Tjong Very Sumito and others *v* Chan Sing En and others
[2012] SGHC 125

Case Number	: Suit No 89 of 2010
Decision Date	: 21 June 2012
Tribunal/Court	: High Court
Coram	: Steven Chong J
Counsel Name(s)	: Gabriel Peter, Tan Sia Khoon Kelvin David, Ong Pang Yew Shannon (Gabriel Law Corporation) for the first and second plaintiffs; Nicholas Jeyaraj s/o Narayanan (Nicholas & Tan Partnership LLP) for the first defendant; Murugaiyan Sivakumar Vivekanandan (Genesis Law Corporation) for the fifth and sixth defendants; Ong Su Aun Jeffrey (JLC Advisors LLP) for the seventh to ninth defendants.
Parties	: Tjong Very Sumito and others — Chan Sing En and others

Contract – Economic Duress

Companies – Incorporation – Lifting of Corporate Veil – Alter ego principle

Credit and Security – Guarantee – Enforceability

Credit and Security – Gurantees and indemnities – Construction

Evidence – Standard of proof – Allegation of forgery

Restitution – Money Had and Received

Tort – Conversion

Tort – Fraudulent Misrepresentation

Tort – Unlawful Means Conspiracy

Trusts – Resulting Trusts

[LawNet Editorial Note: The appeal to this decision in Civil Appeal Nos 82 and 83 of 2012 (Suit No 89 of 2010) was allowed in part by the Court of Appeal on 6 August 2013. See [2013] SGCA 44.]

21 June 2012 Judgment reserved.

Steven Chong J:

Introduction

1 This dispute relates to three separate agreements for the sale of shares in two Indonesian companies which ultimately own an Indonesian coal mine. The first agreement was, *inter alia*, for the sale of 72% of the shares in the first company to a subsidiary of a Singapore public listed company for US$18 million. The second and third agreements were for the sale of the balance shares in the two Indonesian companies to parties who were allegedly independent of the public listed company.

2 At the heart of this case, the main dispute concerned the non-payment of the full purchase price under the first agreement. It is common ground that about US$12 million of the purchase price was not paid to the sellers. It was instead paid to entities with whom the sellers have had no dealings and who were not parties to the agreement though they were identified under the terms of the first agreement to be "authorised to receive the [purchase price] for and on behalf of the [sellers]". However, according to the former Managing Director of the public listed company ("the MD") and the non-parties, the latter were entitled to *retain* the purchase price without the need to account to the sellers. In the course of the action, the MD as well as the non-parties proffered differing, unsubstantiated and even un-pleaded reasons to justify retention of the payments. Why? One would have expected that the basis for the payments would be explicitly stipulated in the first agreement if the non-parties were indeed entitled to *retain* the payments.

3 As regards the second and third agreements, the sellers claimed that the balance shares were, *inter alia*, sold under duress because the MD allegedly told the sellers that they would not receive the balance purchase price under the first agreement unless the balance shares were sold to his nominee for a fraction of its market value, *ie*, US$2 million.

4 This case is unusual in many respects. The following is just a sampling. First, numerous documents were alleged to have been forged or fabricated by the sellers. Although the MD and the non-parties retained handwriting experts to prove the forgery, the sellers, curiously, did not. However, at the trial, the MD's handwriting expert conceded under cross-examination that a key document in the action which the MD had denied signing was *probably* signed by him. Second, the public listed company admittedly made an "erroneous" announcement over SGXNet, a system hosted by the Singapore Exchange ("SGX") that allows users such as listed companies to submit their corporate announcements. The public listed company had "erroneously" announced that the payments to the non-parties were justified on the basis that the shares were originally owned by them when, in truth, this was plainly false. This alleged "error" came to light during the injunction hearing before me when it was conceded by the MD's counsel that the announcement was incorrect as the non-parties were never the owners of the shares. [note: 1] How did such an "error" occur? At the injunction hearing, it was presented as a "typographical error". [note: 2] Third, on the eve of the trial, one of the sellers dramatically applied to be separately represented and for leave to discontinue the action altogether. Fourth, although the buyers under the second and third agreements claimed to be independent of the public listed company, they were not able to produce any evidence that they had paid the purchase price. Instead, the evidence suggests that the purchase price under the second and third agreements was paid by the public listed company. Finally, the non-party to the first agreement who received the bulk of the purchase price under the first agreement, *ie*, US$10 million comprising cash and shares, was a no-show at the trial. The writ could not even be served on him. No one could establish whether he *actually* received the cash payment and why he was entitled to retain the cash payment and the shares. The sellers instead claimed at the trial that the MD pocketed the balance purchase price.

5 This dispute is responsible for generating two landmark decisions of the Court of Appeal, *viz*, *Tjong Very Sumito and others* v *Chan Sing En and others* [2011] 4 SLR 580 on the question whether a person can be ordinarily resident in two jurisdictions for the purposes of security for costs, and *Tjong Very Sumito and others* v *Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 on the seminal definition of "dispute" for the purposes of applying for a stay of proceedings under the *International Arbitration Act* (Cap 143A, 2002 Rev Ed) in Suit 348 of 2008 ("the Antig Suit"). In the latter judgment, reference was made by the Court of Appeal at [11] to the "erroneous" SGXNet announcement.

6 This case first came before me some two years ago in connection with an *ex-parte* mareva injunction. Adopting the approach of the English Court of Appeal in *Dubai Bank* v *Galadari* [1990] 1 Lloyd's Rep 120, although I accepted that the sellers had established an arguable case for conspiracy and fraudulent misrepresentation, I nonetheless set aside the *ex-parte* injunction on account of the sellers' inexcusable delay in applying for the injunction, which undermined their belief in the alleged risk of dissipation of assets as such risk was grounded solely on a *prima facie* case of conspiracy or fraud. [note: 3] However, due to the troubling features of the dispute, I held over the inquiry as to damages suffered by reason of the interim injunction until after the outcome of the trial. [note: 4] On that occasion, I observed that the agreements were "no ordinary plain vanilla transactions" and that there "is clearly something more than meets the eye". [note: 5] This became clearer as the trial unfolded.

The parties

7 The 1st plaintiff, Tjong Very Sumito ("Tjong"), is an Indonesian businessman involved in businesses dealing with *inter alia* iron ore, coal, property, and furniture. [note: 6] The 2nd plaintiff, Iman Haryanto ("Iman"), is Tjong's brother, [note: 7] and the 3rd plaintiff, Herman Aries Tintowo ("Herman"), is Tjong's friend and co-director in an events organisation company, Venus International Productions Pte Ltd. [note: 8] Neither Iman nor Herman has filed any Affidavit of Evidence-in-chief ("AEIC") in this Suit.

8 The 1st defendant, Richard Chan Sing En ("Richard Chan"), is the former Managing Director of a Singapore public listed company, Magnus Energy Group Ltd ("MEGL") and former director of MEGL's wholly-owned subsidiary, Antig Investments Pte Ltd ("Antig"). [note: 9] Antig was incorporated on 1 June 2004, and Richard Chan was appointed its director on the same day. [note: 10] He resigned as Antig's director on 15 May 2008 and left the employment of MEGL on 1 June 2008. [note: 11] According to Tjong, Richard Chan was introduced to him by the 5th defendant, Alwie Handoyo ("Alwie"), on a social basisin Singapore in or around 2004. Alwie had apparently told Tjong that Richard Chan was someone whom Tjong could trust and who would help Tjong make money. [note: 12]

9 Alwie is an Indonesian graduate from the California State University, Fresno. He claims to be a well-connected businessman who holds shares and directorships in various Indonesian companies. [note: 13] He is currently a director of the company which owns the Jakarta Stock Exchange. [note: 14] Alwie was introduced to Tjong in the late 1990s through one Mr Abi and Pak Rahardjo ("Rahardjo"), [note: 15] and has known Richard Chan since about 1999 or 2000, the two having dealt with each other "in relation to the telecommunication industry". [note: 16] Alwie is also the husband of the 6th defendant, Susiana Chandra ("Susiana"), who is a homemaker. [note: 17]

10 The 2nd defendant, Aventi Holdings Limited ("Aventi"), and the 4th defendant, Overseas Alliance Financial Limited ("OAFL"), are companies incorporated in the British Virgin Islands ("BVI") which were identified as recipients of a large part of the purchase price under the 1st SPA (see [42] and [48] below). Both Aventi and OAFL were served with the writ of summons on 26 February 2010 at their registered office at Portcullis TrustNet Chambers ("Portcullis") in Tortola, BVI, [note: 18] but neither has entered an appearance or defence. As will be discussed (see [69] to [75] below), it is not entirely clear who the ultimate owners of Aventi and OAFL are. It suffices to say for now that Alwie asserts

that he is himself the controlling mind of OAFL while the 3rd defendant, Johanes Widjaja ("Johanes"), is the controlling mind of Aventi. [note: 19]

11 Alwie claims to have known Johanes since 2000 or 2001. [note: 20] To date, Johanes has not been served with the writ of summons as the plaintiffs have been unable to locate him based on his last-known residence and contact number, as provided by Alwie's former solicitors. [note: 21] The plaintiffs took out a summons against Portcullis in March 2010 to compel the provision of information on Johanes. [note: 22] However, subsequent attempts to serve the writ on Johanes pursuant to such information have proved to be similarly futile.

12 Finally, the 7th, 8th and 9th defendants are Jake Pison Hawila ("Jake"), Advance Assets Management Ltd ("AAML") and Edwin Sugiarto ("Edwin") respectively. Jake and AAML (a BVI investment holding company of which Edwin is the sole shareholder-director) [note: 23] are the purchasers of the balance shares owned by Tjong. Jake and Edwin have, respectively, known Alwie since 2000 and 2002. [note: 24]

13 In a twist of events, on 10 January 2012, shortly before the commencement of trial on 16 January 2012, Herman applied to be separately represented and for leave to discontinue his action, [note: 25] which was granted on 13 January 2012. All references to the plaintiffs in this Judgment insofar as events prior to 13 January 2012 shall collectively mean Tjong, Iman and Herman. However, all orders made in this Judgment in relation to the plaintiffs shall refer only to Tjong and Iman given Herman's discontinuance of his claim.

The sale and purchase agreements

14 The dispute concerns the execution and performance of three sets of sale and purchase agreements involving the shares of two Indonesian companies, PT Batubaraselaras Sapta ("PT Batubara") and PT Deefu Chemical Indonesia ("PT Deefu"). PT Batubara carried on business in the coal industry in Indonesia and owns the right to mine and extract coal from the Kuaro coal formation located at Kabupatan Pasir, East Kalimantan, Indonesia. Prior to 23 November 2004, 95% of its shares were owned by PT Deefu, while the remaining 5% were held by Tjong. According to the plaintiffs, PT Deefu and Tjong had purchased those shares from PT Batubara's original owners, one Ms Roosanawati and one Mr Happy Nugroho Priyadi ("Mr Happy") in around August 2004. [note: 26]

15 PT Deefu, which is principally an investment holding company, was set up on 5 December 2000 by Tjong and Iman. [note: 27] Prior to 23 November 2004, its shares were owned by Tjong, Iman and Herman, who held 72.7%, 20% and 7.3% shareholdings respectively. [note: 28] As Tjong's nominees, Iman and Herman held their PT Deefu shares on trust for Tjong. [note: 29]

The 1st SPA

16 On 23 November 2004, the plaintiffs and Antig entered into a Shares Sale and Purchase Agreement ("November 2004 Agreement") under which the plaintiffs agreed to sell and Antig agreed to purchase 72% of PT Deefu shares for US$18 million. The plaintiffs signed the November 2004 Agreement in Alwie's Jakarta office. Then followed a series of four supplemental agreements between the plaintiffs and Antig, which effected various amendments to the November 2004 Agreement. For ease of reference, the November 2004 Agreement, together with all four supplemental agreements,

will be collectively referred to as "the 1st SPA".

17 The parties dispute over the precise circumstances surrounding the execution of the 1st SPA. According to Richard Chan, Alwie was the facilitator for the transaction under the 1st SPA, [note: 30] while Tjong was the principal negotiator representing the plaintiffs. [note: 31] Richard Chan claims that Tjong was regularly accompanied by a chauffeur, bodyguards and a personal legal counsel, one Mr Gardy Sutajie ("Gardy") during negotiations in Jakarta, [note: 32] which were conducted in a mix of Bahasa Indonesia, English and Mandarin. [note: 33] Gardy states in his AEIC that he had indeed been present at several meetings attended by Tjong, Rahardjo, Richard Chan and Alwie in Jakarta. [note: 34] He agreed in cross-examination that he is not a qualified lawyer. [note: 35] It is Richard Chan's case that Tjong understood what was going on at all times and never objected to the use of English during these meetings. [note: 36] This was vigorously challenged by Tjong, who claims to be unable to fully understand documents in English or to carry on a full conversation in English. [note: 37]

18 I shall first provide an overview of the cause and effect of each of these four supplemental agreements based on the different versions of events asserted by each of the relevant parties.

The supplemental agreements

19 The first supplemental agreement dated 3 January 2005 ("the 1st Supplemental") gave Antig more time to complete the necessary due diligence and provided that, out of the completion payment under the November 2004 Agreement, MEGL was to pay Tjong US$300,000 in advance, upon the execution of the 1st Supplemental. According to Richard Chan and Alwie, the 1st Supplemental was entered into on the plaintiffs' request for the advance payment. [note: 38] According to Tjong, however, it was MEGL which initiated negotiations for the 1st Supplemental as it wanted more time to complete its due diligence. [note: 39]

20 The second supplemental agreement dated 18 February 2005 ("the 2nd Supplemental") was executed to clarify the extent of the plaintiffs' shareholding in PT Deefu which, according to Tjong, had been incorrectly stated in the November 2004 Agreement. [note: 40] Richard Chan and Alwie however assert that the 2nd Supplemental came about when Antig discovered that the plaintiffs had breached their previous representations made in the November 2004 Agreement by increasing PT Deefu's share capital after the execution of the 1st Supplemental. Antig thus demanded that the plaintiffs provide certain additional warranties and representations before Antig would agree to continue with the transaction. [note: 41]

21 The third supplemental agreement dated 19 July 2005 ("the 3rd Supplemental") placed a US$2 million cap on the amount of advance loans to be disbursed by Antig to the plaintiffs pending completion. Richard Chan asserts that this was prompted by Tjong's frequent demands for advance loans, allegedly required for various licences and technical issues relating to the coal mine. [note: 42] Tjong claims, however, that the 3rd Supplemental reflected an agreement that Antig would pay US$2 million of the purchase price immediately in order to placate Tjong, who had apparently wanted to cancel the transaction which was taking too long to complete . [note: 43]

22 The fourth supplemental agreement dated 19 August 2005 ("the 4th Supplemental") is the most

critical supplemental agreement in that it clarifies the payment terms of the purchase consideration under the November 2004 Agreement. For ease of comparison, I shall set out both the original and amended payment terms.

23 The original payment terms under clause 4.02(2) of the November 2004 Agreement ("the original Clause 4.02(2)") provided that:

> (2) The parties hereby agree and the [plaintiffs] hereby instruct and authorize [Antig] to pay the [US$18 million] Purchase Price due to them in the following manner:-
>
> (a) The Deposit Sum which shall form part of the Purchase Price, shall be paid within seven (7) days of the execution of this Agreement, by way of telegraphic transfer to the following parties: -
>
> (i) the sum of United States Dollars Two Hundred Thousand (US$200,000.00) only shall be paid to [Tjong] or such other party as may be authorized or nominated by [Tjong]; and
>
> (ii) the sum of United States Dollars Fifty Thousand (US$50,000.00) only shall be paid to OAFL.
>
> (b) the Completion Payment which shall form part of the Purchase Price shall be paid on or before the Completion Date by way of telegraphic transfer to the following parties:-
>
> (i) the sum of United States Dollars Three Million (US$3,000,000.00) shall be paid to [Tjong] or such other party as may be authorised or nominated by [Tjong]; and
>
> (ii) the sum of United States Dollars Five Hundred Thousand (US$500.000.00) shall be paid to OAFL;
>
> (c) the Consideration Shares, the total value of which shall form part of the Purchase Price shall, as to such manner of shares whose total value at the Issue Price amount to United States Dollars Nine Million Five Hundred Thousand (US$9,500,000.00), be issued and allotted to Aventi and as to the balance whose total value at the Issue Price amount to United States Dollars One Million Four Hundred and Fifty Thousand (US$1,450,000.00), shall be issued and allotted to OAFL within 30 days of the Completion Date; and
>
> (d) the Balance Purchase Price amounting to United States Dollars Three Million Three Hundred Thousand (US$3,300,000.00) shall be paid on or before the Final Payment Date to the following parties:-
>
> (i) the sum of United States Dollars Two Million Eight Hundred Thousand (US$2,800,000.00) shall be paid to [Tjong] or such other party as may be authorised or nominated by [Tjong]; and
>
> (ii) the sum of United States Dollars Five Hundred Thousand (US$500,000.00) shall be paid to Aventi.

Pursuant to clause 2.2 of the 4th Supplemental, the plaintiffs and Antig agreed to delete the original Clause 4.02(2) of the November 2004 Agreement in its entirety and replace it with the following new clause ("Clause 4.02(2)"):

(2) The Parties hereby agree and the [plaintiffs] hereby instruct and authorise [Antig] to pay the Purchase Price due to them in the following manner:-

(a) a sum of US$250,000.00 ("Deposit Sum") to be paid within 7 days of the execution of the Shares Sale and Purchase Agreement, of which US$200,000.00 shall be paid to [Tjong] and US$50,000.00 shall be paid to OAFL, *who is authorised to receive the same for and on behalf of the [plaintiffs]*;

(b) a sum of US$300,000.00 ("Advance Payment") to be paid to [Tjong] upon execution of the Supplemental Agreement;

(c) a sum of US$3,200,000.00 ("Completion Payment") to be paid on or before Completion, of which US$2,700,000.00 shall be paid to [Tjong] and US$500,000.00 shall be paid to OAFL, *who is authorised to receive the same for and on behalf of the [plaintiffs]*;

(d) a sum equal to US$5,750,000.00 to be paid within 30 days from Completion Date, which sum shall be satisfied by the allotment and issue of the Consideration Shares, of which a maximum of 132,909,091 Consideration Shares with an equivalent value of US$4,300,000.00 as at the Completion Date shall be allotted and issued to Aventi, who is authorised to receive the same for and on behalf of the [plaintiffs], and a maximum of 44,818,182 Consideration Shares with an equivalent value of US$1,450,000.00 as at Completion Date shall be allotted and issued to OAFL, *who is authorised to receive the same for and on behalf of the [plaintiffs]*; and

(e) the balance US$8,500,000.00 ("Balance Purchase Price") to be paid in the following manner:-

(i) on the date falling 12 months from the Completion Date, of which US$2,800,000.00 shall be paid to [Tjong] and US$2,000,000.00 shall be paid to Aventi *who is authorised to receive the same for and on behalf of the [plaintiffs]*; and

(ii) on the date falling 24 months from the Completion Date, US$3,700,000.00 shall be paid to Aventi, *who is authorised to receive the same for and on behalf of the [plaintiffs]*.

No interest is payable on the Balance Purchase Price.

[emphasis added]

24 In essence, the effect of Clause 4.02(2) was that, out of the total purchase price of US$18 million, US$6 million was to be paid in cash to Tjong and the balance US$12 million was to be paid to Aventi and OAFL, who were authorised to receive the same "for and on behalf of" the plaintiffs. Of the US$12 million to be paid to Aventi and OAFL, US$5.75 million was to be paid in the form of new allotments of MEGL shares with the balance payable in cash. I shall use the term "the Shares Component" to denote the US$5.75 million payable in the form of allotments of MEGL shares. The remaining US$12.25 million payable in cash shall be referred to as "the Cash Component". To date, the plaintiffs have only received US$5,528,772. [note: 44] They have consequently brought a multitude of claims against Richard Chan, Aventi, Johanes, OAFL, Alwie and Susiana to recover the balance purchase consideration by way of the cash payments and the share allotments.

25 Despite the critical importance of the 4th Supplemental, the AEICs of Tjong, Richard Chan and

Alwie contained scant details of the events prompting its execution. [note: 45] It was Richard Chan's pleaded position that the four supplemental agreements, and in particular, the 4th Supplemental, were made on the plaintiffs' instructions. [note: 46] This contradicted Tjong's case that he did not understand what he was signing as the 4th Supplemental was drafted in English and Tjong did not read it. [note: 47] Richard Chan later hedged his position, saying that Tjong had been "agreeable" to the amendments, [note: 48] before finally conceding that it was not Tjong, [note: 49] but himself, who had instructed the lawyers to have the phrase "for and on behalf of the vendors" included in the 1st SPA, [note: 50] purportedly because SGX was not agreeable to the number of MEGL shares being issued to Aventi and OAFL. [note: 51] Richard Chan acknowledged under cross-examination that the plaintiffs signed the 4th Supplemental on his representation that it was a SGX requirement. [note: 52]

26 At first sight, it may appear curious that the plaintiffs are seeking to challenge the 4th Supplemental [note: 53] which, on its face, supports their case that Aventi and OAFL were not entitled to beneficially retain the payments. It has, however, been the consistent position of the plaintiffs that they had signed all the documents on Richard Chan's instructions without fully understanding their terms and effect. It is at least clear that the inclusion of Aventi and OAFL in the 1st SPA was not on the instructions of the plaintiffs. [note: 54] Richard Chan testified that Aventi and OAFL were inserted in the 1st SPA after negotiating with Alwie, Johanes and Tjong. [note: 55] This contradicted his earlier testimony that throughout the transaction he did not speak to Johanes in relation to the 1st SPA. [note: 56] Whatever may be the reason behind the insertion of Aventi and OAFL in the 1st SPA and the execution of the 4th Supplemental, the undeniable fact remains that it was executed on those terms and I shall accordingly determine the plaintiffs' claims based on a construction of Clause 4.02(2), which will be analysed in more detail at [96] – [104] below. As will be apparent below at [106] – [119], there is a considerable body of objective evidence to substantiate my construction of Clause 4.02(2).

The 2nd and 3rd SPAs

27 The claims brought against Jake, AAML and Edwin relate to two further Share Sale Agreements entered into on 12 July 2007. Under the second Share Sale Agreement, Tjong agreed to sell, and Jake agreed to purchase the remaining 5% of PT Batubara shares at a price of US$320,000 ("the 2nd SPA"). Pursuant to the third Share Sale Agreement, Tjong agreed to sell and AAML agreed to purchase the remaining 28% of PT Deefu shares at a price of US$1.68 million ("the 3rd SPA"). When discussed collectively, the shares sold under the 2nd and 3rd SPAs will be referred to as "the Remaining Shares".

28 According to Richard Chan, the 2nd and 3rd SPAs came about on Tjong's initiative. Tjong had apparently approached Richard Chan for a US$2 million loan in March 2007 secured by a pledge on the Remaining Shares. [note: 57] When Richard Chan told Tjong that MEGL was unable to provide the loan, Tjong then suggested that MEGL purchase the Remaining Shares. However, MEGL already had a majority share of PT Deefu and claims that it had no desire to increase its shareholding through Antig. [note: 58] Nonetheless, Richard Chan offered to help Tjong by asking Alwie to source for potential buyers. [note: 59] Richard Chan claims that he only found out later that Alwie had managed to find Jake – whom Richard Chan did not know personally – and AAML to acquire the Remaining Shares.

[note: 60]

29 Jake and Edwin confirm that they had never met Richard Chan prior to these proceedings, [note: 61] and that it was Alwie who had approached them regarding the sale of the Remaining Shares in early 2007. [note: 62] Both claim that they had left Alwie to make the necessary arrangements for the transactions and that Alwie was the only person amongst the defendants whom they had dealt with. [note: 63]

30 In early 2008, just a couple of months after the acquisition of the Remaining Shares under the 2nd and 3rd SPAs, Jake and Edwin entered into share swap agreements with an Australian listed company, APAC Coal Limited ("APAC"), pursuant to which they swapped the Remaining Shares for a total of 63.2 million APAC shares. [note: 64] At that time, the APAC shares were valued at A$0.20 per share. [note: 65] Effectively, Jake and Edwin (through AAML) resold the Remaining Shares, which they bought for only US$2 million, at a value of A$12.64 million.

Procedural history

31 This case has had a somewhat tortuous history. As some features of the previous proceedings bear on the present case, I shall outline them briefly, insofar as they are relevant.

The Antig Suit

32 According to Tjong, Richard Chan became uncontactable sometime after 12 November 2007, and attempts to reach him on his phone and at the MEGL offices all came to naught. [note: 66] It then dawned on Tjong that Richard Chan, MEGL and Antig had never intended the plaintiffs to be paid the balance purchase price. [note: 67] Following this realisation, Tjong instructed his solicitors to recover the balance of approximately US$12 million. His immediate concern at that time was to stop the next payment of US$3.7 million due to Aventi under the 1st SPA on 13 June 2008. [note: 68] The plaintiffs' solicitors thus wrote to Antig in April 2008 demanding that the US$3.7 million be paid directly to the plaintiffs. When no response was elicited from Antig despite the sending of numerous demand letters, the plaintiffs commenced the Antig Suit against Antig in May 2008. [note: 69] The Antig Suit was however stayed in favour of arbitration pursuant to an arbitration clause contained in the 1st SPA (see *Tjong Very Sumito and others* v *Antig Investments Pte Ltd* [2009] 4 SLR(R) 732).

33 Significantly, it transpired in the course of the Antig Suit that the US$3.7 million had already been paid out in November 2007 pursuant to an agreement between Antig and Aventi for Antig to effect early payment to Aventi at a discount. [note: 70] Tjong claims that he never knew, and had not authorised, such early payment. The identity of the beneficial recipient of this US$3.7 million is disputed, and will be discussed at [45] to [47] below.

The Mareva proceedings

34 The present proceedings were brought against the 1st to 9th defendants on 8 February 2010 for the balance purchase price of US$12,471,227, being the difference between the full purchase price of US$18 million and the US$5,528,772 the plaintiffs have thus far received (a difference of US$1 arises due to the rounding down of the two sums). On the same day, the plaintiffs applied for a Mareva injunction prohibiting the defendants from dealing with their assets worldwide. [note: 71] I granted the

ex-parte injunction on 11 February 2010 on the basis that there was a real risk of dissipation of the defendants' assets in Singapore, and on the plaintiffs' undertaking as to damages suffered as a result of the interim injunction. [note: 72] I placed weight on the fact that despite several letters sent to Antig directing it not to make the payments to Aventi and OAFL, Antig had ignored the instructions, accelerated the payments and purportedly paid the bulk of the purchase price to Aventi and OAFL.

35 Subsequently, Richard Chan, Alwie, Susiana, Jake, AAML and Edwin applied to set aside the injunction order. [note: 73] I heard the parties and eventually discharged the injunction on 17 March 2010 [note: 74] on the ground of the plaintiffs' inexcusable delay in applying for the injunction. [note: 75] As mentioned (at [6] above), I was of the view that the delay demonstrated that the plaintiffs did not have a genuine belief that the defendants would dissipate their assets to defeat the judgment. Also, if there had been such a risk, the defendants' assets would by then have been dissipated. Various affidavits filed by the parties in connection with these Mareva injunction proceedings were relied on by the parties in the course of the trial.

The plaintiffs' application for judgment in default against Aventi and OAFL

36 Subsequently, on 22 April 2010, the plaintiffs took out two summonses seeking judgment in default of defence against Aventi and OAFL. [note: 76] These were disallowed by the Assistant Registrar who was not satisfied that the claims against Aventi and OAFL were truly severable against, and/or independent of, the claims against Johanes and Alwie, bearing in mind *inter alia* the fact that the plaintiffs were seeking to lift the corporate veil against Aventi and OAFL.

Stay of present proceedings against MEGL and Antig

37 In August 2010, MEGL and Antig were added as the 10th and 11th defendants by way of an amendment to the plaintiffs' writ of summons [note: 77] following the discharge of the injunction during which certain observations were made about the false SGXNet announcement issued by MEGL. They responded by applying for a stay in favour of arbitration brought by MEGL and Antig against the plaintiffs, [note: 78] which they obtained on 23 November 2010. [note: 79] Subsequent to the stay, the plaintiffs have since discontinued the proceedings against MEGL and Antig. As such, while numerous references to MEGL and Antig remain in the pleadings, this Court will not be making any order against MEGL or Antig in the present proceedings.

38 By way of a joint statement filed by Tjong, Iman and Richard Chan on 9 April 2012 after the trial, the Court was informed that parties to the arbitration have served their statements of claim and defence, and the matter has been fixed for hearing by the arbitral tribunal in January 2013. The joint statement confirms that the arbitral tribunal, which was set up on 21 September 2011, is aware of the general nature of the present proceedings, and that Jake, AAML and Edwin (who discontinued their counterclaim in the present proceedings against the plaintiffs for rescission of the 2nd and 3rd SPAs, on the ground that Tjong had misrepresented to Jake and AAML that he was the sole beneficial owner of the Remaining Shares) [note: 80] have agreed to abide by the decision of the arbitral tribunal as regards the plaintiffs' title to the PT Deefu and PT Batubara shares.

39 During the course of the trial, I indicated on a number of occasions that the absence of MEGL and Antig to the proceedings was highly unsatisfactory because the central issue of the arbitration concerns PT Deefu's title to the PT Batubara shares at the material time; a finding by the arbitral tribunal that the plaintiffs and PT Deefu never had title to the PT Batubara shares could potentially render the present proceedings nugatory. Despite this, the parties opted not to apply for a stay

pending the outcome of the arbitration.

40 Although the issue relating to the plaintiffs' title to the PT Deefu shares was raised in Richard Chan's Defence filed in March 2010, [note: 81] it was only after the *conclusion* of the trial that his counsel, Mr Nicholas Narayanan ("Mr Narayanan") belatedly suggested that the trial should be stayed pending the outcome of the arbitration. [note: 82] I rejected the application given that the trial had by then run its full course. I note, further, that no evidence was produced at the trial to support the allegations that PT Deefu and Tjong did not own the PT Batubara shares at the material time. Instead, the evidence appears to point in the opposite direction. First, the plaintiffs have produced a July 2007 settlement agreement [note: 83] under which Tjong paid US$300,000 to settle a judgment debt arising from a November 2005 Indonesian judgment ordering him to pay US$945,000 to Ms Roosanawati and Mr Happy for the purchase of the PT Batubara shares. That this payment of US$300,000 was indeed made by Antig on 25 June 2007 on Tjong's behalf is evidenced by a statement of account produced by Tjong [note: 84] and confirmed by Richard Chan. [note: 85] Second, by clause 8.01 of the November 2004 Agreement, the plaintiffs warranted to Antig that they owned and had full right, power and authority to deal with the PT Deefu shares. The plaintiffs were obliged, under clause 5.01 of the November 2004 Agreement, read with clause 2.2(5) of the 2nd Supplemental, to provide Antig with PT Deefu's share register showing that the plaintiffs owned the relevant PT Deefu shares. These documents must have been provided to Antig's satisfaction otherwise completion of the 1st SPA would not have taken place. As will be discussed (see [212] below), Tjong had withheld from Antig documents which he was obliged to produce under the 1st SPA, in order to extract a guarantee from Richard Chan. The evidence suggests that the documents were released following the provision of such a guarantee in late 2006.

The plaintiffs' claims

41 The plaintiffs have brought a complex web of claims against the defendants based on various related causes of action and interlocking facts. The claims against Richard Chan, Aventi, Johanes, OAFL, Alwie and Susiana are based on facts arising in relation to the 1st SPA, and those brought against Jake, AAML and Edwin together with Richard Chan concern the 2nd and 3rd SPAs. The common link between the two sets of claims is Richard Chan. I shall first set out in the neatest possible manner the various claims brought against each defendant, the underlying causes of action and the discrete subject matter they relate to. But before doing so, I should say that it is quite unsatisfactory that the plaintiffs' claims for resulting trust and/or constructive trust/knowing receipt and/or money had and received and/or conversion [note: 86] were pleaded *in the same breath* as alternatives based on essentially the same factual matrix. No effort was made in the plaintiffs' written closing submissions to distinguish between each of the *distinct* causes of action and how the facts satisfy the different ingredients of each cause of action. Further, some claims, though pleaded, were without explanation not featured at all in the plaintiffs' written closing submissions. At a hearing on 29 May 2012, which was called at my request, counsel for the plaintiffs, Mr Peter Gabriel ("Mr Gabriel"), confirmed that the plaintiffs are not pursuing the constructive trust/knowing receipt claims against all of the defendants as well as the undue influence claim against Jake, AAML and Edwin in respect of the 2nd and 3rd SPAs.

Claims relating to the 1st SPA

Alleged discrete sums wrongfully paid out

(i) Aventi and Johanes: US$5.7 million and 124,856,364 MEGL shares

42 The plaintiffs claim that there was no legitimate reason for the payment of US$5.7 million and allotment of 124,856,364 MEGL shares to Aventi, and that the payment and allotment were not intended to be gifts. The plaintiffs claim that Aventi therefore holds the US$5.7 million and 124,856,364 MEGL shares on resulting trust for the plaintiffs' benefit. [note: 87] The plaintiffs advanced two further claims in the alternative, *viz*, (a) Aventi must return the US$5.7 million to the plaintiffs as money had and received; [note: 88] and (b) Aventi has converted the 124,856,364 MEGL shares for its own use and is thus liable to pay damages. [note: 89] These claims relating to the US$5.7 million and 124,856,364 MEGL shares will be dealt with at [77] to [184] below.

43 The plaintiffs argue, further, that Johanes should be made personally liable based on all three causes of action against Aventi, *ie*, the corporate veil of Aventi should be pierced. [note: 90] However, the writ has not been served on Johanes, the effect of which will be discussed at [75] below.

44 Based on the documentary evidence, I accept that 124,856,364 MEGL shares had indeed been *allotted* to Aventi. There is, for instance, a letter dated 22 June 2006 written by Antig [note: 91] confirming that 124,856,364 MEGL shares were to be allotted and issued to Aventi's nominee. MEGL has also made an announcement to SGX on 23 June 2006 [note: 92] confirming that it had issued a total of 166,959,091 MEGL shares to Aventi and OAFL. There is also evidence (see [166] below) that Aventi/Johanes have sold at least 100 million MEGL shares.

45 The evidence however does not show that Aventi has *received* the payment of US$5.7 million, which was purportedly made without the plaintiffs' knowledge by way of two advance payments – US$1.88 million, representing the discounted value of US$2 million on 20 July 2006 and US$3,492,800 representing the discounted value of US$3.7 million on 7 November 2007. [note: 93] The documents only show that the two discounted payments had probably been paid to a Credit Agricole (Suisse) S.A. ("Credit Agricole") account. There is, for instance, a 20 July 2006 letter purportedly written by Johanes [note: 94] on behalf of Aventi instructing Richard Chan to draw up a cheque for US$1.88 million in favour of "Credit Agricole (Suisse) S.A.". This letter is stamped "Paid", indicating that the sum had been paid as instructed to the Credit Agricole account. The beneficiary of this account is however unknown. While Richard Chan claims that Johanes was the beneficiary, he was only able to point to the 20 July 2006 instructions from Johanes as the basis for his assertion. [note: 95] Further, payment even if made to Johanes is not necessarily payment to Aventi as stipulated in Clause 4.02(2). Just to be clear, my finding is that there is no evidence of *actual receipt* of the US$5.7 million by Aventi. This is separate and distinct from the inquiry as to whether Antig had *paid out* US$5.7 million to Credit Agricole or to any other party.

46 There is also no evidence that the second advance payment of US$3.7 million was actually made to Aventi. Although there is a statement by MEGL to SGX on 13 November 2007 stating that, in return for a discount of 5.6%, [note: 96] Antig has acceded to Aventi's request for another early settlement of the US$3.7 million payment, there is nothing to show who the payment was actually made to. Under cross-examination, Richard Chan was only able to state that the discounted US$3.7 million was "maybe" paid into the Credit Agricole account. [note: 97] In light of this, I am not able to conclude that Aventi *received* the payment of US$5.7 million out of the purchase price due under the 1st SPA.

47 I note that the plaintiffs' case has now morphed into something quite different from their pleaded case. They now argue that the US$5.7 million was paid to Richard Chan, [note: 98] who is the (alleged) beneficiary of the Credit Agricole account. [note: 99] This is a significant departure from their pleaded case, *viz*, that Aventi received the US$5.7 million and is liable to return it. At the same time, the plaintiffs still maintain their claim of US$5.7 million against Aventi in their written closing submissions. [note: 100] Such conflicting submissions are the result of the plaintiffs' unfortunate failure to address their mind to the impact of their alternative and conflicting claims. In any event, they have not produced evidence showing that Richard Chan is the owner of the Credit Agricole account. This finding may be of some relevance to the arbitration proceedings against Antig and MEGL, but for now I am unable to make any order against Aventi in respect of the US$5.7 million payment given the evidence, which is in line with the plaintiffs' alternative submissions, that Aventi did not receive the US$5.7 million.

(ii) OAFL and Alwie: US$550,000 and 42,102,727 MEGL shares

48 The claims brought against OAFL and Alwie mirror those brought against Aventi and Johanes. The plaintiffs claim that there was no legitimate reason for the payment of US$550,000 and the allotment of 42,102,727 MEGL shares to OAFL, and that the payment and allotment were not intended to be gifts. The plaintiffs claim that OAFL therefore holds the sum of US$550,000 and 42,102,727 MEGL shares on resulting trust for the plaintiffs' benefit. [note: 101] Alternatively, the plaintiffs claim that OAFL is liable to (a) return the sum of US$550,000 to the plaintiffs as money had and received, [note: 102] and (b) pay the plaintiffs damages for its conversion of the 42,102,727 MEGL shares. [note: 103] The plaintiffs argue that Alwie should be personally liable based on all three causes of action *via* the lifting of OAFL's corporate veil [note: 104] (see [69] to [74] below).

49 I find that the sum of US$550,000 has been paid to and received by OAFL. I also find that the 42,102,727 MEGL shares have indeed been allotted to OAFL. In relation to the shares, there is, first, a letter from Antig to the plaintiffs dated 22 June 2006 [note: 105] confirming that 42,102,727 MEGL shares were to be issued to OAFL's nominee. Secondly, the MEGL announcement mentioned at [44] above confirmed that MEGL had issued 166,959,091 MEGL shares to Aventi and OAFL. Finally, the allotment was also admitted by Alwie. [note: 106]

50 In relation to the US$550,000, Alwie has produced OAFL's Coutts Bank account statements, which reflect the receipt of US$500,000 by OAFL in two tranches – US$93,396.62 (S$200,000) on 26 January 2006 [note: 107] and US$406,603.38 (S$647,524.01) on 16 June 2006. [note: 108] According to the statements, these cheque payments were made by MEGL and MEGL's predecessor company, Strike Engineering Ltd. The plaintiffs have also produced a 23 November 2004 letter by Alwie [note: 109] instructing Antig to pay US$50,000 into Alwie's Citibank account. Alwie admits that this payment of US$50,000 was made to his personal bank account, apparently because OAFL's account was yet to be opened at that time. [note: 110]

(iii) Susiana: US$157,525

51 The plaintiffs allege that Susiana had received US$157,525 rightfully due to the plaintiffs under the 1st SPA. They seek to make her liable to account for the payment as resulting trustee. [note: 111] They claim that Susiana was used as a "front" to receive money for Alwie and had facilitated in dissipating the US$157,525 without a trace. [note: 112] Alternatively, they seek to recover the sum

based on money had and received. [note: 113] The fact of receipt of US$157,525 by Susiana is admitted by Alwie and Susiana. Alwie claims that this sum represented (a) payment of the remaining portion of a commission due to him for brokering the sale of the shares to Antig (US$130,000) and (b) repayment on a personal loan of 250 million rupiah extended to Tjong (approximately US$27,525). [note: 114] Susiana adopts the same position as Alwie. The claims against Susiana will be examined at [78] to [157] below.

(iv) Richard Chan and Alwie: S$334,429.20

52 The plaintiffs claim that Richard Chan and/or Alwie had received S$334,429.20 (US$210,000) rightfully due to the plaintiffs under the 1st SPA, and are liable to account for the payment as resulting trustees. [note: 115] Alternatively, they seek to recover the payment of S$334,429.20 based on the principle of money had and received. [note: 116] As will be discussed (see [90] below), the evidence shows that the payment of S$334,429.20 was beneficially received by Alwie, and not Richard Chan, *via* a cheque paid into a Coutts Bank account.

Balance purchase price of US$12,471,227

53 The plaintiffs have also brought claims to recover the entire balance purchase price of US$12,471,227. First, they claim that Richard Chan and Alwie had made a series of false and fraudulent representations to Tjong, which the plaintiffs relied on to their detriment, specifically, by failing to challenge the 1st SPA terms, by allowing Richard Chan to continue to handle payment matters under the 1st SPA, and by entering into the four supplemental agreements, resulting in the loss of the balance purchase price. [note: 117] They rely on Section 2(1) of the Misrepresentation Act (Cap. 290) in the alternative. [note: 118] These misrepresentation claims will be examined at [185] to [205] below.

54 Secondly, the plaintiffs have sued Richard Chan on a written guarantee ("the guarantee") purportedly executed by him in favour of Tjong for the full purchase price of US$18 million. As the plaintiffs have to-date received only US$5,528,772, they claim that the guarantee has been breached and seek recovery of the balance US$12,471,227, or alternatively, the sum of US$6,721,227 and the market value of 166,959,091 MEGL shares (see [211] to [264] below). [note: 119]

55 Thirdly, the plaintiffs claim that Richard Chan, Aventi, Johanes, OAFL, Alwie, Susiana and/or MEGL had conspired to induce the plaintiffs to, *inter alia*, enter into the 1st SPA by making a series of fraudulent misrepresentations, causing them loss and damage amounting to the balance purchase price of US$12,471,227 (see [206] to [210]). [note: 120]

Claims relating to the 2nd and 3rd SPAs

Avoidance of 2nd and 3rd SPAs based on allegation of duress

56 Tjong seeks to avoid the 2nd and 3rd SPAs on the ground that he had executed them under duress from Richard Chan. [note: 121] By reason of this, he also seeks to hold Jake, AAML and Edwin liable, arguing that they have been unjustly enriched under the 2nd and 3rd SPAs and are liable for the losses he sustained as a result of entering into the 2nd and 3rd SPAs. [note: 122]

Claims for damages based on allegation of fraudulent misrepresentation

57 Tjong claims that he was induced to enter into the 2nd and 3rd SPAs because Richard Chan had fraudulently misrepresented to him that he would, in return, make payment of, or ensure that the plaintiffs would be paid, the balance purchase price under the 1st SPA. [note: 123] Tjong claims that Richard Chan is therefore liable for his losses, being the undervalue of the Remaining Shares under the 2nd and 3rd SPAs. [note: 124] This claim is examined at [310] to [319] below.

Unlawful means conspiracy involving Richard Chan, MEGL, Antig and/or Jake

58 Tjong further alleged that Richard Chan, MEGL, Antig and/or Jake conspired to induce Tjong, *via* duress and/or fraudulent misrepresentation perpetrated by Richard Chan, to sell his remaining 5% PT Batubara shares at an undervalue under the 2nd SPA. [note: 125] Although allegations of undue influence were also pleaded in the plaintiffs' statement of claim, Mr Gabriel confirmed at the 29 May 2012 hearing that the plaintiffs are no longer pursuing them.

Unlawful means conspiracy involving Richard Chan, MEGL, Antig, AAML and/or Edwin

59 Similarly, Tjong claims that, pursuant to a conspiracy between Richard Chan, MEGL, Antig, AAML and/or Edwin, he had been induced, *via* duress and/or fraudulent misrepresentation perpetrated by Richard Chan, to sell his remaining 28% PT Deefu shares at an undervalue under the 3rd SPA. [note: 126] This claim is examined at [320] below.

Tjong's standing to sue

60 Given Iman's absence as a witness from the trial and the discontinuance of Herman's action (see [13] above), a preliminary issue arises as to whether Tjong has the standing to sue in relation to the PT Deefu shares owned by Iman and Herman. I find that he does.

61 It is the plaintiffs' case that Iman and Herman were Tjong's nominees who held their PT Deefu shares on trust for Tjong. [note: 127] Tjong has produced two Powers of Attorney executed by Iman and Herman in his favour. The first, which is dated 27 September 2010 and executed by Iman, [note: 128] authorises Tjong to "receive money from the sale of 110 (one hundred ten) shares in PT Deefu". It also states that the shares "are actually owned by [Tjong]". The second Power of Attorney, which is dated 21 June 2010 and executed by Herman, [note: 129] goes further by authorising Tjong to "[f]ile a lawsuit in court of Jakarta and Singapore against Richard Chan, [MEGL]/[Antig], [Aventi], Johanes Widjaja, [OAFL], Alwie Handoyo, Susiana Chandra, Jake Pison Hawila, [AAML], Edwin Sugiarto and others".

62 It is also significant that under Clause 4.02(2), only Tjong (and not Iman or Herman) was specifically identified to receive the payments. In fact, for every payment, only Tjong was required to sign the payment instruction. Further, the guarantee provided by Richard Chan acknowledges that Tjong alone is entitled to the full purchase price. As explained in [108] below, Alwie also signed a letter dated 15 June 2006 in which he expressly acknowledged that he "will return the monies and shares received from [MEGL], and [Antig], to Tjong". [note: 130] Clearly, Antig, Richard Chan and even Alwie recognise that Tjong is entitled to receive the full purchase price because *all* of the PT Deefu shares were indeed beneficially owned by him.

63 Counsel for Alwie and Susiana, Mr Murugaiyan Sivakumar Vivekanandan ("Mr Murugaiyan"), however argues that Iman's action should be dismissed pursuant to Order 35 rule 1(2) of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("ROC") because of his absence at trial, which has deprived the defendants of their right to cross-examine him. [note: 131] Relying on *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1 ("*Performing Right Society*"), Mr Murugaiyan argues that following the dismissal of Iman's action, Tjong cannot maintain any claim in relation to Iman's shares. [note: 132] The relevant passage by Lord Cave LC in *Performing Right Society* (at p 14) reads:

> [W]hen a plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it must in due course be made a party to the action ... If this were not so, a defendant after defeating the claim of an equitable claimant might have to resist like proceedings by the legal owner, or by persons claiming under him as assignees for value without notice of any prior equity, and proceedings might be indefinitely and oppressively multiplied. …
>
> [internal citations omitted]

Simply put, in order to obtain *final* judgment, an equitable owner must either perfect his title by taking an assignment from the legal owner or, alternatively, by joining the legal owner because of the risk that the defendant will be exposed to a second claim by, *eg*, a *bona fide* purchaser for value without notice claiming under the legal owner (*Alliance Entertainment Singapore Pte Ltd v Sim Kay Teck and another* [2007] 2 SLR(R) 869 at [63]). Mr Murugaiyan argues that, for this same reason, Tjong has no standing to sue in relation to Herman's PT Deefu shares following the discontinuance of Herman's action. [note: 133]

64 I reject these submissions. Order 35 rule 1(2) of the ROC does not require the court to dismiss Iman's claim. Consequently, since Iman remains a co-plaintiff in this Suit, *Performing Right Society* does not impeach Tjong's standing to sue in relation to his shares. *Performing Right Society* also does not impeach Tjong's standing to sue in relation to Herman's shares since the 21 June 2010 Power of Attorney in Tjong's favour eliminates the risk of multiple proceedings which concerned Lord Cave LC in *Performing Right Society*; by reason of his Power of Attorney, which expressly conferred authority on Tjong to bring the action against the defendants on Herman's behalf, Herman would be bound by the outcome of this Suit (*Yongnam Development Pte Ltd v Somerset Development Pte Ltd* [2004] SGCA 35 at [40] – [43]).

65 Although Herman has, in an affidavit filed in support of his application to discontinue his action, denied that he executed the Power of Attorney, [note: 134] he has not produced himself for cross-examination on this issue. I should also add that leave to discontinue was granted not because of Herman's claim that he did not execute the Power of Attorney, but because Herman did not want to continue with the proceedings and he is entitled to do so subject to relevant costs orders. I am not satisfied that he was unaware of either the present proceedings or the Antig Suit, which he was a party to. In fact, he confirmed that he was told of Tjong's intention to bring the present Suit in 2009, [note: 135] and was aware of the media coverage of the present proceedings in July 2010. [note: 136] He however chose to take no action until his application to discontinue his action shortly before the commencement of trial.

Lifting of the corporate veil

The law

66 As the plaintiffs are seeking to lift the corporate veils of Aventi and OAFL in order to make

Johanes and Alwie liable, it is perhaps useful to deal with this issue upfront. The lifting of a company's veil of incorporation involves difficult policy issues – while it is trite that a company is a separate legal entity from its shareholders and controllers (*Saloman v Saloman* [1897] AC 22), there is also the concern that company directors should not be allowed to escape personal liability for wrongs personally committed simply because those wrongs were perpetrated in their capacity as company directors (*TV Media Pte Ltd v De Cruz Andrea Heidi and another appeal* [2004] 3 SLR(R) 543 ("*TV Media*") at [144]).

67 Courts will, in exceptional cases, be willing to pierce the corporate veil to impose personal liability on the company's controllers. While there is as yet no single test to determine whether the corporate veil should be pierced in any particular case, there are, in general, two justifications for doing so at common law – first, where the evidence shows that the company is not *in fact* a separate entity; and second, where the corporate form has been abused to further an improper purpose (*Walter Woon on Company Law (Tan Cheng Han, SC gen ed) (Sweet & Maxwell, Rev 3rd Ed, 2009)* ("*Walter Woon*") at para 2.51 – 2.52, 2.57).

68 One instance where courts would pierce the corporate veil is where the controller of a company uses the company as an extension of himself and makes no distinction between its business and his own, *eg*, in *TV Media*, where the overwhelming personal involvement of the director and principal shareholder (Semon) in the negligence of the company (Health Biz) had been "not merely very great", but "total" (*TV Media* at [140]). The plaintiff in *TV Media* claimed that Health Biz had negligently imported and sold a slimming drug containing undeclared substances, which caused her to suffer liver damage. Having established that Semon had absolute control of Health Biz, and had been the person making all the important company decisions, the Court of Appeal concluded that he was the only person in the position to direct, authorise and/or procure Health Biz's negligence (*TV Media* at [132] – [140]). On totality, Semon's level of involvement in Health Biz indicated that he was clearly its controlling mind and spirit, which justified the lifting of Health Biz's corporate veil against him (*TV Media* at [145]).

OAFL

69 It is the plaintiffs' pleaded case that the corporate veils of Aventi and OAFL should be lifted in order to make Johanes and Alwie personally liable for the claims brought against Aventi and OAFL respectively (see [43] and [48] above), though they are merely "given to understand", and do not claim to have any personal knowledge as to whether Aventi and OAFL are indeed controlled by Johanes and Alwie. [note: 137]

70 The plaintiffs argue that OAFL's corporate veil should be pierced because *inter alia* Alwie was OAFL's alter ego, which was used to receive the payments and the MEGL shares under the 1st SPA. [note: 138] I find that the facts justify the piercing of OAFL's corporate veil on this ground. Alwie admits that he is the controller of OAFL. [note: 139] Although that alone would not move the court to intervene, given that parties are entitled to protect themselves by creating companies even if these are effectively one man companies (see, for example, *Sitt Tatt Bhd v Goh Tai Hock* [2009] 2 SLR 44 ("*Sitt Tatt*") at [79], *NEC Asia Pte Ltd (now known as NEW Asia Pacific Pte Ltd) v Picket & Rail Asia Pacific Pte Ltd and others* [2011] 2 SLR 565 ("*NEC Asia*") at [36]), the evidence shows that OAFL had been used by Alwie as an extension of himself and that Alwie's involvement in procuring the payments to OAFL under the 1st SPA had been substantial.

71 First, apart from the fact that Alwie had absolute control of OAFL, the paper trail shows that

payments purportedly made under the 1st SPA to OAFL's Coutts Bank account had in fact been beneficially received by Alwie (see [52] above and [90] below). This was, notably, a fact undisputed by Alwie, [note: 140] who also admitted that this Coutts Bank account had been used interchangeably for his other "personal purposes". [note: 141] Alwie himself underscored the inter-changeability between himself and OAFL – when asked why he claimed to be entitled to retain the payments he received from Antig, he answered "*I* am authorised...to receive the money" under the 1st SPA. [note: 142] But while OAFL was a named recipient of the payments, no reference was made to Alwie in the 1st SPA.

72 Second, in two misleading SGXNet announcements made on 14 October 2005 and 26 March 2010, MEGL had sought to justify the payments made to OAFL on the basis that *Alwie* (not OAFL) was a creditor of the plaintiffs (see [117] and [190] below). In line with this, Alwie has also concocted several fallacious allegations to justify his position as Tjong's creditor (see [90] to [91] and [99] to [101] below).

73 Third, I find it telling that OAFL has not filed an independent defence (it has been struck off the BVI Registry since 1 May 2008), and that Alwie had throughout the proceedings been acting as OAFL's mouthpiece in asserting that OAFL was entitled to retain the payments it received under the 1st SPA. On the totality of the evidence, it is clear that Alwie was the alter ego of OAFL, which on Alwie's own admission had been specifically incorporated for the purpose of the 1st SPA. [note: 143] I also note that the extent of his involvement in the procurement of payments to OAFL had been overwhelming. By his own admission, he was principally involved in the negotiations regarding the 1st SPA [note: 144] pursuant to which certain payments were to be made to OAFL for and on behalf of the plaintiffs. I therefore see no reason why OAFL's corporate veil should not be lifted to make Alwie liable if a case has indeed been made out against OAFL.

74 At trial, however, the plaintiffs attempted to suggest a positive case that Richard Chan is the owner and controlling mind of Aventi and OAFL. [note: 145] Their pleadings, which merely stated that Tjong understood from Richard Chan that Aventi and OAFL belonged to him, [note: 146] did not contain a positive assertion that he was in fact the owner of Aventi and OAFL. Indeed, in their pleaded case against Aventi and OAFL, the plaintiffs have only sought to hold Johanes and Alwie (not Richard Chan) liable for the claims against Aventi and OAFL. [note: 147] Further, no submissions were made by the parties in their respective written closing submissions as to whether Richard Chan was the owner of Aventi and OAFL. As such, I shall refrain from making any finding on this issue in the present proceedings since it does not arise from the pleadings.

Aventi

75 The situation is a little more complex in the case of Aventi and Johanes. Although Alwie stated that Johanes was effectively the controlling mind of Aventi, [note: 148] Johanes is not strictly before this Court since he has not been served (see [11] above). As the plaintiffs have not successfully invoked this Court's *in personam* jurisdiction over Johanes, this Court cannot make any order against him personally (s 16 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), *Consistel Pte Ltd and another v Farooq Nasir and another* [2009] 3 SLR(R) 665 at [23] – [24], [33]). The lifting of the corporate veil in the case of Aventi is therefore moot. However, Aventi has been validly served and orders can be made against it if the case is made out.

AAML

76 The plaintiffs also seek the piercing of AAML's corporate veil to make Edwin personally liable for the claims against AAML. [note: 149] Again, although Edwin admits to being the sole director-shareholder and controller of AAML, [note: 150] mere evidence of sole shareholding and control does not justify the piercing of AAML's corporate veil (*Sitt Tatt* at [79], *NEC Asia* at [36]). Aside from asserting that AAML's corporate veil should be pierced, the plaintiffs have neither pleaded the grounds on which this should be done, nor provided evidence justifying such exceptional grounds. I am thus not persuaded that AAML's corporate veil should be pierced *vis-a-vis* Edwin.

Claims against Richard Chan, Aventi, Johanes, OAFL, Alwie and Susiana

77 As mentioned (at [42] to [55] above), the plaintiffs have brought a multitude of alternative causes of action against the above defendants based on essentially the same factual matrix. I shall examine each in turn commencing with the claim for money had and received.

Money Had and Received

78 The plaintiffs claim that the following defendants have received from Antig the various sums listed below, and seek to recover them as money had and received: [note: 151]

(a) As against Richard Chan and/or Alwie, the sum of $334,429.20, which was part of the US$6 million to be directly received by the plaintiffs under Clause 4.02(2);

(b) As against Aventi, the sum of US$5.7 million, which was to be received by Aventi for and on behalf of the plaintiffs under Clause 4.02(2);

(c) As against OAFL and/or Alwie, the sum of US$550,000, which was to be received by OAFL for and on behalf of the plaintiffs under Clause 4.02(2); and

(d) As against Susiana, the sum of US$157,525, which was part of the US$6 million to be directly received by the plaintiffs under Clause 4.02(2).

As explained (at [45] above), the plaintiffs have not proved that Aventi received the US$5.7 million under head (b). I have also found that the sum of $334,429.20 under head (a) was received by Alwie, and not Richard Chan (see [90] below). Hence, the plaintiffs' claim for money had and received can only proceed against OAFL, Alwie and Susiana under heads (a), (c) and (d). I shall refer to the sums under heads (a), (c) and (d) as "the payments".

79 Alwie claims that OAFL was entitled to retain the payments under the 1st SPA. Although various un-pleaded defences were raised at the injunction hearing and at the trial, Alwie relies solely on the terms of the 1st SPA in his pleadings. [note: 152] In particular, he relies on Clause 4.02(2) to justify OAFL's purported entitlement to retain the payments it received. This solitary basis was confirmed by Alwie in cross-examination, as well as by his counsel, Mr Murugaiyan. [note: 153] The proper construction of Clause 4.02(2), as will be discussed (at [96] to [104]), naturally becomes pivotal to the defence of OAFL and/or Alwie. As for Susiana, Alwie accepts that she did receive the sum of US$157,525 on his behalf as part of his commission as well as the return of his personal loan to Tjong (see [51] above).

80 I shall first discuss the relevant principles of unjust enrichment so that the facts can be examined in their proper perspective. For completeness, I will also consider the various un-pleaded

defences separately below as they have a material bearing on the credibility of some of the witnesses.

The law

81 A claim of money had and received is part of the wider body of the law of unjust enrichment (*Star Cruise Services Ltd v Overseas Union Bank Ltd* [1999] 2 SLR(R) 183 at [120]), provided the following conditions are satisfied:

(a) the defendant has received a benefit (*ie*, he has been enriched);

(b) the enrichment is at the plaintiff's expense;

(c) it is unjust to allow the defendant to retain the enrichment; and

(d) there are no defences available to the defendant.

(see also Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal [2011] 3 SLR 540 at [110]).

82 As a preliminary matter, I will first deal with the argument raised by Mr Murugaiyan, that the claim in unjust enrichment is premised on a "waiver of the tort" and therefore, if the plaintiffs "failed to establish a tort (*ie* conversion) [their] claim in restitution also fails". [note: 154] In making this submission, Mr Murugaiyan relied on the Court of Appeal case of *Yeow Chern Lean v Neo Kok Eng and another* [2009] 3 SLR(R) 1131 ("*Yeow Chern Lean*").

83 I am not persuaded by the argument that the claim in unjust enrichment is contingent, or parasitic, upon the claim in conversion. In the first place, the two claims *relate to different subject matter and different defendants*. The claim in unjust enrichment relates only to the *money payments* allegedly wrongfully received by Richard Chan, Aventi (although I found no evidence of Aventi receiving the payments), OAFL, Alwie and Susiana. The claim in conversion relates only to the *MEGL shares* allegedly wrongfully received by Aventi, Johanes, OAFL and Alwie. They are two *entirely different and separate* claims and causes of action, which do not overlap whatsoever. In contradistinction, in *Yeow Chern Lean*, the claim in moneys had and received was brought in the alternative to a claim in conversion for identical subject matter: two cheques, allegedly misappropriated. In that situation, the claim in restitution functioned only as a *remedy*, and not a substantive cause of action as in the case here. As the Court of Appeal clearly stated (at [52]):

> … The House of Lords has made it clear in United Australia v Barclays Bank Ltd [1941] 1 AC 1 that *the "waiver" was really an election to take a gain-based rather than loss-based award for the tort.* In the absence of the tort, this claim in restitution fails. … [emphasis added]

Receipt of benefit at the plaintiffs' expense

84 Turning to the first element, it seems clear to me that OAFL, Alwie and Susiana have benefitted from the receipt of the payments from Antig through MEGL. The payments are clearly valuable, financially quantifiable, and were not received by them as an incidental benefit or ministerially as agents (*Seagate Technology Pte Ltd and another v Goh Han Kim* [1994] 3 SLR(R) 836 at [26]).

85 The next question to be determined is whether the benefit of the payments was *at the plaintiffs' expense*. The test for this depends on whether the plaintiffs are seeking a personal or

proprietary restitutionary claim. A personal claim in unjust enrichment is a claim for a personal restitutionary remedy, ie, a claim that the defendant should pay the claimant a sum of money corresponding to the value of a benefit that he unjustly received at the claimant's expense. On the other hand, a proprietary claim in unjust enrichment is a claim for a proprietary restitutionary remedy, *ie*, a declaration that the claimant has title to the property owned by the defendant, accompanied by whatever order is needed to enable the claimant to realise his proprietary right (see Goff & Jones, *The Law of Unjust Enrichment*, (Sweet & Maxwell, 8th Ed, 2011) ("*Goff & Jones*") at paras 7-01 and 7-02).

86 While a claimant seeking a proprietary restitutionary remedy must establish some proprietary link to the money claimed *via* rules of following and tracing (*Foskett v McKeown* [2001] 1 AC 102 ("*Foskett*") at 130), a claimant seeking a personal restitutionary remedy must show that he has suffered a loss sufficiently linked to the defendant's gain. The plaintiffs seem to have pleaded both a personal as well as a proprietary restitutionary claim; they have pleaded that the first to sixth defendants have been unjustly enriched and are holding the said property under a constructive trust [note: 155] (*ie*, a proprietary restitutionary claim premised on establishing the plaintiffs' proprietary interest in the payments and/or the MEGL shares transferred to the first to sixth defendants) and, also, that the share purchase price paid out to the first to sixth defendants are payable under an action for money had and received [note: 156] (*ie*, a personal restitutionary claim since the plaintiffs are demanding that the defendants personally account for those sums).

87 To succeed in their proprietary restitutionary claim, the plaintiffs must be able to trace their PT Deefu shares to the payments transferred to OAFL, Alwie and Susiana. Tracing is the process of identifying a new asset as the substitute for the old, and has its basis in property law rather than the law of unjust enrichment (*Foskett* at 127-128). A plaintiff seeking a proprietary restitutionary remedy must thus show how his proprietary rights in the original asset have been converted into proprietary rights in the substituted property. I find that the plaintiffs' PT Deefu shares cannot be traced into the payments paid out by Antig to OAFL, Alwie and Susiana. There is no evidence that these payments came from the sale of the PT Deefu shares or were in any way obtained by Antig through dealing with the PT Deefu shares. These funds were instead MEGL's reserves which were used to pay for the PT Deefu shares. This being the case, it cannot be said that title in the PT Deefu shares were converted into proprietary rights in the payments, and the plaintiffs' proprietary restitutionary claim must, accordingly, fail.

88 As regards the plaintiffs' personal restitutionary claim, the nexus between the plaintiffs' loss and the defendants' gain is easily established in a two-party case once it is shown that the plaintiff had transferred property to the defendant under circumstances resulting in the defendant being unjustly enriched. It has been observed that the complexion of the case changes in a multiple-party setting, where the question is, as *Goff & Jones* describes at para 6-52:

> [W]hether [the claimant] can show that [the defendant's] enrichment was at [the claimant's] expense, where [a third party] has conferred a benefit on [the defendant] that was destined for [the claimant], and that would have accrued to [the claimant] but for [the defendant's] interceptive receipt.

89 Even though the present case features three parties, the basic principle that there must be a nexus between the plaintiffs' loss and the gain by OAFL, Alwie and Susiana nevertheless applies.

90 On the present facts, the analysis proceeds on two tracks. First, the sums of S$334,429.20 and US$157,525 received by Alwie and Susiana respectively, which were sums paid out of US$6 million of the Cash Component, were directly receivable by the plaintiffs under Clause 4.02(2). The plaintiffs

say that on the completion day of the 1st SPA, *ie*, 13 June 2006, Richard Chan/MEGL had prepared a cheque for S$334,429.20 (which was equivalent to US$210,000 at the material time) made out to Coutts Bank in Singapore. This payment was therefore not strictly in compliance with Clause 4.02(2). He caused Tjong to sign on the photocopy of the cheque so as to make it appear that Tjong had received the cheque. The plaintiffs say that, without authority from Tjong, Richard Chan kept the cheque for himself and/or gave it Alwie. [note: 157] In his defence, Alwie admits that he (not OAFL) did receive the cheque for the sum of S$334,429.20 issued to Coutts Bank as part of a "commission" due to him for brokering the sale of the shares to Antig. [note: 158] In the course of the trial, he produced documents showing that the cheque for S$334,429.20 was indeed paid into a Coutts Bank account held by OAFL [note: 159] but beneficially owned by Alwie himself. [note: 160] According to Alwie, Tjong had offered him a finder's fee of US$340,000 if he could find a buyer for the mine concession owned by PT Batubara. [note: 161] There is no agreement recording the amount of commission, the conditions upon which it would be paid, and how it would be paid. Alwie was not even able to identify the date on which the alleged commission agreement was concluded. He prevaricated as to whether the agreement was reached *before* or *during* the negotiations of the 1st SPA. [note: 162] In the premises, there is no evidence that Alwie is entitled to the commission/finder's fee. That finding establishes that Tjong did not agree to the payment, thereby supporting my conclusion that Antig's payment of S$334,429.20 was not in accordance with Tjong's instructions and/or Clause 4.02(2).

91 The plaintiffs also claim that the sum of US$157,525 was paid to Susiana without their authority. Further, Tjong claims that he does not owe Susiana any money and there was no reason to have paid her the sum of US$157,525. Susiana claims that the payment of US$157,525 to her was on account of Alwie's entitlement to commission and his personal loan to Tjong. Not only was there no evidence to support the commission, there is equally no evidence to support the existence of this personal loan. [note: 163] This, again, corroborates my finding that the payment of US$157,525 to Susiana was not in accordance with Tjong's instructions and/or Clause 4.02(2).

92 It would appear that the plaintiffs, in advancing the argument that Alwie and/or Susiana were not entitled to receive the two sums, did not appreciate that such an argument would in effect undermine their own case for money had and received in relation to those two sums. This is because, by the plaintiffs' own case, Antig acted contrary to Clause 4.02(2) by paying out the sums of S$334,429.20 and US$157,525 to Alwie and Susiana respectively. Further, Tjong did not agree to these two payments. The gains of S$334,429.20 and US$157,525 by Alwie and Susiana were therefore not at the expense of the plaintiffs, given that their recourse against Antig *vis-à-vis* the two sums remained alive. On this premise, the plaintiffs' claim for money had and received in relation to the sums of S$334,429.20 and US$157,525 cannot succeed.

93 Second, unlike the two sums of S$334,429.20 and US$157,525, Antig was contractually obliged to pay US$550,000 to OAFL under Clause 4.02(2). Although OAFL was entitled to receive it "for and on behalf of" the plaintiffs, OAFL is not entitled to *retain* the same (see [96] to [119] below). Given that Antig has discharged its obligation *vis-à-vis* the US$550,000 under Clause 4.02(2), the plaintiffs have lost their contractual recourse as against Antig in relation to that sum. Concommitantly, OAFL has received the payments pursuant to Clause 4.02(2). In other words, the nexus has been constituted by Antig's performance of its obligation under Clause 4.02(2), which simultaneously extinguished the plaintiffs' right of recourse against Antig and conferred a benefit upon OAFL. This is akin to a situation where money due to a claimant has been transferred by a third party to the claimant's authorized agent (see, for example, *Asher v Wallis* (1707) 88 ER 956 (QB)). This leaves the court with the issue of whether the requirement of an unjust factor has been made out by the plaintiffs *vis-à-vis* the receipt by OAFL of US$550,000.

Unjust factor

94 Having found that OAFL's receipt of US$550,000 was at the plaintiffs' expense, what is the unjust factor? The approach taken by our courts, as well as the courts in England, requires the identification of a *specific* unjust factor to justify disgorging a defendant of his benefit. There is, as yet, no *general* principle giving a claimant a right of recovery from a defendant who has been unjustly enriched at the claimant's expense (*Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 at 196-197 per Lord Browne-Wilkinson), and the courts do not have "a discretionary power to order repayment whenever it seems... just and equitable to do so" (*Kleinwort Benson Ltd v Birmingham CC* [1996] 4 All ER 733 at 737 per Evans LJ). Hence, "it will not do for claimants to plead generalised claims in unjust enrichment, nor is it acceptable to assert that the circumstances make the defendant's enrichment unfair in a broad sense... specific reasons anchored in the case law must be given to justify the assertion that the defendant's enrichment is unjust" (*Uren v First National Home Finance Ltd* [2005] EWHC 2529 at [16]).

95 OAFL has received, and seek to retain, the sum of US$550,000. The 1st SPA, *via* Clause 4.02(2), clearly confers authority on OAFL to *receive* this sum. Does the 1st SPA also confer authority on OAFL to *retain* this sum for its personal benefit? This depends on a construction of Clause 4.02(2).

Construction of Clause 4.02(2)

96 Clause 4.02(2), which is reproduced at [23] above, expressly states that the payments and the allotments of MEGL shares are made to Aventi and OAFL who are "authorised to receive the same for and on behalf of" the plaintiffs. Does this phrase mean that Aventi and OAFL were not meant to retain or benefit from the payments received by them, or does it mean that Aventi and OAFL are entitled to retain them as outright transfers without having to account to the plaintiffs? As a starting point, it is crucial to note that Clause 4.02(2) expressly stipulates that the entire purchase price, *ie*, US$18 million is "*due to*" the plaintiffs. Indeed, Alwie and Susiana admit in their defence that the US$18 million was to be paid by Antig "to the plaintiffs". [note: 164]

97 Alwie claims that Clause 4.02(2), when interpreted in its context and with reference to the factual matrix surrounding the creation of the contract, authorises OAFL to retain the payments it had received for its own benefit based on the circumstances surrounding the formation of the 1st SPA, *ie*, *to benefit* from the transfer. [note: 165] The contextual approach to contractual interpretation was affirmed by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich*") at [114]. The Court of Appeal further explained that extrinsic evidence is admissible to assist in interpretation even if there is no ambiguity in the contract sought to be interpreted (*Zurich* at [115]). I would, however, caution against parties misusing, or indeed, abusing the authority of *Zurich* to distort the true interpretation of the contract at hand. The *Zurich* contextual approach is far from a *carte blanche* route to the admission of any and all extrinsic evidence to aid a party's interpretation of a contract. On the contrary, the *Zurich* contextual approach is to be applied in a cautious manner with strict adherence to the guiding principles laid out by the Court of Appeal. First, extrinsic evidence will *not* be admitted to *add to, vary or contradict* the contract (*Zurich* at [132b]). Second, extrinsic evidence would not be admitted to create a different interpretation *if the relevant contractual language was plain and unambiguous with reference to the existing facts* (*Zurich* at [116]). Finally, if a different interpretation from the plain language is to be accepted, the factual context of the contract *must be clear and obvious* (*Zurich* at [129]).

98 Mr Murugaiyan submits that the 1st SPA is silent as to whether the payments were paid to OAFL on its own right or on behalf of the plaintiffs. [note: 166] I disagree. On a plain reading of Clause 4.02(2), it seems clear that Aventi and OAFL were not meant to benefit from the receipt of the payments and the MEGL shares since both parties merely hold them "for and on behalf of" the plaintiffs. If Alwie wishes this Court to adopt an interpretation different from the plain language, the threshold requirement he must first satisfy is that the factual context of the contract should be clear and obvious.

99 Has he satisfied this threshold requirement? Far from it. As I have noted above at [25], the parties have provided scant details of the events surrounding the execution of the 4th Supplemental which introduced Clause 4.02(2) in its present form into the 1st SPA. Further, in the course of these proceedings, Alwie sought to rely on three vastly different factual matrices which he says constitute the factual context of the 1st SPA entitling him to retain the sum of US$2 million. The first factual matrix, relied upon in his closing submissions, centres around Tjong's earlier attempt to sell his shares in PT Batubara. [note: 167] According to Alwie, Tjong had purchased the PT Batubara shares from Ms Roosnawati and Mr Happy in August 2004 and was willing to sell them for a quick profit. [note: 168] Tjong then entered into an agreement with one Benny Tjokrosaputro ("Benny") for a loan of US$1 million with an option to purchase 67% of Tjong's shares in PT Batubara upon payment of a further US$7 million. [note: 169] The deal with Benny eventually fell through, [note: 170] and Tjong then approached Alwie for assistance to look for a buyer for the PT Batubara shares. Johanes and Alwie then structured the present sale on the basis that the plaintiffs would be paid US$6 million for 72% of the plaintiffs' shares in PT Deefu (which in turn owns 95% of the shares in PT Batubara) and the balance purchase price (whatever that amount might be) would be paid to both Johanes and Alwie to take steps to make the mining concession commercially viable. As such, the 1st SPA was drafted to allow for payment of US$2 million to be made to OAFL, of which Alwie was the sole shareholder and director, and payment of US$10 million to Aventi. [note: 171] Coincidentally, Richard Chan agreed with Alwie as regards the alleged true nature of the 1st SPA [note: 172] though he conceded that this was not reflected in the terms of the 1st SPA. [note: 173]

100 The second version of facts relied upon by Alwie as constituting the factual context of the 1st SPA is premised on a credit agreement dated 6 June 2006 that he entered into with Tjong (the "Credit Agreement"). [note: 174] I note that the existence of the Credit Agreement was first raised by Alwie in support of his application to set aside the injunction. He filed an affidavit dated 9 March 2010 alleging that he had disbursed a sum of US$3 million to Tjong pursuant to the Credit Agreement for the working capital requirements of PT Batubara to justify the payments and the MEGL shares received from Antig. [note: 175]

101 However, at the trial, Alwie acknowledged that his affidavit filed on 9 March 2010 to this effect was false in that he did not disburse the US$3 million or any other sum to Tjong. [note: 176] In his AEIC, he purported to present a completely different account of the Credit Agreement, claiming that it was drafted by his in-house counsel. [note: 177] He alleged that the Credit Agreement was prepared to protect his US$2 million entitlement because Tjong was at that time taking steps to sell the 72% share in PT Deefu at a higher price to other parties after concluding the 1st SPA with Antig. [note: 178] He claimed that Tjong was required to pay him US$3 million (an uplift of US$1 million) in the event that he was able to sell the shares to another party at a price higher than US$18 million. In my view, this is a fallacious allegation concocted by Alwie to mislead the Court. First, this is a complete departure from his earlier affidavit for the injunction hearing which he subsequently admitted to be

false. In other words, by his own admission, Alwie is capable of filing false affidavits to advance his case. Second, there is no provision in the Credit Agreement which refers to any uplift of an additional US$1 million in the event of a sale at a price above US$18 million. It seems illogical to prepare an agreement to protect Alwie's entitlement in the event of a contingency without specifying the alleged contingency. Third, Alwie's claim that the Credit Agreement was drafted by his in-house counsel (while intending to give it a veneer of respectability) makes it all the more unbelievable since that intention was not even remotely expressed in Credit Agreement. Finally, this case theory was not even raised in the defence in spite of two rounds of amendments, the latest being in August 2011.

102 As a result, the factual context which Alwie seeks to rely on is far from "clear and obvious", and therefore the threshold test laid down in *Zurich* is not satisfied. Hence, I find that Alwie is unable to rely on any extrinsic evidence to persuade this Court to adopt an interpretation of Clause 4.02(2) which is divergent from its plain meaning. In any event, as explained at [99] to [101] above, the so-called extrinsic evidence not only fails to support the defence, it also serves to further undermine Alwie's credibility.

103 On a plain reading of Clause 4.02(2), I find that the plaintiffs did not intend for Aventi and OAFL to retain the payments and the MEGL shares received from Antig for their own benefit. In fact, the language of Clause 4.02(2) points to the contrary. Further, there is absolutely no evidence to prove that the plaintiffs intended the payments and the allotments of MEGL shares as outright transfers to Aventi and OAFL. In fact, Richard Chan was compelled to concede in cross-examination that there is nothing on the face of Clause 4.02(2) which allows OAFL (Alwie) and Aventi (Johanes) to retain the payments and the MEGL shares in their own right. [note: 179] Alwie purported to establish that consideration was provided to the plaintiffs for the payments and the MEGL shares by relying on the Credit Agreement, which I have found to be completely fallacious. Finally, in an attempt to support Alwie's defence that the plaintiffs were only entitled to receive US$6 million out of the US$18 million purchase price, Gardy, who had previously worked for Tjong, testified that he had seen a clause in the 1st SPA stating that the plaintiffs were only entitled to US$6 million. [note: 180] I did not find Gardy to be a credible witness. If such a clause had existed in the 1st SPA, Alwie or Richard Chan would have produced it and that would have easily resolved the construction issue in respect of Clause 4.02(2) against the plaintiffs. Gardy also claimed that the plaintiffs had produced several drafts of the 1st SPA. He was however not able to explain why they have not been produced by Richard Chan or Alwie if such drafts existed. [note: 181]

104 No alternative construction of Clause 4.02(2) has been put forward by Aventi or Johanes given their non-participation at the trial. My finding is premised on the clear language of Clause 4.02(2). I cannot see what Johanes and/or Aventi could have said differently from Alwie that would have caused me to arrive at a different interpretation.

105 I should add that Mr Murugaiyan also submitted that since OAFL and Alwie are strangers to the 1st SPA, they cannot be saddled with the obligations to repay the payments and the MEGL shares which they had received from Antig pursuant to the 1st SPA. [note: 182] However, this argument is misplaced because the plaintiffs' claim based on money had and received is not a contractual claim under the terms of the 1st SPA. The plaintiffs are only seeking to rely on Clause 4.02(2) as evidence of the lack of entitlement of OAFL and Aventi to retain the payments, so as to establish their claims in money had and received.

Objective evidence in support of the construction of Clause 4.02(2)

106 There is also a body of objective evidence before this Court which is entirely consistent with

my finding that the plaintiffs had no intention to benefit Aventi and OAFL and that the entire purchase consideration is due to Tjong

107 First, Richard Chan provided the guarantee to Tjong stating that he "will personally guarantee a payment of US$18 million" to Tjong and "not through Aventi and OAFL". This is disputed by Richard Chan, who claims that the guarantee is forged. As will be elaborated below at [211] to [232], I find that Richard Chan did in fact provide the guarantee to Tjong. It follows, clearly, that the provision of the guarantee is, at the very least, an admission by Richard Chan that the plaintiffs are entitled to the entire purchase price of US$18 million. This is entirely consistent with my finding as regards the construction of Clause 4.02(2) and that the plaintiffs did not intend to benefit Aventi and OAFL with the payments and the MEGL shares received from Antig.

108 Second, Alwie also signed a letter dated 15 June 2006 in which he expressly acknowledged that he "will return the monies and shares received from [MEGL], and [Antig] to Tjong". [note: 183] When Alwie was cross-examined on this letter, he initially admitted that the signature found on the letter was his but claimed that his signature was purportedly lifted from another document. [note: 184] However, when confronted with his AEIC wherein he alleged that the signature on the letter was a forgery, [note: 185] he recanted his earlier answer and claimed that it was forged. [note: 186] Given Alwie's conflicting evidence on a matter clearly within his personal knowledge, I asked him to look at the signature carefully to clarify his answer. He paused for a few minutes before confirming that the signature on the letter was not his, *ie*, a forgery. [note: 187] Finally, although Alwie claims the signature on the letter was a forgery, I found it particularly disquieting that he did not ask his handwriting expert to support his evidence [note: 188] since he had already engaged the expert to comment on several other allegedly forged documents. Mr Murugaiyan submitted that the handwriting expert was not asked to comment on the 15 June 2006 letter because Alwie "is the best person to give evidence as to his own signature". [note: 189] Evidently, this was not the case since Alwie had initially admitted on the witness stand that the signature on the 15 June 2006 letter was his. In addition, there is at least one instance when he had admittedly provided false evidence (see [101] above). He is therefore capable of giving false testimony when it suits him. In light of his initial answer under cross-examination that the signature on the letter of 15 June 2006 was his, together with his inexplicable failure to secure the assistance of his handwriting expert to support his forgery claim, I find that Alwie has failed to prove that the letter of 15 June 2006 was a forgery. That being the case, the letter acknowledges that OAFL is *not* entitled to retain the payments and the MEGL shares from Antig. This is also entirely consistent with the clear language of Clause 4.02(2).

109 Third, Tjong relies on four letters dated 18 February 2005, 13 June 2006, 29 October 2007 and 12 November 2007 which he wrote to Antig and addressed to the attention of Richard Chan, in which he essentially sought to remind Antig to pay the entire purchase price of US$18 million to him instead of Aventi and OAFL. [note: 190] Richard Chan denies receiving the letters and claims that they were fabricated by Tjong. [note: 191] In addition, the plaintiffs also rely on a fax dated 13 May 2007 ("the 13 May fax"), which they claim was sent by Richard Chan to support their entitlement of the full purchase price. [note: 192] Not unexpectedly, this fax was also alleged by Richard Chan to be fabricated. [note: 193] Having heard the evidence at the trial, I am satisfied that the four letters (the 13 May fax is dealt with separately below) were not fabricated by Tjong and that they were in fact sent contemporaneously and received by Antig. I attach particular significance to the fact that each of the four letters which were translated from Bahasa Indonesia by a certified translator, Mr Hamid Ibrahim (who was also the sworn interpreter for the Indonesian witnesses at the trial) contained a date of the translation which preceded the commencement of the present action. These four letters

again support the plain meaning of Clause 4.02(2), *viz*, that the plaintiffs are entitled to the entire US$18 million and that Aventi and OAFL were never authorised to retain the payments and the MEGL shares.

110 The English translation of the 13 May fax (originally in Bahasa Indonesia including the handwriting at the top of the fax) reads: [note: 194]

> Very, there is one copy about PT. BESS still written by Noor, FYI ! Thanks
>
> I, the undersigned:
>
> Name: Tjong Very Sumito
>
> …
>
> Hereby declare and confirm:
>
> That the payment for the sale of 72% of PT Deefu Chemical Indonesia's shares to Antig Investments Pte. Ltd in the amount of USD 18,000,000 (eighteen million US dollars) which has been made to Aventi Holdings Ltd. and OAFL (Overseas Alliance Financial Ltd.) will be returned in the future to me personally and as the assignee of Iman Haryanto and Herman Aries Tintowo by virtue of power of attorney dated 9 June 2006 which they signed before Notary Arman Lany, SH.
>
> I made this Letter of Statement truthfully under no coercion in any form and from any party.
>
> Signed on May 13, 2007
>
> [signed]
>
> Tjong Very Sumito
>
> Approved by:
>
> [signed]
>
> Richard Chan

According to Tjong, this fax was prepared by one Ms Noor Meurling ("Noor") of Soebagjo, Jatim, Djarot & Partners ("SJD"), a lawyer retained by Antig in Indonesia to handle matters in connection with the 1st SPA. [note: 195] Tjong claims that Noor had passed a copy of this fax for him to sign, and that after signing it he returned it to Noor before it was faxed back to Tjong. Tjong initially said that it was MEGL which had faxed it to him but later said that it was faxed over from Noor: [note: 196] I note that the header on the face of the 13 May fax, which reads "13 May 2007 4:52PM MAGNUS ENERGY", suggests that it was faxed by MEGL on 13 May 2007. However, Richard Chan denies having faxed this document to Tjong. [note: 197] While Tjong maintains otherwise, [note: 198] he claims that he has not been able to find the original fax. [note: 199] Tjong further says that when he received the 13 May fax, Richard Chan had already signed on the document and had written the words at the top of the fax. [note: 200] While Richard Chan accepts that the handwriting at the top of the 13 May fax and the signature were indeed his (after some hesitation), [note: 201] he nonetheless claims that the

signature was fabricated. [note: 202]

111 In challenging the authenticity of the 13 May fax, Richard Chan says that his signature was lifted from a cancelled payment voucher dated 6 September 2005 (the "Cancelled Payment Voucher"). [note: 203] Richard Chan relies on the evidence of Mr Yap Bei Sing ("Mr Yap"), a Consultant Forensic Scientist of the Health Sciences Authority who was called as an expert witness for Richard Chan, Alwie and Susiana. Mr Yap's evidence is that the signature of Richard Chan found on the 13 May fax as well as that found on the Cancelled Payment Voucher are "almost identical and superimposable in respect of the formation, relative positioning and spacing of strokes and the baseline between them". Mr Yap thus concluded that the signature found on the 13 May fax "was reproduced with an enlargement in size from the specimen signature of Richard Chan" found on the Cancelled Payment Voucher. [note: 204] I note that Mr Yap's evidence on this point was not challenged by the plaintiffs. [note: 205] I also observe that the strokes of Richard Chan's signature as well as the position of his signature relative to the signature line on the 13 May fax do bear an uncanny similarity to Richard Chan's signature on the Cancelled Payment Voucher. However, I am not satisfied that Richard Chan has discharged the high burden of proof to establish that the 13 May fax was fabricated by Tjong. The fabrication could only have been done by a person with possession of the Cancelled Payment Voucher. The logic of this premise was accepted by Mr Yap in cross-examination. [note: 206] There is however no evidence that the plaintiffs, in particular, Tjong was ever provided with a copy of the Cancelled Payment Voucher. There is also no rational reason why a copy would have been provided to Tjong in any event. If so, how could Tjong have fabricated the 13 May fax? In fact, Mr Yap rightly conceded that since Richard Chan had possession of the Cancelled Payment Voucher, he himself could have reproduced the signature from the Cancelled Payment Voucher onto the 13 May fax. [note: 207] I am however not making any finding that the reproduction was done by Richard Chan.

112 Further, there is no dispute that the handwriting at the top of the 13 May fax was Richard Chan's. When asked why there was a necessity for the 13 May fax to come into existence with his handwritten remarks, all Richard Chan could say was that the 13 May fax was fabricated, without more. [note: 208] Further, he testified on the witness stand as well as in his AEIC that his original signature on the Cancelled Payment Voucher was in *blue* ink. [note: 209] I then asked for the original to be produced and "lo and behold" it was in *black* ink instead. [note: 210]

113 In the premises, Richard Chan has failed to satisfy this Court that the signature on the 13 May fax was lifted by Tjong from the Cancelled Payment Voucher. In fact, the 13 May fax lends further support to the plaintiffs' claim that they are entitled to the full purchase price and is entirely consistent with the provision of the guarantee by Richard Chan.

114 Fourth, the suspicious manner in which the sum of US$5.7 million was purportedly prematurely *paid* on the written and/or oral instructions of Aventi also points to Richard Chan's complicity with the fact that Aventi and OAFL were not authorised to retain the payments or the MEGL shares, and that Richard Chan was told by Tjong not to make the payments to Aventi and OAFL and had given the assurance to Tjong following receipt of the four letters.

(a) Under the 1st SPA, the sum of US$5.7 million which Antig is required to pay to Aventi (who is authorised to receive the payments for and on behalf of the plaintiffs) was payable in two tranches, the first amount being US$2 million within 12 months from the completion date *ie*, 13 June 2007 and the second amount being the balance of US$3.7 million within 24 months from the completion date *ie*, 13 June 2008. Richard Chan agreed under cross-examination that any payment instructions must come from the plaintiffs since, legally, the entire purchase price

belonged to the plaintiffs. [note: 211]

(b) Antig, through MEGL, purportedly acted on the written instructions of Aventi by letter dated 20 July 2006 in issuing a cheque in favour of Credit Agricole for the discounted sum of US$1.88 million, instead of US$2 million, in consideration of early payment. [note: 212] The letter (without any letterhead, address, *etc*.) was addressed to Richard Chan as the Managing Director of MEGL. Apart from the fact that this "discount" was extended on the instructions of Aventi, a non-party to the 1st SPA, it was done without the knowledge or approval of the plaintiffs, who were the contracting parties to whom the entire purchase price was due. However, in an email dated 7 June 2006, Richard Chan represented to the Chief Financial Officer of MEGL that the instructions to pay to Credit Agricole came from the plaintiffs and that the accounts in Credit Agricole belonged to the plaintiffs. [note: 213] Under cross-examination, he agreed that both representations set out in the email to MEGL were false. [note: 214]

(c) MEGL issued a statement dated 13 November 2007 that Antig had acceded to Aventi's request for early payment of the balance US$3.7 million. [note: 215] In fact, by an email dated 28 September 2007, Richard Chan represented to MEGL that he had received such a request from Aventi. A discount of 5.6% was agreed by Aventi and a sum of US$3,492,800 was purportedly released to Aventi in September 2007 instead of the due date of 13 June 2008. Richard Chan, who testified that MEGL and Antig would always insist on written instructions for early payment, was however not able to produce any such written instructions in respect of the US$3.7 million payment. Further, to-date, no evidence has been produced to prove that the discounted sum of US$3,492,800 was in fact paid to Aventi other than the statement issued by MEGL. While it is highly suspicious that MEGL and/or Antig would agree to early payment against a discount without any written instructions from even Aventi, the indisputable fact remains that Antig acceded to the early request for a discounted payment, at best, on the oral instructions of a non-party, Aventi, without the knowledge and approval of the plaintiffs. Richard Chan again admitted in cross-examination that this discounted payment was not in accordance with the 1st SPA. [note: 216] This highly unusual arrangement must be contrasted with the strict manner in which payments were released to Tjong. Every payment received by Tjong was preceded by a written request prepared for him to sign even though he was a party to the 1st SPA [note: 217] but Antig and MEGL seem to be content to accept the oral instructions of a non-party whom Richard Chan, their MD, shockingly claims not to have personally dealt with in connection with the 1st SPA. [note: 218]

(d) The highly irregular *early* discounted payments purportedly on the instructions of Aventi must also be contrasted with the *late* payments to Tjong in respect of a much smaller sum of US$2.8 million. [note: 219]

(e) As it was apparent to Antig, and therefore Richard Chan, that Aventi was only authorised to receive the payments for and on behalf of the plaintiffs, it must have been plain and obvious to Richard Chan that early discounted payment, which is tantamount to a variation of the payment terms of the 1st SPA, could not have been made without the concurrence of the plaintiffs. This much was admitted by Richard Chan. [note: 220] That early discounted payments had been made without Tjong's knowledge is also consistent with the fact that Richard Chan did not want Tjong to know that payments had been made to OAFL, and purportedly to Aventi, in spite of his assurance to Tjong that he, through Antig, would not do so.

(f) Finally, both early payments were not made directly to Aventi. Instead, they were paid to

Credit Agricole without specifying the account holder (see [45] to [46] above). Why would Antig and Richard Chan risk paying substantial sums to Credit Agricole when such payments were not in strict compliance of the 1st SPA, either as to time or payee? Mr Gabriel sought to suggest that it was because Richard Chan was the ultimate beneficiary of the payments to Credit Agricole. However, as stated in [47] above, this has not been pleaded and, in any event, there is no satisfactory evidence before this Court as to who is the ultimate owner of the Credit Agricole account. Speculative submission by the plaintiffs would not suffice.

(g) Finally, I think it is apt at this juncture to comment on the conduct of the plaintiffs in commencing the Antig Suit against Antig for the sum of US$3.7 million on 20 May 2008, shortly prior to the contractual due date of 13 June 2008. Richard Chan says that if the plaintiffs believe that the balance purchase price due to them was about US$12 million as they are now claiming in this action, there can be no conceivable reason for them to file a claim for just US$3.7 million in the Antig Suit. [note: 221] Tjong explained in cross-examination that the amount claimed in the Antig Suit was filed on the advice of his then solicitors to obtain an injunction to stop Antig from making the payment of US$3.7 million to Aventi. [note: 222] It is at least clear that when the Antig Suit was brought, the plaintiffs were completely oblivious to the fact that Antig had some seven months ago paid a discounted sum of US$3,492,800 to Credit Agricole purportedly on the written instructions of Johanes. In fact, when the plaintiffs' solicitors wrote a letter of demand dated 9 April 2008 to Antig for the payment of the US$3.7 million, [note: 223] there was no response from Antig stating that the payment had already been made. Viewed in this context, I do not regard the amount claimed in the Antig Suit as a reflection of the plaintiffs' recognition or admission that they are not entitled to the entire balance purchase price. It was instituted for the specific purpose of stopping the payment of a specific sum which was due at that time. Finally, in the letter of demand dated 9 April 2008, the plaintiffs' then solicitors specifically stated that "[n]o admission is made that the total consideration of US$18 million has been satisfied". [note: 224]

115 Fifth, the sum of US$500,000, which Alwie accepted was received by OAFL, was in fact paid in two tranches; the first for the sum of US$93,396.62 on 26 January 2006 and the second for the sum of US$406,603.38 on 16 June 2006. This revelation only emerged during the cross-examination of Richard Chan who claimed that the first sum of US$93,396.62 was advanced to OAFL to meet the costs and expenses incurred on behalf of the plaintiffs. [note: 225] This advance was admittedly made without the prior authorisation of the plaintiffs. [note: 226] There is also no claim by OAFL against the plaintiffs for reimbursement of these expenses allegedly incurred on their behalf. If so, by such conduct, both Alwie and Richard Chan implicitly accepted that the payments were due to and for the benefit of the plaintiffs, and not Aventi or OAFL.

116 Finally, I also find it to be extremely bizarre that Richard Chan is of the same mind with Alwie on the construction of Clause 4.02(2). If it had been the plaintiffs' intention for Aventi and OAFL to retain the payments and the MEGL shares in their own right, that intention could, and should, have been expressly stated in the 1st SPA, which was drafted by lawyers instructed by MEGL/Antig. Richard Chan went so far as to testify that there had been, from "Day 1", three groups of vendors (*ie*, the plaintiffs, Aventi and OAFL). Yet, inexplicably, only the plaintiffs were identified as the vendors under the 1st SPA. [note: 227] Further, Clause 4.02(2) makes it clear that the entire purchase price is *due to the plaintiffs* and further states that Aventi and OAFL are merely "authorised to receive the same for and on behalf of" the plaintiffs. Not only is there a complete absence of any provision in the 1st SPA to the contrary, the insertion of Clause 4.02(2) is entirely consistent with the usual expectation that as vendors, the plaintiffs are indeed entitled to receive the entire purchase

price.

117 To give false credence to Aventi and OAFL's entitlement to the payments and the MEGL shares, MEGL issued a shareholders' circular dated 14 October 2005 over SGXNet stating that Johanes and Alwie were the plaintiffs' creditors "from whom the [plaintiffs] acquired all the issued shares of PT Deefu". [note: 228] This announcement was made to explain the reasons why Aventi and OAFL were authorised to receive the payments and MEGL shares on behalf of the plaintiffs. This announcement, which sought to create a creditor-debtor relationship between the plaintiffs, Aventi and OAFL on the basis that the plaintiffs' shares in PT Deefu were in turn acquired from Johanes and Alwie, was patently false since Johanes and Alwie were never owners of the shares in PT Deefu. This was accepted by Richard Chan, although he sought to present it as an "honest inadvertent error" in his defence and AEIC. [note: 229]

118 I will deal with this alleged "honest inadvertent error" separately below when I consider the claim in fraudulent misrepresentation and under the guarantee (see [190] to [194] and [228] to [230] below). In the meantime, suffice it to say that the "false" announcement by MEGL raises the question as to why MEGL or Antig and/or Richard Chan should be so concerned about the ultimate beneficiaries of the payments and the MEGL shares beyond the clear language of Clause 4.02(2). There is no doubt in my mind that Richard Chan was responsible for the fraudulent misrepresentation that Aventi and OAFL were the original shareholders of PT Deefu. He was referred to an email dated 15 January 2006 where he informed MEGL that Tjong *and* Alwie were *both* shareholders of PT Deefu. When confronted with the email, Richard Chan was unable to explain why he had wrongly informed MEGL about Alwie's alleged status as a shareholder. [note: 230] As purchasers, Antig must ensure that the entire purchase price is paid in strict conformity with the 1st SPA. It is pertinent to highlight that it is not Richard Chan's case that Antig had fulfilled its obligation under the 1st SPA by simply making payments to Aventi and OAFL in accordance with Clause 4.02(2). Instead, it is Richard Chan's positive case, notwithstanding the clear language of Clause 4.02(2) to the contrary, that Aventi and OAFL are entitled under Clause 4.02(2) to retain the payments and the MEGL shares in their own right as Johanes and Alwie were "creditors" of the plaintiffs. [note: 231]

119 By his own admission, Richard Chan has no personal knowledge of the alleged circumstances which purportedly gave rise to the alleged creditor relationship. [note: 232] Under cross-examination, this allegation by Richard Chan morphed from creditors of Tjong to creditors of PT Deefu. [note: 233] Why would MEGL, Antig and Richard Chan go to such lengths to create a false impression of a fictitious creditor relationship when it should simply be their task to pay the plaintiffs the entire purchase price in accordance with Clause 4.02(2)? In my view, the false SGXNet announcement, as well as the false testimony of Richard Chan, acknowledges that Aventi and OAFL were not intended, under the 1st SPA, to retain or benefit from the payments and the MEGL shares. That was precisely the reason why a false explanation had to be presented in order to justify the payments and the allotment of MEGL shares to them. Further, Richard Chan also accepted that in the SGXNet announcement, the MEGL shares were described to have been allotted to Aventi and OAFL as the plaintiffs' *nominees*. [note: 234] That constitutes a further acknowledgment by MEGL, Antig and Richard Chan that the entire purchase price comprising the payments and MEGL shares were always rightfully due to the plaintiffs from the outset.

Conclusion on money had and received

120 It is clear, based on the plain meaning of Clause 4.02(2), that OAFL has no authority to retain the payments made to it under the 1st SPA. This constitutes the relevant unjust factor required to

establish the money had and received claim. As observed in *Goff & Jones* at paras 8-01 – 8-02, the want of authority to retain money constitutes an unjust factor where:

> [A] defendant, D, obtains an enrichment by immediate transfer from a claimant, C, in *circumstances* where C did not consent to the enrichment. It is also common for a defendant, D, to obtain an enrichment from a claimant, C, more remotely, as a result of the actions of a third party, X, which were neither authorised nor consented to by C...
>
> *Where X holds assets subject to duties and powers to deal with them for C's benefit, and acts within his authority, C will have no remedy. But where X acts outside his authority, his "want of authority" will itself constitute a sufficient ground for recovery by C.*
>
> [emphasis added]

121 As OAFL and/or Alwie have not pleaded any defences to unjust enrichment, it is not necessary for me to examine and discuss the same. Before I leave this section of the Judgment, I should make some observations about the credibility of Richard Chan. From my assessment of the evidence, I found him to be an exceptionally untruthful witness. On many occasions, he had to concede to numerous falsehoods in his AEIC, his earlier interlocutory affidavits, his oral testimony, and even in representations made to the SGX (see, for example, [25] and [117] to [119] above, [229] to [230] and [268] below). When confronted with unfavourable documents, his default response is typically to allege either forgery or fabrication even in respect of documents in the Agreed Bundle (see, for example, [109] to [113] above and [268] below). He contradicted himself on numerous occasions. This finding will be particularly relevant when I deal with the claims against Richard Chan, especially under the guarantee (at [211] to [264] below).

122 In the circumstances, I have no hesitation to find that the plaintiffs are entitled to recover the sum of US$550,000 from OAFL and/or Alwie as money had and received.

Resulting Trust

123 The plaintiffs claim, alternatively, that Aventi, OAFL, Alwie and Susiana hold the payments and the MEGL shares on a resulting trust for their benefit. [note: 235] They claim that there was no legitimate reason for these various payments and allotments of shares, which were not intended as gifts. [note: 236] The resulting trust claim is founded on the same factual matrix as the claim under money had and received. The question, therefore, is whether those same facts can make out a case for resulting trust.

124 Obviously, the legal ingredients of a resulting trust, and the elements required for the gestation of a resulting trust, are quite different from that of money had and received. Indeed, the *subject-matter* of each claim is also quite different: while the claim under money had and received only encompasses the payments, the resulting trust claim encompasses *both the payments and the MEGL shares*. To be clear, the plaintiffs' resulting trust claim relates to the following defendants and subject-matter:

(a) As against Richard and/or Alwie, the sum of S$334,429.20;

(b) As against Aventi, the sum of US$5.7 million and 124,856,364 MEGL shares;

(c) As against OAFL and/or Alwie, the sum of US$550,000 and 42,102,727 MEGL shares; and

(d) As against Susiana, the sum of US$157,525.

As discussed (at [78] above), head (a) can only be pursued against Alwie since I found that the payment of S$334,429.20 had been received by him, and not Richard Chan. Further, head (b) can only be pursued in relation to the 124,856,364 MEGL shares since the evidence does not show that Aventi had received the payment of US$5.7 million (see [45] above).

125 I invited the parties to tender further submissions to address the legal ingredients of a resulting trust, especially in a situation where the party seeking to rely on resulting trust is not the transferor of the legal title to the property.

126 Having examined the further submissions and the authorities, I am not persuaded that the resulting trust doctrine may be stretched to apply to the payments and the MEGL shares in the present sale-and-purchase context. I will explain why this is so.

The law

127 I had occasion recently in *Tee Yok Kiat and another v Pang Min Seng and another* [2012] SGHC 85 to consider this area of the law. I referred to Lord Browne-Wilkinson's dictum in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 ("*Westdeutsche*") at 708, where he described the two classic situations which could give rise to a resulting trust:

> Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a *voluntary payment* to B *or pays (wholly or in part) for the purchase of property which is vested* either *in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer*: see Underhill and Hayton pp 317ff, *Vandervell v IRC* [1967] 1 All ER 1 at 8, [1967] 2 AC 291 at 312ff and *Re Vandervell's Trusts (No 2), White v Vandervell Trustees Ltd* [1974] 1 All ER 47 at 63ff, [1974] Ch 269 at 288ff.
>
> (B) Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest: *ibid* and *Barclays Bank Ltd v Quistclose Investments Ltd* [1968] 3 All ER 651, [1970] AC 567. Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention.
>
> [emphasis added]

The above passage was cited with approval by the Court of Appeal in *Lau Siew Kim v Yeo Guan Chye Terence and another* [2008] 2 SLR(R) 108 ("*Lau Siew Kim*") at [34].

128 In the present case, the payments and the MEGL shares were not the subject of an express trust. Therefore it is only necessary to consider the doctrine of *a presumed resulting trust.* As the Court of Appeal explained in *Lau Siew Kim* (at [35]), citing Chambers, *Resulting Trusts* (Clarendon Press, Oxford, 1997) at p 32:

> The facts which give rise to the presumption of resulting trust are (i) a transfer of property

to another, (ii) for which the recipient does not provide the whole of the consideration. The facts which give rise to the resulting trust itself are (i) a transfer of property to another, (ii) in circumstances in which the provider does not intend to benefit the recipient.

Robert Chambers has quite appropriately highlighted two essential points: first, that the lack of consideration required for the presumption is *not* a requirement for the resulting trust; and second, that the lack of intention to benefit the recipient required for the resulting trust is precisely the fact being inferred when the presumption is applied. It is thus apparent that a resulting trust may arise independently of the presumption so long as it can be shown that the transfer was not intended to benefit the recipient; and, in a similar vein, a resulting trust may not *necessarily* arise *even if* there was no consideration, if it can be shown that the transfer was *indeed* intended to benefit the recipient.

[emphasis added]

129 Before I consider the applicability of the *Westdeutsche/Lau Siew Kim* principles, the unique, and indeed peculiar, factual circumstances of the present case require me to first discuss general equitable principles. Traditionally, in a vendor-purchaser relationship, beneficial interest in the object of sale vests in the purchaser upon entering into a valid contract of sale (*Lysaght v Edwards* (1876) 2 Ch D 499 ("*Lysaght*")). Although the *locus classicus* of this equitable doctrine principally concerned contracts for the sale of land, it is now settled law that such a trust can also arise over personalty, such as shares (*Oughtred v IRC* [1960] AC 206; *Neville v Wilson* [1997] Ch 44). This trust is said to be constructive (see David Fox, *Snell's Equity* (Sweet & Maxwell, 32nd Ed, 2010) at para 24-004, citing *Shaw v Foster* (1872) LR 5 HL 321 at 349, 356). It is crucial to bear in mind that this vesting of beneficial interest operates *unilaterally*: while beneficial interest of the property is vested in the purchaser, beneficial interest in the *purchase money* does not simultaneously vest in the vendor. Instead, the vendor's entitlement to the purchase money is protected by a vendor's lien over the property to ensure payment.

130 In the present case, the plaintiffs are not in a traditional *Lysaght* vendor-purchaser trust situation. Instead, the plaintiffs are *the vendors* of the PT Deefu shares, and not *the purchasers* of the payments and the MEGL shares. It is odd to speak of the plaintiffs as purchasers of the payments. Instead, the payments and the MEGL shares represent the purchase consideration for 72 percent of the PT Deefu shares which is the subject matter of the sale under the 1st SPA. As a matter of doctrinal orthodoxy, the traditional *Lysaght* analysis requires that the vesting of beneficial interest operate *unilaterally*, *ie*, only the beneficial interest in the PT Deefu shares vests in Antig upon entering into the 1st SPA, and the beneficial interest in the payments and the MEGL shares do *not* simultaneously vest in the plaintiffs.

131 In the vendor-purchaser context, the presumed resulting trust doctrine typically applies where the purchaser under the contract of sale *does not provide full consideration* and where the consideration (or part thereof) is paid by a third party. In such a situation, the beneficial interest in the property vests in the person who had provided the consideration (unless it can be shown that he had intended to benefit the purchaser). This is illustrated in *Peh Eng Leng v Pek Eng Leong* [1996] 1 SLR(R) 939 ("*Peh Eng Leng*"), where the Court of Appeal held that there was a presumed resulting trust in favour of the plaintiff, who had provided the whole of the consideration for the purchase of a property, although he was not party to the contract of sale and equally not the transferor of the property. Mr Gabriel, in citing *Peh Eng Leng*, is correct that a resulting trust can arise even where the party seeking to rely on it was not the transferor of the property. However, it is important to recognise that by paying the purchase price, the appellant in *Peh Eng Leng* acquired *beneficial* title to

the property. Therefore, when legal title was directly transferred to the respondent by the original owner of the property, beneficial title was not conveyed to the respondent. Unfortunately for the plaintiffs, they never had the beneficial interest in the payments and the MEGL shares at the time when the PT Deefu shares were sold under the 1st SPA. The plaintiffs' invocation of the resulting trust doctrine is therefore flawed. It bears reiteration that the resulting trust doctrine *does not effect, but gives effect to*, the beneficiary's equitable interest. In the circumstances, allowing the plaintiff's claim for a resulting trust over the payments and/or the MEGL shares would effectively be putting the *equitable* cart before the *proprietary* horse.

132 It is necessary to examine why the *Lysaght* vendor-purchaser trust and the presumed resulting trust only operate unilaterally to vest beneficial interest in the property which is the object of sale. It must first be borne in mind that the *Lysaght* vendor-purchaser trust and the presumed resulting trust share a common, and *essential*, feature: both trusts crystallise *at the time the property is acquired, or when the contract of sale is entered into* (*Lysaght* at 506, *Lau Siew Kim* at [112]).

133 At this material time, the *only identifiable subject-matter of a trust* is the property which is the object of sale (usually, real property). No trust can arise with respect to the purchase money because it was not segregated from the purchaser's general patrimony (*In re Andrabell Ltd* [1984] 3 All ER 407 at 415-416). Even in *Hunter v Moss* [1993] 1 WLR 934, the court held that a trust could only be created over "a specific sum of money forming part of a larger credit balance in a particular bank account" (at 940). By extension, a resulting trust, which arises by operation of law, cannot latch on to the purchase money unless they are held in a specific account in escrow. As such, the vendor remains a *creditor* rather than a *beneficiary*, albeit his entitlement to the purchase money is protected by the vendor's lien. In the present case, no resulting trust could have arisen with respect to the purchase consideration at the material time when the PT Deefu shares were acquired by Antig or when the 1st SPA was concluded. First, the payments were not segregated or identified from Antig's (or MEGL's) general patrimony. No escrow account was created for the payments under the 1st SPA. Second, and *a fortiori*, no resulting trust could have arisen with respect to the MEGL shares which, at the material time, *did not even exist* since they were new allotments by MEGL after completion of the 1st SPA.

Conclusion on resulting trust

134 In the circumstances, I am constrained by the limitations of the resulting trust doctrine to find that no resulting trust can arise in favour of the plaintiffs with respect to the payments and the MEGL shares. This does not, however, mean that Richard, Alwie, Aventi, OAFL and Susiana were entitled to the payments or the MEGL shares. As explained above, OAFL remains accountable to the plaintiffs in money had and received *vis-à-vis* the payments (see [78] – [122] above). They are also liable for conversion of the MEGL shares (see [135] – [161] below).

Conversion

135 The conversion claim is restricted only to the MEGL shares. The first, and fundamental, question is whether the plaintiffs have standing to sue for the common law tort of conversion. Having established *locus standi*, the plaintiffs would then have to show that there has been deliberate conduct on the part of Aventi and OAFL inconsistent with the plaintiffs' possessory rights, and that such conduct was so extensive an encroachment on the plaintiffs' rights as to exclude them from use and possession of the MEGL shares (*Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 ("*Orix Leasing*") at [92]).

136 The plaintiffs claim that Aventi and/or Johanes are liable in conversion for unlawfully, and without the plaintiffs' consent, taking into their possession the allotment of the 124,856,364 MEGL shares. [note: 237] Alternatively, they claim that those shares were converted when Aventi sold them without the plaintiffs' consent. [note: 238] In the case of OAFL and/or Alwie, although the plaintiffs have merely pleaded that OAFL and/or Alwie have taken into their possession the 42,102,727 MEGL shares allotted to them under the 1st SPA [note: 239], it transpired during the trial, through Alwie's admission, the MEGL shares have since been sold. [note: 240] Assuming that standing is not an issue, conversion would be made out since Aventi and OAFL who were to hold the shares for and on behalf of the plaintiffs had, by withholding and selling the shares, clearly acted inconsistently with the plaintiffs' rights (*Orix Leasing* at [45]).

Locus standi

137 To satisfy the court that they have standing, the plaintiffs must establish that at the material time, they had either actual possession or a right to immediate possession of the MEGL shares. Having title to the property concerned does not necessarily mean having a right to immediate possession, and hence, a right to sue for conversion (see, for example, *The Cherry* [2003] 1 SLR 471 at [58] and *Orix Leasing* at [49]). Similarly, a person who merely has an equitable right in the property without possession would not have standing to sue for conversion (*MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675 at 691). The centrality of the concept of possession to the law on conversion was aptly put by Professor Michael G. Bridge in *Personal Property Law* (Oxford University Press, 3rd Ed, 2002) at pp 62 – 63:

> [T]he common law failed to develop a sophisticated concept of ownership of personalty. The place of ownership was occupied by possession, which had the consequence that the protection of property interests was left to the law of tort…Conversion, a tort concerned with the protection of ownership, lay therefore at the behest of those in possession of the chattel at the time of the wrongful act and was later extended, because of the limitations of possession, to those with a right to immediate possession. Despite assertions sometimes made to the contrary, it does not as such lie in favour of those with an equitable interest in chattels.

138 Unfortunately, the submissions by Mr Gabriel and Mr Murugaiyan focussed on the question of *ownership* of the MEGL shares, and omitted to address the Court on whether the plaintiffs had any *possessory interest* in the MEGL shares. Mr Gabriel, in his initial submissions, simply assumed that if the plaintiffs are entitled to the MEGL shares, it follows that the sale of the shares by Aventi and OAFL must necessarily constitute conversion. This is, however, incorrect. On 29 May 2012, I invited Mr Gabriel and Mr Murugaiyan to address this issue as they only concerned the plaintiffs, OAFL and/or Alwie (Johanes and Aventi are not before this Court). Both counsel eventually filed submissions on this issue on 4 June 2012, and I now set out my findings with the benefit of their further submissions.

139 It is quite clear that the plaintiffs never had actual possession of the MEGL shares because the shares were issued by MEGL directly to Aventi and OAFL. Did the plaintiffs, nonetheless, have a right to immediate possession? Mr Gabriel argues in further submissions that they did, and that such right to immediate possession was borne out in two ways. First, he argues that Aventi and OAFL were *bailees* of the MEGL shares, and that when they sold the MEGL shares without the knowledge or consent of the plaintiffs who were bailors, they had committed an act repugnant to the terms of the bailment such that the right to immediate possession of the shares had thereby re-vested in the plaintiffs. [note: 241] Second, Mr Gabriel argues that Aventi and OAFL received the MEGL shares as *agents* of the plaintiffs, giving the plaintiffs the immediate right to demand delivery of the shares to

them, and thus, vesting in them the right to immediate possession. [note: 242] I will deal with each argument in turn.

Bailment

140 In the plaintiffs' further submissions filed on 4 June 2012, they asserted that Aventi and OAFL were mere bailees holding the MEGL shares for them, and when Aventi and OAFL sold the MEGL shares without their knowledge or consent, they had committed an act which was repugnant to the terms of the bailment such that the right to immediate possession of the shares re-vests in the plaintiffs. [note: 243]

141 A bailment relation is founded exclusively on one person's voluntary possession of goods which belong to another (*The Pioneer Container* [1994] 2 AC 324 at 342). Thus, the old requirement in law that a bailment involves a delivery of goods from the bailor to the bailee is no longer strictly necessary (*Palmer on Bailment* (Sweet & Maxwell, 3rd Ed, 2009) at para 1-023). In this connection, the plaintiffs have pleaded that Aventi and OAFL had received the MEGL shares which are rightfully due to them. [note: 244] The fact that Aventi and OAFL took possession of the MEGL shares is clearly borne out by the objective evidence (see [44] and [49] above).

142 In a bailment for a fixed period of time, termination of the bailment would occur upon expiry of the term. However, there is no time period prescribed for the bailment between the plaintiffs and Aventi and OAFL. There is also no clause in the 1st SPA entitling the plaintiffs to determine the bailment. Under the common law, a bailment is terminated and the right of possession to the bailed property re-vests in the bailor if the bailee behaves in a manner that is utterly repugnant to the terms of the bailment (*Orix Leasing* at [52]). In order to deprive the plaintiffs of their common law rights as bailors, "very clear language" must be specified in the 1st SPA (*Union Transport Finance Ltd v British Car Auctions Ltd* [1978] 2 All ER 385 at 390). There is no such provision in the present case.

143 It is clear to me that Aventi and OAFL, as bailees of the MEGL shares, had acted in a manner utterly repugnant to the terms of the bailment when they, who have not proven their entitlement to retain the MEGL shares in their own right, sold the MEGL shares. From the evidence, Aventi had sold at least 100 million of the 124,856,364 MEGL shares allotted to it. [note: 245] As for the shares allotted to OAFL, Alwie testified that he has since sold them. [note: 246] Hence, at the point of selling the MEGL shares, Aventi and OAFL had terminated the bailment and the right to immediate possession of the shares had thereby re-vested in the plaintiffs, conferring on them the legal standing to sue for conversion.

Agency

144 Mr Gabriel also submits that Aventi and OAFL had received the payments and the MEGL shares under the 1st SPA as agents of the plaintiffs and are bound to pay over or account for them to the plaintiffs. This, Mr Gabriel says, gives the plaintiffs a right to immediate possession of the MEGL shares. [note: 247] Mr Gabriel's submissions did not specifically address this Court on whether an agency relationship was created between the plaintiffs and Aventi and OAFL, and how that is to be reconciled with Tjong's seemingly contradictory factual assertions.

145 An agency is the fiduciary relationship that arises when one person, the principal, manifests assent to another person, the agent, that the agent shall act on the principal's behalf and be subject

to the principal's control, and the agent manifests assent or otherwise consents so to act (Professor Tan Cheng Han SC, *The Law of Agency* (Academy Publishing, 2010) ("*Tan Cheng Han*") at para 01.006, citing with approval the *Restatement of Law Third, Agency*; see also *Bowstead & Reynolds on Agency* (Sweet & Maxwell, 19th Ed., 2010) ("*Bowstead & Reynolds*") at para 1-003 to para 1-005). Thus, the two core elements of an agency relationship appear to be (a) consent of both the principal and agent; and (b) authority conferred or power granted to the agent to legally bind the principal (*Tan Cheng Han* at para 01.007 to para 01.019). The concomitant duties of an agent are only triggered by the power and authority granted to him by the principal.

146 Subject to a few exceptions (as when agency arises by operation of law) and qualifications (*eg*, where there is retrospective ratification of a purported agent's act), the essence of agency is the consent of the principal and the agent (*Garnac Grain Co Inc v HMF Faure and Fairclough Ltd* [1968] AC 1130 ("*Garnac Grain*") at 1137 *per* Lord Pearson (applied in *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd and another* [1999] 2 SLR(R) 24 at [23]); see also *Tan Cheng Han* at para 01.007 to para 01.010). At first blush, the plaintiffs seem to suggest that they had not consented to making Aventi and OAFL their agents under the 1st SPA. After all, it is their case that Tjong, who acted for himself, Iman and Herman during the negotiations of the 1st SPA, [note: 248] had "no dealings with or knowledge of Aventi and OAFL". [note: 249] Further, Tjong stated in his AEIC that he was told by Richard Chan and Alwie that any money paid or MEGL share allotted to Aventi and OAFL would only be done upon his written authorization. [note: 250] It was also Tjong's evidence that no such authorization had been given by him, and that he had in fact instructed Antig not to pay anything to Aventi and OAFL. [note: 251]

147 However, as I have observed above (at [26]), the words "for and on behalf of the [plaintiffs]" were added to Clause 4.02(2) and the parties are bound by it. It is Richard Chan's evidence that those words were added after all parties in the negotiation had agreed to the amendment. [note: 252] In any case, the plaintiffs had also signed the 4th Supplemental, thereby signaling their consent to appoint Aventi and OAFL as their agents to receive the payments and the MEGL shares. As observed by Lord Pearson in *Garnac Grain* at 1137:

> The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, *even if they do not recognise it themselves and even if they have professed to disclaim it*, as in *ex parte Delhasse*. But the consent must have been given by each of them, either expressly or by implication from their words and conduct.
>
> [emphasis added]

148 Mr Gabriel relies on the language of Clause 4.02(2) to say that Aventi and OAFL had authority to receive the payments and the MEGL shares. [note: 253] I have dealt at length with the interpretation of Clause 4.02(2) which clearly states that while the payments and the MEGL shares to be paid and allotted under the 1st SPA are rightfully due to the plaintiffs, Aventi and OAFL were authorized to *receive* the payments and the MEGL shares though not to beneficially retain the same (see [96] to [104] above).

149 I am satisfied that the plaintiffs have a right to immediate possession of the MEGL shares because Aventi and OAFL, in receiving the payments and the MEGL shares on behalf of the plaintiffs, have a duty to account to the plaintiffs *qua* agent, and must hand over such property "on demand"

(*Blaustein v Maltz, Mitchell & Co* [1937] 2 KB 142 at 156; see also *Nickolson v Knowles and Others* (1820) 56 ER 812 and Bowstead & Reynolds at para 6-099). This was also recognized by the court in *Edgell v Day* (1865) LR 1 CP 80 ("*Edgell*"), a case which Mr Gabriel relies on in his further submissions. In *Edgell*, the plaintiff, as executrix of one deceased Mr Edgell, brought, *inter alia*, a claim in tort to recover monies which had been received by the defendant. The defendant was previously employed by Mr Edgell as the latter's solicitor for the sale of certain property and had received the monies as deposits from the buyers of Mr Edgell's property. The plaintiff successfully argued that the defendant was bound to hand over the money to Mr Edgell on demand because he was employed as Mr Edgell's agent to receive the deposits on the terms that he would account for them. The Court of Common Pleas also observed that the general principle of law is that a payment of money to an agent is payment to the principal (*Edgell* at 84).

150 On the facts in *Edgell*, a demand was made for the defendant to hand over the money, still in his possession, to Mr Edgell. However that is not to say that a prior demand is essential before the principal is vested with a right to immediate possession. In a situation where the agent is still in possession of the property on behalf of the principal, the conversion is consummated when the agent refuses to hand over possession on demand by the principal. However, in a situation where the agent has sold the property without authority, the sale in itself constitutes the act of conversion. In that situation, a prior demand is irrelevant.

151 I draw support from two decisions in somewhat similar circumstances, namely, *Bute (Marquess) v Barclays Bank Ld* [1955] 1 QB 202 ("*Bute*"), and *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 ("*Lipkin Gorman*").

152 In *Bute*, one McGaw was appointed manager of three farms in Scotland belonging to the plaintiff, the Marquess of Bute. McGaw's duties included the making of applications to the Department of Agriculture for Scotland for certain subsidies in respect of the farms on the plaintiff's behalf. In January 1949, McGaw forwarded three such applications. In May 1949, McGaw left the plaintiff's employment. No fresh instructions were sent by the plaintiff to the Department of Agriculture, and in September 1949, the Department, in accordance with their usual practice, sent to McGaw three warrants "in respect of Hill Sheep Subsidy, 1949" payable to McGaw but also marked with the words "(for the Marquess of Bute)." McGaw then applied to a bank in Yorkshire for permission to open a personal account with the warrants, and the bank credited the amount of the warrants to an account in his name and permitted McGaw to draw on the account. The plaintiff sued the bank for conversion, and the court found that the plaintiff had a right to immediate possession of the warrants at the time of conversion on two grounds. First, it was held that, upon termination of McGaw's employment, the plaintiff was entitled to require McGaw to deliver the warrants to him when received since McGaw's only title to receive the warrants stemmed from his appointment as the plaintiff's agent (*Bute* at 211). Secondly, the court found that the words "for Marquess of Bute" on the warrants represented a promise to pay McGaw for the plaintiff, and connotes that the plaintiff was the true owner of the warrants leaving McGaw accountable to the plaintiff. The duty of McGaw to account to the plaintiff gave the plaintiff a right to immediate possession of the warrants (*Bute* at 212). The court was of the view that at the date of the conversion by the agent, the principal was entitled to immediate possession and, accordingly, entitled to sue in conversion (*Bute* at 211). This was the position even though no demand was made by the principal at any time.

153 In *Lipkin Gorman*, one Cass was a partner in the plaintiff firm of solicitors and had authority to operate the firm's client account at the bank. On one occasion, Cass, acting within his authority, procured through the firm's cashier, a banker's draft for £3,735 drawn in favour of the firm, paying for it by a cheque from the firm's client account. He then endorsed the banker's draft and proffered it to the defendant gambling club which accepted it in exchange for chips. The House of Lords found that

the plaintiff firm had the right to immediate possession of the banker's draft as soon as the bank handed over the banker's draft to the firm's cashier because the banker's draft was made payable to them and neither the firm's cashier nor Cass had any right to retain the banker's draft against the plaintiff firm. The House of Lords did not require the principal to have made a demand for delivery up of the property held by his agent, stating that "the effect of the banker's draft in the present case having been made payable to the [plaintiffs] is, in my opinion, that the [plaintiffs] had the right to immediate possession of the draft... On this basis, as it seems to me, the [plaintiffs] had vested in them, as from the moment when the banker's draft was delivered to Cass (through Chapman) by the bank, sufficient title to enable them to bring an action for damages for conversion of the draft" (*Lipkin Gorman* at 587 *per* Lord Goff).

154 In the present case, the MEGL shares held by Aventi and OAFL as agents of the plaintiffs were expressly stated to be due to the plaintiffs. Thus, the plaintiffs have a right to immediate possession of the MEGL shares from the moment they were issued and allotted to, and received by Aventi and OAFL "for and on behalf of" the plaintiffs (*Lipkin Gorman* at 587), or certainly at least when they had consummated the conversion of the MEGL shares by selling them (*Bute* at 211).

Scripless shares

155 The plaintiffs' conversion claim also raises the interesting question of whether the MEGL shares (which Mr Narayanan confirmed at the 29 May 2012 hearing were scripless shares) can form the subject matter of conversion. After examining the further submissions, in particular the plaintiffs', I am satisfied that the scripless nature of the shares does not render the MEGL shares any less capable of being converted.

156 While it remains an open question in Singapore whether intangible property can form the subject matter of conversion (the House of Lords in *OBG Ltd v Allan* [2008] 1 AC 1 decided in a 3-2 majority that conversion is not actionable for choses in action), the law is fairly settled that corporeal objects representing the value of intangible property, such as cheques (see *Yeow Chern Lean v Neo Kok Eng and another* [2009] 3 SLR(R) 1131), Preferential Additional Registration Fee certificates, (see *Cycle & Carriage Motor Dealer Pte Ltd v Hong Leong Finance Ltd* [2005] 1 SLR(R) 458) and share certificates (see *EG Tan & Co (Pte) v Lim & Tan (Pte) and another* [1985-1986] SLR(R) 1081), can be subject matters for a claim in conversion.

157 Although the MEGL shares are scripless, they are essentially scripless only for the purposes of trading. Such shares in Singapore are traded by way of book-entry in the Central Depository (CDP) register rather than by way of an instrument of transfer like share certificates and transfer forms (see s 130A of the *Companies Act* (Cap 50, 2006 Rev Ed) ("*Companies Act*"). However, these shares are still represented by physical share certificates issued by the issuing company that are deposited with the CDP and registered in the name of the CDP or its nominee (s 130C of the *Companies Act*). This is also the case for the MEGL shares. [note: 254]

Damages

158 Given the foregoing, Aventi and OAFL who were to hold the MEGL shares *for and on behalf of* the plaintiffs had, by withholding and selling the shares, clearly acted inconsistently with the plaintiffs' rights. I am satisfied that the plaintiffs' conversion claim is made out. The only outstanding issue is thus the quantum of damages recoverable by the plaintiffs.

159 The plaintiffs submit that damages are to be assessed as at the time of conversion, citing *BBMB Finance (Hong Kong) Ltd v EDA Holdings Ltd and others* [1990] 1 WLR 409. This principle of

assessing damages was affirmed by the Court of Appeal in *Chartered Electronics Industries Pte Ltd v Comtech IT Pte Ltd* [1998] 2 SLR(R) 1010 ("*Chartered Electronics*") at [18].

160 The Court of Appeal explained that the general position is to assess damages at the time of conversion because "[t]he general principle in the quantification of tortious damages is *restitutio in integrum*: the plaintiff is entitled to recover the amount which will put him in the position he would have been in had the tort never been committed" (*Chartered Electronics* at [16]). I can see no reason why this method of assessment should not be used in this case.

161 Based on the CIMB Daybreak report dated 2 November 2006 adduced by the plaintiffs, 80,000 shares were sold by Aventi and/or Johanes on 6 November 2006 at the price of S$0.22 each. [note: 255] It is not clear when the balance of 44,856,364 MEGL shares were sold by Aventi and/or Johanes and at what price. However, in light of Aventi's non-appearance and to avoid the unnecessary expense of an assessment hearing, I will instead assess the damages using the same sale price of S$0.22 for the entire 124,856,364 MEGL shares allotted to Aventi. Accordingly, the plaintiffs are awarded damages against Aventi for the conversion of the MEGL shares in the sum of S$27,468,400 (S$0.22 x 124,856,364). As for the shares allotted to OAFL, Alwie admitted that they have since been sold. Although he agreed to procure the documents from his private banker on the details of the sale, [note: 256] he failed to do so in spite of three separate reminders from the Court. [note: 257] Alwie is therefore liable to the plaintiffs for the conversion of 42,102,727 MEGL shares with damages to be assessed based on their actual sale price.

Fraudulent Misrepresentation

162 I move next to consider the plaintiffs' claim in fraudulent misrepresentation. The plaintiffs have pleaded two sets of representations which they allege were fraudulently made. The first set of misrepresentations relates to public announcements made by MEGL to its shareholders by way of the SGXNet Announcement [note: 258] while the second set relates to representations allegedly made to Tjong regarding the payment terms under the 1st SPA (the "SPA Representations"). [note: 259]

The law

163 One finds the classic formulation of the elements of the tort in Lord Herschell's judgment in *Derry v Peek* (1889) 14 App Cas 337 ("*Derry v Peek*") at 374:

> … First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement [from] being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

164 The Court of Appeal in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 ("*Panatron*") at [14] restated the elements of an action in fraudulent misrepresentation as follows:

(a) First, there must be a representation of fact made by the defendant by words or conduct.

(b) Second, the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff.

(c) Third, it must be proved that the plaintiff had acted upon the representation.

(d) Fourth, it must be proved that the plaintiff suffered damage by so doing.

(e) Fifth, the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true.

165 The plaintiffs have pleaded, in the alternative, reliance on section 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed) [note: 260] ("Misrepresentation Act") which reads:

Damages for misrepresentation

2.—(1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

It can be seen that the elements for a claim under section 2 of the Misrepresentation Act mirrors those in the tort of fraudulent misrepresentation save that the plaintiffs do not need to show that the misrepresentation was made fraudulently.

166 After considering the evidence before me, I find that the plaintiffs' claim in fraudulent misrepresentation *vis-à-vis* both the SGXNet Announcement and the SPA Representations fails. I will deal with each set of misrepresentations in turn.

The SGXNet Announcement

167 The SGXNet Announcement issued by MEGL stated that: [note: 261]

i. "OAFL is a BVI company that is controlled by Mr Alwie Handoyo, one of the creditors of the [plaintiffs] from whom the [plaintiffs] acquired all the issued shares of PT Deefu"; and

ii. "Aventi is a BVI company that is controlled by Mr Johanes Widjaja, one of the creditors of the [plaintiffs] from whom the [plaintiffs] acquired all the issued shares of PT Deefu".

While the SGXNet Announcement was clearly false, because Alwie and Johanes were never former owners of the PT Deefu shares, [note: 262] the fraudulent misrepresentation claim based on it must fail for the reasons that follow.

168 First, the plaintiffs have not pleaded any reliance on the announcement in the SGXNet Announcement, and have also not pleaded any particulars of loss arising from such reliance. While they have pleaded that the Court of Appeal in CA 171/2008 was misled by the SGXNet Announcement into finding that Aventi and OAFL were creditors of the plaintiffs, this does not aid the plaintiffs who

must prove that they themselves had acted in reliance of the SGXNet Announcement. Further, the plaintiffs did not actively pursue their claim in fraudulent misrepresentation in relation to the SGXNet Announcement at the trial. This could be because they were constrained by their pleaded position that they never knew of the SGXNet Announcement until the commencement of the present action. [note: 263]

169 Second, the SGXNet Announcement was certainly not made with the intention that it should be acted upon by the plaintiffs or by a class of persons including the plaintiffs. This is because the SGXNet Announcement was made on 14 October 2005, *after* theNovember 2004 Agreement was signed and *after* the four supplemental agreements were signed on 3 January 2005, 18 February 2005, 19 July 2005 and 19 August 2005. In fact, I have found that the SGXNet Announcement was made to give false credence to Aventi and OAFL's entitlement to the payments and the MEGL shares under the1st SPA as ostensible creditors of the plaintiffs (see [117] above). For these same reasons, the plaintiffs' alternative claim under section 2 of the Misrepresentation Act in relation to the SGXNet Announcement is misconceived, and fails.

170 I would also add that MEGL subsequently released a second announcement over SGXNet to correct an "inadvertent error" in the SGXNet Announcement. The second announcement reads:

> It has recently been brought to the attention of the Company [*ie* MEGL] that there were inadvertent errors on page 18 of the Circular and the Announcement, namely, that Mr Alwie Handoyo and Mr Johanes Widjaja were represented to be "one of the creditors from whom the [plaintiffs] acquired all the issued shares of PT Deefu". The Company wishes to clarify that the relevant statements in the Ciruclar and Announcement should instead have read that Mr Alwie Handoyo and Mr Johanes Widjaja were one of the creditors of the [plaintiffs], from whom Antig acquired the issued shares of PT Deefu.

171 It is no coincidence that this second announcement was made on 26 March 2010, shortly after I first raised this troubling issue at the injunction hearing. In my Oral Grounds dated 17 March 2010 discharging the injunction, I noted that "[c]learly, the circular [*ie* the SGXNet Announcement dated 14 October 2005] was intended to create at least a misleading if not a false impression that [Aventi] and [OAFL] were entitled to receive part of the purchase price under the 1st [SPA] because the Plaintiffs were indebted to them". [note: 264] Again, this amendment to the SGXNet Announcement appears contrived given that MEGL continued to positively exert a creditor relationship between Aventi, OAFL and the plaintiffs without any legitimate basis. I do not accept Richard Chan's evidence that this second announcement was made by MEGL without any input from him. On the contrary, I find that it was made with his knowledge and input, given his intimate involvement in the SGXNet announcement and his personal knowledge of the observations raised by me in my Oral Grounds.

The SPA Representations

172 Apart from the SGXNet Announcement, the plaintiffs assert that a series of ten allegedly false representations were made by Richard Chan and/or Alwie to Tjong. They can be divided into the following categories:

(a) Two representations that the inclusion of Aventi and OAFL in the 1st SPA was to reduce the tax payable by the plaintiffs on the payments to be received by them; [note: 265]

(b) A representation assuring the plaintiffs that the payments and the MEGL shares would be

transferred by Antig to both companies only upon Tjong's authority or instruction to Antig; [note: 266]

(c) Six representations assuring the plaintiffs that the payments and the MEGL shares would only be paid to the plaintiffs; [note: 267]

(d) A representation that Richard Chan would pay Tjong the outstanding balance purchase price if Tjong sold his stake in PT Batubara and his remaining stake in PT Deefu; [note: 268] and

(e) A representation that Richard Chan would make arrangements for the payment of the outstanding balance purchase price under the 1st SPA after Tjong signed some documents. [note: 269]

173 The plaintiffs claim that they relied on the SPA Representations in the following manner: [note: 270]

(a) By not disputing the terms of the November 2004 Agreement ("Reliance 1");

(b) By entering into the Supplemental Agreement ("Reliance 2"); and/or

(c) By allowing Richard Chan (and MEGL) to deal with/continue to handle all matters of payment in respect of the sale of the 72% of the PT Deefu shares ("Reliance 3").

174 It is extremely significant to bear in mind that the plaintiffs did not plead that they were induced to enter into the November 2004 Agreement based on the SPA Representations. Tjong, on behalf of himself and the plaintiffs, signed the November 2004 Agreement on 23 November 2004. [note: 271] None of the alleged misrepresentations was therefore operative in inducing the plaintiffs to sign the November 2004 Agreement. Accordingly, the plaintiffs are bound by the terms of the November 2004 Agreement even if Tjong or the other plaintiffs did not fully understand all the terms therein (*L'Estrange v Graucob* [1934] 2 KB 394; see also *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR(R) 195 at [29]). Further, while Tjong may have testified that he did not fully understand all the terms, there is no evidence that the other two plaintiffs were similarly ignorant. In the course of his cross-examination, I have taken note that Tjong has some understanding of English. This was also confirmed by his previous solicitor, Mr Manjit Singh, that "Tjong can speak some English". [note: 272]

175 Upon examination of the chronological sequence of the events in the plaintiffs' Statement of Claim (Amendment No 2), I agree with Mr Narayanan that all of the SPA Representations were allegedly made *after* the signing of the November 2004 Agreement. [note: 273] In particular, the plaintiffs' pleaded case is that the SPA Representations induced them, *inter alia*, to enter into the supplemental agreements.

176 While it may be interesting to examine the evidence as to whether the SPA Representations were in fact made by Richard Chan and Alwie (and I do observe there is some evidential basis for holding so – see [289] below) and, if so, whether they were fraudulently made, the claims in fraudulent misrepresentation in tort and under section 2 of the Misrepresentation Act ultimately fail for want of loss arising from any reliance on the alleged misrepresentations.

No loss arising from the misrepresentations

No loss arising from the misrepresentations

177 For the plaintiffs to succeed in their claim for fraudulent misrepresentation, they must show that they have suffered losses as a result of the change in their position in reliance on the SPA Representations. The authorities are clear that the claim in fraudulent misrepresentation cannot succeed if no loss flows from such reliance, even if it can be established that the representations were fraudulently made and induced the representee to act upon it.

178 In *Kea Holdings Pte Ltd and another v Gan Boon Hock* [2000] 2 SLR(R) 333, the second appellant (Kea Resources) was a wholly-owned subsidiary of the first appellant (Kea Holdings) and the former was in the business of shipbuilding and the sale and purchase of vessels. The respondent ("Gan") was the managing director of the second appellant at the material time. The appellants brought a claim against Gan, *inter alia*, for the tort of deceit / fraudulent misrepresentation. The claim arose out of the sale of a vessel by Kea Maritime, a company within the same group of companies as the appellants. It was discovered that Gan had procured two sale agreements of the vessel stating different sale prices. Kea Maritime's agreement showed the price to be $1.2 million, while the buyer's copy of the agreement showed the price to be $1.3 million. Although there was no evidence that Gan had taken the differential sum of $100,000 as the agreement was prematurely terminated and the instalment payments were not fully paid up, the appellants claimed that Gan was liable for the differential sum as the tort of deceit had been perpetrated on them and they had suffered a loss in not being able to collect and forfeit the said sum. The Court of Appeal agreed that Gan had made fraudulent misrepresentations to the appellants through the forged contract with the intention that Kea Maritime would act on it. However, the Court of Appeal went on to find (at [37]-[39]):

> … The tort of deceit consists of the wilful making of a false statement with the intent that the plaintiff shall act in reliance upon it and with the result that he does so act and suffers damage in consequence. This damage must be proved by the plaintiff; Diamond v Bank of London and Montreal Ltd [1979] QB 333.
>
> *It is in relation to the final requirement that the appellants' case failed. Neither Kea Resources nor Kea Maritime had actually suffered damage as a result of Gan's actions. The appellants' basic point appeared to be that, since the deposit of $100,000 was not received by Kea Maritime, they were entitled to claim it from Gan. The difficulty with this was that there was no evidence that the $100,000 was ever paid to him or anyone else.*
>
> Furthermore, it is trite law that the person against whom a tort has been committed must prove that he has suffered actual damage. This proposition was encapsulated by Lord Diplock in Albacruz (Cargo Owners) v Albazero (Owners) [1977] AC 774 where he said the following:
>
> > The general rule in English law today as to the measure of damages recoverable for the invasion of a legal right, whether by breach of a contract or by commission of a tort, is that damages are compensatory. Their function is to put the person whose right has been invaded in the same position as if it had been respected so far as the award of a sum of money can do so. Such an award can readily do so in the case of mercantile contracts, since the purpose of the parties in entering into them is to make a money profit. So where the wrong for which suit is brought is the breach of a mercantile contract the measure of damages for the breach is generally the financial loss that the plaintiff has sustained by reason of the defendant's failure to perform the contract according to its terms.
>
> *Thus, even if the appellants successfully proved that Gan had made the fraudulent misrepresentation, they failed to show that neither Kea Resources nor Kea Maritime suffered any loss*, or that Gan gained a profit as a result, due to the fact that the transaction fell through

for other reasons. …

[emphasis added]

It is also important to note that the underlying purpose of the tort of fraudulent misrepresentation is to place "the victim into the position in which he would have been, if the misrepresentation had not been made, and not to protect his expectations by putting him into the position in which he would have been, if the representation had been true". See the observations of the Court of Appeal in *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 at [28], citing Edwin Peel, *Treitel on The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) ("*Treitel*") at para 20-018. The loss allegedly suffered by the plaintiffs is the critical element in the tort. Unfortunately, the plaintiffs' written closing submission is bereft of any attempt to explain how their reliance on the fraudulent misrepresentation had caused them any loss.

179 In relation to Reliance 1, the plaintiffs have not shown how they would have successfully challenged the terms of the November 2004 Agreement given that they are not claiming that they were induced into entering it to begin with. Further, it is unclear what would have happened had they in fact challenged the terms of the November 2004 Agreement, since a variation of contractual terms requires the consent of all contractual parties, and the plaintiffs have not shown that Antig would have agreed to vary the terms. It must be reiterated that the plaintiffs have not alleged any misrepresentation which induced them into signing the November 2004 Agreement.

180 As for Reliance 3, the plaintiffs have not shown what they could have done to prevent Richard Chan and MEGL from handling the arrangement, bearing in mind that the buyer of the PT Deefu shares is Antig. Therefore, as a director of Antig who was involved in the sale of these shares, Richard Chan must naturally be the person in charge of payment arrangements under the November 2004 Agreement. Further, Antig is a wholly owned subsidiary of MEGL and, more importantly, the funds for the payments in fact came from MEGL. Thus, it is unclear what losses the plaintiffs have suffered in allowing Richard Chan to continue to handle the payment arrangements already agreed under the November 2004 Agreement.

181 Finally, in relation to Reliance 2, the plaintiffs have not shown what loss they have suffered by entering into those agreements. For the 1st Supplemental, the only amendment favouring Antig was the extension of the due diligence period by thirty days. [note: 274] However, the plaintiffs have not shown how this has caused them any loss. In fact, this extension came with an accelerated payment of US$300,000, which the plaintiffs admitted to receiving in January 2005. [note: 275] The 2nd Supplemental mainly effected certain clerical changes (like the correct number of shares held by each plaintiff in PT Deefu), and added a few additional warranties and covenants to be undertaken by the plaintiffs. Again, the plaintiffs have not shown what loss they have suffered from these changes, especially since Antig did not act on these warranties and covenants. The 3rd Supplemental added a new condition precedent and a cap on the loans which can be advanced to the plaintiffs prior to the completion date of the 1st SPA, but again the plaintiffs have not shown what losses have resulted from these. Finally, the 4th Supplemental, which clarified that the payments and allotments of the MEGL shares to OAFL and Aventi are to be received by both companies for and on behalf of the plaintiffs, actually resulted in a benefit to the plaintiffs.

182 In any event, if the fraudulent misrepresentation is in fact actionable, it would simply place the plaintiffs in the same position as if they had not signed the supplemental agreements. In that regard, I accept Mr Narayanan's submission that the plaintiffs would still be bound by the unimpeached November 2004 Agreement. Hence, I find that the plaintiffs have suffered no loss and have even

obtained benefits from entering into the supplemental agreements. Thus, the plaintiffs' claim for fraudulent misrepresentation fails for want of loss suffered.

Unlawful Means Conspiracy

183 In respect of the claim for unlawful means conspiracy, the plaintiffs plead that two or more of the 1st to 6th and 10th Defendant: [note: 276]

> have combined with the intention of injuring the plaintiffs to commit deceit / fraudulent misrepresentation by causing the plaintiffs to enter into the [November 2004 Agreement] and/or the Supplemental Agreement and/or allowing [Richard Chan] (and MEGL) or continuing to deal with [Richard Chan] to handle all matters of payment in respect of the sale of 72% of the shares in PT Deefu thinking that they will be paid the full purchase price for the sale of their 72% of the shares in PT Deefu. Pursuant to and in furtherance of the said conspiracy, the deceit was carried out and the intention achieved. The plaintiffs did not dispute the terms of the [November 2004 Agreement] and/or entered into the Supplemental Agreements and/or had allowed [Richard Chan] (and MEGL) or continued to deal with [Richard Chan] to handle all matters of payment in respect of the sale of the 72% of the shares in PT Deefu. The plaintiffs in fact were not fully paid.
>
> As a result of the unlawful means conspiracy, the plaintiffs have suffered loss and damage to the total amount of at least US$12,471,227.

184 It is apparent from the plaintiffs' pleadings that the unlawful means conspiracy claim is parasitic upon the plaintiffs' claims of deceit/fraudulent misrepresentations. Thus, although the plaintiffs have submitted at length on the existence of an unlawful means conspiracy based on some general allegation of fraud allegedly perpetrated by the above defendants, [note: 277] they are bound by their pleaded case that the unlawful means is restricted only to deceit/fraudulent misrepresentations which, by their own case, occurred *after* the signing of the November 2004 Agreement.

185 However, it is clear from the plaintiffs' pleadings that only Richard Chan, Alwie and MEGL are alleged to have made fraudulent misrepresentations to the plaintiffs. Since MEGL is not a substantive defendant in this action (see [37] above), I shall refrain from making any express findings against MEGL. It is also clear that the plaintiffs claim that, as a result of the conspiracy to make fraudulent misrepresentations to Tjong, the plaintiffs were caused "to enter into the [November 2004 Agreement] and/or the Supplemental Agreements and/or allowing [Richard Chan] (and MEGL) or continuing to deal with [Richard Chan] [sic] to handle all matters of payment in respect of the [November 2004 Agreement]". [note: 278] I pause to note that the plaintiffs' case on inducement to enter into the November 2004 Agreement is misplaced simply because, on the plaintiffs' pleaded case, all these representations were made *after* the signing of the November 2004 Agreement.

The law

186 A conspiracy by unlawful means is constituted when two or more persons combine to commit an unlawful act with the intention of injuring or damaging the plaintiff, and the act is carried out and the intention achieved (*Quah Kay Tee v Ong and Co Pte Ltd* [1996] 3 SLR(R) 637 ("*Quah Kay Tee*") at [45], cited in *Beckkett Pte Ltd v Deutsche Bank AG and another and another appeal* [2009] 3 SLR(R) 452 ("*Beckkett*") at [120]). Thus, the elements that the plaintiffs must prove for their claim to succeed are:

(a) First, there must be a combination of or concerted action between two or more persons.

(b) Secondly, the alleged conspirators must have combined to commit an unlawful act. The unlawful act need not be independently actionable as a civil wrong (*Beckkett* at [120]).

(c) Thirdly, the unlawful act must have been committed with the intention of injuring or damaging the plaintiff. However, where an unlawful means conspiracy is alleged, the intention to injure the plaintiff need not be the "predominant purpose": *Quah Kay Tee* at [45]; *Chun Cheng Fishery Enterprise Pte Ltd v Chuang Hern Hsiung and Another (Lin Chao-Feng and Another, Third Parties)* [2008] SGHC 135 ("*Chun Cheng Fishery*") at [77].

(d) Finally, the alleged conspirators' intention must have been achieved; that is, the plaintiff must have suffered loss as a result of the alleged conspirators' unlawful act.

No loss arising from the alleged conspiracy

187 For the claim to be actionable, it is imperative for the plaintiffs to prove that the fraudulent misrepresentations were made with the intention of injuring or damaging the plaintiff, and that the plaintiffs have suffered loss as a result thereof. However, my findings (at [179] to [181] above) that the fraudulent misrepresentations (even if made) did not cause any loss to the plaintiffs are also fatal to the unlawful means conspiracy claim. In *Quah Kay Tee*, the plaintiff commenced an action against a debtor, their former employee, for moneys owed to it. The plaintiff obtained an interim injunction to restrain the debtor from disposing or otherwise dealing with his assets. Although the debtor was informed of the interim injunction, he thereafter transferred certain shares in a private company to the defendant, his father, for $10. Subsequently, the plaintiff obtained judgment against the debtor and tried to seize the shares, but it was unsuccessful as the shares had already been transferred to the defendant. The plaintiff then commenced an action, *inter alia*, for a claim in unlawful means conspiracy against the defendant for damages or, alternatively, for an order that the share transfer be avoided. The relevant legislative instrument applicable to the transfer of the debtor's shares in this case was the Act Against Fraudulent Deeds, Gifts, Alienations, Etc (which was intituled by the Statute of 13 Elizabethan 1571 (c 5)(UK)) ("the Elizabethan Statute"). The relevant provision in the Elizabethan Statute provides that all conveyances and dispositions of property, real or personal, made with the intent to delay, hinder or defraud creditors shall be null and void against them, their heirs and their assigns. The Court of Appeal observed at [46]-[47] that a claim in unlawful conspiracy cannot succeed if no loss was suffered by the plaintiff:

> It was unclear whether the court below had decided that there was a tort of conspiracy by lawful or unlawful means. This difference was important because, as stated earlier, the former required a "predominant purpose" to injure the respondents: see *Lonrho plc v Fayed* [1992] 1 AC 448, whereas the latter had no such requirement. In this appeal, the appellant contended that there was no allegation of an unlawful act here. This was not disputed by the respondents. We, however, proceeded to consider the two types of conspiracy: *ie* conspiracy by lawful means and conspiracy by unlawful means.
>
> Quite apart from the question as to whether a fraudulent preference constitutes unlawful means, we thought that even if there were a tort of conspiracy by unlawful means here, then presumably, this was unlawful precisely because the transfer was caught by the Elizabethan Statute. This being the case, *the transfer would be avoided under the Elizabethan Statute. And this would have a direct impact on the proof of damages because, if the Elizabethan Statute was contravened, the shares would have to be returned to the debtor. What then is the basis for a claim in damages where the respondents would have suffered no loss? Unless the respondents could prove other losses such as those arising out of delay, they could not argue that the Elizabethan Statute was breached and claim damages at the same time*.

[emphasis added]

Breach of the Written Guarantee

188 In addition to the above claims, the plaintiffs have also brought a discrete claim based on the guarantee against Richard Chan for the sum of US$12,471,227, being the balance purchase price not yet received by the plaintiffs. [note: 279] This guarantee, which was purportedly executed by Richard Chan in late 2006, states succinctly that:

[signature of Richard Chan]

Richard Chan

Director

> **I will personally guarantee a payment of US$18,000,000 upon the Share Sale and Purchase Agreement dated 23 November 2004 to Mr. Tjong Very Sumito**, ***not through OAFL and Aventi.***

[emphasis added in italics]

The plaintiffs claim that this guarantee was breached because Tjong did not receive the full purchase price and instead a substantial portion was purportedly paid to Aventi and OAFL. [note: 280]

189 On the plaintiffs' version of events, Antig had requested the plaintiffs to provide the necessary documents to effect the legal transfer of the shares purchased under the 1st SPA ("the Requested Documents"). [note: 281] The plaintiffs apparently refused to do so unless they were assured that the balance purchase price would be paid to them, and not to Aventi and OAFL. [note: 282] Consequently, Richard Chan executed the guarantee in Tjong's favour some two months after 13 June 2006, and only then did the plaintiffs hand over the Requested Documents. [note: 283]

190 Several issues arise in relation to this guarantee. First, Richard Chan denies executing it and alleges that it has been forged. Second, Richard Chan argues that even if the purported guarantee is authentic, it is in any event unenforceable. Third, it appears that this purported guarantee is, on its true construction, an indemnity. Quite unsatisfactorily, parties have not devoted much attention to this issue of construction. The plaintiffs, in particular, seem to have assumed that the purported guarantee was in effect an indemnity without explaining why this construction should be adopted. By the same token, it was never Richard Chan's case either in his defence or in his written closing submissions that the guarantee merely undertakes the due performance of Antig's obligation under the 1st SPA. In other words, Richard Chan has implicitly accepted that the guarantee is effectively an indemnity to ensure that Tjong receives the full purchase consideration of US$18 million. Fourth, Richard Chan seeks to rely on certain discharge and settlement letters which he claims would absolve him of liability under the guarantee. I will deal with each issue in turn.

The allegation of forgery

191 This purported guarantee takes centre stage amongst the numerous allegedly forged documents in this case since a successful claim on it potentially allows the plaintiffs to recover the full US$18 million purchase price under the 1st SPA from Richard Chan. Having considered the

evidence, I am of the view that the state of evidence is not sufficient to ground a finding of forgery. In fact, the surrounding circumstances and documents support the plaintiffs' position that the guarantee had indeed been executed by Richard Chan.

High standard of proof in cases of alleged forgery

192 It is trite that the burden of proof is on the party alleging forgery, and while the civil standard is applicable, the gravity of an allegation of fraud and forgery have led courts to require more compelling evidence than that which is sufficient to simply "tilt the balance" *(Yogambikai Nagarajah v Indian Overseas Bank and another appeal* [1996] 2 SLR(R) 771 ("*Yogambikai*") at [44] and *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR(R) 263 at [14]).

193 In *Yogambikai*, a sum of $1 million was placed in the fixed deposit bank account of one Shanti by her ex-husband. The ex-husband subsequently instructed the bank, *via* a handwritten mandate letter, to transfer the monies elsewhere. The mandate letter contained Shanti's signature, the authenticity of which she challenged. Shanti claimed that she had learnt about the mandate letter for the very first time when she wrote to the bank (IOB) to inform it that she had misplaced all her documents relating to her account, and was told by IOB that the monies therein had already been transferred pursuant to the mandate letter. Both the High Court and Court of Appeal refused to make a finding of forgery. Apart from the weakness of the expert evidence in support of forgery, the Court of Appeal observed that (*Yogambikai* at [47]):

> Firstly ... *Shanti had lied in her letters to IOB when she said that she had lost all her documents and also that she wanted to operate her account there again.* The fact was that she never had control of the account and never operated it nor did she ever have custody of the documents relating to that account...Secondly, there were inconsistencies in her evidence as to the crucial telephone conversation with Anbu in which she made a reference to her "child", later changed to "children". *Thirdly, she had delayed commencing her action against the bank*. Fourthly, she inexplicitly failed to make a police report when she realised that she had just been cheated of approximately $1m. Her explanation was that she was reluctant to get her husband into trouble. However, at the material time, she had already lost all hope of saving the marriage, had a baby to take care of, was surviving on a very minimal income, and according to her testimony, had been the subject of abuse by Anbu. ...
>
> [emphasis added]

The Court of Appeal also noted that there was no plausible explanation as to why the ex-husband would give her the money in the first place if he had it in mind to misappropriate it later (*Yogambikai* at [49]). The fact that the mandate letter was written by the ex-husband, and that the ex-husband was the ultimate recipient of the monies also did not compel the conclusion that the mandate signature was forged (*Yogambikai* at [50]).

Circumstances surrounding the allegation of forgery

194 The circumstances surrounding the emergence of the guarantee and the subsequent allegations of forgery were most interesting to say the least. The guarantee only surfaced for the very first time in mid-2011 – *ie*, more than a year after the filing of the writ, and five years after the purported execution of the guarantee in 2006 – when the plaintiffs amended their statement of claim to include their claim based on it. [note: 284] When asked to explain the delay, Tjong claimed that the guarantee had been locked away in an "iron safe" in Jakarta. [note: 285] According to him, he had been told by an immigration officer that Richard Chan had made a police report against him and, as

such, he did not dare to return to Jakarta to retrieve the guarantee. [note: 286] Eventually, the guarantee was retrieved from the "iron safe" by Tjong's wife. [note: 287] In other words, there was no requirement for Tjong to have personally returned to Jakarta to retrieve the guarantee in the first place.

195 Equally interesting was the fact that it took almost six months for Richard Chan to amend his defence to state that the guarantee was a "fabricated" document. [note: 288] Richard Chan was granted two weeks to amend his defence in July 2011. He failed to do so within the stipulated time. [note: 289] AEICs were ordered to be exchanged in September 2011 and he failed to do so as well. It was only after the plaintiffs had obtained an "unless order" [note: 290] that he was finally prompted to amend his defence, in December 2011, to plead the alleged "fabrication". [note: 291] One would have expected objections of this nature to be raised at the first available opportunity, especially given the potentially wide liability the guarantee imposed on him. When asked why he took so long to amend his defence despite having the opportunity to do so much earlier, Richard Chan stuck resolutely to his refrain "I left it all to my counsel". [note: 292] This should also be viewed against the highly peculiar fact that throughout the proceedings, neither Richard Chan nor his lawyers bothered to inspect the original guarantee (which he claims to be a forgery) even though it was always available for inspection. [note: 293] It transpired in the course of the trial that Mr Narayanan had delegated the inspection of the discovered documents, including the guarantee, to a member of his staff. [note: 294]

196 It did not escape my attention that there was a conspicuous lack of reference to the guarantee in an expert report [note: 295] attached to the affidavit filed by Richard Chan on 1 September 2011 in support of Alwie and Susiana's application to strike out the plaintiffs' claim. The expert report dated 18 August 2011 was filed in support of his claim that there was "concrete evidence of forgery" by the plaintiffs. [note: 296] Curiously, while peripheral documents were referred for expert analysis, the guarantee, which exposed Richard Chan to a potential liability of US$18 million, had been omitted. It was also telling that those documents claimed to be forged in Richard Chan's 1 September 2011 application were discovered much earlier in January 2011. [note: 297] Yet, no allegation of forgery was raised in relation to those documents until September 2011, shortly after the plaintiffs had amended their statement of claim to include the guarantee. These points were pressed by Mr Gabriel during cross-examination, and no satisfactory explanation was forthcoming from Richard Chan [note: 298]:

Mr Gabriel:	In tandem with...the 5th and 6th defendants, you filed an application supporting that application and you filed an expert report on 1 September 2011. Do you understand?
A:	Understand.
...	
Q:	You will see you have said "concrete evidence of forgery". It has nothing to do with the guarantee. You understand?
A:	Yes, correct.
Q:	It's some other document?
A:	Yes.

...

Q: The claim the plaintiff has is not even based on it. Do you understand?

A: I understand.

Q: The claim that the plaintiff is basing on, which you are saying is not your signature, is your written guarantee. Do you understand?

A: Understand.

Q: *Your report from Mr Yap was made some time in August. Mr Yap confirmed that he was given instructions in July and he made the report in August. Do you understand, August 2011?*

A: *Yes.*

Q: *Why did you not tell Mr Yap, or any other expert, to give a report on your written guarantee that it is a forgery, as it's a substantive claim made, so that you can then on 1 September join in to have our action struck out?*

A: *I left it all to my counsel to arrange everything like this.*

...

Q: You never found concrete evidence of forgery in respect of the guarantee as of September 1st 2011, correct?

A: I don't remember the exact date, but I left it to the counsel to arrange with the experts to give evidence.

...

Court: A counsel cannot tell you whether the document is forged or not.

A: Correct, sir.

Court: You have to tell counsel.

A: Yes, sir.

Court: And if he had told your counsel that the guarantee is forged –

A: Yes.

Court: -- *is there any reason why that your counsel would not ask HSA to comment?*

A: I left it –

Court: *Is there any reason?*

A: *No, there's none, sir.* I left it all to them to arrange for all the experts, sir.

Mr Gabriel: Mr Chan, the reason, I put it to you, this was not raised even in September that your written guarantee was a forgery is because it was a genuine guarantee given by you. Do you agree?

A: I disagree.

...

Q: ...you didn't do any cross-examination on those documents until September, August/September. Do you understand?

A: Understand.

Q: And it only came about after the pleading of our claim on the guarantee. Do you understand?

A: Understand.

Q: That must be because you did not want this claim on the guarantee to go ahead because you know it is genuine. Correct?

A: Wrong. Do not agree.

[emphasis added]

While it may be interesting or even suspicious as to why the guarantee was introduced so late in the day and why Richard Chan took some time to claim that it was forged, the task of this Court is to consider the issue with reference to the pleadings and the evidence adduced by the parties.

Evidence of the handwriting expert

197 Richard Chan relies on an expert report by a forensic document and handwriting examiner, Ms Michelle Helena Novotny ("Ms Novotny") [note: 299], to support his allegation of forgery. Ms Novotny was the only expert retained in relation to the guarantee; the plaintiffs have not tendered any expert report on this point. Significantly, Ms Novotny's report was made without the benefit of inspecting the original guarantee.

198 Prior to Ms Novotny taking the stand on 21 February 2012, Mr Narayanan applied to adduce a supplementary report by Ms Novotny, following an inspection of the original guarantee *on the previous day*. [note: 300] This was met with strong objections by Mr Gabriel. [note: 301] After hearing parties, I dismissed Mr Narayanan's application. [note: 302] I indicated to parties that the need to inspect the original guarantee had been apparent from the outset, and that Richard Chan had been invited to inspect it since September 2011. Mr Narayanan had earlier applied for leave to send the original copy of the guarantee to Australia for Ms Novotny's examination. [note: 303] I dismissed the application on 11 January 2012 as there was no legitimate reason why Ms Novotny could not have made the trip to Singapore to examine the guarantee before finalising her expert report. No satisfactory explanation was provided as to why Richard Chan did not arrange for Ms Novotny to inspect the original document before preparing her report. I accepted that the admission of the supplementary report would prejudice the plaintiffs as they had not had any time to consult their own experts on the fresh points raised therein given that the trial was already underway and that the plaintiffs had already closed their case. [note: 304] I made it clear, however, that in fulfilling her duty to the court, Ms Novotny was entitled to raise whatever points she deemed necessary arising from Mr Gabriel's cross-examination. [note: 305]

199 After a close examination of Ms Novotny's evidence, I conclude that it does not support a finding that the guarantee is a forged document. On the contrary, she stated in her report that it is "highly probable" that the signature on the guarantee was written in original form by the writer of the specimen signatures attributed to Richard Chan. [note: 306] She readily conceded the same point when

it was put to her under cross-examination: [note: 307]

Mr Gabriel: Ms Novotny...[c]an you turn to page 11 of the report.

A: Yes.

...

Q: Now, I will read to you paragraph (a). You say there, you conclude as follows:

> "It is highly probable that the disputed signature on document D1 was written in original form by the writer of the specimen signature attributed to Mr Chan..."

Now, Mr Chan is the first defendant, for your information.

A: Thank you.

Q: *I put it to you that it is highly probable that the signature on D1 is the original signature of Mr Chan. Do you agree or disagree?*

A: *I agree, on the basis that the specimen signature were provided to me as having been written by Mr Chan.*

Q: Thank you. No further questions, your Honour.

[emphasis added]

200 No re-examination was carried out by Mr Narayanan to explain away Ms Novotny's concessions on the stand, [note: 308] though he pointed out in his written closing submissions [note: 309] that Ms Novotny had gone on to state in her report that there is a possibility that the bottom part of a page genuinely signed by Richard Chan had been physically cut from the top part of the page, before the text portion of the guarantee was superimposed by re-feeding the bottom part through a printer. [note: 310] This "superimposition theory" is, however, problematic for several reasons. First, it was not pleaded. In fact, Richard Chan's pleadings did not contain any particulars of the alleged fabrication, [note: 311] and while Richard Chan alluded in his AEIC to the questionable failure of Tjong to raise the guarantee much earlier, [note: 312] nothing was mentioned about the "superimposition theory".

201 Richard Chan confirmed under cross-examination that his case was that the guarantee was forged because the signature was not his, [note: 313] *ie*, not the "superimposition theory". If so, Ms Novotny's observations on the "superimposition theory" would strictly be irrelevant, as in *Upton McGougan Ltd v Bellway Homes Ltd* [2009] EWHC 1449 at [33] and [42], where the defendant was debarred from relying on a section of his expert's report which fell outside the scope of the defendant's pleaded counterclaim. The following observations by Belinda Ang J in *Sumpiles Investments Pte Ltd v AXA Insurance Singapore Pte Ltd* [2006] 3 SLR(R) 12 at [79] – [81] are instructive:

> … During cross-examination, [the plaintiff's expert] came up with new theories...These theories were never pleaded...I pause here to make some observations. First, other than a passing reference to brake slip, [the plaintiff expert]'s report did not deal with the new theories that came up during cross-examination. An expert who intends to raise new theories should make them known to the other expert early enough and not spring them upon the other thereby leaving them with little or no time to study or consider the theories...Third, there were attempts by the

plaintiff to enlarge or stray from [the plaintiff expert]'s new theories through cross-examination of the other expert. *The court should be astute to ensure that the plaintiff who has not pleaded its case in this manner does not attempt to establish one in cross-examination or by other evidence*.

[emphasis added]

202 Second, and more fundamentally, I am of the view that the superimposition theory should not in any event be accorded much weight – if any at all – since it was propounded without Ms Novotny first having the benefit of inspecting the *original* guarantee. This is so as the veracity of such a theory is necessarily dependent upon the expert having had the opportunity to inspect the original document. For example, Ms Novotny observed in her report that there was a difference in the clarity of the text in the top and bottom sections of the reproduced guarantee under examination. She was consequently of the view that one section had been superimposed on the other, though she qualified her opinion by premising it on the *assumption* that the distortion was not caused by the reproduction nature of the document under examination. [note: 314] Ms Novotny also stated in her report that the misalignment between the top and bottom sections was suggestive of at least two printing sessions. [note: 315] Again, such an observation, which was made based on a reproduced copy of the document, cannot be reliable. This much was admitted by Ms Novotny herself, who emphasised that the value of her evidence is "limited by the reproduction nature of the disputed document". [note: 316]

Objective evidence supports the plaintiffs' position

203 Apart from Richard Chan's failure to *positively* prove forgery by relying on Ms Novotny's expert evidence, the *objective evidence* supports Tjong's version of events leading up to the execution of the guarantee. Tjong has, for instance, exhibited three letters from Antig's solicitors, Minang Warman Sofyan & Associates Law Offices ("MWSA"), – one undated, [note: 317] and the other two dated 13 July 2006 [note: 318] and 25 July 2006 [note: 319] – showing that Antig had indeed been pressing Tjong for the provision of the Requested Documents at the material time. There is also a letter dated 11 December 2006 [note: 320] sent to him by Antig's solicitors, SJD, stating that Tjong has provided Richard Chan with a certificate from the Central Jakarta District Court relating to an amicable settlement, and will soon provide Antig with all original documents of PT Deefu and PT Batubara. Further, Mr Narayanan confirmed that it is *not* Richard Chan's case that the Requested Documents have not been received; [note: 321] he confirmed that Tjong eventually released the withheld documents to Antig "a few months after July 2006". [note: 322]

204 The evidence also supports the plaintiffs' case, based *inter alia* on a true construction of Clause 4.02(2), that the plaintiffs were entitled to retain the full purchase price of US$18 million to the exclusion of Aventi and OAFL (see [96] to [105] above). Richard Chan was well aware of this fact. For example, the four letters written by Tjong dated 18 February 2005, [note: 323] 13 June 2006, [note: 324] 29 October 2007 [note: 325] and 12 November 2007 [note: 326] addressed to Antig to the attention of Richard Chan, as well as the 15 June 2006 letter [note: 327] written by Alwie, are all consistent with a finding that Richard Chan had indeed guaranteed payment of US$18 million to Tjong. That Tjong had, in his third letter dated 29 October 2007, pressed Richard Chan for the outstanding payment of US$12 million *pursuant to "your promise to me"* is also consistent with the finding that the guarantee was executed shortly before. My finding as regards the 13 May fax (at [109] to [113] above) is entirely consistent with the provision of the guarantee by Richard Chan. Finally, the highly suspicious circumstances under which the early discounted payment of US$5.7 million was purportedly

made to Aventi, without the knowledge of the plaintiffs, could not have taken place without the direction or at least the concurrence of their MD, Richard Chan. See [114] above. That is also consistent with Richard Chan's awareness that the full purchase price was *due* to the plaintiffs as explicitly stated in Clause 4.02(2).

205 Mr Narayanan argues that the execution of the guarantee by Richard Chan goes against the grain of the plaintiffs' case that Richard Chan had engineered an elaborate scheme to defraud the plaintiffs, *ie*, why would Richard Chan otherwise create a document entirely contrary to his own interests? [note: 328] Mr Gabriel disagrees, arguing that a finding that the guarantee had been genuinely executed by Richard Chan would be completely congruent with such a case theory. I have alluded (at [117] to [118] above) to the curious interest MEGL or Antig and/or Richard Chan, as purchasers of the shares, have displayed in the ultimate beneficiaries of the purchase price, to the extent of making the SGXNet announcement, which created the false impression about the beneficial entitlement of Aventi and OAFL. Mr Gabriel argues that the SGXNet announcement was part of a carefully devised scheme to ensure that the US$12 million would vest in Aventi and OAFL on the pretext that they were creditors of the plaintiffs. [note: 329] On this footing, Mr Gabriel argues that the guarantee gels with the plaintiffs' case theory as it served to reinforce the misleading representations made by Richard Chan and Alwie to Tjong that Tjong would receive the full purchase price of US$18 million notwithstanding the reference of Aventi and OAFL in the 1st SPA. [note: 330]

206 Richard Chan's failure to sufficiently explain the false information contained in the SGXNet announcement does lend credence to Mr Gabriel's arguments. When cross-examined on this issue, Richard Chan's answers were incoherent and highly unsatisfactory. He first asserted that the false information was included as a "pure mistake", before seeking to distance himself from it by *inter alia* asserting that he had only found out about the announcement for the first time during this Suit: [note: 331]

> Mr Gabriel: As far as stock exchange is concerned, they know the owners are the vendors, for what purpose they are being given the shares. Correct?
>
> A: Correct.
>
> ...
>
> Q: After you have satisfied the stock exchange as to what they wanted, then you put in this statement here, that [Alwie] is a creditor of the vendors from whom the vendors acquired all the issued shares of PT Deefu. Correct? And you say the same about Mr Johanes Widjaja. Correct?
>
> A: That was a mistake.
>
> Q: Which was a mistake?
>
> A: I only approve and ask them to put basically they are one of the creditors of the vendors, and basically all the others are not. Basically it is really just pure mistake.
>
> ...
>
> Court: *Who made the mistake? Tell me.*

A: *I can't pinpoint anybody now*, sir, because I definitely – eventually it comes back to me, but definitely the instruction was to just put down as creditors of the vendors, and that's all. But it was wrong all the way. I didn't even – it was really careless of me. I didn't –

Court: You think that is a credible explanation?

A: No sir, I know – I know I cannot – what do you call – excuse myself for that. It is wrong. I know definitely it is wrong.

Mr Gabriel: Mr Chan, this was a statement put in intentionally inside here, and this went all the way to the Court of Appeal of Singapore. Do you understand?

A: I understand.

Q: You must have read the judgment.

A: I did not. *In fact, the only time I found out about this was during this case. And I even argue with my counsel; I said, "No, it shouldn't be." And they showed me, and I was – "Whoa."*

...

Q: *It was not intentional?*

A: *No.*

Q: *Never before?*

A: *Never.*

[emphasis added]

207 Richard Chan was then referred to the minutes of a MEGL board meeting held on 26 August 2005, [note: 332] which recorded SGX's concern over the allotment of shares in MEGL, and a statement that Aventi was a creditor of the plaintiffs. The minutes were signed by Richard Chan as Chairman for the meeting. When asked to explain, his response was again feeble and unsatisfactory: [note: 333]

Mr Gabriel: Now, if you say that the circular, there was some mistake, how would you explain this same statement put in by you? Because you signed this as certified, true, correct record of minutes, and you were the chairman of the meeting. You see that?

A: Yes.

Q: How would you then explain this?

...

A: When I read this yesterday, this was the time – the first time I also saw that there was on this minutes, and that's the reason why I say, so now I know where it came from. It was really a mistake.

Court: But the effect is that you misrepresented to the board of directors.

A: I – I hope not, but – you know, but it was really just a pure mistake.

Findings on the authenticity of the guarantee

208 Given the unexplained delay in the amendment of Richard Chan's defence, the curious failure to refer the guarantee for expert analysis in July 2011, the concessions made by Richard Chan's own expert that the signature on the guarantee was probably his, and the acknowledged inherent weakness of Ms Novotny's evidence stemming from the failure to examine the original guarantee before preparing the report, I conclude that Richard Chan has failed to meet the high standard of proof required to establish his claim of forgery. This, together with the substantial body of objective evidence in support of the plaintiffs' position before me, leads me irresistibly to find that the guarantee was indeed executed by Richard Chan.

209 Although the guarantee was unconventional in form – it is undated, does not have a letterhead, sports a signature at the top rather than the bottom, and is printed on a piece of paper which is smaller than half of an A4-sized document [note: 334] – that cannot, on its own, ground a serious charge of forgery. The fact that it is written in English [note: 335] should also be a neutral point *vis-a-vis* the possibility of forgery, since the 1st SPA was itself executed in English. Mr Narayanan argues that the fact that the guarantee was extracted from Richard Chan and not Antig was another suspicious factor. [note: 336] I disagree. Richard Chan had an interest in Antig, and it is not uncommon for directors to execute guarantees on behalf of their companies or subsidiaries. This conclusion is also consistent with my finding (at [288] to [289] below) that Richard Chan had subsequently represented to Tjong that the plaintiffs would receive the entire purchase price of US$18 million if Tjong sold his remaining PT Batubara and PT Deefu shares to some other parties, as it is similarly premised on an acknowledgment that the plaintiffs are entitled to the US$18 million.

Enforceability of the guarantee

210 Mr Narayanan argues that even if the guarantee is a genuine document, it is unenforceable because it is uncertain and unsupported by consideration. [note: 337] The parties eventually agreed that Singapore law governs the question of enforceability of the guarantee. [note: 338]

Consideration

211 Mr Narayanan argued in his oral closing submissions that the plaintiffs were under a pre-existing obligation to hand over the Requested Documents to Antig, and thus, performance of such an obligation cannot be construed as good consideration. However, as Mr Gabriel argues, it is fairly settled that performance of, or a promise to perform, an existing contractual obligation to a third party may afford sufficient consideration (see, for example, M P Furmston, *Cheshire, Fifoot and Furmston's Law of Contract*, (Butterworths, 14th ed, 2001) at pp 117 – 120 and *Treitel* at para 3-054 – para 3-055).

212 In *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd*; *The Eurymedon* [1975] AC 154 ("*The Eurymedon*"), for example, the plaintiff consignee of goods offered the defendant stevedore that if he would unload the plaintiff's goods from a ship, the plaintiff would promise not to sue him for damage to the goods. Although the defendant was already bound to unload the goods pursuant to a contract with a third party, the Privy Council held that the defendant's act of unloading the goods was good consideration for the plaintiff's promise. Similarly, in *Pao On v Lau Yiu Long* [1980] AC 614 ("*Pao On*"), the plaintiffs entered into a contract with a company in relation to certain share sales. The plaintiffs subsequently refused to perform the contract unless the defendants, who were shareholders of the company, guaranteed the plaintiffs against losses which might be incurred as a

result of the performance of one of the contractual terms. The Privy Council held (*Pao On* at 631 – 632) that:

> … the consideration for the promise of indemnity...was primarily the promise given by the plaintiffs to the defendants, to perform their contract with Fu Chip...Thus the real consideration for the indemnity was the promise to perform, or the performance of, the plaintiffs' pre-existing contractual obligations to Fu Chip...Indeed, [the indemnity] reinforces [the plaintiffs' pre-existing contractual obligation to Fu Chip] by imposing upon the plaintiffs an obligation now owed to the defendants to do what, at the first defendant's request, they had agreed with Fu Chip to do. Their Lordships do not doubt that a promise to perform, or the performance of, a pre-existing contractual obligation to a third party can be valid consideration. In [*The Eurymedon*], the rule and the reason for the rule were stated:
>
> > An agreement to do an act which the promisor is under an existing obligation to a third party to do, may quite well amount to valid consideration...the promisee obtains the benefit of a direct obligation...
>
> [internal citations omitted]

213 On the basis of well-established principles enunciated in *The Eurymedon* and *Pao On*, the fact that the consideration provided to Richard Chan under the guarantee was a pre-existing obligation owed by Tjong to Antig would not render the guarantee unenforceable. No authority was cited by Mr Narayanan to suggest otherwise.

Uncertainty

214 Mr Narayanan also argues that the guarantee is unenforceable for uncertainty. It is indeed trite that the terms of a guarantee must be certain (Donovan & Phillips, *The Modern Contract of Guarantee* (Sweet & Maxwell, 2010) ("*Donovan & Phillips*") at para 2-90). Courts will not, however, readily hold that a guarantee is void on grounds of uncertainty. As observed in *Donovan & Phillips* at para 2-90 – para 2-92:

> A guarantee, like any other contract, may be void because the terms of the guarantee are uncertain. *The tendency, however, has been for the courts to interpret the guarantee with regard to the fact that it is a commercial document, and there are few cases where a guarantee has been held void on this basis*...Apart from the statement of consideration, the terms of the guarantee must be sufficiently certain. The relevant parties must be properly identified as well as the principal transactions to which the guarantee relates and the amount of the guarantor's liability.
>
> *Again in this context, the courts will strive to uphold the guarantee as certain, where possible...The courts will revert to the factual matrix of the transaction to give the guarantee a commercially sensible meaning* and rectification can be used to correct obvious errors that may appear to render the guarantee uncertain. On one view where the relevant transactions have been executed and acted upon, the courts will be less likely to find that the guarantee is uncertain. Furthermore, the fact that sections of the standard form agreement are not completed will probably not render the guarantee uncertain.
>
> [emphasis added]

215 Turning to the guarantee on the present facts, Mr Narayanan argues that (a) it is unclear

whether the guarantee is made pursuant to the terms of the 1st SPA or whether it was some other unidentified promise by Antig to pay US$18 million; (b) the beneficiary of the guarantee is uncertain; and (c) it is unclear whether Richard Chan provided the guarantee in his capacity as Antig's director or in some other capacity. [note: 339] No authority has been cited to me in support of these submissions.

216 I reject Mr Narayanan's second and third arguments as it appears quite clear on the face of the guarantee that it was made in Richard Chan's capacity as "director" for the benefit of "Mr. Tjong Very Sumito". As for his first argument, it essentially relates to the issue of construction of the nature of the guarantee. He however stops short of explaining how the guarantee should be construed and why that should be the case, simply asserting that the position is unclear and, therefore, the guarantee is unenforceable. I shall now deal with this issue of construction.

Legal nature of the guarantee

217 What is the exact legal nature of the purported guarantee executed by Richard Chan? Was it a guarantee, as it was expressed to be, or was it in fact an indemnity? This determination is significant as it has a bearing on the extent of Richard Chan's liability, if any, under the purported guarantee, given that Antig has discharged part of its payment obligations under the 1st SPA (US$5,528,772 and US$550,000 have been paid to Tjong and OAFL respectively under the Cash Component, and Aventi and OAFL have been allotted MEGL shares representing US$5.75 million under the Shares Component).

218 A surety is discharged from his liability under the guarantee if the principal debtor pays the debt or performs the obligation which the surety has guaranteed, or if the principal's liability is forgiven. But where the surety contract is, on its true construction, an indemnity, the surety may not necessarily be discharged by reason of the performance of the principal debtor of his obligations, or otherwise, by discharge of the principal debtor (Geraldine Andrews & Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 6th ed, 2011) ("*Andrews & Millett*") at para 9-001). If Richard Chan indeed signed the surety contract *qua* guarantor, his liability under the guarantee would be discharged to the same extent to which Antig has performed its payment obligations.

219 Whether a surety contract is a guarantee or indemnity is a question of substance, not form; the label used to describe the document is not conclusive of its legal nature, which falls to be construed based on its words and in light of the parties' intentions. As Lord Diplock held in *Moschi v Lep Air Services Ltd and others* [1973] A.C. 331 ("*Moschi*") at 349 (applied in *China Taiping Insurance (Singapore) Pte Ltd v Teoh Cheng Leong* [2012] 2 SLR 1 ("*China Taiping*") at [16]):

> Whether any particular contractual promise is to be classified as a guarantee … depends upon the words in which the parties have expressed the promise. Even the use of the word 'guarantee' is not in itself conclusive. It is often used loosely in commercial dealings to mean an ordinary warranty. It is sometimes used to mis-describe what is in law a contract of indemnity and not of guarantee … Every case must depend upon the true construction of the actual words in which the promise is expressed.

220 After a close examination of the wording of the purported guarantee, pursuant to which Richard Chan promised a payment of US$18 million to Tjong "*not through OAFL and Aventi*", I am of the view that the purported guarantee is in fact an indemnity. I will explain why this is so, before elaborating on the effect of this finding on Richard Chan's liability.

Construction of guarantees and indemnities

221 The key difference between a guarantee and an indemnity is that while a guarantor's liability is collateral to and dependent upon the liability and default of the principal debtor, an indemnifier's liability is original and independent (*PT Jaya Sumpiles Indonesia v Kristle Trading Ltd* [2009] 3 SLR(R) 689 ("*Kristle Trading*") at [50] and *China Taiping* at [28]). This is related to the principle of co-extensiveness, which holds that a guarantor's liability is generally co-extensive with the principal debtor's liability in terms of the amount, time of payment and conditions under which the principal debtor is liable (*Kristle Trading* at [28] and *Andrews & Millett* at para 6-002). This principle does not, however, apply to indemnities. As such, it is said in *Andrews & Millett* at para 6-002 that:

> *Where the liability of a promisor under an agreement exceeds that of the primary debtor*, in that, for example, he may be liable when the primary debtor is not, or for an amount for which he is not, then the agreement is not a guarantee, and *the promisor undertakes primary liability himself*. In such circumstances the contract in question can only be viewed as an indemnity.
>
> [emphasis added]

222 This explains why specific recourse agreements taken by hire purchase companies from a car dealer providing for payment by the dealer in the event of the hirer's default would normally be construed as indemnities, *eg*, in *Goulston Discount Co Ltd v Clark* [1967] 2 QB 493. The liability of the dealer in such cases, which is for the full hire-purchase price, is clearly not co-extensive with the hirer's liabilities, which would usually be restricted to the arrears in instalments.

223 There is similarly an absence of co-extensiveness between the liabilities of the principal debtor and the surety where the latter agrees to pay regardless of whether the principal debtor is liable (*Andrews & Millett* at para 3-013). This is illustrated in *Lakeman v Mountstephen* (1874) L.R. 7 H.L. 17 ("*Lakeman*"). A contractor (Mountstephen) was reluctant to carry out certain works unless the relevant authorities promised to pay. When the chairman of the relevant authority (Lakeman) learnt of this, he told Mountstephen to "go on and do the work, and I will see you paid". Lord Cairns concluded that to hold Lakeman's promise to be a guarantee would be "a most strange and violent construction". In essence, Lakeman had said to Mountstephen, "[y]ou go on and do the work; do not concern yourself upon the subject of whether you have an order from the board, or have not such an order. You go on and do the work, and I will be your paymaster" (*Lakeman* at 22 – 23). Put simply, Lakeman had stepped in and undertook primary liability to pay for Mountstephen's work. In such a case, there could not have been a guarantee.

224 Through the construction exercise, the court essentially seeks to discern, based on the wording of the surety contract, whether the surety had undertaken primary or secondary liability. In *Associated British Ports v Ferryways NV and another* [2009] 1 C.L.C. 350 ("*Ferryways*"), a ferry service operator (Ferryways) signed an agreement with a port operator (ABP), pursuant to which ABP guaranteed a timed turnaround of 160 "units" at its port at designated time slots and specified rates. Problems arose in relation to the linkspan from ship to shore, and Ferryways required ABP to improve it. As this was a costly investment for ABP, it needed to secure Ferryways' long term commitment. They thus entered into a new 30-year agreement pursuant to which there was a minimum throughput obligation. Further, MSCB, a company related to Ferryways, signed a Letter Agreement assuming full responsibility for ensuring that Ferryways "(i) has and will at all times have sufficient funds and other resources to fulfil and meet all duties, commitments and liabilities entered into and/or incurred by reason of the Agreement *as and when they fall due* and (ii) promptly fulfils and meets all such duties commitments and liabilities."

225 Ferryways subsequently breached the 30-year agreement, and ABP sought to enforce the Letter Agreement against MSCB. The English Court of Appeal concluded that the Letter Agreement

was a guarantee. Consequently, as there had been a material variation of the underlying 30-year agreement to which MSCB was not a party, MSCB was discharged from any liability under the Letter Agreement. The court rejected ABP's argument that the Letter Agreement created a primary liability as limb (i) stated that MSCB was "at all times" responsible for ensuring that Ferryways had sufficient funds to meet its liabilities, whether or not they had yet fallen due. Instead, Maurice Kay LJ held that (*Ferryways* at 355):

> Far more significant is the way in which limb (i) defines the obligation of MSCB by reference to Ferryways meeting all its 'duties, commitments and liabilities entered into and/or incurred by reason of the Agreement *as and when they fall due'. It is, in the hallowed words used by the judge, a 'see to it' obligation*: MSCB would see to it that Ferryways performed its obligations under the Second Agreement. If Ferryways could not meet its liabilities to ABP 'as and when they fall due' (the primary liability), then the secondary liability of MSCB would accrue by way of guarantee.
>
> [emphasis added]

The present facts

226 Neither Mr Gabriel nor Mr Narayanan has made submissions addressing the true nature of the guarantee, and the attendant implications of either construction. It has not been contended by Mr Narayanan that Antig's performance of part of its payment obligations under Clause 4.02(2) limited the maximum amount recoverable against Richard Chan under the guarantee. On Mr Gabriel's part, there appears to be an assumption that the purported guarantee was, in truth, an indemnity. This would explain why the plaintiffs' pleaded claim on the guarantee was US$12,471,227 (being the balance of the US$18 million purchase price not yet received by the plaintiffs), [note: 340] despite their acknowledgement that Antig had allotted 166,959,091 MEGL shares to Aventi and OAFL [note: 341] in accordance with Clause 4.02(2).

227 I am of the view that the purported guarantee, on its true construction, is in fact an indemnity. The phrase "*not through OAFL and Aventi*" directly contradicts Clause 4.02(2), which directs Antig to pay part of the US$18 million purchase price to Aventi and OAFL to hold "for and on behalf of" the plaintiffs. In essence, it was a promise to pay Tjong the full amount regardless of whether Antig was liable to that same extent; Richard Chan's obligation to ensure payment of US$18 million to Tjong could not have been premised on default by Antig, who was only obliged to pay US$6 million directly to Tjong under the 1st SPA.

228 Could it nevertheless be argued that the reference made to the 1st SPA in the purported guarantee ("upon the Share Sale and Purchase Agreement dated 23 November 2004") indicates that Richard Chan's liability was really secondary in nature? I do not think so. A similar argument was raised and rejected in *China Taiping*. The defendant (Teoh) was the director of several companies which hired foreign workers. The companies were statutorily obliged to provide Security Bonds for these workers, pursuant to which $910,000 was payable to the Controller as security deposit to secure performance of the security bonds. Instead of furnishing a cash security deposit of $910,000, Teoh requested the plaintiff insurer (CT) to provide 47 guarantees to the Controller guaranteeing and undertaking to pay the sum to the Controller on demand (the Guarantees). In consideration of the Guarantees, Teoh concurrently executed 47 indemnities indemnifying CT against *inter alia* all claims, payments, demands, actions and losses incurred in relation to the security bonds (the Indemnities).

229 When the Security Bonds were subsequently breached by the companies, the security deposits

became liable to forfeiture. To mitigate its loss under the Guarantees, CT agreed to cooperate with the Ministry of Manpower (MOM) by assisting in the repatriation of the foreign workers. In doing so, CT incurred a total cost of around $450,000 in relation to eight heads of payment, *viz*, (a) bond, (b) air tickets, (c) meals, (d) lodging, (e) mattress, (f) transport, (g) administration fees and (h) token wages. Only heads (a) to (e) were spelled out under the Security Bonds. Teoh thus argued that the liabilities under the Guarantees and Indemnities are inextricably linked, and necessarily circumscribed by the conditions of the Security Bonds, *ie*, that heads (f) to (h), which were not spelt out in the Security Bonds, were not recoverable under the Indemnities. In rejecting Teoh's argument, Chan J held (*China Taiping* at [26]):

> In [Teoh]'s submissions, he did not address the legal nature of the Guarantees, ie, whether it was only a guarantee or an on-demand guarantee … [Teoh]'s point simply is that the Guarantees refer to the Security Bonds and therefore are circumscribed by the conditions under the Security Bonds … [But] while the recital of the Guarantees made references to the conditions under the Security Bonds, these conditions were clearly not incorporated into the operative clauses in the Guarantees to qualify the Controller's right to make a demand on [CT]. I therefore found that on a construction of the Guarantees, they were on-demand performance bonds and [CT]'s liabilities under the Guarantees were independent and not circumscribed by the conditions in the Security Bonds.

Similarly, given the clear and unequivocal wording "*not through Aventi and OAFL*", the mere reference to the 1st SPA in the purported guarantee would not serve to circumscribe Richard Chan's liability to indemnify Tjong up to the full amount of US$18 million as that proviso was directly contradictory to Clause 4.02(2).

230 In light of the foregoing, I find that the purported guarantee was, on its true construction, an indemnity. This would mean that Richard Chan would be liable for the balance purchase price not yet received by the plaintiffs, *ie*, US$12,471,227.

Letters of discharge and settlement

231 Finally, Richard Chan also relies on two sets of documents signed by Tjong, which purportedly released, *inter alia*, Antig and its directors from any liability in relation to the sale of the PT Batubara shares. These documents can have a bearing on the plaintiffs' claim if the document executed by Richard Chan was *in truth* a guarantee, since Richard Chan as guarantor will be discharged from his liability under the guarantee if the liability of the principal debtor, Antig, is forgiven (*Andrews & Millett* at para 9-001 and para 9-010). As I have found that it was in substance and effect an indemnity, Richard Chan's reliance on these letters become moot. I shall however deal with this issue briefly to show that Richard Chan's reliance on those letters was in any event misconceived.

232 The first set of documents comprise two statements dated 2 November 2007 wherein Tjong purportedly agreed to "release and discharge" Antig and its directors from "any and all claims, actions, proceedings, demands whatsoever" arising in relation to the acquisition of Tjong's PT Batubara shares ("the Discharge Letters"). [note: 342] The second set relates to a letter dated 12 November 2007 wherein Tjong purportedly agreed to accept a sum of US$1,138,772 in full and final settlement of any remaining purchase price under the 1st SPA still due to him ("the Final Settlement Letter"). [note: 343] I will address each set of documents in turn, though I should state upfront that neither would have been of assistance to Richard Chan's case as they do not release Antig from its obligation to pay the plaintiffs the full balance purchase price under the 1st SPA.

The Discharge Letters

The Discharge Letters

233 It is Richard Chan's pleaded case that, by the Discharge Letters, the plaintiffs released Richard Chan from all causes of action, such that their current claims against him are non-maintainable. [note: 344] The two Discharge Letters, which are substantially similar with each other, read:

> The undersigned:
>
> Tjong Very Sumito, in this matter *acting in my capacity as ex-Commissioner of PT Batubara Selaras Sapta* ("the Company") hereby states the following:
>
> 1. That I agree to release and discharge Antig, any affiliated/associated/related company of Antig...as well as all current and former officers, directors, agents and employees of Antig Group (and their successors and assigns) from any and all claims, actions, proceedings, demands, whatsoever, financial, civil or otherwise;
>
> 2. That any claim that I make against Antig Group *for any matter arising during the acquisition of my shares in [PT Batubara]* and/or in relation to or in connection with the said acquisition shall be deemed to be an act contrary to law;
>
> 3. that by this provision I confirm that I have no claims or right to any claim whatsoever against Antig and/or the Antig Group and/or to any third party in relation to the said share acquisition and matters connected therewith and I expressly acknowledge that any statement made/to be made by me to the contrary to any authority or other party whatsoever shall be inaccurate and in contradiction of this confirmation and acknowledgement.
>
> *This Statement is given in respect of the shares acquisition of all my shares in the Company.*
>
> *Signed on 2-11-2007*
>
> PT Batubara Selaras Sapta
>
> [Signed]
>
> Name: Tjong Very Sumito
>
> [emphasis added]

234 The plaintiffs aver that the Discharge Letters were prepared by Richard Chan and that Richard Chan had requested Tjong to sign them. [note: 345] They claim that Tjong did not understand what was stated in the Discharge Letters as they were in English, and was told by Richard Chan to sign the Discharge Letters in order to receive the balance purchase price under the 1st SPA, as the Discharge Letters were instructions to Antig to make payment to the plaintiffs. [note: 346] The plaintiffs also claim that Richard Chan fraudulently misrepresented to Tjong that he would make arrangements for payments under the 1st SPA which Tjong relied on by signing the Discharge Letters. [note: 347]

235 In any event, the Discharge Letters, which were signed by Tjong is his capacity as ex-commissioner of PT Batubara and not as one of the vendors under the 1st SPA, refer exclusively to the sale of Tjong's shares in *PT Batubara*, and not the sale of Tjong's PT Deefu shares. They are therefore of no relevance to Richard Chan, MEGL and Antig who purchased the plaintiffs' PT Deefu

shares under the 1st SPA. It was, in fact, Jake who was the purchaser of Tjong's remaining 5% PT Batubara shares under the 2nd SPA (this point will be developed further below (at [275] to [279]) on the question whether Jake and Edwin were in fact Antig's nominees in the acquisition of those shares). While it is true that PT Batubara was substantially owned by PT Deefu, the scope of the Discharge Letters must be construed strictly and, on their face, they do not extend to the sale of the PT Deefu shares under the 1st SPA. Indeed, Richard Chan conceded under cross-examination that the Discharge Letters only refer to Tjong's PT Batubara shares. [note: 348] He could not offer any explanation for his misplaced reliance on the Discharge Letters other than to say "I have got no answer". [note: 349]

236 In light of the foregoing, I find that the Discharge Letters are of no assistance to Richard Chan's case. They did not release Antig from its liability in relation to its acquisition under the 1st SPA of 72% of the PT Deefu shares. *A fortiori*, even if I am wrong in my construction of the purported guarantee as an indemnity, Richard Chan's liability under the guarantee remains.

The Final Settlement Letter

237 Next, Richard Chan relies on the Final Settlement Letter [note: 350] dated 12 November 2007 from Tjong to Antig stating that the final amount due to Tjong was US$1,138,772 (S$1,630,038.24) and instructing Antig to issue a cheque for this sum as "final settlement" of the balance purchase price under the 1st SPA. [note: 351]

238 In discharging the injunction against Richard Chan, Alwie, Jake and Edwin in March 2010, I noted in my oral grounds that there were four other letters similarly dated 12 November 2007. [note: 352] All of them contradict the Final Settlement Letter. The first states that the final amount of the balance price was US$3.7 million payable within 24 months from 13 June 2006 [note: 353] while the second states that the final amount of the balance purchase price was US$18 million. [note: 354] The third referred to the sum of US$1,138,772 (S$1,630,038.24) as being only "partial" settlement of the balance purchase price, [note: 355] and the fourth directed Antig to pay Tjong US$5.7 million and 177,727,273 MEGL shares. [note: 356] According to Tjong, the first of these three letters and the Final Settlement Letter [note: 357] were prepared by Richard Chan who asked him to sign them in order to receive the sum of US$1,138,772 under the 1st SPA. [note: 358] In my oral Grounds of Decision referred to at [6] above, I stated that I was not satisfied that these letters were fabricated by Tjong because, if he wanted to fabricate them, he could not have done so in a worse possible way. [note: 359]

239 The Final Settlement Letter was accompanied in Richard Chan's AEIC by a numerical table showing how the amount of US$1,138,772 had been arrived at. [note: 360] However, it appears to deal only with the amount due and payable on 13 June 2007 under clause 2(e)(i) of the 1st SPA for the instalment payment of US$3 million, and not for the full sum of US$18 million under the 1st SPA; the amount was referred to as the "Balance 1st Instalment of Balance Purchase Price", rather than the full balance purchase price under the 1st SPA. In other words, the numerical table setting out the derivation of the outstanding sum of US$1,138,772 was only supposed to represent the final balance payment for the first instalment.

240 I also note that there is no document setting out how the full sum of US$18 million due to the plaintiffs under the 1st SPA was actually disbursed (*ie*, at which date and to whom, and whether the payments were accelerated and/or at a discount). If the Final Settlement Letter does indeed have the effect of being final settlement of all sums due under the 1st SPA, one would have expected Antig to set out how the full sum has been satisfied, making allowances for discounts and set-offs. Richard Chan also testified that he could not remember if there is an account of all previous payments made to the plaintiffs. [note: 361] The reason for this absence is probably because the defendants did not want Tjong to know that payments had been made to OAFL and, possibly, Aventi. This is corroborated by Tjong's actions – he had written a series of four letters asking Antig not to make payments under the 1st SPA to any party other than himself, and even started the Antig Suit without knowing that the payment instalment of US$3.7 million was purportedly pre-paid to Aventi at a discount (see [33] and [114] above). These observations further strengthen my finding that the Final Settlement Letter does not fully and finally settle all payments due under the 1st SPA.

Conclusion on the claim based on the guarantee

241 In the premises, I find that the plaintiffs' claim against Richard Chan under the guarantee is made out, and Richard Chan is liable to Tjong for US$12,471,227, being the balance of the US$18 million purchase price not yet received by the plaintiffs.

Claims against Jake, AAML and Edwin

242 The claims against Jake, AAML and Edwin concern the Remaining Shares – 5% in PT Batubara and 28% in PT Deefu. The plaintiffs seek to set aside the 2nd and 3rd SPAs on the ground that Tjong had executed them (a) under economic duress; and, alternatively, (b) in reliance on Richard Chan's fraudulent misrepresentations. I will deal with each ground in turn.

Claims based on duress

243 An interesting feature of the duress claim is that while such claims are generally made where pressure is exerted by one contracting party on another, the duress alleged on the present facts had allegedly emanated from Richard Chan who is, strictly speaking, a non-party to the 2nd and 3rd SPAs, *ie*, the claims against Jake, AAML and Edwin are *indirect*. As will be discussed (see [269] to [272] below), there are a number of ways to bridge this gap. On the present facts, the plaintiffs have done so by pleading unlawful means conspiracy amongst Richard Chan, MEGL, Antig and Jake *vis-a-vis* the 2nd SPA, [note: 362] and Richard Chan, MEGL, Antig, AAML and Edwin *vis-a-vis* the 3rd SPA. [note: 363] In my examination of this issue, MEGL and Antig will not feature in the equation.

244 According to the plaintiffs' pleaded case, Richard Chan knew that Tjong was in need of cash and had coerced Tjong into selling the Remaining Shares. This was purportedly done by threatening that if Tjong refused, (a) Tjong would not be paid the balance of the purchase price for the sale of 72% of PT Deefu shares ("Threat 1"); (b) Richard Chan would cancel the 1st SPA, so that 72% of PT Deefu shares would be returned to the plaintiffs, and Tjong would have to return the money already received under the 1st SPA ("Threat 2"); and (c) PT Deefu would issue more shares to dilute Tjong's shareholding therein ("Threat 3") [note: 364] (collectively referred to as "the Threats").

245 I find it more likely than not that the Threats were made by Richard Chan as alleged. Richard Chan agrees that he was, in June 2007, withholding the completion payments that were due to the

plaintiffs under the 1st SPA. [note: 365] In the meantime, early payments totaling US$5.7 million were surreptitiously made to a Credit Agricole account without the plaintiffs' knowledge (see [45] to [46] and [114] above). [note: 366] He conceded in cross-examination that he wanted to acquire the Remaining Shares while withholding the payments due to the plaintiffs: [note: 367]

> Mr Gabriel: Withholding all these payments, you then wanted to acquire the remaining shares at $2 million. Correct?
>
> A: Correct.

This appears to have stemmed from Antig's desire to increase its stake in PT Deefu and PT Batubara, as evidenced by letters written by Antig's solicitors, SJD, to Tjong, dated 7 December 2006, [note: 368] 11 December 2006 [note: 369] and 5 June 2007 [note: 370] referring to Antig's plan to take over *all* the Remaining Shares. Richard Chan disingenuously attempted to distance himself from the letters by SJD first by claiming that they were not genuine letters, [note: 371] but when confronted with the fact that the letters were included in the Agreed Bundles, he changed his position claiming that SJD was wrong in writing the letters in those terms. [note: 372] He however eventually conceded that on the face of the letters, Antig was desirous of purchasing the Remaining Shares. [note: 373] This exchange is but one of the many falsehoods spewed by Richard Chan throughout the trial.

246 I find that it is likely that Richard Chan had issued the Threats in order to acquire the Remaining Shares on Antig's behalf at a low price. All three threats are consistent with Antig's desire to increase its shareholding in PT Deefu and PT Batubara, by either acquiring the Remaining Shares from Tjong, or by diluting Tjong's existing shareholding. Having said that, I must then deal with the following legal issues in turn:

(a) Whether there had been illegitimate pressure exerted on Tjong by Richard Chan, resulting in a coercion of Tjong's will when he signed the 2nd and 3rd SPAs; and

(b) If so, whether Jake, AAML and Edwin were sufficiently implicated in the duress such that the 2nd and 3rd SPAs may be set aside.

Whether there had been illegitimate pressure exerted on Tjong by Richard Chan, resulting in a coercion of Tjong's will when he signed the 2nd and 3rd SPAs?

247 There are two elements to constitute duress, *viz*, (a) the exertion of illegitimate pressure and (b) such pressure amounting to the compulsion of the victim's will (see, for example, *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 400, *Tam Tak Chuen v Khairul bin Abdul Rahman and others* [2009] 2 SLR(R) 240 ("*Tam Tak Chuen*") at [22] and *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and another (Orion Oil Ltd and another, intervener)* [2011] 2 SLR 232; [2010] SGHC 270 ("*E C Investment*") at [51]). The causative threshold a plaintiff needs to meet is discussed in *Treitel* at para 10-005 (endorsed in *E C Investment* at [52]) as follows:

> *[T]he two factors may also be said to be interdependent in the sense that the more illegitimate the pressure the lower the causal threshold.* This may explain why, for duress of the person, it need only be proved that the threat was one reason why the contract was entered into, whereas *for economic duress the minimum requirement before it can be said that the threat*

was a significant cause is to satisfy the 'but for' test, i.e. that the agreement would not have been made at all or on the terms it was made.

[emphasis added]

248 In their written closing submissions, the plaintiffs have concentrated on establishing element (a) while Jake, AAML and Edwin have focused on denying the existence of element (b). I find that the Threats did amount to illegitimate pressure on the present facts. However, there was no compulsion of Tjong's will at the material time, and therefore the duress claim fails.

Illegitimate Pressure

The law

Threats of unlawful acts

249 Threats of unlawful action, *eg* contractual breach, can amount to illegitimate pressure. Mr Gabriel relies on *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] 3 WLR 419 ("*North Ocean Shipping*") for the proposition that a threat to break a contract without legal justification may amount to economic duress. [note: 374] In *North Ocean Shipping*, a contract between ship owners and ship builders allocated the risk of currency devaluation to the builders. However, upon devaluation of the currency, the builders threatened to breach the contract unless additional payments were made by the owners. Although the duress claim ultimately failed due to a subsequent waiver of the right to avoid the re-negotiated contract, Mocatta J found that illegitimate pressure had indeed been applied by the builders (*North Ocean Shipping* at 719):

> A threat to break a contract may amount to..."economic duress"...I think the facts found in this case do establish that the agreement to increase the price by 10 per cent...was caused by what may be called "economic duress." *The [builders] were adamant in insisting on the increased price without having any legal justification for so doing and the owners realised that the [builders] would not accept anything other than an unqualified agreement to the increase*...The owners made a very reasonable offer of arbitration coupled with security for any award in the [builder]'s favour that might be made, but this was refused. They then made their agreement, which...have been made under compulsion, by the telex of June 28 without prejudice to their rights.
>
> [emphasis added]

In essence, as the threat to breach the contract in *North Ocean Shipping* was made in support of an illegitimate demand, it amounted to illegitimate pressure (Professor Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2006) ("*Enonchong*") at para 3-007). This is an important point to note as not all threats of contractual breach would constitute illegitimate pressure.

250 *North Ocean Shipping* may be contrasted against the case of *Sharon Global Solutions Pte Ltd v LG International (Singapore) Pte Ltd* [2001] 2 SLR(R) 233; [2001] SGHC 139 ("*Sharon Global*"). The plaintiff company (SGS) contracted to sell steel products to the defendant company (LG), which in turn entered into a back-to-back agreement to sell the steel products to an important customer (POSCO). Due to SGS's inexperience, it could only find a vessel to ship the steel at a higher freight cost. SGS was prepared to breach the contract unless LG agreed to share the additional costs. LG reluctantly agreed as it was worried about the serious commercial consequences of failing to fulfil its obligations to POSCO. Citing *Chitty on Contracts* (Sweet & Maxwell, 28th Ed, 1999), Kan Ting Chiu J

distinguished between threatened contractual breaches which would amount to duress and those that would not (*Sharon Global* at [32]):

> *… [D]eliberate exploitation of the victim's position with a view to gaining some advantage unrelated to the contract and to which the threatening party knows he is not entitled is clearly illegitimate. Conversely, an apparent threat should not be treated as illegitimate if it was really no more than a true statement that, unless the demand is met, the party making it will be unable to perform; nor if the party has a genuine belief that he is legally entitled to the amount demanded.* It is suggested that a demand made in good faith, in the sense that the party demanding has a genuine belief in the moral strength of his claim — for example, because he has encountered serious and unexpected difficulties in performing and will suffer considerable hardship if his demand is not met; or to correct an acknowledged imbalance in the existing contract — might in some circumstances also be treated as legitimate. Here the behaviour of the victim, for example whether he protests, will be relevant. First, it will go to causation...secondly, payment without protest may leave the demanding party believing that the justice of his demand is admitted, whereas it will be harder for him to prove that he was acting in good faith if he ignores the victim's protests.
>
> [emphasis added]

251 On the facts of *Sharon Global*, no illegitimate pressure was established as there had been no exploitation of the alleged victim's position (*Sharon Global* at [34] – [39]):

> … [T]he spirit of the venture must be taken into account. From the start, both parties intended to co-operate to gain entry into the HBI business...The second relevant factor is the cause for the plaintiff's demand that the defendant share the additional costs. The plaintiff through its inexperience, misjudged the freight costs badly...[and] was unable to bear the additional costs alone...[and] the plaintiff bore a greater burden under the agreement of 12 August by paying its share of the additional freight than it would have under the performance bond...*Against this background it cannot be said that the plaintiff was seeking to exploit the situation to increase its profits* when it informed the defendant that it would not charter the vessel unless the defendant agreed to share the additional costs...two matters stood out for consideration. *First, the plaintiff was not seeking to improve its financial position by seeking the contribution instead of forfeiting the performance bond. Second, the plaintiff was not seeking to shift the burden of the additional costs entirely to the defendant, and had agreed to bear a share of it even when it did not have the funds for that purpose*.
>
> [emphasis added]

Threats of lawful action

252 Threats of lawful action can also constitute duress. However, a corollary of the rule that a party pleading duress must prove illegitimate pressure, as opposed to mere commercial pressure, is that where the threatened act is in itself lawful, it would be extremely difficult, and indeed, rare, to be able to prove economic duress, especially in the commercial context (*C.T.N. Cash & Carry Ltd v Gallager Ltd* [1994] 4 All ER 714 ("*C.T.N. Cash and Carry*") at p 719 and *E C Investment* at [47] and [51]). This arises from the need to ensure certainty in the commercial bargaining process (*Tam Tak Chuen* at [50] and *E C Investment* at [48] – [49]). Four factors are relevant to the question of whether a threat of lawful action is illegitimate (*Enonchong* at para 3-022, *Tam Tak Chuen* at [50] and *E C Investment* at [48]), *viz*:

(a) Whether the threat is an abuse of legal process;

(b) Whether the demand is not made *bona fide*;

(c) Whether the demand is unreasonable; and

(d) Whether the threat is considered unconscionable in the light of all the circumstances.

253 The buyer in *C.T.N. Cash and Carry* paid a sum of money to his supplier as a result of the supplier's threat to otherwise stop the buyer's credit facilities in their future dealings. Significantly, the supplier was not contractually bound to sell goods to the buyer; separate contracts were made from time to time and credit facilities, which were effective until withdrawn, were granted by the supplier in its absolute and unfettered discretion. Further, the supplier acted in the *bona fide* belief that such sum was owing to it. Steyn LJ readily accepted that the fact that the defendants have used lawful means did not by itself remove the case from the scope of the doctrine of economic duress. However, he cautioned against a too-ready finding of lawful act duress in a purely commercial setting (*C.T.N. Cash and Carry* at 718 – 719):

> … On the other hand ... *English courts have wisely not accepted any general principle that a threat not to contract with another, except on certain terms, may amount to duress.* ... [A]n extension [of the categories of duress] capable of covering the present case, involving "lawful-act duress" in a commercial context in pursuit of a *bona fide* claim, would be a radical one with far-reaching implications. It would introduce a substantial and undesirable element of uncertainty in the commercial bargaining process. Moreover, it will often enable b*ona fide* settled accounts to be re-opened when parties to commercial dealings fall out. The aim of our commercial law ought to be to encourage fair dealing between parties. But it is a mistake for the law to set its sights too highly when the critical enquiry is not whether the conduct is lawful but whether it is morally or socially unacceptable. ... *Outside the field of protected relationships, and in a purely commercial context, it might be a relatively rare case in which "lawful-act duress" can be established.* And it might be particularly difficult to establish duress if the defendant *bona fide* considered that his demand was valid. In this complex and changing branch of the law I deliberately refrain from saying "never". But as the law stands, I am satisfied that the defendants' conduct in this case did not amount to duress.
>
> [emphasis added]

Steyn LJ's conclusion that there had been no illegitimate pressure was based on three crucial findings (*C.T.N. Cash and Carry* at 717 – 718):

> [First, *t]he dispute arises out of arm's length commercial dealings* between two trading companies. ... The fact that the defendants were in a monopoly position cannot therefore by itself convert what is not otherwise duress into duress.
>
> [Second,] *the defendants were in law entitled to refuse to enter into any future contracts with the plaintiffs for any reason whatever or for no reason at all.* Such a decision not to deal with the plaintiffs would have been financially damaging to the defendants, but it would have been lawful. *A fortiori* it was lawful for the defendants, for any reason or for no reason, to insist that they would no longer grant credit to the plaintiffs. The defendants' demand for payment of the invoice, coupled with the threat to withdraw credit, was neither a breach of contract nor a tort.
>
> [Third, t]he defendants exerted commercial pressure on the plaintiffs in order to obtain payment

of a sum which they *bona fide* considered due to them. *The defendants' motive in threatening withdrawal of credit facilities was commercial self-interest in obtaining a sum that they considered due to them*.

[emphasis added]

254 This concern to safeguard certainty in the commercial bargaining process was echoed in the High Court decision of *E C Investment* which involved an experienced businessman (AA) looking to raise urgently-needed funds using a property he owned. The plaintiff, sensing a money-making opportunity, drove a hard bargain and eventually entered into an arrangement with AA, pursuant to which the plaintiff was granted an option to purchase the property at $20 million for an option fee of $1.5 million. The option gave AA an opportunity to cancel it upon refunding the $1.5 million option fee and cancellation fee of $180,000. AA was confident that he would be able to settle this "loan" and cancel the option within one or two months. At the material time, AA had legal advice and did not protest. After a detailed examination of the law on economic duress, Quentin Loh J held that (*E C Investment* at [55] – [59]):

If the Plaintiff had agreed to lend AA $2m with the Property as security, delayed matters to the last minute and when AA turned up to pick up his cheque he was then presented with a loan agreement, a smaller sum of $1.5m and an option to sell the Property to the Plaintiff for $20m (instead of $22m) which was even below the forced sale value, and it was by then too late for AA to refuse and look for other sources of funds, then...there may have been sufficient illegitimate pressure and coercion of AA's will to set aside the option to purchase the Property at $20m. I emphasise the word "may".

... AA is a seasoned businessman who has been through much in his business career. *The figures were not final when the meeting commenced on 5 June 2009. There was no promise or agreement. ... [T]hey were there to negotiate. ...* There was certainly no protest or suggestion of illegitimate pressure from AA or his advisers or that some understanding had been breached.

The fact that AA was very desperate for funds and that fact was known to the Plaintiff only meant that they had the upper hand in the negotiations. That was a legitimate commercial advantage and not pressure because the Plaintiff was not obliged to lend AA money ... Holding otherwise would mean that many hard pressed debtors would be able to avoid contractual obligations on this ground. That fact alone cannot amount to unlawful exploitation or illegitimate pressure. The truth is...that AA entered into this transaction...because he was confident he could repay that sum within one or two months. *AA had the benefit of advice from his lawyer and his CFO, both of whom were also with him at the 5 June 2009 meeting. He understood what he was signing. I therefore cannot see how there is any duress in this case that could vitiate the contract or that there is any illegitimate coercion which vitiated the will.*

[emphasis added]

The present facts

255 I am of the view that the Threats amounted to illegitimate pressure exercised on Tjong. Threats 1 and 2 are essentially threats to breach the 1st SPA, *ie*, threats of unlawful action. As in *North Ocean Shipping*, there was no legal justification for Richard Chan's demand for Tjong to enter into the 2nd and 3rd SPAs or risk not being paid under the 1st SPA. The 2nd and 3rd SPAs were completely unrelated to the performance of the 1st SPA. The present factual matrix is also a far cry

from that in *Sharon Global*, where the "threat" was really no more than a true statement that, unless the demand was met, performance of the contract by the party issuing the threat would be rendered onerous or impossible. I find, to the contrary, that Threats 1 and 2 were made deliberately to exploit Tjong's weak financial position with a view to procuring the Remaining Shares at an undervalue – an advantage which is completely unrelated to the 1st SPA (*Sharon Global* at [32]).

256 The exploitative nature of Threats 1 and 2 becomes apparent when one considers the huge "discount" at which the Remaining Shares were sold under the 2nd and 3rd SPAs. Mr Gabriel draws an analogy between the present facts and the facts in *Tam Tak Chuen.* [note: 375] The plaintiff in that case (Tam) sought to set aside the sale of certain shares to the 1st defendant (Khairul) on the ground of duress. Khairul had apparently confronted Tam with an incriminating video evidencing Tam's extramarital affair, and had threatened to tender the footage as evidence in court if Tam did not agree to the sale. Judith Prakash J held that (*Tam Tak Chuen* at [58]):

> The facts of this case also support the finding that Dr Khairul's threat to make the photographs and video footage public was made to support an unreasonable demand...Even using LYS's valuation, the sum paid by Dr Khairul for the shares was not even 25% of their value of $212,361...As the demands made by Dr Khairul in respect of the consideration for the transfer of all the plaintiff's shares in all the companies were unreasonable, his threat was illegitimate on this basis as well.

Mr Gabriel argues that, as in *Tam Tak Chuen*, the Remaining Shares were obtained at a discount of more than 75%. Indeed, Richard Chan, Jake and Edwin admit that the Remaining Shares were sold at undervalue. Richard Chan agreed during cross-examination that "from [Tjong's] point of view", selling the Remaining Shares for US$2 million was a "gross undervalue". [note: 376] Similarly, Edwin conceded on the stand that to his knowledge the sale of the remaining 28% of PT Deefu shares had been sold at undervalue as Tjong needed cash. [note: 377] Jake also stated in his AEIC that he found the deal to be a "worthwhile punt" because while MEGL had valued the 5% of PT Batubara shares at US$1.3 million, he was able to procure them at US$320,000. [note: 378] The fact that Jake and Edwin were able to shortly after resell the Remaining Shares for A$12.64 million (see [30] above) underscores the undervalued nature of the transactions under the 2nd and 3rd SPAs.

257 In oral closing submissions, Counsel for Jake, AAML and Edwin, Mr Jeffrey Ong ("Mr Ong"), relied on *E C Investment* to argue that extracting the sale of the Remaining Shares from Tjong at an undervalue with the knowledge of Tjong's financial situation was at most an exertion of legitimate commercial pressure. *E C Investment*, and similarly, *C.T.N. Cash and Carry*, are not, however, directly applicable to the present facts since those cases did not involve any threatened breach of contract; parties in those cases were in the *pre-contractual* bargaining stage and were not obliged to transact. In those cases, the knowledge *per se* that a party to the negotiation was desperately in need of funds only gave the other party an upper hand in the bargaining process. By contrast, Antig was under existing payment obligations to Tjong under the 1st SPA. Knowing that Tjong was in need of cash, Richard Chan then threatened to withhold those payments unless Tjong agreed to sell the Remaining Shares at an undervalue. In other words, this is not a case where the defendants had simply used their commercial muscle to extract an attractive bargain for themselves. There appeared instead to be an exploitation of Tjong's allegedly weak financial position with a view to gaining an advantage unrelated to the 1st SPA.

258 As for Threat 3, there is nothing in PT Deefu's Articles of Association [note: 379] indicating that

the threatened share issue would be a contravention of the Articles. Apart from matters to do with amendment of the Articles, merger, consolidation, acquisitions, dissolution and liquidation, which require 75% shareholders' approval, [note: 380] the Articles state that all other resolutions may be reached *via* 50% shareholders' resolution. [note: 381] In other words, Threat 3 is a threat of lawful action. Nonetheless, I am of the view that it amounted to illegitimate pressure, since it was unreasonably made to extract the sale of the Remaining Shares at undervalue. Richard Chan, who knew of Tjong's weak financial position, was aware that Tjong would not have been able to subscribe to any new issue of shares, thus leading to the inevitable dilution of his Remaining Shares. More importantly, Threat 3 must be assessed in light of Threats 1 and 2 as they were all made to achieve the same purpose. Given the exploitative nature of the Threats, I find that they did indeed amount to illegitimate pressure.

Compulsion of Tjong's will

The law

259 Whether an illegitimate threat amounts to duress depends on its coercive effect in each case. There is no coercion of will where, *eg*, the alleged victim "considered the matter thoroughly, chose to avoid litigation, and formed the opinion that the risk in giving the guarantee was more apparent than real" (*Pao On* at 635). In determining the extent of such coercive effect, the court will consider the factors enumerated by Lord Scarman in *Pao On*, which have been repeatedly relied on as guidelines by our courts (see, for example, *Tam Tak Chuen* at [62] and *E C Investment* at [44]), *viz*:

(a) Whether the person alleged to have been coerced did or did not protest;

(b) Whether, at the time of the alleged coercion this person did or did not have an alternative course open to him;

(c) Whether he was independently advised; and

(d) Whether after entering into the contract he took steps to avoid it.

The present facts

Access to legal advice and failure to protest or take steps to avoid the 2nd and 3rd SPAs

260 The defendants emphasise that Tjong (a) had failed to protest until the issue of the present proceedings in 2010, *ie* more than 2.5 years after the 2nd and 3rd SPAs were executed; [note: 382] (b) had access to independent advice from Mr Manjit Singh and from his lawyers in Indonesia; [note: 383] (c) had access to, and did get advice from, other sources such as Dr Irwan; [note: 384] and (d) had alternative courses open to him at the material time. [note: 385]

261 Mr Ong relies on *Third World Development Ltd v Atang Lateif* [1990] 1 SLR(R) 96; [1990] SGCA 2 ("*Third World*") to argue that failure to take steps to avoid the contract within reasonable time is fatal to a claim for economic duress. [note: 386] Pursuant to written agreements, the company in *Third World* engaged the respondents as exclusive operators of a casino in a building project. The appellant, who was the chairman, managing director and 99% shareholder of the company, executed a letter of undertaking in which he undertook that if, for any reason, the respondents were not permitted to operate the casino at the building, he would refund on demand payments made in advance by the respondents. On being subsequently sued on the letter of

undertaking, the appellant relied on the vitiating ground of economic duress. He alleged that the respondents knew that he and the company were in grave financial difficulties and that alternative finances would not be readily available. They had then deliberately and wrongfully refused to pay the full amount of advance rent that was due to the company, thus coercing him into executing the letter of undertaking. In rejecting the defence of economic duress, LP Thean J held that (*Third World* at [11] – [18]):

> … [I]mmediately or soon after the undertaking was executed and the remaining half of the advance rent was paid to the company, the appellant did not make any complaint of the undertaking; he did not initiate any step to challenge or seek to avoid the undertaking; nor did he notify the respondents that as he was coerced into signing the undertaking he was seeking legal advice on the effect or validity of the undertaking. … It is significant that, *even [when] confronted with a demand for payment of the amount under the undertaking, not a word was uttered by the appellant that the undertaking was forced on him or that the respondents in any way pressurised him to execute the undertaking. It was only after this action was started that the appellant complained that he was coerced into signing the undertaking* ... There is nothing before us which could really support the appellant's allegation that there was any coercion of his will in signing the undertaking.
>
> [emphasis added]

262 The 2nd and 3rd SPAs were executed on 12 July 2007, and from then till commencement of the present suit in February 2010, a period of about 30 months, no step was taken by Tjong to avoid those transactions. [note: 387] There was also nothing to show that Tjong had intended to sell the Remaining Shares for more than US$2 million, but was forced by Richard Chan to settle for US$2 million. The circumstances do not suggest that Tjong had been coerced to enter into the 2nd and 3rd SPAs.

Alternative courses were opened to Tjong

263 Mr Ong and Mr Narayanan also argue that alternative courses were opened to Tjong at the material time. In relation to Threat 1, they pointed out that Tjong, by his own case, had by then extracted the guarantee from Richard Chan, which he must have believed to be enforceable. [note: 388] Mr Narayanan further suggested that Tjong's will could not have been overborne if he had been able to obtain the guarantee from Richard Chan. [note: 389]

264 In relation to Threat 2, Mr Narayanan pointed out that, by Tjong's own case, he had intentionally withheld documents from Antig in order to extract the guarantee from Richard Chan. It was argued, therefore, that Tjong had himself been prepared to run the risk of cancellation of the 1st SPA. [note: 390] There could not therefore have been a coercion of his will. Indeed, Tjong has given evidence that he did not respond to several written and verbal requests by Antig and Richard Chan to provide the relevant documents as he had wanted an assurance that the balance purchase price would be paid to him. [note: 391]

265 In *B & S Contracts and Designs Ltd v Victor Green Publications Ltd* [1984] I.C.R. 419 ("*B & S*"), a contractor who had undertaken to erect stands for an exhibition told his customer, less than a week before the exhibition, that the contract would be cancelled unless the customer paid an additional sum of money to meet claims which were being made against the contractor by his workmen. The cancellation of the contract would have gravely damaged the customer's reputation

and might have exposed him to heavy claims for damages from the exhibitors. Eveleigh LJ held that "it was clear at that stage that there was no other way for [the customer] to avoid the consequences that would ensue if the exhibition could not be held from his stands than by paying the [additional sum of money] to secure the workforce" (*B & S* at 424). In these circumstances, duress was established.

266 *B & S* may be contrasted against *Pao On*, where the plaintiffs threatened to breach a contract with a company unless the defendants, who were the shareholders in the company, gave the plaintiffs a guarantee against loss resulting from performance of the contract. The defendants, thinking that the risk of such loss was small, gave the guarantee in order to avoid adverse publicity which the company might suffer if the contract was not performed. There was no 'coercion of the will' on the facts of *Pao On*. Similarly, I find that there was also no compulsion of Tjong's will. His failure to protest, in particular, and the existence of the guarantee, which he extracted, providing him with an alternative recourse to obtaining the full US$18 million, militate against a finding that he would not have entered into the 2nd and 3rd SPAs but for the Threats.

267 Significantly, while Tjong claims that he owed friends, other businesses and Benny "several million US", [note: 392] he has not produced any evidence of the extent of his debts. As Kan J held in *Sharon Global* (at [42] – [45]):

> Without elucidation from the defendant, I do not understand what the serious commercial consequences [of the threat to breach the contract] alluded to were. Questions which should be addressed were not...How strong were those concerns, and how much did they influence the defendant's decision ... ? *When a defence of economic duress is raised, it is incumbent on the party raising it to show that the duress placed it in a position where it was compelled to accede to the other party's demands ... On the part of the defendant, I did not have a clear picture that it had no alternative but to accept the plaintiff's terms because it had to fulfill its obligations to POSCO under any circumstances*.
>
> [emphasis added]

In fact, by the time the 2nd and 3rd SPAs were executed in July 2007, Tjong had received about US$3 million from Antig under the 1st SPA. [note: 393] While Tjong might have been in need of funds, there is no basis to find that he was in such *desperate* need to have compelled him to accede to the Threats.

Whether Jake, AAML and Edwin were sufficiently implicated in the duress such that the 2nd and 3rd SPAs may be set aside

268 Given my foregoing conclusion that there had been no duress operative upon Tjong *vis-a-vis* his execution of the 2nd and 3rd SPAs, the question of whether Jake, AAML and Edwin have been implicated in any such duress becomes moot. I will however deal with this issue since parties have made extensive submissions on it.

No direct duress claim against Jake, AAML and Edwin

269 It is agreed that no *direct* pressure had been applied on Tjong by Jake or Edwin. Nonetheless, as I have alluded to at [243] above, a contract may sometimes be set aside on the ground of duress exerted by someone who is, strictly-speaking, a third party to the contract. For example, the authors of *Chitty on Contracts* (Sweet & Maxwell, Vol 1, 2008) observed (at para 7-052) that:

> Where it is sought to avoid a contract on the ground of duress exercised, not by the party seeking to enforce the agreement, but by some third party, the party seeking to avoid the contract *must prove that the other party knew of the duress, or had constructive notice of it or had procured the making of the contract through the agency of the party who exercised the duress*.
>
> [emphasis added]

It is similarly observed in *Enonchong* at para 21-007 that, aside from agency situations, a transaction may also be set aside on the ground of duress, undue influence or unconscionable dealing of a third party if the contracting party had actual or constructive notice of such third party conduct. The rationale supporting the doctrine of notice in this context was briefly summarised in *Enonchong* at para 23-002 to para 23-003 as follows:

> Under English law if A is induced by C's duress or undue influence to contract with B, normally B is entitled to rely on A's apparent consent and in the ordinary case B can enforce the contract against A in spite of the duress of undue influence of C. However, if B was aware of the duress or undue influence of C then B will not be allowed to enforce the contract...First, such a person cannot claim to rely on the other contracting party's apparent consent, since he is aware of the reality that there was no free consent. Secondly, there is no question of protecting security of transactions where the contracting party has notice of the fact that the consent of the other party was improperly procured ... [he] knows from the start that the agreement is one that will be unenforceable since it has been procured by wrongdoing ... Thirdly, although the party with knowledge may be considered to be innocent of the wrongdoing, as he is not involved in it, nevertheless he cannot really be considered to be acting in good faith or in accordance with good conscience.

270 The operation of the doctrine of notice in this context is illustrated in *Kesarmal s/o Letchman Das and another v N.K.V. Valliappa Chettiar s/o Nagappa Chettiar* [1954] 1 W.L.R. 380 ("*Kesarmal*") and *Halpern v Halpern* [2006] EWHC 603 (Comm) ("*Halpern*"). *Kersarmal* involved interesting facts that took place during the Japanese occupation in Malaya. The respondent sought to impugn his transfer of a property to the appellants, alleging that the agreement was signed under duress at the Sultan's residence. The Sultan and the appellants were all present at the signing, together with two Japanese officers. The Sultan had apparently told the respondent that he must sign the transfer agreement. When the respondent hesitated, one of the Japanese told him that he had to obey the Sultan's orders. The Privy Council upheld the lower court's findings that the transfer agreement had been procured by duress, and that the appellants, as transferees, had actual knowledge of the exercise of the duress; the Privy Council held that it was undisputed that both duress and knowledge of it by the appellants were established, such that the transaction must be set aside (*Kesarmal* at 384).

271 *Halpern* concerned an application for summary judgment, and alternatively, an order to strike out certain parts of the defence. The defendants argued that a compromise agreement entered into with the plaintiffs during settlement negotiations had been procured by duress. The defendants alleged that the arbitrator (the Rabbi) had insisted that, in the absence of a compromise, the defendants were obliged to make a ritual oath (which, on the evidence, an observant Jew would not in practice be willing to swear), the making of which they could avoid by paying a sum of money (*Halpern* at [85]). The plaintiffs disputed that such pressure had been exerted and argued *inter alia* that, in any event, the putative duress emanated from the Rabbi who was a non-party to the agreement, and thus could not avail the defendants (*Halpern* at [95]). In allowing a trial on the issue of duress (*Halpern* at [107] and [117(d)]), Christopher Clarke J held that (*Halpern* at [96]):

> *[T]he fact that Rabbi Schmerler was the person who exercised the alleged duress does not automatically exonerate the claimants. But it would have, at the least, to be established that Samuel knew that Rabbi Schmerler was exerting illegitimate pressure on Mordechai and took the benefit of it.* In the present case, if there was duress, it seems to me that there is a realistic prospect of the [defendants] establishing that it was a duress which is capable of making the contract voidable...it would seem at least arguable that Samuel was pressing Rabbi Schmerler to do something that he knew was not justified in order to procure a compromise.
>
> [emphasis added]

272 Jake, AAML and Edwin accept that if it can be shown that Richard Chan was their agent, a direct claim of duress against Jake, AAML and Edwin would be possible. [note: 394] However, while the plaintiffs have pleaded that Richard Chan "was an agent and/or had actual or apparent/ostensible authority to act on behalf of MEGL, Antig, Jake and AAML", [note: 395] they have not conducted their case on that basis. [note: 396] Instead, at the trial, they have proceeded on the basis that Jake, AAML and Edwin were the nominees of MEGL/Antig/Richard Chan in relation to the purchase of the Remaining Shares, [note: 397] and their claim against Jake, AAML and Edwin is indirect and "in conjunction" with their claim against Richard Chan, based on conspiracy. [note: 398] Similarly, while they argue that Jake, AAML and Edwin had been wilfully blind to the procurement of the 2nd and 3rd SPAs by duress, this argument was made in support of their case based on conspiracy, [note: 399] and not in relation to any direct claim against Jake, AAML and Edwin.

Indirect claim against Jake, AAML and Edwin based on conspiracy

273 As mentioned (at [186] above), to make out a claim of unlawful means conspiracy, there must be (a) a combination of, or concerted action between, two or more persons (b) to commit an unlawful act (c) with the intention of injuring or damaging the plaintiff, and (d) the unlawful act was carried out and the plaintiff must have suffered loss as a result of the alleged conspirators' unlawful act.

274 As I have found that there was no compulsion of Tjong's will at the material time, duress by Richard Chan is not established, and consequently, element (d) is not made out. The claim of unlawful means conspiracy *vis-à-vis* Jake, AAML and Edwin thus fails. Even if duress by Richard Chan is established, the plaintiffs have not shown that there was a concerted action to procure the Remaining Shares *via* duress.

Was Richard Chan the agent of Antig/MEGL, Jake and AAML in relation to the 2nd and 3rd SPAs

275 As mentioned, this aspect of the plaintiffs' case is quite confusing. Although the plaintiffs claim that Richard Chan was the agent of Antig, MEGL, Jake and AAML in relation to the procurement of the Remaining Shares under the 2nd and 3rd SPAs, at the trial they sought to establish that Jake, AAML and Edwin were instead the nominees of Antig, MEGL and/or Richard Chan (see [272] above). In fact, the evidence supports the latter case theory but the pleadings remain unamended. Two receipts were produced by the plaintiffs to show that two sums of US$64,000 and US$336,000 (*ie*, 20% of the purchase price under the 2nd and 3rd SPAs) were paid by MEGL. [note: 400] On top of that, both Jake and Edwin admit that they do not have any document evidencing their payment of the balance 80%. [note: 401] Tellingly, when it was suggested by Mr Gabriel that Edwin had, from the beginning, known about the US$336,000 receipt, Edwin replied that although he had seen the receipt, "I have had no hand in that document. *It has nothing to do with me*" (emphasis added). [note: 402]

276 Edwin was evasive when cross-examined on this issue. When asked if he had any evidence of payment he made after signing the 3rd SPA, he stated that he did not obtain a copy of the cheque or transfer because the bank that he used was under state investigations. [note: 403] When pressed as to why he did not ask his lawyers for details of the payment made to them, he said that "the law firm has already closed or something". [note: 404] On being reminded that the documents of the law firm would nevertheless remain, and that he could have gone to his lawyer, Noor, to ask for the transaction file, Edwin even claimed that "she was not my lawyer, sir", [note: 405] although he eventually had to admit that Noor was his lawyer when referred to a statement to that effect in his own affidavit. [note: 406] In the end, he admitted that he did not ask for the receipt because the receipt would have reflected the true position – that the 20% was paid by MEGL. [note: 407]

277 In addition, neither Jake nor Edwin had met Tjong in relation to the 2nd and 3rd SPAs. [note: 408] When asked whether he agreed that it was "unusual" for a buyer and seller for shares in a company not to have met and discussed the transaction, Jake admitted that it was indeed "funny" that they did not meet. [note: 409]

278 Finally, as explained at [235] above, the Discharge Letters, which Richard Chan seeks to rely on to relieve himself of any liability, pertain to the sale of Tjong's PT Batubara shares to Jake, and not the sale of Tjong's PT Deefu shares. The Discharge Letters were addressed to Antig. Why would the Discharge Letters in connection with the sale of the 5% share in PT Batubara be addressed to Antig if Antig was not in truth the purchaser of those shares?

279 In short, not only was the duress by Richard Chan not made out, contrary to the plaintiffs' own pleaded case, the evidence as elicited by the plaintiffs proved that Richard Chan was not the agent of Jake, AAML and Edwin. Rather, it was more likely than not that they were the nominees of Antig, MEGL and/or Richard Chan in the purchase of the Remaining Shares. But despite this finding, the evidence does not lead to the irresistible conclusion that there has been a conspiracy or common design to procure the Remaining Shares under the 2nd and 3rd SPAs *via* duress.

No "combination of or concerted action"

280 It is accepted that proof of conspiracy is normally to be inferred from objective facts as direct evidence is seldom obtainable (*Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch)* [2006] 1 SLR(R) 901 at [19]). The court may thus *infer* an agreement from the acts of alleged co-conspirators (*The "Dolphina"* [2012] 1 SLR 992 ("*The Dolphina*") at [263]). A corollary of this is that, while the elements of "combination" and "unlawful act" are theoretically discrete, in practice they often have to be considered in tandem because proof of a combination is usually gathered from the unlawful acts committed and the surrounding circumstances (*The Dolphina* at [264]). It is important to bear in mind, however, that while a conspirator need not know *all* the details of the plot, he must know of the common objective or design and what his role in bringing it about involves (*The Dolphina* at [204] and [282]).

281 A question that arises is whether Jake and Edwin possessed the requisite knowledge to make them co-conspirators in a common design. Mr Ong argues that a finding that Jake, AAML and Edwin were nominees of MEGL, Antig and Richard Chan does not lead inexorably to the inference that they were also co-conspirators. He draws a distinction between (a) an agreement to carry out acts constituting duress; and (b) an agreement to purchase the Remaining Shares at an undervalue. [note: 410] He argues that while (a) amounts to unlawful means conspiracy, (b) does not. He relies on

Belmont Finance Corporation Ltd v Williams Furniture Ltd and others [1979] 1 Ch 250 ("*Belmont Finance*") for the proposition that the plaintiffs must prove that Jake or Edwin knew of the facts relevant to the illegality of the 2nd and 3rd SPAs, *ie*, that they were procured by duress. [note: 411]

282 Pursuant to a written agreement, the 3rd to 6th defendants in *Belmont Finance* sold 100% of the shares in M Co. to the plaintiff company for £500,000. Also pursuant to the written agreement, the 3rd to 6th defendants purchased 100% of the issued shares in the plaintiff, which were held by the 2nd defendant company, for £489,000. The second purchase was conditional upon the first purchase. The plaintiff went into liquidation and its receivers sued the 2nd to 6th defendants, the holding company of the 2nd defendant, and two of the plaintiff's directors, claiming that the true value of the M Co. shares was £60,038, and therefore, that they had been sold to the plaintiff at an excessive value. This allegedly aided the 3rd to 6th defendants' purchase of the plaintiff's shares, in contravention of a statutory prohibition against financial assistance. The agreement was said to establish the conspiracy, and the unlawful purpose was to deprive the plaintiff of over £400,000 worth of its assets (*Belmont Finance* at 260 – 261).

283 The court in *Belmont Finance* had to decide whether the plaintiff was debarred from succeeding in its conspiracy claim on the ground that it was a party to the conspiracy. Buckley LJ rejected the argument that since the conspiracy was founded on the illegal agreement, the plaintiff who was a party to the agreement was therefore also a party to the conspiracy (*Belmont Finance* at 263 – 264). Buckley LJ held that (*Belmont Finance* at 263):

> [O]ne must look with some care at what is alleged to have been the conspiracy ... the statement of claim ... asserts that the defendants wrongfully conspired to carry into effect the sale and purchase of the share capital of the plaintiff company. The sale and purchase of the share capital of the plaintiff company is to be found in the agreement ... *the allegation is that antecedent to the agreement being entered into, the conspirators conspired, the effect of the conspiracy being that they would enter into the agreement* ... one finds that there are relied upon [in the statement of claim] as overt acts of the parties to the conspiracy the negotiations and the correspondence which took place before the agreement was entered into, the entry into the agreement and its completion. I cannot understand how the negotiations could be overt acts of the conspiracy unless the conspiracy existed before those negotiations took place, because as I understand it, *an overt act establishing the existence of a conspiracy is an overt act which shows that the agreement which is alleged to be conspiratorial has already been made*. …
>
> [emphasis added]

In other words, while the illegal agreement was part and parcel of the implementation of the conspiracy, it could not itself be the conspiracy (*Belmont Finance* at 263 - 264). The fact that the plaintiff was party to the agreement did not therefore make them, without more, co-conspirators. In the end, Buckley LJ held that (*Belmont* at 264):

> … *The plaintiff company, not being shown to have knowledge of the facts relevant to the illegality of the agreement...is not shown to have been a party to the conspiracy* or to guilty knowledge about the illegality of the transaction which was to be carried out under the agreement. On these grounds it seems to me that it is mistaken to regard the plaintiff company as being in law party to the conspiracy. …
>
> [emphasis added]

284 Did Jake and Edwin possess knowledge of acts relevant to the illegitimate pressure exercised on Tjong (ignoring, for the moment, my finding at [260] to [267] above that there was no *operative* duress on the present facts)? Although the plaintiffs claim that Jake and Edwin knew about Tjong's financial woes and the sale at undervalue, they have not asserted that Jake and Edwin possessed positive knowledge of the Threats made to Tjong. Rather, they argue that the manifest undervalue should have prompted Jake and Edwin to inquire as to the circumstances bringing about the undervalue, [note: 412] and their failure to so inquire made them *wilfully blind* to the "true position". [note: 413] Relying on a passage by Lord Scott in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd and others* [2003] 1 AC 469 ("*Manifest Shipping*"), Mr Gabriel argues that given such wilful blindness, Jake and Edwin should be taken to have known of and participated in the duress. [note: 414] In that passage (*Manifest Shipping* at [112]), the concept of wilful blindness, or "blind-eye" knowledge, is discussed as follows:

> … "Blind-eye" knowledge approximates knowledge. Nelson at the battle of Copenhagen made a deliberate decision to place the telescope to his blind eye in order to avoid seeing what he knew he would see if he placed it to his good eye...[A]n imputation of blind-eye knowledge requires an amalgam of suspicion that certain facts may exist and a decision to refrain from taking any step to confirm their existence. ...

285 The argument based on *wilful blindness* implies that the involvement of Jake, AAML and Edwin in the conspiracy was manifested, not in a positive act, but an *omission* to act. That "unlawful means" may be effected through an omission instead of an act was accepted by Belinda Ang J in *The Dolphina* at [269]. Turning to the present facts, I accept that Jake and Edwin knew at all times that Tjong was in need of cash. Edwin admitted to this under cross-examination, [note: 415] and although Jake denied the same on the stand, [note: 416] I note that he had stated in his AEIC that he knew that Tjong was in need of funds and anxious for the sale to be completed. [note: 417] However, the plaintiffs have not suggested that there was any reason why Jake and Edwin should not have executed the 2nd and 3rd SPAs especially since it was Tjong's own understanding that they were acting as nominees, though the plaintiffs' pleaded case is to the contrary. Tjong was fully aware of Antig's involvement in the sale of the Remaining Shares from the outset, as evidenced by letters written by Antig's solicitors, SJD, to Tjong, dated 7 December 2006, [note: 418] 11 December 2006 [note: 419] and 5 June 2007 [note: 420] referring to Antig's plan to take over all the Remaining Shares. Therefore based on Tjong's own knowledge, it appears that MEGL and Antig were not left out of the 2nd and 3rd SPAs to mislead him as to the true identity of the purchaser of the Remaining Shares. Why, then, was Edwin evasive when cross-examined on the issue of payment under the 3rd SPA? A possible reason – that Jake and AAML had been used as nominees of MEGL or Antig to sidestep foreign ownership issues – was put to Richard Chan during cross-examination: [note: 421]

> Mr Gabriel: Mr Chan, I believe – I'll check – either [Jake] or [Edwin] have said that [Alwie] had approached them to purchase the shares – I can confirm who it is later – because an Indonesian was required to hold the remaining shares because a foreign party would not be allowed to hold. Would that be a correct understanding?
>
> A: No, I do not recall on this.
>
> Q: Mr Chan, I put it to you that the remaining shares of Mr Sumito in PT Deefu and in PT Batubara were bought by either you or MEGL or Antig by using [Jake and AAML] as your nominees. Do you agree or disagree?

A: Disagree.

286 On totality, I am unable to conclude that Jake, AAML and Edwin were co-conspirators in a common design to procure the sale of the Remaining Shares *via* duress. There is no indication that they knew about the Threats. It is also significant that it was never put to either Jake or Edwin that they were aware of the Threats. Mere knowledge that the transaction was a steal, and that the seller was facing financial difficulties, does not lead to the irresistible inference that they also knew that the seller's offer to sell was procured by duress or that they were party to such a scheme. Further, although the finding that they were nominees of Richard Chan, MEGL and Antig certainly raises questions about the true nature of the transaction, the existence of such background manoeuvrings was something that Tjong was himself privy to from the outset.

Claims based on fraudulent misrepresentation

Whether Tjong had been induced to enter into the 2nd and 3rd SPAs by fraudulent misrepresentation

287 I turn, finally, to deal with Tjong's claim of fraudulent misrepresentation *vis-à-vis* the 2nd and 3rd SPAs. A misrepresentation made by a third party does not allow the representee to rescind the contract if the misrepresentation was neither made on behalf of the other contracting party nor without the knowledge of the other contracting party (*Pulsford v Richards* (1853) 51 E.R. 965 at p 968, John Cartwright, *Misrepresentation, Mistake and Non-disclosure* (Sweet & Maxwell, 2007) ("*Cartwright*") at para 4.73 and para 4.75). The representee may, however, bring a tortious claim against the third party representor by, *eg*, showing that the misrepresentation was made fraudulently (*Cartwright* at para 4.73).

288 As mentioned at [57] above, Tjong claims damages from Richard Chan, arguing that he was induced to enter into the 2nd and 3rd SPAs because Richard Chan had fraudulently misrepresented to him that he would, in return, ensure that the plaintiffs would be paid the balance purchase price under the 1st SPA ("the Representation"). [note: 422]

289 I am satisfied that the elements of fraudulent misrepresentation as set out by the Court of Appeal in *Panatron* at [14] (see [164] above) are established. First, the Representation is in substance and effect similar to Threat 1, *viz*, that Tjong would only be paid under the 1st SPA if he sold the Remaining Shares, and I am satisfied that it had been made. Mr Narayanan suggested, during his cross-examination of Tjong, that Tjong should have included a term in the 2nd and 3rd SPAs stating that he was signing it only because he was to be paid the balance purchase price by Antig. [note: 423] The absence of such a term does not however suggest that the Representation had not been made. Such a term would not in any event have been binding on Antig, who was, strictly speaking, not a party to the 2nd and 3rd SPAs. My finding (at [275] to [279] above) that Jake and AAML were the nominees of MEGL and Antig in respect of the 2nd and 3rd SPAs also explains why Richard Chan, as their MD, would have made the Representation to Tjong. Second, in line with Antig's desire to acquire the Remaining Shares (see [245] above), the Representation was clearly made to be acted upon by Tjong. Third, it had obviously been made fraudulently by Richard Chan who knew of its false nature (*Derry v Peek* at 374, *Panatron* at [13]). It is observed in Spencer Bower, Turner & Handley, *Actionable Misrepresentation* (Butterworths, 4th ed, 2000) at para 101 (endorsed in *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co and others* [2007] 1 SLR(R) 196

("*Raiffeisen*") at [41]) that in determining whether a representation has been made fraudulently:

> … the question is not whether the representor honestly believed it to be true in the sense assigned to it by the court, or on an objective consideration of its truth or falsity, but whether he honestly believed it to be true *in the sense in which he understood it when it was made*.
>
> [emphasis added]

Since Richard Chan knew that US$2 million out of the balance purchase price had by then been surreptitiously paid to the Credit Agricole account in July 2006 (see [45] and [114] above), I find that, at the time of the Representation, he did not honestly believe that the plaintiffs would be receiving the full US$18 million.

290 Fourth, I am satisfied that the Representation had been a significant factor inducing Tjong to act as he did. His claim that he sold the Remaining Shares at undervalue in reliance of the Representation is consistent with his efforts, during the same period of time (see [189] and [204] above), to procure payment of the balance purchase price from Antig. This was a concern which was very much alive in his mind at the material time, and which must have caused him to rely on the Representation made by Richard Chan.

291 Mr Ong argues that Tjong's motivation was simply that he was in debt and needed to sell the Remaining Shares to raise cash. [note: 424] But unlike the "but for" causation threshold required to prove economic duress (see [247] above), it is sufficient for a plaintiff suing for misrepresentation to show that the misrepresentation played a real and substantial part in causing him to act on the representation, no matter how strong or how many *other* factors existed (*Panatron* at [23]). In other words, the Representation need not have been the sole, determinative, or even the predominant, factor inducing Tjong to sell the Remaining Shares for US$2 million (*Panatron* at [22], *Cartwright* at para 3.54 and para 5.23); "[o]nce ma[d]e out that there has been anything like deception, intentional deception, and no contract, resting in any degree on that foundation, can stand" (*Reynell v Sprye*, 68 E.R. 340 at 360 *per* Lord Cranworth LJ). The difference in causative thresholds necessary to make out a case of duress and misrepresentation renders it possible for there to be actionable misrepresentation and the absence of operative duress on the same facts (see, for example, *Occidental Worldwide Investment Corp v Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293).

292 Mr Ong argues, further, that Tjong could not have trusted Richard Chan in July 2007, [note: 425] *ie*, he could not have believed in the veracity of the Representation so as to be misled by it. It is however Tjong's evidence that although his trust in Richard Chan had waned sometime after June 2006, [note: 426] this trust was rekindled by the provision of the guarantee: [note: 427]

> Mr Narayanan: So when did you start trusting Richard again? Was it after he had signed this guarantee?
>
> A: Yes. And after he signed this letter, he also make up with me that we will not quarrel.

He testified that although this trust in Richard Chan "lessened", [note: 428] it was still alive when the 2nd and 3rd SPAs were executed: [note: 429]

Mr Narayanan: The – by this time, were you still trusting Richard when he asked you to sell your remaining stake in the two companies to Antig?

...

A: Yes, I trusted him but already getting lesser. If I don't trust him, I'm not selling to him.

I accept that the true turning point of their relationship only came about in end-2007 when Richard Chan became uncontactable, causing Tjong to realise that he had never intended for the plaintiffs to receive the full purchase price (at [32] above). Having made the Representation specifically to induce Tjong to sell the Remaining Shares, so that Antig could increase its stake in PT Deefu, it would be counterintuitive for Richard Chan to now argue that Tjong could not have believed the Representation to be true.

293 Fifth, and finally, there is *prima facie* evidence that the Remaining Shares had been sold at undervalue, *ie*, that Tjong suffered loss by entering into the 2nd and 3rd SPAs. It is, for instance, admitted by Richard Chan that based on the sale price under the 1st SPA of 72% of the PT Deefu shares, the value of the Remaining Shares would have been about US$8 million to US$9 million. [note: 430] Further, as mentioned (at [30] above), Jake and Edwin had managed to sell the Remaining Shares for A$12.64 million in early 2008, [note: 431] far in excess of the US$2 million for which the Remaining Shares were sold under the 2nd and 3rd SPAs.

Damages recoverable against Richard Chan

294 Tjong claims (a) damages suffered as a result of the undervalue, being the difference between the sale price of the Remaining Shares under the 2nd and 3rd SPAs (US$2 million), and the value of the APAC shares Jake and Edwin received in exchange for the Remaining Shares in early 2008 (A$12.64 million), [note: 432] or alternatively, damages arising from the undervalue to be assessed; and (b) damages in the form of the balance purchase price under the 1st SPA. [note: 433]

295 I allow Tjong's claim for damages arising from the undervalue of the Remaining Shares to be assessed since those losses flowed directly from the transactions under the 2nd and 3rd SPAs. His claim for the balance purchase price under the 1st SPA is however unsustainable.

296 A plaintiff is entitled to recover as damages a sum representing the financial loss flowing directly from his alteration of position under the inducement of the defendant's fraudulent misrepresentation. While such damages need not have been foreseeable, they must have been *directly caused by the impugned transaction* (see, for example, *Smith New Court Securities Ltd v Citibank N.A.* [1997] AC 254 at 267, 284 and *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR 909 at [21]). Given these settled principles, I cannot see how Tjong would be able to recover the balance purchase price of the 1st SPA under this head of claim. To be clear, his claim in relation to the Representation is that, relying on it, he entered into the 2nd and 3rd SPAs, thereby sustaining the claimed losses. [note: 434] The unpaid balance purchase price under the 1st SPA formed the "carrot" inducing Tjong to enter into the 2nd and 3rd SPAs – it did not arise *out of* the 2nd and 3rd SPAs.

Unlawful means conspiracy claim against Richard Chan, MEGL, Antig, Jake, AAML and Edwin

297 In addition to the fraudulent misrepresentation claim brought directly against Richard Chan, Tjong also claims that, Richard Chan, MEGL, Antig, Jake, AAML and Edwin had conspired to induce him, *via* the Representation, to sell his Remaining Shares at an undervalue. However, for similar reasons set out at [286] above, I find that the plaintiffs have not sufficiently proved the existence of a common design amongst the alleged co-conspirators to procure the sale of the Remaining Shares *via* fraudulent misrepresentation. There is no indication that Jake and Edwin knew that the Representation, which was in substance the same as Threat 1, had been made, and mere knowledge of the undervalue does not lead to the inference that there had been a conspiracy to fraudulently induce Tjong to sell his Remaining Shares under the 2nd and 3rd SPAs.

Conclusion

298 By reason of my findings, the plaintiffs succeed in the following claims:

(a) As against OAFL and/or Alwie, the sum of US$550,000 for money had and received;

(b) As against Aventi, damages for conversion of 124,856,364 MEGL shares;

(c) As against OAFL and/or Alwie, damages for conversion of 42,102,727 MEGL shares;

(d) As against Richard Chan, liability under the guarantee for the balance purchase price remaining unpaid to the plaintiffs, *ie*, US$12,471,227, comprising:

(i) US$6,721,227 (being the US$12.25 million Cash Component less the US$5,528,772 received by the plaintiffs); and

(ii) the entire Shares Component representing US$4.3 million and US$1.45 million received by Aventi and OAFL respectively for and on behalf of the plaintiffs; and

(e) As against Richard Chan, damages for fraudulent misrepresentation in respect of the undervalue sale of the Remaining Shares under the 2nd and 3rd SPAs.

299 I make the following orders for the claims relating to the Cash Component representing US$12.25 million under the 1st SPA (see [24] above),

(a) OAFL and/or Alwie are to pay the plaintiffs the sum of US$550,000 under [298(a)];

(b) Richard Chan is liable to the extent of US$6,721,227 under [298(d)(i);

(c) Interest at 5.33% on the above sums from the date of the writ to the date of judgment; and

(d) For avoidance of doubt, in respect of the Cash Component, the plaintiffs are only entitled to a total of US$6,721,227, excluding interest and costs, collectively from Richard Chan, OAFL and Alwie, and each up to the respective sums stated above.

300 I make the following orders for the claims relating to the Shares Component representing US$5.75 million under the 1st SPA (see [24] above):

(a) Aventi is to pay the plaintiffs damages in the sum of $27,468,400 for conversion of

124,856,364 MEGL shares under [298(b)];

(b) OAFL and/or Alwie are to pay the plaintiffs damages to be assessed for conversion of 42,102,727 MEGL shares under [298(c)];

(c) Richard Chan is liable to the extent of US$5.75 million under [298(d)(ii)];

(d) Interest at 5.33% on the above sums from the date of the writ to the date of judgment and, in the case of assessment, interest at such rate and for such period to be reserved to the Registrar; and

(e) For avoidance of double recovery, in the event that Richard Chan discharges the judgment debt of US$5.75 million under [300(c)], and the plaintiffs recover damages for conversion:

(i) against Aventi under [300(a)], the plaintiffs shall refund to Richard Chan such amount representing double recovery up to the maximum sum of US$4.3 million; and

(ii) against OAFL and/or Alwie under [300(b)], the plaintiffs shall refund to Richard Chan such amount representing double recovery up to the maximum sum of US$1.45 million.

301 I make the following orders for the claims relating to the 2nd and 3rd SPAs:

(a) Richard Chan is to pay Tjong damages to be assessed for fraudulent misrepresentation in respect of the undervalue sale of the Remaining Shares;

(b) Interest at such rate and for such period to be reserved to the Registrar; and

(c) The claims against Jake, AAML and Edwin are dismissed with costs to be taxed if not agreed on a standard basis.

302 Although the plaintiffs did not succeed in every cause of action, they have substantially succeeded on practically all their claims against Richard Chan, Aventi, and OAFL/Alwie. In the premises, I will award the plaintiffs the following costs orders:

(a) Full costs on a standard basis in respect of all the claims brought against Richard Chan to be taxed if not agreed;

(b) Full costs on a standard basis in respect of all the claims brought against Aventi to be taxed if not agreed; and

(c) Full costs on a standard basis in respect of all the claims brought against OAFL and/or Alwie to be taxed if not agreed. Although the claim against Susiana is dismissed, that claim is inextricably linked to the claim against Alwie. As such, there will be no separate order of costs in relation to Susiana.

Postscript

303 The totality of my findings places the bulk of the liability against Richard Chan. According to my assessment of the evidence, he was unequivocally the prime mover of the 1st, 2nd and 3rd SPAs. The entire transaction involving all three SPAs led by Richard Chan, assisted by Alwie and, perhaps, the "phantom", Johanes, smells of foul play. On the face of my decision, the total award exceeds the

entire purchase consideration of US$18 million. This consequence arose as a result of the plaintiffs' entitlement to the 166,959,091 MEGL shares representing US$5.75 million of the entire purchase consideration which have since been sold for several times their original par value. It, however, remains unresolved as to the true identities of the ultimate "beneficiaries" of both the Credit Agricole and the Coutts Bank accounts and the windfall profits arising from the sale of the MEGL shares. Having said that, the payments and the MEGL shares allotments would not have been possible without Richard Chan and Alwie's complicit involvement. They will have to settle their liabilities arising from my decision *inter se* with such "beneficiaries", whoever they might be.

[note: 1] Oral Grounds of Decision (17 March 2010) at [11].

[note: 2] Oral Grounds of Decision (17 March 2010) at [11].

[note: 3] Oral Grounds of Decision (17 March 2010) at [18].

[note: 4] Oral Grounds of Decision (17 March 2010) at [19].

[note: 5] Oral Grounds of Decision (17 March 2010) at [14].

[note: 6] Notes of Evidence ("NE") (16 January 2012) at p 49 lines 10 – 24.

[note: 7] Notes of Evidence ("NE") (16 January 2012) at p 49 lines 25 – 26.

[note: 8] NE (16 January 2012) at p 50 lines 11 – 23.

[note: 9] AEIC of Richard Chan (13 January 2012) at [2].

[note: 10] AEIC of Tjong Very Sumito (13 December 2011) at [26], AEIC of Richard Chan (13 January 2012) at [2].

[note: 11] AEIC of Richard Chan (13 January 2012) at [2].

[note: 12] AEIC of Tjong Very Sumito (13 December 2011) at [24].

[note: 13] AEIC of Alwie Handoyo (13 December 2011) at [5].

[note: 14] NE (16 February 2012) at p 24 lines 15 - 25.

[note: 15] AEIC of Alwie Handoyo (13 December 2011) at [6].

[note: 16] AEIC of Alwie Handoyo (13 December 2011) at [8].

[note: 17] AEIC of Alwie Handoyo (13 December 2011) at [1].

[note: 18] Memorandum of Service (5 March 2010).

[note: 19] AEIC of Alwie Handoyo (13 December 2011) at [27(2)(ii)]; 5th Defendant's Defence (Am.No.2) (1 August 2011) at [9] and [10].

[note: 20] AEIC of Alwie Handoyo (13 December 2011) at [7].

[note: 21] Agreed Bundle ("AB") at p 2893 (Letter dated 1 April 2010), AEIC of Tjong Very Sumito (13 December 2011) at [12], Plaintiffs' Closing Submissions (19 March 2012) at [29].

[note: 22] SUM 1363/2010/R (26 March 2010).

[note: 23] AEIC of Edwin Sugiarto (13 December 2011) at [2].

[note: 24] AEIC of Jake Pison Hawila (12 December 2011) at [5], AEIC of Edwin Sugiarto (12 December 2011) at [5], NE (22 February 2012) at p 35 line 6

[note: 25] SUM 117/2012/N (10 January 2012) and SUM 125/2012/K (10 January 2012).

[note: 26] SOC (Amendment No. 2) (13 July 2011) at [2], NE (16 January 2012) at p 53 lines 1 – 9.

[note: 27] AEIC of Tjong Very Sumito (13 December 2011) at [119].

[note: 28] SOC (Amendment No. 2) (13 July 2011) at [4], NE (16 January 2012) at p 52 lines 7 – 18.

[note: 29] AEIC of Tjong Very Sumito (13 December 2011) at [22].

[note: 30] AEIC of Richard Chan (13 January 2012) at [14].

[note: 31] AEIC of Richard Chan (13 January 2012) at [12].

[note: 32] AEIC of Richard Chan (13 January 2012) at [11]

[note: 33] AEIC of Richard Chan (13 January 2012) at [12].

[note: 34] AEIC of Gardy Sutajie (12 December 2011) at [7].

[note: 35] NE (20 February 2012) at p 124 lines 10-11.

[note: 36] AEIC of Richard Chan (13 January 2012) at [12].

[note: 37] AEIC of Tjong Very Sumito (13 December 2011) at [30].

[note: 38] AEIC of Richard Chan (13 January 2012) at [33], AEIC of Alwie Handoyo (13 December 2011) at [41].

[note: 39] AEIC of Tjong Very Sumito (13 December 2011) at [48].

[note: 40] AEIC of Tjong Very Sumito (13 December 2011) at [49].

[note: 41] AEIC of Richard Chan (13 January 2012) at [35], AEIC of Alwie Handoyo (13 December 2011) at [43].

[note: 42] AEIC of Richard Chan (13 January 2012) at [42].

[note: 43] AEIC of Tjong Very Sumito (13 December 2011) at [54].

[note: 44] AEIC of Tjong Very Sumito (13 December 2011) at [134] – [135].

[note: 45] AEIC of Tjong Very Sumito (13 December 2011) at [55], AEIC of Richard Chan (13 January 2012) at [43], AEIC of Alwie Handoyo (13 December 2011) at [48] – [49].

[note: 46] Further and Better Particulars of the 1st Defendant's Defence (10 May 2010) at [7], NE (26 January 2012) at p 57 lines 19 – 24.

[note: 47] AEIC of Tjong Very Sumito (13 December 2011) at [55], NE (17 January 2012) at p 37 lines 19 – 22.

[note: 48] NE (26 January 2012) at p 60 lines 11 – 14 and p 73 lines 22 – 25.

[note: 49] NE (26 January 2012) at p 74 lines 2 – 8.

[note: 50] NE (26 January 2012) at p 77 line 25 – p 78 line 2.

[note: 51] NE (26 January 2012) at p 79 lines 6 – 13.

[note: 52] NE (26 January 2012) at p 100 lines 15 - 21.

[note: 53] SOC (Amendment No. 2) (13 July 2011) at [27], AEIC of Tjong Very Sumito (13 December 2011) at [55].

[note: 54] NE (26 January 2012) at p 74 lines 1 - 8.

[note: 55] NE (26 January 2012) at p 79 lines 14 – 19 and p 80 lines 5 – 10.

[note: 56] NE (25 January 2012) at p 38 lines 19 – 21 and p 90 line 15 – p 91 line 1.

[note: 57] AEIC of Richard Chan (13 January 2012) at [69].

[note: 58] AEIC of Richard Chan (13 January 2012) at [71].

[note: 59] AEIC of Richard Chan (13 January 2012) at [72].

[note: 60] AEIC of Richard Chan (13 January 2012) at [76].

[note: 61] AEIC of Jake Pison Hawila (12 December 2011) at [33], AEIC of Edwin Sugiarto (12 December 2011) at [41].

[note: 62] AEIC of Jake Pison Hawila (12 December 2011) at [5], AEIC of Edwin Sugiarto (12 December 2011) at [5].

[note: 63] AEIC of Jake Pison Hawila (12 December 2011) at [34], AEIC of Edwin Sugiarto (12 December 2011) at [42].

[note: 64] AEIC of Jake Pison Hawila (13 December 2011) at [19] – [23], AEIC of Edwin Sugiarto (13 December 2011) at [24] – [29].

[note: 65] AEIC of Jake Pison Hawila (13 December 2011) at [19], AEIC of Edwin Sugiarto (13 December 2011) at [24].

[note: 66] AEIC of Tjong Very Sumito (13 December 2011) at [103].

[note: 67] AEIC of Tjong Very Sumito (13 December 2011) at [104].

[note: 68] AEIC of Tjong Very Sumito (13 December 2011) at [107].

[note: 69] AEIC of Tjong Very Sumito (13 December 2011) at [107] – [110].

[note: 70] AEIC of Tjong Very Sumito (13 December 2011) at [112].

[note: 71] SUM 584/2010 (8 February 2010).

[note: 72] ORC 712/2010/K (11 February 2010).

[note: 73] SUM 888/2010/Z (27 February 2010), SUM 869/2010/S (26 February 2010), SUM 852/2010/G (25 February 2010), SUM 923/2010/B (2 March 2010).

[note: 74] ORC 1307/2010/H, ORC 1336/2010/V, ORC1326/2010/P, ORC 1327/2010/T.

[note: 75] Oral Grounds of Decision (17 March 2010) at [18].

[note: 76] SUM 1814/2010 (22 April 2010), SUM 1813/2010 (22 April 2010).

[note: 77] Writ of Summons (Amendment No. 1) (26 August 2010).

[note: 78] SUM 4424/2010/D (20 September 2010).

[note: 79] ORC5965/2010/B (23 November 2010).

[note: 80] 7th Defendant's Defence and Counterclaim (1 April 2010) at [46] – [55], 8th and 9th Defendants' Defence and Counterclaim (1 April 2010) at [45] – [54].

[note: 81] 1st Defendant's Defence (31 March 2010) at [7] – [9].

[note: 82] 1st Defendant's Closing Submissions (19 March 2012) at [8].

[note: 83] AEIC of Tjong Very Sumito (13 December 2011) at [158] at pp 770 – 774.

[note: 84] AEIC of Tjong Very Sumito (13 December 2011) at p 397.

[note: 85] NE (27 January 2012) at p 100 lines 11 – 21.

[note: 86] SOC (Amendment No. 2), 13 July 2011 at pp 27 – 33.

[note: 87] SOC (Amendment No. 2), 13 July 2011 at [72], Plaintiffs' Closing Submissions (19 March 2012) at [400].

[note: 88] SOC (Amendment No. 2), 13 July 2011 at [76], Plaintiffs' Closing Submissions (19 March 2012) at [400].

[note: 89] SOC (Amendment No. 2), 13 July 2011 at [89] – [92], Plaintiffs' Closing Submissions (19 March 2012) at [406].

[note: 90] SOC (Amendment No. 2), 13 July 2011 at [75], [93], Plaintiffs' Closing Submissions (19 March 2012) at [15].

[note: 91] Plaintiffs' Bundle of Documents ("PB") at p 466.

[note: 92] AB at p 245.

[note: 93] AEIC of Tjong Very Sumito (13 December 2011) at [112], [136], PB at p 263.

[note: 94] PB at p 263.

[note: 95] NE (25 January 2012) at p 111 line 6 – p 112 line 3.

[note: 96] AB at p 293.

[note: 97] NE (27 January 2012) at p 40 line 24.

[note: 98] Plaintiffs' Closing Submissions (19 March 2012) at [144], [150] and [152].

[note: 99] Plaintiffs' Closing Submissions (19 March 2012) at [143].

[note: 100] Plaintiffs' Closing Submissions (19 March 2012) at [400].

[note: 101] SOC (Amendment No. 2), 13 July 2011 at [78], Plaintiffs' Closing Submissions (19 March 2012) at [402].

[note: 102] SOC (Amendment No. 2), 13 July 2011 at [82], Plaintiffs' Closing Submissions (19 March 2012) at [402].

[note: 103] SOC (Amendment No. 2), 13 July 2011 at [95] – [98], Plaintiffs' Closing Submissions (19 March 2012) at [409].

[note: 104] SOC (Amendment No. 2), 13 July 2011 at [81], [99], Plaintiffs' Closing Submissions (19 March 2012) at [16].

[note: 105] PB at p 467.

[note: 106] NE (16 February 2012) at p 54 lines 19 – 21.

[note: 107] 5th Defendant's Supplementary Bundle of Documents (14 February 2012) ("5th SBD") at p 92.

[note: 108] 5th SBD at p 97.

[note: 109] PB at p 464.

[note: 110] NE (16 February 2012) at p 150 line 14 – p 152 line 10.

[note: 111] SOC (Amendment No. 2), 13 July 2011 at [67]

[note: 112] AEIC of Tjong Very Sumito (13 December 2011) at [85] – [87].

[note: 113] SOC (Amendment No. 2), 13 July 2011 at [69], Plaintiffs' Closing Submissions (19 March 2012) at [398].

[note: 114] 5th Defendant's Defence (Amendment No. 2) at [47], AEIC of Alwie Handoyo (13 December 2011) at [66].

[note: 115] SOC (Amendment No. 2), 13 July 2011 at [84]

[note: 116] SOC (Amendment No. 2), 13 July 2011 at [84] – [87], Plaintiffs' Closing Submissions (19 March 2012) at [404].

[note: 117] SOC (Amendment No. 2), 13 July 2011 at [53] – [60], Plaintiffs' Closing Submissions (19 March 2012) at [389] – [390].

[note: 118] SOC (Amendment No. 2), 13 July 2011 at [61].

[note: 119] SOC (Amendment No. 2), 13 July 2011 at [99A] – [99C], Plaintiffs' Closing Submissions (19 March 2012) at [412].

[note: 120] SOC (Amendment No. 2), 13 July 2011 at [62] – [64], Plaintiffs' Closing Submissions (19 March 2012) at [396].

[note: 121] SOC (Amendment No. 2), 13 July 2011 at [102] – [103].

[note: 122] SOC (Amendment No. 2), 13 July 2011 at [104] – [105].

[note: 123] SOC (Amendment No. 2), 13 July 2011 at [38], AEIC of Tjong Very Sumito (13 December 2011) at [172] – [176].

[note: 124] SOC (Amendment No. 2), 13 July 2011 at [116] – [117].

[note: 125] SOC (Amendment No. 2), 13 July 2011 at [124] – [125].

[note: 126] SOC (Amendment No. 2), 13 July 2011 at [128] – [129].

[note: 127] SOC (Amendment No. 2), 13 July 2011 at [4], AEIC of Tjong Very Sumito (13 December 2011) at [22].

[note: 128] PB at pp 365 – 367.

[note: 129] PB at pp 362 – 364.

[note: 130] PB at p 198.

[note: 131] 5th Defendants' Closing Submissions (19 March 2012) at [7] – [9].

[note: 132] 5th Defendants' Closing Submissions (19 March 2012) at [10].

[note: 133] 5th Defendants' Closing Submissions (19 March 2012) at [6].

[note: 134] Affidavit of Herman Aries Tintowo (12 January 2012) at [18] – [19].

[note: 135] Affidavit of Herman Aries Tintowo (12 January 2012) at [12].

[note: 136] Affidavit of Herman Aries Tintowo (12 January 2012) at [14].

[note: 137]

[note: 138] Plaintiffs' Further Submissions (4 June 2012) at [43].

[note: 139] AEIC of Alwie Handoyo (13 December 2011) at [27(2)(ii)].

[note: 140] AEIC of Alwie Handoyo (13 December 2011) at [62],

[note: 141] NE (16 February 2012) at p 143 line 21 – p 144 line 23.

[note: 142] NE (16 February 2012) at p 47 line 25 – p 48 line 12 and p 50 lines 12 – 16.

[note: 143] NE (16 February 2012) at p 144 lines 2 – 4.

[note: 144] AEIC of Alwie Handoyo (13 December 2011) at [23].

[note: 145] NE (16 January 2012) at p 6 lines 28 – 30, Plaintiffs' Closing Submissions (19 March 2012) at [196].

[note: 146] SOC (Amendment No. 2), 13 July 2011 at [22].

[note: 147] SOC (Amendment No. 2), 13 July 2011 at [75], [81], [93] and [99].

[note: 148] AEIC of Alwie Handoyo (13 December 2011) at [27(2)(ii)].

[note: 149] SOC (Amendment No. 2), 13 July 2011 at [106], [114] and [122].

[note: 150] AEIC of Edwin Sugiarto (13 December 2011) at [2].

[note: 151] SOC (Amendment No. 2), 13 July 2011 at [69], [76], [82] and [86].

[note: 152] 5th Defendant's Defence (Amendment No. 2) (1 August 2011) at [62].

[note: 153] NE (16 February 2012) at p 47 line 25 - p 49 line 19.

[note: 154] 5th and 6th Defendants, Written Submissions dated 4 June 2012, at paras 18-22.

[note: 155] SOC (Amendment No. 2), 13 July 2011 at [68], [73], [79] and [85].

[note: 156] SOC (Amendment No. 2), 13 July 2011 at [69], [76], [82] and [86].

[note: 157] SOC (Amendment No. 2), 13 July 2011 at [36].

[note: 158] 5th Defendant's Defence (Amendment No. 2) at [64].

[note: 159] 5th SBD at p 98.

[note: 160] 5th SBD at p 70.

[note: 161] AEIC of Alwie Handoyo (13 December 2011) at [11].

[note: 162] NE (16 February 2012) at p 78 lines 14 - 25, NE (17 February) at p 45 lines 5 – 25, p 47 lines 12 – 16 and p 47 line 25 – p 48 line 11.

[note: 163] NE (17 February 2012) at p 75 line 5 – p 76 line 12.

[note: 164] 5th and 6th Defendants' Defence (5 April 2010) at [20].

[note: 165] 5th Defendant's Closing Submissions (19 March 2012) at [34] – [44].

[note: 166] 5th Defendant's Closing Submissions (19 March 2012) at [36].

[note: 167] 5th Defendant's Closing Submissions (19 March 2012) at [39].

[note: 168] AEIC of Alwie Handoyo (13 December 2011) at [11].

[note: 169] AEIC of Alwie Handoyo (13 December 2011) at [54] and at pp 110 - 113, NE (16 February 2012) at p 101 lines 17 - 22.

[note: 170] AEIC of Alwie Handoyo (13 December 2011) at pp 114 - 115.

[note: 171] AEIC of Alwie Handoyo (13 December 2011) at [27], [30].

[note: 172] NE (25 January 2012) at p 113 lines 2 – 20.

[note: 173] NE (26 January 2012) at p 31 lines 13 - 19.

[note: 174] 5th Defendant's Bundle of Documents ("5DBD") (11 January 2012) at pp 134 – 143.

[note: 175] Affidavit of Alwie Handoyo (9 March 2010) at [7]-[8] and at pp 6 - 15.

[note: 176] NE (16 February 2012) at p 97 line 16 - p 98 line 4, p 98 line 16 - p 100 line4.

[note: 177] NE (16 February 2012) at p 109 lines 17 - 21.

[note: 178] AEIC of Alwie Handoyo (13 December 2011) at [53] - [58].

[note: 179] NE (26 January 2012) at p 31 lines 13 - 19.

[note: 180] NE (20 February 2012) at p 132 line 22 - p 133 line 8.

[note: 181] NE (20 February 2012) at p 126 lines 15 - 17 and p 129 lines 6 - 16.

[note: 182] 5th Defendant's Closing Submissions (19 March 2012) at [37] – [38].

[note: 183] PB at p 199 - 200.

[note: 184] NE (20 February 2012) at p 50 lines 10 - 14.

[note: 185] AEIC of Alwie Handoyo (13 December 2011) at [81].

[note: 186] NE (20 February 2012) at p 50 line 19 - p 51 line 25.

[note: 187] NE (20 February 2012) at p 52 lines 14 - 25.

[note: 188] NE (20 February 2012) at p 50 lines 7 - 9.

[note: 189] 5th Defendant's Closing Submissions (19 March 2012) at [56].

[note: 190] Plaintiffs' Closing Submissions (19 March 2012) at [101]-[105], PB at pp 2, 8, 76, and 84.

[note: 191] 1st Defendant's Defence (Amendment No. 3) at [83A].

[note: 192] Plaintiffs' Closing Submissions (19 March 2012) at [99]-[100]; PB at p 188.

[note: 193] 1st Defendant's Defence (Amendment No. 3) at [83A].

[note: 194] PB at pp 188-189.

[note: 195] NE (18 January 2012) at p 29 lines 1 - 2.

[note: 196] NE (18 January 2012) at p 30 lines 10 - 13.

[note: 197] NE (30 January 2012) at p 132 line 13 - 14 and p 13 lines 10 - 17.

[note: 198] NE (18 January 2012) at p 29 lines 27 - 28, 1st Defendant's Closing Submissions at Schedule 1, [8(iii)].

[note: 199] NE (18 January 2012) at p 32 lines 8 - 11, 1st Defendant's Closing Submissions at Schedule 1, [8(iii)(a)].

[note: 200] NE (18 January 2012) at p 30 lines 2 - 4.

[note: 201] NE (18 January 2012) at p 30 lines 18 - 19.

[note: 202] NE (30 January 2012) at p 58 lines 16 - 17.

[note: 203] AEIC of Richard Chan (13 December 2011) at [100]-[104], 1st Defendant's Closing Submissions at [8(iv)].

[note: 204] AEIC of Yap Bei Sing (13 January 2012) at pp 7 - 8.

[note: 205] 1st Defendant's Closing Submissions at Schedule 1, [8(v)].

[note: 206] NE (22 February 2012) at p 4 lines 8 - 11.

[note: 207] NE (22 February 2012) at p 4 lines 14 - 25.

[note: 208] NE (30 January 2012) at p 51 line 14 - p 52 line 3, p 52 lines 18 - 23 and p 53 lines 14 - 19.

[note: 209] NE (30 January 2012) at p 52 lines 4 - 7.

[note: 210] NE (30 January 2012) at p 57 line 23 - p 58 line 5 and p 92 lines 9 - 18.

[note: 211] NE (26 January 2012) at p 101 line 25 to p 102 line 8.

[note: 212] PB at p 263.

[note: 213] PB at p 251.

[note: 214] NE (26 January 2012) at p 138 line 7 – p 140 line 8.

[note: 215] AB at p 293.

[note: 216] NE (26 January 2012) at p 114 lines 10 - 13 and p 121 lines 7 - 9.

[note: 217] AB at pp 131, 132, 235, 282, 284 and 291.

[note: 218] NE (25 January 2012) at p 38 lines 19 - 21.

[note: 219] SOC (Amendment No. 2), 13 July 2011 at [50].

[note: 220] NE (26 January 2012) at p 122 line 6 - p 123 line 18.

[note: 221] AEIC of Richard Chan (13 December 2011) at [90].

[note: 222] NE (18 January 2012) at p 14 lines 13 - 28.

[note: 223] AB at p 299.

[note: 224] *Ibid*.

[note: 225] NE (27 January 2012) at p 71 line 9 - p 74 line 15.

[note: 226] NE (27 January 2012) at p 80 lines 4 - 17.

[note: 227] NE (27 January 2012) at p 19 line 25 to p 21 line 20.

[note: 228] SOC (Amendment No. 2), 13 July 2011 at [49B], AB at p 181.

[note: 229] 1st Defendant's Defence (Amendment No. 3) at [49J], AEIC of Richard Chan (13 December 2011) at [80].

[note: 230] NE (27 January 2012) at p 108 lines 11 - 25 and p 111 line 23 - p 113 line 25.

[note: 231] 1st Defendant's Defence (Amendment No. 3) at [49B] and [49J], AEIC of Richard Chan (13

January 2012) at [80]; NE (27 January 2012) at p 123 lines 4 - 14.

[note: 232] AEIC of Richard Chan (13 December 2011) at [20].

[note: 233] NE (26 January 2012) at p 24 line 23 - p 25 line 9.

[note: 234] NE (27 January 2012) at p 115 lines 12 - 19 and p 117 lines 5 - 16.

[note: 235] SOC (Amendment No. 2), 13 July 2011 at [66] - [87].

[note: 236] SOC (Amendment No. 2), 13 July 2011 at [67], [72], [78] and [84].

[note: 237] SOC (Amendment No. 2), 13 July 2011 at [91].

[note: 238] SOC (Amendment No. 2), 13 July 2011 at [92].

[note: 239] SOC (Amendment No. 2), 13 July 2011 at [97].

[note: 240] NE (16 February 2012) at p 57 lines 11 – 13.

[note: 241] Plaintiffs' Further Submissions (4 June 2012) at [24].

[note: 242] Plaintiffs' Further Submissions (4 June 2012) at [22].

[note: 243] Plaintiffs' Further Submissions (4 June 2012) at [24].

[note: 244] SOC (Amendment No. 2), 13 July 2011 at [89], [91], [95] and [97]

[note: 245] PB 18 and PB 30

[note: 246] NE (16 February 2012) at p 57 lines 11 – 13.

[note: 247] Plaintiffs' Further Submissions (4 June 2012) at [20]-[22].

[note: 248] AEIC of Tjong Very Sumito (13 December 2011) at [28].

[note: 249] SOC (Amendment No. 2), 13 July 2011 at [29].

[note: 250] AEIC of Tjong Very Sumito (13 December 2011) at [43].

[note: 251] AEIC of Tjong Very Sumito (13 December 2011) at [44].

[note: 252] NE (26 January 2012) at p 60 lines 11 – 14.

[note: 253] Plaintiffs' Further Submissions (4 June 2012) at [20].

[note: 254] PB at pp 257 - 258.

[note: 255] PB at p 30

[note: 256] NE (16 February 2012) at p 57 lines 11 – 18 and p 63 line 23 – p 64 line 4

[note: 257] NE (16 February 2012) at p 63 line 23 – p 64 line 4, NE (17 February 2012) at p 157 lines 13 – 21 and NE (20 February 2012) at p 58 line 22 – p 59 line 6, and

[note: 258] SOC (Amendment No. 2), 13 July 2011 at [49A] - [49J].

[note: 259] SOC (Amendment No. 2), 13 July 2011 at [53].

[note: 260] SOC (Amendment No. 2), 13 July 2011 at [61].

[note: 261] SOC (Amendment No. 2), 13 July 2011 at [49B], AB at p 181.

[note: 262] Oral Grounds of Decision (17 March 2010) at [11].

[note: 263] SOC (Amendment No. 2), 13 July 2011 at [49E].

[note: 264] Oral Grounds of Decision (17 March 2010) at [11]

[note: 265] SOC (Amendment No. 2), 13 July 2011 at [53] (statements 1 and 4).

[note: 266] SOC (Amendment No. 2), 13 July 2011 at [53] (statement 2).

[note: 267] SOC (Amendment No. 2), 13 July 2011 at [53] (statements 3, 4, 5, 6, 7 and 9).

[note: 268] SOC (Amendment No. 2), 13 July 2011 at [53] (statement 8).

[note: 269] SOC (Amendment No. 2), 13 July 2011 at [53] (statement 10).

[note: 270] SOC (Amendment No. 2), 13 July 2011 at [54].

[note: 271] SOC (Amendment No. 2), 13 July 2011 at [20] and [21].

[note: 272] NE (25 January 2012) at p 82 lines 11 - 12.

[note: 273] SOC (Amendment No. 2), 13 July 2011 at [22] - [46].

[note: 274] Section 2.1(b), 1st Supplemental.

[note: 275] Section 2.1(a), 1st Supplemental and SOC (Amendment No. 2), 13 July 2011 at [50].

[note: 276] SOC (Amendment No. 2), 13 July 2011 at [63] - [64].

[note: 277] Plaintiffs' Closing Submissions (19 March 2012) at [110] – [200].

[note: 278] SOC (Amendment No. 2), 13 July 2011 at [63].

[note: 279] SOC (Amendment No. 2), 13 July 2011 at [99A] – [99C].

[note: 280] SOC (Amendment No. 2), 13 July 2011 at [37E], [99B] – [99C], Plaintiffs' Closing Submissions (19 March 2012) at [337].

[note: 281] SOC (Amendment No. 2), 13 July 2011 at [37A].

[note: 282] SOC (Amendment No. 2), 13 July 2011 at [37B].

[note: 283] SOC (Amendment No. 2), 13 July 2011 at [37B], AEIC of Tjong Very Sumito (13 December 2011) at [69] – [71].

[note: 284] SOC (Amendment No. 2), 13 July 2011 at [37A] – [37E] and [99A] – [99C].

[note: 285] NE (17 January 2012) at p 48 lines 4 – 11.

[note: 286] NE (17 January 2012) at p 50 line 10 – p 51 line 22.

[note: 287] NE (17 January 2012) at p 51 lines 1 – 14.

[note: 288] 1st Defendant's Defence (Amendment No. 3), 6 December 2011 at [41A].

[note: 289] NE (30 January 2012) at p 29 lines 9 – 22.

[note: 290] ORC 5589/2011 (30 November 2011).

[note: 291] 1st Defendant's Defence (Amendment No. 3), 6 December 2011 at [41A] and [62A].

[note: 292] NE (30 January 2012) at pp 27 – 32.

[note: 293] NE (30 January 2012) at p 27 line 19 – p 28 line 24.

[note: 294] NE (17 January 2012) at p 51 line 30 – p 52 line 11.

[note: 295] Affidavit of Richard Chan (1 September 2011), Exhibit CSE-21.

[note: 296] Affidavit of Richard Chan (1 September 2011) at pp 10 – 12.

[note: 297] NE (30 January 2012) at p 40 line 25 – p 41 line 17.

[note: 298] NE (30 January 2012) at p 33 line 15 – p 42 line 3.

[note: 299] AEIC of Michelle Helena Novotny (13 January 2012), Exhibit MHN-2.

[note: 300] NE (21 February 2012) at p 8 line 6 – p 9 line 9.

[note: 301] NE (21 February 2012) at p 12 line 15 – p 18 line 6.

[note: 302] NE (21 February 2012) at p 20 line 16 – p 21 line 15.

[note: 303] SUM 5607/2011 (12 December 2011), RA 7/2012 (4 January 2012).

[note: 304] NE (21 February 2012) at p 21 lines 7 – 11.

[note: 305] NE (21 February 2012) at p 21 lines 12 – 15 and p 23 lines 7 – 15.

[note: 306] AEIC of Michelle Helena Novotny (13 January 2012), Exhibit MHN-2 at p 2.

[note: 307] NE (21 February 2012) at p 23 line 22 – p 24 line 22.

[note: 308] NE (21 February 2012) at p 25 lines 2 – 5.

[note: 309] 1st Defendant's Closing Submissions (19 March 2012) at [90(e)] and [93].

[note: 310] AEIC of Michelle Helena Novotny (13 January 2012), Exhibit MHN-2 at [25].

[note: 311] Richard Chan's Defence (Amendment No. 3), 6 December 2011 at [41A] and [62A].

[note: 312] AEIC of Richard Chan (13 January 2012) at [94] – [96].

[note: 313] NE (30 January 2012) at p 26 lines 4 – 12.

[note: 314] AEIC of Michelle Helena Novotny (13 January 2012), Exhibit MHN-2 at [22].

[note: 315] AEIC of Michelle Helena Novotny (13 January 2012), Exhibit MHN-2 at [20].

[note: 316] AEIC of Michelle Helena Novotny (13 January 2012), Exhibit MHN-2 at [4].

[note: 317] AEIC of Tjong Very Sumito (13 December 2011) at pp 876 – 878.

[note: 318] AEIC of Tjong Very Sumito (13 December 2011) at pp 855 – 857.

[note: 319] AEIC of Tjong Very Sumito (13 December 2011) at pp 860 – 862.

[note: 320] AB at p 261.

[note: 321] NE (17 January 2012) at p 59 line 30 – p 60 line 22.

[note: 322] NE (17 January 2012) at p 61 line 1.

[note: 323] PB at p 2.

[note: 324] PB at p 8.

[note: 325] PB at p 76.

[note: 326] PB at p 84.

[note: 327] PB at p 200.

[note: 328] 1st Defendant's Closing Submissions (19 March 2012) at [90(a)].

[note: 329] Plaintiffs' Closing Submissions (19 March 2012) at [185], [196] – [197].

[note: 330] Plaintiffs' Closing Submissions (19 March 2012) at [198].

[note: 331] NE (27 January 2012) at p 117 line 17 – p 121 line 8.

[note: 332] PB at p 237.

[note: 333] NE (27 January 2012) at p 122 line 7 – p 123 line 3.

[note: 334] 1st Defendant's Closing Submissions (19 March 2012) at [90(e)].

[note: 335] 1st Defendant's Closing Submissions (19 March 2012) at [90(b)].

[note: 336] 1st Defendant's Closing Submissions (19 March 2012) at [90(d)].

[note: 337] 1st Defendant's Defence (Amendment No. 3), 6 December 2011 at [41B], 1st Defendant's Closing Submissions (19 March 2012) at [96].

[note: 338] 1st Defendant's Closing Submissions (19 March 2012) at [96].

[note: 339]

[note: 340] SOC (Amendment No. 2), 13 July 2011 at [99C].

[note: 341] SOC (Amendment No. 2), 13 July 2011 at [50].

[note: 342] AB at pp 2149 – 2150, AEIC of Tjong Very Sumito (13 December 2011) at pp 307 – 308.

[note: 343] AEIC of Richard Chan (13 January 2012) at p 295, AEIC of Tjong Very Sumito (13 December 2011) at p 447.

[note: 344] 1st Defendant's Defence (Amendment No. 3), 6 December 2011 at [79] and [80]-[82].

[note: 345] AEIC of Tjong Very Sumito (13 December 2011) at [92].

[note: 346] Plaintiffs' Reply (Am.No.2) (20 December 2011) at [24], AEIC of Tjong Very Sumito (13 December 2011) at [92].

[note: 347] Plaintiffs' Reply (Am.No.2) (20 December 2011) at [25].

[note: 348] NE (25 January 2012) at p 153 lines 13 – 19.

[note: 349] NE (25 January 2012) at p 154 lines 4 and 13.

[note: 350] AEIC of Tjong Very Sumito (13 December 2011) at p 447.

[note: 351] AEIC of Richard Chan (13 January 2012) at [55] – [57] and p 295.

[note: 352] AEIC of Tjong Very Sumito (13 December 2011) at pp 445, 446, 448, 451.

[note: 353] AEIC of Tjong Very Sumito (13 December 2011) at p 446.

[note: 354] AEIC of Tjong Very Sumito (13 December 2011) at p 445.

[note: 355] AEIC of Tjong Very Sumito (13 December 2011) at p 448.

[note: 356] AEIC of Tjong Very Sumito (13 December 2011) at p 451.

[note: 357] AEIC of Tjong Very Sumito (13 December 2011) at pp 445, 446, 447, 448.

[note: 358] SOC (Amendment No. 2), 13 July 2011 at [47]; AEIC of Tjong Very Sumito (13 December 2011) at [101].

[note: 359] Oral Grounds of Decision (17 March 2010) at [9].

[note: 360] AEIC of Richard Chan (13 January 2012) at p 296.

[note: 361] NE (27 January 2012) at p 93 lines 3 - 7 and p 96 lines 3 – 11.

[note: 362] SOC (Amendment No. 2), 13 July 2011 at [124], Plaintiffs' Closing Submissions (19 March 2012) at [209].

[note: 363] SOC (Amendment No. 2), 13 July 2011 at [128].

[note: 364] SOC (Amendment No. 2), 13 July 2011 at [39], [102], AEIC of Tjong Very Sumito (13 December 2011) at [74] – [75].

[note: 365] NE (30 January 2012) at p 100 lines 4 – 15.

[note: 366] NE (27 January 2012) at p 35 line 22 – p 36 line 10.

[note: 367] NE (30 January 2012) at p 100 lines 12 – 15.

[note: 368] AB at p 255.

[note: 369] AB at p 261.

[note: 370] AB at p 270.

[note: 371] NE (25 January 2012) at p 132 line 21 – p 133 line 7.

[note: 372] NE (25 January 2012) at p 141 lines 5 – 20.

[note: 373] NE (25 January 2012) at p 136 line 25 – p 137 line 3 and p 141 line 24 – p 142 line 7.

[note: 374] Plaintiffs' Closing Submissions (19 March 2012) at [219].

[note: 375] Plaintiffs' Closing Submissions (19 March 2012) at [232] – [234].

[note: 376] NE (30 January 2012) at p 91 lines 7 – 15.

[note: 377] NE (22 February 2012) at p 79 line 25 – p 80 line 5.

[note: 378] AEIC of Jake Pison Hawila (13 December 2011) at [6] – [8].

[note: 379] AB at pp 39 – 82.

[note: 380] AB at pp 76 – 78.

[note: 381] AB at p 73.

[note: 382] 1st Defendant's Closing Submissions (19 March 2012) at [114(c)], 7th – 9th Defendants' Closing Submissions (19 March 2012) at [56] – [58].

[note: 383] 1st Defendant's Closing Submissions (19 March 2012) at [114(a)].

[note: 384] 1st Defendant's Closing Submissions (19 March 2012) at [114(b)].

[note: 385] 1st Defendant's Closing Submissions (19 March 2012) at [115].

[note: 386] 7th – 9th Defendants' Closing Submissions (19 March 2012) at [50].

[note: 387] AEIC of Edwin Sugiarto (12 December 2011) at [46], 7th – 9th Defendants' Closing

Submissions (19 March 2012) at [56].

[note: 388] 7th – 9th Defendants' Closing Submissions (19 March 2012) at [60].

[note: 389] 1st Defendant's Closing Submissions (19 March 2012) at [115(a)].

[note: 390] 1st Defendant's Closing Submissions (19 March 2012) at [115(b)].

[note: 391] AEIC of Tjong Very Sumito (13 December 2011) at [69] – [70].

[note: 392] NE (20 January 2012) at p 28 lines 2 – 15.

[note: 393] SOC (Amendment No. 2), 13 July 2011 at [50].

[note: 394] 7th – 9th Defendants' Closing Submissions (19 March 2012) at [15].

[note: 395] SOC (Amendment No. 2), 13 July 2011 at [102].

[note: 396] 7th – 9th Defendants' Closing Submissions (19 March 2012) at [19].

[note: 397] Plaintiffs' Closing Submissions (19 March 2012) at [211], AEIC of Tjong Very Sumito (13 December 2011) at [80], NE (22 February 2012) at p 79 lines 20 – 23 and NE (23 February 2012) at p 56 lines 13 – 15.

[note: 398] Plaintiffs' Closing Submissions (19 March 2012) at [209] – [210].

[note: 399] Plaintiffs' Closing Submissions (19 March 2012) at [238] – [242].

[note: 400] Plaintiffs' Closing Submissions (19 March 2012) at [212] – [213], PB at pp 171 – 172.

[note: 401] NE (23 February 2012) at p 55 line 24 – p 56 line 3 and NE (22 February 2012) at p 55 lines 3 - 6.

[note: 402] NE (22 February 2012) at p 58 lines 13 – 19.

[note: 403] NE (22 February 2012) at p 55 lines 3 – 14.

[note: 404] NE (22 February 2012) at p 55 lines 19 – 20.

[note: 405] NE (22 February 2012) at p 64 line 3.

[note: 406] NE (22 February 2012) at p 64 line 13.

[note: 407] NE (22 February 2012) at p 64 lines 21 – 25.

[note: 408] AEIC of Tjong Very Sumito (13 December 2011) at [19] – [20], [79], AEIC of Jake Pison

Hawila (12 December 2011) at [34], AEIC of Edwin Sugiarto (12 December 2011) at [43].

[note: 409] NE (23 February 2012) at p 58 lines 4 – 14.

[note: 410] 7th – 9th Defendants' Closing Submissions (19 March 2012) at [36] – [39].

[note: 411] 7th – 9th Defendants' Closing Submissions (19 March 2012) at [39].

[note: 412] Plaintiffs' Closing Submissions (19 March 2012) at [215].

[note: 413] Plaintiffs' Closing Submissions (19 March 2012) at [240].

[note: 414] Plaintiffs' Closing Submissions (19 March 2012) at [240].

[note: 415] NE (22 February 2012) at p 41 lines 3 – 25, p 44 lines 13 – 16 and p 124 line 7.

[note: 416] NE (23 February 2012) at p 15 line 14 – p 21 line 16.

[note: 417] AEIC of Jake Pison Hawali (13 December 2011) at [35].

[note: 418] AB at p 255.

[note: 419] AB at p 261.

[note: 420] AB at p 270.

[note: 421] NE (30 January 2012) at p 90 lines 11 – 24.

[note: 422] SOC (Amendment No. 2), 13 July 2011 at [38], [53], AEIC of Tjong Very Sumito (13 December 2011) at [172] – [176].

[note: 423] NE (17 January 2012) at p 70 lines 13 – 17.

[note: 424] 7th – 9th Defendants' Closing Submissions (19 March 2012) at [76].

[note: 425] 7th – 9th Defendants' Closing Submissions (19 March 2012) at [75].

[note: 426] NE (17 January 2012) at p 45 line 23 – p 46 line 21.

[note: 427] NE (17 January 2012) at p 49 lines 5 – 8.

[note: 428] NE (17 January 2012) at p 59 line 16.

[note: 429] NE (17 January 2012) at p 65 lines 19 – 24.

[note: 430] NE (30 January 2012) at p 91 lines 7 – 10.

[note: 431] AEIC of Jake Pison Hawila (13 December 2011) at [19] – [23], AEIC of Edwin Sugiarto (13 December 2011) at [24] – [29].

[note: 432] Plaintiffs' Closing Submissions (19 March 2012) at [421].

[note: 433] SOC (Amendment No. 2), 13 July 2011 at [117], Plaintiffs' Closing Submissions (19 March 2012) at [420] – [422].

[note: 434] SOC (Amendment No. 2), 13 July 2011 at [116] – [117].