Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd and Others [2006] SGHC 152

Case Number : OS 343/2005, SIC 1954/2005, 2067/2005

Decision Date : 11 September 2006

Tribunal/Court : High Court

Coram : Andrew Phang Boon Leong J

Counsel Name(s) : Hee Theng Fong and Tay Wee Chong (Hee Theng Fong & Co) for the plaintiff; Cheah Kok Lim and Chong Shiao Hann (Ang & Partners) for the fourth defendant; Foo Maw Shen and John Wang Shing Chun (Yeo Wee Kiong Law Corporation) for the fifth defendant

Parties : Wu Yang Construction Group Ltd — Zhejiang Jinyi Group Co, Ltd; Chen Jinyi; Kingsea Ltd; Mao Yong Hui; Vgo Corp Ltd

Companies – Shares – Allotment – Company issuing shares as purchase consideration in excess of what company being acquired valued at – Whether company thereby financing dealings in its own shares – Whether such dealings amounting to financial assistance in breach of s 76 Companies Act – Whether company's actions amounting to legitimate or bona fide business transaction – Section 76(1)(a) Companies Act (Cap 50, 1994 Rev Ed)

Evidence – Proof of evidence – Standard of proof – Plaintiffs alleging fraud and conspiracy on part of defendant – Standard of proof applicable for allegations of fraud and conspiracy in civil proceedings

Tort – Conspiracy – Difference between wrongful means conspiracy and simple conspiracy – Whether plaintiff needing to plead specific category of conspiracy being relied upon – When plaintiff needing to prove predominant intention to injure on defendant's part – Whether utilisation of unlawful means sufficient to render defendant liable – Whether plaintiff needing to prove damage suffered

11 September 2006

Andrew Phang Boon Leong J:

Introduction

1 The plaintiff is a company incorporated in the People's Republic of China ("PRC"). It claims that it is, *inter alia*, an equitable pledgee or transferee of 59,339,238 shares in VGO Corporation Ltd ("VGO") from Kingsea Ltd ("Kingsea"), which is the third defendant (see also [10] below). VGO, which is the fifth defendant, is a Singapore company which is listed on the Singapore Exchange. Goh Ching Wah ("Goh") is a director of VGO. The background to the plaintiff's present position *vis-à-vis* the VGO shares just mentioned ("the shares") is as follows. I should state at the outset that although the relevant fact situations are somewhat complex, the legal issues are straightforward. I should also mention that I am indebted to counsel for the parties for setting out these fact situations clearly and concisely – and which aided me greatly in this particular portion of the judgment.

2 The second defendant is a PRC national and is the managing director of the first defendant (also a company incorporated in the PRC). The second defendant holds 50.23% of the shares in the first defendant. He is also the sole owner and controller of Kingsea.

3 As a result of nine written agreements ("the Nine Agreements") entered into between the plaintiff and the first as well as second defendants between June 2003 and 3 February 2005, the latter became jointly liable to the plaintiff to the tune of RMB30m. More specifically, the second

defendant had agreed to pledge the shares in VGO which were registered in Kingsea's name to the plaintiff to guarantee an instalment payment scheme under which the first defendant had promised to repay the RMB30m that it owed to the plaintiff. Indeed, by the ninth agreement, the second defendant had agreed to transfer all these shares to the plaintiff to offset the amount owed to the plaintiff. However, an attempt, in February 2005, to register the shares in the plaintiff's name failed due to the failure to meet the requirements laid down by the Central Depository (Pte) Limited.

4 On 23 March 2005, the plaintiff applied by way of an *ex parte* Summons in Chambers (No 1521 of 2005) for a Mareva injunction against the second defendant and Kingsea ("the Mareva Injunction"). I granted the application. As a result, the shares referred to in [1] above were frozen.

5 On 6 April 2005, the plaintiff commenced arbitration proceedings against the first defendant (which was in fact a precondition to the grant of the Mareva Injunction). The first defendant objected to the arbitration on the ground that the Singapore International Arbitration Centre ("the SIAC") had no jurisdiction because there had been no valid arbitration agreement between the parties in the first instance. The SIAC nevertheless proceeded to appoint an arbitrator. The arbitration proceedings, according to the plaintiff, seem to have petered out.

6 Coming now to the present proceedings, on 15 April 2005, VGO filed an application (by way of Summons in Chambers No 1954 of 2005) to vary the Mareva Injunction. On 25 April 2005, the fourth defendant, Mao Yong Hui ("Mao"), also filed a similar application (by way of Summons in Chambers No 2067 of 2005) to vary the Mareva Injunction on similar grounds. In particular, both VGO and Mao claimed that they were entitled to the shares (I will refer to both these applications as "the applications"). It should be mentioned that Mao is also a PRC national and is the executive director of Hangzhou Kingsea Food Co Ltd ("Hangzhou Kingsea"), a PRC company and a sub-subsidiary of VGO. He is also the legal representative of Hangzhou Kingsea.

7 The basis of the applications mentioned in the preceding paragraph rested on the fact that VGO had acquired from Kingsea the entire issued and paid-up capital of a British Virgin Island company, Spring Wave Ltd ("Spring Wave"). In turn, Spring Wave held the entire issued and paid-up capital of Hangzhou Kingsea. It should be mentioned (for reasons that will become clearer below) that Hangzhou Kingsea itself held 50.26% of the share capital of Heilongjiang Kingsea Wudailianchi Mineral Water (Group) Co Ltd ("Heilongjiang KSWDLC"), which is also a company incorporated in the PRC. Heilongjiang KSWDLC has (in turn) two other subsidiaries, also incorporated in the PRC. As the transaction between VGO and Kingsea which was mentioned right at the outset of this paragraph is central to the applications in the present proceedings, a brief description of it is apposite.

8 On 7 October 2002, VGO entered into a conditional sale and purchase agreement ("the Agreement") with Kingsea. As already mentioned in the preceding paragraph, VGO acquired, as a result and from Kingsea, the entire issued and paid-up capital of Spring Wave as well as loans advanced by Kingsea to Spring Wave. The purchase consideration was initially agreed at RMB55m. However, this purchase consideration was later adjusted to RMB50.596m instead as a result of a financial audit of the Net Asset Value ("NAV") of Spring Wave and its subsidiaries. This is an important fact because the plaintiff, as we shall see, relied heavily on it in order to establish its claim that it should prevail in the present proceedings pursuant to s 76 of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act"). As also mentioned above, the result of the Agreement was that VGO held the entire issued and paid-up capital in Spring Wave.

9 The purchase consideration for the Agreement (which was to be paid by VGO to Kingsea) was to be satisfied by the allotment and issue of 123,918,506 new shares in VGO ("the New Shares"). 102,152,755 of the New Shares were in fact issued in favour of Kingsea and were registered in its

name accordingly. The remaining 21,765,751 shares were issued in script form to different individuals, including Mao.

10 Between December 2002 and February 2004, VGO and Kingsea entered into *three* further written agreements to supplement the Agreement ("the Supplemental Agreements"). By virtue of the Supplemental Agreements, Kingsea undertook specific warranties to VGO as part of VGO's acquisition of Spring Wave pursuant to the Agreement, as described above. As partial *security* for Kingsea's performance of these specific warranties or undertakings, 81,175,347 of the 102,152,755 New Shares issued to Kingsea (see [9] above) were deposited with VGO as *escrow shares*. In other words, having allotted and issued 102,152,755 New Shares to Kingsea, VGO retained 81,175,347 of those shares with a power of sale reserved to the directors of VGO in the event that Kingsea breached the specific warranties. All these shares continue to be registered in the name of Kingsea. The number of escrow shares was first reduced to 44,437,379 on there being some compliance with the obligations under the undertakings. However, there was a subsequent breach of the obligations, resulting in an increase of 9,068,861 escrow shares. Subsequently, a further 5,832,998 escrow shares were again deposited with VGO. In total, therefore, Kingsea deposited 59,339,238 escrow shares with VGO (see also [1] above).

11 It should be noted at this juncture that it was under the second of the three Supplemental Agreements that the NAV of Spring Wave and its subsidiaries was reduced from RMB55m to RMB50.596m – a point already noted above (at [8]). This was due to the fact that a long term debt of RMB4,456,723 owing by Heilongjiang KSWDLC to Agang Group Co Ltd ("the Agang debt") was, under this particular agreement, excluded from the computation of the NAV of Spring Wave and its subsidiaries. Before me, counsel for the plaintiff, Mr Hee Theng Fong, went further, and argued that the amended figure of RMB50.596m was *still* an overvaluation of the relevant NAV. He argued that the concession to be obtained by Heilongjiang KSWDLC to exclusively extract the natural resources of a spring in Heilongjiang Province ("the Concession"), which was valued at RMB5m under the second of the Supplemental Agreements, had not in fact been obtained and, to that extent, also reduced the NAV of Spring Wave and its subsidiaries. As I have mentioned, all this will become relevant in so far as the plaintiff's argument based on an alleged contravention of s 76 of the Act is concerned.

12 As a result of the default by Kingsea of the undertakings under the Supplemental Agreements, VGO ultimately exercised its power of sale with regard to all the escrow shares. On or about 20 March 2005, Goh found a buyer for the shares, a Mr Lee Chin Seng ("Lee"). Goh instructed a solicitor, Rey Foo ("Foo"), to draft the agreements to sell the shares to Lee. However, that particular sale was aborted. On 22 March 2005, the shares were sold to Mao.

13 On 25 July 2005, both the applications mentioned above (at [6]) came on for hearing before me. The plaintiff suddenly raised issues relating to an alleged breach of s 76 of the Act as well as an alleged fraud and conspiracy between, *inter alia*, VGO and Mao. In the premises, the plaintiff argued that the defendants' interest had to be postponed to its interest, the defendants having been guilty of inequitable conduct. Having regard, in particular, to the latter allegation (of alleged fraud and conspiracy), I directed that further affidavits be filed by the parties and I also directed that there be discovery of documents as well as a trial between the parties in order to ascertain who would be entitled to the 59,339,238 VGO shares. Deponents of the said affidavits would be subject to cross-examination at the trial itself. I also allowed the parties to call expert witnesses on PRC law to give evidence with respect to the validity (or otherwise) of the Nine Agreements under PRC law.

The legality of the Nine Agreements under PRC law

14 As already mentioned above, the parties called expert witnesses to testify as to the legality

(or otherwise) of the Nine Agreements. The plaintiff argued that the Nine Agreements were consistent with PRC law, whereas VGO and Mao argued that the Nine Agreements were illegal and void under PRC law. With respect, the expert evidence was neither here nor there. It is true that the proof of foreign law in a domestic court is a question of fact (see s 47(1) of the Evidence Act (Cap 97, 1997 Rev Ed) and Adrian Briggs, CGJ Morse & JD McClean, *Dicey and Morris on The Conflict of Laws* (Sweet & Maxwell, 13th Ed, 2000) at p 221, rule 18(1)). But the ability of the (domestic) court to make an informed decision is dependent largely on the quality of the expert evidence adduced. The reality of the situation, in this case at least, was that the expert evidence, which was diametrically opposed (and not surprisingly, at that), was singularly unhelpful. Each expert asserted his position and stuck to his guns. There was no nuanced explanation that would aid the court in arriving at an informed and just decision. This is the great potential disadvantage, in my view, of having such a rule as to the proof of foreign law. In the event, the experts cancelled themselves out simply because (and unfortunately at that) they both never got past "neutral gear", so to speak. However, this made no difference to my decision as I found in favour of VGO and Mao in any event.

15 I should mention that neither expert referred to relevant treatises or articles. This would have helped to inject an objective (not to mention, helpful) measure into their respective evidence. Perhaps there were none, but because this point was not raised, we shall never know. Indeed, it seems to me that at the very least, helpful works of the kind just mentioned might have been cited as support for the more general principles of (especially, contract) law in the PRC for the simple reason that if the Nine Agreements constituted an unusual or novel arrangement, it would have made good sense for the expert and the parties concerned to have worked their way through to their respective conclusions by commencing with the general principles of PRC contract law. As already mentioned, however, this was not to be.

16 I also found the testimony of the other witnesses singularly unhelpful. This was, for example, the case with Mr Chen Zhi Zhang ("Chen"), who is the managing director of the plaintiff. Indeed, cross-examination of this particular witness, like that of the other witnesses, was relatively protracted simply because the witnesses either did not know much about the legality of the Nine Agreements or, if they did, were reluctant to share their knowledge.

The alleged breach of s 76 of the Companies Act

17 I pause here to note, once again, that the alleged breach of s 76 of the Act was raised literally "out of the blue" by counsel for the plaintiff, Mr Hee (see [13] above). A party is entitled, of course, to raise any legal issue that he or she wishes, provided that no prejudice or surprise accrues to the other party. Hence, rather surprising as it was, I allowed Mr Hee the maximum latitude to canvass this particular issue on behalf of his clients. Indeed, a major plank during the trial itself consisted of Mr Hee's attempt to demonstrate that the NAV of Spring Wave and its subsidiaries (the central subject matter of the Agreement entered into between VGO and Kingsea) was not what it was originally thought to have been. To recapitulate, it was thought that the NAV was RMB55m (hence, this constituted the original purchase consideration for the Agreement). However, the purchase consideration for the Agreement was adjusted downwards to RMB50.596m because of the Agang debt. As mentioned earlier (see [11] above), Mr Hee also argued that the fact that the Concession (allegedly valued at RMB5m) had not been obtained should, likewise, also be taken into account in reducing the NAV. Indeed, he proceeded to argue that all this meant that the parties to the Agreement were in breach of s 76 of the Act as, to the extent of the difference in what the NAV was originally thought to be and what it actually turned out to be – in other words, to the extent that VGO shares had been issued as purchase consideration under the Agreement *for that particular difference in amount* – to *that extent* there had (so Mr Hee's argument ran) been financial assistance by VGO in aiding the purchase of its (VGO's own) shares and, hence, a contravention of s 76 of the

Act.

18 It is important to also note, at this particular juncture, that at no time did Mr Hee argue that the *original purpose* for the Agreement lacked good faith or was a sham transaction. VGO had in fact entered into the Agreement with Kingsea *in order to diversify its business portfolio* by branching out into the food industry. This was in fact a perfectly legitimate business purpose, in my view. This view was, as I have just mentioned, apparently shared by *the plaintiff as well*. *However*, the plaintiff's impugning of the Agreement for an alleged contravention of s 76 of the Act centred (according to Mr Hee) on *only a part* of the Agreement proper, and which has already been set out above.

19 With respect, I find the argument just set out to be completely without merit. Indeed, one does not even have to be a business person to realise that if such a situation as the plaintiff was impugning fell afoul of s 76 of the Act, it would be extremely difficult (on occasion, even impossible) to do business. The argument, whilst superficially attractive, was commercially impractical. Indeed, such a situation was clearly *not* within the spirit and intent of s 76 of the Act. The superficial attractiveness of the plaintiff's argument was, in this regard, less than skin-deep. It was utterly without basis and appeared to be a desperate attempt to obtain a decision that was favourable to the plaintiff. Any reasonable person would realise that a perfectly legal business venture could be – and undoubtedly had been – entered into between the parties even though the value of the purchase consideration was not exactly equivalent to the NAV of the businesses purchased. There are many reasons why businesses are purchased. The key question is not a mechanistic and carping inquiry into differences between the purchase consideration and the NAV but, rather, whether or not there are legitimate or *bona fide* reasons for the business transaction to be entered into in the first instance. At this juncture, I pause to re-emphasise an extremely significant point in this particular regard – that the plaintiff *at no time* ventured to impugn the good faith or *bona fides* of VGO in entering into the Agreement with Kingsea (which centred on a diversification of the former's overall business portfolio). If, indeed, the plaintiff's argument centring on s 76 of the Act is taken to its logical conclusion, the legitimate business intentions of a listed Singapore company would be shipwrecked upon the shoals of a desperate legal argument. Never truer was the adage "hard cases make bad law", for the attempt to accommodate the plaintiff in the present proceedings through such an argument would put a parlous complexion on s 76 of the Act itself. Indeed, this adage, in my view, is *not even applicable* here for it is often utilised in the context of the court doing justice for a particular party by stretching (or, rather, twisting) the law beyond its legitimate boundaries. In contrast, it seems to me, in fact, that to accept the plaintiff's argument with respect to s 76 of the Act in the present proceedings would be to perpetrate an *injustice* on the *defendants* – whilst simultaneously making "bad law" in the process. It would be a case of "bad cases making bad law" instead – the very antithesis of the aims of justice and fairness that constitute the very foundations of the enterprise of the law.

20 Indeed, it is my view that the present case *does not even fall within* the literal ambit of s 76 of the Act in the first instance. In the present proceedings, the shares in question were, in point of fact, issued by VGO and were *an integral part of the purchase consideration for another asset*. Indeed, these shares did not even constitute the lion's share (let alone, the entire) purchase price. In other words, VGO *issued* shares in order to pay for the asset concerned. This is a far cry from a situation where the company financially assists someone to *purchase* its shares. It is only this last-mentioned situation that falls within the ambit of s 76 of the Act.

21 I should add that in issuing the New Shares as the purchase consideration for the asset concerned, VGO did not in fact reduce its capital. As we shall see, it is at least a main thrust of s 76 of the Act to ensure that the company does not *deplete its capital* to the detriment of its creditors and shareholders (see generally [30]–[33] below). This was clearly not the case in the present proceedings.

22 In any event, the courts will not generally inquire into the *quantum* of consideration furnished *bona fide* by a company as payment for an asset. It is simply not the courts' concern whether such a company has struck a good or bad bargain. Indeed, under the general law of contract, and consistently with the general principle of freedom of contract, the courts will not inquire into the adequacy of consideration as such. This proposition might itself contribute towards a larger argument for the abolition of the doctrine of consideration itself (*cf* the Singapore High Court decision of *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594 at [139]; affirmed by the Court of Appeal in [2005] 1 SLR 502, but without consideration of this particular issue), but this is clearly outside the scope of the present proceedings. What *is* relevant is the fact that it was perfectly proper for the company (VGO) in the present proceedings to issue the New Shares as consideration for the asset concerned and, in the absence of clear evidence that these shares were issued for an illegitimate and/or collateral purpose that had nothing to do with the transaction at hand, it is improper for this court to even begin to interfere with this transaction in any way. Any other approach would undermine the notion of free enterprise, which is a bedrock of our society. As I have already emphasised, at no point in the present proceedings has the plaintiff impugned the transaction concerned as being a sham transaction.

23 This *general* approach is in fact to be found throughout company law generally. For instance, it has been held that directors are not limited in their powers under the articles of association of the company except to the extent that they must hold a view that is *bona fide* in the interests of the company as a whole (see, for example, the oft-cited English Court of Appeal decisions of *Allen v Gold Reefs of West Africa, Limited* [1900] 1 Ch 656 at 671 and *In re Smith and Fawcett, Limited* [1942] Ch 304 at 308). Indeed, the courts will not readily interfere with what are essentially management decisions of the company: see the oft-cited Australian Privy Council decision of *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 832 (a decision which was in fact cited and applied in *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1995] 1 SLR 313 ("*Intraco*"), albeit in the context of the issue of directors' duties). Indeed, it will be seen that commercial reality infuses the operation of the financial assistance provisions under the Act.

24 Again, it has been held that a company may purchase property at any price it considers fit as well as pay for it in fully paid-up shares and that such a transaction should be upheld in the absence of any dishonesty or proof that the said transaction was otherwise colourable (see, for example, the English Court of Appeal decision of *In Re Wragg, Limited* [1897] 1 Ch 796). It is true that the issue involved in that case was somewhat different and concerned the attempted impugning of the issuing of shares at a discount to par. Indeed, given the abolition of par value in the Singapore context (see, especially, s 15 of the Companies (Amendment) Act 2005 (Act 21 of 2005)), such an issue would not even arise for decision in the future. However, it bears repeating that it is the *general* approach that is important in so far as the present proceedings are concerned.

25 But let me *assume*, for the moment, that it is *at least possible* for the plaintiff to bring the present fact situation within the ambit of s 76 of the Act (an assumption which I must reiterate I am in fact compelled to *reject* on the very facts of the present proceedings). It is my view that there would, even on this extremely generous (and *unwarranted*) assumption, *not* be a contravention of s 76 of the Act. Let me elaborate.

26 I have mentioned that s 76 of the Act was not intended to capture situations such as that relied upon by the plaintiff in the present proceedings. Let me elaborate on this important legal point as applied in the context of (common) situations such as that which existed in the present case.

27 Section 76 of the Act itself reads as follows:

Company financing dealings in its shares, etc.

76. —(1) Except as otherwise expressly provided by this Act, a company shall not —

(*a*) whether directly or indirectly, give any financial assistance for the purpose of, or in connection with —

(i) the acquisition by any person, whether before or at the same time as the giving of financial assistance, of —

(A) shares or units of shares in the company; or

(B) shares or units of shares in a holding company of the company; or

(ii) the proposed acquisition by any person of —

(A) shares or units of shares in the company; or

(B) shares or units of shares in a holding company of the company;

(*b*) whether directly or indirectly, in any way —

(i) acquire shares or units of shares in the company; or

(ii) purport to acquire shares or units of shares in a holding company of the company; or

(*c*) whether directly or indirectly, in any way, lend money on the security of —

(i) shares or units of shares in the company; or

(ii) shares or units of shares in a holding company of the company.

(2) A reference in this section to the giving of financial assistance includes a reference to the giving of financial assistance by means of the making of a loan, the giving of a guarantee, the provision of security, the release of an obligation or the release of a debt or otherwise.

(3) For the purposes of this section, a company shall be taken to have given financial assistance for the purpose of an acquisition or proposed acquisition referred to in subsection (1) (*a*) (referred to in this subsection as the relevant purpose) if —

(*a*) the company gave the financial assistance for purposes that included the relevant purpose; and

(*b*) the relevant purpose was a substantial purpose of the giving of the financial assistance.

(4) For the purposes of this section, a company shall be taken to have given financial assistance in connection with an acquisition or proposed acquisition referred to in subsection (1) (*a*) if, when the financial assistance was given to a person, the company was aware that the financial assistance would financially assist —

(*a*) the acquisition by a person of shares or units of shares in the company; or

(*b*) where shares in the company had already been acquired — the payment by a person of any unpaid amount of the subscription payable for the shares, or the payment of any calls on the shares.

(5) If a company contravenes subsection (1), the company shall not be guilty of an offence, notwithstanding section 407, but each officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 3 years or to both.

(6) Where a person is convicted of an offence under subsection (5) and the Court by which he is convicted is satisfied that the company or another person has suffered loss or damage as a result of the contravention that constituted the offence, that Court may, in addition to imposing a penalty under that subsection, order the convicted person to pay compensation to the company or other person, as the case may be, of such amount as the Court specifies, and any such order may be enforced as if it were a judgment of the Court.

(7) The power of a Court under section 391 to relieve a person to whom that section applies, wholly or partly and on such terms as the Court thinks fit, from a liability referred to in that section extends to relieving a person against whom an order may be made under subsection (6) from the liability to have such an order made against him.

(8) Nothing in subsection (1) prohibits —

(*a*) the payment of a dividend by a company in good faith and in the ordinary course of commercial dealing;

(*b*) a payment made by a company pursuant to a reduction of capital in accordance with Division 3A of this Part;

(*c*) the discharge by a company of a liability of the company that was incurred in good faith as a result of a transaction entered into on ordinary commercial terms;

(*d*) anything done in pursuance of an order of Court made under section 210;

(*e*) anything done under an arrangement made in pursuance of section 306;

(*f*) anything done under an arrangement made between a company and its creditors which is binding on the creditors by virtue of section 309;

(*g*) where a corporation is a borrowing corporation by reason that it is or will be under a liability to repay moneys received or to be received by it —

(i) the giving, in good faith and in the ordinary course of commercial dealing, by a company that is a subsidiary of the borrowing corporation, of a guarantee in relation to the repayment of those moneys, whether or not the guarantee is secured by any charge over the property of that company; or

(ii) the provision, in good faith and in the ordinary course of commercial dealing, by

a company that is a subsidiary of the borrowing corporation, of security in relation to the repayment of those moneys;

(*ga*) the giving by a company in good faith and in the ordinary course of commercial dealing of any representation, warranty or indemnity in relation to an offer to the public of, or an invitation to the public to subscribe for or purchase, shares or units of shares in that company;

(*h*) the purchase by a company of shares in the company pursuant to an order of a Court;

(*i*) the creation or acquisition, in good faith and in the ordinary course of commercial dealing, by a company of a lien on shares in the company (other than fully-paid shares) for any amount payable to the company in respect of the shares; or

(*j*) the entering into, in good faith and in the ordinary course of commercial dealing, of an agreement by a company with a subscriber for shares in the company permitting the subscriber to make payments for the shares by instalments, but nothing in this subsection —

(i) shall be construed as implying that a particular act of a company would, but for this subsection, be prohibited by subsection (1); or

(ii) shall be construed as limiting the operation of any rule of law permitting the giving of financial assistance by a company, the acquisition of shares or units of shares by a company or the lending of money by a company on the or units of shares.

(9) Nothing in subsection (1) prohibits —

(*a*) the making of a loan, or the giving of a guarantee or the provision of security in connection with one or more loans made by one or more other persons, by a company in the ordinary course of its business where the activities of that company are regulated by any written law relating to banking, finance companies or insurance or are subject to supervision by the Monetary Authority of Singapore and where —

(i) the lending of money, or the giving of guarantees or the provision of security in connection with loans made by other persons, is done in the course of such activities; and

(ii) the loan that is made by the company, or, where the guarantee is given or the security is provided in respect of a loan, that loan, is made on ordinary commercial terms as to the rate of interest, the terms of repayment of principal and payment of interest, the security to be provided and otherwise;

(*b*) the giving by a company of financial assistance for the purpose of, or in connection with, the acquisition or proposed acquisition of shares or units of shares in the company or in a holding company of the company to be held by or for the benefit of employees of the company or of a corporation that is related to the company, including any director holding a salaried employment or office in the company or in the corporation; or

(*c*) the purchase or acquisition or proposed purchase or acquisition by a company of its own shares in accordance with sections 76B to 76G.

(9A) Nothing in subsection (1) prohibits the giving by a company of financial assistance for the purpose of, or in connection with, an acquisition or proposed acquisition by a person of shares or units of shares in the company or in a holding company of the company if —

(*a*) the amount of the financial assistance, together with any other financial assistance given by the company under this subsection repayment of which remains outstanding, would not exceed 10% of the aggregate of —

(i) the total paid-up capital of the company; and

(ii) the reserves of the company,

as disclosed in the most recent financial statements of the company that comply with section 201;

(*b*) the company receives fair value in connection with the financial assistance;

(*c*) the board of directors of the company passes a resolution that —

(i) the company should give the assistance;

(ii) giving the assistance is in the best interests of the company; and

(iii) the terms and conditions under which the assistance is given are fair and reasonable to the company;

(*d*) the resolution sets out in full the grounds for the directors' conclusions;

(*e*) all the directors of the company make a solvency statement in relation to the giving of the financial assistance;

(*f*) within 10 business days of providing the financial assistance, the company sends to each member a notice containing particulars of —

(i) the class and number of shares or units of shares in respect of which the financial assistance was or is to be given;

(ii) the consideration paid or payable for those shares or units of shares;

(iii) the identity of the person receiving the financial assistance and, if that person is not the beneficial owner of those shares or units of shares, the identity of the beneficial owner; and

(iv) the nature and, if quantifiable, the amount of the financial assistance; and

(*g*) not later than the business day next following the day when the notice referred to in paragraph (*f*) is sent to members of the company, the company lodges with the Registrar a copy of that notice and a copy of the solvency statement referred to in paragraph (*e*).

(9B) Nothing in subsection (1) prohibits the giving by a company of financial assistance for the purpose of, or in connection with, an acquisition or proposed acquisition by a person of shares or units of shares in the company or in a holding company of the company if —

(*a*) the board of directors of the company passes a resolution that —

(i) the company should give the assistance;

(ii) giving the assistance is in the best interests of the company; and

(iii) the terms and conditions under which the assistance is given are fair and reasonable to the company;

(*b*) the resolution sets out in full the grounds for the directors' conclusions;

(*c*) all the directors of the company make a solvency statement in relation to the giving of the financial assistance;

(*d*) not later than the business day next following the day when the resolution referred to in paragraph (*a*) is passed, the company sends to each member having the right to vote on the resolution referred to in paragraph (*e*) a notice containing particulars of —

(i) the directors' resolution referred to in paragraph (*a*);

(ii) the class and number of shares or units of shares in respect of which the financial assistance is to be given;

(iii) the consideration payable for those shares or units of shares;

(iv) the identity of the person receiving the financial assistance and, if that person is not the beneficial owner of those shares or units of shares, the identity of the beneficial owner;

(v) the nature and, if quantifiable, the amount of the financial assistance; and

(vi) such further information and explanation as may be necessary to enable a reasonable member to understand the nature and implications for the company and its members of the proposed transaction;

(*e*) a resolution is passed —

(i) by all the members of the company present and voting either in person or by proxy at the relevant meeting; or

(ii) if the resolution is proposed to be passed by written means under section 184A, by all the members of the company,

to give that assistance;

(*f*) not later than the business day next following the day when the resolution referred to in paragraph (*e*) is passed, the company lodges with the Registrar a copy of that resolution and a copy of the solvency statement referred to in paragraph (*c*); and

(*g*) the financial assistance is given not more than 12 months after the resolution referred to in paragraph (*e*) is passed.

(9C) A company shall not give financial assistance under subsection (9A) or (9B) if, before the assistance is given —

(*a*) any of the directors who voted in favour of the resolution under subsection (9A) (*c*) or (9B) (*a*), respectively —

(i) ceases to be satisfied that the giving of the assistance is in the best interests of the company; or

(ii) ceases to be satisfied that the terms and conditions under which the assistance is proposed are fair and reasonable to the company; or

(*b*) any of the directors no longer has reasonable grounds for any of the opinions expressed in the solvency statement.

(9D) A director of a company is not relieved of any duty to the company under section 157 or otherwise, and whether of a fiduciary nature or not, in connection with the giving of financial assistance by the company for the purpose of, or in connection with, an acquisition or proposed acquisition of shares or units of shares in the company or in a holding company of the company, by —

(*a*) the passing of a resolution by the board of directors of the company under subsection (9A) for the giving of the financial assistance; or

(*b*) the passing of a resolution by the board of directors of the company, and the passing of a resolution by the members of the company, under subsection (9B) for the giving of the financial assistance.

(10) Nothing in subsection (1) prohibits the giving by a company of financial assistance for the purpose of, or in connection with, an acquisition or proposed acquisition by a person of shares or units of shares in the company or in a holding company of the company if —

(*a*) the company, by special resolution, resolves to give financial assistance for the purpose of or in connection with, that acquisition;

(*b*) where —

(i) the company is a subsidiary of a listed corporation; or

(ii) the company is not a subsidiary of a listed corporation but is a subsidiary whose ultimate holding company is incorporated in Singapore,

the listed corporation or the ultimate holding company, as the case may be, has, by special resolution, approved the giving of the financial assistance;

(*c*) the notice specifying the intention to propose the resolution referred to in paragraph (*a*) as a special resolution sets out —

(i) particulars of the financial assistance proposed to be given and the reasons for the proposal to give that assistance; and

(ii) the effect that the giving of the financial assistance would have on the financial position of the company and, where the company is included in a group of corporations consisting of a holding company and a subsidiary or subsidiaries, the effect that the giving of the financial assistance would have on the financial position of the group of corporations,

and is accompanied by a copy of a statement made in accordance with a resolution of the directors, setting out the names of any directors who voted against the resolution and the reasons why they so voted, and signed by not less than two directors, stating whether, in the opinion of the directors who voted in favour of the resolution, after taking into account the financial position of the company (including future liabilities and contingent liabilities of the company), the giving of the financial assistance would be likely to prejudice materially the interests of the creditors or members of the company or any class of those creditors or members;

(*d*) the notice specifying the intention to propose the resolution referred to in paragraph (*b*) as a special resolution is accompanied by a copy of the notice, and a copy of the statement, referred to in paragraph (*c*);

(*e*) not later than the day next following the day when the notice referred to in paragraph (*c*) is despatched to members of the company there is lodged with the Registrar a copy of that notice and a copy of the statement that accompanied that notice;

(*f*) the notice referred to in paragraph (*c*) and a copy of the statement referred to in that paragraph are sent to —

(i) all members of the company;

(ii) all trustees for debenture holders of the company; and

(iii) if there are no trustees for, or for a particular class of, debenture holders of the company — all debentures holders, or all debenture holders of that class, as the case may be, of the company whose names are, at the time when the notice is despatched, known to the company;

(*g*) the notice referred to in paragraph (*d*) and the accompanying documents are sent to —

(i) all members of the listed corporation or of the ultimate holding company;

(ii) all trustees for debenture holders of the listed corporation or of the ultimate holding company; and

(iii) if there are no trustees for, or for a particular class of, debenture holders of the listed corporation or of the ultimate holding company — all debenture holders or debenture holders of that class, as the case may be, of the listed corporation or of the ultimate holding company whose names are, at the time when the notice is despatched, known to the listed corporation or the ultimate holding company;

(*h*) within 21 days after the date on which the resolution referred to in paragraph (*a*) is passed or, in a case to which paragraph (*b*) applies, the date on which the resolution

referred to in that paragraph is passed, whichever is the later, a notice —

(i) setting out the terms of the resolution referred to in paragraph (*a*); and

(ii) stating that any of the persons referred to in subsection (12) may, within the period referred to in that subsection, make an application to the Court opposing the giving of the financial assistance,

is published in a daily newspaper circulating generally in Singapore;

(*i*) no application opposing the giving of the financial assistance is made within the period referred to in subsection (12) or, if such an application or applications has or have been made, the application or each of the applications has been withdrawn or the Court has approved the giving of the financial assistance; and

(*j*) the financial assistance is given in accordance with the terms of the resolution referred to in paragraph (*a*) and not earlier than —

(i) in a case to which sub-paragraph (ii) does not apply — the expiration of the period referred to in subsection (12); or

(ii) if an application or applications has or have been made to the Court within that period —

(A) where the application or each of the applications has been withdrawn — the withdrawal of the application or of the last of the applications to be withdrawn; or

(B) in any other case — the decision of the Court on the application or applications.

(10A) If the resolution referred to in subsection (10) (*a*) or (*b*) is proposed to be passed by written means under section 184A, subsection (10) (*f*) or (*g*), as the case may be, shall be complied with at or before the time —

(*a*) agreement to the resolution is sought in accordance with section 184C; or

(*b*) documents referred to in section 183 (3A) in respect of the resolution are served on or made accessible to members of the company in accordance with section 183 (3A),

as the case may be.

(11) Where, on application to the Court by a company, the Court is satisfied that the provisions of subsection (10) have been substantially complied with in relation to a proposed giving by the company of financial assistance of a kind mentioned in that subsection, the Court may, by order, declare that the provisions of that subsection have been complied with in relation to the proposed giving by the company of financial assistance.

(12) Where a special resolution referred to in subsection (10) (*a*) is passed by a company, an application to the Court opposing the giving of the financial assistance to which the special resolution relates may be made, within the period of 21 days after the publication of the notice referred to in subsection (10) (*h*) —

(*a*) by a member of the company;

(*b*) by a trustee for debenture holders of the company;

(*c*) by a debenture holder of the company;

(*d*) by a creditor of the company;

(*e*) if subsection (10) (*b*) applies by —

(i) a member of the listed corporation or ultimate holding company that passed a special resolution referred to in that subsection;

(ii) a trustee for debenture holders of that listed corporation or ultimate holding company;

(iii) a debenture holder of that listed corporation or ultimate holding company; or

(iv) a creditor of that listed corporation or ultimate holding company; or

(*f*) by the Registrar.

(13) Where an application or applications opposing the giving of financial assistance by a company in accordance with a special resolution passed by the company is or are made to the Court under subsection (12), the Court —

(*a*) shall, in determining what order or orders to make in relation to the application or applications, have regard to the rights and interests of the members of the company or of any class of them as well as to the rights and interests of the creditors of the company or of any class of them; and

(*b*) shall not make an order approving the giving of the financial assistance unless the Court is satisfied that —

(i) the company has disclosed to the members of the company all material matters relating to the proposed financial assistance; and

(ii) the proposed financial assistance would not, after taking into account the financial position of the company (including any future or contingent liabilities), be likely to prejudice materially the interests of the creditors or members of the company or of any class of those creditors or members,

and may do all or any of the following:

(A) if it thinks fit, make an order for the purchase by the company of the interests of dissentient members of the company and for the reduction accordingly of the capital of the company;

(B) if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase (otherwise than by the company or by a subsidiary of the company) of the interests of dissentient members;

(C) give such ancillary or consequential directions and make such ancillary or consequential orders as it thinks expedient;

(D) make an order disapproving the giving of the financial assistance or, subject to paragraph (*b*), an order approving the giving of the financial assistance.

(14) Where the Court makes an order under this section in relation to the giving of financial assistance by a company, the company shall, within 14 days after the order is made, lodge with the Registrar a copy of the order.

(15) The passing of a special resolution by a company for the giving of financial assistance by the company for the purpose of, or in connection with, an acquisition or proposed acquisition of shares or units of shares in the company, and the approval by the Court of the giving of the financial assistance, do not relieve a director of the company of any duty to the company under section 157 or otherwise, and whether of a fiduciary nature or not, in connection with the giving of the financial assistance.

(16) A reference in this section to an acquisition or proposed acquisition of shares or units of shares is a reference to any acquisition or proposed acquisition whether by way of purchase, subscription or otherwise.

(17) This section does not apply in relation to the doing of any act or thing pursuant to a contract entered into before 15th May 1987 if the doing of that act or thing would have been lawful if this Act had not been enacted.

28 Before proceeding to consider those parts of s 76 of the Act that are of direct application to the factual matrix of the present proceedings, I have set out s 76 in its *entirety* not *merely* to illustrate its considerable length. Indeed, s 76 of the Act was rather more modest in length prior to the numerous amendments that have been effected over a great many years to it. This underscores the basic point that the spirit and intent of s 76 is not to constitute an impediment to the legitimate trade and commerce that constitutes the lifeblood of any and every company. Indeed, the basic thrust of the Act is the precise opposite. To this end, there have been numerous amendments to s 76 precisely in order to ensure that this particular provision does not constitute an impediment to trade and commerce. In other words, this particular provision has been amended meticulously in order to ensure that commercial realities are not only recognised but also given effect to. This is an important general principle and tells us that we must, likewise, interpret as well as apply s 76(1)(*a*) in a manner *consistent with the commercial realities of the situation at hand*. As we shall see, this is precisely the rationale that has been adopted in the relevant case law and which (as we have just seen) is *embodied in legislative policy as well*. The interpretation and application which the plaintiff contends for in the present proceedings is, in fact, *wholly contrary* to the spirit and intention of s 76, to which I have just referred.

29 The views expressed in the preceding paragraph are in fact buttressed by the fact that the amendments effected to s 76 were the result of the Singapore Parliament's acceptance of virtually all the recommendations of the *Report of the Company Legislation and Regulatory Framework Committee* (October 2002) ("*Report*"). More importantly, it was observed in the *Report* that "[t]he current statutory formulation relating to financial assistance is fraught with uncertainty and amenable to reform" (see *Report* at para 3.4.1). Although s 76 itself was not repealed, the dissatisfaction with the provision, in its unattenuated form, was clear.

30 In a leading local treatise, it has been "suggested that the mischief that the section [*viz*, s 76 of the Act] is aimed at is the improper depletion of a company's assets to the detriment of its creditors" (see Walter Woon & Andrew Hicks, *The Companies Act of Singapore – An Annotation* vol 1 (LexisNexis, 2004) ("Woon & Hicks") at paras 2609–2625).

31 Again, another learned author in the field has recently observed thus (see Catherine Roberts, *Financial Assistance for the Acquisition of Shares* (Oxford University Press, 2005) ("Roberts") at para 1.01):

> This rule [against financial assistance for the acquisition of shares] has links with a fundamental principle at the core of Company Law, namely *maintenance of capital. The rule can be seen as a method by which a company's capital is maintained for the protection of the company's creditors, and a company's assets are protected against misuse and dissipation by directors and controlling shareholders*. [emphasis added]

32 In a similar vein, these were the views expressed in the UK *Report of the Company Law Committee* (Cmnd 1749, June 1962) at para 173:

> If people who cannot provide the funds necessary to acquire control of a company from their own resources, or by borrowing on their own credit, gain control of a company with large assets on the understanding that they will use the funds of the company to pay for their shares it seems to us all too likely that in many cases the company will be made to part with its funds either on inadequate security or for an illusory consideration. If the speculation succeeds, the company and therefore its creditors and minority shareholders may suffer no loss, although their interests will have been subjected to an illegitimate risk; if it fails, it may be little consolation for creditors and minority shareholders to know that the directors are liable for misfeasance. In recent times there have been some flagrant abuses of this kind to the serious detriment, particularly, of minority shareholders.

33 In the judicial context, Arden LJ observed, in the recent English Court of Appeal decision of *Chaston v SWP Group plc* [2003] 1 BCLC 675 ("*Chaston*") thus (at [31]):

> The *general mischief*, however, remains the same, namely that the resources of the target company and its subsidiaries should not be used directly or indirectly to assist the purchaser financially to make the acquisition. *This may prejudice the interests of the creditors of the target or its group, and the interests of any shareholders who do not accept the offer to acquire their shares or to whom the offer is not made*. [emphasis added]

34 And, in the English Court of Appeal decision of *In re VGM Holdings, Limited* [1942] 1 Ch 235, Lord Greene MR (with whom Luxmoore and Goddard LJJ agreed), referring to the UK predecessor of s 76 of the Act, observed thus (at 239):

> Those whose memories enable them to recall what had been happening after the last war [*ie*, World War Two] for several years will remember that a very common form of transaction in connection with companies was one by which persons – call them financiers, speculators, or what you will – finding a company with a substantial cash balance or easily realizable assets such as war loan, bought up the whole or the greater part of the shares of the company for cash and so arranged matters that the purchase money which they then became bound to provide was advanced to them by the company whose shares they were acquiring, either out of its cash balance or by realization of its liquid investments. That type of transaction was a common one, and it gave rise to great dissatisfaction and, in some cases, great scandals. I think that it is not

illegitimate to bear in mind that notorious practice in considering the ambit of the section.

35 The passage just quoted is, it is suggested, of more than passing significance simply because it gives us the *original historical perspective* centring on the promulgation of the UK precursor of s 76 of the Act. It is true that the methods of contravening s 76 of the Act have naturally (and unfortunately) become more subtle and sophisticated in the intervening period. However, it is equally true that s 76 of the Act was never intended to "capture" transactions by a company which were entered into *bona fide* in the commercial interests of the company itself (as opposed to providing, in substance if not form, financial assistance for the purchase of the company's own shares). It is this *underlying spirit* that the above quotation serves to underscore, and which is (as we shall see) wholly consistent with the approach adopted in the present proceedings.

36 More importantly, the application of the relevant parts of s 76 of the Act (in particular, s 76(1)(*a*)) to the precise facts of the present proceedings also gives rise to a result which is consistent with the general spirit and intent of this provision. Indeed, it would be appropriate, at this juncture, to proceed to consider this particular issue (of application), commencing with the leading Singapore Court of Appeal decision of *Intraco* ([23] *supra*).

37 In *Intraco*, the respondent claimed against the appellant for recovery of moneys paid by the respondent to the appellant for the purchase of debts owed to the appellant by two companies, *viz*, City Carton and Box-Pak, respectively. The factual background was as follows. City Carton was a major local paper carton manufacturer and Box-Pak was its wholly-owned subsidiary. Both these companies had found themselves in dire financial straits. One of their creditors was the appellant who was, at the time, the main supplier of raw materials to both City Carton and Box-Pak. The respondent was a company set up by the controllers of City Carton and was, initially, a related company of City Carton. The respondent later ceased to be a related company of City Carton but both it and City Carton continued to be run by the same individuals who had substantial interests, directly or indirectly, in both these companies. City Carton had received substantial interest-free cash advances from the respondent, which consequently became a creditor of City Carton as well. The respondent subsequently entered into an agreement in writing with the appellant whereby the respondent took an assignment of all the debts owed by City Carton and Box-Pak to the appellant totalling $2,545,897.83 in exchange for the sum of $2,371,079.62. It was unclear how this sum was arrived at. Some four days later, the respondent wrote a letter to the appellant confirming that 20,000 shares of $100 each in the capital of the respondent had been "allotted" to the appellant at par, payable in cash in full within one month. As part of the agreement to subscribe for shares in the respondent, the appellant also agreed to advance a loan of $371,079.62 to the respondent. Unfortunately, the respondent subsequently found itself in financial difficulties and went into receivership and, later, liquidation. The receivers formed the view that the purchase of the debts owed to the appellant by City Carton and Box-Pak was improper and therefore instituted proceedings against the appellant as well as other individuals. The individuals, however, were not served with the writ and were not parties to the proceedings. The court held that the purchase of the debts by the respondent from the appellant was linked to the subscription by the appellant of the 20,000 shares in the respondent and to the loan of $371,079.62 extended by the appellant to the respondent.

38 L P Thean JA, who delivered the judgment of the court, cited the following observations of Hoffmann J (as he then was) in the English High Court decision of *Charterhouse Investment Trust Ltd v Tempest Diesels Ltd* [1986] BCLC 1 at 10 ("*Charterhouse*"):

> There are *two elements* in the commission of an offence under s 54 [of the then UK Act and corresponding, in substance at least, to s 76 of the Act]. The *first* is *the giving of financial assistance* and the *second* is *that it should have been given 'for the purposes of or in connection*

with' … a purchase of shares. [emphasis added]

39 Thean JA held that the arrangement concerned did *not* contravene s 76 of the Act. The court was of the view that the transactions had to be viewed in their proper commercial context. Thean JA observed thus (at 322–323, [23]):

> As a matter of inference, the directors [of the respondent] at the time must have believed that City Carton, though technically insolvent, had reasonable prospects of improvement and was still viable. By taking over the debts from the appellants in return for the appellants' subscribing for the shares, the respondents had formed a business alliance with the appellants, a Government-linked company, and this would be beneficial to the respondents, then a fledgling company, which had yet to commence production and marketing. In other words, these transactions were commercially beneficial to the respondents as well as the appellants. This must have been the view taken by the directors of the respondents. It seemed to us highly improbable that the directors would enter into these transactions, if they had not entertained that view. There was no reason why they should cause the respondents to enter into these transactions for the benefit the appellants solely without some reciprocal benefits to the respondents. Looked at in the proper context, the transactions were entered into in the commercial interests of the respondents and not for the purpose of putting the appellants in funds to subscribe for the 20,000 shares in the respondents.

40 In the event, the court held, first, that there had been no giving of financial assistance by the respondent to the appellant in order to enable the latter to acquire shares in the former (dealing with the first element in *Charterhouse*). Thean JA observed (at 323–324, [25]):

> [W]e entertained grave doubts whether the transactions amounted to 'giving financial assistance' to the appellants to acquire the shares in the respondents. The subscription for the shares and the advance of the loan were in return for the purchase of the debts by the respondents, or the vice versa. In effect, the shares were allotted by the respondents for consideration other than cash. It is true that the debts were quite worthless, but, as we have said, the directors of the respondents were obviously of the view at that time that City Carton could be revived and that they intended to make City Carton a subsidiary of the respondents. There was not much evidence on the financial condition of the respondents at the time. Given that it was just starting a paper mill, that it had injected $1.491m into City Carton, that its issued share capital at the time was only $10,560,000, that the syndicated loan sought to be arranged by the Bank of Montreal Asia Ltd did not materialize, and finally that by January 1985 they were in severe financial straits, the respondents could not have been a financially strong or solid company as to warrant an investor such as the appellants injecting cash in the sum of $2m into the company. From their point of view, subscribing for the shares for consideration other than cash would probably be the only acceptable way of investing in that company.

41 The learned judge held, further, that, in any event, even if there had been financial assistance, it had (having regard to the second element in *Charterhouse*) not been given "for the purposes of or in connection with" the purchase of the respondent's shares; in his view (at [26]):

> Assuming that the transactions amounted to giving financial assistance to the appellants to subscribe for the shares, there would still be the second 'element' with which the respondents had to contend. We have discussed the commercial benefits that would accrue to the respondents. Looking at the transactions in their proper commercial context, we did not think that they were entered into solely or mainly for the purpose of enabling the appellants to acquire the shares in the respondents at no costs to themselves. The transactions were entered into

bona fide in the commercial interest of the respondents as well. In our judgment, the transactions were not in breach of s 76 of the Companies Act.

42 The following oft-cited observations by Hoffmann J in *Charterhouse* might also be usefully noted ([38] *supra* at 10):

> There is *no definition* of giving financial assistance in the section, although some examples are given. The words have no technical meaning and their frame of reference is in my judgment *the language of ordinary commerce. One must examine the commercial realities of the transaction and decide whether it can properly be described as the giving of financial assistance by the company, bearing in mind that the section is a penal one and should not be strained to cover transactions which are not fairly within it.* [emphasis added]

43 It is not surprising, therefore, that the abovementioned observations, although focused on the first limb of s 76(1)(*a*), were not only quoted but were also applied in *Intraco* – simply because of their focus on the commercial realities of the transaction concerned (an approach which, as we have seen, was adopted wholly in *Intraco* itself). This focus has in fact since been reiterated in a great number of English decisions (see, for example, the English Court of Appeal decisions of *Chaston* ([33] *supra*, especially at [32]) and *MT Realisations Ltd v Digital Equipment Co Ltd* ("*MT Realisations*") [2003] 2 BCLC 117 at [28]). In *MT Realisations*, Mummery LJ (with whom May LJ and Dame Elizabeth Butler-Sloss P agreed) observed (at [35]) that:

> I would add that each case is a matter of applying the commercial concepts expressed in non-technical language to the particular facts. The authorities provide useful illustrations of the variety of fact situations in which the issue can arise, but it is rare to find an authority … which requires a particular result to be reached on different facts. [emphasis added]

44 This is in fact a timely reminder not to depend too heavily on decided precedents because, as Mummery LJ correctly points out, the facts of each case will invariably be different. The search ought, in the final analysis, to be for *general principles* – one of which (as we have seen) is the need to focus on the commercial realities of the transaction concerned.

45 It will be seen that both the content and underlying spirit of *Intraco* apply directly to the facts of the present proceedings. These centre around a practical commercial approach towards the application of (here) s 76(1)(*a*) of the Act. Indeed, in a leading local treatise already cited, it has been observed thus (see Woon & Hicks ([30] *supra* at para 2608)):

> Cases of illegal financial assistance for the acquisition of shares should be distinguished from genuine commercial transactions in which the assistance for acquisition of shares is a side-effect and not the point of the transactions. Each fact situation must be looked at in its commercial context.

Indeed, significantly, in my view, what follows is a discussion of *Intraco* itself. Reference may also be made to Woon & Hicks, *id* at para 2607 as well as to *Walter Woon on Company Law* (Sweet & Maxwell Asia, 3rd Ed, 2005) at p 467. Woon & Hicks also point out – pertinently, in my view – that "[i]n commerce, certainty is required", but that "[s]ection 76 is one provision that creates constant uncertainty because of the width of the prohibition" (see Woon & Hicks, *id* at paras 2609–2625).

46 I have, in fact, already demonstrated why such an approach must necessarily render the plaintiff's reliance upon s 76(1)(*a*) a futile one (see generally above at [17]–[24]), and will not therefore repeat my analysis here. It will suffice to note that such an analysis as well as the

inexorable conclusion that I have reached in favour of the defendants is clearly supported by the language as well as interpretation of s 76(1)(*a*) itself (notably, in *Intraco*). Indeed, it may be stated that the situation in the present proceedings is an *a fortiori* one compared to that which existed in *Intraco* itself. In the present proceedings, the transaction concerned was, as we have seen, not only a *bona fide* one in the commercial interests of the company (from the perspective, it will be recalled, of diversification of the business of the company concerned (VGO) itself) but was also one which, taken as a whole, *actually achieved that objective*. This was also the situation in *Intraco*, but the chances for a successful fruition from a business perspective were not only less there but also failed in the final analysis. The situation in the present proceedings may also be sharply contrasted with that which existed in the English Court of Appeal decision of *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 ("*Belmont Finance*"), where the transaction was a complete sham which contravened not only the spirit but also the substantive provisions of the then UK equivalent of s 76(1)(*a*) of the Act.

47 The plaintiff would undoubtedly argue that the miscalculation with respect to the NAV in the transaction concerned ought to be taken into account. I have already pointed out in some detail why this cannot be taken into account in the application of s 76(1)(*a*) of the Act. This provision is not intended to interfere with business and commercial decisions taken in a *bona fide* fashion. Economic losses are an inevitable fact of business life and cannot be circumvented by a creative application of s 76(1)(*a*) of the Act.

48 It bears repeating that the approach adopted by the plaintiff in the present proceedings is no more than a desperate attempt to impugn what is an otherwise legitimate business transaction. In this regard, I should point out that the plaintiff itself did not challenge the rationale for VGO's diversification of its business[note: 1] and was also prepared to accept that the concession rights were in fact genuinely needed by VGO.[note: 2]

49 Indeed, one might even argue (by analogy with the relevant part of the reasoning in *Intraco* ([23] *supra* at 323, [25]) that even if the facts in the proceedings fell within the ambit of s 76 of the Act (which I have held they do *not*), there was nevertheless no financial assistance simply because the shares concerned were given for consideration *other than cash*. It is of course true that "[e]ven if the company acquires an asset in return for the money paid, there may still be financial assistance if the aim of the transaction is to put a party in funds for the purpose of acquiring the company's shares" (see Woon & Hicks ([30] *supra*) at para 2606). Significantly, the authors cite, as authority for the proposition just quoted, *Belmont Finance* ([46] *supra*). It will be recalled that *Belmont Finance* was a clear case involving a sham transaction, where the *only* purpose of all the transactions concerned was, in *substance*, to enable the company to provide full financial assistance for the purchase of its shares. The present proceedings involved a *radically different* fact situation altogether.

50 I should add that the general case law also buttresses the approach that I have adopted in the present proceedings. A central thread, as I have already mentioned, is that s 76 of the Act is not intended to shipwreck what are clear and *bona fide* commercial transactions by the company itself. The *substance* of the transaction concerned is of the first importance. In the Supreme Court of Western Australia decision of *Dempster v National Companies and Securities Commission* (1993) 9 WAR 215, Malcolm CJ (in citing and interpreting the views of Mahoney JA in the New South Wales Court of Appeal decision in *Burton v Palmer* [1980] 2 NSWLR 878 at 887) observed thus (at 271):

> In substance, what Mahoney JA was saying was that if a company has a present financial obligation to A which it discharges in whole or in part by the issue of shares in the company, by way of compromise, it cannot be said to have given financial assistance. *The substance of the*

transaction is no different from the company paying the amount of the obligation to A and A then using that amount to acquire shares in the company. Given that the number of shares represents a reasonable and proper consideration for the discharge, neither form of transaction involves giving "financial assistance". [emphasis added]

51 Malcolm CJ then proceeded (see *ibid*) to cite from Mahoney JA's own judgment in *Burton v Palmer* ([50] *supra* at 887) to the effect that "[t]he position will be different where the company, for *a collateral purpose*, agrees to indebtedness in an amount *to which otherwise it would not have agreed*; and the Court will scrutinize carefully the circumstances of such an agreement" [emphasis added] (see also the English Court of Appeal decision of *British and Commonwealth Holdings plc v Barclays Bank plc* [1996] 1 WLR 1 at 16). Significantly, in my view, *Belmont Finance* is cited by way of comparison. *Belmont Finance* was, of course, a blatant example of financial assistance, where the *only* purpose of all the transactions concerned was, in *substance*, to enable the company to provide full financial assistance for the purchase of its shares.

52 The observations in these decisions in fact related to the power of a company to quantify claims against it as well as to compromise any challengeable claims in the context where its shares have also been purchased. The situation involved in the present proceedings is, in this regard, different and is, in fact, an *a fortiori* one.

53 However, I must emphasise that what I have stated in the present case ought not to – and must not – constitute a licence for companies to surreptitiously circumvent the spirit and intent of s 76 of the Act. A useful and practical approach would be to inquire into the *substance* of the transaction pursuant to which the shares of the company change hands. If the substance of the transaction is to enable the company to furnish, whether directly or indirectly, financial assistance for the purchase of its shares, then s 76 would have been clearly contravened. Each case will obviously differ from the others in its factual context and there is therefore no substitute for the careful consideration of the factual matrix concerned in order to ascertain what the substance of the transaction is.

54 There have in fact been trenchant criticisms of the equivalent of s 76 of the Act in other jurisdictions (see, for example, Roberts ([31] *supra*) at paras 1.07 and 1.11; Paul L Davies, *Gower and Davies' Principles of Modern Company Law* (Sweet & Maxwell, 7th Ed, 2003) ("Davies") at p 260; L S Sealy, *Cases and Materials in Company Law* (Butterworths, 7th Ed, 2001) ("Sealy") at p 378; and Eilís Ferran, "Corporate Transactions and Financial Assistance: Shifting Policy Perceptions But Static Law" [2004] CLJ 225 ("Ferran") at 225) and even calls for its abolition (see, for example, Davies, *supra* at pp 260–261; Roberts, *supra* at para 5.38–5.42; and Ferran, *supra* at 239–243). And, in the *Singapore* context, there has also been clear dissatisfaction with the provision, resulting in a further liberalisation of s 76 of the Act itself (and see generally [29] above). However, the issue of reform is well beyond the purview of the present case. After all, I found that the fact situation did not even fall within the ambit of s 76 of the Act in the first instance and that, even if it did, the provision was not contravened on the facts of this case. My own view is that it is no bad thing to have a provision like s 76 of the Act but it is of the first importance to always bear in mind the mischief it was intended to prevent in order not to make it a trap for unwary companies who are simply conducting their respective businesses in good faith. In any event, legislative amendments are not necessarily a panacea, especially in the context of the present subject-matter (see, for example, in the Australian context, Keith Fletcher, "Re-baiting the financial assistance trap" (2000) 11 Australian Journal of Corporate Law 119 and, by the same author, "F A, after 75 years" (2005) 17 Australian Journal of Corporate Law 323). It should also be noted that s 76 of the Act is not the only legal remedy or recourse available to parties who seek to impugn specific transactions entered into by the company concerned.

55 The plaintiff also argued that there had been a contravention of s 76(1)(*c*) of the Act, which prohibits a company from lending money on the security of its own shares. In this regard, Mr Hee argued that the loans and debts owing from Zhejiang Kingsea and Hangzhou Sanli, two companies controlled by the second defendant or his associates, to Hangzhou Kingsea were secured by the escrow shares, as evidenced by the third of the Supplemental Agreements; in the circumstances, so the argument went, VGO had lent money to Zhejiang Kingsea and Hangzhou Sanli through its subsidiary, Hangzhou Kingsea, which loan was secured by VGO's own shares. This argument is without merit. As the defendants correctly point out, the third of the Supplemental Agreements (on which the plaintiff relies) came into existence *after* the acquisition of Spring Wave and the issuing of the VGO shares pursuant to the Agreement. I should also point out that the argument by the plaintiff in this particular regard is both short as well as lacking in both the necessary details as well as general reasoning.

A remaining issue under section 76 of the Companies Act

56 I should, however, deal with one remaining issue that arises from *Intraco* itself. Though this point was not argued by either party, it ought, in fact, to have been argued by counsel for the plaintiff as it constituted, in my view, the plaintiff's best possible argument based on an alleged contravention of s 76(1)(*a*) of the Act. However, as I have already found that there had been no "financial assistance" within the meaning of s 76(1)(*a*) of the Act, this point is an academic one (this was also the situation in *Intraco*: see [40] above). The observations that follow will therefore, strictly speaking, be *obiter dicta*.

57 The issue in question itself arises from Hoffmann J's observation in *Charterhouse* that there are two elements to be considered (see [38] above). In particular, the remaining issue relates to the *second* element. Put simply, the issue in question is this: It is not entirely clear whether the court in *Intraco* ought to have taken into account, when applying the second element in *Charterhouse*, the phrase "in connection with" in s 76(1)(*a*) of the Act as well (there is a hint to this effect, but no more, in the report by the Company Legislation and Regulatory Framework Committee: see *Report* ([29] *supra*) at para 3.4.1 as well as in Hans Tjio, "Singapore: Financial Assistance and Directors' Duties" (1995) 3 Journal of Financial Crime 307 at 308). Nevertheless, even if a broad interpretation of this phrase was adopted, it is clear that the court in that case would have arrived at the same decision as it had found, in any event, that there had been no "financial assistance" in the first instance. Nevertheless, in so far as the second element in *Charterhouse* is concerned, if the court in *Intraco* had in fact taken into account the phrase "in connection with" in s 76(1)(*a*) of the Act, it might have arrived at a different result on the *second* issue on the basis that the transaction concerned was in fact entered into "in connection with" the acquisition of the shares of the subject company. In my view, however, such a broad and exceedingly literal interpretation is not persuasive.

58 It should be acknowledged, however and notwithstanding the view I have just proffered, that there is some authority which exists (and which was not, unfortunately, apparently brought to the attention of the court in *Intraco*) suggesting a different interpretation from that which I proffered at the end of the preceding paragraph.

59 There is, first, some indirect case law authority that *assumes*, in relation to the then UK equivalent of s 76(1)(*a*) of the Act, that the phrase "in connection with" is broader than the phrase "for the purpose of". In the English High Court decision of *Dyment v Boyden* [2004] 2 BCLC 423, for example, Hart J opined thus (at [34]):

> Accordingly, I have come to the conclusion that, *while the company's entering into the lease can be said to have been 'in connection with' (in the words of the old s 54) the acquisition of the*

> *shares, it cannot fairly be said to have been 'for the purpose' of that acquisition*. It entered into the lease in order to obtain the premises, and agreed to pay what is now known to be an excessive rent because the owners of the freehold were in a position to exact that ransom. [emphasis added]

The above view was cited with apparent approval by Peter Gibson LJ (with whom Clarke and Keene LJJ agreed) on appeal: see the English Court of Appeal decision of *Dyment v Boyden* [2005] 1 BCLC 163, [35].

60 One might also note the approach adopted by Hodgson J in the Supreme Court of New South Wales decision of *Darvall v North Sydney Brick & Tile Co Ltd* (1987) 12 ACLR 537 at 560–561, where the phrases "in connection with" and "for the purpose of" were treated as distinct alternatives with differing scopes. On appeal, the majority of the New South Wales Court of Appeal, in *Darvall v North Sydney Brick & Tile Co Ltd (No 2)* (1989) 7 ACLC 659 "*Darvall (No 2)*", did not consider this particular issue. However, Kirby P (as he then was) did express views that are consistent with the approach adopted by Hodgson J at first instance. In fairness, although Kirby P dissented *vis-à-vis* the overall decision of the court, this did not in any way impact on his views on this particular issue simply because, as already mentioned, the majority did not make any pronouncements on this issue.

61 It is important to note that Kirby P did think that there was "some force" in the arguments to the opposite effect (see at 686). However, he held the way he did "on balance" (see *ibid*). The argument that, in my view, carried the most weight was expressed by the learned judge as follows (see *ibid*):

> [T]he course of the legislation in Australia and England represents a two-edged sword … Whereas in England the phrase "in connection with" was removed, in Australia it was preserved – presumably for a purpose. That purpose was, one might infer, to overcome the difficulty presented by the obligation to prove the "purpose" of the company. The necessity to prove a "connection" still requires something more than temporal coincidence. But it allows the Court to apply a common sense approach … [t]he retention of the phrase in our legislation, in the face of the English decision to remove it, suggests to my mind a deliberate decision in Australia to persist with the more stringent obligation affecting the company's officers.

62 The argument just set out is also reflected in at least a few UK texts. As one author put it, "in 1981, new statutory rules were introduced [in the UK] which were intended to formulate more precisely the definition of the conduct which it was sought to prohibit: the words 'in connection with' were deleted, and the emphasis is now on the purpose, or predominant purpose, for which the assistance is given" (see Sealy ([54] *supra*) at p 378). In a similar vein, Roberts has observed thus ([31] *supra* at para 1.08):

> The previous words 'in connection with' were deleted. The emphasis in the legislation now is on the purpose, or predominant purpose, for which the assistance is given and there is also a focus on the good faith of those concerned in the transaction.

63 Notwithstanding what appear to be weighty arguments that mandate a broad interpretation of s 76(1)(*a*) of the Act that treats the phrases "in connection with" and "for the purpose of" as distinct alternatives, with the former being of broader application than the latter, it is suggested that such a broad interpretation ought *not* to be followed. The phrase "in connection with" should, instead, be read narrowly so as to be consistent with the phrase "for the purpose of". Before proceeding to elaborate on the relevant arguments, it is suggested, with respect, that the court ought not to speculate on the intentions of Parliament in the absence of a clear indication of such

intentions.

64 A broad reading of the phrase "in connection with" in s 76(1)(*a*) of the Act would render the alternative phrase (and limb) therein (centring around the phrase "for the purpose of") otiose. It could of course be argued that the phrase "for the purpose of" should be read broadly. However, this is precisely the approach that the court in *Intraco* eschewed, preferring to adopt a purposive approach instead – which entailed interpreting this phrase as encompassing a *substantial* purpose (as opposed to a merely subsidiary one). Indeed, I am of the view that a *similar* approach should be adopted to the interpretation of the phrase "in connection with" as well. In other words, the transaction concerned should be more than a mere literal causative fact *vis-à-vis* the subsequent acquisition of the shares of the subject company; a closer nexus between the two should be required. Such an interpretation of the phrase "in connection with" is supported by s 76(4) of the Act. According to s 76(4), a company is treated as having given financial assistance "in connection with" an acquisition or proposed acquisition of its own shares *if the company was aware at the time the assistance was given* that this assistance would either financially assist a person in acquiring its shares or, where the shares have already been acquired, would assist a person in paying any unpaid subscription payable for the shares or the payment of any calls on the shares. The notion of "awareness" imported in s 76(4) indicates that the phrase "in connection with" connotes more than a mere *factually proximate* relationship between the impugned transaction and the subsequent acquisition of the company's shares; for instance, in the situations listed in s 76(4), it is the *knowledge* on the company's part which creates the necessary nexus between these two events. Lest it be misunderstood, I hasten to emphasise that my views on this matter are in no way intended to suggest that s 76(4) encapsulates an *exhaustive* definition of the phrase "in connection with". My point here is simply that the phrase "in connection with" in s 76(1)(*a*) cannot be taken on its face value and must be purposively interpreted. Notably, in *Darvall (No 2)* ([60] *supra*) at 686, even though Kirby P was of the provisional view that the Australian equivalent of our s 76(4) is not an exhaustive definition of the phrase "in connection of", he too recognised that the words "in connection with" connoted a link that had to extend beyond mere temporal proximity. This interpretation would also harmonise the meaning to be attributed to the two alternative limbs in s 76(1)(*a*) of the Act, as embodied within the phrases "for the purpose of" and "in connection with", respectively.

65 As I have already elaborated upon above, both the reasoning in *Intraco* as well as the general legislative context and development of s 76 suggest a commercially practical approach towards s 76(1)(*a*) of the Act. To adopt a contrary approach would not only be detrimental to the conduct and development of commerce but would also run counter to the spirit and rationale underlying the provision itself.

66 However, I do acknowledge that it could also be argued that to read the phrases "for the purpose of" and "in connection with" in s 76(1)(*a*) of the Act in the manner I have suggested above is to render the phrase "in connection with" otiose. In other words, the argument from otioseness as set out above (see [64] above) is a double-edged sword. This is not an unpersuasive argument by any means. However, *other things being equal*, the correct approach to adopt ought to be one that *gives effect to the underlying spirit and rationale* of s 76(1)(*a*) of the Act. In other words, if both competing approaches could possibly result in otioseness, then the approach which best achieves the legislative intention behind the provision itself ought to be adopted. Looked at in this light, the approach in *Intraco* ought to be adopted as being sound in both principle as well as rationale. I state this, of course, with all due respect as it is, in any event, a decision of the Court of Appeal and therefore binding upon me because (as I have pointed out above) that decision applies to the facts in the present proceedings – indeed, in an *a fortiori* manner.

67 Indeed, I would go so far as to state that the phrases "for the purpose of" and "in

connection with" in s 76(1)(*a*) of the Act were intended to be read as a whole; they were "of a piece", so to speak. In order, for example, to ascertain whether the transaction concerned was entered into "in connection with" the acquisition of shares in the subject company, it must surely follow that such a *purpose* must, *ex hypothesi*, exist in the first instance. By the same token, it is virtually impossible to envisage the transaction concerned being entered into "for the purpose" of acquiring the shares of the subject company if this was not effected by one "in connection with" the other. It might well have been the case that adopting either one phrase or the other would have sufficed. This is in fact the present situation under s 151 of the UK Companies Act 1985 (c 6), where the phrase "in connection with" has been done away with. This might well, as Prof Sealy has pointed out above, be to make it clear beyond peradventure that the broad reading of "in connection with" was undesirable and inconsistent with the general approach intended in the then UK provision (in s 54 of the UK Companies Act 1948 (c 38)), which was of course adopted by the Singapore legislature as s 76(1)(*a*) of the Act. Even if we accept this reason, it is – in and of itself – confirmation that a *broad* approach towards s 76(1)(*a*) of the Act was *never intended* in the first instance. However, I would, with respect, go further. It seems to me that, even without deleting the phrase "in connection with" in s 76(1)(*a*) of the Act (or s 54 of the UK Companies Act 1948), one could have arrived at the same result. I have in fact already elaborated upon the proper approach above. To recapitulate, this entails reading the phrase "in connection with" *narrowly* – a reading that would not only be consistent with a *similar* approach towards the phrase "for the purpose of" in the selfsame section but would also (and more importantly) be consistent with the *underlying legislative purpose* behind s 76(1)(*a*) of the Act itself. In other words, *no* amendment need (*unlike* in the UK context) be made to the present language of s 76(1)(*a*) in so far as these two phrases are concerned. The amendment in the UK context was, in my view, effected *ex abudanti cautela*.

68 In summary, even if the phrase "in connection with" in s 76(1)(*a*) of the Act had been expressly considered by the court in *Intraco*, it would (and ought, in my respectful view) have arrived at the same decision. As I have already explained above, there is every reason why the phrases "in connection with" and "for the purpose of" in s 76(1)(*a*) of the Act ought to be read in a consistent manner. Foremost amongst the various reasons is the consideration that such a reading would give effect to the provision itself, which entails the avoidance of a result that would hinder (rather than promote) commerce. And this *substantive* reason would also serve to overcome any technical argument to the effect that there exists a comma after the phrase "for the purpose of" in s 76(1)(*a*).

69 I should observe that a broad reading of the phrase "in connection with" in s 76(1)(*a*) of the Act (which I have rejected), whilst linguistically possible, is (at best) an academic exercise. The provisions of the Act in general and s 76(1)(*a*) thereof in particular exist in order to promote (rather than stifle) commerce in a real world setting. Whilst nice linguistic arguments have their proper place in a stimulating intellectual discussion, they have, with respect, no place whatsoever in a practical context, where they are both irrelevant and apt to confuse rather than enlighten. In the circumstances, therefore, even if the plaintiff had raised this issue, it could not possibly have succeeded on this particular approach towards s 76(1)(*a*) of the Act as well.

70 I should also refer to ss 76(3) and 76(4) of the Act (reproduced at [27] above). Neither is, in my view, intended to be exhaustive, but may be of some assistance in so far as the issues of construction I have hitherto canvassed are concerned. Section 76(3) of the Act is an elaboration of the phrase "for the purpose of" in s 76(1)(*a*) of the Act, whilst s 76(4) is an elaboration of the phrase "in connection with" (also) in s 76(1)(*a*) of the Act. It is submitted that both these subsections are consistent with the central concept of commercial realities. As mentioned earlier (see [64] above), s 76(4) of the Act refers, as an illustration of the phrase "in connection with", to situations where the company was *aware* that its acts of financial assistance would assist the acquisition of its shares. This, in my view, clearly excludes a situation involving a *bona fide* commercial transaction, and where

those acting for the company never even applied their minds to the potential effects that the transaction could have of financially assisting an acquisition of its shares. In the present proceedings, for example, therefore, it was clear that this element (of knowledge) was missing here simply because the sole intention behind the transaction concerned was to diversify the assets of VGO *via* a *bona fide* commercial transaction. It follows from this that to the minds of those running VGO, the question of whether the Agreement would financially assist Kingsea in acquiring VGO shares would never even have arisen.

As a not altogether irrelevant aside, it could, in my view, also be argued that s 76(8)(*c*) of the Act (also reproduced above at [27]) might also *possibly* apply in the context of the present proceedings so as to take the transaction concerned outside the ambit of s 76(1) of the Act (though *cf* the Supreme Court of Western Australia's decision in *Fitzsimmons v R* (1997) 23 ACSR 355). In any event, this provision furnishes strong support for the argument I have made in some detail above to the effect that it is necessary to have regard to the commercial realities.

71 There is in fact *another* reason why the phrase "in connection with" should be read narrowly together with the phrase "for the purpose of". We have hitherto assumed, consistent with the approach adopted by Hoffmann J in *Charterhouse* (see [38] above), that s 76(1)(*a*) of the Act has two elements. Whilst this is literally true, it is suggested that, from the perspective of *practical application*, the two elements *ought to be read and applied holistically – as an integrated whole*. To this end, one cannot divorce the first element of "financial assistance" from the second – that the "financial assistance" must be "for the purpose of, or in connection with" the acquisition of the target company's shares. In other words, how could the court ascertain whether there has been "financial assistance" given *within the ambit of s 76(1)(*a*)* of the Act in a *meaningful* fashion without *simultaneously* ascertaining whether or not the alleged "financial assistance" was given *for a particular purpose*, *viz*, to assist in the purchase of the company's shares? I have, in fact already referred to the fundamental importance of the concept of purpose in s 76(1)(*a*) of the Act. And the importance of this concept hinges on the *mischief* that is sought to be avoided, as set out above. That mischief does *not* include transactions, the sole or primary purpose of which is to give effect to the *bona fide* commercial interests of the company *other than* in the giving of financial assistance in order to assist in the purchase of the company's shares. If so, then the phrase "in connection with" must be given a meaning that is consistent with the context and intention underlying s 76 of the Act itself. In the circumstances, I would reject a broad reading of "in connection with" and hold that that phrase must be read consistently with the phrase "for the purpose of". I would also add that such a holistic or integrated approach towards s 76(1)(*a*), whilst somewhat different from that adopted in *Intraco*, is nevertheless not inconsistent with both the substance as well as the spirit of the decision in that particular case and may, with respect, be viewed as a refinement of the approach suggested therein. Indeed, since an initial draft of this judgment was prepared, an important decision on s 76 of the Act was rendered by Sundaresh Menon JC in *PP v Lew Syn Pau* [2006] SGHC 146. Although the focus of the learned judge in that decision was on the criterion of whether or not the company's assets have been placed at risk when there is a potential for future depletion to take place by virtue of an undertaking or obligation entered into by the company at the time of and in connection with the acquisition of its shares, Menon JC also referred to the need for the court to have regard to the commercial realities as well. Indeed, the learned judge observed thus (*ibid* at [151]):

> Accordingly, I conclude that in order to establish that a company has given *financial* assistance it will be *necessary* to establish that there has been a depletion of the assets of the company … But this may not always be *sufficient* to warrant the conclusion that the transaction is in substance one involving the giving of financial assistance … [emphasis in original]

This approach is, in my view, entirely consistent with that which I have adopted in the present case.

The alleged breach of section 199 of the Securities and Futures Act

72 Counsel for the plaintiff also alleged a breach, by VGO, of s 199 of the Securities and Futures Act (Cap 289, 2006 Rev Ed) (see also, generally, Hans Tjio, *Principles and Practice of Securities Regulation in Singapore* (LexisNexis, 2004) at para 8.29), which reads as follows:

> **False or misleading statements, etc.**
>
> **199.** No person shall make a statement, or disseminate information, that is false or misleading in a material particular and is likely —
>
> (*a*) to induce other persons to subscribe for securities;
>
> (*b*) to induce the sale or purchase of securities by other persons; or
>
> (*c*) to have the effect of raising, lowering, maintaining or stabilising the market price of securities,
>
> if, when he makes the statement or disseminates the information —
>
> (i) he does not care whether the statement or information is true or false; or
>
> (ii) he knows or ought reasonably to have known that the statement or information is false or misleading in a material particular.

73 The short response to this allegation is that it does not appear that the provision set out in the preceding paragraph applies on its terms in the first place. In particular, Mr Hee had argued that the provision had been contravened because VGO's announcement to the public in general and its shareholders in particular had omitted to mention the concession rights as well as the exclusion of the Agang debt. However, a moment's reflection will reveal that the plaintiff's argument in this regard is wholly off the mark given the specific facts in the present proceedings which related to the issue of the New Shares as purchase consideration for a transaction that was *bona fide* in VGO's interest.

74 Even if s 199 of the Securities and Futures Act were possibly applicable (which I have held in the preceding paragraph cannot be the case), it is clear that no breach of the provision arises from the present facts. The alleged statement, at the time it was made, was neither false nor misleading. It was centred on a *bona fide* commercial transaction entered into by the company for the diversification of its business. More specifically, it was not proved by the plaintiff that, at the time the statement was made, the maker of the statement did not care whether the statement or information was true or false. This would appear to be the analogue of one of the formulations of fraud or deceit at common law by Lord Herschell in the seminal House of Lords in *William Derry v Henry William Peek* (1889) 14 App Cas 337 at 374. The plaintiff also failed to prove in the alternative that, at the time the statement was made, the maker of the statement knew or ought reasonably to have known that the statement was false or misleading in a material particular. Again, to all intents and purposes, the proposed transaction between VGO and Kingsea was one that was clearly to VGO's benefit. Finally, no evidence whatsoever was led to prove that there was a likely effect of raising, lowering, maintaining or stabilising the market price of VGO shares.

The allegations of fraud and/or conspiracy

75 It is apposite to note that the actual principles of law relating to the tort of conspiracy are

none too clear. What *is* clear is that there are, traditionally, two separate and distinct aspects or ways of applying the tort of conspiracy. As might have been surmised, the legal principles with respect to each aspect are somewhat different.

76 There is, first, the situation where unlawful means have been used (also known as "wrongful means conspiracy"). The relevant law in this context appears to be straightforward. In particular, there is no need for the plaintiff concerned to prove that there has been a predominant intention on the part of the defendants to injure it. It would appear that the very utilisation of unlawful means is, by its very nature, sufficient to render the defendants liable, regardless of their predominant intention. This would appear to be both logical as well as just and fair, especially if we bear in mind the fact that the central core, as it were, of the tort of conspiracy hinges on the proof that the conspiracy is somehow unlawful and that the plaintiff is entitled to succeed provided that it can prove that it has suffered damage.

77 Secondly, there is the situation where lawful means have been used (also known as "simple conspiracy" or "conspiracy to injure"). Unlike the first category referred to briefly in the preceding paragraph, this second category requires that the plaintiff prove that there has been a predominant intention on the part of the defendants to injure it (see the leading House of Lords decision of *Lornho plc v Fayed* [1992] 1 AC 448 ("*Lornho*")). This additional element is required simply because, without it, the alleged conspiracy would be devoid of any element of unlawfulness. It is precisely because there is a predominant intention on the part of the defendants to injure the plaintiff that the plaintiff is entitled to succeed provided (again) that it (the plaintiff) can prove that it has suffered damage. It is this concerted predominant intention to injure that renders the conduct of the defendants, which would otherwise have been lawful, unlawful or illegitimate. As Lord Bridge of Harwich, who delivered the substantive judgment of the House in *Lornho* (with which the other law lords agreed), observed (at 465–466):

> Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action *for that illegitimate purpose* that the law, however anomalous it may now seem, finds *a sufficient ground to condemn their action as illegal and tortious*. But when the conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful. [emphasis added]

There is, in this particular regard, a close analogy, in my view, with the doctrine of economic duress in contract law. In particular, the law of economic duress has, like the law relating to tortious conspiracy, been classified traditionally into two categories – the first pertaining to unlawful acts and the second pertaining to "lawful act duress". It would appear that it would, at the very least, be extremely difficult to prove economic duress with respect to the latter category simply because the doctrine of economic duress generally requires proof of illegitimate pressure, as opposed to mere commercial pressure.

78 As an aside, this view in the context of economic duress (popularly known as the "illegitimate pressure theory") now appears to be the view accepted by the courts in both England and Australia: see, for example, the House of Lords decisions of *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 and *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152; the New South Wales Court of Appeal decision of *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40; as well as the New Zealand Privy Council decision of *R v Her Majesty's Attorney-General for England and Wales*

[2003] UKPC 22. The "illegitimate pressure theory" has been traditionally contrasted with the "overborne will theory" which holds that there must be coercion of the will which vitiates consent (and see the seminal pronouncement by Kerr J (as he then was) in the English High Court decision of *Occidental Worldwide Investment Corp v Skibs A/S Avainti, Skibs A/S Glarona, Skibs A/S Navalis (The "Siboen" and the "Sibotre")* [1976] 1 Lloyd's Rep 293 at 336). Prof P S Atiyah has, in my view, convincingly argued that the "overborne will theory" is misleading inasmuch as it suggests that the party who is the alleged victim of economic duress did not know what he or she was doing and was acting, therefore, as if he or she were in a state of "automatism" (see generally P S Atiyah, "Economic Duress and the 'Overborne Will'" (1982) 98 LQR 197; though *cf* the further exchange in D Tiplady, "Concepts of Duress" (1983) 99 LQR 188 and P S Atiyah, "Duress and the Overborne Will Again" (1983) 99 LQR 353). There is, in my view, no real conflict between these two theories. Words such as "coercion" and "vitiation of consent", whilst pointing (on view) to the simplistic and reductionist concept of "automatism" that Prof Atiyah rightly rejects, could also refer to "coercion" or "vitiation of consent" from the (alternative) perspective of pressure that so distorts the voluntariness of the consent of the party that is the alleged victim of economic duress that the law regards such pressure as illegitimate. And what the law regards as illegitimate becomes, from that particular perspective, situations where there has in effect been no consent at all. The judgment in the Singapore Court of Appeal decision of *Third World Development Ltd v Atang Latief* [1990] SLR 20, which (citing the Hong Kong Privy Council decision of *Pao On v Lau Yiu Long* [1980] AC 614, which (in turn) cited *The Siboen and the Sibotre*, *supra*) refers to the concept of vitiation of consent, should therefore now be read in the light of both the Commonwealth precedents just cited as well as in the light of the explanation just proffered.

79 Returning to the tort of conspiracy, it is clear that the precise category of the tort pleaded is of the utmost importance simply because there will be the additional element of a predominant purpose by the defendants to injure the plaintiff that will need to be proved if the alleged conspiracy is one by lawful means. As a learned author put it (see Lee Pey Woan, "Economic Torts" in ch 20 of *Basic Principles of Singapore Business Law* (Thomson, 2004) at para 20.31):

> The tort of conspiracy may take either one of two forms: conspiracy to injure *or* conspiracy by unlawful means. Two features distinguish these two forms of the tort: firstly, the former does not involve the use of unlawful means but the latter does, ***and secondly, the former requires the conspirators to have acted with the predominant purpose of injuring the victim but the latter does not.*** [emphasis added in bold italics]

The same author later proceeds to observe (*id* at para 20.33) that "[i]n practice, this requirement for predominant purpose severely restricts the scope of the tort as it is often not difficult to show that the defendants' conduct is actuated principally by the desire to protect self-interests".

80 The two categories of the tort of conspiracy referred to above have in fact been deeply etched in the legal landscapes of both Singapore as well as other Commonwealth jurisdictions.

81 In the Singapore Court of Appeal decision of *Quah Kay Tee v Ong & Co Pte Ltd* [1997] 1 SLR 390, for example, Lai Kew Chai J, who delivered the judgment of the court, observed thus (at [45]; see also *Chew Kong Huat v Ricwil (Singapore) Pte Ltd* [2000] 1 SLR 385 at [34]):

> The tort of conspiracy comprises two types: conspiracy by unlawful means and conspiracy by lawful means. A conspiracy by unlawful means is constituted when two or more persons combine to commit an unlawful act with the intention of injuring or damaging the plaintiff, and the act is carried out and the intention achieved. In a conspiracy by lawful means, there need not be an unlawful act committed by the conspirators. But there is the additional requirement of proving a

'predominant purpose' by all the conspirators to cause injury or damage to the plaintiff, and the act is carried out and the purpose achieved.

82 Returning to the facts of the present proceedings, I note that, in an approach that only served to exacerbate matters, the plaintiff did not clearly indicate which particular category of the tort of conspiracy it was in fact relying upon – bearing in mind that it bore the burden of proof (see *Clerk & Lindsell on Torts* (Sweet & Maxwell, 19th Ed, 2006) at para 25-136). However, having regard to the fact that they were arguing that the defendants had conspired to defraud them, I took their case to be premised upon the first category, *viz*, conspiracy by unlawful means. If, indeed, their case had been based on the second category, it would probably have failed at the outset since it was clear that the defendants' predominant purpose in acting the way they did was to protect their own commercial interests.

83 In the event, I found that the plaintiff had not proved its case. Let me elaborate.

84 I note, that, assuming the best case that can be made on behalf of the plaintiff (*viz*, that the alleged conspiracy is one by unlawful means and, hence, there is no need for the plaintiff to prove a predominant purpose on the part of the second defendant, VGO and Mao to injure it), I nevertheless found that the evidence adduced by the plaintiff in so far as an alleged conspiracy by the second defendant, VGO and Mao was concerned fell woefully short of the mark. Indeed, it appeared as if this part of the plaintiff's claim was a mere last-ditch attempt to shore up a case that was already weak to begin with. That this was clearly the position was confirmed by the testimonies of the witnesses concerned. That was in fact why I had ordered that there had to be a trial in the first instance when the plaintiff (as I have already mentioned) suddenly alleged fraud and/or conspiracy on the part of the second defendant, VGO and Mao during one of the initial hearings before me in chambers. Indeed, in my view, and having regard to the credibility of the various witnesses, it was clear that the plaintiff had not even satisfied the standard of proof based on the balance of probabilities. This would of course be, *a fortiori*, the case if the alleged conspiracy had been one of "simple conspiracy", *viz*, one that involved lawful means since that would entail the need for the plaintiff to prove, additionally, that there had been a predominant intention on the part of these defendants to injure the plaintiff.

85 Turning to the testimony of the witnesses in general and their credibility in particular, one of the key persons purportedly involved in the alleged conspiracy in the present proceedings was Goh. Before proceeding to comment on Goh's testimony and credibility, I should note that counsel for the plaintiff was arguing that there had been a conspiracy amongst the second defendant, VGO and Mao that was manifested, *inter alia*, by a series of alleged coincidences, which I deal with below (at [90]). Mr Hee also based his argument from conspiracy on the fact that the abortive agreement with Lee and the sale of the shares to Mao (see generally [12] above) were sham transactions. He argued, *inter alia*, that the fact that the purchase consideration for the shares was to be paid by Mao over two years, with the shares being transferred first to Mao without any payment, also supported the plaintiff's allegation of a conspiracy.

86 Returning to Goh's testimony, I found Goh to be a witness of truth. He was clear about the rationale for the Agreement between VGO and Kingsea, which I have already discussed in relation to the alleged breach of s 76 of the Act. He was not evasive in the least although he was asked difficult questions, sometimes in an excessively difficult manner, in my view. He answered the questions in a straightforward fashion. It was clear that he was an experienced businessman. But he was no "shark" which the allegation of fraud and/or conspiracy sought to make him out to be. In addition, at no point did the plaintiff claim that the Agreement between VGO and Kingsea was a sham transaction. After all, it had taken place much earlier than the transaction which the plaintiff was suing the second defendant on. I also believed Goh when he stated that the abortive sale of the escrow shares to Lee

and the subsequent sale to Mao were transactions that were not only above board but were also in the interests of the company. It bears repeating that the present proceedings centred on the issue of priority of transactions. VGO and Mao were, *ceteris paribus*, clearly entitled to succeed. That is why counsel for the plaintiff raised the arguments in relation to an alleged breach of s 76 of the Act as well as a conspiracy to defraud them – almost at the last minute as last-ditch defences. I return to my assessment of, as well as findings on, the evidence by Goh. On these findings alone, the allegation of fraud and/or conspiracy by the plaintiff must fail since an essential element (or person, rather) in the chain of events that the plaintiff had to prove has gone missing – or, more accurately, was never present in the first instance.

87 I should also mention, in this regard, the testimony of Foo, who is a lawyer and who was involved in the initial (albeit abortive) sale of the shares to Lee. It was clear that the plaintiff was alleging that this particular attempted sale was a sham transaction. I found Foo, however, to be a witness of truth. Indeed, if the plaintiff's allegation was true, Foo would have descended to depths of professional misconduct which would, of course, be wholly unacceptable. I did not find that to be the case. And if he were an innocent pawn in the grand conspiracy alleged by the plaintiff, he must have been quite incompetent not to have realised what was transpiring. I did not find that to be the case either.

88 Mao was of course another key player in the alleged plot or conspiracy in so far as the plaintiff was concerned. I found Mao to be an exceedingly shrewd businessman. But he was one who, being legally trained himself, was cognisant of the threshold where legality ends and illegality begins. He was glad to enter into the transaction in question because he stood a chance of being economically better off in the process. Make no mistake about it. His act was not one of unadulterated (or even, for that matter, adulterated) altruism. However, he was no conspirator. Indeed, I need to pause at this juncture to observe that the plaintiff's own key witness, Chen, struck me as a shrewd businessman himself. But this was neither here nor there. His evidence, incidentally, was in fact centred on the issue of the legality (or otherwise) of the Nine Agreements, as mentioned above.

89 What, then, about the plaintiff's argument with regard to the mode in which Mao was to pay for the shares in the transaction of 22 March 2005 (see [85] above)? I accept the defendants' explanation that VGO had tried its level best to sell the escrow shares but that there were no other takers. VGO was in fact merely attempting to recoup its money and had in fact written three letters of demand to Kingsea prior to its attempts to sell the shares. In the circumstances, I also accept the defendants' explanation that the terms under which Mao was to pay for the shares was a practical one, inasmuch as it afforded Mao a reasonable window of opportunity to sell the shares and apply the proceeds to pay for the shares. There was, as is expected in transactions of this nature, a business risk involved. However, as I have pointed out in the preceding paragraph, Mao struck me as a shrewd businessman who would be willing to take such a risk for possible profit.

90 Counsel for the plaintiff also sought to argue that there were too many coincidences in various transactions, particularly from the perspective of timing. For example, he argued that Hangzhou Kingsea had disposed of its entire 50.26% shareholding in Heilongjiang KSWDLC to Zhejiang Da Feng Tong Xin Dian Zi Co Ltd ("Zhejiang DFT") for a consideration of RMB16m and that Kingsea had executed a power of attorney appointing Mao to sell 42,813,517 (non-escrow) VGO shares registered in its name, the proceeds of which were paid as follows:

(a) RMB16m to Zhejiang DFT;

(b) RMB1,105,000 to VGO in part satisfaction of one of the undertakings owed to it (VGO);

and

(c) RMB4,978,575 to Hangzhou Kingsea, being a debt owed to it by Kingsea.

In the circumstances, Mr Hee argued that the purpose of the above transactions was to conceal losses that would otherwise have arisen in VGO's financial statements due to its failure to obtain the concession rights and a waiver of the Agang debt. He also argued that the proceeds of sale would be channelled back to VGO. He argued, further, that no explanation was offered as to why Mao would release RMB16m to Zhejiang DFT. The main thrust of this particular line of argument, however, centred on the plaintiff's allegation that the 42,813,517 VGO shares were not in fact non-escrow shares but were, instead, escrow shares. Mr Hee argued that it followed that the 59,339,238 VGO shares that were the focus of the present proceedings were *non*-escrow shares. He also argued that, even if I accepted VGO's and Mao's version that the 42,813,517 VGO shares were non-escrow shares, the sale of those shares constituted misconduct on the part of VGO and Mao.[note: 3] I reject this series of arguments which seem to me, with respect, to be rather contrived and convoluted. On the contrary, I accept the defendants' argument that there was no sinister motive behind the sale of Hangzhou Kingsea's interest in Heilongjiang KSWDLC, and that this sale was effected because VGO had decided that it did not want the Concession without the exclusivity to the rights therein. There was, in fact, no proof adduced whatsoever that the sale of Hangzhou Kingsea's interest in Heilongjiang KSWDLC to Zhejiang DFT was a sham transaction. In this regard, the defendants also point out – correctly in my view – that the proceeds were applied in a specific matter, as set out above, and that not all the money went to VGO.

91 What about the fact that the agreement under which the shares were sold to Mao took place on 22 March 2005, one day prior to the date when the plaintiff applied for the Mareva Injunction (as to which see [4] above; I have already dealt with the abortive sale to Lee (at [85] above))? But one must bear in mind the fact that it was *the plaintiff* who sought a Mareva injunction as they had gotten wind of the transaction between VGO and Mao, and this explains the proximity in time, so to speak, between these two events. In other words, the coincidence in terms of timing in this particular regard was "*self-induced*" by the plaintiff.

92 I should also point out that even though where unlawful means are alleged to have been used, and it is therefore *not* necessary for the plaintiff to prove that the defendants' intention to injure it was the *predominant* motive, it is nevertheless clear that the plaintiff in question has *nevertheless* to prove that the defendants had intended to injure it. Here again, based on the evidence before me, I do not find that this essential element had in fact been satisfied by the plaintiff.

93 But this is not an end to this particular issue. It must, however, be borne in mind that the allegation of conspiracy by the plaintiff in the context of the present proceedings was linked to an alleged fraud. Indeed, the alleged fraud constituted the underlying action itself. Looked at in this light, although, as we shall see in a moment, the standard of proof is still the civil standard based on the balance of probabilities, the amount of proof required was higher than that which would be required in a normal civil action. It is true that the proof itself would, in most cases such as the present, be inferred (see, for example, the Singapore High Court decisions of *Malaysian International Trading Corp Sdn Bhd v Interamerica Asia Pte Ltd* [2002] 4 SLR 537 at [59] and *OCM Opportunities Fund II, LP v Burhan Uray* [2004] SGHC 115 ("*OCM Opportunities*") at [47] (for related decisions, see *OCM Opportunities Fund II, LP v Burhan Uray* [2004] 4 SLR 74 and *OCM Opportunities Fund II, LP v Burhan Uray (No 2)* [2005] 3 SLR 60). But mere unsubstantiated assertion is clearly insufficient. And even something that goes a little more beyond mere assertion is still insufficient.

94 An allegation of fraud entails a high requirement with respect to proof. Whilst still being based on the civil standard of a balance of probabilities, the amount of evidence required is far from trifling. Indeed, it was quite the contrary. I have in fact explored the issue of the standard of proof required with respect to allegations of this nature in more detail in the Singapore High Court decision of *Chua Kwee Chen, Lim Kah Nee and Lim Chah In v Koh Choon Chin* [2006] 3 SLR 469 at [10]–[39], and will therefore not repeat them here. Applying as well as elaborating upon the Singapore Court of Appeal decision in *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR 263, I observed (at [39]):

> In summary, the standard of proof in civil proceedings where fraud and/or dishonesty is alleged is the civil standard of proof on a balance of probabilities. However, where such an allegation is made (as in the present proceedings), *more* evidence is required than would be the situation in an ordinary civil case. Such an inquiry lies, therefore and in the final analysis, in the sphere of practical application (rather than theoretical speculation). In this regard, a distinction ought not, in my view, to be drawn between civil fraud and criminal fraud. [emphasis in original']

95 An allegation of fraud and/or conspiracy is an extremely serious one. It ought not to be made lightly. It bears repeating that mere assertion is insufficient. In this regard, having regard to the evidence before me (the analysis of which has been set out above), it was clear that the plaintiff had not satisfied the requisite standard of proof for fraud (here, in the context of an alleged conspiracy). Indeed, as I have pointed out earlier, they had not even satisfied the lower standard of proof to begin with. Be that as it may, it is clear that the plaintiff would, based on its own pleaded case, have to discharge the standard of proof for fraud – which it clearly has not. As VGO and Mao correctly point out, VGO already had a security interest that clearly had priority over the plaintiff's interest. In the circumstances, it would have made no sense whatsoever for VGO to orchestrate a sham transaction in the context of a conspiracy, although this did not preclude it from exercising its security interest over the escrow shares when it thought it was commercially appropriate.

96 In the circumstances, there is no need to consider other problematic issues in the law relating to tortious conspiracy – for example, whether it is sufficient for the defendants to embark on a deliberate course of conduct, whilst realising that harm to the plaintiff is a likely (or even inevitable) consequence of their actions, or whether it must be proved that the defendants acted with a purpose to actually harm the plaintiff. One writer has argued persuasively that there is no material difference between the two tests (see generally Gary Chan Kok Yew, "Intention and Unlawful Means in the Tort of Conspiracy" [2005] Sing JLS 261 ("Chan") at 262–266). Indeed, it is suggested that since both tests necessarily adopt an *objective* approach, the difference, in the *practical* sphere, is probably going to be extremely minimal or even non-existent (*cf* also *OCM Opportunities* ([93] *supra*) at [25]–[38], especially at [38]).

97 Neither is there a need, in the present proceedings at least, to consider a confused (and confusing) issue relating to that category of the tort of conspiracy which involves unlawful means – whether the "unlawful means" must be actionable *per se* by the plaintiff. There are decisions that state that this need not be the case (see, for example, the English High Court decision of *Bank Geselleschaft Berlin International SA v Raif Zihnali* (16 July 2001) (QBD, Commercial Court) (transcript available on Lexis)). On the other hand, there are also decisions adopting a wholly contrary approach, holding that it must be shown that the unlawful activity was actionable against at least one of the conspirators absent the co-operation between them (see, for example, the (also) English High Court decision of *Michaels v Taylor Woodrow Developments Ltd* [2001] Ch 493, and the relevant authorities cited therein; *cf* also *OCM Opportunities* ([93] *supra*) at [39]–[43]). Again, the writer referred to in the preceding paragraph has argued persuasively in favour of the latter approach (see generally Chan ([96] *supra*) at 267–269). In particular, the learned author argues that such an approach "is consistent with the notion of unlawful means conspiracy as a form of secondary liability premised on

the existence of some primary liability (such as the tort of deceit)" (see Chan, *id* at 269); he also argues that "the requirement of actionability may also help to stem the potential flood of opportunistic overtures by potential plaintiffs against alleged conspirators in the absence of actionable primary wrongs" (see Chan, *ibid*).

Conclusion

98 I found that none of the arguments proffered on behalf of the plaintiff was grounded in either legal principle or the evidence available. On the contrary, the two principal arguments, centring on an alleged breach of s 76 of the Act and an alleged fraud and/or conspiracy on the part of the second defendant, VGO and Mao, were, with respect, rather far-fetched. As I have observed, in particular, with regard to s 76 of the Act, I found the arguments extremely technical and completely contrary to the language and spirit behind the provision itself. I need here to observe – on a more general level – that counsel, in their zealousness for their clients' causes, must step back at least occasionally to view their respective arguments in perspective. This is especially the case where relatively novel points are (as in the present proceedings) being proffered. In other words, counsel owe an overriding duty to the court and to justice. This does not compromise, in one whit, the no less important duty they owe to their respective clients simply because over-imaginative and/or unconvincing arguments do not serve their clients' causes in any meaningful way. It is, to state the obvious, quite the opposite.

99 In the premises, I granted an order in terms of prayers 3 to 5 in so far as Summons in Chambers No 1954 of 2005 was concerned. I also granted an order in terms of prayers 3 to 5 in so far as Summons in Chambers No 2067 of 2005 was concerned. I also ordered that the costs of the proceedings be borne by the plaintiff and that such costs be agreed, or taxed if not agreed.

[note: 1] See the plaintiff's Reply Submissions at para 8.

[note: 2] See *id* at para 6.

[note: 3] See the plaintiff's Written Submissions at para 88.