Beckkett Pte Ltd v Deutsche Bank AG and Another
[2007] SGHC 153

Case Number : Suit 326/2004

Decision Date : 21 September 2007

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Steven Chong SC, Andrew Ong, Ronald Choo, Sim Kwan Kiat, Dawn Tan, Kelvin Poon, Chenthil Kumarasingam, Ian Teo and Ooi Zhao Rong (Rajah & Tann) for the plaintiff; K Shanmugam SC, Ang Cheng Hock, William Ong, Christopher Tan Teow Hin, Loong Tse Chuan, Nicholas Lum, Vikram Nair and Tay Yong Seng (Allen & Gledhill) for the first defendant; Kenneth Tan SC (instructed), Soh Wei Chi, Ng Soon Kai and Toh Chen Han (Ng Chong Hue LLC) for the second defendant

Parties : Beckkett Pte Ltd — Deutsche Bank AG; PT Dianlia Setyamukti

Credit and Security – Mortgage of personal property – Stocks and shares – Scope of duty of pledgee to pledgor and guarantor when selling pledged shares – Pledgee failing to ascertain market price of shares before agreeing to private sale – Proper basis for valuation of shares – Whether shares sold at undervalue – Whether possible to establish breach of duty without proof of undervalue – Whether claim by company in respect of shares pledged by its subsidiary allowable

Damages – Compensation and damages – Claim by shareholder for loss purely reflective of damage caused to or loss suffered by company – Whether claim permissible – Whether open to claimant to take measures to render principle inapplicable

Tort – Conspiracy – Whether security sold at undervalue pursuant to conspiracy between pledgee and buyer – Differences between conspiracy by lawful and unlawful means – Whether intention or predominant intention to injure made out

21 September 2007

Kan Ting Chiu J:

Background

1 This action has its origins in a US$100m Bridging Loan the first defendant, Deutsche Bank AG ("Deutsche Bank") made to PT Asminco Bara Utama ("Asminco"), an Indonesian company, pursuant to a Bridge Facility Agreement dated 24 October 1997.

2 The plaintiff, Beckkett Pte Ltd ("Beckkett") is an investment-holding company incorporated in Singapore. Prior to February 2002, Beckkett owned approximately 74.2% of the issued share capital of an Indonesian company, PT Swabara Mining and Energy ("SME"). SME in turn owned 99.9% of the shares of Asminco.

3 Prior to December 1997, Asminco owned 15% of the issued share capital of PT Adaro Indonesia ("Adaro"), which owned a coal mine in Kalimantan. At that time, Asminco also owned 20% of the issued share capital of PT Indonesia Bulk Terminal ("IBT"), which operated a bulk terminal which served Adaro's mine. Beckkett, SME, Asminco, Adaro and IBT are referred to collectively as the Swabara Group of companies. Adaro's coal mine in Kalimantan, which produces a low-ash, low-energy coal known as "Envirocoal", was the "crown jewel" of the Swabara Group. Adaro and IBT are Indonesian companies.

4 In 1997, Asminco had the opportunity to acquire a further 25% of the issued share capital of Adaro and 20% of the issued share capital of IBT for US$100m. Asminco was anxious to acquire the additional shares in these two companies, but it lacked the finances for that. It obtained a Bridging Loan of US$100m from Deutsche Bank under a Bridge Facility Agreement which was to be repaid in six months. Beckkett agreed to guarantee the punctual repayment of the Bridging Loan, and pledged all its shares in SME as security under a share pledge agreement governed by Indonesian law. SME and Asminco also provided security for the Bridging Loan. SME executed a guarantee in favour of Deutsche Bank and pledged all the shares it held in Asminco, while Asminco pledged all the shares it held in Adaro and IBT. (All the shares pledged will be referred to collectively as "the Pledged Shares"). With the funds from the Bridging Loan, Asminco acquired the additional shares in Adaro and IBT and became the holder of 40% of the issued shares of these two companies in December 1997.

5 The original intention was that the Bridging Loan was to be a short-term facility which was to be replaced by long-term financing that was to be structured, but that did not materialise. By August 1998, Asminco was in default on the repayment of the Bridging Loan. Various proposals were made for the repayment of the loan, but no repayments were received. After Deutsche Bank was approached by the representatives of the second defendant, PT Dianlia Setyamukti ("DSM") an Indonesian company, to buy the Pledged Shares, Deutsche Bank entered into a private sale by an agreement ("the share sale agreement") on 21 November 2001. Deutsche Bank had not put the shares on sale previously, and did not have them valued in contemplation of a sale. Under the agreement, DSM acquired from Deutsche Bank all the Pledged Shares together with an assignment of all its rights under Beckkett's guarantee and the Bridging Loan for a total consideration of US$46m. This agreement was governed by the laws of Singapore. When the sale was completed, the Adaro and IBT shares were transferred to DSM, and the SME shares and Asminco shares transferred to two nominees of DSM, namely PT Mulhendi Sentosa ("Mulhendi") and PT Akabiluru ("Akabiluru") respectively, but nothing turned on this.

6 Beckkett did not receive notice of the sale from Deutsche Bank until it received a letter from Deutsche Bank's Indonesian lawyers on 18 February 2002 informing it that Deutsche Bank had sold the pledged SME shares for US$800,000. That was followed on 14 March 2002 by a letter from Deutsche Bank's Singapore solicitors demanding payment under the guarantee for payment of US$86,888,969.31 said to be owing by Asminco to Deutsche Bank as at 21 February 2002.

7 Beckkett regarded the US$46m price for the Pledged Shares to be a gross undervalue. It drew support from documents discovered from Deutsche Bank including:

(a) internal valuation undertaken by Deutsche Capital Singapore for Deutsche Bank which put the price of Adaro and IBT as at August 1999 at US$689.3m;

(b) an offer from AG Rheinbraun (a reputable German company) made in October 1999 to purchase majority interests in Adaro and IBT on the basis that the combined enterprise value of the two companies was US$650m, with an indication that the figure could be increased by up to US$50m;

(c) an internal memo of Deutsche Bank dated 19 November 1999 with an attachment of a combined discounted cash flow enterprise (equity plus debt) valuation of Adaro and IBT at between US$568m and US $1,060m;[note: 1] and

(d) a combined discounted cash flow valuation dated 28 December 2000 of the enterprise value of Adaro and IBT at US$785m and equity value at US$666.8m.[note: 2]

Its sense of grievance must have intensified when it learnt in January 2005 of a pending US$950m leveraged buy-out of Adaro and IBT by an international consortium.

Beckkett's action

8 Instead of paying the outstanding loan, Beckkett sued Deutsche Bank and DSM. The action was initially taken out on 27 April 2004 against Deutsche Bank alone, and DSM was joined as the second defendant on 28 February 2005.

9 Beckkett claimed that Deutsche Bank owed duties to it as pledgee/mortgagee of the SME shares and, as the creditor of the Bridging Loan secured by the guarantee executed by Beckkett, a duty to exercise its power of sale over the Pledged Shares by taking reasonable care to obtain a true value for the shares or to obtain the best price possible for them.

10 Beckkett's case against Deutsche Bank was that it failed:

(a) to obtain a proper and independent valuation of the Pledged Shares before selling them,

(b) to take any steps to seek alternative bids or publicise the sale of the Pledged Shares, and

(c) to use its power of sale for proper purposes and to act in good faith.

11 Beckkett alleged that Deutsche Bank, as creditor under the Bridging Loan secured by the guarantee, was under a duty to Beckkett:

(a) to use its duties of sale of the Pledged Shares for proper purposes and in good faith,

(b) to take reasonable care to obtain the true values of the Pledged Shares by holding an auction or taking steps to obtain the best price obtainable when it exercised its power of sale over the Pledged Shares, and

(c) not to impair the value of the Pledged Shares.

12 Beckkett alleged that Deutsche Bank had failed in its duties as a pledgee/mortgagee and as creditor in that it failed:

(a) to obtain proper valuations of the Pledged Shares before entering into an agreement to sell the Pledged Shares,

(b) to take any step to seek alternative bids for the shares or to properly publicise the sale, and

(c) to use its power of sale for proper purposes and in good faith.

13 Beckkett alleged that the sale of the Pledged Shares by Deutsche Bank to DSM and its nominees was carried out in pursuance of a conspiracy between Deutsche Bank and DSM by unlawful means and/or with the predominant purpose to injure Beckkett by Deutsche Bank selling to DSM the Pledged Shares at an undervalue, and thereafter, to wind up Beckkett.

14 The remedies Beckkett sought in this action were:

(a) a declaration that the sales of the Pledged Shares pursuant to the share sale agreement

are invalid, null and void and that it be set aside,

(b) a declaration that the equity of redemption over the Pledged Shares be restored to Beckkett, SME and Asminco,

(c) an order that Deutsche Bank and DSM return the Pledged Shares to Beckkett, SME and Asminco and restore their percentage shareholdings in SME, Asminco, Adaro and IBT, and

(d) damages to be assessed.

15 To get a better understanding of the case, we need to look at the make-up of Beckkett. Beckkett was a wholly owned subsidiary of Asian Mining Energy Corporation ("ASMEC"), a company incorporated in Mauritius. ASMEC was owned by three shareholder groups described as:

(a) the Metropolitan Investment Corporation or Tirtamas Group headed by Hashim Djojohadikusumo, a prominent Indonesian businessman,

(b) the Unigaruda Masabadi ("RGM") Group headed by Sukanto Tanoto ("Sukanto"), another prominent Indonesian businessman;

(these two groups, collectively described as the "Shareholder Group", owned just over 58% of the shares of ASMEC between them), and

(c) the Management Group comprising persons involved in the management of SME, Asminco, Adaro and IBT, namely:

(i) Graeme Robertson, Chairman, CEO and President Director of the Swabara group,

(ii) Allan Buckler, Chief Operations Officer/Operations Director and Director of SME, Adaro and IBT,

(iii) Terry Smith, Deputy Director of Operations and Commissioner of SME, Adaro and IBT, and

(iv) Indra Aman, General Legal Counsel and Director of SME and Adaro and Commissioner of Asminco,

which owned the balance of the ASMEC shares through three companies, Indopac Development Corporation Ltd ("Indopac"), Tim Ko Company Ltd ("Tim Ko") and Jade Age International Corp ("Jade Age").

16 Beckkett alleged that the Management Group had procured DSM to purchase the Pledged Shares from Deutsche Bank and to seek Deutsche Bank to wind up Beckkett with funds provided by DSM to prevent Beckkett from removing the Management Group from the boards of SME, Asminco, Adaro and IBT. Beckkett accused Deutsche Bank of agreeing to take action to wind up Beckkett although it had no legitimate interest in winding up Beckkett as the bank's credit committee had resolved that the sale of the Pledged Shares was in full and final settlement of Asminco's loan. (It was not made clear whether this resolution was binding and enforceable against Deutsche Bank, or whether it was a unilateral position adopted by Deutsche Bank.)

17 Beckkett contended that the sale agreement was invalid and void as its performance was

unlawful under the laws of Indonesia, where the sale and purchase took place.

18 On the basis of these assertions, Beckkett sought:

(a) a declaration that the sale agreement was invalid, null and void and that it be set aside,

(b) a declaration that the equity of redemption over the Pledged Shares be restored to Beckkett, SME and Asminco, or

(c) damages.

The alleged involvement of the Management Group

19 Beckkett's action against Deutsche Bank and DSM made reference to the Management Group. It was alleged that members of the group, namely Allan Buckler, Terry Smith and Indra Aman "participated in the negotiations and/or assisted" DSM in the purchase of the Pledged Shares from Deutsche Bank. Beckkett alleged that Deutsche Bank knew or ought to have known that by so doing these three persons were acting improperly and in breach of their duties to their companies.[note: 3]

20 Beckkett also alleged that these three persons were using DSM as their corporate vehicle to purchase the Pledged Shares and that Deutsche Bank knew or should have known that.[note: 4]

Deutsche Bank's defence and counterclaim

21 Deutsche Bank pleaded that after the loan was disbursed, Asminco defaulted on its repayments. Negotiations were held, but there was no resolution and Asminco remained in default.

22 After the failure of the negotiations, Deutsche Bank received two unsolicited offers from third parties in 2001 to purchase the Pledged Shares. These offers, which were of less than US$46m, were rejected.

23 Between September and November 2001, Deutsche Bank entered into negotiations with DSM following an unsolicited offer from DSM which led to an agreement in writing dated 21 November 2001 for DSM to purchase the Pledged Shares for US$46m. Deutsche Bank was not forthcoming in the discovery of documents. This led to repeated applications to the court for discovery, and when the orders were made, the discovery made was disappointing. No correspondence, memoranda, contact reports or discussions were produced by Deutsche Bank. Deutsche Bank's case was that all the negotiations had been conducted orally, with no written notes or memoranda of those oral negotiations made or kept. The bank acknowledged that no valuation of the Pledged Shares was undertaken in preparation for the sale to DSM. DSM was similarly unhelpful on the ground that its records were damaged or lost.

24 The sale agreement provided *inter alia* that:

(a) Deutsche Bank was to petition to the Jakarta court to obtain rulings on the legal issues concerning the enforcement of the banks' rights, and that the petition was to be "a unilateral application and no other party is to be made a party to the action", and

(b) DSM was to provide a valuation certificate supporting the purchase price of US$46m.

Ultimately, the Adaro and IBT shares were transferred to DSM, the SME shares were transferred to Mulhendi, and the Asminco shares to Akabiluru.

25 On 16 January 2002, after the share sale agreement was signed, DSM, the purchaser, obtained a valuation on the Pledged Shares from Zulfikri & Co, a firm of registered public accountants in Indonesia, that as at 31 December 2000:

(a) the value of the SME shares was negative;

(b) the value of the Adaro shares was US$37,999,242;

(c) the value of the Asminco shares was negative; and

(d) the value of the IBT shares was negative.

26 On 11 December 2001, Deutsche Bank obtained a ruling from the District Court of South Jakarta that Deutsche Bank had the right and authority to sell all the SME shares pledged by Beckkett privately without going through a public auction. (Similar court rulings were also obtained by Deutsche Bank for the sale of the rest of the Pledged Shares).

27 On the strength of the Order of Court of 11 December 2001, Deutsche Bank entered into an agreement on 15 February 2002 with Mulhendi for the sale of Beckkett's Pledged Shares in SME to Mulhendi for US$800,000, and on 19 February 2002, the sale was confirmed by the District Court of South Jakarta to be legal and in compliance with the law.

28 On 21 February 2002, Deutsche Bank informed Asminco of the sale of the Pledged Shares and demanded payment of the balance of US$86,888,969.31. On 14 March 2002, Allen & Gledhill, Deutsche Bank's solicitors in Singapore wrote to Beckkett to demand payment of the US$86,888,969.31 under the terms of the guarantee it had given in respect of the Bridging Loan.

29 Deutsche Bank's defence was a denial of all of Beckkett's allegations, and an assertion that in any event, Beckkett was not entitled to claim for any loss or damage which is reflective of the loss or damage suffered by SME, Asminco, Adaro and IBT. Further, Deutsche Bank counterclaimed against Beckkett as guarantor of the Bridging Loan of US$98,223,142.55 due and owing under that loan as at 28 May 2004.

30 Deutsche Bank filed affidavits of evidence-in-chief of 14 persons who were expected to be its witnesses. Those persons were not called as witnesses. After Beckkett had called its witnesses and closed its case, Deutsche Bank elected not to enter its defence. It did not call any witnesses, although its counsel remained and participated in the proceedings when DSM called its witnesses.

DSM's defence

31 In its defence, DSM set out the payments made to Deutsche Bank for the Pledged Shares:

(a) US$800,000 for the SME shares which were transferred to Mulhendi as nominee for DSM,

(b) US$100 for the Asminco shares which were transferred to Akabiluru as nominee for DSM,

(c) US$44.2m for the Adaro shares which were transferred to DSM, and

(d) US$1m for the IBT shares which were transferred to DSM.

(These four sums add up to US$46,000,100, but there was no issue over the US$100 discrepancy.)

32 DSM pleaded that its purchase and transfer of the Pledged Shares were in accordance with advice from an Indonesian law firm Adams & Co.

Beckkett's defence to Deutsche Bank's counterclaim

33 Beckkett denied the counterclaim. It disputed that there was a breakdown in the negotiations on 27 June 2001. More importantly, it disputed the legality of the sale of the Pledged Shares to DSM on the ground that the orders of the South Jakarta District Court:

(a) did not sanction the Zulfikri valuations or the sale price of the Pledged Shares,

(b) were not binding on Beckkett as they were obtained without notice to Beckkett, and

(c) were obtained without disclosure of the sale agreement between Deutsche Bank and DSM, coupled with the fact that the sale price was determined before the Zulfikri valuations were obtained.

Beckkett asserted that if Deutsche Bank had taken reasonable care in selling the Pledged Shares, the proceeds from the sale would have exceeded the amount outstanding under the Bridging Loan.

Beckkett's case against Deutsche Bank as mortgagee

34 Beckkett's main complaints were that:

(a) Deutsche Bank should have obtained independent valuations of the Pledged Shares,

(b) Deutsche Bank should have put the Pledged Shares on sale in a more open manner than it had done, and

(c) Deutsche Bank did not sell the Pledged Shares for proper purpose and in good faith.

35 Beckkett made these complaints on the basis that a mortgagee exercising a power of sale has a duty to act in good faith and to take reasonable care to obtain the true market value or the proper price for the property. It relied on the Court of Appeal's decision in *Lee Nyet Khiong v Lee Nyet Yun Janet* [1997] 2 SLR 713 ("*Lee Nyet Khiong*").

36 In *Lee Nyet Khiong*, the appellant made a loan to the respondent, for which the respondent executed a mortgage of her property in favour of the appellant as security. When the respondent failed to repay the loan, the appellant sold the property. The sale by tender was advertised in The Straits Times for one day. The advertisement only described the location, the land area and that it was a freehold property without giving any other particulars. The tender was to close in two weeks.

37 The Court of Appeal declared that:

> 34 It is well settled that a mortgagee, in exercising his power of sale, has a duty to act in good faith and also a duty to take reasonable care to obtain the true market value or the proper price of the mortgaged property at the date on which he decides to sell it. In *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 at p 966, Salmon LJ said:
>
> > The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law.

The first duty was accepted by the mortgagee, and only the second duty was then the issue. Salmon LJ having reviewed the various authorities came to the following conclusion, at pp 968–969:

> I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it.

This view has been endorsed by the Privy Council in *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349, which was an appeal from Hong Kong Court of Appeal, and has also been accepted by this court: see *Ng Mui Mui v Indian Overseas Bank Ltd* [1986] 1 MLJ 203; [1984-1985] SLR 286, *How Seen Ghee v Development Bank of Singapore Ltd* [1994] 1 SLR 526 and *Malayan Bank Bhd v Hwang Rose & Ors* [1997] 2 SLR 1.

38 The Court of Appeal found that the appellant had failed to discharge his duty as mortgagee when he sold the property. The Court stated:

> 37 On the facts of this case, we did not find that the appellant had discharged his duty. We turn first to the 'efforts' of the appellant, starting with the advertisement he placed in the newspaper for the sale of the property by tender. First, the advertisement gave but a bare minimum of the description of the property which was woefully inadequate. It set out merely the site or location, the nature of the tenure and the area of the land. It did not provide any information as to the state and condition of the house on the property. More particularly, it omitted to mention, among other things, that the house had recently been extensively renovated, that it is a two-storey bungalow with an attic level and a two-storey annexe building, and that it has a swimming pool, spacious entertainment area, central air-conditioning system and a large built-in area with a floor area of approximately 968 sq m excluding patio, garage, terraces and void areas. These details would have attracted a wider group of potential purchasers, particularly those who were interested in a luxurious lifestyle. There was probably a market for the sale of such property which could have been reached, if the adequate description of the property had been given.
>
> 38 Secondly, the advertisement appeared only once, and the chances of potential purchasers missing the advertisement would be very high. Increasing the number of advertisements would in all probability have attracted a greater number of interested parties.
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> 39 Thirdly, a short period of only two weeks was allowed for tenders to be submitted. This, in our view, was wholly unreasonable in the circumstances. The property was (and is) worth a large sum of money. A prospective purchaser who is interested in tendering for it would have to make the necessary searches and investigations and organise his finances before embarking upon the purchase of such an expensive property. It is not a decision which can be taken lightly. By allowing only two weeks to receive the tenders, the appellant was further reducing the market for such a property, as some purchasers would not have been able to make such an important decision with such a short period of time.

(These facts compared favourably to the manner in which the Pledged Shares were sold by Deutsche Bank to DSM.)

39 Beckkett contended that this duty is not only owed to a mortgagor, but is also owed to a guarantor. This was made clear in *The Bank of East Asia Ltd v Tan Chin Mong Holdings (S) Pte Ltd*

and Ors [2001] 2 SLR 193 where G P Selvam J stated (at [21]) that "the mortgagee owed the duty not only to the mortgagor but to the surety as well", and in *Beckkett Pte Ltd v Deutsche Bank Aktiengesellschaft Singapore Branch* [2003] 1 SLR 321 (at [9]):

> Where there is a guarantor, the duty extends to him as he has an interest in the sale as he is also liable for the debt remaining after the sale, see *Standard Chartered Bank Ltd v Walker* [1982] 3 All ER 938 ["*Walker*"], *American Express International Banking Corp v Hurley* [1985] 3 All ER 564 ["*Hurley*"] , *The Bank of East Asia Ltd v Tan Chin Mong Holdings (S) Pte Ltd* [2001] 2 SLR 193, *Goh Chin Soon v Vickers Capital Ltd (formerly known as ST Capital Ltd)* [2001] 1 SLR 728 and *Bank of Credit and Commerce International SA (Licensed Deposit Takers) v Aboody* (30 September 1987, Queen's Bench Division, unreported).

40 In *Walker*, a decision of the Court of Appeal of England, Lord Denning MR held at 942:

> If it should appear that the mortgagee or the receiver have not used reasonable care to realise the assets to the best advantage, then the mortgagor, the company, and the guarantor are entitled in equity to an allowance. They should be given credit for the amount which the sale should have realised if reasonable care had been used. Their indebtedness is to be reduced accordingly.

41 In *Hurley,* a decision of the English High Court, Mann J referred to *Walker* and affirmed at 571 the proposition of law that:

> The mortgagee when selling mortgaged property is under a duty to a guarantor of the mortgagor's debt to take reasonable care in all the circumstances of the case to obtain the true market value of that property.

In that case, the property mortgaged was specialised sound and lighting equipment used at pop concerts. The mortgagee's guarantor was dissatisfied with the way in which the receiver sold the equipment. Mann J held at 574:

> In my judgment the receiver did not take reasonable care in all the circumstances of the case to obtain the true market value of the equipment. He had in his hands equipment which he knew had been valued at £193,323 and which he knew was of a specialist nature. In regard to the disposal of the equipment he did nothing. Although advised by Edward Symmons Ltd that he should look to the trade the receiver did not do so but was content that the trade should look to him. In my judgment the failure to take reasonable care is manifest in these forms: (i) a failure to take specialist advice from a person in the popular music industry; (ii) a failure to advertise in publications concerning the popular music industry. The receiver is liable in negligence to the guarantor.

(Applying the same reasoning to the present case, particular care should have been taken to get valuations from experts in the coal mining and transportation industry, and to make the availability of the shares known within the industry.)

42 There is a more recent decision of the High Court of England in *Barclays Bank Plc v Kingston* [2006] 2 Ll LR 59 at [16] to [18] where Burnton J stated:

> 16. … The duty to take reasonable care to obtain a proper price is owed to the principal debtor (assuming it is he whose asset constitutes the security), since his liability to the creditor should have been reduced by the full value of the security: *Cuckmere Brick Co v Mutual Finance* [1971]

Ch 949.

17. A guarantor of the principal debtor's liabilities is also interested in the security, in two respects. First, before realisation by the creditor, if he pays the amount owed by the principal debtor he will be entitled to the security by way of subrogation to the rights of the creditor. Secondly, his liability, like that of the principal debtor, falls to be extinguished or reduced by the amount realised by the creditor when he realises the security, assuming it to be sufficient. …

18. *It is because of the second of these interests of the guarantor that the creditor owes him, as well as the principal debtor, a duty*, if he realises a security for the liabilities of the principal debtor, to do so at a proper price.

[Emphasis added]

43 A further issue arose over the private sale of the Pledged Shares. The pledge agreement was governed by Indonesian law. Two articles of the Indonesian Civil Code ("ICC") are of particular application when a pledgee seeks to sell pledged property, namely Art 1155 and Art 1156.

44 Article 1155 sets out a pledgee's general powers of sale:

If the contracting parties do not agree otherwise, then if the debtor or pledgor do [sic] not fulfil his obligation, after the expiration of the agreed time period, or after the issuance of the summon demanding the fulfilment of the agreement in the event there is no specific provision regarding the time period, the creditor is entitled to sell the pledged goods through public auction in accordance with the local customary practices and the common prevailing requirements, with the objective that the debt together with interests and costs can be repaid from the proceeds of such sale.

If the pledged goods consist of trade goods or securities that can be traded in a public exchange, then the sale can be conducted in such a place through the mediation of two professional brokers that are experts in such field.

45 This provision does not prevent a pledgee from fulfilling his duties as pledgee as it entitles, but does not compel him to sell the pledged goods in the ways set out in the article.

46 Article 1156 goes on to provide that:

In any event, if the debtor or the pledgor defaults from its obligations, then the creditor can file a claim through a Court to have the pledged goods sold to repay the debts together with interests and costs in accordance with the procedures to be determined by the Judge, or for the Judge to permit the creditor to retain the pledged goods as a repayment of certain amount which will be determined by the Judge in a decision up to the amount of the debts, together with interests and costs.

With respect to the transfer of the pledged goods contemplated in this article and the preceding article, the creditor is obliged to notify the pledgor, at the latest, on the next day if post or telegraph services are available every day, or, if it is not the case, with the next shipment of post. Notice sent by way of telegraph or registered mail shall be deemed to be an appropriate notice.

But it is not a mandatory provision. It is there to be used, but a pledgee/vendor is not required to use

it for every sale. It only enables the pledgee to apply to court for permission to sell the pledged property through other methods of sale if the pledgee chooses to do that.

47 The official text of the ICC is the original Dutch text. There are published Bahasa Indonesia versions of the ICC and commentaries by distinguished writers which are generally regarded as authoritative, although there are variations in the text of the ICC they each adopted. When counsel referred to these provisions before me, they had to have them translated into English, and the translations they obtained and produced were also not entirely similar. The texts that I have set out were supplied by Beckkett's witnesses. However, the differences are not material to the issue under consideration.

48 Issue was taken over the fact that Deutsche Bank had applied for the orders *ex parte*, without notice to Beckkett. Beckkett contended that an application to the court under Art 1156 should be for a *putusan* which is obtained through an *ex parte* application, rather than a *penetapan*, which is an order obtained through an *inter partes* application.

49 Deutsche Bank had obtained 16 *penetapans* from the South Jakarta District Court which authorised the bank to dispose of the Pledged Shares through a sale to DSM, Mulhendi and Akabiluru.

50 Beckkett referred those orders back to the Indonesian courts. It applied to the Jakarta High Court, which issued a *penetapan* that the earlier orders of the South Jakarta District Court were null and void and were to be withdrawn, and those orders were revoked on 9 March 2005.[note: 5]

51 The matter was then taken by Deutsche Bank, DSM, Mulhendi and Akabiluru to the Supreme Court. This resulted in a document dated 3 March 2006, which confirmed the ruling of the High Court. However, Deutsche Bank, DSM, Mulhendi and Akabiluru which brought the matter to the Supreme Court now dispute the status of the document and assert that it is not a decree of the Supreme Court.

52 Two points should be noted in connection with the court orders. First, as Art 1156 is not a mandatory provision, Deutsche Bank was not compelled by law to obtain permission from the court to sell the Pledged Shares by a private sale. Since it was under a duty as pledgee of the shares to sell the shares in the open market, it should not have applied under Art 1156 for permission to sell the shares in a private sale, and it cannot rely on the orders of the South Jakarta District Court to answer Beckkett's complaint.

53 The second point is that as matters stand, the orders of the South Jakarta District Court which authorised the private sales have been revoked by the High Court. There was no issue over the validity of the order of revocation of the High Court. Consequently, whether or not the order of the High Court has been affirmed by a decree of the Supreme Court, the orders of the South Jakarta District Court which authorised the sale of the pledge shares through a private sale no longer exist.

Beckkett's case on conspiracy

54 There was disharmony between the Passive Shareholders and the Management Group which had developed before the sale of the Pledged Shares. The Passive Shareholders felt that they were denied access to the management of the companies, and took action to have a more active role in the companies.

55 In October 2001, the Passive Shareholders had three of their nominees appointed as directors of ASMEC. Indopac, Tim Ko and Jade Age, the shareholder companies of ASMEC which were controlled

by the Management Group tried to obtain a court order to restrain the three directors from taking offices, but they failed to get the order. In November 2001, the Passive Shareholders also succeeded in having two of their nominees appointed to the board of directors of Beckkett to replace two incumbent directors. In November 2001, a shareholder company of SME controlled by Graeme Robertson obtained an injunction from the South Jakarta District Court to prevent SME from convening a meeting to change the board of directors of SME.

56 Beckkett alleged that "DSM is not an independent third party as they allege, but is in fact a corporate vehicle used by the Management Group to acquire the Pledged Shares."[note: 6]

57 In support of the contention, it pointed out that neither Deutsche Bank nor DSM produced any correspondence, memorandum or contact report on the discussions and negotiations that took place between them.

58 The documents produced revealed that Indra Aman, the General Legal Counsel and Director of SME and Adaro and Commissioner of Asminco, who did not hold any office in DSM, was actively engaged and took an active role in ensuring that the sale was completed.

59 In an internal Deutsche Bank email from William Barin to Wolfgang Topp (both senior officers of Deutsche Bank) dated 29 October 2001, reporting on the progress of the sale of the Pledged Shares for US$46m, Indra Aman's significant role is apparent:

> I conveyed to Indra, our agreement to accept USD46mn cash as full and final settlement, on the basis:
>
> - that we can finalise and settle by end of Dec 2001
>
> - DB receives cash up front (within 2 weeks) of USD4mn. I told him that we are prepared to confirm in writing that this amount will be applied towards the final settlement amount.
>
> - the cost of DB's external legal counsel are to be borne by the company. I also told him that we would also part [sic] of the USD4mn cash to help fund our legal costs which would then have to be reimbursed at settlement by the company.
>
> On further enquiry, Indra confirmed that the way that they propose to proceed is for DB to act under its various security and deliver the pledged shares to a vehicle that the company will nominate. Indra mentioned that he envisaged taking legal action first in Singapore under the corporate guarantee and then moving down the security chain after that. But this is something that needs further refinement and consideration by the Company.
>
> Indra said that one of the next steps is he would like to organise a meeting (either in JKT or Singapore) between – Alan, Wolfgang, Asminco's "backers" in this proposal (he would not say who), he and I to move things forward. He will revert with some proposed dates for the meeting.[note: 7]

60 The extent of Indra Aman's involvement was also shown when as late as 13 November 2001, after Victor Sim Mong Seng ("Sim"), the legal counsel of Deutsche Bank at that time, had prepared a draft agreement[note: 8] for an unnamed party to provide a fund for the use by Deutsche Bank to enforce the guarantee against Beckkett and to take legal proceedings, which might include liquidation proceedings against Beckkett. Sim sent the draft to Indra Aman because Sim did not know the identity of the unnamed party. The term was incorporated in the share sale agreement signed

between Deutsche Bank and DSM on 21 November 2001.[note: 9]

61 Indra Aman's involvement in the sale of the Pledged Shares was such that Sim emailed him on 22 November 2001, the day after the sale share agreement was signed, expressing his (Sim's) intention to send a notice of demand to Asminco. In his email, Sim informed Indra Aman:

> I propose that DB Singapore send the attached demand letter to Asminco.
>
> …
>
> The reasons are:
>
> - It has been quite some time since the last demand was made and there was development on a standstill arrangement since then (although to my understanding the standstill has since lapsed).
>
> - You will note that the letter is to be copied to Beckkett and Swabara. *In a normal case we would give notice to* a collateral provider before enforcing against the collateral to give the collateral provider an opportunity to pay off the loan and keep the collateral or to make an offer for the release of the collateral. *It is prudent in the instant case* (although not legally obliged to under the security documents) to highlight the claim again to the collateral providers and at the same time give them notice of DBSP's rights under the security documents as a consequence of Asminco's default.
>
> *Please let me know what you think*.[note: 10]
>
> [emphasis added]

and Indra Aman's response was:

> Thank you for your email and since we did not see you at the close of the meeting we would like to extend our thanks for your support and assistance in making the execution of the agreement possible. Indonesian counsel seems to be satisfied that Asminco has defaulted under the Bridge Loan and has not this far requested for any additional demand by DB on Asminco. However, I will reconfirm with them again and forward them your proposed letter. My opinion is that if the additional demand letter is not required then *we would not issue an additional letter of demand as this might unnecessarily alert Beckkett*. Nevertheless, I will reconfirm with Indonesian counsel and revert back to you as soon as I hear from them.[note: 11]
>
> [emphasis added]

and as a result of his input, no notice of demand was sent.

62 Indra Aman's influence went beyond getting Deutsche Bank to withhold the letter of demand. On 15 January 2002, he sent an email[note:12] to Sim in which he requested that Deutsche Bank should send to him letters back-dated to 4 December 2001, 13 December 2001 and 20 December 2001. He explained:

> The reason for obtaining these letters is that the letters will form the basis for a response from Borrower that would trigger further letters from DB laying down the reason for all involved parties to be present on the Closing Date and transact or do whatever is necessary in relation to the take over. These letters are attached for your review.[note: 13]

He proceeded to give detailed instructions, which are set out in full here as they reveal the extent of Indra Aman's control over the whole process:

> The scenario is basically as follows:
>
> 18.01.2002 – Asminco responds to letters from DB as mentioned above. These letters contain monthly statement of overdue principal and unpaid interest plus correspondence on applicable interest rate and request for payment of interest payables. The letters provide Asminco with a reason to respond. The key points in Asminco's response is as follows: It is unable to pay interest; It is dependent upon dividend flow from Adaro; The loan facility is not supported by a written dividend policy of Adaro; Existing management has fought hard to convince other shareholders to put into place a dividend policy; Existing management's efforts finally come to fruition with the support of a new shareholder in Adaro (HII); Shareholders of Adaro (MEC, IC, Asminco and HII) have recently decided upon a dividend policy that should give some comfort to DB; Proposes meeting with DB to discuss refinancing or restructure of the debt with the support Asminco shareholders (SME and SBB); States that distributions for IBT may also come in the future.
>
> 19.01.2002- DB responds to letter by proposing 23.01.2002 as the date of the meeting. It is believed that because DB's letter is merely a response to Asminco's letter to conduct a "harmless" meeting, Asminco's management should not be deemed obligated to inform its shareholders of the letter nor the meeting and consequently should not forewarn adverse parties and trigger any preemptive action from them.
>
> 20.01.2002 – Asminco confirms meeting to be held 23.01.2002 at 10:00am at Asminco's office.
>
> 20.01.2001 – (After receipt of Asminco's confirmation) DB writes to each of SME and SBB to invite them to the same meeting with Asminco. DB shall specifically state that the invitation arises from Asminco's letter of 18.01.2002 which is to be attached to the letters of invitation. As you can see in Asminco's letter of 18.01.2002 both SME and SBB are on purpose specifically mentioned. Management can later argue that it thought the letter of invitation "harmless" due to the fact that Asminco was first to mention them and that DB invited SME and SBB merely to confirm the truth of their support since any subsequent refinancing or restructure of the debt would require approval from both SME and SBB as shareholders of Asminco. SME's presence on Closing Date is required to set up the calling of an EGM by DSM, and SBB's presence on Closing Date is required to convene an EGM of Asminco to confirm the transfer of the shares previously owned by SME and to replace all members of the Board of Directors and Commissioners of Asminco so that management control can be ascertained. Asminco's presence is also crucial as this sets up a basis for confirmation from Asminco that the debt is due and payable and the exact amount of debt outstanding prior to the transfer of shares and after the transfer of shares. The residual amount of debt after the transfer of shares will be used by Singapore counsel to commence litigation against Beckkett to wind it up. A note on the calling of EGM of SME is warranted. Because 10% of SME is owned by Winfield controlled by an adverse party makes convening of an EGM without prior notice (as in the case of Asminco and Adaro explained below) not possible. Following normal procedures in the AoA of SME will take too much time giving opportunity for a preemptive strike action. SME's presence (unlike in Asminco and Adaro EGMs) is to object to the calling of EGM because in the opinion of SME the transfer of shares in [sic] out of the ordinary. This provides the legal basis for the new shareholder to go to court and obtain special permission to convene an EGM on its own. It is anticipated that this procedure will take approximately 5 days to complete as opposed to the 21 days otherwise required.

20.01.2001 – DB writes to Adaro and each of its shareholders to invite to a meeting to be held on 23 January 2002 at 1:00pm at Adaro's office. Asminco's letter of 18.01.2002 will again be attached to these letters of invitation. By attaching Asminco's letter to the invitation will provide some logical explanation as to why the shareholders of Adaro have also been invited by DB. It is safe to assume that DB wants to meet with respect to the newly established dividend policy of Adaro and in particular to obtain confirmation from the shareholders that the policy is true and further to obtain a feel from Adaro and its shareholders an indication of the amounts involved. Adaro's presence is required to make notations of the transfer of shares and to chair the EGM of shareholders requested by the new shareholders. The presence of the shareholders of Adaro is required so that an EGM without prior notice can be convened and a valid and binding resolution can be adopted including among others recognition of the transfer of shares that took place.

20.01.2001 – DB writes to IBT to invite to a meeting to be held on 23 January 2002 at 2:00pm at IBT's office. Asminco's letter of 18.01.2002 will again be attached to the letter of invitation. In light of Asminco's letter it is believed to be perfectly normal for DB to meet with IBT. IBT's presence in the meeting on Closing Date is required to set up the calling of an EGM of IBT by DSM (same procedure would apply here as the procedure for the calling of an EGM of SME explained above).

21.01.2002 – Adaro confirms meeting to be held on 23.01.2002 at 1:00m at Adaro's office.

21.01.2002 – IBT confirms meeting to be held on 23.01.2002 at 2:00pm at IBT's office.

…

The last thing of importance is that all parties at the latest one day prior to Closing Date should erase and destroy all files or correspondence on the transaction leaving only executed originals in place.[note: 14]

[Emphasis added]

and Deutsche Bank actually sent out the letters drafted by Indra Aman with minor immaterial changes in some and no changes at all in the others.

63 The instructions Indra Aman issued to erase and destroy all files and correspondence on the transaction showed that he was not only involved, but was in charge. The situation remained even after the completion of the sale. When Beckkett subsequently came to know of the sale, and was seeking further information on the sale from Deutsche Bank, Sim tried to get in touch with Indra Aman on 25 February 2002.[note: 15] Sim also alluded to a visit to Jakarta with Deutsche Bank's lawyers to meet Indra Aman "to discuss the action and things like that with several other people".[note: 16]

64 When the foregoing facts and Beckkett's complaints are reviewed, the following questions arise:

(a) why did Indra Aman, who did not represent Deutsche Bank, the vendors of the shares or DSM the purchasers, have such interest and influence in the matter

(b) why was Deutsche Bank prepared to work with and take instructions from him especially with regard to not notifying Beckkett on the enforcement of its pledge, when it was the bank's normal practice to do that as a matter of prudence?

(c) why were DSM, Mulhendi and Akabiluru left out in these matters? and

(d) why was it necessary to erase and destroy the files and correspondence leading to the share sale agreement?

65 The fact that the Pledged Shares were bought and sold:

(a) in a private sale,

(b) without any valuation,

(c) with the express condition that the application for court approval was to be made *ex parte*, and

(d) with the condition that:

> Singapore Counsel commences enforcement proceedings for and on behalf of DB (but financed by DSM) in the competent court of the Republic of Singapore against Beckkett Pte Ltd pursuant to the Guarantee granted by Beckkett Pte Ltd in favour Deutsche Bank A.G. The enforcement proceedings will aim at winding up Beckkett Pte Ltd.[note: 17]

added further to Beckkett's disquiet.

66 Beckkett also alleged that Deutsche Bank knew that DSM was not a *bona fide* purchaser of the shares. It relied on the internal documents of Deutsche Bank which were disclosed in the process of discovery:

(a) a Credit Report dated 24 August 2001, referring to "negotiations to sell Pledged Shares in PT Adaro (owner of Adaro coal assets) back to key shareholder";[note: 18]

(b) minutes of the CIB Divisional Credit Committee meeting dated 28 September 2001 where the same words as quoted in (a) were used;[note: 19]

(c) an internal email from William Barin ("Barin"), Vice-President of the Credit Risk Management Workout Group of Deutsche Bank to Wolfgang Topp ("Topp"), Managing Director of Deutsche Bank referring to Deutsche Bank's negotiations with Indra Aman on the sale of the Pledged Shares stating:

> Indra confirmed that the way that they propose to proceed is for DB to act under its various security and deliver the pledged shares to a vehicle that the company will nominate;[note: 20]

(d) an email dated 29 October 2001 from Barin to Victor Sim informing him of a meeting scheduled for 31 October 2001:

> Coming from Asminco – are Indra Aman (in house lawyer), Alan Buckler, plus an unknown person said to be the Co's "backer for the proposal"
>
> From DB – W Topp, myself and you.[note: 21]

(The President Commissioner of DSM, Edwin Soeryadjaya ("Soeryadjaya") confirmed during the trial that he was the unnamed backer.[note: 22] Neither Soeryadjaya nor DSM was an existing or key shareholder of Asminco, and they were not related to Asminco.);

(e) a Credit Report dated 2 November 2001 which repeated the words quoted in (a);[note: 23]

(f) minutes of a CIB Divisional Credit Committee dated 22 November 2001 (the day after the execution of the share sale agreement) which stated:

> Collateral consists of private company shares representing borrower's interest in a substantial Indonesian coal mine and certain related infrastructure. These will be sold back to certain existing shareholders;[note: 24]

(g) a Provisioning Memorandum dated 31 December 2001 referring to "shareholders with whom we are proposing to sell";[note: 25]

(h) an excerpt of the minutes of a Group Board Meeting dated 17 January 2002 referring to Asminco and the sale of equity collateral "to a borrower-related entity";[note: 26] and

(i) a Provisioning Memorandum dated 21 March 2002 using the same words quoted in (g).

67 Deutsche Bank had disclosed in the further and better particulars to its defence that its officers had negotiated with DSM's representatives (Soeryadjaya on three occasions and Sandiaga Salahuddin Uno ("Uno") on four occasions) in September-November 2001. This lent weight to Beckkett's contention that Deutsche Bank knew that DSM was not the real purchaser, as DSM was controlled by Soeryadjaya and Uno, and was not related to Asminco.

68 There was evidence to support Beckkett's assertion that DSM might not be the real purchaser of the shares, and that the real purchaser was the party variously described as a key shareholder or certain existing shareholders, and a borrower-related entity. But the evidence did not go as far as to show that the true purchasers were the Management Group.

69 The manner of financing for the purchase of the Pledged Shares also attracted the attention and criticism of Beckkett. The financier was a bank, Bank Mandiri, but the evidence did not come from the bank. The financial arrangements had to be gathered from the evidence of Soeryadjaya, Uno and Chia Ah Hoo, a director of Adaro.

70 The broad picture that emerged was that Bank Mandiri was prepared to offer a US$40m loan to DSM in the form of a contract financing loan. For that purpose, it required DSM to enter into a direct coal transportation contract with Adaro, to transport Adaro's coal (which it had been doing as a sub-contractor), and for Adaro to make a pre-payment of US$40m to DSM. Bank Mandiri was to make a loan to Adaro for Adaro to make the pre-payment.

71 Under these arrangements, DSM obtained US$40m from Bank Mandiri to buy the shares. It was also able to repay Bank Mandiri with the US$40m pre-payment it received from Adaro under the coal transportation contract. However, the coal transportation contract was novated before it was carried out and no pre-payment was due from Adaro. Nevertheless, the pre-payment was not refunded, but was converted into an interest free loan from Adaro to DSM, leaving Adaro to service its loan from Bank Mandiri.

72 Counsel for Beckkett was critical of the propriety of these transactions. He pointed out that several documents produced were backdated (and that was not acknowledged until it was detected and brought up by Beckkett's counsel), and that effectively DSM had bought the Adaro and IBT shares with an interest-free loan from Adaro.

73 But this was not really relevant to the case. However interesting the funding arrangements may be, they do not relate to issues of conspiracy before me. It was not Beckkett's case that Deutsche Bank had any knowledge or role in these transactions, or that the transactions between DSM, Bank Mandiri and Adaro formed part of Beckkett's case of conspiracy between Deutsche Bank and DSM.

Beckkett's witnesses

74 Beckkett called twelve witnesses:

(a) Arthur Ling Ping Shuan, a Director of Beckkett, who gave evidence on the creation of the bridge loan, the restructuring negotiations, and the events leading to Beckkett's action;

(b) Ian Wayne Spence, a Commissioner of Adaro appointed on the request of Djojohadikusumo and Sukanto, who gave evidence on his dealings with the Management Group and the concerns of the Shareholder Group;

(c) Anthony Jeffrey D'Cruz, Business Controller in the RGM Group and a Director of Beckkett, who gave evidence on his dealings with the Management Group;

(d) Josef Kristiadi, who gave evidence on the political situation in Indonesia in 1999-2001;

(e) Faisal Basri, who gave evidence on the economic and political situation in Indonesia in 1999-2001;

(f) Ambyo Mangunwidjaja, who gave evidence of the effect of the Value Added Tax changes brought about by Government Regulation No144/2000;

(g) Muhammad Yahya Harahap, who gave evidence on the effect of Art 1156 of the ICC;

(h) Mariam Darus, who gave evidence on directors' duties under Indonesian law;

(i) Claude Arthur Jugmans, who gave evidence on the valuation of the Adaro and IBT shares;

(j) James Schaeffer Jr, who gave evidence on the price Adaro coal can fetch;

(k) Ian Laurence Alexander, who gave evidence on the Discounted Cash Flow valuation of the Adaro and IBT shares done by him; and

(l) Victor Sim Mong Seng, former Senior Legal Counsel of Deutsche Bank, who was called by Beckkett when Deutsche Bank indicated before the trial that it would not call him. He gave evidence on his involvement in the sale of the Pledged Shares.

75 I do not propose to set out these witnesses' evidence and the disagreements that the defendants have with them. The issue over Art 1156 was simply whether applications should be made *ex parte* or *inter partes*. The issue of directors' duties arose out of the allegation that Allan Buckler, Terry Smith and Indra Aman had breached their duties as directors by participating in or assisting in negotiations for the sale of the shares. As the exact nature of their alleged participation/assistance was not identified and the alleged breaches of duties were not described, there was simply no basis for saying that they had failed to discharge their duties as directors.

76 The bulk of the evidence and the disputes relate to the valuation of the shares. The evidence

on the political and economic conditions in Indonesia, the effect of the VAT legislation and the production and price of Adaro coal relate back to the valuation of the Adaro and IBT shares when they were sold.

Deutsche Bank's submission of "no case to answer"

77 At the close of Beckkett's case, Deutsche Bank submitted that there was no case to answer, and elected not to enter its defence. Consequently, it did not rely on the affidavits of evidence-in-chief that were filed by its intended witnesses, and did not call any of them to give evidence.

78 The bank submitted that there was no case to answer because:

(a) Beckkett, in its capacity as guarantor of the Bridging Loan, has no standing to bring a positive claim against the Bank in respect of the Pledged Shares, whether for a return of the shares or for damages.

(b) The Bank does not owe any duty to Beckkett to preserve, or avoid impairing, the value of SME's assets (purportedly represented by the Asminco, Adaro and IBT shares) over and above the ordinary duty to obtain the proper price for the SME shares. The Bank need not account to Beckkett for its sale of the Asminco, Adaro and IBT shares.

(c) In respect of Beckkett's claim as pledgor/mortgagor of the SME shares, Beckkett has failed to prove that the shares were sold at an undervalue and hence, failed to prove (i) that the Bank breached its duties as mortgagee when exercising its power of sale; or (ii) that any loss was suffered by Beckkett.

(d) In respect of Beckkett's claim as pledgor/mortgagor of SME shares, the Bank does not owe any duty to Beckkett to give prior notice to Beckkett before selling the SME shares.

(e) In respect of Beckkett's claim as pledgor/mortgagor of SME shares, Beckkett has not proven the Bank's alleged failure to act in good faith and to use its power of sale for proper purposes.

(f) In respect of Beckkett's claim for conspiracy generally, Beckkett has failed to prove that the acts complained of caused loss or damage to Beckkett.

(g) In respect of Beckkett's claim for conspiracy to injury [sic], Beckkett has not proven that the Bank was motivated by a predominant purpose to injure Beckkett.

(h) In respect of Beckkett's claim for "unlawful means" conspiracy, Beckkett has not proven that (i) the Bank intended to cause economic harm to Beckkett; or (ii) the Bank employed any unlawful means against Beckkett, either on the facts or on the law.

(i) In respect of Beckkett's claim that the Sale Agreement dated 21 November 2001 is illegal by reason of the alleged conspiracy and the alleged breach of the Bank's duties owed to Beckkett, Beckkett has not proven that (i) the object of the Sale Agreement was the commission of a conspiracy; or (ii) the Sale Agreement involved the breach of the Bank's duties owed to Beckkett.

(j) In respect of Beckkett's claim that the performance of the Sale Agreement dated 21 November 2001 was unlawful by the laws of Indonesia and therefore illegal, Beckkett has not

proven that the performance of the Sale Agreement was unlawful by the laws of Indonesia.

(k) Even if Beckkett is able to prove that the performance of the Sale Agreement was unlawful by the laws of Indonesia or that the Sale Agreement was illegal by reason of the alleged conspiracy or the alleged breach of the Bank's duties owed to Beckkett, the alleged illegality in both cases may affect the enforceability of the Sale Agreement between the Bank and Dianlia *inter se* but does not:

(i) prevent the Bank and Dianlia from performing the Sale Agreement if they wish to do so;

(ii) prevent title from passing under the Sale Agreement;

(iii) entitle a third party such as Beckkett to set aside the Sale Agreement;

(l) Further, even if Beckkett is able to show that the Sale Agreement dated 21 November 2001 is illegal as its performance was unlawful by the laws of Indonesia, and assuming that Beckkett has standing to set aside the Sale Agreement, Beckkett has not proven that:

(i) the Bank and Dianlia knew at the material time that the performance of the Sale Agreement was illegal; or

(ii) that there were outstanding obligations under the Sale Agreement which had been frustrated by the alleged illegality.

(m) Beckkett has not shown that it has suffered any loss for the alleged breaches of mortgagee's duties and conspiracy.

(n) In any event, even if Beckkett can show a loss arising from breach of mortgagee's duties or conspiracy, Beckkett is not entitled to claim relief in relation to the Asminco, Adaro and IBT shares which merely reflect losses suffered by SME and Asminco.[note: 27]

Examination of Deutsche Bank's submissions

79 In this part of my judgment where I examine the issues raised by Deutsche Bank, I have taken the liberty to distill and reword them in the interest of clarity and brevity.

(a) No duties in tort

80 Deutsche Bank questioned the basis of a mortgagee's duties in the sale of a security. It asserted that the law stated in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 ("*Cuckmere*") that there is a general common law duty of care imposed on the mortgagee is no longer good law.[note: 28]

81 Counsel referred to two decisions of the Privy Council in *China and South Sea Bank v Tan Soon Gin George* [1990] 1 AC 536 and *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295. In both cases, Lord Templeman did not accept that common law duty of care is imposed on a mortgagee exercising a power of sale. He held in the latter case at 315 that:

> The general duty of care said to be owed by a mortgagee to subsequent encumbrancers and the mortgagor in negligence is inconsistent with the right of the mortgagee and the duties which the courts applying equitable principles have imposed on the mortgagee. If a mortgagee enters into possession he is liable to account for rent on the basis of wilful default; he must keep mortgage

premises in repair; he is liable for waste. Those duties were imposed to ensure that a mortgagee is diligent in discharging his mortgage and returning the property to the mortgagor. If a mortgagee exercises his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor. *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.* [1971] Ch. 949 is Court of Appeal authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price but is no authority for any wider proposition. A receiver exercising his power of sale also owes the same specific duties as the mortgagee. But that apart, the general duty of a receiver and manager appointed by a debenture holder, as defined by Jenkins L.J. in *In re B. Johnson & Co. (Builders) Ltd.* [1955] Ch. 634, 661, leaves no room for the imposition of a general duty to use reasonable care in dealing with the assets of the company. The duties imposed by equity on a mortgagee and on a receiver and manager would be quite unnecessary if there existed a general duty in negligence to take reasonable care in the exercise of powers and to take reasonable care in dealing with the assets of the mortgagor company.[note: 29]

82 Counsel also referred to the judgment of Nourse LJ in *AIB Finance v Debtors* [1998] 2 All ER 929 at 937:

> It was established by the decisions of this court in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] 2 All ER 633, [1971] Ch 949 and *Parker-Tweedale v Dunbar Bank Plc* (*No 1*) ["*Parker-Tweedale*"] [1990] 2 All ER 577, [1991] Ch 12 , first, that a mortgagee, although he may exercise his power of sale at any time of his own choice, owes the mortgagor *a duty to take reasonable care to obtain a proper price for the mortgaged property at that time;* secondly, that *the duty is not tortious in nature but one recognised by equity* as arising out of the particular relationship between mortgagee and mortgagor.[note: 30]
>
> [Emphasis added]

83 In this passage, the first statement relating to a mortgagee's power of sale and duties referred to *Cuckmere,* and the statement on the equitable nature of the duty referred to *Parker-Tweedale.* It is to be noted that although Nourse LJ departed from *Cuckmere* and agreed with *Parker-Tweedale* that the duty is founded on equity, he agreed with the scope of the duty set out in *Cuckmere*.

84 I should point out that at the present time, the law is settled in Singapore. *Cuckmere* was accepted as good law in *Lee Nyet Khiong*, and as it is a judgment of the Court of Appeal, it is binding on this court.

85 It appears to me that whether the basis of the duty be the common law or equity, the requirement that the mortgagee has the duty to take reasonable care, as stated by Nourse LJ in *AIB Finance v Debtors*, is eminently logical and correct, and this was stated in strong terms by Sir Richard Scott VC in *Medforth v Black* [2000] Ch 86 at 102:

> I do not accept that there is any difference between the answer that would be given by the common law to the question what duties are owed by a receiver managing a mortgaged property to those interested in the equity of redemption and the answer that would be given by equity to that question. I do not, for my part, think it matters one jot whether the duty is expressed as a common law duty or as a duty in equity. The result is the same. The origin of the receiver's duty, like the mortgagee's duty, lies, however, in equity and we might as well continue to refer to it as a duty in equity.[note: 31]

although the different remedies and limitation periods that apply to actions in tort and in equity must be kept in mind.

86 Deutsche Bank also argued that since Beckkett did not repay the Bridging Loan, it did not have the equity of redemption necessary for it to claim in respect of the Asminco, Adaro and IBT shares pledged by Asminco and SME.[note: 32] Beckkett correctly distinguished the right of subrogation (which it conceded it did not have) from its interest in those shares. It submitted that:

> It is correct that prior to making payment under the guarantee, Beckkett is not entitled to do so. However, as stated in O'Donovan & Phillips, [*The Modern Contract of Guarantee*, Sweet and Maxwell, 2003] (at paragraph [12-336]) "because the guarantor is, upon payment of the principal debt, entitled to be subrogated to all securities and remedies held by the creditor for the debt, the creditor is subject to an equitable duty to preserve these securities and remedies.[note: 33]

and also referred to Andrews & Millett's *Law of Guarantees,* Sweet and Maxwell, 2000 at [11-018]:

> The surety's right to be subrogated to all the creditor's rights in respect of the guaranteed debt is traditionally said to arise at the moment he has paid in full all that he must pay to the creditor under the guarantee, unless he has waived the right. In fact, the strict position is that the rights of the surety to the benefit of a security given by the principal arise when the guarantee is entered into, rather than upon payment or performance of the guaranteed obligation. Thus the creditor owes an obligation to the surety to deal with securities in a reasonable and prudent manner, and may discharge the surety if he does not. Pending payment or performance, the surety can (following a demand by the creditor) have the securities marshalled in his favour. However, the surety's right to enforce the right of subrogation by calling upon the creditor to transfer or assign to him the security to which he has become entitled does not arise until the surety has paid or performed the obligation guaranteed.[note: 34]

87 Deutsche Bank as mortgagee owed a duty to Beckkett even if Beckkett did not repay the Bridging Loan. But it also bears remembering that the sale of those shares pledged by other parties would not give Beckkett an independent right of action against Deutsche Bank. Beckkett would suffer no loss or damage from the sale of those shares unless Deutsche Bank claimed against it under the guarantee for the shortfall between the outstanding loan and the sale proceeds. In this case, as Deutsche Bank did make such a claim in its counterclaim, Beckkett can raise in defence to the counterclaim Deutsche Bank's failure to preserve and deal with those shares in a proper manner.

(b) No breach of duties without undervalue

88 In making this assertion, Deutsche Bank focused on Beckkett's duties as claimant without considering its own duties as pledgee. Counsel stated:

> Our primary submission is that all claims against a mortgagee are actionable only upon proof of damage. Proof of undervalue is therefore a necessary element of any claim against a mortgagee. Beckkett's failure to prove the alleged undervalue is fatal to its entire case in respect of the Bank's duty as mortgagee.
>
> In *Good Property Land Development Pte Ltd v Societe General* [1989] SLR 229, the learned Justice Chan Sek Keong (as he then was) held [at 237-238] that:
>
> > In my view, the first and primary task of the court is to determine whether the price at which the mortgaged property was sold was the best price reasonably obtainable at the time

> of sale. It is only after the court has determined that the price was not the best price that the court will go on to decide whether this was due to fraud, bad faith or breach of duty (which, of course, includes negligence) on the part of the mortgagee. If the defendants are able to establish at the trial of the action that they have sold the mortgaged property at the proper price at the time of sale, these allegations must necessarily fall to the ground.[note: 35]

89 That was not the effect of the decision. In an earlier part of the judgment Chan J held at 234 that:

> The basic question in these proceedings is the extent of the duties of the mortgagee vis-a-vis the mortgagor in exercising his power of sale. It is unnecessary for me to trace the historical development of the law relating to the duties of a mortgagee. As far as this court is concerned, the law is as stated in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 where the Court of Appeal decided that a mortgagee had two duties: one to act in good faith and the other 'to take reasonable precautions to obtain … the true market value of the mortgaged property at the date on which he decides to sell it': per Salmon LJ at p 966.

Reading the two passages together, the mortgagee must inform itself of the value and the price obtainable for the property before it agrees to sell it to a purchaser. When that is established, then the enquiry moves to determine whether the price actually obtainable is a reasonable price in the circumstances. The onus was on Deutsche Bank as the pledgee/vendor of the shares to show that they were sold properly.

90 The courts have not construed the law in the manner suggested by Deutsche Bank. One year after *Good Property* was decided, there was another decision touching on the duties of a mortgagor. In *Kian Choon Investments (Pte) Ltd v Societe Generale and Anor* [1990] SLR 167, L P Thean J referred to and affirmed the duties of a vendor-mortgagee set out in *Cuckmere* and reiterated that "a mortgagee in exercising the power of sale has two duties: the duty to act in good faith and the duty to take reasonable steps to obtain the best price available in the circumstances". As the duty to obtain the best available price is on Deutsche Bank, it must show that it has discharged that duty.

91 Counsel took the argument even further, that:

> If there is no undervalue, there can be no breach of a mortgagee's duties.[note: 36]

This argument does not stand up under examination. The starting point is that a mortgagee has a duty to act properly when it exercises its right of sale. To discharge that duty, the mortgagee must ensure that it sells the property at a proper price. Before Deutsche Bank agreed to sell the SME shares pledged by Beckkett for US$800,000 in a private sale, it had the duty to ensure that US$800,000 was the proper price for the shares, and that it had selected the proper mode of sale.

92 Beckkett pleaded that:

> Further, at the time of the offer from Rheinbraun, the 1st Defendant undertook a comparison of Rheinbraun's offer with the 1st Defendant's own internal valuation of Adaro and IBT. The 1st Defendant's own internal enterprise (equity plus debt) valuation of Adaro and IBT ranged from US$568 million to US$1,060 million. From end 1999/early 2000 to end 2001, the macroeconomic and political situation in Indonesia improved, coal prices increased and Adaro's annual coal production increased from 13.6 million tonnes in 1999 to 17.7 million tonnes in 2001. The 1st

> Defendant undertook another internal enterprise (equity plus debt) valuation of Adaro and IBT as at 28 December 2000 which showed a sum of around US$785 million. Yet, the 1st Defendant decided to sell the shares in Adaro and IBT to the 2nd Defendant on 21 November 2001 for a fraction of its own valuation of US$785 million in December 2000 and Rheinbraun's offer of up to US$700 million less than two years earlier. The sale price to the 2nd Defendant valued 100% of Adaro and IBT at about US$113 million as compared to the 1st Defendant's own internal valuation range of US$568 million to US$1,060 million and Rheinbraun's offer of up to US$700 million less than 2 years earlier, and the 1st Defendant's own internal valuation of US$785 million as at December 2000.[note: 37]

(The valuations, in particular the 2000 valuations, set the shares' enterprise value at US$785m and equity value at US$666.8m).

93 Beckkett's Statement of Claim referred to two valuations, one done on or before 19 November 1999[note: 38] and another dated 28 December 2000.[note: 39] In its submissions, Beckkett relied on the latter valuation.[note: 40] This is a set of documents which set out summaries of the discounted cash flow analysis of the enterprise values and equity values of several companies including Adaro and IBT. The analysis was made on the basis of specific assumptions and information that were set out. Beckkett was right to rely on the 2000 valuation rather than the 1999 valuation because it was made closer to the date the shares were contracted to be sold.

94 Beckkett pleaded its case for damages in its Re-Amended Statement of Claim:

> 47. … Based on the 1st Defendant's own internal enterprise valuation of approximately US$785 million as at December 2000 … The true value of SME on or about end 2001 was approximately US$181 million (after taking into account a full repayment of the Bridge Loan and accrued interest) and the value of the Plaintiff's 74.2% stake in SME would be worth approximately US$134 million. The SME shares were sold at an undervalue of at least US$133 million as at the date of sale. The foregoing is based upon the Plaintiff's state of knowledge and documents available to the Plaintiff before full and complete discovery by the Defendants. For the avoidance of doubt, the Plaintiff is claiming damages on the basis set out in paragraphs 48 and 48A below but reserves its right to claim damages on a different basis, or such other basis as may be determined by the Court.
>
> 48. The Plaintiff contends that it is entitled to damages calculated based on the difference between the current market value of the SME shares and the price at which it was sold in or about November 2001.

95 Beckkett also adduced evidence on the equity valuation of the 40% Adaro and IBT shares (but not the SME shares) in a report put up by its witness, Jugmans. That evidence was admitted into evidence over Deutsche Bank's objections. Jugmans and also Alexander and Schaeffer whose reports Jugmans had relied on, were subject to rigorous cross-examination by counsel for Deutsche Bank, which showed up incorrect assumptions, information gaps and other deficiencies in their reports.

96 Ultimately, Beckkett did not rely on those findings of its witnesses and reverted to the position that "Beckkett's primary case on undervaluation is in fact based on Deutsche Bank's own internal valuations"[note: 41] although those valuations did not include any valuation of the SME shares.

97 Beckkett in its reply submissions relied exclusively on the valuations to arrive at the value of the SME shares at US$96.9m.[note: 42] In arriving at that figure, Beckkett appeared to have omitted

a 10% deduction that was to be made because the 40% holdings were minority interests with limited rights of control over the companies. The calculations made on the same basis with the 10% deduction produce a figure of US$77.7m:

	Dec-00 Internal Valuation
Source of equity valuation of Adaro and IBT	7AB2563 to 7AB2631
	Median US$ Million
40% of Adaro's equity valuation	605.3
40% of IBT's equity valuation	61.5
Total	666.8
Deduct:	
10% for Minority Interest of Asminco in IBT and Adaro	-66.7
	660.1
Value of 40% Interest in IBT and Adaro	240.0
Deduct:	
Loan owed to Deutsche Bank paid by Asminco	-132.0
Remainder sale proceeds of IBT and Adaro after paying Deutsche Bank	108.0
Value of Beckkett's 74.2% share in SME	80.1
Deduct:	
3% Discount for lack of Control – Beckkett's interest in SME	-2.4
Net value to Beckkett	77.7

98 Deutsche Bank submitted that Beckkett's methodology was flawed in that:

(a) The valuations of Adaro and IBT in December 2000 were not tested by cross-examination,[note: 43] and

(b) Beckkett's pro-rating approach was wrong in principle as it assumed that Asminco had the same value of its assets, ie the 40% Adaro and 40% IBT shares, and that SME had the same value of Asminco. This is wrong because the shareholders of a company have no beneficial interest in the assets of a company.[note: 44]

99 Beckkett's response to the first point was that if Deutsche Bank's valuation was not tested by cross-examination, it was because Deutsche Bank, the source of the information, had elected not to call any witnesses. If Deutsche Bank wanted to question the reliability of its own valuation, it should adduce evidence to do that. It was ironic to have a situation where a party was prepared to rely on a bank's valuation, and the bank was disputing the reliability of the valuation without explaining where the valuation had gone wrong, or what the proper valuation should be.

(c) Beckkett has no claim for reflected loss from the sale of the Adaro and IBT shares

100 This argument was grounded on the proposition that "(N)either the assets of a company nor its undertaking belong to the shareholders"[note: 45] and the fact that the pledged Adaro and IBT shares were owned by Asminco, and Beckkett was connected to them only because SME owned shares in Asminco, and Beckkett owned 74.2% of the share capital of SME.

101 Deutsche Bank submitted that:

> … Any such loss claimed by Beckkett in these proceedings is barred by the "no reflective loss" principle, insofar as it reflects the loss suffered by the companies SME and Asminco.[note: 46]

and

> The application of the 'no reflective loss' principle works on two levels here. Beckkett cannot claim for the loss suffered by SME in respect of the Asminco shares, if any. SME, as shareholder of Asminco, cannot claim for the loss suffered by Asminco in respect of the 40% Adaro and IBT shares. *A fortiori* the case here, where what Beckkett is seeking to do is to recover loss suffered by Asminco, which is the subsidiary of Beckkett's subsidiary SME.[note: 47]

102 As support for its argument in law, Deutsche Bank relied on the decision of the English Court of Appeal in *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 ("*Gerber Garment*") a case of patent infringement. The plaintiff/patentee sued the defendant for infringing patents owned by it, and claimed against the defendant loss arising from the infringement which were incurred by two of the plaintiffs' wholly owned subsidiary companies. The trial judge awarded damages to the plaintiff on the basis that it is self-evident that every dollar lost to a wholly-owned subsidiary was a dollar lost to the parent company. On appeal, the Court of Appeal held by a majority that the trial judge was wrong. Hobhouse LJ held at 479:

> The root principle which must be adhered to is that each company is a separate legal entity. The property of one is not the property of another. The plaintiff must prove its own financial loss in its own pocket and quantify it. Any other approach is contrary to the decided authorities and the principle in *Saloman v A. Saloman & Co Ltd* [[1897] AC 22]

103 The right of a shareholder to claim for loss to him resulting from loss or damage caused to a company has been examined at greater length by the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1 ("*Johnson*"). *Johnson* was in turn discussed by our Court of Appeal in *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR 597 ("*Townsing*") where Chan Sek Keong CJ stated (at [69]):

> The principle of reflective loss has been considered and approved in a number of English cases, such as *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 ("*Gerber*"), and was authoritatively discussed in the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1 ("*Johnson*"). Whilst there were various nuances between each of the judicial opinions expressed

in *Johnson*, the general tenor of the majority of their Lordships' *dicta* underscores the broad ambit which the "no reflective loss" principle generally encompasses: but *contra Johnson* at 42–48, *per* Lord Cooke of Thorndon. According to Lord Bingham of Cornhill (see *Johnson* at 35), this principle has the general effect of dictating that "[a] claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss". In a similar vein, Lord Millett (see *Johnson* at 66), with whom Lord Goff of Chieveley agreed, regarded recoverability as turning on the simple question of "whether … the shareholder's loss is franked by that of the company". Lord Hutton in turn chose to express the principle in a positive manner (see *Johnson* at 51) through the proposition that:

> [A] shareholder … is not debarred from recovering damages because the defendant owed a separate and similar duty of care to the company, *provided that the loss suffered by the shareholder is separate and distinct from the loss suffered by the company*. [emphasis in original]

and he concluded (at [77]):

> In our view, there are sound and compelling reasons to support the English approach as expounded in *Prudential Assurance* [[1982] Ch 204] and *Gardner* [*Gardner v Parker* [2004] 1 BCLC 417]. In such cases, the apparent separability of a shareholder's and his company's losses is but a consequence of the artificial construct created by a company's separate legal personality. The prohibition against reflective loss recognises the unity of economic interests which bind a shareholder and his company, and gives effect to the unique position which a shareholder stands in *vis-à-vis* his company. In the words of Lord Millett in *Johnson* at 66–67:
>
> > *In economic terms, the shareholder has two pockets, and cannot hold the defendant liable for his inability to transfer money from one pocket to the other*. In principle, the company and the shareholder cannot together recover more than the shareholder would have recovered if he had carried on business in his own name instead of through the medium of a company. [emphasis in original]

The Court did not apply the principle in that case because it had not been pleaded.

104 In the present case, the no-reflective–loss defence was pleaded by Deutsche Bank. When that was pleaded, it was open to Beckkett to take measures to render the principle inapplicable by removing the risk of double recovery and prejudice to the other shareholders or creditors of Asminco and SME in allowing Beckkett to proceed with its claim, as suggested in *Townsing* (at [85]), but Beckkett did not do that.

105 Strictly speaking, Deutsche Bank did not need to invoke the principle because there is a distinction between reflective loss suffered by a company and the under-valuation of the company's shares. When Beckkett sued Deutsche Bank as pledgor its claim was that the SME shares it pledged were sold at an undervalue when they were sold for US$800,000, and not that it had suffered reflective loss from the sale of the Adaro and IBT shares. For that purpose, it was essential for Beckkett to show that the SME shares were worth more than US$800,000. Even if Beckkett could show that Asminco or SME or itself could claim the reflective loss, that would not show whether the SME shares that were sold for US$800,000 were sold at an undervalue because the value of the share of a company is not only determined by the value of its assets alone, but also by its liabilities, its prospects and other factors.

(d) Beckkett had not proved undervalue of the SME shares

106 Deutsche Bank made the point that even if the Adaro and IBT shares were sold at an undervalue, that did not mean that the SME shares were sold at an undervalue.

107 Deutsche Bank pointed out that Beckkett had focused on the fair market value of the 40% Adaro and IBT shares without reference to the value of the pledged SME shares.[note: 48]

108 Beckkett had argued that:

> This Honourable Court need not concern itself with Deutsche Bank's misconceived contention that no undervalue of the SME shares has been shown. The undervalue of the pledged shares in Adaro and IBT exceeded US$200 million, a staggering sum by any yardstick. Whatever the value of SME is, it does not detract from the fact that Deutsche Bank is guilty of selling the Adaro and IBT shares at a gross undervalue. Nor can it help Deutsche Bank to avoid the ineluctable conclusion that they breached their mortgagee's duty as Beckkett has contended.[note: 49]

and

> Beckkett as a shareholder of SME may not own SME's assets including SME's shares in Asminco (and in turn Asminco's shares in Adaro and IBT), but the value of Beckkett's SME shares represents a proportionate part of SME's assets which included the Adaro and IBT shares.[note: 50]

109 Although it is true that an under-valuation of the Adaro and IBT shares would depress the value of SME shares, Beckkett had conflated the depression of the value of SME shares with their being undervalued at US$800,000.

110 It was common ground between Beckkett and Deutsche Bank that SME was a debt-laden company. SME's consolidated financial statement for the period ended 31 December 2001[note: 51] showed that SME had a negative shareholders' equity of US$19.8m, after taking into account the investments in the 40% holdings in Adaro and IBT at cost, at US$92.4m.

111 Even if one takes the fair market value of those shares at US$96.9m, SME was still a company with a negative value. On that basis, the SME shares were not under-valued at US$800,000.

112 However, the point is really that whatever the value of SME's assets may be, the value of SME as a company can only be determined by taking into account all the relevant factors, including its assets and liabilities. The shares of a technically-insolvent company can be valuable, eg, because its assets are valued at cost and have actually appreciated in value, or because it may have good prospects of becoming profitable, or for other reasons. Consequently, one needs to look at more than the assets of a company, or its financial statements, to ascertain the market value of the company's shares. Although Beckkett made reference to the values of the Adaro and IBT shares, it had not done enough to establish the value of SME, or the value of the SME shares Beckkett pledged to Deutsche Bank.

113 The critical factor is the fair market value of the 74.2% SME shares Beckkett pledged and Deutsche Bank sold, and neither Beckkett nor Deutsche Bank had established that.

(e) Beckkett had not proved that Deutsche Bank had the intention to injure necessary to support a claim of conspiracy

114 The law recognises two types of conspiracy. The Court of Appeal explained in *Quah Kay Tee v Ong & Co Pte Ltd* [1997] 1 SLR 390 (at [45]) that:

> 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.

"Intention" and "purpose" are used interchangeably in this context.

115 In *Kuwait Oil Tanker Co SAK & Anor v Al Bader & Ors* [2000] 2 All ER (Comm) 271, Nourse LJ made the distinction between the two types of conspiracy clearer (at [118]):

> in order to establish an unlawful means conspiracy, it is necessary to establish *an intention* to injure the claimant but not *a predominant intention* or purpose to do so.
>
> [emphasis added]

In other words, for conspiracy by unlawful means, an intention, whether it is a predominant or subsidiary intention, will suffice, but for conspiracy by lawful means, the intention to injure must be a predominant intention.

116 The "injure" element and the "intention" element need to be considered carefully. The "injure" element is causal, ie whether the parties have agreed to a course of action that would cause injury. The "intention" element relates to the parties' states of mind with regard to the injury, and the recent decision of the House of Lords in *Douglas & Ors v Hello! Ltd & Ors* [2007] UKHL 21 is instructive. Generally speaking, parties may engage in a course of action which causes injury without knowing or intending that the injury would be caused. Parties may also engage in a course of action knowing that injury would be caused by that action, and in such a situation, it is said that because of the knowledge, there was intention to cause injury. That knowledge will suffice when the course of action is unlawful. But if the course of action is lawful, something more is required, because the knowledge that injury will be caused *per se* will not constitute a predominant intention to cause the injury.

117 The references to "intention" and "predominant intention" in the passages set out are in the singular, signifying a common or shared intention of the parties. Common does not mean identical. This is made clear by Lord Wright in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch & Anor* [1942] AC 435 at 479:

> I do not accept, as a general proposition, that there must be a complete *identity of interest* between parties to a combination. There must, however, be sufficient *identity of object*, though the advantage to be derived from that same object may not be the same.
>
> [Emphasis added]

118 By "identity of object" Lord Wright was referring to common objective. To constitute the intention to injure by unlawful means, each party must have the objective to cause injury, although the objective may be driven by different interests. When it comes to conspiracy to injure by lawful means, the predominant intention of the parties must be to cause injury.

119 Beckkett has founded its case on both forms of conspiracy. It submitted that:

> [B]oth Deutsche Bank and DSM deliberately withheld notice of the intended enforcement from Beckkett, which inevitably prevented Beckkett from redeeming the pledged shares as guarantor of the Bridge Loan and pledgor of the SME shares. Deutsche Bank and DSM also conspired to sell the pledged shares at undervalue and thereafter wind-up Beckkett to prevent Beckkett from challenging the sale, thereby injuring Beckkett.[note: 52]

120 Although Deutsche Bank and DSM had agreed to the sale of the Pledged Shares at US$46m, that *per se* is not conspiracy to injure Beckkett. To start with, there was no evidence that either of them believed that the price of US$46m was an undervalue. Secondly, whilst Deutsche Bank was under a duty to Beckkett to take proper care in selling the shares, DSM was not under such a duty, and it would not know and was under no duty to know what steps, if any, Deutsche Bank had taken to satisfy itself that US$46m was a proper price.

121 If Deutsche Bank and DSM did not knowingly fix the price at an undervalue, there can be no agreement to cause Beckkett injury by transacting at an undervalue. Taking the argument a step further, even if DSM had known that US$46m was an undervalue, that is not evidence of a predominant intention on its part to injure Beckkett because its primary interest was to purchase the shares at the lowest possible price, and not to injure Beckkett, and it cannot be said that the predominant intention of the combination was to cause injury.

122 Beckkett also relied on the agreement to seek court approval for the sale by the *penetapans* as evidence of a conspiracy to injure. *Prima facie*, the agreement to obtain the court approvals *ex parte* was to facilitate the transaction. There was no evidence that Deutsche Bank or DSM knew at that time that *penetapans* were inappropriate and that *putusans* were required. There can be no inference that they intended to do something unlawful. It would of course be different if they had agreed to do something they knew to be wrong, eg, to under-declare the sale price.

123 Beckkett also took the agreement to wind up Beckkett after the sale as evidence of a conspiracy. This issue should be examined from the stand point that when a creditor applies to wind up a debtor company, it is exercising its right under the law. Banks do that in the normal course of their business, and it cannot be said that the predominant intention for doing that is to injure the debtor companies.

124 Beckkett also pointed to the agreement between Deutsche Bank and DSM that while Deutsche Bank was to apply to wind up Beckkett, DSM was to fund the application as evidence of a conspiracy between them. Why did DSM want to fund the application to wind up Beckkett when it had no debt to recover from it? The liquidation of Beckkett would undoubtedly be injurious to Beckkett, but was the predominant intention of the agreement to cause the injury? The agreement itself does not support an inference one way or the other, and DSM's explanation, which I shall refer to later, must be taken into consideration.

(f) Beckkett had not proved that unlawful means were employed

125 This relates back to the *penetapan*/*putusan* question under Art 1156 of the ICC. There is no controversy that the private sale had to be approved by the Indonesian courts. The sale of the Pledged Shares was carried out after the *penetapans* were obtained from the South Jakarta District Court. However, those *penetapans* were set aside by the Jakarta High Court, and have not been re-instated.

126 Under Indonesian law, the position must be that there were no valid approvals for the sale. It would follow that the sale was not carried out by lawful means, and was carried out by unlawful means as no valid court approval was obtained.

127 This conclusion has different consequences for each defendant. This fixes liability on Deutsche Bank as it was a failure on its part as mortgagee to discharge its duties towards Beckkett. However, it does not attach liability on DSM unless they intended to injure Beckkett when they agreed that the application to court was to be made *ex parte*.

DSM's defence

128 DSM proceeded with its defence at the trial. It called 11 witnesses. The evidence of the first two witnesses, who were the directing minds of DSM in the purchase of the Pledged Shares from Deutsche Bank, is particularly relevant to the issue of whether DSM had engaged in a conspiracy with Deutsche Bank to injure Beckkett. The witnesses were:

(a) Edwin Soeryadjaya ("Soeryadjaya"), President Commissioner of DSM. He is a member of a prominent business family in Indonesia which controlled the Indonesian conglomerate PT Astra International ("Astra"). He is the principal person who decided that DSM should buy the Pledged Shares, and he agreed with Deutsche Bank on the price of US$46m. Astra was engaged indirectly as a mining contractor of the Adaro coal mines. When he came to know that the Adaro and IBT shares might be available, he was interested to acquire the shares, but was apprehensive over Sukanto's indirect interest in the Pledged Shares, as Sukanto has a reputation for being an aggressive and difficult debtor;

(b) Sandiaga Salahuddin Uno ("Uno"), director of DSM and an associate of Soeryadjaya. He informed Soeryadjaya of the availability of the shares and made the first two offers for them at US$25 and US$40m. After the price was fixed at US$46m, he dealt with the structuring of the sale, with advice from Agus Soetopo ("Soetopo"), an Indonesian lawyer. (Soetopo deposed an affidavit of evidence-in-chief in these proceedings, but he subsequently decided not to attend court to give evidence). Uno also dealt with Indra Aman, who served as the contact person between Deutsche Bank and DSM. He also gave evidence on DSM's financing for Bank Mandiri and the coal transportation contract between DSM and Adaro;

(c) Chia Ah Hoo, director of Adaro, whose evidence touched on the coal transportation contract with DSM and the reclassification of the US$40m paid by Adaro to DSM for advanced payment for coal transportation services to an interest-free loan after the coal transportation contract was novated;

(d) Budi Rachman, general manager of operations of DSM, who gave evidence on steps taken for the implementation of the coal transportation contract with Adaro, and the subsequent charges following the novation of the contract;

(e) Angelien Menokathy Jacob, Head of Accounting Section of DSM, who gave evidence on the posting of accounting entries relating to coal transportation services;

(f) Inghie Kwik, who gave evidence on the macroeconomic, social and political situation in Indonesia in 2001 when DSM acquired the Pledged Shares;

(g) Peh Yudie Prawira Paimanta, who gave evidence on tax issues and uncertainties brought about by Government Regulation No 144/2000 relating to Value Added Tax;

(h) Shiv Kumar Dave, who gave evidence on the results advanced by the Indonesia Bank Restructuring Agency in recovering the assets of banks declared by Bank Indonesia to be unsound;

(i) Fred B.G. Tumbuan, who gave evidence on Indonesian law, particularly the effect of Art 1156 of the ICC;

(j) Mohamed Idwan Ganie, who gave evidence on Indonesian law. His evidence touched on, *inter alia*, the duties of directors and commissioners, and a pledgee's right to seek the return or restoration of pledged assets that had been sold; and

(k) Colin Victor Gubbins, who gave evidence on the price of Indonesian coal.

129 At the close of the case, DSM filed extensive submissions. The array of issues raised in the submissions fell into main heads, that:

(a) DSM was a *bona fide* purchaser of the Adaro and IBT shares;[note: 53]

(b) Beckkett's claim on conspiracy must fail as it had failed to prove pecuniary loss;[note: 54]

(c) Beckkett had failed to prove that there was a combination to injure it;[note: 55]

(d) Beckkett cannot make any claim in relation to the Asminco, Adaro and IBT shares;[note: 56] and

(e) the return of the Pledged Shares is not an appropriate remedy.[note: 57]

(a) DSM was a bona fide purchaser of the Adaro and IBT shares

130 Beckkett's case that DSM was not a *bona fide* purchaser relied mainly on the references in Deutsche Bank's internal documents referring to negotiations with a "key shareholder", a "vehicle", "certain existing shareholders" and "borrower-related entity" as well as Indra Aman's active involvement in the sale.

131 When I review the evidence, I find little basis for rejecting Soeryadjaya's evidence that he had wanted to acquire the shares through DSM for its own benefit. Soeryadjaya has the business background and interest in the mining industry generally and Adaro specifically to put in place arrangements to acquire the shares. There were no persuasive reasons put up to show that Soeryadjaya allowed the Management Group to use him or DSM as a "front".

132 Although Beckkett alleged that DSM was buying the shares on behalf of the Management Group consisting of Graeme Robertson, Allan Buckler, Terry Smith and Indra Aman, Beckkett's case was founded on their alleged participation and assistance in DSM's purchase. However, except for Indra Aman's input in the sale process, there were no particulars given of the involvement of the other persons.

133 Indra Aman did not give evidence in the proceedings. If he had been a witness, Beckkett's counsel would no doubt have questioned him on his involvement, but counsel did not have this opportunity. On the evidence, there were unanswered questions on his involvement in the sale. However, there was no basis to infer that he was acting on behalf of the Management Group, as he could also have acted out of self-interest and he could have represented other parties.

134 I find that Beckkett had not proved that DSM bought the shares as a "front", or that Deutsche Bank knew DSM was buying the shares on behalf of some party. Beckkett had therefore not proved that DSM was not a *bona fide* purchaser.

(b) Beckkett's claim in conspiracy must fail as it had failed to prove pecuniary loss

135 Counsel referred to Lord Diplock's statement in *Lonrho Ltd and Another v Shell Petroleum Co Ltd and another (No.2)* [1982] AC 173 at 188 that "[t]he gist of the cause of action [of conspiracy] is damage to the plaintiff". Counsel also referred to *Quinn v Leathem* [1901] AC 495, where Lord Brampton held at 528:

> A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person. It may be punished criminally by indictment, or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed.

136 Their Lordships referred to "damage" generally, and counsel did not explain and I do not find any need to narrow that to "pecuniary loss".

137 Beckkett's response was that it had suffered loss in the deprivation of the equity of redemption of the Pledged Shares and loss from the sale of the Pledged Shares at an undervalue.

(c) Beckkett had failed to prove that there was a combination to injure it

138 I have found that there was no evidence that DSM or Deutsche Bank had knowingly fixed the price at an undervalue when they agreed on the US$46m. I have also found that there was no evidence that DSM or Deutsche Bank knew that the applications for court approvals should be *inter partes.*

139 The remaining issue was the agreement for DSM to provide the funding to wind up Beckkett after the sale. This was dealt with by Uno in [103] to [105] of his affidavit of evidence-in-chief when he referred to his concerns and the advice he obtained from Soetopo:

> 103. … I asked Mr Soetopo again to do whatever that was necessary to fully comply with Indonesian Law and to ensure that our transaction was watertight. I told him that I wanted all angles covered, since this was our purchase of collaterals in a bank's enforcement action. Also, I was still concerned about unwanted litigation and baseless challenges from troublemakers and I asked him again how best we could protect our investment subsequently from this. At that time, I had in mind, in particular, any sort of unwanted litigation that might be imaginatively started by Sukanto Tanoto, but that was in fact not the only unwanted litigation I was thinking of. I was also thinking of the 1st Defendant possibly bringing any sort of litigation subsequently – in my mind, technically speaking, Asminco itself would still owe an outstanding debt to the 1st Defendant, and SME was liable to the 1st Defendant under a corporate guarantee.
>
> 104 Mr Soetopo informed me that in our structure of the transaction as discussed, we had considered all the angles from the Indonesian Law perspective. We were, for the protection of the investment, looking to restructuring the group of companies and how best to "ring fence" against any unfounded litigation by troublemakers via Asminco and SME. However, he informed that if we wanted to cover all angles in terms of restructuring and protection, there was still a Singapore angle which we might want to look into with Singapore legal advisors. He informed me

that there was a corporate guarantee given by the Plaintiff, a Singapore company, and that the Plaintiff was the pledgee of the shares in SME. He said that the Plaintiff owed the 1st Defendant the remaining outstanding loan, which technically, the 1st Defendant could still claim from Asminco even after we bought over Asminco. Also, if the 1st Defendant recovered any monies from the Plaintiff as corporate guarantor, the Plaintiff could claim against Asminco. Furthermore, the Plaintiff was the company up above SME, and that was the channel from which troublemakers or errant third parties might bring an unfounded litigation based on the SME shares that were pledged to the 1st Defendant and sold by the 1st Defendant.

105 I asked Mr Soetopo what he thought we should do. He pointed out that the Plaintiff had not paid the 1st Defendant under the corporate guarantee all these years, and there was the option of asking the 1st Defendant whether it was going to seek recovery on the outstanding debt from the Plaintiff under the corporate guarantee, and if the Plaintiff could not pay up, then proposing to the 1st Defendant, in taking enforcement action in respect of the defaulted distress loan, to liquidate the Plaintiff. In this regard, Mr Soetopo said that he could not advise further as to how the matter would proceed as that would take place in Singapore under Singapore Law.

140 From the explanation, DSM's motive to have Beckkett wound up was defensive in nature, to avoid unnecessary litigation. The proposed means of securing that, by having Deutsche Bank to petition to have Beckkett wound up if it failed to discharge its obligations as guarantor, was a lawful means. Banks can and do wind up debtors with their own funds, perhaps in the hope of recovering something from the liquidation, or perhaps for tax or other purposes. All that DSM had done was to offer an incentive to Deutsche Bank to do something it was fully entitled to do on commercial and legal grounds.

141 Consequently, I find that Beckkett had not proved that Deutsche Bank and DSM had combined with the intention to injure it. This finding disposes of Beckkett's case on conspiracy against them.

(d) Beckkett cannot make any claim to the Asminco, Adaro and IBT shares

142 This is correct because Beckkett did not pledge any of these shares, and Beckkett did not repay the loan and cannot claim any right of subrogation.

(e) The return of the Pledged Shares is not an appropriate remedy

143 As I have found that DSM was a *bona fide* purchaser of the Adaro and IBT shares, and that DSM had not conspired to injure Beckkett, Beckkett is not entitled to any remedy from DSM.

144 Even if Beckkett's case against DSM was made out, I would not have ordered the shares to be returned as:

(a) Beckkett has no claim to the shares except for the SME shares it pledged,

(b) the shareholdings in Adaro and IBT have been transformed by the leveraged buy-out after the sale, and

(c) the value of the shares has been benefited from investments and developments made, as well as the sharp increase in coal prices that has taken place after the sale.

Measure of damages

145 Deutsche Bank was emphatic that the evidence of Jugmans, Alexander and Schaeffer was so flawed in theory and practice that no reliance could be placed on them. In the face of severe criticism of their evidence, Beckkett reverted to its reliance on Deutsche Bank's own internal valuation of the equity values of Adaro and IBT shares as at 28 December 2000.

146 In its closing submissions, Deutsche Bank has argued that there was a fatal shortcoming in Beckkett's case in its failure to show undervalue in the sale of the SME shares.[note: 58] Insofar as Beckkett's "primary case" was that the under-valuation is shown in Deutsche Bank's internal valuation, that is correct because this valuation does not refer to the value of the SME shares directly.

147 Beckkett however argued that:

> At this stage, it is not necessary to prove the exact loss in the value of SME shares. It would be sufficient to prove that any sale of the pledged shares in Adaro and IBT at an undervalue will *inevitably* cause a loss in the value of the shares in the companies upstream. This, Beckkett has amply proved.[note: 59]
>
> [Emphasis in the original]

148 There were two difficulties with this argument. First, the loss in value of the SME shares caused by the sale of the Adaro and IBT shares was not really in issue. The true issue was whether the SME shares were sold at an undervalue for US$800,000, and Deutsche Bank's internal valuations of the Adaro and IBT shares did not show whether the SME shares were worth more than US$800,000.

149 Second, the reference to "at this stage" and the implication that the presentation of the proof can, or is to be done at a later stage were misconceived. This trial of this action was not divided such that liability is to be determined at the first stage, to be followed by the assessment of damages in the second stage. There was an order for bifurcation made on 18 November 2006, but that was a limited and specific bifurcation. The order was necessary because of Beckkett's claim for damages in respect of the pledged SME shares for damages "based on the difference between the current market value of the SME shares and the price at which it (sic) was sold in or about November 2001."[note: 60] The order was that for the 2005 value the shares were to be determined at a later stage because the parties were not ready to deal with that at the trial. (It is not entirely clear why the 2005 value was considered important, as the action was filed in 2004, and the bifurcation order was sought and made in 2006.) As the proof of undervalue at the time of sale in November 2001 is an entirely separate matter from the 2005 valuation, the former was not deferred. Beckkett was therefore obliged to prove that at the hearing, or face the consequences. As it has not proved its loss, it is only entitled to nominal damages.

Deutsche Bank's counterclaim

150 As Deutsche Bank elected not to call its witnesses, it did not prove its counterclaim. I should add that even if Deutsche Bank had proceeded with its counterclaim, it would have encountered difficulties. The difficulties arise from the fact that it did not have the Adaro, IBT and Asminco shares valued, and had sold them in a private sale without notice to other potential buyers. As I have stated earlier, Deutsche Bank as vendor-pledgee owes a primary duty to the pledgors, and it also owes a duty to any guarantor who may be liable for the shortfall between the outstanding loan and the proceeds from the sale of the shares.

151 For this reason, although Beckkett has no independent right of action over the sale of the Adaro, IBT and Asminco shares, it is entitled to raise that as a defence to any claim from Deutsche Bank for the shortfall. The onus then is on Deutsche Bank to show that it had acted with due care when it sold those shares, and Deutsche Bank's conduct fell short of that.

Conclusion

152 Having so reviewed the issues of law and fact raised by the parties, I find and order on the claims and the counterclaim that:

(a) Beckkett has made out a case that Deutsche Bank failed to discharge its duties as pledgee when it sold the SME shares, but has failed to show that Deutsche Bank had in fact sold those shares at an undervalue, so I award to Beckkett nominal damages of $1000;

(b) Beckkett's claim for conspiracy against Deutsche Bank and DSM is dismissed; and

(c) Deutsche Bank's counterclaim against Beckkett is dismissed.

153 On costs, I order that:

(a) as Beckkett has established Deutsche Bank's liability but failed to prove its loss in the claim against Deutsche Bank as pledgee, each party is to bear its own costs;

(b) Beckkett is to pay Deutsche Bank and DSM costs in the claim on conspiracy;

(c) Deutsche Bank is to pay Beckkett costs in the counterclaim; and

(d) all the costs to be paid are to be taxed for two counsel.

[note: 1] 7AB2306-2309

[note: 2] 7AB 2563

[note: 3] Re-Amended Statement of Claim paras 28 and 29

[note: 4] Re-Amended Statement of Claim paras 30 and 31

[note: 5] 15AB 5645-6

[note: 6] Plaintiff's Closing Submissions para 287

[note: 7] 9AB3338

[note: 8] 9AB3370-3376

[note: 9] 9AB3461-3476

[note: 10] 9AB3508

[note: 11] 9AB3508

[note: 12]11AB4321-4323

[note: 13]11AB4321

[note: 14]11AB4321-4323

[note: 15]Notes of Evidence 22/2/2006 p 8 lines 15-24

[note: 16]Notes of Evidence 22/2/2006 p 35 lines 3-24

[note: 17]9AB3476 term 4.

[note: 18]9AB3130

[note: 19]9AB3137

[note: 20]9AB3338

[note: 21]9AB3339

[note: 22]Notes of Evidence 16/8/06 p 107 line 21 – p 108 line 3

[note: 23]9AB3350

[note: 24]9AB3503

[note: 25]11AB4301

[note: 26]12AB4478

[note: 27]1st Defendant's Closing Submissions para 136

[note: 28]1st Defendant's Closing Submission para 145

[note: 29]1st Defendant's Closing Submissions para 153

[note: 30]1st Defendant's Closing Submissions para 156

[note: 31]Plaintiff's Reply Submissions para 125

[note: 32]1st Defendant's Closing Submissions para 175

[note: 33]Plaintiff's Reply Submissions para 130

[note: 34]Plaintiff's Reply Submissions para 131

[note: 35]1st Defendant's Closing Submissions paras 230 and 231

[note: 36]1st Defendant's Closing Submissions para 235

[note: 37] Re-Amended Statement of Claim, para 27

[note: 38] 7AB 2306-2309

[note: 39] 7AB 2563-2631

[note: 40] Plaintiff's Reply Submissions paras 288-289

[note: 41] Plaintiff's Reply Submissions para 294(c)

[note: 42]Plaintiff's Reply Submissions para 294(d)

[note: 43] 1st Defendant's Closing Submissions para 368

[note: 44] 1st Defendant's Closing Submissions para 371

[note: 45]1st Defendant's Closing Submissions para 223

[note: 46]Executive Summary of 1st Defendant's Closing Submissions para 291

[note: 47]Executive Summary of 1st Defendant's Closing Submissions para 298

[note: 48]1st Defendant's Reply Submissions para 679

[note: 49]Plaintiff's Reply Submissions para 272

[note: 50]Plaintiff's Reply Submissions para 276

[note: 51]12AB 4524-4532

[note: 52]Plaintiff's Closing Submissions para 652

[note: 53]2nd Defendant's Closing Submissions paras 21-31

[note: 54]2nd Defendant's Closing Submissions paras 564-569

[note: 55]2nd Defendant's Closing Submissions paras 570-617

[note: 56]2nd Defendant's Closing Submissions paras 971-973

[note: 57]2nd Defendant's Closing Submissions paras 974-978

[note: 58]Executive Summary of 1st Defendant's Closing Submissions para 117

[note: 59] Plaintiff's Reply Submissions para 292

[note: 60]Re-Amended Statement of Claim para 48