State Bank of India Singapore *v* Rainforest Trading Ltd and another [2011] SGHC 182

Case Number	: Originating Summons No 958 of 2010
Decision Date	: 04 August 2011
Tribunal/Court	: High Court
Coram	: Steven Chong J
Counsel Name(s)	: Pradeep Pillai and Koh Junxiang (Shook Lin & Bok LLP) for the plaintiff; Samuel Chacko and Christopher Yeo (Legis Point LLC) for the defendants.
Parties	: State Bank of India Singapore — Rainforest Trading Ltd and another

Credit and Security

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 107 of 2011 was dismissed by the Court of Appeal on 20 January 2012. See [2012] SGCA 21.]

4 August 2011 Judgment reserved.

Steven Chong J:

Introduction

1 The case before me concerns an application by a bank to enforce a "pledge" of shares in a private company. Initially, the application sought an order for the enforcement of the "pledge" without further notice to the defendants and without reference to the Articles of Association of the company. Typically, the Articles of Association of private companies would provide for the exercise of pre-emption rights in respect of the sale of shares to *other* members of the company. How would such a pre-emption right operate when the private company is a wholly owned subsidiary? When questions as regards the difficulties posed by the plaintiff's application were raised by the court, the original application was abandoned and in its place various declaratory reliefs were sought.

2 In their attempt to resist the application, various allegations of fraud were raised by the defendants against the bank. Fraud is "*easy*" to allege and not infrequently is raised in affidavits without any basis to support the allegation. This judgment will also address counsel's duty to act responsibly when raising allegations of fraud. Counsel and the clients they represent should be reminded that legal proceedings cannot be used as a "*licence*" or a "*shield*" to cast serious allegations of fraud without any credible basis.

Background facts

Dramatis personae

3 The plaintiff, State Bank of India, Singapore ("SBI SG"), is a banking institution which is governed and regulated in Singapore by the Monetary Authority of Singapore.

4 The first defendant, Rainforest Trading Limited ("Rainforest"), is a company incorporated in the British Virgin Islands.

5 The second defendant, eSys Technologies Pte Ltd ("eSys") (now known as Haruki Solutions Pte Ltd), is a private company incorporated in Singapore. eSys is a wholly owned subsidiary of Rainforest and is engaged in the business of distributing computers, components, related products as well as the provision of technical, advisory and consultancy support, research and development and services for users of high technology products.

6 Teledata Informatics Limited ("Teledata") (now known as Agnite Education Limited) is a publicly listed company incorporated in India which engages in the business of development of marine software, logistics software and utility software products as well as the provision of services for users of high technology products.

7 Baytech Inc ("Baytech") is a company incorporated in the British Virgin Islands and is a wholly owned subsidiary of Teledata. While Teledata and/or Baytech are not parties to these proceedings, they play material roles in the factual matrix preceding the present application.

Key personnel

8 The following individuals feature prominently in the dispute at hand:

Mr Aravind Kumar ("Mr Kumar")	Senior Vice President, Credit Administration of SBI SG
Mr Gopalakrishnan Venkatramanan ("Mr Ram")	Teledata representative
Mr K Padmanabhan ("Mr Padma")	Director and sole shareholder of Baytech and Managing Director of Teledata
Mr Akash Deep Sharma ("Mr Sharma")	Director of eSys and former director of Rainforest
Ms Emily Chay ("Ms Chay")	Former Chief Financial Officer of eSys
Mr Vikas Goel ("Mr Goel")	Former Managing Director of eSys and former sole director of Rainforest

Underlying transaction: Share Subscription Agreement

9 On 10 November 2006, Mr Ram and Mr Padma of Teledata and/or Baytech, met with Ms Chay and Mr Goel of eSys, wherein it was proposed that Teledata was interested in investing in eSys. A Share Subscription Agreement ("SSA") dated 29 November 2006 was thereafter entered into between Mr Goel, eSys and Teledata.

10 The acquisition of majority control of eSys by Teledata was implemented via the acquisition of shares in Rainforest, a special purpose vehicle set up by eSys. Consequently, on 29 December 2006, eSys passed directors' resolutions to approve the transfer of its entire issued and paid up share capital to Rainforest. eSys's share capital consisted of 20 million fully paid up ordinary shares. In the result, eSys became a wholly owned subsidiary of Rainforest.

Terms of SSA and Supplemental Agreements

11 The salient terms of the SSA are as follows:

(a) Rainforest, a special purpose vehicle, was to be incorporated in the British Virgin Islands

for the purpose of the SSA. Mr Goel would conduct a share swap by transferring all of his shares in eSys to Rainforest in return for 49% of the shareholding of Rainforest.

(b) Teledata would invest approximately US$65 million in equity in Rainforest and would extend a further loan of US$40 million to Rainforest.

(c) Rainforest was to utilise the monies and extend loans of up to US$60 million to eSys.

(d) Teledata would hold 51% of the shares in Rainforest upon payment of the requisite sums.

12 The defendants stated that the SSA dated 29 November 2006 was subsequently revised by supplemental agreements on 29 November 2006 (twice), 9 February 2007 (once) and 14 February 2007 (once). Under the amended SSA, the defendants stated that it was agreed by Mr Goel and eSys that Baytech was to be appointed as Teledata's nominee for the purposes of subscribing to shares in Rainforest pursuant to the SSA. SBI SG denied knowledge of any amendments having been made to the SSA dated 29 November 2006. However, in an email chain between Mr Ram and Mr Uthayacharan, the advocate and solicitor representing SBI SG , Mr Uthayacharan specifically raised queries to Mr Ram in relation to the supplemental agreement to the SSA dated 9 February 2007. From the email chain, it would appear that contrary to SBI SG's assertion, SBI SG was aware of the supplemental agreements to the SSA. However, for reasons as explained in [53] below, nothing turns on this.

13 In or around December 2006, payments due and owing under the SSA from Teledata to eSys had not been made. Mr Padma and Mr Ram informed Ms Chay and Mr Goel that Teledata had applied for a loan to finance the acquisition of the shares in Rainforest and that the payments due and owing under the SSA would be made soon thereafter. It was at this point that SBI SG entered into the picture, in the provision of a sizeable loan facility to Baytech.

The Facility Agreement

14 Sometime in or around December 2006, Teledata decided to obtain financing from SBI SG and negotiations were underway between the parties as evidenced by the "indicative quote" dated 31 January 2007 from SBI SG to Teledata. However, as Baytech was the special purpose vehicle of Teledata for the purposes of this loan facility, SBI SG's letter of offer dated 31 January 2007 was addressed to Baytech instead. Upon conclusion of the negotiations, SBI SG entered into a Facility Agreement dated 22 February 2007 ("the Facility Agreement") with Baytech. Pursuant to the terms of the Facility Agreement, SBI SG agreed, *inter alia*, to make available a US Dollar term loan facility in aggregate sum of US$80 million to Baytech. The "Final Maturity Date" was defined as 36 months from the date of drawdown and the entire loan facility was drawn down by Baytech in one tranche on 23 February 2007.

15 Pursuant to cl 3.1, the stated purpose of the Facility Agreement was clearly to finance the acquisition of 51% of the shares in Rainforest though the SSA was not specifically referred to in the Facility Agreement:

> The Borrower [Baytech] shall apply all amounts borrowed by it under the Facility for control of the majority share holding in [eSys] by acquisition of 51% of the equity shares in [Rainforest], British Virgin Islands.

16 A number of securities were provided to SBI SG pursuant to cl 4 of the Facility Agreement to secure Baytech's liability in the event of default:

(a) Corporate Guarantee by Teledata.

(b) Personal Guarantee of Mr Padma.

(c) An extension of all charges on all collateral securities in respect of Teledata held by the State Bank of India, Overseas Branch, Chennai.

(d) First charge on all the fixed assets of Teledata.

(e) First charge on all the fixed assets of Teledata Marine Solutions Limited and Teledata Technology Solutions Limited upon demerger.

(f) Pledge of 51% of the paid up share capital of eSys to be acquired out of the facility, which pledge shall be completed and duly registered as a charge in favour of SBI SG within 30 days of the execution of the Facility Agreement.

(g) Pledge of 51% of the paid up share capital of Rainforest, which pledge shall be completed and duly registered as a charge in favour of SBI SG within 30 days of the execution of the Facility Agreement.

17 In accordance with cl 4, as security for the Facility Agreement, both Teledata and Mr Padma signed corporate and personal guarantees respectively dated 1 October 2008 in favour of SBI SG. More importantly, for the purposes of this dispute, pursuant to cl 4(iv), 10,200,000 shares in eSys (representing 51% of eSys's share capital) ("the Pledged Shares") were "pledged" by Rainforest to SBI SG.

The Pledged Shares

18 By letter dated 5 April 2007 addressed to SBI SG, Rainforest delivered Share Certificates Nos 10, 11, 12, 13 and 14 of eSys, ("the Share Certificates") together with a signed blank share transfer form to SBI SG. The letter signed by Mr Goel as "Sole Director of Rainforest" read as follows:

> This has reference to the facility of Foreign Currency *Loan of USD 80 million* granted by your Bank to Baytech Inc (wholly owned subsidiary of Teledata....)
>
> The above facility has been granted to Baytech Inc pursuant to the facility agreement entered into between your branch and Baytech Inc, British Virgin Islands.
>
> As per the terms of the facility agreement, we have to pledge the shares of [eSys] standing in the name of [Rainforest] with your office and we have handed over the following share certificates standing in the name of the company to your office vide our separate letter.
>
> ...
>
> We have also noted the above pledge of shares in our Books in [SBI SG's] favour. We request you to take on record the pledge of shares.
>
> [emphasis added]

19 In a separate letter dated 5 April 2007 from eSys to SBI SG also signed by Mr Goel, eSys expressly acknowledged the delivery of the Share Certificates and stated that such delivery was "part

of the security for the [Facility Agreement]". The letter signed by Mr Goel as "Managing Director" of eSys read:

> **Sub: Pledge of shares standing in the name of Rainforest Trading Limited – *[Facility Agreement] of USD 80 million granted to Baytech Inc***
>
> ...
>
> The beneficiary of the shares viz., [Rainforest] has advised that the above share certificates have been pledge [sic] in favour of State Bank of India as *part of security for the* [Facility Agreement]. In this connection, we confirm having noted the interest of State Bank of India in the shares in the Register of Members. *We note to obtain the clearance from State Bank of India, Singapore, before effecting any change in the name/s of beneficiary of the above shares*.
>
> [emphasis added]

20 In addition, a further accompanying cover letter dated 5 April 2007 attached to the blank share transfer form duly signed by Mr Goel as the "Sole Director" of Rainforest, read:

> **Syndicated Term *Loan of US$ 80 Million* availed by Baytech Inc**.
>
> **- Facility Agreement dated 22/02/07**
>
> *As one of the securities for the above loan*, we had tendered to you five share certificates (representing 10.2 million shares) issued by [eSys] for in favour of [Rainforest]. *In continuation of this, we now present the blank share transfer form duly signed*. Please acknowledge.
>
> [emphasis added]

21 In the letters dated 5 April 2007 from both Rainforest and eSys, Mr Goel expressly stated that SBI SG's interest in the Pledged Shares was recorded in the companies' books/register of members and that the shares were being offered as security for the loan provided by SBI SG to Baytech under the Facility Agreement. Furthermore, on or around 10 December 2007, Rainforest had pursuant to the Facility Agreement, registered a charge over the Pledged Shares in favour of SBI SG in the British Virgin Islands as "security for a US Dollar term loan" for the sum of US$80 million.

Event of default

22 Clause 21 of the Facility Agreement states that an event of default will be deemed to have occurred if:

> **2 1.1 Non-Payment**
>
> A member of the Core Group does not pay on the due date any amount payable pursuant to a Finance Document at the place and in the currency in which it is expressed to be payable unless:
>
> (a) its failure to pay is caused by administrative or technical error; and
>
> (b) payment is made within 5 Business Days of its due date.

"Core Group" is defined under the Facility Agreement to mean "the Borrower, Obligors and the Guarantor/s".

23 Clause 7.1 of the Facility Agreement, the governing clause pertaining to repayment of the loan, states:

> (a) The Borrower shall repay each Loan on or before the Final Maturity Date by way of 5 half yearly instalments of USD13,000,000 each, and the 6th and last instalment of USD15,000,000, the 1st such instalment being payable within 6 months after drawdown.

It is common ground that in breach of cl 7.1, Baytech failed to make payment of the US$13 million due and owing to SBI SG on 20 February 2009. By letter dated 25 March 2010 to Baytech, SBI SG declared that an event of default had occurred under the Facility Agreement and that all outstanding sums, together with accrued interest, and all other amounts accrued under the Facility Agreement became immediately due and payable. SBI SG stated that a sum of US$41,989,189.91 plus interest accrued from the date of default until the date of full payment was due and owing under the Facility Agreement to be paid within seven days of receipt of the letter, *ie*, on 2 April 2010.

24 Having received no response from Baytech, by way of letters dated 16 April 2010, SBI SG called upon Teledata and Mr Padma to pay under the corporate and personal guarantees respectively. Teledata and Mr Padma failed to make the payment within the stipulated deadline. In light of the failure of the guarantors to honour their respective guarantees, SBI SG then sought to enforce its security over the Pledged Shares towards repayment of the outstanding debt owed by Baytech. This was the background against which the principal issue relating to the enforcement of the Pledged Shares came before this court for determination.

Multiplicity of legal proceedings

25 The parties central to the present dispute have also commenced other proceedings against each other in India, New York and Singapore. In or around November 2009, Teledata commenced court proceedings against Mr Goel and eSys in India. Mr Goel and eSys have also commenced committal proceedings against Teledata in India on the basis that Teledata had relied on a forged document in the Indian proceedings.

26 On 18 November 2010, Mr Goel and Rainforest brought an action in New York against Mr Ramachandran, Bunge Ltd and Bunge SA in relation to the illegal transfer of US$7.5 million out of Rainforest's bank account.

27 On 12 November 2010, Mr Goel and Rainforest commenced arbitration proceedings in Singapore against, *inter alia*, Teledata, in relation to, *inter alia*, the use of a purportedly forged SSA ("the forged copy") by Teledata. In the arbitration proceedings, the defendants are seeking an order for Teledata/Baytech to procure the delivery up of the Pledged Shares.

28 It is, however, material to highlight that SBI SG is ***not*** a party to any of the other proceedings and, more significantly, none of the papers filed in support of the legal proceedings contain any allegations against SBI SG. However, on 18 May 2011 (one day prior to the hearing of OS 958/2010) Rainforest commenced a separate action, Suit No 362/2011 ("S 362/2011") against SBI SG and others, seeking, *inter alia*, an order to set aside the Pledged Shares, essentially in reliance on the various allegations raised against SBI SG in the present action, OS 958/2010.

Procedural history of the OS

29 At the Pre-Trial conference held on 12 October 2010 in relation to OS 958/2010, in response to the defendants' notice that they would be raising allegations of fraud, the Senior Assistant Registrar, Mr Yeong Zee Kin directed the defendants to file an application to convert OS 958/2010 to a writ action. Accordingly, the defendants filed Summons No 5300 of 2010/B ("the Summons") and it came before an Assistant Registrar ("the AR") on 11 January 2011 whereupon he ordered OS 958/2010 to be converted to a writ action.

30 SBI SG appealed against the AR's decision and on 4 March 2011, Kan Ting Chiu J allowed the appeal and restored the action as OS 958/2010. In Kan J's view, the allegations of fraud raised in the affidavits by the defendants did not constitute sufficient evidence to warrant the conversion of OS 958/2010 to a writ action. In any event, Kan J opined that the allegations of fraud could be re-considered by the court at the substantive hearing in OS 958/2010. There was no appeal from Kan J's decision. For reasons which I will elaborate below at [48]–[77], it is clear to me that the allegations of fraud raised by the defendants are devoid of any merit and consequently have no bearing on the substantive issues before me.

The original OS

31 SBI SG presented a straightforward case in OS 958/2010. As an event of default had occurred under the Facility Agreement, SBI SG sought to perfect its security in the Pledged Shares. SBI SG submitted that the deposit of the share certificates accompanied by a signed blank share transfer form gave rise to an equitable mortgage with an implied power of sale upon default. The crux of the defendants' case was that the Pledged Shares were procured and/or obtained through an elaborate fraud perpetrated by Teledata, Baytech and SBI SG. As a result of the purported fraud and forgery, the defendants argued that Rainforest was induced into granting the Pledged Shares as security for the Facility Agreement and consequently, by reason of SBI SG's involvement in the fraud, SBI SG is not entitled to benefit from or enforce the Pledged Shares. Further, the defendants reinstated their original position that OS 958/2010 should be converted to a writ action.

32 As Baytech and Teledata are not parties to these proceedings and the enforcement of SBI SG's security in the Pledged Shares is the primary issue before the court, the defendants' case rested on establishing that SBI SG was complicit in the purported fraud. It cannot be gainsaid that the fraud, if any, perpetrated by other parties to this dispute, in the absence of complicity on the part of SBI SG, would not affect the validity or enforceability of the Pledged Shares.

Amendment of the OS

33 At the commencement of the hearing before me, the reliefs originally sought by SBI SG in OS 958/2010 were as follows:

(a) Declarations that pursuant to the terms of a Facility Agreement dated 22 February 2007 entered into between SBI SG and Baytech:

(i) an Event of Default has occurred pursuant to *inter alia* cl 21 of the Facility Agreement; and

(ii) SBI SG is entitled to enforce its security over the Pledged Shares in connection with the Facility Agreement.

(b) SBI SG be at liberty to sell the Pledged Shares without further notice to the defendants.

(c) SBI SG be empowered to transfer the Pledged Shares to any party without further notice to the defendants and/or any member notwithstanding any provision in eSys's Articles of Association ("eSys Articles"), and to receive any dividends due or to accrue thereon.

(d) Directors of eSys be directed to register any transfer of the Pledged Shares.

(e) eSys to give access to SBI SG and/or authorised representatives to all books and records as may be reasonably required to carry out a valuation of the Pledged Shares.

(f) Costs to be fixed and paid to SBI SG.

34 Counsel for the defendants, Mr Samuel Chacko ("Mr Chacko") initially challenged OS 958/2010 only on the basis of various allegations of fraud/forgery and complicity against SBI SG. In the course of the hearing, I expressed my doubts as to whether the court is empowered to order the sale of the Pledged Shares without reference to the eSys Articles. I invited both Mr Chacko and counsel for SBI SG, Mr Pradeep Pillai ("Mr Pillai") to research the point and on resumption of the hearing, both counsel accepted that any sale of the Pledged Shares, even if ordered by the court, must comply with the eSys Articles. Under these circumstances, Mr Pillai, having considered the inherent difficulties with the original reliefs, sought leave to amend OS 958/2010 ("Amended OS") as follows:

(a) SBI SG be at liberty to sell the Pledged Shares *subject to the provisions in eSys's Articles of Association*.

35 SBI SG also re-stated the other declaratory reliefs sought earlier pursuant to the Facility Agreement:

(a) An event of default has occurred pursuant to *inter alia* cl 21.

(b) SBI SG is entitled to enforce its security over the Pledged Shares in connection with the Facility Agreement.

(c) Rainforest forthwith give access to SBI SG and the authorised representatives all books and records of eSys as may be reasonably required to carry out a valuation of the Pledged Shares.

(d) Costs to be fixed and paid to SBI SG.

Mr Chacko did not raise any objection to the amendments made to OS 958/2010.

The issues

36 Arising from the Amended OS, the following issues are before me for determination:

(a) Should this OS be converted to a writ action?

(b) Has an event of default occurred under the Facility Agreement?

(c) Is there any merit in the defendants' allegations of SBI SG's complicity in the purported fraud of Teledata/Baytech?

(d) Does the deposit of share certificates and a signed blank share transfer form as security give rise to an equitable mortgage?

(e) Whether the deposit of share certificates together with a signed blank share transfer form alone, gives an equitable mortgagee a power of sale.

(f) How do restrictions in the eSys Articles affect the implied power of sale of an equitable mortgagee?

(g) Assuming there is such a power of sale, how does SBI SG as an equitable mortgagee enforce the power of sale with reference to the eSys Articles?

(h) How do the eSys Articles operate when the shares involved a wholly owned subsidiary, *ie*, eSys, "pledged" by its holding company, Rainforest?

(i) Given that SBI SG accepts that the court cannot order the sale of the Pledged Shares without reference to the eSys Articles, is there any practical purpose in the court granting the relief sought by SBI SG?

Issues (d) to (i) were raised by the court and both parties were given time to address them by way of supplementary written submissions.

Should the OS be converted to a writ action

37 In spite of the Order made by Kan J, the defendants revived their earlier submission that OS 958/2010 should be converted to a writ action to be heard together with S 362/2011 or in the alternative, that OS 958/2010 should be heard after the conclusion of S 362/2011. In my view, there is no merit in this submission. First, the defendants did not appeal against Kan J's decision when he disallowed the application to convert OS 958/2010 to a writ action. Secondly, although Kan J remarked that the fraud allegations could be re-considered by the judge hearing the substantive application, for reasons which will be apparent below (see [48]–[77]), having considered the allegations, I can see no reason why the matter cannot be disposed of by way of the Amended OS.

Has an event of default occurred

38 By letter dated 25 March 2010 to Baytech, SBI SG declared that an event of default had occurred under the Facility Agreement and that all outstanding sums, together with accrued interest, and all other amounts accrued under the Facility Agreement became immediately due and payable. There was no response from Baytech.

39 In their written submissions, the defendants conceded that they are not in a position to challenge SBI SG's assertion that Baytech is in default. However, Mr Chacko submitted that since Baytech is not a party to OS 958/2010, such a declaration does not bind Baytech and therefore there is "no legitimate reason in granting the declaration" and to do so, the court would be acting in vain.

40 While it is correct that Baytech is not a party to OS 958/2010, I disagree with Mr Chacko that there is no legitimate reason to declare that an event of default has occurred. For reasons as explained in [93]–[96] below, the implied power of sale of an equitable mortgagee only arises by operation of law upon default. That being the case, a declaration of default must necessarily precede any steps to enforce the Pledged Shares. On the evidence before me, there can be no doubt that an event of default has occurred under the Facility Agreement and I so declare it.

The fraud allegations raised by the defendants

41 The defendants' principal argument, whether under the original OS or the Amended OS, was that SBI SG's security interest in the "Pledged Shares" was tainted by fraud, forgery and bribery ("collectively referred to as the fraud allegations"). In an effort to make good their case on fraud, the defendants have raised a wide range of fraud allegations against SBI SG, each of which will be examined below. However, before embarking on a detailed review of the fraud allegations, it is perhaps useful to take cognisance of the rules governing reliance on hearsay evidence in affidavits and the duty of counsel in raising allegations of fraud in affidavits.

Contents of the defendants' affidavits

42 Order 41 rule 5 of the Rules of Court (Cap 322, 2006 Rev Ed) ("the Rules of Court") pertaining to the contents of affidavits states:

> (1) Subject to the other provisions of these Rules, an affidavit may contain only *such facts as the deponent is able of his own knowledge to prove*.
>
> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.
>
> [emphasis added]

43 The default rule is that an affidavit may only contain facts within the deponent's personal knowledge. The exception to this default rule is set out under O 41 r 5(2) which permits reference to hearsay evidence for interlocutory proceedings provided the grounds and source of belief are stated. While the Rules of Court do not specifically define the term "interlocutory proceedings" for the purposes of O 41 r 5(2), there is a considerable body of case law on point. In *MUI Bank Bhd v Alkner Investments Pte Ltd* [1990] 3 MLJ 385 at 387–388, following the English Court of Appeal decision of *Rossage v Rossage* [1960] 1 WLR 249, Chao Hick Tin JC (as he then was) held that the application before him was not an interlocutory matter as it was an application "to determine the rights of the parties". Adopting a similar approach to Chao JC, in "*The Ocean Jade*" [1991] 1 SLR(R) 354 at [86], Karthigesu J stated that "only those applications which do not decide the rights of the parties can be considered to be interlocutory". The relevant distinction is essentially between proceedings which seek an order relating to the conduct or progress of the action or for the purposes of keeping things in *status quo* till the rights can be decided and proceedings which require the court to adjudicate on the parties' substantive rights.

44 Mr Pillai submitted that the OS before me clearly falls in the latter category. This was not challenged by Mr Chacko. The court is faced with the task of determining whether an event of default has occurred, whether an equitable mortgage has arisen, if so whether a power of sale has accrued and whether an order should be made to facilitate the fair valuation of the Pledged Shares so as to enforce the eventual sale and transfer of the Pledged Shares. The declaratory reliefs sought by SBI SG are not interlocutory in nature as they cover substantive rights. It is clear that the underlying purpose of O 41 r 5(1) is to ensure that ordinary rules of evidence including the prohibition of hearsay evidence apply when the substantive rights of parties are being adjudicated. Accordingly, the exception of O 41 r 5(2) does not extend to the defendants in which event the defendants are precluded from making allegations in its affidavits outside the personal knowledge of the deponents. This might well be the reason why the defendants sought to convert the OS to a writ action in order to circumvent the prohibition under O 41 r 5(1). This will become even clearer when the specific

allegations of fraud are scrutinised.

45 It should also be pointed out that there are professional rules of conduct governing the conduct of solicitors in the drafting of affidavits containing allegations of fraud. In this regard, lawyers should be reminded that Rule 59 of the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) dictates as follows:

> **Facts, arguments and allegations**
>
> An advocate or solicitor shall not contrive facts which will assist his client's case **or** draft any originating process, pleading, **affidavit**, witness statement or notice or grounds of appeal containing:
>
> ...
>
> (b) any allegation of fraud unless he has clear instructions to make such allegation **and***has before him reasonable credible material which as it stands establishes a prima facie case of fraud*; or
>
> (c) *in the case of an affidavit or witness statement, any statement of fact other than the evidence which in substance according to his instructions the advocate and solicitor reasonably believes the witness would give if the evidence contained in the affidavit or witness statement were being given orally*.
>
> [emphasis added]

46 Rule 59 stipulates that an affidavit should not contain allegations of fraud unless the advocate or solicitor has before him reasonable credible material to establish a *prima facie* case of fraud. In my view, the graver the allegation of fraud, *eg*, bribery, the greater the need for counsel to address the issue of reasonable credible evidence to support it. In the present case, as will be appreciated below, a number of the fraud allegations made by the defendants were based entirely on hearsay evidence. The question is whether evidence, inadmissible by reason of its hearsay nature, is *ipso facto* not reasonably credible for the purposes of r 59. As no submission was made by either counsel on this issue and since its determination is strictly not necessary for the purposes of the Amended OS, I shall refrain from expressing a view on the matter. However, I wish to take this opportunity to remind counsel of their duty under r 59.

The fraud allegations

47 The defendants have made wide ranging allegations in relation to the purportedly fraudulent conduct of Teledata, Baytech, SBI SG and a number of other unrelated entities to this action. Specifically, the defendants made the following allegations, each of which will be considered below:

(a) The SSA exhibited by SBI SG was the forged copy and by comparing it with the "true copy", SBI SG would have been or was put on notice of the purported forgery ("the Forgery Allegation").

(b) SBI SG did not monitor the use of the loan monies by Baytech in accordance with the stated purpose of the Facility Agreement ("the Failure to Monitor Allegation").

(c) SBI SG was complicit in the fraud of Teledata and Baytech, in relation to the procurement of the Pledged Shares ("the Fraudulent Procurement Allegation").

(d) SBI SG was complicit in the fraudulent conduct of Teledata and Baytech such as the churning of debts and acceptance of bribes from the representatives of Teledata in granting the Facility Agreement. OS 958/2010 was also filed by SBI SG to gain majority control of eSys in order to stymie other proceedings from being commenced by the defendants ("the Bribery Allegation").

The Forgery Allegation

48 The defendants alleged that Teledata relied on the "forged copy" of the SSA to obtain the Facility Agreement from SBI SG. The defendants asserted that the SSA drafted by M/s Drew & Napier LLC and certified by Mr Aaron Kok Ther Chien of Drew & Napier LLC, was the "true copy" of the SSA which accurately reflects the agreement reached between eSys, Mr Goel and Teledata. By reason of a range of "glaring inconsistencies" identified between the "true copy" and the "forged copy" of the SSA, the defendants claimed that the SSA exhibited by SBI SG was a forgery and that SBI SG should have been put on notice of the forgery. The following discrepancies were identified between the "forged copy" and the "true copy" of the SSA:

(a) Clause 2.1 of the "forged copy" of the SSA stated that the acquisition price for each Rainforest share was $1.00. Hence for the 61,200,201 Rainforest shares to be purchased, the total sum payable by Teledata should have been US$61,200,201. Instead, cll 2.1 and 2.3 reflected the total sum payable as US$105 million.

(b) The "forged copy" of the SSA was signed only on the execution page whereas the "true copy" was signed and initialled on every page.

(c) The "forged copy" of the SSA contained numerous spelling, formatting errors and was poorly drafted.

(d) No reference was made to Baytech in the "forged copy" of the SSA raising questions as to why SBI SG would extend the Facility Agreement to Baytech.

49 The defendants averred that Teledata and/or Baytech forged the SSA exhibited by SBI SG dated 29 November 2006 to reflect a higher sum payable for the Rainforest shares (*ie*, US$105 million instead of about US$61 million) so as to procure a larger loan from SBI SG. The crux of the defendants' argument was that SBI SG knew or ought to have known that the SSA was a forgery but nonetheless approved and extended the Facility Agreement to Baytech to purchase shares from Rainforest at an inflated price. The defendants argued that by reference to the "true copy" of the SSA and its supplemental agreements, it was apparent or ought to have been apparent to SBI SG that "the documentation underlying the transaction was flawed".

50 The defendants averred that under cl 2.3 of the "forged copy" of the SSA, Teledata (or its subsidiaries/associates) would make payment of US$105 million to acquire a 51% interest in Rainforest. The defendants stated that in the "true copy" of the SSA, the acquisition price was instead stated as US$61 million. The defendants therefore extrapolated that by advancing a loan facility of US$80 million in reliance on the "forged copy", SBI SG effectively granted Baytech a loan of 76% of the total price payable to acquire the 51% interest in Rainforest. As 76% of the total consideration price of US$105 million was granted pursuant to the Facility Agreement, the defendants speculated that if the "true copy" had been relied on, SBI SG might only have approved a loan of US$46 million (*ie*, 76% of US$61 million). On the back of this submission, the defendants then rationalised that SBI SG cannot legitimately claim for the outstanding amount of US$41,989,189.91 due and owing under the Facility Agreement because this would mean that more than US$38 million

(US$80 million – US$41,989,189.91) has since been repaid under the Facility Agreement. It therefore follows, according to the defendants, that if the loan amount had been US$46 million instead of US$80 million, the balance outstanding would only have been about US$8.5 million.

51 The heart of the "Forgery Allegation" presupposed two fundamental assumptions. First, SBI SG had in its possession both the "forged copy" and the "true copy" of the SSA and second that if Rainforest had known that the loan amount to Baytech under the Facility Agreement was US$80 million, Rainforest would not have pledged the eSys shares.

52 It should be noted that the defendants have not alleged that SBI SG had in any way participated in the "forgery" of the SSA. They merely asserted that by comparing both versions of the SSA, SBI SG ought to have known that the version in its possession was forged. However, the defendants have not adduced any evidence to establish that SBI SG had received the "true copy" of the SSA at any material time. Upon my examination of both versions of the SSA, I found it interesting that at the top of every page of the "forged copy", the facsimile printout clearly evidenced that the "forged copy" was faxed over by Teledata to SBI SG on 15 February 2007. In contrast, no similar marking appeared on the "true copy". In the absence of any evidence that SBI had received the "true copy", the defendants could not credibly assert that SBI SG was in possession of both versions and was thereby put on notice of the discrepancies by comparing them.

53 Although it appears that SBI SG was aware of the supplemental agreements to the SSA, the defendants have not suggested that SBI SG knew or ought to have known that the SSA in its possession was the "forged copy" from a perusal of the supplemental agreements. It is also curious for the defendants to claim that since no reference was made to Baytech in the "forged copy" of the SSA, it raises questions as to why SBI SG would extend the Facility Agreement to Baytech. By the same token, no reference was made to Baytech in the "true copy" of the SSA as well. Further, when I perused the supplemental agreements (which the defendants claimed SBI SG were aware of), there was actually a reference to Baytech in the supplemental agreement dated 9 February 2007.

54 Further, while it cannot be denied that the loan under the Facility Agreement was to finance the purchase of 51% shareholding in Rainforest, the execution of the SSA, true or forged copy, under which the Rainforest shares were purchased was not a condition precedent to the Facility Agreement and was in fact not even referred to in the Facility Agreement. It is relevant to point out that SBI SG only received the "forged copy" on 15 February 2007, *after* the letter of offer for the Facility Agreement had been issued to Baytech on 31 January 2007.

55 While it is true that the Facility Agreement was executed on 22 February 2007 *after* receipt of the "forged copy" of the SSA, it is crucial to note from the three letters dated 5 April 2007 signed by Mr Goel on behalf of Rainforest and eSys as well as the charge over the Pledged Shares registered by Rainforest (see [18]–[21] above), that Rainforest knew that the loan amount under the Facility Agreement was US$80 million. Therefore the forgery, even if true, does not alter the undeniable fact that Rainforest knew that the Pledged Shares were offered as security for a US$80 million loan to Baytech under the Facility Agreement. It is disingenuous for the defendants to undertake a speculative mathematical exercise as to what the loan amount would have been had SBI SG been aware of the "true copy" of the SSA when by the objective evidence before me, Rainforest knew fully well that the Pledged Shares were offered as security for a US$80 million loan to Baytech. If what the defendants say is true, it would mean that Rainforest, eSys and Mr Goel who signed the three letters were themselves complicit in obtaining a loan at an inflated price of the Rainforest shares under the "true copy" of the SSA. As such, it is fallacious for the defendants to submit that "[i]f the Defendants had known of the attempts to rely on a forged document for the purposes of fraudulently obtaining a higher loan facility, the Defendants would not have agreed to grant any charges to SBI over the

shares."

56 On the facts before this court, no evidence was adduced to establish that SBI SG had any knowledge of the purported forgery or had even received the allegedly "true copy" of the SSA in order to be placed on notice of the alleged discrepancies. Finally, as highlighted above, Rainforest at all material times was fully aware that the loan under the Facility Agreement was US$80 million and more importantly, willingly offered the Pledged Shares as security for the Facility Agreement.

The Failure to Monitor Allegation

57 The defendants stated that the Facility Agreement was not used for its stated purpose as Baytech did not utilise the loan monies to make the payments due and owing to Rainforest in accordance with the SSA. While the Facility Agreement or the letter of offer did not make specific reference to the SSA, by reason of cl 3.1 of the Facility Agreement, reproduced at [15], it is apparent that the purpose of the US$80 million loan was to acquire the 51% shareholding in Rainforest.

58 Did Teledata and/or Baytech fail to make payment to Rainforest in breach of the SSA? If so, how is this relevant to the issues to the present dispute? In an affidavit filed by Mr Goel in a separate proceeding in Suit 854 of 2006 ("S 854/2006") at [63], he confirmed that Teledata had paid US$55 million for 55 million shares in Rainforest. Of the US$55 million paid to Rainforest, US$31 million was paid after the Facility Agreement was executed on or about 22 February 2007. So clearly at least a substantial part of the loan was used to pay for the Rainforest shares. The defendants argued that in breach of cl 3.1 of the Facility Agreement, the balance US$49 million of the loan disbursed by SBI SG was not used to fund the acquisition of the 51% shareholding of Rainforest. Further, the defendants claimed that the subscription price of US$61 million has not been paid in full and until full payment, Baytech was not entitled to the shares in Rainforest and as such the defendants argued that it was "inconceivable that SBI [SG] could claim rights to these shares under a purported charge". Baytech's purported breaches of its obligations to Rainforest under the SSA are currently the subject matter of separate arbitration proceedings in Singapore between, *inter alia*, Mr Goel, Rainforest, Teledata and Baytech to which SBI SG is not a party.

59 There are serious and insurmountable difficulties in the defendants' arguments. First, under cl 3.2 of the Facility Agreement, SBI SG was not required to monitor the use of the loan facility by Baytech/Teledata:

> No Finance Party is bound to monitor or verify the application of any amount borrowed pursuant to this Agreement.

"Finance Party" is defined in the Facility Agreement to include the Lender, SBI SG.

60 Secondly, it is clear that the loan amount of US$80 million was in fact granted to Baytech and that there was a drawdown by Baytech of the entire US$80 million in one tranche on 23 January 2007. The enforcement of any security, including the Pledged Shares, under the Facility Agreement was in no way contingent on the successful completion of the SSA particularly since the SSA was concluded some three months *prior* to the Facility Agreement. Contrary to the defendants' submission, there is nothing "inconceivable" for SBI SG to enforce the Pledged Shares upon default of the Facility Agreement. Any non-payment by Teledata and/or Baytech under the SSA is irrelevant to the rights and obligations of SBI SG *vis-a-vis* Rainforest in relation to the Pledged Shares. They are entirely separate transactions.

61 In any event, taking the defendants' argument at its highest, even if Baytech had breached cl 2.3 of the SSA in failing to make full payment for the Rainforest shares by the contractually stipulated deadline of 30 December 2006, Rainforest nevertheless readily pledged the shares to SBI SG on or about 5 April 2007, well after passing the payment deadline. In other words, the shares were pledged notwithstanding the fact that Rainforest had full knowledge that the purchase price under the SSA had not been fully paid up. In spite of the alleged non-compliance with the stated purpose of the Facility Agreement, Rainforest willingly and unequivocally provided security by way of the Pledged Shares for the Facility Agreement and soon thereafter duly registered a charge over the Pledged Shares in SBI SG's favour in the British Virgin Islands.

62 In an attempt to clarify Mr Goel's evidence in S 854/2006, the defendants stated that between December 2006 and February 2007, a sum of US$55 million was indeed paid to Rainforest under the SSA in ten separate deposits. However, they alleged that a total sum of US$54,800,000 was then transferred out of Rainforest's account as short-term loans for Teledata's suppliers for which Teledata agreed to pay interest at 12% per annum. The defendants claimed that Rainforest's bank account was operated on the instructions of Baytech/Teledata and since Teledata was a majority shareholder of Rainforest, there was no reason to doubt its intentions. It is far from clear how this allegation or submission in any way implicates SBI SG or relates to the central question of the validity or enforceability of the Pledged Shares. The claim by Rainforest against Teledata for repayment of theses alleged short term loans has nothing to do with the enforceability of the Pledged Shares.

63 As SBI SG had no obligation to monitor the use of the loan monies and as Rainforest had willingly provided security by way of the Pledged Shares to SBI SG for the Facility Agreement notwithstanding Baytech's alleged failure to make payment of the full purchase price for the Rainforest shares under the SSA, the defendants' arguments at this stage came across as an afterthought and were irrelevant to either the validity or the enforceability of the Pledged Shares.

The Fraudulent Procurement Allegation

64 The defendants submitted that the purpose of the pledge was "intended to prevent a sale of the eSys Shares to third parties" and not as security for the Facility Agreement. The defendants submitted that sometime in or around January or February 2007, Ms Chay, accompanied by another employee of eSys, handed over the Share Certificates to Mr Uthayacharan, the solicitor representing SBI SG. The defendants reasoned that the Share Certificates were delivered to Mr Utayacharan prior to the execution of the Facility Agreement (*ie*, 22 February 2007) because Mr Goel and the defendants were allegedly informed by Mr Ram of Teledata that SBI SG's Mr S Adikesavan, the Manager of Credit Administration, had made clear that the request for the pledge of eSys shares was merely an administrative formality and would not amount to a formal charge. SBI SG objected to this allegation as it is plainly hearsay. In response, the defendants, while not denying its characterisation as hearsay evidence, alleged that they were prevented by Teledata and its representatives from having any contact with SBI SG and its officers. The primary contact between them in respect of the Facility Agreement was Mr Ram from Teledata, who purportedly repeatedly told them not to contact SBI SG or its officers. I fail to see how the alleged difficulties experienced by the defendants in having direct contact with SBI SG can render the evidence any more admissible. Even if these representations had indeed been made by Teledata's representatives to the defendants, there is no objective evidence before me that SBI SG was aware of them at any material time.

65 Notwithstanding these allegations, it is undeniable that the express wording of the three covering letters from eSys and Rainforest unequivocally referred to the Pledged Shares *as security*. None of the letters referred to the alleged "administrative formality". Further, in an internal email dated 23 March 2007 from Mr Ravindran Varadarajan ("Mr Ravi"), Senior Finance Manager of eSys to

Ms Chay and Mr Ram, Mr Ravi informed Ms Chay of the need to submit additional documents, namely a blank signed share transfer form and a letter from Rainforest specifically stating that the Pledged Shares were provided as *security* for the Facility Agreement.

66 In the circumstances, I accept SBI SG's submission, that it was incredible that Mr Goel would have unreservedly pledged 51% of the shares in eSys, issued a signed blank share transfer form and consistently referred to the Pledged Shares as "security" if he was indeed under the genuine belief that the pledge was merely an administrative formality. Additionally, both Rainforest and eSys recorded SBI SG's interest in the Pledged Shares in their books and registers of members in addition to registering a charge in the British Virgin Islands in favour of SBI SG over the Pledged Shares. If the true purpose of the delivery of the share certificates was *merely* to prevent a sale of the same, eSys/Rainforest would not have undertaken such elaborate steps without protest or query. Such a claim rings hollow in the face of clear objective evidence that the shares were indeed "pledged" to SBI SG as security for the Facility Agreement.

The Bribery Allegation

67 A multitude of serious allegations were made by the defendants through the affidavits of Mr Goel and Mr Sharma under this category. Each of them will be separately examined below:

(a) In or around early 2007, at a meeting held at a seafood restaurant in Bangkok, Mr Padma told Mr Goel that Teledata paid a bribe of 2% of the Facility to senior officers of SBI SG to ensure that the Facility was approved.

68 This is plainly hearsay and yet the serious allegation of bribery was made without any qualms on the part of the defendants. It is obvious that the allegedly "corrupt" senior officers of SBI SG were not even identified. Further, Mr Goel, by his own evidence, knew about the bribery in early 2007 and yet he continued to participate in the transaction with Teledata and Mr Padma without any record of his protest in the contemporaneous documents and thereafter took several steps in offering the Pledged Shares as security for the Facility Agrement.

(b) As SBI SG is a major international bank, the bribe was "the only possible explanation for the failure of [SBI SG's] officers to perform proper due diligence to ensure that the terms of the Facility Agreement are genuine and correctly reflect the underlying documentation".

69 The Facility Agreement was supported by contemporaneous documentation and there was no evidence that SBI SG had failed to properly conduct proper due diligence. It is also clear from the evidence that Rainforest was fully aware that the Pledged Shares were offered as security for the US$80 million under the Facility Agreement. I fail to see how the lack of due diligence on the part of SBI SG, if any, would necessarily mean that the officers of SBI SG must therefore have been bribed.

(c) SBI SG's decision to release the US$80 million to Baytech rather than Rainforest was "against industry practice" as it facilitated fraud in cases where the buyer did not use the said funds for the stated purpose. The defendants suggested that normal practice would dictate releasing the funds directly to the seller.

70 This is an ill-considered allegation. It bears mention that the Borrower under the Facility Agreement is Baytech and not Rainforest. There is no reason why releasing the loan to Baytech, *ie*, the Borrower, would facilitate fraud or is contrary to industry practice. The defendants' scenario of dispensing the funds to the seller is typically adopted where the agreement specifically provides for release of the purchase price to the seller. Such a submission, in the absence of any contractual

obligation under the Facility Agreement, is bereft of any merit.

(d) Teledata and SBI SG shared a long standing banking relationship and it is stated that in or around 2008, Mr Padma and Mr Anush Ramachandran ("Mr Ramachandran") told Mr Goel that Teledata owed substantial sums of money to SBI SG. Mr Padma and Mr Ramachandran confirmed that SBI SG's officers assisted Teledata in "churning" its debts and other obligations, *ie*, establishing new dummy loans to settle existing obligations owed to SBI SG. One of the examples stated of "churning of debts" was Teledata making two separate payments amounting to US$7.5 million to a Swiss Company Bunge SA, a company which had loans with SBI SG. The defendants alleged that a substantial part of the balance amount of approximately US$46 million of the remaining portion of the loan facility also found its way back through Bunge/Teledata and other dummy companies back to SBI SG.

71 First, there is nothing objectionable or unusual for banks to have long standing relationship with clients. In fact, banks strive to achieve such relationships. Secondly, the above allegations are completely hearsay. Although there was no basis for the defendants to have alleged that part of the US$80 million loan found its way back to Teledata and its related companies, nonetheless, during the hearing, I directed Mr Pillai to produce documentary evidence to show that the loan monies had in fact been disbursed to Baytech. In response to my direction, SBI SG filed an affidavit by Marur Narasimha Aravind Kumar dated 19 May 2011 wherein a Swift secure authenticated message was exhibited evidencing the transfer of US$80 million to Baytech's account with HSBC Bank in Hong Kong. The loan was therefore paid to a different bank (HSBC Bank) in a different country (Hong Kong). Thirdly, by their own case, at least US$24 million had already been paid by Teledata to Rainforest under the SSA *prior* to the Facility Agreement. It therefore stands to logic that part of the loan amount would not be released to Rainforest under the SSA otherwise there would be overpayment. Finally, even if the allegation of debt churning is true, it does not change the fact that the Pledged Shares were willingly offered by Rainforest as security for the US$80 million loan under the Facility Agreement and more pertinently, Rainforest had received at least US$31 million from the loan drawdown.

(e) If SBI SG was innocent it should have made civil or criminal complaints against Baytech and Teledata by reason of awareness of their forgery and fraud for almost 2 years now. HSBC, Vijaya Bank and Canara Bank have all commenced proceedings against Teledata in the past year.

72 This allegation presumes that Baytech and Teledata are guilty of fraud or forgery but this has not been established. While the defendants may be entirely comfortable to raise allegations of fraud without foundation, the fact that others are not prepared to do so does not mean that they are therefore complicit. This submission is nothing more than another shocking specimen of a quantum leap in logic.

73 SBI SG has issued letters of demand to Baytech, Teledata and Mr Padma and proceedings against the same, according to Mr Pillai, are being contemplated in India. In any event, there is no requirement at law that steps must be taken or judgment must be obtained against the Borrower or the guarantors before SBI SG is entitled to enforce its security over the Pledged Shares.

(f) SBI SG refused to meet Mr Sharma after the meeting in January/February 2010 to discuss the fraud that Teledata had committed. SBI SG's refusal to meet was because it was involved in the said fraud and has been actively taking instructions from Teledata executives and assisting Teledata for some years to "churn" its old debts with new debts.

74 This is another outrageous allegation which is utterly baseless and speculative.

(g) The defendants raised the fact that beyond issuing the letters of demand to Baytech, Teledata and Mr Padma, SBI SG has not done anything to enforce the various other securities provided for under the Facility Agreement. Instead SBI SG has only taken steps to enforce the Pledged Shares which the defendants speculated was to gain control of eSys.The defendants averred that SBI SG was working with "Teledata to attempt to obtain control over [eSys] to stymie [eSys's] legal claims against [SBI SG] and Teledata and/or its officers".

75 This allegation should be examined in light of the chronology of the various legal proceedings. It is not disputed that the arbitration proceedings were commenced on 12 November 2010 some two months *after* OS 958/2010 was filed (16 September 2010). Further, the motive behind the enforcement cannot affect the enforcement rights of SBI SG against the Pledged Shares. Any suggestion that OS 958/2010 was brought to stymie legal proceedings against SBI SG and/or Teledata is both irrelevant and speculative.

76 Mr Goel's affidavit also raised multiple unrelated allegations in relation to a number of unrelated entities to these proceedings such as eSys Information Technologies Ltd (India), Bank of India, AlphaSoft and Solitus. In my view, none of them have any bearing on the validity or enforceability of the Pledged Shares.

77 Having determined that none of the fraud allegations levelled by the defendants holds any water against SBI SG, I shall now turn my attention to consider the issues of law raised by me during the hearing.

The nature of an equitable mortgage of shares

78 It is perhaps helpful to begin the analysis by underscoring the fact that the deposit of share certificates together with a blank share transfer form, often loosely described as a pledge of shares, actually gives rise to an equitable mortgage and not a pledge. Associate Profesor Poh Chu Chai in *Law of Pledges, Guarantees and Letters of Credit* (Butterworths Asia, 5th Ed, 2003) at p 47 explains that:

> It is fundamental to the concept of a pledge that possession of the chattel being offered as security has to be transferred to the pledgee either physically or constructively.
>
> A chose in action ... with the exception of negotiable securities, does not constitute a convenient subject matter for a pledge. Generally, a chose in action represents a personal right enforceable only with the assistance of the courts.
>
> [L]egal title to the shares in a company passes to a third party only after the share transfers are duly registered by the company. Thus, if a chose in action is offered to a creditor as security, it is more appropriate to talk of a mortgage of the chose in action rather than a pledge of the chose in action.

79 There is ample authority, both local and English cases, in support of the settled principle of law that the deposit of share certificates together with a signed blank share transfer form creates an equitable mortgage over the shares. Mr Pillai relied on *Harrold v Plenty* [1901] 2 Ch 314 ("*Harrold v Plenty*") where the court held (at 316) that:

> The only material allegation in the statement of claim is that in March, 1897, the defendant deposited with Harrold the certificate of ten ordinary shares in a limited company as security for the repayment to Harrold of the sum of 150l., then owing to him from the defendant, with interest thereon at the rate of 6*l*. per cent. per annum. *Now, it is plain that a pledgee is in a very*

different position from an ordinary mortgagee. He has only a special property in the thing pledged. He may obtain a sale, but he cannot obtain a foreclosure. I do not think that this is properly a case of pledge. A share is a chose in action. The certificate is merely evidence of title, and whatever may be the result of the deposit of a bearer bond, such as that which Sir George Jessel dealt with in *Carter v. Wake* (1), I think I cannot treat the plaintiff as a mere pledgee. *The deposit of the certificate by way of security for the debt, which is admitted, seems to me to amount to an equitable mortgage, or, in other words, to an agreement to execute a transfer of the shares by way of mortgage*. The result is that the plaintiff is entitled to a judgment substantially in the form which would be given if, instead of the certificate of shares, the document had been a title-deed of real estate or a policy of assurance.

[emphasis added]

80 In *Stubbs v Slate*r [1910] 1 Ch 632 ("*Stubbs v Slater*"), the court (at 638–639) arrived at the same conclusion on the law:

If one asks how they were entitled to sell it is necessary to go back a step. The plaintiff handed over to the brokers one certificate for the 390 shares together with a transfer executed by the plaintiff in blank, in which the numbers of the shares were specified, but the name of the purchaser and the consideration were, of course, not specified. It was the ordinary well-known transfer in blank. Now what is the effect of that? I am astonished that there should be any doubt about it. So long ago as 1899 Stirling J. in *London and Midland Bank v Mitchell* (1) dealt with a case of precisely this nature and indicated what was the legal effect of it. *That was a case in which certain shares together with a blank transfer had been deposited with a bank to secure a debt*, and it was held that the bank had not lost their right against the shares although their simple contract remedy against the client was lost by reason of the Statute of Limitations. *The Court there pointed out that the whole transaction was a mortgage as to which the bank were entitled to the ordinary remedy of foreclosure*.

[emphasis added]

81 Similarly, the Court of Appeal in *Pacrim Investments Pte Lte v Tan Mui Keow Claire and another* [2008] 2 SLR(R) 898 at [15] remarked:

Counsel for Pacrim conceded that the deposit of the share certificates together with the signed blank transfers for the 70 million Consideration Shares created an equitable mortgage. *We agree that, in law, a "pledge" of share certificates accompanied by duly signed transfers is an equitable mortgage*.

[emphasis added].

82 I had occasion in the recent decision of *Kong Swee Eng v Rolles Rudolf Jurgen August* [2011] 1 SLR 873 ("*Kong Swee Eng*") to consider this area of the law. I observed that the decisions of *Harrold v Plenty* and *Stubbs v Slater*, though not of recent vintage, remain good law. In *Kong Swee Eng*, the facts were not as straightforward as the present case. As part of the security for a sale and purchase agreement, the majority shareholder granted a fixed charge over his shares as security. Under the charge, the majority shareholder was supposed to deposit the share certificates together with the duly executed share transfer forms with an escrow agent. However, due to an oversight, the share certificates and the executed share transfer forms were not deposited. In that case, it was common ground between the parties that the pledge of the shares constituted an equitable mortgage even though neither the share certificates nor the blank share transfer forms were in fact deposited. I

held at [28] that the omission on the part of the majority shareholder did not alter the nature of the security interest in the shares.

83 Leading textbooks have also made the position clear beyond doubt. Edward I Sykes and Sally Walker, *The Law of Securities* (The Law Book Company Limited, 5th Ed, 1993), at p 782 states:

> [A] deposit of a share certificate has always been held to constitute an equitable mortgage.

Further, *Fisher and Lightwood's Law of Mortgage* (Wayne Clark ed, LexisNexis Butterworths, 13th Ed, 2010) ("Fisher and Lightwood") at [17.23] also states:

> A mortgage of shares is most commonly effected by deposit of the share certificates with the mortgagee ... *This is not a mere pledge, but affects a true equitable mortgage entitling the mortgagee to foreclosure*.
>
> [emphasis added]

84 It was therefore not remarkable for Mr Chacko to have initially conceded during the hearing that SBI SG's interest in the Pledged Shares was indeed in the nature of an equitable mortgagee. However, he subsequently changed his position during the hearing and claimed that the deposit of the Pledged Shares together with the duly executed blank share transfer form "*without more*" was in law, no more than a possessory lien over the shares in order to prevent Rainforest from dealing with or selling the shares. To borrow the words of Cozens-Hardy MR in *Stubbs v Slater* at 639, "*I am astonished that there should be any doubt about it*" [emphasis added].

85 In his written submissions, Mr Chacko suggested that *Harrold v Plenty* might not offer as a reliable authority since the claim was not contested and the decision was allegedly based on a misreading of *France v Clark* (1881) 26 Ch D 257 ("*France v Clark*"). He further relied on *Hunter v Hunter* [1936] AC 222 ("*Hunter v Hunter*") to demonstrate that the cases do not support the "broad proposition put forward in *Harrold v Plenty*". However, on any examination of *France v Clark* or *Hunter v Hunter*, it is clear that the principal issue in both cases concerned the propriety of the *exercise* of the power of sale by an equitable mortgagee. In fact, in *France v Clark* at 262 and *Hunter v Hunter* at 249, the courts proceeded on the basis that the deposit of the shares together with the signed share transfer form gave rise to an equitable mortgage. The defendants' submissions on *France v Clark* and *Hunter v Hunter* properly belong to the issue relating to the *exercise* of the power of sale which I will address separately below at [97]–[111].

Possessory lien

86 The *spectre* of the possessory lien was raised by Mr Chacko during the hearing without any supporting authority. I indicated my preliminary view that the concept of a possessory lien might not apply to shares. Despite the time given for additional research, this submission was repeated in the defendants' further written submissions without any substantive authority other than definitions extracted from various legal dictionaries. Mr Chacko did not attempt any argument or furnish any authority to distinguish the preponderance of local and English authorities and leading textbooks that a deposit of share certificates accompanied by a signed blank share transfer form gives rise to an equitable mortgage. As I have explained at [85] above, his reliance on *France v Clark* and *Hunter v Hunter* in fact support the settled principle of law.

87 As a convenient starting point, ELG Tyler and NE Palmer, *Crossley Vaines' Personal Property* (Butterworths, 5th Ed, 1973) at p 137 ("Crossley Vaines") provides a useful summary of the different

kinds of lien:

> There are a number of different kinds of lien. There are judicial and statutory liens, maritime liens (binding ships for the payment of seamen's wages, salvage and the like), equitable liens (unpaid vendor's lien on a sale of land or shares (a), partner's lien on dissolution, etc.), and the lien of the unpaid seller of goods...

88 The classic definition of a common law lien is that by Grose J in *Hammonds and Another, Executors of Blight v Barclay and Others, Assignees of Fentham a Bankrupt* (1802) 102 ER 356, namely that it is a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied. A lien differs from a mortgage in that the ownership of the goods does not pass, and from a pledge in that it bestows no right of sale.

89 Crossley Vaines categorised possessory liens into (a) *General Liens* and (b) *Particular Liens*. Alfred H Silvertown, *The Law of Lien* (Butterworths, 1988) at 19 states that general possessory liens can exist as a common law right arising from general usage or by express agreement. General liens are such that those entitled to them may retain in their possession the goods of others until all claims against the latter are satisfied.

90 In contrast, a *particular* lien is a right to retain chattels until all charges incurred in respect thereof have been paid. As stated by *Halbury's Laws of England* vol 68 (LexisNexis, 5th Ed, 2008) ("Halsbury") at [818], particular liens are favoured by the law and may arise in the same manner as general liens. The particular possessory lien arises because work has been done upon the chattel and is exercisable against the owner. Anyone who works on a chattel, in consideration of an agreed price or with reference to an implied contract to pay a reasonable sum, may retain the chattel until the price is paid. Of note, Crossley Vaines sets out the following requirements to satisfy a claim for a particular lien at p 140:

> (a) The work must improve the chattel, mere maintenance is insufficient.
>
> (b) No lien arises unless the work is done at the request of the owner or his agent. No lien is acquired by merely finding a chattel and maintaining it. There is no right of salvage at common law.
>
> (c) No lien exists for storage or keep. If the depositee does no work on the chattel but spends money on it at the request of the owner, he must recover the money from the owner of the action, for he has no lien therefor.
>
> (d) A lien claimed in respect of work done on a chattel arises only upon completion of the work, unless completion is prevented by the owner, in which case a lien arises for the work actually done.

91 Mr Chacko, in his submissions, did not specify which type of possessory lien he was referring to. However, it is manifest that he could not be referring to a particular lien since there can be no question of "improvement" to the Pledged Shares. Likewise, there is no suggestion of any agreement or usage by custom to satisfy the elements of a general lien at common law.

92 In the present case, from the objective evidence before me, the parties evidently intended SBI SG to have a security interest in the Pledged Shares. Not only were the Share Certificates deposited with SBI SG together with the blank transfer form signed by Rainforest, both Rainforest and eSys wrote to SBI SG to confirm that the deposit of the Share Certificates was to provide security for the

loan under the Facility Agreement. In addition, a charge over the Pledged Shares was duly registered by Rainforest. In these circumstances, it is clear beyond peradventure that SBI SG are the equitable mortgagees of the Pledged Shares. In effect, Mr Chacko's incorrect use of the term "possessory lien" was probably in support of his argument that the deposit of share certificates was merely an "administrative formality" (see [64]–[66] above). If it was merely for "safekeeping" (which is in essence Mr Chacko's submission), there would be no conceivable reason for Rainforest to have signed the share transfer form in blank, registered a charge over the Pledged Shares in favour of SBI SG or confirmed to SBI SG that the shares were deposited to provide security for the loan.

Power of sale pursuant to an equitable mortgage

93 Having determined that SBI SG is an equitable mortgagee in respect of the Pledged Shares, I direct my attention to discuss the enforcement rights of an equitable mortgagee, in particular, the power of sale. A mortgagee's power of sale typically arises in three situations:

(a) by an express contractual provision in the security document;

(b) by way of statute, *ie*, s 24(1)(a) of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) ("CLPA") if the mortgage was made by deed; and

(c) by operation of law.

94 SBI SG submitted that under both English and Singapore authorities a power of sale under an equitable mortgage is implied by operation of law *upon default*.

95 In *Harrold v Plenty*, having decided that an equitable mortgage arose by deposit of the share certificates, Cozens-Hardy MR noted that in a mortgage where there was no express power of sale, a right to sell was implied by operation of law after giving reasonable notice to the mortgagor. Similarly in *Deverges v Sandeman, Clarke & Co* [1902] 1 Ch 579 ("*Deverges*"), the defendant stockbrokers took instructions on two occasions from their client to purchase 400 shares and subsequently 300 more shares in a company. A charge was placed on the shares for the sum owing by the client with interest accruing at six per cent. Upon the client's failure to make payment, the shares were transferred to the stockbrokers and registered in their names. The stockbrokers sought to recover the unpaid purchase money by selling the shares that were registered in their names. The client commenced an action against the stockbrokers after discovering the sale of the shares. The English Court of Appeal proceeded on the agreed basis that the defendants were equitable mortgagees and dealt with the specific question of whether a mortgagee of shares had an implied power to sell the shares upon default. The decision of the court turned on whether or not the notice given by the defendants was reasonable. The court held at 588 and 596:

> *Now the defendants, being mortgagees, have in equity, notwithstanding their legal title to the shares, no estate sufficient to enable them to sell, and thus exclude the mortgagor from his equitable right to redeem, unless there is either an express or an implied power of sale in the mortgage*. In the present case there is no express power of sale, and we have, therefore, to ascertain whether or not there is, in the circumstances of this case, an implied power of sale. I wish at once to say that I do not think that the circumstances which will give rise to an implication of a power of sale in favour of a mortgagee of a chattel, or even of stock or shares,

can differ in favour of the mortgagee from those which are necessary to give a right of sale to a pledgee. *In both cases the creditor holding security is allowed, as against the debtor in default, to enlarge his interest or estate*. In the case of a pledge, whether of chattels or of stock or shares, a power of sale is implied at law if a day is fixed by the contract for the payment of the debt; for in such a case it is inferred that the contract between the parties is that, if the borrower do not repay the advance, the lender shall be at liberty to reimburse himself by the sale of the thing pledged*. In the case of a mortgage in which there is a fixed day for payment and default in payment, a similar power of sale would seem to arise, if not in the case of a mortgage of a chattel, at all events in the case of a mortgage of stock or shares*.

...

I think it is settled law – vide *Tucker v Wilson* 1 P. Wms. 261 that the mortgagees have a power of sale, provided that a reasonable time has elapsed after notice requiring payment.

[emphasis added]

96 In determining whether an implied power of sale arose in *Deverges* (as no time for payment had been fixed), the court considered the length of the notice period necessary to ensure that the purchaser was afforded the opportunity to redeem the shares by settling the debt owed. If time for payment is fixed, the power of sale can be exercised upon default. In the case where no time for payment is fixed, the power of sale could be exercised upon the expiration of a reasonable time. Before me, a charge has been registered over the Pledged Shares in favour of SBI SG. Further, there was a fixed date of payment stipulated under the Facility Agreement. There can be no question that the power of sale has arisen given my earlier finding at [38]–[40] above that an event of default has occurred.

The effect of the Articles of Association on a mortgagee's power of sale

97 To begin with, it is pertinent to highlight that SBI SG accepts that the sale of the Pledged Shares must be carried out in compliance with the eSys Articles. Therefore there is no issue of any sale taking place without having to comply with the eSys Articles. Nevertheless, Mr Chacko sought to persuade this court that SBI SG does not have the requisite documentation or waivers to enforce the security on the Pledged Shares or to exercise its power of sale. He identified four alleged shortcomings in SBI SG's power of sale:

(a) Rainforest had not signed any formal documentation to mortgage or granted a legal charge over the Pledged Shares to SBI SG.

(b) Rainforest had not waived any of the relevant provisions of the Articles relating to the sale or transfer of eSys's shares.

(c) Rainforest had not granted any power of attorney to SBI SG to authorise or empower SBI SG to take any action on its behalf to sell or deal with the Pledged Shares in the event of default by Teledata/Baytech of its obligations under the Facility Agreement.

(d) Rainforest had not signed any document granting SBI SG the power to sell the Pledged Shares on its behalf.

98 Further, the defendants averred that a mere pledge of shares by the deposit of share certificates and blank share transfer forms with a creditor is insufficient to grant the creditor a right

to sell the deposited shares where the Articles of the company whose shares are pledged contain restrictions on their transfer or sale.

99 Before examining the authorities cited by Mr Chacko, it is apposite to make a few preliminary observations. It is irrelevant for the defendants to submit that Rainforest had not waived compliance with the eSys Articles relating to the sale or transfer of Pledged Shares. No such argument was mounted by SBI SG to this effect who has in any event confirmed its intention to sell the Pledged Shares in conformity with the eSys Articles. The other three objections raised by Mr Chacko related to the absence of formal documentation granting the power of sale. An equitable mortgage by its nature typically arises by operation of law in the absence of formal documentation. If Mr Chacko is right, it would follow that shares which are the subject of an equitable mortgage, which does not expressly provide for a power of sale, cannot be enforced. I am not aware of any authority to support such a wide proposition. In fact, the authorities are to the contrary.

100 Finally, Mr Chacko's submission also fails to recognise the distinction between the *accrual* of the power of sale and the *exercise* of the power of sale. The important distinction was spelt out in the Australian case of *Elders Forestry Ltd v Bosi Security Services Ltd & Others* [2010] SASC 223 where the court at [147] held that:

> *An equitable mortgagee of shares has an implied power of sale on default. The exercise of such a power does not involve the vesting of the shares in the mortgagee prior to sale. A mortgagee must, in exercising the power of sale, comply with procedures prescribed by the company's constitution*. An equitable mortgagee is also entitled to foreclosure which is effected by order of the court. The effect is to extinguish the mortgagor's equity of redemption and to vest the entire beneficial ownership in the mortgagee. Any subsequent sale by the mortgagee will be in his capacity as a beneficial owner. Foreclosure operates to vest only the equitable interest. The legal title to shares depends upon registration on the company's share register. The entitlement of the mortgagee to registration and legal title is subject to restrictions on transferability in the constitution of the company.
>
> In *Adelaide Building Co Pte Lrd (in liquidation) v ABC Investments Pty Ltd* (1900) 8 ACLC 445 at 448-9, King CJ held:
>
> > The mortgagee can receive no more a security than the mortgagor has to transfer. In the present case the property transferred by way of security whether shares, subject to the restrictions on transferability which are an incident of those shares. Those restrictions on transferability are as binding on the mortgagee as they are on the mortgagor.
>
> [emphasis added]

101 Mr Chacko cited several decisions in aid of his proposition that an implied power of sale does not arise in respect of the Pledged Shares given the restrictions of sale and transfer under the eSys Articles. First, Mr Chacko relied on *France v Clark*, where France, the registered holder of ten fully paid up shares, deposited the certificates together with a signed blank transfer of the shares with Clark as security for a loan for 150 pounds. The Articles of Association of the company required that all transfers should be subject to the approval of the directors. Clark then used the share certificates as security for his own debts to Quihampton for the sum of 250 pounds and in so doing, transferred the benefit of his equitable mortgage by deposit to Quihampton. Clark passed away shortly thereafter. Without communicating with France, Quihampton filled in his own name as transferee of the shares and sent them for registration to the company. The issue before the court was whether Quihampton became the purchaser for valuable consideration without notice of France's rights when he filled in

the blanks in the share transfer. The court rejected the argument that France, by the deposit of the shares and the signed blank transfer, had enabled Clark to represent himself as the true owner or the person having the power to deal with the shares as owner because the share transfer form itself showed that Clark was not the owner. The court held that Quihamption merely stepped into the shoes of Clark as equitable mortgagee and accordingly, the share transfer to himself as owner was a nullity. This decision provides no assistance to the defendants for various reasons.

102 First, before me there is no issue of SBI SG transferring the Pledged Shares to itself as owner. Instead, SBI SG is taking steps to sell the Pledged Shares as an equitable mortgagee with the court's assistance and in compliance with the eSys Articles. Secondly, SBI SG is not claiming to have ownership rights over the Pledged Shares unlike in *France v Clark*. Instead it is merely seeking to enforce its rights as equitable mortgagee which was what the court held Quihampton was entitled to do.

103 The defendants' reliance on *Hunter v Hunter* is also misguided. There, the plaintiff as registered owner of the shares, deposited the shares as security for a loan from the bank. The plaintiff signed a continuing guarantee to the bank and also a memorandum of charge whereby he charged in favour of the bank all the shares certificates which were deposited as security for payment on demand of the monies due to the bank. The memorandum of charge contained an express power enabling the bank to sell or dispose of any of the shares in the event of default. The shares were of a private company containing restrictions in its Articles of Association on the transfer of shares. The bank was aware of the restrictions in the Articles of Association, but transferred the shares in violation of the mechanism set out therein. The House of Lords eventually held that the transfers were void for having been made in contravention of the Articles of Association of the company.

104 Next, the defendants relied on *Sing Eng (Pte) Ltd v PIC Property Ltd* [1990] 1 SLR(R) 792 ("*Sing Eng (Pte) Ltd"*). In that case, there were two principal issues before the court. The first concerned the definition of "the person aggrieved" within the meaning of s 194 of the Companies Act (Cap 50, 1988 Rev Ed) which is not relevant in the instant case. The second concerned the interpretation of the Articles of Association of the plaintiff company, specifically the ambit of the phrase "other person entitled to transfer". In *Sing Eng (Pte) Ltd*, the bank which was the equitable mortgagee of the pledged shares acting on the express power of sale under the memorandum of charge transferred the shares to its nominee who then purported to sell the shares to the respondent in breach of the mechanism set out in the Articles of Association. The company applied to set aside the transfer. Against this background, the issue before the Court of Appeal was whether the transfer was carried out in conformity with the Articles of Association and that issue turned on the question of whether the bank as equitable mortgagee was a "person entitled to transfer" the shares. In that context, the Court of Appeal held that a "person entitled to transfer" means the person who is not a member of the company but who is entitled *under the articles* to transfer shares of the company. The Articles of Association specifically identified the categories of "persons" who were entitled to transfer the shares and the same did not include an equitable mortgagee. In addition, the transfer was held at [27] to be void because as equitable mortgagee, the bank was in no position to transfer the legal title in the shares. The Court of Appeal at [21] and [27] also attached considerable significance to the fact that under the transfer notice, the bank purported to transfer the shares in its own right and not on behalf of the registered owners of the shares. The Court of Appeal decided that a sale or transfer notice which was not given in accordance with the pre-emption provisions of the Articles of Association was ineffectual and any subsequent transfer in breach of the provisions was inoperative. Here, there is presently no transfer notice to speak of. In any event, SBI SG has stated that it intends to give the transfer notice as agent for Rainforest unlike the defective transfer notice that was provided by the bank in its own right in *Sing Eng (Pte) Ltd*.

105 Finally, Mr Chacko referred to the case of *Xiamen International Bank and others v Sing Eng (Pte) Ltd* [1993] 2 SLR(R) 176 (*"Xiamen International Bank")* which was the continuation of the saga following the decision in *Sing Eng (Pte) Ltd*. After the holding of the Court of Appeal in *Sing Eng (Pte) Ltd*, the bank, on six separate occasions, unsuccessfully attempted to register the shares in the name of its nominee. The bank thereafter obtained a declaration that the shares were held on trust by the registered shareholders on behalf of the bank. Armed with the declaration, the bank sought once again, to rectify the register of shareholders on the basis that the bank was the lawful attorney of the registered shareholders with powers to do all acts in their names to dispose of their shares.

106 In *Xiamen International Bank*, the pre-emption rights as provided under Art 34 of the Articles of Association stipulated the following procedure:

> Except where the transfer is made pursuant to arts 33, 36 and 43, hereof, a person proposing to transfer any share (hereinafter called the proposing transferor) shall give notice in writing (hereinafter called the transfer notice) to the company that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value, and shall constitute the company his agent for the sale of the share to any member of the company at the price so fixed or at the option of the purchaser, at the fair value to be fixed by the auditors of the company. The transfer notice shall not be revocable except with the sanction of the directors.

The defendant company in reliance on the Articles of Association objected to the application on several grounds, *inter alia*, (a) the transfer notice had no legal effect because the sale had *preceded* the notice, (b) the pre-emption price in the transfer notice was exorbitant and (c) that it was "fictitious" for the bank to state in the transfer notice that it was acting as attorneys for the registered shareholders in the sale since the registered shareholders have already placed on record that they had not appointed the bank as attorneys. It should be highlighted that the application before the court was not to sanction the sale but to rectify the register of shareholders on the basis that the bank, as lawful attorneys of the registered shareholders had the power to sell the shares. Further, each of the objections raised by the defendant company related to the *exercise* of the bank's rights to sell the shares and each of them was rejected by the court.

107 In *Xiamen International Bank*, in response to one of the defendant company's objections that the name of the transferor stated in the transfer form was defective in that it purported to have been signed by the bank as lawful attorneys of the registered shareholders, the court observed that under the guarantees executed by the registered shareholders, there was an express clause which stipulated that for the purposes of enabling the bank to sell the shares, the registered shareholders have appointed the bank as their lawful attorneys to "sell, realize, transfer or otherwise dispose" of the shares. On the strength of this holding, Mr Chacko submitted that without a proper power of attorney, SBI SG has no power to sell the shares. This objection is misconceived. First, there is nothing in *Xiamen International Bank* to suggest that without such a power of attorney, an equitable mortgagee like SBI SG has no power to sell the Pledged Shares. Further, I agree with Mr Pillai that the problem which confronted the bank in *Xiamen International Bank* does not arise here since any transfer or sale of the Pledged Shares would be by Rainforest as it had already signed the share transfer form as the transferor. Secondly, in that case the sale had already taken place in the name of the registered shareholders by the bank acting as their lawful attorneys. Before me, the sale of the Pledged Shares has not taken place and consequently, there is no issue of SBI SG selling the Pledged Shares as the lawful attorneys of eSys.

108 In *Kong Swee Eng*, the plaintiff argued that if an equitable mortgage was not made by deed, then the only way that an equitable mortgagee can sell the legal interest of the mortgaged property, *ie*, the shares, is by applying to court for a sale under s 30(2) of the CLPA. In support, the plaintiff's

counsel in that case referred me to two passages from leading textbooks on the subject. The first passage is found in Fisher and Lightwood at para 30.43:

> In the case of an equitable mortgage not made by deed, there is no statutory power of sale. If the mortgagee wishes to sell, he must therefore apply to the court, which will be able to vest in him a legal term of years, so he can sell as if he were a legal mortgagee.

The other passage is from Edward F Cousins and Ian Clarke, *The Law of Mortgages* (Sweet & Maxwell, 2nd Ed, 2001) at para 16-121:

> In the case of other equitable mortgages not made by deed, there is no statutory power of sale out of court. However, by virtue of section 91(2) of the Law of Property Act 1925, the court itself has the power to order a judicial sale on the application of the mortgagee or of any interested person and may vest a legal term of years in the mortgagee so that he can sell as if he were a legal mortgagee.

109 The submission was rejected by me and at [50] in *Kong Swee Eng*, I observed that obtaining a power of attorney was *one method* whereby the equitable mortgagee can transfer the legal title in the shares to the purchaser without assistance from the court:

> However, what these two passages really meant, in my judgment, was that, in a situation where the mortgage was not made by deed, an equitable mortgagee who has no *other* power or mechanism to convey the legal title out of court would simply have no choice but to apply to court to sell or convey the legal title. Examples of such mechanisms that allow the transfer of the legal title out of court can be found in mortgage instruments and include: the granting of a power of attorney to the equitable mortgagee to convey the legal interest (*Re White Rose Cottage* [1965] 1 Ch 940), or a declaration by the mortgagor that he holds the legal interest on trust for the mortgagee (*London and County Banking Co v Goddard* [1897] 1 Ch 642).
>
> [emphasis original]

110 Absent formal documentation such as a power of attorney, SBI SG may have to seek the court's assistance to convey the legal title in the Pledged Shares to any purchaser whether nominated by the Directors of eSys or any other party in default thereof. That issue is currently not before me and I shall say no more. Suffice it to say that there are various ways for an equitable mortgagee such as SBI SG to enforce its security in the Pledged Shares. Obtaining a power of attorney is certainly one route but is clearly not the only method. Another possible course is to apply to court under s 30(2) of the CLPA.

111 In the final analysis, it is clear that *France v Clark*, *Hunter v Hunter* and *Sing Eng (Pte) Ltd* concerned the sale or transfer of shares executed by the equitable mortgagee without complying with the Articles of Association while *Xiamen International Bank* concerned the *exercise* of the power of sale. These cases do not assist the defendants given that there is no completed sale or transfer before me and in any event, SBI SG has emphatically reiterated its position that it intends to sell the Pledged Shares in accordance with the eSys Articles.

The exercise of the power of sale with reference to the eSys Articles

112 In the present case, the mechanism for the transfer of shares envisioned by the eSys Articles is governed by the following relevant provisions:

Article 24

The directors may in their *absolute discretion* and without giving any reason therefore decline to register any transfer of shares to a person of whom they do not approve and may also decline to register any transfer of shares on which the company has a lien.

Article 28

Shares may be freely transferred by a member or other person entitled to transfer to any existing member selected by the transferor, but save as aforesaid and save as provided by Article 33 hereof, no share shall be transferred to a person who is not a member so long as any member *or any person selected by the directors as one whom it is desirable in the interest of the Company to admit to membership is willing to purchase the same at the fair value*.

Article 29

Except where the transfer is made pursuant to Article 33 hereof the person proposing to transfer any shares (hereinafter called "the proposing transferor" shall give notice in writing (hereinafter called "the transfer notice") to the Company that he desires to transfer the same. *Such notice shall specify the sum he fixes as the fair value*, and *shall constitute the Company his agents for the sale of the share to any member of the Company or persons selected as aforesaid, at the price so fixed, or at the option of the purchaser, at the fair value to be fixed by the auditor in accordance with these articles*. A transfer notice may include several shares, and in such case shall operate as if it were a separate notice in respect of each. The transfer notice shall not be revocable except with the sanction of the directors.

Article 30

If the Company shall within three months after service of a sale notice find a member willing to purchase any share comprised therein (hereinafter described as a "purchasing member") and shall give notice thereof to the retiring member, the retiring member shall be bound upon payment of the fair value to transfer the share to such purchasing member, who shall be bound to complete the purchase within seven days from the service of such last mentioned notice. The Directors shall, with a view to finding a purchasing member, offer any shares comprised in a sale notice to the persons then holding the remaining shares in the Company as nearly as may be in proportion to their holdings of shares in the Company, and shall limit a time within which such offer if not accepted will be deemed to be declined and the Directors shall make such arrangements as regards the finding of a purchasing member for any shares not accepted by a member to whom they shall have been offered as aforesaid within the time so limited as they shall think just and reasonable.

Article 33

If the directors shall not, within the space of three months after service of a sale notice, find a purchasing member of all or any of the shares comprised therein and give notice in a manner aforesaid, or if through no default of the retiring member, the purchase of any shares in respect of which such last-mentioned notice shall be given shall not be completed within twenty-one days from the service of such notice the retiring member shall, at any time within six months thereafter, be at liberty to sell and transfer the share comprised in his sale notice (or such of them as shall not have been sold to a purchasing member) to any person at any price.

[emphasis added]

113 Although Article 24 stipulates that the directors may in their "absolute discretion" decline to register the transfer of shares, the law is clear that the exercise of such discretion is reviewable by reason of s 128(2) of the Companies Act (Cap 50, 2006 Rev Ed) which provides that a company shall not refuse to register a transfer of shares by virtue of any discretion conferred by the Articles "unless it has served on the applicant, within one month beginning on the day on which the application was made, a notice in writing stating the facts which are considered to justify refusal in the exercise of that discretion." Judith Prakash J in *Xiamen International Bank* held that once reasons are given by the company for the manner in which the discretion has been exercised, the court may review the sufficiency of the reasons. Mr Chacko has not suggested otherwise.

114 Mr Pillai submitted that the nature of a pre-emption right is a right of a shareholder to acquire shares in the company in preference to any other person. Thus if the company is wholly owned by a single shareholder, *ie*, a wholly owned subsidiary, and the holding company wishes to sell part of its shares, the rights of pre-emption do not come into play as there is no other shareholder or member who can exercise the pre-emption rights to purchase the shares. However under Article 28, as Mr Pillai has rightly pointed out, the pre-emption rights *do not only* contemplate the sale of shares to *other* members (of which there is none in a wholly owned subsidiary with a single shareholder). Instead it also extends to non-members, as the directors of eSys faced with a potential sale, are accorded the opportunity to put forward a person, deemed desirable, to purchase the shares within the time period stipulated, failing which the sale could proceed *vis-a-vis* any third party. Thus Article 28 effectively confers on the directors of eSys the power to grant a right of first-refusal to a non-member whom they deemed desirable to purchase the shares. SBI SG takes no issue with eSys nominating another "*desirable*" person to purchase the Pledged Shares. Its interest is to ensure that the sale is at a fair value which now takes me to the last issue of whether I should order a valuation of the Pledged Shares to facilitate a sale in compliance with the eSys Articles.

Access to books and records of eSys for valuation of the Pledged Shares

115 Article 29 provides that any person proposing to transfer shares of eSys is required to serve a notice in writing ("transfer notice") specifying a fair value of the shares. On receipt of such notice, eSys shall act as agent for the transferor in the sale to "*any member of the Company or persons selected as aforesaid, at the price so fixed, or at the option of the purchaser, at the fair value to be fixed by the auditor in accordance with these articles*" [emphasis added]. Typically, if the transferor is an existing shareholder, he or she would have access to some information to fix the fair value of the shares. Further, Art 29 also contemplates the appointment of an auditor to fix the fair value at the option of the purchaser. This option is presumably invoked when the intended purchaser disagrees with the fair value stated in the transfer notice. How would such a procedure operate in the context of SBI SG enforcing its security in the Pledged Shares?

116 In its Amended OS, SBI SG has sought an order for access to all books and records of eSys as may be reasonably required to carry out a valuation of the Pledged Shares. SBI SG is essentially seeking ancillary orders to facilitate the *eventual* sale of the Pledged Shares. SBI SG's declared intention is to sell the Pledged Shares in accordance with the eSys Articles. Under Art 29, SBI SG is required to state a fair value for the Pledged Shares. SBI SG being the equitable mortgagee has no access to the books and records of eSys to enable it to fix a fair value in the transfer notice. To do so, it is imperative for SBI SG to conduct a proper valuation to arrive at a fair value. As such, any intended sale by SBI SG cannot be properly carried out in accordance with the eSys Articles without a proper valuation first being conducted. From SBI SG's perspective, the identity of the eventual purchaser is not critical (except that the purchaser must have the means to complete the sale). SBI

SG's principal focus is to sell the Pledged Shares at a fair value. Therefore while it is entirely within the power of eSys's directors to nominate a "*desirable person*" to acquire the Pledged Shares, the defendants should not obstruct the necessary process of determining the fair value of the Pledged Shares.

117 The defendants argued that as Arts 29 and 33 governed the valuation of the Pledged Shares, SBI SG has no right in law or in fact to inspect eSys's books and records. The defendants argued that these provisions were actually designed to prevent an intending seller or purchaser from seeking access to the accounts and records of eSys whilst ensuring that "an agreed upon third party expert", an auditor, would be given the access instead. They argued that this mechanism was intended to maintain the confidentiality of eSys's documents and records. In the absence of any valuation of the Pledged Shares, SBI SG could face the unfair situation of stating a value which may be lower than the actual value of the Pledged Shares. Given the history of the dispute, I can see real benefits to both parties for an independent valuation to be conducted. This would certainly eliminate another potential area of dispute. In light of the concerns expressed by eSys, I direct the parties to agree on the appointment of a joint independent auditor to determine a fair value of the Pledged Shares, failing which the court will appoint one on behalf of the parties. In this way, SBI SG would not have direct access to the books and records of eSys and consequently the confidentiality of the books and records of eSys can be preserved while at the same time, a proper valuation of the Pledged Shares can be undertaken. By making this order, I am in fact ensuring that the sale of the Pledged Shares, if and when it takes place, would be carried out in conformity with the eSys Articles. Without a proper valuation, SBI SG would not be able to state a fair value of the Pledged Shares in the transfer notice as required under Art 29 of the eSys Articles. SBI SG contemplates the need to seek the court's assistance to give effect to the sale and transfer of the Pledged Shares pending the outcome of the defendants' reaction to the prospective transfer notice. Hopefully the saga of *Sing Eng (Pte) Ltd* and *Xiamen International Bank* will not repeat itself.

Conclusion

118 By reason of my findings, I grant the following declarations:

(a) an event of default has occurred pursuant to, *inter alia*, cl 21 of the Facility Agreement; and

(b) SBI SG is entitled to enforce its security by selling the Pledged Shares *subject* to the provisions of the eSys Articles.

119 In addition, I direct a valuation of the Pledged Shares be conducted and for this purpose, the parties are to agree on the joint appointment of an independent auditor within three weeks from the date hereof, failing agreement, the parties are at liberty to seek the court's assistance to appoint an auditor on behalf of the parties.

120 Finally, I award the costs of the Amended OS to SBI SG to be taxed if not agreed.