Columbia Asia Healthcare Sdn Bhd *v* Hong Hin Kit Edward and another and another appeal [2015] SGCA 3

Case Number	: Civil Appeals Nos 68 and 69 of 2014
Decision Date	: 22 January 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Judith Prakash J
Counsel Name(s)	: Harish Kumar and Jonathan Toh (Rajah & Tann Singapore LLP) for the appellant in Civil Appeals Nos 68 and 69 of 2014; Niru Pillai, Liew Teck Huat and Jason Yeo (Global Law Alliance LLC) for the respondents in Civil Appeals Nos 68 and 69 of 2014.
Parties	: COLUMBIA ASIA HEALTHCARE SDN BHD — EDWARD HONG HIN KIT — ALBERT HONG HIN KAY — P T NUSAUTAMA MEDICALINDO

Contract – Breach

Contract – Remedies – Damages

[**LawNet Editorial Note**: The decision from which this appeal arose is reported at [2014] 3 SLR 87 and [2014] 3 SLR 164.]

22 January 2015 Judgment reserved.

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

Introduction

1 Four appeals were before us at the hearing on 2 October 2014. The appeals arose from three sets of proceedings that were consolidated and heard together by the High Court Judge ("the Judge"), namely:

(a) Suit No 964 of 2009 ("Suit 964")

(b) Suit No 861of 2008 ("Suit 861")

(c) Suit No 862 of 2008 ("Suit 862")

All three sets of proceedings stemmed from the purchase of Gleni International Hospital ("the Hospital") and the land on which it was built ("the Land").

2 The purchase of the Hospital and the Land was structured in the form of a share purchase. The Hospital and the Land were owned by PT Nusautama Medicalindo ("PTNM") which was in turn wholly owned by Universal Medicare Pte Ltd ("UMPL"). Pursuant to a Share Sale Agreement ("the SSA") dated 24 December 2007, Columbia Asia Healthcare Sdn Bhd ("Columbia") agreed to purchase 99% of the shares in UMPL ("the Sale Shares") from Mr Edward Hong Hin Kit ("Edward Hong"), Mr Albert Hong Hin Kay ("Albert Hong") (collectively, "the Hongs") and Mr Boelio Muliadi ("Muliadi"), with an option to acquire the remaining 1% of UMPL's shares, also dated 24 December 2007 ("the Call Option Agreement").

3 Suit 964 was brought by Columbia against the Hongs for alleged breaches of the terms of the SSA. The Judge held and ordered/declared that the Hongs (a) pay damages for their breach of the SSA in failing to ensure that title to the Land was unencumbered; (b) indemnify Columbia against any claim arising from the transfer of shares; and (c) indemnify Columbia for any actual or contingent tax liabilities flowing from their breach of tax warranties in the SSA. The Hongs appealed against this part of his decision in Civil Appeal No 74 of 2014 ("CA 74"). The Judge also rejected Columbia's claim for multiplier damages for the diminution in value of the Sale Shares and Columbia appealed against this part of the Judge's decision in Civil Appeal No 68 of 2014 ("CA 68").

4 Civil Appeal No 75 of 2014 ("CA 75") was the Hongs' appeal against the Judge's decision in Suit 861. The suit concerned a claim by Thermal Industries & Supplies (Pte) Ltd ("Thermal Industries") against Columbia for various sums due and owing. Columbia brought third-party proceedings against the Hongs for indemnities provided by them as vendors under the SSA. The Judge granted judgment in favour of Thermal Industries for the debts owed to it but also found that the Hongs were liable to indemnify Columbia for the said amount.

5 Civil Appeal No 69 of 2014 ("CA 69") was Columbia's appeal against the decision of the Judge in Suit 862. This was a claim by Thermal International (S) Pte Ltd ("Thermal International") against Columbia for sums due and owing to it, including a sum owed for the purchase of an MRI machine ("the MRI debt"). Columbia brought third-party proceedings against the Hongs for indemnities provided by them as vendors under the SSA. The Judge granted judgment in favour of Thermal International and found that the Hongs were not liable to indemnify Columbia for the said sums. Columbia appealed against the Judge's decision in respect of the Hongs' liability to indemnify Columbia for the MRI debt.

6 At the end of the hearing, we dismissed the appeals in CA 74 and CA 75 with brief oral grounds reaffirming the decision of the Judge below but reserved judgment in respect of CA 68 and CA 69. We now deliver the judgment of the court in respect of CA 68 and CA 69.

Background facts

7 The full background to the dispute is set out in *Columbia Asia Healthcare Sdn Bhd and another v Hong Hin Kit Edward and another and other suits* [2014] 3 SLR 87 ("the Judgment") (for the supplementary judgment making formal orders, see *Columbia Asia Healthcare Sdn Bhd and another v Hong Hin Kit Edward and another and other suits* [2014] 3 SLR 164). We propose to only briefly set out the background to the abovementioned transaction and the facts relevant to the disposal of CA 68 and CA 69.

Background to the transaction

The pre-contractual negotiations

8 In 2007, the Hongs were looking to sell the business of PTNM and were referred to Valued Partners Ltd ("Valued Partners"), a company specialising in mergers and acquisitions. Michael Chow, the head of Valued Partners, contacted the Managing Director of Columbia, Rick Evans, who expressed interest in purchasing the Hospital and the Land.

9 On 19 October 2007, Rick Evans visited the hospital in Medan and met Edward Hong ("the First Key Meeting"). According to Rick Evans, he was given a sheet of paper purporting to show the operating cash flow of the Hospital for nine or ten months at this meeting or at an earlier meeting in September. From this, he was able to infer that the Hospital would generate a positive annual cash flow of about US$2.5m for 2007. The Hongs denied that there had been an earlier meeting in

September and that any representation had been made as to the Hospital's annual operating cash flow for 2007 at that time.

10 Following the First Key Meeting, Rick Evans wrote to Edward Hong on 22 October 2007 with an initial conditional offer of US$30m for the Hospital and the Land ("the First Conditional Offer"). According to Rick Evans, it was Columbia's practice to determine the purchase price of its acquisitions with reference to the target hospital's Earnings Before Interest, Taxes, Depreciation and Amortization ("EBITDA") multiplied by an appropriate multiplier. He claimed that following a discussion with Prem Abraham, the Chief Financial Officer of Columbia, they decided to apply a multiplier of 12 to PTNM's 2007 EBITDA of US$2.5m to arrive at the US$30m offer price. Another key condition contained in the First Conditional Offer was that the Hospital and the Land would come to Columbia free of all debts and obligations. Edward Hong replied the next day stating that he was comfortable with all the terms outlined in the First Conditional Offer, save for the price.

11 On 27 October 2007, Rick Evans, Edward Hong, Eddie Foo (Edward Hong's trusted advisor) and others met at Columbia's facility in Kuala Lumpur ("the Second Key Meeting"). Immediately after this meeting, Rick Evans made a second conditional offer ("the Second Conditional Offer") to Edward Hong, raising the offer price to US$31m, with all other conditions remaining the same. On 29 October 2007, Edward Hong tacitly accepted this offer. Rick Evans therefore instructed Alan Lim, the lawyer acting for Columbia in the negotiations, to begin drafting an agreement.

12 Subsequently, Columbia discovered from management accounts and balance sheet figures provided by the vendors that PTNM's current liabilities exceeded its current assets by US$841,000 as at September 2007. Columbia was of the view that the vendors were obliged to bear this excess in liabilities in accordance with what had been agreed upon in negotiations. Nevertheless, Rick Evans and Edward Hong agreed that Columbia would be responsible for US$500,000 of these liabilities and the vendors would bear the remaining US$341,000. The purchase price of the Sale Shares was therefore reduced by US$841,000, from US$31m to US$30,159,000. The US$500,000 that Columbia agreed to be responsible for became the purchase price of a nursing academy, Yayasan Gleni ("the Nursing Academy").

The short-form agreement

13 Between 30 November and 3 December 2007, Rick Evans paid a visit to Medan that culminated in a Short-Form Agreement ("the SFA") dated 1 December 2007, which was signed by Edward Hong on behalf of the vendors and by Rick Evans on behalf of Columbia. In addition to the agreed reduction of the purchase price of the Sale Shares to US$30,159,000, Edward Hong would grant an exclusive option to purchase the remaining 1% of the shares in UMPL for US$1,000 by way of separate agreement, *ie*, the Call Option Agreement. The purchase of the Nursing Academy was also to be by way of a separate agreement.

14 A salient term of the SFA was that both UMPL and PTNM were to be delivered free and clear of all liens, debts and encumbrances. However, in respect of PTNM, the vendors would not be liable to Columbia for the following two categories of debts: (a) obligations to trade vendors and doctors that were part of its day-to-day operations ("the Trade Vendor Exclusion"); and (b) debts owed to UMPL ("the Intercompany Debt Exclusion").

The Share Sale Agreement

15 Following the signing of the SFA, there were further communications between Alan Lim and the vendors' solicitors, Michael Khoo & Partners ("MKP"), about the draft SSA. On 7 December 2007, a

meeting was held in Singapore to finalise and sign the SSA. Under the SSA, the purchase price of the Sale Shares was to be paid in Singapore Dollars at an agreed exchange rate of US$1 to S$1.45 which worked out to be S$43,730,550. This sum was apportioned as follows:

(a) S$25.5m was to be paid by Columbia directly to Goldman Sachs (Asia) Finance to discharge the debt owed to it by UMPL (the "Goldman Sachs Indebtedness"); and

(b) the remaining S$18,230,550 was defined in the SSA as the purchase price for the Sale Shares ("the SSA Purchase Price").

16 Under s 3.2 of the SSA, the SSA Purchase Price was to be paid by Columbia to MKP as stakeholders. Section 3.4 of the SSA provided that the SSA Purchase Price was to be released first towards the "full and final settlement of the Liabilities" and the balance (if any) to the Vendors upon the fulfilment of certain conditions.

17 "Liabilities" were defined in s 2.1.24 of the SSA as follows:

2.1.24 Liabilities means all and any present or future liabilities or obligations of [UMPL] and [PTNM] whether actual, contingent or otherwise whatsoever (excluding the Goldman Sachs Indebtedness, all obligations to trade vendors and doctors that are a part of the day to day operation of [PTNM], and the inter-company debts between [UMPL] and [PTNM]) incurred by [UMPL] and/or [PTNM] less the current assets of PTNM, up to and include [sic] the Completion Date.

The parties do not dispute that the Trade Vendor Exclusion is contained in the above provision, *ie*, that the vendors would not be liable to Columbia for PTNM's obligations to trade vendors and doctors that were part of its day-to-day operations.

18 The SSA also contained certain warranties and indemnities given by the vendors to Columbia. In particular, s 3 of the Third Schedule to the SSA warranted the truthfulness and accuracy of PTNM's audited accounts for the year ended 31 December 2006 as well as PTNM's management accounts as at October 2007. The latter set of accounts contained PTNM's actual EBITDA up to 31 October 2007 ("PTNM's 2007 EBITDA"). Both sets of accounts were also appended to the SSA.

19 Upon finalisation of the terms, the SSA was engrossed and seven undated copies of it were signed off by the vendors and given to Lim. Subsequently, on 13 December 2007, MKP sent Alan Lim four undated copies of the Call Option Agreement signed by Edward Hong. The SSA and the Call Option Agreement were both eventually dated 24 December 2007. Completion took place on 22 January 2008 at MKP's office.

20 Columbia exercised its option under the Call Option Agreement to purchase the remaining 1% of the shares in UMPL on 16 May 2008 and the shares were transferred in early July 2008.

PTNM's tax exposure

21 Just over three months after Completion, Columbia discovered what it alleged to be under-declaration and under-payment of tax by the Hospital whilst under the management of the vendors. Of particular concern was Art 21 withholding tax ("Art 21 WHT") that was supposed to be withheld from the Hospital's employees and paid directly to the Indonesian Tax Authority ("the ITA") on behalf of its employees as well as value added tax ("VAT").

22 Rick Evans and Edward Hong met on 30 May 2008 to discuss this tax issue. At this meeting, Rick Evans informed Edward Hong that Columbia intended to henceforth comply with Indonesian law and abandon the Hospital's previous practice in respect of its tax liabilities. Following this meeting, Edward Hong emailed Rick Evans on 2 June 2008 warning him that his decision to comply with Indonesian law would likely trigger a back-assessment of taxes by the ITA and further that "such additional taxes and/or penalties should, properly, not be to account of the vendors …". In response, Rick Evans wrote to Edward Hong on 11 June 2008 stating that the vendors were bound by the SSA, and could not unilaterally absolve themselves from any liabilities whether of UMPL or PTNM if such liabilities flowed from the failure in the past to observe or to comply with the relevant tax legislation.

23 From 2008 to 2013, PTNM underwent a tax audit by the ITA. In 2012 and early 2013, the ITA issue additional tax assessments against PTNM for the years 2004 to 2007 in the following amounts:

(a) 1,991,644,129 rupiah for the year 2004;

(b) 1,930,263,887 rupiah for the year 2005;

(c) 2,327,175,849 rupiah for the year 2006; and

(d) 778,439,127 rupiah for the year 2007.

In total, the amount of additional tax was 7,027,522,992 rupiah. It is common ground that Columbia paid the additional tax to the ITA on 15 May 2012 for the 2004 tax assessment and on 14 September 2012 for the 2005 to 2007 tax assessments.

The MRI debt

24 Sometime in early October 2002, Thermal International shipped an MRI machine to PTNM for use in the Hospital. An invoice for the machine in the sum of S$656,000, numbered "D253/2002", was issued by Thermal International to PTNM on 10 October 2002. Subsequently, a second invoice for the same amount and bearing the number "D253/2006" was issued by Thermal International to PTNM on 29 December 2006. It was on the second invoice that Thermal International mounted its claim.

25 It was not disputed that PTNM made payments for the MRI machine amounting to S$262,600.30 between June and December 2007. This left a balance of S$393,399.70, *ie*, the MRI debt that is the subject of CA 69.

The decision below

26 Only the parts of the Judgment that concern the present appeals will be summarised.

27 The Judge accepted that PTNM's 2007 EBITDA had been inflated as a result of the under-declaration and under-payment of taxes that had been parked in a general ledger account for "other revenue" and the profit and loss account. However, he rejected Columbia's claim for the diminution in value of the Sale Shares allegedly flowing from the inflation of PTNM's 2007 EBITDA calculated according to the following formula ("the Columbia formula"):

[Overstatement of PTNM's 2007 EBITDA] x [appropriate multiplier]

28 The Judge found that PTNM's 2007 EBITDA coupled with an appropriate multiplier was not Columbia's sole or main basis for deriving the actual purchase price. He also found that Columbia did

not suffer a discrete loss due to the inflation of PTNM's 2007 EBITDA over and above what was (or might be) assessed by the ITA in respect of any unpaid taxes.

29 In so far as the MRI debt was concerned, the Judge found that Thermal International had sold the MRI machine to PTNM in the normal course of its business and that the MRI debt was therefore an obligation falling within the Trade Vendor Exclusion in s 2.1.24 of the SSA. The Hongs were therefore not liable to indemnify Columbia in respect of the MRI Debt.

The issues before this Court

30 The main issue before the court in respect of CA 68 is whether the diminution in value of the Sale Shares (if any) due to the inflation of PTNM's 2007 EBITDA ought to be calculated with reference to the Columbia formula.

31 Having dismissed the Appellants' claim for rectification of s 2.1.24 of the SSA in CA 74, the sole issue before us in CA 69 is whether the MRI debt falls within the Trade Debt Exclusion in s 2.1.24 of the SSA.

Our decision

CA 68: the diminution in value of the Sale Shares

32 The Hongs did not dispute that the vendors had been in breach of the warranty that PTNM's management accounts were true and accurate. Columbia sought to rely on s 8.4.2 of the SSA in order to bring its claim for the diminution in value of the Sale Shares. It states as follows:

> 8.4.2 Subject to completion of the sale and purchase of the Sale Shares, if at any time it shall be found that any matter the subject of a Warranty was not as warranted and that the vendors are in breach of such warranty and the effect of such breach is that either:
>
> > 8.4.2.1 the value of the Company or any asset of the Company or the value of the Sale Shares is less than what its value would have been had there been no such breach of warranty
> >
> > …
> >
> > then the Vendors will…if the Purchaser shall so elect in its absolute discretion, pay to the Purchaser an amount equal to the diminution thereby caused in the value of the Sale Shares; Provided always that these provisions shall be without prejudice to any other rights or remedies which the Purchaser may have by reason of any breach of such Warranty.

33 In our judgment, the correct approach is to determine whether Columbia has succeeded in demonstrating that its claim falls within the terms of s 8.4.2 of the SSA inasmuch as:

(a) there has been a breach of warranty; and

(b) the value of the Sale Shares which it actually received (hereinafter referred to as "the value as is") was less than the value of the Sale Shares it ought to have received had there been no breach of warranty (hereinafter referred to as "the value as warranted").

If Columbia succeeds in demonstrating this, the Hongs are *contractually obliged* to pay to Columbia that diminution in value of the Sale Shares. As the parties do not dispute that there had been a

breach of the warranty given in respect of the accuracy of PTNM's management accounts, it only remains for Columbia to demonstrate the diminution in value of the Sale Shares as stated at (b) above.

34 In this regard, Columbia advanced the case that the diminution in value of the Sale Shares should be calculated by reference to the Columbia formula. Counsel for Columbia, Mr Harish Kumar ("Mr Kumar"), argued that the Columbia formula is appropriate because:

(a) PTNM's 2007 EBITDA coupled with an appropriate multiplier was Rick Evans' sole or main basis for deriving the purchase price of the Sale Shares; and/or

(b) it was also the unchallenged expert evidence of James Searby, Columbia's valuation expert that the Columbia formula was appropriate.

The applicable approach to valuing the Sale Shares

35 As we observed at the hearing before this court, the SSA contains no express provision that the Sale Shares were to be valued by reference to the Columbia formula. In the absence of contractual machinery to value the shares, the court will have to determine the appropriate way to value the aforesaid shares (see, for example, the English Court of Appeal decision of *Infiniteland Ltd and another v Artisan Contracting Ltd and another* [2006] 1 BCLC 632 at [55]–[56]). This is a *factual determination* based on the evidence adduced. In the present case, we are to assess the suitability of calculating the diminution in value by reference to the Columbia formula. In this regard, let us turn to consider a few decisions where the courts have been involved in a similar inquiry.

36 The *value as warranted* of shares is presumed to be the actual price paid for the shares unless rebutted (see the English Court of Appeal decision of *Eastgate Group Ltd v Lindsey Morden Group Inc* [2002] 1 WLR 642 ("*Eastgate*") at [18] and the English High Court decision of *Sycamore Bidco Ltd v Breslin and another* [2012] EWHC 3443 ("*Sycamore*") at [391]). A similar approach was taken by Belinda Ang Saw Ean J in the Singapore High Court decision of *Holland Leedon Pte Ltd (in liquidation) v Metalform Asia Pte Ltd* [2012] 3 SLR 377, where she observed (at [51]) that the actual price agreed upon between a willing purchaser and vendor was *prima facie* evidence of the market value as warranted. In order to rebut the presumption, the defendant vendor has to adduce evidence that even as warranted, the shares were worth less than the actual price paid for the shares and that the purchasers had made a bad bargain in any event (see *Eastgate* at [18]).

37 The *value as is* of the shares would be what a willing buyer would have paid a willing seller at the date of the transaction, knowing the true state of affairs. This issue was considered at some length in *Sycamore*, the facts of which are somewhat similar to the present case. The claimant had purchased shares from the defendants and discovered accounting errors in the company's profit and loss accounts after completion. Specifically, the turnover figure stated in the said accounts had been inflated by reason of the improper recording of certain compensation amounts as turnover. The purchaser claimed damages flowing from the breach of warranty that the company's profit and loss accounts were accurate. In his judgment, Mann J observed (at [405]), as follows:

> … The purpose of the valuation is to find what a willing purchaser would pay to a willing seller. There are various ways of conducting this investigation. In the absence of an apparent market from which a price can be derived, other techniques have to be used. Assuming a purchaser who would use a model like [the actual purchaser's] is one technique … But the views of the actual purchaser and of another potential purchaser are not irrelevant. If the purchaser would have paid the same sum anyway, then that goes to value. If another purchaser is in the wind, so that the

actual purchaser's price has to be beaten to secure the transaction, then that goes to value too.

38 As can be seen from the above passage, the valuation exercise is a multi-faceted and fact-centric one that does not give rise to the application of a uniform approach. An inquiry into how the actual purchaser valued the shares or would have valued the shares (had it known of the inaccuracies in the accounts) could, in the proper circumstances, be relevant to the question of value. Indeed, in the English Court of Appeal decision of *Senate Electrical Wholesalers v Alcatel Submarine Networks* [1999] 2 Lloyd's Rep 423 ("*Senate*"), the court emphasised that the evidential starting point of the inquiry was how the actual purchaser had valued the shares and that the expert evidence on the appropriate valuation method cannot stand alone if it is significantly at variance with evidence of what actually happened (see *Senate* at [34] approving the decision of the judge below as cited at [27]). Therefore, in working out the *value as is* of the shares, the court will often look at the way the claimant purchaser valued the company as evidence of the way the market would value the property or business (see generally *Senate* at [34]).

39 However, Stuart-Smith LJ also found in *Senate* that this did *not* mean that the court was *bound* to adopt the method of valuation that the claimant purchaser had adopted. He observed that there may be circumstances where it would be appropriate to depart from the actual purchaser's valuation approach, particularly where the valuation experts had agreed on an alternative approach. This was the case in the English High Court decision of *ADT Ltd v BDO Binder Hamlyn* [1996] BCC 808 (at 878–879). Both experts had agreed that a discounted cash flow valuation could not be done and that if such calculations could not be done, valuations of companies seen as going concerns usually proceeded by estimating maintainable profits and applying a price earnings multiple.

40 The price that the actual purchaser would have paid if the proper accounts had been presented is also good, albeit inconclusive, evidence of the *value as is* of the shares. In *Sycamore*, the defendants had sought to adduce evidence that the difference in the turnover figure would have made no difference to the price that the actual purchaser would have been willing to pay. However, Mann J eventually found that the evidence adduced in this respect was equivocal and thus turned to the expert valuation evidence instead.

41 As previously mentioned, the expert evidence cannot be significantly at variance with evidence of how the purchaser had actually valued the shares. When considering an expert's valuation evidence, the court will also look at the realities of commercial bargaining and market competition to determine if the valuation model used and the assumptions underpinning such a model could be said to reflect what a willing purchaser would pay a willing vendor. For example, in *Sycamore*, a "haggle factor" was applied to the figure arrived at by the expert's model to take into account the commercial reality that this was a purchase of an attractive business with real perceived growth prospects (at [464]).

42 The English High Court decision of *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573 ("*Thomas Witter*") is an interesting decision where the judge declined to accept not only the experts' opinion (having found that their approach was overly complicated and involved conjecture and surmise) but also the formula allegedly relied on by the purchaser to derive the price. Instead, he adopted a simpler formula as the best approximate to damages. We emphasise, however, that *Thomas Witter* is *not* authority for the proposition that the court can go off on an investigation of its own, so to speak, when valuing shares. As the English Court of Appeal clarified in *Senate* (at [39]–[55]), the court may not adopt a valuation approach that parties have not been given the opportunity to lead evidence or make submissions on.

The pleadings issue

43 The point made at the end of the preceding paragraph brings us squarely to an issue that arose at the hearing before us. Counsel for the Hongs, Mr Niru Pillai ("Mr Pillai"), argued that Columbia's *sole basis* for invoking the Columbia formula had all along been that the offer price of US$31m for the Sale Shares was in fact arrived at by Rick Evans applying a multiplier of 12.4 to PTNM's 2007 EBITDA as (inaccurately) stated in PTNM's warranted management accounts. According to Mr Pillai, the Hongs had therefore sought to meet Columbia's case by advancing a defence that rebutted the aforementioned assertion. He argued that, in the premises, the Hongs would be prejudiced if Columbia is allowed, on appeal, to raise an alternative basis for invoking the Columbia formula, *ie*, James Searby's expert evidence.

44 Naturally, Mr Kumar disagreed with Mr Pillai's contentions. Mr Kumar argued that it was clear from the beginning that Columbia's action was for the breach of the SSA and that it was seeking to claim for the diminution in value of the Sale Shares pursuant to s 8.4.2 of the SSA. Columbia was therefore not only entitled to adduce evidence that a specific formula had been used by the purchaser to value the Sale Shares, but also to adduce expert evidence that the market would have valued the Sale Shares by applying the same formula.

45 At this juncture, we think it apposite to examine Columbia's pleadings in more detail. The following paragraphs of its Statement of Claim (Amendment No 4) ("SOC") are critical in the context of this particular appeal:

> 8. The total consideration was derived by applying the following formula:- *Total consideration = [PTNM's 2007 EBITDA] x multiplier*
>
> [The Hongs] had represented in pre-contractual negotiations that [PTNM] would generate operating cash flow of US$2,500,000 based on the EBITDA figures reported in the [PTNM's] management accounts. …
>
> Initially in a letter dated 22 October 2007 to the [Edward Hong], Mr Evans made a conditional offer of US$30,000,000 based on a forecasted operating cash flow of US$2,500,000 for 2007 and applying a multiple of 12, which Mr Evans in his commercial judgment considered to be appropriate in the circumstances. Following further negotiations with [Edward Hong] … Mr Evans raised the conditional offer to US$31,000,000 thereby increasing the multiplier to 12.4.
>
> …
>
> 14. In breach of the Agreement and of the representations made and warranties given by them as set out above [the Hongs] failed to
>
> …
>
> (3) provide a true and fair view of the state of affairs of [PTNM] at the relevant dates and of the revenue, profits or losses and the taxes payable for the period concerned by making full provision for all actual liabilities and proper provision for all contingent liabilities in the relevant accounts of [PTNM];
>
> …
>
> (e) The classification of WHT and VAT as revenue resulted in the inflation of [PTNM's] revenue;

…

(h) [The Hongs] are in breach of their representations and warranties under sections 6.6.2, 6.6.3 and 15 of the Third Schedule of the Agreement.

15. [The Hongs] had deliberately misrepresented the operating cash flow of [PTNM] to [Columbia]. The EBITDA figures reported in [PTNM's] management accounts are wrong because of the wrongful manner in which WHT and VAT were treated… As a result of [the Hongs'] misrepresentations, [Columbia] overpaid for the Sale Shares by a sum to be determined by the court. [The Hongs] are liable to repay this sum to [Columbia].

16. Further, the value of [PTNM] and/or the Sale Shares has been diminished as a result of the Encumbrance on the Land, its tax exposures and the risk of impending litigation in relation to the DVI Shares. Under section 8.4.2 of the Agreement, [the Hongs] are liable to make good the amount representing the diminution in value of [PTNM] and/or the Sale Shares.

…

17. As a result of the aforesaid breaches by [the Hongs], [Columbia] and/or [PTNM] have suffered loss and damage:

(2) The diminution in value of [PTNM] and/or the Sale Shares.

…

AND THE PLAINTIFFS CLAIM against [the Hongs] and each of them:

(1) Damages to be assessed for over-payment for the Sale Shares and/or the diminution in value of [PTNM] and/or the Sale Shares…

46 From the above, we make the following observations:

(a) It is not entirely clear on the face of its SOC if Columbia was advancing two different claims – one for damages to be assessed for the over-payment for the Sale Shares and another for diminution in value of the Sale Shares pursuant to s 8.4.2 of the SSA.

(b) Read together, paras 8 and 15 of the SOC appear to advance the case that Rick Evans had relied on the Hongs' misrepresentations in respect of PTNM's 2007 EBITDA and thus overpaid for the Sale Shares. The Hongs were therefore liable to repay the overpaid sum to Columbia.

(c) Although para 16 of the SOC states that, pursuant to s 8.4.2 of the SSA, the Hongs are liable to make good the amount representing the diminution in value of the Sale Shares due to PTNM's tax exposures, it does *not* state that:

(i) Section 8.4.2 of the SSA was being invoked due to the breaches of the SSA as particularised at para 14; or

(ii) Columbia was advancing the case that the diminution in value should be calculated with reference to a particular formula and if so, the basis for invoking such a formula.

(d) The only formula in the SOC was that stated at para 8 of the SOC, where it was explained

that the total consideration for the Sale Shares had been derived by applying a multiplier of 12.4 to PTNM's 2007 EBITDA.

47 We note that no mention was made of the Columbia formula even in Columbia's opening statement. Instead, Columbia's case as regards the Sale Shares was stated to be as follows:

> 27. If the defendants are in breach of their contractual warranties, it is trite law that damages should be awarded such that [Columbia] is put in as good a position as if the warranties were not breached.
>
> 28. The evidence will show that the total consideration for the Sale Shares was derived based on the representation that the PTNM was expected to generate an operating cash flow of about US$2,500,000 for 2007. At the offer price of $31,000,000, this equated to a multiplier of 12.4.
>
> 29. The expert evidence will show that PTNM, under the control of the defendants, had under-declared and under-paid about 60% of total WHT and instead recorded this item as "other revenue" in its books. PTNM also wrongfully classified VAT as revenue. These led to an artificial inflation of PTNM's operating cash flow and therefore an overpayment for the Sale Shares. [Columbia] is entitled to damages in the amount of the overpayment for the Sale Shares.

The above reflects paras 8 and 15 of the SOC. Besides the allegation that the total consideration of the Sale Shares had in fact been calculated in a particular manner, there is no hint that Columbia's case was that the overpayment for the Sale Shares should be calculated with reference to a particular formula and, if so, the basis for invoking that formula.

48 As can be seen from their Defence and Counterclaim (Amendment No 5), the Hongs understood Columbia's claim as being one of misrepresentation which resulted in an overpayment for the Sale Shares calculated with reference to the formula stated at para 8 of the SOC. The Hongs therefore pleaded that:

> (a) Rick Evans did not use the aforesaid formula to derive the total consideration for the Sale Shares;
>
> (b) no misrepresentation had been made in respect of PTNM's 2007 EBITDA; and
>
> (c) in any event, Rick Evans had not been influenced or induced in any way by any alleged representation as to PTNM's 2007 EBITDA by reason of (a).

49 On the first day of trial, Mr Kumar clarified that Columbia's cause of action was for breach of the SSA and not for misrepresentation:

Court:	That's a different point, but is your client's cause of action based on 2.5 million times 12?
Mr Kumar:	*Our basis for saying on which we arrived at the price is that we had [PTNM's 2007 EBITDA] and on that we put a multiple and that's how we derived [the price]*. And because in fact [PTNM's 2007 EBITDA] was not that, because of these misrepresentations in relation to WHT and VAT by which [PTNM's 2007 EBITDA] was inflated. So in reality, [PTNM's 2007 EBITDA] was much lower than 2.5 million.
Court:	But is that the cause of action?

Mr Kumar: No. The cause of action is in fact for *breach of the SSA*, that the accounts that you have given which show [PTNM's 2007 EBITDA] are in fact untrue.

…

Court: So he is just saying the accounts are wrong. So whether this witness based it on 2.5 million times 12, that's not the cause of action as such. Because at the end of the day, even if you establish that it is based on replacement costs, he is saying "I'm still entitled to sue you because under the SSA you are supposed to have given certain representation for warranties." He is not basing his claim on the representation as such of 2.5 million. Am I right, Mr Kumar?

Mr Kumar: Yes, your Honour.

[emphasis added]

In light of his clarification, we do not think that it is open to the Hongs to argue that they were misled into thinking that Columbia's case was one based on misrepresentation. *However*, this exchange also reinforced the impression conveyed by both Columbia's SOC and opening statement that the sole basis for invoking the Columbia formula was its allegation that this was how the total consideration for the Sale Shares was in fact arrived at.

50 It is clear from the subsequent exchanges between counsel for the Hongs and the Judge that the Hongs' entire defence was premised on rebutting that allegation. First, when asked by the Judge if the Hongs were also challenging the multiplier figure, Mr Pillai replied:

> …I wanted to let you know, your Honour, since the witness is not here, our position is no such formula was discussed, no such components were therefore discussed; we do not accept that these components, either the 2.5 or even the 12, would have featured in their mind [sic] …

Subsequently, during the cross-examination of James Searby, another counsel for the Hongs, Mr Liew Teck Huat ("Mr Liew"), stated:

Mr Liew: Your Honour, the problem I have with the opinion expressed by Mr Searby is that he went on the assumption that the formula involving the multiplier was the agreed purchase price. That was the assumption.

…

Your Honour, *the point that I am trying to address with this witness is that if you just simply go on the assumption that Rick Evans agreed to the purchase price based on the multiplier, then his calculation would not be entirely reliable, because Rick Evans did not actually go on that assumption.*

…

Court: Of course it would follow. But that is different from saying, "Is it possible?"…

…

> *As an expert, I suppose he will say, is that rational or not rational, or is that the best method of valuing or not. It may even be the best method, but if Rick Evans did not use that it is too bad. But that part, [James Searby] will not know.*
>
> …
>
> At the end of the day, of course, it is for Mr Kumar to persuade me that even if Rick Evans had thought that that is the correct measure that I should award, if he wins, because later on counsel have to address me as to the correct measure, even if he manages to succeed on liability.
>
> I suppose that's why he got Mr Searby here to say something. But Mr Kumar, as a matter of law, I'm not quite sure whether that is the correct measure of damages, so you can address me later on in submissions.
>
> …

[emphasis added]

51 We should add that, in Columbia's opening statement, James Searby was described as an expert witness giving evidence on the *quantification of damages* caused by the Hongs' breaches of the SSA. It is in this context that the Judge's comments above in respect of the correct measure of damages should be seen. From the above exchange, it appears that even the Judge was under the impression that James Searby's evidence had been adduced in order to support Columbia's assertion that Rick Evans had in fact calculated the consideration for the Sale Shares by reference to some formula. It is telling that the Judge eventually dismissed Columbia's claim on the basis that it had failed to establish that PTNM's 2007 EBITDA coupled with an appropriate multiplier was Rick Evans' sole or main basis for deriving the total consideration for the Sale Shares.

52 Columbia's case in respect of its diminution in value claim pursuant to s 8.4.2 of the SSA was not fully and clearly articulated until closing submissions, when it submitted that the diminution in value was to be calculated according to the Columbia formula because (a) Rick Evans had actually applied a multiplier of 12.4 to PTNM's 2007 EBITDA to derive the Purchase Price; (b) the expert evidence was that this was an appropriate approach to value the Sale Shares; and (c) the expert's alternative Discounted Cash Flow ("DCF") model yielded a close result to the alleged diminution in value calculated on the basis of the Columbia formula. In their reply submissions, the Hongs repeated their case that no such formula was ever utilised by Rick Evans and stated in respect of the multiplier figure:

> 17. … It has never been [the Hongs'] case that the purchase price was based on a multiplier of the cash flow.
>
> To the Hong Brothers, the multiplier is a fiction. It never existed until Columbia commenced this legal action. Given this position, it would have been impossible for the Hong Brothers to put forward their own multiplier when it was never an issue to start with.
>
> 18. As such, it is not a question of [the Hongs] disputing the reasonableness of Columbia's multiplier. They dispute the very existence of any multiplier.

53 We should add that we do not think that Columbia's contention that the Hongs have based their case on an alternative valuation method of replacement costs is correct. Their case on their pleadings and during the course of trial was essentially that the consideration for the Sale Shares had

not been based on the formula put forward by Columbia. Their argument that Rick Evans had in fact valued the Sale Shares on a replacement cost basis came about as a result of Michael Chow's evidence that after the First Conditional Offer had been made, Rick Evans had informed him that he was of the view that the replacement cost for the Hospital was between US$30 million and US$35 million and the fact that it was profitable "was a bonus".

54 In the premises, we are satisfied that the Hongs would be prejudiced if Columbia is allowed to rely on James Searby's expert evidence as an alternative basis for invoking the Columbia formula. The Hongs had come to rebut the case posited in Columbia's statement of claim and subsequently reinforced by Columbia's opening statement and at trial – that the sole basis for invoking the Columbia formula was that the total consideration for the Sale Shares had *in fact* been derived by applying the multiplier of 12.4 to PTNM's 2007 EBITDA. The Hongs have therefore been deprived of the opportunity to adduce their own expert evidence in respect of the valuation of the Sale Shares and to challenge the individual components of the Columbia formula, *eg*, the multiplier of 12.4 which they did not take a position on.

Our findings

55 Turning to the evidence adduced, we agree with the Judge's finding that Columbia has *not* discharged its burden of proving that there has been a diminution in value of the Sale Shares to be calculated with reference to the Columbia formula.

56 In our judgment, PTNM's 2007 EBITDA coupled with the appropriate multiplier was *not* in fact Rick Evans' *sole or main* basis for deriving the US$31m offer price. We adopt the reasons stated by the Judge at [258] of the Judgment and will also add that apart from his concession that he had looked at the replacement value of the Hospital as a cross-check, Rick Evans had on other occasions during cross-examination averred to *other* considerations that he had also addressed his mind to. One such occasion was as follows:

> A: It wasn't the hospital that was the opportunity, the opportunity was that it was in Medan, a good market, and most important, it had a licence. Foreigners can only own 67 per cent of a hospital in Indonesia, that's the law. Here was an opportunity for us to have 100 per cent without having to go through a process with the Government of Indonesia because we were buying a Singapore corporation. The value of that was substantial. We didn't know exactly how much, but that's the way we looked at it.
>
> …
>
> Q: And you saw the opportunities from your own substantial experience, having dealt with healthcare business across Asia?
>
> A: True.
>
> Q: *Having acquired the hospital for this price, you can't say you were unhappy with the acquisition?*
>
> A: *No.*
>
> …
>
> Q: *So you are a willing buyer; there is a willing seller; you accepted a price you are happy with*

and you have no regrets until today, would that be correct?

A: That's correct.

[emphasis added]

It would appear from the above exchange that Columbia was induced to pay the price it did by, *inter alia*, the opportunity to gain a foothold in a good market and circumvent Indonesian law on foreign ownership of hospitals. Indeed, it would also appear that, viewed against the backdrop of Columbia's failure to complain about overpayment for the Sale Shares at the earliest opportunity, the inflation in PTNM's 2007 EBITDA would not have made any difference to the price Rick Evans would have paid for the Sale Shares. As mentioned above at [40], the price that the actual purchaser would have paid if the proper accounts had been presented is good (albeit inconclusive) evidence of the *value as is* of the Sale Shares.

57 Columbia also argued at some length that the Hongs were proceeding on the same basis of PTNM's 2007 EBITDA coupled with an appropriate multiplier to justify their asking price of US$32m. In this regard, Columbia relied on a note sent by Eddie Foo to Michael Chow via email on 25 October 2007 ("the 25 October Note") which contained the following:

EBITDA is approximately US$ 2.5 million per annum.

This yields a multiple of 32/2.5 – **12.8**

The biggest attraction, by far, for any investor into [the Hospital] is the potential it offers. The immediately preceding PE multiple is one derived from historical earnings – and is one that is very acceptable by industry norms. However, it is the future earnings potential that should be the centrestage attraction.

We believe it actually has geometric earnings increment potential.

Eddie Foo's evidence in respect of the 25 October Note was that he had written it after being asked by Michael Chow to justify the vendors' asking price. He explained that he had used EBITDA coupled with a multiplier as he was aware that this was a formula commonly used.

58 Inasmuch as this evidence shows that the Hongs had sought to justify their asking price on the basis of PTNM's 2007 EBITDA coupled with an appropriate multiplier, it does not show that *Rick Evans* had proceeded on a similar basis. There is no evidence that Rick Evans had relied on this note to derive the offer price for the Sale Shares. On the contrary, Columbia's case was that Rick Evans had already been proceeding on the basis of this formula when making the First Conditional Offer, which we observe, preceded the 25 October Note.

59 Further, there is also no evidence that the 25 October Note was prepared pursuant to any discussions between the vendors and Columbia about any formula in respect of the offer price. Rick Evans had conceded in cross-examination that he never informed the vendors about how Columbia's initial offer price of US$30m was arrived at. We also do not accept Columbia's allegation that the only reasonable explanation for the inclusion of the formula in the 25 October Note was that not only did Michael Chow know that Rick Evans had, as a matter of fact, applied a multiplier to PTNM's 2007 EBITDA to arrive at the initial US$31m offer price, he also had informed Eddie Foo about it. Significantly, neither Rick Evans nor Prem Abraham gave evidence that Michael Chow was involved in or was otherwise informed about how the offer price for the Sale Shares was determined prior to the

making of the First Conditional Offer.

60 In the light of all the evidence before us, we are not convinced that the 25 October Note would suffice to show that this was the way Columbia, *ie*, the claimant purchaser, had in fact arrived at the offer price for the Sale Shares.

61 As we noted in the preceding section of this part of the judgment, the Hongs will be prejudiced if Columbia is now allowed to rely on the expert evidence as an alternative basis to invoke the Columbia formula. Even if this were not the case, we are nevertheless inclined to give little weight to James Searby's evidence that the appropriate method of valuing the Sale Shares should be the application of the multiplier to PTNM's 2007 EBITDA.

62 First, James Searby's evidence in relation to the Columbia formula was essentially that the ordinary way of valuing a going concern business would be by reference to its future profits and cash flows and not by reference to the replacement costs of its assets. That might well be correct generally. However, his proposed valuation method is clearly inappropriate in light of the other factors which induced Columbia to pay the price it did (see above at [56]). We reiterate that the expert evidence cannot stand alone if it is significantly at variance with evidence of what actually happened (see above at [38]). Second, in so far as the expert's alternative assessment of the diminution in value with a simplified DCF model is concerned, it suffices to note that he qualified the results in his expert report by saying that they "should be treated as indicative only" and that this alternative was "a broad cross-check to my primary valuation method".

63 For completeness, we would also dismiss Columbia's alternative claim for damages for breach of warranty on the basis of the diminution in value of the Sale Shares calculated by reference to the Columbia formula for the above stated reasons. Indeed, it might be plausibly argued that this particular claim is (in substance at least) the same as the claim under s 8.4.2 of the SSA. In any event, in our judgment, Columbia has *not* placed before the court *sufficient evidence* of the loss it claims it suffered (even if it is otherwise entitled in principle to recover damages for the breach of the warranty) – thus failing to satisfy the *threshold* requirement that this court referred to in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 (especially at [27] and [31]). We agree with the Judge that no discrete loss has been shown to have flowed from the breach of warranty as to the accuracy of PTNM's accounts by an artificial inflation of PTNM's 2007 EBITDA. In light of his grant of an indemnity for any unpaid tax, nothing else should be granted to Columbia for the breach of indemnity.

CA 69: the MRI debt

64 Turning now to CA 69, Columbia submits that the Judge erred in finding that the MRI debt fell within the Trade Vendor Exclusion in s 2.1.24 of the SSA, *ie*, it is an obligation "to trade vendors and doctors that are part of the day to day operation of PTNM". It contends that the Trade Vendor Exclusion is concerned with whether the obligation was one incurred in the course of the day-to-day operations of PTNM. The Hongs contend on the other hand that the Judge did not err as the MRI machine was supplied by a trade vendor (*ie*, Thermal International) and had been intended to be used for the day-to-day operations of PTNM.

65 In our judgment, the plain language of the Trade Vendor Exclusion read in its context supports the meaning ascribed to it by Columbia. The Trade Vendor Exclusion is clearly concerned with the categorisation of *obligations* and not the items or services supplied. It is crucial to recall that the Hospital was being purchased as a going concern. The parties could not have intended that obligations incurred in the course of the day-to-day operations of PTNM to continue to be the

responsibility of the vendors after the sale of the Hospital to Columbia.

66 The inquiry, therefore, is whether the MRI debt was incurred in the course of the day-to-day operations of PTNM. In our view, the distinction drawn between capital and revenue expenditure is apposite; the latter would clearly fall to be an obligation incurred in the course of the day-to-day operations of PTNM. A suggested approach is to be found in the Singapore High Court decision of *ABD Pte Ltd v Comptroller of Income Tax* [2010] 3 SLR 609 ("*ABD*") at [75]. In summary, the court must first look at the purpose of the expenditure and ascertain whether or not such expenditure created a new asset or opened new fields of trading (or the strengthening thereof). Secondly, the court must do so having regard to the following:

(a) The nature of the expenditure – a one-time expenditure would tend to suggest that the expenditure is capital in nature.

(b) The consequence or result of the expenditure – where the expenditure results in either the strengthening of the existing core business structure or adds to the structure, it is more likely to be capital in nature. In this regard, oft-used analogy of the distinction between the tree and the fruit is apt. The "core business structure" may be seen as comprising the permanent structure of the business utilised for the generation of profits (as opposed to the stock-in-trade of the business).

Although this court did not expressly endorse the above approach in the recent decision of *BFC v Comptroller of Income Tax* [2014] 4 SLR 33, it did note (at [15]) that the various tests for determining whether a given item of expenditure is to be regarded as capital or revenue in nature (from which the suggested approach was derived) were discussed "comprehensively" in *ABD*. We also pause to note, parenthetically, that, having regard to the analysis that follows, the *same* result would nevertheless have been arrived at in any event even if any of the specific tests discussed in *ABD* had been applied instead. It will suffice (for the purposes of the present appeal) to turn to consider the evidence with the above enunciated principles in mind.

67 Columbia's position was that the MRI machine was a capital expense. Prem Abraham had testified as follows:

A: … In our experience, an MRI machine can last easily for six years onwards, unless there's a technology change… So we -- normally for an MRI machine, in all our hospitals, it's classified as a fixed asset, as a long-term asset. It is not a day-to-day operation item like we buying sutures or that sort of item, medication or anything like that.

Court: To say that it is not consumed daily is different from saying it's not a day-to-day operation, so I want to be careful because if someone says I use the MRI every day, then how would you respond to that?

A: If it's not like items that we buy –- that we stock and has an expiry date, which is probably six months, that we probably use within a shorter period of time, most likely no longer than six months in most case, unless a certain medication you need to keep for emergencies and stuff like that, so that's the differentiation.

Prem Abraham's evidence is corroborated by the inclusion of the MRI machine in the list of fixed assets of PTNM recorded to be purchased in 2002, *whilst still under the management of the vendors*.

68 On his part, Eddie Foo also accepted that the purchase of the MRI machine was a capital expenditure on a fixed asset item:

> Q: … [Prem Abraham's] evidence really was that this is clearly not -- this is not a trade vendor debt in the nature of the day to day operations. He's merely saying that this is a capital expenditure; correct?
>
> A: Yes, it's a capital expenditure --
>
> Q: Whether it's --
>
> A: Of a fixed assets item.
>
> Q: And therefore it cannot conceivably be a trade debt within the definition of liabilities.
>
> A: Of course, no. That fixed asset item is used day to day in the operations of the hospital to generate its taxable and accessible incomes.

Despite his concession, Eddie Foo claimed that Prem Abraham's interpretation would mean that the purchase of a fixed asset, like an MRI machine, could never be a trade debt and that MRI vendors will never have trade debts.

69 In our judgment, Eddie Foo's assertions are incorrect. First, the fact that the MRI machine was (literally) used in the day-to-day operations of the Hospital is irrelevant. Indeed, as counsel pointed out to Eddie Foo in cross-examination, the Hospital building was also used in the day-to-day operations. However, it would be clearly absurd to suggest that the purchase of the Hospital building is part of the day-to-day operations of PTNM. Secondly, it does not follow that the purchase of the MRI machine can never be a trade debt. A trade debt is simply owed when a company purchases goods on credit from a trade vendor. The question is whether the trade debt is one incurred in the day-to-day operations of PTNM.

70 Applying the test set out above at [66] and in light of the relevant evidence, the expenditure on the MRI machine (and therefore the obligation to Thermal International) would constitute capital expenditure. It was a one-off expenditure on a piece of equipment that would have strengthened the existing business of the Hospital and from which "fruit" (*ie*, income) would be produced. This can be contrasted with the salaries to be paid to the specialists needed to operate the MRI machine. The latter expenditure would fall within the Trade Debt Exclusion but the former would not. We agree that the purchase of an MRI machine is more akin to the purchase of a Hospital building than it is to the purchase of sutures, medicines and/or the payment of doctor's salaries.

71 With respect, we are of the view that the Judge erred in focusing on the fact that Thermal International had sold the MRI machine to PTNM in the normal course of the former's business. It is certainly conceivable in light of *Thermal International's* business as a vendor and supplier of such equipment that MRI machines would constitute the stock-in-trade of its business. This, however, is irrelevant to the determination of whether this expenditure is one incurred by *PTNM* in the course of its day-to-day operations.

72 In the premises, we find that the MRI Debt does *not* fall within the Trade Debt Exclusion and the Hongs are therefore obliged to indemnify Columbia for the sum of S$393,399.70, being Thermal International's claim against Columbia.

Conclusion

Conclusion

73 For the reasons set out above, we dismiss the appeal in CA 68 and allow the appeal in CA 69.

74 The usual costs and consequential orders are to follow.