Columbia Asia Healthcare Sdn Bhd and another *v* Hong Hin Kit Edward and another and other suits
[2014] SGHC 65

Case Number : Suits No 861 and 862 of 2008 and 964 of 2009

Decision Date : 10 April 2014

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Harish Kumar and Jonathan Toh (Rajah & Tann LLP) and Troy Yeo (Troy Yeo & Co) for the plaintiffs in Suit 964 and for the defendants in Suits 861 and 862; Niru Pillai and Liew Teck Huat (Global Law Alliance LLC) for the defendants in Suit 964 and for the third parties in Suits 861 and 862; Michael Khoo SC and Ong Lee Woei (Michael Khoo & Partners) for the plaintiffs in Suits 861 and 862.

Parties : Columbia Asia Healthcare Sdn Bhd — P T Nusautama Medicalindo — Edward Hong Hin Kit — Albert Hong Hin Kay — Thermal Industries & Supplies (Pte) Ltd

Contract – Breach

Contract – Remedies – Damages

Contract – Privity of Contract – Contracts (Rights of Third Parties) Act

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 68 of 2014 was dismissed and the appeal in Civil Appeal No 69 of 2014 was allowed by the Court of Appeal on 22 January 2015. See [2015] SGCA 3.]

The supplementary judgment to this main judgment is reported at [2014] 3 SLR 164.]

10 April 2014 Judgment reserved.

Woo Bih Li J:

1 There are three sets of proceedings stemming from the purchase of Gleni International Hospital ("the Hospital") erected on No 2A Jalan Listik, Medan, Sumatera Utera, Indonesia ("the Land"). The purchaser was Columbia Asia Healthcare Sdn Bhd ("Columbia"). The vendors ("the Vendors") were Mr Edward Hong Hin Kit ("Edward Hong"), Mr Albert Hong Hin Kay ("Albert Hong") (collectively, "the Hongs") and Mr Boelio Muliadi ("Boelio Muliadi").

2 The purchase of the Hospital and the Land was structured in the form of a share purchase. The Hospital and the Land were owned by PT Nusautama Medicalindo ("PTNM"). PTNM was in turn wholly-owned by Universal Medicare Pte Ltd ("UMPL"). The Vendors held all the shares in UMPL. Columbia agreed to purchase 99% of the shares in UMPL ("the Sale Shares") from the Vendors pursuant to a share sale agreement ("the SSA") dated 24 December 2007. Columbia subsequently acquired the remaining 1% of UMPL's shares pursuant to an option also dated 24 December 2007 ("the Call Option Agreement").

3 At the time of completion of the SSA, a Singapore company, Medical Equipment Credit Pte Ltd ("MEC"), was registered as the chargee of a charge on the title certificate to the Land ("the MEC

Charge"). MEC was owned by DVI Inc ("DVI"), an American corporation.

The proceedings

4 The three sets of proceedings are Suits No 861 and 862 of 2008 ("Suit 861" and "Suit 862" respectively) and Suit No 964 of 2009 ("Suit 964"). They were consolidated and heard together.

Suits 861 and 862

5 Suits 861 and 862 were brought by Thermal Industries & Supplies (Pte) Ltd ("Thermal Industries") and Thermal International (S) Pte Ltd ("Thermal International") (collectively, "the Thermal Companies") respectively against PTNM on 19 November 2008. The Thermal Companies are Singapore companies involved in the provision of medical supplies and equipment to hospitals and medical facilities. The Thermal Companies are controlled by Edward Hong, who is a director and substantial shareholder in both companies. These are a breakdown of the claims made by the Thermal Companies in Suits 861 and 862:

(a) In Suit 861, Thermal Industries claimed from PTNM the sums of S$262,934.48 and S$10,000. The former was the balance of monies advanced by Thermal Industries as a loan to PTNM; [note: 1] and the latter was for four second-hand servers sold by Thermal Industries to PTNM. [note: 2]

(b) In Suit 862, Thermal International claimed from PTNM the sums of S$393,399.70, S$3,320 and US$9,763.00. The first was the balance for a Magnetic Resonance Imaging ("MRI") machine sold by Thermal International to PTNM. The latter two were for various supplies provided by Thermal International to PTNM.

6 PTNM disputed these claims. Columbia applied successfully to be joined as a defendant in Suits 861 and 862. Should PTNM be found liable in Suits 861 and 862, PTNM and Columbia brought third-party proceedings against the Hongs for indemnities provided by them as vendors under the SSA.

7 In Suit 861, PTNM also counterclaimed against Thermal Industries for damages to be assessed for the supply of allegedly defective second-hand servers.

8 In Suit 862, both PTNM and Columbia counterclaimed against Thermal International the sum of S$144,046.03 as payment mistakenly made by PTNM to Thermal International for a Philips angiography machine.

Suit 964

9 Suit 964 was filed on 11 November 2009, more than a year after Suits 861 and 862 were commenced. The plaintiffs, Columbia and PTNM, claimed against the Hongs for alleged breaches of the SSA. The claims in Suit 964 sought, amongst others:

(a) An order for damages to be assessed for receiving an encumbered title to the Land because of the existence of the MEC Charge and/or costs, including legal costs, of taking the necessary measures to remove the MEC Charge on the Land so as to obtain a good and marketable title to the Land.

(b) A declaration that the Hongs are liable to indemnify Columbia/PTNM for any claim by DVI in relation to the transfer of shares held by DVI in PTNM ("the DVI Shares") to Albert Hong,

including all costs of defending any such claim.

(c) A declaration that the Hongs are liable to indemnify Columbia and/or PTNM in relation to actual and potential liabilities as a result of the Vendors' breaches of various warranties given in the SSA (principally relating to the under-declaration and under-payment of tax).

(d) An order for damages to be assessed for over-payment for the Sale Shares and/or the diminution in value of PTNM and/or the Sale Shares as a result of the inflation of PTNM's 2007 revenue figures.

10 The Hongs disputed the claims in Suit 964. They also counterclaimed against both Columbia and PTNM damages for abuse of process and conspiracy with the predominant purpose of injuring the Hongs, by seeking to extort a favourable outcome in Suit 964 and Suits 861 and 862. The damage allegedly suffered by the Hongs' includes loss of business and personal reputation.

11 At the outset, I should say that the statement of claim in Suit 964 did not state why PTNM is a co-plaintiff with Columbia. PTNM was not a party to the SSA. The warranties given by the Vendors under the SSA were given to Columbia. Neither did the statement of claim assert any right of PTNM to rely on the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) ("the CRTPA") to enforce the terms of the SSA, unlike the third-party claims made by PTNM (and Columbia) against the Hongs in Suits 861 and 862. In those two suits, PTNM claimed that various warranties given by the Vendors in the SSA purported to confer a benefit on it (PTNM), and that it was entitled to enforce those warranties against the Hongs by virtue of s 2 of the CRTPA. Coming back to Suit 964, PTNM's only reliance on the CRTPA was in para 22(b) of its defence to counterclaim. I do not think such a plea is appropriate. It should be in the statement of claim. In any event, I am not persuaded on the merits that PTNM is entitled to rely on the CRTPA to enforce the warranties in the SSA. I will say more about this later.

12 Accordingly, I am of the view that PTNM has not been correctly included as a co-plaintiff in Suit 964. Neither is it entitled to rely on the CRTPA to make a claim against the Hongs in Suits 861 and 862 for breaches of warranties. Henceforth, I shall refer only to Columbia as the plaintiff in Suit 964 and Columbia as the defendant making a claim against the Hongs in Suits 861 and 862.

13 The Hongs argued that Columbia's claims were not made in good faith. They relied on the fact that Columbia's claim in Suit 964 was against only the Hongs, even though Boelio Muliadi was also a named vendor in the SSA, and had also given the same warranties as the Hongs. This argument is untenable. It is up to Columbia to decide who it wishes to sue. The fact that it decided not to sue Boelio Muliadi was neutral. Indeed, one might argue that it made sense not to sue Boelio Muliadi, as there is no evidence as to whether he is likely to have assets in Singapore, as opposed to the Hongs, who assert that they are "prominent Singaporeans with substantial reputations in Singapore and internationally". [note: 3]

14 This brings me to the next point, which can be dealt with quickly. I refer to the Hongs' counterclaim in Suit 964 for damages for abuse of process and conspiracy. I agree with Columbia that this counterclaim is without legal basis. If Columbia's claims in Suit 964 are invalid, they will be dismissed. The claims cannot, in and of themselves, give rise to the counterclaim brought by the Hongs. Otherwise, every claim will be met by such a counterclaim. The absence of evidence and closing submissions from the Hongs to support their counterclaim reinforces the point that the Hongs were never serious about their counterclaim. It should never have been made.

Issues before this court

15 The main disputes between the parties lay in the claims made in Suit 964. I will thus address the issues raised in that suit first.

16 There are four main issues in Suit 964:

(a) The first main issue is whether the Hongs were in breach of the terms of the SSA that the Land would be free from encumbrances (on the date of completion of the SSA), and that Columbia would have good and marketable title to the Land, because the MEC Charge constituted an encumbrance on the Land ("the Encumbrance Issue"). If so, the sub-issue is whether Columbia is estopped or otherwise precluded from alleging this breach. If not, the consequential issue is the relief which Columbia is entitled to.

(b) The second main issue is whether the Hongs are liable under the SSA to indemnify Columbia against claims made by DVI, in relation to the transfer of the DVI Shares to Albert Hong, including costs of defending any such claim ("the DVI Issue"). If so, the consequential issue is whether the court should grant a declaration to that effect.

(c) The third main issue is whether the Hongs have breached the SSA due to PTNM's alleged improper book-keeping, and under-declaration and under-payment of tax ("the Tax Exposure Issue"). The sub-issue is whether a provision of the SSA should be expunged or rectified. If not, and if the Hongs are in breach of the SSA on the third main issue, the consequential issue is the relief which Columbia is entitled to.

(d) The fourth main issue is whether the Hongs have breached the SSA by inflating revenue figures because of under-declaration and under-payment of tax ("the Inflated Revenue Issue"). If so, the consequential issue is the relief which Columbia is entitled to. Columbia alleged that it had determined the actual purchase price for the Sale Shares by applying Earnings before Interest, Taxes, Depreciation and Amortisation ("EBITDA") with an appropriate multiplier. Hence Columbia claimed a diminution of the actual purchase price based on a similar formula.

17 The following issues arise for determination in Suit 861 as between Thermal Industries and PTNM:

(a) Whether Thermal Industries is entitled to S$262,934.48, the alleged balance of sums paid by Thermal Industries to MEC on PTNM's behalf.

(b) Whether the servers sold by Thermal Industries to PTNM were defective second-hand goods which were unusable from the time they were delivered to PTNM.

If Thermal Industries' claim for S$262,934.48 succeeds, the following issues arise for determination as between Columbia and the Hongs, who are third parties in Suit 861:

(c) Whether Columbia has standing to bring a claim against the Hongs for an indemnity for the S$262,934.48.

(d) If so, whether s 2.1.24 of the SSA should be expunged or rectified so that the definition of "Liabilities" under s 2.1.24 excludes debts owing by PTNM to the Thermal Companies such that the Hongs are not liable for such debts.

(e) If s 2.1.24 of the SSA is not expunged or rectified, whether the debt of S$262,934.48 falls under the definition of "Liabilities" in s 2.1.24 for which the Hongs have agreed to indemnify

Columbia.

18 The following issues arise for determination in Suit 862:

(a) Whether PTNM is liable to pay Thermal International the sums of S$393,399.70, S$3,320 and US$9,763.00.

(b) Whether Columbia has standing to bring a claim against the Hongs for an indemnity for the sums claimed against PTNM by Thermal International.

(c) If so, whether s 2.1.24 of the SSA should be expunged or rectified to exclude debts owed by PTNM to the Thermal companies so that the definition of "Liabilities" under s 2.1.24 excludes debts owing by PTNM to the Thermal companies and, consequently, the Hongs are not liable for such debts.

(d) If s 2.1.24 of the SSA is not expunged or rectified, whether the sums of S$393,399.70, S$3,320 and US$9,763.00 fall under the definition of "Liabilities" in s 2.1.24 for which the Hongs have agreed to indemnify Columbia.

(e) Finally, in respect of the counterclaim, whether PTNM mistakenly paid S$144,046.03 to Thermal International for a Philips angiography machine.

The parties and witnesses

19 Columbia is a Malaysia-based company in the business of developing and operating medical facilities across Asia. Pursuant to the SSA and the Call Option Agreement, Columbia acquired 100% of the issued share capital of UMPL, a company incorporated in Singapore. PTNM is an Indonesian company. Its primary asset is the Land and the Hospital in Medan, and its primary business is the operation of the Hospital. I will first set out the witnesses that were called to give evidence by the respective parties during the trial. The following factual witnesses testified on behalf of Columbia during the trial:

(a) Rick Evans, the Chairman of the Columbia group of companies, which Columbia and now PTNM are part of. Rick Evans was the person chiefly representing Columbia in the negotiations leading up to the SSA;

(b) Prem Abraham, the Chief Financial Officer (South East Asia) of the Columbia group of companies, who gave evidence on Columbia's due diligence exercise and the financial aspects of the share sale transaction;

(c) Alan Lim, a partner of a Malaysian law firm, Tengku Mohamed & Alan Lim ("TMAL"), who acted for Columbia during negotiation of the SSA;

20 Two expert witnesses also gave evidence for Columbia and PTNM, namely:

(a) Roy Tedja, a partner of an Indonesian tax-consulting firm JL Tax & Customs Advisory, who gave expert evidence mainly in relation to PTNM's alleged under-declaration and under-payment of taxes and inflation of revenue; and

(b) James Searby, Managing Director of the Singapore office of FTI Consulting, an expert services firm specialising in litigation support and valuation. He gave evidence on how the diminution in the value of the Land and the Sale Shares ought to be computed.

21 Prior to the completion of the SSA, the shares in UMPL were held by the Vendors in the following percentages: 12.5% by Edward Hong, 70% by Albert Hong and 17.5% by Boelio Muliadi. Edward Hong is also a managing director and substantial shareholder in both the Thermal Companies. The following factual witnesses gave evidence on behalf of the Hongs and/or the Thermal companies during the trial:

(a) Edward Hong.

(b) Eddie Foo, the General Manager of the Thermal Companies who, as Edward Hong's trusted advisor, was intimately involved in the negotiations leading up to the SSA.

(c) Michael Chow, the Chairman of Valued Partners Limited ("Valued Partners"), a mergers and acquisitions advisory practice. Michael Chow was an advisor to Columbia in various hospital transactions over the years, but left Columbia more than two years before the start of the trial. [note: 4] Michael Chow acted as an intermediary between the Hong brothers and Rick Evans in the sale of UMPL's shares, and was the first person to raise the prospect of acquiring the Hospital to Rick Evans.

(d) Michael O'Hanlon, the Chief Executive Officer of DVI and the Chairman of MEC at the material time. DVI was a company that provided loans to the global medical community. It operated through its wholly owned subsidiary, MEC, in the Asia Pacific region. MEC was the provider of certain loans which feature prominently in Suits 861 and 862. DVI and MEC have since gone into liquidation. Counsel for PTNM and Columbia, Mr Harish Kumar ("Mr Kumar"), chose not to cross-examine Michael O'Hanlon and accepted his affidavit of evidence-in-chief ("AEIC").

22 The Hongs relied on two expert witnesses. First, they called Nick Graham, a chartered accountant of RSM AAJ Associates. Second, they sought to admit two affidavits by Tay Puay Cheng, an Executive Director in the Forensic division, and Head of the Restructuring division of KPMG Services Pte Ltd. Mr Kumar chose not to cross-examine Tay Puay Cheng. Mr Kumar was prepared to accept Tay Puay Cheng's affidavit of evidence in chief, subject to the qualification that he (Mr Kumar) was of the view that the evidence was irrelevant. [note: 5] None of the parties gave much weight to Tay Puay Cheng's evidence in their submissions, so I will not refer to it further.

Background facts

23 I will go into some detail on the background facts because of the many allegations made in the three actions.

The history of PTNM and the loans from MEC

24 PTNM was set up in the early 1990s as a joint venture between four parties: Gleneagles Development Pte Ltd ("Gleneagles"), Albert Hong and two Indonesian business partners, one of whom was Boelio Muliadi. In 1995, PTNM obtained a loan for US$25m ("the Syndicated Loan") from a banking syndicate headed by the Hongkong and Shanghai Banking Corporation Limited ("the Syndicated Lenders") for the construction of the Hospital. The Syndicated Loan was guaranteed by the four shareholders of PTNM in the proportion of their shareholdings.

25 The Syndicated Lenders subsequently recalled the loan. The shareholdings of the two Indonesian partners were confiscated by the Syndicated Lenders because they were unable to pay their share of the loan. At this juncture, Edward Hong saw an opportunity for the Hongs to take over

the entire business of the Hospital by repaying the balance of the Syndicated Loan. [note: 6]

26 In the course of the negotiations, the Syndicated Lenders agreed to a payment of US$12m as a full and final settlement of their claim. Gleneagles indicated that they would give up their shares in PTNM if the Hongs could settle the entire loan. On 2 July 2002, UMPL obtained a US$12m facility from MEC ("the MEC Loan") to be applied to the settlement of the Syndicated Loan. Pursuant to this arrangement, MEC obtained the MEC Charge over the Land (the Land was owned by PTNM). MEC was registered as a chargee of the Land on 1 September 2003.

27 The Hongs decided that UMPL would be the vehicle to hold the shares in PTNM. However, 10% of the shares in PTNM were to be held on trust for UMPL by an Indonesian company, in order to comply with Indonesian law. [note: 7] UMPL thus became the owner of 90% of PTNM's shares, and the beneficial owner of the remaining 10% of PTNM's shares. The shares of UMPL were in turn allocated between Albert Hong, Edward Hong and Boelio Muliadi. Subsequently, 10% of the shares in UMPL were re-allocated by Albert Hong to DVI.

28 In addition to the US$12m facility used to settle the Syndicated Loan, MEC also provided a loan of US$3m to Thermal International for working capital. On 1 July 2002 Edward Hong requested MEC to remit US$740,000 out of the US$3m loan directly to PTNM in order to alleviate PTNM's cash-flow at the time. Accordingly, US$740,000 was paid to PTNM out of *Thermal International's* loan from MEC.

29 Thereafter, DVI and MEC went into liquidation. Goldman Sachs (Asia) Finance ("GSAF") bought over UMPL's and Thermal International's debts to MEC on 20 September 2004. MEC's rights, title and interest under the MEC Loan and the US$3m loan facility were assigned to GSAF. I will refer to the aggregate of the sums owed by UMPL to GSAF under the assigned debt as the "Goldman Sachs Indebtedness". GSAF was supposed to become a chargee of the Land, but GSAF was apparently not registered on the land title certificate as such. GSAF also did not procure the removal of the MEC Charge at that time. MEC therefore remained registered as a chargee of the Land, notwithstanding the assignment to GSAF.

30 In 2005, Edward Hong took control of the running of the business from Boelio Muliadi, who had been running the Hospital since the start of operations in 1997. [note: 8]

Preliminary negotiations

31 By 2007, the Hongs were looking to sell the Hospital. Edward Hong was referred to Valued Partners, which was headed by Michael Chow, with a view to finding a buyer for PTNM. Michael Chow contacted Rick Evans who indicated his interest in purchasing the Hospital.

32 According to Rick Evans, a meeting was arranged between himself and Edward Hong in Kuala Lumpur either at the end of September or the beginning of October 2007. [note: 9] The Hongs dispute the occurrence of this meeting. On 19 October 2007, Rick Evans, accompanied by Michael Chow and Lucia Voon, a Columbia employee, made a visit to the Hospital in Medan. There, Rick Evans met with Edward Hong and took a tour of the facilities.

33 Rick Evans' evidence was that he was given an information sheet on the Hospital either at the first meeting around September 2007 or at the 19 October 2007 meeting. That sheet of paper showed the operating cash flow of the Hospital for 9 or 10 months. Rick Evans was able to infer from this that the Hospital would generate a positive annual cash flow of about US$2.5m for 2007. [note: 10] The annual cash flow was also referred to during the trial as the EBITDA of the business for 2007. Rick

Evans also claimed that he had made it clear to the Hongs that any acquisition would be made on the basis that UMPL and PTNM were handed over "clean": with all current liabilities and current assets equalised and all long-term debts retired at completion. [note: 11] Conversely, the Hongs deny that any representation was made on cash flow at this point in time. [note: 12]

34 According to Rick Evans, when Columbia acquired hospitals, it typically determined the purchase price with reference to the hospital's annual cash flow or EBITDA multiplied by an appropriate number, also known as the appropriate multiplier. After the 19 October 2007 meeting, Rick Evans said that he discussed the proposed purchase with Prem Abraham. They agreed that 12 was an appropriate multiplier. The EBITDA of US$2.5m and a multiplier of 12 yielded a figure of US$30m. Rick Evans thus decided to make an offer of US$30m for the Hospital.

35 The Hongs disputed that Columbia had based the purchase price solely on the EBITDA and a multiplier. The Hongs asserted that Columbia had based the purchase price entirely, if not at least partially, on replacement costs (*ie*, the cost to replace the assets of equal value). Further, the Hongs asserted that Rick Evans did not communicate any basis for his initial offer of US$30m to Edward Hong, a point which Rick Evans agreed with.

36 On 22 October 2007 Rick Evans sent a letter containing an initial conditional offer of US$30m to Edward Hong. The letter indicated, amongst others, that "[a]ny and all debts, obligations and/or other liens owed by UMPL and/or by [PTNM] [were] to be retired at closing". [note: 13] Edward Hong replied on 23 October 2007 stating that he was comfortable with all the terms outlined in the conditional offer, save for the price.

37 On 26 October 2007, Eddie Foo sent an email to Michael Chow with an attachment containing some financial information about the Hospital. The attachment stated that the replacement cost of the Hospital was US$57.7m (including the value of the Land), and that the EBITDA for 2007 was about US$2.5m. According to the attachment, this would have yielded a multiplier of 12.8 based on a purchase price of US$32m. [note: 14]

38 On 27 October 2007, Rick Evans, Edward Hong and others met at Columbia's facility in Puchong, Kuala Lumpur. Rick Evans' evidence was that at this meeting, he received an information memorandum dated September 2007 ("the IM"). [note: 15] There is some dispute as to the actual date when Rick Evans received the IM. But this is not material, as it was not disputed that he received it before the SSA was signed by him and the Vendors. The IM projected PTNM's EBITDA for 2007 at IDR 25,240,889,000 (or approximately US$2.68m). Columbia's case was that Prem Abraham had seen and relied upon the IM to corroborate the represented cash flow of US$2.5m.

39 During the meeting of 27 October 2007, Columbia was asked to raise its initial offer. Rick Evans acceded and increased Columbia's offer to US$31m. Immediately after the meeting, Rick Evans sent a second conditional offer to Edward Hong for US$31m, which was otherwise identical in terms to the first conditional offer.

40 Edward Hong responded to the second conditional offer with a letter dated 29 October 2007. In the letter, Edward Hong asked for the due diligence and the finalisation of the sale and purchase agreement to proceed simultaneously in order to accelerate completion. This was, in effect, a tacit acceptance of Columbia's offer of US$31m. Rick Evans instructed Alan Lim to begin drafting the sale and purchase agreement.

41 On 6 November 2007, Eddie Foo sent an email to Rick Evans, explaining the outstanding

Goldman Sachs Indebtedness reflected in PTNM's accounts. [note: 16] Eddie Foo explained that these moneys were originally borrowed by UMPL and Thermal International respectively from DVI and on-lent to PTNM. He explained that these debts had been subsequently sold by DVI to GSAF. He also mentioned that the Vendors would liaise with GSAF such that all titles and securities would be released free and unencumbered when settlement payments were made on 31 December 2007, which was the completion date the parties were aiming for.

42 Eddie Foo's explanation to Rick Evans was inaccurate in at least two respects. First, the loans were extended to UMPL and Thermal International by MEC and not by DVI. Second, of the US$3m that Thermal International had borrowed from MEC, only US$740,000 was actually remitted to PTNM by MEC. Whether this remittance of US$740,000 made PTNM a debtor of MEC, Thermal Industries or Thermal International is a matter of considerable dispute, which I will elaborate on later.

43 In mid-November 2007, Columbia's due diligence team headed by Prem Abraham visited the Medan Hospital to conduct the due diligence exercise. The team looked primarily at PTNM and UMPL's draft unaudited accounts for 2007 and the audited accounts for 2006. [note: 17] According to Prem Abraham, the team spoke primarily with Eddie Foo as well as PTNM's Financial Controller, K C Leong, and General Accounts Manager and Senior Finance Manager, Kimun Kuara. After the due diligence was undertaken, summaries and supporting documents were produced by Columbia.

44 Correspondence was exchanged between the parties in relation to this due diligence exercise. Eddie Foo's letter of 26 November 2007 (mistakenly dated 26 November 2006), referred to the Vendors settling the Goldman Sachs Indebtedness directly with GSAF with "no further financial advantage or disadvantage to [Columbia] as the Buyers." [note: 18]

45 In the meantime, Alan Lim was working on a draft of the sale and purchase agreement. A number of drafts were exchanged between him and MKP, solicitors for the Vendors. Four drafts were prepared in total, two of which passed between the solicitors.

46 On 29 November 2007, Eddie Foo sent an email to Rick Evans with the subject "S&P in Medan" which brought up the following points: [note: 19]

(a) Albert Hong was proceeding to acquire DVI's 10% share in UMPL with the result that the Vendors in the share sale agreement would be the Hong brothers and Boelio Muliadi. If there was a claim by DVI in relation to its shares that were to be acquired by Albert Hong, the Vendors would stand liable and this was to be included in the SSA.

(b) The Vendors would, as a condition precedent, obtain GSAF's agreement to release all securities upon payment of the amounts owing to GSAF. It was envisaged that the Goldman Sachs Indebtedness would be paid off and the release of the securities obtained simultaneously with the completion of the sale and purchase agreement.

The Short-Form Agreement

47 Between 30 November and 3 December 2007, Rick Evans paid a visit to Medan. This visit culminated in the Short-Form Agreement ("the SFA") dated 1 December 2007 signed by Edward Hong on behalf of the Vendors and by Rick Evans on behalf of Columbia. [note: 20]

48 Prior to the SFA being signed, the parties had reached an agreement to reduce the purchase price by US$341,000. This was because Columbia had discovered that PTNM's current liabilities

exceeded its current assets by US$841,000 according to management accounts and balance sheet figures as at September 2007 which were provided on behalf of the Vendors. [note: 21] Columbia was of the view that the Vendors were obliged to bear this excess in liabilities, in accordance with what had been agreed upon in negotiations. Rick Evans nevertheless agreed that Columbia would be responsible for US$500,000 of these liabilities, leaving the Vendors to bear the remaining US$341,000.

49 The apportionment of the US$841,000 was done in the following manner. The purchase price for the Sale Shares (99% of the Shares in UMPL) was reduced by US$841,000, from US$31m to US$30,159,000. The US$500,000 which Columbia agreed to be responsible for became the purchase price of Yayasan Gleni, a nursing academy, which was to be the subject of a separate agreement. There was initially no separate agreement to purchase Yayasan Gleni.

50 The SFA incorporated the abovementioned arrangement. [note: 22] The salient terms of the SFA were that:

(a) Columbia would acquire the Sale Shares from the Vendors. Edward Hong would retain 1% of the shares in UMPL and continue to serve as a commissioner and director of PTNM. He would grant an exclusive option to Columbia to purchase his 1% share at a purchase price of US$1,000 (pursuant to the Call Option Agreement).

(b) The purchase price for the Sale Shares was to be US$30,159,000, which was to be paid in its equivalent in Singapore dollars.

(c) The Vendors were to deliver both UMPL and PTNM free and clear of all liens, debts and encumbrances. There were two exclusions in the case of PTNM: (1) obligations to trade vendors and doctors that were part of the day to day operations; and (2) debts owed to UMPL. The Vendors were not liable to Columbia for these two categories of debts.

(d) Completion was targeted for 31 December 2007 with the possibility of an extension of up to a month for reasons outside the control of the parties.

(e) Edward Hong was to sell to Columbia the entire interest in Yayasan Gleni pursuant to a separate agreement, for a purchase price of US$500,000.

(f) All taxes payable to the Indonesian authorities for business operations of UMPL and PTNM through 31 December 2007 were to be paid by the Vendors, provided that this obligation would expire on 31 December 2008.

(g) The Vendors warranted that all the shares of UMPL were owned by them, and that all the shares of PTNM were owned by UMPL (this included the 10% of PTNM's shares that were held by an Indonesian company on trust for UMPL).

(h) Columbia was to complete all due diligence processes no later than 10 December 2007.

(i) Columbia was to deliver a draft of a formal agreement incorporating the terms of the SFA by 4 December 2007 and the parties were to make best efforts to sign such an agreement by 7 December 2007.

(j) Columbia had the option of assigning up to 35% of the Sale Shares to an interested third-party investor, Kuwait Finance House (M) Berhad ("KFH") or one of its subsidiaries.

(k) Columbia was to pay a deposit of US$1m upon the execution of the formal agreement.

51 On 3 December 2007, Eddie Foo wrote to GSAF offering S$25.5m in full settlement of the Goldman Sachs Indebtedness to be paid on 31 December 2007, in accordance with a proposal made by GSAF on 7 May 2007. GSAF responded by email on 6 December 2007 stating that it would accept S$25.5m in settlement provided the money was paid by 31 December 2007 and a settlement deed was executed.

The preparation and execution of the SSA

52 After the SFA was signed, Alan Lim communicated with MKP about the draft formal agreement, that is, the SSA. Eventually, the signing of the SSA was scheduled for 7 December 2007. On 7 December 2007, Michael Chow, Alan Lim, Rick Evans, Boelio Muliadi, Edward Hong, Albert Hong and Eddie Foo attended a meeting in Singapore for the finalisation and signing of the SSA by the Vendors. [note: 23] There were discussions to finalise the terms of the SSA. Upon finalisation of the terms, the SSA was engrossed and seven undated copies of it were signed off by the Vendors and given to Alan Lim. Some of the terms in the SSA were not identical to those in the SFA. This gave rise to some allegations by the Hongs which I will elaborate on later.

53 Under the SSA, the Vendors agreed to sell 99,000 shares comprising 99% of the issued share capital of UMPL to Columbia. The purchase price was agreed to be US$30,159,000. At an agreed exchange rate of US$1 to S$1.45, this worked out to S$43,730,550. This sum was apportioned as follows:

(a) S$25.5m was to be paid by Columbia directly to GSAF to discharge the Goldman Sachs Indebtedness; and

(b) S$18,230,550 was defined as the purchase price for the Sale Shares (notwithstanding that the actual purchase price was S$43,730,550).

The agreed completion date was 31 December 2007. The "Goldman Sachs Indebtedness", was defined as follows:

> 2.1.15 Goldman Sachs Indebtedness means the aggregate of all sums whether principal, interest (including without limitation default interest), capitalised interest, commitment fee, insurance premium, fees (including but not limited to valuation fees), costs and expenses, charges or otherwise outstanding or payable or agreed to be payable by [UMPL] and any Security Party from time to time whether solely or jointly with any other person and whether as principal or surety and includes all liabilities and obligations whether present or future, actual or contingent for the repayment or payment of all monies by [UMPL] and any Security Party in respect of or arising from the loan facility originally granted to [UMPL] by a loan facility originally granted to [UMPL] by a third party and subsequently novated to [GSAF] and/or the Security Documents which outstanding amount shall be Singapore Dollars Twenty Five Million.

54 Under s 3.2 of the SSA, the S$18,230,550 was to be paid by Columbia to MKP as stakeholders in the following manner:

> 3.2.1 the Deposit Sum to the Vendors' Solicitors as stakeholders upon execution of this Agreement to be dealt with in accordance with Section 3.3 hereof; and
>
> 3.2.2 the Balance Purchase Price to the Vendors' Solicitors as stakeholders on or before the

Completion Date to be dealt with in accordance with Section 3.4 hereof

"Balance Purchase Price" and the "Deposit Sum" were defined in s 2.1 of the SSA as follows:

> 2.1.3 Balance Purchase Price means the sum of Singapore Dollars Sixteen Million Seven Hundred Eighty Thousand Five Hundred and Fifty (SGD 16,780,550) only...
>
> 2.1.20 Deposit Sum means the sum of Singapore Dollars One Million Four Hundred and Fifty Thousand Only (SGD 1,450,000.00) only

55 Section 3.4 of the SSA provided that the Vendors' solicitors were to release the balance of S$18,230,550 and the interest thereon in the following manner:

> 3.4.1 firstly, towards full and final settlement of the Liabilities; and
>
> 3.4.2 secondly, the balance thereof, if any, to the Vendors upon the following having been fulfilled :
>
> a. all the security documents shall have been fully and unconditionally released and discharged;
>
> b. ...

Section 3.4.1 therefore provided that the purchase price was to be first deployed towards settling the "Liabilities", with "Liabilities" being defined in s 2.1.24 of the SSA as follows:

> 2.1.24 Liabilities means all and any present or future liabilities or obligations of [UMPL] and the [PTNM] whether actual, contingent, or otherwise whatsoever (excluding the Goldman Sachs Indebtedness, all obligations to trade vendors and doctors that are a part of the day to day operation of [PTNM], and the inter-company debts between [UMPL] and [PTNM]) incurred by [UMPL] and/or [PTNM] less the current assets of [PTNM], up to and include [sic] the Completion Date.

Under s 3.4.2, the Vendors would also have the obligation to ensure that the security documents executed in relation to the Goldman Sachs Indebtedness were released and discharged before they could pay themselves.

56 On 13 December 2008, MKP sent Alan Lim four undated copies of the Call Option Agreement signed by Edward Hong. Under this agreement, Edward Hong granted Columbia an option to acquire the remaining 1,000 shares in UMPL comprising 1% of UMPL's issued share capital at the purchase price of S$1,450.

57 The next day, a directors' meeting of UMPL was held whereby DVI's share certificate for 10,000 shares in UMPL ("the DVI Shares") was cancelled and a new share certificate for a corresponding number of shares was issued to Albert Hong.

58 On 19 December 2007, Rick Evans informed Edward Hong that he had signed the SSA and the Call Option Agreement on behalf of Columbia.

59 A deed of settlement and discharge dated 21 December 2007 ("the Deed of Settlement") was signed between various parties including UMPL, Thermal International, Edward Hong, Albert Hong and GSAF. Also, on 21 December 2007, Columbia gave instructions to remit the deposit of S$1.45m under

the SSA. The deposit was received by MKP on or about 24 December 2007. The SSA and the Call Option Agreement were both dated 24 December 2007.

The novation agreement(s)

60 Since PTNM was to be sold with its liabilities (except for the excluded liabilities) discharged, there were discussions to assign or novate any debts in PTNM's books shown as owing to the Thermal Companies. According to Rick Evans, the parties met at Albert Hong's office in Singapore on 31 December 2007. [note: 24] The Hongs denied that any meeting took place that day.

61 Rick Evans' evidence was that at the alleged meeting of 31 December 2007 one of the items agreed on was that the advances made by Thermal International to PTNM, as shown in PTNM's balance sheet for October 2007, were to be assigned to Columbia. This led to a novation agreement in respect of certain debts owing by PTNM to Thermal International being executed at completion.

62 There was also some correspondence to the effect that Columbia wanted a second novation agreement with respect to debts owing by PTNM to Thermal Industries. However, only the novation agreement involving Thermal International was eventually executed at completion (the detailed facts involving these debts are discussed later below in relation to Suit 861). Thermal Industries alleged that Edward Hong refused to sign the novation agreement for the debts owed by PTNM to Thermal Industries because these were trade debts and, hence, the Vendors were not obliged to discharge them. Columbia was informed of this. Columbia did not dispute that they were told about Edward Hong's reason for not signing that novation agreement, but Columbia's position was that it never agreed with Edward Hong's reason. It was content to proceed without the second novation agreement and to see how things developed.

Events leading up to completion

63 As 31 December 2007 approached, it was agreed between the parties to the SSA that Columbia would pay S$26,974,858 to MKP and that the latter would use that sum to settle the Goldman Sachs Indebtedness. The sum of S$26,974,858 was Columbia's 65% share of the actual purchase price (that is, S$43,730,550 (see [53] above)) less the deposit of S$1.45m already paid. It was not clear at that time whether KFH was proceeding to take up 35% of the investment.

64 MKP received the S$26,974,858 on 2 January 2008, and on 4 January 2008, MKP paid S$25.5m to GSAF. On 9 January 2008, Edward Hong wrote to Rick Evans by email asserting that GSAF had already been paid from the money that Columbia had sent and that s 3.4.2(b) of the SSA had been fulfilled, *ie*, that "all the security documents [had been] fully and unconditionally released and discharged". [note: 25]

65 On 15 January 2008, MKP sent an email to Alan Lim forwarding an email from GSAF dated 8 January 2007 confirming receipt of S$25.5m. MKP also forwarded a letter from GSAF's solicitors, Allen & Gledhill LLP ("A&G") dated 8 January 2008. The letter from A&G to MKP forwarded various documents pursuant to the Deed of Settlement dated 21 December 2007. [note: 26]

66 On 16 January 2008, Alan Lim responded to MKP saying that he was unable to conclude that the documents enumerated in A&G's letter of 8 January 2008 were in fact exhaustive, and that Columbia's Singapore solicitors, TSMP Law Corporation, had not been able to complete the legal due diligence because documents were still outstanding. Alan Lim further asked MKP to take note of s 3.4.2 of the SSA. [note: 27]

67 This drew a lengthy written response from MKP on 17 January 2008. [note: 28] The response referred to a telephone conversation which Rick Evans had with Edward Hong, in which Rick Evans told Edward Hong that KFH was not proceeding with the transaction, and that Columbia would pay the balance of the actual purchase price. According to MKP's response, Rick Evans had informed Edward Hong during their telephone conversation "that payment of the Balance Purchase Price would be received in Singapore on 22 January 2008". MKP's response also stated that Edward Hong had "agreed to this extended date for payment, with the understanding that on receipt of the balance, the Vendors will have access to the funds." [note: 29]

68 Rick Evans in his AEIC disputed the above version of events. He asserted that while he had indicated that Columbia might be able to complete by 22 January 2008, he had not made a firm commitment to that date. In any case he had never agreed that the Vendors would have access to the money. [note: 30] On 17 January 2008, Alan Lim wrote back to MKP stating that Columbia would pay the balance by 25 January 2008 and that all moneys paid were to be dealt with in accordance with s 3.4 of the SSA. [note: 31]

69 On 18 January 2008, MKP responded to reiterate the Vendors' position that Edward Hong had only agreed to further extend the completion date past the already extended date of 18 January 2008 provided that the remaining 35% of the actual purchase price would be received by the Vendors on or before 22 January 2008 and that the SSA be varied to allow the Vendors to have access to this balance. [note: 32]

70 On 20 January 2008, Rick Evans spoke with Edward Hong and they agreed that they would complete on 22 January 2008. Later that day, Alan Lim wrote to MKP setting out the arrangements upon completion.

71 Alan Lim subsequently sent to MKP an amended draft of the novation agreement for Thermal International, a draft of the novation agreement for Thermal Industries and a draft of an agreement for the purchase of Yayasan Gleni. I have referred to the intended novation agreements earlier. The Yayasan Gleni agreement was duly executed on 22 January 2008 and the consideration of S$725,000 (being the equivalent of US$500,000) was subsequently paid.

72 Completion under the SSA occurred on 22 January 2008 at MKP's office. A bank draft for S$15,305,692 (being the balance of the purchase price) was handed to MKP. In return, MKP handed over certain documents, including the land title certificate for the Land. MKP's letter of 22 January 2008 also stated that the land title certificate in PTNM's name for the Land was "free from all and any Encumbrances whatsoever". [note: 33] However, it was later discovered that MEC's name had not been removed (as a chargee) from the land title certificate. Shortly after completion, Columbia took over the management of the Hospital.

Post-completion events

73 Post-completion, MKP sent a number of emails to Alan Lim. In these emails MKP sought confirmation that they could pay out the balance of the money they were holding to the Vendors, on the basis that Rick Evans had purportedly agreed with Edward Hong to vary the SSA to allow the Vendors access to the funds. Columbia's stance at that point was that they had never agreed to a waiver of s 3.4 of the SSA (which provided for how the purchase price was to be released). Nevertheless, preparations were made to allow MKP to release to the Vendors 90% of the money currently held by them as a gesture of goodwill. The 10% remainder was to be retained by MKP as

stakeholder until all the conditions in s 3.4 had been complied with. [note: 34] This position was communicated to MKP in Alan Lim's email to them dated 24 January 2008.

74 On 29 January 2008, MKP wrote to Alan Lim. The letter attached various forms that had been provided by GSAF's solicitors. MKP was of the understanding that those forms had to be filed in Indonesia in order to obtain clean title to the Land. The executed documents were eventually sent by MKP to Alan Lim's office under the cover of their letter of 14 February 2008. As it transpired, these documents proved ineffective to remove the MEC Charge.

75 By a letter dated 31 January 2008, MKP wrote to Alan Lim enclosing a letter of release signed by GSAF dated 21 January 2008. On the same day, MKP sent an email to Alan Lim asserting that the Vendors had fully complied with the SSA and that they were entitled to the rest of the moneys being retained by MKP. MKP specifically asserted that "[i]n so far as section 3.4.1 and section 3.4.2(a) are concerned, the Liabilities have been fully and finally settled and all security documents (of the Company) have been fully and unconditionally discharged". [note: 35]

76 On 1 February 2008, Alan Lim wrote to MKP indicating that while the Vendors had not fully complied with s 3.4 of the SSA, Rick Evans was agreeable to the "release of the 10% Balance Purchase Price to the Vendors upon Mr Edward Hong's undertaking to assist our client to resolve all outstanding issues". The email emphasised that this was done "in the spirit of goodwill and good faith". [note: 36] MKP wrote back on the same day to confirm Edward Hong's undertaking and that accordingly they would be releasing the remaining 10% of the money to the Vendors.

77 On 27 February 2008, UMPL received a letter from DVI's solicitors, Shook Lin & Bok LLP ("Shook Lin"). DVI's assets were, at that point, under the control of a liquidating trustee. Shook Lin's letter asserted DVI's claim to 10,000 shares in UMPL. On 7 March 2008, MKP wrote to Alan Lim stating that his "clients shall deal with the purported claim of [DVI's liquidating trustee] with [Shook Lin] directly if the need arises." [note: 37] The liquidator of DVI eventually brought legal proceedings against the Hongs and UMPL to enforce its rights, but later discontinued the action.

78 By a letter dated 16 May 2008, Alan Lim sent a notice to MKP that Columbia intended to exercise its option under the Call Option Agreement to purchase the 1,000 shares in UMPL held by Edward Hong. Columbia accordingly paid S$5,800, and the last 1,000 shares in UMPL were transferred to them in early July 2008.

79 In May 2008, there was communication between Eddie Foo and Prem Abraham concerning debts that were allegedly due from PTNM to Thermal International as a trade vendor, and which had not been assigned under the novation agreement which Thermal International had signed. On 28 May 2008, PTNM made a payment of S$200,000 to Thermal International. I will elaborate on this below as it features in Suit 862.

80 A few months after completion, Columbia discovered issues regarding what they alleged to be under-declaration and under-payment of income tax by the Hospital in the past. Columbia was concerned, in particular, about Article 21 withholding tax ("Art 21 WHT"). This was tax that the Hospital, as an employer, was obliged to withhold from its employees (in this case doctors). The Hospital was then to pay this withholding tax directly to the Indonesian Tax Authority ("the ITA") on behalf of its employees. Edward Hong claimed that he and Eddie Foo met with Rick Evans in the middle of March 2008 to discuss these issues. In his AEIC, Edward Hong stated that:

> Amongst the matters discussed at this meeting were the tax issues. ***We explained that***

> ***consistent with what we were advised as the industry practice, the withholding tax on doctors' fees would be slightly under-declared so that the doctors would get more fees as would the hospital.*** We told them that as advised by our Indonesian management team, this was common practice in the medical industry in Indonesia. [...]
>
> [...]
>
> ***Neither Rick Evans nor Columbia's solicitors raised any problems with the tax issue at that meeting. To me, it was a non issue*** . [note: 38]
>
> [emphasis added]

The position of Rick Evans and Columbia was that such a meeting never occurred.

81 On 30 May 2008, Rick Evans met Edward Hong for a lunch meeting in Singapore to discuss the tax issues. At this meeting, Rick Evans indicated to Edward Hong that he was aware of the practice of under-declaration and under-payment of Art 21 WHT in the Hospital and that Columbia, now in control of the Hospital, intended to comply with Indonesian law in the future and abandon the Hospital's previous practice in this regard. [note: 39]

82 Following the lunch meeting, Edward Hong sent an email to Rick Evans on 2 June 2008 where he stated that the past practice in relation to the under-declaration and under-payment of Art 21WHT (what he called "the old system") had been in place since the inception of the Hospital. Edward Hong further stated that PTNM had not had trouble with the ITA. Referring to Rick Evans' decision to comply with Indonesian tax law, Edward Hong wrote that: [note: 40]

> [S]hould such deliberate and obvious change by you be the reason for a review by the revenue authorities of previous years' taxes and particularly should it trigger back-assessment of taxes, then, we are of opinion that such additional taxes and/or penalties should, properly, not be to account of the vendors... [note: 41]

83 On 11 June 2008, Rick Evans responded, stating that the Vendors were bound by the SSA, and could not unilaterally absolve themselves from any liabilities whether of UMPL or PTNM, if such liabilities flowed from the failure in the past to observe or comply with the relevant tax legislation.

84 Subsequently, Columbia ran into difficulties removing the MEC Charge ("the Land problem"). Alan Lim requested help from the Hongs to resolve the problem. Emails were exchanged between the parties on the resolution of the Land problem. Columbia also made various allegations of improper book-keeping and potential tax liabilities incurred by PTNM when under the management of the Hongs. The Hongs, on their part, continued to demand payment for various sums allegedly owed by PTNM to the Thermal Companies (these payments form the subject matter of Suits 861 and 862).

85 MKP's letter dated 30 October 2008 to Alan Lim accused Columbia of raising various "non-issues", "to delay payment of the undisputed sums of S$669,654.28 and US$9762, due and owing to [Thermal International] by PTNM". [note: 42] In relation to the Land problem, MKP also stated that their clients, the Hongs, found it "amusing that Columbia Asia has chosen, for their own improper purpose, not to see through the scam for what it is – that those Indonesian security-registering authorities just want their palms greased before agreeing to the OBVIOUS." [note: 43] In respect of the improper book-keeping and tax liabilities, MKP made the general assertion that everything had been declared to Columbia and that it had been factored into the price.

86 By an email dated 20 November 2008, MKP wrote to Alan Lim to inform him that he had issued two writs against PTNM on behalf of Thermal Industries and Thermal International. Those writs were Suits 861 and 862 respectively.

87 In the meantime, Columbia continued to attempt to seek the Hongs' assistance to resolve the Land problem which Columbia claimed was hampering its ability to obtain financing by using the Land as collateral. MKP responded by way of a letter dated 3 December 2008 stating that the Hongs had been advised that the resolution of the Land problem "could have been accomplished within one week at an approximate cost of the equivalent of US$1,000" and that they (the Hongs) were "ready, willing and able to assist in the process. They always have." [note: 44]

88 On 6 March 2009, Rick Evans and Edward Hong met in Singapore in an attempt to resolve the Land problem and the alleged debts owed by PTNM to the Thermal Companies. Rick Evans claimed he told Edward Hong that if the Land problem could be resolved, he would be prepared to discuss the outstanding amounts claimed by the Thermal Companies. [note: 45] Edward Hong said that he would resolve the Land problem and have the MEC Charge removed from the land title certificate by the end of the month.

89 An email was sent from Edward Hong to Rick Evans on the same day (6 March 2009) purporting to summarise their discussion. [note: 46] According to that email, Rick Evans had agreed, in exchange for the Hongs resolving the Land problem by the end of the month, to pay "the full amount of the agreed outstanding trading debt that still exists between our 2 companies, as claimed/documented, approximately S$670K plus US$10K." [note: 47] In his evidence, Rick Evans disagreed with this aspect of Edward Hong's email, contending that he had never agreed to pay the outstanding sums mentioned therein. However, in Rick Evans' reply to Edward Hong's email, dated 11 March 2009, he did not dispute Edward Hong's allegation that he had agreed to pay the alleged outstanding trade debt in return for the removal of the MEC Charge. [note: 48]

90 Despite Edward Hong's personal efforts after 6 March 2009, [note: 49] he could not procure the removal of the MEC Charge. Towards the tail end of his unsuccessful efforts, Edward Hong wrote in an email dated 19 June 2009 that Columbia had not informed the Hongs that "[GSAF] and [Columbia] had unsuccessfully endeavoured to have MEC's interest on the relevant title removed" when Columbia encouraged the Hongs to commit to cleaning up the title of the Land. [note: 50] Edward Hong's email also alleged that their commitment to clean up the land title was given on a "best endeavour" basis at a without prejudice meeting on 6 March 2009. Nevertheless, he assured Columbia that "we are advised by the various parties working on our behalf that we are close to having the matter resolved by the first week of July 2009".

91 In a further email from Edward Hong dated 8 July 2009, Edward Hong reiterated that the 6 March 2009 meeting in Singapore was a "without prejudice" meeting, and that he had agreed to clean up the land title "as a good corporate Samaritan". [note: 51] Edward Hong further stated that "I cannot assist you further with this Land issue and will allow the matter to rest." He ended his email by saying that the matter should be between GSAF and Columbia as Columbia had paid the Goldman Sachs Indebtedness and "in consideration for which [GSAF] were meant to deliver an unencumbered title".

92 I pause here to mention that I have referred to the 6 March 2009 meeting and the email sent by Edward Hong on 6 March 2009 in respect of that meeting, even though Edward Hong subsequently

alleged that the 6 March 2009 meeting was on a without prejudice basis. I do not accept that that meeting was conducted on a without prejudice basis. That allegation was made by Edward Hong too late in the day to try and prevent Columbia from relying on the meeting. When he wrote on 6 March 2009 to refer to that meeting, he did not say it was on a without prejudice basis. He only alleged that the meeting was on a without prejudice basis for the first time in his email dated 19 June 2009, when he had encountered difficulties in removing the MEC Charge. In any event, the closing submission for the Hongs for Suit 964 relied on that meeting in respect of the Inflated Revenue Issue. Therefore, the Hongs have waived disclosure of the substance of the meeting even if it had been conducted on a without prejudice basis.

93 Rick Evans replied to Edward Hong on 13 July 2009 stating that he had been closely following the Hongs' efforts to deliver a clean land title and that his previous statements that the Land problem would be easy to resolve had been unrealistic. [note: 52] Rick Evans also emphasised that the Vendors had an obligation to deliver the Land free of all encumbrances and that they had, to date, failed to discharge this obligation. He also said that an unsuccessful attempt by GSAF to transfer the security interest in the Land to themselves between 2005 and 2006 had never been disclosed to Columbia by the Vendors. Rick Evans stated that Edward Hong's assertions with respect to "a best endeavour commitment" and on a "without prejudice basis" were imagined and he enjoined the Hongs to resolve the Land problem. [note: 53]

94 On 11 November 2009, Columbia instituted Suit 964 against the Hongs. Further efforts were taken by Columbia and/or PTNM to resolve the Land problem, but they proved futile until on or about 15 October 2012 when the MEC Charge was finally removed. [note: 54]

Suit 964

Issue 1: the Encumbrance Issue

Summary of relevant facts

95 It is to be recalled that on or about June 2002, UMPL obtained the MEC Loan for US$12m from MEC which was secured by the MEC Charge, which was accordingly reflected in the land title certificate. Under an agreement dated 30 September 2004, MEC's rights, title and interest under the MEC Loan were assigned to GSAF. However, GSAF was unable to register a security interest in its own name with the Medan Land Office. Neither did it obtain the removal of the MEC Charge.

96 The MEC Loan formed part of the Goldman Sachs Indebtedness as defined in s 2.1.15 of the SSA. Columbia paid the sum of S$26,974,858, which included the Goldman Sachs Indebtedness of S$25.5m to MKP as stakeholders on 2 January 2008. MKP in turn paid S$25.5m to discharge the Goldman Sachs Indebtedness on or about 4 January 2008. Upon receiving payment, Goldman Sachs signed and issued a Form of Release dated 21 January 2008, purporting to release a security interest over the Land.

97 On 19 March 2009, PTNM applied to the Medan Land Office for the removal of the MEC Charge from the land title certificate. PTNM was informed by the Medan Land Office on 6 April 2009 that MEC remained registered as the security interest holder and that, in the circumstances, GSAF was not in a position to grant a release of the security interest. [note: 55] Consequently, the form of release signed by GSAF was rejected by the Medan Land Office.

98 The MEC Charge remained on the land title certificate until on or about 15 October 2012, after

the first tranche of this trial, when efforts in removing it were finally successful.

Whether the Hongs are liable under the SSA for failing to deliver the Land free of encumbrances

99 The SSA laid out a number of obligations on the Vendors regarding title to the Hospital and the Land, including:

(a) The obligation to forward the completion documents to Columbia (s 7.1.1.1 of the SSA). The completion documents included "the original title deed to the Hospital in the name of [PTNM] free from all and any Encumbrances whatsoever" (s 2.1.9.1 of the SSA).

(b) The Hospital and the Land were warranted to be "free from all and any Encumbrances" (s 9.1.1.2 of the SSA).

(c) PTNM was warranted to have "good and marketable title" to the whole of the Land (s 26.2.1 of the Third Schedule to the SSA).

100 "Encumbrance" was defined in s 2.1.12 of the SSA as follows:

Encumbrance includes any interest or equity of any person (including any right to acquire, option, pre-emption right or right of first refusal) or any debenture, mortgage, charge, pledge, lien, assignment, hypothecation, security interest, title retention or any other security agreement or arrangement.

101 Columbia's case was that the Hongs were in breach of the above terms. They had failed to deliver the original title deed to the Land free of encumbrances, as the MEC Charge had not been removed. [note: 56]

102 The Hongs' defence was two-fold. First, that the MEC Charge was not an "encumbrance" because there was no debt underlying it; the MEC Charge was, at most, an administrative oversight. [note: 57] Second, that Columbia had waived its rights, or was estopped from alleging that the existence of the MEC Charge on the land title certificate was a breach of warranty. This was due to the fact that Columbia affirmed and completed the SSA despite having had full knowledge of the MEC Charge on the land title certificate. [note: 58]

(1) Whether the MEC Charge was an "encumbrance" under the SSA

103 The MEC Charge clearly fell within the definition of "encumbrance" on a plain reading of s 2.1.12 of the SSA. The fact that the debt that the MEC Charge was meant to secure had been paid off did not make it any less a charge that remained on the land title certificate.

104 The existence of an encumbrance is not to be confused with the quantum of the debt secured by the encumbrance. Hence, the existence of an encumbrance does not vary depending on whether it secures a large debt, a small debt, or no debt at all. The existence of an encumbrance is also not to be confused with the ease or difficulty of removing the encumbrance.

105 The argument for the Hongs that no one else could claim under the MEC Charge because the debt has been paid was irrelevant to the Encumbrance Issue. It was a disingenuous argument which reflected their desperate situation. Absurd results would follow if it were correct.

106 It would mean that if there was a GSAF charge registered on the land title certificate, all that

the Hongs would have had to do under the SSA was to discharge the Goldman Sachs Indebtedness. They would not have had to remove the GSAF charge, as the latter too would not constitute an encumbrance once the underlying debt was paid off. The unsustainability of the argument is obvious.

107 The Hongs cited a Court of Appeal authority, *Huang Ching Hwee v Heng Kay Pah and Anor* [1992] 3 SLR(R) 452 ("*Huang Ching Hwee*"), for the proposition that "the continued entry of MEC's name on the register was not a defect of title ... because neither MEC nor any other third party had any subsisting rights over the Land" [note: 59]. In my view, this case is irrelevant in the present context. In *Huang Ching Hwee*, the court considered whether there was an implied term under a contract for sale of land that the vendor has a duty to disclose latent defects of title. The court there held that a potential statutory liability (in contrast to one where notice had already been issued by the relevant authority) arising from unauthorised alterations to the property was not a defect of title. The issue in the present proceedings is a different one altogether. There was nothing in that case suggesting that the MEC Charge was not an encumbrance. In any event the definition of "Encumbrance" in the SSA is clearly against the Hongs. The MEC Charge was an encumbrance whether or not it was disclosed to Columbia.

108 Furthermore, I reiterate that even in Edward Hong's own email dated 8 July 2009, he had said that the issue of the MEC Charge should be between GSAF and Columbia (see [91] above). The reason was that Columbia had already paid off the Goldman Sachs Indebtedness, in return for which GSAF was meant to deliver "an unencumbered title". Edward Hong's reference to "an unencumbered title" demonstrated that the Hongs knew all along that the MEC Charge was an encumbrance. Consequently, they must have known that it was their obligation to procure the removal of the MEC Charge but chose to contend otherwise when it suited them.

109 It follows that any suggestion by MKP in communication with Alan Lim that the Hongs had done all that they were obliged to do under the SSA in respect of the Land was just wishful thinking.

(2) Whether the MEC Charge resulted in PTNM not possessing "good and marketable title" to the Land

110 I proceed now to examine whether the existence of the MEC Charge resulted in a breach of the warranty that PTNM had "good and marketable title" to the Land. This point was not addressed specifically by the Hongs' defence. I will deal with it quickly.

111 I find the remarks on this point in *Sinclair on Warranties and Indemnities on Share and Asset Sales* (Robert Thompson gen ed) (Sweet & Maxwell, 8th Ed, 2011) at para 6-14 instructive:

> A vendor of land will be expected to show good title. He must prove that he is entitled to and is selling the legal estate in the land for the appropriate tenure... free from encumbrances or defects which will or may impact the use and enjoyment of the property for the purpose for which it is intended to be used save as is otherwise provided of disclosed...
>
> ***The inclusion of the words "and marketable" involves a separate requirement, by implying that there is an absence of other factors relating to the property, either rendering it commercially unsaleable or impairing its saleability.*** The limited nature of the requirement to show good title is thus opened up to general aspects of marketability.
>
> [emphasis added]

112 It can be seen that the requirement of "marketability" is an additional requirement. In my view,

the saleability of the Land was impaired so long as the MEC Charge remained. Buyers would obviously require and assume that the MEC Charge would be removed, just as Columbia did. As an aside, it remains a mystery to me why GSAF acquired MEC's rights under the MEC loan and the US$3m loan facility without ensuring that the MEC Charge was removed. The terms of GSAF's acquisition were not made known to the court. Also, the non-removal may have been due to an omission on someone's part.

113 Accordingly, I find that the Hongs are in breach of their obligations under the SSA to deliver the original title deed to the Land and the Hospital free from encumbrances, and to deliver good and marketable title to the Land.

(3) Whether Columbia has waived or was estopped from relying on the Hongs' breaches

114 I turn now to the Hongs' contention that Columbia had waived the obligation to deliver the land title certificate to the Land free from encumbrances, or that they were estopped from insisting on the performance of this obligation. The Hongs relied on the completion under the SSA and the release of the entire purchase price to support their contention.

115 I have set out above (at [73], [75] and [76]) in detail the circumstances as to how the completion and the eventual release of the entire purchase price came about. It is obvious that Columbia did not waive the relevant requirement. Neither did Columbia make any representation which would have caused the Hongs to believe that Columbia would not rely on the relevant requirement.

116 I recognise that neither Rick Evans nor Alan Lim mentioned specifically at either the time of completion or the release of the entire purchase price that the MEC Charge was still to be removed. However, it is clear from the communication set out above that neither had agreed that the Hongs had done all that they were required to do. Indeed, as stated at [76] above, when Alan Lim wrote to MKP on 1 February 2008, he made it clear that the Hongs had not fully complied with s 3.4 of the SSA, and that Rick Evans was agreeable to releasing the last 10% of the actual purchase price only on Edward Hong's undertaking to assist in resolving all outstanding issues.

117 Columbia had taken things for granted. It had assumed, wrongly, that there would be no difficulty in getting the MEC Charge removed. On that basis, it was agreeable to the completion and the release of the entire purchase price. However, I do not accept that Edward Hongs' undertaking (given through MKP's email of 1 February 2008 (see [76] above) to assist Columbia to resolve all outstanding issues was given gratuitously, as was suggested in their closing submissions. Nor do I accept that the Hongs were only obliged to use their best endeavours to get the MEC Charge removed, as Edward Hong had belatedly suggested in his email of 19 June 2009 (see [90] above).

118 Accordingly, I find that Columbia did not waive nor was it estopped from relying on the Hongs' breaches of their obligations under:

(a) s 7.1.1.1 of the SSA to transfer the Land and the original title deed to the Hospital free from all encumbrances;

(b) s 9.1.1.2 of the SSA that the Hospital and the Land would be free from all encumbrances at the Completion Date; and

(c) s 26.2.1 of the Third Schedule to the SSA that PTNM had "good and marketable title".

The appropriate measure of damages

119 Columbia sought two forms of relief. The first was for damages to be assessed for "the diminution in value of [PTNM] and/or the Sale Shares and/or receiving title to the Land that is encumbered". The second was for an indemnity for "[c]osts, including legal costs, of taking the necessary measures to remove the Encumbrance on the Land so as to obtain a good and marketable title to the Land". The first was a claim for the diminution in value of the Sale Shares. The second was for the costs of cure: the moneys expended in removing the MEC Charge from the Land.

120 Columbia alleged that PTNM incurred costs, including legal costs, to remove the MEC Charge from the land title in the sum of US$391,251. Subsequently, in a chambers hearing on 6 February 2013, Mr Kumar, counsel for Columbia, indicated that the claim for costs incurred to remove the MEC Charge was an alternative claim to that for damages for receiving an encumbered title. Clearly, the measure of damages must be calculated *either* on the basis of the costs of cure *or* the diminution in value, and the plaintiffs are not entitled to claim for both at the same time: see *Metalform Asia Pte Ltd v Ser Kim Koi and another (Holland Leedon Pte Ltd (in liquidation), third party)* [2009] 1 SLR(R) 369 ("*Metalform Asia*") at [14].

121 In closing submissions, Mr Kumar argued that the more appropriate measure of damages would be the diminution in the value of the Sale Shares. The argument was that the MEC Charge would have decreased the value of the Land. This reduction in value of the Land, one of PTNM's main assets, would, in turn, have led to a diminution in value in UMPL's shares. It is not surprising that Columbia attempted to quantify its damages in this manner. Columbia's expert, James Searby, had filed a report assessing such a diminution in value at S$1.52m. This amount far exceeds the costs of cure, which Columbia alleged was US$391,251.

122 Columbia submitted that s 8.4.2 of the SSA stipulated that the diminution in value was the appropriate measure of damages:

> 8.4.2 Subject to completion of the sale and purchase of the Sale Shares, if at any time it shall be found that any matter and subject of a Warranty was not as warranted and that the Vendors are in breach of such Warranty and the effect of such breach is that either:
>
> 8.4.2.1 ***the value of the Company or any asset of the Company or the value of the Sale Shares is less than what its value would have been had there been no such breach of Warranty*** ; or
>
> 8.4.2.2 the Company and/or the IndoCo have/has incurred any liability (actual or contingent) which would not have been incurred had there been no such breach of Warranty,
>
> Then the Vendors will make good the amount of the diminution in the value of the assets of the Company or the liability incurred by the Company and/or the IndoCo, as the case may be, or ***if the Purchaser shall so elect in its absolute discretion, pay to the Purchaser an amount equal to the diminution thereby caused in the value of the Sale Shares*** ; Provided always that these provisions shall be without prejudice to any other rights or remedies which the Purchaser may have by reason of any breach of such Warranty.
>
> [emphasis added]

123 To begin with, Rick Evans' evidence was that he would not have completed the transaction if he had known of the Land problem: [note: 60]

> If I had known that I would not be receiving an unencumbered Land Title or that I could not have

easily obtained such a title shortly thereafter, I would not have completed the transaction.

In the circumstances, Columbia submitted that the appropriate measure of damages is the diminution in the value of the property as a saleable asset.

124 In support of its contention, Columbia cited the following passage from Harvey McGregor, Martin Spencer & Julian Picton, *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2012) ("*McGregor*") at para 22-026 for the general position at law:

> Where the claimant has entered into possession and then a defect is discovered, it may be that there is little or no chance that he will be evicted in the case of a superior title or that his enjoyment of the premises will be interfered with in the case of an incumbrance. In such circumstances it is arguable that the damages should be nominal, on the ground that until eviction or other interference the injury is merely hypothetical. Against this it may be said with force that the covenant for good right to convey would thus be watered down to one for quiet enjoyment and that, to avoid this, the claimant should get full damages here and now. It is suggested that a middle course is the correct one. ***The claimant should be able to recover damages representing the diminution in the value of the property as a saleable asset by reason of the possibility of interference, and the more remote the possibility the less will the selling value be diminished.*** [emphasis added]

125 Columbia submitted that an appropriate measure of the diminution in value in the present case is the difference in value between the Land free from all encumbrances and the Land encumbered with a charge of uncertain duration. Columbia pointed to the fact that it took Columbia some four years and nine months to procure the discharge of the MEC Charge to support its assertion that the MEC Charge was, at the time of completion, a charge encumbering the Land for an *uncertain duration*. Columbia also cited the case of *Watts v Marrow* [1991] 1 WLR 1421, a decision concerning a negligent building survey, for the proposition that the correct measure of damages in cases where the claimant would *not* have acquired the property in question had it known of the defects is the diminution in value of the property and not the costs of cure.

126 James Searby's report analysed the difference in value between the Land free from encumbrances, and the Land encumbered by "a charge of an uncertain duration". [note: 61] According to James Searby, the best measure of this would be the effect on the *marketability* of the Land of an encumbrance of uncertain duration. [note: 62] James Searby considered it appropriate to use what he termed the "transaction-based" approach, which compared the market value of a marketable asset to the observed value of a similar, non-marketable asset. [note: 63] James Searby then went on to examine a range of studies known as "restricted stock studies" comparing trading prices of restricted stock in public company shares with contemporaneous prices for identical (but unrestricted) stock in public markets. James Searby noted that post-1990 restricted stock studies indicated discount rates of between 9% and 22%. He also cited two studies which used regression analysis on restricted stocks to try to isolate the discount for lack of marketability from other factors, which indicated discounts in a range of between 7.23% and 13.5%. [note: 64] Based on the preceding figures, James Searby concluded that a reasonable discount for the lack of marketability in the present case would lie between 10% and 20%. [note: 65] Assuming the value of the Land to be US$7m, which was the value put on the Land by Eddie Foo on 25 October 2007, James Searby estimated that an appropriate discount for the encumbered land should have been US$1.05m or S$1.52m. [note: 66]

127 I am not convinced by the arguments put forth by Columbia on this particular point. I am of the

view that a more appropriate measure of damages is the costs of cure. My reasons are as follows.

128 I do not accept the argument that the MEC charge was of uncertain duration and that the damage caused by the encumbrance ought to be considered as at the time of completion.

129 I make two observations. First, at the time of completion, neither side believed that there would be any difficulty in removing the MEC Charge. Aside from their beliefs, it is undisputed that the underlying debt had been paid off. It should not have been difficult to have the MEC Charge removed. The uncertainty or difficulty in removing the MEC Charge was known to the parties only after completion. It is therefore inappropriate to say that at the time of completion, the MEC Charge was for an uncertain duration. Second, Columbia appeared to be suggesting that this court should not take into account developments after completion. I do not agree with that suggestion. If Columbia was right, it would still be entitled to full damages even if the MEC Charge was removed one day or one week after completion. Such a suggestion is unjust and preposterous.

130 I do not accept that s 8.4.2 of the SSA is applicable. That provision applies only if the value of PTNM or the Sale Shares is permanently affected, which is not the case here, since the MEC Charge has been removed.

131 I note *McGregor* suggests that the appropriate measure of damages for defective title is the diminution in the value of the property as a saleable asset by reason of the possibility of interference. *McGregor* refers to *Turner v Moon* [1901] 2 Ch 825 ("*Turner*") for this suggestion. In that case, the buyer discovered the existence of a right of way over a property after he had already bought it. In the buyer's action for breach of an implied covenant of title, it was held that the proper measure of damages was "the difference between the value of the property as purported to be conveyed, and that which the vendor had power to convey". There is therefore a material difference between the facts of *Turner* and of the present case. In the present case, the MEC Charge was expected to be removed and although it took a much longer time and much more effort to do so, the MEC Charge has been removed.

132 James Searby's report was also made on the premise that the non-marketability of title may have been permanent. In other words, it was based on an assessment of probabilities of various outcomes at the time of completion. But it is illogical for this court to make an assessment of damages based on probable outcomes, when one of the outcomes has already materialised. James Searby's report must surely be affected by the fact that the MEC Charge was subsequently removed on 15 October 2012. With the benefit of this knowledge, it appears to me to be inappropriate to continue to characterise the MEC Charge as a "charge of uncertain duration". As noted by the Court of Appeal in *Metalform Asia* at [14]:

> The measure of damages must be calculated either on the basis of "the costs of cure" or "loss of bargain" and ***which one is applicable depends on the circumstances of the individual case.*** [emphasis added]

133 It is clear to me that the appropriate measure of damages is the costs of cure. However, the information that the MEC Charge was finally removed and the alleged costs of cure were provided in the midst of the trial. Therefore, I ordered a bifurcation of the assessment of the costs of cure on 20 February 2013 in order not to delay the completion of the trial. If the Hongs lost on the Encumbrance Issue, there would be a separate assessment for the costs of cure.

Issue 2: the DVI Issue

Summary of relevant facts

Summary of relevant facts

134 DVI previously owned 10,000 shares in UMPL. According to the Hongs, when DVI went into liquidation in the USA, the Bankruptcy Court for the District of Delaware issued a "Notice of Sale by De Minimis Shares of Stock" on 10 September 2004 stating that the 10,000 DVI shares were available for purchase for US$1,000. Albert Hong responded through his then solicitors, Wee Swee Teow & Co, claiming that as an existing shareholder in UMPL, he had a pre-emption right to acquire those shares under Article 29 of UMPL's Articles of Association. Albert Hong allegedly exercised his right of pre-emption to purchase the shares for US$1,000 (although arguably by then DVI had withdrawn the offer to sell these shares). [note: 67]

135 At a directors' meeting of UMPL held on 14 December 2007, it was resolved that "pursuant to [Article] 33, on receipt of US$1,000.00 from Albert Hong, for the DVI shares, the Company do and hereby cancel the DVI shares and that Mr Albert Hong be registered as the shareholder of the 10,000 shares." [note: 68] Albert Hong accordingly purported to pay to UMPL US$1,000 to be held on trust for DVI's liquidating trustee in order to cancel the DVI shares and obtain the issuance of an equivalent number of shares in his name. The 10,000 shares then formed part of the Sale Shares sold to Columbia under the SSA.

136 As noted above (at [77]), the liquidating trustee of DVI subsequently brought a claim against the Hongs, UMPL and Columbia in relation to these 10,000 shares in Suit No 61 of 2012. The claim was discontinued without prejudice to DVI bringing a fresh action.

Whether the Hongs are liable under the SSA to indemnify Columbia against any third-party claims relating to the Sale Shares

137 Under s 9.1.1.2 of the SSA, the Hongs warranted that they have ownership of and title to the Sale Shares at the completion date, and that the Sale Shares would be transferred to Columbia free from all encumbrances. Under s 9.1.1.10 of the SSA, the Hongs warranted that the Sale Shares were duly authorised and validly issued and allotted. On that basis, Columbia sought an indemnity from the Hongs under s 8.4.2 of the SSA for any loss it may suffer in relation to any claim by DVI, including the costs of defending any such claim. Section 8.4 of the SSA obliged the Hongs to hold Columbia harmless from all suits, proceedings and judgments suffered by Columbia as a result of any breaches of the warranties given by the Vendors.

138 The Hongs had previously accepted that they would have the responsibility of dealing with any claim from DVI's liquidating trustee. As stated above (at [77]), in a letter from MKP to Alan Lim dated 7 March 2008, MKP reassured Alan Lim that "[o]ur clients shall deal with the purported claim of [DVI's liquidating trustee] with [Shook Lin] directly if the need arises". [note: 69]

Whether declaratory relief should be granted

139 The Hongs argued that declaratory relief should not be granted. They stated that there was no reasonable prospect of any further claim being brought by DVI.

140 The power of the court to grant a declaration is found in s 18 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA") read with para 14 of the First Schedule to the SCJA and O 15 r 6 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). The court's power to grant a declaration is discretionary, but it will be exercised if it is necessary to establish the plaintiffs' rights.

141 The test for declaratory relief was elucidated by the Court of Appeal in *Karaha Bodas Co LLC v*

Pertamina Energy Trading Ltd [2006] 1 SLR(R) 112 ("*Karaha Bodas*") at [14]:

> … the following are the requirements that must be satisfied before the court grants [declaratory] relief:
>
> (a) the court must have the jurisdiction and power to award the remedy;
>
> (b) the matter must be justiciable in the court;
>
> (c) as a declaration is a discretionary remedy, it must be justified by the circumstances of the case;
>
> (d) the plaintiff must have locus standi to bring the suit and there must be a ***real controversy*** for the court to resolve;
>
> (e) any person whose interests might be affected by the declaration should be before the court; and
>
> (f) there must be some ambiguity or uncertainty about the issue in respect of which the declaration is asked for so that the court's determination would have the effect of laying such doubts to rest.
>
> [emphasis added]

142 The Hongs argued that there was no evidence to show that a further claim was likely to be brought by DVI, which has been in liquidation since November 2004. The Hongs claimed that:

> The key issue is to determine if there is any ***real or distinct possibility*** of the liquidating trustee of DVI bringing any action for recovery of the shares ***and their prospect of success*** of such a claim. [emphasis added]

It was unclear where this test was derived from. The Hongs appeared to be relying on the *Karaha Bodas* requirement of "real controversy" as the basis of their argument.

143 As noted in the closing reply submissions for Columbia: [note: 70]

> The defendants' statement of the issue is wrong. The real point is that ***the defendants deny that they are obliged under the SSA to indemnify [Columbia] against any claim by DVI in relation to the transfer of the DVI Shares*** , including all costs of defending any claim that DVI may bring against it ... [emphasis added]

144 I agree that the "real controversy" is not whether DVI is likely to bring a claim. It is whether the Hongs are obliged under s 8.4.2 of the SSA to indemnify Columbia against "[a]ny claim in relation to the transfer of the DVI Shares, including all costs of defending any claim that DVI may bring against it". Furthermore, this is not a situation where DVI is precluded as a matter of law from bringing a claim. What the Hongs are saying is that there will not be such a claim in the circumstances because the liquidation of DVI has already been ongoing for several years, and an earlier action by DVI has been discontinued.

145 However, in my view, such allegations are neither here nor there. There was no ruling on the merits of DVI's claim. The Hongs did not assert that DVI is precluded as a matter of law from initiating

another action for the DVI Shares. The Hongs merely say that any such claim will not be successful on the merits but, again, they must know that that is not the point. Columbia is entitled to an indemnity in case any such claim, if and when it is made, is successful.

146 If the Hongs had simply admitted that they were obliged to indemnify Columbia under the SSA for any such claim if and when it arises, there would have been no need for Columbia to seek such a declaration in the first place. However, given the Hongs' stance on this matter, I am of the view that this remedy is justified in the circumstances.

Issue 3: the Tax Exposure Issue

147 The third main issue relates to whether the Vendors were in breach of a number of tax warranties given in the SSA. There is a certain degree of overlap—both legally and factually—between this issue and the fourth main issue (the Inflated Revenue Issue), which relates to the Vendors' alleged breaches of warranties in the SSA relating to the accuracy of PTNM's books. For the sake of clarity I will first set out the questions raised by each of these issues, and how they relate to each other.

148 In relation to the third main issue, Columbia alleged that PTNM had been under-declaring and under-paying value-added tax ("VAT") and withholding tax ("WHT"). Columbia alleged that these breaches caused them loss which fell into two categories: *actual* tax exposures and *potential* tax exposures.

149 The actual tax exposures arose as a result of additional tax assessments made by the ITA between 2008 and 2013, in respect of PTNM's transactions for the years 2004 to 2007. The Hongs did not dispute that the ITA has in fact conducted these additional assessments, and that Columbia has had to pay sums to the ITA as a result of these assessments.

150 Next, the potential tax exposures. Columbia claimed that it may become subject to potential tax exposures if the ITA reopens tax audit for the years 2004 to 2007, on the basis that a tax crime that has been committed. In the event that this happens, the potential tax exposures will include any additional sums of tax which PTNM would be liable for, any penalties which the ITA may impose, and the legal costs of dealing with the concomitant investigation, prosecution, or both.

151 It is important to appreciate that, on the assumption that I find the Hongs to be in breach, the loss falling within the category of actual tax exposures have already been incurred by Columbia at the time of the action. In contrast, the loss falling within the category of potential tax exposures is inchoate: there is a chance the loss might occur; there is a chance there might be no loss at all. Whether or not this category of loss will crystallise is contingent on the ITA reopening an audit. This distinction between the actual and potential categories of loss is crucial in understanding the relief sought by Columbia under the third main issue, which will be dealt with in a subsequent section.

152 The fourth main issue relates to PTNM's alleged improper inflation of revenue by dressing up under-declared and under-paid tax as revenue. Columbia alleged that as a result of this revenue inflation, it paid more for the Sale Shares than it would have, had PTNM's books been true and accurate. Columbia thus claimed for the diminution in the value of the Sale Shares as a result of these breaches of warranties.

153 It will be seen that there is a factual overlap between the third and the fourth main issues: both sets of alleged breaches arise from the *same act* of characterising under-declared and under-paid tax as revenue. The same act nevertheless gives rise to (purported) breaches of distinct

warranties, which are capable of sustaining distinct claims against the Hongs. There is also a degree of legal overlap between Columbia's claims under the third and fourth main issues. This is because (on the assumption I find the Hongs to be in breach) the losses suffered by Columbia for under-declaration and under-payment of tax on the one hand, and for the inflation of revenue on the other, are, to some extent, obverse sides of *the same coin*. The allegation was that the avoided taxes were dressed up as revenue. Without one, there would not be the other. Thus, while I examine these claims as distinct issues, I remain aware that they are connected. In particular, I am also aware of the possibility of double recovery if full relief is awarded for both these claims cumulatively.

154 I now turn to address the questions raised by the third main issue.

Summary of relevant facts

155 Columbia's case is that in or around May 2008, after fully taking over the management of the Hospital, it discovered that PTNM had been under-declaring and under-paying WHT whilst it was under the control of the Hongs. [note: 71] Prem Abraham gave evidence that in the course of visits to the Hospital, Norman Chong, an employee of Columbia, had spoken to Kimun Kuara, a finance executive of PTNM, who told him about the Hospital's practice of under-declaring Art 21 WHT in relation to doctors' fees. [note: 72]

156 There was also an email dated 5 August 2004 (about three and a half years earlier) from Kimun Kuara to K C Leong, the financial controller of PTNM at that material time, stating that the Hospital was declaring and paying only 40% of the Art 21 WHT it should have been paying in relation to doctors' fees. [note: 73] Another document with the title "DOCTOR FEE TAX ARRANGEMENT" was also in evidence and set out the mechanics of this arrangement. [note: 74] According to Prem Abraham, this document was part of the hospital records and was handed to Norman Chong. Norman Chong and Prem Abraham only discovered it, together with the email dated 5 August 2004, around April 2008. [note: 75]

157 On the other hand, the Hongs claimed that Columbia was aware about the under-declaration and under-payment of taxes, and did not view it as a problem. Edward Hong alleged that a meeting took place between himself, Eddie Foo and Rick Evans in March 2008. Edward Hong stated that at the meeting, it was explained that "consistent with what we were advised as the industry practice, the withholding tax on doctors' fees would be slightly under-declared". He claimed that "[n]either Rick Evans nor Columbia's solicitors raised any problems with the tax issues at that meeting ... it was a non issue". [note: 76] Columbia denied such a meeting took place. There was also no reference to such a meeting in any correspondence between the parties.

158 It is undisputed that Rick Evans and Edward Hong met on 30 May 2008, and that tax issues were discussed at this meeting (see [81] above). During this meeting, Rick Evans told Edward Hong about what he had discovered in relation to the Hospital's past tax practices and explained Columbia's intention, as new owners of the Hospital, to put a stop to these practices and comply with Indonesian law. [note: 77]

159 On 2 June 2008, Edward Hong sent an email to Rick Evans in relation to the matters discussed at the 30 May 2008 meeting. [note: 78] Edward Hong's email of 2 June 2008 stated that the practice of under-declaring withholding tax had been in place since the inception of the Hospital, and that there had never been a problem with the ITA. According to Edward Hong, if Columbia's change of practice triggered a tax audit for past years and led to the assessment and imposition of additional

taxes and penalties, the Vendors should "properly" not be held responsible for this.

160 On 11 June 2008, Rick Evans responded stating that the Vendors were bound by the SSA and could not unilaterally absolve themselves from liability, whether of UMPL or PTNM, flowing from the failure in the past to observe or comply with the relevant tax legislation. [note: 79]

161 In the meantime, Columbia had given instructions to its auditors, Deloitte, to conduct a tax review for the fiscal years 2005 to 2008. Pursuant to these instructions, a tax memorandum dated 23 October 2008 was prepared. This memorandum highlighted areas of concern and Deloitte was asked to engage in a closer analysis of WHT and VAT. This led to a further report dated 12 February 2009.

162 Prem Abraham sent a letter to the Hongs dated 28 October 2008 concerning a number of outstanding issues including the Land Issue and PTNM's records. [note: 80] The letter referred to Deloitte's 23 October 2008 memorandum and stated that the memorandum had highlighted potential tax exposures arising from improper book-keeping practices and the under-payment of Art 21 WHT on doctors' fees.

163 On 30 October 2008, MKP issued a lengthy letter in response to Prem Abraham's letter. MKP accused Columbia of raising "non-issues", and that "[the under-declaration of WHT on doctors' fees] had been raised with and discussed with [Columbia] before the SSA was signed, and they have been fully appraised of the matter".

164 From 2008 to 2013, PTNM underwent a tax audit by the ITA. In 2012 and early 2013, the ITA issued additional tax assessments against PTNM for the years 2004 to 2007 in the following amounts:

(a) IDR 1,991,644,129 for the year 2004;

(b) IDR 1,930,263,887 for the year 2005;

(c) IDR 2,327,175,849 for the year 2006; and

(d) IDR 778,439,127 for the year 2007.

IDR 7,027,522,992

It is common ground that Columbia has paid IDR 7,027,522,992 to the ITA between 26 April 2012 and 14 November 2012.

Whether the Hongs are liable under the SSA for breaches of warranties relating to the tax position of PTNM

165 Columbia argued that the under-declaration and under-payment of taxes breached a number of warranties contained in the Third Schedule to the SSA, namely that:

(a) the audited accounts and management accounts of PTNM gave a true and fair view of the state of affairs of PTNM at 31 December 2006 and 30 November 2007 respectively (s 3.1);

(b) full provision had been made for all actual and contingent liabilities in the relevant accounts (ss 3.1.1 and 3.1.2);

(c) neither PTNM nor the Hospital committed "any criminal, illegal or other unlawful act ..." (s 5.6);

(d) PTNM had duly made all tax returns and had provided the necessary information to the relevant authorities, and that this information was correct and made on a proper basis (s 6.1);

(e) there was no liability to taxation in respect of transactions effected before completion (s 6.2); and

(f) the statutory records and books of PTNM contained true, full and accurate records of all matters required to be dealt with (s 15).

166 The Hongs raised three arguments in response. The first argument was that the accounts were true and accurate, for a number of reasons. First, the accounts were audited by PTNM's auditors, Grant Thornton, and the ITA did not question the accounts. Second, the directors of PTNM appointed by Columbia had accepted that the accounts were true and accurate. Third, that at a meeting in or around March 2008, Rick Evans accepted Edward Hong's and Eddie Foo's explanation about the original tax position of PTNM. Fourth, at the 30 May 2008 meeting, Rick Evans further confirmed that he was aware of the standard industry practice regarding under-declaration of Art 21 WHT in respect of doctors' fees. Fifth, all liabilities and obligations in respect of all taxes were discharged at 31 December 2008.

167 The fifth reason leads onto the Hongs' second argument: that the representations and warranties in the SSA were effective only up till 31 December 2008. The Hongs argued that that was the true intention of the parties. They argued that the SSA should accordingly be rectified to give effect to that intention.

168 The Hongs' third argument was that Columbia was estopped or precluded from alleging that taxes were under-declared or under-paid. This was because Columbia had known of this from the due diligence that it conducted. To buttress this argument, the Hongs pointed to a report by Kusnandar & Co ("Kusnandar") (a firm that was appointed by TMAL, Columbia's solicitors, to conduct legal due diligence on PTNM) that all relevant tax issues had been resolved at all times. I deal with each of these arguments in turn.

(1) Whether the warranties on the tax position of PTNM were breached

169 It is clear that the Hongs' first argument that there has been no breach of warranty must fail (leaving aside the Hongs' second argument that the warranties were only effective up to 31 December 2008, which I will come to in a moment). It is undisputed that the ITA made additional assessments against PTNM for the years 2004 to 2007 totalling IDR 7,027,522,992 (see above at [164]). The Hongs did not suggest that these additional assessments were incorrect.

170 The very fact that the additional assessments were made is a breach of the warranties in s 6 of the Third Schedule to the SSA. The Hongs have also admitted (see above at [157] to [159]) that when PTNM was under the management of the Vendors, it had been deliberately under-declaring and under-paying Art 21 WHT. Yet in their pleadings, the Hongs maintained some form of denial that there was any under-declaration or under-payment. Indeed, Columbia complained in its closing submissions that the Hongs were blowing hot and cold: at times maintaining their denial, at others, dropping it.

171 In these circumstances the other points raised by the Hongs were non-starters. In the light of the subsequent additional tax assessments made by the ITA, the Hongs' position that PTNM's

accounts were accepted with no query from the ITA is untenable.

172 The Hongs' reliance on the fact that directors of PTNM appointed by Columbia signed off on PTNM's accounts in June 2008 is misplaced. Signing off on such accounts does not in any way affect the contractual force of the warranties given by the Hongs. In my view, the nominees were simply trying to allow PTNM to carry on its business without alerting the ITA of the previous years' shortcomings. While neither the nominees nor Columbia had volunteered any information to the ITA about under-declaration or under-payment of taxes, it is unrealistic to expect them to have done so; they owe no such obligation to the Hongs. I say this because counsel for the Hongs saw it fit to make the point about non-disclosure by Columbia to the ITA during cross-examination of a witness for Columbia. Indeed, it seems to me that if such information had been volunteered to the ITA, the Hongs would have blamed Columbia for opening Pandora's Box. It was quite unfair for their counsel to make the point that he did.

173 In relation to the alleged meeting in March 2008 in which the under-declaration of withholding tax was dismissed, Rick Evans has denied that there was such a meeting. I find that the Hongs have failed to establish that this meeting took place. In any event, Edward Hong only alleged that neither Rick Evans nor Columbia's solicitors raised any problem on the tax issue at that meeting. This is different from an allegation that Rick Evans had in fact agreed not to insist on Columbia's rights under the SSA.

174 As regards the meeting on 30 May 2008, I have referred above (at [158] and [159]) to the email from Edward Hong to Rick Evans shortly thereafter on 2 June 2008. The email showed that there was no such assurance from Rick Evans. That was why Edward Hong unilaterally tried to assert that any review or back-taxes by the ITA should not be to the account of the Vendors. That is also why Rick Evans replied on 11 January 2008 to stress that the Vendors were bound by the SSA and could not extricate themselves unilaterally.

175 I do not find Columbia's own due diligence or Kusnandar's report to be relevant. I do not see how such steps taken by Columbia could negate, whether by estoppel or otherwise, clear warranties given by the Hongs.

(2) Whether the warranties in the SSA in relation to taxes were effective only up to 31 December 2008

176 I will now address the Hongs' second argument that the tax warranties in the SSA were only valid and effective up to 31 December 2008. They relied on ss 9.1.1.13 and 9.1.1.14 of the SSA which state that "this warranty in relation to taxes shall be valid up to the 31 day of December 2008". However, ss 9.1.1.13 and 9.1.1.14 deal only with tax warranties relating to capital reserves. Accordingly, the Hongs sought rectification of ss 9.1.1.13 and 9.1.1.14 of the SSA, such that they apply to *all tax warranties*.

177 It will be helpful to set out the provisions, and the rectification that the Hongs sought:

> 9.1.1... the Vendors hereby represent and warrant to the Purchaser:
>
> ...
>
> 9.1.1.13~~that in relation to the capital reserves as disclosed in the AA2 and the MA2 accounts~~, no taxes are payable by [PTNM] provided always that this warranty in relation to taxes shall be valid up to the 31 day of December 2008; and

~~no previous shareholders of [PTNM] who had made the advances to [PTNM] and which was converted to the capital reserves shall have any claims whatsoever against [PTNM] for any repayment of such advances provided that this warranty shall be valid for a period of 6 years from Completion Date.~~

The struck-through portions are those that the Hongs were seeking to expunge through rectification. It is immediately apparent that the rectification sought by the Hongs will have a great effect on the obligations of the Vendors under the SSA. It will extend the 31 December 2008 time limit from a narrow class of tax warranties (only on capital reserves) to *all* tax warranties.

178 The Hongs argued that the terms, if rectified, would reflect the true intentions of the parties. They relied on cl 5 of the SFA, which was the in-principle agreement, prior to the drafting of the SSA. Clause 5 of the SFA stated that the Vendors represented and guaranteed that "all taxes ... shall be paid by the Vendor[s], provided however, that this obligation of the Vendors shall expire on December 31, 2008". [note: 81]

179 The law on rectification of contractual terms for mistake is set out in two High Court cases. In *Maxz Universal Development Group Pte Ltd v Shen Yixuan* [2009] SGHC 164, Lee Seiu Kin J stated at [22] that rectification of a contract is an exercise of the court's equitable jurisdiction when contracting parties mistakenly draw up terms which militate against what they actually intended. The court then laid out general principles applicable to rectification:

(a) There must be an "outward expression of accord" in relation to the particular provision. It is not necessary to show that there was a binding agreement prior to the execution of the written document, but it must be shown that parties had a continuing intention with regard to that provision down to the execution of the written contract – see *Joscelyne v Nissen* [1970] 2 QB 86.

(b) The burden of proof is on the party seeking rectification and there must be very clear distinct evidence that there was a different intention from the contract document at the time the contract was entered into – see *Tucker v Bennett* (1887) 38 Ch D 1, *Joscelyne v Nissen* [1970] 2 QB 86.

(c) The denial of one of the parties that the deed as it stands is contrary to his intention will have considerable weight, and unless the other party can convince the court that the document does not represent both parties' intentions at the time of execution, rectification will only be ordered exceptionally. It is not sufficient to show that the written contract does not represent the true intention of the parties, it must be shown that the written contract was actually contrary to the intention of the parties – see *Lloyd v Stanbury* [1971] 1 WLR 535.

(d) There must be a literal disparity between the terms of the prior agreement and those of the document which it is sought to rectify. ...

180 In *Pender Development Pte Ltd and another v Chesney Real Estate Group LLP* [2009] 3 SLR(R) 1063, Andrew Ang J emphasised at [20] that "[t]he degree of probability to be established in rectification proceedings [is] a high one, similar to that of "convincing proof"".

181 The extent of the rectification, coupled with the high threshold necessary for rectification, made the task the Hongs faced an uphill one. The Hongs had to show "convincing proof" that the common intention of the parties at the time of contracting was that all of the tax warranties given by the Vendors' were to lapse on 31 December 2008.

182 In my view, this position is unsustainable on the evidence. The sequence of events leading up to the execution of the SSA shows that this was clearly not the case:

(a) Alan Lim's evidence was that when Rick Evans first sent the SFA to him, he gave Rick Evans his opinion that cl 5 was not fair. [note: 82]

(b) In the fourth draft of the SSA, the warranties in respect of taxes as set out in s 6 of the Third Schedule to the SSA were set out in their present form without any time limitation. [note: 83] This draft was sent to MKP by Alan Lim on 4 December 2007, after the SFA was signed.

(c) MKP replied in an email dated 6 December 2007 at 8.58 am enclosing certain proposed amendments to the draft SSA. [note: 84] They proposed to amend s 8.2.3.7 to read:

> pay and discharge all Taxation, prior to the imposition of penalties, in accordance with all laws provided that the obligation of the Vendors to pay such taxes shall expire on 31 December 2008; [emphasis in original]

(d) MKP sent a further email on 6 December 2007 at 6.24 pm [note: 85] stating that the underlined portion of s 8.2.3.7 above had "been deleted from [the] original amendment. This was done because the underlined portion appeared to be contrary to cl 5 of the SFA, and because it appeared to impose liability on the Vendors for payment of tax imposed on PTNM beyond the completion date, and that it was never the Vendors' obligation to pay PTNM's taxes.

(e) According to Alan Lim, the matter of the Vendors' obligations concerning PTNM's taxes was discussed during the meeting between the parties on 7 December 2007. This was before the Vendors signed the SSA on the same day. Alan Lim gave the following evidence as to why he objected to cl 5 of the SFA: [note: 86]

> I objected to the wide clause that was required of my client to be included in the SSA as reflected in the SFA. After -- I recall I asked Mr Eddie Foo any reason to limit the warranty period to just one year, was there something that he ought to tell us, or is there something wrong that he better disclose at that point in time so that my client could make an informed decision. But nothing was disclosed.
>
> …
>
> And then Mr Rick Evans finally agreed to only limitation, the exclusion clause is limited to capital reserve, as reflected in 9.1.1.13; and 9.1.1.14 was also discussed, they were advanced by shareholders. Again, as I recall there was attempt to limit it to one year, but I objected, I insisted it should be at least a limitation period of six years applicable in Singapore, Indonesia for that matter. These two clauses were the result of the negotiation that day. That's my recollection counsel.

183 More importantly, Alan Lim elaborated that ss 9.1.1.13 and 9.1.1.14 of the SSA were inserted by the Vendors' own solicitor, Josephine Low of MKP, before the SSA was executed by the Vendors. According to Alan Lim, after the parties completed their discussion on 7 December 2007, Josephine Low and himself went into another room where she made the amendments on her laptop while he was beside her. [note: 87]

184 Significantly, Mr Niru Pillai ("Mr Pillai"), counsel for the Hongs in the proceedings, informed the court that the Hongs' position was that ss 9.1.1.13 and 9.1.1.14 were not discussed at that meeting. Furthermore, Mr Pillai stated that according to Josephine Low, she had nothing to do with the insertion of these clauses. It was Alan Lim who had inserted them. [note: 88] Yet, the Hongs chose not to call Josephine Low to give evidence. There was no suggestion that she was out of the country or was a hostile witness. I draw an adverse inference against the Hongs for this omission.

185 Mr Pillai put to Alan Lim that the words "capital reserves" and "taxation on capital reserves" were never discussed, much less agreed upon. Mr Pillai's case put to Alan Lim was that those terms were mistakenly inserted due to "templating". [note: 89] Columbia rightly pointed out in closing submissions that this allegation was absurd. Sections 9.1.1.13 and 9.1.1.14 of the SSA appeared in none of the previous drafts. They could not have been inserted due to "templating". [note: 90]

186 The Hongs also relied on the fact that Rick Evans admitted that he did not know the meaning of "capital reserves" in cross-examination. [note: 91] In my view, this is neither here nor there. It did not mean that the SSA should be rectified in the manner sought by the Hongs.

187 I find Alan Lim to be a steady witness. In the light of his evidence that it was Josephine Low who inserted the provisions in dispute, coupled with the Hongs' deliberate decision not to call Josephine Low to give evidence to the contrary, I accept Alan Lim's evidence on the point.

188 There is another point against the Hongs on the issue of rectification. Before 30 August 2012, the Hongs took the position that s 9.1.1.13 of the SSA was consistent with cl 5 of the SFA. Hence, there was no need for rectification of s 9.1.1.13. [note: 92] It was only on 30 August 2012 that they decided to apply to amend their pleadings to include the plea for rectification.

189 The Hongs were clearly blowing hot and cold. If the provision really ought to have been rectified, they would have taken that position from the outset. It would have been plainly obvious that what was stated in the SSA did not capture the true intention of the parties. They would not have taken contradictory positions and inserted their plea for rectification of s 9.1.1.13 of the SSA so late.

190 The Hongs argued that it was unjust for the Vendors to be perpetually liable for any additional tax liability of PTNM for the relevant years. In my view, this argument is a non-starter. The Vendors knew what they were in for. They could have sold the Sale Shares on an "as is where is" basis. Indeed, this was an argument that was raised. The fact is that they did not. They agreed to give warranties and it would be unjust to allow them to renege on the warranties.

191 I conclude that the Hongs' case for rectification of ss 9.1.1.13 and 9.1.1.14 must fail.

(3) Whether Columbia was estopped from alleging that the taxes were under-declared and under-paid

192 This defence will be dealt with below (at [233]–[239]) in relation to the Inflated Revenue issue, where the Hongs adopted a similar argument.

The appropriate measure of damages

193 I mentioned above that Columbia claimed for two categories of loss: actual tax exposures and potential tax exposures. The relief sought by Columbia was rather unhappily framed. Columbia argued

that it was entitled to damages for loss of a chance to negotiate a lower purchase price for the Sale Shares and a full indemnity from the Hongs for the actual tax exposures.

194 In relation to loss of a chance, Columbia asserted that if it was aware of the potential tax liabilities, it would have sought a further reduction of the price of the Sale Shares to that extent. It asserted that there was a real and substantial chance that the Hongs would have agreed to a discount.

195 Columbia had to seek relief in this circuitous manner because the loss from the potential tax exposures was inchoate; it had not crystallised into a liability that had been or will be imposed on PTNM. On the other hand, the actual tax exposures were liabilities that had already been imposed on PTNM. Columbia therefore claimed a full indemnity from the Hongs for the actual tax exposures. Columbia acknowledged that there was a substantial overlap in both these claims. If the former claim was allowed, an appropriate portion of potential tax exposures should be removed from the latter claim to avoid double recovery.

196 Columbia relied on expert evidence to quantify the potential tax exposure PTNM might become subject to as a result of the Vendors' breaches. Roy Tedja (Columbia's expert) and Nick Graham (the Hongs' expert), both agreed that the tax assessments issued for 2005 to 2007 represented the final assessment of taxes for those years in the *absence of a tax crime*. [note: 93] The experts disagreed as to the likelihood of the tax authorities reopening an audit for those years.

197 Roy Tedja was of the opinion that a tax crime had been committed, [note: 94] and so, the previous tax practice of PTNM may have led to the ITA reopening an audit. Nick Graham, on the other hand, asserted that under-declaration of tax *could* be treated as a tax crime, but that was not necessarily so. [note: 95] He thus concluded that it was not certain whether the ITA could reopen an audit.

198 The table below summarises Roy Tedja's view of the potential tax liabilities (including interest and penalties) which PTNM was liable for:

Tax	**Tedja's figure (IDR)**
Art 21 WHT	10,737,777,254
Art 23 WHT	658,242,265
Art 26 WHT	3,089,687,463
Art 4(2) WHT	136,107,433
Output VAT	902,624,590
Input VAT	4,180,049,064
Self-assessed VAT	56,783,160
Total	**19,761,271,228**
SGD	**3,149,200.39**

199 This was the figure Columbia relied on for the loss of a chance claim.

200 In my view, the question of the appropriate measure of damages is best considered on the basis of first principles.

201 In the first place, the statement of claim did not plead damages by way of a loss of chance. In my view, a general plea for damages is different from damages for loss of a chance. The latter has to be clearly pleaded.

202 In any event, the fundamental principle of compensation is that the appropriate measure of damages is "that sum of money which will put the party who has been injured, or who has suffered, *in the same position as he would have been in if he had not sustained the wrong* for which he is now getting his compensation" [emphasis added]: *Livingstone v Rawyards Coal Co* (1880) LR 5 App Cas 25. As noted in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 21.002:

> To do this, we need to identify what it is that the promise has *lost* by occurrence of the breach. That is to say, we need to see what position the promisee *would have been in*, had the contract not been breached, and then compare that with the position that the promisee *is now in*, given that the contract has been breached. The difference between those two positions is the promisee's "loss". [emphasis in original]

203 On the present facts, it is clear that if the Hongs had not breached the relevant warranties in the SSA, there would simply have been no under-declaration and under-payment of tax: all PTNM's taxes for the years 2005 to 2007 would have been correctly paid and recorded in its accounts. If there were no breach, PTNM would simply not be liable to pay any additional tax for the years 2005 to 2007. The ordinary and the obvious way of addressing the situation is to hold the Hongs liable to indemnify Columbia by paying to Columbia any amount PTNM has paid or might have to pay in tax for those years of assessment. This would involve granting:

> (a) an order for the Hongs to reimburse Columbia in respect of the additional taxes that Columbia has actually paid; and
>
> (b) a declaration that the Hongs are liable to indemnify Columbia for any future tax assessments which might be brought for the same years (presumably if an audit is reopened on the basis that a tax crime has occurred), as well as any additional penalties which may be imposed and/or any costs (including legal costs) which might be incurred in dealing with any investigation and/or prosecution by the tax authorities.

204 In my view, the above orders would have the effect of putting Columbia in as good a position as it would have been in, had there been no breach of the relevant warranties. This would give effect to the fundamental principle of compensatory damages. Put simply, the difference between Columbia's present position, and Columbia's position had the relevant warranties not been breached, was the risk of PTNM incurring further tax liabilities for the relevant years of assessment. It is the monetary value of this risk which I am now attempting to quantify.

205 Columbia asserted that the monetary value of this risk is equivalent to the discount that it would have been likely to obtain, had it been made aware of the true state of affairs at the time of contracting.

206 The basis of this claim is that Columbia lost a chance to re-negotiate the purchase price of the Sale Shares. The problem with this approach is that it presupposes that Columbia would have sought

a discount, and that the Vendors would have been likely to grant it. Yet, while Columbia made arguments that there was a real and substantial chance of the Hongs re-negotiating the purchase price, they did not adduce any evidence on the likelihood of obtaining a reduction in the purchase price and the extent of the reduction. Furthermore, in my view, this is not a situation where the SSA is silent on the point and Columbia lost a chance to use it to re-negotiate the purchase price. The SSA expressly provides for warranties, including those which Columbia now rely on. Since the warranties cover the situation, it is not open to Columbia to argue for something else like the possibility of a reduction in price as opposed to the ordinary damages for breach of warranty. Columbia did proceed with the transaction considering itself sufficiently protected by the numerous detailed warranties given by the Vendors.

207 The approach preferred at [203] above has the benefit of certainty and avoids any windfall to either side. I add that this approach is consistent with the wording of the indemnities contained in s 8.4.3 of the SSA.

208 I will now address the cut-off date for additional tax assessments which the Hongs remain liable to indemnify Columbia. On 26 March 2014, the parties were asked to make submissions on the point.

209 For the sake of clarity, the cut-off date refers to the final date of transactions for which PTNM may incur a tax liability and which the Hongs are liable to indemnify Columbia for, regardless of when the tax assessment is made. In other words, if the ITA makes an additional tax assessment for a transaction that occurred *before* the cut-off date, the Hongs will have to indemnify Columbia for the additional liability. It does not matter that the ITA assessment is made *after* the cut-off date. I mention this because the latest submission for the Hongs reiterated that they are not liable for any tax liability assessed after a certain cut-off date even if the tax liability is for a transaction which occurred before the cut-off date.

210 Columbia's position was that the cut-off date was the date of completion, 22 January 2008. It relied, in particular, on s 8.4.3 of the SSA, the indemnity provision. The provision stated that the Vendors agreed to indemnify Columbia for tax liabilities "arising from any transaction effected or deemed to have been effected on or before the Completion Date ...".

211 On the other hand, the Hongs made various submissions on the excuse of giving context to the short point they were asked to address. I need only refer to those submissions which were relevant to the cut-off date.

212 The Hongs argued that Columbia's claim for the tax indemnity was an afterthought. They also stated that the cause of action for an indemnity had not arisen, because additional tax liability had not yet been incurred. Finally, they stated that the cut-off date was 31 December 2007. They relied on evidence given by Rick Evans in cross-examination that the Vendors were not liable for any taxes accruing after 2007.

213 These points may be dealt with shortly. It is clear, from what I have already discussed above, that Columbia's claim for the tax indemnity was not an afterthought. As I have laid out above, Columbia's claim encompasses both *actual* and *potential* tax liabilities. Furthermore, the SSA clearly supports its claim for the tax indemnity. The actual tax liabilities have already accrued. The sums which PTNM has had to pay the ITA have been ascertained and established. Therefore, Columbia has a good cause of action against the Hongs on the indemnity for those sums. I will order the Hongs to indemnify Columbia in respect of the actual tax liabilities.

214 In respect of the potential tax liabilities, I agree with the Hongs that insofar as no further assessments have yet been made, the liability to indemnify has not yet arisen. Nonetheless, I am of the view that it is appropriate to grant a declaration that the Hongs are to indemnify Columbia for any future tax assessments and the associated penalties and/or costs. I have set out the principles governing the grant of declaratory relief above, and do not propose to go into them again. It suffices to say that there was a real controversy between the parties as to the existence, extent and scope of the indemnities provided by the Hongs under the SSA, making declaratory relief appropriate.

215 I will now deal with the cut-off date for the indemnities. I am of the view that the SSA is clear on this point. Section 8.4.3 of the SSA states that the Vendors are liable to indemnify Columbia for any additional liabilities incurred in respect of transactions occurring in the period on or before the completion date which is 22 January 2008. I do not regard as relevant Rick Evans' evidence in cross-examination that the Vendors were not liable for any taxes accruing after 2007. The obligations of the parties under the SSA cannot be affected by Rick Evans' misunderstanding of the legal effect of the SSA's provisions.

Issue 4: the Inflated Revenue Issue

Whether the Hongs are liable under the SSA for breaches of warranties relating to the revenue of PTNM

216 Columbia's case was that WHT and VAT were under-declared, and instead reflected as a component of PTNM's revenue. As a consequence, PTNM's EBITDA figure for the relevant period was higher than it should have been. Columbia claimed that this was a breach of the Vendors' warranties listed above at [165]. Columbia asserted that the loss it suffered was the diminution in value of the Sale Shares.

217 The Hongs raised two main arguments in their defence. First, they argued that the warranties in the SSA did not induce Columbia to enter into the SSA. They asserted that Columbia was fully aware of PTNM's actual tax position, and that Columbia instead relied on the findings from their own due diligence exercise and the Kusnandar report. The Hongs' second argument was that Columbia was estopped from alleging that taxes were under-declared or under-paid because Columbia knew that all relevant taxes had been resolved.

(1) Whether there was inflation of revenue due to WHT accounting

218 It is quite clear from the discussion above that there was under-declaration and under-payment of Art 21 WHT (see above at [169] and [170]).

219 The experts for both parties were in agreement that at least some Art 21 WHT was not paid to the ITA, and was instead stored in a general ledger account for "other revenue". The experts agreed that the Hospital retained 7.5% of doctors' fees. [note: 96] This entire sum was supposed to be paid to the ITA as Art 21 WHT. But only approximately 40% of this sum was recorded in the general ledger account for intended payments to the ITA. The remainder of approximately 60% was recorded in the general ledger account for "other revenue", and not paid to the ITA. [note: 97] Nick Graham, the expert witness for the Hongs, even made the qualification that in some instances, it was even higher than 60%. [note: 98]

220 Nick Graham's and Roy Tedja's opinions differed only on the quantum of the inflated revenue due to under-declared Art 21 WHT. In Roy Tedja's first affidavit of evidence-in-chief, he concluded

that IDR 989,952,563 in the general ledger account for other revenue could be traced to the under-declared and under-paid Art 21 WHT. [note: 99] Nick Graham, on the other hand, concluded that the figure was only IDR 853,013,874. [note: 100]

221 Nick Graham suggested that there were two reasons for this discrepancy. First, because "other journals use sequential numbers for each entry and/or there is a different reference system for some journals"; and second, the possibility that the general ledger account for other revenue "includes transactions other than the Article 21 WHT that has been withheld but not paid to the State Treasury". [note: 101]

222 Roy Tedja swore a second affidavit of evidence-in-chief, in which he reappraised his first assessment. In doing so, he took into account Nick Graham's observations. As a result he revised the figure in his assessment down to IDR 972,275,994.

223 Nick Graham admitted that Roy Tedja was able to obtain explanations from the employees of the Hospital. [note: 102] Nick Graham did not question the truth or accuracy of what Roy Tedja was told by the employees.

224 Based on the foregoing, I am persuaded that Roy Tedja's figure should be preferred over Nick Graham's. Accordingly, I find that the inflation of PTNM's 2007 revenue due to the under-declaration and under-payment of Art 21 WHT was IDR 972,275,994.

(2) Whether there was inflation of revenue due to VAT accounting

225 Roy Tedja was also of the opinion that PTNM had not correctly accounted for VAT. There were two types of VAT that were relevant: output VAT and input VAT. Output VAT is tax charged by PTNM to the patient, which is then payable by PTNM to the ITA. Input VAT is tax charged by PTNM's suppliers to PTNM, which is then paid by PTNM's suppliers to the ITA.

226 Roy Tedja gave evidence that both these forms of VAT were improperly recorded. PTNM recorded output VAT charged to outpatients on the sale of medicines as a revenue item rather than as a liability. It also recorded input VAT paid to suppliers for the purchase of medicines as an expense rather than as an asset. By adding these items to the profit and loss account, the inflation of PTNM's 2007 revenue due to VAT was IDR 277,033,514. [note: 103]

227 Nick Graham substantially agreed with the reasoning above, but disagreed on the quantum of the inflated revenue. He was of the opinion that the inflation of PTNM's 2007 revenue due to VAT was only IDR 267,835,481. [note: 104] Nick Graham's reason for the different figure was that: [note: 105]

> There are journal entries in the Outpatient Pharmacy Revenue account during January-February, 2007 that have a Document ID commencing "IP". From our brief discussion with Sumiaty's assistant, we understand that these represent a month-end accrual of pharmacy supplies for Inpatients. If this is correct, then these balances probably should not be included in the Outpatient Pharmacy Revenue account for the purposes of considering potential overstatement of revenue. That is, if these do relate to Inpatient Pharmacy Revenue then no VAT would apply (as compared to Outpatient Pharmacy Revenue that is subject to VAT).

228 Roy Tedja did not address Nick Graham's reason. Since the burden of proof is on Columbia, I am of the view that Columbia has not proved its case on this point. I find that the inflation in PTNM's 2007 revenue due to VAT accounting was IDR 267,835,481.

229 Accordingly, I am of the view that the Hongs are in breach of the warranties set out above at [165]. In particular, I note that the experts are both in agreement that the PTNM's 2007 revenue figures have been inflated by improper book-keeping for WHT and VAT. I turn now to address the defences raised by the Hongs.

(3) Whether Columbia was induced to enter into the SSA by the Vendors' warranties

230 The Hongs' first defence was that Columbia was not induced by the warranties contained in the SSA to enter into the transaction. Instead, Columbia relied on its own due diligence exercise.

231 This argument misses the point. Columbia's claim was for breaches of warranties contained in the SSA. Liability for breach of contract is strict; inducement to enter into the contract is irrelevant.

232 The argument about the absence of inducement appears to have been raised on the mistaken premise that Columbia's claim was for misrepresentation, rather than breach of contract. While Columbia's pleadings were not completely clear on the point, Mr Kumar clarified in open court, [note: 106] and in Columbia's reply submissions that the claim was for breach of contract, and not misrepresentation. [note: 107]

(4) Whether Columbia was estopped from alleging that the revenue was inflated by the under-declared and under-paid tax

233 I come now to the Hongs' second argument on estoppel. Three elements have to be satisfied for estoppel by representation to be made out (see *Chng Bee Kheng and another (executrixes and trustees of the estate of Fock Poh Kum, deceased) v Chng Eng Chye* [2013] 2 SLR(R) 715 at [97]). First, there must have been a representation of fact. Second, there must have been reliance on the representation by the representee. Third, the representee must have suffered a detriment as a result of the reliance.

234 I find that Columbia did not unequivocally represent by words or conduct that it would not allege that PTNM's taxes were under-declared or under-paid, for five reasons.

235 First, there was no evidence that Columbia, through the due diligence it conducted, came to know about the tax irregularities leading to the overstatement of EBITDA. The documentary evidence, such as the summaries of the due diligence exercise, indicate that it was not detected.

236 Second, s 9.1.3 of the SSA specifically provides that due diligence does *not* affect the warranties provided in the SSA. It was therefore not open for the Hongs to rely on the due diligence performed by Columbia to avoid their obligations under the SSA.

237 Third, the Hongs have failed to establish the alleged meeting in mid-March 2008 and there was, in any event, no alleged agreement at that meeting (see above at [173]).

238 Fourth, the emails following the meeting on 30 May 2008 between Rick Evans and Edward Hong made it clear that Columbia made no representation that it would not allege the tax irregularities. This was stated categorically in the email from Rick Evans to Edward Hong on 11 June 2008.

239 Fifth, the mere fact that the Columbia-nominated directors signed off on PTNM's audited accounts in June 2008 was not a representation from Columbia to the Hongs that Columbia would not allege that PTNM's taxes were under-declared or under-paid.

The appropriate measure of damages

240 Columbia was claiming under s 8.4.2 of the SSA for the Hongs to pay to Columbia an amount equal to "the diminution in the value of the Sale Shares caused by the artificially inflated revenue". [note: 108] Columbia adduced expert evidence through James Searby that the diminution in value ought to be calculated according to the following formula: [overstatement of EBITDA] x [the appropriate multiplier]. The Hongs did not adduce any expert evidence of an alternative basis for assessing the diminution in value.

(1) The law

241 It is well-established that damages for breach of a warranty in a contract are to be assessed on the basis of what would be required to put a plaintiff in the position he would have been in, had there been no breach of the warranty. Belinda Ang J in *Holland Leedon Pte Ltd v Metalform Asia Pte Ltd* [2012] 3 SLR 377 ("*Holland Leedon*") noted (at [54]) that this may be assessed in one of two ways: with reference to the diminution in value (the difference between the market value of the business warranted and the actual value of the business) or the costs of cure.

242 The facts of *Holland Leedon* are instructive. That case involved an appeal to the High Court against a summary determination of issues of law before an arbitrator. There, the respondent purchased the business and specified assets of the appellant under a sale and purchase agreement. Several warranties in the sale and purchase agreement pertaining to the business were breached. This resulted in the incurrence of additional costs which led to a decrease in the EBITDA of the business. The respondent argued that the diminution in value was the difference between the EBITDA if the warranties had been true, multiplied by a multiplier of 7, which was the contractually stipulated mechanism for calculating the purchase price. The court agreed with the arbitrator that it was not conceptually wrong for damages to be assessed by reference to the diminution in value, which was calculated by recurring costs multiplied by 7. The court nonetheless held that the suitability of such a formula was to be determined by the arbitrator based on the evidence adduced at the hearing of the merits, as it was a *factual determination*.

243 The decision of the English Court of Appeal in *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd (formerly STC Submarine Systems Ltd)* [1999] 2 Lloyd's Rep 423 ("*Senate*") is also relevant. There, a business was sold to the plaintiff for £90m. The plaintiff subsequently discovered that the profits of the business were overstated by £1.7m. This was a breach of a warranty given by the seller. The plaintiff quantified damages by applying a multiplier of 13.67 to the difference between the warranted profit and the actual profit. The English Court of Appeal upheld the decision of the High Court, which rejected the plaintiff's approach. The English Court of Appeal observed (at [33] and [34]) that applying a multiplier to the difference in actual and warranted figures might be appropriate where the purchase price had been derived in that manner. But it stressed that that was only one of the many ways of assessing the damage. The English Court of Appeal was not convinced that that approach was appropriate on the facts of the case. The court found that there were many other factors, apart from the earnings, which induced the purchaser to pay the price it did for the business.

244 In the subsequent case of *Sycamore Bidco Ltd v Breslin* [2013] EWHC 3443, the English High Court took the view that the exercise was an essentially factual one, of valuation. It relied on expert evidence from both sides to assist it in coming to the appropriate measure of damages.

245 The above three cases do not carry Columbia's case for the calculation of damages very far.

They do not say that Columbia's formula should always be used. To the contrary, *Holland Leedon* and *Senate* make it clear that the inquiry is fact-specific.

246 Columbia had obtained expert evidence on valuation from James Searby, whereas the Hongs did not obtain any expert evidence on the point. This does not mean that the court must accept James Searby's evidence without question (see the observations of V K Rajah JA in *Sakthivel Punithavathi v PP* [2007] 2 SLR(R) 983 at [76]). Indeed, Columbia did not push its argument that far. I now turn to the facts relevant to the appropriate measure of damages.

(2) The facts and evidence

247 Columbia argued that the diminution in value ought to be calculated with reference to the [overstatement of EBITDA] x [the appropriate multiplier] for the following reasons:

(a) The natural starting point for determining the value of the Sale Shares as warranted was the price of US$31 million. Columbia's case was that this price was in fact derived by applying the formula of EBITDA x a multiplier of 12.4. The actual EBITDA of PTNM up to and including October 2007 was incorporated into the SSA and warranted to be accurate.

(b) It was appropriate for the business of a going concern to be valued by reference to the profits or cash flows that it is expected to bring to the owner in the future. The multiplier that Columbia used was reasonable according to expert evidence in relation to the market conditions during the time of completion.

(c) The actual value of the Sale Shares given the overstated EBITDA was represented as a discount from the price of US$31m calculated by reference to the sum of the overstatement of EBITDA applied to the multiple of 12.4.

(d) Such an approach was reasonable given that the alternative assessment under a simplified discounted cash flow model yielded a close result.

(e) The appropriate time for valuing the diminution of value of the Sale Shares ought to be the date of completion or 22 January 2008, the date of breach.

248 The Hongs denied that any formula was used by the parties in agreeing on the actual purchase price. They also asserted that the actual purchase price had been reached with reference to the replacement costs of the Land and the Hospital. They implied that there was no variation in the replacement costs. The Hongs' alternative argument was that in any event, Columbia did not use the formula it claimed to derive the actual purchase price.

249 It was undisputed that Rick Evans did not discuss explicitly with Edward Hong the basis for deriving the purchase price. Michael Chow, who gave evidence for the Hongs, claimed he was told by Rick Evans that the replacement costs were considered in arriving at the actual purchase price. This was the basis for the Hongs' position that Rick Evans had derived the actual purchase price from the replacement costs. The Hongs stressed that Michael Chow's evidence should be given more weight because, at the material time, Michael Chow was an agent, if not an employee, of Columbia. He therefore had no reason to lie for the Hongs.

250 Rick Evans claimed he did not tell Michael Chow that he had considered the replacement costs in deriving the actual purchase price. Columbia suggested that Michael Chow was an independent party from Columbia at the material time. Furthermore, Columbia alleged that Michael Chow had

business dealings with the Hongs at the time he swore his affidavit of evidence-in-chief and when he gave oral evidence. Columbia argued that he was partial to the Hongs, and that his evidence should be given less weight.

251 I am not persuaded by Columbia's attempt to portray Michael Chow as an independent party at the material time. It would not help Columbia even if Michael Chow was an independent party. That, in itself, would not have been reason enough for him to favour the Hongs later when litigation arose. I am also not persuaded that Michael Chow was being partial to the Hongs because of his later business dealings with them.

252 Furthermore, even if I were to disregard Michael Chow's evidence on the point, Rick Evans' own evidence as to how he arrived at the actual purchase price was not as clear or unqualified as Columbia would have liked.

253 As mentioned above, Rick Evans' evidence was that he relied on EBITDA and the appropriate multiplier to derive the actual purchase price. However, it is important to bear in mind that in his own affidavit of evidence-in-chief, he had stated that he cross-checked the figure with replacement costs. In cross-examination, he denied that he had considered replacement costs. Yet when he was confronted with his affidavit of evidence-in-chief, he did not deny the reference to replacement costs. [note: 109] Therefore, even on Rick Evans' own evidence alone, he had not relied solely on EBITDA with a multiplier.

254 The Hongs stressed in their closing submissions that there was nothing in the SSA which stipulated that the actual purchase price was derived from the EBITDA multiplied by an appropriate multiplier, unlike in *Holland Leedon*.

255 Moreover, in oral evidence, James Searby said [note: 110] :

> It's my view that replacement value is not an appropriate way to value a going concern business. A going concern business should be valued by reference to the profits or cash flows that you expect it to bring to the owner in future, not either by reference to the profits that it has brought in the past or by reference to the replacement cost of its assets. That is because perhaps much, even most, of the value of any business is composed of goodwill, which is not able to be valued at repayment cost.

256 Although James Searby was explaining why replacement cost was not an appropriate way to value an ongoing business, he was also saying that one does not rely on the business' past performance to derive the purchase price. Yet, that is what Rick Evans appeared to be claiming he did, with his position that the price of the Sale Shares was derived solely from the EBITDA of 2007 multiplied by the appropriate multiplier. Moreover, it seems illogical to me that Rick Evans would rely on EBITDA for only one past year to derive the actual purchase price.

257 The Hongs had another argument. Even if Columbia was unaware of the under-declaration and under-payment of tax and inflation of revenue before the SSA was executed, the Hongs submitted that Columbia knew about this after Deloitte's memorandum dated 23 October 2008. Yet, there was no complaint by Columbia about overpayment for the Sale Shares then. Even after Deloitte's further report dated 12 February 2009, no complaint was made by Rick Evans at the 6 March 2009 meeting (which Edward Hong had belatedly claimed was without prejudice). All Rick Evans was concerned about then was the Land problem. Indeed, Mr Kumar clarified orally to the court on 9 January 2014 that Columbia did not give prior notice to the Hongs that it would claim a reduction in the actual purchase price because of inflation of EBITDA until the writ of summons in Suit 964 was filed.

258 Having considered all the evidence, I am of the view that Columbia has failed to establish that PTNM's EBITDA coupled with an appropriate multiplier was Rick Evans' sole or main basis for deriving the actual purchase price. That is why it was not mentioned specifically to Edward Hong in pre-contract negotiations. That is also why the SSA did not stipulate that the actual purchase price was derived on that basis. That is why there was no complaint by Columbia about overpayment for the Sale Shares at the earliest opportunity.

259 It seems to me that Rick Evans had considered PTNM's 2007 EBITDA as just one of several factors to determine how much Columbia would pay. Only he knows precisely what all the other factors were. Replacement cost was certainly one of them too.

260 In the circumstances, I am of the view that Columbia has not discharged its burden of proving that the loss it suffered was the inflation of]=EBITDA multiplied by an appropriate multiplier. The actual purchase price was based on a multitude of factors amongst which EBITDA was only one. Furthermore, as I will grant Columbia an indemnity for any unpaid tax (whether it be WHT or VAT or otherwise), I will not grant Columbia anything else for inflation of EBITDA. In my view, there is no discrete loss for that inflation.

Suit 861

261 In Suit 861, Thermal Industries made two claims against PTNM. The first, for the sum of S$262,934.48 which it purportedly paid to MEC on PTNM's behalf; the second, for the sum of S$10,000 for second-hand servers which it supplied to PTNM.

262 Columbia was allowed to be joined as a defendant. Columbia and PTNM disputed that these debts were owed to Thermal Industries. They further claimed an indemnity under the SSA against the Hongs as third parties. PTNM was not a party to the SSA. It asserted that the CRTPA allowed it to enforce certain provisions in the SSA against the Hongs.

263 My analysis in relation to the primary claim in Suit 861 will be as follows:

(a) whether PTNM owed a debt of S$262,934.48 to Thermal Industries; and

(b) if (a) is answered in the affirmative,

(i) whether s 2.1.24 of the SSA should be expunged or rectified to exclude the debt owed to the Thermal Companies; and if not,

(ii) whether the debt falls the scope of the indemnities provided by the Vendors under the SSA.

264 Before doing so, I will first address the Hongs' preliminary objection that Columbia did not suffer any loss even if the S$262,934.48 was owed by PTNM to Thermal Industries, because it was a reflective loss. The argument was that PTNM was the one who had to pay the sums due, and so, Columbia's "loss" was merely a reflection of the loss suffered by PTNM.

265 In my view, this argument is not valid. Columbia is entitled to rely on the SSA to claim a contractual right to an indemnity; otherwise, the contractual right is meaningless. Whether the sum in question falls within the scope of the contractual provision it relies on is another matter.

266 As for PTNM's claim against the Hongs, PTNM was not a party to the SSA. I infer that PTNM

was joining Columbia in making such a claim as a matter of caution, in case Columbia was somehow precluded from relying on the SSA, for example, because of the reflective loss argument. As Columbia is not precluded by the reflective loss argument from making the counterclaim, the purpose of including PTNM to make the claim is academic. In any event, for the reasons stated below, I am of the view that PTNM has not established that it is entitled under the CRTPA to make a claim against the Hongs under the SSA.

267 PTNM had to rely on the CRTPA because it was not a party to the SSA. The relevant provision is s 2 of the CRTPA and in particular, ss 2(1)(*b*) and 2(2). Sections 2(1) and (2) of the CRTPA state:

> 2.—(1) Subject to the provisions of this Act, a person who is not a party to a contract (referred to in this Act as a third party) may, in his own right, enforce a term of the contract if —
>
> (*a*) the contract expressly provides that he may; or
>
> (*b*) subject to subsection (2), the term purports to confer a benefit on him.
>
> (2) Subsection (1)(*b*) shall not apply if, on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by the third party.

268 PTNM submitted that because s 3.4.1 of the SSA required the Vendors to settle PTNM's liabilities with money received under the SSA, the SSA clearly purported to confer a benefit on PTNM.

269 PTNM relied on *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 ("*CLAAS*") at [28]. It submitted that a provision to indemnify a third party has been held to confer a benefit on the third party for the purposes of s 2(1)(*b*) of the CRTPA.

270 However, there is an important difference between the facts in *CLAAS* and in the present case. In *CLAAS*, the provision in question expressly stated that liquidated damages for a breach were payable to the third party. In the present case, there is no such provision. The indemnity is given to Columbia and it does not state that payment is to be made to PTNM.

271 As is obvious from ss 2(1)(*b*) and 2(2) of the CRTPA, there are two limbs to be considered if the contract does not expressly provide that a third party, who is not a party to the contract, may enforce a term of the contract.

272 The first limb is s 2(1)(*b*). Under this limb, the court has to consider whether the contractual term purports to confer a benefit on the third party.

273 If so, then the second limb has to be considered. If it appears that the parties to the contract did not intend for the contractual term to be enforced by the third party, then the third party will not be entitled to enforce it, notwithstanding that that the term purports to confer a benefit on him.

274 The Court of Appeal in *CLAAS* said at [28] and [29]:

> 28 … There is no requirement that benefiting the third party must be the predominant purpose or intent behind the term. However, it must be a purpose of the parties. *Prima facie*, s 2(1)(*b*) is applicable to enable the Appellant to enforce cl 11 [of the agreement in question] because cl 11(c) has expressly stated that the liquidated damages for a breach of the clause are payable to the Appellant.

> 29 However, s 2(1)(*b*) must be read with s 2(2). The latter provision (quoted at [26] above) enables a party to a contract to show that, on a proper construction of the contract, the parties did not intend the terms therein to be enforceable by a third party. … It seems to us that what s 2(1)(*b*) and s 2(2) seek to do is to distinguish between intended and incidental beneficiaries to a contract, with the latter beneficiaries not being entitled to sue under the contract. The burden of proof rests on the party who invokes s 2(2) to show, on a proper construction of the contract, that the parties did not intend the term concerned to be enforceable by the third party.

275 It is not clear from [29] of the judgment in *CLAAS* whether the distinction between intended and incidental beneficiaries is to be applied when the court is considering the first limb, the second limb, or both limbs. Logically, the same test or guide should not apply to both limbs otherwise only one limb should suffice. Should then the distinction between intended and incidental beneficiaries be applied to the first or the second limb?

276 In *Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening* [2009] Lloyd's Rep 123, the English High Court was of the view that as regards the English equivalent of the first limb:

> 74. A contract does not purport to confer a benefit on a third party simply because the position of that third party will be improved if the contract is performed. The reference in the section to the term purporting to "confer" a benefit seems to me to connote that the language used by the parties shows that one of the purposes of their bargain (rather than one of its incidental effects if performed) was to benefit the third party.

277 This suggests that the English court was of the view that the distinction between intended and incidental beneficiaries applies to the first limb.

278 This is logical. It is only when a third party establishes that it is an intended beneficiary of the contract that the burden then shifts, under the second limb, to the party giving the indemnity or warranty ("the Warranting Party"), to show that notwithstanding that the third party is an intended beneficiary, the parties to the contract did not intend the term to be enforceable by the third party. It is not logical for the Warranting Party to have the burden of showing that the third party is not intended to enforce the term if the third party has not yet established that it is an intended beneficiary.

279 Therefore, the first question is whether PTNM was an intended or incidental beneficiary.

280 I do not agree with PTNM's submission that just because s 3.4.1 of the SSA requires the Hongs to settle PTNM's liabilities with money received under the SSA, the SSA purported to confer a benefit on PTNM. Such a submission draws no distinction between an intended and an incidental beneficiary.

281 The purpose of that provision was for the benefit of Columbia because Columbia was paying the actual purchase price on a certain basis, *ie*, that various liabilities would be paid off by PTNM. The Hongs gave the warranty because they wanted a certain purchase price. True, the payment of the liabilities would benefit PTNM, but this was only incidentally so. The intended beneficiary was Columbia, and only Columbia. If PTNM was an intended beneficiary, then arguably, its holding company would also be an intended beneficiary.

282 Assuming that I am incorrect on the application of the first limb to the facts before me, I am of the view that on an objective construction, the parties to the SSA did not intend PTNM to enforce any of the warranties in the SSA. The warranties were made to protect the contractual bargain

between Columbia and the Hongs and in view of the actual purchase price that Columbia was paying. Without the SSA, the Hongs have no obligation to pay for liabilities of PTNM and there is no reason why they should incur a liability to an additional party like PTNM because of the actual purchase price. Furthermore, if, for example, there was a change in Columbia's plans and it were to sell its shares in UMPL and it was not interested in pursuing a claim for any breach of SSA, it is clear to me that neither Columbia or the Hongs would expect PTNM to be entitled to pursue such a claim.

283 Accordingly, I conclude that PTNM is not entitled to rely on the CRTPA to enforce the terms of the SSA.

Summary of relevant facts

The transfer of US$740,000 to PTNM

284 Thermal Industries' claim for US$740,000 is in relation to four payments it allegedly made to MEC on PTNM's behalf. The enquiry with respect to this claim begins with a loan provided by MEC to Thermal International pursuant to a letter of offer and a hire-purchase agreement dated 26 June 2002 for US$3m. In July 2002, on the instructions of Edward Hong, as Managing Director of Thermal International, MEC transferred US$740,000 of the US$3m loan directly to PTNM. MEC subsequently assigned its rights under the hire-purchase agreement to GSAF by way of a sale and purchase agreement dated 30 September 2004.

The recording of the loans on PTNM's accounts

285 While PTNM only received US$740,000 in funds, the transaction came to be reflected in PTNM's books as a *US$3m* loan from Thermal International, as follows.

286 In or around 2003, the managers of PTNM apparently ran into some difficulty in relation to how the sum of US$740,000 was to be recorded in PTNM's books. For various reasons, and following internal correspondence between Eddie Foo, Kimun Kuara and Arthur Pittman, the Managing Director of PTNM, the preferred course of action appeared to be for Thermal *Industries* to enter into a fabricated loan agreement with PTNM for US$3m. This fabricated loan agreement would include the US$740,000 which had been paid by MEC to PTNM as directed by Thermal International.

287 The reason for this elaborate scheme was explained by Eddie Foo in cross-examination. [note: 111] According to Eddie Foo, PTNM had, since its inception, been the recipient of a number of substantial shareholder's loans. These loans had subsequently been written off. There was, at the material time, a desire by UMPL's shareholders to try to claw back at least US$3m of these funds. It was somehow decided by the Hospital's management that this would be best achieved by writing in a fictional US$3m loan into PTNM's books. According to Edward Hong, the reason for wanting to treat the lender of this US$3m loan as Thermal Industries, instead of Thermal International (who actually advanced the lesser sum of US$740,000 to PTNM), was that Thermal International was a 51% subsidiary of the Parkway Group. Thermal International therefore could not make the loan to PTNM due to the Parkway Group's corporate structure. [note: 112]

288 The arrangement appeared to be engineered by Eddie Foo, [note: 113] as evidenced by his numerous emails, including one on 31 December 2004 where he stated that "the subject US$740,000 is a part of the US$ 3m loan on a "back-to-back" basis with [Thermal Industries]." [note: 114] This was also the way PTNM represented the loan to its external auditors, Grant Thornton, as seen in Arthur Pittman's letter of representation dated 8 January 2004: [note: 115]

> [I]n the interest of expediting the settlement of the matter ... this US$740,000 should be netted against the US$3m loan through [Thermal Industries] and the whole thing be contra-ed against the write-off to General Reserve ...and with the US$3m recorded as a loan from [Thermal Industries].

The arrangement was again reflected in Eddie Foo's email of 15 January 2004 to K C Leong, the financial controller of PTNM, where he wrote: [note: 116]

> I would suggest you reclassify that US$740,000 as having come as part of the US$3m loan from [Thermal Industries]—which is basically where [Thermal Industries] got the funds from anyway.

289 A number of documents were created in furtherance of this scheme, [note: 117] including:

(a) a signed agreement marked July 2002, with the exact date left blank, for a loan of US$3m from Thermal Industries to PTNM for the "purchase of equipment and working capital", with interest set at 8.75%; [note: 118]

(b) another signed loan agreement between PTNM and Thermal Industries, on identical terms as the first, but this time dated 1 November 2002; [note: 119]

(c) an unsigned debt confirmation letter from PTNM to Thermal Industries dated 19 November 2004.

As can be seen, there are numerous documents indicating that it was intended, at the very least between 2002 and 2004, for the transaction to be treated in PTNM's books as a loan from Thermal *Industries* to PTNM for US$3m. I have already explained (above at [287]) that apart from the US$740,000 obtained directly from MEC, PTNM never received this US$3m sum.

290 Notwithstanding the desire on the part of the management to treat the "loan" as coming from Thermal *Industries*, PTNM's external auditors, Grant Thornton somehow came to label it as coming from Thermal *International* (which, to be recalled, was the party which directed MEC to advance US$740,000 to PTNM). The transaction was eventually entered into PTNM's accounts as a loan of US$3m from Thermal International.

The repayments to MEC

291 Repayments were subsequently made to MEC for the loan of US$740,000. Two instalments of S$93,746.12 were deducted at source. Six subsequent instalments of S$93,746.12 were paid:

(a) by PTNM to MEC on 22 November 2002;

(b) by PTNM to MEC on 27 December 2002;

(c) by Thermal Industries to MEC on 7 March 2003;

(d) by Thermal Industries to MEC on 4 April 2003; and

(e) by Thermal Industries to MEC on 2 August 2003 (two instalments were paid on this date).

The eight instalments of S$93,746.12 add up to S$749,968.96. This is presumably less than US$740,000. No elaboration was given on the difference and I shall say no more about it.

292 As can be seen, Thermal Industries therefore made four of the six above payments amounting to S$374,984.48 to MEC. Since MEC's loan agreement was with Thermal International and not with PTNM, the four payments made by Thermal Industries to MEC could not logically discharge any indebtedness of PTNM to MEC. PTNM had not borrowed money from MEC, but from Thermal International. However, PTNM's management appeared to proceed on the assumption that the payments made by Thermal Industries were made on PTNM's behalf.

293 On 17 October 2003, Kimun Kuara wrote to Eddie Foo with the following query: [note: 120]

> We understand from you that those 4 payments (totalling SGD 374,984.48) have been done. Believe that is done on behalf of us. Would you like us to record this SGD 374,984.48 in our books? Please advise.

To this, Eddie Foo replied on the same day stating:

> Yes, you will have to record this in your books to our credit debiting shareholder loan for the principal & P&L interest for the interest.
>
> However, PTNM should try to repay us this amount before year-end so as it doesn't appear in our books at year-end.

In cross-examination, Eddie Foo qualified his statement by saying that insofar as Thermal Industries was "not exactly a shareholder" of PTNM, the term "shareholder loan" was incorrect. [note: 121]

294 Pursuant to Eddie Foo's instructions, the S$374,984.48 sum was recorded in PTNM's accounts as a loan from Thermal Industries. At the same time, PTNM's debt to Thermal International (purportedly for US$3m) was written down to take into consideration the payments made to MEC. [note: 122] The remainder of the US$3m debt purportedly owing to Thermal International was eventually reflected in:

(a) PTNM's audited financial statements, which were eventually appended to the SSA, for the years 2005 and 2006 (in IDR); [note: 123] and

(b) PTNM's management accounts for the year 2007, also appended to the SSA, as a debt of US$2,805,504 owed to Thermal International. [note: 124]

295 Thermal Industries issued a debit note dated 31 December 2003 to the Hospital for S$374,984.48 with the accompanying description "PAYMENT ON YOUR BEHALF: LOAN INSTALMENT OF S$93,746.12 X 4". Following this, PTNM made payments of S$100,000 on 5 April 2004 and S$12,050 on 29 October 2004 to Thermal Industries.

296 This left an outstanding amount of S$262,934.48 which PTNM allegedly owed to Thermal Industries. This sum forms the substance of Thermal Industries' claim in Suit 861.

297 The sum of S$262,934.48 was recorded as a loan owing to Thermal Industries in:

(a) PTNM's audited accounts for 2005 and 2006, which were annexed to the SSA, where the

amount was recorded (in IDR) as being due to Thermal Industries; [note: 125]

(b) PTNM's management accounts for 2007, which were also annexed to the SSA, where an amount of S$273,309 was recorded as a "Long Term Loan". [note: 126]

The novation agreement(s)

298 We now move forward to the year 2007 when the Vendors and Columbia were in negotiations over the sale of UMPL's shares. One of the loose ends that remained was the issue of debts between PTNM and the Thermal Companies. PTNM's management accounts at the time showed that there were two outstanding long-term loans owed to Thermal International and Thermal Industries (see above at [294] and [297] respectively). Columbia's case is that it had planned for both of these loans to be novated to UMPL. [note: 127]

299 Rick Evans stated in his AEIC that he had met with the Hongs and Eddie Foo on 31 December 2007 at Albert Hong's office in Singapore. According to Rick Evans, it was agreed then that the advances in PTNM's balance sheet for October 2007 were to be assigned to Columbia. [note: 128] This would, in effect, extinguish PTNM's debt to Thermal International, and instead, create a debt in favour of Columbia. The agreement and the 31 December 2007 meeting was referred to in a letter from Alan Lim to Michael Khoo dated 2 January 2008. [note: 129] The Hongs denied that any meeting took place between the parties on that day.

300 On 21 January 2008, Alan Lim wrote to Rick Evans by email, forwarding a draft of the novation agreement to be executed by Thermal International in favour of Columbia. [note: 130] The draft novation agreement had no appendices, and the amount of debt to be assigned had been left blank. Alan Lim indicated that he decided to transfer the debt through a novation, rather than an assignment because of stamp duty considerations. He also pointed out that PTNM owed a debt to Thermal Industries, but that this was a short term debt according to PTNM's audited accounts as at 31 December 2006. He then asked Rick Evans to confirm whether he required the Thermal Industries debt to be novated. Alan Lim was presumably referring to note 20(a) of PTNM's accounts for 2005 and 2006 (see [297(a)], above). [note: 131] This debt was apparently in respect of "payments for expenses and advances", but was not classified as a long-term debt under these accounts.

301 Alan Lim's evidence is that he subsequently discussed the matter with Prem Abraham, who was in charge of Columbia's finance matters. According to him, Prem Abraham confirmed that the Thermal Industries debt should also be novated, as the "[V]endor[s] would have to settle the debt anyway". [note: 132]

302 Alan Lim's 2 January 2008 email and the draft novation agreement were forwarded to Edward Hong on 9 January 2008. A further email was sent by Alan Lim to Edward Hong on 18 January 2008, in which Alan Lim stated that "the other Novation Agreement pertaining to the other note should be along similar lines". [note: 133] The "other Novation Agreement" presumably referred to the one in respect of Thermal Industries' debt.

303 On 21 January 2008, the eve of completion, Alan Lim sent another email to MKP. This email appended an amended draft of the novation agreement for the Thermal International debt, and a fresh draft of a novation agreement for the Thermal Industries debt. Both drafts had appendices showing the debts to be novated: the sum of S$273,709 from Thermal Industries, and the sum of US$2,805,504 from Thermal International. The figures were all drawn from PTNM's management

accounts balance sheet for 2007 (see [297(b)] and [294(b)], respectively above).

304 However, only the Thermal International novation agreement was executed at completion. Alan Lim and Prem Abraham, who were present in Singapore for the completion on 22 January 2008, gave evidence that the novation agreement for the Thermal Industries debt was not executed because Edward Hong informed the Columbia representatives that it was actually a trade debt. [note: 134] According to Prem Abraham, Columbia took Edward Hong's word that it was a trade debt, and proceeded to complete the sale and purchase. [note: 135] Alan Lim said that he advised Prem Abraham that it was safe to go ahead without obtaining a novation agreement for the Thermal Industries debt, as the Hongs were still obligated to discharge all liabilities under the SSA. [note: 136]

305 In these circumstances, a novation agreement dated 22 January 2008 was entered into between Thermal International, UMPL and PTNM in respect of the Thermal International debts. No similar agreement was executed in respect of the Thermal Industries debt.

Whether the debt was owed by PTNM to Thermal Industries

306 For what it professed to be a simple and undisputed debt, Thermal Industries' pleadings evolved greatly over the course of these proceedings. This proved confusing for reasons which I will elaborate on in the next section.

307 In the initial statement of claim filed by Thermal Industries, the sum of S$272,934.48 was stated to be the balance of sums paid by Thermal Industries, on PTNM's behalf, to discharge PTNM's indebtedness to DVI. This was subsequently amended to read "PTNM's indebtedness to MEC". [note: 137] The sum of S$272,934.48 was derived by adding $10,000 claimed for the defective second-hand servers to the S$262,934.48 referred to at [261] above. Thermal Industries' latest statement of claim stated that PTNM was indebted to it in the sum of S$262,934.48, being the balance of monies advanced by it as a loan to PTNM. It stated that Thermal Industries paid S$374,984.48 "to MEC on PTNM's behalf" but was silent as to which party PTNM's debt is owed to.

308 In the latest amendment of Thermal Industries' reply and defence to counterclaim (almost four years after commencing this suit), Thermal Industries alleged for the first time that the payments were made by Thermal Industries to "assist [PTNM] to meet its loan service commitments to Thermal *International*". [note: 138] According to Thermal Industries, "the repayment of the US$740,000 to Thermal International may be effected by direct repayments to MEC by or on behalf of [PTNM], and that such payments are valid in going towards discharging [PTNM's] repayment obligations to Thermal International." [note: 139] It is alleged that sometime in 2002, Edward Hong and Boelio Muliadi orally agreed to have PTNM pay MEC directly, rather than have PTNM pay Thermal International, who would in turn pay MEC. [note: 140]

309 PTNM and Columbia pleaded that the sum of US$740,000, which formed part of the loan amount of US$3m advanced by MEC to Thermal International, could only be conceived of as a loan from Thermal International to PTNM. PTNM admitted to repaying two instalments to MEC on 22 November 2002 and 27 December 2002 respectively. But PTNM alleged that these payments could only be conceived as loan repayments to MEC on behalf of Thermal International. These were therefore loan repayments by PTNM to Thermal International. [note: 141] Since PTNM had no indebtedness to MEC, Thermal Industries could not have made any payment to MEC on PTNM's behalf. [note: 142] The loan amount of US$3m from MEC to Thermal International, from which US$740,000 was paid to PTNM, was recorded in PTNM's audited accounts as a loan for US$3m from Thermal

International to PTNM. This loan was subsequently novated from Thermal International to UMPL by a novation agreement dated 22 January 2008.

310 Due to the various changes in the pleadings of Thermal Industries and the convoluted evidence about the debt, there was much confusion on the part of various witnesses as to which of the Thermal Companies should be treated as the lender of US$740,000 to PTNM. Since the loan of US$740,000 was advanced to PTNM on the instructions of Thermal International out of the US$3m loan it had received from MEC, the correct approach ought to be to treat Thermal International as the lender of the funds. However, as elaborated above, there was evidence that at the material time the payments to MEC were made, Thermal Industries was treated by the management of PTNM as the lending entity.

311 On balance, it seems to me that even if the debt had initially been owed by PTNM to Thermal International, the creditor was substituted so that Thermal Industries became the creditor in place of Thermal International. This was done with the agreement of PTNM which was controlled by the Hongs at the relevant time. Indeed, PTNM recorded Thermal Industries as the creditor. Therefore, I grant judgment in favour of Thermal Industries against PTNM for S$262,934.48.

Whether the Hongs are liable to indemnify Columbia for the debt PTNM owed to Thermal Industries

312 Columbia raised two arguments in the event that I find PTNM liable to Thermal Industries for the sum claimed.

313 First, Columbia argued that the debt was one properly borne by the Hongs under s 8.4.1 of the SSA. These provisions obliged the Hongs to hold Columbia harmless against loss arising from a breach of any term of the SSA.

314 Columbia argued that the Hongs were in breach of ss 3.1 and 3.4 of the SSA. Section 3.1 provided that the Sale Shares were to be purchased "free from all ... Liabilities ...". Section 3.4 provided that the purchase price was to be applied towards "full and final settlement of the Liabilities" before being released to the Vendors.

315 Columbia argued that the debt owed to Thermal Industries fell within the term "Liabilities". "Liabilities" is defined in s 2.1.24 of the SSA as "all and any present or future liabilities or obligations ... of PTNM ... excluding the Goldman Sachs Indebtedness, all obligations to trade vendors and doctors that are a part of the day to day operations of PTNM ...". Section 3.4 of the SSA thus required the debt to Thermal Industries be discharged before the purchase price was released to the Vendors.

316 Columbia asserted that the Vendors had breached ss 3.1 and 3.4 of the SSA by making representations that the Liabilities had been discharged, despite the fact that the Thermal Industries debt had not been paid. Columbia thus asserted that it was entitled to an indemnity from the Vendors under s 8.4.1 of the SSA.

317 Columbia's second argument was that Thermal Industries was the agent, nominee or alter ego of Edward Hong. Thermal Industries was accordingly precluded from seeking recovery, since Edward Hong had agreed under ss 2.1, 3.1 and 3.4 of the SSA that neither PTNM nor Columbia shall be responsible for the debts to the Thermal Companies.

318 I will deal with the second argument first. I reject it. There are two separate questions. The

first is whether PTNM owes the sum in issue to Thermal Industries. Whether Edward Hong owns Thermal Industries is another matter which does not preclude Thermal Industries from making the claim. As for Columbia's first argument, it carried more weight. Yet it is possible that even if PTNM owes the sum to Thermal Industries, the Hongs are not liable to indemnify Columbia.

319 The Hongs' defence to Columbia's claim for an indemnity has shifted almost completely since the start of these proceedings. In their initial third-party defence, the Hongs pleaded that they as vendors had complied with all their obligations under the SSA. [note: 143] They pleaded that the debt to Thermal Industries was excluded from the definition of "Liabilities" in s 2.1.24 of the SSA in that it was part of the "Goldman Sachs Indebtedness" and/or part of the "day to day operations of [PTNM]. [note: 144] As such, the debt was not part of the liabilities which the Hongs had to meet under the SSA.

320 In the third amendment to their defence, the Hongs pleaded for the first time that due to "grammatical and phraseological errors", the definition of "Liabilities" in s 2.1.24 of the SSA should be rectified to exclude "debts between [Thermal Industries] and [Thermal International] on the one hand, and [UMPL] and/or [PTNM] on the other". [note: 145]

321 In the latest amendment of their defence, the Hongs position shifted again. They pleaded that s 2.1.24 was wrongly included in the SSA because the intention of the parties was that PTNM's liabilities should, and had already been factored into the actual purchase price. [note: 146] In support of this latest proposition, the Hongs' defence referred to Rick Evans' visit to Medan on 1 December 2007, whereby he proposed to reduce the agreed purchase price of US$31m by US$841,000 to take into account the current liabilities of PTNM. According to the Hongs, this meant that they were no longer responsible for any further liability (whether current or otherwise), and this was the basis of the SSA. They accordingly asked for s 2.1.24 of the SSA to be expunged.

322 In the alternative, the Hongs also pleaded that "even if ... section 2.1.24 was intended to be included in the S&P Agreement, its actual contents do not represent the intention of the parties". The Hongs therefore sought an order rectifying s 2.1.24 of the SSA so that it reads:

> "Liabilities means all and any present or future liabilities or obligations of [UMPL] and [PTNM] whether actual, contingent or otherwise whatsoever, (excluding the Goldman Sachs Indebtedness, all obligations to trade vendors and doctors that are part of the day to day operation of [PTNM], and the ~~inter-company debts between [UMPL] and [PTNM]~~ debts between **[Thermal Industries] and [Thermal International] on the one hand, and [UMPL] and/or [PTNM] on the other**) incurred by [UMPL] and/or [PTNM], up to and including the Completion Date."

The Hongs were seeking to remove the struck-through words, and introduce the words in bold through rectification.

Whether s 2.1.24 of the SSA should be expunged or rectified

323 The Hongs reliance on Rick Evans' agreement to the reduction of the actual purchase price is misplaced. As seen above (at [48] and [49]), Columbia was of the view that the excess of current liabilities over current assets was something that was to be borne by *the Vendors*. Even then, Columbia agreed to bear US$500,000 of the US$841,000 sum but this did not mean that Columbia was waiving its right in respect of non-current liabilities.

324 In my view, the Hongs' rectification defence was a last-ditch attempt to evade liability under the SSA and was contradicted by the objective facts. The documentary evidence showed unequivocally that the parties had agreed that the sale of the Sale Shares would take place with *current* assets and liabilities equalised, [note: 147] with all other liabilities to borne by the Vendors. This was a constant thread which ran through the parties' negotiations, including both conditional offers made by Rick Evans and the SFA signed by the parties on 1 December 2007. There was no objective evidence that the parties intended to free the Hongs from all liabilities whatsoever.

325 The SFA which was signed on 1 December 2007 provided that the Vendors would deliver UMPL "free and clear of all ... debts", and that PTNM would be delivered "free and clear of all ... debts ... save for ... obligations to trade vendors and doctors that are part of the day to day operations ... and ... debts owed to UMPL". This was eventually captured in s 2.1.24 of the SSA. The SFA therefore clearly provided that the vendors were responsible for all liabilities of UMPL and PTNM, with the exception of PTNM's current liabilities (which had already been factored into the reduced price insofar as they were not supported by current assets) and debts owed by PTNM to UMPL.

326 In fact Eddie Foo admitted in cross-examination that this was the "literal interpretation" of the SFA. [note: 148] Having been forced to concede this, he then claimed that the SFA also did not reflect the intention of the parties, [note: 149] and that the Hongs were taking out an application to rectify the SFA as well. [note: 150] This claim was inconsistent with his other evidence that the SFA was compatible with his stance. [note: 151] It was also inconsistent with the fact that the Hongs did not apply to rectify the SFA; the Hongs' existing defence only sought a rectification of the SSA and not the SFA.

327 The Hongs attempted to rely on an email from Eddie Foo to Rick Evans dated 29 November 2007 to show that the transaction was intended to be on an "as is where is" basis in relation to PTNM's liabilities. The following is an extract from the email in question:

> 4. Outstanding Doctors' Fees but Assets and Liabilities of UM & PTNM in General
>
> We feel that this should also be on a "as-is-where-is" basis and insofar as it has already been disclosed, has also already been factored into the agreed transaction price.

However, this was merely a proposal to Rick Evans, and it was not reflected in either the SFA or the SSA.

328 The Hongs' assertion that the definition of "Liabilities" had been wrongly included in the SSA was without merit. The SSA was drafted with the input of both sides' solicitors. As mentioned above, Alan Lim had drafted four drafts of the SSA but only the second and fourth drafts were circulated to the Vendors. In the second draft, dated 25 November 2007, the definition of "Liabilities" had no exclusions. This was changed in the fourth draft, where three exclusions were inserted: (a) the Goldman Sachs Indebtedness; (b) all obligations to trade vendors and doctors that are a part of the day to day operation of PTNM; and (c) the inter-company debts between UMPL and PTNM.

329 On 6 December 2007, MKP wrote back by email at 8.58am with proposed amendments after having taken instructions. MKP was principally concerned with the Goldman Sachs Indebtedness and the only amendment they proposed in relation to the definition of "Liabilities" was to exclude the reference to the Goldman Sachs Indebtedness. By another email on the same day, MKP sent further suggested amendments to the fourth draft of the SSA. Their proposed definition of Liabilities appeared to be simply "all and any present or future liabilities or obligations". All three exceptions to the

definition were taken out, presumably so that the Vendors would be responsible for all the liabilities of the company, without qualification. On 7 December 2007, the solicitors from both sides worked to finalise the SSA, and it was thereafter signed by the Vendors in its present form.

330 The Hongs' contention that s 2.1.24 was mistakenly included in the SSA, and their attempt to now distance themselves from the SSA, are unmeritorious. The intention of the parties was clearly that non-current liabilities were to be the Hongs' responsibility, unless specifically excluded by the SSA. Indeed, the evidence shows that Columbia planned for the present debt to be novated from Thermal Industries to UMPL and even drafted a novation agreement to this effect. This novation agreement was not signed due to Edward Hong's incorrect position that the debt was a trade debt.

331 In these circumstances, I reject the Hongs' claim to expunge or rectify s 2.1.24 of the SSA.

Whether debts owed to Thermal Industries fall within the scope of the indemnity under the SSA

332 To recap, section 2.1.24 of the SSA provides that:

> 2.1.24 Liabilities means all and any present or future liabilities or obligations of [UMPL] and [PTNM] whether actual, contingent, or otherwise) whatsoever (excluding the Goldman Sachs Indebtedness, all obligations to trade vendors and doctors that are a part of the day to day operation of [PTNM], and the inter-company debts between [UMPL] and the [PTNM]) incurred by the [UMPL] and/or the [PTNM] less the current assets of the [PTNM], up to and include the Completion Date.

333 Under s 3.1 of the SSA, the Hongs agreed to sell the sale shares "free from all Encumbrances and Liabilities whatsoever". Under s 3.4.1 of the SSA, the Hongs' solicitors were to release the Deposit Sum and Balance Purchase Price "firstly, towards full and final settlement of the Liabilities". Finally, under s 8.4.1 of the SSA, the Hongs undertook to indemnify Columbia against all losses, liabilities, judgments and costs incurred by the latter arising out of any breach of any term or condition of the SSA.

334 On a plain reading of the SSA, any debt owed by PTNM to Thermal Industries would be a liability the Hongs were responsible for, unless it fell within one of the exceptions in s 2.1.24 of the SSA. In the present case, Thermal Industries' claim is clearly not in respect of an "inter-company debt between [UMPL] and [PTNM]". It also does not fall under the exception of "all obligations to trade vendors and doctors that are part of the day to day operation of [PTNM]". Whilst Thermal Industries did on occasion act as PTNM's supplier in the past, it did not allege that this particular sum of S$262,934.48 was in respect of the "day to day operation" of PTNM. Indeed, Eddie Foo admitted in his cross-examination that the debt owed to Thermal Industries was not a trade debt. [note: 152]

335 It is therefore clear that under the SSA, the obligation for discharging the alleged debt to Thermal Industries lay with the Hongs. The Hongs are therefore liable under s 8.4.1 of the SSA to indemnify Columbia for the S$262,934.48.

Whether PTNM is liable for the second-hand servers supplied by Thermal Industries

336 Thermal Industries also claimed S$10,000 for the second-hand servers supplied by them to PTNM. Prem Abraham asserted that these servers were defective and unusable from the time they were delivered. [note: 153] However, this appeared to be a bare allegation based on what Prem Abraham was allegedly told by employees of the Hospital.

337 The burden of proof lies on Columbia to establish this allegation. I conclude that it has failed to do so. Furthermore, I am of the view that the servers come within the exception of obligations to trade vendors for which the Hongs are not liable. Therefore, PTNM is liable to pay Thermal Industries S$10,000 for the servers and the Hongs need not indemnify Columbia for this liability.

Suit 862

338 In Suit 862, Thermal International made various claims against PTNM. Thermal International claimed:

(a) S$393,399.70 which was the balance owing for an MRI machine that Thermal International supplied to PTNM;

(b) S$3,320 for supplies from Thermal International to PTNM; and

(c) US$9,763 for supplies from Thermal International to PTNM.

339 PTNM did not dispute liability in respect of the sums in [338(b)] and [338(c)]. In respect of the sum in [338(a)], PTNM's position was less clear. In its defence in Suit 862, PTNM denied liability for the sum. This was a bare denial with no further elaboration. Prem Abraham's AEIC, however, stated that "the claim for any payment under [the] sale and purchase [of the MRI machine] is time barred". Yet in closing submissions, PTNM did not appear to deny liability for this sum. I will deal with the limitation point later.

340 In the event that PTNM was found to be liable for the three sums, Columbia sought an indemnity from the Hongs under the SSA for those sums.

341 Columbia and PTNM also made a counterclaim in unjust enrichment against Thermal International. This was for the sum of S$144,046.03 which PTNM paid to Thermal International on 27 May 2008. This payment was made by PTNM for a Philips angiography machine which Thermal International supplied to PTNM. It was unclear from the pleadings and submissions which party was making the counterclaim: PTNM, Columbia, or both. Presumably the counterclaim was brought by PTNM because it was the entity that made the payment. I will refer only to PTNM in respect of the counterclaim

342 PTNM alleged that it was "under no legal obligation" to pay for the equipment, and that it had "mistakenly" made the payment because it "did not realise the position under the terms of the SSA". PTNM's case was that the sum paid fell within "Liabilities" under s 2.1.24 of the SSA, as it was not a debt due to a trade vendor. They argued that therefore, *the Vendors* and not *PTNM* would have been liable for the sum. PTNM's payment of the sum was therefore made pursuant to a mistake, which resulted in the unjust enrichment of Thermal International.

343 PTNM's argument on this point was puzzling. Even assuming that the sum due for the Philips angiography machine fell within "Liabilities" under s 2.1.24 of the SSA, PTNM's payment to Thermal International would not have been mistaken. PTNM would still have been obliged to make the payment in discharge of a liability it owed to Thermal International. The SSA did not extinguish PTNM's debt to Thermal International (both of whom were not parties to the SSA). The terms of the SSA would merely have entitled Columbia to claim an indemnity from the Hongs for a breach of warranty. However, Columbia did not claim an indemnity from the Hongs in respect of this sum.

Summary of relevant facts

344 Sometime in early October 2002, Thermal International shipped an MRI machine to PTNM for use in the Hospital. An invoice for the machine in the sum of S$656,000 was issued on 10 October 2002. It was not disputed that PTNM made payments for the MRI machine amounting to S$262,600.30 between June and December 2007. This left a balance of S$393,399.70. This balance formed the first of the three sums Thermal Industries claimed in Suit 862.

345 I pause parenthetically to note that even if PTNM had taken up the limitation point in pleadings and submissions (which it did not), the payments made by PTNM to Thermal International between June and December 2007 would have amounted to an affirmation of the debt. As such, the limitation period would have re-started from the date the last of these payments was made: 12 December 2007. Accordingly, the writ of summons for Suit 862, which was filed on 20 November 2008, would have been within the limitation period for the claim.

346 As regards the claim against the Hongs for an indemnity, I reiterate that PTNM has no standing to enforce the provisions of the SSA (see [267]–[283] above). Only Columbia has standing to maintain such a claim against the Hongs.

Whether the Hongs are liable to indemnify Columbia for the sums claimed in Suit 862

347 As seen from above, the real question was not whether PTNM was liable for the sums claimed by Thermal International, but whether the Hongs are liable to indemnify Columbia for the sums claimed, on the basis that PTNM was liable for them.

Whether s 2.1.24 of the SSA should be expunged or rectified

348 It follows from my decision in Suit 861 (at [323]–[331] above) that s 2.1.24 is not to be expunged or rectified.

Whether sums due for the MRI machine, the supplies, and the Philips angiography machine fall within the scope of the indemnity under the SSA

349 The sole question in this issue is whether the MRI machine, the supplies, and the Philips angiography machine fall within one of the exceptions to the definition of "Liabilities" under s 2.1.24 of the SSA: whether the debts are "obligations to trade vendors part of the day to day operation of [PTNM]".

350 In relation to the debt for the MRI machine, Columbia argued that it was not an obligation owed to a trade vendor. This was because the MRI machine was a capital item and a fixed asset, [note: 154] as it would depreciate over time. The debt was consequently a "Liability" under s 2.1.24 of the SSA, for which the Hongs are properly responsible. It is to be recalled that under s 3.1 of the SSA, the Hongs had agreed to sell the sale shares "free from all Encumbrances and Liabilities whatsoever". Under s 8.4.1 of the SSA, the Vendors are liable for all losses and liabilities flowing from their breach of any condition or warranty given under the SSA.

351 The Hongs' position was that the debt was a trade debt. In particular, Eddie Foo took the position that the MRI machine was not a fixed asset as it was used in the day to day operation of the Hospital to generate income. However, when confronted with the analogy that the entire hospital building was used on a "day to day" basis, Eddie Foo appeared to agree that the cost of supplying that building would not constitute a trade debt. [note: 155]

352 Nevertheless, I am of the view that a sale of the Hospital building or the Land is not necessarily

the same thing as a sale of the MRI machine. There was no dispute that Thermal International had sold the MRI machine to PTNM in the normal course of business of Thermal International. I am of the view that the debt to Thermal International therefore comes within an exception to the definition of "Liabilities" in the SSA as an obligation to a trade vendor. Contrary to the arguments made by Columbia, it matters not whether the debt is treated as a long-term or a current debt in the books of PTNM or whether the MRI machine is depreciated over a long period of time.

353 I therefore find that the Hongs are not liable under s 8.4.1 of the SSA to indemnify Columbia for the sum of S$393,399.70.

354 For the same reasons, I find that the Hongs are not liable to indemnify Columbia for the sums of S$3,320 and US$9,763 which were for supplies used for the day to day operation of the Hospital.

355 As I mentioned above, PTNM's counterclaim of S$144,046.03 for payment for the Philips angiography machine on the basis of mistake is unfounded. Columbia did not seek an indemnity from the Hongs for the sum paid. However, even if Columbia had done so, I would have concluded that the amount paid for the Philips angiography machine is an amount paid to a trade vendor for the reasons I have given in respect of the MRI machine. It therefore does not fall within "Liabilities" under s 2.1.24 of the SSA, and the Hong's are not liable to indemnify Columbia for it.

Conclusion

356 In conclusion, for Suit 964:

(a) I grant Columbia judgment against the Hongs for damages to be assessed for the reasonable costs of taking measures to remove the MEC Charge from the land title certificate. The assessment of such costs is to be conducted by me or another judge (including a judicial commissioner) of the High Court.

(b) I declare that the Hongs are liable to indemnify Columbia for any claim by DVI in relation to the transfer of the DVI Shares, including reasonable costs of defending any claim that DVI may bring against Columbia and/or PTNM.

(c) In respect of the Tax Indemnity Issue,

(i) I order the Hongs to indemnify Columbia for the sum of IDR 7,027,522,992 being the additional taxes that were paid to the ITA in respect of the years 2004 to 2007; and

(ii) I also declare that the Hongs are liable to indemnify Columbia for any future tax assessments on PTNM for the period before 22 January 2008, as well as any penalties which may be imposed and/or any reasonable costs (including legal costs) which may be incurred in dealing with any investigation and/or prosecution by the tax authorities.

357 In Suit 861, I grant Thermal Industries judgment against PTNM for S$262,934.48 and for S$10,000. However, I also order the Hongs to indemnify Columbia for the sum of S$262,934.48.

358 In Suit 862:

(a) I grant Thermal International judgment for S$393,399.70, S$3,320 and US$9,763.00 against PTNM;

(b) I dismiss the claim by Columbia (and PTNM) for an indemnity from the Hongs for these three sums; and

(c) I dismiss the counterclaim by PTNM for S$144,046.03 against Thermal International.

359 There was no submission on the interest rate or the date from which the interest is to run. To avoid unnecessary complication, I will grant one rate of interest and the interest will start to run from one date. I order that interest be paid on any sum already ascertained, and which I have ordered to be paid, at the rate of 5.33% per annum from 11 November 2009, being the date when the last of the three actions was filed. This is not unfair to the Hongs as they are likely to end up paying more than what the Thermal Companies are entitled to receive from PTNM under my decision.

360 I will hear the parties on costs at a later date after the amount of the reasonable costs of taking measures to remove the MEC Charge from the land title certificate is determined by the court or agreed between the Hongs and Columbia.

[note: 1] Statement of Claim (Amendment No 4) for Suit 861 at para 4.

[note: 2] Statement of Claim (Amendment No 4) for Suit 861 at para 5.

[note: 3] Defence & Counterclaim (Amendment No 5) in Suit 964 at para 16.1.

[note: 4] AEIC of Michael Chow filed on 6/7/2012 ("Michael Chow's AEIC") at para 16.

[note: 5] Notes of Evidence ("NE"), 27/02/2013 at p 3.

[note: 6] AEIC of Edward Hong filed on 6/7/2012 ("Edward Hong's AEIC") at para 11.

[note: 7] Edward Hong's AEIC at para 18.

[note: 8] Edward Hong's AEIC at paras 24 and 26.

[note: 9] AEIC of Rick Evans filed on 24/7/2012 ("Rick Evans' AEIC") at para 5; NE, 15/8/2012 at p 23.

[note: 10] Rick Evans' AEIC at para 5; NE, 15/8/2012 at pp 32, 36, 49 and 50; NE, 24/8/2012 at p 100.

[note: 11] Rick Evans' AEIC at para 5.

[note: 12] Defence & Counterclaim (Amendment No 5) in Suit 964 at para 6.1.3.

[note: 13] Rick Evans' AEIC at pp 71–73.

[note: 14] Rick Evans' AEIC at p 82.

[note: 15] Rick Evans' AEIC at pp 1496–1575.

[note: 16] Rick Evans' AEIC at p 86.

[note: 17] AEIC of Prem Abraham filed on 24/7/2012 ("Prem Abraham's AEIC") at para 8.

[note: 18] Rick Evans' AEIC at p 334.

[note: 19] Rick Evans' AEIC at pp 659 to 665.

[note: 20] Rick Evans' AEIC at para 21.

[note: 21] Rick Evans' AEIC at paras 20(c) and 21(3); NE, 16/8/2012 at pp 29 and 33.

[note: 22] Rick Evans' AEIC at pp 659–665.

[note: 23] Rick Evans' AEIC at p 22.

[note: 24] Rick Evans' AEIC at para 39.

[note: 25] Rick Evans' AEIC at pp 1101–1102.

[note: 26] Rick Evans' AEIC at para 45; pp 1103–1108.

[note: 27] Rick Evans' AEIC at p 1128.

[note: 28] Rick Evans' AEIC at para 47; pp 1128–1133.

[note: 29] Rick Evans' AEIC at p 1133.

[note: 30] Rick Evans' AEIC at para 47.

[note: 31] Rick Evans' AEIC at pp 1134–1137.

[note: 32] Rick Evans' AEIC at pp 1103–1108.

[note: 33] Rick Evans' AEIC at pp 1176–1178.

[note: 34] Rick Evans' AEIC at p 1197.

[note: 35] Rick Evans' AEIC at pp 1246–1250.

[note: 36] Rick Evans' AEIC at p 1246.

[note: 37] Rick Evans' AEIC at p 1254.

[note: 38] Edward Hong's AEIC at paras 179 and 181.

[note: 39] Rick Evans' AEIC at para 61; Edward Hong's AEIC at para 182.

[note: 40] Rick Evans' AEIC at p 1294.

[note: 41] Edward Hong's AEIC at para 85 and p 305.

[note: 42] Rick Evans' AEIC at p 1373.

[note: 43] Rick Evans' AEIC at p 1375.

[note: 44] Rick Evans' AEIC at p 1394.

[note: 45] Rick Evans' AEIC at para 80.

[note: 46] Rick Evans' AEIC at pp 1398 and 1399.

[note: 47] Rick Evans' AEIC at p 1399.

[note: 48] Rick Evans' AEIC at p 1398.

[note: 49] Rick Evans' AEIC at para 81.

[note: 50] Rick Evans' AEIC at p 1406.

[note: 51] Rick Evans' AEIC at pp 1438–1440.

[note: 52] Rick Evans' AEIC at pp 1445–1455.

[note: 53] Rick Evans' AEIC at pp 1445 and 1446.

[note: 54] Statement of Claim (Amendment No 4) in Suit 964 at para 14(3)(1)(j).

[note: 55] Rick Evans' AEIC at p 1422.

[note: 56] Statement of Claim (Amendment No 4) in Suit 964 at para 14(1).

[note: 57] Defence & Counterclaim (Amendment No 5) in Suit 964 at paras 10.2.1–10.2.5.

[note: 58] Defence & Counterclaim (Amendment No 5) in Suit 964 at paras 10.2.7–10.2.8.

[note: 59] Defendants' Closing Submissions in Suit 964 at para 334.

[note: 60] Rick Evans' AEIC at para 83(2).

[note: 61] Plaintiffs' Closing Submissions in Suit 964 at para 137; AEIC of James Searby ("James Searby's AEIC") filed on 20/7/2012.

[note: 62] James Searby's AEIC at paras 5.5–5.11.

[note: 63] James Searby's AEIC at para 5.16.

[note: 64] James Searby's AEIC at para 5.30.

[note: 65] James Searby's AEIC at para 5.32.

[note: 66] James Searby's AEIC at para 5.33.

[note: 67] Rick Evans' AEIC at p 1254.

[note: 68] Edward Hong's AEIC at pp 603 and 604.

[note: 69] Rick Evans' AEIC at p 1254.

[note: 70] Prem Abraham's AEIC at para 46.

[note: 71] Prem Abraham's AEIC at para 46.

[note: 72] NE, 6/2/2013 at pp 81 and 93.

[note: 73] Prem Abraham's AEIC at pp 82 and 83.

[note: 74] Prem Abraham's AEIC at pp 84 and 85.

[note: 75] NE, 6/2/2013 at p 83.

[note: 76] Edward Hong's AEIC at paras 179 and 181.

[note: 77] Rick Evans' AEIC at para 61; Edward Hong's AEIC at para 182.

[note: 78] Rick Evans's AEIC at p 1294.

[note: 79] Rick Evans's AEIC at pp 1295–1297.

[note: 80] Rick Evans's AEIC at p 1493.

[note: 81] Rick Evans' AEIC at p 663.

[note: 82] NE, 28/8/2012 at pp 134– 136.

[note: 83] Rick Evans's AEIC at pp 637–639.

[note: 84] Rick Evans's AEIC at pp 680–765, 702.

[note: 85] Rick Evans's AEIC at p 787.

[note: 86] NE, 28/8/2012 at pp 142 and 143.

[note: 87] NE 28/8/2012 at pp 145 and 146.

[note: 88] NE, 30/8/2012 at p 23.

[note: 89] NE, 30/8/2012 at p 63.

[note: 90] NE, 30/8/2012 at p 27.

[note: 91] NE, 16/8/2012 at pp 74, 76, 77.

[note: 92] NE, 30/8/2012 at pp 45–47.

[note: 93] AEIC of Roy Tedja filed on 28/1/2013 ("Roy Tedja's 2nd AEIC") at p 11; AEIC of Nick Graham's filed on 13/2/2013 ("Nick Graham's 3rd AEIC") at p 2; NE, 13/2/2012 at pp 60 and 69; NE, 14/2/2012 at p 40.

[note: 94] NE, 14/2/2013 at p 41.

[note: 95] NE, 27/2/2013 at pp 15 and 16.

[note: 96] Roy Tedja's 2nd AEIC at p 14; NE, 27/2/2013 at p 9.

[note: 97] Roy Tedja's 2nd AEIC at pp 14 and 15.

[note: 98] NE, 27/2/2013 at p 10.

[note: 99] Roy Tedja's 2nd AEIC at p 15.

[note: 100] AEIC of Nick Graham filed on 27/8/2012 ("Nick Graham's 2nd AEIC") at p 15.

[note: 101] Nick Graham's 2nd AEIC at p 15.

[note: 102] NE, 27/2/2013 at p 13.

[note: 103] Roy Tedja's 2nd AEIC at p 16.

[note: 104] Nick Graham's 3rd AEIC at p 27.

[note: 105] Nick Graham's 3rd AEIC at p 27.

[note: 106] NE, 15/8/2012 at p 54.

[note: 107] Plaintiff's Reply Submissions in Suit 964 at paras 4–29.

[note: 108] Plaintiff's Closing Submissions in Suit 964 at para 35.

[note: 109] NE, 24/8/2012 at pp 6–9.

[note: 110] NE, 14/2/2013 at p 62.

[note: 111] NE, 20/2/2013 at pp 74–76.

[note: 112] NE, 25/2/2013 at pp 50–52, 55.

[note: 113] NE, 21/3/2009 at p 3.

[note: 114] Prem Abraham's AEIC at pp 49–60.

[note: 115] Prem Abraham's AEIC at pp 61–63.

[note: 116] Prem Abraham's AEIC at pp 64 and 65.

[note: 117] NE, 20/2/2013 at pp 81 and 82.

[note: 118] Prem Abraham's AEIC at p 67.

[note: 119] Prem Abraham's AEIC at p 70.

[note: 120] Prem Abraham's AEIC at pp 47 and 48.

[note: 121] NE, 20/2/2013 at p 66.

[note: 122] NE, 4/3/2013 at pp 1–3.

[note: 123] Rick Evans' AEIC at p 1038.

[note: 124] Rick Evans' AEIC at p 1046.

[note: 125] Rick Evans' AEIC at p 1038.

[note: 126] Rick Evans' AEIC at p 1046.

[note: 127] Prem Abraham's AEIC at para 15.

[note: 128] Rick Evans' AEIC at para 39; NE, 30/8/2012 at p 75 and 76.

[note: 129] Rick Evans' AEIC at pp 1072–1074.

[note: 130] Rick Evans' AEIC at pp 1075–1100.

[note: 131] Rick Evans' AEIC at p 1038.

[note: 132] NE, 30/8/2012 at p 77 and 78.

[note: 133] Rick Evans' AEIC at p 1076.

[note: 134] Prem Abraham's AEIC para 16; NE, 31/8/2012 at p 35; NE, 13/2/2013 at p 7.

[note: 135] NE, 13/2/2013 at pp 7 and 8.

[note: 136] NE, 31/8/2012 at pp 35 and 37.

[note: 137] Statement of Claim (Amendment No. 1) in Suit 861.

[note: 138] Reply and Defence to Counterclaim (Amendment No. 2) in Suit 861 at para 3.

[note: 139] Reply and Defence to Counterclaim (Amendment No. 2) in Suit 861 at para 4.

[note: 140] Reply and Defence to Counterclaim (Amendment No. 2) in Suit 861 at para 6.

[note: 141] Defence and Counterclaim (Amendment No. 3) in Suit 861 at para 7.

[note: 142] Defence and Counterclaim (Amendment No. 3) in Suit 861 at para 8.

[note: 143] Third Party Defence in Suit 861 at para 7.

[note: 144] Third Party Defence in Suit 861 at para 8.

[note: 145] Third Party Defence (Amendment No. 3) in Suit 861 at paras 11 and 12.

[note: 146] Third Party Defence (Amendment No. 4) in Suit 861 at para 8.

[note: 147] NE, 18/2/2012 at pp 9 and 10.

[note: 148] NE, 19/2/2013 at p 28.

[note: 149] NE, 19/2/2013 at p 30.

[note: 150] NE, 19/2/2013 at pp 55, 58, 59, 80.

[note: 151] NE, 19/2/2013 at p 28.

[note: 152] NE, 21/2/2013 at pp 30 and 31.

[note: 153] Prem Abraham's AEIC at para 40.

[note: 154] NE, 03/2/2013 at p 63.

[note: 155] NE, 31/2/2013 at p 75.