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

**[2023] SGHC 192**

Originating Claim No 112 of 2023 (Summons No 1447 of 2023)

Between

Ho Chee Kian

… *Claimant*

And

Ho Kwek Sin

… *Defendant*

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# JUDGMENT

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[Civil Procedure — Summary judgment]
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# v
# Ho Kwek Sin

**[2023] SGHC 192**

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(Summons No 1447 of 2023)
Goh Yihan JC
27 June 2023

18 July 2023 Judgment reserved.

**Goh Yihan JC:**

1 This is the claimant's application for summary judgment against the defendant under O 9 r 17 of the Rules of Court 2021 ("ROC 2021"). In particular, the claimant seeks: (a) a declaration that the defendant breached cl 2(b) of a Settlement Agreement; (b) an order that the defendant specifically performs various aspects of the Settlement Agreement; and (c) in the alternative to (b), damages of $308,038.34 or an amount to be assessed. The claimant had originally sought a declaration that the defendant also breached cl 2(c) of the Settlement Agreement but withdrew this at the hearing before me. The defendant argues that the application should be dismissed and prays that he be given unconditional leave to defend.

2 Having taken some time to consider the matter, I allow the claimant's application. I enter summary judgment in favour of the claimant, with damages

to be assessed by the Registrar. In essence, this case involves a valid and binding agreement that was entered into by the claimant and the defendant. The claimant performed his side of the bargain. The defendant did not do so. But the defendant has provided no good reason why he has not so performed. As a result, the claimant is entitled to damages arising from the defendant's breach of the agreement. I provide the full reasons for my decision in this judgment.

## Background facts

3 I begin with the background facts. The claimant is the son of a brother of the late Mr Ho Kok Kwong ("the Deceased"). The defendant is another brother of the Deceased. The claimant is therefore the defendant's nephew by virtue of the claimant's father being the brother of the defendant and the Deceased. Both the claimant and the defendant are beneficiaries of the estate of the Deceased.

### *The Deceased's death and ensuing Estate*

4 The Deceased passed away in unfortunate circumstances. On 2 July 2020, officers from the National Environment Agency discovered the skeletal remains of the Deceased in his flat ("the Flat"). It was determined through forensic tests that the Deceased had died about nine years ago. Tragically, because the Deceased's body had laid undiscovered for many years, it had decomposed to such an extent that the police pathologist was not able to determine the cause of death. Following further investigations, the police determined that there was no foul play involved in the Deceased's death. On 13 August 2020, the police passed the keys to the Flat to the defendant.

5 The Deceased had died intestate. On 13 August 2020, the defendant was informed, by a letter from the claimant's then-solicitors, that the claimant

intended to apply for the letters of administration of the Deceased's estate ("the Estate"). On 14 August 2020, the defendant replied, by way of a letter from his then-solicitors, that he has a prior right to the grant of such letters of administration. On 20 August 2020, the claimant replied that he was agreeable to the defendant being appointed as administrator of the Estate, provided that the claimant be joined as a co-administrator. On 31 August 2020, the defendant informed the claimant that he, as the surviving sibling of the Deceased, has the right to be the sole administrator of the Estate and did not require the claimant's consent to do this.

***The parties' dispute and the Settlement Agreement***

6 Against these circumstances, the defendant applied to the Family Justice Courts on 11 September 2020 to be the sole administrator of the Estate ("the LA Application"). However, so as to ensure that letters of administration would not be granted without notice given to him, the claimant filed caveat FC/CAVP 80/2020 on 14 August 2020 against the grant of letters of administration. The claimant later filed caveat FC/CAVP 8/2021 on 8 February 2021. Between September 2020 and March 2021, the claimant and the defendant continued to argue about the defendant's right to be an administrator of the Estate.

7 The parties' dispute in relation to the LA Application led to a court mediation on 31 March 2021. The mediation culminated in a Settlement Agreement which was entered into on 1 June 2021 between the claimant, the defendant, and the Deceased's nieces, Ms Lam Joon Lan, and Ms Lam Yuen Har ("the Settlement Agreement"). Broadly speaking, the effect of the Settlement Agreement is for the claimant to withdraw the two caveats he had lodged, which would then enable the defendant to proceed with

the LA Application to be the sole administrator of the Estate. The claimant and his brother, Mr Ho Chee Sin ("HCS"), are also to donate their respective shares of the Estate to a charity. The defendant is then to make a similar donation in a matching amount. I will go through the clauses of the Settlement Agreement in detail later, but it suffices to say that the parties' dispute centres on the interpretation and application of these clauses.

***Events after the Settlement Agreement leading to the present application***

8 On 7 June 2021, the claimant withdrew the two caveats he had lodged. On 8 August 2021, the defendant was granted the letters of administration as the sole administrator of the Estate. However, on 9 March 2022, the claimant commenced FC/OSP 10/2022 ("OSP 10") against the defendant in the latter's capacity as administrator of the Estate. In brief, in OSP 10, the claimant sought an order for the defendant, as the administrator of the Estate, to file and serve an affidavit on the steps that he had taken to collect, bring in, and distribute the Estate. The claimant commenced OSP 10 because he felt that the defendant did not provide the beneficiaries with accurate information about the administration progress and distribution timeline. OSP 10 was largely dismissed by the Family Justice Courts on 1 November 2022, save for the claimant's prayer that the defendant makes available a video recording and contents of several laptops for inspection and the taking of copies by the beneficiaries.

9 On 28 December 2022, the defendant, acting as the sole administrator of the Estate, paid $154,019.17 each to the claimant and HCS. On 30 December 2022, the claimant and HCS arranged for two cashier's orders, each of the amount $154,019.17, to be issued in favour of Sian Chay Medical Institution ("SCMI"), which is a registered Institution of Public Character. On the same day, SCMI wrote a letter to the claimant and HCS to acknowledge receipt of the

sum of $308,038.34 through the two cashier's orders issued in its favour ("the Acknowledgement Letter"). The claimant provided the Acknowledgement Letter to the defendant by way of an email dated 6 January 2023. When the defendant did not respond, the claimant followed up with a letter dated 13 February 2023. However, the defendant was not satisfied with the Acknowledgement Letter. As such, by way of letters dated 14 February 2023 and 16 February 2023 from his solicitors to the claimant, the defendant requested the official receipts issued by SCMI to prove that the sum of $308,038.34 was duly received.

10 On 20 February 2023, the claimant commenced HC/OC 112/2023 ("OC 112") against the defendant, which is the underlying claim in relation to the present application. After the parties filed their Statement of Claim and Defence respectively, on 12 May 2023, the claimant filed the present application for summary judgment.

**The applicable law on summary judgment**

11 Before considering the parties' positions, I first set out the applicable principles governing a summary judgment application under O 9 r 17 of the ROC 2021. As I explained in the High Court decision of *Horizon Capital Fund v Ollech David* [2023] SGHC 164 (at [59]–[60]), it is trite law that the purpose of the summary judgment procedure is to enable a claimant to obtain a quick judgment where there is plainly no defence to the claim without trial (see the High Court decision of *Ling Yew Kong v Teo Vin Li Richard* [2014] 2 SLR 123 at [30], citing *Singapore Civil Procedure 2013* (G P Selvam gen ed) (Sweet & Maxwell, 2013)). Accordingly, if the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived (or, if arguable, can be shown shortly to be plainly unsustainable),

then the claimant is entitled to summary judgment (see *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at para 14/1/2).

12 However, I should add that this does not mean that a defendant can never resist summary judgment based on a question of law. One way that a defendant can do so is when the question of law is complex. For instance, the High Court in *Calvin Klein, Inc and another v HS International Pte Ltd and others* [2016] 5 SLR 1183 (at [102]–[106]) opined in *obiter* that it was not appropriate to decide the issue of secondary trade mark infringement by way of summary judgment because of the significant legal and factual complexities involved. Nevertheless, summary judgment should still be granted once the court is convinced that the question of law, however difficult, is really unarguable (see the English Court of Appeal decision of *Cow v Casey* [1949] 1 KB 474 at 481). I make this observation because almost all of the defendant's defences in resisting the present application are founded on questions of law.

13 As such, to obtain summary judgment, a claimant must first show that he has a *prima facie* case for his claims. If he fails to do that, his application ought to be dismissed. However, once the claimant shows that he has a *prima facie* case, the tactical burden then shifts to the defendant who, in order to obtain permission to defend, must establish that there is a fair or reasonable probability that he has a real or *bona fide* defence (see the High Court decision of *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 ("*M2B World*") at [17], citing the High Court decision of *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342 at [43]–[47]). The defendant needs only show that there is a triable issue or question, or that for some other reason there ought to be a trial. More specifically, the defendant must provide further evidence to rebut an inference

that may otherwise be drawn from the evidence provided by the claimant. The court will not grant permission to defend if the defendant only provides a mere assertion, contained in an affidavit, of a given situation which forms the basis of his defence (see *M2B World* at [19], citing the High Court decision of *Prosperous Credit Pte Ltd v Gen Hwa Franchise International Pte Ltd and others* [1998] 1 SLR(R) 53 at [14]). If the defendant cannot satisfy this tactical burden, the claimant will be entitled to summary judgment.

**The parties' positions**

14 With the applicable law in mind, I turn to the parties' positions.

*The claimant's position that he has shown a* prima facie *case*

15 The claimant's position is that he has shown a *prima facie* case against the defendant for the latter's breach of the Settlement Agreement. First, the claimant points out that the defendant does not dispute that the Settlement Agreement is valid and binding.[1] Second, the claimant has provided evidence to show that he and HCS made the donation to SCMI by cashier's orders and that SCMI is an Institution of Public Character.[2] Third, SCMI provided a letter acknowledging receipt of the cashier's orders.[3] Fourth, despite the claimant and HCS performing their side of the bargain, the defendant did not make any donation to any charitable institution.[4] The claimant therefore says that the defendant has failed to perform his obligations under the Settlement Agreement and is in breach of the same.

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1 Claimant's Written Submissions dated 14 June 2023 ("CWS") at para 23.

2 CWS at para 25.

3 CWS at para 27.

4 CWS at para 28.

*The defendant's position that he has raised* bona fide *defences*

16 It is appropriate at this point to turn to the defendant's defences. From as best as can be discerned, the defendant advances the following defences. First, the defendant's obligation under the Settlement Agreement to make a donation does not arise. This is because the claimant has not complied with cl 2(b) read with cl 2(d) of the Settlement Agreement, as the claimant has failed to provide receipts from SCMI to the defendant.[5] Second, in connection with the first ground, the defendant's obligation to make a donation is at his absolute discretion and is thus not contractually binding.[6] Third, the claimant's commencement of OSP 10 amounts to a breach of the Settlement Agreement, which disentitles or estops the claimant from relying on the terms of the Settlement Agreement to commence OC 112.[7] Fourth, and this appears to be a point advanced only in the defendant's pleadings and not in his written submissions for the present application, the claimant (and HCS) suffered no loss from the defendant's failure to make the donation.[8]

17 In setting out these defences in this manner, I have not precisely replicated all of the allegedly triable issues (of which there are 16) the defendant had raised at paragraph 57 of his affidavit that he filed to resist the present application.[9] I have not done so because the defendant himself has not advanced some of these issues in his written submissions. Further, many of these issues are either duplicative of others or plainly irrelevant to the material dispute

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5 Defendant's Written Submissions dated 14 June 2023 ("DWS") at paras 48 and 50.

6 DWS at para 51(b)(ii).

7 DWS at para 51(b)(i).

8 Defence (Amendment No. 1) dated 9 May 2023 at para 23.

9 Affidavit of Ho Kwek Sin dated 26 May 2023 at para 57.

between the parties. To be fair to the defendant, I sought clarification from his counsel, Mr Luke Lee ("Mr Lee"), during the hearing before me that my setting out of the defences in the manner above is a fair representation of the defendant's intended defences. Mr Lee replied that it is. As such, I proceed to analyse the defendant's defences in the manner as I have set out above.

*The claimant's position that the defendant has not raised any* bona fide *defences*

18 Against these defences, the claimant submits that the defendant has not, in fact, raised any *bona fide* defences. First, the claimant has provided a receipt from SCMI.[10] Second, the defendant has a binding obligation to donate under the Settlement Agreement.[11] Third, the claimant did not breach the Settlement Agreement by commencing OSP 10.[12] Fourth, assuming the claimant breached the Settlement Agreement, the defendant has failed to state whether and when he elected to terminate the performance of the Settlement Agreement.[13] To the contrary, the defendant's acts suggest he did not elect to terminate the performance of the Settlement Agreement.[14]

**My decision: the claimant is entitled to summary judgment**

19 In my view, the claimant is entitled to summary judgment in respect of the defendant's breach of the Settlement Agreement. However, I do not find that the claimant is entitled to all of the orders it seeks. Instead, I find that the

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10 CWS at para 65.

11 CWS at para 63.

12 CWS at para 41.

13 CWS at para 33.

14 CWS at para 50.

claimant is entitled only to damages to be assessed as a result of the defendant's breach. I expand on these conclusions below.

### *The claimant has shown a* prima face *case*

20 To begin with, it is clear that the claimant has shown a *prima facie* case that the defendant is in breach of the Settlement Agreement. The relevant clause in this regard is cl 2 of the said Agreement, which reads as follows:[15]

> 2. The Parties agree to make donations to charity as follows:
>
> (a) Upon the receipt of their respective shares of the inheritance, Mr HCK and his sibling Mr Ho Chee Sin shall within 14 days inform Mr HKS in writing on the name of the charity and percentage share in actual amount of their inheritance they wish to donate.
>
> (b) Upon the receipt of the above written confirmation by Mr HCK and Mr Ho Chee Sin of amount of their donation and the charity name and that they having donated the aforesaid amount to the said charity, Mr HKS shall within 14 days from the date thereof, confirm in writing, his donation to a charity matching the same percentage and actual amount of the inheritance donated by Mr HCK and Mr Ho Chee Sin.
>
> (c) Upon the receipt of the above written confirmation, Parties shall exchange documentary evidence on their respective donations within the next 28 days.
>
> (d) Each Party is at liberty to donate to a charity of their choice provided the charity is registered as an IPC (Institution of a Public Character) and each Party shall provide proof of the donation by way of receipt from the said charity.

21 First, it is undisputed that the parties entered into a valid and binding Settlement Agreement on 1 June 2021. Indeed, cl 4 of the Settlement Agreement expressly provides that the parties "fully understand the terms of this Settlement Agreement and are precluded from later alleging that they did

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[15] 1st Affidavit of Ho Chee Kian dated 12 May 2023 at p 20.

not consent and/or did not appreciatethe [*sic*] effect of the Settlement Agreement". Moreover, the defendant has not disputed the validity and binding nature of the Settlement Agreement, nor has he argued that he entered into the said Agreement under some misapprehension that would be sufficient to vitiate the contract.

22 Second, it is clear from the documentary evidence that the claimant and HCS have satisfied their obligations under cl 2(a) of the Settlement Agreement. In this regard, after receiving their respective shares of the Estate on 28 December 2022 (amounting to $154,019.17 each), the claimant and HCS did, within 14 days thereof, inform the defendant in writing via an email dated 6 January 2023 of the name of the charity that they wish to donate to (*ie*, SCMI) and the amount they wish to donate (*ie*, $308,038.34 in total).

23 It is also clear from the documentary evidence that the claimant and HCS have satisfied their obligations under cl 2(b) of the Settlement Agreement. In addition to providing the written confirmation of the matters stipulated in cl 2(a), they also provided written confirmation that they have "donated the aforesaid amount to the said charity", in the form of the Acknowledgment Letter from SCMI.

24 Third, it is clear that the defendant has, subject to any viable defence, breached his obligation under cl 2(b) of the Settlement Agreement. Given that the claimant and HCS had performed their obligations under cll 2(a) and 2(b) of the Settlement Agreement, the defendant's dependent obligation under cl 2(b) arose. In this regard, the defendant raises a rather convoluted manner of reading cl 2(b), arguing that it can be broken down into two parts, and that the first part in turn consists of two limbs. In my respectful view, not even lawyers should read any clause in such a mechanical and robotic manner that is

inconsistent with the poetry and romance of the English language. Instead, on a plain reading as informed by the context and a healthy dose of common sense, cl 2(b) is very clear. The defendant's obligation under cl 2(b) arose once the claimant and HCS provided the defendant with written confirmation of the amount of donation that they intended to make to their chosen charity and written confirmation that they had indeed done so. Since the claimant and HCS did precisely this by the email dated 6 January 2023 – which the defendant has not denied receiving – the defendant's obligation under cl 2(b) arises. This obligation is that the defendant "shall within 14 days from the date thereof, confirm in writing, his donation to a charity matching the same percentage and actual amount of inheritance donated by Mr HCK and Mr Ho Chee Sin".

25 In so far as the defendant argues that his obligation under cl 2(b) does not arise because the claimant and HCS have merely provided the Acknowledgement Letter as opposed to a receipt from SCMI, I do not find that this prevents the claimant from establishing a *prima facie* case. This is because cl 2(c) clearly provides that the parties are only to exchange "documentary evidence on their respective donations within the next 28 days" upon receipt of the various written confirmations. Clause 2(d) in turn defines "documentary evidence" to be a "receipt from the said charity". Accordingly, again from a plain reading of cll 2(c)–2(d) as informed by the context, I find that it is only *after* the defendant himself has confirmed, in writing, that he has made his corresponding donation, will the claimant and HCS be obliged to provide an official receipt from SCMI in respect of their donation to the defendant. Since the defendant never provided any such written confirmation in accordance with his obligation in cl 2(b), the claimant's and HCS's obligations to exchange documentary evidence of their donation (by way of an official receipt) under cl 2(c) read with cl 2(d) never arose. Accordingly, the fact that the claimant and

HCS have merely provided the Acknowledgement Letter does not bar them from establishing a *prima facie* case against the defendant. To the contrary, the claimant and HCS *did more* than was expected of them by providing, in addition to a written confirmation of their donation, a letter from the charity concerned that the donation sum was well and duly received.

26 As a related but ultimately immaterial point, counsel for the claimant, Ms Christine Chuah ("Ms Chuah"), submitted before me that the Acknowledgment Letter amounts to a receipt under cl 2(d) of the Settlement Agreement. I do not find this to be the case for the following reasons. First, as Mr Lee points out, the Acknowledgment Letter provided by SCMI does not satisfy the requirements of a tax deduction receipt under s 9(3) of the Charities (Institutions of A Public Character) Regulations (2008 Rev Ed) ("s 9(3)"), which states as follows:

> (3) A tax deduction receipt shall be in such form as may be specified by the Commissioner or the Sector Administrator and shall —
>
> (*a*) incorporate the following statement:
>
> "This receipt is for your retention. This donation is tax deductible and the deduction will be automatically included in your tax assessment as you have provided your Tax Reference number (e.g. NRIC/FIN/UEN). You do not need to claim the deduction in your tax form.";
>
> (*b*) state the name of the Sector Administrator, where applicable; and
>
> (*c*) be serially numbered.

Although the definition in cl 2(d) does not expressly require that the receipt satisfy the requirement in s 9(3), I find that it is more probable than not that a charity registered as an Institution of Public Character will provide proof of a donation in compliance with the requirement in s 9(3).

27 Second, Ms Chuah's submission is inconsistent with the documentary evidence in the form of an email sent by the claimant to the defendant's then-solicitors dated 16 February 2023, where the claimant implied that the Acknowledgment Letter was not a receipt within the meaning of cl 2(c) read with cl 2(d) of the Settlement Agreement:[16]

> …
>
> 5. Under Clause 2(c) of the Settlement Agreement, the parties' obligation to exchange documentary evidence of their respective donations arises upon receipt of your client's written confirmation of his matching donation to a charity.
>
> 6. The request in Paragraph 3 of your letter for "Official Receipt" and "any other Official formal documents" is a request for the "documentary evidence" within the meaning of Clause 2(c).
>
> 7. Until I receive written confirmation of your client's matching donation to a charity under Clause 2(b) of the Settlement Agreement, your request is premature.
>
> 8. For the avoidance of doubt, I and [*sic*] and remain ready, willing and able to provide the documentary evidence under Clause 2(c) of the Settlement Agreement upon receipt of your client's written confirmation of his matching donation to a charity under Clause 2(b).
>
> …

28 Despite my findings above in relation to the nature of the Acknowledgement Letter, it remains that the issue of whether the Acknowledgment Letter amounts to a receipt pursuant to cl 2(c) read with cl 2(d) of the Settlement Agreement is not material to my determination of the present application. This is because the defendant does not argue that the claimant breached his obligation under cl 2(c). The defendant only goes as far as to argue that the claimant's failure to provide a receipt prevents him from

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[16] 1st Affidavit of Ho Chee Kian dated 12 May 2023 at pp 55–56.

verifying the claimant's donation. But as I have mentioned above, the defendant has himself not satisfied his obligation under cl 2(b), failing which the claimant's and HCS's dependent obligations to provide a receipt under cl 2(c) will not arise. Therefore, regardless of whether the Acknowledgment Letter amounts to a receipt, I am satisfied that the plaintiff has shown a *prima facie* case that the defendant has failed to satisfy his obligation under cl 2(b) of the Settlement Agreement.

29 For completeness, based on a contextual interpretation of the Settlement Agreement, I summarise how the methodology prescribed in cll 2(a)–2(d) is to work:

(a) First, pursuant to cl 2(a), the claimant and HCS must, within 14 days of receiving their respective shares of the Estate, inform the defendant in writing the name of the charity that they wish to donate to, and the corresponding amount.

(b) Second, under cl 2(b), the claimant and HCS must provide the written confirmation referred to in cl 2(a) and the written confirmation that they have donated the corresponding amount to their chosen charity. Therefore, in order for the defendant's obligation under cl 2(b) to arise, the claimant and HCS must not only indicate their intent to donate, but they must also confirm that they have *actually* made the said donation. Once the defendant receives this written confirmation, the defendant becomes obliged, under cl 2(b), to confirm in writing within 14 days that he has made a matching donation to a charity of his choice. This clearly contemplates the defendant to have *actually* made such a donation.

(c) Third, after the claimant and HCS receive the written confirmation from the defendant referred to in cl 2(b), all of the relevant

> parties (*ie*, the claimant, the defendant, and HCS) must, under cl 2(c), exchange documentary evidence of their respective donations within 28 days. In this regard, cl 2(d) provides that the said "documentary evidence" must be "by way of receipt from the said charity". Clause 2(d) also clarifies that each party is "at liberty to donate to a charity of their choice provided the charity is registered as an IPC (Institute of a Public Character)". In other words, all of the relevant parties can each donate to a different charity of their choice.

30 I also make one further observation about this methodology. It appears that there is some risk that a party can provide a "written confirmation" of having made a donation without having done so. There is such a risk because the methodology laid out only obliges the parties to exchange documentary evidence of their respective donations *after* they have previously sent the written confirmations of the said donations to each other. It is therefore conceivable that a party could send a "written confirmation" without having actually made a donation and cause the other party to make a donation in reliance on the false confirmation. With that being said, the innocent party can sue the wrongful party for breach of contract if the latter is eventually unable to provide documentary evidence of a donation.

31 Moreover, while this may not be the best way to structure the parties' obligations *vis-à-vis* each other, a court cannot go behind the parties' intention and rewrite the contract for them under the guise of interpretation. Indeed, on the present facts, this very risk is aptly provided for by the Settlement Agreement and a court should not go behind the parties' clearly expressed intentions, even if there is a better way of structuring the arrangement (see the Court of Appeal decision of *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte*

*Ltd)* [2015] 5 SLR 1187 (at [32])). In any event, this risk has *not* materialised here because the defendant has failed to perform his obligation in cl 2(b) and accordingly, the parties' obligations to exchange documentary evidence in cl 2(c) did not arise. While the defendant claims he cannot conclusively verify from the Acknowledgment Letter whether the claimant and HCS really made their donations from this Letter, I do not find this claim reasonable. Indeed, unless the defendant is alleging that SCMI is lying in the Letter (which the defendant does not allege), the Letter is as good as a receipt from SCMI. I do acknowledge that the Acknowledgment Letter cannot satisfy cl 2(c) read with cl 2(d), even if it has the same substantive effect. However, as I have mentioned above, the claimant's and HCS's obligations in cl 2(c) did not even arise.

32 For all these reasons, I find that the claimant has shown a *prima facie* case against the defendant for breaching cl 2(b) of the Settlement Agreement. Given that Ms Chuah has confirmed that the claimant will withdraw his prayer for a declaration that the defendant is in breach of cl 2(c), I do not need to make a finding in this regard.

### *The defendant has not raised any* **bona fide** *defences*

33 Having found that the claimant has proved a *prima facie* case against the defendant for breach of cl 2(b) of the Settlement Agreement, I turn now to consider whether the defendant has raised any *bona fide* defences. For the reasons that follow, I find that the defendant has *not* raised any *bona fide* defences.

*The defendant is obliged by the Settlement Agreement to make a donation*

(1) The defendant's obligation under cl 2(b) arose after the claimant and HCS submitted written confirmation of their donations

34 The defendant's first defence is that his obligation under cl 2(b) of the Settlement Agreement does not arise because the claimant and HCS have not provided "conclusive contemporaneous proof in the form of official receipts". For the reasons I have explained above, I do not think that this is a plausible defence. As I have said, the defendant's obligation to make a matching donation under cl 2(b) arises as soon as he receives the written confirmation from the claimant and HCS mentioned in cl 2(a). This obligation is not dependent on the claimant and HCS's provision of an official receipt; that obligation for the parties to exchange documentary evidence in the form of an official receipt arises only *after* the defendant has provided his written confirmation that he has made the donation pursuant to cl 2(b).

(2) The defendant's obligation to make a donation is plainly not at his absolute discretion

35 The defendant's next defence is that there is no binding contractual obligation in the Settlement Agreement that he must donate to a charity. In this regard, the defendant submits that the donations made by the claimant and HCS are purely voluntary. As such, the defendant also has the absolute discretion to determine if he wishes to make a donation under cl 2(b) of the Settlement Agreement. In my view, this defence is a non-starter for several reasons.

36 First, the opening words of cl 2 are clear. They provide that the "Parties *agree* to make donations to charity as follows" [emphasis added]. This imposes a clear contractual obligation on the claimant, the defendant, and HCS to make donations in the manner prescribed in the sub-clauses of cl 2.

37 Second, cll 2(a) and 2(b) use the mandatory word "shall" to describe the parties' obligations to make a donation. Thus, cl 2(a) provides that the claimant and HCS *shall*, in effect, provide the written confirmation of their intent to donate, as well as the particulars of such, to the defendant within 14 days of receiving their shares of the Estate. Similarly, cl 2(b) provides that the defendant *shall*, in effect, provide the written confirmation that he has already *made* a matching donation within 14 days of receiving the former confirmation from the claimant and HCS. I do not see how the defendant can plausibly argue that his obligation to donate is somehow at his absolute discretion. If at all, the defendant can argue that his obligation to donate under cl 2(b) is *dependent* on the claimant and HCS fulfilling their obligations under cl 2(a). In that sense, it is possible that the defendant need not make a donation if the claimant and HCS do not fulfil their obligations under cl 2(a). But that is not the case here. Given that the claimant and HCS have fulfilled their obligations under cl 2(a), the defendant became obliged to make the donation under cl 2(b).

38 Third, and more broadly, there is simply no indication in the Settlement Agreement whatsoever, nor has the defendant explained otherwise, that the defendant's obligation to make a donation is in his absolute discretion.

39 Accordingly, I dismiss the defendant's defences that relate, in effect, to the contractual interpretation of the Settlement Agreement. I therefore find that the defendant is clearly obliged to make a donation pursuant to cl 2(b) of the Settlement Agreement. Unless the defendant can raise other defences to negate this obligation, the claimant will be entitled to summary judgment.

*The defendant's obligation to make a donation is not absolved by the claimant's alleged breach of the Settlement Agreement*

40 The defendant attempts to escape from his obligation to make a donation under cl 2(b) of the Settlement Agreement by arguing that the claimant had breached cl 5 of the Settlement Agreement first by commencing OSP 10. As such, the defendant submits that the claimant is "thereby not entitled to and/or estopped from relying on the terms of the Settlement Agreement in order to commence the Suit".[17] The defendant further argues that the Settlement Agreement was "terminated by virtue of the Claimant's repudiatory breach and thus the Defendant no longer has any contractual obligations to the Claimant under the Settlement Agreement".[18] The defendant finally submits that the claimant "has not provided adequate contemporaneous proof or basis that the Settlement Agreement has not been repudiated by the Claimant".[19]

(1) The claimant did not breach the Settlement Agreement by commencing OSP 10

41 In my view, the defendant's defence founded on the claimant's alleged breach of cl 5 of the Settlement Agreement is plainly unsustainable. In this regard, cl 5 provides as follows:[20]

> This Settlement Agreement shall be in full and final settlement of any and of all actions claims that the Parties have or may have against the other arising out of and/or in connection with the Estate.

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17 DWS at para 51(b)(i).

18 DWS at para 51(b)(i).

19 DWS at para 51(b)(i).

20 1st Affidavit of Ho Chee Kian dated 12 May 2023 at p 21.

42 The claimant did not breach cl 5 by commencing OSP 10 because the clause does not expressly or impliedly prohibit the claimant from bringing other matters in relation to the Estate, nor does it spell out the consequences for doing so. Moreover, as the claimant rightly points out, the claimant brought OSP 10 against the defendant in the latter's capacity as the administrator of the Estate. In contrast, the claimant and the defendant entered into the Settlement Agreement in their personal capacities, against the context where the parties were disputing whether the defendant could be the sole administrator of the Estate. Accordingly, I do not think the parties intended for cl 5 to prevent them from filing any action against the administrator of the Estate in his distribution of its assets. Given the absence of any express provision of an intention to the contrary, it surely could not have been the parties' intention to shy away from any further proceedings against an errant administrator who, for instance, siphons the assets for his own benefit.

43 Accordingly, I do not think that the claimant breached cl 5 when he commenced OSP 10.

(2) Even if the claimant breached the Settlement Agreement by commencing OSP 10, the defendant did not accept this breach

44 In any event, even if the claimant had breached cl 5 of the Settlement Agreement by commencing OSP 10, I find that the defendant did not accept this breach, with the result that the Settlement Agreement continued afoot, along with the parties' obligations within.

(A) THE APPLICABLE LAW IN RELATION TO DISCHARGE OF A CONTRACT BY BREACH

45 In this regard, it is helpful to set out the applicable law in relation to discharge of a contract by breach, which have been largely laid out in the

important and seminal Court of Appeal decision of *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*").

46 First, the parties have used several terms to describe the breach in question, such as "repudiatory breach" and "renunciation". The seemingly interchangeable nature of these two terms is best reflected in the Court of Appeal decision of *San International Pte Ltd (formerly known as San Ho Huat Construction Pte Ltd) v Keppel Engineering Pte Ltd* [1998] 3 SLR(R) 447 (at [20]), where the court stated that the "law on repudiatory breach or renunciation can be summarised as follows" (see also the Court of Appeal decision of *iVenture Card Ltd and others v Big Bus Singapore City Sightseeing Pte Ltd and others* [2022] 1 SLR 302 ("*iVenture*") at [64]–[65]). Indeed, the court has on various occasions used different terminology to describe the discharge of a contract by breach:

(a) The expression "repudiatory breach" was used in the Court of Appeal decisions of *Brown Noel Trading Pte Ltd v Donald & McArthy Pte Ltd* [1996] 3 SLR(R) 760 (at [25]), *Miller Freeman Exhibitions Pte Ltd v Singapore Industrial Automation Association and another* [2000] 3 SLR(R) 177 (at [30]), *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] 3 SLR 857 (at [103]), and *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal and other matters* [2017] 2 SLR 12 (at [127], [149]–[156], and [174]–[176]). A related expression "repudiatory conduct" was used in the Court of Appeal decision of *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2021] 1 SLR 631 (at [215]–[230]).

(b) The expression "renunciation" was used in the Court of Appeal decisions of *RDC Concrete* (at [93]–[94], [96], and [113]), *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 (at [155]), *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] 3 SLR 857 (at [59]) and *Biofuel Industries Pte Ltd v V8 Environmental Pte Ltd and another appeal* [2018] 2 SLR 199 (at [20]).

(c) The expression "rescission" was used in the High Court decision of *OCBC Securities Pte Ltd v Phang Yul Cher Yeow and another action* [1997] 3 SLR(R) 906 (at [79]) to refer to the consequence of a breach, as opposed to the unwinding of the contract due to, for instance, misrepresentation.

47 In my respectful view, while the use of the different terminology is not wrong as they each convey the same basic idea, it is helpful for the law to use a consistent set of terminology in this already complex area of law. In this regard, Professor J W Carter, who is widely regarded as the foremost expert on the topic, put it well in his seminal text when he said that "the terminology employed to describe and apply the concepts of breach of contract is far from uniform" (see J W Carter, *Carter's Breach of Contract* (LexisNexis Butterworths, 3rd Ed, 2011) ("*Carter*") at para 3-34). While no less a figure than Lord Wilberforce has lamented that to ask for uniformity in this area is to "cry for the moon" (see the House of Lords decision of *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 AC 827 ("*Photo Production*") at 844), there is no reason to aim for a moon-shot. At the very least, if the terminology used in Singapore can *conduce* towards uniformity, then that is better than the widely varied terminology that is presently bandied around. To that extent, I would suggest the following points:

(a) The expression "repudiatory breach", which is a commonly used generic description of all those situations in which the common law confers a right to terminate, could be avoided (see *Carter* at para 3-35). More specifically, the expression "repudiatory breach" may be inaccurate in so far as it is used to describe *all* the situations in which a party has a right to terminate for breach. This is because the word "repudiation" is more appropriately used to describe a promisor's refusal to perform the contract. It is therefore inaccurate to describe a breach of condition (or of an intermediate term giving rise to sufficiently serious consequences) as "repudiatory" or a "repudiation" unless it involves a *refusal* to perform (see *Carter* at para 3-36). Indeed, a refusal to perform a contract will not necessarily amount to a repudiation, and much depends on all the facts and circumstances of the case, including whether a reasonable person can conclude that the party concerned no longer intends to be bound by the contract (see *iVenture* at [65]). Moreover, the expression "repudiatory breach" describes a *conclusion* that a breach is of the requisite characteristic (*ie*, either breach of a condition or a breach of an intermediate term giving rise to sufficiently serious consequences) so as to confer the right to terminate the performance of the contract. Thus, in so far as the expression is used to describe a breach that *may* give rise to such a right *before* the requisite analysis is undertaken, it may not be accurate. It is more accurate to state that the breaching party has committed a *breach*, and *then* undertake the analysis as to whether that breach gives the innocent party the right to terminate the performance of the contract.

(b) The expression "repudiation" should describe only a repudiation of obligation, that is, a clear absence of readiness or willingness to *perform*, which satisfies the requirement of seriousness (see *Carter* at

para 7-03). This will reduce the concept of repudiation as being an "elusive" one (see the Ninth Circuit of the US Court of Appeal decision in *Riess v Murchison*, 384 F.2d 727 at 733 (CA, 9th Cir, 1967)) due to the variety of inconsistent ways the word has been used (see the House of Lords decision of *Heyman and another v Darwins, Limited* [1942] 1 AC 356 ("*Heyman*") at 378). In particular, the word "repudiation" should not be used to describe a termination of the performance of a contract. So far as possible, an innocent party who terminates a contract ought *not* to be said to have "repudiated" it (see, *eg*, *Bettini v Gye* (1876) 1 QBD 183 at 187); rather, it is sufficient to simply say that the innocent party has *terminated* the performance of the contract. Also, the word "repudiation" should not be used to mean a breach of a contract which entitles the innocent party to terminate the performance of the contract. This particular usage is apt to confuse because "repudiation" refers to a subset of conduct that may give rise to the right to terminate, that is, the absence of readiness or willingness to *perform*, which will include a situation where there may be no actual *failure to perform*.

(c) The expression "renunciation" is ambiguous and should not be used. In the English Court of Appeal decision of *Chilean Nitrate Sales Corp v Marine Transportation Co Ltd (The Hermosa)* [1982] 1 Lloyd's Rep 570, Donaldson LJ used the term "renunciatory" to "indicate conduct which, whether or not it amounts to an actual breach of contract, foreshadows a breach which would have this potentially dissolutive character" (at 572). The learned judge observed that an alternative term used to describe this situation is "anticipatory", "since the effect is to allow the injured party to anticipate a breach and act upon it before it occurs" (at 572). In my respectful view, if this is the case, then the law should just stick to "anticipatory breach", rather than use the word

"renunciation" (and its derivatives, such as "renounce") to describe the situation where there is conduct which allows the innocent party to anticipate a breach.

(d) The expression "rescission" may lead to confusion with the rescission of a contract *ab initio* and should not be used to describe the consequences related to a breach (see *Photo Production* at 844). Unlike the rescission of a contract *ab initio*, termination discharges the parties, and their rights are to be analysed at the time of discharge (see *Carter* at para 3-40).

(e) Consequently, the basic contrast created by the use of a consistent set of terminology is between: (i) termination for failure to perform, that is, the breach of a contractual term; and (ii) termination for repudiation, which crucially includes the situation where there is no failure to perform but merely an absence of readiness or willingness to perform (see *Carter* at para 3-12).

48 Second, termination is never automatic; indeed, neither a breach of contract nor a repudiation operates to terminate the performance of the contract automatically (see *RDC Concrete* at [90] and *Carter* at para 10-01). Instead, termination is always a matter of choice. Thus, while a breach of contract or a repudiation can give rise to a *right* to terminate, the consequent question is whether the innocent party has *exercised* that right to terminate that is conferred by the breach or repudiation (see *RDC Concrete* at [90]). Parenthetically, it may also be more accurate to speak of termination as the exercise of a right to terminate the *performance of a contract* as opposed to one to terminate *the contract* (see *Carter* at para 3-41). This is because what is terminated is actually the parties' duties to perform and be ready and willing to perform. The contract

is, strictly speaking, never terminated. That said, the expression "termination of the contract" is a convenient shorthand that is perhaps much too entrenched to change.

49 Third, where there is a breach or repudiation, and the innocent party is entitled to elect to terminate the performance of the contract, that choice is *unfettered*: he can either choose to continue with (or affirm) the contract (and thus waive the breach), or he can choose to bring the contract to an end. However, should the innocent party choose to terminate the performance of the contract, what is required for an effective election are unequivocal words or conduct evincing such an election (see the House of Lords decision of *Vitol SA v Norelf Ltd (The Santa Clara)* [1996] AC 800 at 810–811). Although these requirements are largely informal, the effect of such words or conduct must make plain the decision to terminate the performance of the contract (see *Heyman* at 361).

50 Fourth and finally, regardless of whether the innocent party is entitled to elect to terminate the performance of the contract, he is always entitled to claim damages as of right for the loss resulting from the breach of the contract (see *RDC Concrete* at [114]). This is subject to legal constraints such as the need to prove substantive damages, mitigation, remoteness of damages, and limitation (see *RDC Concrete* at [114]).

### (B) EVEN IF THE CLAIMANT BREACHED THE SETTLEMENT AGREEMENT, THE DEFENDANT DID NOT ACCEPT THE CLAIMANT'S BREACH

51 Returning to the facts of the present application, even if I were to take the defendant's case at its highest and accept that that the claimant breached cl 5 of the Settlement Agreement, I still do not think that the defendant has raised a *bona fide* defence in this regard. I say this for the following reasons.

52 First, the defendant appears to be operating under the misapprehension that the claimant's breach of cl 5, even if true, will terminate the contract *automatically*. This much is clear from the defendant's submissions to the effect that "[t]he Settlement Agreement was terminated by virtue of the Claimant's repudiatory breach and thus the Defendant no longer has any contractual obligations to the Claimant under the Settlement Agreement".[21] The defendant seems to take the view that when the claimant breached cl 5, the breach automatically terminated the parties' performance of the Settlement Agreement, and hence the defendant no longer has to perform his obligations within, especially that in cl 2(b). As I have explained above, this is plainly wrong as a matter of law. Even if the claimant breached cl 5, that does not, in and of itself, terminate the performance of the Settlement Agreement.

53 Second, and relatedly, the defendant does not explain why even if the claimant breached cl 5 of the Settlement Agreement, that breach gives rise to defendant's right to terminate the performance of the Settlement Agreement. It is trite law that not every breach of a term will give rise to the right to so terminate. It is not necessary to go through all such situations that have been comprehensively outlined in the seminal decision in this area of *RDC Concrete*. It suffices to say that the defendant has not provided any explanation whatsoever as to *why* the alleged breach of cl 5 will give rise to the right to terminate. As such, the defendant's defence founded on the alleged breach of cl 5 also fails on this basis.

54 Third, even if I were to assume that the claimant's alleged breach of cl 5 gives rise to the defendant's right to terminate, the defendant has not explained

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[21] DWS at para 51(b)(i).

how the evidence shows that he had *exercised* that right to terminate the performance of the Settlement Agreement, such that he is absolved from performing the specific obligation to make a donation provided for in cl 2(b). In this regard, as I have explained above, what is required for an effective election are unequivocal words or conduct evincing such an election. The defendant has not shown any evidence to this effect from 9 March 2022 onwards, which is when the claimant commenced OSP 10. Indeed, when questioned, Mr Lee conceded that the defendant's pleadings contained no particulars regarding the defendant accepting the claimant's alleged breach. Therefore, although the court can determine the legal consequences of a matter that was not argued by a party, the court can only do so if the material facts are sufficiently pleaded (see the High Court decision of *Ho Choon Han v SCP Holdings Pte Ltd* [2022] SGHC 260 at [33]). However, the defendant has failed to plead any facts in this regard.

55 For completeness, I note that the defendant's disbursement of the assets of the Estate to the claimant and HCS does not constitute an affirmation of the Settlement Agreement, such that the defendant has waived his right to terminate the performance of the Settlement Agreement. This is because the disbursement was done in the defendant's capacity as the administrator of the Estate, instead of his personal capacity. While Ms Chuah argued that the defendant's asking for the official receipts from SCMI via letters dated 14 and 16 February 2023 constitutes an affirmation of the Settlement Agreement, I do not need to decide this point because of the three reasons I have provided above. I will simply say that a party may legitimately reserve its rights in relation to a contract being breached but take steps to protect itself against being in breach without it necessarily amounting to affirmation.

56 In totality, I therefore find that the defendant has not raised a *bona fide* defence in relation to the claimant's alleged breach of cl 5 of the Settlement Agreement caused by the commencement of OSP 10.

*The defendant's argument that the claimant has suffered no loss is plainly unsustainable*

57 Finally, while the defendant does not appear to have pursued this point in his written submissions, I will deal with his apparent allusion that the claimant has suffered no loss arising from the defendant's breach of the Settlement Agreement. The defendant appears to suggest that because the beneficiary of the donation would have been a third-party charity, the claimant suffers no damage and therefore cannot claim for breach of contract.

58 In my view, this defence, even if it was really advanced, fails for two simple reasons. First, it is trite law that a cause of action for breach of contract is not dependent on there being any loss suffered from the breach. While the fact of there being loss will affect the damages to be awarded, this does not detract from the basic point that the claimant does not need to demonstrate that he has suffered any loss in order to pursue (and succeed in) a cause of action for breach of contract.

59 Second, and in any event, the Court of Appeal in *Family Food Court (a firm) v Seah Boon Lock and another (trading as Boon Lock Duck and Noodle House)* [2008] 4 SLR(R) 272 (at [51]) endorsed the so-called "broad ground" for the recovery of damages as laid out in the House of Lords decision in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (see also the Court of Appeal decision of *Sun Electric Pte Ltd and another v Menrva Solutions Pte Ltd and another* [2019] SGCA 51 at [4]). By this "broad ground", the claimant can claim substantial damages arising from the loss of his

performance interest. As the High Court in *Motor Insurers' Bureau of Singapore and another v AM General Insurance Bhd (formerly known as Kurnia Insurans (Malaysia) Bhd) (Liew Voon Fah, third party)* [2018] 4 SLR 882 (at [118]) acknowledged, the "broad ground" enables a claimant to sue for damages where the loss of his performance interest cannot be framed in purely financial terms, such as if his objective in contracting was not to make a profit but to benefit other persons altruistically. This is precisely the situation in the present application. It is therefore clear that the claimant can claim more than just nominal damages even though the ultimately beneficiary may well be a third-party charity.

60 Accordingly, I find that the defendant's defence premised on the claimant having suffered no damage, even if advanced, would fail.

***Summary of the claimant's relief***

61 In summary, I find that the claimant has shown a *prima facie* case that the defendant has breached cl 2(b) of the Settlement Agreement but the defendant has not raised any *bona fide* defence against this. I therefore enter summary judgment in favour of the claimant for damages arising from that breach.

62 However, I do not enter summary judgment for the defendant to, in effect, specifically perform the Settlement Agreement. This is because it is trite law that when damages are available, then a court should be slow to order specific performance (see the High Court decision of *Lee Chee Wei v Tan Hor Peow Victor and others* [2006] SGHC 116 (at [9])). While an award of damages is a legal remedy, an order of specific performance is an equitable remedy, where the court must compel the defendant personally to do what he promised

to do (see the Court of Appeal decision of *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 ("*Lee Chee Wei (CA)*") (at [52])). Therefore, the court will only exercise its discretion to grant specific performance if it is just and equitable to do so, by considering factors such as: (a) whether damages would be an adequate remedy; and (b) whether the person against whom the relief of specific performance is being sought would suffer substantial hardship (see *Lee Chee Wei (CA)* (at [53])).

63 In this regard, one common example where an award of damages is not an adequate remedy is a contract relating to immovable property. The orthodox position is that land is deemed to be unique and no substitute is adequate, such that damages are considered inadequate even when the interest in question is a mere commercial lease for a short term (see the Court of Appeal decision of *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and others and another appeal* [2012] 1 SLR 32 (at [78])). In the present case, the claimant has not sufficiently explained why I should exercise my discretion to grant specific performance of the Settlement Agreement, wherein damages can be an adequate remedy. I therefore do not enter summary judgment for the defendant to specifically perform the Settlement Agreement.

64 I also do not enter summary judgment for damages in the sum of $308,038.34. This is because the claimant's claim for damages arising from the loss of his performance interest may not be equated identically to the sum that the defendant is to pay a charity. I order therefore that such damages are to be assessed.

65 For completeness, I do not think that it is necessary to make a declaration that the defendant is in breach of cl 2(b) of the Settlement Agreement. As Professor Andrew Burrows notes, declaratory relief in the context of contractual

and tortious claims can be made and will primarily be to pronounce on whether the defendant's conduct amounted to a breach of contract or a tort, as well as related issues (see Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (OUP, 4th Ed, 2019) at p 506). However, there have been few cases since where courts have granted declarations in the context of contractual and tortious claims. I do not think that it is necessary for me to do so in this case.

**Conclusion**

66 For all the reasons above, I enter summary judgment in favour of the claimant and award the claimant damages to be assessed by the Registrar.

67 Unless the parties are able to agree, they are to tender their submissions on the appropriate costs order within 14 days of this judgment, limited to seven pages each.

Goh Yihan
Judicial Commissioner

Chuah Hui Fen Christine and Yao Qinzhe (D' Bi An LLC)
for the claimant;
Luke Lee Wen Loong (Tan Lee & Partners) for the defendant.