eSys Technologies Pte Ltd *v* nTan Corporate Advisory Pte Ltd
[2013] SGCA 27

Case Number	: Civil Appeal No 84 of 2012
Decision Date	: 25 March 2013
Tribunal/Court	: Court of Appeal
Coram	: Andrew Phang Boon Leong JA; Judith Prakash J; Belinda Ang Saw Ean J
Counsel Name(s)	: Samuel Chacko, Christopher Yeo and Shi Jingxi (Legis Point LLC) for the Appellant; Edwin Tong, Kristy Tan and Valerie Tay (Allen & Gledhill LLP) for the Respondent.
Parties	: eSys Technologies Pte Ltd — nTan Corporate Advisory Pte Ltd

Contract – Contractual terms

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2012] SGHC 136.]

25 March 2013 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the High Court Judge ("the Judge") in *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* [2012] SGHC 136 ("the Judgment"). It raises, in the main, issues of contractual interpretation of crucial terms between a financially distressed company and a corporate finance and restructuring expert.

The factual background

2 eSys Technologies Pte Ltd ("the Appellant") is engaged in the business of distributing computer hardware and in particular hard disk drives. Its founder is Vikas Goel ("Mr Goel"), who is also a 99.999% shareholder and managing director of the company. The Appellant's commercial relationship with Seagate Technology ("Seagate"), a US-based multinational company which designs, manufactures and markets hard drives, was critical to its business. In particular, the Appellant relied heavily on its distributorship agreements with Seagate as 40% of its sales comprised Seagate products.

3 On 6 November 2006, Seagate decided to terminate its worldwide distributorship agreement with the Appellant and filed a public announcement with the US Securities and Exchange Commission ("the SEC Announcement") to this effect. The SEC announcement alleged that:

(a) The Appellant had committed material breaches of its distribution agreements with Seagate;

(b) The Appellant had refused to allow Seagate to perform a contractual audit of its sales records to confirm the accuracy of its rebate claims;

(c) The Appellant's officials had indicated that an audit would reveal irregularities in the

Appellant's compliance with the terms of Seagate's sales incentive programs and other unspecified irregularities;

(d) Some US$50 million was owed by the Appellant to Seagate; and

(e) Seagate fully intended to pursue its contractual audit rights and claims against the Appellant.

4 The SEC announcement not only had a crippling effect on the Appellant's bottom-line but also seriously damaged its commercial reputation. In particular, it raised alarm among the Appellant's trade and bank creditors and prompted demands for the repayment of, or additional security for, outstanding loans amounting to a total of some US$50 million. In addition, the Appellant's bank creditors cancelled some US$132 million of credit lines and its suppliers cancelled another US$90.5 million of credit lines. The cancellation of these various credit lines dried up the Appellant's cashflow and threatened the company's survival as a going concern as it was heavily dependent on credit to facilitate its trading operations. One of the bank creditors, KBC Bank ("KBC"), even spoke to the Appellant about KBC's intentions to appoint a judicial manager.

5 Given the deluge of creditors' demands, the key problem facing the Appellant was the fact that, as it was a trading company whose primary assets were inventories and receivables, it needed time to first realise its inventories and collect its receivables, in order to perform its repayment obligations. In the meantime, the Appellant required help to stave off the creditors' demands and prevent them from commencing legal action.

6 In this connection, the Appellant's legal advisors, Drew & Napier LLC, recommended nTan Corporate Advisory Pte Ltd ("the Respondent"). On 11 November 2006, an urgent meeting was arranged between Mr Goel and Nicky Tan ("Mr Tan"), Chief Executive Officer of the Respondent.

The Engagement Letter

7 On 14 November 2006, it was decided that the Appellant would engage the Respondent as an independent advisor. An agreement for the "appointment of independent advisor" was executed between the Appellant and the Respondent ("the Engagement Letter").

8 The Engagement Letter was drafted by the Respondent and under the heading "Scope of Work" it listed the following material items ("the Scope of Work Clause"):

Scope of Work

The board of directors of eSys [*ie*, the Appellant] ("Board of Directors") has resolved to and appointed us [*ie*, the Respondent] as independent advisor to eSys and its subsidiary and associate companies (together, the "Group") to:

...

ii) advise and assist the Group in reviewing and developing strategic options with the objective of enhancing value to all stakeholders;

iii) advise and assist the Group, as appropriate, on suitable options to restructure its operational activities and financial arrangements;

...

v) advise and assist the Group in identifying and securing potential investors;

…

9 In addition, under the heading "our fee arrangements", it was set out that there would be two distinct component of fees due to the Respondent:

(a) Time costs fee, out of pocket expenses (including fees of any experts or professionals) and such other fees as may be provided for in any addendum to the Engagement Letter ("Time Cost Fees");

(b) A Value Added Fee ("VAF") computed at 5% of the Total Gross Value Added ("TGVA").

10 The TGVA is defined to be the sum total of the following ("the VAF Clause"):

(a) Value of the Group's liabilities written off, extinguished, avoided or restructured;

(b) Fair value of new assets injected and recovered by the Group;

(c) Value of new equity and/or debt raised by the Group; and

(d) Any other value add agreed with [the Appellant] and the Group.

[emphasis added]

11 Under paragraph 8 of Appendix A to the Engagement Letter, it was further provided that, even after termination of the engagement, the Respondent would continue to be entitled to any VAF earned if the Appellant adopted or implemented its advice relating to the scope of work within 36 months from the date of such termination.

12 Upon execution of the Engagement Letter, the Appellant placed a deposit of S$2 million ("the deposit") with the Respondent. The Engagement Letter also provided that, at the end of the engagement, the balance of the deposit after setting off all fees and expenses would be returned to the Appellant.

Bank creditors' meeting

13 Following the Respondent's engagement, it proceeded to organise a meeting with the Appellant's bank creditors. The purpose of the meeting was to convince the various bank creditors to agree to a standstill, pursuant to which the bank creditors would withhold their demands for repayments and give the Appellant more time to repay its debts ("the Bank Liabilities"). The Respondent thus undertook the preparation of the necessary materials for the bank creditors' meeting with this goal in mind. In accordance with the advice from Mr Tan, the Appellant offered to appoint PricewaterhouseCoopers as the bank creditors' financial advisor in order to boost the bank creditors' confidence in the Appellant.

14 On 24 November 2006, the bank creditors' meeting was held ("the Meeting"). Mr Tan chaired the Meeting and informed the bank creditors of the following:

(a) The current financial status of the Appellant;

(b) There were potential investors in the Appellant;

(c) The nature of the Appellant's business and that it would be in the banks' best interest to hold off their demands against the Appellant;

(d) The Appellant was in the midst of formulating a repayment plan which it was estimated would be ready in two weeks;

(e) No creditor would be paid in preference to others; and

(f) The Appellant was prepared to file an application under s 210(10) of the Companies Act (Cap 50, 2006 Rev Ed), if necessary.

15 The Meeting ended with the banks agreeing to meet among themselves on the following Tuesday (*ie*, 28 November 2006). It was resolved that until then none of the banks would commence legal proceedings against the Appellant to recover the Bank Liabilities.

16 As it turned out, even after 28 November 2006, none of the bank creditors commenced legal proceedings against the Appellant and the latter eventually managed to repay all its debts to its creditors by March 2007.

The Teledata Transaction

17 The other significant work allegedly done by the Respondent related to an investment by Teledata Informatics Ltd ("Teledata") of approximately US$100 million in the Appellant ("the Teledata Transaction"). Earlier, on 10 November 2006, soon after Seagate terminated its worldwide distributorship agreements with the Appellant, a letter of interest was sent by Teledata indicating an interest on Teledata's part to purchase 51% of the total paid up equity shares of the Appellant for a consideration of US$60 million ("the Direct Funding Structure"). In addition, Teledata would provide a loan of US$40 million to the Appellant as working capital.

18 According to Mr Tan, during his first meeting with Mr Goel on 11 November 2006, he had informed the latter that the Direct Funding Structure was not a good idea as it might give the bank creditors impetus to put the Appellant into liquidation so as to gain access to the fresh funds *via* a *pari passu* distribution. Instead, Mr Tan advised that the Appellant should be restructured so that it became wholly owned by a special purpose vehicle holding company ("Holdco"), with the new monies being received by Holdco, and then extended to the Appellant *via* a conditional secured loan.

19 On 25 November 2006, further discussions took place between Mr Goel and Mr Tan. On 29 November 2006, a Share Subscription Agreement ("the SSA") was entered into by the Appellant, Mr Goel, and Teledata, essentially implementing the Holdco structure for the purposes of Teledata's investment. The company eventually used as the holding company was Rainforest Trading Limited.

20 Mr Goel had had some specific concerns in relation to the Teledata Transaction. In particular:

(a) He was concerned to exclude the value of a piece of land in India owned by eSys India, the Appellant's subsidiary, from the Teledata deal. This was later effected through the eSys India Transfer Structure; and

(b) He was also keen to receive a cash payout of US$5 million from the Teledata deal but Teledata was unwilling to pay him an additional sum of money, over and above the US$60 million.

Mr Tan suggested two methods of achieving this aim, *viz*, "the Re-evaluation Excess VG Payment Structure" and "the US$5 million VG Payment Structure", respectively.

21 A series of supplemental agreements to the SSA were thus also executed by the Appellant, Mr Goel and Teledata on 29 November 2006 to give effect to the above arrangements.

Termination of the Respondent's engagement

22 On 4 January 2007, the Respondent issued an invoice in the sum of S$663,759.64 to the Appellant for the services rendered from 14 November 2006 to 31 December 2006.

23 By way of a letter dated 6 February 2007, the Appellant terminated the Respondent's appointment, and requested a refund of the balance of the deposit.

24 On 23 February 2007, the Respondent issued a further invoice for an additional sum of S$69,680.15 to the Appellant for the services rendered from 1 January 2007 to 6 February 2007. It is undisputed that the fees in both invoices issued on 4 January 2007 and 23 February 2007 ("the two invoices") related solely to the Time Cost Fees and not VAF.

25 The invoice of 23 February 2007 was accompanied by a letter from the Respondent responding to the Appellant's letter of termination of 6 February 2007. The Respondent's letter of 23 February 2007 further referred to "paragraph 8, Appendix A of our letter of appointment dated 14 November 2006", and invited the Appellant to make proposals as to how to deal with the terms of that paragraph. This was a reference to the VAF which the Respondent could be entitled to even after termination of the engagement (see above at [11]).

26 On 5 April 2007, an email was sent to Mr Tan by Emily Chay ("Ms Chay"), the Appellant's Chief Financial Officer, asking for the refund of the deposit. Mr Tan replied one day later on 6 April 2007 stating that the Respondent would "deal with the deposit in accordance with the terms of [the] engagement letter".

27 Many months later, on 28 January 2008, Ms Chay wrote again to the Respondent. She attached a statement of account which set off the two invoices against the deposit, and pressed for the return of the remainder of the deposit with interest. On 14 February 2008, the Respondent replied to the Appellant, stating that the VAF due to the Respondent far exceeded the balance of the deposit, and that the Respondent had repeatedly asked the Appellant for the relevant information and documents to facilitate the computation of the VAF albeit to no avail. In the circumstances, the Respondent requested that the Appellant provide the said information and documents as soon as possible, in order to facilitate the computation of the VAF.

28 On 6 August 2010, Legis Point LLC, the solicitors for the Appellant, sent the Respondent a letter of demand requesting the return of the balance deposit with interest and an account of the Respondent's two invoices. Following a series of exchange of solicitors' letters, on 9 September 2010 the Appellant commenced the proceedings that eventually led to the present appeal.

29 On 22 August 2011, the Respondent filed its Defence and Counterclaim (Amendment No 1). In particular, the Respondent counterclaimed for VAF in relation to: (a) the restructured Bank Liabilities; and (b) the injection of funds *via* the Teledata Transaction.

The decision in the court below

30 The court below dismissed the Appellant's claim for an account as well as its claim for the balance of the deposit, and allowed the Respondent's counterclaim for VAF in respect of the Bank Liabilities successfully "re-structured" by the Respondent as well as for the Teledata deal.

31 The Judge made the following material findings:

(a) It was an implied term of the Engagement Letter that the Respondent was to provide an account to the Appellant (see the Judgment at [33]);

(b) As the Appellant's claim for an account was a claim in equity, the doctrine of laches applied and the Appellant ought to be denied its claim for an account even though its claim was not time-barred, as it was more than three and a half years late (see the Judgment at [90] and [91]);

(c) The Appellant's request for an account was neither genuine nor *bona fide* (see the Judgment at [92]);

(d) The Respondent was entitled to its counterclaim for VAF on the restructured Bank Liabilities as the informal standstill achieved by the Respondent constituted "restructuring" within the meaning of the Engagement Letter (see the Judgment at [65]–[75]); and

(e) The Respondent was entitled to its counterclaim for VAF on the Teledata Transaction as the Holdco structure was incorporated into the deal as a result of the Respondent's advice (see the Judgment at [80]).

The issues

32 There are three issues which arise for consideration before this court:

(a) Was the Respondent under a legal duty to render an account to the Appellant with regard to the two invoices sent by the former to the latter; and, if so, has the Respondent in fact discharged that duty ("Issue 1")?

(b) Was the Respondent entitled to VAF in relation to the Bank Liabilities ("Issue 2")?

(c) Was the Respondent entitled to VAF in relation to the Teledata Transaction ("Issue 3")?

33 Let us consider each of these issues *seriatim*.

Issue 1

34 It is now common ground between the parties that it was an implied term (presumably, a "term implied in fact") of the Engagement Letter that the Respondent was obliged to provide an account to the Appellant.

35 The law relating to "terms implied in fact" in the Singapore context is clear. The governing tests to be applied by the court concerned in ascertaining whether or not a term should be implied "in fact" in relation to any given contract are the "business efficacy" test and the "officious bystander" tests. The tests complement each other, with the officious bystander test constituting the *practical mode*

by which the business efficacy test is implemented (see generally the recent decision of this court in *Foo Jong Peng and others v Phua Kiah Mai and another* [2012] 4 SLR 1267 (as well as the authorities cited therein), which decision reaffirms these established principles in the local context and which does not follow the Privy Council decision of *Attorney General of Belize and others v Belize Telecom Ltd and another* [2009] 1 WLR 1988, at least in so far as that decision departs from the principles just mentioned). Applying both tests to the present case, it is clear (as the Judge found) that a term ought to be implied "in fact" in the manner set out in the preceding paragraph. It is surely necessary to give business efficacy to the Engagement Letter that the Appellant be furnished with sufficient information by the Respondent to determine whether the latter's fees (as contained in the two invoices) are justified. Indeed, if the officious bystander had asked whether such information ought to be given, the parties would have unanimously suppressed him with a testy "Oh, of course!" As the Judge pointed out, this was buttressed – and, in fact, borne out – by testimony given on behalf of *the Respondent* itself (see the Judgment at [32]).

36 However, counsel for the Respondent, Mr Edwin Tong ("Mr Tong"), sought to argue that this particular implied term also required the Appellant to request an account *within a reasonable time* and that this element had not been met in the present case as the Appellant had only sought the information after a period of three and a half years from the issuance of the second invoice on 23 February 2007. It seems to us, however, that this argument at least overlaps, or even deals with (in substance), the same question as the argument from laches which the Judge adopted in the Respondent's favour. It would therefore be appropriate, at this juncture, to turn to and deal directly with the argument from laches.

37 In our view, there is a threshold difficulty in so far as the argument from laches is concerned. The Appellant premises its remedy on an implied term under the *common law* of contract (*ie*, it was a legal remedy seeking to enforce a legal right, where a statutory limitation period applies). There is local case law holding that in such circumstances the *equitable* doctrine of *laches* is *not* applicable. In the High Court decision of *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769 ("*Cytec Industries*"), Andrew Ang J observed (at [43]–[50]):

> 43 In a nutshell, the defendant relied on a decision of the English Court of Appeal, *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 1 WLR 1265 ("*Habib Bank*"), to argue that the principle of laches applied equally to equitable and legal rights. The defendant asserted that taking the modern broad approach, which involved considering the period of delay, the extent to which the defendant's position had been prejudiced and the extent to which that prejudice was caused by the actions of the plaintiff (*Nelson v Rye* [1996] 1 WLR 1378 at 1392), it was inequitable for the plaintiff to bring the present claim because it had not provided any explanation for the delay of approximately six years and this had caused the defendant to be handicapped in defending the action because it could no longer find documents relevant to the claim or locate the personnel which were involved in the material transactions.
>
> 44 The plaintiff took the position that the Court of Appeal, in *Scan Electronics (S) Pte Ltd v Syed Ali Redha Alsagoff* [1997] 1 SLR(R) 970 at [19] ("*Scan Electronics*"), had agreed with the trial judge that laches, being an equitable defence, had no place in the context where the claimant was asserting rights at law. Such a defence was therefore inapplicable to its claim for the Debt, which was a legal right. In any event, the plaintiff also argued that no triable issue had been raised because there was no evidence that the delay in bringing the claim had caused prejudice to the defendant. On the contrary, the defendant was merely trying to avoid paying the Debt. It was significant that, earlier, the defendant had inconsistently sought to stay the present action on the basis that Indonesia was the more appropriate forum *as voluminous documentary evidence and all the relevant witnesses were located in Indonesia*.

45 I came to the conclusion that the defence of laches was not applicable to the present factual matrix and hence could not present any triable issue. Additionally, the defendant failed to satisfy me that there was a fair or reasonable probability that it had a real or *bona fide* defence of laches because of the inconsistent positions it had taken on the availability of evidence in the course of the entire proceedings.

46 Laches is a doctrine of equity. It is properly invoked where essentially there has been a substantial lapse of time coupled with circumstances where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver thereof; or, where by his conduct and neglect he had, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted (*Sukhpreet Kaur Bajaj d/o Manjit Singh v Paramjit Singh Bajaj* [2008] SGHC 207 at [23]; *Re Estate of Tan Kow Quee* [2007] 2 SLR(R) 417 at [32]). This is a broad-based inquiry and it would be relevant to consider the length of delay before the claim was brought, the nature of the prejudice said to be suffered by the defendant, as well as any element of unconscionability in allowing the claim to be enforced (*Re Estate of Tan Kow Quee* at [38]). Although simply stated, the application of the doctrine requires some attention.

47 Warren L H Khoo J, in *Syed Ali Redha Alsagoff v Syed Salim Alhadad bin Syed Ahmad Alhadad* [1996] 2 SLR(R) 470 at [47], held that laches was essentially an equitable defence in answer to a claim in equity; hence, where in that case the claim by the plaintiff as the administrator *de bonis non* was a claim to assert rights at law of the estate over the property, the defence of laches had no place. According to Khoo J, this was a case where the maxim equity follows the law aptly applied. In an appeal against this decision, *Scan Electronics* ([44] *supra*), the Court of Appeal stated (at [19]) in respect of the argument of laches that it "entirely agree[d]" with the trial judge. It then concluded (at [20]) that:

> ... unreasonable delay or negligence in pursuing a right or claim, *particularly an equitable one*, may be held to disentitle the plaintiff to relief. ... [emphasis added]

The defendant relied upon that statement for support of its contention that the doctrine of laches applies even when the claimant was asserting a right at law. To my mind, that reading of the judgment was untenable as it was inconsistent with the Court of Appeal's unequivocal endorsement of Khoo J's holding. What, perhaps, the Court of Appeal left unsaid was that laches may also bar entitlement to equitable remedies in aid of a legal right or claim (see John McGhee QC, *Snell's Equity* (Sweet & Maxwell, 31st Ed, 2005) ("*Snell's Equity*") at para 5-18).

48 The rationale behind this principle becomes clear when one considers the evolution of the doctrine of laches and the Act [*ie*, the Limitation Act (Cap 163, 1996 Rev Ed)]. Historically, early limitation statutes only applied to courts of common law (*Snell's Equity* at para 5-17). The courts of equity applied the maxim *vigilantibus, non dormientibus, jura subveniunt* (equity aids the vigilant and not the indolent) to control flagrant abuses of its procedure (at para 5-16). Delays sufficient to prevent a party from obtaining an equitable remedy were technically called "laches" (at para 5-16). However, today, the Act (based largely on the UK Limitation Act which developed from early limitation statutes) prescribes limitation periods for certain equitable rights, such as claims for non-fraudulent breach of trust (six years) (see s 22(2) of the Act). Although it is plain that the Act does not affect the equitable jurisdiction of the court to refuse relief on the ground of laches (*per* s 32 of the Act), ***where there is a statutory limitation period operating expressly or by analogy, the plaintiff is generally entitled to the full statutory period before his claim, whether legal or equitable, becomes unenforceable*** (*Tay Tuan Kiat v*

Pritnam Singh Brar [1985-1986] SLR(R) 763 at [6], citing *In re Pauling's Settlement Trusts* [1964] Ch 303). This was another application of the maxim equity follows the law. However, the court retains a discretion to refuse to grant an equitable remedy in aid of a legal right even though the right is subject to a statutory period which has not expired (*Snell's Equity* at para 5-18). In my view, such a discretion was exercised in *British and Malayan Trustees Ltd v Sindo Realty Pte Ltd* [1998] 1 SLR(R) 903 at [64]. Additionally, where there are equitable claims to which no statutory limitation period applies (see, *eg*, *Re Estate of Tan Kow Quee* ([46] *supra*) concerning the recovery of trust property by the beneficiary from the trustee), these would naturally be covered by the doctrine of laches.

49 Contrary to what the defendant argued, the case of *Habib Bank* ([43] *supra*) does not stand for the proposition that the doctrine of laches applies equally to legal rights as it does to equitable rights. All that was said in that case was that the application of the doctrine of laches did not depend on whether one was asserting an equitable right or enforcing a legal right by equitable means. The English Court of Appeal (at 1285) regarded this distinction as both archaic and arcane and held that the law had developed a far broader approach to laches, *ie*, that enunciated at [46] above, that did not depend upon the historical accident of whether the particular right was first recognised by the common law or was invented by the Court of Chancery. This must be correct because in both instances, the equitable jurisdiction of the court is invoked.

50 Here, just as in *Scan Electronics* ([44] *supra*), ***a legal remedy was sought to enforce a legal right, and the defence of laches had no application*** . Further, ***this was a case where the Act prescribed a particular statutory bar (s 6(1) read with s 26(2) of the Act)*** and considering all the circumstances of the case, in particular the inconsistent positions taken by the defendant in respect of the existence of supporting evidence, there was no reason for equity to intervene. In fact, this was a case which warranted the robust approach to summary judgment described in *Hua Khian Ceramics Tiles Supplies Pte Ltd v Torie Construction Pte Ltd* [1991] 2 SLR(R) 901 and reiterated in *MP-Bilt Pte Ltd v Oey Widarto* [1999] 1 SLR(R) 908 at [13]-[14].

[italics in original; emphasis in bold italics added]

38 There is certainly much to commend in the reasoning of Andrew Ang J in *Cytec Industries* as set out in the preceding paragraph (and endorsed by Quentin Loh JC as well in the High Court decision of *Tan Yong San v Neo Kok Eng and others* [2011] SGHC 30 at [97]–[100]) and we gratefully adopt it (subject to the caveat mentioned below at [41]–[42]). The doctrine of laches therefore *cannot* apply in the context of the present case.

39 In Andrew McGee, *Limitation Periods* (6th Ed, Sweet & Maxwell, 2010) at para 3.021, it was also observed that:

> The Limitation Acts are the only general provision which require that an action be brought within a given time. *There is no such thing as a common law limitation period and it would be quite inappropriate at the present time for the courts to attempt to develop such a common law doctrine*. In the case of equitable remedies, by contrast, it is clear that lapse of time amounting to much less than the statutory limitation periods can cause such prejudice to the defendant as to render the granting of the remedy inappropriate. [emphasis added, footnote omitted]

40 The observation by the learned author in the preceding paragraph, together with *Cytec Industries*, effectively disposes of the Respondent's suggestion that there exists an implied term requiring the Appellant to request an account *within a shorter period of time* than that afforded to it

under s 6 of the Limitation Act (Cap 163, 1996 Rev Ed) ("the Limitation Act"). Indeed, allowing the Respondent's argument to succeed would, in our view, be to permit the Respondent to obtain by the back door what it could not obtain by the front. Given that the Appellant had six years to mount *any claim under the contract* entered into between the parties pursuant to s 6 of the Limitation Act, we do not see any juristic basis for the Respondent to argue that the Appellant should have brought their claim earlier based on the authorities cited above.

41 In arriving at our decision, we are fully cognizant of *Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418 ("*De Beers*"), where this court was willing to apply the doctrine of laches to a *common law* claim in restitution even though no equitable relief was sought. The proposition put forth in *Cytec Industries* – *ie*, that the doctrine of laches *could not* apply to a claim at common law where no equitable remedies are sought – would appear, at first blush, to contradict this court's decision in *De Beers*. We note, however, that *De Beers* could possibly be distinguished on the basis that, unlike a claim founded on contract (as is the case in the present appeal), a claim in restitution (which was the situation in *De Beers*) does not, on its face, appear to fit neatly into any of the causes of action set out in s 6 of the Limitation Act (see *De Beers* at [32]). However, some doubt appears to have been cast on such an approach by this court in its recent decision in *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 ("*OMG Holdings*") where it was suggested (at [41], albeit only by way of *obiter dicta*) that a claim in restitution (at least in so far as it is coincident with a quasi-contractual claim) "could well be time-barred under [s 6] of the Limitation Act". This court in *OMG Holdings* made this suggestion after considering, *inter alia*, the English High Court decision of *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890 ("*Kleinwort Benson*"), where Hobhouse J was of the view (at 942–943) that the limitation period of six years for an action "founded on simple contract" was "sufficiently broad" to encompass a claim for money had and received because such a claim was quasi-contractual. It might be noted – parenthetically – that *Kleinwort Benson* was (as noted by the High Court in *Chip Hup Hup Kee Construction Pte Ltd v Yeow Chern Lean* [2010] 3 SLR 213 ("*Chip Hup Hup Kee Construction*") at [17]) not brought to the attention of this court in *De Beers* nor to that of the High Court, whose decision (in *Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd* [2001] 2 SLR(R) 669) it affirmed. Be that as it may, it suffices to note, for the purposes of the present appeal, that the underlying thread in both *De Beers* and *OMG Holdings* appears to be that it would be contrary to both logic as well as public policy for there to be no applicable time constraint whatsoever to a claim founded on restitution as opposed to contract or tort (see *Report of the Law Reform Committee on the Review of the Limitation Act (Cap 163)* (February 2007) (Chairman: Charles Lim Aeng Cheng) of the Singapore Academy of Law at para 29 as well as *Chip Hup Hup Kee Construction* at [24]). Indeed, in Terence Prime & Gary Scanlan, *The Law of Limitation* (Oxford University Press, 2nd Ed, 2002), the learned authors also observed (in relation to the UK context, which observation applies generally) thus (at p 304):

> …according to [*Re Pauling's Settlement Trusts* [1962] 1 WLR 86], laches can only be used by a party to a claim where either the [Limitation Act] or another statute does not provide for a limitation period in respect of the relevant claim.

42 Nevertheless, the specific issues of (a) whether (and precisely when) the doctrine of laches is applicable to a common law claim; and (b) whether a restitutionary action falls within the ambit of s 6 of the Limitation Act were not argued before us (as the Respondent did not even expressly rely on the doctrine of laches, nor was its claim founded on restitution) and we would prefer not to express any conclusive view, leaving it to a future court to decide these issues when they next arise squarely for its determination. In the present appeal, it suffices for us to point out that, unlike the situation in *De Beers*, the Appellant's claim is founded on contract and is regulated by the Limitation Act. Having regard to the authorities cited above, we are of the view that neither the doctrine of laches nor an

obligation to request an account earlier than the period of three and a half years taken by the Appellant applies or arises in the context of the present appeal.

43 Given our rejection of the Respondent's arguments centring on the implied term, has the Respondent nevertheless furnished the requisite account in any event *via* Mr Tan's Affidavit of Evidence-in-Chief ("AEIC") filed on 19 October 2011 ("the 19 October 2011 AEIC") read together with the relevant exhibits thereto? Having perused the documents just mentioned, we are of the view that there has *not* been a sufficient account given. We envisage that a sufficient account would have been more organised and detailed.

44 In particular, Mr Tan deposed at para 475 of the 19 October 2011 AEIC that the system for recording time and expenses at the Respondent, and for billing clients, was through the "Time and Expense Report Excel File" which were spreadsheets maintained by each individual employee. Even a cursory review of these spreadsheets, however, reveals that they are merely a collation of the number of hours worked each day on the matter concerned by each employee, as well as of that employee's expense claims. There is no description at all of the type of work performed by the employee who submitted the time sheets over the time period billed. This is despite the fact that the first column of each time sheet is entitled "Client Name and Description of Work". While we acknowledge that the level of detail recorded in time sheets for the purposes of billing may vary across different industries, we are of the view that, at the very minimum, some description of the nature of work performed over each time period is necessary, for the process would otherwise be rendered perfunctory and (more importantly) of no utility and intelligibility in so far as the client (here, the Appellant) is concerned. For instance, in the present case, the Time and Expense Report filed for Mr Dan Yock Hian, a Director of the Respondent, for December 2006 merely reflects that he worked a total of 139.5 hours that month, with the breakdown of the number of hours he worked each day of that month, and nothing more.

45 It further bears mentioning that, according to Mr Tan, the Respondent's consultants were not subject to even the Excel spreadsheet system of recording and "it is up to them to keep their own time records in a manner which suits them". In addition, Mr Tan himself was also not subject to the Excel spreadsheet system of recording and instead he apparently kept a manual record of the hours he spent on the various matters.

46 For the purposes of providing an account to a client in order to justify billings, it is evident that the spreadsheets provided by the Respondent were manifestly lacking. Indeed, Mr Tan himself implicitly accepted this when he said at para 478 of the 19 October 2011 AEIC that:

> As I have explained, nTan [*ie*, the Respondent] does not maintain a time recording system such as those typically employed in law firms, where time entries with corresponding descriptions of work are entered into an electronic time recording system. However, this entire AEIC contains a detailed description of the key areas of work undertaken by nTan [*ie*, the Respondent] during its engagement by the Plaintiff [*ie*, the Appellant].

47 With respect, we are unable to accept that the Respondent is allowed to simply rely on the description contained in Mr Tan's affidavit (*ie*, the 19 October 2011 AEIC) to supplement what was so manifestly lacking in the time sheets provided. As the Respondent charges its fees on a *time-costing basis*, we find its insistence that it "does not maintain a time recording system such as those typically employed in law firms" to be, while descriptively apt, legally and normatively wanting.

48 Whilst the Respondent in the present appeal might have been engaged in merely a *private contractual dealing* with the Appellant, its role *vis-à-vis* the Appellant is substantially similar to that of

an "insolvency practitioner" engaged by a financially distressed company for its professional assistance. As such, the following admonition in the High Court decision of *Re Econ Corp Ltd (in provisional liquidation)* [2004] 2 SLR(R) 264 (at [61]) applies in equal measure to the Respondent in the present case:

> It is imperative that the insolvency practitioner provides the court, and … the [relevant parties] … with *sufficient material to justify the remuneration claimed*. Without attempting to exhaustively catalogue the information and documents that ought to be included, suffice it to say that there should be adequate information, supported by documents (if necessary) evidencing the following:
>
> (a) The identity of the particular person who has done the work, together with his seniority and years of experience in the relevant area of expertise.
>
> (b) The circumstance of the appointment, the nature of the tasks undertaken and identifying any special or unusual features of the tasks undertaken …
>
> (c) The need for and the role of the various team members …
>
> (d) *Time spent in carrying out the various tasks*. This again calls for a *breakdown identifying the tasks and persons employed to carry out the tasks*. Contemporaneous documents like time sheets should be produced, if required, for verification.
>
> [emphasis added]

49 In the circumstances, we find it unsatisfactory for the Respondent to simply make reference to the key areas of work undertaken by the Respondent during its engagement by the Appellant for the purposes of meeting the obligation of furnishing an account of the time spent, which calls for a "breakdown identifying *the tasks* and persons employed". Unless the account provided was *sufficiently organised and contained adequate detail of the work performed by each of the Respondent's employees over the time period billed for*, the *obligation to account* would be devoid of meaning. We also reject the Respondent's complaint that "[the Appellant] never made an issue at trial over the truth of the contents of the time sheets" (underlining in original), for the simple reason that without the *adequate detail* warranted by law in the respective time sheets, it was not open to the Appellant to evaluate the truth of the contents of the time sheets even if it had wanted to.

50 For the foregoing reasons, we allow the appeal on this particular issue and order that the Respondent render a proper account of the work it has done for the Appellant based on our holding at [49] above. In the meantime, the deposit of S$2 million will continue to be held by the Respondent. It is hoped, however, that the parties will be able to arrive at a sensible arrangement with respect to this particular issue.

Issue 2

51 The nub of the Respondent's case with regard to this particular issue is neatly encapsulated within the following paragraph in the Judgment (see the Judgment at [39]):

> The [Respondent's] case was that it successfully restructured the [Appellant's] liabilities *vis-á-vis* the bank creditors. As such, it was entitled to VAF amounting to 5% of such liabilities. In this regard, the [Respondent's] main contention was that it had successfully secured agreement from the bank creditors to stave off their demands, thereby enabling the [Appellant] to eventually

repay its debts.

52 Indeed, in delivering her decision with regard to this particular issue, the Judge restated – in similar terms – what appeared to her to be the "critical issue for determination", as follows (see the Judgment at [64]):

> The critical issue for determination is, did the informal standstill by the banks *restructure* liabilities pursuant to the VAF clause? It was not disputed that [the Respondent] was instrumental in getting the bank creditors to agree to an informal standstill. What was disputed, however, was whether the informal standstill "restructured" the liabilities of [the Appellant] in a manner which would entitle [the Respondent] to a VAF. According to [the Respondent's] case, it had completed item (iii) of the Scope of Work Clause ... by advising and assisting [the Appellant] in restructuring [the Appellant's] financial arrangements, which led to [the Appellant's] liabilities being restructured or avoided pursuant to (a) of the VAF Clause ... [emphasis in original]

53 As already noted above, the Judge decided this issue in favour of the Respondent, observing thus (see the Judgment at [65]):

> In my view, given the context in which the Engagement Letter was entered into, the standstill agreement undoubtedly entitled [the Respondent] to claim VAF pursuant to the Engagement Letter. Consequently, VAF is payable to [the Respondent] calculated at 5% of the total bank liabilities which were the subject of the standstill agreement.

54 The crucial parts of the Engagement Letter (as the Judge identified), include item (iii) of the Scope of Work Clause, which reads as follows:

> advise and assist the Group, as appropriate, on suitable options to ***restructure*** its *operational activities and financial arrangements* [emphasis added in italics and bold italics]

55 Another crucial part (also identified by the Judge) is (a) of the VAF Clause, which reads as follows:

> Value of the Group's liabilities *written off, extinguished, avoided* ***or restructured*** [emphasis added in italics and bold italics]

56 A closer analysis of the *factual matrix* of the present case is warranted at this stage. It is clear, from the minutes of the Meeting, that the informal standstill which Mr Tan achieved would definitely last *only until the following Tuesday* (see above at [15]). It was *patently unclear* what would happen *beyond* that particular point in time. A *binding legal agreement* between the Appellant and the bank creditors was absent –as the bank creditors had merely agreed to hold their hands until (*only*) the following Tuesday after the Meeting. More importantly, perhaps, it is clear that – absent a binding legal agreement between the Appellant on the one hand and the bank creditors on the other – any one (or more, or all) of the bank creditors could have, *at any time*, *chosen to have resiled from the informal standstill*. Put simply, there was no indication how long – beyond the Tuesday following the Meeting – the informal standstill would have lasted. Mr Tong submitted that the Respondent was responsible for an ongoing effort to maintain the informal standstill. However, what evidence there is on record does not bear this out, bearing in mind the fact that the burden of proof in this particular regard lies on the Respondent. Notwithstanding these factual deficiencies, it remained the Respondent's case throughout the hearing before us that the informal standstill "restructured" the Bank Liabilities of the Appellant, thus entitling the Respondent to the VAF.

57 In our opinion, the Respondent's view of what constituted a "restructuring" for the purposes of a claim under item (iii) of the Scope of Work Clause read with (a) of the VAF Clause is unpersuasive *in the context of the Engagement Letter*. As a matter of sound contractual interpretation, "restructuring" in the present context necessarily entailed a *systematic* change in the structure of the operational activities and/or of the financial arrangements of the Appellant. Put simply, a *literal* change, even if effected on the advice and with the assistance of the Respondent, *would not* be sufficient to amount to a "restructuring" within the meaning of the Engagement Letter between the parties if it did not contain this element of *system or structure.* We will now elaborate on why we have come to this view.

58 Looking at its plain English meaning, the word "restructuring" already *connotes* a *structure* such that a *temporary and/or ad hoc* approach would generally be *insufficient*. However, a more nuanced approach is required as explained in Pearlie Koh & Andrew Phang Boon Leong, "Express and Implied Terms" in ch 6 of *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) as follows (at para 06.042):

> This is not merely a matter of understanding what the meaning of the *words* are, which, as Lord Hoffmann explained, is simply "a matter of dictionaries and grammars", but involves ascribing to the words that meaning which the parties, using those words ***against the relevant background*** , would have reasonably been understood to mean. The resultant meaning may or may not accord with either party's *subjective* intention, for the purpose of the process of construction is to be identify and give effect to the parties' intentions, *objectively* ascertained. [italics in the original; emphasis added in bold italics]

59 The "relevant background" that would be helpful in this hermeneutical exercise comes from, invariably: (a) the industry practice; and (b) the entire contract properly construed. On the first point of inquiry, the court is guided by asking "what a reasonable person *in the position of the parties* would have understood the words to mean" (see *Chitty on Contracts*, vol 1 (H G Beale gen ed) (Sweet & Maxwell, 31st Ed, 2012) ("*Chitty on Contracts*") at para 12-043 [emphasis added]; see also the House of Lords decision of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912). This entails an inquiry into the issue as to whether, *in the practice of insolvency or restructuring*, an "informal standstill" in itself is sufficient to constitute the very meaning of the word "restructuring".

60 In Christopher Mallon and Shai Y Waisman, *The Law and Practice of Restructuring in the UK and US* (Oxford University Press, 2011) ("Mallon and Waisman"), the learned authors described a "contractual standstill" as follows (at para 6.09):

> A contractual standstill is often combined with waivers and/or amendments and involves lenders agreeing that for certain prescribed events of default, the lenders will not exercise their rights to accelerate. Where not in conjunction with a waiver or amendment the standstill may be all that can be achieved if there are insufficient lenders positively [*sic*] to grant a waiver or amendment. *In either case the intention is to give the company a breathing space in which to negotiate a set of permanent amendments or a full balance sheet restructuring*. [emphasis added]

61 In essence, we understand Mallon and Waisman's description of a standstill as being a *prelude to the eventual restructuring* of a financially distressed company, rather than constituting the entire "restructuring" process itself. This description is in harmony with the "London Approach" mentioned in Alice Belcher, *Corporate Rescue: A Conceptual Approach to Insolvency Law* (Sweet & Maxwell, 1997) where a standstill is described as the first of four phases which "allows information to be gathered and a plan to be formulated" (at p 119). Given that a similar process can be identified in the local

case law as well (see the High Court decision of *Citibank NA v Lim Soo Peng and Another* [2004] SGHC 266), it could be said that "a reasonable person *in the position of the parties*" would have understood the word "restructuring" as connoting more than simply an "informal standstill".

62 Be that as it may, counsel for the Appellant, Mr Samuel Chacko ("Mr Chacko"), was prepared to concede that a "restructuring" *could* take the form of simply a *change* in the legal obligations owed by his client to the bank creditors, such that a *standstill of a binding legal effect* which required the bank creditors to hold their hands for *a specific period of time* could be described as "restructuring". However, these elements were *wholly absent* on the facts of the present appeal. As Mr Chacko correctly pointed out, there was, in substance, *no change whatsoever* in the obligations owed by the Appellant to the bank creditors. While Mr Tong sought to run the argument during oral submissions that *by the conduct of the banks*, they had given the Appellant an extension of time constituting a change in the latter's obligations, it was pointed out to him that the Appellant's debts were *still* due and payable beyond the Tuesday following the Meeting; and subsequently, the Appellant had duly paid the debts *on the basis that they were always and at all material times due and payable*.

63 As Mr Tong candidly admitted (and, correctly, in our view, based on the relevant evidence on record before us), the informal standstill arrived at in the context of the present case was *not legally binding*. This is *not* to state that a *legally binding* agreement or arrangement could *not* have been arrived at between the Appellant and the bank creditors, even in the context of an informal standstill. Put simply, the agreement would have been "informal" only inasmuch as it was *not yet* rendered *into the form of a written document*. It is, however, clear that this conception of the concept of "informality" was *not* (as just noted) what the Respondent was referring to. It was, instead, an arrangement that was *not only* oral *but also not intended to have any binding legal effect at all*. Therefore, *even on* Mr Chacko's *concession*, the informal standstill does not constitute a "restructuring" in the present circumstances.

64 At this juncture, it is important for us to point out that we are *not* oblivious to the *commercial possibility* of parties preferring an informal (*ie*, non-legally binding) standstill arrangement, *nor are we prescribing to insolvency practitioners how restructuring arrangements should be conducted*. We acknowledge the multi-faceted complexity of these professional undertakings and take heed of Prof Roy Goode's views in Roy Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th Ed, 2011) at p 479 that:

> A common practice is for a formal standstill (or "lock-in") agreement to be prepared but to leave it unsigned, at least in the first instance and sometimes without it ever being signed at all. So often any standstill is non-contractual and operates *de facto* rather than pursuant to a binding obligation. There may, indeed be no standstill agreement at all, merely a general understanding among creditors to refrain from enforcement action for a given period. The reason for not having a signed agreement is that negotiations can be very protracted, particularly where there are many creditors and the financing structure is complex, so that it is better to have creditors informally assenting to a standard set of terms, albeit lacking contractual force, than to leave everything in the air.

65 However, this is precisely where a second point of inquiry to take into account the "relevant background" (see above at [59]) is of critical importance. To reiterate, the role of this court is not to determine, in the abstract, or even as a matter of general law, whether and when an informal standstill can constitute the whole of a restructuring process. Rather, we are merely interpreting, as a question of *fact* in relation to *this* case, the meaning of the word "restructuring" *in the context of the Engagement Letter*. On this note, it is trite law that the contract between the parties in general and the relevant portions of that agreement that bear upon the present issue in particular must be

viewed *contextually* (see the leading decision of this court in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029). Indeed, as this court observed in *Straits Advisors Pte Ltd v Behringer Holdings (Pte) Ltd and another and another application* [2010] 1 SLR 760 (at [8]), "[n]arrow and technical constructions which are inconsistent with the whole scheme of a given contract and the circumstances in which it was concluded must be eschewed". It is also mentioned in *Chitty on Contracts* (at para 12-063) that "[e]very contract is to be construed with reference to … the whole of its terms, and accordingly, the whole context must be considered in endeavouring to interpret it, even though the immediate object of inquiry is the meaning of an isolated word or clause".

66 As the Appellant has correctly highlighted, the Engagement Letter provides for a *two-tier structure of fees* payable to the Respondent (see above at [9]). The VAF which the Respondent sought to recover in its counterclaim is a second tier, success fee; a substantial *additional* amount on top of the remuneration the Respondent would already be receiving for all work performed based on the actual time costs incurred (pursuant to the first tier, Time Cost Fees). In construing whether there had been "restructuring" *entitling the Respondent to the VAF*, it cannot be the case (nor would it have been the parties' intention) that any "tangible value … that nTan [*ie*, the Respondent] [had] secured for eSys [*ie*, the Appellant]" would *necessarily* entitle the Respondent to the VAF. Such a result would be entirely at variance with (a) of the VAF Clause (which has been reproduced above at [55]) and which, by its very language, contemplates at least some *substantive change*, as is evident by the words "written off", "extinguished" and "avoided". The word "restructured" which follows the aforementioned words must, in our view, be construed and, indeed, take its meaning from the rationale, spirit as well as context underlying those words. The informal standstill does not – and cannot – constitute a "restructuring" in the manner contemplated in the Engagement Letter between the parties as it was nothing more than a *temporary* arrangement that could be resiled from at any time; put simply, it was an arrangement that had *no* real *structure or framework or system* as such. The *absence* of a *legal framework* immediately undermines the desideratum – indeed, *necessity* – of a *systematic* change in the structure of either the operational activities and/or financial arrangements of the Appellant; which change is, in our view, a datum or fundamental requirement or prerequisite before a "restructuring" can be said to have taken place *within the meaning of the Engagement Letter between the parties*.

67 No one can gainsay the fact that, as a result of the Respondent's efforts through Mr Tan at the Meeting, some breathing space was obtained for the Appellant. However, how long that breathing space would last and how much "commercial oxygen" would result was (as we have noted) unclear. The Respondent should undoubtedly be remunerated for its efforts in accordance with the account ordered above (at [50]) for work done in this particular respect under Time Cost Fees, but it is clear that it is *not* entitled to the *additional* remuneration by way of a VAF as there had been *no* "restructuring" for the reasons set out above. In the circumstances, we find that there had been *no* "restructuring" within the meaning of the Engagement Letter between the parties and the Appellant therefore succeeds on this particular issue.

Issue 3

68 In so far as this particular issue is concerned, the Respondent based its claim on both items (ii) and (v) of the Scope of Work Clause, which read as follows:

> (ii) *advise and assist* the Group in *reviewing and developing strategic options with the objective of enhancing value to all stakeholders*;
>
> ...

(*v*) *advise and assist* the Group in *identifying* ***and*** *securing potential investors*;

[emphasis added in italics and bold italics]

The Respondent submitted that the work it had performed for the Teledata Transaction (*ie*, items (ii) and (v) above) had resulted in the injection of "new equity raised by the Appellant" pursuant to (c) of the VAF Clause (see above at [10]), thus entitling it to VAF of 5% of the Teledata Transaction.

69 Mr Chacko argued that item (v) (reproduced in the preceding paragraph) was clearly inapplicable on the facts. In particular, he argued that the Respondent had neither "identified" nor "secured" the loan pursuant to the Teledata Transaction ("the Loan"). Mr Tong, on the other hand, whilst conceding that the Loan had not been "identified" by the Respondent (the Loan having already been onstream even prior to the employment of the Respondent by the Appellant), argued that the Loan had nevertheless been "secured" through the efforts of the Respondent.

70 We find great force in Mr Chacko's argument simply because, as he argued, item (v) contemplates a *cumulative* effort of *not only* "identifying" *but also* "securing" potential investors. That this is so is clear from, as Mr Chacko argued, the word "*and*" between the words "identifying" and "securing" in item (v) itself. This is, in our view, no mere literal exercise and is consonant with the rationale centring on the element of reward for *additional* effort *and* results inherent in the award of the VAF to the Respondent. In particular, it is not unreasonable for the parties to have agreed that mere identification of a potential investor would not be sufficient but that, if such was coupled with the securing of a potential investor, that would suffice to satisfy the requirements of item (v) and enable the Respondent to secure the award of a VAF pursuant to (c) of the VAF Clause.

71 However, even *assuming* that the requirements of "identifying" and "securing" of potential investors are *disjunctive* ones, we are of the view that the latter requirement has nevertheless *not* been met by the Respondent. Let us elaborate.

72 The Respondent's argument in so far as the alleged fulfilment of item (v) is concerned rests on the fact that it had, by proffering the advice it did, assisted the Appellant in "securing" the Loan. Much would therefore turn on the meaning of the word "securing" in item (v), looked at in the *context* of item (v) in particular and the agreement between the parties in general.

73 Crucially, we observe that the Loan was already onstream *even before* the Appellant had engaged the Respondent. The Respondent's argument, however, is that it had – through Mr Tan – advised the Appellant to *modify* the *form* in which the Loan should be structured (principally, by recourse to a Holdco structure, as opposed to simply receiving the funds concerned directly), which modification was apparently adopted by the Appellant in the contract entered into in relation to the Loan. *However*, whether or not the *modified* form in which the Loan was structured was *superior to* the original form in which the Loan was to be structured is, in our view, an exercise in *speculation*. *Even if* this were *not* the case, it is *not* entirely clear that, *if* the Loan had been structured in the *latter* fashion (*ie*, in its *original form*), the results sought to be achieved by the Appellant would *not*, on balance, have materialised. *In any event*, item (v) relates – in the context of the present case – to a situation in which it was *the Loan* which was "*secured*" , *regardless of what happened subsequently to the funds received pursuant to the Loan*. Looked at in *this* light, it is clear, in our view, that *the Loan* was, in fact, "*secured*" by *the Appellant even prior to its engagement of the Respondent*.

74 Let us turn now to the Respondent's primary argument before us, *viz*, that it had fulfilled the requirements under item (ii) (reproduced above at [68]) thus entitling it to 5% of the value of new

equity brought about by the Teledata Transaction. In our view, item (ii) has been phrased in too broad a fashion. Indeed, it is so broad as to encompass virtually any action by the Respondent – save for the most trivial of actions. More importantly, this particular item does not appear to be result-driven. How, then, can it be ascertained whether or not the "strategic options" reviewed as well as developed (in the words of item (ii) themselves) were done so "*with* the objective of enhancing value to all stakeholders" [emphasis added] resulting in "new equity and/or debt" to the benefit of the Appellant? And, given the potential ease with which item (ii) can be met, it would be a fairly simple task for the Respondent to then rely on this particular item in order to trigger the payment of VAF under the VAF Clause for *all kinds* of "new equity and/or debt" raised by the Appellant in the period it has engaged the Respondent. But could this have been the *common intention* of the *parties*? We would hardly think that this could have been the case – especially when we bear in mind the fact that a VAF is fundamentally premised on there being a *substantive (and additional) value* which has resulted from the Respondent's work. As alluded to earlier at [66], it could *not* have been intended by the parties, unless it was expressly drafted as such, that a VAF could be charged based on *any* work performed by the Respondent (which would, as we have noted, have invariably come within the ambit of item (ii), given the extremely broad and general manner in which it has been phrased).

75 It seems to us, therefore, that for the purposes of satisfying (c) of the VAF Clause, item (ii) ought – given its immense generality – to be read *in tandem* with the more specific (as well as concrete) item (v). In other words, the Respondent would only be entitled to VAF in relation to (c) of the VAF Clause (read together with items (ii) and (v) of the Scope of Work Clause) if it has *reviewed and developed strategic options* with the Appellant, and having done so, *procured or introduced an investor who makes the investment* into the Appellant. As these elements were not present, the Respondent is not entitled to the VAF it claimed to have earned *via* the Teledata Transaction.

76 In the result, the Respondent's claim for the VAF with respect to the Loan pursuant to the Teledata Transaction fails to pass muster under both item (ii) as well as item (v) of the Scope of Work Clause. The Appellant's appeal on this particular issue therefore succeeds as well.

Conclusion

77 For the reasons set out above, the Appellant succeeds with regard to all three issues. We therefore allow the appeal with costs. The usual consequential orders will apply.

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