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

[2023] SGHC 17

Suit No 433 of 2021

Between

Compass Consulting Pte Ltd

… *Plaintiff*

And

(1) Lim Siau Hing @ Lim Kim Hoe
(2) Lim Vhe Kai

… *Defendants*

JUDGMENT

[Contract — Contractual terms — Rules of construction]
[Contract — Illegality and public policy — Statutory illegality]

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Compass Consulting Pte Ltd
v
Lim Siau Hing (alias Lim Kim Hoe) and another

[2023] SGHC 17

General Division of the High Court — Suit No 433 of 2021
Goh Yihan JC
11, 12, 16–18 August, 3, 25 October 2022

20 January 2023 Judgment reserved.

Goh Yihan JC:

1 The plaintiff, Compass Consulting Pte Ltd ("Compass"), claims $500,000 worth of company shares ("Bonus Shares") and $480,000 in moneys ("Cash Fee") against the defendants, Mr Lim Siau Hing @ Lim Kim Hoe ("Mr Lim") and Mr Lim Vhe Kai ("Damien") (collectively, "the Lims"). Compass claims these sums based on its (allegedly) successful completion of an agreement between the parties. Under this agreement, Compass was to aid in a transaction involving a reverse take-over ("RTO") of a company. In essence, the plaintiff says that this is a classic case of defendants seeking to escape from a perfectly valid bargain.

2 Having taken time to consider the evidence and submissions that were ably put forward by Mr Paul Ong ("Mr Ong") for the plaintiff, and Mr Mark Cheng ("Mr Cheng") for the defendants, I allow the plaintiff's claim in part for a sum of $500,000. In my judgment, Compass has proved the existence and

validity of the requisite underlying agreement, which is not tainted by illegality. However, I find that, according to that agreement, Compass is only entitled to $500,000. I explain my reasons for coming to this conclusion in this judgment.

Background

3 By way of background, Compass is a private company limited by shares. It was incorporated in Singapore on 22 March 2004. The plaintiff's directors are Mr Kelvin Chin Wui Leong ("Kelvin") and his wife, Ms Chong Lee Ching ("CLC"). Compass avers that its principal business is the provision of business advisory services.[1] The defendants dispute this. Instead, they claim that Compass had, at all material times, held itself out to be in the business of providing corporate finance advisory services.[2] Further, the defendants also argue that neither Compass nor its representatives have capital markets services licences under the Securities and Futures Act (Cap 289, 2006 Rev Ed) (the "SFA").

4 The defendants are Malaysian citizens and are father and son. They are the executive directors of KTMG Limited ("KTMG"), a public company listed on the Catalist board of the Singapore Exchange ("SGX"). The defendants are the controlling shareholders of KTMG through their collective direct and deemed shareholding interests.[3] More specifically, Mr Lim is the Executive Chairman and Damien is the Chief Executive Officer ("CEO") of KTMG, respectively. Prior to this, the defendants were the executive directors and controlling shareholders of Knit Textiles Mfg Sdn Bhd ("KTM"). In February

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1 Statement of Claim dated 12 May 2021 at para 1.

2 Defendants' Opening Statement dated 3 August 2022 at para 1. See also Defence (Amendment No 1) dated 25 February 2022 at para 2.

3 Statement of Claim dated 12 May 2021 at para 2.

2019, the defendants succeeded in listing KTM and its related companies (the "KTM Group") on the Catalist board of the SGX through the RTO of Lereno Bio-Chem Ltd ("Lereno"). This led to Lereno being renamed as KTMG and the defendant's present status.

The undisputed facts

5 I begin with the undisputed facts. It is undisputed between the parties that in May 2017, Kelvin introduced the Lims to Mr Ong Puay Koon ("OPK"), the then-Managing Director and CEO of Lereno, to explore the possibility of listing the KTM Group on SGX through an RTO of Lereno. Compass was then engaged as the project manager for the RTO. The terms of Compass's engagement were spread out over three separate agreements.

6 First, pursuant to a Corporate Advisory Agreement dated 3 May 2017 (the "1st Letter of Engagement" or "1st LOE"), Compass was appointed as "project manager" to assist the KTM Group in pursuing a listing on a recognised stock exchange. The 1st LOE provided that Compass would be paid a monthly retainer of $10,000 plus its out-of-pocket expenses pursuant to the engagement.

7 Second, pursuant to an addendum to the Corporate Advisory Agreement dated 15 May 2017 (the "2nd Letter of Engagement" or "2nd LOE"), it was agreed that Compass would provide the services set out in Clause 1 of the said document. Clause 2 of the 2nd LOE stated, among others, that (a) the fees for Compass's services are estimated to be $1,100,000, payable either in cash or by the issuance of shares in the listed entity upon completion of the RTO; and (b) this amount may be adjusted subject to mutual agreement should there be a change in the scope or finalised transaction structure. The parties also agreed

that the fee of $1.1m would be paid to Compass out of the consideration that the Lims will receive from the sale of the KTM Group.

8 Third, at a meeting held on 17 July 2017 where the Lims reached an agreement with OPK on how the RTO should be structured, Compass and the Lims also agreed on the Bonus Shares and the Cash Fee (although the Lims dispute that Compass was a party to the agreement). The Lims signed the following documents at the same meeting:

(a) a document titled "Project Libra: Sale of Knit Textile Manufacturing Sdn Bhd and its related companies (KTM) to Lereno Bio-Chem Ltd (Transaction)" addressed to OPK and Kelvin ("Document 1"). Document 1 stated that the Lims, "being the directors and shareholders of KTM, hereby agree to the sale of KTM to Lereno Bio-Chem Ltd (LBC) provided [their] net share of equity in the listed issuer, LBC, after all restructuring and other adjustments, is no less than 65% at completion of the Transaction";

(b) a document titled "Project Libra – Corporate Service Agreements" addressed to OPK and Kelvin ("Document 2"). Document 2 stated that the Lims, "being the directors and shareholders of KTM, hereby agree to provide both [OPK] and [Kelvin] and/or their nominated representatives a corporate advisory service agreement (Agreements) for a period of 2 to 3 years from completion of Transaction (the Period). The total fees for the Agreements for both [OPK] and [Kelvin] is no less than S$480,000 per person for the Period"; and

(c) a document titled "Project Libra: Sale of Knit Textile Manufacturing Sdn Bhd and its related companies (KTM) to Lereno

> Bio-Chem Ltd (Transaction)" addressed to Lereno's Board of Directors ("Document 3"). Document 3 stated that "[s]ubject to final definitive agreement, necessary approvals and satisfactory completion of the necessary due diligence and valuation, [the defendants], the undersigned being the directors and shareholders of KTM, hereby agree to the sale of entire equity in KTM to Lereno-Bio Chem Ltd (LBC) for a consideration of S$30 Million."

9 Following the 17 July 2017 meeting, Lereno entered into an option agreement dated 27 September 2017 with Mr Lim to acquire 100% of the issued ordinary shares in Knit Textile and Apparel Pte Ltd ("KTA") (the "Option Agreement"). These shares were held by Mr Lim. The consideration for the acquisition was $26.4m. As part of the restructuring requirements underlying the RTO, the shareholding structure of the companies within the KTM Group was restructured so that (a) Damien's 30% shareholding interest in KTM was transferred to Mr Lim; (b) 100% of the issued share capital of all the companies in the KTM Group was legally and beneficially owned by KTA; and (c) Mr Lim was the legal and beneficial owner of 100% of the issued share capital of KTA. Accordingly, Lereno agreed to acquire the KTM Group simply by purchasing all of Mr Lim's shares in KTA. The sum of $26.4m covered the price of $25.3m which Lereno had agreed to pay to acquire all of Mr Lim's shares in KTA (and in turn the KTM Group), as well as the fee of $1.1m which was payable to the plaintiff pursuant to Clause 2 of the 15 May 2017 Agreement.

10 The RTO was completed on 18 February 2019. Lereno acquired Mr Lim's shares in KTA for a consideration of $26.4m in accordance with the Option Agreement. The consideration of $26.4m was fully satisfied on completion by the allotment and issuance of 132 million ordinary shares in Lereno, at the issue price of $0.20 per share. Mr Lim then allotted and issued an

aggregate of 5,500,000 shares in Lereno to Compass in payment of the $1.1m fee.

11 Although Compass has been paid the fee of $1.1m as provided for in Clause 2 of the 2nd LOE, and the monthly retainer fees under the 1st LOE, the Lims have not paid Compass the Bonus Shares and the Cash Fee. This has given rise to the present proceedings between Compass and the Lims.

The parties' cases and issues arising from them

Compass's case

12 In its claim for the Bonus Shares and the Cash Fee, Compass's case is that, in addition to the 1st and 2nd LOEs, there was a separate agreement reached with the Lims at the meeting on 17 July 2017, pursuant to which it was promised additional payments in the form of $500,000 worth of shares in KTMG (*ie*, the Bonus Shares) and $480,000 in cash (*ie*, the Cash Fee).

13 In support of its case, Compass first argues that during negotiations between the parties from May 2017, Kelvin had communicated to the Lims that Compass expected to receive a fee of $2m upon the listing of the KTM Group (the "Completion Fee"). Compass says that although the 2nd LOE promised it a fee of $1.1m, either in cash or by the issuance of shares in the listed company, the parties understood that the $1.1m was only part of the Completion Fee. This was done presumably to bolster its case that the Lims were aware that the Completion Fee was always meant to be $2m and not just $1.1m.

14 Second, Compass argues that on 17 July 2017, it was agreed between Compass's representatives, Kelvin and CLC, and the Lims that the final amount of the Completion Fee payable to Compass by the Lims upon completion of

the RTO was $2.08m. Therefore, in addition to the fee of $1.1m referred to above, the Lims will pay Compass the Bonus Shares and the Cash Fee over a period of 24 to 36 months after the completion of the RTO. Compass says that this agreement was contained in Document 1 and Document 2, but not Document 3. However, in breach of this agreement, the Lims have not paid Compass either the Bonus Shares or the Cash Fee.

15 Third, Compass claims that the Lims had admitted that Compass is entitled to the Bonus Shares and the Cash Fee on two occasions: (a) during a meeting between Kevin and Damien on 26 March 2019 in Kuala Lumpur; and (b) during a telephone call between CLC and Damien on 22 July 2019.

The Lims' case

16 In their defence, the Lims do not dispute that they agreed to pay the Bonus Shares and the Cash Fee. They admit that there was a separate agreement reached on 17 July 2017. However, the Lims make four arguments as to why Compass is not entitled to any of the reliefs sought. First, the Lims say that the separate agreement was entered into between the Lims, OPK and Kelvin in their personal capacities. There was never any discussion, much less any agreement, for any additional benefits for Compass. Compass is therefore the wrong plaintiff in the present claim.

17 Second, the Lims argue that the separate agreement is unenforceable for uncertainty since the payment of $480,000 was to be made pursuant to a "corporate service agreement" to be entered into with Kelvin or his nominee. In this regard, no such agreement was entered into, no services were provided and, in any case, this was an agreement to agree and/or the terms are vague and unenforceable.

18 Third, the Lims say that even if there was an agreement, the additional payments which they had agreed to give Kelvin were subject to two conditions: that upon the completion of the RTO, (a) the Lims' shares would amount to more than 65% of the ordinary shares of the listed entity; and (b) be worth at least $30m (the "$30m Condition"). While it is undisputed that condition (a) was satisfied, the Lims' shares were only worth $26.4m on completion. As such, given that condition (b) was not met, Kelvin (or, for that matter, Compass) was not entitled to either the Bonus Shares or Cash Fee.

19 Fourth, the Lims argue that the additional payments relate to or arise from Compass's and its representatives' provision of services for the RTO, which are "regulated activities" as defined in the Second Schedule of the SFA. Given that Compass and its representatives do not have a capital markets services licence as required under s 82(1) of the SFA, the agreement to provide the additional payments is tainted by illegality and hence unenforceable.

The relevant issues

20 Prior to the trial, the parties tendered an Agreed List of Issues, for which I am grateful. Subject to modifications to take into account what transpired at trial, I will frame the relevant issues largely in accordance with the Agreed List of Issues.

21 In my view, having considered the Agreed List of Issues and the trial, the parties' respective cases give rise to the following issues:

(a) first, whether there was an agreement between the correct parties for the purposes of Compass's claim;

(b) second, what the agreement comprised;

(c) third, whether Compass met the conditions under the agreement to be entitled to the Bonus Shares and the Cash Fee;

(d) fourth, even if Compass met the conditions for payment, whether it is specifically entitled to the Cash Fee;

(e) fifth, whether the agreement was performed so to entitle Compass to the benefits it was promised; and

(f) sixth, regardless of the above, whether the agreement is nonetheless unenforceable because of illegality.

Summary of my findings

22 For ease of understanding, I provide a summary of my findings before examining each issue in detail. In essence, I find that this is a case of a dissatisfied customer who is evading payment of what was contractually promised. However, what was contractually promised is not all that Compass is claiming for. For reasons I will develop below, the Lims were not happy with Kelvin's disruptive behaviour that threatened to derail the RTO. While I believe that Kelvin was disruptive, that does not disentitle Compass from being paid. What matters is whether the Lims contractually promised Compass the sums it now claims. While there are many agreements, the material agreement is the one that was concluded on 17 July 2017 between the Lims and Compass in relation to the Bonus Shares and Cash Fee. I shall refer to this as the "Agreement".

Compass and the Lims are the proper parties to the Agreement

23 There were several key issues canvassed at trial. Each issue represents a legal hurdle that Compass must cross to be ultimately successful. First, the

parties spent some time arguing about the proper parties to the Agreement. Compass claimed that the Lims contracted with it. The Lims contended that they contracted with Kelvin directly and hence Compass is not the proper party who should be suing. In my judgment, the evidence shows that the Lims entered into the Agreement with Compass. Their argument that they only intended to deal with Kelvin is a convenient afterthought to escape their contractual liabilities.

Kelvin did not contractually bind the Lims to a $2m fee

24 Second, the parties disputed whether Kelvin had told the Lims at the outset (*ie*, May 2017) that Compass expected to be paid $1.1m or $2m (which would provide a basis for including the Bonus Shares and Cash Fee). I find that Kelvin did not directly indicate to the Lims that he had expected $2m in May 2017. Even if he did, that never materialised into a contractual obligation. In this regard, Kelvin struck me as a very careful individual. The 1st LOE and 2nd LOE were drafted very comprehensively. If there was a promise for $2m, which is almost double the $1.1m recorded in those documents, Kelvin would certainly have listed that down. However, I find that it is immaterial whether Kelvin had told the Lims at the start if Compass expected $2m. If he did, it would have strengthened Compass's case. But it would not nullify Compass's case had he not done it. The contents of the Agreement is what matters.

The Agreement comprised Document 1 and Document 2

25 Third, the parties spent time on what happened at the meeting on 17 July 2017. This was the meeting where the Agreement was entered into. Specifically, the parties dispute what the Agreement comprised. While Document 1, Document 2, and Document 3 were signed at this meeting, a key question was whether Document 3 was part of the Agreement between Compass and

the Lims. This is key because Document 3 allegedly contains the $30m Condition. The shares were not worth $30m and thus, if the $30m Condition were part of the Agreement, Compass would not have satisfied this condition and would not be entitled to payment. On this issue, I find that the Agreement between Compass and the Lims was contained in Document 1 and Document 2 only. I do not accept the Lims' argument that the three documents were to be read together. Document 3 was clearly addressed to different parties and did not bind Compass.

Compass satisfied the condition to be paid but is entitled to only $500,000

26 Further, I find that Compass has satisfied the condition to be paid pursuant to Document 1 and Document 2. What is sauce for the goose is sauce for the gander. Just as I find that Compass did not record the $2m fee in writing, so too I find that the $30m Condition not recorded anywhere in Document 1 and Document 2. Even if Document 3 were included, I find that, on its proper interpretation, it does not assist the Lims as it does not contain a condition for their shares in KTMG to be worth $30m before Compass can be paid. However, I also find that Compass is only entitled to $500,000 in Bonus Shares and not the $480,000 in Cash Fee. This is because Document 2, which refers to the $480,000, clearly contemplates in writing that Compass is to enter into a separate corporate service agreement to earn this sum. The various issues in dispute therefore fall to be considered on a construction of the Agreement, as guided primarily by its plain meaning.

Kelvin's likely disruptive conduct does not disentitle Compass to $500,000

27 Fourth, the parties spent some time on Kelvin's allegedly disruptive conduct in the lead-up to the RTO. Considerable time was spent on Kelvin's reaction to a Cambodian transaction and how he was marginalised in the lead-

up to the RTO's completion. I find the Cambodian transaction, as well as the degree of Kelvin's involvement, to be a distraction. Ultimately, Kelvin might have been the most disruptive figure – and I have reason to believe this from his demeanour during cross-examination – but Compass is entitled to what it was contractually promised. Whether Kelvin conducted himself rudely does not affect Compass's contractual entitlement. There is no clause that requires him to behave like a gentleman. Similarly, although parties do not raise this, whether Kelvin was marginalised or deeply involved in the lead-up to the completion of the RTO is immaterial. There is no clause that required him to be deeply involved until the end so as for Compass to claim what it was contractually entitled to.

The Agreement was not tainted by illegality

28 Fifth, the parties disputed over whether the agreement was tainted by illegality. This would have rendered the agreement unenforceable. This was more a question of law than fact. Having considered the parties' submissions, I do not think the Agreement was tainted by illegality. The result of my findings is that Compass is entitled to $500,000.

29 Having set out a summary of my findings, I now turn to examine each issue in greater detail.

Whether there was an agreement between the correct parties for the purposes of this claim

The parties' arguments

30 The first hurdle for Compass to cross is establishing that it, and not Kelvin or CLC, had entered into the relevant agreement with the Lims.

31 In this regard, Compass argues that the relevant agreement was entered into by Compass's representatives, Kelvin and CLC, for and on behalf of Compass. Kelvin's evidence is that the Lims had always engaged Compass as the project manager for the RTO. This is clear from the 1st LOE and 2nd LOE. In addition, Kelvin and CLC had attended all meetings, including that on 17 July 2017, and engaged with the Lims and OPK as Compass's representatives.[4] Thus, it is incorrect for the Lims to allege that Compass "was not a party to or intended beneficiary" of any of the "discussions" at the meeting on 17 July 2017.[5] Moreover, Compass submits that Scheme Spreadsheet in Document 1 expressly refers to the Bonus Shares and Cash Fee as being payable to "Compass". Further, Compass submits that the parties' objective intention, that Compass would be the ultimate beneficiary of the Bonus Shares and Cash Fee, can also be gleaned from the parties' conduct after the RTO was completed. In essence, Compass says that the parties behaved in a manner that is consistent with the Bonus Shares and Cash Fees being payable to Compass, and not Kelvin in his personal capacity.

32 In contrast, the Lims argue that the Agreement comprised Document 1, Document 2, and Document 3, and was entered into between the Lims, Kelvin and OPK. There was never any discussion, much less agreement, for any additional benefits for Compass. Moreover, the Lims suggest that the cover note to Document 1 was specifically addressed to OPK and Kelvin personally. There was no mention of Compass. Similarly, the contents of Document 2 provided that the Lims were to provide a corporate services agreement to OPK and Kelvin and that the total fees would be no less than S$480,000 "per person". Furthermore, the Lims submit that if Compass was the contracting party to the

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4 AEIC of Kelvin Chin Wui Leong at para 42(1).

5 Defence of the 1st and 2nd Defendants dated 16 July 2021 at para 16.

1st and 2nd LOEs, then it is curious why Kelvin chose to prepare a separate set of documents comprising Document 1, Document 2, and Document 3. If Compass was meant to be the beneficiary, Kelvin could have simply prepared a further addendum to the 1st and 2nd LOEs.

My decision: the agreement was between Compass and the Lims

33 The ascertainment of the correct parties to the relevant agreement – the contents of which I deal with subsequently – is essentially an exercise of contractual interpretation. The principles of contractual interpretation are well-established. The Court of Appeal in *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal* [2018] 1 SLR 170 summarised the principles as follows (at [19]):

> …
>
> (a) The starting point is that one looks to the text that the parties have used (see *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 at [2]).
>
> (b) At the same time, it is permissible to have regard to the relevant context as long as the relevant contextual points are clear, obvious and known to both parties (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125], [128] and [129]).
>
> (c) The reason the court has regard to the relevant context is that it places the court in "the best possible position to ascertain the parties' objective intentions by interpreting the expressions used by [them] in their proper context" (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [72]).
>
> (d) In general, the meaning ascribed to the terms of the contract must be one which the expressions used by the parties can reasonably bear (see, *eg*, *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [31]).

As will be seen below, the first principle, that the plain meaning of the contractual words is the first port-of-call, is the most important one as applied to the present case.

34 To these principles I will add an additional one, which is that when the documents being interpreted are not drafted by lawyers, the interpretative exercise must be undertaken in broad strokes and not with minute precision. It is trite that non-legally trained persons cannot "be expected to have expressed themselves with the exactitude that might be expected of experienced legal draftsmen", and thus, it is appropriate to adopt a "common sense approach" to interpreting the agreement rather than a "technical and legalistic approach" with an excessive focus on structure and language (see the decision of the Court of Appeal in *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [74]; see also the High Court decision of *Sun Electric Pte Ltd and another v Menrva Solutions Pte Ltd and another* [2021] 5 SLR 648 at [41]). Indeed, where there are inconsistencies in how the proper party to the contract is expressed, it is incumbent on the court to consider the objective circumstances to discern who the parties had ultimately intended as the beneficiary of the contract.

35 Applying these principles, I find that the relevant agreement was between Compass and the Lims. I reach this conclusion for three reasons. First, a plain interpretation of Document 1 and Document 2, which are the only documents making any reference to Compass or Kelvin, shows that the intended beneficiary is Compass and not Kelvin.

36 I turn first to Document 1, which comprises two pages, and which I have reproduced below for convenience:[6]

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6 Agreed Bundle of Documents, Vol 2 at pp 584–585.

PRIVATE AND CONFIDENTIAL

17 July 2017

To Mr. Ong Puay Koon / Mr. Chin Wui Leong
Present

PROJECT LIBRA

Sale of Knit Textile Manufacturing Sdn Bhd and its related companies (KTM) to Lereno Bio-Chem Ltd (Transaction)

Subject to final definitive agreement, necessary approvals and satisfactory completion of the necessary due diligence and valuation, we, the undersigned being the directors and shareholders of KTM, hereby agree to the sale of KTM to Lereno Bio-Chem Ltd (LBC) provided our net share of equity in the listed issuer, LBC, after all restructuring and other adjustments, is no less than 65% at completion of the Transaction.

Yours truly,
On and behalf of board of directors and shareholders of KTM

Lim Siau Hing @ Lim Kim Hoe	Lim Vhe Kai
Malaysian ID:	Malaysian ID:
Malaysian Passport:	Malaysian Passport:

PRIVATE AND CONFIDENTIAL
PROPOSED SCHEME

PROJECT LIBRA	Shares	%	S$ Value	Main Cap	Type of shares
Listco	73,630,000	2.2%	0.010	736,300	
Debt Conversion	480,000,000	14.4%	0.010	4,800,000	New
Knit/professional fees	150,000,000	4.5%	0.010	1,500,000	New
Compass	110,000,000	3.3%	0.010	1,100,000	New
Subtotal	813,630,000	24.3%		8,136,300	
Knit valuation, say	2,530,000,000	75.7%	0.010	25,300,000	New
Total	3,343,630,000	100.0%		33,436,300	
Knit	2,100,000,000	62.8%	0.010	21,000,000	
Compass	50,000,000	1.5%	0.010	500,000	Vendor
Premium	380,000,000	11.4%	0.010	3,800,000	Vendor
	2,530,000,000	75.7%		25,300,000	
Total Knit	67.3%				

* PLUS Service agreement for OPK and Compass of S$480K per pax for 2 to 3 yrs

37 While Document 1 is addressed to Kelvin (*ie*, "Mr Chin Wui Leong"), the Scheme Spreadsheet on the second page clearly refers to "Compass". More specifically, the Scheme Spreadsheet refers to Compass twice (*ie*, it refers to the $1.1m fee worth of shares and the $500,000 in Bonus Shares as sums payable

to "Compass"). Further, the footnote at the bottom of the second page also refers to "Compass" as the intended recipient of the "service agreement" valued at "S$480K per pax". It makes a distinction between "OPK" and "Compass" in terms of the "service agreement". This is determinative. The footnote refers to "OPK" because it makes sense that only OPK can provide the "service agreement" himself. OPK was at that time the Managing Director and CEO of Lereno. Lereno is not a consultancy firm. Thus, Document 1 was quite deliberate in pointing to the individual or entity who could provide the service agreement, and this was OPK. The same reasoning applies to the reference to "Compass". Unlike OPK, Compass *is* a consultancy firm that could provide the service agreement. Thus, on a plain reading of Document 1, the Lims clearly intended to benefit Compass and not Kelvin. I do not consider the reference to "pax" as indicating that the Lims intended to refer to a person (which would be Kelvin) as opposed to a company (which would be Compass). This is because it would be inappropriate to insist on strict legal precision for such documents that were not drafted by lawyers.

38 The same reasoning applies to Document 2, which I have reproduced below:[7]

[7] Agreed Bundle of Documents, Vol 2 at p 586.

PRIVATE AND CONFIDENTIAL

17 July 2017

To Mr. Ong Puay Koon / Mr. Chin Wui Leong
Present

PROJECT LIBRA
CORPORATE SERVICE AGREEMENTS
Sale of Knit Textile Manufacturing Sdn Bhd and its related companies (KTM) to Lereno Bio-Chem Ltd (Transaction)

Subject to completion of the Transaction, we, the undersigned being the directors and shareholders of KTM, hereby agree to provide both Mr. Ong Puay Koon (OPK) and Mr. Chin Wui Leong (CWL) and/or their nominated representatives a corporate advisory service agreement (Agreements) for a period of 2 to 3 years from completion of Transaction (the Period). The total fees for the Agreements for both OPK and CWL is no less than S$480,000 per person for the Period.

Yours truly,
On and behalf of board of directors and shareholders of KTM

Lim Siau Hing @ Lim Kim Hoe	Lim Vhe Kai
Malaysian ID:	Malaysian ID:
Malaysian Passport:	Malaysian Passport:

While Document 2 is addressed to OPK and Kelvin, and makes no reference to Compass, the reference to "service agreement" in the title, a term that is also used in the footnote in the Scheme Spreadsheet annexed to Document 1, means that the two documents should be read together. Indeed, I find that the objective intention behind Document 2 is to flesh out what the "service agreement" referred to in the footnote means.

39 As such, when Document 2 refers to "service agreement", it relates to the same "service agreement" in Document 1, which is said to be for "Compass". It is true that Document 2 itself states that "the total fees for the [service agreements] for both OPK and CWL [referring to Kelvin] is no less than S$480,000 per person". This may thus suggest that Document 2 was intended for Kelvin and not Compass. While this is a plausible argument, I prefer the interpretation that Document 2 was entered into with Compass because it ensures a harmonious interpretation when read with Document 1. It would also not be realistic to expect utmost precision in these documents given the circumstances in which they were drafted. Moreover, the Lims clearly knew

that Kelvin provides his consultancy services through Compass and not personally.

40 Apart from the plain meanings of Document 1 and Document 2, the second reason for my finding is that this interpretation (that Compass and not Kelvin is the proper party) makes commercial sense. It makes more commercial sense than the alternative interpretation that would have Kelvin as the intended beneficiary. As the Court of Appeal held in *Master Marine AS v Labroy Offshore Ltd and others* [2012] 3 SLR 125 (at [39] and [41]), when there are two competing interpretations, it is acceptable to adopt the more commercially sensible interpretation unless the clear words of the contract require otherwise. It is not commercially sensible for Kelvin to have contracted directly with the Lims when he had been dealing as Compass's representative *vis-à-vis* them all along. In this regard, it is immaterial that Kelvin could have appended the terms contained in the documents to the 1st and 2nd LOEs. While it might have been neater for him to have done that, I do not think that his choice of preparing the documents in the manner that he has should be taken to mean that the parties did not intend Compass to be the beneficiary of the Agreement.

41 More broadly, where the dispute in question is whether the proper party to a contract is a company or is instead the company's co-owner, as in the present case, it would not be satisfactory to dismiss a claim based on the technicality that the wrong party between the two choices has been pleaded. This is because, based on the objective intentions of the parties as gleaned from the Agreement, the company and the company's co-owner are treated as one and the same entity (whilst, of course, respecting the doctrine of separate legal personality which is the bedrock of company law: see the decision of the Court of Appeal in *Miao Weiguo v Tendcare Medical Group Holdings Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in*

judicial management) and another [2022] 1 SLR 884 at [114]). While pleadings are important in circumscribing the parties' respective cases, there would not be prejudice caused to the defendants if the dispute is over the proper contracting party – whether it is the plaintiff company or the company's owner instead. This is because all the relevant evidence would likely be before the court since the owner would likely have represented the company in its dealings with the defendants. As such, there is no real substantive prejudice occasioned to the defendants in these circumstances.

42 As such, while Compass made no such application at any point of these proceedings, if it were true that Compass is the wrong plaintiff, then I would have granted leave to amend the pleadings to reflect Kelvin as the right plaintiff. Moreover, even if Kelvin should have brought the claim instead, this does not detract from the fact that all the relevant evidence is before the court. This is because, for all intents and purposes, Kelvin is the controlling individual behind Compass. There would have been no prejudice to the Lims that could not have been compensated for by costs had leave been granted for such an application.

43 For completeness, I should mention that Compass had argued that it can, in any case, rely on the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) to enforce the Agreement even if Kelvin were found to be the proper party to it. Understandably, the Lims submit that Compass should not be allowed to do so as this was never pleaded. Although I do not need to decide this point, I will briefly note that, had the point been needed, I would have allowed Compass to rely on the said Act. This is because it is primarily a question of contractual interpretation whether, pursuant to s 2(1)(*b*), the relevant term purports to confer a benefit on the supposed third party, Compass.

What did the Agreement comprise?

The parties' arguments

44 Having ascertained the parties to the Agreement, I come to its contents. Compass argues that the Agreement (for the Bonus Shares and Cash Fee) comprised Document 1 and Document 2 only, and that Document 3 was not part of this agreement. Kelvin's evidence is that during the meeting on 17 July 2017, OPK had asked the Lims to prepare for another document for the purpose of facilitating his discussions with the Lereno Board and demonstrating that the deal with the Lims was genuine.[8] This was Document 3. By this argument, Document 3 was therefore not prepared to record or reflect any term of the Agreement concerning the Bonus Shares and Cash Fee. Indeed, the plaintiff says that this conclusion is borne out by the fact that Document 3 is not even addressed to Compass or any of its representatives.

45 In contrast, the Lims argue that Document 3 supports their contention that the agreement to pay the Bonus Shares and Cash Fee was subject to the condition that their shares in the listed entity are worth at least $30m on completion. They say that Document 3 must be read together with Document 1 and Document 2. In this respect, Mr Lim's evidence in his AEIC is that Kelvin had prepared the three documents ahead of the meeting on 17 July 2017. Kelvin then explained to Mr Lim that these three documents were for Damien and him to confirm that they (the Lims) would provide the additional incentives to Kelvin and OPK personally on the conditions that (a) their shares amounted to more than 65% of the ordinary shares of the listed entity, and (b) were worth at least $30m.[9] By Mr Lim's account, all three documents must be read together.

8 AEIC of Kelvin Chin Wui Leong at para 38.

9 AEIC of Lim Siau Hing at paras 23 and 24.

Similarly, Damien's evidence in his AEIC, which he maintained during cross-examination, was that Kelvin had prepared the three documents ahead of the meeting on 17 July 2017, and that they were to be read together. Finally, the Lims also point to OPK's evidence that Kelvin had prepared the three documents to be executed by the parties to evidence the Agreement that had been reached at the meeting on 17 July 2017.

My decision: the Agreement only comprised Document 1 and Document 2

46 In my judgment, the Agreement in relation to the Bonus Shares and Cash Fee was contained in Document 1 and Document 2 only. I say this for several reasons.

47 First, I do not think it is material whether the three documents were prepared before or after the meeting on 17 July 2017. The Lims' point appears to be that if the documents were prepared *together*, and not in response to discrete developments during the meeting on 17 July 2017, then it is more likely for the documents to constitute a coherent whole. I disagree. In my view, while the fact that the documents were prepared together can point to them being read together, this is at best a neutral factor. Ultimately, what matters – as I will discuss below – is the contents of the documents.

48 Second, there is nothing in the evidence that dispels Kelvin's explanation of why Document 3 was needed. Indeed, during Mr Ong's cross-examination of OPK, OPK said he needed Document 3 because (a) he needed to get Lereno's board to approve the transaction at $30m, and (b) to show that the Lims "mean business", [10] which I understand to mean that they are serious

[10] Trial Transcript, Day 5, 18 August 2022 at p 78, lines 12–19.

in their intent with respect to the RTO. This is consistent with Kelvin's account in his AEIC. The only point of disagreement between OPK and Kelvin is how the figure of $30m was arrived at. OPK says that Kelvin said he could complete the transaction at $30m despite saying that the value of KTM is $26.4m.[11] In contrast, Kelvin says that OPK wanted the figure of $30m to be reflected so that OPK could be seen as negotiating the figure down to the sum of $25.3m to help him to appear to Lereno's board of directors that he was acting independently and in Lereno's best interest.[12] Regardless of how this disagreement is resolved, it does not affect the fact that OPK did have an *independent* need for Document 3.

49 Furthermore, nothing in Mr Lim's or Damien's evidence challenges this account of the need for Document 3. I say this despite Mr Lim and Damien both insisting during cross-examination that the three documents were to be read together. I prefer Kelvin's account to the Lims' account. First, I did not place much weight on Mr Lim's evidence during cross-examination. Mr Lim displayed either a genuine or selective loss of recollection of the material events. While I accept that Mr Lim is elderly and that the material events had happened many years ago, I found it curious that he could generally only remember selected events that were clearly beneficial to his case. I also found Mr Lim to be passively evasive, in the sense that he would avoid answering questions by saying he could not remember or that he did not want to answer the question posed.[13] In any event, Mr Lim also said at various times during cross-examination that he does not read his emails and had relied primarily on Damien

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11 Trial Transcript, Day 5, 18 August 2022 at p 79, lines 1–11.

12 AEIC of Kelvin Chin Wui Leong at para 38

13 Trial Transcript, Day 4, 17 August 2022 at p 56, lines 7–25 to p 57 line 1.

in so far as the various agreements relating to the RTO were concerned.[14] I therefore do not place great weight on Mr Lim's evidence at trial. While I will not go so far as to say that Mr Lim's evidence was shaped by Damien, I will say that Mr Lim's evidence is unreliable for the reasons I have explained above. Damien was a reasonable witness who stuck to a consistent narrative that the three documents were meant to be read together. However, in my view, whether the three documents are to be read together is ultimately a question of law that may only be partially informed by Damien's account.

50 Third, the characterisation of Document 3 as a standalone document that was prepared for OPK's use is also consistent with its contents. For ease of reference, I reproduce Document 3:[15]

PRIVATE AND CONFIDENTIAL

17 July 2017

To: Board of Directors
Lereno Bio-Chem Ltd
Present
Attention: Mr. Ong Puay Koon

PROJECT LIBRA

Sale of Knit Textile Manufacturing Sdn Bhd and its related companies (KTM) to Lereno Bio-Chem Ltd (Transaction)

Subject to final definitive agreement, necessary approvals and satisfactory completion of the necessary due diligence and valuation, we, the undersigned being the directors and shareholders of KTM, hereby agree to the sale of entire equity in KTM to Lereno Bio-Chem Ltd (LBC) for a consideration of S$30 Million.

Yours truly,
On and behalf of board of directors and shareholders of KTM

Lim Siau Hing @ Lim Kim Hoe	Lim Vhe Kai
Malaysian ID:	Malaysian ID:
Malaysian Passport:	Malaysian Passport:

[14] Trial Transcript, Day 4 at, 17 August 2022 at p 71, lines 17–25 to p 72 lines 1–2; p 74 lines 16–23.

[15] Agreed Bundle of Documents, Vol 2 at 587.

51 As can be seen, Document 3 is addressed from the Lims to OPK. Kelvin's name is nowhere to be seen. This is consistent with the notion that Document 3 was only prepared for and addressed to Lereno's board for the purposes of facilitating the internal discussions that OPK intended to have with the board. In contrast, Document 1 and Document 2 are addressed to OPK *and* Kelvin. The difference in the addressees across Document 1 and Document 2, *in contrast to* Document 3, shows that Document 3 was not meant to be read together with the former two documents. Furthermore, whereas Document 2 refers to Document 1 by defining the terms of the corporate advisory service agreement, Document 3 makes no reference to either Document 1 or Document 2. This again shows that Document 3 was meant to be a standalone document on its own. I therefore do not think that Document 3 was intended by the parties to bind Compass or Kelvin, both of whom are not mentioned in Document 3 at all.

52 For all these reasons, I find that the Agreement, which I have defined to refer to the one concluded on 17 July 2017 between the Lims and Compass in relation to the Bonus Shares and Cash Fee, only comprised Document 1 and Document 2. Document 3 did not form part of the Agreement.

What were the terms of the Agreement?

The parties' arguments

53 Having concluded that the Agreement is between the Lims and Compass, and that it comprised Document 1 and Document 2 only, I come now to ascertain the terms of the Agreement. It is undisputed between the parties that the Lims had promised under the Agreement to pay the Bonus Shares and Cash Fee to Compass. The key dispute is the condition(s) that such payment is subject to. Thus, as is crucial to the parties' respective cases, I must decide if the

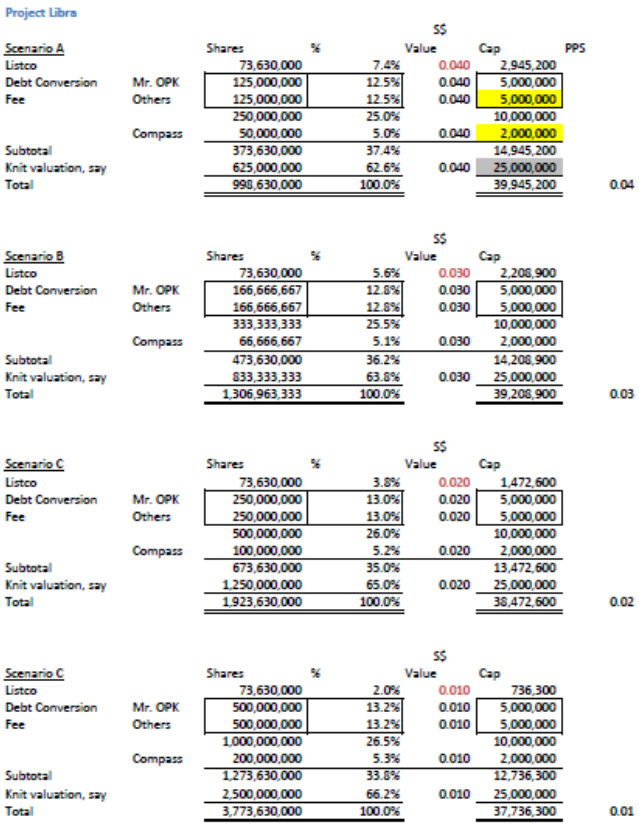
Agreement obliges the Lims to pay the Bonus Shares and the Cash Fee to Compass, subject to (a) the Lims' shares amounting to more than 65% of the ordinary shares of the listed entity; and (b) being worth at least $30m. Given that it is undisputed that condition (a) has been met, the crucial question is whether condition (b) (*ie*, the $30m Condition) is part of the Agreement.

54 In this regard, Compass argues that the Lims agreed to pay the Bonus Shares and Cash Fee to it if the RTO is completed with reference to the Scheme Spreadsheet and with the Lims holding no less than 65% of the issued share capital of Lereno. Compass argues for this conclusion because the $30m Condition was not imposed as part of the Agreement. Such a Condition is also inconsistent with the express terms of Document 1 and the Scheme Spreadsheet.

55 Compass further argues that in determining the parties' intentions with respect to the agreement for the Bonus Shares and Cash Fee, the court can look at any relevant prior negotiation and subsequent conduct of the parties. Compass says that the evidence shows that at the time the Lims engaged Compass as their project manager in May 2017, they were aware that Compass's completion fee would amount to around $2m. This is because Kelvin had consistently told the Lims that Compass's fee is $2m, and this provided the basis for the inclusion of the Bonus Shares and Cash Fee without the $30m Condition.[16] Compass also relies on the spreadsheets prepared by Kelvin *for OPK* leading up to the Agreement, all of which indicated that Compass's Completion Fee would be

[16] AEIC of Kelvin Chin Wui Leong at para 26(1).

$2m, as represented by the value of the shares to be allotted to it.[17] This can be seen from the spreadsheet Kelvin sent to OPK on 3 May 2017:[18]



Project Libra

Scenario A		Shares	%	S$ Value	Cap	PPS
Listco		73,630,000	7.4%	0.040	2,945,200	
Debt Conversion	Mr. OPK	125,000,000	12.5%	0.040	5,000,000	
Fee	Others	125,000,000	12.5%	0.040	5,000,000	
		250,000,000	25.0%		10,000,000	
	Compass	50,000,000	5.0%	0.040	2,000,000	
Subtotal		373,630,000	37.4%		14,945,200	
Knit valuation, say		625,000,000	62.6%	0.040	25,000,000	
Total		998,630,000	100.0%		39,945,200	0.04

Scenario B		Shares	%	S$ Value	Cap
Listco		73,630,000	5.6%	0.030	2,208,900
Debt Conversion	Mr. OPK	166,666,667	12.8%	0.030	5,000,000
Fee	Others	166,666,667	12.8%	0.030	5,000,000
		333,333,333	25.5%		10,000,000
	Compass	66,666,667	5.1%	0.030	2,000,000
Subtotal		473,630,000	36.2%		14,208,900
Knit valuation, say		833,333,333	63.8%	0.030	25,000,000
Total		1,306,963,333	100.0%		39,208,900	0.03

Scenario C		Shares	%	S$ Value	Cap
Listco		73,630,000	3.8%	0.020	1,472,600
Debt Conversion	Mr. OPK	250,000,000	13.0%	0.020	5,000,000
Fee	Others	250,000,000	13.0%	0.020	5,000,000
		500,000,000	26.0%		10,000,000
	Compass	100,000,000	5.2%	0.020	2,000,000
Subtotal		673,630,000	35.0%		13,472,600
Knit valuation, say		1,250,000,000	65.0%	0.020	25,000,000
Total		1,923,630,000	100.0%		38,472,600	0.02

Scenario C		Shares	%	S$ Value	Cap
Listco		73,630,000	2.0%	0.010	736,300
Debt Conversion	Mr. OPK	500,000,000	13.2%	0.010	5,000,000
Fee	Others	500,000,000	13.2%	0.010	5,000,000
		1,000,000,000	26.5%		10,000,000
	Compass	200,000,000	5.3%	0.010	2,000,000
Subtotal		1,273,630,000	33.8%		12,736,300
Knit valuation, say		2,500,000,000	66.2%	0.010	25,000,000
Total		3,773,630,000	100.0%		37,736,300	0.01

56 Moreover, Compass argues that after completion on 18 February 2019 and when chased by Compass for the Bonus Shares and Cash Fee, the Lims never disputed that Compass was not entitled to payment on the basis that their shares in Lereno were not worth at least $30m on completion. Also, during a meeting with Kelvin in Kuala Lumpur on 26 March 2019 and a telephone call with CLC on 22 July 2019, Damien had offered to purchase the Bonus Shares

17 AEIC of Kelvin Chin Wui Leong at para 26(1).

18 Agreed Bundle of Documents, Vol 1 at p 123.

from Compass and affirmed that the Cash Fee would be paid when Compass had the means to do so. Collectively, Compass says that these circumstances show that the parties did not agree to the $30m Condition.

57 As against this, the Lims say that the evidence led at trial shows that Kelvin had informed the defendants that he was confident that he could structure the RTO such that the Lims would own at least 65% of the shares of Lereno on completion *and* that their shares would be worth more than $30m. In essence, the Lims say that Kelvin requested, and the Lims agreed, that subject to the two conditions (including the $30m Condition) being achieved, the Lims would give additional payments to Kelvin in his personal capacity.

58 Importantly, the Lims say that their evidence is corroborated by OPK. According to OPK, Kelvin had met him at his Science Park office prior to the 17 July 2017 meeting. At this meeting, Kelvin told OPK that he was confident that he could structure a sale of KTM's entire equity to Lereno, such that the Lims would own at least 65% of the shares of Lereno on completion *and* that their shares would be worth more than $30m. By OPK's evidence, Kelvin then proposed to OPK that they should ask the Lims to provide additional incentives to each of them personally if Kelvin could secure such an outcome.

59 Beyond what Kelvin allegedly told the Lims and OPK, the Lims also submit that Damien had explained why it would not have been commercially sensible for him to agree to the additional incentives if the $30m Condition was not achieved. In essence, without the $30m Condition, Damien's evidence is that it would not be worth it to promise Kelvin an additional $500,000 and OPK an additional $3.8m worth of shares, respectively.

My decision: the Agreement did not contain the $30m Condition

60 I have already concluded that the Agreement did not include Document 3. Since the $30m Condition, if at all, is to be found in Document 3, it must follow that the Agreement did not contain the $30m Condition. In saying this, I am of the view that the Lims' argument on the $30m Condition is intrinsically tied up with their submission that the Agreement was contained in all three documents. As such, if the latter submission failed, it must follow that the $30m Condition was not part of the Agreement reached between the parties. But for completeness, I expand on this conclusion to deal with any possible argument (which the Lims did not argue) that the $30m Condition could exist apart from being in Document 3 (perhaps by way of implication).

Kelvin did not contractually bind the Lims to a $2m fee

61 First, I accept that Kelvin did not contractually bind the Lims to a $2m fee. This much is undisputed. I accept, arising from Mr Cheng's cross-examination of Kelvin,[19] that Kelvin was a very careful person in having prepared two very detailed LOEs. These LOEs included terms that addressed contingencies through devices such as an abortive fee.[20] Indeed, Kelvin had taken the trouble to attach the 2nd LOE by way of addendum to the 1st LOE but did not add in the $2m to the 2nd LOE. I also accept, from Kelvin's own evidence that he determined Compass's success fees based on 5% of the post-enlarged share capital of the listed company, that in determining the service fee payable to Compass, none of the contemplated scenarios came close to $2m. Kelvin also accepted during cross-examination that there is no documentary

19 Transcript Day 1, 11 August 2022 at p 166, lines 19–25 to p 167 lines 1–7.

20 Agreed Bundle of Documents, Vol 1 at p 119.

evidence in support of his assertion that he had told the Lims he expected $2m in total. For these reasons, Kelvin did not bind the Lims to the $2m fee.

62 For the same reasons, I also find that it is unlikely that Kelvin informed the Lims *directly* of the $2m fee. There is simply no documentary evidence that shows this. The most direct documentary evidence, the spreadsheets which referred to Compass's portion of the shares as being worth $2m, were sent to OPK and *not* the Lims. In addition, Kelvin's testimony at trial was counterbalanced by Damien's testimony and, in the absence of any further evidence, I find that Kelvin did not inform the Lims of the $2m figure at all material times. However, as I explained at the outset, this does not weaken Compass's case, as much as it does not strengthen it. This is because the crux lies in what the Agreement says, not what happened before (or after) the Agreement was signed.

63 That said, I find that Kelvin did subjectively desire a $2m fee. This can be seen from the spreadsheets that he sent to OPK discussing the structure of the RTO. All these spreadsheets, including the one I reproduced above, consistently show an allotment of shares worth a total of $2m to Compass. I accept Kelvin's evidence at trial that it was down to an oversight that he never recorded this $2m figure anywhere.[21] But I believe that he subjectively desired the fee, right up to the meeting on 17 July 2017. Thus, as a matter of law, while Kelvin's state of mind as of 17 May 2017 that he desired a $2m fee did not constitute any form of prior negotiation, it provides a relevant background towards the interpretation of the Agreement.

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[21] Transcript Day 1, 11 August 2022 at p 166, lines 2–12 and p 167 lines 8–14.

Even if Document 3 was part of the Agreement, it did not contain the $30m Condition

64 Leaving aside Kelvin's state of mind, even if Document 3 *was* part of the Agreement, I find that it does not contain the $30m Condition on its proper construction. For ease of explanation, I reproduce Document 3 once again:[22]

PRIVATE AND CONFIDENTIAL

17 July 2017

To: Board of Directors
Lereno Bio-Chem Ltd
Present
Attention: Mr. Ong Puay Koon

PROJECT LIBRA

Sale of Knit Textile Manufacturing Sdn Bhd and its related companies (KTM) to Lereno Bio-Chem Ltd (Transaction)

Subject to final definitive agreement, necessary apprcvals and satisfactory completion of the necessary due diligence and valuation, we, the undersigned being the directors and shareholders of KTM, hereby agree to the sale of entire equity in KTM to Lereno Bio-Chem Ltd (LBC) for a consideration of S$30 Million.

Yours truly,
On and behalf of board of directors and shareholders of KTM

Lim Siau Hing @ Lim Kim Hoe	Lim Vhe Kai
Malaysian ID:	Malaysian ID:
Malaysian Passport:	Malaysian Passport:

65 It is difficult to see how the $30m Condition can be read into Document 3. On its face, Document 3 provides for the Lims to sell the "entire equity in KTM to Lereno Bio-Chem Ltd (LBC) for a consideration of S$30 Million". It says nothing about the Bonus Shares or Cash Fee. It makes no mention of Compass or Kelvin, the party (depending on Compass's or the Lims' perspective) which the $30m Condition is supposed to bind. Further, even if Document 3 was meant to be read together with Document 1 and Document 2, there is nothing in Document 3 that explains *how* it relates to Document 1 and Document 2. On a plain interpretation of Document 3, it imposes no condition

[22] Agreed Bundle of Documents, Vol 2 at p 587.

that is applicable to Compass at all – whether read alone or in conjunction with Document 1 and Document 2.

66 Moreover, a $30m Condition would be inconsistent with the terms of Document 1, especially the Scheme Spreadsheet annexed to it, which I reproduce below:[23]

PRIVATE AND CONFIDENTIAL
PROPOSED SCHEME

PROJECT LIBRA	Shares	%	S$ Value	Main Cap	Type of shares
Listco	73,630,000	2.2%	0.010	736,300	
Debt Conversion	480,000,000	14.4%	0.010	4,800,000	New
Knit/professional fees	150,000,000	4.5%	0.010	1,500,000	New
Compass	110,000,000	3.3%	0.010	1,100,000	New
Subtotal	813,630,000	24.3%		8,136,300	
Knit valuation, say	2,530,000,000	75.7%	0.010	25,300,000	New
Total	3,343,630,000	100.0%		33,436,300	
Knit	2,100,000,000	62.8%	0.010	21,000,000	
Compass	50,000,000	1.5%	0.010	500,000	Vendor
Premium	380,000,000	11.4%	0.010	3,800,000	Vendor
	2,530,000,000	75.7%		25,300,000	
Total Knit	67.3%				

* PLUS Service agreement for OPK and Compass of S$480K per pax for 2 to 3 yrs

67 This Scheme Spreadsheet, which undisputedly forms part of Document 1, is also part of the Agreement. It contemplates the allotment of shares worth $1.1m (representing the service fee agreed to in the 2nd LOE) and $500,000 (the Bonus Shares) to Compass. Importantly, the total valuation for KTM from this Spreadsheet is $25.3m. It does not make sense for Kelvin to promise, on behalf of Compass, a valuation far more than this figure (*ie*, $30m)

[23] Agreed Bundle of Documents, Vol 2 at p 585.

to earn the completion fee ($2m) that he always had in mind for Compass. Again, while I find that Kelvin never communicated the $2m figure to the Lims (or OPK), his own subjective belief is relevant because it tells us what Kelvin would have agreed to. In my judgment, with his subjective belief in mind, Kelvin would not have agreed to the $30m Condition when, to his mind, Compass would already be entitled to the Bonus Shares and Cash Fee on the basis of Document 1 and Document 2. In other words, it made little sense for Kelvin to place an unnecessary hurdle for Compass to earn what it was already entitled to.

68 For these reasons, I find that the Agreement did not contain the $30m Condition. In saying this, I am conscious that Compass argues that the Agreement was partly oral and partly written. Compass makes this point because it is clear from the face of Document 1 and Document 2 that these are in the nature of letters signed only by the Lims. However, I find that the Agreement was contained in Document 1 and Document 2 for the following reasons. First, it is clear that the matters involved were of some importance to the parties. I find it unsatisfactory to find, no matter how informal Document 1 and Document 2 may be, that the parties intended to supplement these important matters by unrecorded oral terms. Second, I did not think that either side adduced sufficient evidence to prove what the additional oral terms might be. In the circumstances, the plain meaning and scope of Document 1 and Document 2 should govern the obligations between the parties.

69 All that said, I am conscious that OPK, whose evidence I regard quite weightily because of his neutrality, had said that a $30m Condition was floated across the parties. However, even if I were to accept that, this is not inconsistent with my reasoning above, which relies on a legal analysis of the contractual documents. Put differently, whatever it is that the parties might have discussed,

if that did not find expression in the eventual Agreement, then it cannot bind the parties. The plain meaning of the contract governs first and foremost. And if the plain meaning of the contract is clear, nothing which the parties had discussed among themselves that does not find expression in the contract can bind the parties.

The parties' subsequent conduct to the Agreement supported the absence of the $30m Condition

70 Because I have found it sufficient to reach my findings simply based on the Agreement itself, I do not need to consider whether the parties' subsequent conduct supported the presence or absence of the $30m Condition. But because the parties make submissions on this point, I will briefly allude to the point.

71 As a matter of law, the High Court in *Tembusu Growth Fund II Ltd and another v Yee Fook Khong and another* [2020] SGHC 104 ("*Tembusu Growth Fund II*") held that the parties' subsequent conduct in that case supported its interpretation of the contract concerned. To substantiate its use of subsequent conduct, the court surveyed a number of cases that used subsequent conduct to interpret contracts (at [82]–[84]):

> (a) *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] 2 SLR 1083 ("*Hewlett-Packard*") at [56]: the Court of Appeal held that while it was not endorsing a blanket prohibition on the use of subsequent conduct, it reiterated that the use of such evidence must satisfy the tripartite requirements in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*"). For completeness, whilst not referenced in *Tembusu Growth Fund II*, the Court of Appeal in *Hewlett-Packard* stated (at [55]) that *in the event* that subsequent conduct was to

be admitted, the court also had to bear in mind the following criteria (apart from the *Zurich Insurance* requirements): (a) the principle of objectively ascertaining contractual intention(s) remains paramount; and accordingly, (b) the subsequent conduct must always go toward proof of what the parties, from an objective viewpoint, ultimately agreed upon.

(b) In *Ngee Ann Development Pte Ltd v Takashimaya Singapore Ltd* [2017] 2 SLR 627 at [86], the Court of Appeal referred to subsequent conduct to determine the parties' agreement on the meaning of a term of the contract, observing that these events "reflect[ed] the parties' understanding" of how a particular term was to be put into effect.

(c) In *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd and others and another appeal* [2018] 1 SLR 180 at [51], where the Court of Appeal observed that subsequent conduct in contractual interpretation was permissible but is "in general only of relevance if the subsequent conduct provides *cogent evidence* of the parties' agreement at the time when the contract was concluded" [emphasis in original].

(d) In *Solomon Alliance Management Pte Ltd v Pang Chee Kuan* [2019] 4 SLR 577 at [73], the High Court found subsequent conduct to be an aid to interpretation as it satisfied the tripartite requirements of relevancy, reasonable availability, and relation to a clear or obvious context.

72 Accordingly, the High Court in *Tembusu Growth Fund II* therefore opined that subsequent conduct can be admitted if it satisfies the *Zurich Insurance* tripartite requirements of relevance, reasonable availability, and clear and obvious context (at [84]). If this is indeed how the courts regard the

admissibility of subsequent conduct, then it may be better for the Court of Appeal to no longer regard the admissibility of such evidence as an open question and to forestall expressing a definitive view as to the admissibility of subsequent conduct for contractual interpretation (see the decisions of the Court of Appeal in *MCH International Pte Ltd and others v YG Group Pte Ltd and others and other appeals* [2019] 2 SLR 837 at [20]–[21], and *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 ("*Simpson Marine*") at [78]–[79]).

73 The latest pronouncement by the Court of Appeal on the issue of the admissibility of subsequent conduct is found in *The "Luna" and another appeal* [2021] 2 SLR 1054. There, after an extensive survey of cases, the court held that the distinction between the evidential rules applicable to the formation and interpretation of contracts should remain on the basis of principle and authority, *ie*, it is permissible to consider evidence of subsequent conduct for contract *formation* but *not interpretation* (at [34]). It may be argued that such a distinction between the evidential rules applicable to the formation and interpretation of contracts is untenable (see *Simpson Marine* at [78]). Thus, at the next available opportunity, it is respectfully suggested that the apex court should clarify that such evidence can be admitted for contractual interpretation on the satisfaction of the *Zurich Insurance* tripartite requirements and the other criteria laid down in *Hewlett-Packard*.

74 Returning to the present case, I am satisfied that the parties' conduct subsequent to the formation of the Agreement on 17 July 2017 was consistent with Compass's case that the $30m Condition was not part of the Agreement. To begin with, I find that the parties' subsequent conduct satisfies the *Zurich Insurance* requirements and goes toward proof of what the parties, from an objective viewpoint, ultimately agreed upon. First, none of the parties spoke of

the $30m Condition after 17 July 2017. While this, by itself, is at best a neutral factor, it becomes a stronger factor when one considers the other relevant factors in the present case.

75 Second, following the independent valuation of the KTM Group to be $30.4m by its business valuer (Jones Lang Lasalle Corporate Appraisal and Advisory Limited), neither the Lims nor Lereno attempted to adjust the consideration of $26.4m to $30.4m despite being entitled to do so pursuant to the Option Agreement. Indeed, if the $30m Condition had been part of the Agreement, including with OPK, then one would expect the parties to have adjusted the consideration to meet the $30m threshold because the Lims would receive more consideration shares in Lereno, and Compass and OPK would be paid their additional bonuses due to the (alleged) $30m Condition being satisfied.

76 Third, Kelvin's and CLC's communications with the Lims showed that they never believed the $30m Condition to exist. For example, in a note dated 15 March 2019,[24] Kelvin opined that Compass was due a completion fee of $2.08m upon completion of the project without mentioning the $30m Condition.

77 Fourth, Damien made no attempt to refute Kelvin's or CLC's communications that showed their belief that the $30m Condition did not exist. While a party's silence or inaction will not normally amount to an unequivocal representation unless there is a duty to speak (see the Court of Appeal decision of *Audi Construction Pte Ltd v Kian Hup Construction Pte Ltd* [2018] 1 SLR 317 at [58]–[61]), I am of the view that a court can draw the relevant inference

[24] Agreed Bundle of Documents, Vol 8 at p 4344.

from a party's failure to speak up against what to him would be an erroneous representation, with the caveat that such representation should never be the decisive factor in the determination of any dispute.

78 I derive support for this proposition from the High Court decision of *Seah Han v Onwards Media Group Pte Ltd* [2021] SGHC 179 ("*Seah Han*"). In that case, the High Court had found that the agreed commission concerned was 10% of the value of the contract. In finding so, Philip Jeyaretnam JC (as he then was) held that this conclusion (which was in the plaintiff's favour) was supported by the WhatsApp messages that the plaintiff had sent to the defendant's former chairman, stating that the commission was indeed 10%. However, the former chairman did not respond to deny or contradict those messages. The learned judge held (at [23]) that if the message had been erroneous, it should have provoked a protest from the former chairman.

79 This is similar to the present case. I do not think that Damien has given a good reason for not responding to Kelvin's and CLC's communications, all of which are consistent with the $30m Condition not being part of the Agreement. In particular, I do not think that it is realistic for Damien to assert that he was afraid that Kelvin might sabotage the "gong session" to mark the completion of the RTO. Indeed, it was not to Kelvin's advantage to sabotage the RTO at this stage as it was in his interests for the RTO, including its formal completion, to be completed successfully. This was so that Compass could get what it was contractually entitled to.

80 Accordingly, I find that the parties' subsequent conduct is consistent with the Lims having promised to pay the Bonus Shares and Cash Fee regardless of whether the $30m Condition was satisfied. There was, and I so find, no $30m Condition in the Agreement.

81 Thus, *at this point* of the analysis, Compass would *prima facie* be entitled to the Bonus Shares *and* the Cash Fee given that (a) it is undisputed that these were promised by the Lims, (b) I have found that the promise was made by the Lims to Compass, and (c) Compass had satisfied the only condition recorded in the Agreement, *ie*, the RTO was indisputably completed with Mr Lim holding more than 65% of the issued share capital of KTMG.

82 However, the Lims argue that the part of the Agreement in relation to the Cash Fee is, among others, too uncertain and Compass is therefore not entitled to it. I now turn to this issue.

Whether the Agreement concerning the Cash Fee, especially from Document 2, is enforceable

The parties' arguments

83 On this issue, Compass argues that while Document 2 refers to an agreement to provide both OPK and Kelvin with a "corporate advisory service agreement for a period of 2 to 3 years from completion of [the] Transaction", the reference does not accurately reflect the true agreement between the parties with respect to the Cash Fee. The agreement was for the Cash Fee to be paid over a period of 24 to 36 months from the completion of the RTO, rather than pursuant to any "corporate advisory service agreement".

84 Compass says that the Lims requested for Document 2 to refer to a "corporate advisory service agreement" so that they could have the flexibility of arranging for the Cash Fee to be paid through their companies pursuant to a corporate advisory service agreement, notwithstanding that the obligation to pay the Cash Fee was personal to the Lims. Further, Document 2 refers to "a period of 2 to 3 years from completion of Transaction" because the defendants had

requested that they be allowed to pay the Cash Fee over a period to ease their cash flow issues. Accordingly, Compass argues that it was not the parties' intention or understanding that Compass would be obliged to earn the Cash Fee by providing corporate advisory services after the RTO.

85 In any event, Compass argues that it is an established principle that the mere presence of unsettled terms does not mean that there was no contract formed. This is because parties may conclude a binding contract even when some terms were not yet agreed upon between them. The important test is whether the parties had shown, by their words or conduct, that they intended to be bound despite any unsettled terms. In this case, Compass argues that the parties intended to be bound by the Agreement. Therefore, Damien assured Kelvin and CLC, after the transaction was completed in February 2019, that the defendants would pay the Cash Fee when they had the means to do so.

86 The Lims rely on OPK's evidence, which OPK repeated at the trial, that Kelvin had met with OPK before the meeting on 17 July 2017. Kelvin had at this meeting with OPK proposed asking the Lims to provide additional incentives. However, OPK's evidence is that since he was not comfortable with the Lims paying them cash for no proper justification, he suggested: "to provide professional advisory or consultancy services to the listed entity after the proposed RTO Transaction, so that Lereno (and not the defendants personally) would make these payments to [them], in consideration of services which [they] would provide to Lereno".[25] When Mr Ong questioned OPK during cross-examination about why OPK would want to continue working after the RTO, OPK replied, quite sensibly, that since the envisaged consultancy service was

[25] AEIC of Ong Puay Koon dated 5 May 2022 at para 24.

not too onerous, he did not mind the extra income if it meant not doing much work.[26] According to OPK, Kelvin agreed to this proposal.

87 Therefore, given this prior discussion between Kelvin and OPK, the Lims say that Kelvin had always proposed to them that the sum of $480,000 was to be paid by a corporate advisory service agreement to be subsequently entered into between KTMG/Lereno, Kelvin, and OPK. The Lims further say that this is corroborated by the referencing of the Cash Fee in both Document 1 and Document 2.

88 As such, the Lims say that Compass is not entitled to the Cash Fee because the parties never entered into any corporate advisory service agreement. They also say that the parties' discussions and agreement in relation to the "corporate advisory service agreement" do not give rise to an enforceable agreement, given that both the nature and scope of services to be rendered, duration of services, and fees to be paid to OPK and Kelvin have not been agreed on.

My decision: Compass is not entitled to the Cash Fee

89 In my judgment, Compass is not entitled to the Cash Fee because Compass never entered into a further corporate advisory service agreement as is required under Document 2. For ease of exposition, I reproduce Document 2 once again:

[26] Trial Transcript, Day 5, 18 August 2022 at p 61, lines 4–23.

PRIVATE AND CONFIDENTIAL

17 July 2017

To Mr. Ong Puay Koon / Mr. Chin Wui Leong
Present

PROJECT LIBRA
CORPORATE SERVICE AGREEMENTS
Sale of Knit Textile Manufacturing Sdn Bhd and its related companies (KTM) to Lereno Bio-Chem Ltd (Transaction)

Subject to completion of the Transaction, we, the undersigned being the directors and shareholders of KTM, hereby agree to provide both Mr. Ong Puay Koon (OPK) and Mr. Chin Wui Leong (CWL) and/or their nominated representatives a corporate advisory service agreement (Agreements) for a period of 2 to 3 years from completion of Transaction (the Period). The total fees for the Agreements for both OPK and CWL is no less than S$480,000 per person for the Period.

Yours truly,
On and behalf of board of directors and shareholders of KTM

Lim Siau Hing @ Lim Kim Hoe	Lim Vhe Kai
Malaysian ID:	Malaysian ID:
Malaysian Passport:	Malaysian Passport:

90 First, I agree with the Lims that, on a plain reading of Document 2, the reference to "service agreement" must mean an agreement for consultancy services. Such a reading ensures a consistent meaning across the Agreement. In this regard, Document 1 contains a passing reference to a "[s]ervice agreement for OPK and Compass of S$480K per pax for 2 to 3 yrs" and Document 2 records the defendants' agreement to provide "[OPK] and [CWL] and/or their nominated representatives a corporate advisory service agreement (Agreements) for a period of 2 to 3 years from completion of Transaction (the Period). The total fees for the Agreements for both OPK and CWL are no less than S$480,000 per person for the Period." Taken together, this can only refer to an agreement to provide consultancy services.

91 Second, I accept OPK's evidence in this regard that he had told Kelvin he was uncomfortable with just accepting cash from the Lims for no work at all. In contrast to OPK's evidence that the parties had discussed a $30m Condition, this aspect of OPK's evidence about the Cash Fee does find expression in the

Agreement. As I have explained, the Agreement plainly refers to a "service agreement". OPK's evidence corroborates that the parties had intended to work by providing additional consultancy services to earn this fee. I also accept OPK's explanation in response to Mr Ong's cross-examination that he accepted the possibility of working to earn the fee (until he relinquished his right to the fee in July 2018) despite effectively retiring after the RTO, because he regarded the consultancy work to be easy.

92 Because Compass never entered into a further service agreement with the Lims, it is not entitled to the Cash Fee that is tied to the further provision of consultancy services. Thus, without having to go into whether this renders this aspect of the Agreement uncertain, I find that Compass is not entitled to the Cash Fee. On this analysis, the uncertainty issue does not arise simply because, even assuming for contractual certainty, Compass did not do what it had to (*ie*, enter into and perform a *further* service agreement with the Lims) to earn the Cash Fee.

93 On this point, I note Kelvin's evidence that the Lims had requested for the "corporate advisory service agreement" payment arrangement as the Lims wanted the flexibility of using one of their companies to pay the Cash Fee. As such, this was why Kelvin prepared Document 2 to refer to a "*corporate* advisory service agreement" [emphasis added], as opposed to a "Service Agreement" as stated in the Proposed Scheme 2/Agreed Scheme. I am not able to accept this explanation because it does not accord with what is found on the face of Document 2. I cannot see how else the "corporate advisory service agreement" can be construed. Indeed, Document 2 also provides that such an agreement is for a period of "2 to 3 years from completion of Transaction". This coheres with the Lims' contention that Document 2 contemplates that Compass must enter into a further corporate advisory service agreement to earn the Cash

Fee. If the arrangement was merely to provide the Lims with the flexibility to pay the Cash Fee through one of their other companies, there would be no need to provide for such a lengthy period of time.

Whether the Agreement was performed so as to entitle Compass to the benefits it was promised

94 Therefore, *at this point* of the analysis, Compass is only entitled to the Bonus Shares, since Compass had satisfied the condition that the RTO was completed with Mr Lim holding more than 65% of the issued shares. I therefore find that the Agreement was performed since Mr Lim held more than 65% of the issued shares.

95 For completeness, I should also say that (and to be fair, the Lims do not seriously pursue this point) Kelvin's alleged disruptions to the RTO are not relevant to Compass's contractual entitlement to the Bonus Share and Cash Fee. From his demeanour during cross-examination, I find it likely that Kelvin was a disruptive figure in the RTO, especially in relation to the Cambodia transactions, which I do not need to detail. At the trial, I found Kelvin to be a difficult witness, who was quarrelsome. This fortifies my belief that he was a disruptive figure in the RTO. But I do not find that he was dishonest. An over-enthusiastic (if misplaced) zest to put forward one's position should not be misinterpreted as dishonesty, even if it can be disruptive. In any case, I agree with Compass that any disruption Kelvin likely caused to the RTO is irrelevant for Compass's present claim. This is for the simple reason that there is no contractual obligation for Kelvin not to be disruptive, nor do the Lims argue for this. It is also irrelevant, and I do not make a finding in this regard, whether Kelvin and CLC were cut off completely or substantively from the RTO after

July 2018. Again, there is no contractual obligation for Compass to be substantially involved, nor do the Lims argue this.

96 However, the Lims mount one last argument, which is that the entire Agreement is tainted by illegality. If they succeed on that argument, Compass will end up with nothing.

Notwithstanding that Compass performed its obligations and is entitled to the Bonus Shares, was the Agreement between the parties nonetheless tainted by illegality?

The parties' arguments

97 The Lims further say that Compass had offered to provide advice and/or carry out services to KTM which are regulated activities under the SFA. However, Compass and its representatives, Kelvin and CLC, did not possess the requisite capital market licence(s) under the SFA. Therefore, it was illegal for them to carry out or hold themselves out to carry such business. In particular, the Lims argue that Compass was in breach of s 82(1) of the SFA.

98 In response, Compass admits that it and its representatives did not possess capital market licence(s) under the SFA.[27] However, Compass says that (a) the services it provided under the agreements were not regulated activities under the SFA; (b) all regulated activities were carried out by professional parties appointed for the transaction; (c) the Lims agreed to the appointment of such professional parties and their fees were paid for by the Lims; and (d) in any event, the Lims are not entitled to look to Compass and its representatives for advice on any financial, legal, tax, investment, accounting or regulatory matters concerning the transaction given that the Lims acknowledged and

[27] Reply dated 30 July 2021 at para 5.

accepted under the 2nd LOE that Compass was "not advising [the defendants] or any other person or entity as to any financial, legal, tax, investment, accounting or regulatory matters in any jurisdiction".

My decision: the Agreement is not tainted by illegality

The applicable law

(1) The analytical framework

99 The generally applicable law on illegality as the doctrine applies to contracts is not disputed. Thus, in *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 ("*Ting Siew May*"), the Court of Appeal held that in order for there to be statutory illegality, there had to be, first, a contravention of a statutory provision as a threshold requirement (at [103]). Such contravention could also include the contravention of subsidiary legislation as well (at [104]). Secondly, the court held that a contravention of the statutory provision(s) concerned does not, *ipso facto*, result in the contract concerned being declared as void and unenforceable by the court (at [105]). The legislative intent is all-important. In this respect, "the inquiry is whether the statutory provision concerned is intended to prohibit only the conduct *or* whether it is, instead, intended to prohibit not only the conduct *but also the contract as well*" [emphasis in original] (at [106]), which is to be gleaned from an interpretation of the provision. The principles laid down in *Ting Siew May* were affirmed in the subsequent Court of Appeal decision of *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 ("*Ochroid*").

100 The application of *Ting Siew May* and *Ochroid* would therefore require me to consider if Compass was in breach of s 82(1) of the SFA and, if so,

whether such a statutory contravention would result in the Agreement being declared as void and unenforceable.

(2) The statutory regime governing the Agreement

101 The relevant provision of the SFA is s 82(1), which provides that a person who wishes to conduct the regulated activity of advising on corporate finance must hold a capital markets services ("CMS") licence for advising on corporate finance. Section 82(1) provides as follows:

> **Need for capital markets services licence**
>
> **82.**—(1) Subject to subsection (2) and section 99, no person shall, whether as principal or agent, carry on business in any regulated activity or hold himself out as carrying on such business unless he is the holder of a capital markets services licence for that regulated activity.

102 I do not think it can be seriously disputed that Compass falls within s 82(1). This is because s 2(1) of the SFA defines "regulated activity" to be an activity specified in the Second Schedule to the SFA. Part I of the Second Schedule expressly provides that "advising on corporate finance" is a regulated activity under the SFA. The phrase "advising on corporate finance" is then defined in Part II of the Second Schedule to mean, among others, giving advice "(*c*) concerning the arrangement, reconstruction or take-over of a corporation or any of its assets or liabilities". This is precisely what Compass was engaged to do. Compass had advised on the various options in terms of the restructuring of the KTM Group, advised on the complexity and risks in the course of the transaction, and advised on the need to appoint independent directors, *etc*. Accordingly, Compass is caught by s 82(1) of the SFA, but it is undisputed that neither it nor its representatives possessed the requisite CMS licence. For completeness, while Compass is obviously not a "person" in the ordinary sense of the word, s 2(1) of the Interpretation Act 1965 (2020 Rev Ed) provides that

the word "person" "include[s] any company or association or body of persons, corporate or unincorporate".

103 The purpose behind s 82(1) is to protect the interests of the investing public. The SFA achieves this overarching purpose by ensuring that only qualified persons would engage in regulated activities where the interests of public investors are involved. I accept that it is clear from the legislative debates that Parliament intended that boutique firms or individuals who wish to provide corporate finance advisory services are regulated under the SFA. This much is clear from then Deputy Prime Minister, BG Lee Hsien Loong's comments in Parliament (see *Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2163):

> I would just like to address one point which Mr Sin raised, which is the issue of boutique firms or individuals who are small and who want to become market intermediaries. It is not our intention to make it difficult for ex-bankers and employees of financial institutions to start up on their own and enter corporate finance or other activities. So we will have a level playing field. And if they are able to do it and if they have the expertise, I think the framework will enable them to do so.

104 However, a person caught by s 82(1), such as Compass (as I have found), may be exempted from holding a CMS license. This is expressly provided for by ss 82(2) and 99(1) of the SFA. In this regard, s 99(1) provides as follows:

> **Exemptions from requirement to hold capital markets services licence**
>
> **99.**—(1) The following persons are exempted in respect of the following regulated activities from the requirement to hold a capital markets services licence to carry on business in such regulated activities:
>
> …

> (*h*) such other person or class of persons in respect of any regulated activity as may be exempted by the Authority.

105 In order to ascertain the "person or class of persons" who may be exempted by the Authority, it is necessary to turn to, among others, the conditions and restrictions specified under paragraph 7 of the Second Schedule of the Securities and Futures (Licensing and Conduct of Business) Regulations (Cap 289, Rg 10, 2004 Rev Ed) ("Regulations"). Regulation 14(1) of the Regulations provides that each person specified in the Second Schedule of the Regulations is exempted from ss 82(1) or 99(B)(1) of the SFA (as the case may be) in the circumstances specified in the Second Schedule. The exemptions from the obligation to hold a CMS license for advising on corporate finance are set out in paragraphs 7(1)(*a*), 7(1)(*b*), 7(1)(*c*) and 7(1)(*d*) of the Second Schedule of the Regulations.

106 In particular, under paragraph 7(1)(*c*) of the Second Schedule of the Regulations, a person will be exempted from the requirement to hold a CMS license if he is:

> **Exemption from requirement to hold capital markets services licence to advise on corporate finance**
>
> 7.—(1) The following persons shall be exempted from the requirement to hold a capital markets services licence to carry on business in advising on corporate finance, subject to the conditions and restrictions specified:
>
> …
>
> (*c*) a person who advises another person concerning any arrangement, reconstruction or take-over of any corporation or any of the corporation's assets or liabilities, provided that —
>
> (i) such advice is not specifically given for the making of any offer of securities to the public by the second-mentioned person; and

> (ii) where the second-mentioned person is —
>
> (A) a public company;
>
> (B) listed on a securities exchange; or
>
> (C) a subsidiary of a corporation listed on a securities exchange,
>
> such advice is not circulated to the shareholders (other than shareholders who are accredited investors) of (in the case of sub-paragraph (A) or (B)) the second-mentioned person or (in the case of sub-paragraph (C)) the listed corporation, or is otherwise made known to the public; …

107 As such, adopting the approach taken by the Court of Appeal in *Ting Siew May* and *Ochroid*, the key question is whether Compass can come within the exemption set out in paragraph 7(1)(*c*) of the Regulations ("paragraph 7(1)(*c*)"). If Compass can come within paragraph 7(1)(*c*), it would not be in breach of s 82(1) of the SFA. There would therefore be no question of the Agreement being tainted by illegality.

The Lims' procedural objection addressed

108 Before I address whether Compass come within paragraph 7(1)(*c*), I should deal with the Lims' procedural objection that Compass had not pleaded its reliance on the Regulations. According to the Lims, the only factual and legal issues engaged in the pleadings were whether the scope and nature of the services which Compass provided were "regulated activities" and hence contrary to s 82 of the SFA. As such, the Lims say that Compass should not be allowed to deviate from its pleaded position and rely on the exemption in paragraph 7(1)(*c*) from the requirement to hold a CMS licence. The Lims further explain that this is because they would be prejudiced by Compass's failure to plead material facts, especially in relation to whether the RTO related

to any immediate or actually impending offer of products to the public by the Lims or the KTM Group.

109 While I accept that it is incumbent on Compass to plead sufficient facts to enable the Lims to meet its case, I do not think that Compass's failure to plead its reliance on the Regulations should deprive it of the opportunity to do so now. First, a plain reading of s 82(1) of the SFA would reveal that it is subject to certain exceptions. Indeed, it expressly provides that it is subject to ss 82(2) and 99. Section 99 in turn provides for a list of persons exempted from the requirement of holding a CMS licence to carry on business in the regulated activities. I therefore do not think that the Lims can claim to be surprised by Compass eventually arguing that its representatives would come under those exceptions. This is especially since it is the Lims who have raised the defence of illegality founded on s 82(1) of the SFA to begin with.

110 Second, given that the crux of paragraph 7(1)(*c*) of the Regulations as it may apply in the present case is whether the RTO related to any immediate or actually impending offer of products to the public by the Lims or the KTM Group, I am satisfied that sufficient evidence to this effect was properly adduced at trial. In other words, I find that there is sufficient evidence to determine the Lims' pleaded defence of illegality as a matter of law.

*Compass can come within paragraph 7(1)(*c*) of the Second Schedule of the Regulations*

111 Having addressed the Lims' procedural objection, I explain why I decide that Compass would come within paragraph 7(1)(*c*) – which applies to a person who advises another person concerning any arrangement, reconstruction or take-over of any corporation or any of the corporation's assets or liabilities. Broadly, I find that Compass's advice on corporate finance was not

"specifically" given for the making of any offer of securities to the public. In this regard, the High Court decision of *Rockeby biomed Ltd v Alpha Advisory Pte Ltd* [2011] SGHC 155 ("*Rockeby*") is instructive. Judith Prakash J (as she then was) in that case, in interpreting, among others, paragraph 7(1)(*c*), held as follows (at [36]):

> It is in the light of the foregoing intention that I think the phrase "specifically given for the making of any offer of securities to the public" must be interpreted. It is not enough to concentrate on the meaning of "specifically" without bearing in mind the "public" at whom the offer concerned is to be directed. In this case, the public means the investing public who would purchase securities in a listed company. The dictionary definitions of "specific" given to me by both counsel show that generally it means "clearly defined or identified" or "precise". Counsel for the Client emphasised that "exclusively" is not one of the meanings of the word. That may be so but it appears to me that the way in which "specifically" is used in the phrase in question does imply a degree of exclusivity in that it implies that the advice must be precisely concerned with or directed to an offer of securities to the public which is imminent or ongoing. *Thus, the advice must relate directly to an actual offer to the public.* If the *purpose of the advice is to put a particular company in such a position that it may qualify to subsequently make an offer of securities to the public*, it appears to me that *such advice would not be specifically given for the making of any offer of securities to the public even though that may be the ultimate purpose for which the advice is taken. …*
>
> [emphasis added]

The phrase "specifically given for the making of any offer of securities to the public" was interpreted to mean that the advice must relate *directly* to an actual offer to the public. As can be seen, the learned judge held that there was a "degree of exclusivity" in the meaning of "specifically" in paragraph 7(1)(*c*), in that the advice given must be "precisely concerned with or directed to an offer of securities to the public". The emphasis is on the *directness* of the advice to such a public offering. Even if (which is not the case here) the purpose of the advice is to put a particular company in such a position that it may qualify to subsequently make an offer of securities to the public, this would *not* be

"specifically" given for the making of any offer of securities to the public. Hence, in *Rockeby* itself, whilst there was advice given on steps to be taken if the client wanted an initial public offering ("IPO") to be made in Singapore and the envisaged IPO in Singapore was one of the ultimate purposes to be achieved, as the advice did not directly relate to an immediate or actually impending offer of shares to the public, then the court found that the advisor had fallen within the remit of the exemption in paragraph 7(1)(*c*) of the Second Schedule of the Regulations (at [41]–[42]).

112 In my view, this is entirely in line with the legislative intent behind s 82(1) of the SFA, which is the parent legislation. On the one hand, it is clear that Parliament intended that only qualified persons would engage in regulated activities where the interests of public investors are involved. However, on the other hand, and as Prakash J noted in *Rockeby* (at [35]), the exemptions provided for in paragraph 7 in the Second Schedule of the Regulations are also intended to allow "for diversity of service providers in the capital markets services sector by ensuring that there were areas within which boutique firms could operate and reach clients who would find it expensive to engage the services of investment banks". Accordingly, paragraph 7(1)(*c*) should be interpreted in a manner that gives effect to these purposes in a given case.

113 With the above in mind, I turn to the present case. The key question is whether the RTO is related to any immediate or actually impending offer of products to the public by the Lims or the KTM Group. I do not think that the RTO can be characterised in such a manner.

114 First, I accept Compass's position that any advice which Compass provided to the Lims, as the Lims' project manager for the RTO, pertained to the steps that had to be taken if the Lims wanted to achieve a listing of the

KTM Group on the SGX through the proposed RTO. Put differently, Compass's advice related to matters needed in order to have a successful RTO and did not directly relate to any impending offer of products to the public. No shares were offered to the public and no funds were raised from the public in connection with the RTO.

115 I am fortified in this conclusion by Clause 1 of the 2nd LOE, where Compass had made it clear to the Lims that they could not look to Compass for advice on "any financial, legal, tax, investment, accounting or regulatory matters in any jurisdiction". Like the similar clause in *Rockeby* (at [42]), I accept that this provision indicates not only that Compass was aware of the limitations on its ability to advise the Lims on, among others, any financial and regulatory matters concerning the RTO, but also made it clear to the Lims that they could not look to Compass for such advice. Compass acted in accordance with this express intention and was well within the bounds of the exemption in paragraph 7(1)(*c*) of the Regulations. At no time did Compass specifically indicate to the Lims that it was duly licensed to provide any services which were regulated under the SFA and, indeed, it is not the Lims' case that such a representation was made by Compass. On this point, while Damien may have testified that Kelvin represented to him that he can "take [them] from inception to [successful] IPO all the way and make sure that the project is a success",[28] it remains the case that Clause 1 governed the parties' agreement and there is nothing further in the evidence to suggest that Compass deviated from the ambit set out by Clause 1.

116 In this connection, the Lims also argue that they (and the KTM Group) had not engaged any advisor other than Compass because Compass had

[28] Trial Transcripts, Day 3, 16 August 2022 at p 25, lines 11–19.

represented that it would work through the entire RTO. I do not think this assists the Lims. While the Lims did not engage their own team of professionals to deal with the regulatory aspects of the RTO, that cannot mean then that Compass provided such advice. Indeed, I find that the Lims had chosen not to do so and likely relied on the team put in place by Lereno to take care of the RTO.

117 Second, and in any event, the RTO did not involve the making of any offer of securities to the public by the Lims/KTM Group or Lereno. In this regard, I disagree with the Lims' suggestion that, by virtue of its Guidance Note on 1 February 2008, the SGX took the view that RTOs, like IPOs, will affect the interests of the investing public. In my view, an RTO may or may not affect the interests of the investing public and each case must turn on its own facts. Indeed, as Prakash J explained in *Rockeby* (at [37]), the methodology of financing acquisitions could take various forms such as cash or the issue of securities or a combination of the two. In financing an acquisition, however, an offer to the public need not necessarily be involved.

118 In the present case, the RTO was essentially a specific transaction between Mr Lim and Lereno pursuant to which Lereno acquired Mr Lim's entire stake in the KTM Group for a consideration of $26.4 million which was paid by way of the issuance of shares in Lereno to Mr Lim. It is reiterated that no shares in the KTM Group or Lereno were offered to the public and no funds were raised from the public in connection with the RTO. Indeed, Damien confirmed this under cross-examination when he acknowledged that the RTO did not involve the raising of any funds from the public.[29] Thus, Compass acted well within the ambit of paragraph 7(1)(*c*)(i) because any advice on corporate finance that it provided to the Lims was "not specifically given for the making

[29] Trial Transcripts, Day 3, 16 August 2022 at p 30, lines 1–6.

of any offer of securities to the public" by the Lims or the KTM Group. Indeed, this is similar to the facts of *Rockeby*, where the client had as its ultimate purpose a listing on the Singapore stock exchange. The advisor there determined that the client had to acquire another corporation. While the advisor had advised that securities should be issued, the securities were never issued to the public at large but rather only to the owner of the corporation to be acquired.

119 On this point, I note the Lims' submission that, notwithstanding the way in which the RTO was structured, it remained the case that, upon completion of the RTO, Mr Lim and the family trust company owned and controlled approximately 80.44% of the issued share capital of Lereno. Thus, pursuant to Rule 14 of the Singapore Code on Take-overs and Mergers (the "Code"), Mr Lim and his concert parties would have been required to make a general offer to all Lereno's shareholders, *ie*, the investing public. Rule 14.1 of the Code provided as such:

> **14.1 When mandatory offers are triggered**
>
> Except with the Council's consent, where:-
>
> (a) any person acquires whether by a series of transactions over a period of time or not, shares which (taken together with shares held or acquired by persons acting in concert with him) carry 30% or more of the voting rights of a company; or
>
> (b) any person who, together with persons acting in concert with him, holds not less than 30% but not more than 50% of the voting rights and such person, or any person acting in concert with him, acquires in any period of 6 months additional shares carrying more than 1% of the voting rights,
>
> such person must extend offers immediately, on the basis set out in this Rule, to the holders of any class of share capital of the company which carries votes and in which such person, or persons acting in concert with him, hold shares. In addition to such person, each of the principal members of the group of persons acting in concert with him may, according to the circumstances of the case, have the obligation to extend an offer.

The Lims submit that while Lereno's shareholders provided a "Whitewash Waiver", this does not detract from the fact that the RTO transaction did trigger an obligation to require an offer of securities to Lereno's shareholders, as noted in Lereno's Shareholders' Circular dated 21 December 2018.[30] As such, by this argument, the interests of Lereno's 3,000 shareholders (*ie*, the investing public) were clearly at stake.

120 However, I disagree with this submission because the *substance* of the RTO transaction does not actually involve the investing public on the facts. While Rule 14.1 of the Code plainly provides that a mandatory general offer of shares must be made if a certain percentage shareholding in the company was acquired, this is subject to the proviso "[e]xcept with the Council's consent", *ie*, *unless* a grant of waiver was obtained from the Securities Industry Council (see *KBC Bank N V v Stratech Systems Limited* [2009] SGDC 483 at [28]; *In re Noble Group Ltd* [2019] Bus LR 947 at [48]–[49]). To put it another way, there was no need to make a general offer of securities to other shareholders (and hence no funds were raised from the public) if the Securities Industry Council agreed to waive the requirement in Rule 14.1 of the Code.

121 Looking at the Shareholders' Circular dated 21 December 2018, it is mentioned in paragraph 3.3 that the "SIC [*ie*, the Securities Industry Council] had, on 19 December 2018, *waived the requirement* for the Vendor and the Family Trust Company to make a mandatory general offer for the Company under Rule 14 of the Code" [emphasis added] upon satisfying certain conditions (*ie*, that a majority of shareholders must agree to the proposed whitewash resolution to waive their rights to receive a general offer, *etc*), and it is undisputed that the Lereno shareholders were invited to and did in fact provide

[30] Agreed Bundle of Documents, Vol 8 at pp 3848–4851.

the whitewash waiver at an extraordinary general meeting.[31] Ultimately, there was no offer of securities made to the public nor was it ever intended for that purpose from the outset. The advice related to an RTO transaction not involving public investment financing. Thus, Compass falls within the ambit of the exemption in paragraph 7(1)(*c*)(i) of the Regulations as there was no advice "specifically given for the making of any offer of securities to the public", and I do not think that the underlying purpose behind s 82(1) of the SFA to protect the investing public is contravened in the present case.

122 Third, while not determinative by itself, it is important to note that at no time in the course of the RTO did the SGX raise any concerns about whether Compass possessed a CMS licence. Indeed, no such concerns were raised by SAC, Lereno's Singapore lawyers, or any of the other professional parties involved in the RTO. This suggests that the SGX and the other professional bodies involved in the RTO had no issue with the fact that Compass was acting as the Lims' project manager without holding a CMS licence. That said, I attribute lesser weight to the fact that the Lims did not raise any concerns with whether Compass held a CMS licence. This is because the Lims, unlike the SGX and the other professional bodies, may not be expected to know of this requirement and whether it should apply in the present case.

123 For the reasons I have given, I find that the Lims' defence of illegality fails. Compass is able to come within paragraph 7(1)(*c*) of the Second Schedule of the Regulations and is therefore exempted from the requirement to hold a CMS licence pursuant to s 82(1) of the SFA. Accordingly, my earlier conclusion that Compass is entitled to the Bonus Shares stands.

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[31] Defendant's Reply Closing Submissions dated 25 October 2022 at para 101; AEIC of Kelvin Chin Wui Leong at p 693.

The appropriate remedy

124 Given that I have found that Compass is entitled to the Bonus Shares, I come finally to the appropriate remedy. In this case, Compass's primary claim is for an agreed sum due to the provision of services and secondarily for damages. The Lims' position is that Compass is not entitled to claim damages in the alternative, citing the High Court decision of *MP-Bilt Pte Ltd v Oey Widarto* [1999] 1 SLR(R) 908 at [20].

125 I accept Mr Ong's explanation before me in chambers at the start of the trial, which was later elaborated in Compass's closing submissions, that this is not an alternative head of claim but is rather complementary to the claim for an agreed sum. This is because the Bonus Shares are not, strictly speaking, monetary in nature. As such, Compass's entitlement to the Bonus Shares would not lie in an action for an agreed sum. Rather, the claim would be for damages to be assessed in respect of the Shares that Compass was entitled to but did not receive. This must be correct. Mr Ong's very first clarification turned out to be an important one in the light of my ultimate conclusion. By the expectation loss measure, the damages to be awarded would be $500,000 for breach of the Lims' obligation to transfer the Bonus Shares. This is what Compass *would have gained* but for the breach, and the loss is simply the value of the pecuniary benefit that the promisor failed to deliver (see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) at para 21.033).

Conclusion

126 For all the reasons above, I give judgment in favour of Compass for damages, which is to be fixed at $500,000, in respect of the Bonus Shares that

it was entitled to receive but did not receive. The usual order for interest to be awarded pursuant to s 12 of the Civil Law Act 1909 (2020 Rev Ed) also applies.

127 In closing, I record my gratitude to Mr Ong and Mr Cheng, as well as Ms Tan and Mr Tedjopranoto, for their able assistance in the conduct of the trial. I am grateful for all their assistance.

128 Unless they can agree on the appropriate cost order, the parties are to write in with submissions on costs within 14 days of this judgment.

Goh Yihan
Judicial Commissioner

Ong Min-Tse Paul (Paul Ong Chambers LLC) for the plaintiff;
Cheng Wai Yuen Mark, Tan Tian Hui and Benedict Tedjopranoto
(Rajah & Tann Singapore LLP) for the first and second defendants.