Oversea-Chinese Banking Corp Ltd *v* Asia Pacific Links Ltd and another (Abdul Rahman bin Maarip, third party)
[2010] SGHC 301

Case Number : Suit No 896 of 2008

Decision Date : 12 October 2010

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Lee Eng Beng SC, Sim Kwan Kiat, Chin Wei Lin and Christine Huang (Rajah & Tann LLP) for the plaintiff; Michael Khoo SC, Andy Chiok, Josephine Low, Ong Lee Woei (Michael Khoo & Partners) Yap Wai Ming and Eugene Thuraisingam (Stamford Law Corporation) for the defendants.

Parties : Oversea-Chinese Banking Corp Ltd — Asia Pacific Links Ltd and another (Abdul Rahman bin Maarip, third party)

Tort – Misrepresentation – Fraud and deceit

12 October 2010 Judgment reserved.

Lai Siu Chiu J:

Background

1 The present suit arose out of an aborted voluntary conditional cash offer launched in 2008 by the first defendant, Asia Pacific Links Ltd ("APLL"), to acquire at 22.5 cents per share ("the Offer"), all the issued ordinary shares in Jade Technologies Holdings Ltd ("Jade") which it did not already own or control. The second defendant Soh Guan Cheow Anthony ("Dr Soh") was, at the material time, the sole shareholder and one of two directors of APLL with the other director being his wife. Dr Soh was also a director and the Group President of Jade.

2 The plaintiff, Oversea-Chinese Banking Corporation Ltd ("OCBC") is one of Singapore's largest local banks. OCBC was appointed as the financial adviser to APLL for the Offer. The terms and conditions of OCBC's appointment are set out in an agreement dated 1 February 2008 ("the Mandate Letter"). Allen & Gledhill LLP (A&G) was APLL's legal adviser for the Offer.

3 On 18 February 2008, following several email exchanges between the parties and also with A&G, and after a meeting on 14 February 2008 to settle the announcement of the Offer (the "First Verification Meeting"), OCBC announced the Offer (the "Offer Announcement") to the Singapore Stock Exchange Ltd ("SGX"). The Offer Announcement contained a statement that the defendants held 451,172,504 shares representing 46.54% of Jade's issued capital and a confirmation from OCBC that sufficient financial resources were available to APLL to satisfy full acceptance of the Offer. After the Offer was announced, a verification meeting was held on 5 March 2008 to settle the Offer Document (the "Second Verification Meeting"). On 6 March 2008, APLL and A&G gave clearance for the Offer Document to be printed and issued. OCBC despatched the Offer Document on 10 March 2008. Under the terms of the Offer Document, the Offer would have closed on 7 April 2008.

4 As proof that APLL had sufficient financial resources to satisfy full acceptance of the Offer, Dr Soh provided OCBC with several documents. These documents (henceforth collectively referred to

as the "Documents Evidencing APLL's Financial Resources") consisted of (i) a letter dated 18 February 2008 ("the First Letter"), (ii) a fax dated 19 February 2008 which stated that Standard Chartered Bank ("SCB") Jakarta had indeed issued the First Letter ("the Second Letter"), (iii) a letter dated 1 April 2008 which stated that SCB Jakarta would remit US$100m to OCBC that day ("the Third Letter") and copies of three SWIFTs of a Bank Guarantee purportedly issued by SCB Jakarta ("the First SWIFT", "the Second SWIFT" and "the Third SWIFT" respectively). The First and the Third Letters were purportedly signed by one Ng Khok Pheng ("Mr Ng") and one Lim Bun Tjaij ("Mr Lim") of SCB Jakarta. The Second Letter was purportedly signed by Mr Ng.

5 It subsequently transpired that APLL did not in fact hold 46.54% of Jade's issued capital. Whilst APLL had represented to OCBC and A&G that it retained beneficial ownership in the Jade shares which it held, APLL had, pursuant to an executed document called Global Master Share Lending Agreement ("the GMSLA"), transferred some of its Jade shares to companies in the Merrill Lynch International Group ("Merrill Lynch") which held the same as custodian for an Australian company, Opes Prime Stock Broking Ltd ("Opes Prime"); title to those shares had in fact been transferred to Opes Prime. The Jade shares transferred pursuant to the GMSLA totalled 300,050,000 shares, representing approximately 30.95% of Jade's issued capital. Upon Opes Prime's receivership on 27 March 2008, Merrill Lynch seized some of the Jade shares and sold shares representing approximately 9.82% of Jade's issued capital on 1 April 2008. Additionally, in March 2008, doubts were cast on the authenticity of the Documents Evidencing APLL's Financial Resources and the defendants were unable to satisfy OCBC that they had sufficient funds to meet full acceptance of the Offer. On 29 March 2008, A&G discharged itself as legal adviser to APLL in relation to the Offer while OCBC resigned as its financial adviser on 2 April 2008. APLL eventually withdrew the Offer on 4 April 2008.

6 As a result of the withdrawal of the Offer, the Securities Industry Council ("the SIC") conducted an inquiry into the circumstances surrounding the Offer. The SIC found that Dr Soh and OCBC had breached various provisions of the Singapore Code on Take-overs and Mergers ("the Code"). All three parties involved in issuing the Offer Document were censured by the SIC with Dr Soh receiving the heaviest penalty – he was prohibited (for five years) from making any take-over offer in Singapore and was denied facilities (for three years) to buy and sell shares through SGX without the consent of the SIC. The SIC hearing committee also considered Dr Soh unsuited to be a director of any listed company in Singapore for a period of five years.

The pleadings

The claim

7 In its statement of claim, OCBC alleged that APLL had breached the Mandate Letter. OCBC accused the defendants of committing fraud, negligent misrepresentation and conspiracy. OCBC asserted that any failure on its part to fully comply with the Code, and any inaccuracy or omission in the Offer Announcement and Offer Document, was attributable to the fraud and wrongdoing of the defendants.

8 OCBC alleged that the defendants *inter alia* misrepresented to OCBC that:

(a) The defendants collectively and beneficially owned 451,172,504 shares representing 46.54% of the issued capital of Jade (the "Shareholding Representation");

(b) APLL had sufficient financial resources to satisfy full acceptances of the Offer (the "Financial Resources Representation");

(c) APLL intended, through the Offer, to develop and grow the businesses of Jade and its subsidiaries and pursue opportunities for revenue synergies, particularly in the energy sector (the "Rationale Representation"); and

(d) The directors of APLL had taken all reasonable care to ensure that the facts stated and all opinions expressed in the Offer Announcement and the Offer Document were fair and accurate and that no facts had been omitted from the Offer Announcement and the Offer Document (the "Responsibility Statements").

In reliance on the above representations, OCBC said it issued the Offer Announcement, despatched the Offer Document and continued acting as the financial adviser to the Offer.

9 OCBC contended that the Offer was not genuine and that the defendants, faced with rapidly declining prices in the shares and the risk of forced sales of their Jade shares by their financiers, had implemented a fraudulent and illegal scheme to support or ramp up the price of Jade shares. OCBC alleged that the defendants had induced OCBC to act as the financial adviser for the Offer by a web of deceit and forgery. OCBC alleged that the defendants had concealed material facts from OCBC and, *inter alia*, provided OCBC with false information and sham documents.

10 OCBC claimed that it had suffered damage to its reputation as a result of the eventual withdrawal of the Offer as well as loss of take-over advisory work. OCBC had also incurred significant legal costs and other associated expenses in relation to the SIC inquiry. OCBC claimed, *inter alia*, the following reliefs against APLL:

(a) $410,094.77 payable under the Mandate Letter for work done in connection with the Offer;

(b) A declaration that OCBC was entitled to terminate the Mandate Letter and discharge itself as the financial adviser to the Offer;

(c) A declaration pursuant to cl 4(b)(ii) of the Mandate Letter that APLL was liable to indemnify and hold OCBC harmless against all actions, claims, liabilities, costs etc. which OCBC may suffer or incur or which may be made, brought or claimed against OCBC in connection with its engagement as financial adviser; and

(d) Costs on an indemnity basis pursuant to cl 4(b) of the Mandate Letter.

as well as the following reliefs against both APLL and Dr Soh:

(e) A declaration that either or both were liable to OCBC for fraudulent or negligent misrepresentation or both;

(f) A declaration that either or both APLL and Dr Soh were liable to indemnify and to hold OCBC harmless against all actions, claims, liabilities, costs, etc. which OCBC may suffer or incur or which may be made, brought or claimed against OCBC arising out of or in connection with the Offer.

11 The trial was bifurcated pursuant to an order of court dated 12 January 2010 (made in Summons No 6437 of 2009). The trial before this court was only to determine liability.

The defence and counterclaim

12 The defendants denied OCBC's claims and alleged that the defendants were themselves victims of a third party's fraudulent acts. The defendants contended that they had acted in good faith in their dealings with OCBC and had believed (and were reasonable in so believing) in the authenticity of the Documents Evidencing APLL's Financial Resources which they had forwarded to OCBC, as well as in the veracity of the statements made in those documents. Dr Soh claimed to have relied on one Dr Abdul Rahman bin Maarip ("Dr Rahman"), who was his business associate, to procure those documents. Dr Soh claimed that he had not been able to contact Dr Rahman since October 2008. He joined Dr Rahman as a third party to the present proceedings but was unable to serve the court papers on Dr Rahman even up to the commencement of the trial.

13 It was the defendants' case that the failure of the Offer was occasioned by OCBC's gross neglect, breaches of its contractual obligations to the defendants under the Mandate Letter and breaches of the Code with regard to (i) OCBC's verification of APLL's shareholding in Jade and (ii) its confirmation of the adequacy of APLL's financial resources to fund the Offer. The defendants contended that OCBC should not have released the Offer Announcement on 18 February 2008. The defendants also asserted that OCBC's termination of its appointment as financial adviser on 2 April 2008 was wrongful.

14 The defendants alleged that OCBC was involved in the process of ramping up the price of Jade shares, through OCBC Securities Pte Ltd ("OCBC Securities"), a wholly-owned subsidiary of OCBC. It was the defendants' case that the increase in OCBC Securities' shareholding in Jade in the period between 31 January 2008 and the announcement of the Offer on 18 February 2008 was a breach by OCBC of Rule 11.1 of the Code relating to restrictions on dealings by a professional adviser before an offer.

15 The defendants counterclaimed against OCBC for loss and damage it allegedly suffered as a consequence of OCBC's alleged negligence, breach of contract and breaches of the Code in the discharge of its duties as financial adviser for the Offer.

The issue

16 It was not disputed that OCBC had committed breaches of the Code as found by the SIC, particularly relating to (a) its confirmation of APLL's financial resources for the Offer; and (b) its verification of APLL's shareholdings in Jade. The key issue was whether OCBC was responsible for the consequences of its breaches of the Code or whether such breaches resulted from the conduct of APLL and Dr Soh, which conduct OCBC contended was fraudulent and which it had no reason to suspect would be committed by its own client and against which OCBC was not in a position to easily detect or prevent.

The facts

The defendants' initial acquisition of Jade shares

17 Apart from Jade and APLL, at the material time, Dr Soh was the sole shareholder and director of another company called Faitheagle Investments Ltd ("Faitheagle") and was also a director and shareholder of companies such as First Capital Growth Investment Ltd ("FCGIL"), Asia Pacific Venture Capital Ltd ("APVC") and Asia Growth Capital Pte Ltd ("AGCPL"). Dr Soh was appointed a non-executive director of Jade on 23 May 2007 and Group President of Jade on 8 June 2007. He resigned from these posts on 6 May 2008 and 28 April 2008 respectively.

18 On 7 May 2007, APLL acquired shares representing approximately 76.2% of the total issued

capital of Jade via a mandatory unconditional cash offer made by Daiwa Securities SMBC for and on behalf of APLL. This was triggered by a sale and purchase agreement under which APLL bought Jade shares at $0.015 per share for a total price of $9.7m. Subsequent private placements of Jade shares resulted in APLL's stake in Jade falling to approximately 45.97% of Jade's issued capital as at September 2007.

The defendants' dealings in Jade shares before 30 January 2008 and Faitheagle's undisclosed dealings in Jade shares

19 Faitheagle was incorporated on 12 May 2005. According to Dr Soh, its business includes, *inter alia*, the operation of fund managements for investments. Dr Soh had/has a dual capacity in Faitheagle: he was/is its fund manager and he also holds shares for himself under Faitheagle's accounts.

20 Between August and November 2007, Faitheagle purchased 5.5 million shares in Jade. Those shares were subsequently sold in four tranches between 12 February 2008 and 25 February 2008. On 12 February 2008, Faitheagle sold 1 million Jade shares at $0.215 per share. Between 21 and 25 February 2008, Faitheagle sold 4.5 million Jade shares for $0.22 per share. Dr Soh did not inform the market, OCBC or A&G of either the purchase or the disposal of those 5.5 million Jade shares.

APLL's transfer of Jade shares to SBS Nominees Ltd

21 On 11 September 2007, APLL transferred 34 million Jade shares to SBS Nominees Ltd, in respect of a loan of $4m granted to APLL by Singapura Finance Ltd ("SFL"). A further transfer of 30 million Jade shares, for no consideration, was made to SBS Nominees Ltd on 25 January 2008 to meet a margin call by SFL. APLL retained beneficial ownership in those shares.

The Global Master Share Lending Agreement with Opes Prime

22 In September 2007, Dr Soh began negotiations with Opes Prime. On 26 September 2007, APLL entered into the GMSLA with Opes Prime (see [5] above). Laurie Emini ("Emini") the chief executive of Opes Prime subsequently signed the GMSLA which was dated 12 October 2007. Between 26 September and 18 October 2007, Dr Soh transferred a total of 145,050,000 Jade shares to Merrill Lynch pursuant to the GMSLA, in exchange for a total loan from Opes Prime of $29,698,308.09. The price of Jade shares was $0.37 on 26 September 2007. The loan was based on a 60% loan-to-security value ratio. Accordingly, a margin call would be triggered once the price of Jade shares fell below $0.34. Towards the end of 2007, the price of Jade shares declined. By mid-December 2007, Jade shares were trading below $0.30 per share. The falling prices of Jade shares triggered multiple margin calls from Opes Prime which were settled in cash.

23 Clause 2.3 of the GMSLA provides:

> Notwithstanding the use of expressions such as "borrow", "lend", "Collateral", "Margin", "redeliver" etc, which are used to reflect terminology used in the market for transactions of the kind provided for in this Agreement, title to Securities "borrowed" or "lent" and "Collateral" provided in accordance with this Agreement *shall pass from one Party to another* as provided for in this Agreement, the party obtaining such title being obliged to redeliver Equivalent Securities or Equivalent Collateral as the case may be. [emphasis added]

As such, APLL no longer held title to Jade shares transferred under the GMSLA. However, APLL and Dr Soh did not disclose this fact to SGX or to the market.

24 On 21 January 2008, the price of Jade shares had declined to $0.16 per share. Dr Soh received a call from a representative of Opes Prime, demanding payment of $500,000 by noon that day to meet a margin call of $1m. He did not make the payment. Since APLL failed to meet the margin call, Opes Prime force-sold 4.6 million Jade shares on 21 January 2008.

25 The price of Jade shares continued to slide to $0.09 per share on 30 January 2008. On 25 January 2008, APLL transferred a further 155,000,000 Jade shares to Opes Prime as further collateral so as to stop margin calls.

26 As at 25 January 2008, APLL had transferred to Opes Prime a total of 300,050,000 Jade shares under the GMSLA, of which 4.6 million were force-sold on 21 January 2008. No statutory disclosure of the forced sale of 4.6 million Jade shares was made. Instead, on 21 January 2008, Dr Soh instructed Jade to announce on SGXNET that he had purchased 5.5 million Jade shares in his own name at between $0.175 and $0.225 per share although no such purchase had in fact taken place. In the result, Dr Soh represented (incorrectly) to the market that APLL continued to hold a 45.97% stake in Jade and that collectively, he and APLL held 46.54% of the issued capital of Jade.

APLL's engagement of OCBC as financial adviser for the Offer

The meeting on 31 January 2008 (the "First Meeting")

27 On 31 January 2008, Dr Soh met with OCBC's officers ("the OCBC team") for the first time, where he disclosed his intention to launch the Offer. The price of Jade shares as of 31 January 2008 was $0.10 per share. The Offer price was set at 22.5 cents at the First Meeting as Dr Soh informed OCBC that 22.5 cents was the highest price he had paid for Jade shares in the 3 months before 31 January 2008. Dr Soh also informed OCBC that the defendants held 46.54% of Jade's issued capital.

28 The parties disagreed on what was discussed at the First Meeting. According to Dr Soh, the meeting was preceded by a briefing on Jade's activities. Dr Soh claimed that a presentation was given on an oil deal involving FCGIL and one of Jade's wholly-owned subsidiaries. In his affidavit of evidence-in-chief ("AEIC"), Dr Soh deposed that he had shown to the OCBC team some documents relating to the oil deal (which funding was by way of a bank guarantee from FCGIL's account with SCB Jakarta to UBS Singapore) and had informed the OCBC team that the FCGIL funds could not be remitted to Singapore but that a bank guarantee could be issued against the funds to back borrowings from the receiving bank. In Dr Soh's version of events, he had also explained to the OCBC team that the bank account was in the name of FCGIL rather than APLL and that Dr Soh held one-third of the shares in FCGIL. Dr Soh claimed that it was only after the briefing that Jade's staff left the room and he then disclosed to the OCBC team his intention to launch the Offer. According to Dr Soh, the OCBC team confirmed to him that he could use a similar arrangement as that used for the oil deal to prove that he had sufficient financial resources for the Offer. Under this arrangement, SCB Jakarta would issue a bank guarantee in favour of APLL and send it to OCBC. OCBC would, however, require a letter from SCB Jakarta indicating funds had been earmarked for the Offer.

29 OCBC disagreed that a briefing had taken place before Dr Soh announced his intention to launch the Offer. OCBC denied that Dr Soh had made any mention of FCGIL at the meeting. Whilst OCBC accepted that Dr Soh had mentioned that APLL had pledged approximately 30 million Jade shares, OCBC asserted that Dr Soh had not provided further details of the same and that Dr Soh had assured the OCBC team that he still owned the pledged shares. Moreover, Dr Soh had informed the OCBC team that, *in addition to* procuring a letter from another bank confirming APLL's access to the requisite funds to satisfy full acceptance of the Offer, he would be procuring a banker's guarantee from UBS AG

as proof that APLL had sufficient funds for the Offer. OCBC asserted that Dr Soh did not request and OCBC did not provide any advice. According to OCBC, it was never contemplated, or indicated to Dr Soh at the First Meeting and throughout their dealings with him regarding the Offer, that OCBC would be responsible for providing APLL with any financing for the Offer.

30 It appears from handwritten notes taken at the First Meeting by Ang Suat Ching ("Ang"), a member of the OCBC team, that some discussion had taken place regarding an oil/coal refinery but there was no record of any mention having been made of FCGIL, SCB Jakarta, or the manner in which an oil deal had been funded. There was also no record, in the handwritten notes, that SCB Jakarta would issue a bank guarantee in favour of APLL and send it to OCBC or that SCB Jakarta would issue a letter to OCBC to indicate that funds had been earmarked for the Offer. The following notes were also taken:

1. proof of fund – BG from UBS as proof of funds.

2. announcement

3. Timing

4. concert party web

5. counsel -> Appt letter

...

AP Link give pledge ~~$30m~~ 30m sh as pledge

There was no mention of any proposed arrangement by which OCBC would finance the Offer. Moreover, the handwritten notes referred to a BG from *UBS* as proof of funds. There was no mention of a bank guarantee from SCB Jakarta.

The preparation of the Offer Announcement

The due diligence conducted by Tan

31 On 31 January 2008, Tan Wei Ping, ("Tan") another member of the OCBC team emailed Jocelyn Hoi ("Hoi"), the relationship manager at OCBC's Enterprise Banking Department who was in charge of APLL's account, to inquire if there was any adverse information or issues relating to APLL's account with OCBC. Hoi replied to say that there was none. Tan (PW1) did not ascertain the status of APLL's account with OCBC as he saw no need to do so. On the following day, Tan verified Dr Soh and APLL's shareholdings in Jade against the information in Jade's annual report for the financial year ending 30 September 2007 as well as Jade's announcements on 18 July 2007 and 21 January 2008 on SGXNET. The annual report stated that APLL was a substantial shareholder with a 45.97% direct interest in Jade's shares. Tan recognised that some of those shares could be beneficially owned by APLL but held by nominees as APLL's custodian. However, he saw no need to verify who those nominees were. The announcement on SGXNET stated that Dr Soh held direct and indirect shareholdings in Jade of 5,500,000 (0.57%) and 445,672,504 (45.97%) shares respectively. Tan also conducted searches on OCBC's internal anti-money laundering database and found no adverse records on APLL. On 1 February 2008, Tan sent an over-the-wall memorandum to officers at OCBC Securities to ensure that they observed strict confidentiality with regard to information acquired in the course of the preparation for the Offer. Tan also sent a "no conflict" memorandum to the Head of OCBC's Group

Investment Unit and OCBC's General Counsel both of whom confirmed that they had no objections to OCBC's appointment as APLL's financial adviser for the Offer. Tan also carried out checks, on 31 January 2008, 14 February 2008 and 6 March 2008, on SGXNET for the shareholdings of APLL and Dr Soh. The results were consistent with Dr Soh's representations to OCBC that the defendants held a total of 46.54% of Jade shares.

32 After the due diligence checks were conducted, OCBC provided Dr Soh with the Mandate Letter dated 1 February 2008 for OCBC's appointment as APLL's financial adviser which Dr Soh signed and returned on 11 February 2008. On 1 February 2008, A&G was appointed APLL's legal adviser for the Offer.

The meeting on 4 February 2008 (the "Kick-off Meeting")

33 A Kick-off Meeting was held on 4 February 2008 at which lawyers from A&G were present. Tan and Ang (PW3) made handwritten notes at this meeting. Tan's notes recorded that Dr Soh informed the meeting that he had purchased 5.5 million Jade shares at $0.225 per share on 21 January 2008 (even though Dr Soh had not in fact made the purchase) and that the defendants held 46.54% of Jade's issued capital. The notes taken by Tan and Ang also recorded that 140 million of APLL's Jade shares were pledged to Opes Prime or lent to them as custodian, in exchange for a $20m loan to invest in E3 Holdings Ltd ("E3") and Netelusion, and that the collateral was cash. Contrary to the position taken by OCBC that Dr Soh had informed the meeting that he had pledged 140 million Jade shares under the GMSLA, Dr Soh claimed that he had told OCBC that APLL had pledged 300,050,000 Jade shares to Opes Prime. However, it is not disputed that Dr Soh did not tell OCBC about Opes Prime's forced sale of 4.6 million Jade shares on 21 January 2008 or Faitheagle's purchase of 5.5 million Jade shares in 2007.

34 Whilst Tan agreed that Dr Soh had mentioned that the pledge was pursuant to a "cash as collateral" agreement, Tan admitted that it did not occur to him then that the shares (and not the cash) would normally be held as collateral in a share pledge agreement. Tan also stated that nobody at the meeting clarified what was meant by "cash as collateral" nor did anyone in the OCBC team ask Dr Soh about the terms of the GMSLA agreement. According to OCBC, A&G requested Dr Soh for a copy of the GMSLA agreement and OCBC left it to A&G to highlight any issues arising therefrom. Indeed, A&G sent an email request to Dr Soh on 5 February 2008 for documents including a copy of the GMSLA, but the GMSLA was not forwarded to A&G. Neither OCBC nor A&G saw the GMSLA until much later (on 29 March 2008).

35 OCBC's position was that at the meeting and at all material times, it never made any representation to Dr Soh that it would provide the requisite funding for the Offer. Instead, according to Ang, at that meeting, OCBC had requested that Dr Soh provide a letter from a financial institution in a specified format ("the Financial Resources Confirmation Letter") before OCBC would give its confirmation that APLL had sufficient financial resources to satisfy full acceptance of the Offer and Dr Soh had requested for a template of this letter. Ang deposed that she had instructed Tan to send the requested template to Dr Soh.

36 The template of the Financial Resources Confirmation Letter was indeed provided by Tan to Dr Soh by email on 4 February 2008. The text of the template stated:

> **PROPOSED VOLUNTARY CONDITIONAL CASH OFFER ("OFFER") FOR ALL SHARES ("OFFER SHARES") IN THE CAPITAL OF JADE TECHNOLOGIES HOLDINGS LIMITED NOT ALREADY OWNED OR AGREED TO BE ACQUIRED BY ASIA PACIFIC LINKS LTD ("COMPANY") AND ITS CONCERT PARTIES**

We refer to the above.

We have been instructed by the Company to earmark S$[•amount] from our [•type of facility] granted to the Company, to make payment for the Offer Shares tendered in acceptance of the Offer. In this regard, we confirm that the Company has sufficient financial resources to satisfy full acceptances of the Offer.

Yours faithfully

For and on behalf of

[•NAME OF BANK]

[emphasis in bold in original]

37 On 12 February 2008, Tan sent an email to Dr Soh's assistant Norman Phua ("Norman"). The text of Tan's email sheds some light on the understanding between the parties as to the manner in which the defendants would prove to OCBC that APLL had sufficient funds to satisfy the Offer. It reads:

Hi Norman

I have attached some emails containing documents which require Dr Soh's attention. ...

Separately, [APLL] is required to provide a confirmation that it has sufficient resources available to satisfy full acceptance of the [Offer] and we understand that Dr Soh *will transfer a banker's guarantee from one of his companies* ***to [APLL]*** *to fulfil this requirement*. Please kindly give me a call when you are available to discuss this issue. Thanks.

Regards,

Wei Ping

[emphasis added in bold and italics]

According to Tan, he called Norman shortly after sending the email. After the telephone conversation, Tan sent Norman another copy of the template of the Financial Resources Confirmation Letter as an attachment to a second email sent on 12 February 2008. This email stated:

Dear Norman

Please find attached the draft financial resources confirmation for your necessary action. *We would appreciate if you could liaise with [APLL] and its banker to provide us with the confirmation* before the announcement of the [Offer].

Regards,

Tan Wei Ping

[emphasis added]

38 It appeared from Tan's two emails of 12 February 2008 that the understanding between the

parties was that Dr Soh would transfer to APLL a bank guarantee which had been granted to one of his other companies. Moreover, APLL still had to liaise with its banker to provide OCBC with a Financial Resources Confirmation Letter. There was no mention that OCBC would finance the Offer as Dr Soh claimed.

Emails between the parties with regard to preparing for the Offer Announcement

39 On 5 February 2008(see [34]), A&G requested documents including the GMSLA from Dr Soh. On the same day, A&G emailed a draft Offer Announcement to Dr Soh and OCBC (wherein it was stated at para 1.2 that APLL and its concert parties held an aggregate of 46.54% of Jade's issued shares or 451,172,504 shares). On 6 February 2008, A&G sent another email to Dr Soh, copied to the OCBC team, attaching a draft Directors' Board Resolution to be signed by APLL's directors approving the release of the Offer Announcement.

40 OCBC emailed Dr Soh and A&G with a revised copy of the draft Offer Announcement (the "revised draft Offer Announcement") on 6 February 2008 but did not amend the figures stated in the draft Offer Announcement relating to APLL and its concert parties' shareholdings in Jade.

41 On 11 February 2008, Dr Soh sent an email to OCBC acknowledging receipt of the revised draft Offer Announcement. In the email, Dr Soh informed OCBC that Norman would assist him in the preparation of the Offer. Dr Soh did not comment on or qualify the information in the revised draft Offer Announcement relating to the shareholdings in Jade of APLL and its concert parties.

42 A&G circulated a draft letter to the SIC on the ring-fencing of concert parties on 12 February 2008. On 13 February 2008, the Assistant Vice-President of OCBC's Group Finance confirmed to Tan that as of 31 December 2007, OCBC and its group companies did not hold any shares in Jade. OCBC made amendments to A&G's draft letter, and the amended letter was sent to the SIC on 15 February 2008.

43 Jade's share price rose from $0.09 on 31 January 2008 to $0.20 just before 13 February 2008. Between 13 and 18 February 2008, Jade shares were suspended pending various announcements by Jade which were unrelated to the Offer.

The First Verification Meeting on 14 February 2008

44 On 14 February 2008, Dr Soh and Norman met with OCBC's team and A&G to review the contents of the draft Offer Announcement. At the meeting, A&G went through the contents of the draft Offer Announcement with the attendees to confirm the accuracy of the statements made therein.

45 At the First Verification Meeting, Dr Soh confirmed to OCBC and A&G that APLL and he collectively and beneficially owned 451,172,504 shares representing 46.54% of the issued capital of Jade. He then certified on the verification notes for the First Verification Meeting that he accepted full responsibility for the accuracy of the information given in the Offer Announcement, and confirmed that he had made all reasonable enquiries such that to the best of his knowledge and belief, each statement of fact in the Offer Announcement was true and that there were no other material facts the omission of which would make any statement in the Offer Announcement misleading.

46 It was reflected in the minutes of the First Verification Meeting, as recorded by A&G, that OCBC had confirmed, at the meeting, that sufficient financial resources were available to APLL to satisfy full acceptance of the Offer. However, OCBC claimed that this was inaccurate and that the OCBC team

had informed A&G that OCBC had yet to receive a Financial Resources Confirmation Letter from APLL. As such, OCBC could not confirm that sufficient financial resources were available to APLL to satisfy full acceptance of the Offer. According to OCBC, Dr Soh had indicated that the Financial Resources Confirmation Letter was pending and that he would provide OCBC with the same once it arrived. Although OCBC's officer, Tsai Ai Liang ("Tsai"), had signed the notes of the meeting on 14 February 2008 to confirm its contents, it was OCBC's position that no issue was raised regarding this discrepancy because the minutes of the meeting were only circulated on 24 March 2008, by which time OCBC had received the requisite Financial Resources Confirmation Letter from APLL.

47 Dr Soh on the other hand claimed that the minutes of the meeting were accurate and that since OCBC had confirmed that APLL had sufficient financial resources available to satisfy full acceptances of the Offer, he was entitled to assume that OCBC had carried out its own independent verification.

Demands by Opes Prime against APLL in February 2008

48 On 7 February 2008, Opes Prime made a further margin call of $2,134,118 on Dr Soh. This margin call was eventually cancelled on 12 February 2008 as the price of Jade shares had risen.

49 On or about 15 February 2008, Dr Soh became concerned when a statement issued by the Central Depository (Pte) Limited showed that Merrill Lynch held 258,802,000 Jade shares (as nominee for Opes Prime) while a statement issued by Opes Prime dated 5 February 2008 showed that it held 295,450,000 Jade shares. He suspected that Opes Prime may have force-sold more Jade shares after the first forced sale of 4.6 million Jade shares on 21 January 2008. On or about 27 February 2008, Dr Soh travelled to Australia to seek an explanation from Opes Prime. In an email to Opes Prime dated 4 March 2008, Dr Soh (falsely) claimed that the SIC was inquiring into APLL's beneficial ownership of the Jade shares and pressed Opes Prime to explain the discrepancies in the number of Jade shares reflected in the two statements.

50 Dr Soh concealed from OCBC his communications with Opes Prime and his concerns over the "missing" Jade shares.

The First Letter from SCB Jakarta

51 On 18 February 2008, Dr Soh emailed OCBC to say that the "proof of fund bank letter just arrived, original is being mailed to your office". This proof of fund bank letter appeared to be the First Letter from SCB Jakarta (at [4] above). The First Letter was attached to Dr Soh's email. However, as OCBC was unable to open the soft copy of the document, Norman delivered a hard copy of the First Letter to OCBC's office that afternoon. Dr Soh had certified, on that copy of the First Letter, that it was a true copy. OCBC claimed that by presenting the copy of the First Letter to OCBC and certifying that it was a true copy, Dr Soh and/or APLL had represented to OCBC that APLL had sufficient financial resources to satisfy full acceptance of the Offer. On the other hand, Dr Soh claimed that the First Letter was procured by Dr Rahman, who was his business associate, and since the letter was addressed to OCBC, OCBC should have known that certification by Dr Soh could not have been of the original of the First Letter. Moreover, Dr Soh added, OCBC should have ensured that the First Letter was received by means of a secure system since the words "SWIFT: OCBCSGSG" appeared on the same.

52 The First Letter stated:

18th Feb 08

Asia Pacific Links Ltd

IBC No.: 541513

OCBC Account No: 516-716248-001

Swift: OCBCSGSG

Attention: Dr Anthony Soh

Oversea-Chinese Banking Corporation Limited

Corporate Finance Department

63 Chulia Street #03-03

OCBC Centre East

Singapore 049514

Attention: Ms Tsai Ai Liang/Ms Ang Suat Ching/Mr Tan Wei Ping

PROPOSED VOLUNTARY CONDITIONAL CASH OFFER ("OFFER") FOR ALL SHARES ("OFFER SHARES") IN THE CAPITAL OF JADE TECHNOLOGIES HOLDINGS LIMITED NOT ALREADY OWNED OR AGREED TO BE ACQUIRED BY ASIA PACIFIC LINKS LIMITED ("COMPANY") AND ITS CONCERT PARTIES

We refer to the above.

We have been instructed by the Company to earmark *US$*100,000,000 … from our current account granted to the Company, to make payment for the Offer shares tendered in acceptance of the Offer. In this regard, we confirm that the Company has sufficient financial resources to satisfy full acceptances of the Offer.

Yours faithfully

For and on behalf of

Standard Chartered Bank

Jakarta Branch

[Ng Khok Pheng (Manager)]

[Lim Bun Tjaij (Officer Trade Services)]

[emphasis added]

53 When cross-examined if it had struck her that the letter referred to US$100m as opposed to the S$100m that was required by OCBC, Ang replied that she was not concerned as US$100m easily translated to S$140m-S$150m which was still in excess of what was needed for the Offer.

54 In the afternoon of 18 February 2008, Tan called the telephone number stated on the First Letter and managed to speak to a person who identified himself as "Mr Ng" and who orally confirmed that SCB Jakarta had issued the First Letter. "Mr Ng" undertook to send a written confirmation as well as the original of the First Letter to OCBC. Tan then sent a message to an email address that "Mr Ng" had given to him, in which Tan requested confirmation that SCB Jakarta had earmarked US$100m from APLL's current account for the Offer. "Mr Ng" promised to send the letter the following morning. A fax was indeed transmitted by "Mr Ng" to OCBC on 19 February 2008 (see [62] below).

The release of the Offer Announcement

55 After receiving approvals from Dr Soh and A&G, OCBC issued the Offer Announcement to SGX at 7.30pm on 18 February 2008. Up to 18 February 2008, neither Dr Soh nor Norman had made any changes to the statements of shareholdings of APLL and Dr Soh in paras 1.2, 9.1 and Appendix 5 of the draft Offer Announcement.

56 I note that it was Dr Soh, in his reply dated 18 February 2008 to Tan's email of the same date (which merely attached a revised draft Offer Announcement for Norman's clearance but did not state when the Offer Announcement would be released), who had asked for the Offer Announcement to be released at 7.30 pm that day. Dr Soh's email stated:

> Dear Wei Ping,
>
> Please release the offer announcement tonight at 7.30 pm.
>
> The Co would release the PCIM announcement at 6.30 pm and will release the offeree announcement before 9 pm!
>
> Regards
>
> Dr Anthony Soh

57 The Offer Announcement included the Shareholding Representation, the Financial Resources Representation and the Responsibility Statements (see [8] above). It further stated that the rationale for the Offer was for the Offeror to acquire an increased stake in Jade as part of its strategic investment in companies with growth potential Based on the information stated in the Offer Document regarding the defendants' shareholdings in Jade, APLL would require $116.7m to satisfy full acceptance of the Offer at the Offer price of $0.225 per Jade share.

Statements made by Dr Soh without prior consultation with OCBC or A&G

58 On 18 February 2008, at 7.47 pm, A&G sent an email to Dr Soh to emphasise that neither Dr Soh nor APLL should take any unilateral action in relation to the Offer without first consulting OCBC or A&G. According to Ang, she had also called Dr Soh later that night to remind him not to make any unilateral comments on the Offer without first seeking the advice of A&G and OCBC. The catalyst for the issuance of these reminders to Dr Soh was the discovery by OCBC and A&G, that Dr Soh had, on or before 16 February 2008 and without prior consultation with either of them, issued a letter to Jade stating his intention to make the Offer.

59 On 19 February 2008, an article appeared in the Business Times newspaper stating that Dr Soh would be making a $117m cash offer to acquire the remaining 53.46% of Jade's shares. The article quoted Dr Soh *in extenso* on the potential of Jade's businesses and his profit forecast in relation to Jade. Dr Soh was also quoted as saying, with reference to an Indonesian coal mine project undertaken by Jade, that Jade was sitting on a "gold mine". Dr Soh was further quoted as saying that he was making the Offer for Jade as he believed that the coal mine project would increase the value of Jade several-fold. The article was based on an interview that Dr Soh had given to a Business Times journalist on the evening of 18 February 2008. In response to this article, an announcement dated 20 February 2008 had to be made by OCBC on behalf of APLL to clarify and withdraw the statements made by Dr Soh in the article. This was subsequently published in the Business Times and sent to Jade's shareholders.

60 Neither OCBC nor A&G were informed, prior to Dr Soh's interview by the Business Times journalist, that he would be giving the interview. Ang also testified that during her telephone conversation with Dr Soh on the evening of 18 February 2008, Dr Soh did not at any time mention or allude to his interview with any reporter. When cross-examined on why he had given the interview despite Ang's telephone call to him, Dr Soh claimed that the interview had been scheduled sometime earlier. However, when asked to confirm that he already knew that he was going to be interviewed by the journalist when he spoke to Ang over the telephone, Dr Soh claimed that the journalist had only contacted him an hour after the Offer Announcement was made. In any event, Dr Soh did not inform the journalist that he was not in a position to give the interview.

61 In an email sent at 9.30 am on 19 February 2008, in reply to A&G's email to him the previous evening, Dr Soh informed A&G that he had spoken to Ang on 18 February 2008 and that "[he] wished that [he] had sought advice prior to ... speaking to [the Business Times reporter] in [his] capacity as Group President of Jade (not as offeror)". In the email, Dr Soh also stated that the Business Times had taken advantage of the information he had given to its journalist in the interview by reporting the information together with the takeover news. I note that Dr Soh's statements in this email were inconsistent with his conduct of giving the interview *after* he had read A&G's email earlier that evening reminding him not to take any unilateral action relating to the Offer without consulting A&G or OCBC, and *after* his telephone conversation with Ang.

The Second Letter from SCB Jakarta

62 On 19 February 2008, OCBC received by fax the Second Letter. The Second Letter purported to confirm that SCB Jakarta had indeed issued the First Letter and the authenticity of the contents of the First Letter. However, OCBC did not notice that the fax header displayed an incorrect spelling of SCB Jakarta's name as "STANDART CHARTERED BANK" instead of "STANDARD CHARTERED BANK". On 27 February 2008, Tan called "Mr Ng" at the number stated in the Second Letter as OCBC had not received the originals of the First and Second Letters. "Mr Ng" told him that the letters had been sent. Tan then called Norman who informed him that APLL had also not received the originals of the letters but assured Tan that he would follow up on the matter.

63 In his email to OCBC on 18 February 2008 (see [51] above), Dr Soh had, in addition to attaching the First Letter, stated that:

> I have also asked Standard Chartered Bank to arrange a Banker's Guarantee of USD 100 millions [sic] which will be swifted within a week.

On 25 February 2008, Tan emailed Norman to check if the banker's guarantee referred to in Dr Soh's email was ready. Dr Soh replied on 27 February 2008 stating that, based on his understanding of the

Mandate Letter issued by APLL to OCBC, the First Letter was all that was required to satisfy OCBC that there were sufficient funds for the purposes of the Offer. He also expressed reluctance to obtain a banker's guarantee because of the additional expense which it would incur. In particular, Dr Soh stated that:

> As I understand in the mandate letter that only a Bank Letter from SCB in support of AP Links Ltd is *all that is required*, since that bank letter was issued *and you have communicated twice with the SCB Banker* who had confirmed that funds are available to AP Links for the Gen Offer, that should be more than enough for proof of funds as a Banker's Guarantee or Swift *was never part of the requirement as I understood right from the beginning*. ... [emphasis added]

64 Dr Soh sought to provide OCBC with additional comfort by relying on the following attachments: a US$500m banker's guarantee that was issued by SCB Jakarta via SWIFT in favour of a UBS AG bank account belonging to Faitheagle, a register of directors of Faitheagle, and a share certificate of Faitheagle. Alternatively, he stated that if it was absolutely necessary, he could request UBS to issue a separate bank guarantee from his Faitheagle account at UBS to his APLL account at OCBC *provided OCBC was willing to accept and give him a credit line*.

65 According to Tan, as at 27 February 2008, he had not informed Dr Soh or Norman of the telephone calls that he had made to verify the contents of the First and the Second Letters. In fact, Dr Soh was only told that Tan had made the calls to "Mr Ng" to verify the contents of the First and the Second Letters at a conference call between Dr Soh, OCBC and A&G on 27 March 2008 (see [77] below). The relevant extract from a transcript of this conference call (at p 3) is as follows:

> Anthony Soh: So I have just established that you spoke to Mr Ng in the past right?
>
> Tan Wei Ping: That's right.
>
> Anthony Soh: And he said that okay he confirms, did he ever in the past confirm that he wrote those letters?
>
> Tan Wei Ping: Yes.

66 It is clear from Dr Soh's email dated 27 February 2008 that Dr Soh was aware that he had to provide the Financial Resources Confirmation Letter to OCBC to prove that APLL had sufficient funds for the Offer. Moreover, a bank guarantee was not the means by which APLL would demonstrate to OCBC that it had sufficient funds to carry out the Offer. OCBC's team (Tan, Tsai and Ang) claimed that whilst they were surprised by the contents of Dr Soh's email as he had voluntarily offered to provide a banker's guarantee for the Offer at the initial meeting on 31 January 2008 and again in his email of 18 February 2008, they were not overly concerned with Dr Soh's sudden change of mind since the OCBC team was relying on the First Letter as satisfaction of the Financial Resources Confirmation Letter requirement and a banker's guarantee was not required from an offeror for a takeover.

67 In the event, Dr Soh did not provide any banker's guarantee to OCBC as proof that APLL had sufficient funds to satisfy full acceptance of the Offer.

The preparation of the Offer Document

68 On 20 February 2008, A&G circulated a first draft of the Offer Document to OCBC, Dr Soh and Norman. Information relating to APLL and Dr Soh's shareholdings in Jade were left blank in the draft.

Revisions were made to the draft by Tan and A&G and further drafts were circulated amongst the parties. On 4 March 2008, A&G sent a revised draft of the Offer Document to Dr Soh and OCBC. Appendix 5 of the draft set out APLL and Dr Soh's direct shareholdings in Jade as 445,672,504 shares and 5.5 million shares respectively. It also reflected that the only dealing in Jade shares by Dr Soh during the three month period immediately preceding the Offer Announcement Date and ending on 4 March 2008 was an acquisition of 5.5 million Jade shares by Dr Soh on 21 January 2008. Dr Soh replied to A&G's email dated 4 March 2008 instructing that out of the 45.97% Jade shares owned by APLL, 8.42% were held by APLL as direct shareholder and that APLL's deemed interest in the remaining Jade shares was 37.55%. He further stated that 37.55% of the Jade shareholding was held by nominees such as Merrill Lynch, Morgan Stanley and SBS Nominees. However, he stated that the "total interest [wa]s still the same as 445,672,504 (45.97%)".

69 Further, on 6 March 2008, Tan sent an email to Dr Soh in which he drew Dr Soh's attention to, *inter alia*, Appendix 5 of the Offer Document. Although the information set out in the Appendix was inaccurate, in his reply email to OCBC and A&G on 6 March 2008, Dr Soh did not point out the inaccuracies to OCBC or A&G.

The Second Verification Meeting

70 The Second Verification Meeting took place on 5 March 2008 and was attended by OCBC, A&G, Dr Soh and Norman. In the verification notes, Dr Soh certified, *inter alia*, that he accepted full responsibility for the accuracy of the information given in the Offer Document and that there were no material omissions.

The despatch of the Offer Document

71 The Offer Document was despatched by OCBC on 10 March 2008. It repeated the Shareholding Representation, the Financial Resources Representation, the Rationale Representation and the Responsibility Statements.

Reminders to Dr Soh of his responsibilities during the Offer

72 On 26 February 2008, A&G sent Dr Soh and Norman an email (copied to OCBC), annexing a copy of the Guidelines on Dealing Restrictions, Reporting Obligations and Public Statements (the "Guidelines"). A notice (marked "IMPORTANT NOTICE") on the first page of the Guidelines stated that Dr Soh was under certain restrictions in respect of trading in Jade shares and went on to emphasise that he was not to buy or sell Jade shares during the Offer period. Paragraph 4 of the Guidelines expressly stated that no "Relevant Person" (which would include Dr Soh) was to either purchase or dispose of Jade shares for the duration of the Offer without the prior written consent of an Authorised Person (which included OCBC). On 27 February 2008, Tan called Norman to remind Dr Soh not to trade in Jade shares during the offer period. In that telephone conversation, Norman confirmed that Dr Soh had not traded in Jade shares since the Offer Announcement. This was despite the fact that Dr Soh had disposed of 5.5 million Jade shares in Faitheagle between 12 and 25 February 2008 (see [20] above). The telephone conversation between Tan and Norman was documented in an email from Tan to Ang on 27 February 2008 (see [197] below).

73 The defendants admitted that on 7 March 2008, Dr Soh had transferred 50 million Jade shares from APLL to Faitheagle. He subsequently disposed of 45.7 million of these 50 million shares in the following manner:

(a) 10 March 2008 – 10 million Jade Shares were sold at $0.2205;

(b) 10 March 2008 – 5 million Jade Shares were sold at $0.225;

(c) 11 March 2008 – 7 million Jade Shares were sold at $0.2206;

(d) 11 March 2008 – 4 million Jade Shares were sold at $0.2206;

(e) 17 March 2008 – 4.7 million Jade Shares were sold at $0.22; and

(f) 31 March 2008 – 3 tranches of 5 million Jade Shares were sold at $0.22.

74 According to the defendants, this disposal of Jade shares by Faitheagle after the Offer Document was despatched on 10 March 2008 was in consequence of an email that Dr Soh had received from A&G dated 11 March 2008 which stated:

> Please be informed that under Rule 12 of the Singapore Code on Take-overs and Mergers, although the Offeror and its associates are free to deal in the relevant securities during the Offer period (e.g. acquire Jade shares through off-market or on-market purchases and acquisitions, sale and purchase agreements, etc.), these dealings must be publicly disclosed on the SGXNET no later than 12 noon on the dealing day following the relevant transaction.

However, contrary to A&G's instructions, Dr Soh did not disclose on SGXNET his transfer of Jade shares to Faitheagle and subsequent disposal of most of those shares. It is also noteworthy that Tan had sent a separate email to Dr Soh and Norman on 11 March 2008 to clarify A&G's email above and to remind them that Dr Soh should consult A&G and OCBC prior to any dealings in Jade shares. Dr Soh had disposed of 15 million Jade shares on the previous day prior to his receipt of A&G's email.

Requests by OCBC for funding for the Offer

75 Under the terms of the Offer Document, the Offer would have closed on 7 April 2008. As such, OCBC started making requests to APLL in mid-March 2008 for funds to be made available to settle acceptances of the Offer. According to OCBC, APLL informed OCBC that the funds would be in the form of a banker's guarantee. On or about 19 March 2008, Dr Soh informed OCBC that APLL had procured a bank guarantee (purportedly issued by SCB Jakarta) to pay for acceptances of the Offer ("the Bank Guarantee"); that SCB Jakarta would be sending a funds confirmation to OCBC via SWIFT for this purpose and that SCB Jakarta would issue the Bank Guarantee (which was for US$50m) and a second bank guarantee (for US$50m) to settle the Offer. However, from 19 March to 25 March 2008, OCBC, despite making numerous attempts, was unable to locate the SWIFT for the Bank Guarantee. On 26 March 2008, Dr Soh provided OCBC with a copy of the SWIFT of the Bank Guarantee (the First SWIFT). However, OCBC was still unable to locate the First SWIFT in its system. The OCBC team were subsequently informed, on 27 March 2008, by OCBC's SWIFT Operations Department that there were several irregularities in the copy of the First SWIFT which Dr Soh had provided to OCBC.

The calls to SCB Jakarta

76 On 27 March 2008, Tan telephoned a person who identified himself as "Mr Ng" using the "direct dial" number on the First Letter. This person informed Tan that SCB Jakarta's SWIFT Operations Department would contact OCBC's SWIFT Operations Department. However, OCBC's SWIFT Operations Department did not receive any communication from SCB Jakarta. Tan also called the main line of SCB Jakarta to enquire about the status of the Bank Guarantee and managed to speak to one Mr Ng (one of the purported signatories of the First Letter). According to Tan, this was a different person from the one who had identified himself as "Mr Ng" when OCBC called the number on the First Letter. This Mr Ng informed OCBC that he did not sign the First Letter and that Mr Lim, the other purported signatory of the First Letter, had retired from SCB Jakarta in January 2008. OCBC was then referred to Kuncahyo Bangun ("Bangun") of the trade services department of SCB Jakarta, who handled bankers' guarantees issued by SCB Jakarta. Bangun verbally informed OCBC that SCB Jakarta had never issued the First or the Second Letters or the Bank Guarantee. Subsequently, OCBC received two emails from Bangun (dated 27 March 2008 and 28 March 2008) which stated that SCB Jakarta had never issued the First Letter, the Second Letter and the Bank Guarantee.

The telephone conference with Dr Soh on 27 March 2008

77 In the evening of 27 March 2008, OCBC and A&G conducted a telephone conference with Dr Soh and informed him of the telephone call to the main line of SCB Jakarta. Dr Soh sounded alarmed at the news and suggested that he may have been a victim of fraud. He assured OCBC and A&G that he would clarify the matter and agreed to meet OCBC and A&G to further discuss the matter the following day. This conference call on 27 March 2008 was recorded. From the transcript, it appeared that it was at this telephone conference that Dr Soh mentioned Dr Rahman and FCGIL to OCBC and A&G for the first time. This is clear from the following extract (p 2) of the transcript of the telephone conference:

> Ai Liang: Can I. Doctor Soh *can I just clarify who is Dr Rahman?*
>
> Anthony Soh: Doctor Rahman is a co-signatory. He is a fund manager of a fund that we both manage sometime ag, few years back. So we made quite some money from the fund and then the profit, we set aside into a separate account and two of us are signatories. There are two signatories of this account. *The account under something called First Capital Growth Investment* and this account handled by our lawyer, Ng Kim Tian. ...
>
> [emphasis added]

At the trial, Tsai (PW2) testified that she only heard about FCGIL and its account in SCB Jakarta on 27 March 2008.

78 It is also apparent from the transcript of the conference call that Dr Soh stated during this conference call that, *inter alia*:

> (a) He still held the original of the Second Letter as well as the copy of the First SWIFT which he had provided to OCBC;
>
> (b) The First SWIFT could still be held up at the office of JP Morgan or the Monetary Authority of Singapore since it involved US dollars and that might be the reason why the Plaintiff's SWIFT operations was unable to locate it;
>
> (c) The US$100m was held in the SCB Jakarta bank account of FCGIL which had a total of approximately US$300m to which Dr Soh had a one-third share;

(d) He might have been a victim of fraud;

(e) He could arrange for the remittance of S$10m-S$20m from his accounts with other banks to OCBC to satisfy acceptances of the Offer once it turned conditional;

(f) He held 46% of Jade's shareholding;

(g) He did not want OCBC to report the matter to the SIC immediately and needed some time to resolve the issue;

(h) He would get Dr Rahman down to Singapore to meet with all parties and clarify the matter;

(i) He wanted to meet OCBC and A&G the next day when he would then have the opportunity to verify whether there were indeed two Mr Ngs and if so, to confront Dr Rahman about the different versions of facts presented by the two Mr Ngs.

The meeting in the morning on 28 March 2008

79 OCBC, A&G and Dr Soh attended a meeting in the morning on 28 March 2008. Dr Rahman was absent. Dr Soh informed the parties at the meeting that Opes Prime had been placed under receivership and that this would affect his shareholding in Jade as a result of the arrangement he had with Opes Prime under the GMSLA. According to OCBC, to the surprise of OCBC's team, A&G informed Dr Soh that it had not yet received a copy of the GMSLA. OCBC claimed but which Dr Soh denied, that at the meeting, Dr Soh had suggested to OCBC and A&G that APLL rely on Opes Prime's receivership as a basis to withdraw the Offer.

80 At the meeting, Dr Soh also claimed that he was arranging for a credit facility from Deutsche Bank. However, OCBC was unable to verify Dr Soh's claim because the officer at Deutsche Bank with whom OCBC's team spoke (on the telephone) was unwilling to reveal any details to OCBC on grounds of banking secrecy. Although Dr Soh was present with OCBC when the call to Deutsche Bank was placed, he remained silent when OCBC was on the telephone with Deutsche Bank's officer. Subsequently, OCBC requested for and Dr Soh agreed to provide, a list of assets which Dr Soh owned that could be liquidated for cash to support full acceptances of the Offer. This list was provided to OCBC the following morning. In the list, Dr Soh declared that he had the following assets:

a. A bungalow, an office unit and a condominium unit valued at $23m in total and on which loans amounting to $7.08m had been taken out;

b. 451 million Jade shares worth $70.47m after deduction of shares financed by Opes Prime and SBS Nominees;

c. Shares in E3 Holdings, Netelusion, Cordlife and China Medstar, valued at $17.71m in total;

d. Other assets including bonds, structured finance and other investment products in private banks totalling US$12m;

e. Cash totalling $5m.

At the meeting on 28 March 2008 and in his email attaching the list of assets, Dr Soh also informed OCBC that the asset pledged for the Offer was based on a current account at SCB belonging to FCGIL which had a deposit of US$625m and which was co-owned equally by three shareholders – Dr Rahman, Dr Soh and one Isnin Rahim ("Isnin"). Dr Soh claimed that US$200m of the monies in the account belonged to him. Additionally, at the meeting on 28 March 2008, Dr Soh provided OCBC with a copy of a bank statement dated 6 February 2008 which recorded that FCGIL had a balance of $625,002,745.20 in an account with SCB. OCBC requested that Dr Soh provide an updated bank statement.

81 Thereafter, OCBC made telephone calls, in Dr Soh's presence, to Mr Ng (using the SCB Jakarta main line) and to the person who identified himself as "Mr Ng" (using the telephone number indicated on the First letter). The latter "Mr Ng" insisted that the funding from SCB Jakarta for the Offer was still in place whilst the former denied having sent the First Letter or the Second Letter. Dr Soh also called Dr Rahman on speaker phone to inform him that OCBC had not received the First SWIFT and that Mr Ng, who was contacted through the SCB Jakarta main line, denied that the First and Second Letters and the First SWIFT were issued by SCB Jakarta. In this telephone conversation, Dr Rahman told Dr Soh that he would check and follow up accordingly. According to Dr Soh (but disputed by OCBC), Dr Rahman also informed Dr Soh that someone had tried to "disturb the deal".

82 At around 11am, OCBC decided to send a SWIFT message to SCB Jakarta through OCBC's SWIFT system to seek confirmation that:

(a) SCB Jakarta had earmarked US$100m for APLL in connection with the Offer;

(b) APLL had sufficient financial resources to satisfy full acceptance of the Offer; and

(c) SCB Jakarta had issued the Bank Guarantee in the form of the First SWIFT.

83 Just before the meeting ended, Dr Soh provided OCBC with the original of the Second Letter but stated that he had not received the original of the First Letter from SCB Jakarta.

The meeting in the evening on 28 March 2008

84 A meeting, attended by OCBC, A&G and Dr Soh, was reconvened at 5pm on 28 March 2008. Halfway through this meeting, a letter was received from Deutsche Bank stating that there was an understanding that Dr Soh would be transferring US$50m – US$100m from SCB Jakarta to APLL's account with Deutsche Bank and, out of those funds, US$10m would be used to satisfy acceptances of the Offer. It was emphasised in the letter that the letter should not be construed as the grant of a credit facility. OCBC was of the view that the letter was insufficient confirmation of APLL's financial resources.

85 At this meeting, calls were made to the two "Mr Ng"s again to check if they had received OCBC's SWIFT. The Mr Ng whom OCBC called using the number on the First Letter claimed that he had not received any SWIFT from OCBC and that he would check again with Dr Rahman on the SWIFT

from OCBC. When he was asked about SCB Jakarta's address, this Mr Ng was unable to give a clear answer and could only provide the street name of SCB Jakarta after a while. He then claimed that he was at a meeting with clients and hung up abruptly. OCBC was unable to contact the other Mr Ng through the main line of SCB Jakarta.

86 Towards the end of the meeting, A&G informed Dr Soh that they would be advising OCBC to inform the SIC of the events that had transpired. Dr Soh asked for more time to resolve the issue of his proof of funds.

87 Immediately after the meeting and after Dr Soh had left, OCBC and A&G called the SIC and informed it of the events that had transpired.

88 A&G discharged themselves as legal advisers to APLL on 29 March 2008 and, on 30 March 2008, APLL appointed Rodyk & Davidson LLP ("Rodyk") in place of A&G.

Dr Soh's further attempts to show that he had the financial resources for the Offer

89 On 29 March 2008, Dr Soh had a conference call with the OCBC team in which he claimed that he was arranging for a US$80m credit line from Deutsche Bank on the backing of a US$100m banker's guarantee to be sent by SCB Jakarta to Deutsche Bank. Dr Soh also said that as a back-up plan, he was concurrently arranging a US$100m banker's guarantee from HSBC London to Deutsche Bank.

90 In the evening on 29 March 2008, OCBC received an email from Dr Soh in which Dr Soh explained that Dr Rahman had discussed the matter with the President of SCB Jakarta and that the First SWIFT did not reach OCBC due to the use of an improper format. He further stated that SCB Jakarta would resend the necessary SWIFT confirmation using the correct format.

91 On the morning of 31 March 2008, OCBC and its newly appointed solicitors, Rajah & Tann LLP ("R&T") met with Dr Soh. According to OCBC, at the meeting, Dr Soh informed OCBC that, in addition to the 140 million shares that had been pledged to Opes Prime, a further (approximately) 155 million Jade shares had been pledged to Opes Prime under the GMSLA. (Dr Soh disputed this point and asserted that he had made full disclosure of the transfer of 300,050,000 Jade shares to Opes Prime under the GMSLA as early as 31 January 2008). Further, Dr Soh made the following statements at this meeting:

(a) The First SWIFT was not sent by SCB Jakarta due to a "human factor". Dr Rahman had made a complaint to the President of SCB Jakarta and expected the SWIFT Confirmation to reach OCBC by the end of the current or following day;

(b) The most realistic option for the provision of funds would be for APLL to obtain a credit line from Deutsche Bank;

(c) Dr Soh expected his current financial resources to be sufficient to settle acceptances should the Offer turn unconditional and was not counting on OCBC to provide financing for the Offer;

(d) Dr Soh had reasons to believe that he owned 46% of the Jade shares up until Opes Prime was placed into receivership and that he was currently in the process of establishing whether he still retained beneficial interest in the 295 million Jade shares;

(e) Dr Soh planned to instruct his Australian lawyers to apply for an injunction to restrain

Merrill Lynch from selling the Jade shares. His lawyers were going to submit representations to the Opes Prime receivers to state that the shares belonged to him. Furthermore, Dr Soh said that he planned to redeem the Jade shares and repay the outstanding loan of US$27m through a financing facility with UBS Bank using the "pledged" Jade shares as collateral.

92 At the same meeting, Dr Soh gave OCBC a copy of a letter apparently issued by SCB Jakarta on 10 August 2007 to FCGIL, confirming that FCGIL had US$625m in an account with the London branch of SCB and that Dr Soh and Dr Rahman were the authorised signatories of that account. Dr Soh relied on the letter to claim that he had sufficient financial resources to satisfy the Offer as he was a one-third shareholder of FCGIL.

The Second SWIFT

93 On 1 April 2008, Rodyk sent an email to OCBC attaching a copy of a purported confirmation from SCB Jakarta that the SWIFT remittance of US$100m would be effected that day (the Second SWIFT). By the close of business on 1 April 2008, OCBC still had not received the Second SWIFT. Dr Soh called Tan twice on 1 April 2008 to inform Tan that SCB Jakarta had already sent the Second SWIFT to OCBC and that someone from OCBC's SWIFT Operations Department by the name of "Jessica Tan Wei Sze" had acknowledged receipt of the Second SWIFT. Dr Soh also promised Tan that he would provide OCBC with a copy of the Second SWIFT the next morning. However, OCBC was unable to locate either the Second SWIFT or any employee by the name of "Jessica Tan Wei Sze".

The Third Letter from SCB Jakarta

94 On 2 April 2008, Dr Soh emailed to Tan a copy of a letter dated 1 April 2008 purportedly issued by SCB Jakarta to FCGIL enclosing a statement of account as of 31 March 2008 in respect of FCGIL's account with SCB Jakarta (the Third Letter). The purported signatories of the Third Letter were "Mr Ng" and "Mr Lim". The Third Letter stated that SCB Jakarta was "transmitting [FCGIL's] instrument amounting to United States Dollars One hundred (US$100) millions to OCBC Bank in Singapore today". Tan called OCBC's SWIFT Operations Department to check if there were any SWIFT messages received from SCB Jakarta in favour of APLL on 1 April 2008 but was informed that no such messages had been received as of 2 April 2008.

The resignation of OCBC and Rodyk and the withdrawal of the Offer

95 On 31 March 2008, Tsai flew to Jakarta and met the president-director of OCBC's subsidiary, PT Bank OCBC Indonesia, Lo Nyen Khing ("Lo"). Lo informed Tsai that the signatures of "Mr Ng" and "Mr Lim" on the First Letter did not match the specimen signatures in the authorised signatories book in PT Bank OCBC Indonesia, and that "Mr Lim" was no longer with SCB Jakarta.

96 On 1 April 2008, Dr Soh, through Rodyk, provided OCBC with a circular dated 1 April 2008 from Deloitte Touche Tohmatsu (the receivers and managers of Opes Prime) (the "Deloitte Circular"). The Deloitte Circular explained that the title to the shares "lent" to Opes Prime was in fact fully transferred to Opes Prime. This meant that APLL only held 16% and not 46% of Jade's shareholding. In a telephone call at 7 pm on 1 April 2008, Rodyk informed OCBC that APLL would not have sufficient funds to pay for full acceptance of the Offer if it transpired that APLL did not own the 30% block of shares which were "pledged" to Opes Prime. Later that evening, APLL wrote to the Board of Jade informing that:

> A circular from the receivers and managers of [Opes Prime] appointed by ANZ Banking Group, a creditor of [Opes Prime], dated 1 April 2008 … informed the clients of [Opes Prime] that where

securities are "lent" to [Opes Prime], absolute title to the securities passes from the lender to [Opes Prime] (as borrower).

On the basis of APLL's letter, Jade called for a trading halt with immediate effect.

97 As of 2 April 2008, OCBC was still unable to locate any SWIFT messages received from SCB Jakarta in favour of APLL. In the light of the developments, OCBC resigned as financial adviser to APLL. According to Ang, she informed Dr Soh of this resignation which news Dr Soh accepted without raising any objections. Tan then delivered a copy of OCBC's discharge letter to Dr Soh's residence. At 7 pm, OCBC sent an email to Dr Soh and Rodyk to inform them that OCBC was discharging itself as financial adviser to APLL and to attach a copy of OCBC's discharge letter.

98 On 3 April 2008, Rodyk also resigned as legal adviser to APLL in relation to the Offer.

The withdrawal of the Offer

99 Although OCBC had resigned as Dr Soh's financial adviser, Dr Soh still contacted the OCBC team on 3 April 2008 to inform OCBC that the SIC had requested that he provide OCBC with a confirmation of his financial capacity to complete the Offer by noon on 4 April 2008 via a SWIFT confirmation, failing which the SIC would require APLL to withdraw the Offer. Dr Soh also informed OCBC that he had cancelled the Second SWIFT and had instructed SCB Jakarta to send another SWIFT confirmation to OCBC (the Third SWIFT). By the expiry of SIC's deadline, OCBC's SWIFT Operations Department was still unable to locate the Third SWIFT. At the suggestion of the SIC, Tan made another inquiry with SCB Jakarta to confirm whether SCB Jakarta had issued any SWIFT messages to OCBC during the relevant period of time. The bank officer that Tan spoke to confirmed that SCB Jakarta had not issued any SWIFT messages to OCBC.

100 On 4 April 2008, APLL withdrew the Offer with the consent of the SIC. Jade announced that the Offer was withdrawn with immediate effect. On 9 April 2008, Jade announced on SGXNET that Merrill Lynch had reduced its stake in Jade from 26.49% to 16.66% on 1 April 2008 and that the decrease was due to a sale of Jade shares pursuant to Merrill Lynch's rights under the GMSLA. On 7 April 2008, 16 April 2008 and 30 April 2008, SFL force-sold 8 million, 12 million and 17 million Jade shares respectively.

101 On 17 April 2008, in response to a query by R&T, SCB Jakarta confirmed that various documents, including the First, Second and Third Letters and the First, Second and Third SWIFTs were never issued by them and that Mr Ng could not be reached at the "direct dial" number displayed on the First Letter. This was further confirmed by an exchange of SWIFT messages between OCBC and SCB Jakarta on 22 and 29 April 2008.

The Letter dated 8 October 2008 ("the Fourth Letter")

102 A letter dated 8 October 2008 was addressed to the Securities Commission of Kuala Lumpur, Malaysia, and was apparently issued by one "Felix Berdhi Santoso" who purported to confirm that:

(a) FCGIL used to maintain a "satisfactory account" with SCB Jakarta which had since been closed;

(b) A letter dated 18 February 2008 was issued by SCB Jakarta to OCBC;

(c) A banker's guarantee numbered SCB/BG/18175/2008 (for US$50m) dated 19 March 2008 was issued by SCB Jakarta in favour of APLL; and

(d) A banker's guarantee numbered SCB/BG/18182/2008 for US$100m was issued by SCB Jakarta in favour of APLL.

The Securities Industry Council inquiry

103 The matter was first brought to the attention of the SIC by OCBC's in-house legal counsel on 28 May 2008. The SIC hearing committee issued a report on 14 October 2008, after conducting an inquiry to determine if any party had breached the Code in relation to the withdrawal of the Offer by APLL for Jade. The findings of the SIC hearing committee were not disputed by either party.

(1) Findings in relation to Dr Soh

104 The SIC hearing committee found that Dr Soh had committed multiple and serious breaches of the Code. In particular, he had breached General Principle 6 and Rules 3.5(c), 8.2, 23.3(c) and 11.2 of the Code.

105 The SIC hearing committee found no indication from OCBC that Dr Soh could reasonably have relied upon to conclude that OCBC would provide Dr Soh with the necessary financing to satisfy acceptances of the Offer. The SIC hearing committee further stated that assuming arrangements were in place for a credit line to be available for Dr Soh to draw upon to satisfy acceptances, it was still ultimately dependent on receipt of an acceptable banker's guarantee. The SIC hearing committee found that ultimately, all the reasonable measures that Dr Soh claimed to have taken to secure the necessary funding for the Offer boiled down to a mere verbal agreement with Dr Rahman for the banker's guarantee. Further, it stated that Dr Soh had a separate and distinct obligation from his advisers to satisfy himself that he could implement the Offer in full and he was not relieved of this obligation by OCBC's confirmation of APLL's financial resources.

106 The SIC hearing committee found that Dr Soh did not present the information on his shareholdings accurately and fairly under Rule 8.2 of the Code by his bare statement that he had a deemed interest in the shares affected by the GMSLA.

107 The SIC hearing committee found Dr Soh to be in breach of Rules 3.5(c), 23.3(c) and 8.2 of the Code in failing to disclose Faitheagle's sales of Jade shares in February 2008 and Opes Prime's forced sale on 21 January 2008. As for the sale of 50.2 million Jade shares by Faitheagle during the Offer period between 21 February 2008 and 31 March 2008, the SIC hearing committee held that this contravened Rule 11.2 of the Code.

(2) The findings in relation to OCBC

108 OCBC was found to have breached Rules 3.5 and 23.8 of the Code in respect of its financial resources confirmation and Rules 3.5(c), 23.3(c) and 8.2 of the Code in respect of the disclosure of shareholdings.

109 The SIC hearing committee held that OCBC should have independently verified the contents of the First Letter by calling the main line of SCB Jakarta.

110 The SIC hearing committee noted that OCBC never followed up with A&G on whether A&G had

reviewed the GMSLA. OCBC should have sought but failed to seek, clarification from A&G on the ownership status of the Jade shares under the GMSLA.

111 The SIC hearing committee accepted that Dr Soh's reticence and breaches of the Code deprived OCBC of the opportunity to detect his failings and to advise him properly. It held that OCBC's breaches were relatively less culpable than Dr Soh's overall conduct. Although there might have been a deception on OCBC in respect of the confirmation letters purportedly issued by SCB Jakarta, the SIC hearing committee was unable to express an opinion as to whether Dr Soh was complicit in this deception.

The witnesses

OCBC's witnesses

112 OCBC had seven factual witnesses and one expert witness. Tan, Tsai and Ang were from the OCBC team who liaised with Dr Soh regarding the Offer. At the material time, Tan was a manager in, Tsai was the head of and Ang was the Vice President of, OCBC's Corporate Finance Department. Tsai left the daily management of the Offer to Tan and Ang. Whilst Tan was not present at the meeting on 31 January 2008, he was instructed by Ang to conduct due diligence checks on APLL, Dr Soh and Jade, and to assist with the Offer thereafter. All three witnesses had consistent testimonies of what had occurred throughout their dealings with Dr Soh and APLL. More importantly, their accounts of what transpired at their meetings with Dr Soh corresponded with the minutes taken by Ang at those meetings as well as the transcripts of such meetings, where available.

(a) In particular, all three witnesses were adamant that Dr Soh had never requested a loan and OCBC had never offered to provide APLL with the requisite funding for the Offer.

(b) They also consistently emphasised that during the First Meeting, Dr Soh never mentioned FCGIL, Faitheagle or Dr Rahman and did not inform OCBC about the margin calls by Opes Prime and SFL, the forced sale of Jade shares by Opes Prime, and the provision of further collateral to those financiers, even though the events took place just a few days prior to that meeting.

(c) All three witnesses also took the position that Dr Soh never disclosed to OCBC the various dealings in Jade shares by APLL and Faitheagle from January to March 2008.

(d) Additionally, Tan and Ang claimed that Dr Soh had stated at the Kick-off Meeting that APLL had transferred 140,000,000 (and not 300,050,000) Jade shares to Opes Prime and had retained full beneficial ownership over those Jade shares.

(e) The witnesses also stated that there was no reason for OCBC to disbelieve Dr Soh's representations on shareholdings, financial resources and the motivations for making the Offer, and they did not suspect that any of those representations were untrue.

113 Dina Artarini ("Artarini") is currently the Head of Legal and Head of Wholesale Banking Legal in SCB Jakarta. At the trial, she testified that, having searched through SCB Jakarta's register of outgoing letters and list of authorised signatories and having conducted checks on "Felix Berdhi Santoso", she could confirm that the Fourth Letter was never issued with the authority of SCB Jakarta.

114 Stephen Edward Clark ("Clark") was OCBC's expert witness. He is, and has been since 1988, a managing director of The Anglo Chinese Investment Company, Limited, a business based in Hong

Kong, which he jointly founded and which is active in a wide range of corporate finance transactions. Since 1976, Clark (PW5) had worked continuously in corporate finance. He was a member of the Committee on Takeovers and Mergers in Hong Kong from 1984 until it was replaced in 1992 by the Hong Kong Takeovers and Mergers Panel. He has been a member of the Hong Kong Takeovers and Mergers Panel since its inception and its chairman since 1 April 2009, having previously been its acting chairman and a deputy chairman. OCBC engaged Clark to provide an independent expert report on OCBC's conduct as the financial adviser to APLL in connection with the Offer. Consistent with OCBC's position at the trial, Clark did not dispute the reasonableness of the SIC's decision in connection with OCBC's conduct during the Offer and while it was in preparation. In fact, he stated that it was not his place to criticise the SIC's decision and that he was not prepared to do so since he chairs the equivalent committee in Hong Kong. Nevertheless, Clark was of the opinion that *in the circumstances which OCBC found itself, it was not possible for it to give proper advice on the conduct of the Offer because it was so far from being properly and fully informed*. Clark was also of the opinion that OCBC had adopted the approach of a reasonably competent financial adviser during its engagement. The details of and reasons for Clark's expert opinion will be discussed below (at [250]-[256]), suffice it to say at this juncture, I found Clark's reasoning and conclusions persuasive.

115 Hui Yew Ping ("Hui") is currently the managing director of OCBC Securities. Hui (PW6) deposed that, at all material times, the addressees of an over-the-wall memorandum sent by Tan on 1 February 2008 (Mike Tan, Matilda Su and himself) (see [31] above) had complied with the terms of the memorandum in that they had kept all information obtained from their involvement in the exercise confidential and did not trade in the shares or other securities of Jade. With regard to the defendants' allegation that OCBC Securities had increased its shareholding in Jade from 84,680,000 to 100,386,000 between 31 January 2008 and 15 February 2008, Hui emphasised that all the transactions pertaining to Jade shares during that period were carried out solely for and on the behalf of customers of OCBC Securities and that his company did not hold any beneficial interest in such shares.

116 Felicia Goh ("Goh") is an officer in the SWIFT Operations Unit of OCBC's Payment Operations (Operations & Technologies Division) Department ("the SWIFT Operations Department"). Between 20 March 2008 and 6 April 2008, Goh (PW7) was tasked to check if OCBC had received any SWIFT message from SCB Jakarta. In particular, Tan had requested that Goh locate the First, Second and Third SWIFTs. Goh deposed that she had searched OCBC's SWIFT system but was unable to locate all three SWIFTs. She had since been given copies of all three SWIFTs. Goh explained in detail why the copies of the three SWIFTs were irregular and did not conform to the format of a typical SWIFT message. She also confirmed that she had told Tan that there was no such person named "Jessica Tan Wei Sze" working in OCBC's SWIFT Operations Department.

117 Joice Tan ("Joice") is the Associate Director (Team Leader) of Emerging Businesses (EmB) at OCBC's Enterprise Banking Department ("the EB Department") which is responsible for opening and managing accounts for small and medium enterprises and also offers credit facilities to such enterprises. The EB Department operated/operates independently from OCBC's Corporate Finance Department and both departments had/have no access to one another's confidential customer information. As such, Joice (PW8) stated that the Corporate Finance Department would not, at any point in time, have been apprised of the amount of cash that APLL held in its bank account with OCBC that was managed by the EB Department.

118 According to Joice, the relationship between the EB Department and Dr Soh concerned only the administration and maintenance of the accounts of Jade and APLL with OCBC and no formal discussions on the provision of funding by OCBC to Dr Soh, APLL or Jade had ever taken place.

119 Joice described her meeting with Dr Soh in April 2007 as one where Dr Soh had informed Joice

and her colleagues that APLL wished to open a current account with OCBC and where he provided them with particulars of APLL, including information relating to the nature of its business and its background for the purposes of satisfying OCBC's "know-your-client" procedures. The account was subsequently opened on 5 July 2007. Joice stated that at the April 2007 meeting and throughout the period when OCBC was managing APLL's account, Dr Soh never requested a loan from OCBC to finance any take-over offer by APLL.

120 Joice described her second contact with Dr Soh in November 2007, as one where he had called her to enquire if OCBC's EB Department would be interested in granting him a loan of about S$100m. As this was an informal enquiry by telephone, Joice was unable to confirm, when cross-examined, if the loan related to the *purchase of* an Indonesian oil *field* or if it was in respect of an *oil deal*. Moreover, Joice stated that she was unaware that the oil deal was for Jade and not for APLL. She disagreed with Dr Soh's claim that a meeting had taken place between herself, Hoi, Dr Soh and the head of OCBC's EB Department, where Dr Soh had showed the attendees a draft bank guarantee from SCB Jakarta and where OCBC had expressed a keen interest to do the deal on the back of the draft guarantee. Joice emphasised that Dr Soh never made a formal request for financing.

121 With regard to an email from Hoi (an account manager in Joice's team) to Tan on 4 March 2008 wherein Hoi had provided Tan with OCBC's interest rates as requested by Tan and queried Tan on what type of business proposal OCBC was granting to Dr Soh upon receipt of a bank guarantee from him, Joice described this as "a general sales question". In his reply to Hoi's email on 6 March 2008, Tan had informed Hoi that his request for OCBC's interest rates were for reference only and that OCBC would not be granting any loans or guarantee to Dr Soh or APLL for the Offer. After the exchange of emails in March 2008, neither Tan nor Dr Soh approached OCBC's EB Department to request for funding to be provided to APLL for the Offer.

The defendants' witnesses

122 Dr Soh (DW1) was the only factual witness for the defendants. This was despite the fact that much of his evidence referred to conversations with and/or the actions of other individuals such as Dr Rahman, Isnin, Norman, William Chan and Cindy Goh.

Dr Soh's testimony

123 Dr Soh has been in business since he left medical practice in 1992. Despite his years of experience as a businessman and the fact that, at the material time, Dr Soh was a director and shareholder of several companies (see [17] above), Dr Soh claimed that he had been the victim of a fraud perpetrated by Dr Rahman whom Dr Soh had been unable to contact since October 2008. In his submissions at the SIC inquiry, in his AEIC and during his cross-examination at this trial, Dr Soh proffered various (and sometimes contradictory) explanations for the events that occurred in the lead-up to the withdrawal of the Offer, particularly with regard to his undisclosed dealings in Jade shares.

(1) Dr Soh's description of his relationship with Dr Rahman

(A) Dr Soh's acquaintance with Dr Rahman

124 According to Dr Soh, Dr Rahman was first introduced to Dr Soh on 5 May 2006 as a "high net worth Malaysian investor" by one Steven Ow, a Malaysian broker residing in Singapore. When Dr Soh first met Dr Rahman, the latter was with Isnin who was introduced to Dr Soh as a director of a listed Malaysian construction company. Dr Soh later learnt that Isnin was Dr Rahman's business partner. At

that meeting, Dr Rahman informed Dr Soh that he was interested in investing with Dr Soh and that he was the signatory of a bank account maintained with SCB Jakarta which had the sum of US$500m belonging to a highly placed Malaysian personality. Dr Rahman explained to Dr Soh that although he could not withdraw or remit the money from the account, the fund could be used as a means of financing transactions through the grant of bank guarantees or standby letters of credit secured against those funds.

125 Dr Soh claimed that he had conducted initial due diligence on Dr Rahman. However, this consisted only of telephoning Steven Ow and Isnin to confirm Dr Rahman's identity and the source of funds in the SCB Jakarta and conducting an internet search on Dr Rahman which yielded no useful results. This was despite the fact that Dr Soh had only met Isnin once, Dr Rahman was present at that meeting and Dr Soh was aware that Dr Rahman and Isnin were very close friends. Dr Soh also claimed that he was assured of Dr Rahman's creditworthiness and the existence of the SCB Jakarta account because he believed that Dr Rahman had successfully applied for a Privilege Banking Account with United Overseas Bank ("UOB") by 8 November 2006 using copies of his SCB Jakarta account statements. Apart from the quantum leap in logic in assuming a privilege banking customer of UOB Singapore was creditworthy to the extent of US$500m, Dr Soh did not produce any evidence to support his belief.

(B) Dr Soh's business dealings with Dr Rahman

126 In his AEIC, Dr Soh claimed that he took on Dr Rahman as a client using APVC (see [17] above) as the business vehicle whereby APVC would act as Dr Rahman's broker and procure investments for Dr Rahman (who would finance the investments) with any profits generated to be shared *equally* between Dr Rahman and APVC. Dr Soh prepared a Client Evaluation Summary, dated 6 May 2006, containing information that would be supplied to banks or other financial institutions for the purpose of verifying Dr Rahman's identity and business activities. Dr Soh also had Dr Rahman execute (1) a Letter of Intent which confirmed that Dr Rahman was willing "to enter US$500m for [his] participation into a Private Placement – Buy/Sell Transaction" and which authorised Dr Soh to verify and confirm that Dr Rahman had the funds to enter into the transaction; (2) a Bond Power of Authorisation which authorised Dr Soh as Dr Rahman's agent to negotiate with financial partners and entities to develop Dr Rahman's monies in his SCB Jakarta account; and (3) a Fee Protection Agreement, under which Dr Rahman agreed to pay transactional fees to APVC amounting to 5% of all profits made on each successful transaction, to be divided in the following manner: 2% each to Steven Ow and another person and 1% to FCGIL.

127 Dr Soh also prepared a Joint Venture Agreement dated 6 May 2006, ("the JVA"). The terms of the JVA obliged Dr Rahman to pledge the sum of US$500m in his SCB Jakarta bank account to APVC for investment purposes for at least one year plus one day. Both Dr Rahman and APVC were to have an equal share of the profits payable from the Profit Disbursement Account.

128 According to Dr Soh, he carried out two to three transactions with Dr Rahman in the period up to 25 July 2006. In those transactions, Dr Soh would help to broker agreements between third parties for the sale and purchase of commodities. The funds in the SCB Jakarta account would be used to secure bank guarantees in order to open credit lines with financial institutions. APVC would be listed as the buyer of the commodities from the vendor and would sell the commodities in turn to the purchaser, thereby generating profits in those transactions as a middleman. According to Dr Soh, Dr Rahman made the ultimate decision whether to proceed with a transaction and Dr Rahman dealt with the European brokers directly once Dr Soh had put them in touch with him. In his AEIC, Dr Soh claimed that as per the terms of the JVA, any profits generated were kept by Dr Rahman in the Profit Disbursement Account, in Dr Rahman's name, at SCB Jakarta to be shared *equally* between Dr Soh and

Dr Rahman. Dr Soh claimed that he understood from Dr Rahman that the profits generated by deals introduced by Dr Soh between May and September 2006 amounted to US$125m.

129 However, at the trial, Dr Soh claimed that he only earned 1% of any fees derived from transactions involving Dr Rahman and was not told exactly how much of the profits in the Profit Disbursement Account were his or when he would receive such profits. Contrary to what appeared on the face of the JVA, when cross-examined on his business dealings with Dr Rahman, Dr Soh took the position that he had never entered into any joint venture or partnership with Dr Rahman but had only acted as Dr Rahman's broker. Dr Soh insisted that he was merely a middleman at all times and did not review the information provided to him by Dr Rahman. According to Dr Soh, the "business" between Dr Soh and Dr Rahman included business with European brokers under a European Bank Investment Programme. Dr Soh claimed that 50% of the profits of each transaction would go to Dr Rahman and the European Brokers respectively, out of which Dr Rahman would only give Dr Soh 5% out of his 50% share of the profits which Dr Soh would distribute in accordance with the Fee Protection Agreement in [126].

130 Dr Soh claimed that although there was no written agreement between APVC and the European brokers and the European brokers were not mentioned in the JVA, the 50% share of profits which was to be distributed to APVC under the JVA was actually deducted by the European brokers, out of which APVC would then be paid 2-5% of the profits. Dr Soh claimed that any reference to APVC in the agreements, Letter of Intent and other documents mentioned above did *not* refer to APVC *as principal* but to APVC acting as an *agent* for European brokers, to receive the documents. Only 1% of the profits earned from bank guarantees arranged by Dr Rahman belonged to Dr Soh and would be channelled to the Profit Disbursement Account.

131 At the trial, Dr Soh claimed that he did not really understand the purpose of the JVA and that all the documents and agreements were based on templates that he had previously used for his transactions with European brokers.

132 Contrary to what was stated in the Letter of Intent and the Bond Power of Authorisation (at [126] above), Dr Soh testified that Dr Rahman had imposed the condition that Dr Soh was to have no direct contact with any officers of SCB Jakarta including the manager of Dr Rahman's account, Mr Ng. Whenever Dr Soh needed a bank guarantee, he had to get approval from Dr Rahman, who would earmark funds from the SCB Jakarta account for the bank guarantee.

(c) Dr Rahman's involvement in FCGIL

133 Dr Soh claimed that sometime in July 2006, Dr Rahman telephoned Dr Soh and informed him that he was having difficulties with the European transactions because the SCB Jakarta account was in his personal name, which was a Muslim name. Dr Rahman also felt that it was more appropriate to use a company for the European transactions. Dr Soh suggested to Dr Rahman that he could use FCGIL, which was then a dormant company, for this purpose. Dr Rahman, Isnin and Dr Soh then became equal shareholders in FCGIL through a transfer of shares to Dr Rahman and Isnin by Dr Soh. Dr Soh stated that he agreed to transfer the shares without consideration because Dr Rahman was transferring US$500m into FCGIL.

134 Dr Soh claimed that he was appointed a signatory of FCGIL's bank account with SCB Jakarta, albeit with limited authority in that he was not permitted to drawdown on the account but could only sign off on documents committing the funds as security for transactions. Dr Soh also asserted that Dr Rahman had visited him accompanied by an Indonesian man (who said he was a bank officer at SCB Jakarta), who witnessed Dr Soh's signing of the bank specimen signature card for the FCGIL account

with SCB Jakarta. According to Dr Soh, after he completed the legal documentation regarding the share transfer and the opening of a bank account for FCGIL with SCB Jakarta, Dr Rahman took away the documents and gave Dr Soh a copy of a 28 July 2006 statement of the SCB Jakarta account which reflected that it had a credit balance of US$500,002,745.20.

135 Dr Soh admitted that he abided by Dr Rahman's instructions in [132] at all times and never dealt directly with SCB Jakarta or visited SCB Jakarta or spoke to SCB Jakarta bank officers. I note however that the directors' resolution in respect of the opening of FCGIL's account with SCB Jakarta provided that the account was to be operated by Dr Soh's signature *and either Dr* Rahman's *or* Isnin's signature.

136 According to Dr Soh, around September 2006, Dr Rahman transferred US$125m (which represented profits from the Profit Disbursement Account) into FCGIL's account, leaving it with a balance of US$625m. This was reflected in a bank statement. The US$125m could be withdrawn if all three shareholders agreed. Dr Soh claimed that Dr Rahman had informed him that Dr Soh's share of the monies in the Profit Disbursement Account was US$10m DR Rahman's transfer of the US$125m into FCGIL meant that Dr Soh's share of the monies effectively increased to US$42m.

137 Although Dr Soh had provided OCBC with statements of the FCGIL account with SCB Jakarta dated 28 July 2006, 29 September 2006, 6 February 2007 and 31 March 2008, those were printed on the same SCB Jakarta letterhead as the First Letter. The signatories verifying the authenticity of these statements of accounts were again "Mr Ng" and "Mr Lim", and their signatures on those statements were similar to the signatures found on the First Letter. A letter dated 8 October 2008 issued by one Felix Berdhi Santoso of SCB Jakarta to the Securities Commission in Kuala Lumpur confirming the existence of the account maintained by FCGIL with SCB Jakarta was further confirmed by Artarini (PW4) to be forged (see [113] above). This meant that either the FCGIL account never existed or, that the statements of the FCGIL account were forged.

138 I agreed with OCBC's submission that Dr Soh's evidence on how his business dealings with Dr Rahman were conducted was inherently incredible. Dr Soh explained that FCGIL's account with SCB Jakarta held US$625m, of which US$500m belonged to a prominent political figure and the balance of US$125m belonged to Dr Rahman, Isnin and himself. The US$500m could be used to procure the issue of banker's guarantees for the benefit of third parties who wished to use such guarantees to obtain credit lines. However, the funds could not be remitted out of FCGIL's account. This made little commercial sense since there would be no reason why SCB Jakarta would issue a banker's guarantee on the security of a cash deposit which could not be used. It would also render the First Letter useless and inaccurate since the funds could never be taken out to satisfy full acceptances of the Offer. Moreover, Dr Soh did not produce any evidence of a single banker's guarantee which had been issued by SCB Jakarta based on the collateral of the funds in FCGIL's account.

(D) Dr Soh's emails with Dr Rahman

139 OCBC argued that Dr Soh's email correspondence with Dr Rahman contained cryptic messages which are set out in the following paragraphs ([140] to [148]).

(i) Email correspondence with subject matter: "Swift MT 760 Dated 200208"

140 At 4.01 pm on 27 February 2008, Dr Rahman emailed Dr Soh with the following message:

> Dear Bro,

I received it late from SCB. There was a communication with UBS, which I will forward to you once I receive it.

There was also a communication with MAS.

Regards,

A-Rahman.

At 4.45 pm on the same day, Dr Soh replied to this email as follows:

Dear Bro,

Thanks for the info. Please let us know once you have further info so I can check with UBS and arrange credit line.

Regards

A Soh

141 When queried about the contents of Dr Rahman's email, Dr Soh stated that he did not know exactly what Dr Rahman meant by the communications with UBS and MAS. He disagreed with counsel for the plaintiff that this was "some sort of code" between himself and Dr Rahman and that he and Dr Rahman were trying to come up with a fake bank guarantee to try and deceive UBS to grant Dr Soh a credit line.

(ii) Email correspondence with subject matter: "Bank Guarantee"

142 On 29 February 2008, Dr Rahman sent an email to Dr Soh stating:

Dear Bro,

I enclosed herein the correspondence from SCB Jakarta to UBS Bank Singapore for your attention and perusal.

Rgards,

A-Rahman.

To : UBS BANK AG, SINGAPORE SG

email : marcel.rohner@ubs.com

From : STANDARD CHARTERED BANK, JAKARTA

email : ng.khok.peng@id.standardchartered.com

Date : February 29th, 2008

Re : Bank Guarantee

Dear Sirs,

We have received your confirmation regarding our swift message [*sic*] MT 760 Guarantee Number: BG 0044/SC/2/08 dated 20/02/08 that you will proceed to Singapore Central Bank for Credit Authorization, we will informed [sic] our customer.

Regards,

STANDARD CHARTERED BANK, Jakarta.

Trade and Services Department

Ng Khok Peng

Dr Soh agreed with counsel for OCBC that the "correspondence … from SCB Jakarta to UBS Bank Singapore" enclosed by Dr Rahman did not appear to be a forwarded email. Instead, it seemed to be part of the email message from Dr Rahman to Dr Soh. Dr Soh was unable to provide the context for this email although he agreed with counsel that the email seemed to suggest that UBS had, prior to 29 February 2008, sent some confirmation to SCB Jakarta and that UBS had confirmed that they would proceed to Singapore Central Bank for credit authorisation.

143 Dr Soh replied to Dr Rahman's 29 February 2008 email on 5 March 2008 as follows:

Dear Bro,

Since William suggested that UBS Zurich may be already using our BG while "waiting" for MAS approval of credit line which will take a long time, he suggested that we take the approach of "threatening" to cancel the swift to make UBS respond swiftly. So suggest you ask Mr Ng to send the following email:

Mr Marcel Rohner

Group CEO

UBS AG

Dear Sir,

Thank you for your confirmation regarding our Bank Guarantee No: BG 0044/SC/2/08 dated 20/02/08 that you will proceed to Singapore Central Bank – MAS for Credit Authorization.

We have informed our client who has confirmed that to date your client Faitheagle Investment Limited with private bank account in UBS AG Singapore #190639 and UBS AG Hong Kong #227389 has not received notification of the above swift and the action pending.

Our client has given us instruction that the beneficiary Faitheagle Investment Limited has an account with your bank in Hong Kong and since the BG is transferable, it should be possible to transfer to Faitheagle account in Hong Kong which is outside the jurisdiction of MAS to provide the credit line. Our client has given us further instruction that if Faitheagle does not receive notification of the Swift MT760 or indication of credit facility available, we have been advised to cancel the swift and send to the beneficiary's account in another European Bank.

Please advise us urgently so that we may inform our client accordingly.

Best regards,

Ng Khok Peng

General Manager

For and on behalf of Standard Chartered Bank, Jakarta Branch

144 When cross-examined on the contents of the draft message that Mr Ng was to send to UBS Bank which was enclosed in Dr Soh's email, Dr Soh's evidence was that this message was drafted by William Chan. Probed on the contents of his email which preceded the draft message, Dr Soh claimed that he had written the email on William Chan's instructions and had not understood most of the message. Dr Soh disagreed with counsel for OCBC that the email dated 5 March 2008 was drafted by him in order that Dr Rahman would be able to produce a forged letter signed by Mr Ng to put pressure on UBS to give Dr Soh or Faitheagle a credit line.

145 William Chan was not copied in the message and was also not called as the defendants' witness. It is noteworthy that William Chan was Dr Soh's employee in Jade. Further, the draft message to UBS Bank that was enclosed in Dr Soh's email referred to Faitheagle's account with UBS and William Chan was not working for Faitheagle. In fact, Faitheagle was Dr Soh's company. Dr Soh could not give any convincing explanation as to why William Chan would be involved in drafting a banker's guarantee for SCB Jakarta or why William Chan himself was not sending the draft to Dr Rahman (or even copied on Dr Soh's email). Dr Soh's explanation that William Chan had worked in a SWIFT operations rooms when he was at Rothschild's and had also worked as a bank regulator for the United States government such that he somehow had access to the SWIFT operations rooms of all banks defies belief.

(iii) Email correspondence regarding the SWIFT of the bank guarantee

146 Dr Soh did not dispute Tan's evidence that on 19 March 2008, he had informed Tan that APLL had procured a US$50m banker's guarantee. Tan subsequently called Norman to inform Norman that he could not locate the SWIFT of the first US$50 million banker's guarantee. On 20 March 2008, Dr Rahman emailed Dr Soh with the following message:

Dear Bro,

SCB Jakarta has successfully transmitted our swift MT 760 to OCBC yesterday. I have instructed SCB to transmit the document to the attention of Mr. Tan Wei Peng [*sic*]. *Thereafter, I really appreciate to communicate with Mr. Tan*.

However, I not able to abstract a copy as Indonesia is off for holiday, today and tomorrow.

Regards,

A-Rahman.

[emphasis added]

Dr Soh was unable to explain what Dr Rahman meant when he said that he would "really appreciate to

communicate with Mr. Tan".

147 On 20 March 2008, Dr Soh replied to Dr Rahman as such:

> Dear Bro,
>
> Thanks for this info, I will inform Tan wei ping in ocbc to trace and retrieve the swift. *Any idea what is the amount transmitted?*
>
> Regards,
>
> A Soh
>
> [emphasis added]

Dr Soh's (unconvincing) explanation for his query in the email, of the amount transmitted, despite his evidence that Dr Rahman had told him that the bank guarantee was for US$50m was that he was merely clarifying to ensure that the bank guarantee was for US$50m.

148 On 29 March 2008, Dr Soh sent an email to Dr Rahman which stated as follows:

> Dear Bro,
>
> Draft MT760 as spoken.
>
> Please expedite a bank statement or a swift to OCBC asking them to "resend" their MT299 in MT format?
>
> Regards
>
> A Soh

There was no expression of anger or shock at being cheated or indeed any demand for explanations from Dr Rahman in this email. There was not even a query as to why there were apparently two "Mr Ng"s. This was despite the fact that the Offer was already in jeopardy by 27 or 28 March 2008 and the authenticity of the First Letter had been called into question. Dr Soh had also claimed, during his telephone conference with OCBC on 27 March 2008 (see [78] above), that he might have been a victim of Dr Rahman's fraud. Moreover, OCBC had sent a SWIFT message to SCB Jakarta on 28 March 2008 to seek confirmation that APLL had sufficient resources to satisfy full acceptance of the Offer and that SCB Jakarta had sent the First SWIFT. At Dr Soh's request, a copy of the SWIFT was sent to Dr Rahman on the same day.

149 Read against the above background, there are grounds to suspect that Dr Soh's email to Dr Rahman of 29 March 2008 was a request for assistance to prepare more forged documents to induce OCBC to believe that SCB Jakarta had in fact received OCBC's SWIFT message but that it was not in the correct format. Further, attached to Dr Soh's email were two draft banker's guarantees in SWIFT format which were addressed to OCBC and Deutsche Bank. There seemed to be no reason for William Chan's involvement in these emails (see [145] above). I agree with OCBC's submission that a more likely explanation is that the two draft banker's guarantees were forgeries in the making and Dr Soh was personally responsible for, or had a hand in, making them.

(iv) Email correspondence after 6 April 2008

150 Dr Soh's evidence was that, up to 6 April 2008, he did not confront Dr Rahman on all the latter's broken promises. He explained that it was because until then, he had not doubted Dr Rahman. On 7 April 2008, Dr Rahman sent Dr Soh an email attaching a copy of a SWIFT. On 9 April 2008, Dr Soh emailed Dr Rahman with the following message:

> Dear Bro,
>
> Thanks. I understand the authority is checking with SCB through OCBC to verify if our account exists in SCB etc, while they deal with me on the proof of funds and other issues. Formal charges not yet but if we can prove that the fund exists and I was backed up by the US$100 million earmarked for the General Offer of Jade, then I think the charges will be less severe.
>
> Regards
>
> A Soh

At trial, Dr Soh's explanation for this email was that he wanted Dr Rahman to prove to him that everything that Dr Rahman had told Dr Soh was true. Dr Soh's continued correspondence with Dr Rahman after the Offer had been withdrawn is difficult to comprehend if it is indeed true that, as Dr Soh claimed, Dr Rahman had defrauded him.

151 On 10 October 2008, about six months after the Offer had collapsed, Dr Rahman emailed Dr Soh, attaching the Fourth Letter (see [102] above). Dr Soh claimed that this letter was unsolicited. It is strange that Dr Soh would continue to communicate with Dr Rahman if he had indeed defrauded Dr Soh.

152 On 15 October 2008, Dr Soh sent an email to Dr Rahman. In the email, Dr Soh stated that he had called Dr Rahman many times since the previous week but to no avail. He also requested that Dr Rahman take a look at the Business Times report of 15 October 2008. Dr Soh informed Dr Rahman that the situation was getting very serious with OCBC making an accusation of forgery of documents. Dr Soh told Dr Rahman that the proof of the bank guarantee, bank letter and fax dated 18 February 2008 was very important as it would counter OCBC's allegation. Dr Soh referred to the SCB Jakarta letter dated 8 October 2008 (see [151] above) and stated that it was very important that Dr Soh personally speak to the bank officer in Jakarta that issued the letter, in the presence of a third party witness to confirm that SCB Jakarta had issued the letter. Dr Soh also mentioned that he would need to discuss the closure of the FCGIL account with Dr Rahman when he met Dr Rahman in person. When he was cross-examined on these emails, Dr Soh disagreed that he and Dr Rahman were working together to come up with the SCB Jakarta documents and the bank guarantees to deceive financial institutions. Dr Soh also disagreed that Dr Rahman was in fact working for him and he was paying Dr Rahman, as evidenced by his payment of US$100,000 in November 2007 and another payment of US$100,000 in March 2008 to the latter.

(2) Dr Soh's explanation for the events that took place before the withdrawal of the Offer.

(A) THE ANNOUNCEMENTS BY JADE WHILST DR SOH WAS JADE'S GROUP PRESIDENT

153 Counsel for OCBC alleged that Dr Soh's game plan was really to push up the market price of the penny stock through a series of announcements (set out in [154] to [161]) of projects that Dr Soh had introduced to Jade while he was Group President.

(i) The Nemogold oil deal

(i) The Nemogold oil deal

154 On 5 July 2007, Jade announced that its subsidiary, Jade Commodities & Resources Pte Ltd ("JCR") had entered into a service contract with FCGIL to provide contract administration services to FCGIL in connection with a purchase contract entered into by FCGIL with a Russian oil company, Nemogold Ltd ("Nemogold") for the purchase of an aggregate of 2,400,000 metric tonnes of Russian Gas Oil D2 for about US$1.3 billion over a term of 12 months. This deal between FCGIL and Nemogold was eventually called off and no delivery of oil ever took place under this contract. On 17 December 2007 Jade announced that JCR had taken over the FCGIL contract. According to Dr Soh, this was because the price of Jade shares had increased such that Jade was able to secure credit facilities from banks. However, as of the date that Dr Soh resigned from Jade, no such facilities had been granted. On 9 June 2008, after Dr Soh had left Jade, Jade announced the termination of the oil contract.

(ii) The sale and purchase of land in Johor Bahru

155 On 15 June 2007, Jade announced that it had incorporated a wholly-owned subsidiary, Jade Real Estate Pte Ltd ("JRE"). In an announcement dated 26 September 2007 and in Jade's September 2007 annual report, it was announced that JRE had purchased a piece of land in Johor Bahru, Malaysia for S$17,350,000 and had immediately on-sold the land to Win Divine Sdn Bhd ("Win Divine") for $27m giving rise to an estimated profit before tax of $8,824,000. In the 26 September 2007 announcement, there was a projected earnings per share of Jade from a loss of 0.17 cents per share before the sale to a gain of 0.87 cents after the sale. On 27 October 2007, Jade announced that for the 26 September 2007 announcement, waiver had been obtained from the requirement of Rule 1014 of the Listing Manual. This announcement included a table showing the beneficial impact that the purchase and sale of the land had on Jade's earnings per share, gearing and net tangible assets. On 10 March 2008, Jade announced that it was in negotiations to mutually extend the timeline for completion of the purchase and sale of the land to a date no later than 30 June 2008.

156 On 23 June 2008, it was announced that Win Divine and Jade had, on 20 June 2008, mutually agreed to terminate with immediate effect, the Sale and Purchase Agreement referred to in the announcements made on 26 September 2007 and 27 October 2007.

(iii) The project manager services letter of intent with Maxwell Rainbow

157 On 28 June 2008, Jade announced that JRE had entered into a non-binding letter of intent with Maxwell Rainbow Sdn Bhd to provide project management services in connection with a proposed real estate development project in Malaysia. This project never took off.

(iv) The investment in Innovative Polymers

158 On 22 June 2007, it was announced that Jade had entered into a term sheet dated 21 June 2007 with Innovative Polymers Pte Ltd ("Innovative") in relation to a proposed investment in Innovative of S$7.2 million. This was terminated a month later on 26 July 2007.

(v) The notes issue with Pacific Capital Investment Management

159 On 17 October 2007, Jade announced that it intended to undertake a notes issue to Pacific Capital Investment Management Limited ("PCIM") of unsecured non-interest bearing notes due 2012 in an aggregate principal amount of up to $150m. This deal ultimately did not go through. In Jade's 2008 annual report, its acting Chairman, Mr Chong Hon Leong, stated that the withdrawal from the Offer by APLL seriously affected funds available for Jade's new business citing as a case in point Jade's

agreement with PCIM for a notes issue. The notes issue was not activated as APLL could not proceed with the required securities lending agreement it had entered into with PCIM due to legal issues relating to the Offer.

(vi) The Indonesian coal mine project

160 On 4 December 2007, it was announced that JCR was in the process of incorporating two new subsidiaries in Indonesia and would start negotiations for a coal mining service contract. On 10 March 2008, it was announced that JCR had incorporated two subsidiaries in Indonesia and that a coal mining service agreement had been entered into between one of the subsidiaries and PT Dasacita Pusaka Prima on 6 March 2008. An "expert" report prepared on 26 February 2008 by Russia's National Geological Institute (known as Giproshaht) stated that 25 million tonnes of coal could be obtained from this coal mine. This turned out to be completely inaccurate as it was later confirmed that only 64,525 tonnes of coal could be mined which was also of poor quality and would be unattractive to buyers. On 19 January 2009, Jade announced the termination of this project.

(vii) The collaboration with E3 to purchase an oil refinery in china

161 On 20 January 2008, Jade announced that JCR and Englo Real Estate Development Pte Ltd, an E3 subsidiary, had entered into agreements to co-invest and cooperate with each other to acquire a 49% stake in an oil refinery and a 100% stake in a piece of land in China, with a proposed extension of the refinery at a cost of RMB 20 billion or S$3.96 billion.

162 On 21 May 2008, it was announced that the joint venture with Englo Real Estate Development Pte Ltd had been terminated.

(viii) Conclusions to be drawn from the failure of all projects announced

163 Whilst Dr Soh agreed with counsel for the plaintiff that all the above projects never saw fruition, he claimed that the failure of the projects was caused by the fact that he had left APLL and the projects had therefore lost their "driver". It is difficult to accept that all the projects proposed were ultimately unsuccessful because Dr Soh was no longer in the driver's seat. OCBC postulated (quite accurately I believe) that the above projects were merely empty gestures on Dr Soh's part, public announcements of which were designed to arouse interest in and improve the price of, Jade shares. I seriously doubt that Dr Soh had any real intention to develop the businesses of Jade and its subsidiaries.

(B) The rationale for the Offer

164 Dr Soh claimed that he wanted to launch the Offer for Jade shares because he firmly believed that the price of $0.10 per share on 30 January 2008 undervalued Jade's potential. According to Dr Soh, his belief was based on the potential development by JCR of the coal mine project in Indonesia in [160]. Dr Soh claimed that a draft independent report undertaken by Giproshaht in December 2007, which estimated that the coal reserves could be mined at 4 million tons had increased the estimate to 25 million tons in a final report dated 26 February 2008; this demonstrated that Jade's business prospects had potential. However, Dr Soh did not produce a copy of the draft report of Giproshaht. In any event, this coal mine project did not take off as it was later confirmed that only 64,525 tonnes of poor quality coal could be extracted from the coal mine.

(C) The funding for the Offer

165 Dr Soh admitted that he did not have sufficient funds to satisfy full acceptance of the Offer from the date of the Offer Announcement until the date of withdrawal. In fact, his estimated net worth when he started negotiating for the purchase of the majority stake in Jade was only $5m-$10m, including his landed property. Dr Soh's bank accounts were examined at trial and he agreed that, as at 27 March 2008, he had approximately $1.1m in cash and was able to raise additional financing (through the liquidation of the non-cash assets in his bank accounts including Faitheagle's 3.3 million Jade shares which he subsequently sold on 31 March 2008) of close to $8m within a couple of days from 27 March 2008.

166 Nevertheless, Dr Soh claimed that he had informed OCBC from the outset that APLL did not have the necessary funds to complete the Offer and that OCBC had only required a comfort letter from a bank that US$100m had been earmarked from a bank account maintained by FCGIL with SCB Jakarta against which funds a bank guarantee for US$100m would be issued. Dr Soh also claimed that OCBC had, without knowledge of APLL and himself, satisfied itself as to the financial resources of the Offeror on 14 February 2008, even before receiving a copy of the First Letter on 18 February 2008. Dr Soh further alleged that he had been the victim of a major fraud perpetrated by Dr Rahman, who was responsible for procuring the First Letter and the bank guarantee. I find Dr Soh's explanations with regard to his decision to launch the Offer despite his lack of financial resources difficult to accept.

167 First, Dr Soh's written submissions at the SIC inquiry stated:

> 67. On or about the end of January 2008 when he was contemplating whether to make the VGO, Dr Soh had met with Jocelyn Hoi from OCBC's Enterprise Banking team to discuss funding for the purposes of the contemplated VGO. The proposal discussed was that OCBC would provide the credit line to APL for the monies for the acceptances on the contemplated VGO but in turn, OCBC would require a banker's guarantee as security. …

Yet, at the trial, Dr Soh claimed that the above statement was wrong and that the meeting at the end of January 2008 was not with Hoi (with whom he claimed that he had only had a telephone conversation) but with OCBC's corporate finance team, in particular, Tsai and Ang. Dr Soh claimed that he had only called Hoi sometime after 12 February 2008 to enquire if OCBC would grant APLL a credit facility against the security of a bank guarantee. This telephone call was not mentioned in Dr Soh's AEIC and was only brought up at trial. In any event, Joice had testified that no such meeting with Hoi had ever taken place (see [120] above).

168 Second, Dr Soh's claim that he had informed OCBC at the First Meeting (on 31 January 2008) that APLL did not have the cash for the Offer but that he had a company, FCGIL, which had an account with SCB Jakarta and that *the money in that account could not be remitted out but he could arrange for a bank guarantee to be issued from FCGIL's SCB Jakarta account for the purpose of the Offer* goes against the weight of the evidence given by OCBC's witnesses (see [34] – [38] above) and also appeared to be contrary to what was stated in Dr Soh's email to OCBC on 27 February 2008 (see [63] and [64] above). Moreover, it was clear from the queries raised by Tsai during OCBC's conference call with Dr Soh on 27 March 2008 (see [77] above) that as at 28 March 2008, Dr Soh had not informed OCBC of the existence of Dr Rahman and FCGIL.

169 Third, Dr Soh had no valid basis for alleging that OCBC would fund the Offer. At paras 161 and 162 of Dr Soh's AEIC, he deposed:

> 161. It was my understanding that if a bank guarantee were to be provided by UBS or any other bank, a financial institution would need to provide a loan to APLL for the VGO, which would be

secured by the bank guarantee. At no time during the meeting was I asked by the OCBC team whether I had approached any other financial institution to provide credit lines against such a bank guarantee, or whether the approval of any credit lines had been obtained against such a bank guarantee.

162. I concluded from this that if OCBC were willing to accept a bank guarantee issued in favour of APLL's account with OCBC, then OCBC would be willing and able to fund the VGO by way of a loan to APLL against the security of this guarantee.

At the trial, Dr Soh admitted that there was no legally enforceable agreement that OCBC would provide financing for the take-over. Rather, his case was that there was an understanding or expectation that OCBC would grant him a credit facility based on a bank guarantee. Joice from OCBC's EB Department however had testified that no formal discussions on the provision of funding by OCBC to Dr Soh had ever taken place (see [117] – [121] above). The defendants were in a better position than OCBC to know the state of APLL's financial resources. I reject the defendants' contention that they were entitled to rely on OCBC's apparent confirmation of the defendants' financial resources in the notes of the First Verification Meeting.

170 Fourth, during his conference call with OCBC on 27 March 2008 (see [77] – [78] above), Dr Soh had calculated aloud that "since [he had] 46% of the shares, there [was] always a way for [him] to pledge those shares to come out with the money even if [he didn't have] any other resources to pay for [the acceptances of the Offer]". Dr Soh had also commented that "common sense [told him] that at most [they were] going to have … 30 million or 40 million shares" and that "less than 10 million dollars [would] be required to do [the Offer]". Dr Soh accepted, at trial, that his representation, during the conference call, that he had 46% of Jade's issued capital as at 27 March 2008 was not true and that he knew it was not true. In fact, he had sold 35 million shares before 27 March 2008. As a result, he would have required 30 to 40 million shares plus 35 million shares to make up 50% of Jade's issued capital.

171 Fifth, there were problems with the First Letter which Dr Soh should have noticed but did not raise with OCBC. The First Letter stated that SCB Jakarta had granted a credit facility to APLL. However, Dr Soh admitted that this was factually incorrect since APLL did not have any account or credit facility with SCB Jakarta when the letter was issued. Yet, Dr Soh did not inform OCBC. The First Letter also referred to the earmarking of funds in an SCB Jakarta account for the purposes of satisfying acceptances of the Offer. At the trial, Dr Soh agreed with OCBC's counsel that the earmarking of the funds was not for the purpose of making payment pursuant to the Offer (since it was Dr Soh's case that the funds in the SCB Jakarta could not be utilised). However, Dr Soh did not point out these factual inaccuracies to OCBC.

172 Sixth, Dr Soh stated that although he had not been pressing OCBC in any way that the Offer Announcement should have been released on an urgent basis, OCBC released the Offer Announcement at 7.30 pm on 18 February 2008. However, it appeared from the first email correspondence between Dr Soh and OCBC on 18 February 2008 (see [56] above) that Dr Soh was most anxious to release the Offer announcement on the night of 18 February 2008. On the same day, Dr Soh repeated his request in his second email to Tan at 7.50 pm (when he appeared not to have known that the Offer Announcement had been released by then) stating:

Dear Wei Ping,

I have no comment on the final announcement, subject to comments from others if any, please release at the scheduled time tonight.

173 Seventh, on 27 February 2008, Dr Soh had sent an email to OCBC in which he requested that OCBC waive the requirement for a bank guarantee from SCB Jakarta since that would incur costs of US$250,000 (see also [63] – [66] above). Dr Soh's explanation for sending this email to OCBC was that he had received an email attachment from Dr Rahman on 27 February 2008 of a bank guarantee dated 20 February 2008 for US$500m issued by SCB Jakarta in favour of UBS for further credit to the account of Faitheagle. This led him to decide that the SCB Jakarta bank guarantee for US$100m to OCBC would not be necessary as he could use the UBS bank guarantee to apply for a credit line for the issue of a bank guarantee from UBS Singapore to OCBC for US$100m. Dr Soh's email of 27 February 2008 stated:

> As mentioned, to give OCBC additional comfort that financial resources are more than amply provided for this exercise, please see the latest swift on Feb 20th from SCB to my UBS Account under Faitheagle Investments Ltd, in which I am the sole shareholder and sole director (as you know I am also the sole shareholder in [APLL]). The swift has been acknowledged receipt by UBS and is clearing the MAS right now, after which a credit line of 90% of the US$500 million will be provided for me to use for the GO, oil trading, mining or any investments.

174 When cross-examined on whether UBS had indeed acknowledged receipt of the SWIFT dated 20 February 2008 from SCB Jakarta to Faitheagle's UBS account, Dr Soh responded that Dr Rahman had sent him an email to say that UBS had acknowledged receipt. Dr Soh's excuse for not being able to find out from UBS directly was that he "was told by both Dr Rahman and William Chan not to contact UBS". This defied commonsense as UBS was Faitheagle's banker and Dr Soh was, at the material time, the sole shareholder and director of Faitheagle, as stated in his email above. Dr Soh also admitted that UBS had not, contrary to the impression given in the email, agreed to grant him a credit line of 90% of US$500m.

175 Moreover, Dr Soh had concluded the 27 February 2008 email as follows:

> If it is still absolutely necessary, I can request UBS to issue a separate bank guarantee from my Faitheagle account at UBS to [APLL] account at OCBC (*provided OCBC is willing to accept and give me a credit line)* and for that I will have to pay 0.125% of US$100 millions or US$125,000, or alternatively I can apply for credit line of US$100 millions [sic] to draw down (partial of 500 millions [sic]) on this banker's guarantee (in which case I will have to pay 5% interest upfront … and I am wondering *if this is really necessary* since I do not expect I need to use more than US$10 millions [sic] for this exercise as I do not expect large acceptances, since UBS will provide me a line of credit up to 90% of this Banker Guarantee, or up to US$450 millions [sic] after the MAS clearance, and I believe that is more than enough for this VGO? [emphasis added]

It is clear from the above paragraph that there was no existing agreement between OCBC and Dr Soh that OCBC would grant Dr Soh a credit line. In fact, Dr Soh was raising the provision of a credit line as a suggestion to back his alternative plan to provide OCBC with a bank guarantee and, at the same time, was hoping that this would not be necessary.

(D) The misstatement of APLL's shareholdings in Jade

(i) Dr Soh's failure to disclose the 5.5 million Jade shares that Faitheagle had purchased in 2007

176 Dr Soh had purchased 5.5 million Jade shares through Faitheagle sometime between August and November 2007 but had failed to disclose the purchases at the First Meeting (see [20] and [27] above). Had he disclosed the purchases, the minimum price for the Offer should have been 26.86 cents, instead of the 22.5 cents at which it was launched.

177 Dr Soh claimed that he had forgotten about Faitheagle's purchase of 5.5 million Jade shares. He testified that had he remembered, there would have been no need for him to purchase 5.5 million Jade shares on 21 January 2008; all that he needed to do would have been to announce the transfer of 5.5 million Jade shares from Faitheagle to APLL on 21 January 2008. Dr Soh claimed that it did not occur to him to mention the trading in Jade shares by Faitheagle when A&G circulated a draft Memorandum of Compliance for the Draft Offer Document on 26 February 2008 because he had believed that the purchase of 5.5 million shares through Faitheagle's UBS Hong Kong account was in his name, as part of a swap of accounts which he had intended. Dr Soh's explanation for having forgotten about Faitheagle's purchases of Jade shares was that there were several counters in which Faiheagle traded and that in 2007, Faitheagle was essentially an investment account which was managed not only for Dr Soh himself but for other investors as well. However, contrary to his evidence, the statements of Faitheagle's account revealed that Faitheagle had traded in only three counters between August and November 2007.

178 Dr Soh was the sole shareholder of both Faitheagle and APLL. Whilst he insisted that he behaved like a fund manager for Faitheagle's investors, Dr Soh claimed to be a shareholder of Faitheagle's Jade shares. In other words, Dr Soh claimed that he was the fund manager managing the Jade shares in Faitheagle for the investor who was also himself. I do not accept Dr Soh's explanation that he was under the impression that he need not disclose Faitheagle's purchase of Jade shares despite knowing that APLL had to disclose any dealings in Jade shares.

(ii) Dr Soh's failure to disclose the nature of APLL's shareholdings in Jade under the GMSLA

179 It is undisputed that Dr Soh had repeatedly assured OCBC that APLL held full beneficial ownership of the shares transferred to Opes Prime under the GMSLA. Despite this, it was Dr Soh's position that OCBC and A&G ought to have advised the defendants on the effect of the GMSLA and that their failure to render this advice led him to make the Offer which he would not have made had he known that beneficial interest in the pledged shares had passed to Opes Prime under the GMSLA. OCBC alleged that Dr Soh well knew (which he denied) that he had transferred beneficial interest in the pledged shares under the GMSLA.

180 Dr Soh claimed in his AEIC that he had asked Norman to deliver a copy of the GMSLA to A&G's office on 5 February 2008 and was not aware that A&G had not received it since no reminder or further request was made by OCBC or A&G. This departed from Dr Soh's position at the SIC inquiry where he had submitted that he had asked Norman to make a copy of the GMSLA available for collection but understood only later that A&G did not collect the copy. When questioned on this discrepancy with his pleaded case, Dr Soh adopted the position in his AEIC.

181 According to Dr Soh, he never doubted that he had the beneficial interest in the shares pledged under the GMSLA. Dr Soh pointed out that John Lindholm, the Liquidator and Scheme Administrator of Opes Prime had confirmed in two letters, one addressed to the SGX and SIC dated 24 July 2009 and the other to the Commercial Affairs Department of Singapore ("CAD") dated 10 December 2009 (collectively "John Lindholm's Letters"), that APLL had commenced proceedings in the Federal Court of Australia against Opes Prime and certain Merrill Lynch entities in April 2008 on the basis that APLL had only entered into the GMSLA because of representations made to it by Opes Prime's directors and officers to the effect that APLL would at all times retain the beneficial ownership in the shares and that APLL could reverse the transaction at any time. John Lindholm's Letters stated that the Scheme Administrators and Liquidators of Opes Prime had not seen any evidence to contradict APLL's allegations.

182 Dr Soh took the position, during cross-examination, that the GMSLA was in reality a *share-lending* agreement and *not* a *share pledge* agreement. According to Dr Soh, Raj Maiden ("Maiden"), an employee of Opes Prime's local entity, Opes Prime Asset Management Pte Ltd ("Opes Singapore"), had explained to Dr Soh that if APLL placed Jade shares with Opes Prime, Opes Prime would place the shares with its custodian in Singapore, Merrill Lynch Singapore Pte Ltd ("Merrill Lynch Singapore") and give APLL a cash loan on a loan-to-valuation ratio ("LVR") of 60%. According to Dr Soh, Maiden and Emini (the CEO of Opes Prime) had both assured him orally and in an email dated 26 September 2007, that although APLL would have to transfer the shares to Merrill Lynch Singapore, under the GMSLA, it would still remain the beneficial owner of the shares. However, at trial, Dr Soh admitted that his purpose of asking who had beneficial ownership of the shares was merely to ensure that he would get his shares back once he repaid the loan.

183 There is evidence that indicated that, contrary to Dr Soh's testimony, he was aware, at least as of 4 March 2008, that there was a problem with APLL's ownership of Jade shares.

184 First, at para 136 of his AEIC, Dr Soh claimed that, in February 2008, he "was actually considering getting back all of the Jade shares pledged to Opes Prime by arranging for a 50% revolving share-financing scheme from UBS Singapore to finance the redemption" but did not do so because he "realised that it would entail multiple announcements during the VGO". If Dr Soh had thought that he retained beneficial ownership of the pledged shares at that point in time, there seemed to be no reason why he would need to make any announcements for the transfer of shares under the share-financing scheme with UBS. Dr Soh claimed that he did not know if he would have to announce the transfer of shares from one custodian to another. Yet, he did not clarify this with his legal or financial advisers.

185 Second, at the First Verification Meeting, Dr Soh had confirmed that he and APLL held a total of 451,172,504 shares. This was despite the fact that on 5 February 2008, Dr Soh had received a summary positions statement from Opes Prime which indicated that he had 295,450,000 Jade shares pledged with Opes Prime. Summary positions statements were also issued by Opes Prime to Dr Soh on 6 February 2008, 7 February 2008, 11 February 2008, 14 February 2008, 29 February 2008 and 7 March 2008, all of which stated that Opes Prime was only holding 295,450,000 Jade shares. At para 131 of his AEIC, Dr Soh admitted that he had seen the summary positions statement dated 5 February 2008 by 15 February 2008. The figure of 295,450,000 Jade shares reflected in the summary positions statements is equivalent to 300,050,000 shares less 4.6 million shares. Dr Soh should have known, when he received the statements, that the 4.6 million shares which Opes Prime had force-sold on 21 January 2008 (see [24] above) had not been reinstated. Indeed, Dr Soh claimed to have travelled to Melbourne on 28 February 2008 to question Emini as to whether Opes Prime had sold Jade shares without his knowledge or consent. Yet, Dr Soh did not alert OCBC of the discrepancy in the summary positions statement. Even if Dr Soh had doubted that, as he claimed, the figure stated by Opes Prime in the 5 February 2008 statement was inaccurate, he should have informed OCBC of his suspicions and ought to have clarified with OCBC as to the exact number of Jade shares that he and APLL held.

186 Third, in Dr Soh's email to Chris Holly dated 4 March 2008 in response to an email from Chris Holly on the same day requesting that Dr Soh progressively reduce his financing arrangement with Opes Prime by repaying $5m every week commencing that week, he stated:

> Dear Chris,
>
> Thanks for your email.
>
> As we had discussed two weeks ago and you are aware, [Jade] is now undergoing a General Offer

by [APLL] which was announced on 18th Feb 08 *and the regulatory authority – Securities Industry Council (a unit of Monetary Authority of Singapore) is scrutinizing the shares that [APLL] held*.

[APLL] recently declared that it has a share financing arrangement with Opes Prime and that 295,450,000 shares are held by Merrill Lynch Singapore on behalf of Opes Prime, with which [APLL] had entered into a GIMSLA agreement.

However, the share registry print out on 29th Feb 08 showed that Merrill only held 257,502,000 [Jade] shares, and I also know that there is another client of Opes that still had 12 millions shares supposed to be held by Merrill in the same arrangement, so there is a shortage of 37,948,000 shares and if you take this other client's 12 million shares into account, then there is a shortage of 49,948,000 shares in Merrill's account.

The authority is waiting for an answer from me for the following:-

1. Since I informed the authority that my "cash collateral" is about S$28 millions and based on [APLL]'s offer price of 22.5 cents per share, there should be 207,407,000 shares held or pledged as collateral if based on 60% financing (207,407,000 x 22.5 cents/shareX 60%=S$28 millions) why did I state that 295+ million shares were held and since I was asked to show proof, we had to request the share registry to provide proof that Merrill indeed held this no. of shares but unfortunately, it showed that only 257 millions shares were held by Merrill.

2. *I have to prove that [APLL] is still the beneficiary of these shares* (notwithstanding the fact that the discrepancy in numbers held) and that Merrill did not sell these shares without its beneficiaries' advice or instructions. In so doing I have to show the latest statement from Opes which showed my cash position and no of shares pledged which clearly showed 295 millions plus as confirmed in your statement today.

3. Could you please assist to clarify if Merrill is still holding all the 295+ million shares, if not who is the custodian and where are the remaining shares held?

…

[emphasis added]

187 Dr Soh admitted that he was using this letter to pressurise Opes Prime and that at the time when he wrote this email, the SIC had not, in fact, scrutinised the shares that APLL held as at 4 March 2008 or asked Dr Soh about the three issues listed in the passage quoted above. Neither had OCBC or A&G. Given Dr Soh's admission that the SIC, OCBC and A&G had not, at that point in time, asked him about the beneficial ownership of the shares pledged under the GMSLA, this attempt by Dr Soh to pressurise Opes Prime into providing him with proof of his beneficial ownership of the pledged shares shows that Dr Soh knew, as of 4 March 2008, that there was a problem with the issue of beneficial ownership of the shares transferred under the GMSLA. Despite this, Dr Soh sent an email to OCBC and A&G that same day in which he pointed out that APLL held 45.97% of Jade's issued capital, amounting to 445,672,504 shares.

188 Dr Soh agreed with counsel for OCBC that the figure of 445,672,504 shares was incorrect but explained that he had not informed A&G or OCBC of this discrepancy as he had forgotten about Faitheagle's sale of 5.5 million Jade shares on 12 February 2008. Dr Soh's email of 4 March 2008 also did not refer to the shares pledged under the GMSLA or the fact that 4.6 million Jade shares had been

force-sold by Opes Prime. Dr Soh's explanation for this discrepancy was that he had not known if the forced sale had taken place; his explanation is not credible. In his email of 4 March 2008 to Chris Holly as set out above, Dr Soh had stated that "[APLL] recently declared that it has a share financing arrangement with Opes Prime and that *295,450,000* shares are held by Merrill Lynch Singapore on behalf of Opes Prime...". The figure of 295,450,000 stated in the email was the figure of 300,050,000 minus the 4.6 million shares that had been force-sold.

(iii) Dr Soh's failure to disclose Opes Prime's forced sale of APLL's Jade shares

189 Following a drop in the price of Jade shares in January 2008, Dr Soh received a call from Maiden on the morning of 21 January 2008 demanding payment of S$500,000 to meet a margin call of approximately S$1m. Although Maiden threatened to sell the Jade shares if Dr Soh did not pay the sum of S$500,000 by noon that day, Dr Soh claimed that he did not believe him.

190 Dr Soh deposed that he did not satisfy the margin call although he had the necessary funds to do so. When questioned on his available funding at that point in time, Dr Soh claimed that he had S$1m in his UBS account. Dr Soh claimed that it did not occur to him that the simpler course of action would be to pay down the loan by S$1m. Dr Soh's claim that he had S$1m in his UBS account was also not supported by his UBS statements of account as of 31 January 2008 which reflected that only S$213,745.81 was available in one of Faitheagle's UBS accounts whilst the other account had a negative balance of US$3,662.45. Whilst the statement of account which reflected a negative balance also reflected that the value of equities in the account was US$3,272,695.44, the bulk of this was Cordlife shares, which were being held for Dr Soh's investors (see [199] below). Dr Soh was unable to produce any evidence to prove that he had S$1m in cash on 21 January 2008.

191 Instead of satisfying the 21 January 2008 margin call, Dr Soh claimed that he instructed his banker at UBS Singapore to purchase 5 million shares in Jade on behalf of Faitheagle. According to Dr Soh, owing to a misunderstanding, his instruction was not carried out by UBS. There was a miscommunication as the bank officer at UBS thought that Dr Soh merely wanted reassurance that there were at least 5 million Jade shares in Faitheagle's account which there were. Faitheagle had previously purchased 5.5 million Jade shares between August and November 2007. UBS Singapore therefore did not purchase any more Jade shares for Dr Soh. Dr Soh claimed that due to this misunderstanding, he proceeded to inform Jade that he had purchased 5.5 million Jade shares at the day's market prices of $0.16 to $0.225 *in his personal name* and Jade had announced this to SGX on 21 January 2008.

192 Although OCBC requested for copies of Dr Soh's telephone bills and all other documents that showed the date, time and/or duration of all telephone conversations that were alleged to have taken place, Dr Soh only produced the records for his mobile telephone for the period 18 January 2008 to 17 March 2008. Even then, Dr Soh was unable to identify, from the record for 21 January 2008, the telephone call which he alleged had taken place between himself and Cindy Goh of UBS. His explanation was that he did not make all calls using his mobile telephone, especially when he was in the office. Ultimately, despite the requests of counsel for OCBC at trial, no voice log recordings were produced by Dr Soh in support of his claim that there had been a miscommunication between himself and Cindy Goh.

193 Dr Soh's explanation for making the purchase of 5.5 million shares through Faitheagle instead of APLL was that it was only a stand-by purchase and he was not sure if Opes Prime would really sell his shares. In my opinion, even if the miscommunication with Cindy Goh had taken place, there was no reason for Dr Soh to represent to OCBC or to cause Jade to make a public announcement that he had personally purchased 5.5 million Jade shares. Rather, Faitheagle should have been identified as the

purchaser.

194 In the announcement made on 21 January 2008, it was stated that Dr Soh had paid S$1.1m for the 5.5 million Jade shares. However, Dr Soh admitted at trial that he did not know the price at which he thought Faitheagle had purchased the 5.5 million Jade shares, and he did not check the price with Cindy Goh. Since the price for the Offer had been set at 22.5 cents (which Dr Soh had informed OCBC was the highest price at which Dr Soh had purchased the Jade shares on 21 January 2008), the price at which the Jade shares had been purchased on 21 January 2008 would have had a material impact on the Offer price. Even if Dr Soh's evidence that he had no time to find out the transacted prices for the shares on 21 January 2008 is to be believed, it is puzzling that ten days later when the First Meeting with OCBC was held, Dr Soh still had not checked on the prices at which he thought the 5.5 million Jade shares had been purchased by Faitheagle.

195 Since APLL failed to meet the margin call, Opes Prime force sold 4.6 million Jade shares on the same day. Dr Soh received an email from Maiden on 21 February 2008 informing him of this forced sale. According to Dr Soh, he telephoned Opes Prime on 22 January 2008 to question Emini about the sale and to order Opes Prime to restore the shares. Dr Soh claimed that as Emini had promised to repurchase the 4.6 million shares to restore the same number of shares to APLL as those which had been sold, Dr Soh proceeded to dispose of 5.5 million shares in Faitheagle on 22 January 2008, thinking that he had acquired those shares on 21 January 2008. However, Dr Soh did not produce any evidence to prove that Opes Prime had assured him that the shares would be reinstated. He also admitted that he never checked with Opes Prime on whether the shares were in fact reinstated.

196 Dr Soh claimed that he had intended to buy, and had announced the purchase of, 5.5 million Jade shares in order to restore any shares that Opes Prime might force-sell to meet the margin call. However (as pointed out by counsel for OCBC), that cannot be right because whilst Dr Soh disclosed his purchase of the 5.5 million Jade shares, he did not disclose the forced-sale of 4.6 million Jade shares by Opes Prime. Dr Soh also did not announce his subsequent disposal of 5.5 million Jade shares between 12 February 2008 and 25 February 2008. This was despite the fact that he had disposed 1 million of the 5.5 million Jade shares on 12 February 2008, after engaging OCBC and A&G as APLL's advisers for the Offer and just before the First Verification Meeting. Dr Soh had also proceeded to confirm that the shareholding figures stated in the Offer Announcement were correct four days later on 18 February 2008. Moreover, after the Offer Announcement was released, Dr Soh sold another 1 million of the 5.5 million Jade shares on 21 February 2008, 2 million of the 5.5 million Jade shares on 22 February 2008 and 1.5 million of the 5.5 million Jade shares on 25 February 2008 but still confirmed, at the Second Verification Meeting (on 5 March 2008) that the shareholding representations in the draft Offer Document were correct. As such, Dr Soh falsely represented to the market that APLL continued to hold a 45.97% stake in Jade and that collectively, he and APLL held 46.54% of the issued capital of Jade.

197 On 27 February 2008, Tan had sent an email to Ang that said:

> Just spoke to Norman over the phone. He confirmed that Dr Soh has not traded in Jade Shares since the announcement of the offer. He will also remind Dr Soh not to trade in Jade Shares during the offer period.

Dr Soh claimed that Norman had asked him if he had *purchased* any Jade shares, to which question Dr Soh had answered "No". As such, Dr Soh contended, since he had not been asked if he had *traded* in Jade shares, he did not disclose his sales of Jade shares in February 2008. Dr Soh persisted in his unconvincing explanation even though counsel for OCBC pointed out to him that he had received the Guidelines from A&G on 26 February 2008 (see [72] above).

(E) Dr Soh's undisclosed dealings in Jade shares in March 2008

198 Dr Soh's explanation for his undisclosed transfer of 50 million Jade shares to Faitheagle in March 2008 and subsequent disposal of those shares between 10 and 31 March 2008 (see [73] above) was riddled with inconsistencies.

199 In his submissions to the SIC, Dr Soh explained that under one fund management arrangement (the "Faitheagle Agreement"), an investment fund of S$10m was paid to an Australian stock broking account in exchange for Australian securities (namely, shares in Cordlife Ltd) which were then credited to Faitheagle. According to Dr Soh, the monies for the fund were contributed by one Liu Jun (a Chinese citizen) and one Ian Hendy (an Australian) in equal beneficial proportions. The two investors were introduced to Dr Soh by a broker Trevor Pettett. Dr Soh claimed that he had agreed to manage these funds in exchange for a share of profits generated from the funds and had further agreed to protect the principal value of the S$10m invested and to make good any losses on that amount.

200 At end-January 2008, the investment had depreciated to about S$2m worth of shares in Australian securities and Trevor Pettett instructed Dr Soh to top up the value of the initial investment. As such, Dr Soh decided to do a share swap. On 27 February 2008, Dr Soh instructed Norman to execute the share swap. In the result, 50 million of APLL's Jade shares were transferred to Faitheagle on 7 March 2008 without consideration. Dr explained that he had done the transfer out of goodwill, to top up Liu Jun's and Ian Hendy's investment by way of a swap where he would give Faitheagle 50 million of Jade shares in return for the depreciated S$2m worth of Australian securities. His reason for not disclosing this transfer of shares was that since he was the sole shareholder and director of Faitheagle and sole shareholder of APLL, he believed, mistakenly, that it was not necessary to make any disclosure of this transfer.

201 Dr Soh claimed that he had wanted to do the share swap to support Ian Hendy's newly-widowed wife as the former had passed away in 2007. 45.7 million of the 50 million shares which were transferred to Faitheagle were subsequently sold between 10 and 31 March 2008. At the trial, Dr Soh claimed that when he transferred the 50 million shares from APLL to Faitheagle, he had not intended to sell the shares. According to Dr Soh, it was only on or about 10 March that he decided to sell the shares to give money to Ian Hendy's wife as she was hospitalised and needed the money. This testimony was inconsistent with Dr Soh's submissions at the SIC inquiry, where he had stated that:

> … it was *always intended* that these Shares were to be sold off or liquidated at latest by end of March 2008 so that the fund in Faitheagle would have cash for other investments. 45.7 million of these 50 million Shares were subsequently sold … [emphasis added]

When he was cross-examined on his inconsistency, Dr Soh's evidence was that his submission to the SIC inquiry on this point was wrong. However, he had no explanation as to why his position in the SIC submissions differed from what he claimed (at trial) was the true situation. The total amount for which the 45.7 million Jade Shares were sold was S$10,090,600. None of the sales proceeds were in fact given to Mrs Hendy as (according to Dr Soh) S$4m went into payment for his investment in Netelusion shares while the balance remained frozen in Faitheagle's UBS account.

202 Dr Soh claimed that since both APLL and Faitheagle were wholly owned by him and the concept of a "concert party" had not been explained to him (even though he had received a standard client briefing document from A&G), he did not consider, in making the transfer, that he was causing any change in ownership of the shares. This was despite the fact that, as he admitted under cross-examination, Dr Soh understood that as a matter of commercial reality, he and APLL would be parties

acting in concert. Dr Soh claimed that he did not know that APLL and Faitheagle were his concert parties. Otherwise, he would have disclosed his transfer of 50 million shares to Faitheagle. However, at the trial, Dr Soh agreed with counsel for OCBC that disclosure was necessary whether or not one dealt with a concert party. Moreover, the term "concert parties" was clearly explained to Dr Soh in an email dated 27 April 2007 from Dr Soh's legal adviser in a previous take-over offer for Jade shares. That email stated (at paragraphs 2 and 9):

> [2] Concert parties are individuals or companies who co-operate, pursuant to an agreement or understanding (formal or informal), to obtain or to consolidate effective control of a company through the acquisition of shares of that company…
>
> …
>
> [9] Where any member of the Third Parties is an individual, please note that the Code presumes that the individual is acting in concert with:
>
> a) his close relatives
>
> b) related trusts of his;
>
> c) any person accustomed to act according to his instructions;
>
> d) companies controlled by him or the persons referred to in a), b) or c)

203 Further, in an email dated 3 May 2007 to Daiwa Securities SMBC Singapore Ltd regarding a letter from Barclays Bank plc, Dr Soh had stated:

> I have gone to the extreme to get this done for just a 3 millions POF, and please Barclays would do no more and we better close the deal ASAP as I am getting a bit impatient and frustrated with all these delay and technical issues, our other deals in [APLL] cannot wait any longer and though we simplified the deal by doing in one tranche, by delaying it longer will *only create more concerted party issue because [APLL] has to do other deals also*. [emphasis added]

204 In another email dated 6 May 2007 to Dr Soh's legal adviser in his previous take-over offer for Jade shares, Dr Soh had stated:

> 4. In view of above item 3 and *to avoid the concerted [sic] parties issue*, we would like to do the placement of the 13% in a "transparent, non concerted, fair and open manner" that would not invite complaint from the public or queries from SIC. … *Is it advisable that we adopt some kind of "application", "bidding" or "balloting" procedure as in IPO oversubscription so that no one will be implicated as concert parties*? [emphasis added]

205 It appeared from the above email correspondence that Dr Soh understood the meaning of the term "concert parties". Incredibly, Dr Soh claimed that he made the statements in his emails without fully understanding what "concert parties" meant. However, it was crystal clear from the email dated 3 May 2007 that, at the very least, Dr Soh was aware that APLL was his concert party in his first take-over offer for Jade shares. Since Dr Soh was the sole shareholder of both APLL and Faitheagle, by extension, Dr Soh should have known that Faitheagle was APLL's concert party for the purposes of the Offer.

206 Dr Soh also claimed that he had sold the shares after reading a letter from A&G, dated

11 March 2008 (at [74] above) which stated that he was free to deal in Jade shares during the Offer period albeit that the transaction had to be disclosed on SGXNET by 12 noon on the following trading day. Whilst Dr Soh admitted that he should have reported the transaction, he claimed that the advice given by A&G was incorrect and that he had acted upon this advice in disposing of the Jade shares held by Faitheagle. He had taken the view that since APLL was going to obtain a large number of Jade shares as a result of the Offer, he could therefore dispose of the Jade shares held by Faitheagle. When it was pointed out to him that he had sold Jade shares on 10 March 2008, prior to receipt of A&G's email on 11 March 2008, Dr Soh conceded he had done so regardless of A&G's email. However, he clarified that he was not blaming his professional advisers for his sale of 5.5 million Jade shares in February 2008 and 45.7 million Jade shares in March 2008.

207 I note that A&G's email of 11 March 2008 was not the only or even the first time that A&G had advised the defendants that, generally, there should not be any sale of Jade shares during the Offer period. A&G had advised the defendants not to sell Jade shares during the Offer period in an email on 5 February 2008 enclosing a draft letter entitled "disclosure of dealings of directors" which stated in bold that Dr Soh and his immediate family were prohibited from dealing in Jade shares from the date of the letter; in an email dated 19 February 2008 attaching a memorandum on director's responsibilities which stated (at para 6.2) that if APLL and any person acting in concert with it intended to dispose of Jade shares such disposal must not be below the offer price and prior consent must be obtained from the SIC; and, finally, in an email dated 26 February 2008 attaching the Guidelines (see [72] above).

208 A total of 54.51 million shares were traded on 31 March 2008, of which 15 million shares were sold by Dr Soh. Dr Soh realised S$3.3m from the sale of the 15 million Jade shares. I note that the sale of 15 million shares on 31 March 2008 was preceded by a telephone conversation on 29 March 2008 in which Dr Soh had expressed his fear to Ang that Jade's shareholders would dump their shares on 31 March 2008. Dr Soh's lame explanation for his sale of the 15 million shares on 31 March 2008 was that he had given instructions to sell the shares from the second or third week of March onwards and he could not revoke those instructions in time.

209 I note too that despite his sale of 15 million shares on 31 March 2008, Dr Soh had written to OCBC on 1 April 2008 to inform that he had written, on behalf of APLL, to Jade to request for a halt in the trading of Jade shares but that Jade had not agreed to this. In the same email, Dr Soh stated that:

> You are also aware that, given the public information available on what is happening to Opes in Australia, *I am not in a position to control the disposal of the shares in Jade*. Therefore, any false market is not generated by me nor is it within my control. [emphasis added]

Paul Robin Monrad Smith's testimony

210 Paul Robin Monrad Smith ("Smith") was the defendant's expert witness. He is the senior managing director in the London Corporate Finance Team of FTI Consulting. Smith (DW2) is a qualified Chartered Accountant who has worked in the Corporate Finance department of an investment bank. The most recent transaction involving the conduct of take-overs that Smith has been involved in took place in 2002.

211 On the duties of a financial adviser, Smith felt that when dealing with entrepreneurs, a competent financial adviser should be more careful, should not assume that the customer is familiar with anything, and should check the information provided by the customer very carefully. In his experience, entrepreneurial clients tended to have a fairly optimistic view of the world and may not be

aware of potential problems. Smith expressed the view that the OCBC team had accepted whatever it was told by Dr Soh without making any enquiries. He pointed out that the OCBC team had made no enquiries about Dr Soh's financial position. According to Smith, OCBC's conduct prior to and during the Offer fell short of the requirements of, *inter alia*, General Principle 6 of the Code that a financial adviser should be satisfied that an offer can be implemented in full. However, Smith did not express any view on whether civil liability would flow from OCBC's alleged breaches of the Code.

The findings

The claim

212 The evidence presented at trial revealed that the Shareholding Representation, the Financial Resources Representation, the Rational Representation and the Responsibility Statements were all false documents and the defendants offered no credible explanation as to why they had repeatedly made the false representations to OCBC throughout their dealings with OCBC. I find that OCBC has proven its case that the defendants had intentionally made false representations to deceive OCBC into agreeing to be appointed as the financial adviser for the Offer and issuing the Offer Announcement and the Offer Document on behalf of APLL. Those false representations led to the launch of the Offer on a completely false basis which in turn led to an increase in the price of Jade shares at a time when APLL was in financial difficulties. APLL benefited from this increase in the price of Jade shares through its covert disposal of 51.2 million of the Jade shares that it owned.

213 Even if the defendants' misrepresentations to OCBC were the result of a fraud perpetrated on Dr Soh and OCBC by Dr Rahman, APLL and Dr Soh would still be liable in negligence to OCBC as the defendants did not exercise reasonable care in making the various representations of their shareholdings in Jade and failed to make inquiries on the authenticity of the documents purportedly emanating from SCB Jakarta.

214 APLL is also liable for breach of its warranty under the Mandate Letter that all information and materials provided by APLL would be correct and accurate in all respects and that there were no material omissions that would make its statements false or misleading.

The Shareholding Representation

215 It is clear on the evidence that APLL and Dr Soh consistently represented to OCBC and A&G that they had beneficial ownership of 445,672,504 and 5,500,000 Jade shares respectively, representing a total of 46.54% of the issued capital of Jade. This representation was made to OCBC:

(a) During the First Meeting (see [27] above);

(b) At the Kick-off Meeting (see [33] above);

(c) At the First Verification Meeting (see [45] above);

(d) In an email from Dr Soh to OCBC dated 18 February 2008, just before the Offer Announcement was made (see [56] above);

(e) In Dr Soh's email to OCBC dated 4 March 2008 (see [68] above);

(f) At the Second Verification Meeting (see [70] and [196] above);

(g) In Dr Soh's email dated 6 March 2008 to A&G and OCBC (see [69] above);

(h) During the telephone conference with OCBC on 27 March 2008 (see [78(f)] above);

(i) In Dr Soh's email to OCBC dated 29 March 2008 (see [80] above); and

(j) During the meeting on 31 March 2008 (see [91(d)] above).

216 The defendants knew that the Shareholding Representation was false or were reckless as to its truth for at least the following reasons:

(a) Dr Soh was aware that Opes Prime had force-sold 4.6 million Jade shares on 21 January 2008. He further suspected, on or around 15 February 2008, that Opes Prime may have force sold more Jade shares after the first forced sale on 21 January 2008. Those events should have alerted Dr Soh, if he did not already know, that APLL did not have beneficial ownership of the shares under the GMSLA. Yet, Dr Soh concealed from OCBC his communications with Opes Prime and his concerns over the "missing" Jade shares. Moreover, a copy of the GMSLA was not given to either OCBC or A&G until 29 March 2008 despite their earlier requests. Dr Soh must have or should have read cl 2.3 of the GMSLA which clearly provided that title in the Jade shares "pledged" to Opes Prime, had passed to Opes Prime.

(b) Dr Soh falsely informed the market that he had purchased 5.5 million shares in Jade on 21 January 2008 when no such purchase had taken place (see [26] above).

(c) After the Offer was announced, between 21 February 2008 and 31 March 2008, Dr Soh sold 50.2 million Jade shares (representing approximately a 10% stake in Jade) that he held under APLL and Faitheagle but did not disclose this sale to OCBC and the market generally.

The Financial Resources Representation

217 The defendants knew that APLL did not have sufficient financial resources to satisfy full acceptance of the Offer but misled OCBC into thinking otherwise.

218 The defendants' claim that OCBC knew all along that APLL did not have the funds to satisfy full acceptance of the Offer and needed financing for the Offer goes against the weight of the evidence. On the contrary, the evidence showed that OCBC had never agreed to finance the Offer (see [166] – [169] and [175] above). Financing from OCBC was not required as the defendants consistently represented through the First Letter and the other documents purportedly emanating from SCB Jakarta, that APLL had the necessary financial resources to satisfy full acceptance of the Offer. Even

when OCBC's suspicions as to the availability of funding for the Offer were aroused, Dr Soh had repeatedly represented to OCBC that the defendants had sufficient resources to complete the Offer in his telephone conversations with OCBC on 27 March and 29 March 2008 and in an email dated 29 March 2008 (see [78] – [80] above). He had also provided OCBC with copies of several bankers' guarantees in SWIFT format purportedly issued by SCB Jakarta (see [89] – [94] above).

219 In the light of Tan's telephone calls to the two "Mr Ngs" on 27 March 2008 (see [76] above) and on 28 March 2008 (see [85] above) and Tsai's unchallenged evidence that, during her visit to Indonesia, she found that the signatures on the First and Second Letters did not conform with the signatures of Mr Ng and Mr Lim on the authorised signatory list of SCB Jakarta (see[95] above), there is every reason to believe that the documents Dr Soh provided to OCBC as proof that he had sufficient financial resources to satisfy full acceptance of the Offer were all false.

220 Moreover, OCBC's witnesses had testified that OCBC never received the First SWIFT, the Second SWIFT or the Third SWIFT that Dr Soh claimed were issued by SCB Jakarta. Goh had testified why the copies of the SWIFTs were likely to be fake as their format differed from the official SWIFT guidelines (see [116] above). Artarini had also testified that a letter dated 10 October 2008 which appeared to be sent by SCB Jakarta to the Kuala Lumpur Securities Commission had not, in fact, been sent by SCB Jakarta (see [113] above).

221 Additionally, OCBC produced email correspondence between Tan and Bangun of SCB Jakarta's trade services department which confirmed that SCB Jakarta never issued the First Letter, or the Second Letter or the First SWIFT (see [76] above). Further, in a letter dated 17 April 2008, SCB Jakarta's then Director of Legal Compliance (Chisca Mirawati), confirmed that SCB Jakarta had never issued the SCB Jakarta Letters and the three banker's guarantees dated 19 March 2008, 1 April 2008 and 4 April 2008. Artarini had further stated that the real Mr Ng could not be reached at the "direct dial" number stated on the First Letter.

222 There was also a substantial amount of incriminating email correspondence that gave grounds to suspect that Dr Soh worked closely with Dr Rahman on the preparation and drafting of bankers' guarantees, SWIFTs and correspondence to be issued to OCBC, purportedly by SCB Jakarta (see [139] – [152] above).

223 Even if Dr Soh's evidence as to how the Offer was to have been funded is to be believed, this would mean that there were problems with the First Letter which Dr Soh should have noticed but did not raise with OCBC (see [171] above). In the defence and counterclaim, the defendants had conceded that at no material time did APLL hold an account with SCB Jakarta. Yet, the First Letter (see [52] above) referred to the sum of US$100m having been earmarked by SCB Jakarta from *APLL's current account with SCB Jakarta*. The First Letter stated a fact which Dr Soh must have known was untrue or could not be true. Yet, he did not question Dr Rahman or SCB Jakarta or inform OCBC. Instead, he certified the First Letter as a true copy of the original (although he claimed that he never received the original) and submitted it to OCBC to confirm that APLL had sufficient financial resources to complete the Offer.

224 After the Offer was placed in jeopardy by doubts cast on the authenticity of the First Letter, the defendants made further representations to OCBC (at [218] above) to prove that APLL had sufficient funds to satisfy full acceptance of the Offer. Dr Soh must have known that those representations were untrue at the time he made them. First, in a telephone conference with OCBC on the morning of 28 March 2008, Dr Soh represented that APLL would obtain a credit facility from Deutsche Bank. However, Dr Soh did not assist in OCBC's verification of this credit facility (see [80] above). It was subsequently revealed in Deutsche Bank's letter to OCBC that Deutsche Bank had not,

in fact, offered a credit facility to Dr Soh (see [84] above). Second, Dr Soh informed OCBC (at the telephone conference and in the list of his assets given to OCBC) that FCGIL maintained an account with SCB Jakarta which had a balance of approximately US$625m of which approximately US$200m belonged to him (see [80] and [92] above). It was Dr Soh's evidence that he owned only one-third of US$125m in FCGIL's SCB Jakarta account (see [136] above and [225] below). Third, on 29 March 2008, Dr Soh stated in a telephone conversation with OCBC that HSBC London would be sending a US$100m banker's guarantee to Deustche Bank to secure a US$80m credit facility. The arrangement did not materialise. Dr Soh also provided copies of documents purportedly issued by SCB Jakarta which confirmed the financial resources of FCGIL. As noted above at [219], the documents appeared to be forged.

225 At the SIC Inquiry, Dr Soh admitted that the funding for the Offer would allegedly come in the form of the Bank Guarantee, which in turn would be issued on the strength of the US$625m allegedly sitting in FCGIL's account with SCB Jakarta. Yet, it was Dr Soh's own admission both at the SIC Inquiry and at this trial, that FCGIL only owned US$125m of the US$625m. As a one-third shareholder of FCGIL, Dr Soh must have known that he had at best US$42m in the remaining US$125m, which figure was far short of the US$100m required to satisfy full acceptance of the Offer.

The Rational Representation

226 The defendants' motivation for launching the Offer was also suspect (see [164]). Dr Soh produced no evidence to support his claim that he had decided to launch the Offer on the basis of a Giproshaht report on a coal mine in Indonesia. The defendants appeared to have had no financial resources to carry through let alone complete the Offer. It is undisputed that neither APLL nor Dr Soh had sufficient financial resources of their own to complete the Offer. Apart from the claimed arrangement with Dr Rahman, APLL had obtained no commitment whatsoever from any financial institution to provide funding for the Offer. Even if the arrangement with Dr Rahman existed, since the US$500m could not be removed from the SCB Jakarta account, the defendants still had no financial resources to satisfy full acceptance of the Offer.

227 Instead, the evidence is overwhelming that at the end of January 2008, APLL and Dr Soh were under severe financial pressure. APLL had transferred 145,050,000 Jade shares to Opes Prime as collateral for a loan of close to $30m based on a value of $0.34 per share (see [22] above). APLL had also pledged 30 million Jade shares with SFL for a loan of $4m. (see [21] above). However, by mid-December 2007, Jade shares were trading below $0.30 per share, and multiple margin calls were made by Opes Prime from October 2007 onwards. The price of Jade shares continued to decline to a low of $0.16 per share on 21 January 2008 and this triggered the forced sale of Jade shares by Opes Prime (see [24] above). To meet margin calls by Opes Prime and SFL respectively, on 25 January 2008, APLL transferred a further 155 million Jade shares to Opes Prime and pledged a further 30 million Jade shares to SFL (see [21] and [25] above). On 31 January 2008, when the First Meeting with OCBC was held, the price of Jade shares had fallen to $0.10 per share.

228 Between 12 February 2008 and 31 March 2008, APLL and Faitheagle had reduced their stakes in Jade by the sale of 51.2 million shares (see [72] and [73] above). The defendants had deliberately concealed these disposals of Jade shares from OCBC and had not announced the disposals to the market. Their conduct of disposing of such a substantial number of Jade shares at prices below the Offer price was inconsistent with that of an offeror with a genuine intention of launching a take-over of Jade. Such conduct could only mean that APLL would have to pay even more money to buy back those shares when the Offer was completed. It bears repeating that Dr Soh's testimony, that he had transferred the 50 million Jade shares to Faitheagle on 10 March 2008 to provide for the widow of one of Faitheagle's investors (Ian Hendy) was not only inconsistent with his submissions to the SIC but

was also untrue, as the cash from the sale of Jade shares by Faitheagle was never given to Mrs Hendy.

229 I note too that Faitheagle had disposed of 15 million Jade shares at $0.22 per share on 31 March 2008, when the authenticity of the First Letter had been thrown in doubt and the Offer was in jeopardy because of the receivership of Opes Prime. The sale of the 15 million Jade shares constituted almost 40% of the entire volume of Jade shares traded on 31 March 2008. On the very same day, Dr Soh was pleading with OCBC to give him more time to raise funds to complete the Offer and also told OCBC that he was "worried" that people were dumping Jade shares on the market that day. In an email dated 1 April 2008 to OCBC, Dr Soh even stated that he was "not in the position to control the disposal of shares in Jade" (at [209] above).

230 The defendants deliberately concealed their financial difficulties and dealings in Jade shares from OCBC. Their actions were inconsistent with those of an offeror with a genuine intention to make an Offer. I accept OCBC's hypothesis that the defendants saw the Offer as a means of propping up the price of Jade shares (which it temporarily did) so as to prevent more margin calls and provide a respite from APLL's financial pressures. In fact, the defendants benefited from the increase in the price of Jade shares when APLL's Jade shares were sold surreptitiously after the Offer Announcement was made.

231 Whilst it might seem incredible that the defendants would launch the Offer on a completely false basis, OCBC had suggested one possible escape route that the defendants might have been relying on. The escape route was that there would not be many acceptances of the Offer and APLL would not have had to pay more than S$10m–S$20m for acceptances. That would explain why APLL was disposing of Jade shares during the Offer period. Moreover, OCBC had pointed out that in Dr Soh's email dated 27 February 2008 in which Dr Soh sought to dissuade OCBC from seeking a banker's guarantee from him, Dr Soh had stated his concern that a banker's guarantee might not really be necessary since he "d[id] not expect he need[ed] to use more than US$10millions [sic] for [the Offer] as [he did] not expect large acceptances". In his telephone conversation with OCBC on 27 March 2008, Dr Soh repeatedly said that he only expected to purchase 30 million Jade shares under the Offer for approximately US$6m.

The Responsibility Statements

232 The defendants knew that the Responsibility Statements in the Offer Announcement and the Offer Document were false or were reckless as to the truth. This can be inferred from the fact that the defendants had failed to disclose the forced sale of Jade shares by Opes Prime and the sale of Jade shares by APLL and Faitheagle between 12 February 2008 and 31 March 2008.

The claim for negligent misrepresentation

233 Even if the defendants' claim that they were innocent and a fraud had been perpetrated on them is true (which I do not accept), I am of the view that the defendants are still liable to OCBC for negligent misrepresentation. The defendants assumed a responsibility for the truth of the Shareholding Representation, the Financial Resources Representation, the Rationale Representation and the Responsibility Statement and/or owed OCBC a duty to take care in ensuring that they were true. Moreover, the defendants knew or ought to have known that OCBC would rely upon the representations.

234 Whilst Dr Soh claimed to have relied on an alleged financing arrangement with FCGIL and Dr Rahman, I find that any such reliance would have been grossly negligent. As noted earlier at [125],

Dr Soh took few steps to verify Dr Rahman's identity and the veracity of the statements that Dr Rahman had made to him as well as the documents which Dr Soh alleged that Dr Rahman had prepared for the Offer. As the SIC hearing committee observed in its grounds of decision (at para 3.14), "[u]ltimately, all the reasonable measures that Dr Soh claimed to have taken to secure the necessary financing for the Offer boiled down to a mere verbal agreement with Dr Rahman for the banker's guarantee". I adopt the views of the SIC that Dr Soh failed to take reasonable steps to be satisfied that he could and would be able to implement the Offer in full and had been far too casual in his approach to his obligations to satisfy himself that (1) he had the necessary financial resources to satisfy full acceptance of the Offer; and (2) he retained beneficial interest in the Jade shares lent to Opes Prime under the GMSLA.

The claim for breach of the Mandate Letter

235 The Mandate Letter (in particular, clauses 2 and 4(b) of its Appendix), obliged APLL to provide OCBC with correct and accurate information and materials, to indemnify OCBC for its legal expenses in connection with any dispute arising in connection with any services or arrangements that were the subject of the Mandate Letter, and to hold OCBC harmless against all actions, losses, claims, liabilities (joint or several), costs, etc. which OCBC may suffer in connection with its appointment as APLL's financial adviser. However, the indemnities did not apply if the expenses incurred by OCBC had "arisen directly from the gross negligence or wilful default of OCBC Bank, its employees, officers and/or its agents" (Clause 4(a) of the Appendix to The Mandate Letter).

236 I find that OCBC had not been grossly negligent. APLL is therefore liable to indemnify OCBC for its costs and damages in connection with OCBC's appointment as financial adviser for the Offer arising from its failure, to provide OCBC with correct and accurate information and materials. By reason of the fact that the defendants had made the Shareholding Representation, the Financial Resources Representation, the Rationale Representation and the Responsibility Statements when they knew those representations were false or, at the very least, were inaccurate, APLL breached its duties as stated in cll 2 and 4(b) of the Appendix to The Mandate Letter.

237 Clause 6.2 of the Appendix to the Mandate Letter further provided that OCBC would be entitled to terminate the Mandate Letter if APLL breached any term and/or obligation under the Mandate Letter or if there was any development, event or circumstance which, in the reasonable opinion of OCBC, may affect or prejudice the matters contemplated in The Mandate Letter.

238 In the light of my findings, I hold that OCBC was entitled to terminate the Mandate Letter on 2 April 2008 and to discharge itself as financial adviser to the Offer. APLL is further liable to OCBC for fees earned under different stages of OCBC's performance of the Mandate Letter.

The counterclaim

239 The defendants contended that OCBC should not have announced the Offer on 18 February 2008. They alleged that the true cause of the collapse of the Offer was OCBC's failure to fulfil its obligation as financial adviser to APLL on two counts: (1) the verification of APLL's shareholding in Jade in the light of the GMSLA; and (2) the confirmation of APLL's financial resources to complete the Offer.

240 In view of my earlier findings, the defendants' counterclaim against OCBC for negligence must fail. In any event, I am of the opinion that the mere fact that OCBC had been found by the SIC to have breached the Code does not inexorably lead to the conclusion that OCBC is liable to APLL for a claim in negligence. Rather, the facts must be examined to determine, as between OCBC and the

defendants, whether it was OCBC's failure to comply with the provisions of the Code or the defendants' fraudulent and/or negligent misrepresentations that were the direct and proximate cause of the parties' losses following the collapse of the Offer.

241 Whilst I concur with the SIC's findings that OCBC ought to have made further enquiries on the GMSLA and APLL's financial resources (see [108] – [111] above), OCBC's breaches of the Code in failing to verify the defendants' shareholdings in Jade and to verify APLL's financial resources did not cause the collapse of the Offer. Rather, it was Dr Soh's repeated misrepresentations to OCBC that had resulted in the collapse of the Offer and the consequential losses and damage suffered by OCBC.

The defendants cannot argue that OCBC was defrauded because it failed to exercise reasonable care.

242 A fraudulent party cannot argue that the victim was defrauded because he failed to exercise reasonable care (*Panatron Pte Ltd and another v Lee Cheow Lee* [2001] 2 SLR(R) 435 at [24]). As the defendants had perpetrated a fraud against OCBC, the defendants' counterclaim against OCBC for negligence must necessarily fail.

The mere fact that OCBC had breached the Code does not mean that it is liable in negligence to the defendants.

243 The defendants' counterclaim against OCBC was premised on the SIC's findings on OCBC's conduct in the Offer. While it accepted the findings of the SIC that it had breached the Code, OCBC cited the decision of *Chandran a/l Subbiah v Dockers Marine Pte Ltd* [2010] 1 SLR 786 ("*Chandran a/l Subbiah*") and relied on the evidence of Clark to submit that the mere fact it had breached certain provisions of the Code did not mean that it was liable in negligence to the defendants. I agree. Even if the defendants were not fraudulent, they would not have been able to claim in negligence against OCBC as it was the defendants' own conduct that was the direct and proximate cause of their loss.

244 The Code was introduced in January 1974 as a non-statutory code modelled on the UK's City Code on Take-overs and Mergers. The Code is given recognition in s 139 of the Securities & Futures Act (Cap 289, 2006 Rev Ed) and is administered and enforced by the SIC. It is explicitly stated in the Introduction to the Code that the "duty of the [SIC] is the enforcement of good business standards and not the enforcement of law".

245 In *Chandran a/l Subbiah*, the Court of Appeal observed (at [52] of the judgment) that it is settled law that industry codes of conduct are not invariably reflective of the existing common law standards of care. In determining the appropriate standard of care in each individual case, the court considered all relevant factors, and the existence of a regulatory code of practice is but one such factor. Whilst *Chandran a/l Subbiah* concerned the relevance of the Ministry of Manpower Workplace Safety and Health Advisory Committee's Compliance Assistance Checklist (Working at Height), the observation of the Court of Appeal was not confined to the relevance of that particular industry code but referred to "the relevance of industry codes of conduct promulgated by regulatory authorities in ascertaining common law obligations". The Introduction to the Code states that "the primary objective of the Code is the fair and equal treatment of all shareholders in a take-over or merger situation" and that the Code "represents the collective public opinion on the standard of conduct to be observed *in general*, and how fairness can be achieved in particular, in a take-over or merger transaction" [emphasis added].

246 Whilst the mere finding by the SIC hearing committee that OCBC had breached certain provisions of the Code may be relied upon as tending to establish or negate liability, it is not

determinative of OCBC's liability for breach of any duty of care to the defendants. The facts of the case must be examined to determine if OCBC is indeed liable.

247 At the trial, Dr Soh clarified that his claim that OCBC had breached its duty to him to advise on the Offer revolved around the fact that OCBC had *not* advised him that he could wait until 21 April 2008 to launch the Offer if he did not want to purchase the Jade shares at 22.5 cents. According to Dr Soh, he was merely asked if he had bought any shares and had therefore informed OCBC of his purchase of shares at 22.5 cents on 21 January 2008. Dr Soh's evidence was that if OCBC had told him that the time period for which the highest price that he had paid for Jade shares would be considered was three months, he would have been able to wait until 21 April 2008 to launch an offer for Jade shares at 10 cents or less. However, Dr Soh admitted that no loss resulted from this alleged breach OCBC since the Offer was ultimately withdrawn.

248 Dr Soh alleged that OCBC had a duty, in addition to looking at the Financial Resources Confirmation Letter, to ensure that the funds held by SCB Jakarta were remitted to Singapore. However, since it was his position that he had told OCBC that the funds could not be remitted over, his case was actually that OCBC had a duty to finance the Offer. As pointed out earlier, the weight of the evidence militates against such a finding.

249 It bears noting that the SIC found that Dr Soh had committed multiple and serious breaches of the Code. The SIC hearing committee had further commented that Dr Soh's reticence and breaches of the Code deprived OCBC of the opportunity to detect his failings and advise him properly.

250 OCBC had engaged Clark (see [114] above) to provide an independent expert report on its conduct as the financial adviser to APLL in connection with the Offer. In particular, OCBC had asked Clark to give his views on:

(a) OCBC's conduct in ascertaining the shareholdings of APLL and Dr Soh in Jade, in particular, whether OCBC was entitled to rely on information relating to the shareholdings in Jade of APLL and Dr Soh, as reflected in the public records; and

(b) Whether OCBC had taken sufficient steps in the circumstances in ascertaining that APLL had sufficient resources to satisfy full acceptance of the Offer.

251 Clark prepared his report on the basis that the version of events put forth by OCBC's witnesses was true to the extent that it was supported by contemporaneous documents. He found no evidence that at any stage OCBC had offered to finance the Offer in whole or in part or that any document that it produced would have given rise to any realistic expectation that OCBC was to provide financing. Clark also found that throughout the duration of OCBC's engagement, at no time was Dr Soh able to demonstrate through documentary or other genuine evidence, that he had any money at all. It was clear from the list of his assets that Dr Soh had given to OCBC that the financing of the Offer was far beyond his means. In fact, Dr Soh had difficulties keeping in place the securities financing arrangements with Opes Prime under which he, through APLL, owed some S$27m or more.

252 Crucially, Clark concluded that in the circumstances in which OCBC found itself, it was not possible for OCBC to give proper advice on the conduct of the Offer. He explained that the verification process normally adopted to check the accuracy and completeness of statements in a document produced to the standard required of both the Preliminary Announcement and the Offer Document was not designed for and was not particularly effective in unearthing fraud since the

production of a forgery is designed to withstand the normal procedures adopted in a verification exercise. Clark stated that "[v]erification is not an investigative or forensic process and cannot be expected to act as one" and that "[i]t is not generally an issue that those launching a voluntary general offer misrepresent their shareholding interest because generally they have no motivation to do so or, if they do, it is impossible to find this out."

253 As for the GMSLA, Clark had opined that it was reasonable for OCBC to have assumed that A&G would have ensured that it received a copy of the GMSLA as requested and would have regarded it as a document necessary for A&G to carry out its drafting and verification so that A&G would have read it.

254 Clark stated that in all his years of experience, he knew of no instance where an offeror had launched a voluntary general offer:

> (a) when it patently did not have any of the resources to carry through to completion were the offer to become unconditional;
>
> (b) in circumstances when it may have transferred title to the greater part of its shareholding to financiers, that shareholding being itself a controlling shareholding; and
>
> (c) in the course of which it used the opportunity afforded by the offer to dispose of a material portion of the balance of its shareholdings.

He considered the situation "highly unusual".

255 Clark also considered it unique that a financial sufficiency statement had been supported by forged letters from an offeror's bank and by someone pretending to be an officer of the offeror's bank. In this regard, he placed the ultimate responsibility for the production of accurate information on the directors of the offeror. Moreover, Clark noted that due diligence and verification processes cannot be relied upon to expose what was by design false, inaccurate or incomplete.

256 In Clark's opinion, OCBC took a disciplined approach from the outset. Dr Soh appeared credible and convincing and there was nothing that would be expected to have put OCBC on its guard. Clark summed up the relationship between the client and his financial adviser as *not* one

> … where you find out the truth and I'm not going to help you find it. It must be the other way. The client must be open with his position, must be open with the information, must give information that is complete, and then proper advice can be given.

He concluded that the procedures that OCBC adopted were usual for the transaction at hand and that there was no evidence to suggest that OCBC was presented with information which would, or should, have caused it to be suspicious of the information being provided to it, which it decided to ignore.

257 I am in broad agreement with Clark's observations set out above. Although I disagree with the observation of the defendant's expert witness, Smith, that OCBC's officers had made no enquiries about Dr Soh's financial position and had accepted whatever Dr Soh had told them without making enquiries, I do accept as valid Smith's criticism that OCBC had fallen short of the requirements of the Code in its conduct of the Offer (see [211] above). Nevertheless, whilst OCBC ought to have complied with the provisions of the Code in carrying out its verification of Dr Soh's financial resources and shareholdings in Jade, that does not mean that OCBC is liable in negligence to Dr Soh for that

reason. Dr Soh had concealed material information from OCBC and provided OCBC with several forged Documents Evidencing APLL's Financial Resources the origin of which he was unable to satisfactorily explain at trial.

OCBC was not involved in the process of ramping up the price of Jade shares through OCBC Securities.

258 The defendants' allegation that OCBC might be a concert party to the Offer by virtue of OCBC Securities' holdings in Jade shares and that OCBC Securities was involved in ramping up the price of Jade shares was baseless. Hui had testified that OCBC Securities is a security brokerage firm that does not hold any proprietary interest in the shares which are in its custody.

Conclusion

259 The defendants had approached OCBC to launch the Offer despite knowing that they had no funds to satisfy full acceptance of the Offer and that they did not have any financing arrangement in place. Throughout their interactions with their legal and financial advisers, the defendants repeatedly misrepresented APLL's financial resources and level of shareholdings in Jade. The defendants had also presented OCBC with forged and/or false documents to prove that they had the financial resources to proceed with the Offer. Although the defendants either knew or had been put on notice that they and/or the persons related to them were not to carry out any undisclosed transactions in Jade shares, the defendants sold a large portion of APLL's unencumbered Jade shares at prices below the Offer price, prior to the conclusion of the Offer.

260 Consequently, OCBC succeeds in its claim against the defendants. Accordingly, I award OCBC interlocutory judgment on its claim and dismiss the defendants' counterclaim. The damages suffered by OCBC will be assessed at a later stage. Such assessment will determine whether OCBC is entitled to $410,094.77 (inclusive of GST) or some other sum as its fees under the Mandate Letter, whether OCBC should recover all or any part of the $835,327.25 which it incurred as legal and associated expenses in relation to the SIC inquiry and the opportunity cost it apparently lost when OCBC voluntarily abstained from carrying out any financial advisory work for eleven months after 11 April 2008.

Costs

261 Clause 4(b) of the Mandate Letter reads as follows:

> 4.(b) if, in connection with any services, matters or arrangements that are the subject of this mandate letter, OCBC Bank becomes involved in any capacity in any dispute or claim or action or legal proceeding, the Company unconditionally agree on demand to:-
>
> > (i) reimburse OCBC Bank (whether or not OCBC Bank is a formal party to any such action or legal proceeding) the legal fees, disbursements of counsel and other expenses (including the costs of travelling, investigation and preparation) incurred by OCBC Bank on a full indemnity basis;...

OCBC is entitled to and shall therefore have the costs of its claim and the defendants' counterclaim on an indemnity basis, which costs are to be taxed unless otherwise agreed.

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