuation based on the area of the properties discussed to determine the value of the Subject Land without any uplift.

51 As the area of the Subject Land is 1.459 acres and the area of the land in the 2013 Valuation Report is 234.5 acres and the Applicable Value is RM 379,600,000, the value of the Subject Land is RM 2,361,776, *ie*, RM 379,600,000/234.5 x 1.459 = RM 2,361,776 (in round figures).

52 However, as only 77.5% of the shares were acquired, the Respondent is entitled to only 77.5% of RM 2,361,776 = RM 1,830,376 (in round figures) as damages.

***Was the Judge correct in ordering that the Appellant pay interest at 5.33% from 26 March 2014?***

53 The Judge had awarded interest at 5.33% per annum to run from 26 March 2014.

54 Although the Appellant argues for interest to run from a later date, the Appellant does not argue that 26 March 2014 is not the date when the cause of action arose. Instead, he argues that interest should run from 8 March 2021 which is the date of the decision of the Court of Appeal. He asserts that until then, he was deprived of the use of the Subject Land. It is not entirely clear to us whether that alleged deprivation was the result of an injunction granted against the Appellant and/or OBSB from using the Subject Land in the meantime, and/or because the Appellant and OBSB felt that it was imprudent to use the Subject Land in the meantime. Mr Lek suggested it was the latter. In any

event, the interest which a court may order is on the sum which the Respondent is entitled to from the time the entitlement arose. If, in fact, the Appellant had suffered damage from not using the Subject Land in the meantime, that is a separate matter.

**Conclusion**

55 We therefore set aside the award of damages made by the Judge. The Appellant is to pay the Respondent the sum of RM 1,830,376 as damages with interest thereon at 5.33% from 26 March 2014 to the date of full payment.

56 On the question of costs, the Appellant has succeeded in his appeal, but his success was not from an argument which he had raised below or initially on appeal. Likewise, while the assessment of damages was necessitated by the Appellant's breach of the Land Warranty, the Respondent had used the wrong approach for the assessment. In all the circumstances, we set aside the costs order made by the Judge. Parties are to bear their own costs of the proceedings here and the assessment below.

57 The usual consequential orders apply.

Woo Bih Li
Judge of the Appellate Division

Aedit Abdullah
Judge of the High Court

Lem Jit Min Andy, Poon Pui Yee and Cherrilynn Chia (Harry Elias Partnership LLP) for the appellant.
Teh Guek Ngor Engelin SC, Yeo Yian Hui Mark and Charmaine Lim (Engelin Teh Practice LLC) for the respondent.

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