# Alwie Handoyo *v* Tjong Very Sumito and another and another appeal
# [2013] SGCA 44

**Case Number** : Civil Appeal Nos 82 and 83 of 2012 (Suit No 89 of 2010)

**Decision Date** : 06 August 2013

**Tribunal/Court** : Court of Appeal

**Coram** : Sundaresh Menon CJ; Chao Hick Tin JA; V K Rajah JA

**Counsel Name(s)** : Sivakumar Vivekanandan Murugaiyan (Genesis Law Corporation) and Tang Hang Wu (TSMP Law Corporation) for the appellant in Civil Appeal No 82 of 2012; Ang Cheng Hock SC, Tay Yong Seng and Ivan Lim (Allen & Gledhill LLP) and Nicholas Narayanan (Nicholas & Tan Partnership LLP) for the appellant in Civil Appeal No 83 of 2012; Peter Gabriel, Kelvin David Tan Sia Khoon and Ong Pang Yew Shannon (Gabriel Law Corporation) for the respondents in Civil Appeals No 82 and 83 of 2012.

**Parties** : Alwie Handoyo — Tjong Very Sumito and another

*AGENCY – Evidence of agency*

*BAILMENT*

*CIVIL PROCEDURE – Pleadings*

*COMPANIES – Incorporation of companies – lifting corporate veil*

*CONTRACT – Contractual terms*

*EQUITY – Conversion*

*EVIDENCE – Proof of evidence – onus of proof – standard of proof*

*EVIDENCE – Witnesses*

*RESTITUTION – Unjust enrichment*

*TORT – Misrepresentation – fraud and deceit*

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2012] 3 SLR 953.]

6 August 2013 Judgment reserved.

**V K Rajah JA (delivering the judgment of the court):**

**Introduction**

1 Civil Appeal Nos 82 and 83 of 2012 ("CA 82" and "CA 83" respectively) are appeals against the decision of the High Court in Suit No 89 of 2010 ("Suit 89"). CA 82 is the appeal by the fifth defendant, Alwie Handoyo ("Alwie"). CA 83 is the appeal by the first defendant, Chan Sing En ("Chan"). The first plaintiff, Tjong Very Sumito ("Tjong"), and the second plaintiff, Iman Haryanto ("Iman"), are the respondents (collectively "the Respondents") in CA 82 and CA83. There was

originally a third plaintiff in Suit 89, Herman Tintowo ("Herman"), but he discontinued his action on 13 January 2012 and is not a party to the appeals.

2 The dispute between the parties is over the payment of the purchase price of US$18m under a sale and purchase agreement ("the first SPA") for the purchase of shares in an Indonesian company. Tjong, Chan and Alwie were involved in a transaction with several parties, including Magnus Energy Group Ltd ("MEGL") which is a Singapore public-listed company and its wholly-owned subsidiary Antig Investments Pte Ltd ("Antig"), as well as two offshore shell entities, Aventi Holdings Limited ("Aventi") and Overseas Alliance Financial Limited ("OAFL"). The first SPA was entered into between the Respondents and Herman (collectively "the Plaintiffs") as the seller of the shares, and Antig as the purchaser.

3 The circumstances surrounding the transaction are murky, to say the least. In a nutshell, this was a convoluted transaction the true nature of which appears to have been intentionally masked through the interposition of layers of apparently legitimate transactions. As is often the case with such questionable transactions, when business partners' relationships sour and disputes arise, the unravelling of the transaction presents considerable legal difficulties. The present case is no different, as the lengthiness of the decision of the High Court judge ("the Judge") in *Tjong Very Sumito and others v Chan Sing En and others* [2012] 3 SLR 953 ("the Judgment") bears testament.

**Facts**

***The protagonists***

4 Tjong is the main protagonist in the dispute. He set up PT Deefu Chemical Indonesia ("PT Deefu") on 5 December 2000 with Iman. Tjong and Iman are brothers while Herman is their friend. Although the relevant agreements were entered into between Antig and the Plaintiffs, Tjong conducted the negotiations with Chan. Tjong was introduced to Alwie by a mutual acquaintance, and Alwie in turn introduced Tjong to Chan. Tjong claimed that he is not well versed in English. He knows words and phrases but is unable to carry on a full conversation in English. Nevertheless, he has not disclaimed any of the relevant agreements.

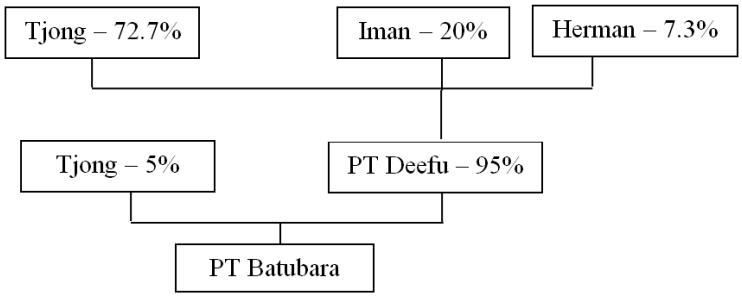
5 Chan played a pivotal role throughout the negotiations and execution of the relevant agreements. He was the managing director of MEGL up till 1 June 2008. He was also a director of Antig up till 15 May 2008 when he resigned. He was the point man for MEGL and Antig in the negotiations and execution of the first SPA. Chan has known Alwie and Johanes Widjaja ("Johanes"), the third defendant in Suit 89, since 1999–2000 and has business dealings with both of them.

6 Alwie is a businessman based in Jakarta, Indonesia. He holds various directorships and owns shares in a number of Indonesian companies. He was introduced to Tjong sometime in the late 1990s by a mutual acquaintance, one Mr Rahardjo. Alwie has known Johanes since 2000 or 2001 and had business dealings with him prior to this dispute. Alwie and Johanes are key participants in this dispute as they are the directing mind and will of OAFL and Aventi, the two entities which were paid a sizeable portion of the US$18m purchase price.

***Background***

7 The dispute arises from a sale and purchase of shares in PT Deefu. In early August 2004, PT Deefu and Tjong paid US$1.2m for 100% of the share capital of PT Batubaraselaras Sapta ("PT Batubara"), the principal value of which resided in the company's ownership of the right to mine and extract coal from the Kuaro coal formation at Kabupaten Pasir, East Kalimantan, Indonesia ("the

Concession"). PT Deefu's shares were held by Tjong, Iman, and Herman in the percentages 72.7%, 20% and 7.3% respectively. However, for all intents and purposes, the controller of the Concession was Tjong. For ease of reference, the shareholdings in PT Batubara and PT Deefu are represented by the following diagram:




***Events prior to the first SPA***

8 It appears that the Plaintiffs did not have the funds to develop and operate the Concession. Even though they had purchased the shares in PT Batubara in early August 2004, by 11 August 2004 thereabouts, they attempted to sell 67% of PT Batubara to one Mr Tjokrosaputro for US$8m. The deal with Mr Tjokrosaputro fell through. Had the deal with Mr Tjokrosaputro materialised, the Plaintiffs would have gained at least US$6.8m almost *instantly* from the "flipping" of their purchase of PT Batubara, despite at the same time retaining a 33% stake.

***The first SPA***

9 The Plaintiffs secured what appears on first blush to be an even "better" deal just three months later. On 23 November 2004, the Plaintiffs entered into the first SPA with Antig under which the Plaintiffs sold a total of 72% of the shareholding in PT Deefu to Antig for US$18m. 72% of PT Deefu translates to roughly 68.4% of PT Batubara, almost identical to the size of the shareholding which the Plaintiffs had tried to sell to Mr Tjokrosaputro. In other words, the Plaintiffs on paper stood to gain approximately US$10m *more* than what they would have obtained from the failed transaction with Mr Tjokrosaputro in just a space of three months. As we shall elaborate below (see [69]–[83], and [86]–[87]), there is more than meets the eye to this "better" deal.

10 The deal, which was to be completed on 13 June 2006 ("the Completion Date"), was structured in a way that left Tjong with 28% of the shareholding of PT Deefu after the sale. The purchase price of US$18m was to be paid partly in cash and partly by an allotment and issuance of shares in MEGL, the Singapore-listed parent company of Antig. Of the purchase price of US$18m, US$6m was to be paid to Tjong, US$10m in cash and shares to Aventi, and US$2m in cash and shares to OAFL.

***The supplemental agreements and various letters***

11 The Plaintiffs and Antig then entered into four supplemental agreements. The first three supplemental agreements are not particularly significant, but do help to convey a fuller picture of the entire transaction. It is the fourth supplemental agreement which is central to the dispute.

*The first supplemental agreement*

12 The terms of the first supplemental agreement dated 3 January 2005 ("the first Supplemental") are immaterial to the present dispute. It merely provided that MEGL agreed to pay Tjong US$300,000 upon the execution of the first Supplemental and that the due diligence period was extended by a

further 30 days.

*The second supplemental agreement*

13 The second supplemental agreement dated 18 February 2005 ("the second Supplemental") was executed to clarify the extent of the Plaintiffs' shareholding in PT Deefu. It provided that the original number of issued and fully paid-up ordinary shares in PT Deefu as reflected in the first SPA was incorrect.

*The 18 February 2005 letter*

14 Prior to the signing of the second Supplemental, there was a meeting between Tjong, Chan and Alwie at Alwie's office. Tjong claimed that Alwie explained some of the terms of the first SPA at this meeting, including the fact that part of the purchase price would be paid to Aventi and OAFL in order to help Tjong save on tax liabilities to the Indonesian Government. This meeting and the conversation that transpired is critical, as will be evident later.

15 On the same day that the second Supplemental was signed, Tjong purportedly prepared a letter – with the help of a distant relative, Dr Irwan Sutisna Jahja, who is conversant with the English language, and another brother, Iman Malik, which read (when translated) ("the 18 February 2005 Letter"): [note: 1]

> With this I inform you, I did not know Aventi and OAFL. Due to that I emphasize that:
>
> 1. I have never owe from Aventi and OAFL nor being indebted to them.
>
> 2. I have never given any power of attorney or whatsoever to Aventi and OAFL.
>
> 3. I have never given instruction to Antig Investment Pte. Ltd. to pay anything whatsoever to Aventi and OAFL.
>
> 4. Therefore payment for selling and buying of PT. Deefu Chemical Indonesia to Antig Investments Pte. Ltd for the sum of USD 18 million must be paid directly to Tjong Very Sumito, Iman Haryanto and Herman Aries Tintowo.

16 Tjong claimed that he gave the 18 February 2005 Letter to Chan and Alwie in Singapore and Jakarta respectively. He claimed that he personally gave the letter to Chan after the signing of the second Supplemental. Chan and Alwie, however, denied receiving the letter. The 18 February 2005 Letter was allegedly also mailed to Antig on 14 March 2005. Pertinently, both MEGL and Antig filed affidavits on 17 October 2011 stating that they have never received that document. We note that no credible evidence confirming that the 18 February 2005 Letter was received by Antig, MEGL, Chan or Alwie was adduced by Tjong.

17 It is worth noting that the 18 February 2005 Letter directly contradicts cl 4.02(4) of the first SPA which states: [note: 2]

> All payments made by the Purchaser to the ***persons set out in section 4.02(2)*** **above** ***shall be deemed as payment in full to the Vendors*** . [emphasis added]

*The 7 March 2005 letter*

18 On 7 March 2005, the parties signed a letter which provided that the Plaintiffs would bear the costs involved in obtaining an extension of time for the commencement date of the operation of the Concession ("the 7 March 2005 Letter"). PT Batubara had previously entered into an agreement with the Government of the Republic of Indonesia which provided that mining operations under the Concession shall be deemed to commence on 20 November 2005. The 7 March 2005 Letter also stated that Antig shall provide a loan of up to US$1.5m to the Plaintiffs to meet the costs and expenses for the application for extension of time; any loans made shall be set off against the US$18m purchase price.

*The third supplemental agreement*

19 The third supplemental agreement dated 19 July 2005 ("the third Supplemental") set out variations, amendments and modifications to the first SPA as are required to carry out the preliminary extract of coal at a site under the Concession. A key term in the third Supplemental concerned the loans which Antig was to extend to the Plaintiffs for the purpose of the preliminary extraction operations. It was agreed that these loans would not exceed US$2m. Upon completion of the first SPA, any loans would be treated as working capital of PT Batubara. However, if the first SPA was terminated, the Plaintiffs would be liable for the repayment of the loans to Antig.

*The fourth supplemental agreement*

20 The fourth supplemental agreement dated 19 August 2005 ("the fourth Supplemental") is the most crucial to this dispute. Pursuant to cl 2.2 of the fourth Supplemental, the payment terms under cl 4.02(2) in the first SPA were varied. We shall refer to cl 4.02(2) as varied by the fourth Supplemental as "the Amended Clause 4.02(2)".

21 In essence, the sums payable to Tjong, Aventi and OAFL remained the same, though Aventi would now receive a larger amount of cash in lieu of MEGL shares. This was, according to Chan, to placate the Singapore Exchange (SGX) which had objected to MEGL's issuance of shares amounting to US$9.5m to Aventi – which was originally planned under cl 4.02(2) – as that would make Aventi a major shareholder of MEGL. The other significant difference is that the Amended Clause 4.02(2) explicitly referred to Aventi and OAFL as parties "authorised to receive [the sums] for and on behalf of the [Plaintiffs]". [note: 3] Under the first SPA, the status of Aventi and OAFL as parties authorised to receive the purchase price was only set out in the "Definitions" section and not within cl 4.02(2).

22 We pause to note that notwithstanding the 18 February 2005 Letter, none of the supplemental agreements, in particular the fourth Supplemental, modified cl 4.02(4) of the first SPA (see [17] above).

***Genesis of the dispute***

*Events on or around Completion Date*

23 The completion of the sale and purchase took place in Indonesia on 13 June 2006. At this meeting which was attended by, *inter alios*, Tjong, Chan and Alwie, Tjong was given two documents to sign which he did.

24 The first document was a letter from Antig to the Plaintiffs explaining that the net amount payable to Tjong on the Completion Date was US$1,970,109.65 instead of the agreed US$2.5m. The difference reflected the amount that Antig had loaned to the Plaintiffs pursuant to the 7 March 2005 Letter (see [18] above). The second document was a letter from Tjong to Antig requesting Antig to

issue cheques for the sums of S$2,803,009 and S$334,429 as partial settlement of the remaining amounts payable under the first SPA.

25 Chan then presented two cheques for the sum of S$2,803,009 (equivalent to US$2,289,999) and S$334,429 (equivalent to US$210,000) to Tjong. Tjong claimed that Chan made him sign on the photocopy of the two cheques to make it seem like Tjong had received both cheques. Chan kept the cheque for the equivalent sum of US$210,000, which was made in favour of Coutts Bank, even though Tjong asked for it. Chan asserted that the US$210,000 cheque was made at the request of Tjong and was meant for Alwie as his commission fees for brokering the deal. Tjong denied that there was any agreement to pay a commission to Alwie.

26 The next day, 14 June 2006, Tjong purportedly gave a letter dated 13 June 2006 to Alwie ("the 13 June 2006 Letter"). According to Tjong, he handed the same letter to Chan in Singapore a few days later at the Hyatt Hotel. The letter reads (when translated): [note: 4]

> With this, I informed that I had received the power of attorney from Herman Aries Tintowo and Iman Haryanto, via power of attorney letter dated 9th June 2006 which they signed in the presence of notary Arman Lany, Law Graduate.
>
> Further payment, selling / buying of shares from PT. Deefu Chemical Indonesia to Antig Investments Pte. Ltd as much as 72% for the sum of USD 18 million be paid to me Tjong Very Sumito and not to Aventi or OAFL.

27 Tjong claimed that he gave Chan this letter not because of the terms of the fourth Supplemental, but because of the impression he had from the meeting in February 2005 when Chan and Alwie purportedly told him that the payments to Aventi and OAFL were for his (Tjong's) benefit. However, Chan claimed that the first time he had sight of the 13 June 2006 Letter was in Suit 89. He denied receiving the letter and disputes the authenticity of the letter. Alwie too stated that he did not receive a copy of the 13 June 2006 Letter, and that he only found out about the letter when he received an affidavit filed by Tjong on 8 February 2010 in support of the Plaintiffs' application for a Mareva injunction against him ("the Mareva Injunction").

*The Guarantee*

28 Sometime in July 2006, Antig requested the Plaintiffs to provide further documents. Tjong said he did not respond as he wanted assurance that the US$12m which was payable to Aventi and OAFL under the first SPA ("the Balance Purchase Price") would be paid to him. Tjong claimed that he met up with Chan in Singapore at the Hyatt Hotel sometime in September 2006 when he told Chan that he would not provide the documents unless Chan gave an assurance that all the monies would be paid to him, and not to Aventi and OAFL. Tjong said that by this time, he no longer trusted Chan and therefore requested Chan to provide this assurance. Chan allegedly agreed that he would personally guarantee that Tjong would receive the full US$18m. Tjong went to Chan's office subsequently to pick up the guarantee which Tjong claimed was already signed even before he arrived ("the Guarantee") (see [169] below). Tjong provided Antig with the requested documents after obtaining the Guarantee.

29 The enforceability of the Guarantee is a key issue in CA 83. Chan denied executing the Guarantee and averred that the Guarantee was fabricated by Tjong. He also pointed out that the existence of the Guarantee was only revealed at a very late stage of the proceedings on 22 June 2011, when the Plaintiffs applied to amend their Statement of Claim for a second time, which amended Statement of Claim was eventually filed on 13 July 2011 ("the Amended Statement of

Claim"). Suit 89 was commenced on 8 February 2010 and there had already been an earlier amendment to the Statement of Claim on 25 August 2010. The absence of any reference to the Guarantee in this earlier version of the Statement of Claim was conspicuous. It was also not referred to or produced in the Plaintiffs' earlier application for the Mareva Injunction in February 2010.

*The second and third SPA*

30 Despite the Guarantee, the Balance Purchase Price was not paid to Tjong. Tjong claimed that when he met Chan in Singapore on one occasion after the Guarantee was provided to him, Chan made it clear to him that if he wanted the Balance Purchase Price, he had to sell his remaining 28% stake in PT Deefu and his 5% stake in PT Batubara ("the Remaining Shares") to "MEGL/Antig or [Chan's] group" for US$2m. According to Tjong, Chan further said that if Tjong refused to sell the Remaining Shares, the following may occur:

(a) Tjong would not be paid the Balance Purchase Price; and/or

(b) Chan will cancel the first SPA; and/or

(c) PT Deefu would issue more shares to its shareholders in return for capital injection and Tjong's remaining 28% stake in PT Deefu would be diluted as he was not in a position to pay for any new PT Deefu shares.

31 Tjong claimed that under these circumstances, he agreed to sell the Remaining Shares. Two sale and purchase agreements were subsequently entered into on 12 July 2007 ("the second SPA" and "the third SPA"). Under the second SPA, Tjong sold his entire 5% shareholding in PT Batubara to one Jake Pison Hawila ("Jake") for US$320,000. Under the third SPA, Tjong sold his remaining 28% shareholding in PT Deefu to Advance Assets Management Ltd ("AAML") for US$1.68m. The sole shareholder and director of AAML was one Edwin Sugiarto ("Edwin"), the ninth defendant in Suit 89. In early 2008, Jake and Edwin (through AAML) sold the PT Batubara and PT Deefu shares they had acquired from Tjong to an Australian listed company, APAC Coal Limited ("APAC"), for AUD$12.64m. APAC is a subsidiary of MEGL. Chan stated that he did not know Jake or Edwin.

32 The circumstances leading to the entering of the second and third SPAs is another key issue in CA 83. According to Alwie, he had approached Jake and Edwin – his friends and business associates – to purchase the Remaining Shares. Alwie had done so as he had been informed by Chan that Tjong wanted to sell the Remaining Shares for US$2m. Chan in turn claimed that Tjong had first approached him for a US$2m loan from MEGL. According to Chan, Tjong said that he needed the funds for his other investments as well as to settle some legal problems in Indonesia. Chan said that Tjong was willing to pledge the Remaining Shares to MEGL to secure the loan. However, Chan said that MEGL was not interested in increasing its stake in PT Deefu (through Antig) since it already had majority control. Nevertheless, Chan offered to help Tjong ascertain if others were interested in acquiring the Remaining Shares.

*Events leading to the commencement of Suit 89*

33 On 2 November 2007, Tjong made two statements ("the Discharge Letters") which were substantially similar. They provided that Tjong agreed to release and discharge Antig and its affiliated companies and their officers from any and all claims, and that Tjong confirmed that he had no claim against Antig and its affiliated companies or any third party in respect of the acquisition of the shares of PT Batubara. Tjong admitted to signing the Discharge Letters, but stated that the Discharge Letters were prepared by Chan who requested him to sign. According to Tjong, he did not understand

what was in the Discharge Letters but signed them anyway as Chan told him that he had to sign them to receive the Balance Purchase Price. Tjong asserted that in any event, the Discharge Letters have no binding effect under either Singapore or Indonesian law.

34 On 12 November 2007, Chan met up with Tjong in Singapore. At this meeting, Tjong signed more documents given to him by Chan. According to Tjong, he signed those documents as he was told by Chan that they were necessary if he wanted to receive the Balance Purchase Price. After Tjong had signed the documents, Chan handed him a cheque for the sum of S$1,630,038. This was the amount stated in one of the documents signed by Tjong as being the "final amount of the Balance Purchase Price" [note: 5] due to Tjong.

35 On that same day, Tjong prepared a letter which he gave to Chan the next day ("the 12 November 2007 Letter"). It reads (when translated): [note: 6]

> Please be advised that I have received a sum of S$1,630,038.24 or US$1,138,772 as specified in the Share Sale Agreement dated November 23, 2004. Please pay the remaining amount of the sale price at US$2,000,000, US$3,700,000 and 177,727,273 shares having total value of USD5,700,000 as soon as possible.

As with the other letters which Tjong purportedly gave, Chan denied receiving the 12 November 2007 Letter.

36 According to Tjong, Chan was uncontactable after the 12 November 2007 Letter was given to him. It was around that time that he instructed solicitors to recover the Balance Purchase Price. He was also concerned about the final payment of US$3.7m to Aventi which was supposed to take place on 13 June 2008, being 24 months after the Completion Date. Unknown to Tjong, the US$3.7m payable to Aventi had already been satisfied by a payment of US$3,492,800 by Antig to Aventi on 7 November 2007. Chan claimed that Aventi had requested for early payment and offered Antig a 5.6% discount in return. Antig agreed after considering the prevailing fixed interest rates and pointed to an announcement by MEGL on the SGXNet on 13 November 2007 declaring the early settlement payment to Aventi. However, no evidence has been adduced to show that Aventi had first requested for early payment.

37 In the dark over the early payment, Tjong's solicitors, on behalf of the Plaintiffs, wrote to Antig on 9 April 2008: [note: 7]

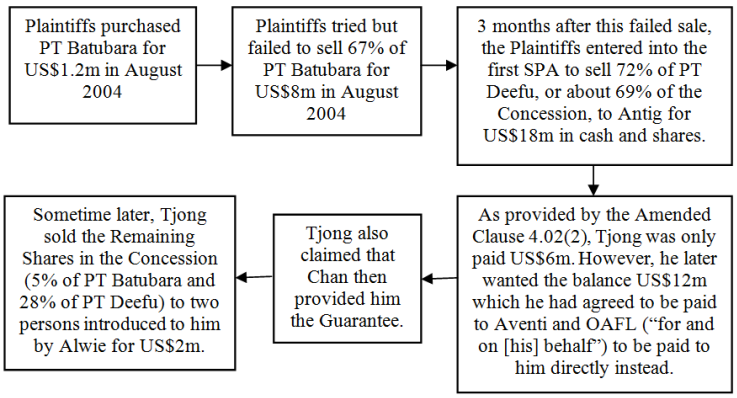
> We act for Tjong Very Sumito, Iman Haryanto and Herman Aries Tintowo.
>
> ...
>
> Our clients instruct us that a sum of US$3.7 million is due for payment in June 2008. Our clients hereby give you notice that they require the said payment to be made to TJONG VERY SUMITO. Our clients specifically convey to you that any payment or purported payment to Aventi Holdings Ltd ("Aventi") will not be recognised.

38 Despite at least two reminders, there was no response from Antig. The Plaintiffs commenced Suit No 348 of 2008 ("Suit 348") on 20 May 2008 to prevent Antig from making the US$3.7m payment to Aventi. Upon an application by Antig, this court stayed Suit 348 in favour of arbitration (see *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 1 SLR(R) 861).

39 Suit 89 was then commenced by the Plaintiffs on 8 February 2010 against 11 defendants which

included Chan, Alwie, Antig, MEGL, Aventi and OAFL. The Plaintiffs' claims revolved around two main issues: (a) the non-payment of the Balance Purchase Price; and (b) the entrance into the second and third SPAs. It should be noted that in 2011, Antig and MEGL commenced arbitration against the Plaintiffs which ultimately led to a stay of proceedings in Suit 89 against Antig and MEGL. The Plaintiffs subsequently discontinued the court proceedings against Antig and MEGL entirely. Hence, neither Antig nor MEGL filed a defence or took a position in respect of the claims made against Chan and Alwie.

40 It will be helpful, at this juncture, to summarily recap this complex web of facts:




**Parties' pleaded cases**

41 For the purposes of the present appeals, except where relevant, the claims against the other nine defendants will not be elaborated upon.

***The Plaintiffs' claims***

42 At the outset, it is useful to state that Antig had paid out a total of US$17.7m in cash and shares to Tjong, Aventi and OAFL in the amounts that each were entitled to contractually under the Amended Clause 4.02(2). This is undisputed. The US$300,000 shortfall based on the total purchase price of US$18m was explained by Antig as being due to the discounts given by Aventi for early payment of the amount due to Aventi. The Plaintiffs' case is that the full US$18m should have been paid to Tjong and not to other parties. They claimed:

(a) The total cash payment of US$550,000 ("OAFL Cash Payment") and allotment and issuance of 42,102,727 MEGL shares ("OAFL Shares Payment") (collectively "the OAFL Payments") to OAFL were not authorised by the Plaintiffs.

(b) The total cash payment of US$5,372,800 ("Aventi Cash Payment") and the allotment and issuance of 124,856,364 MEGL shares to Aventi ("Aventi Shares Payment") (collectively "the Aventi Payments") were also not authorised by the Plaintiffs. In particular, the Plaintiffs neither knew nor consented to the early payment of the Aventi Cash Payment.

43 Together with the losses Tjong allegedly suffered by selling his Remaining Shares under the second and third SPAs, the Plaintiffs mounted the following claims against Chan and Alwie:

**AGAINST CHAN ALONE**

(a) The Guarantee Claim: Chan is liable under the Guarantee as the Plaintiffs were not paid and did not receive the Balance Purchase Price.

(b) The Duress Claim: The sale of the Remaining Shares under the second and third SPAs was procured under duress. Chan was one of the parties who had caused the duress and is therefore liable to Tjong for the losses suffered by Tjong in selling the Remaining Shares below value.

(c) The Undue Influence Claim: The sale of the Remaining Shares under the second and third SPAs was procured through undue influence exercised by Chan. Chan is therefore liable to Tjong for the losses suffered by Tjong in selling the Remaining Shares below value.

(d) The second and third SPAs Misrepresentation Claim: Chan had fraudulently misrepresented that Tjong would be paid the Balance Purchase Price if he sold the Remaining Shares according to the terms of the second and third SPAs. Tjong relied on his misrepresentation and sold his Remaining Shares, but was not paid the Balance Purchase Price. Chan is therefore liable to Tjong for the losses suffered by Tjong in selling the Remaining Shares below value, as well as the Balance Purchase Price.

(e) The second and third SPAs Unlawful Means Conspiracy Claim: Chan had conspired with other defendants to cause Tjong to enter into the second and third SPAs through duress, undue influence, deceit and/or fraudulent misrepresentation with the intention of injuring Tjong. Chan is therefore liable to Tjong for the losses suffered by Tjong in selling the Remaining Shares below value.

**AGAINST ALWIE ALONE**

(a) The OAFL Trust Claim: The OAFL Payments were not intended to be a gift from the Plaintiffs. Further, OAFL knew that the OAFL Payments were not rightfully due to it. It therefore holds the OAFL Payments on either a resulting trust or constructive trust for the Plaintiffs. The corporate veil of OAFL should be lifted to make Alwie personally liable to return the OAFL Payments.

(b) The OAFL Unjust Enrichment Claim: OAFL and/or Alwie are also liable to return the OAFL Cash Payment to the Plaintiffs as money had and received by OAFL.

(c) The OAFL Conversion Claim: The Plaintiffs are the beneficial owners of the 42,102,727 MEGL shares comprising the OAFL Shares Payment. OAFL unlawfully and without consent of the Plaintiffs took into their possession the allotment of the MEGL shares. This amounted to conversion of the Plaintiffs' right to ownership or immediate possession of the MEGL shares. The corporate veil of OAFL should be lifted and OAFL and/or Alwie are liable in damages for conversion of the MEGL shares.

**AGAINST BOTH CHAN AND ALWIE:**

(a) The first SPA Misrepresentation Claim: Chan and Alwie had deceived or fraudulently misrepresented to the Plaintiffs the nature and structure of cl 4.02(2) both in its original and amended form. Effectively, the Plaintiffs were led to believe that the US$18m purchase price would be paid to them. Chan and Alwie are therefore liable for the Plaintiffs' loss of the Balance Purchase Price.

(b) The Unlawful Means Conspiracy Claim: Chan and Alwie had conspired with the other defendants to use unlawful means, namely deceit and fraudulent misrepresentations, to cause damage to the Plaintiffs. They are therefore liable for the Plaintiff's loss of the Balance Purchase

Price.

( c ) The US$210,000 Trust Claim: There was no legitimate reason for a payment of US$210,000 to a Coutts Bank account which belonged to Alwie. The US$210,000 was not intended to be a gift to Chan and/or Alwie and therefore Chan and/or Alwie hold(s) the sum on a resulting or constructive trust for the Plaintiffs.

( d ) The US$210,000 Unjust Enrichment Claim: Chan and Alwie are also liable to return the US$210,000 as money had and received by Chan and/or Alwie.

***Chan's defence***

44 Chan disputed all the claims made against him:

(a) Chan denied making any of the misrepresentations relating to the first, second and third SPAs alleged by Tjong. He further claimed that none of the Plaintiffs had relied on any of the alleged misrepresentations and did not suffer loss or damage upon such reliance.

(b) Chan denied executing the Guarantee. He claimed that it was fabricated and asserted that in any event, the Guarantee was unenforceable and had no legal effect.

(c) Chan denied that the Balance Purchase Price was payable to Tjong. The sums paid by Antig were in accordance with the Amended Clause 4.02(2).

(d) Chan denied agreeing with any of the other defendants to do an unlawful act or to do a lawful act by unlawful means to injure the Plaintiffs, and asserted that he had no intention and did not cause any person to carry out an act to injure the Plaintiffs.

(e) Chan denied receiving the US$210,000 payment from the Plaintiffs. Thus, he is not liable under any resulting or constructive trust, or claim for unjust enrichment.

(f) Chan denied the allegations of duress and undue influence. He claimed that there was no threat or illegitimate pressure exerted on Tjong to induce him into entering into the second and third SPAs. Tjong exercised his own free will in entering into the agreements.

45 Chan further relied on the Discharge Letters signed by Tjong. Chan argued that any cause of action which the Plaintiff may have had against him was released or waived pursuant to the Discharge Letters. The Plaintiffs' claims against him are therefore unsustainable.

***Alwie's defence***

46 Alwie's defence was straightforward. His main line of defence was that the OAFL Payments as well as the US$210,000 payment were legitimately received by OAFL pursuant to the Amended Clause 4.02(2), in accordance with the first SPA read with the fourth Supplemental. Thus, the claims in respect of these sums founded on trust, unjust enrichment and conversion were unmeritorious. Alwie also denied the claims founded on misrepresentation and conspiracy.

**Decision below**

47 The Judge dismissed most of the Plaintiffs' claims. However, he found in favour of the Plaintiffs in respect of (a) the Guarantee Claim, (b) the second and third SPAs Misrepresentation Claim, (c) the OAFL Unjust Enrichment Claim, and (d) the OAFL Conversion Claim.

48 Consequently, the Judge held that Chan is liable to Tjong for (a) US$12,471,227, being the difference between the US$18m and what Tjong received, and (b) damages for Tjong's losses flowing from sale of the Remaining Shares under the second and third SPAs. The Judge also ordered OALF and/or Alwie to pay the Plaintiffs (a) US$550,000, and (b) damages to be assessed for the conversion of the 42,102,727 MEGL shares. Aventi was also ordered to pay the Plaintiffs damages of S$27,468,400 for the conversion of 124,856,364 MEGL shares.

49 The Judge provided that if the Plaintiffs recovered damages from Aventi and OAFL and/or Alwie in respect of the conversion of the MEGL shares, the Plaintiffs shall refund to Chan such amount representing double recovery, up to a maximum of US$5.75m which is the original value of the total number of MEGL shares which were issued. Curiously, the Judge did not provide that if the Plaintiffs recovered the US$550,000 from OAFL and/or Alwie, that same amount shall be refunded to Chan to prevent double recovery.

**Parties' submissions on appeal**

***CA 83***

*Chan's submissions*

50 Chan's submissions in this appeal focuses on two aspects, namely the Guarantee Claim and the second and third SPAs Misrepresentation Claim. With regard to the Guarantee Claim, counsel for Chan, Mr Ang Cheng Hock SC ("Mr Ang"), raised the following arguments:

(a) First, the Guarantee was fabricated by Tjong. It was unconventional in form and highly irregular, and the text in the Guarantee was superimposed onto the document which bore Chan's signature ("Superimposition Argument"). The expert evidence by Ms Michelle Novotny ("Ms Novotny"), which included two reports ("Novotny's first Report" and "Novotny's second Report"), supported the Superimposition Argument.

(b) Second, even if the Guarantee was genuine, it should be construed as a guarantee for Antig's performance of its obligations under the first SPA and not as an indemnity which the Judge found. The construction of the Guarantee as a guarantee and not an indemnity is consistent with (a) the commercial context and payment structure of the first SPA, (b) the plain words used in the Guarantee, and (c) the contemporaneous evidence and conduct of the Tjong and Chan.

(c) Third, the Discharge Letters released Chan from any further liability under the first SPA in respect of payments which had already been paid out by Antig. In other words, the Discharge Letters ratified all payments made by Antig as of 2 November 2007, the date of the Discharge Letters, and confirmed that such payments were in accordance with Antig's obligations under the first SPA. Thus, Chan was no longer liable to Tjong as at 2 November 2007.

51 With regard to the second and third SPAs Misrepresentation Claim, Mr Ang canvassed the following arguments:

(a) First, Chan did not represent that he would ensure that Tjong would be paid the Balance Purchase Price if Tjong entered into the second and third SPAs ("the Representation").

(b) Second, the Representation is not even actionable as a misrepresentation as it is a

statement of what Chan would do in the future. Such a statement of a future act is not actionable but is, at best, a promise which is not enforceable for want of, amongst other things, consideration and intention to enter into binding legal relations.

(c) Third, even if the Representation is actionable, it was not fraudulently made as Chan honestly believed that Tjong would receive "full payment" under the first SPA, and did subsequently take steps to ensure that payment would be made. The fact that Chan had procured Antig to pay Aventi is not evidence of dishonesty as the first SPA provided that Aventi was authorised to receive payments on behalf of the Plaintiffs.

(d) Fourth, in any event, Tjong had not been induced into entering into the second and third SPAs by the Representation. Tjong had access to independent lawyers and other sources of advice at the material time. Further, as the Judge had found, there is nothing to show that Tjong had intended to sell the Remaining Shares for more than US$2m but was instead coerced by Chan into selling them for US$2m. Tjong's decision to sell the Remaining Shares at US$2m was an independent and conscious decision motivated by his desire to "flip" the Concession for a quick profit.

(e) Last but not least, the Remaining Shares were not sold below value. The Remaining Shares were effectively minority stakes and a minority discount must be applied accordingly when compared to the US$18m purchase price under the first SPA. The price of the Remaining Shares subsequently sold to APAC is also not reflective of the value of the Remaining Shares.

*Respondents' submissions*

52 Counsel for the Respondents, Mr Peter Gabriel ("Mr Gabriel"), basically rehashed the reasons provided by the Judge. On the Guarantee Claim, Mr Gabriel argued:

(a) The Guarantee is genuine and not fabricated by Tjong. Novotny's first Report does not assist Chan as it does not meet the standard of proof required to establish forgery. Novotny's second Report should not be admitted.

(b) Even if Ms Novotny's expert reports are admitted, all they show is that there was superimposition of the signature and text in the Guarantee. It does not show that this superimposition was done by Tjong. Thus, forgery or fabrication is not made out.

(c) The Guarantee is in the nature of an indemnity. It was meant to ensure that Tjong received the full purchase price *if* Antig, Aventi and/or OAFL failed to pay Tjong.

(d) The Discharge Letters do not assist Chan because they were not related to the sale and purchase of the PT Deefu shares.

53 Mr Gabriel's arguments on the second and third SPAs Misrepresentation Claim are:

(a) The Judge's factual finding that Chan had made the Representation was based on his observation that Chan was not a credible witness. The Judge believed Tjong's testimony and this should not be disturbed.

(b) The Representation is a statement of intention which Chan did not honestly hold. Chan could not have honestly believed that the Respondents would receive the full US$18m if Tjong sold his Remaining Shares under the second and third SPAs. Such a representation is actionable.

(c) The Representation induced Tjong into selling the Remaining Shares and this is actionable even if it was not the sole reason. As long as the Representation was actively present in Chan's mind, which it was, the Representation is actionable. In the present case, the Judge had found that the Representation was a "significant factor" that induced Tjong to sell, and this finding should not be reversed.

***CA 82***

*Alwie's submissions*

54 In CA 82, Mr Sivakumar Murugaiyan ("Mr Murugaiyan") and Dr Tang Hang Wu ("Dr Tang"), counsel for Alwie, made the following submissions:

(a) First, Tjong is not entitled to sue in relation to shares held in the name of Herman as Herman had discontinued his action and was not a party before the Judge. An equitable owner cannot maintain an action without the legal owner being a party to the action.

(b) Second, OAFL and/or Alwie are not liable for the OAFL Unjust Enrichment Claim as (i) there is no unjust factor in OAFL's receipt of the OAFL Cash Payment, and (ii) OAFL's enrichment from the OAFL Cash Payment was not at the Respondents' expense. On the first point, the Judge's finding of an absence of authority on the part of OAFL to retain the OAFL Cash Payment does not constitute an unjust factor. On the second point, the enrichment was not at the Respondents' expense as OAFL Cash Payment came from Antig, not the Respondents.

(c) Third, the OAFL Conversion Claim fails because (i) the MEGL shares from the OAFL Shares Payment are not capable of being converted, and (ii) the Respondents did not have a right of immediate possession to the MEGL shares. On the first point, conversion only applies to tangible property and not intangible rights. The exception to this rule is "documentary intangibles" such as cheques. Only bearer shares and share certificates together with indorsed blank transfer forms are regarded as "documentary intangibles". The 42,102,727 MEGL shares are neither and hence cannot be converted. On the second point, the Respondents do not have a right to immediate possession as their claim against OAFL is a *chose* in action for a right of transfer of the MEGL shares, and *choses* in action cannot be possessed. Further, the Respondents cannot be considered as bailors as they do not have a proprietary right in the shares. Lastly, there was no agency relationship between OAFL and the Respondents which gave rise to an immediate right of possession.

(d) Fourth, the corporate veil should not have been lifted as the Judge had not found that OAFL was a mere device, sham or façade used by Alwie.

*Respondents' submissions*

55 Mr Gabriel contended:

(a) First, Herman had executed a Power of Attorney which authorised Tjong to commence proceedings in respect of the shares in PT Deefu which were legally owned by Herman.

(b) Second, the four elements required to establish a claim in unjust enrichment were found to be met by the Judge. The "unjust factor" in this case is that OAFL "cannot in conscience retain the money [the OAFL Cash Payment]". This unjust enrichment was at the expense of the Respondents as OAFL received the OAFL Cash Payment knowing that it belonged to the

Respondents.

(c) Third, the MEGL shares can be converted as they are supported by physical share certificates held in the Central Depository ("the CDP"). The Respondents have the requisite standing to sue for conversion as they had a right to immediate possession of the MEGL shares as the owner of the MEGL shares, or alternatively, as the principal of OAFL, who acted as its agent in receiving the MEGL shares.

(d) Fourth, there is no dispute that Alwie is the directing mind and will of OAFL. Given that OAFL had been abused to further an improper purpose by wrongfully converting and misappropriating the OAFL Payments, the corporate veil ought to be lifted.

**Issues**

56 In the light of the parties' submissions, there are two main issues in CA 83:

(a) whether the Guarantee is enforceable against Chan and if so, whether the Guarantee is in the nature of a guarantee or an indemnity (the "Guarantee Issue"); and

(b) whether Chan is liable for fraudulently misrepresenting to Tjong that he would be paid the Balance Purchase Price if he entered into the second and third SPAs (the "Misrepresentation Issue").

57 In respect of CA 82, the three main issues are:

(a) whether the Respondents are entitled to sue in relation to shares held in the name of Herman given that Herman had already discontinued his action; and whether the corporate veil of OAFL should be lifted such that Alwie would be personally liable for orders made against OAFL (the "Gateway Issues");

(b) whether OAFL was unjustly enriched by the OAFL Cash Payment (the "Unjust Enrichment Issue"); and

(c) whether OAFL had converted the 42,102,727 MEGL shares from the OAFL Shares Payment (the "Conversion Issue").

58 As all the parties premised their submissions on Singapore law being the applicable law for all the issues, we shall address these issues using Singapore law.

**Preliminary issues**

***Credibility of witnesses***

59 The court should be wary of the maxim *falsus in uno, falsus in omnibus* – false in one thing, false in everything. That the evidence of a witness need not be rejected *in toto* simply because it is unreliable or untrue in some parts is firmly established. In *Chai Chien Wei Kelvin v Public Prosecutor* [1998] 3 SLR(R) 619 at [72], this court cited with approval the *dicta* of Raja Azlan Shah FJ (as he then was) in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 at 19:

> There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinize (*sic*) each

evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

60 In *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105.1 ("*Khoon Chye Hin*"), Thomson CJ stated (at 107):

> If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. *To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence "must in law be rejected" is to go too far and is wrong*. [emphasis added]

This principle, though applied usually in criminal proceedings, no doubt has equal application in civil cases. *Khoon Chye Hin* was cited with approval by Yong CJ in *Teo Geok Fong v Lim Eng Hock* [1996] 2 SLR(R) 957 at [44], which was in turn recently applied by Belinda Ang J in *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR(R) 501 at [22].

61 The correct approach that the court should adopt in such cases is to appraise the witness's entire evidence in the context of all the other evidence and circumstances of the case. A flawed witness may be telling the truth on some matters: *Public Prosecutor v Chee Cheong Hin Constance* [2006] 2 SLR(R) 24 at [103]. It is only where the grain and the chaff are so inextricably linked that evidence from a witness who has been shown to be extremely unreliable may perhaps be discarded *in toto*; the mere fact that some part of a witness's evidence is found to be deficient, unreliable or simply untrue is usually insufficient to justify the rejection of his or her evidence *in toto*.

62 As noted by the Judge, Chan was a deeply unsatisfactory and unhelpful witness who no doubt was untruthful on certain issues. However, that does not warrant a complete rejection of Chan's evidence. This Court must objectively scrutinise his evidence to separate the grain from the chaff. At the same time, we note that the Judge had relatively little to comment on Tjong's credibility as a factual witness. From our reading of the evidence on record, we are of the view that Tjong was as unsatisfactory a witness as Chan, if not more. We provide three non-exhaustive examples.

63 First, Tjong stated on numerous occasions that he is not well-versed in English and has difficulty understanding the key documents such as the first SPA and the supplemental agreements which are recorded in English. The evidence suggested otherwise. One of Tjong's former solicitors, Mr Manjit Singh, gave evidence that Tjong is in fact able to understand English. There was written correspondence between Mr Manjit Singh and Tjong in English. There is no suggestion that Tjong had given the impression to Mr Manjit Singh that the correspondence should be written in another language or that the correspondence should be translated. Further, Tjong did not just sign one or even two documents; he signed the first SPA, the four supplemental agreements, and several other letters, most of which were in English. Most of these documents were signed without the presence of lawyers. If Tjong really had difficulty with the English language, he would have sought assistance in deciphering the documents before signing any of them. A businessman signing commercial documents written in a language in which he is not competent would ordinarily seek professional assistance. The fact that Tjong did not do so lends credence to the suggestion that his command of the English language is not as poor as he has portrayed it to be. Tjong was, after all, a seasoned businessman.

64 Second, Tjong's explication of his understanding of the role of Aventi and OAFL in the transaction shifted numerous times in the course of the proceedings. At one point, he claimed that no payments were to be made to Aventi and OAFL. That does not square with the fact that even under the original cl 4.02(2), Aventi and OAFL were already expressly included as recipients of the purchase

price. Then, at some later point, Tjong claimed that he was amenable to payments being made to him *through* Aventi and OAFL to enable him to save on tax expenses which he would otherwise have incurred in Indonesia. His case in the end, elucidated by Mr Gabriel during oral arguments, was that he did not care whether monies were routed to or through Aventi and OAFL, as long as he ultimately received US$18m. We find Tjong's inability to give a consistent version of his position discomforting.

65 Third, Tjong's explanation for raising the Guarantee at a relatively late stage of proceedings is more than implausible. He claimed that the Guarantee had been locked away in an "iron safe" in Jakarta, and that he had been unable to retrieve it as Chan had made a police report against him in Indonesia which prevented him from returning. [note: 8] There was no evidence of the alleged police report made against Tjong. In the end, the Guarantee was purportedly retrieved by Tjong's wife who brought it to Singapore. Evidently, Tjong did not have to be present in Indonesia to retrieve the Guarantee. His explanation for the delay in producing the Guarantee is nothing short of being incredible. We should point out that the Judge, too, appeared to disbelieve his evidence on this point (see the Judgment at [194]).

66 With such patent inconsistencies inherent in his evidence, there is no clear reason for the court to prefer Tjong's evidence over Chan's or even Alwie's for that matter. We stress once again that the court should always test witnesses' testimonies against the objective evidence to distinguish fact from fiction, truth from falsity. In the present case, given that the credibility of each of the key witnesses is, to some extent, suspect, the objective evidence therefore plays a crucial role in ascertaining what could have taken place. We turn now to what we consider to be the most decisive piece of objective evidence, the first SPA.

***Construction of the Amended Clause 4.02(2)***

67 Although the construction of the payment obligations under the Amended Clause 4.02(2) of the first SPA is not one of the five main issues in CA 82 and CA 83, it is pivotal to the resolution of both appeals. It sets out what the Plaintiffs had agreed to in terms of the structuring of the payment of the purchase price and, in particular, to whom certain sums should be paid.

*Plain meaning of the Amended Clause 4.02(2)*

68 For ease of reference, the Amended Clause 4.02(2) reads: [note: 9]

> The Parties hereby agree and the Vendors hereby instruct and authorise the Purchaser to pay the Purchase Price *due to them* in the following manner:-
>
> (a) a sum of ... US$50,000.00 shall be paid to OAFL, *who is authorised to receive the same* ***for and on behalf of the Vendors*** ;
>
> ...
>
> (c) a sum of ... US$500,000.00 shall be paid to OAFL, *who is authorised to receive the same* ***for and on behalf of the Vendors*** ;
>
> (d) a sum ... of which a maximum of 132,909,091 Consideration Shares [MEGL shares] with an equivalent value of US$4,300,000.00 ... shall be allotted and issued to Aventi, *who is authorised to receive the same for and on behalf of the Vendors*, and a maximum of 44,818,182 Consideration Shares [MEGL 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 Vendors*** ; and

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

(i) on the date ... US$2,000,000.00 shall be paid to Aventi who is authorised to receive the same **for and on behalf of the Vendors**; and

(ii) on the date ... US$3,700,000.00 shall be paid to Aventi, who is authorised to receive the same **for and on behalf of the Vendors**.

[emphasis added in italics and bold italics]

69 Chan and Alwie's explanation of the Amended Clause 4.02(2) was this. Tjong was only supposed to receive US$6m, and the remaining US$2m and US$10m payments to OAFL and Aventi were profits to Alwie and Johanes respectively. In short, Alwie and Johanes were assisting Tjong in "flipping" the Concession by helping to find buyers. The arrangement between the three of them was that Tjong would only get US$6m from any eventual sale and Alwie and Johanes would pocket the difference. Aventi and OAFL were, in *that* sense, receiving part of the purchase price for and on behalf of the Plaintiffs.

70 The Judge rejected this interpretation of the Amended Clause 4.02(2). He thought that a plain reading of the Amended Clause 4.02(2) meant just what it said – that Aventi and OAFL were to hold such payments "for and on behalf of" the Plaintiffs. In other words, the Plaintiffs were entitled to receive the full US$18m purchase price, albeit through Aventi and OAFL as intermediaries. The Judge's difficulty with Chan and Alwie's contention was apparent during the cross-examination of Chan: [note: 10]

Court: ... Mr Siva [counsel for Alwie], at the end of the day the agreement does not support this case theory of 6 million to Mr Sumito [Tjong], 2 million to Mr Handoyo [Alwie] and 10 million to Mr Johanes. It does not say that.

Mr Siva: It says to OAFL and to Aventi.

Court: Yes, **on behalf of the plaintiff**. It does not say they are creditors.

Mr Siva: That I concede your Honour.

Court: **If it was so simple as the defendants would have this court believe -- and this is a simple, straight transaction, then the agreement would be structured on that basis, given that the agreement was revised and amended several times**.

Mr Siva: Yes, it is only the fourth supplemental that I believe use the words "for and on behalf of". Nevertheless I take what your Honour says on both, and that is something we will have to unfortunately deal with, but I'm just, insofar as the payments are concerned, I just want to clarify that these were agreed at that time.

[emphasis added in italics and bold italics]

71 We respectfully disagree with the Judge's interpretation. The plain meaning of "for and on behalf" does not necessarily imply that Aventi and OAFL were holding the payments as *agents* of the Plaintiffs. We are not persuaded that the plain meaning of "for and on behalf" in the Amended Clause 4.02(2) imports the understanding that Tjong would be entitled to the full US$18m under the

first SPA. In fact, the word "receive" preceding the phrase "for and on behalf" supports Chan and Alwie's interpretation that Aventi and OAFL were entitled to receive the payments as third party beneficiaries to the first SPA.

72 The first SPA is not a lengthy document; it is not drafted with excessive legal verbiage; and the crucial payment terms are expressly and clearly worded. Specifically, the Amended Clause 4.02(2) spells out the values of the cash payments and MEGL share payments due to both Aventi and OAFL. Tjong must therefore have known that a substantial portion of the US$18m would be paid to Aventi and OAFL. That is not in doubt. He may not have known who the controlling minds of Aventi and OAFL were, but he would have certainly assumed that the two entities must have been connected to Chan and Alwie, the two people that he had been negotiating with. Why these payments were made to Aventi and OAFL and the nature of Aventi and OAFL's entitlement to retain these payments become clearer when one turns to the context of the entire transaction, from the events that took place prior to the signing of the first SPA to the amendments in the fourth Supplemental.

*Context of the transaction*

(1) Tjong wanted to "flip" the Concession

73 Tjong admitted during cross-examination that he was looking to "flip" the Concession for a quick profit. From the sequence of events, it is apparent to us that that was indeed Tjong's motivation. Led by Tjong, the Plaintiffs had purchased the Concession through the purchase of shares in PT Batubara in August 2004. They then tried to sell a majority stake in PT Batubara to Mr Tjokrosaputro almost immediately (see [8]–[9] above). The Plaintiffs clearly had little or no interest in holding on to a controlling stake in the Concession. When that transaction was aborted, Tjong then put word out that the Plaintiffs owned a Concession and were looking to sell it. Alwie introduced Tjong to Chan, and the first SPA with Antig was entered into shortly thereafter. All this happened within a short span of three months from the time the Plaintiffs purchased the Concession. The inference which the factual matrix invites us to draw is that Tjong was keen to "flip" the Concession. After the failure to close the sale to Mr Tjokrosaputro, Antig presented itself as the perfect buyer.

74 Given that the proposed deal with Mr Tjokrosaputro was only worth US$8m, if the entire purchase price of US$18m under the first SPA was to be paid to the Plaintiffs, it would have been nothing short of a massive windfall for them. Nothing had changed in the short span of time between the failed deal with Mr Tjokrosaputro and the new deal with Antig that would have justified such a large premium. It was for this reason that Alwie contended that what had happened was that he had already obtained a commitment from Tjong that the Plaintiffs would sell 72% of PT Deefu (which works out to 68.4% of PT Batubara) for US$6m. However, the contractual purchase price would be inflated to US$18m. Alwie and Johanes would then pocket the difference, for their role as facilitators, by structuring U$12m of the purchase price to be paid through OAFL and Aventi, which they respectively controlled. We find this arrangement suggested by Alwie to be entirely plausible. Tjong's counsel could not even begin to explain why such an elaborate scheme had been conjured merely to ease his client's alleged tax liabilities without any corresponding benefit to the other counter parties. It bears mention that even at US$6m, the Plaintiffs would still have made a huge profit – more than five times their capital outlay – in a matter of three months. Granted, they would have received US$2m less than they would have under the aborted deal with Mr Tjokrosaputro; however, Tjong still received a handsome profit while retaining a slightly over 30% stake in PT Batubara. Against this backdrop, Tjong would have ample reason to be content to let Chan and Alwie resolve the details regarding the payment of the remainder of the inflated price. That was perhaps why he signed with alacrity the first SPA and the subsequent supplemental agreements despite his alleged lack of proficiency in English and, more importantly, apparently without taking legal advice. As far as Tjong

was concerned, his share of the deal was US$6m. How the other parties wanted to apportion the balance US$12m and via what mechanism was immaterial to Tjong. Even if they stood to gain a larger share of the purchase price, that was the necessary condition for Tjong's US$6m and he consented to that arrangement. That, as we see it, was the basis of the deal.

75 Against this context, the phrase "for and on behalf" in the Amended Clause 4.02(2) becomes clearer. The Plaintiffs would, on paper, be selling their stake in PT Deefu for US$18m. In reality, the understanding was that Tjong would only receive US$6m. The remainder would be paid to Aventi and OAFL. It is in this sense that Aventi and OAFL were receiving the US$12m "for and on behalf" of the Plaintiffs (see also [146], [152] and [157] below). To put it another way, as far as Antig was concerned, the payment to Aventi and OAFL would be deemed to be a payment made to the Plaintiffs.

(2) Tjong's inconsistent explanations

76 Tjong's inconsistent explanations as to why he agreed to the Amended Clause 4.02(2) do not assist the Respondents' cause. When the first SPA was signed, Tjong claimed that he did not read the terms. He claimed that he only found out about the channelling of payments to Aventi and OAFL in a meeting in February 2005 where Alwie explained the payment terms under original cl 4.02(2) to him. It was then that he learnt of the alleged tax benefits. According to Tjong, he told Alwie at the meeting that he disagreed that the payments should go to (or through) Aventi and OAFL. Yet, in the same breath, he claimed that Chan told him that the two companies belonged to Chan, and that these payments were to help Tjong save on taxes. Yet, around the same time but presumably after this meeting, Tjong then purportedly gave Chan and Alwie the 18 February 2005 Letter which stated, *inter alia*, that he was not associated to Aventi and OAFL, did not owe them any debt, and had never instructed Antig to pay them any part of the purchase price (see [15] above). Inexplicably, Tjong signed the second Supplemental on that same day.

77 Finally, in spite of all these protestations, he subsequently agreed to the fourth Supplemental on 19 August 2005, six months later, which reaffirmed that payments were to be made to Aventi and OAFL. This chain of events seriously undermines Tjong's credibility on this issue. If Tjong had already stated in the 18 February 2005 Letter that the purchase price should not go through Aventi and OAFL, why was this not reflected in the fourth Supplemental? More unusually, why did he agree to the Amended Clause 4.02(2) which on its plain wording required Antig to do precisely the thing that Tjong had told Chan and Alwie not to do in his 18 February 2005 Letter? Why did he not seek independent legal (or other) advice and verify the contents of the documents he signed? Mr Gabriel conceded when pressed by us that there was "no logical answer".

78 At the very least, Tjong's case vacillated uneasily between one where he accepted Chan's purported assurance that the payments were for tax reasons and one where he flatly denied that any payments should be made to Aventi and OAFL, even though he has chosen not to plead *non est factum* in respect of the first SPA or the fourth Supplemental. These two explanations are mutually exclusive. Tjong's testimony raises more red flags than it provides answers; it is unclear what his case really is at the end of the day. Indeed, during oral arguments, Mr Gabriel suggested yet another explanation: it was Chan who had inserted the phrase "for and on behalf" in the Amended Clause 4.02(2) in order to comply with the SGX requirements. Tjong's clumsy and inconsistent explanations of the nature of the transaction at various stages of the proceedings appear to be desperate attempts to claw back monies which he had expressly agreed Antig should pay to Aventi and OAFL.

(3) Reducing Tjong's tax liabilities

79 To dispel any residual doubts, we also address Tjong's case at its highest, *ie*, that by the time the fourth Supplemental was signed, he had agreed to the payments to Aventi and OAFL as reflected in the Amended Clause 4.02(2) on the purported understanding that it would reduce his tax liabilities.

80 In the first place, there is little commercial reason for a buyer to gratuitously advise the seller on how to avoid taxes, especially when there is no indication that such advice contributed to a reduction of the negotiated purchase price. Moreover, it is Tjong's own evidence that he did not hire Indonesian lawyers to determine if the arrangement with Aventi and OAFL indeed helped him to save tax. Tjong claimed that he trusted Chan, but it should be noted that Tjong is a seasoned businessman who had not met Chan or dealt with him in any previous capacity. There is simply no sensible reason for Tjong, dealing with Chan on an arm's length basis, to believe Chan to such a great extent. There is also no credible evidence suggesting that Tjong believed that Chan had some special knowledge of the tax regime in Indonesia which Tjong, being an Indonesian businessman himself, did not possess.

81 Those considerations aside, even if we accept that Tjong's alleged potential tax savings was the basis for his entering into the fourth Supplemental, on what basis was he expecting Aventi and OAFL to return to him the payments made to them? If this was a pass-through arrangement, when and how was payment to be made to Tjong? This is a serious flaw in Tjong's case. There is nothing in the first SPA or any of the supplemental agreements providing for a return of the payments from Aventi and OAFL. It must be remembered that Aventi and OAFL are not parties to the first SPA or any of the supplemental agreements. There is no evidence of any extraneous agreements for the repayment of the monies and shares which were to be paid to Aventi and OAFL.

82 We acknowledge that it may appear somewhat odd that Tjong would willingly give up US$12m of the purchase price to Alwie and Johanes (and, by extension, possibly Chan) for their role in helping to find a buyer. This curiosity, however, presupposes that Tjong was strongly convicted that he would have been able to find another buyer willing to pay a similar price. Taking into account the circumstances leading up to the deal with Antig (see [74] above), it is commercially understandable that Tjong wanted to realise the Plaintiffs' paper profit, even if the condition was that part of the purchase price would be paid to Alwie and Johanes for their involvement in securing the buyer. It is worth noting that Tjong was no stranger to giving commissions. He admitted giving a US$90,000 commission to Mr Rahardjo, who had introduced him to Alwie. Against that inference, we find it more unbelievable that Tjong, a seasoned businessman, would agree to have *two-thirds* of the purchase price paid to two entities which he admitted he had no prior connection to, without first having a firm arrangement with the entities as to how the monies and shares would be returned to him, simply because he was told by the representative of the other contracting party that this mechanism would help him save tax. This conclusion requires one to believe that Alwie, Johanes and Chan were altruistic and wanted to act in the best interests of Tjong without obtaining any benefit in return. There is no reason why Alwie, the middleman broker who introduced Chan to Tjong and is himself a businessman, would have voluntarily set up a deal without first extracting a substantial benefit for himself. Tjong's case is all the more fantastical given that he was not advised by lawyers during the negotiations and at the time of the signing of the first SPA and supplemental agreements. He could not have, at the relevant time of contracting, conceived of the causes of action in trust, conversion and unjust enrichment – which he adroitly mounted in Suit 89 – should Aventi and OAFL abscond with "his" monies.

83 In our view, for all the above reasons, we find that it is more likely that the Amended Clause 4.02(2) reflected the parties' intention that the US$12m was to be paid to Aventi and OAFL as third party beneficiaries nominated by the Plaintiffs as opposed to agents of the Plaintiffs. The US$12m was never intended to be paid to the Plaintiffs.

*Clause 4.02(4)*

84 Our interpretation of the Amended Clause 4.02(2) is buttressed when read with cl 4.02(4) of the first SPA (see [17] above). Read alone, cl 4.02(4) is fairly straightforward. It states that payments made to Aventi and OAFL shall be deemed to be payments made to the Plaintiffs. Why was this necessary, we ask? If the Amended Clause 4.02(2) is to be interpreted as imposing an obligation on Aventi and OAFL to hold the monies on behalf of the Plaintiffs as their agents, cl 4.02(4) would be redundant as payments to agents of a principal would obviously count as payment to the principal. If a superfluous interpretation of cl 4.02(4) is to be avoided (see *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474 at [20]), the interpretation of the Amended Clause 4.02(2) found by the Judge and advocated by the Respondents cannot be accepted. In our view, cl 4.02(4) confirms – for the benefit of Antig in particular – that *notwithstanding* a total of US$12m was to be paid to Aventi and OAFL as *beneficiaries* nominated by the Plaintiffs, those payments shall be deemed as payment to the Plaintiffs of the full US$18m purchase price.

*Subsequent conduct as an interpretative aid*

85 Before we leave the interpretation of the Amended Clause 4.02(2), we note that the Judge arrived at his interpretation of the Amended Clause 4.02(2) partlyin reliance on evidence relating to events that occurred *after* the parties entered into the first SPA and fourth Supplemental. In this regard, we are unable to accept that the six subsequent events relied upon by the Judge (see the Judgment at [106]–[119]) are unequivocal. First, the probative value of the subsequent events is premised to a large extent on the Judge's assessment of the credibility (or the lack thereof) of Tjong, Chan and Alwie. As we have clarified, Tjong appears to be no less reliable that Chan or Alwie for that matter. Second, the Judge's reliance on the Guarantee was misplaced, as we shall elaborate later (see [162]–[181] below). Third and most crucially, there is minimal connection, if any, between the subsequent events relied upon and the elucidation of the parties' intentions supporting the interpretation that under the Amended Clause 4.02(2), Aventi and OAFL were not entitled to keep any payments made to it, *ie* they were to hold such payments "for and on behalf of" the Plaintiffs. For instance, the Judge was correct in highlighting the irregularity of the two sums of US$1.88m and US$3.49m which were prematurely paid by Antig to Aventi on the written or oral instructions of Chan. The fact that these two sums were paid into a Credit Agricole account without specifying the account holder made the payments even more dubious. However, notwithstanding the oddities surrounding the payments, it is unclear how this particular subsequent event sheds light on the parties' intentions in relation to the nature of the payments to Aventi and OAFL under the Amended Clause 4.02(2). It does not assist in the illumination of the intentions of Antig and the Plaintiffs as to whether Aventi and OAFL were entitled to keep the payments made to them.

*Conclusion on the Amended Clause 4.02(2)*

86 In the end, notwithstanding the questionable assertions from Tjong that he did not understand English and the unmistakable insinuation that he had been tricked into signing documents, it must be emphasised that the Respondents elected not to plead the defence of *non est factum*. It may very well have been the case that Tjong did not understand crucial aspects of the first SPA. However, as long as the Respondents stand by the Amended Clause 4.02(2), which Mr Gabriel affirmed in the course of oral arguments, they are bound by an objective construction of that clause.

87 It is undeniable that the structuring of the transaction is anything but normal and straightforward, as the Judge rightly observed. Many of the arrangements between Tjong and Chan, Alwie and Johanes were said to be premised on "trust" and "relationship". There is very little

documentary and physical evidence, only wavering testimonies from *all* the parties. At best, it was a shady – or in the Judge's words – irregular transaction. Any reproachable conduct by Chan, Alwie and/or Johanes may well have been prosecutable under Tjong's other claims based on fraud, deceit and conspiracy, but Tjong has chosen not to appeal against the Judge's decision to dismiss those claims. From a contractual perspective, having chosen not to disclaim the first SPA and the fourth Supplemental, Tjong must accept the terms of the agreements for what they appear to mean to an objective person.

88 Our interpretation of the Amended Clause 4.02(2) disposes of CA 82, namely, the Unjust Enrichment Issue and the Conversion Issue. If the payments to Aventi and OAFL under the Amended Clause 4.02(2) were intended to be for the benefit of the two entities, it follows that the Respondents have no basis to claim for unjust enrichment and conversion against OAFL. Nevertheless, in deference to the extensive arguments presented by counsel on the issues in CA 82, and given that CA 82 raises a number of novel and important questions of law, we shall address the issues in CA 82 in some detail.

**Analysis for CA 82**

***The Gateway Issues***

89 There are two gateway issues which must be resolved before the main issues of unjust enrichment and conversion can be considered: first, whether the Respondents have the *locus standi* to bring the claims even though Herman discontinued his action halfway; and second, whether the corporate veil of OAFL should be pierced such that liability could be imposed on its controlling mind, Alwie.

*Respondents' locus standi*

90 Mr Murugaiyan contended that the Respondents have no *locus standi* to continue claims against OAFL for Herman's 7.3% stake in PT Deefu as Herman had dropped out of Suit 89. The Judge found that Herman's discontinuation did not prevent Tjong from continuing Suit 89 in respect of the shares held by Herman on trust for Tjong. He relied on a Power of Attorney dated 21 June 2010 executed by Herman in Tjong's favour. The Power of Attorney authorised Tjong to "[f]ile a lawsuit in courts 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". [note: 11]

91 Without even considering the Power of Attorney, this contention is a non-starter. Mr Murugaiyan's reliance on the House of Lords decision in *Performing Right Society, Ld v London Theatre of Varieties, Ld* [1924] AC 1 ("*Performing Right*") is misplaced. It was held in *Performing Right* (at 14) that "when 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". The significance of the nature of the rights upon which the action is founded is well-illustrated in *Alliance Entertainment Singapore Pte Ltd v Sim Kay Teck and another* [2007] 2 SLR(R) 869. In that case, the plaintiff claimed to be the "exclusive licensee" in Singapore of the copyright in certain works as a result of some contractual arrangements. It commenced proceedings against the defendants for alleged breach of copyright. However, the court found (at [48]) that the plaintiff was not an "exclusive licensee" within the meaning of s 7 of the Copyright Act (Cap 63, 2006 Rev Ed) and thus the action under the Copyright Act could not be maintained. Referring to *Performing Right*, the plaintiff there argued that this defect would be remedied so long as original copyright owners are joined. The court dismissed this argument (at [63]):

> The decisions in *The Charlotte* [1908] P 206, *Performing Right Society Limited v London Theatre of Varieties* [1924] AC 1 ... all deal with the owner in equity having to add the legal owner in order to "perfect" the title to sue or some variant of this. This is unremarkable and accepted practice, in that in order to obtain *final* judgment, the equitable owner must either perfect his title b*y taking an assignment from the legal owner or, alternatively, join t*he legal owner because of the risk to the defendant that he will be exposed to a second claim by or under the legal owner, in particular, by a *bona fide* purchaser for value without notice claiming under the legal owner ... *This type of case is clearly different from the one before me*. ***The plaintiff has not advanced its claim* qua *equitable assignee. The only capacity which it has put forward is as an exclusive licensee pursuant to its contractual arrangements.*** However, if it is not an exclusive licensee within the meaning of the Act, in my judgment, it has no title to sue at all and the joinder of the owners of the copyright does nothing to remedy that. [emphasis added in italics and bold italics]

92 It is incorrect to characterise the present dispute as one solely involving Herman's proprietary rights in PT Deefu. In so far as CA 82 is concerned, the OAFL Unjust Enrichment Claim and the OAFL Conversion Claim are not premised on the vindication of proprietary rights; they arise out of the Respondents' contractual rights under the first SPA. There is no dispute or claim founded on the ownership of the PT Deefu shares in Suit 89. The "thing demanded" – to borrow the phrase from *Performing Right* – is not a proprietary right relating to Herman's 7.3% stake in PT Deefu.

93 Furthermore, the OAFL Unjust Enrichment Claim and the OAFL Conversion Claim are not made by the Respondents *qua* equitable owners of a *chose* in action which is legally owned by Herman. On the contrary, if anything, the Amended Clause 4.02(2) provides that of the Plaintiffs, only Tjong is entitled to receive any payment. Any action to recover monies which are allegedly owed to Tjong is premised on rights which belong entirely to Tjong, not Herman. This is also not a case where the legal and equitable owners of a *chose* in action are different such that the equitable owner of the *chose* in action should join the legal owner if it wishes to enforce the *chose* in action: see *Roberts v Gill & Co and another* [2011] 1 AC 240 at [64]. Herman's discontinuation of the action therefore does not affect the Respondents' right to prosecute the OAFL Unjust Enrichment and the OAFL Conversion Claim.

*Piercing OAFL's corporate veil*

94 Mr Murugaiyan argued that the Judge erred in piercing OAFL's corporate veil because first, this was not pleaded by the Respondents, and second, there was no allegation or finding that OAFL was a mere device, sham or façade.

95 Mr Murugaiyan's first argument may be briefly dealt with. It is indisputably clear from a reading of the Amended Statement of Claim that the Respondents did plead that OAFL's corporate veil should be pierced *vis-à-vis* Alwie: [note: 12]

> Further or in the alternative, based on the aforesaid, the *corporate veil of OAFL should be lifted* and the Plaintiffs seeks (*sic*) the recovery of US$550,000 and 42,102,727 MEGL shares ... from Alwie ...
>
> Further or in the alternative, the Plaintiffs' claim is for US$550,000, being money payable by OAFL and/or Alwie (*by virtue of lifting the corporate veil*) to the Plaintiffs as money had and received by OAFL and/or Alwie to the use of the Plaintiffs.
>
> [emphasis added]

96 As for the second argument that there was no allegation or finding that OAFL was a mere device, sham or façade, Mr Murugaiyan has misconstrued the Judge's ground for piercing OAFL's corporate veil. The Judge lifted OAFL's corporate veil on the ground that Alwie was OAFL's *alter ego*, not that OAFL was a mere device, sham or façade (see the Judgment at [70]). The ground of alter ego is distinct from that based on façade or sham, and the key question that must be asked whenever an argument of alter ego is raised is whether the company is carrying on the business of its controller: *NEC Asia Pte Ltd (now known as NEC Asia Pacific Pte Ltd) v Picket & Rail Asia Pacific Pte Ltd and others* [2011] 2 SLR 565 at [31]; and *Zim Integrated Shipping Services Ltd and others v Dafni Igal and others* [2010] 2 SLR 426 at [86]–[88].

97 OAFL was incorporated in the British Virgin Islands on 28 October 2004 by Alwie for the sole purpose of receiving payment under the first SPA, as admitted by Alwie himself under cross-examination. On 19 November 2004, Alwie appointed himself as the sole director and shareholder of OAFL. Alwie also admitted in his affidavit that OAFL was "controlled" by him. Alwie also similarly admitted in the Defence of the fifth and sixth Defendants (Amendment No 2) ("fifth and sixth Defendants' Amended Defence") that he is the "directing mind and will" of OAFL.

98 Tellingly, Alwie declared under cross-examination that he is entitled under the first SPA to personally receive the US$550,000 paid to OAFL: [note: 13]

> Court: So I want you to explain to me, if you can, do you know whether in your defence -- and, Mr Murugaiyan, I'd be more than happy for you to assist because it's a matter of pleadings -- have you explained to this court why you were entitled to keep this money, other than the sale and purchase agreement.
>
> A: Okay. Basically, in the sale and purchase agreement there's a definition of OAFL. The definitions there states clearly that *I am entitled to receive the money*.
>
> Court: All right.
>
> A: Through OAFL.
>
> [emphasis added]

OAFL's Coutts Bank account which the US$550,000 was paid into was clearly controlled by Alwie. Although OAFL was the named owner of that account, Alwie was the beneficial owner of the account, as Mr Murugaiyan confirmed and as corroborated by Chan, who said that he knew that the monies paid into the Coutts Bank account were for Alwie. Alwie too conceded under cross-examination that he operated the Coutts Bank account as if it was his own personal bank account.

99 Furthermore, Alwie actively procured payments due to OAFL under the first SPA, and the manner in which Alwie procured the payments suggests that Alwie made no distinction between himself and OAFL. On 23 November 2004, Alwie, on behalf of OAFL, wrote to Antig via a letter addressed to Chan, requesting Antig to arrange for the US$50,000 payable under the Amended Clause 4.02(2)(a)(ii) of the first SPA to OAFL to be converted into Singapore dollars and deposited via cheque into Alwie's bank account. The letter was shown to Alwie during cross-examination. Crucially, Alwie admitted that he asked Chan to pay him the US$50,000 even though he was aware that he was not a party to the first SPA and the US$50,000 was in fact supposed to be paid to OAFL under the first SPA.

100 Later, on 12 June 2006, Alwie, on behalf of OAFL, wrote to Chan requesting for the remaining payment due to OAFL under the first SPA to be paid to the Coutts Bank account. On 13 June 2006, a cheque for S$334,429.20 was paid into the Coutts Bank account. When asked in cross-examination why it was paid into the Coutts Bank account, Alwie responded as follows: [note: 14]

> Mr Gabriel: Now, the second cheque, to Coutts Bank, dated 13 June 2006, you confirm that you have received this cheque for the sum of 334,429.20?
>
> A: Yes.
>
> Q: Why was the cheque made out to Coutts Bank?
>
> A: Because if it is put under OAFL, it will take longer to clear by the bank in Singapore. That's why I was told by my banker earlier on that if there is a cheque, *just put in the name of Coutts Bank so that I can receive it* in a few days' time, the most. But if it is OAFL, it will take around two weeks.
>
> Q: Now, was this cheque deposited in OAFL's account with Coutts Bank?
>
> A: Yes, it was.
>
> [emphasis added]

Once again, it is evident that Alwie made no distinction between himself and OAFL. Therefore, we agree with the Judge's decision to pierce OAFL's corporate veil.

***Restitution for unjust enrichment***

101 The Judge held that the Plaintiffs were entitled to recover the OAFL Cash Payment from OAFL (and Alwie, as a consequence of piercing the corporate veil) as money had and received because all the elements of an unjust enrichment claim were established on the facts. The Judge identified the relevant unjust factor as that of a "want of authority to retain money", citing specifically Goff & Jones, *The Law of Unjust Enrichment* (Sweet & Maxwell, 8th Ed, 2011) ("*Goff & Jones (8th Ed)*") at paras 8-01– 8-02 (see the Judgment at [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*** (*sic*) ***. 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 in original in italics; emphasis added in bold italics]

102 In reaching his conclusion that this unjust factor was established on the facts of the case, the Judge concluded that pursuant to the Amended Clause 4.02(2), Aventi and OAFL were not entitled to retain and benefit from payments received by them. Since OAFL had no authority to retain the payments, the unjust factor of "want of authority" was established.

*Upholding the contractual allocation of risk*

103 Given our interpretation of the Amended Clause 4.02(2) (see [67]–[87] above), the Respondents' claim in unjust enrichment must necessarily fail. The amount that was payable to Tjong, as provided under the first SPA and supported by the factual matrix of the case, has always been US$6m and not a cent more. By virtue of the Amended Clause 4.02(2), Antig was contractually obliged to pay the OAFL Cash Payment to OAFL (and not Tjong). In accordance with the Amended Clause 4.02(2), Antig paid the OAFL Cash Payment to OAFL.

104 Simply put, under the first SPA, the Plaintiffs contracted for the OAFL Cash Payment to be made by Antig to OAFL, and this was precisely what they got. It does not lie in the mouth of the Respondents to now say that they are entitled to recover the very same payment that they contracted for Antig to pay to OAFL. Indeed, to allow the Respondents to recover from OAFL the Cash Payment through an action in unjust enrichment would be to undermine the contractual bargain under the first SPA which the Plaintiffs and Antig agreed on. That the law of unjust enrichment should avail a plaintiff *no* remedy against the defendant where the plaintiff and a third party entered into a contract under which the plaintiff was required to confer a benefit directly on the defendant is supported by a string of judicial decisions. The courts are unwilling to permit a plaintiff's unjust enrichment claim in these cases as to do so would undermine the contract and the contractual allocation of risk between the plaintiff and the third party.

105 In the influential House of Lords decision of *Pan Ocean Shipping Co. Ltd v Creditcorp Ltd* [1994] 1 WLR 161 ("*Pan Ocean*"), the appellant time-chartered a vessel from Trident Shipping Co Ltd ("Trident") on terms which provided for advance payments. As part of arrangements for credit facilities from the respondent, Trident assigned receivables due under the charter to the respondent. The appellant paid an advance payment of hire to Trident while the vessel was off-hire. Subsequently, the appellant terminated the charterparty contract between itself and Trident after Trident failed to pay for repair of the vessel. However, Trident's financial position meant that it was not worth suing. Thus, the appellant sued the respondent, seeking to recover from the respondent the advance payment on the ground that it was paid for a consideration that had wholly failed. The House of Lords dismissed the appellant's appeal, holding that the respondent was under no obligation to repay the advance payment. Lord Goff of Chieveley stated (at 164–166):

> All this is important for present purposes, because it means that, ***as between shipowner and charterer, there is a contractual regime which legislates for the recovery of overpaid hire. It follows that, as a general rule, the law of restitution has no part to play in the matter*** *; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate*. Of course, if the contract is proved never to have been binding, or if the contract ceases to bind, different considerations may arise, as in the case of frustration (as to which see *French Marine v. Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* [1921] 2 A.C. 494, and now the Law Reform (Frustrated Contracts) Act 1943). With such cases as these, we are not here concerned. Here, it is true, the contract was prematurely determined by the acceptance by Pan Ocean of Trident's repudiation of the contract. But, before the date of determination of the contract, Trident's obligation under clause 18 to repay the hire instalment in question had already accrued due; and accordingly that is the relevant obligation, as between Pan Ocean and Trident, for the purposes of the present case.

It follows that, in the present circumstances and indeed in most other similar circumstances, there is no basis for the charterer recovering overpaid hire from the shipowner in restitution on the ground of total failure of consideration. It is true that sometimes we find in the cases reference to there having been in such circumstances a failure of consideration (see, e.g., *C. A. Stewart & Co. v. Phs. Van Ommeren (London) Ltd* [1918] 2 K.B. 560, 563, *per* Scrutton L.J.). ...

It is against this background that we have to consider Pan Ocean's claim now made against Creditcorp for repayment of the hire instalment paid to it as assignee of the charter hire. First, *although the benefit of the contract debt had been assigned to Creditcorp, with the effect that payment to Creditcorp by Pan Ocean constituted a good discharge of the debt, nevertheless the burden of the contract remained upon Trident. From this it follows that Trident remained contractually bound to repay to Pan Ocean any overpaid hire, notwithstanding that such hire had been paid not to Trident but to Creditcorp as assignee*. Mr. Hirst, for Pan Ocean, accepted in argument that this was so; but he nevertheless maintained that Pan Ocean had alternative courses of action open to it— either to proceed against Trident in contract, or to proceed against Creditcorp in restitution. His argument proceeded on the basis that, in ordinary circumstances, a charterer has alternative remedies against the shipowner for the recovery of overpaid hire, either in contract or in restitution; and that here, since the hire had been paid to Creditcorp as assignee, Pan Ocean's remedy in restitution lay against Creditcorp in place of Trident. However, for the reasons I have already given, I am unable to accept this argument. This is because, in my opinion, *Pan Ocean never had any remedy against Trident in restitution on the ground of failure of consideration in the present case, its only remedy against Trident lying under the contract*.

...

I am of course well aware that writers on the law of restitution have been exploring the possibility that, in exceptional circumstances, a plaintiff may have a claim in restitution when he has conferred a benefit on the defendant in the course of performing an obligation to a third party (see, e.g., *Goff and Jones on the Law of Restitution*, 4th ed. (1993), pp. 55 et seq., and (for a particular example) *Burrows on the Law of Restitution*, (1993) pp. 271–272). But, quite apart from the fact that the existence of a remedy in restitution in such circumstances must still be regarded as a matter of debate, ***it is always recognised that serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract*** .

[emphasis added in italics and bold italics]

106 We agree with Lord Goff's observations above. There was a valid and subsisting contract between the appellant and Trident, under which Trident had assigned its right to the benefit of payment to the respondent. By suing the respondent instead of Trident for the advance payment, the appellant was effectively seeking to avoid the valid and subsisting contract between itself and Trident, which provided for contractual recourse against Trident in the event of overpaid hire. Lord Goff was rightly concerned that allowing a plaintiff to claim in such a situation would undermine the contract and the contractual allocation of risk between the relevant parties. The appellant should have sued Trident on the contract between them, and not the respondent for restitution.

107 The gist of Lord Goff's observations was adopted by the majority in the important Australian High Court decision of *Lumbers and another v W Cook Builders Pty Ltd (in liquidation)* (2008) 232 CLR 635 ("*Lumbers*"). In *Lumbers*, the appellant owner of land ("the Lumbers") entered into a contract with a building contracting company ("Sons") for the construction of a house on the land. Sons then

subcontracted much of the work under the contract to the respondent company ("Builders"). Builders sued the Lumbers in unjust enrichment for amounts due to it under the subcontract between Builders and Sons. The court held that Builders had no claim against the Lumbers because there was no contract between them. Gummow, Hayne, Crennan and Kiefel JJ, in their majority judgment, said (at [79], [124]–[126]):

> The doing of work, or payment of money, for and at the request of another, are archetypal cases in which it may be said that a person receives a "benefit" at the "expense" of another which the recipient "accepts" and which it would be unconscionable for the recipient to retain without payment. And as is well apparent from this Court's decision in *Steele v Tardiani* (1946) 72 CLR 386, an essential step in considering a claim in quantum meruit (or money paid) is to ask whether and how that claim fits with any particular contract the parties have made. *It is essential to consider how the claim fits with contracts the parties have made because, as Lord Goff of Chieveley rightly warned in Pan Ocean Shipping Co Ltd v Creditcorp Ltd [1994] 1 WLR 161 at 166, "serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract"*. In a similar vein, in the Comments upon §29 of the proposed *Restatement*, (3d), "Restitution and Unjust Enrichment" Tentative Draft No 3, 22 March 2004, the reporter says:
>
> > 'Even if restitution is the claimant's only recourse, a claim under this Section will be denied where the imposition of a liability in restitution would overturn an existing allocation of risk or limitation of liability previously established by contract.'"
>
> ...
>
> When account is taken of the contractual relationship between the Lumbers and Sons several observations may then be made.
>
> First, the Lumbers accepted no benefit at the expense of Builders which it would be unconscionable to retain. The Lumbers made a contract with Sons which either has been fully performed by both parties or has not. *Sons made an arrangement or agreement with Builders which again has either been fully performed or it has not. If either the agreement between Sons and the Lumbers or the agreement or arrangement between Sons and Builders has not been fully performed (because all that is owed by one party to the other has not been paid) that is a matter between the parties to the relevant agreement*. A failure of performance of either agreement is no reason to conclude that Builders should then have some claim against the Lumbers, parties with whom Builders has no contract.
>
> *Because Builders had no dealings with the Lumbers, Builders has no claim against the Lumbers for the price of any work and labour Builders performed or for any money that Builders may have paid in relation to the construction. Builders has no such claim because it can point to no request by the Lumbers directed to Builders that Builders do any work it did or pay any money it did.* ***Reference to whether the Lumbers "accepted" any work that Builders did or "accepted" the benefit of any money it paid is irrelevant*** . *It is irrelevant because it distracts attention from the legal relationships between the three parties: the Lumbers, Sons and Builders*. ***To now impose on the Lumbers an obligation to pay Builders would constitute a radical alteration of the bargains the parties struck and of the rights and obligations which each party thus assumed. There is no warrant for doing that*** .
>
> [emphasis added in italics and bold italics]

108 *Pan Ocean* has also been followed in the leading English Court of Appeal decision of *MacDonald Dickens & Macklin (a firm) v Costello and others* [2012] QB 244 ("*MacDonald*"). There, the claimant builder, MacDonald, Dickens & Macklin ("MDM") entered into a contract with Oakwood Residential Ltd ("Oakwood"), a company owned by the first and second defendants, Mr and Mrs Costello, its shareholders and directors, for the construction of houses on land owned by Mr and Mrs Costello. Mr and Mrs Costello had informed MDM that they were using Oakwood to enter into the contract for tax reasons. MDM had previously done work for Oakwood and was content to proceed in this manner. Subsequently, Oakwood failed to make payments to MDM. At first instance, judgment was given against Oakwood on the outstanding payments. A monetary restitutionary award for unjust enrichment was also made against Mr and Mrs Costello, who then appealed against the decision. The English Court of Appeal allowed the appeal even though it was of the view that Mr and Mrs Costello were enriched at the expense of MDM. Etherton LJ, delivering the unanimous judgment of the court, explained (at [23]):

> I am clear, on the other hand, that *the unjust enrichment claim against Mr and Mrs Costello must fail because it would undermine the contractual arrangements between the parties*, that is to say, the contract between the claimants and Oakwood and the absence of any contract between the claimants and Mr and Mrs Costello. *The general rule should be to uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations, and, in so doing, have similarly allocated and circumscribed the consequences of non-performance. That general rule reflects a sound legal policy which acknowledges the parties' autonomy to configure the legal relations between them and provides certainty, and so limits disputes and litigation*. The following cases support its application to the present case. [emphasis added]

Etherton LJ referred to, *inter alia*, *Brown & Davis Ltd v Galbraith* [1972] 1 WLR 997, *Pan Ocean* and *Lumbers*, and stated (at [30]–[32]):

> 30 All those points are fairly made on behalf of the claimants. Nevertheless the policy considerations articulated by Lord Goff in the *Pan Ocean* case [1994] 1 WLR 161 and by the majority of the High Court of Australia in the *Lumbers* case [2008] 4 LRC 683, as well as the outcome of all the cases cited above, clearly support ***the general policy of refusing restitutionary relief for unjust enrichment against a defendant who has benefited from the plaintiff's services rendered pursuant to a contract to which the defendant was not a party*** . For the reasons I have given, that is a sound legal policy.
>
> 31 Further, as Mr Darton pointed out, *the existence of two remedies, one in restitution and one in contract, is capable of producing anomalous results*. Contractual damages are calculated by reference to the contract price and terms. Compensation for unjust enrichment as a result of the plaintiff's services is calculated by reference to the value of the services (generally at the date of their receipt) which may or may not be the same as the contractual rate. *This raises the possibility of compensation in restitution at a higher rate than the contractual rate, so enabling a claimant to improve on a bad bargain, and with consequential implications for contribution by the defaulting contracting party*.
>
> 32 ... It was perfectly clear, then, that *the claimants were fully aware, and accepted, that Oakwood was their contracting counter-party and that Mr and Mrs Costello were insisting on that arrangement because of tax reasons which would be put at risk if there were direct contractual relations between themselves and the claimants*. There was a perfectly straightforward and standard way in which the claimants could have limited their exposure in the event of default, including insolvency, on the part of Oakwood, namely, by taking guarantees

from Mr and Mrs Costello. The claimants did not do so. *I can see no basis, on those facts, for saying that in principle the law does or should provide a remedy directly against Mr and Mrs Costello because of Oakwood's breach of contract*.

[emphasis added in italics and bold italics]

109 Returning to the facts of the present case, Antig performed its obligations entirely in accordance with the Amended Clause 4.02(2) and the Plaintiffs obtained the performance they contracted for under the first SPA in relation to the OAFL Cash Payment. We agree with Dr Tang's submission that the Respondents appear to be taking the position that the OAFL Cash Payment was wrongfully paid by Antig to OAFL. If that is indeed the Respondents' case, the proper recourse would be to sue Antig. Allowing the Plaintiffs to succeed in its claim in unjust enrichment against OAFL here would undermine the contract between Antig and the Plaintiffs. The same reasons that motivated the courts in *Pan Ocean*, *Lumbers* and *MacDonald* to deny the claims in restitution advanced in those cases operate equally here.

110 For completeness, we do not see OAFL as being unjustly enriched. As Professor Andrew Tettenborn has suggested, where the defendant has *lawfully* received a benefit from a third party when the benefit was the unencumbered property of the third party, the defendant cannot be considered to be unjustly enriched: Andrew Tettenborn, "Lawful Receipt—A Justifying Factor?" (1997) RLR 1 at 12. The present case is exactly on point.

*Want of authority*

111 We also respectfully disagree with the Judge's acceptance of "want of authority" as an unjust factor. As far as we can tell, "want of authority" as an unjust factor is presently a theory advocated solely by the authors of *Goff & Jones (8th Ed)*. Crucially, it attracts no support from judicial decisions or other leading commentators. In fact, although the authors of *Goff & Jones (8th Ed)* purport (at paras 8-34–8-44) to derive "want of authority" as an accepted unjust factor from their interpretation of several English cases, including the seminal decision of *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 ("*Lipkin Gorman*"), they acknowledged subsequently (at para 8-44) that the decisions in these cases were not stated to be based on the recognition of an unjust factor of "want of authority", but on the basis that the respective plaintiffs *had title* to the asset.

112 The suggestion that "want of authority" is an unjust factor also appears to be a marked departure from the views expressed in previous editions of the same treatise, and incidentally coincides with the change of editorship of the treatise from Lord Goff and Prof Gareth Jones to the current editors. The previous editions in fact took an opposing position to that advocated by the editors of the latest edition. For example, the immediately preceding edition of the same treatise interpreted the claim in *Lipkin Gorman* as one of "retention of title": *Goff & Jones on The Law of Restitution* (Gareth Jones ed) (Sweet & Maxwell, 7th Ed, 2007) ("*Goff & Jones (7th Ed)*") at ch 2 generally. There was no suggestion of "want of authority" as an unjust factor. The authors of other leading English textbooks have also not recognised this unjust factor: see Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) ("*Burrows*") at p 410; and Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 2nd Ed, 2006) ("*Virgo*") at pp 645–646. The leading Australian text on unjust enrichment also rejects the view propounded by *Goff & Jones (8th Ed)*: see Keith Mason, J W Carter and G J Tolhurst, *Mason and Carter's Restitution Law in Australia* (LexisNexis Butterworths, 2nd Ed, 2008) ("*Mason & Carter*") at para 306.

113 In our view, the seminal House of Lords decision in *Lipkin Gorman* does not in fact support the position taken in *Goff & Jones (8th Ed)*. In that case, Cass, a partner in the plaintiff firm of solicitors,

took cash from the plaintiff's client account and gambled it away at the defendant casino. The court held that the plaintiff was entitled to claim against the defendant for money had and received. It recognised that, as personal restitution was sought from an indirect recipient, it was necessary to show that the money paid by the partner as a third party belonged to the plaintiff. In our view, the court based its decision on the fact that the money received by Cass was the *property* of the plaintiff solicitors. Lord Goff said (at 572):

> *The first ground is concerned with the solicitors'* ***title*** *to the money received by Cass (through Chapman) from the bank*. It is to be observed that the present action, like the action in *Clarke v. Shee and Johnson*, is concerned with a common law claim to money, where the money in question has not been paid by the appellant directly to the respondents—as is usually the case where money is, for example, recoverable as having been paid under a mistake of fact, or for a consideration which has failed. On the contrary, here the money had been paid to the respondents by a third party, Cass; and in such a case *the appellant has to establish a basis on which he is entitled to the money. This (at least, as a general rule) he does by showing that the money is his legal property*, as appears from Lord Mansfield's judgment in *Clarke v. Shee and Johnson*. If he can do so, he may be entitled to succeed in a claim against the third party for money had and received to his use, though not if the third party has received the money in good faith and for a valuable consideration. The cases in which such a claim has succeeded are, I believe, very rare: see the cases, including *Clarke v. Shee and Johnson*, collected in *Goff and Jones, The Law of Restitution*, 3rd ed. (1986), p. 64, note 29. This is probably because, at common law, property in money, like other fungibles, is lost as such when it is mixed with other money. Furthermore, it appears that in these cases the action for money had and received is not usually founded upon any wrong by the third party, such as conversion; nor is it said to be a case of waiver of tort. It is founded simply on the fact that, as Lord Mansfield said, the third party cannot in conscience retain the money—or, as we say nowadays, for the third party to retain the money would result in his unjust enrichment at the expense of the owner of the money.
>
> So, in the present case, *the solicitors seek to show that the money in question* ***was their property at common law*** . But their claim in the present case for money had and received is nevertheless a personal claim; it is not a proprietary claim, *advanced on the basis that money remaining in the hands of the respondents is* ***their property*** .
>
> [emphasis added in italics and bold italics]

Indeed, Lord Goff went on to discuss (at 574) how the plaintiff's right to its monies in the bank was a *chose* in action which was legal *property* belonging to the plaintiff that it could trace at common law into the cash drawn by Cass.

114 The same can be said of *Nelson and others v Larholt* [1948] 1 KB 339 ("*Nelson*"), another case which the editors of *Goff & Jones (8th Ed)* relied on to argue that the unjust factor of "want of authority" has some judicial support (see *Goff & Jones (8th Ed)* at para 8-44). In *Nelson*, Mr Potts, an executor of an estate, fraudulently drew cheques on the estate's account in favour of the Mr Larholt, the defendant. The beneficiaries brought an action against Mr Larholt to recover the money as money had and received. They succeeded. Denning J (as he then was) stated the following principles (at 342–343):

> The relevant legal principles have been much developed in the last thirty-five years. *A man's money is property which is protected by law*. It may exist in various forms, such as coins, treasury notes, cash at bank, or cheques, or bills of exchange of which he is "the holder" but,

> whatever its form, it is protected according to one uniform principle. *If it is taken from the rightful owner, or, indeed, from the beneficial owner, without his authority, he can recover the amount from any person into whose hands it can be traced*, unless and until it reaches one who receives it in good faith and for value and without notice of the want of authority. Even if the one who received it acted in good faith, nevertheless if he had notice—that is, if he knew of the want of authority or is to be taken to have known of it—he must repay. [emphasis added]

Although "want of authority" was mentioned, it was in the context of the operation of the "*bona fide* purchaser" defence and not as an unjust factor. Like *Lipkin Gorman*, Denning J's decision was based primarily on the fact that the money paid to Mr Larholt was the beneficiaries' property. Hence, we agree with Dr Tang's submission that in all of the cases relied on by *Goff & Jones (8th Ed)* in support of its proposition that "want of authority" constitutes an unjust factor, including *Lipkin Gorman*, the courts did not in fact justify the restitutionary relief on the basis of a "want of authority" on the part of the defendant to keep the money. Consequently, we do not accept that "want of authority" constitutes an unjust factor for the purposes of a claim for unjust enrichment. The Respondents' claim for unjust enrichment therefore fails.

115 Of course, we are cognizant that our conclusion invites consideration of a hitherto unsettled issue *viz*, whether *Lipkin Gorman* was in fact a case of a proprietary restitutionary claim or a personal unjust enrichment claim. We should clarify, at this juncture, that although we had emphasised earlier (at [111]–[114]) that the solicitor's title to the money in *Lipkin Gorman* was critical to the decision, our comments were in the context of explaining why the case is not good authority for "want of authority" as an unjust factor. In this regard, we refer to *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] SGCA 36 where we explained (at [114]) the relevance of the property aspect in the claim for unjust enrichment in *Lipkin Gorman*.

116 The more prominent and forceful proponents in this area are Prof Graham Virgo ("Prof Virgo"), who supports the proprietary restitutionary claim analysis, and Prof Andrew Burrows ("Prof Burrows"), who advocates the traditional unjust enrichment basis, though they are by no means the only such advocates: see *Virgo* at pp 584–585, 645–646; *Burrows* at pp 432–435; see also Lord Millett writing extra-judicially in "Proprietary Restitution" in *Equity in Commercial Law* (Simone Degeling and James Edelman eds) (Law Book, 2005) at pp 309–326. This area is contentious partly because the nomenclature used by commentators and courts is not always the same. To Prof Virgo, the essence of a proprietary restitutionary *claim* is the existence of a continuing – or retention of – proprietary interest in property in the hands of the defendant: *Virgo* at pp 580–581. The remedy for such a claim can be personal or proprietary: *Virgo* at pp 575–576. Prof Burrows, on the other hand, appears to take the position that proprietary restitution is a proprietary *remedy* for a claim for unjust enrichment. In other words, unlike a proprietary restitutionary claim where the basis of the claim is subsisting property rights, Prof Burrow's conception of proprietary restitution reversing unjust enrichment suggests that property rights can be created to reverse unjust enrichment. As with any claim for unjust enrichment, an unjust factor is still required for the awarding of the proprietary remedy: *Burrows* at pp 432–433.

117 While this debate may be dismissed by many as merely academic discourse, it is not so, as the English High Court decision in *Armstrong DLW GmbH v Winnington Networks Ltd* [2013] 1 Ch 156 ("*Armstrong*") illustrates. The dispute in that case was over the trading of European Union allowances for the emission of carbon dioxide ("EUAs"). An e-mail fraud was perpetrated on Armstrong DLW GmbH ("Armstrong"), the claimant operator of two power plants, by an unknown third party. The result was that a considerable number of EUAs were transferred from Armstrong's account to Winnington Networks Ltd ("Winnington"), the defendant trader of EUAs. The EUAs were then immediately sold and

transferred to a regular counterparty. Armstrong contended that it had a "proprietary restitution claim" to vindicate its persisting legal property in the EUAs, and alternatively, that Winnington had been unjustly enriched.

118 Stephen Morris QC ("Morris QC"), sitting as a Deputy High Court judge, recognised the distinction between a proprietary restitutionary claim and a claim for restitution for unjust enrichment, though he also qualified that this distinction has not been universally accepted by the leading academic commentators: *Armstrong* at [62]–[64]. After considering *Lipkin Gorman* and two other key decisions which came after *Lipkin Gorman* – the Court of Appeal decision in *Trustee of the property of FC Jones & Sons (a firm) v Jones* [1997] Ch 159 ("*F C Jones*") and the House of Lords decision in *Foskett v McKeown and others* [2001] 1 AC 102 ("*Foskett*") – and the views of Prof Virgo in *Virgo* at pp 645–646, Morris QC concluded (at [75]) that "the *Lipkin Gorman* case is in substance a case of a 'proprietary restitutionary claim' *and not a claim for restitution for unjust enrichment*" [emphasis added]. Morris QC ultimately upheld Armstrong's proprietary restitutionary claim.

119 We appreciate the force and cogency of Morris QC's reasoning at [62]–[75] of *Armstrong*. However, with the greatest respect to him and Prof Virgo, we are not yet prepared to characterise *Lipkin Gorman* as a clear instance of a proprietary restitutionary claim. First, there is no gainsaying that the plaintiff's claim in *Lipkin Gorman* was explicitly recognised by several of the Law Lords as being founded on "unjust enrichment": at 558 *per* Lord Bridge of Harwich; at 568 *per* Lord Ackner; and at 578 *per* Lord Goff. In fact, Lord Goff was evidently alive to the distinction between proprietary restitutionary claims and personal claims for unjust enrichment given his observation (at 572) that the plaintiff's claim "for money had and received is nevertheless a personal claim; it is not a proprietary claim, advanced on the basis that money remaining in the hands of the respondents is their property."

120 Second, we do not think that *F C Jones* and *Foskett* necessarily lead one to the conclusion that *Lipkin Gorman* ought to be read as a case of a proprietary restitutionary claim. *F C Jones* did not address the express references to unjust enrichment in the various judgments in *Lipkin Gorman*, while *Lipkin Gorman* was not even mentioned in any of the judgments in *Foskett*. This was despite the fact that both Lord Browne-Wilkinson and Lord Millett adverted in *Foskett* (at 108 and 127 respectively) that the vindication of property rights is clearly distinct from the law of unjust enrichment. One would have expected *Lipkin Gorman* to have garnered more attention in *Foskett* if it was clearly a proprietary restitutionary claim which has been "incorrectly" characterised as a claim in unjust enrichment.

121 Third, the concept of a proprietary restitutionary claim distinct from unjust enrichment does present some juridical difficulties. Ostensibly, the two causes of action have different requirements and may attract different defences. As Lord Millett stated in *Foskett* (at 129):

> A plaintiff who brings an action in unjust enrichment must show that the defendant has been enriched at the plaintiff's expense, for he cannot have been unjustly enriched if he has not been enriched at all. But the plaintiff is not concerned to show that the defendant is in receipt of property belonging beneficially to the plaintiff or its traceable proceeds. The fact that the beneficial ownership of the property has passed to the defendant provides no defence; indeed, it is usually the very fact which founds the claim. Conversely, a plaintiff who brings an action like the present must show that the defendant is in receipt of property which belongs beneficially to him or its traceable proceeds, but he need not show that the defendant has been enriched by its receipt. He may, for example, have paid full value for the property, but he is still required to disgorge it if he received it with notice of the plaintiff's interest.
>
> Furthermore, a claim in unjust enrichment is subject to a change of position defence, which

usually operates by reducing or extinguishing the element of enrichment. An action like the present is subject to the bona fide purchaser for value defence, which operates to clear the defendant's title.

*Concluding clarifications*

122 Leaving the law unsettled in these circumstances may not be particularly satisfactory. That said, given that there will be potential cascading ramifications on other fields of law, most notably property, equity, trusts and insolvency, it would be prudent to refrain from making a conclusive determination of this issue without the benefit of fuller arguments. Nevertheless, it is apposite to make three further clarifications about the use of terminology in this admittedly confusing and confused sphere of the law.

123 First, caution should be exercised when interpreting older cases, especially those predating *Lipkin Gorman*, for the simple but important reason that the principle of unjust enrichment is a relatively new creature. It was rejected by Lord Diplock as a general principle as late as 1978 in the House of Lords decision in *Orakpo v Manson Investments Ltd* [1978] AC 95 at 104. Earlier cases were evidently not decided on the basis of unjust enrichment, and it would be dangerous to read those cases as laying down a principle that only came to be established and recognised much later.

124 Second, although the Plaintiffs' claim in Suit 89 against Alwie in respect of the US$550,000 was pleaded as *money had and received*, that, strictly speaking, is not a cause of action. The action of money had and received was a type of "common" count. Common counts were historical pleading devices that permitted the pleading of claims in *general* terms with specific details of the debt sought to be recovered left to the law of evidence: *Mason & Carter* at paras 114–115. We refer to Prof Yeo Tiong Min's ("Prof Yeo") helpful explanation in "Restitution, Tracing, and Change of Position" [1994] SJLS 138 at 140:

> The action for money had and received is no more than a *form* of action, from a distant time in English legal history when plaintiffs had to take writs out in specific formats. It says nothing more than that the defendant owes the plaintiff a debt [footnote omitted]. The ***reason*** for the debt is ***unexplained*** . ***To call the action for money had and received a cause of action is akin to calling an action for damages a cause of action*** . It adds nothing to the analysis. [emphasis in original in italics; emphasis added in bold italics]

125 The use of "common" counts or forms of action has since been abolished, but the nomenclature associated with that system has persisted. That should change, as is the case in Canada where references to most "common" counts have "more or less disappeared from contemporary Canadian professional discourse": Peter D Maddaugh and John D McCamus, *The Law of Restitution* vol 1 (Canada Law Book, Looseleaf Edition, 2013) at para 4:300. Plaintiffs should be precise in elucidating the basis for their restitutionary claims. Identifying the precise underlying cause of action for a restitutionary claim has practical consequences in terms of affecting what the plaintiff needs to show in order to establish the claim. We agree with the comment by the editors of *Goff & Jones (8th Ed)* at para 1.29 that "[t]he old language of 'money had and received' … conceals as much as it reveals about the nature of a claim". In our view, the underlying basis for the action for money had and received is now embraced under the rubric of *unjust enrichment*: see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 1 AC 669 at 710.

126 Third, building on the work of Prof Peter Birks, Prof Yeo also points out that in the context of *unjust enrichment*, the word *restitution* describes a response to an event. The event is the unjust enrichment of the defendant at the plaintiff's expense, and the response is to reverse the

enrichment: Yeo Tiong Min, "Tracing and Three-Party Restitution" [1993] SJLS 452 at 453. We agree. There are other restitutionary remedies which are not founded on a claim for unjust enrichment or property, but on a claim in tort or breach of contract or fiduciary duty. Restitution in this latter category of claims is more commonly known as "restitution for wrongs": *Burrows* at Part Four; *Virgo* at Part IV; James Edelman, "Unjust Enrichment, Restitution and Wrongs" (2001) 79 Texas Law Review 1869. Different causes of action may give rise to the same remedy of restitution. The law of restitution is more than just the law of unjust enrichment; the two are not synonymous. Precision in the use of terms would, we think, go some way in ameliorating the uncertainty in this nascent area of the law.

***OAFL's Conversion of the 42,102,727 MEGL shares***

127 We turn now to the claim against OAFL for conversion of the MEGL shares. In *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101, this court summarised the key elements of an action for conversion (at [45]) in the following terms:

> ... [T]he action lies only if the claimant has possession or a right to *immediate possession* of the goods and this means that an owner who does not have such a right (say, because of the terms of the bailment) cannot bring an action for conversion. ... Generally, an act of conversion occurs when there is unauthorised dealing with the claimant's chattel so as to question or deny his title to it ... Inconsistency is the gist of the action, and thus there is no need for the defendant to know that the goods belonged to someone else or for the defendant to have a positive intention to challenge the true owner's rights ... [emphasis in original]

128 The only element of the test for conversion in dispute in CA 82 is whether the Respondents had an immediate right to possession of the MEGL shares. There is, however, an antecedent question of whether the MEGL shares can even be subject to an action for conversion.

*Whether scripless shares can be converted*

129 It is undisputed that the MEGL shares are scripless. However, the Judge considered that they are scripless only for the purposes of trading. He found that the MEGL shares are represented by physical share certificates issued by MEGL and deposited and registered with the CDP. They are therefore capable of being converted.

130 Mr Murugaiyan argued that scripless shares are intangible property. He referred to the House of Lords decision in *OBG Ltd and another v Allan and others* [2008] 1 AC 1 ("*OBG*"), where the majority held that intangible property cannot sustain an action for conversion. He also argued that only bearer shares and certificated shares with transfers endorsed in blank are capable of being converted. The MEGL shares are neither. Mr Gabriel agreed that the MEGL shares are scripless and echoed the Judge's comment that there are physical share certificates which are deposited with the CDP, and these certificates represented the MEGL shares. It is OAFL's act of taking possession of these certificates that undergirds the action for conversion.

(1) General rule and the exception of documentary intangibles

131 The general rule is that conversion only protects interest in chattels, or things that can be possessed: *OBG* at [95]; *Clerk & Lindsell on Torts* (Michael Jones & Anthony Dugdale eds) (Sweet & Maxwell, 20th Ed, 2010) at para 17-35. In other words, there cannot be conversion of intangibles such as *choses* in action. There is one recognised exception to the general rule. Documentary intangibles such as cheques, negotiable instruments, guarantees, insurance policies and bonds *can* be

converted, even though their sole value is in their nature as *choses* in action. In *Goode on Commercial Law* (LexisNexis, 4th Ed, 2009) at p 32, Prof Goode describes documentary intangibles as "rights to money, goods or securities which are locked up in a document to the extent that the document is considered to represent the right, which thus becomes transferable by transfer of the document itself." This is achieved by treating the chattel, *ie* the physical instrument, as the subject-matter of the conversion, as evidencing the face value which can be extracted under the instrument: *Lloyds Bank, Limited v The Chartered Bank of India, Australia and China* [1929] 1 KB 40 at 55–56. Thus, if a physical instrument which value lies in a *chose* in action is unlawfully dealt with, the person entitled to the physical instrument may recover damages based on the value of the *chose*: *Alsager v Close* (1842) 152 ER 600; *Midland Bank Ltd v Eastcheap Dried Fruit Co* [1961] 2 Lloyd's Rep 251; *Ernest Scragg & Sons v Perseverance Banking and Trust Co* [1973] 2 Lloyd's Rep 101.

132 As corporeal, tangible property, there is no doubt that the share certificates can be converted. The question is whether they are worth more than just pieces of paper. In *Pacrim Investments Pte Ltd v Tan Mui Keow Claire and another* [2005] 1 SLR(R) 141, Andrew Ang J held (at [18]) that:

> [a] share certificate is not a documentary intangible. A pledge of a share certificate does not confer on the pledgee the rights attaching to the shares but only possessory title to the paper on which the share certificate is printed.

This may be read to mean that share certificates are not worth anything more than the paper on which they are printed on. While that may be true of, say, registered shares, (see Gerard McCormack, "Security Over Shares – Reform is in the Air" (2003) 3 Insolvency Lawyer 92 at p 92), this does not apply to all shares. Indeed, the share certificates in *MCC Proceeds Inc v Lehman Brothers International (Europe)* [1998] 4 All ER 675, *Malkins Nominees Limited v Société Financiéré Mirelis SA and others* [2006] EWHC 2132 (Ch), and *EG Tan & Co (Pte) v Lim & Tan (Pte) and another* [1985–1986] SLR(R) 1081, the case referred to by the Judge, were all held to be capable of forming the subject-matter of a claim for *substantial* damages for conversion: see also Mark Hsiao, "Legitimised Interference with Private Properties – Banking Act 2009" (2010) 25(5) JIBLR 227 at 232.

133 In the present case, there are share certificates issued by MEGL over the relevant shares. The complication lies in the way these certificates function under the CDP system which allows trading of scripless shares, a process which invariably decouples the shares from the actual share certificates. Understanding the operation of the CDP system is crucial.

(2) Operation of the CDP

134 The bulk of the operation of the CDP is governed by the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act"). The relevant provisions which explain how the CDP deals with shares and share certificates are:

> **123.**—(1) A certificate under the common or official seal of a company specifying any shares held by any member of the company *shall be prima facie evidence of the title of the member to the shares*.
>
> ...
>
> **130A.** ...
>
> ...

"book-entry securities", in relation to the Depository, means securities —

(*a*) the documents evidencing title to which are deposited by a depositor with the Depository and are registered in the name of the Depository or its nominee; and

(*b*) which are transferable by way of book-entry in the Depository Register and not by way of an instrument of transfer ...

...

"documents evidencing title" means —

(*a*) in the case of stocks, *shares*, debentures or any derivative instruments related thereto of a company or debentures or any derivative instruments related thereto of the Government — the stock certificates, *share certificates*, debenture certificates, or certificates representing the derivative instrument, as the case may be; and

...

**130C**. There is hereby established a computerised Central Depository System whereby, in accordance with the rules of the Depository —

(*a*) *documents evidencing title* in respect of securities (with where applicable, in the case of shares or registered debentures, proper instruments of transfer duly executed) are deposited with the Depository and are registered in the name of the Depository or its nominee;

(*b*) accounts are maintained by the Depository in the names of the depositors so as to reflect the title of the depositors to the *book-entry securities*; and

(*c*) transfers of the *book-entry securities* are effected electronically, and not by any other means, by the Depository making an appropriate entry in the Depository Register of the *book-entry securities* that have been transferred.

**130D.**—(1) *Notwithstanding anything in this Act or any other written law or rule of law or in any instrument or in the memorandum or articles of a corporation, where book-entry securities of the corporation are deposited with the Depository or its nominee —*

(*a*) the Depository or its nominee (as the case may be) shall be deemed *not* to be a member of the corporation; and

(*b*) ***the persons named as the depositors*** *in a Depository Register shall*, for such period as the book-entry securities are entered against their names in the Depository Register, ***be deemed to be*** —

(i) **members** of the corporation in respect of the amount of book-entry securities (relating to the stocks or shares issued by the corporation) **entered against their respective names** in the Depository Register; or

(ii) **holders** of the amount of the book-entry securities (relating to the debentures or any derivative instrument) **entered against their respective names** in the Depository

Register.

...

(2) *Nothing in this Division shall be construed as affecting —*

...

(*c*) ***the enjoyment of any right, power or privilege conferred by, or the imposition of any liability, duty or obligation*** under this Act, any rule of law or under any instrument or under the memorandum or articles of association of a corporation ***upon a depositor, as a member of a corporation*** or as a holder of debentures or any derivative instruments except to the extent provided for in this Division or prescribed by regulations made thereunder.

[emphasis added in italics and bold italics]

135 The relevant provisions in the Companies Act should also be read together with two other sets of documents. The first is the Companies (Central Depository System) Regulations (S 446/1993) ("the CDS Regulations"), in particular regs 8 and 9:

**8**. *All the rights that are attached to the documents evidencing title representing the securities* that are deposited with the Depository and all obligations to which those documents evidencing title are subject *shall subsist and* ***be attached to the book-entry securities registered in the name of the depositor*** in the Depository Registry.

...

**9**. Where in any written law or rule of law it is provided that, in a contract to transfer title to a security, the transferor shall execute and deliver a proper instrument of transfer together with the documents evidencing title relating to the security, such written law or rule of law *shall not apply to the transfer of a book-entry security*.

[emphasis added in italics and bold italics]

The other is the Report of the Select Committee on the Companies (Amendment Bill) (Bill No 33/92) (at E 2):

**Mechanics of Scripless Trading**

6 The CDS is a system for settlement of securities transactions without the *need for physical delivery of share certificates to evidence the passing of title* to such shares. In order to trade under the scripless system, investors have to open a securities account with the Central Depository (Pte) Ltd (CDP), a wholly-owned subsidiary of the SES, or alternatively, a sub-account through a depository agent, so that the CDP can record their share entitlements and subsequent changes in their shareholdings. Financial institutions that can operate as depository agents are banks, merchant banks, trust companies registered under the Trust Companies Act, SES member firms or such other persons approved by the CDP to act in such a capacity.

7 For newly listed companies to be traded under the scripless system, no share certificates would be issued to successful subscribers for its shares. Instead, their allotment of shares would be credited electronically to their respective securities account with CDP or sub-account with a depository agent. *Shares of such companies would be issued in jumbo certificates for*

*registration in the name of the CDP, which acts merely as a bare trustee on behalf of the beneficial owners.* ***Full membership rights are vested with the shareholder as the CDP, although being the registered owner of the shares, is not deemed to be a member of the company*** .

[emphasis added in italic and bold italics]

136 In short, under the scripless trading system in Singapore, although shares are scripless for the purposes of trading, they are still backed by certificates. For newly listed companies, shares would typically be issued under jumbo certificates. Regulation 11 of the CDS Regulations allows the CDP to require an issuer to issue jumbo certificates in the name of the CDP. In all cases, the share certificates would be registered in the CDP's name. Notwithstanding this, the account holder to whom the shares are issued would have a book-entry under his account reflecting his title to the shares, and would enjoy the same rights and privileges as a shareholder of the issuer. When the account holder transfers shares electronically, his account and that of the transferee's would be updated to reflect the change in title to the shares. At any point in time, the account holder who has a book-entry reflecting title to shares of a company would be, for all intents and purposes, entitled to enjoy the rights associated with being a shareholder of that company.

137 That was precisely what MEGL did. It issued new shares *with* a new set of share certificates in favour of the CDP, albeit the shares were expressed to be allotted to HSBC (Singapore) Nominees Pte Ltd, OAFL's nominee, for OAFL's account. Thus, the CDP was the registered owner of the MEGL shares. However, on the CDP's register, in accordance with s 130C(*b*) of the Companies Act, OAFL, through its nominee, was recorded as having title to the MEGL shares. Accordingly, pursuant to s 130D of the Companies Act, OAFL was deemed to be a shareholder of MEGL, and enjoyed the rights associated with being a shareholder of MEGL. In other words, the scripless shares issued to OAFL can be traced to the book-entry in its CDP account which is in turn conditioned on the share certificates issued by MEGL which, though registered in CDP's name, were expressed to be for OAFL's account with the CDP. Hence, we agree with the Judge that the MEGL shares, or more accurately, the share certificates which are tied to and sustain the book-entries in the CDP register, are capable of being the subject-matter of a substantive claim for conversion.

*Whether the Respondents had a right to immediate possession of the MEGL shares*

138 It is trite that only a person who has actual possession or the right to immediately possess the goods concerned can sue for conversion. There is no dispute that the Respondents never had actual possession of the MEGL shares. The shares were allotted and issued directly to OAFL's nominee. The only point of contention is whether the Respondents had a right to immediate possession of the shares.

139 The Judge held that the Plaintiffs had a right to immediate possession of the MEGL shares on two separate grounds of bailment and agency. On bailment, the Judge noted that the Plaintiffs pleaded that the MEGL shares "were rightfully due" to them. On that premise, he then characterised OAFL as a bailee and the Plaintiffs as bailors. Because OAFL acted in a manner which was repugnant to the terms of the bailment by selling the MEGL shares, the bailment was terminated and the Plaintiffs acquired the immediate right to possession of the MEGL shares at the time of the sale. On agency, the Judge held that the words "for and on behalf of the [plaintiffs]" sufficed to create an agency relationship between OAFL and the Plaintiffs. Consequently, OAFL had a duty to account to the Plaintiffs *qua* agent and must hand over the MEGL shares "on demand".

140 Mr Murugaiyan contended that the Respondents did not have a right to immediate possession

as there was neither a bailment relationship nor an agency relationship between the Plaintiffs and OAFL. On bailment, he argued that the Respondents must show that OAFL had voluntarily possessed the MEGL shares which "belonged to" the Respondents. This was not satisfied as the Respondents did not have a beneficial interest in the MEGL shares at any time, as found by the Judge. The Respondents also did not have a contract with OAFL which would place them in the position of a bailor *vis-à-vis* OAFL. On agency, Mr Murugaiyan submitted that there was no mutual consent between OAFL and the Respondents to create an agency relationship. The first SPA and the fourth Supplemental were entered into between the Plaintiffs and Antig. OAFL was not a party to these agreements.

141 Mr Gabriel did not advance any argument that the Respondents had a beneficial interest in the MEGL shares. He instead focused on the Respondents' contractual right to the shares pursuant to the Amended Clause 4.02(2). The nub of the Respondents' case on bailment is that under the Amended Clause 4.02(2), Antig is the bailor, the Respondents are the owners and head bailors, and OAFL is the bailee. This bailment relationship conferred on the Respondents the right of immediate possession. The Respondents' position on agency is somewhat unclear. Mr Gabriel appears to have asserted, without more, that OAFL received the OAFL Payments as agents of the Respondents.

(1) Bailment

142 With respect, the Judge put the cart before the horse in respect of this particular issue. He appears to have assumed that there was a bailor-bailee relationship between the Respondents and OAFL, without providing any reasons as to why and how this relationship arose.

143 The essence of bailment is possession and the central theme of a standard bailment is the carving out, by the bailor, of a lesser possessory interest than his own: Norman Palmer, *Palmer on Bailment* (Sweet & Maxwell, 3rd Ed, 2009) ("*Palmer*") at para 1-001. While possession is the salient feature of bailment, the mere fact of possession does not necessarily render the possessor a bailee. First, if the bailee enjoys possession in conjunction with full rights of ownership, there can be no bailment. Second, the possessor must knowingly and willingly assume possession of goods that *belong* to the bailor: *Palmer* at para 1-002.

144 The problem which the Respondents face is showing that they had a better possessory right *vis-à-vis* OAFL. Indeed, the Respondents *never* had any interests – legal, equitable or possessory – in the MEGL shares. The shares were issued in CDP's name, and allotted to OAFL's nominee for OAFL's account. It is hard to see how the Respondents can assert a better possessory right. The Judge seems to have relied on the Plaintiffs' pleadings "that Aventi and OAFL had received the MEGL shares which are *rightfully due to them*" [emphasis added] (see the Judgment at [141]) as a basis for his finding of a bailment relationship. The Judge had emphasised earlier in the course of construing the Amended Clause 4.02(2) that the entire US$18m purchase price was " 'due to' the [P]laintiffs" (see the Judgment at [96]). His view that the entire purchase price was payable to the Plaintiffs may have grounded his subsequent conclusion that the Plaintiffs had a superior possessory interest than OAFL. However, as stated above (see [67]–[87] above), we disagree with the Judge's interpretation of the Amended Clause 4.02(2). Even if the Judge's interpretation of the phrase "for and on behalf of" is accepted, it cannot be said that the Respondents had a possessory interest in the MEGL shares. All the Respondents had was a contractual right to have Antig make the OAFL Payments to OAFL. If, for instance, Antig did not make the OAFL Payments to OAFL, a remedy of specific performance would only result in Antig transferring the MEGL shares to OAFL, not to the Respondents.

145 The Respondents' next contention that Antig was the bailor while the Respondents were the owners and head bailors is illogical and can be summarily rejected. The MEGL shares were never

owned by the Respondents. Before they were issued, they could not have been owned by anyone, including Antig. Antig's direct issuance and allotment of the MEGL shares to OAFL did not create a bailment relationship between Antig and OAFL as Antig did not retain any possessory interest in the shares. It makes no sense to construe Antig as a bailor of the MEGL shares.

146 Last but not least, as far as OAFL was concerned, it was coming into full and exclusive possession of the MEGL shares. Quite apart from the fact that the Respondents never "owned" the MEGL shares, there is no evidence which suggests that OAFL willingly assumed possession of the MEGL shares which it knew "belonged" to the Respondents. Thus, in light of the above, we are satisfied that there was no bailment relationship between OAFL and the Respondents. Without an existing bailment relationship, the Respondents could not have obtained a right of immediate possession by the termination of a bailment.

(2) Agency

147 The essence of an agency relationship was correctly identified by the Judge (see the Judgment at [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 ... 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 ... [emphasis added in italics and bold italics]

148 Clearly and self-evidently, the agent itself needs to *consent* to being the agent. The essence of consent between the principal and agent was captured succinctly by Lord Pearson in *Garnac Grain Company Incorporated v H M F Faure & Fairclough Ltd and Others* [1968] AC 1130 at 1137:

> The relationship of principal and agent can only be established *by the consent of the principal* ***and*** *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 ... . *But the consent must have been given* ***by each of them*** *, either expressly or by implication from their words and conduct*. Primarily, one looks to what they said and did at the time of the alleged creation of the agency. Earlier words and conduct may afford evidence of a course of dealing in existence at that time and may be taken into account more generally as historical background. *Later words and conduct may have some bearing, though likely to be less important*. [emphasis added in italics and bold italics]

149 Consent by the agent is indisputably required to form an agency relationship. Even the Respondents' own authority, *Leo Vincent Pola & others v Commonwealth Bank of Australia and others* [1997] FCA 1476, adopted the same position (at pp 12–13 of the unreported judgment):

> In general, no formality is necessary for the appointment of an agent to act on behalf of his principal ... . It is only necessary that the principal ***and*** agent consent to the relationship ... If the facts fairly disclose that one party is acting for or representing another by the latter's authority, the agency exists: *Fields* at 103. ... With respect to the agent's consent, if the principal requests another to act for him with respect to a matter and indicates that the other is to act without further communication ***and the other consents so to act*** , the relation of principal and agent exists. If the other does the requested act, it is inferred that he acts as agent unless the circumstances dictate otherwise ... [emphasis added by the Respondents

underlined; emphasis added in bold italics]

150 The Judge justified his finding that OAFL had consented to becoming an agent by reference to the phrase "for and on behalf of the [Plaintiffs]" in the Amended Clause 4.02(2). With respect, we are unable to agree. Even if the phrase can be strained to mean consent, the basic fact is that OAFL was not even a party to the relevant agreements. The first SPA and the fourth Supplemental were entered into between the Plaintiffs and Antig. Any agency relationship between OAFL and the Respondents must therefore be found outside of the relevant agreements. The Respondents have not referred to any such evidence of an agency relationship.

151 Mr Gabriel pointed to three "facts" which he argued is evidence in support of Alwie's admission that OAFL knew that the MEGL shares "rightfully belonged" to the Plaintiffs:

(a) In para 20 of the fifth and sixth Defendants' Amended Defence, Alwie stated that:

> [s]ave that it is admitted the Sale Price was agreed to be paid by Antig to the Plaintiffs partly by way of cash, and partly by way of the issuance and allotment of shares in MEGL, Paragraph 17 of the SOC is not admitted.

(b) A Letter of Statement dated 15 June 2006 purportedly signed by Alwie in which he undertakes to return the OAFL Payments to Tjong ("15 June 2006 Letter").

(c) Alwie's purported admission during cross-examination that the OAFL Payments were payable to the Plaintiffs.

152 First, Alwie's averment in the fifth and sixth Defendants' Amended Defence is not unequivocal evidence that OAFL had agreed to receive the MEGL shares as an *agent* of the Respondents. All it shows is that the full purchase price of US$18m was to be paid by Antig to the Plaintiffs partly in cash and partly in shares. This is in fact consistent with the interpretation that OAFL is a third party beneficiary of part of the purchase price.

153 Second, even if the 15 June 2006 Letter is authentic (which Alwie denies), it again does not support an inference that OAFL had consented to acting as the Respondents' agent. At the most, Alwie had given an undertaking to return the OAFL Payments. The 15 June 2006 Letter provided: [note: 15]

> I, the undersigned:
>
> [Alwie Handoyo]
>
> ...
>
> Hereby certify that I am the owner of OAFL (Overseas Allaince Financial Ltd,) and undertake that I will return the monies and shares received from Magnus Energy Group Ltd, and Antig Investments Pte., Ltd, to Tjong Very Sumito (in his personal capacity and as attorney of Iman Haryanto and Herman Aries Tintowo ...)
>
> This matter agree with Richard Chan (*sic*).
>
> ...

This is far from an admission that *OAFL* acted as the Respondents' agent in receiving the OAFL Payments (which include the MEGL shares) under the first SPA. If the 15 June 2006 Letter is genuine, the Respondents are certainly entitled to sue Alwie for breach of an undertaking, as they have done against Chan in respect of the Guarantee. However, that is a separate matter altogether.

154 Third, Alwie's purported admission in cross-examination does not evince an agency relationship: [note: 16]

> Court: In paragraph 20 [of the fifth and sixth Defendant's Amended Defence], you have admitted that the sale price was agreed to be paid by Antig to the plaintiffs.
>
> A: Yes.
>
> Court: By way of cash and by way of issuance of shares.
>
> A: Yes.
>
> Court: Right? So Mr Gabriel is saying, on the face of this pleading, you have admitted that both the cash and shares is actually payable to the plaintiffs.
>
> A: Oh.
>
> Court: That is what you have admitted, you know.
>
> A: Yeah.
>
> Court: Do you understand?
>
> A: Yeah.

155 Alwie's answers must be examined in context. First, the line of questions asked during the cross-examination related to the same paragraph in the fifth and sixth Defendants' Amended Defence (see [151(a)] above). For the reason given above, the Respondents' construction of that averment is not tenable. Be that as it may, while Alwie appeared to have conceded that the *pleadings* did not reveal any reason why OAFL was entitled to the OAFL Payments apart from the fact that the first SPA provided for it, it is not evidence that OAFL acted as the Respondents' agent in receiving the OAFL Payments. There is a missing link. Even if OAFL knew that it was not entitled to keep the OAFL Payments or was obliged to account to the Respondents because it knew that the OAFL Payments rightfully belonged to the Respondents (which OAFL denies anyway), this is insufficient to establish an agency relationship. Something else is required to show that OAFL had *agreed* to be an agent. Once again, it is to be recalled that the phrase "for and on behalf" in the Amended Clause 4.02(2) has no real legal effect *vis-à-vis* OAFL, a non-party to the first SPA. OAFL may be liable in trust (which ground was dismissed and not appealed against) or other causes of action, but that is not the basis upon which an agency relationship may be implied.

156 In the end, there is just no evidence that OAFL had consented to receive the MEGL shares as agents for the Respondents. Given that Alwie's case has consistently been that OAFL was entitled to receive the money as part of the overall scheme (see [73]–[87] above), we are not surprised by the Respondents' inability to produce evidence of consent by OAFL, or even Alwie, to receive the MEGL shares as the Respondents' agents. The Respondents therefore do not have a claim in conversion.

**Analysis for CA 83**

***The Guarantee***

*Burden and standard of proof for allegations of forgery*

157 In the course of oral arguments, there was some uncertainty as to which party bore the burden of proving fabrication, and to a larger extent, what the standard of proof required was. It is trite that the legal burden to prove an allegation lies on the party asserting the allegation. The true meaning of the rule is that where a given allegation forms an essential part of a party's case, the proof of the allegation rests on him: Hodge M Malek, *Phipson on Evidence* (Sweet & Maxwell, 17th Ed, 2010) at para 6-06. In the context of forgery specifically, this court accepted in *Yogambikai Nagarajah v Indian Overseas Bank and another appeal* [1996] 2 SLR(R) 774 ("*Yogambikai*") at [39] that the burden of proof is on the party alleging forgery of a particular document. In the present case, it is Chan who has alleged that the Guarantee is a fabrication. The legal burden is therefore on him to prove that allegation.

158 The position on the standard of proof required to establish fraud or forgery appears to be fraught with some uncertainty: see Chen Siyuan, "The Power of the Court to Change an Order for the Division of Matrimonial Asserts: *AYM v AYL* [2012] SGCA 68" *SLW Commentary*, Issue 1/Dec 2012 at p 5. In *Yogambikai*, this court held (at [44]) that the "burden of proof [is] more onerous than the ordinary civil standard where what is alleged is as serious and grave as fraud or forgery". However, in *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR(R) 263 ("*Tang Yoke Kheng*"), this court rejected (at [14]) that there is a third burden of proof apart from the civil burden of balance of probabilities and the criminal burden of beyond reasonable doubt. It held that even where fraud is alleged in a civil case, the civil standard of proof applies, albeit where the allegation of fraud is serious, the party alleging the fraud has to do more to establish his case. In the light of this uncertainty in previous decisions of this court, it may be helpful to clarify the position on the requisite standard of proof for allegations of fraud.

159 The approach in *Tang Yoke Kheng* is to be preferred to *Yogambikai*, even if the two decisions are not entirely dissimilar. The standard of proof that applies in *all* civil proceedings is the balance of probabilities. There is no third legal burden of proof that straddles the civil and criminal burdens. In this regard, we draw attention to *Chua Kwee Chen and others (as Westlake Eating House) and another v Koh Choon Chin* [2006] 3 SLR(R) 469, a High Court decision by Phang J (as he then was) in which this issue *viz*, the standard of proof in cases of fraud, was thoroughly examined. After a comprehensive survey of judicial decisions from Singapore, England and Malaysia – including *Tang Yoke Kheng* and *Yogambikai* – Phang J concluded (at [39]):

> In summary, the standard of proof in civil proceedings where fraud and/or dishonesty is alleged is the civil standard of proof on a balance of probabilities. However, where such an allegation is made (as in the present proceedings), *more* evidence is required than would be the situation in an ordinary civil case. Such an inquiry lies, therefore and in the final analysis, in the sphere of practical application (rather than theoretical speculation). [emphasis in original]

160 We agree with Phang J's analysis and conclusion. There is little more to add except to quote the following well-known observations of Lord Hoffmann in *Secretary of State for the Home Department v Rehman (Consolidated Appeals)* [2003] AC 153 where he stated (at [55]):

> The civil standard of proof *always means more likely than not*. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than

> to be satisfied to the same standard of probability that it was an Alsatian. *On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner.* ***But the question is always whether the tribunal thinks it more probable than not*** . [emphasis added in italics and bold italics]

And in *In re B (Children) (HL(E))* [2009] 1 AC 11 where he stated (at [2]):

> If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. *There is no room for a finding that it might have happened*. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened. [emphasis added]

161 To summarise, the burden lies on the party asserting fraud to prove on the balance of probabilities that the fraud has taken place. Either there is fraud or there is not; there is no room for a finding that it *might* have happened. Because of the serious implications of fraud, cogent evidence is required before a court will be satisfied that the allegation of fraud is established.

*Whether the Guarantee is authentic or fabricated*

162 With that in mind, we come to the key question relating to the Guarantee Issue *viz*, whether the Judge erred in rejecting the Superimposition Argument suggested by Chan's expert, Ms Novotny. Ms Novotny had concluded in Novotny's first Report that although Chan's signature in the Guarantee was probably genuine, there was evidence supportive of a proposition that the Guarantee was not a genuine document, *ie*, that the signature was superimposed with the text separately.

163 The Judge rejected the Superimposition Argument on many grounds. First, he found that the Superimposition Argument was not specifically pleaded. It appears from the Judgment that the Judge had placed considerable reliance on Chan's testimony during cross-examination where he appeared to have said that his case on the fabrication of the Guarantee was that the signature was not his. Second, the Judge did not find the conclusion in the Novotny's first Report convincing, in part because Ms Novotny had arrived at her conclusions without the benefit of inspecting the original copy of the Guarantee. Third, the Judge also denied an application by Chan's counsel at trial to admit Novotny's second Report. This supplementary report, which Ms Novotny produced after inspecting the original Guarantee, confirmed her findings in Novotny's first Report.

164 With respect, we disagree with the Judge's reasons for rejecting the Superimposition Argument. We will address his reasons *seriatim*.

(1) Superimposition argument not specifically pleaded

165 First, it bears mentioning that Chan had pleaded in his Defence (Amendment No 3) that he "did not execute any purported written guarantee and ... that the purported written guarantee is fabricated". [note: 17] The Judge interpreted "fabrication" as referring to a scenario where the signature was not Chan's as opposed to the Superimposition Argument. He based this on Mr Gabriel's cross-examination of Chan. We set out the testimony relied on by the Judge (at [201] of the Judgment) in full: [note: 18]

Mr Gabriel: So I will take it that your case, as you have said earlier is this; because it is not your signature, that document is a fabrication. Yes?

Chan: Because I did not sign the document, that signature is not mine.

Q: Sir, answer my question first. Because that signature is not yours, that document is a fabrication. Am I right?

A: Yes.

166 This, however, must be read in the context of an exchange that took place earlier [note: 19] :

Mr Gabriel: So your case is, the signature is not your signature. Consequently, it's a fabrication, as I see your affidavit. Am I right?

Chan: Yes.

...

A: Sure. Understand sir. Definitely the document is fabricated, *but to what extent it is fabricated*, ***whether it is a cut and paste on my signature from another document that was torn apiece*** , that's the reason why of a different funny kind of slip; two, another way I don't know. That's why there is this expert coming down to give the statement on this, to give it as an expert witness.

Court: I don't really understand that evidence, perhaps you can explain to me. So are you now saying it is possible it is your signature?

A: It is possible. Because the signature looks very like mine.

Court: I am no expert, but it looks like yours, but I'm sure your expert will enlighten us even more.

Mr Gabriel: Mr Chan, as I see your case, as I explained to you, your evidence in AEIC, all you say is ...

...

... because it is not your signature, that document is a fabrication. Am I right?

A: According to my counsel, yes. I had let the witness -- let the expert, you know, come and examine it then.

Q: ... [F]orget about the expert at the moment. So it is also your position, because it is not your signature, that document is a fabrication. Am I right?

A: I did not sign that document for sure.

Court: You see, Mr Chan, that kind of answer is not very helpful. Mr Gabriel and this court wants to know your final answer on the signature, that's all.

A: Sir, the signature looks like mine but I did not sign that document.

Court: *So that would mean that* ***someone took your genuine signature and superimposed it on a separate document. Is that your case?***

A: ***Possible, sir*** .

[emphasis added in italics and bold italics]

167 A series of questions later led to the excerpt (at [165] above) relied upon by the Judge and the Respondents now to say that the Superimposition Argument was not part of Chan's case. The transcript makes it clear that Chan had clarified at least twice that *at least one facet* of his fabrication defence was the Superimposition Argument. The Judge therefore erred in relying on only part of Chan's testimony in concluding that the Superimposition Argument was not part of Chan's case.

168 We come back to the fundamental purpose of pleadings. Pleadings are important in defining the issues and informing the opponent in advance of the case he has to meet, so that he may take steps to deal with the case, for example, by presenting the relevant law and evidence: *Farrell (formerly McLaughlin) v Secretary of State for Defence* [1980] 1 WLR 172 at 180; *Nirumalan K Pillay and others v A Balakrishnan and others* [1996] 2 SLR(R) 650. We note that shortly after the Plaintiffs adduced the Guarantee in the proceedings in late June 2011, Chan responded promptly in early July 2011 by way of an affidavit stating that although the Guarantee appears to bear his signature, the authenticity of the signature is questionable. In the same affidavit, he stated that his solicitors had requested to inspect the original but the Plaintiffs had not produced it. Thus, from an early stage, the Plaintiffs were put on notice that Chan disputed the authenticity of the Guarantee, including its contents. The Plaintiffs knew the case he had to meet, and met it head on. Indeed, it did not appear to us from Mr Gabriel's written and oral submissions at both the trial below and in the appeal that the Respondents were caught out by the Superimposition Argument, or to the extent that they had been, if at all, that they were unable to and did not take steps to deal with the Superimposition Argument. The extensive cross-examination of Ms Novotny and the substantive submissions on the Superimposition Argument both at the trial below and in the appeal suggest to us that Mr Gabriel's argument on the insufficient particularity of pleadings at this stage is purely technical. We therefore do not accept that the Superimposition Argument cannot be considered because it was not specifically pleaded.

(2) Novotny's first report

169 In our view, the Judge's reason for rejecting the conclusion in Novotny's first Report is problematic. Before we proceed, it is helpful to take a close look at the Guarantee:

Richard Chan
Director

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

170 Ms Novotny found that the signature and the text in the Guarantee were horizontally *and* vertically misaligned, and that this was evidence of at least two separate rounds of printing. She also found that the text after the signature was in regular print while the documentary text was in bold

print, and that such a difference was unconventional. The grammatical mistakes in the wording of the Guarantee are also glaring.

171 Notwithstanding the explanations given by Ms Novotny, the Judge held that her observations on the misalignments were not reliable because they were premised on a reproduced copy of the Guarantee. It is unclear to us why the mere fact that the report was premised on a copy of the Guarantee is sufficient to negative Ms Novotny's explanations and conclusions. The Judge was right to note that Ms Novotny admitted in the report that the value of her evidence is "limited by the reproduction nature of the disputed document" (see the Judgment at [202]), but he may have placed undue emphasis on that qualification. That qualifier was part of a longer sentence which, when read in its entirely, suggests that it was an explanation by Ms Novotny for why she was precluded from conducting a microscope examination to "determine with certainty" the finer details of the structure and dynamic qualities of the signature and the nature of the printed text on the original document.

(3) Novotny's second report

172 The Judge's reason for dismissing the application to admit Novotny's second Report was that the admission of the report at that late stage in the middle of the trial would prejudice the Plaintiffs as they had already closed their case by that time and would not have time to consult their own experts on the points raised. We disagree. The Plaintiffs' case did not rest on any expert evidence; indeed they did not present an expert of their own to contest Novotny's first Report. Further, Ms Novotny had not taken the stand yet at that time. Any questions which the Plaintiffs' counsel intended to ask her in relation to her first report would have been equally applicable to the supplementary report.

173 The Respondents also contended that Novotny's second Report was not affirmed on affidavit as required by O 40A r 3 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court"). Referring to *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*"), Mr Gabriel argued that Chan's failure to ensure that Novotny's second Report complied with O 40A requirements should result in the rejection of the report. First, Mr Gabriel's interpretation of *Pacific Recreation* is misconceived. While the requirements in O 40A are important, this court concluded (at [89]) that "[n]on-compliance with these requirements *may* result in the expert's opinion being accorded *little or no evidentiary weight* as well as in adverse cost consequences for the party who engaged that expert" [emphasis added]. Non-compliance, at best, goes to weight and does not automatically render the evidence inadmissible. Second, O 2 r 1(2) makes it clear that the court may make such order dealing with the proceedings generally "as it thinks fit" notwithstanding an instance of non-compliance with the Rules of Court. Lastly, the court also has inherent powers, as recognised under O 92 r 4, to make any order as may be necessary to prevent injustice, notwithstanding any contrary provision in the Rules of Court. Thus, the breach of the Rules of Court *per se* is not a bar to the admissibility of Novotny's second Report.

174 The Respondents then contended that the issue of the admissibility of the Novotny's second Report is *res judicata*. No notice of appeal was filed within the one month time limit period against the Judge's decision not to admit the evidence. The short answer is that CA 83 is an appeal against the Judge's decision in Suit 89, including his decision at trial not to admit Novotny's second Report. In other words, the Court of Appeal now is entitled to hold, as part of CA 83, that the Judge had erred in refusing to admit Novotny's second Report. It would in fact have been anomalous for Chan to appeal, in the middle of trial, against the Judge's decision not to admit the evidence. Had he done so, the trial would have had to be stayed pending the appeal. For all practical purposes, that was hardly an option open to Chan. In any event, the court has the power under s 37(4) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) to receive further evidence in a Court of Appeal hearing on

special grounds. The test for whether there are special grounds for admitting further evidence is that established in the famous and oft cited case of *Ladd v Marshall* [1954] 1 WLR 1489. On the facts, Novotny's second Report has an important – even decisive – influence on the case, and there is no reason to doubt its credibility. It should therefore be admitted as part of the evidential record for the purposes of these appeals.

175 The significance of Novotny's second Report lies in its corroboration of Ms Novotny's earlier report. Ms Novotny not only confirmed her findings on the misalignment and irregular print, she also strengthened her conclusions from "evidence supportive" of fabrication to "*strong* evidence in support" [emphasis added] of fabrication. Ms Novotny's conclusions in her two reports provide sufficient and compelling evidence *and* analysis to support her conclusion that the signature and text had been superimposed. In contrast, the Respondents did not even call an expert evidence to verify the authenticity of the Guarantee or to refute the Superimposition Argument. In the circumstances, even if we were minded not to admit Novotny's second Report, Ms Novotny's conclusions in her first report remain uncontradicted. We would have overturned the Judge's finding on the Superimposition Argument on this ground alone.

(4) Other circumstances

176 Leaving aside the technicalities relating to physical properties of the Guarantee, we are unable to see any commercial logic or reason which could have prompted Chan into signing the Guarantee. While Chan held senior positions in both Antig and MEGL and we agree with Mr Ang that directors do sometimes give personal guarantees in respect of a transaction which their company is involved in, there must have been compelling circumstances for Chan to give the Guarantee.

177 In the first place, there is no reason for Chan, an employee of Antig, to give a personal guarantee for a deal which he is not a party to and, as far as the record is concerned, which he does not derive any direct gain from. Second, Antig's obligations under the Amended Clause 4.02(2) are unambiguous: it is obliged to make total cash and share payments of US$12m to Aventi and OAFL. As long as Antig fulfils its obligations (which it had every reason to), and Aventi and OAFL do not pay the US$12m to Tjong, Chan's liability under the Guarantee would invariably arise. This is so if the Guarantee is, as the Respondents' contended, in the nature of an indemnity. There is no indication that Chan is in control of Aventi and OAFL, or has the power to compel them to pay monies received by them from Antig over to Tjong. The directing minds and wills of Aventi and OAFL are Johanes and Alwie respectively. That being the case, there is no discernible reason for Chan to assume full liability of at least US$12m based on the actions or inactions of two entities which he appears not to have any control over.

178 We also note that Chan would also be liable under the Guarantee if Antig did not fully pay up the US$6m due to Tjong under the Amended Clause 4.02(2). If Tjong is right, Chan would have opened himself up to the possibility of being *solely* liable to Tjong for US$18m, despite not deriving any ostensible benefit from the transaction. We find that hard to believe. By all accounts, including Tjong's, Chan was far more commercially savvy.

179 Last but not least, Tjong's evidence was that the Guarantee was already signed when Tjong went to Chan's office to collect the Guarantee. However, that was on the same day that Tjong had purportedly met Chan to ask for a personal guarantee. On Tjong's own evidence, it was Tjong and not Chan who broached the topic of the Guarantee. If Chan signed the Guarantee *before* meeting Tjong, it could only have been because he had foreseen in advance that Tjong wanted a personal guarantee, and further, that he would not be able to persuade Tjong to back down on his demand. These facts which we have to accept in order to find for Tjong border on the unbelievable.

Considering the surrounding circumstances coupled with the technical analyses of Ms Novotny in the round, we are convinced that the Guarantee was fabricated.

(5) Fabrication by whom

180 Mr Gabriel argued in this appeal that even if the Superimposition Argument is made out, it does not necessarily follow that the Guarantee was fabricated in the sense of being "falsely" created. He suggested that the Guarantee may have been created by Chan and given to Tjong. We reject this argument.

181 First, there is no gainsaying that, on the face of the Guarantee, the formatting and appearance of the Guarantee purporting to give Tjong US$18m is most unusual. The Respondents' argument that Chan performed the superimposition himself implies that Tjong had accepted the Guarantee with all its oddities without raising his suspicions to Chan. He neither questioned Chan about the odd appearance and formatting, *nor* sought legal advice as to the enforceability of the Guarantee. Tjong was an experienced businessman. It is difficult to imagine how he could have accepted such an irregularly written Guarantee, particularly at a time where he admitted that he had started to lose faith in Chan's credibility. Second, as mentioned earlier (see [65] above), Tjong's evidence on why he could only produce the Guarantee after the trial dates for Suit 89 were fixed and not earlier stretches the boundaries of credibility. If the Guarantee was genuinely given to him by Chan, Tjong would have tried all ways and means to produce it as early as possible. At the very least, one would have expected him to have referred to it even if he could not retrieve the original. That was not the case. For the reasons above, we are of the opinion that it is more likely than not that Tjong fabricated the Guarantee by superimposing the signature and the text. The Guarantee is therefore not enforceable against Chan.

***Fraudulent misrepresentation***

*Pleadings*

182 At the outset, we pause to observe that the particulars of the fraudulent misrepresentation claim were somewhat deficient. Since Mr Ang has not taken issue with this, a brief mention of this matter will suffice.

183 Order 18 r 12 of the Rules of Court expressly states that any claim of misrepresentation and fraudulent intent must be supported with particular facts. In the case of misrepresentation, the nature and extent of each alleged misrepresentation must be pleaded: *Newport (Mon.) Slipway Dry Dock and Engineering Company v Paynter* (1886) 34 Ch D 88. Particulars showing, for example, when, where, by whom and to whom the alleged fraudulent misrepresentation was made and whether the same was made orally or in writing must be pleaded: *Seligmann and others v Young* [1884] WN 93.

184 On the facts, the Plaintiffs' particularisation of Chan's alleged fraudulent misrepresentation comprised largely of general averments that Chan had told Tjong that he would only receive the Balance Purchase Price if he sold the Remaining Shares for US$2m to MEGL, Antig or Chan's group: Amended Statement of Claim at paras 38–39. The Plaintiffs' most extensive pleading can be found in the Amended Statement of Claim:

> 116.[Chan] was fully aware that there was the balance of the purchase price for the sale of 72% of the shares in PT Deefu due to the Plaintiffs. [Chan] ... represented to [Tjong] that if [Tjong] sold the Remaining Shares to MEGL / Antig or his group, he would ensure that [Tjong] will be paid the full balance of the purchase price of US$18 million for the sale of 72% of the

shares in PT Deefu. Induced by and acting in reliance on the representation, [Tjong] entered into the two sale and purchase agreements to sell the Remaining Shares. In fact the representation was false in that:

a. [Chan] ... had never intended that [Tjong] was to be paid the full purchase price for the sale of 72% [of] the shares in PT Deefu; and/or

b. The Plaintiffs were never paid the full purchase price of US$18 million ... .

117 [Chan] made the representation fraudulently in that he knew that the representation made was false, or was reckless[,] not caring whether it was true or false, intending that [Tjong] should act in reliance on it. [Tjong] did rely on the said misrepresentation and [has] suffered loss and damage as a result of entering into [the second and third SPAs] to sell the Remaining Shares ... .

Immediately apparent is the absence of crucial particulars such as when, where and how the Representation was made, and what Tjong's response was to the Representation. We would just say that had the point had been pressed, the fraudulent misrepresentation claim might have failed at the threshold stage for want of sufficient particularity of pleadings.

*Inducement*

185 On the merits of the fraudulent misrepresentation claim, even if we are prepared to assume that the Representation was made, and fraudulently so, by Chan, we disagree with the Judge that Tjong was induced by the Representation. We first address the argument by counsel over the requisite level of causality for inducement. Mr Ang contended that in a claim for fraudulent misrepresentation, the misrepresentation must be an "effective cause" for the representee to enter into the contract. In other words, but for the misrepresentation, the representee would not have made the contract. Mr Ang relied on the English Court of Appeal decision of *Assicurazioni Generali SpA v Arab Insurance Group (B.S.C.)* [2002] EWCA Civ 1642 ("*Assicurazioni*") as well as *Chitty on Contracts* vol 1 (Hugh Beale gen ed) (Sweet & Maxwell, 31st Ed, 2012) ("*Chitty on Contracts*") at para 6-038 in support of this submission.

186 We do not accept that Mr Ang's submission reflects or ought to reflect the law in Singapore. The first problem with his submission of the "but for" test is that inquiring what the representee would or would not have done in the absence of the representation misses the point entirely. The issue is not whether the representee was induced by other factors; that is immaterial. As Lord Millett cautioned in *BP Exploration Operating Co Ltd v Chevron Shipping Co* [2003] 1 AC 197 ("*BP Exploration*") at [104], a representee can usually say why he acted as he did, but any answer he could give on what he would have done if the representation had not been made is inevitably more speculative. Therefore, the correct focus should not be on what would have happened without the misrepresentation but on whether the misrepresentation influenced the representee's decision to enter into the contract.

187 Indeed, the law in Singapore has been quite settled on this front. In *JEB Fasteners Ltd v Marks Bloom & Co (a firm)* [1983] 1 All ER 583 ("*JEB Fasteners*"), the English Court of Appeal held (at 589):

> *[A]s long as a misrepresentation plays a real and substantial part*, though not by itself a decisive part, in inducing a plaintiff to act, *it is a cause of his loss and he relies on it*, ***no matter how strong or how many are the other matters which play their part in inducing him to act*** . [emphasis added in italics and bold italics]

188 The above passage in *JEB Fasteners* has been cited with approval by numerous courts in Singapore, including this court in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [23], and more recently, by Andrew Ang J in *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co and others* [2007] 1 SLR(R) 196 at [55]–[56]. Simply put, the representation must have a real and substantial effect on the representee's mind such that it can be said to be *an* inducing cause which led him to act as he did; it need not be *the* inducing case: *BP Exploration* at [105]; *Edgington v Fitzmaurice* (1885) 29 Ch D 459 ("*Edgington*").

189 The test propounded in *Assicurazioni* was rejected by Prof John Cartwright in his treatise, *Misrepresentation, Mistake and Non-Disclosure* (Sweet & Maxwell, 3rd Ed, 2012) ("*Cartwright*") at para 3-54 in favour of the more traditional position described above (at [186]–[187]). As others have suggested, there is indeed a strong policy reason for adopting a standard which is easier for the representee to meet, particularly in the case of fraudulent misrepresentations: see *Cartwright* at para 3-55. In *Ross River Limited and another v Cambridge City Football Club Limited* [2007] EWHC 2115 (Ch), Briggs J (as he then was) held (at [202]):

> In cases of fraudulent misrepresentation a more rigorous rule is applied, sometimes described as being by way of deterrence: see Chitty (op. cit.) at para 6-034. It is not enough for the representor to show that the representee would, even if the representation had not been made, still have entered the contract. It is sufficient for the representee to show that the misrepresentation "was actively present to his mind" (per Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch. D 459 at 483).

The above represents the well-established position in Singapore law and we see no reason to disturb it.

190 Applying this test for inducement to the present facts, on the assumption that the Representation was made, we are unable to agree with the Judge that the Representation was likely to have been *an* inducing cause for Tjong to enter into the second and third SPAs. In coming to his conclusion, the Judge took the position that US$2m for the Remaining Shares was way below value, either by reference to the US$18m purchase price of 72% of PT Deefu, or the AUD$12.64m which Jake and Edwin obtained in reselling the Remaining Shares in 2008. The Judge then inferred that Tjong agreed to sell the Remaining Shares below value precisely because he was induced by the Representation which, if it had been carried out, would have enabled him to recoup US$12m.

191 On the value of the Remaining Shares at the time that they were sold under the second and third SPAs, we agree with Mr Ang that it was incorrect to use either the subsequent resale or the original purchase price as benchmarks. The subsequent resale was part of broader transaction to spin off PT Batubara to MEGL's subsidiary which would then be listed in Australia via an Initial Public Offering (IPO). The value of the IPO was estimated to be S$40m. In these circumstances, there would naturally be a premium for the Remaining Shares. The US$18m purchase price under the first SPA is also not a good indicator of the value of the Remaining Shares. The price paid by Antig was for majority control of PT Deefu and by extension, PT Batubara. The Remaining Shares, on the other hand, represented minority shareholdings in both these companies. A discount must therefore be factored in. While we can accept that US$2m is nevertheless on the lower end of the spectrum, there is no objective evidence on the value of the Remaining Shares in July 2007 when they were sold under the second and third SPAs. The burden is on Tjong to show that the Remaining Shares *could* have commanded a higher price. Moreover, as Mr Ang rightly pointed out, there is no evidence that Tjong was looking for and would have held out for a higher price.

192 The facts are simply too bare for us to be satisfied that the alleged Representation induced

Tjong to enter into the second and third SPAs. Part of this is – as we have alluded to earlier – due to the lack of particulars with which Tjong has pleaded his fraudulent misrepresentation claim. His case essentially is that his entering into the second and third SPAs is evidence of inducement; *res ipsa loquitur*. That cannot be. Although the test for inducement only requires the representee to show that the misrepresentation was *an* (and not *the*) inducing cause, the representee still bears the burden of proving that the misrepresentation was "actively present to his mind": *Edgington* at 483.

193 Critically, we are none the wiser as to what transpired *after* the Representation was purportedly made and before the entering of the second and third SPAs. Symptomatic of the defects in his pleadings, Tjong's case on appeal was shorn of any reference to evidence on the record which might suggest that the Representation was "actively present to his mind". Stating that the Representation was made and pointing to the fact that the second and third SPAs were entered into does not discharge this burden. It might discharge the burden if it is so blatantly obvious that there could not have been any other reason for Tjong to have entered into the second and third SPAs apart from the Representation. That is not the case here. US$2m is not a decidedly low price considering that the total cost price of PT Batubara was only US$1.2m. Moreover, we note, parenthetically, that during cross-examination, Tjong candidly admitted that if he did not sell the Remaining Shares, Chan might cause more shares to be issued in PT Deefu thereby diluting the value of Tjong's remaining stake.

194 In these circumstances, we are unable to affirm the Judge's decision that Tjong was induced by the Representation (even if it was made).

**CONCLUSION**

195 CA 82 is allowed in part as we rejected Alwie's appeal against the Judge's findings on *locus standi* and piercing of the corporate veil. Similarly, although we are persuaded by Mr Ang's submissions canvassed in respect of CA 83, the Notice of Appeal for CA 83 contained several more grounds of appeal than were actually argued before us. In these circumstances, we are minded to consider CA 83 as only allowed in part. Accordingly, although Chan and Alwie shall be entitled to the costs below, they are only entitled to 75% of the costs of the appeals. The usual consequential orders are to follow.

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[note: 1] Joint RA Vol III(2) at pp 211–212.

[note: 2] Joint RA Vol V(1) at p 137.

[note: 3] CA 82 Appellant's Core Bundle Vol II at p 250.

[note: 4] Joint RA Vol III(2) at pp 225–226.

[note: 5] Joint RA Vol III(3) at p 221.

[note: 6] Joint RA Vol III(3) at pp 224–225.

[note: 7] Joint RA Vol III(3) at p 226.

[note: 8] CA 83 Appellant's Core Bundle Vol II at pp 64–66.

[note: 9] CA 82 Appellant's Core Bundle Vol II at p 250.

[note: 10] Joint RA Vol III(20) at pp 209–210

[note: 11] CA 82 Respondents' Supplementary Core Bundle at pp 83–83A.

[note: 12] Statement of Claim (Amendment No 2) at paras 81–82.

[note: 13] Joint RA Vol III(21) at pp 51–52.

[note: 14] Joint RA Vol III(23) at p 101.

[note: 15] CA 82 Respondents' Supplementary Core Bundle at p 87.

[note: 16] CA 82 Respondents' Supplementary Core Bundle at p 86.

[note: 17] First Defendant's Defence (Amendment No 3) at para 41A.

[note: 18] Joint RA Vol III(20) at p 30.

[note: 19] Joint RA Vol III(20) at pp 27–28