Singapore Tourism Board v Children's Media Ltd and Others
[2008] SGHC 77

Case Number : Suit 175/2006

Decision Date : 27 May 2008

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Lok Vi Ming SC, Edric Pan, Loh Jen Wei, Joseph Lee, Gracie Goh and Jeannette Lim (Rodyk & Davidson LLP) for the plaintiff; Chelva Rajah SC with Srinivasan V N (Heng Leong & Srinivasan) for the defendant

Parties : Singapore Tourism Board — Children's Media Ltd; Tribute Third Millennium Limited; Anthony David Hollingsworth

Companies – Incorporation of companies – Lifting corporate veil – Special purpose vehicle used as conduit for payments – Corporate governance – Commingling of bank accounts – Whether corporate veil pierced – Whether company used to evade liability – Whether company used to defraud plaintiff – Whether real contractual relationship existed between defendant companies

Contract – Misrepresentation – Fraudulent – Inducement to enter contract – Inducement to enter collateral contract – Confirmation of financing arrangements – Intention to stage musical concert – Whether representation of intention without honest belief constituted fraudulent misrepresentation – Whether silence constituted fraudulent misrepresentation – Whether contract rescinded – Whether collateral contract rescinded

Evidence – Documentary evidence – Proof of contents – External auditor's testimony used to prove truth of contents of document – Failure to call as witness party who originally prepared documents – Legitimacy of expenditure – Whether expert testimony can be adduced to prove contents – Whether expert testimony reliable – Whether experts' verification process independent – Whether experts overly deferential – Whether failure to call party as witness gave rise to presumption that testimony will be unfavourable

Trusts – Quistclose trusts – Statutory body advancing money under contract in performance of statutory function – Whether entitled to recover money – Whether nature of underlying transaction relevant – Whether contractual obligations constituted purpose of advance – Whether statutory function affected purpose of advance

27 May 2008 Judgment reserved.

Lai Siu Chiu J:

1 This claim arose out of the alleged failure on the part of three parties to stage a mega event in Singapore known as "Listen Live" for which Singapore Tourism Board ("the plaintiff" or "STB") had paid sums totalling $6,155,250. It poses the question – how should commercial parties negotiate the contractual pitfalls accompanying good faith intentions in subsequent "compromise" agreements? The dispute also illustrates the consequences that can arise when parties fail to adequately consider the legal implications of an "evolving" contractual arrangement occasioned by repeated failures to perform.

The facts

2 The plaintiff is a statutory body established under the Singapore Tourism Board Act (Cap 305B, 1997 Rev Ed), with the aim, *inter alia*, of promoting Singapore as a travel and tourist destination. Children's Media Limited ("the first defendant") and Tribute Third Millennium Limited ("the second defendant") are private limited companies incorporated in the United Kingdom with the latter being

limited by guarantee. Anthony Hollingsworth ("the third defendant") was at all material times a director and the Chief Executive Officer ("CEO") of the first and second defendants. The second defendant is the shareholder of the first defendant whilst the third defendant is the sole shareholder of the second defendant.

3 The third defendant has/had other companies in his stable. One was The Listen Charity, incorporated in March 1999, which was a charity organisation to help disadvantaged children. Another was Listen Entertainment Limited ("LEL"), incorporated earlier but which became a wholly-owned subsidiary and the trading arm of, The Listen Charity. The third defendant used to be a trustee of both The Listen Charity and LEL before he resigned, purportedly to avoid a conflict of interest. In his testimony and that of some of his witnesses, the third defendant referred to a tripartite agreement made between the second defendant, LEL and The Listen Charity dated 4 July 2005 ("the tripartite agreement") which governed the relationship between the three companies *inter-se* and which under cl 8 thereof, allowed the second defendant to establish subsidiaries such as the first defendant, to carry out all or part of the second defendant's functions. I shall return to the tripartite agreement later.

4 In 2003, the third defendant (who professed to have a sterling reputation in organizing musical events on an immense international scale) and his deputy Paul Duggan ("Duggan"), approached the Singapore government's top officials with a proposal for an event known as Listen Live ("the Event"). The third defendant had previously used the second defendant (which produced multimedia entertainment campaigns to support social, political and cultural causes culminating with global broadcasts) as a corporate vehicle to stage some major and highly publicised events (*eg,* Nelson Mandela's ("Mandela") 70th birthday tribute and The Wall Concert).

5 The plaintiff was designated as the lead agency to negotiate with the defendants. Over the course of a series of meetings with the plaintiff spanning from July to September 2003, the third defendant represented that the Event was to be the culmination of a 180-day worldwide campaign called Listen Campaign ("the Campaign"), which would comprise a series of activities involving well-known celebrities to be broadcast to 500 million people in over 80 countries, featuring 20 major film stars, 20 major music stars and 20 major world dignitaries, heads of state and members of royalty and that this would raise funds (US$92m) for the world's most disadvantaged children.

6 The carrot dangled by the third defendant to entice Singapore's participation was the immense publicity that would accompany the Event. This allegedly included: (a) US$100m worth of campaign opportunity to showcase Singapore to 500 million people worldwide; (b) a sponsorship package providing US$20m worth of exposure returning US$5m worth of 30-second TV and radio commercial spots worldwide; (c) projected spending of US$18.5m in Singapore by industry executives, foreign fans, production teams, visiting broadcasters and press who were attending the international broadcast event; (d) projected US$5m of ticket income; and (e) projected employment of 16,000 man-days.

The First Agreement

7 The negotiations led to the signing of an agreement on 16 January 2004 ("the First Agreement") between the plaintiff and the first defendant – which the third defendant said was a Special Purpose Vehicle ("SPV") specially created to hold the rights to artistes, to ensure that such rights could not be exploited for events other than the Campaign.

8 Under the First Agreement (see AB1-34), the plaintiff was obliged to pay the sum of $12,832,500 comprising of: (a) an underwriting sum of $4,132,500 (recoverable from ticket sales for the Event)

and (b) a sponsorship sum of $8,700,000 (to buy media coverage of an equivalent or greater value). (Hereinafter, the plaintiff's advances or payments to the defendants will be referred to collectively as "the sponsorship sums"). In return, the first defendant was obliged to procure the necessary artistes, broadcasters and financing to stage the Event, in particular, "Core Finance", which was budgeted at $35,104,500, and crucial to the successful staging of the Event. The deadlines providing for the fulfilment of these obligations were time-sensitive as the First Agreement stipulated that the Event "must be staged latest by March 2005". For example, cl 8.2 of the First Agreement provided that if the first defendant failed to confirm that it had raised Core Finance 180 days prior to the staging of the Event, the first defendant could terminate the First Agreement. In that event, the company was obliged to return whatever sponsorship sums the plaintiff had paid.

9 Notwithstanding the contractual timelines, the first defendant failed to procure the necessary artistes, broadcasters or financing required under the First Agreement, attributing this to external events beyond its control and which diverted attention from its fund-raising attempts (*eg*, the tsunami that hit Asia at end 2004). The plaintiff accepted this explanation and agreed to the defendants' request for several consequential amendments to the terms of the First Agreement.

The Second Agreement

10 The defendants' requests culminated in another agreement dated 24 March 2005 ("the Second Agreement") (see AB35-66) between the parties to capture and reflect the extensive variations to the terms of the First Agreement; these included a more front-loaded payment schedule for the sponsorship sums as well as a reduction of the key deliverables for the confirmation of artistes and broadcasters. This appeared to be a gesture of good faith on the plaintiff's part since it could have legally terminated the First Agreement at that time and demanded refund of all sponsorship sums it had paid to the defendants. Clause 8.2 from the First Agreement was retained with amendments - the period for confirmation of Core Finance was reduced to 130 days while the right to terminate was available to both parties instead of only being available to the first defendant (see [31] below).

Core Finance under the Second Agreement

11 On 23 May 2005 (see AB2203), which was the final day for the first defendant to confirm that it had raised Core Finance, the company purported to give confirmation to the plaintiff that Core Finance had been raised in the sum of $38,876,496.14. This allegedly comprised of, *inter alia*, Past Development Expenditure (£3,423,901), an Abi-Art guarantee (US$500,000), an Audience Response Company ("ARC") guarantee (€1m), a loan from one Stuart Clenaghan ("SC loan") of £2.5m, as well as the plaintiff's total commitment of $12,832,500 plus $5.1m from Singapore Airlines ("SIA").

12 Although the plaintiff had serious misgivings about the purported constitution of Core Finance under the Second Agreement (which will be elaborated upon below in [64]-[67]), it made a decision to "acknowledge", without prejudice to its rights, that the first defendant had confirmed Core Finance, so as to enable the Event to proceed.

Events leading to the Third Agreement

13 Under the Second Agreement, the first defendant was also required to confirm the attendance and identities of the first batch of Core Event Artistes and Core Broadcasters at least 130 days prior to the staging of the Event (*viz* by about 23 May 2005). Despite having more time to procure the necessary artistes and broadcasters, the defendants were still unable to meet the timelines stipulated. Again, they blamed their inability to comply with the stipulated timelines on extraneous factors such as a competing event called Live 8 (which was held on 2 July 2005), as well as the

terrorist bombings in London and Cairo.

14 As a result of the first defendant's failure to meet these milestones, it became apparent that the defendants would not be in a position to stage the Event between 16 September 2005 and 1 October 2005 as envisaged under the Second Agreement. Between July and August 2005, several meetings were called to discuss how the parties could proceed in the light of the first defendant's failure to meet its obligations under the Second Agreement.

15 One of these meetings was convened on 11 August 2005 and attended by the third defendant, Duggan and five representatives from the plaintiff. At this meeting, the third defendant informed the plaintiff that The Listen Charity Trustees were of the view that the Event could not proceed within the existing timeframe and should therefore be cancelled. At this juncture, the plaintiff could have terminated the Second Agreement and sued for the return of the sponsorship sums it had paid.

16 However, the plaintiff alleged that at this crucial meeting, the third defendant represented that if the plaintiff could agree to a postponement, the defendants were confident that the Event could still be staged. In reliance on this material representation, the plaintiff agreed to a postponement of the Event and entered into yet another agreement on 18 August 2005 ("the Third Agreement") (see AB 67-89), which provided that staging of the Event would be postponed to April 2006. There was also a side letter signed between the plaintiff and the first defendant dated 18 August 2005 ("the side letter") (at AB1602-1603), which material portions stated:

> a both the prior agreements between STB and [the first defendant] dated 16 January 2004 and 24 March 2005 ("Prior Agreements") shall be deemed terminated upon the signing of the revised Sponsorship Agreement on Listen Live;
>
> b neither… have any claim whatsoever arising from or in connection with any of the Prior Agreements against the other and even if such claims exist, both parties hereby waive all of its rights against the other in respect of those claims; and
>
> c neither party has any further obligations to the other arising from or in connection with any of the Prior Agreements. In this respect, the parties also agree that notwithstanding STB's letter to [the first defendant] dated 16 June 2004, STB is hereby released from its obligations to enter into any further agreements with [the first defendant] in respect of any future Listen Campaigns and Listen Live.

17 However, despite the Third Agreement, the third defendant claimed by his letter dated 5 January 2006 (AB1696) that the first defendant was unable to confirm Core Finance under the Third Agreement by 28 December 2005 and purported to terminate the same on this basis. Subsequent suggestions by the plaintiff to further postpone the Event were rejected by the defendants.

The pleadings

18 The plaintiff's pleadings contained numerous allegations, which portrayed a pattern of discreditable conduct, non-performance, slipshod and/or fraudulent fulfilment of contractual obligations on the part of the defendants. The plaintiff's claim was premised on the following causes of action: (a) repudiatory breach of contract; (b) fraudulent and/or negligent misrepresentations; (c) total failure of consideration; and (d) breach of trust. Pursuant thereto, the plaintiff sought against all the defendants on a joint and several basis, refund of all sponsorship sums as well as damages for breach of contract.

19 The defendants, on the other hand, categorically denied any attempts to cast aspersions on their good faith and competence. The defendants submitted that they did not misrepresent the truth to the plaintiff, but genuinely believed and intended for the Event to be staged. In any event, the defendants insisted, they were contractually entitled to terminate the Third Agreement with no further obligations. Alternatively, the defendants alleged that the plaintiff was itself in repudiatory breach of its own obligations in any event – the plaintiff had failed to give the requisite notice to the defendants to rectify its breaches.

20 The defendants rejected any assertion of joint and several liability on the basis that the plaintiff well knew that the first defendant was specifically set up as a SPV to limit the defendants' liability. Finally, the defendants counterclaimed for damages for misrepresentation on the basis that they had suffered loss and damages as a result of the alleged failure of the plaintiff to adequately fulfil its sponsorship obligations.

21 The task of determining the many issues involved was not made any easier by the parties' conflicting versions of events during the 15 days' trial with the plaintiff calling six witnesses (including its CEO Lim Neo Chian ("Lim")) while the defendants sought to prove their defence and the counterclaim through the third defendant, Duggan and nine other witnesses.

The plaintiff's case

22 In summary, the thrust of the plaintiff's case was premised on attempts to show the lack of competence and *bona fides* on the part of the defendants, who, at best, lacked the ability and resources to stage the Event and, at worst, fraudulently induced and manipulated the plaintiff into disbursing the sponsorship sums.

23 The plaintiff sought a rescission of the Third Agreement and refund of the sponsorship sums as well as damages for breach of contract, based on a multi-pronged attack. First, it submitted that the defendants were in repudiatory breach of the Third Agreement for failing to confirm Core Finance and for failing to make reasonable efforts to raise Core Finance. Second, the plaintiff claimed that the defendants fraudulently and/or negligently misrepresented that the Event would proceed if the plaintiff agreed to a postponement, thus entitling the defendants to rescind the Third Agreement. Third, the plaintiff alleged a total failure of consideration on the defendants' part by virtue of their failure to stage the Event and asserted that the defendants had been unjustly enriched thereby. Finally, the plaintiff insisted that the sponsorship sums were to be used only to stage the Event and that the defendants had acted in breach of trust by applying those funds for improper/other purposes.

24 Pursuant to the foregoing causes of action, the plaintiff further averred that the defendants were jointly and severally liable for damages and sought the return of the sponsorship sums on the basis that: (a) the first defendant was a sham or mere front for the second and third defendants; (b) the third defendant was the alter ego of the first defendant; (c) the third defendant had dishonestly assisted the first defendant to breach its obligations to the plaintiff by, *inter alia*, assisting the first defendant to act in breach of trust through the improper use of the sponsorship sums; (d) the first and the second defendants operated as a single economic entity and/or functional whole; and (e) the first defendant entered into the three agreements with the plaintiff as agent for the second defendant and/or the third defendant.

The defendants' case

25 The defendants' contention was that the plaintiff only contracted with the first defendant. As

such, there was no basis for the plaintiff to sue either the second or the third defendants. The first defendant pointed out that the First Agreement allowed *only* the first defendant to terminate the agreement if Core Finance was not raised, while the Second and Third Agreements allowed *either party* to terminate the agreement if Core Finance could not be raised. The first defendant also pointed out that its contractual relationship with the plaintiff was in respect of the entire Campaign and not just the Event – the first defendant was to organise and produce the Campaign and the Event was one of many elements within that overall Campaign.

26 The first defendant contended it was not required to refund any part of the sponsorship sums because those monies had been committed and/or expended on the cost of marketing and organising the Campaign and the Event prior to 18 August 2005. The plaintiff was also not entitled to a refund of sponsorship sums because there was no refund clause in the Third Agreement unlike the First and Second Agreements, while the side letter specifically stated that neither party had any claim whatsoever arising from the First or the Second Agreements.

27 As for the plaintiff's allegations on misrepresentation, the first defendant maintained that it had never given an unconditional assurance to the plaintiff that the Campaign and the Event would definitely be held.

The findings

28 For convenience, this judgment will be subdivided into sections, adhering to the framework of the plaintiff's allegations, which dealt with separate legal and factual issues.

Repudiatory breach of the Third Agreement

29 The plaintiff's allegation of repudiatory breach of the Third Agreement was premised on the defendants' failure to confirm Core Finance and to make reasonable efforts to raise Core Finance.

Failure to confirm Core Finance

30 The legal effect of the defendants' purported termination of the Third Agreement (at [17]) hinged on the rights and obligations of the parties as contained in the Third Agreement, the relevant sections of which are reproduced below.

31 The clauses relating to termination by the defendants and its effect are the following:

> 8.2 For the avoidance of doubt, the parties agree that in the event that [the first defendant] fails to make the confirmation with respect to Core Finance (as referred to in **Clause 3.7** above) on or before one hundred (100) days prior to the staging of Listen Live, either party may terminate this Agreement by giving written notice to the other party.
>
> 8.4 On such termination all rights and obligations of the parties set out in this agreement shall cease and neither party shall have any further liability to the other hereunder. This shall be without prejudice to any right or remedy that [the plaintiff] may have against [the first defendant] for any breach of this Agreement and shall be without prejudice to any right or remedy that [the first defendant] may have against [the plaintiff] for any breach of this Agreement.

32 To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract. The applicable test is

whether the consequences of the breach are such that it will be unfair to the injured party to hold it to the contract and leave it to its remedy in damages as and when a breach occurred (*Highness Electrical Engineering Pte Ltd v Sigma Cable Co (Pte) Ltd* [2006] 3 SLR 640 at [8] to [11]). Upon the occurrence of a repudiatory breach, the innocent party has a right to elect to accept the repudiation and treat the contract as at an end or to treat the contract as alive and subsisting (*Brown Noel Trading Pte Ltd v Donald McArthy Pte Ltd* [1997] 1 SLR 1).

33 Indeed, cl 8.2 of the Third Agreement essentially echoed the common law position on the consequences that follow a repudiatory breach, except that it modified the position by allowing both the plaintiff and the guilty party, *viz,* the first defendant, to terminate the agreement. In practical terms, it removed the right of election for the innocent party to treat the contract as subsisting. The logical explanation proffered by the plaintiff for this was, that without Core Finance, the Event simply could not proceed.

34 Although cl 8.2 took away the plaintiff's right of election, I am of the view that it did not also constitute a waiver of any breach or the consequent right to damages, a conclusion that is reinforced by cl 8.4, which specifically assured that it is "without prejudice to any right or remedy that the plaintiff may have against the first defendant for any breach of this Agreement". Whilst the plaintiff retained the right to sue for damages occasioned by such breach, whether such a breach did in fact occur is quite another matter altogether.

35 The plaintiff had pleaded a breach of cl 3.7 of the Third Agreement, which obliged the first defendant "at its own cost" to:

> Use reasonable efforts to secure SGD 30 million of sponsorship funds and financing to cover the cost of organising, staging and producing the Listen Campaign including Listen Live ("Core Finance") from all available sources…
>
> Further [the first defendant] shall provide evidence to [the plaintiff], at least one hundred (100) days prior to the Listen Live being held, that the Core Finance has been provided and/or raised and/or guaranteed which [the plaintiff] shall acknowledge (such acknowledgement not to be unreasonably withheld or delayed).

36 In the light of the factual matrix, the plaintiff asserted that the first defendant was obliged to:

(a) use reasonable efforts to raise Core Finance from all available sources; and

(b) provide evidence of Core Finance 100 days before the Event.

37 The plaintiff interpreted the heading to cl 3, *viz*, "CML's Duties and Obligations" and the prefatory words to the clause, *viz*,"CML shall at its own cost", to mean that the first defendant was obliged to stage the Event at its own cost. Clause 3 of the Third Agreement states:

> 3.1 Organise, promote and produce the Listen Campaign strictly in accordance with the timetable and schedule set out in **Appendix A**. Any change to **Appendix A** shall be agreed upon in writing between the parties in advance.
>
> 3.2 As part of the Listen Campaign, stage Listen Live strictly in accordance with **Appendix** B and procure the global broadcast thereof.

38 The plaintiff argued that such an interpretation was not inconsistent with cl 3.7 (at [35]) as the

first defendant was to use reasonable efforts to raise Core Finance from third parties failing which the first defendant was obliged to provide Core Finance at its own cost. In support, the plaintiff relied on the following extract (at p 299 para 9.08) from Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 3rd Ed, 2004):

> If a clause in a contract is followed by a later clause which destroys the effect of the first clause, the later clause is to be rejected as repugnant and the earlier clause prevails. If however, the later clause can be read as qualifying rather than destroying the effect of the earlier clause, then the two are to be read together, and effect given to both.

39 The plaintiff also referred to the testimony of Ken Low (at N/E 24) and Lynette Pang ("Lynette") (at N/E 19-22) to support its argument that such an interpretation was the understanding of the plaintiff's representatives.

40 The plaintiff contended that the defendants' obligation to stage the Event was absolute (relying on cl 10.6 of the Third Agreement) as the plaintiff was paying the defendants in excess of $12m for a concert to be staged and not merely for the defendants' efforts to try to stage the Event. It was therefore not open to the defendants to argue that a term should be implied to the effect that the Event would only be staged if Core Finance was raised and that the defendants were not responsible and did not have to stage the same if they had used reasonable efforts to raise Core Finance, but had failed to do so (see their closing submissions filed on 4 January 2008 para 111). Consequently, the plaintiff argued, the first defendant was in breach *inter alia* of cll 3.1. 3.2 and 3.7 of the Third Agreement when it failed to provide evidence of Core Finance.

Failure to use reasonable efforts to raise Core Finance

41 The plaintiff also asserted that the first defendant failed to use reasonable efforts to raise Core Finance under the Third Agreement on the basis that (a) the defendants refused to apply Core Finance raised under the Second Agreement towards Core Finance under the Third Agreement; (b) the defendants' alleged plan (by way of setting up a new company for merchandising) was futile; (c) and the defendants had a secret plan to replace the Event in Singapore with one in New York.

42 Consequently, the plaintiff submitted that the defendants should not be allowed to rely on their purported right to terminate the Third Agreement under cl 3.7. The defendants' breach was self-induced and it would run counter to the maxim *Ex dolo Malo Non Oritur Actio* (no man can be allowed to found a claim upon his own wrongdoing) to exonerate them.

Fraudulent and/or negligent misrepresentation

43 The issue of fraudulent and/or negligent misrepresentation requires a revisit of the events leading up to and culminating in the Third Agreement. The plaintiff painted an unflattering picture of the defendants' insidious and/or reckless attempts to induce STB to enter into the Third and final "compromise" Agreement as a prelude to getting out of their responsibilities and liabilities under the Second Agreement.

The law of misrepresentation

44 The principles governing the tort of deceit or fraudulent misrepresentation were succinctly set out in *Panatron Pte Ltd and Another v Lee Cheow Lee and Another* [2001] 3 SLR 405 ("*Panatron Pte Ltd"*) (at [13] and [14]) as follows:

> The law as regards fraudulent representation is clear…
>
> …Basically there are the following essential elements. First, there must be a representation of fact made by words or conduct. Second, the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff. Third, it must be proved that the plaintiff had acted upon the false statement. Fourth, it must be proved that the plaintiff suffered damage by so doing. Fifth, the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true.

45 Notably, the Court of Appeal held (at [23]) that the misrepresentations need not be the sole inducement to the respondents, so long as they had played a real and substantial part and operated on their minds, no matter how strong or how many were the other factors which played their part in inducing them to act. In addition, the Court of Appeal held (at [24]) that it was no defence that the respondents acted incautiously and failed to take those steps to verify the truth of the representations which a prudent man would have taken.

46 As for negligent misrepresentations, these are representations made carelessly, or without reasonable grounds for believing them to be true (see *Chitty on Contracts* (Sweet & Maxwell, 29th Ed, 2004) in Vol 1 at para 6-066). Silence or an omission to inform the other side of pertinent facts may also constitute misrepresentation. In *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR 501, the court held (at [68]) that misrepresentation by silence involved a wilful suppression of material and important facts and an intention to deceive. Indeed, the primary difference between negligent and fraudulent misrepresentations appears to be whether the defendant had any honest belief in the truth of the representations made.

47 I return to the facts now. There is little doubt that the plaintiff was highly impressed by what the third defendant initially represented as his credentials, as reflected in an email from Oliver Chong ("Chong") to Lim dated 19 April 2004 (at AB1835), so much so that Lim was prompted thereby to approach Temasek Holdings' chief executive Ho Ching on 10 May 2004 (at AB1837) for sponsorship. The information contained in Chong's email on the Event could only have come from the defendants. (Chong was then the plaintiff's Director of Lifestyle and Events). However, the credit for the two mammoth events cited by the defendants to support their credentials should not have been solely attributed to the third defendant and/or his organisational abilities. I refer specifically to Mandela's 70th birthday tribute held on 11 June 1998 (see above[4]) at Wembley Stadium. It was a British singer called Jerry Dammers who initiated that concert which was also called the Free Nelson Mandela concert as at the time, Mandela was still incarcerated (for 27 years) and he was only released from prison on 11 February 1990. Amongst apartheid opponents both in South Africa and worldwide, Mandela was an iconic symbol of freedom and equality; he was and still is immensely popular. Consequently, there was no lack of international entertainment personalities who were willing to participate in the concert. 72,000 people attended the concert while more than 600 million television viewers from 60 countries watched the broadcast of the same.

48 As for the Wall Concert held on 21 July 1990 to commemorate the fall of the Berlin wall, it was produced and funded entirely by Roger Waters from the pop group Pink Floyd. The concert's venue was at (part of) the former "no man's land" between East and West Berlin. The coming down of the Berlin wall was symbolic of the fall of communism and hence the Wall Concert attracted a sell-out crowd of over 200,000 people, which figure according to the media, doubled just before the performance began.

49 Consequently, while the third defendant and his companies may have been engaged to take charge of the logistics and the nitty gritties involved in presenting such mammoth events, they can hardly take credit for organising/producing either concert. Even if the third defendant was to be given due credit for the two events, I would say this was a case where two or more swallows did not make a summer. (According to the second defendant's brochures at AB201-269, it had organised seven other similar events).

Alleged misrepresentations

50 The first set of representations complained of by the plaintiff related to the authenticity and enforceability of Core Finance. In this regard, there was little doubt on the evidence that the defendants' confirmation of Core Finance was achieved by a combination of loans and financing arrangements with friendly and/or related parties, in order to create the illusion that financing was in place so as to trigger payment of the sponsorship sums from the plaintiff.

51 Although, there were inconsistencies in the parties' version of events relating to the meeting of 11 August 2005 (regarding which the plaintiff's witnesses had testified that the third defendant gave an unequivocal assurance that if the Event was postponed, it could be successfully staged), there was no indication that the defendants had experienced or expected to face difficulties in raising Core Finance.

52 Relying on minutes of the meeting allegedly recorded by Duggan, the defendants claimed that they had repeatedly informed Lim at that meeting that "all the money is gone", whereas the minutes recorded by the plaintiff's Hazel Teh Choon Mei ("Hazel") contained no mention that such a statement was made. In this regard, the court was informed that Duggan's minutes were only made available after the defendants were compelled to do so by two discovery applications taken out by the plaintiff, who took the position that those minutes were a "blatant and complete fabrication". The defendants first informed the plaintiff that Duggan's minutes existed, in a letter on 10 March 2006 from the first defendant written by the third defendant, which contained the following cryptic comment (at AB1721 at para 4):

> Paul and I have consulted the detailed notes we made before and during those meetings and it is clear that what I have summarised above and previously is true.

The question that comes to mind is – why were Duggan's notes not revealed earlier? Moreover, unlike Hazel who was seen to be taking notes (which the defendants admitted), none of the plaintiff's witnesses who attended the meeting saw either the third defendant or Duggan making any notes. Duggan's lame explanation on the lateness of disclosure of his minutes (the notes were stored away, then misplaced, but subsequently found after strenuous searches) did not answer the question why their existence was not revealed *soon after* the meeting, but only in March 2006.

53 I should point out that the same criticism of late discovery was levelled against the plaintiff by the defendants. The defendants' closing submissions pointed out that Hazel's notes of the same meeting were only given to the first defendant on 28 November 2006, after the defendants had taken out an application for discovery and the defendants alleged that the plaintiff did not offer any explanation for the late discovery.

54 I would add that Chong (PW6), who had extensive dealings with the third defendant, had categorically denied the defendants' version of what was said at the meeting on 11 August 2005 in the following terms (see N/E 288):

Q: --it was a deal breaker for obvious reasons because the money had all gone. Mr Hollingsworth had told you that there was no more money left.

A: I disagree categorically with that.

And at N/E 289:

A: At no time did Tony tell us that the monies that we have given out to him has been spent, at no time. Not---

…

A: ---at that 11th August meeting, not even during the negotiations, not once.

…

A: Because it would have been a deal breaker for us too, if all monies have gone, how else he's going to do the event? And we can't just write off 6 million, Mr, er, Mr Chelva. $6 million of public funds to be just written off? I mean, that is inconceivable. If it had been told to us that $6 million had been gone at the 11th August meeting, what will you do? Would we still go on? Would we still believe that the event can go on? No.

55 Having had the opportunity to observe the demeanour of the parties and assessed their conflicting accounts of what transpired at the meeting, I am inclined to disbelieve Duggan and the third defendant. I accept the version of Chong as well as the plaintiff's other witness who attended the meeting, *viz*, Hazel (PW3). Hazel's minutes were exhibited (also at PB46-47) in and narrated at para 8 of her affidavit of evidence-in-chief. The defendants' version was to be found in Duggan's written testimony (at exhibit DG-48).

56 Having dealt with the law on misrepresentation, I turn now to the facts. At the meetings between the parties in July/August 2005, the defendants made various representations that the Event could/would only be held if it was postponed and a new agreement entered into. The defendants never informed the plaintiff that Core Finance would be a problem. It was the plaintiff's case that the defendants' conduct was intended to and did induce the plaintiff to enter into the Third Agreement as the plaintiff fully relied on the representations. It was no defence for the defendants to plead (in para 135 of the Defence and Counterclaim) that the plaintiff had a duty to make its own independent decision with regard to the three agreements. In any case, acting incautiously and failing to take steps to verify the truth of representations on the part of the misrepresentee is no defence to the tort (see *Panatron Pte Ltd* ([44] *supra*)).

57 The plaintiff further accused the defendants of fraudulent misrepresentation. In order to find a way to evade their obligations to refund the plaintiff's monies under cl 8.2, STB alleged that the defendants exploited a weakness in the plaintiff they had noted since the time of the First Agreement, *viz*, that the plaintiff would bend over backwards to accommodate the defendants because of the plaintiff's anxiety to ensure that the Event was held in Singapore. This can be seen from the fact that although the first instalment of 15% ($8.7m) of the sponsorship sums under the First Agreement was only due on the defendants' confirmation of Core Finance having been raised, the plaintiff had acceded to the third defendant's email request of 16 June 2004 to advance the sponsorship sums prior to confirmation of Core Finance. Hence, the plaintiff remitted to the first defendant $435,000 (5% of the sponsorship sums) on 16 July 2004.

58 After the Second Agreement was signed (24 March 2005), the plaintiff disbursed further sums totalling $5,720,250 between 22 June and 1 July 2005. The defendants took advantage of the plaintiff's weakness and declared on 11 August 2005 that they would not proceed with the Event unless the plaintiff agreed to an extension. The third defendant with the undoubted collusion of Duggan informed the plaintiff's representatives that the refund condition in cl (8.2) was a deal breaker. This was not only not denied by the defendants, but put to Chong by their counsel prompting Chong's indignant outburst set out in [54]. The plaintiff submitted this was in reality a threat as the defendants well knew that the plaintiff had little choice but to agree, having already disbursed S$6.1m to the defendants.

59 It was therefore absurd of the defendants to suggest (in their submissions filed on 31 January 2008 at para 71) that the condition to refund sponsorship sums was removed from cl 8.2 because it was recognised that the plaintiff's monies had all been spent. It bears repeating that the plaintiff's representatives who attended the meeting on 11 August 2005 had all testified that at no point were they told that the sponsorship sums had been spent. If indeed as Duggan's minutes recorded, the third defendant did say to the plaintiff's five attendees at the meeting (more than once) that "your money, ours is all gone", it beggars belief that Lim as the CEO of a statutory board, and his officers, would still want to go ahead with the Event, sink more money into the venture and waive the refund requirement under cl 8.2 of the Second Agreement. Had the plaintiff's representatives known that the defendants had dissipated $6.1m in less than three months as the third defendant claimed in these proceedings, the plaintiff would not have agreed to postpone the Event, let alone entered into the Third Agreement. Instead, the plaintiff would have terminated the Second Agreement immediately, demanded and then sued the defendants for, refund of the sponsorship sums.

60 The plaintiff argued that the only conclusion one can draw from the defendants' actions was that the defendants engaged in an elaborate charade by holding discussions that led to the Third Agreement, so as to induce the plaintiff to relinquish its rights to a refund. The plaintiff accused the defendants of orchestrating the meetings in July and August 2005 in order to deceive the plaintiff. As it turned out, the plaintiff was indeed deceived because the defendants had no intention of staging the Event at all.

61 The plaintiff relied on subsequent events to buttress its accusation that the defendants had practised deceit. First, on 12 August 2005, the third defendant sent an email to the plaintiff's legal officer, Purnima Shantilal, (at AB1167) claiming it was the plaintiff that asked for a postponement. Chong set the record straight by his email to the third defendant of 13 August 2005 (at AB1166). The third defendant then wrote to the plaintiff's Assistant CEO Chan Tat Hon ("Chan") on 13 August 2005 (at AB1165) asking Chan to write to the third defendant to the effect that it was the plaintiff who asked for the postponement; Chan did not accede to the request.

62 Second, unbeknownst to the plaintiff, the defendants were secretly making arrangements to stage the Event in New York in July 2006 instead of in Singapore and had even booked Madison Square Gardens as the venue. Third, the defendants were unable to offer any credible explanation as to why they could not apply a single cent of the Core Finance they confirmed they had raised (exceeding $38m) under the Second Agreement towards the Core Finance under the Third Agreement when it was for a lesser sum of $30m. Nor could the defendants explain why all preparatory work done under the Second Agreement could not be or was not channelled to the Third Agreement.

63 The defendants' witness, Arvind Singh (DW10), had conceded (at N/E 1295, 1305 and 1323) that certain items paid for earlier could have been recycled even if the Event was postponed to a later date. Instead, the third defendant offered an absurd explanation (at N/E 527) that although the amount of Core Finance to be raised under the Third Agreement was less than under the Second

Agreement, the sum was actually greater because it entailed raising entirely fresh capital. On the other hand, if indeed the defendants had raised Core Finance under the Third Agreement or could have it easily available from the Second Agreement, they had wilfully and deliberately concealed it from the plaintiff.

64 Earlier (at [12]), I had alluded to the plaintiff's misgivings on the Core Finance items. Chong had questioned (in paras 79 to 81 of his affidavit of evidence in chief ("AEIC") several items that comprised the Core Finance. First, Chong questioned how past development expenditure could qualify as funds available to stage the Event. He also entertained doubts over the alleged guarantee of US$500,000 from ABI-Art Brokerage Inc (ABI) and the guarantee arrangement of €1m between ARC and the first defendant.

65 The guarantee of US$500,000 was from ABI, a Californian company, in favour of the first defendant as well as in favour of LEL (see [3]). ABI was in the business of selling and marketing fine art. Chong opined that it was impossible to know how much of that guarantee the first defendant could call upon. The defendants had produced an agreement dated 13 May 2005 (at AB 2210) between ABI and the first defendant wherein ABI agreed to "produce limited edition high-end multimedia embellished copies of limited edition artwork (that would be produced by 20 core visual artistes) and would arrange for the signing of the limited edition artwork by the core visual artistes" (see cl 2.10 of the agreement).

66 As for the ARC guarantee of €1m, the third defendant had testified that ARC was an abbreviation for Audience Response Company Pte Ltd, a Singapore company the third defendant had incorporated in which he and Duggan were the only shareholders. ARC had signed an agreement dated 20 May 2005 with the first defendant wherein ARC agreed to provide the first defendant with an audience response mechanism that would, *inter alia*, allow the public to respond to the Campaign in not less than three languages.

67 Then there was the SC loan. This was a loan taken from the third defendant's friend (from their tertiary education days together). The third defendant testified that SC (who had become a successful banker) agreed to provide a stand-by loan/guarantee for a sum of £2.5m to the first defendant. The loan would only be made available between 20 September 2005 and 20 January 2006, on the understanding that the Event would be held in Singapore between 30 September and 1 October 2005. The SC loan was evidenced in an agreement dated 20 May 2005 between SC and the first defendant; a fee of 1% (£25,000) of the loan was payable on the date of the agreement and a further 7% (£175,000) was payable on 30 June 2005. The cost of the loan was therefore £200,000 (£25,000 + £175,000).

68 After the defendants had terminated the Third Agreement and claimed they were unable to refund the plaintiff the sponsorships sums, one item of expenditure for which the third defendant used the sponsorship sums was part-payment (on 20 May 2005) of interest on the SC loan. This was stated in the report dated 15 August 2007 of their expert witness Kaka Singh ("Singh") and by the third defendant's own admission (at N/E559). Singh had apparently verified with SC that the latter received £12,500 from the defendants. I should add that notwithstanding that the defendants paid interest on the SC loan, they replaced it with another loan (the Nexus loan).

Other breaches

69 Consequent on the defendants' failure to stage the Event, the plaintiff pointed to a whole host of ancillary obligations (relating to various matters such as corporate hospitality packages, press releases, ticket sales, insurance policies etc.) in the Third Agreement that had fallen due at the point

of the defendants' repudiation, but were not performed, contending that these constituted separate anticipatory breaches for which the plaintiff was entitled to damages. It was further contended that these breaches evinced an intention on the part of the defendants to be no longer bound by the Second and Third Agreements.

70 The plaintiff *inter alia* complained that the defendants failed to:

(a) organise, promote and produce the Campaign in accordance with the timelines and schedule set out in the Second and Third Agreements;

(b) provide Sponsorship benefits; and

(c) furnish the identities of Core Campaign Artistes, Core Event artistes and Core Broadcasters.

71 The most damning evidence that the defendants had no intention of staging the Event in Singapore was to be seen from the fact that they took no steps to confirm artistes or broadcasters for the Third Agreement despite the postponement of the Event. Their public relations man and promoter, Ng Geng Whye ("Ng") (DW11) of GW Agency, had during his cross-examination (at N/E 1342/1343) admitted:

(a) the defendants were unable to tell him to go public with the names of participating artistes (save for four Asian/Chinese artistes);

(b) in August 2005, he did not know for a fact if there were other confirmed artistes;

(c) he only had the names of artistes that were announced in the June 2005 press conference and thereafter he received no further confirmation of names that he could release to the public because the defendants themselves did not have the confirmation; and

(d) he had sold only 60 tickets five weeks before the Event.

72 Ng revealed that as of the date of the press conference held in Singapore on 17 June 2005, only four regional/local artistes viz David Tao, A-Do, Kit Chan and Wang Lee Hom were confirmed. Ng was paid US$43,220 and $113,200 for his services which included opening a bank account in the name of GW Agency for the defendants. He disclosed that on the instructions of the third defendant and Duggan, he was told to cease work and he closed the bank account on 27 August 2005.

Misuse of funds/Breach of trust

73 The next issue related to the defendants' alleged failure to account for the expenditure of the sponsorship funds.

Misuse of funds

74 The plaintiff alleged that the defendants repeatedly failed to disclose documents showing how and when the plaintiff's funds were disbursed, despite the fact that cl 3.8 of the Third Agreement required the first defendant to maintain up-to-date and accurate records of usage of the sponsorship sums and permit the plaintiff by prior appointment to inspect as well as take copies of the accounts. The third defendant's lame explanation that the plaintiff never asked was rebutted by the plaintiff's letter dated 27 March 2006 (at AB1726) wherein the plaintiff pointedly stated:

…despite our repeated requests, you have tellingly refused to furnish any concrete details of your

alleged efforts to raise Core Finance.

In addition, despite your acknowledging our repeated requests for a detailed account of the manner in which STB's funds of S$6,155,250 ("the STB funds") were spent, and your confident assertion in your letter dated 10 March 2006 that you will "happily provide it" to us, you have nevertheless failed to do so.

The third defendant's assertion that he did provide the records in May 2006 (meaning the audited accounts of the first and second defendants) was also shown to be incorrect during cross-examination (N/E 426).

75 Further, despite being required by a court order to furnish discovery, the defendants produced voluminous invoices for large sums of expenditure under vague headings such as "overheads", "administrative charges" "consulting" and "artist booking", without any other supporting documentation to justify the legitimacy and quantum of the payments. Questioned repeatedly on the lack of substantiation during cross-examination, the third defendant (at N/E 424) eventually said that by giving lump sum figures, the same sufficed for the purpose of compliance with the Third Agreement. Further doubts on the authenticity of the documents were cast when it was noted that accounts for the second defendant as of 30 June 2005 were created in July 2007.

76 The defendants sought to legitimise their expenditure by appointing as their expert witnesses Singh (DW4) and Cheng Soon Keong ("Cheng") from the accounting firm of RSM Chio Lim to justify each expense. The plaintiff predictably, sought to undermine the credibility of the expert evidence (particularly Singh's) by objecting to the admissibility of certain documents (on the grounds of authenticity and hearsay), which purportedly demonstrated how the plaintiff's funds have been expended.

77 While the defendants attempted to circumvent this evidential obstacle by adducing those documents through Singh's testimony and expert report, it did not adequately address the issue of authenticity. Indeed, the Engagement Letter dated 14 March 2007 signed by Singh himself as a partner of RSM Chio Lim (exhibit P17) specifically stated that:

All decisions on reasonableness in relation to overheads and costing basis/methodology and the authenticity of documents provided to us as supports shall be the sole responsibility of CML, Tribute and Tony Hollingsworth. We shall not be responsible for the outcome of the decisions.

78 Indeed, such indirect attempts to establish the legitimacy of expenditure went against the rule as regards primary documentary evidence under ss 63 to 66 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act"). A document cannot be admitted into evidence until its authenticity has first been proven (*Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377 at 381). Even after authenticity has been established, it would still be necessary to prove the truth of the contents of the documents, subject to established hearsay objections (*Jet Holding Ltd and Others v Cooper Cameron (Singapore) Pte Ltd and Another and Other Appeals* [2006] 3 SLR 769 at [36]).

79 The plaintiff therefore submitted that the defendants had neither proven the authenticity of a large number of documents (23 items according to para 312 of their submissions filed 7 December 2007) that they had relied on to demonstrate the legitimacy of their expenditure of the sponsorship sums, nor had they adequately proven the truth of the contents of those documents.

80 I am of the view that the plaintiff's objections are valid. The defendants' experts Singh and Cheng essentially relied on what they were told either by the second and third defendants' auditors or

by the third defendant himself. There was little or no independent verification on their part. Neither expert was in a position to testify that they had sighted primary documents or the actual invoices for expense items nor did they question the invoices they had seen. One example would be the third defendant's payment of four invoices all dated 7 September 2005 (see DB2256-2259) of solicitors, Harbottle & Lewis. The third defendant himself was unable to enlighten the court on the nature of such legal services rendered nor why the solicitors would issue four invoices in one day, for sums totalling £23,546.62. It was absurd of the two experts to expect the court to accept that verification in some instances included speaking to the third defendant; self corroboration is no verification.

81 Apart from the challenge mounted against the documents relied upon by Singh, the plaintiff characterized as "extremely curious" the defendants' inexplicable appointment of Singh to conduct a separate "audit" and to testify as an expert witness by relying extensively on documents prepared by Deloitte & Touche ("Deloitte"), which had allegedly verified and audited all of the defendants' expenses. The defendants could simply have appointed Deloitte or called Deloitte to testify. For that matter, why did the defendants not call the defendants' own accountant, Keith Swallow, to testify? After all, he was one of the three sources of Singh's information and documentation (the other two being the third defendant and Duggan).

82 Section 116, illustration (g), of the Evidence Act states that "the court may presume… that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it". In *Teng Ah Kow and Another v Ho Sek Chiu and Others* [1993] 3 SLR 769, the Court of Appeal explained (at 777) that where no explanation is given for not calling a material witness, the court can presume that if this material witness had been called, his evidence would have been unfavourable. In the circumstances, it was the plaintiff's submission that an adverse inference should be drawn against the defendants for their omission to call Deloitte, on the presumption that if called, Deloitte's evidence would not have been favourable to the defendants; I agree.

83 Counsel for the plaintiff added that the defendants' expert witnesses were blatantly deferential to the defendants and were unreliable. Apart from the limited scope of the experts' audit work, the plaintiff highlighted innumerable failings in Singh's audit exercise that appeared to corroborate the auditor's lack of adequate verification.

84 The court's attention was drawn to Singh's cross-examination in the course of which he testified *inter alia*, that: (a) in relation to an erroneous transfer of $422,000 from the first to the second defendant's account, it was of "no interest" to him and that "CML can transfer the amounts to Tribute or to anybody else they want to" (at N/E 1004); (b) in relation to requesting the confirmation from recipients that they received the money in respect of services provided, that his team would have to go on the basis that "people are honest sometimes, most of the time" (at N/E 1020); (c) it was not part of his scope of work to find out if there were lapses in maintaining established accounting standards, such as the blanket transfer of $2,635,075.57 to the second defendant without proper authorisation or any documentation from the first defendant (at N/E 1011/1012); and (d) in relation to the figures relating to overheads, he did not independently assess or evaluate the reasonableness of the figures and he relied on the external auditors for verification of the expenses incurred by the second defendant (at N/E 1001). One example of Singh's questionable verification related to the third defendant's expenditure of £56,744.90 on air-tickets for the period 5 January 2005 to 8 July 2005. Singh said he sighted the invoices issued by Bluebird Travel Ltd as well as evidence of payment by the second defendant, but, in his report (at para 3.17.2.6) he revealed he was not shown any documents detailing the purpose of the trips made.

85 Such a cavalier attitude (due perhaps to the limited terms of reference) casts considerable doubt on the adequacy of the verification exercise undertaken by Singh to legitimize the dissipation of the

sponsorship sums. In this regard, the Court of Appeal recently clarified in *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm)* [2007] 4 SLR 460 ("JSI Shipping") (at [111]) that:

> …items that can be directly verified should, whenever practical, be in fact directly verified; such verification goes to the core of an auditor's skill and competence and is a function of the appropriate degree of professional scepticism which all auditors must adopt. On the facts, the respondent had plainly accorded an indefensible degree of deference to Riggs, instead of assuming the burden of independent verification coupled with an attitude of professional scepticism that all auditors should typically stake their reputations upon.

86 As was further established in *JSI Shipping* (at [63]), it is open to the court to "disregard or even draw an adverse inference against expert evidence that exceeds the judicially determined boundaries of coherence, rationality and impartiality". In view of their wholly unsatisfactory form of inquiry and the unacceptable degree of deference accorded by them to the defendants, I place no reliance on the defendants' experts' reports.

87 Consequently, I am not prepared to accept the experts' testimony to the effect that the defendants had satisfactorily explained the usage and/or expenditure of the plaintiff's sponsorships sums. To add insult to injury, the defendants used the sponsorship sums for expenses they incurred in raising Core Finance (such as payment of interest on the SC loan), making a mockery of cl 3 ([37] *supra*) of the First and Second Agreements which stipulated that Core Finance was to be raised at the first defendant's "own cost".

Creation of a Quistclose trust

88 In *Pacific Rim Palm Oil Ltd v PT Asiatic Persada and others* [2003] 4 SLR 731, the court explained (at [16]) the concept of Quistclose trusts as follows:

> The reference to a "**Quistclose** trust" is a reference to the trust found in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567. The case is authority for the proposition that where money is advanced by A to B, with the mutual intention that it should be used exclusively for a specific purpose, there will be implied (in the absence of any contrary intention) a stipulation that if the purpose fails the money will be repaid, and the arrangement will give rise to a relationship of a fiduciary character, or trust.

89 In the same vein, Lord Millett (in his dissenting judgment) held in *Twinsectra Ltd v Yardley* [2002] 2 AC 164 at 193 that the beneficial interest in the money remains with the lender of the money until the purpose for which the money was paid is fulfilled.

90 On this note, counsel for the plaintiff flagged cl 3.8 of the Third Agreement which envisaged that the first defendant would keep a separate account for the sponsorship sums, thus suggesting that these funds were advanced to the first defendant in circumstances that led to a *Quistclose* trust. The plaintiff's witnesses (Lynette and Chong) had also testified that the spirit of the Agreement contemplated use of the sponsorship sums and underwriting costs only in relation to the Event.

91 Did the non-occurrence of the Event constitute a failure of the purpose of the trust thus obliging the defendants to return the funds? In this regard, the defendants were also alleged by the plaintiff to have (a) used the funds without being able to adequately account for how they were expended; (b) utilised the funds for purposes outside the Event; and (c) used the funds for their own purposes or to enrich themselves.

92 Although the defendants paraded a number of witnesses (Neil McCartney ("McCartney"), Sandra Fones, Paul Anthony Kerr, Arvind Singh) to support their contention that the sponsorship sums had all been spent on various preparations for the Event, I am of the view that the plaintiff's allegation of misuse was not unfounded. My earlier comments on Singh's report and my later observations on how the third defendant manipulated every contract to the second defendant's advantage, but to the first defendant's disadvantage, lend support to the plaintiff's accusation.

93 Not surprisingly, the testimony of the third defendant's friend and managing-director of McCartney Media Limited, *viz*, McCarthy (DW7), was completely biased in the defendants' favour. It was McCartney who revealed that the SC loan was replaced by the Nexus loan at SC's request. If indeed the third defendant (as he represented to the plaintiff) was as well-connected as he claimed, he would not have had to engage people like McCartney (ultimately at the plaintiff's expense) to pay so many third parties in turn to make contact with the public relations personnel or managers of artistes and entertainment stars. I noted too that like the third defendant, McCartney was in a position of conflict in more ways than one. His company was paid US$15,000 a month for consultancy services (without any agreement or engagement letter) and he received in total £38,645.03. McCartney deposed in his written testimony, that he was verbally engaged by the second and third defendants to work on the "business affairs" of the second and third defendants. McCartney also had another company, NSA Campaign Marketing Ltd ("NSA"), of which he and his brother Sean were directors, which had been granted (again by the second and third defendants) the right to market and secure sponsorships for the Campaign (as well as for the Tribute to Peacemakers' campaign) under an agreement dated 23 February 2004 ("the NSA agreement"). His company's invoices (8) to the first defendant included one dated 25 August 2005 (for £2,350) for assisting in arranging the SC loan. As with the interest paid on the SC loan (see [67] above), this item charged to the first defendant breached cl 3.1 of the First and Second Agreements. McCartney was also a director of LEL as replacement for the third defendant, who purportedly resigned to avoid a conflict of interest. Incidentally, it was McCartney who engaged Ng on the first defendant's behalf.

Total failure of consideration

94 Failure of consideration occurs when one party has not enjoyed the benefit of any part of what it bargained for. Where money is paid by a plaintiff to a defendant under a contract and the defendant fails completely to discharge his part of the bargain, the plaintiff has the option of either claiming in contract for damages for breach or he may treat the contract as at an end on the ground that the defendant has repudiated it and sue for the refund of the money in quasi-contract (*Ooi Ching Ling Shirley v Just Gems Inc* [2003] 1 SLR 14 at [43]).

95 For a plaintiff to succeed in a claim for a refund there must be a total failure of consideration. The test, as articulated by Kerr LJ in *Rover International Ltd and other v Cannon Film Sales Ltd* [1989] 1 WLR 912 (at 923) is "whether or not the party claiming total failure of consideration has in fact received any part of the benefit bargained for under the contract".

96 In the light of the foregoing quotation, the plaintiff claimed that the defendants' failure to deliver on their contractual obligations to stage the Event in Singapore constituted a total failure of consideration that entitled the plaintiff to a full refund of the sponsorship sums it had paid.

Joint and several liability of the defendants

97 To avoid the prospect of having an unenforceable and/or paper judgment against the first defendant, the plaintiff attempted to lift the first defendant's corporate veil by pleading that the second and third defendants should be liable for the debts of the first defendant.

98 The concept of piercing the corporate veil has been clarified by *Walter Woon on Company Law* (Sweet & Maxwell Asia, 3rd Ed, 2005) at p 61, which states that courts have generally been willing to lift the corporate veil: (a) where a company is employed to allow a person to evade his legal obligations or to commit fraud; (b) where a company is employed as an agent or *alter ego* of its controllers; (c) where the company is a sham of façade; (d) where it is necessary to give effect to the legislative purpose of a statute; (e) where the court is called upon to exercise an equitable or analogous discretion; (f) where companies in a group are run as a functional whole; and (g) where the justice of the case otherwise requires it.

99 In the same vein, it was held in *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd & Anor* [2000] 2 SLR 98 ("*Win Line (UK) Ltd*") (at [38]) that the courts would pierce the corporate veil where it was merely a device, façade or sham. It was further clarified that a sham referred to acts done or executed by parties to the sham that were intended by them to give to third parties or to the Court, an appearance of creating between the parties legal rights and obligations different from the actual rights and obligations which the parties intended to create.

100 On the facts, the plaintiff characterized the first defendant as a shell company which the third defendant used at his whim and fancy to perpetrate fraud on the plaintiff, *ie,* extraction of the sponsorship sums *via* the first defendant, without exposing himself and his primary vehicle, the second defendant, to any liability. Having dealt with the two companies as one and the same and having treated them both as his *alter ego*, the plaintiff submitted that the third defendant could not rely on the separate legal entity doctrine in an attempt to ring-fence his liability and that of the second defendant.

Lack of corporate governance

101 As a starting point, the plaintiff highlighted the lack of corporate governance evinced by the fact that the first defendant's accounts were treated for all intents and purposes as indistinguishable from the second defendant's accounts. On the evidence, I accept that there were no internal procedures for the control of movement of funds and there was a dearth of documents in relation to bank accounts and liabilities and obligations amongst the entities. On this note, I would observe that despite the third defendant's denials under cross-examination (at N/E 434) that he was not, he was essentially the controlling mind and the sole beneficiary of the profits of the second defendant, given that he was the only person within the second defendant who decided whether to pay monies to himself or to any third parties.

102 Although the third defendant repeatedly claimed in his oral testimony that whatever payments he made were done with Duggan's approval, the plaintiff unkindly described Duggan as no more than the third defendant's puppet. I agree that the evidence adduced from Duggan justified the plaintiff's description of the man. Duggan merely rubberstamped whatever withdrawals the third defendant made from the bank account of the first defendant.

103 More notably, the defendants' own expert Singh admitted under cross-examination that the accounts were "commingled" (at N/E 940):

> Q: The---would you agree with me, Mr Singh, and---and---and tell me if---whether---whether this comes from your memory or whether it is something that you know. Would you agree with me that although the amounts of---that was taken to pay the sum of 54,000 dollars [sic] was taken from both CML's bank account as well as Tribute's bank account but these were amounts that were paid from funds that were either taken directly from CML's account and paid from CML account or otherwise were transferred from CML's account to Tribute's account and then paid

from Tribute's? Would you agree with me?

A: *I'm---I'm not so sure it's so str---it's as straightforward as that, that the accounts were---that the bank accounts were in a way commingled as both---they do get transferred from one bank account to another bank account*. [emphasis added]

and that control of the first defendant's bank account was devoid of any checks and balances (at N/E 1010):

Q: And Mr Singh, would it---does it show that this transfer, this erroneous transfer of $422,000 indicates that whoever it was that was in control of CML's bank account could do so without practically any checks and balances within the company?

A : *Yes, there was only one person so what checks and balances are you talking about?* [emphasis added]

104 Indeed, such was the third defendant's disregard for the purported separate constitution of the first defendant that he even allowed the first defendant to make payments for other entities that he owned such as ARC. Whilst the agreement between the first defendant and ARC envisaged that ARC would bear the costs of engaging IBM, Genovate and Arvind Singh, the first defendant ended up making the payments for ARC, a revelation which prompted the following reaction from the court (at N/E 490):

Court: CML is made to discharge a legal liability where there's no written obligation. Yes or no?

Third defendant: No---er, yes that's correct.

I would add that Singh's report (at para 3.4.5.5) contained the disconcerting comment that the amounts invoiced by IBM did not correspond exactly to the payments made by the first/second defendants.

105 Although Singh subsequently attempted to justify the payments as "related party arrangements" which were "not uncommon", he finally admitted that this arrangement bore the hallmark of somebody who used the first defendant's funds as though they were his own (at N/E 964):

Q: Would you agree with me that this arrangement bears the hallmark of somebody who used CML's funds as if they were his own, i.e. the third defendant?

A: Yes.

106 In the course of cross-examination, the third defendant had demonstrated his absolute control over the first and second defendants as follows; he:

(a) transferred the plaintiff's advance of $434,981,29 to the second defendant's account on 3 August 2004 (N/E 460);

(b) signed all the cheques of the first defendant (N/E469);

(c) caused the first defendant to pay invoices issued by IBM to ARC (N/E479/481) when there was no obligation to do so (see [104] above);

(d) had no documents to support the transfer of monies out of the first defendant's bank

account; and

(e) cleaned out the bank account of the first defendant on 29 July 2005 and transferred its entire credit balance of $2,635,075.57 (equivalent to £901,003.75) to the second defendant's account even though there were no bills payable to the second defendant.

107 The court only had the third defendant's word (which Singh accepted without question) that the estimated number of days that the second defendant spent working on the Event in 2005 was 233 days vis a vis 50 days for his other project Tribute to Peacemakers. Similarly, the court was expected to accept the third defendant's word (without any evidence by his own admission) that it was reasonable for the second defendant to charge the first defendant 15% commission on all net income and another 10% as production fee for working on the Event.

108 When the third defendant initially approached the plaintiff to sponsor the Event, he had represented that the second defendant, with its favourable reputation and success with similar events, would be the outfit organising the Event. The purported "related party arrangements" took on a farcical turn in the light of the defendants' repeated contention (and closing submission) that the first defendant was set up as a SPV to limit the other two defendants' exposure to liabilities like the present one. As I understood it, that was *not* the explanation provided initially, as the first defendant was then alleged to have been set up to protect the artistes' rights from exploitation. According to the third defendant's own AEIC at para 46, he said:

> [The first defendant] was to be the entity which would enter into production and service contracts pertaining to the organisation of the campaign. It was to be the entity to which entered into contracts with broadcasters, ticket promoters, distributors, media outlets etc. Further all the monies from the sponsors, including monies from STB, would be placed with [the first defendant] as each sponsorship agreement would be entered between [the first defendant] and the respective sponsor. It is customary in the entertainment business to create a new "virgin" entity for each project. This is usually insisted on by investors, major sponsors and broadcasters so that the accounting of the project is separate and discreet and so there is no need for extensive (and expensive) due diligence. This rationale was accepted by STB.

109 However the facts showed otherwise. The second defendant purportedly appointed the first defendant to organise and produce the Event. Yet, the first defendant had to pay the second defendant for its services because the first defendant supposedly appointed the second defendant in turn to "manage" the production of the Campaign. Further, apart from the third defendant's word, there were no written documents/agreements to evidence the arrangements. Without any agreements, there was no basis for the second defendant to charge the first defendant a fee. As was rightly pointed out in the plaintiff's reply submissions (paras 21-22), the so-called arrangements were highly suspicious and ludicrous. A question that immediately came to one's mind is, who then was the subcontractor of the Event? Quite rightly based on the above extract from the third defendant's AEIC, it should have been the first defendant.

110 However, in reality the facts showed that the first defendant was merely the conduit to receive the sponsorship sums. Thereafter, the third defendant proceeded to milk the first defendant dry. He withdrew the sponsorship sums to generously pay himself (£200,000 per annum), the second defendant, his friends (including SC, Duggan and McCartney) and third parties before transferring all remaining funds to the second defendant's account. The first defendant was then made to bear *all* the expenses and liabilities of the second defendant as well those of third parties like ARC (not to mention being charged by the second defendant too) but, it obtained none of the benefits for being the organiser of the Event. Where liabilities were to be incurred, the contracts were entered into by

the first defendant (*eg*, the SC loan, the contract with Ng), but where income was to be received, the contract was entered into by the second defendant (the NSA agreement).

111 My conclusions can be further supported by the following evidence:

(a) McCartney was required under the NSA Agreement (see [93] above) to pay and did pay (according to him) to the second defendant the sum of £300,000 by 30 April 2004. Part of that sum (since the NSA Agreement covered the Tribute to Peacemakers event as well) should rightly have been paid over to the first defendant or should have formed part of Core Finance because Core Finance (according to the third defendant's own affidavit evidence at para 311) was to be raised from *inter alia* "contracted income".

(b) the defendants' submissions filed on 4 January 2008 (paras 520-522) sought to rely on the tripartite agreement in [3] to confer legitimacy on the exorbitant overheads (£150,000 per month or £1.8m per year) and "management" fees charged to the first by the second defendant. This argument completely overlooked the crucial factor that the first defendant was *not* a party (acknowledged in para 52 of the third defendant's affidavit) to the tripartite agreement and could not therefore be bound. The tripartite agreement itself was highly suspect – its execution date (4 July 2005) was well after the first defendant had already been charged overheads for 2004 by the second defendant and it was just a month before the Second Agreement was replaced by the Third. I have little doubt that the tripartite agreement was created as *ex post facto* justification for the huge withdrawals by the third defendant from the first defendant's bank account.

(c) the monthly overheads of £150,000 should also be contrasted with the audited accounts of the second defendant which showed annual staff cost of £136,534 and £85,772 for 2005 and 2006 respectively. Additionally, it was noteworthy that under the Second Agreement (conceded by the third defendant in cross-examination) the estimated overheads for a 12 month period up to the scheduled date of the Event was about £900,000 or £75,000 per month. The second defendant charged the first defendant twice that estimate. Over and above £150,000, the first defendant was made to pay for 22 or more items (see para 53 of the plaintiff's reply submissions) totalling £481,908 and which included the second defendant's bank charges of £1,437. One would have thought all these other expenses (even if justified) would already have been subsumed in the figure of £150,000.

112 Yet, the third defendant had the gall to depose on oath (at para 55 of his affidavit) that "Tribute [*ie*, the second defendant] received no payment and assumed all the economic risk" when the converse was true. That untrue statement is also a sharp contrast to the defendants' closing submission (at para 594 of p 258) that "there is absolutely nothing wrong with [the third defendant] and/or [the second defendant] standing to gain from the Listen Campaign". Such a contrary submission only served to highlight the third defendant's hypocrisy in repeatedly professing that his desire was to benefit the disadvantaged children of the world when the only person he benefited was himself. I say this because as the sole shareholder of the second defendant, the third defendant pockets all the profits made by the second defendant and/or fees charged to the first defendant. This excludes the third defendant's profits to be made from his interest in ARC, but which liabilities (owed to IBM and Genovate) he voluntarily took over for the second defendant and then shunted onto the first defendant. Where it served his purpose to do so, he claimed that past development expenditure formed part of Core Finance of $38m under the First Agreement. When it did not serve his purpose (under the Third Agreement), the third defendant claimed that the item did not form part of Core Finance.

113 Apart from the above financial manoeuvres, the functional interchangeability of the first and

second defendants was evident from the testimony of Singh and Duggan, as well as the testimony of Sandra Fone (DW5), who testified that it would not have made any difference whether she called the company she was working for "CML" or "Tribute".

114 This overall lack of corporate governance was astounding, in view of the fact that the sponsorship sums had been provided to a single corporate entity for a specific purpose according to the plaintiff.

115 From the evidence, it was clear that the third defendant was able to do whatever he wanted because Duggan was merely the third defendant's puppet who neither exercised any independent judgment nor provided any measure of checks and balances as a co-director. This was corroborated by the lack of written evidence to show that Duggan was indeed consulted (which I doubted) in relation to payments made from the first defendant's account and Duggan's startling assertion under cross-examination (at N/E 747) that he considered the stipulation of financial policies regarding the first defendant's cheque payments and fund transfers to be unnecessary.

116 Even more surprising was the fact that despite Duggan's frequent absence from the London office, he insisted that he was consulted on every cheque and every transfer relating to the plaintiff's sponsorship sums; this is incredible. Duggan's alleged verbal agreement to the blanket transfer of $2,635,075.57 from the first defendant's account to the second defendant's account provided scant reassurance as he was neither a director of nor a cheque signatory of the second defendant. If Duggan's testimony was to be believed (which I do not), he had, in effect, agreed to the transfer of a huge sum to a completely separate corporate entity – a decision that defied commercial logic and evinced Duggan's unquestioning deference and blind loyalty to the third defendant. Any alleged verification of payments by Duggan must have been only token if not, non-existent.

Dishonest Assistance

117 The plaintiff's second plank of attack was by an action for dishonest assistance, which required that (a) there had been a disposal of the plaintiff's assets in breach of trust or fiduciary duty; (b) the defendant assisted or procured that breach of duty; (c) the defendant acted dishonestly; and (d) the plaintiff suffered a loss (*Caltong (Australia) Pty Ltd v Tong Tien See Construction* [2002] 3 SLR 241).

118 Dishonesty is to be judged objectively (*Bansal Hermant Govindprasad and Another v Central Bank of India* [2003] 2 SLR 33). Similarly, in *Royal Brunei Airlines Sdn Bhd v Phillip Tan Kok Ming* [1995] 3 WLR 64 ("*Royal Brunei Airlines Sdn Bhd*"), the court explained (at 74) that:

> Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He might ask further questions. He might seek advice, or insist on further advice being obtained. He might advise the trustee of the risks but then proceed with his role in the transaction. He might do many things. Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct.

119 Pursuant to the foregoing principles, the plaintiff submitted that the third defendant should be

held personally liable as he had dishonestly assisted the first defendant to misapply the plaintiff's funds in breach of trust. In particular, it was alleged that the third defendant wilfully procured the wholesale transfer of the first defendant's funds to the second defendant's account on 29 July 2005 and that he had, as the person approving payments from the first defendant's account, authorised and acquiesced in irregular dealings and the expenditure of the sponsorship sums even before the purported confirmation of Core Finance on 23 May 2005.

The defendants' counterclaim

120 In response to the plaintiff's claim, the defendants had launched their own offensive in the form of a counterclaim for damages as a result of the plaintiff's alleged failure to adequately fulfil its sponsorship obligations. In particular, the defendants alleged that in reliance on a misrepresentation by the plaintiff's representatives that its Board was well connected and would have no problems raising $5.2m of sponsorship from local companies, the defendants agreed (a) to the plaintiff's counter-proposal in lieu of providing a US$14.5m guarantee; and (b) that the plaintiff would be required to use its best endeavours (in lieu of a guarantee) to raise $5.2m.

121 The plaintiff attacked the counterclaim as frivolous and without merit, a submission which I am inclined to accept for several reasons. First, the plaintiff's representatives, Ken Low (PW1) and Randall Tan (PW5), had categorically testified that they never made any such representations. Second, Lynette (PW2) gave evidence that the third defendant had assured the plaintiff in the course of negotiations that the obligation of "best endeavours" was not a guarantee to raising further sponsorship, but merely a promise to assist in opening doors to potential sponsors in Singapore, so that the defendants could proceed to promote, negotiate and close the deal with those sponsors. Lynette's version of events was amply corroborated by CEO Lim and Ken Low, both of whom stressed that the plaintiff's role as a sponsor was facilitative and limited merely to "opening doors and making the connections", whereas the onus was on the first defendant to secure the requisite financing and sponsorship.

122 Indeed, in an attachment to his e-mail to the plaintiff's Christine Khor sent on 20 November 2003 (at AB596-597), Duggan had expressly stated that:

> In the short-term and certainly up to the time we reach core financing and announce the project our need for assistance from STB is at the senior management level including the CEO. *What we need during this phase is high-level introductions to potential sponsors and partners so that we can brief them on Listen and determine their interest in participating in the project*. [emphasis added]

I am satisfied on the evidence that this was the understanding on the issue of the plaintiff sourcing for more sponsors.

123 In any event, the evidence showed that not only did the plaintiff's representatives make efforts to promote the Event to Singapore companies and other local potential sponsors, the plaintiff, in fact, secured sponsorship of $5.1m from SIA, pursuant to a sponsorship agreement signed on 15 July 2004, six months after the first Agreement had been signed. Lim himself personally contacted CEOs and heads of fourteen Singapore public companies and banks including Temasek Holdings, DBS Bank and SingTel (as well as national television's Mediacorp) by telephone, letters and email, to arrange meetings in an attempt to interest them in sponsoring the Event. The fact that SIA subsequently withdrew its sponsorship and required the defendants to pay for/refund the cost of travel on SIA flights taken by the third defendant and others was not the fault of the plaintiff; it was due to the defendants' postponement of the Event.

124 Consequently, for the third defendant to say in cross-examination (at N/E 497) and in his written testimony (at para 271) that the plaintiff made only low-level introductions and junior/inexperienced staff of STB approached organisations at too low a level respectively, was not only to belittle the concerted efforts made by the plaintiff to introduce sponsors to the defendants but showed that he was prepared to bend the truth, if necessary, for his own ends. I cannot imagine how anyone can say that SIA, with its iconic brand and reputation as one of the best if not the best (and most profitable) airline in the world can be described as a low level introduction. I should add that under vigorous cross-examination (at N/E 503) the third defendant took refuge in the excuse that because the SIA contract (dated 15 July 2004) was not signed within 90 days of the date of the First Agreement, that was his reason for saying that the plaintiff had breached its "best endeavours" obligation under cl 4.2 to recruit further sponsors (other than itself).

125 It seemed to me that the plaintiff's alleged breach of its "best endeavours" obligation represented a desperate attempt by the defendants to detract from, and to pin the blame on the plaintiff for their own failure to meet their contractual obligations, and to fulfil the ultimate responsibility to finance and organize the Event. I accept the defendants' submission that *Rhodia International Holdings Ltd and another v Huntsman International LLC* [2007] 2 All ER (Comm) 577 ("*Rhodia International Holdings Ltd*") makes it clear that an obligation to use reasonable endeavours (on the part of the defendants) was less stringent than one to use "best endeavours" (on the plaintiff's part). However, the higher burden placed on the plaintiff under cl 4.2 in the First and Second Agreements has to be seen in the context of Duggan's own understanding in [122] that the role of the plaintiff was to open doors by making high level introductions to the defendants

126 The dubious nature of the counterclaim was further evidenced by the manner in which the defendants conducted their defence, in particular, the conspicuous failure to challenge (a) the evidence of Ken Low or Randall Tan that no representations had been made to the defendants that the plaintiff would have no difficulty in procuring $5.2m of local sponsors; and (b) the evidence of Lim and Chong with regards to the extensive efforts made by the plaintiff to raise further sponsorships.

127 In this regard, *Browne v Dunn* (1893) 6 R 67 is authority for the proposition that "any matter upon which it is proposed to contradict the evidence-in-chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence in chief". Similarly, in *Liza binte Ismail v PP* [1997] 2 SLR 454, the court held (at 468) that if a party failed to cross-examine a witness on the material aspects of his evidence and there was no other reason to doubt the veracity of the witness' testimony, the court may well conclude in the final analysis that such testimony was credible.

128 In my view, the defendants' failure to present evidence to rebut the plaintiff's testimony that there was no failure on its part to use "best endeavours" showed that the alleged counterclaim was nothing more than mere posturing, without any degree of conviction on the defendants' part. The fact that the defendants shied away at the trial, from any meaningful engagement in this regard with the plaintiff's witnesses meant that they cannot put forward any case that was inconsistent with the unchallenged testimony of the plaintiff's witnesses (*Arts Niche Cyber Distribution Pte Ltd v PP* [1999] 4 SLR 111). The defendants' counterclaim is therefore without merit and I dismiss it accordingly.

Other complaints of dishonest and devious conduct on the part of the defendants

129 The plaintiff concluded its submissions with a recital of instances which proved that the defendants' representatives were untruthful, deceitful and unreliable. The many accusations of dishonesty and incompetence were based not only on the inconsistencies in the defendants'

evidence, but also on the unscrupulous and dishonest tenor of their dealings with the plaintiff when the project was still afoot. Counsel for the plaintiff submitted that the defendants showed a total lack of moral fibre and good faith by taking liberties with their contractual obligations, withholding material information from the plaintiff and secretly engineering a wholesale migration of the Event from Singapore to New York.

130 In summary, the plaintiff alleged that the defendants:

(a) dishonestly attempted to discount the value to be ascribed to the SIA sponsorship;

(b) irresponsibly attributed their failures to a host of extraneous factors but were blind to their own incompetence;

(c) dishonestly engineered the postponement of the Event under the Third Agreement;

(d) fabricated minutes of the meeting of 11 August 2005 to support their false allegations;

(e) dishonestly changed their evidence in relation to the alleged "reduction" of Core Finance from $38m under the Second Agreement to $30m under the Third Agreement;

(f) irregularly used the sponsorship sums to make payments on behalf of ARC even though it had no legal obligation to do so;

(g) lied that it was The Listen Charity Trustees who had decreed that the Event could not be held within the timelines of the Second Agreement;

(h) deliberately misled the plaintiff on the existence (or lack thereof) of Core Finance, which was precisely the reason why the plaintiff was willing to relinquish its right to a contractual refund under cl 8.2 of the Second Agreement;

(i) used arbitrary expense figures which the defendants were unable to justify with reference to any documents to show how those figures were computed or arrived at;

(j) even misrepresented that the Queen of Jordan had agreed to be involved although she had not been approached and was completely unaware of the Campaign; and

(k) secretly made plans to stage the Event in New York before the time for the Event to be staged under the Third Agreement had expired, as an escape route for themselves.

The plaintiff's harsh criticism was characterized by the tagline "incompetence may be forgiven, but dishonesty may not" and levelled at the defendants' propensity to manufacture evidence to further their own case.

The defendants' submissions

131 It would be appropriate at this juncture to set out the more salient points of the defendants' closing submissions.

132 The third defendant had alleged that the plaintiff failed to use its "best endeavours" under cl 4.2 (of the First and Second Agreements) to recruit for further sponsors from Singapore companies to provide $5.2m of sponsorship or contributions "in kind" as a contribution towards Core Finance. (The First Agreement but not the Second, contained a deadline of 90 days from the signing of the

document for the plaintiff to source for further sponsors.) The defendants' submission relied on the definition of "best endeavours" in *Justlogin Pte Ltd and Another v Oversea-Chinese Banking Corp Ltd and Another* [2004] 1 SLR 118 for their definition of "best endeavours"(reaffirmed in *Travista Development Pte Ltd v Tan Kim Swee Augustine and Others*[2007] 3 SLR 628). In the latter case, the court held at [47] that a person who is obliged to use his best endeavours:

> …must take all those reasonable steps which a prudent and determined man acting in his own interest and anxious to [achieve the desired outcome] would have taken.

133 Conversely, the defendants argued that their obligation under cl 3.7 of the Third Agreement (see [34] above) was only to use "reasonable efforts" to secure Core Finance and they were not in breach if, despite using reasonable efforts, the defendants failed to raise Core Finance. They cited *Tan Soo Leng David v Wee Satku & Kumar Pte Ltd* [1998] 2 SLR 83 for the meaning of "best endeavours" and relied on *Rhodia International Holdings Ltd* ([125] *supra*)for the difference between using "reasonable endeavours" as opposed to the higher burden of using "best endeavours". The defendants argued that the plaintiff's submission (that the first defendant would have to provide its own Core Finance if it failed to raise Core Finance) was not reflected anywhere in the Third Agreement. Otherwise, the termination provision in cl 8.2 would make no sense.

134 Relying on the various Recitals in the First Agreement, the defendants submitted that the plaintiff was sponsoring the Campaign and not only the Event. Appendix A in the First Agreement described the Campaign and it was only Appendix B that defined the Event. Similarly, Core Finance in Appendix C was the budget for the Campaign and not the Event. Consequently, usage of the sponsorship sums was not confined to the Event and the first defendant's obligation under cll 3.1 and 3.2 of the First Agreement was to organise, produce and promote the Campaign and as part of that Campaign, to stage the Event. It therefore followed that if the Campaign could not be staged because Core Finance could not be raised, then the Event could not be held either.

135 The defendants went further to add that the money raised in Core Finance (which included the sponsorship sums) was the first defendant's once it was paid over and the first defendant was entitled to use the same. They described the plaintiff's contrary argument in [37] above as commercially illogical. This argument however appeared to fly in the face of the third defendant's own email of 17 May 2005 to McCartney (who was pressing for payment) that said:

> Money has arrived from the Singapore Tourist Board but under our contract with them, it is repayable if we do not confirm Core Finance this Friday. In this sense, it is not *income*. [emphasis added]

136 As for the plaintiff's submission that a *Quistclose* trust was created, the defendants asserted that the factual matrix did not give rise to such a trust which concept appeared to be only relevant to loan arrangements, citing *Show Theatres Pte Ltd (In liquidation) v Shaw Theatres Pte Ltd* [2002] 2 SLR 144. (The plaintiff however countered this argument by referring to *Carreras Rothmans Ltd v Freemans Mathews Treasure Ltd* [1985] 1 Ch 207).

137 The defendants complained that the plaintiff should have but failed to given notice to the defendants to remedy its breach. (The defendants (but not the plaintiff) had in their submissions referred to previous notices of alleged breaches being issued by one party to the other, in which the party giving notice had requested the defaulting party to remedy the breach(es) complained of).

138 Finally, the defendants also argued that the effect of cl 10.6 of the Third Agreement meant that the plaintiffs' claim must fail. The clause states:

> This Agreement embodies all the terms and conditions agreed upon between the parties as to the subject matter of this Agreement and supersedes and cancels in al respects all previous agreements, representations and undertakings, if any, between the parties hereto with respect to the subject matter hereof, whether such be written or oral.

The defendants referred to *Lee Chee Wei v Tan Hor Peow Victor and others and Another Appeal* [2007] 3 SLR 537. The Court of Appeal there held that such clauses defined and confined the parties' rights and obligations within the four corners of the written document, thereby precluding any attempt to qualify or supplement the documents by reference to pre-contractual representations. The plaintiff was attempting to do what the appellate court held could not be done *viz* to import into the Third Agreement the pre-contractual representations by the first defendant that the Event would definitely be held.

139 At this juncture, it would be equally appropriate to make some observations on the key witnesses called by the parties, starting with the plaintiff's main witness Chong. In my view, he ably withstood the rigours of cross-examination and came out unscathed. Contrary to the defendants' submission, Chong was not "unable to give any coherent reason why the refund provision in cl 8.2 was removed". He was not given an opportunity to fully explain during cross-examination. When the court questioned him (at N/E 291), Chong had explained that he agreed to its removal because the defendants had represented that $38m had already been raised as Core Finance under the First Agreement; that factor gave him comfort as only $30m was required for Core Finance under the Third Agreement. Lim's testimony was not impeached as to affect his credibility. As for Hazel, the defendants' closing submissions criticised her taking of the minutes of the meeting on 11 August 2005 and submitted her notes were unreliable and inaccurate. Whatever the alleged shortcomings in her note-taking, I prefer Hazel's notes to Duggan's for the reasons set out in [52] above. As for the testimony of Ken Low and Lynette, it was never seriously challenged (see [121] and [122] above) as to cast doubts on their veracity.

140 In their closing submissions, the defendants made much of the fact that the plaintiff failed to call Chan to the stand, claiming that he (together with Leslie Lee ("Leslie")) was a crucial witness and the court should draw an adverse inference on his absence from court. The defendants pointed out that Chan was the signatory of the three agreements. Why was it necessary to call him to testify for that reason when all three documents formed part of the agreed bundles before the court? The defendants did not elaborate on how Chan would have been "able to shed direct evidence on many of the crucial matters". Chan's directive to Lynette and Leslie to determine the pros and cons of proceeding with the Event (after the meeting with the defendants on 26 July 2005) was not relevant since the plaintiff made a decision to proceed. There was therefore no basis for the defendants to argue that the plaintiff suppressed their internal evaluation.

141 As for Leslie, the defendants pointed out he was the person who recorded the minutes of a meeting between Chong and the third defendant on 28 July 2005 which the defendants claimed was a continuation of the meeting two days earlier. I note that Leslie's email to Chong and Lynette on 29 July 2005 (setting out the minutes of that meeting) did not refer to Leslie's *participation* in the discussions at all. Counsel for the defendants could have/should have cross-examined Chong on what transpired at the meeting and on Leslie's minutes, if indeed the discussions had a bearing on the signing and terms of the Third Agreement and there was no quarrel on the minutes. It bears noting that all crucial meetings were attended by Lim and/or Chong and both did testify.

142 It was no answer for the defendants to argue that the plaintiff failed to call expert testimony to contradict the findings of Singh when Singh's report was discredited as being wholly unreliable. The questionable manner in which the third defendant commingled the accounts of the first and second

defendants was also admitted by Singh in the course of cross-examination (see [103] above).

143 Turning next to the defendants' main witnesses, I have already given my assessment of Duggan, Singh and Neil McCartney. In the case of the third defendant, his repeated mantra was that the plaintiff failed to use its best endeavours to raise sponsorship sums (N/E 563), as if that exonerated the defendants from their own contractual obligations. (In the defendants' submission, they relied on *MacarthurCook Property Investment Pte Ltd and Another v Khai Wah Development Pte Ltd* [2007] SGHC 93 to argue that the plaintiff's failure to perform its own obligations negated the defendants' similar failure).

144 The third defendant also made frequent reference to Singh's report to justify his expenditure of the sponsorship sums when in the ultimate analysis, Singh's report was found to be unreliable. Suffice it to say that he did not impress me with his credibility. His written testimony was self-righteous to the extreme, pinning the blame for anything and everything that went wrong on the plaintiff without accepting or acknowledging any fault or shortcomings on his or on the part of his two companies.

145 I have already referred to the third defendant's conduct (see [124] above) in downplaying the significant role the plaintiff played in introducing potential sponsors to the defendants, and how he belittled the quality of those sponsors while at the same time exaggerating his own abilities. It was clear he had no compunctions either to lie or to give his own slant to the facts. As an example, I refer to para 265 of his AEIC. There he had claimed that Chong's email to him dated 13 August 2005 showed that the plaintiff was fully aware that the first defendant had no funds going into the Third Agreement – that is misleading. Chong's email said nothing of the sort. The relevant para 1 stated:

> Proposed Recoupment
>
> I confirm that STB is agreeable to your proposal of recoupment of USD1.4m from total ticket and hospitality sales. As we understand it, this is to help you find a financier/investor to put up cash for your marketing/sponsorship operations in the next few months plus potential settlement to SIA. Pl let us have your proposed clause with respect to this proposal and also the confirmation of the new proportion for revenue split between STB and CML in terms of recoupment (in our meeting, you mentioned that this could be 60:40 in STB's favour).

146 In the same paragraph of the third defendant's AEIC the third defendant had also claimed that Chong's said email stated that the payments made by the plaintiff would not be in the form of a liability and that Chong confirmed this in a subsequent email dated 17 August 2005. The third defendant deposed that "[o]nce again it was confirmed that there was no requirement for CML to refund the monies paid by STB to CML". Again, that statement was untrue as can be seen from the italicised portion below of Chong's email dated 17 August 2005:

> In our existing agreement, the sequence of milestones under Clause 3.9, 3.10 and 3.11 are not necessarily in sequence and it has already happened such that STB pays out for confirmation core campaign artistes before confirmation of core finance.
>
> *As the new agreement does not provide for full refund of monies*, we cannot afford a situation again in which event artistes and broadcasters are confirmed before core finance. We have to specify that no payments will be made for confirmation of event artistes and broadcasters until core finance is confirmed.

147 Chong's reference to the plaintiff's not obtaining full refund of the sponsorship monies was not a waiver of its rights against the defendants as the defendants would have the court believe. It was

because under the restructured arrangements in the Third Agreement, the first defendant was allowed to recover $2,306,000 from net ticket sales and corporate hospitality sales first. In consideration thereof, the plaintiff would have the right to recover 60% (instead of the 50% under the previous two agreements) of such sales.

148 The third defendant was shown to have lied (based on the evidence of Graham Davies (DW6) when he told the plaintiff at the 11 August 2005 meeting, that the trustees of The Listen Charity had indicated the Event could not be held as scheduled under the Second Agreement. It was the third defendant who informed the trustee of The Listen Charity, Michael Richards ('Richards"), that the Event needed to be postponed and not knowing any better, Richards (DW3), agreed. It was obvious from the evidence of Richards and Graham Davies (who was/is a trustee of another charity called Children in China Charity that assisted The Listen Charity for the Event), that what the two trustees knew of the Event and the plaintiff's involvement was what they were told by the third defendant. It was not only hearsay, but inaccurate hearsay at that.

149 The third defendant certainly did not pass the test of honesty spelt out in *Royal Brunei Airlines Sdn Bhd* ([118] *supra*). The evidence showed (and it was admitted in the defendants' submissions) that the third defendant needed the plaintiff's monies to sustain the operations of his two companies. Hence, his repeated requests to the plaintiff for funds when the milestones to trigger payment under cl 4.1 of the First and Second Agreements had not been reached. The defendant then transferred the sponsorship sums to the second defendant's account almost one year ahead of his confirmation of Core Finance to the plaintiff.

The decision

150 The third defendant knew he could not/would not refund the plaintiff's sponsorship sums. He also knew he was unable to stage the Event even if it was postponed from the period of 16 September 2005 to 1 October 2005 (under the Second Agreement) to 7-8 April 2006 (under the Third Agreement) as he had led the plaintiff to believe. However, he did not want to exercise his right to terminate the Second Agreement before or at the meeting on 11 August 2005 because in doing so under cl 8.2 of the Second Agreement (at [10]), he was required to refund the sponsorship sums. He therefore devised a way out by issuing what in effect amounted to an ultimatum to the plaintiff – that cl 8.2 was a deal-breaker. If that clause remained, it would break the deal. However, the deal, *viz*, the Event (albeit postponed to a later date), would still be on provided the clause was removed.

151 The plaintiff unfortunately, accepted the third defendant's word and agreed to the removal of the refund provision in cl 8.2, unaware that less than a month earlier, the third defendant had transferred the entire balance of the sponsorship sums from the first defendant's account to that of the second defendant and in August 2005, he had instructed third parties like Ng and Paul Kerr to stop work on the Event. As the third defendant terminated the Third Agreement on 5 January 2006, the defendants' repeated assertions and submissions that they always intended to hold the Event rings hollow. The third defendant never intended to hold the Event at all. It speaks volumes of the third defendant's abilities and credibility that to-date, the Event scheduled to be held in New York in July 2006 has not taken place.

152 Consequently, as the plaintiff was deceived into entering into the Third Agreement as well as the side letter, all the requirements of fraudulent misrepresentation set out in *Panatron Pte Ltd* ([44] *supra*) were satisfied, *viz*:

(i) there was a representation of fact by the third defendant that the Event would be held if it was postponed and if the refund provision in cl 8.2 in the Second Agreement was removed;

(ii) the representation was meant to be and was acted on as the plaintiff entered into the Third Agreement (in which the refund provision in cl 8.2 was removed), signed the side letter and postponed the staging of the Event to April 2006; and

(iii) the plaintiff suffered detriment as a result as the defendants claimed to have spent all the sponsorship sums and have refused to refund any part thereof relying on cl 8.2 in the Third Agreement.

Consequently, the defendants' argument that the Third Agreement was "an entire agreement" would not apply.

153 Accordingly, I hold that both the Third Agreement and the side letter are rescinded. Since it was the defendants' case (and submission) that the side letter was a collateral contract to the Third Agreement, my ruling that the side letter should similarly be set aside would be consistent with their argument.

154 The third defendant's conduct showed he was not only guilty of lack of corporate governance, but he had deliberately set out on a course of conduct to ensure that while he had the benefit of and unimpeded access to the funds of the first defendant, in having it as a separate corporate entity, he was able to use the first defendant to distance himself and the second defendant from the first defendant's liability. The third defendant's motive in setting up the first defendant was not as altruistic as he professed when he first met the plaintiff (see [7] above).

155 Adopting the test in *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd* ([99] *supra*), I have no doubt that the first defendant was a façade and/or a sham and like the second defendant, the company was used by the third defendant to evade his legal obligations. Therefore, the court should as the plaintiff had submitted, pierce the corporate veil. Consequently, all three defendants are jointly and severally liable to the plaintiff on its claim. It bears repeating that the third defendant is the sole shareholder of the second defendant, which in turn owns the first defendant (see [2] above).

156 In view of my decision to lift the corporate veil, it would not be necessary for me to go further to consider whether the first defendant acted as the agent of the other two defendants and whether there was a failure of consideration. Similarly, I need not consider the peripheral issues of breach of trust and dishonest assistance pleaded by the plaintiff.

157 One remaining issue that needs to be addressed is, did a *Quistclose* trust arise on the facts of this case? My answer is yes. The defendants' submission that a *Quistclose* trust was only relevant in loan arrangements is an incorrect reading of the law on such resulting trusts. The judgment the defendants relied on, *viz*, *Show Theatres Pte Ltd (in liquidation) v Shaw Theatres Pte Ltd* ([136] *supra*), was reversed on appeal. As the appellate court did not issue grounds for its decision, the position on whether a *Quistclose* trust was created there was, at best, left open.

158 The position at law (see [88] above) is that a *Quistclose* trust is created where money is advanced by A to B with the mutual intention that it should be applied exclusively for a specific purpose. If that purpose fails, and unless a contrary intention appears, the law implies a stipulation that the money will be repaid to A. So long as moneys went into a special account (as in our case) and it was meant for a specific purpose that subsequently failed, the sum should be returned to the plaintiff. The nature of the transaction itself for which the money was intended is not a determinant of when such a trust arises (see *Carreras Rothmans Ltd v Freemans Mathews Treasure Ltd* ([136] *supra*). Equity as well as contract (cl 3.8 of the Third Agreement), required the defendants to explain how they had expended the sponsorship sums on the Event, but they failed to so to any degree of

satisfaction.

159 I should add that it was absurd of the defendants to submit that the plaintiff should have given but failed to give notice to the defendants to remedy their alleged breach of contract. Previously (according to the defendants), both sides had committed various breaches of the contract *vis-a-vis* the First and the Second Agreements. One party had then given notice to the defaulting party to remedy the breaches. The defendants' argument overlooked the fact that they gave notice of termination to the plaintiff of the Third Agreement and the plaintiff had accepted such repudiatory breach of the contract. It was pointless to afford the defendants an opportunity to remedy their breach when their stand was that the contract had terminated.

160 Finally, I have not overlooked the defendants' argument that the plaintiff's obligation was to sponsor the Campaign not the Event only (see [134] *above*). That is undoubtedly correct. However, the plaintiff's interest and indeed its statutory function was to showcase Singapore as a tourist destination. Singapore's interest and focus was therefore on the Event and not the Campaign. That was why the initial meetings with the third defendant and Duggan on holding the Event in *Singapore* were spearheaded by the Permanent Secretary of the Ministry of Trade and Industry and attended by representatives from the Economic Development Board, Jurong Town Corporation, National Arts Council, National Heritage Board and Media Development Authority. That was also the reason why under cl 3.6 of all three agreements, the filming of the Event in the footage to be broadcast had to incorporate (i) the city skyline of Singapore; (ii) the Merlion statue; (iii) the Fullerton Hotel; (iv) the area known as the Marina Waterfront; and (v) Esplanade Theatres on the Bay. Why would the plaintiff want to expend the sponsorship sums on the worldwide Campaign when it was of no benefit to Singapore?

Conclusion

161 I therefore hold that the Third Agreement is rescinded. The parties' position reverts to and their rights are governed by, the Second Agreement. I further award the plaintiff interlocutory judgment against all three defendants on its claim. Damages are to be assessed with the costs of such assessment reserved to the Registrar. The defendant's counterclaim is also dismissed.

Costs

161 As I understand that Offers to Settle pursuant to Order 22A of the Rules of Court (Cap 322, R5, 2006 Rev Ed) were exchanged between the parties, I shall hear parties on the issue of costs on another day.