IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC(I) 03

Suit No 2 of 2015

Between

(1) **TELEMEDIA PACIFIC GROUP LIMITED**
(2) **HADY HARTANTO**

… *Plaintiffs*

And

(1) **YUANTA ASSET MANAGEMENT INTERNATIONAL LIMITED**
(2) **YEH MAO-YUAN**

… *Defendants*

JUDGMENT

[Contract] — [Breach]
[Equity] — [Fiduciary relationships] — [When arising]
[Equity] — [Fiduciary relationships] — [Duties]
[Equity] — [Remedies] — [Equitable compensation]
[Tort] — [Conspiracy]
[Tort] — [Conversion]

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Telemedia Pacific Group Ltd and another v Yuanta Asset Management International Ltd and another

[2016] SGHC(I) 03

Singapore International Commercial Court — Suit No 2 of 2015
Patricia Bergin IJ
22–26, 29 February 2016; 22 April 2016

30 June 2016 Judgment reserved.

Patricia Bergin IJ:

Introduction

1 These proceedings were transferred into the Singapore International Commercial Court, by consent, on 15 April 2015. They arise from the breakdown of a commercial joint venture relationship between international parties, the agreements in respect of which were executed in Shenzhen in the People's Republic of China ("PRC") and in Hong Kong Special Administrative Region ("Hong Kong SAR") in November 2010.

2 The first plaintiff, Telemedia Pacific Group Limited ("TPG"), registered in the British Virgin Islands ("BVI"), operates a satellite communications business in Hong Kong. The second plaintiff, Mr Hady Hartanto (to whom I will refer as "the plaintiff") is a director of TPG and a citizen of Hong Kong SAR. The first defendant, Yuanta Asset Management International Limited ("Yuanta"), is also registered in the BVI. The second

defendant, Mr Yeh Mao-Yuan (known as "Jack Yeh") (to whom I will refer as "the defendant") is the sole director of Yuanta, resides in China and travels on a Dominican passport.

3 The joint venture was to carry out securities and other diverse investments through a special purpose vehicle, another BVI registered company, Asia Energy Management Ltd ("AEM"), using funds from loan facilities secured by shares in Next Generation Satellite Communications Limited ("NexGen") (formerly known as Ban Joo & Company Limited ("Ban Joo")), a company listed on the Singapore Exchange ("SGX"). Although some of the communications and discussions involve reference to shares in Ban Joo, I will refer to the shares as "NexGen" shares.

4 In summary the plaintiffs claim that in breach of contract and in breach of their fiduciary obligations, the defendants disposed of a large number of the NexGen shares that were to be pledged as security for the loans obtained for joint venture investments. The defendants deny these claims and counterclaim that the plaintiffs unilaterally dissipated the joint venture loan funds for their personal use.

5 The plaintiffs also claim that the defendants wrongfully and with intent to injure them by unlawful means, conspired and combined together to defraud the plaintiffs and to conceal the fraud and the proceeds of the fraud from them. The plaintiffs claim that the defendants concealed the disposal and/or sale of 60m NexGen shares in August 2011 and 225m shares in October 2011, the proceeds of which it is alleged the defendant took for his personal use.

6 The plaintiff and the defendant have been involved in previous litigation in relation to some of the joint venture transactions ("the Earlier Proceedings"). The plaintiff sued Crédit Agricole (Suisse) SA (now known as CA Indosuez (Switzerland) SA) ("Credit Agricole), with which the parties held accounts, for allegedly acting without authority in October 2011 in transferring 225m NexGen shares out of TPG's account with Crédit Agricole into Yuanta's account (or that of its subsidiary) with Crédit Agricole. Crédit Agricole joined the defendant as third party. The plaintiff's claims were dismissed as were Crédit Agricole's claims against the defendant: *Telemedia Pacific Group Limited v Credit Agricole (Suisse) SA* [2014] SGHC 235; [2015] 1 SLR 338 ("the Judgment").

7 Although they have been able to agree on a chronology of events the parties are at issue on many aspects of their relationships. In the circumstances it is necessary to refer in some detail to the background that has led the parties to this Court.

Background

8 In August 2008 TPG acquired 51% of the shares in NexGen. At the same time, TPG acquired a number of warrants entitling it to buy NexGen shares for S$0.03 per share. The plaintiff also became the Executive Deputy Chairman of NexGen at about the time of the transaction.

9 From 2008 the plaintiff was a 75% shareholder in TPG and his business partner at the time, Mr Hardi Koesnadi, held the remaining 25% of the shares through his company, Telemedia Pacific International Inc ("TPI").

In August or September 2010 the plaintiff and Mr Koesnadi decided to part ways and, as a result, TPI's 900m NexGen shares were available for purchase.

Initial discussions between the plaintiff and the defendant

10 Having met only socially in either 2003 or 2005, the plaintiff and the defendant met again in 2010. Although the parties are at issue as to the location of the meetings they are agreed that in meetings during the period July to October 2010 they discussed their respective businesses and potential investment opportunities. The plaintiff claimed that the defendant introduced himself as being from a company with the Chinese name for "Yuanta Financial Holdings", which the plaintiff understood was a large and reputable Taiwanese securities house. The defendant denied that he introduced himself in this manner.

11 The plaintiff claimed that in one of their discussions in July or August 2010 the defendant tried to convince him to invest in Scorpio East Holdings Limited ("Scorpio East"), a company involved in film production and distribution. The defendant denied this and claimed that it was the plaintiff who was interested in investing in Scorpio East. The plaintiff's affidavit evidence is that at subsequent meetings with the defendant in August to September 2010 they decided to jointly acquire up to a 30% stake in Scorpio East. The defendant claimed that although he was initially "in the loop" about investing in Scorpio East, he did not receive the final terms and conditions about the transaction and later learned that the plaintiff had gone ahead on his own. It will be necessary to return to the Scorpio East investment in more detail later because the parties are at issue as to whether it was a joint venture

investment (as the plaintiffs claim) or a personal investment of the plaintiff, through TPG (as the defendants claim).

12 The plaintiff claimed that at one of the meetings in July or August 2010 when he informed the defendant of TPG's recent acquisition of NexGen, the defendant expressed keen interest to collaborate with him and claimed that he was involved with several large Taiwanese funds which he could persuade to invest in NexGen.

13 The plaintiff claimed that during these discussions he and the defendant agreed that Mr Koesnadi's/TPI's 900m NexGen shares would be purchased by Yuanta for S$0.05 each (S$45m in total) and that when the value of the shares increased, Yuanta would then on-sell the shares to three Taiwanese funds. The defendant denied this agreement and claimed that it was initially intended that the NexGen shares would be transferred to Yuanta, for the purposes of securing third party loans and would be held on behalf of Yuanta by the three funds. The defendant claimed that each fund would hold less than 5% of the total share capital of NexGen "in order to avoid having to make an announcement" on the SGX "for a change in substantial shareholding".

14 In a meeting in October 2010 the plaintiff and the defendant agreed to undertake the joint investment project of making investments through the joint venture company (later to become AEM) utilising loan funds secured with NexGen shares. The defendant claimed that because NexGen was on the "watch-list" of the SGX and banks were "not keen" to accept its shares as security for financing, it was agreed that TPG would provide the NexGen shares to Yuanta to pledge as security for loans in Yuanta's name because the

defendant and Yuanta enjoyed a good credit rating and reputation. It was also agreed that Yuanta would then provide the loan funds to the joint venture company.

15 The plaintiff claimed that it was agreed that TPG would transfer NexGen shares to a "Yuanta Trust Account" to be pledged as collateral to Crédit Agricole, and Yuanta would receive loans from Crédit Agricole amounting to 50% to 55% of the market value of the shares. The defendant's evidence was that the loan moneys were to be obtained from a third party lender, not from Crédit Agricole. The defendant denied that Yuanta's account with Crédit Agricole was a "trust account" and claimed it was an account that was opened "well before" his relationship with the plaintiff and TPG.

16 The plaintiff's affidavit evidence was that during their discussions he and the defendant agreed to a joint arrangement in which: (1) TPG would give 300m warrants in NexGen to AEM (consisting of 225m from the plaintiff and 75m from Mr Koesnadi); (2) the funds to exercise the warrants would be sourced from a further loan from Crédit Agricole, secured by the shares to be received upon exercising the warrants; (3) Yuanta would buy 900m shares in NexGen from TPG, funded by an advance from AEM's loan moneys to Yuanta, which would be repaid when the shares were on-sold to the three Taiwanese investor funds; and (4) AEM would acquire a 29% stake in Scorpio East (valued at S$4.5 – S$5m).

The plaintiff meets Mr Goh

17 Mr Goh Teck Wee (known as Brian Goh) was employed by Credit Agricole as a director, Private Banking, between August 2010 and March

2012. Mr Goh met the defendant in 2006 when he became his relationship manager at ABN AMRO. When Mr Goh moved to Credit Agricole in August 2010 the defendant became a client of Credit Agricole.

18 It was in about October 2010 that the defendant introduced the plaintiff to Mr Goh. The plaintiff claimed that at this meeting the defendant explained their plans to make joint investments through a joint venture company and for it to secure credit facilities from Crédit Agricole in its name for the purpose of such joint investments. The plaintiff claimed that he and the defendant informed Mr Goh that they were looking to secure credit facilities to the tune of about S$100m to fund the joint venture activities and that TPG and Yuanta would each pledge an equal amount of NexGen shares as security. The plaintiff claimed that Mr Goh subsequently advised that it would be difficult for the joint venture vehicle to secure credit facilities of such a large amount because it was a single stock security and the joint venture vehicle was not an existing customer of Crédit Agricole. The plaintiff claimed that Mr Goh suggested that they should use Yuanta's existing credit facility with Crédit Agricole which the Bank had already approved and for which Yuanta had pledged multiple stocks as security. The plaintiff claimed that Mr Goh suggested that the shares to be pledged would be transferred to an escrow/trust account under Yuanta's name to be held as collateral for the loan; the loans would be disbursed to the Yuanta account; and then disbursed once every two weeks to the joint venture company.

19 The plaintiff also claimed that during these meetings with Mr Goh he agreed that 10% of the loan funds to be disbursed to AEM would be retained in the Yuanta account to cover the Bank's handling charges and interest. The

plaintiff claimed that ultimately he and the defendant agreed that: (a) TPG would open an account with Crédit Agricole and deposit NexGen shares into that account; (b) TPG would transfer the NexGen shares to the Yuanta account to be pledged as collateral; (c) on the security of the pledged NexGen shares, Crédit Agricole would provide loans amounting to 50% to 55% of the market value of the shares to the Yuanta account (10% of the loan sum would be retained in the Yuanta account); and (d) the loan funds deposited in the AEM account would be used for the joint investments to be carried out by AEM. The defendant denied that it was agreed that Crédit Agricole was to provide the loans. He claimed that the loans were to be secured from a third party.

20 The defendant claimed that the third party loans would be used to exercise warrants to buy 300m NexGen shares at S$0.03. He claimed that the warrants were to be converted within 5 days, and then pledged or sold to obtain funds to put into the AEM account for joint management and investment. He also claimed that it was intended that the warrants would be exercised forthwith and 300m shares would be sold for S$0.06 each. At a later stage the defendant claimed that the funds from these sales were to be distributed equally to himself and the plaintiff.

Loan and security agreements

21 In November 2010 an agreement entitled "Non-Recourse Loan Agreement Complete with Share Delivery, Securities and Re-Delivery Agreement and Securities Co-Operation Agreement" ("the First Loan Agreement"), a second agreement with the same title with the addition "(2)" ("the Second Loan Agreement") and a third agreement entitled "Supplementary Agreement – Securities Co-operation Agreement" ("the

Supplementary Agreement") were executed by the parties (together "the Agreements"). The plaintiff claimed that the Agreements were signed in Shenzhen and Hong Kong and the defendant claimed that the Agreements were signed in Shenzhen. Nothing turns on this dispute because there is no issue that the Agreements were executed; are binding on the parties; and were understood by the parties at the time of their execution. The Agreements were prepared by the defendant in Mandarin. English translations are in evidence and there is no issue about the accuracy of those translations.

First Loan Agreement

22 The First Loan Agreement dated 14 November 2010 included the following terms:

> **NON-RECOURSE LOAN AGREEMENT COMPLETE WITH SHARE DELIVERY, SECURITIES, AND RE-DELIVERY AGREEMENT, AND SECURITIES CO-OPERATION AGREEMENT**
>
> This Agreement is made between Yuanta Asset Management International Limited ("Grantor") and Hady Hartanto/(*TELEMEDIA PACIFIC GROUP LIMITED*) ("Grantee") on the 14th day of November, 2010 as follows:
>
> WHEREAS, the Grantee or the person so arranged owns *Ban Joo & Company Ltd (B07.S1)* Co. Ltd. [*sic*] ("Pledged Securities"), and is desirous of delivering the securities to the Grantor as pledge for a non-recourse loan; and
>
> WHEREAS, the Grantee agrees to deliver the aforesaid securities in compliance with the terms;
>
> Therefore, in consideration of the detailed contents of the bilateral agreement herein set forth, and in the spirit of goodwill and other desires deemed worthy of respect, the Parties agree as follows:
>
> **1. Collaterals/Debentures**

a. The Grantee shall deliver as collateral to the Grantor or the person so arranged or its representative the Pledged Securities as follows:

> A maximum of *200,000,000* shares for free trading; unpledged *TAISAN Co (F2X-SIN)* ordinary shares for multiple-times fund raising amounting to US$*3,000,000.00* each time, with the price to be fixed after receipt of the pledged shares in accordance with Article 2 of this Agreement.

b. The Grantee shall deliver ("Delivery Account") the Pledged Securities to: see Attachment A

c. The Grantee authorises the Grantor to sell, trade or pledge the said Pledged Securities at its discretion.

d. The Grantee authorises the Grantor to, in the following manner, hold or deposit with [*sic*]:

(i) *r* [sic] any local or overseas depository institution or liquidation company or system that provides disposal, liquidation or custodian services.

(ii) issuers of securities without certificates

(iii) custodians at any local or overseas bank or custodian centres

2. Terms

a. The total sum of the Loan shall be fixed in accordance with the Agreement and the computation based on the percentage of *50%-55%* of the Pledged Securities transferred to the Grantor is as follows:

(i) average closing price *10* days before closing

(ii) average closing price *5* days before closing

(iii) average closing price of securities on the trading day before closing

b. Hereafter, the total sum of the Loan based on the value of this transaction shall be *50*% and *10*% of the total Loan amount, including application fees. In addition, the Grantee hereby irrevocably authorises the Grantor to pay the fees to the party stipulated in the attachment.

c. In accordance with the provisions of the terms, the Grantor shall, upon receipt of the pledged shares as collaterals, grant the Grantee a non-recourse loan. The maximum amount for the first time shall be *US$20,000,000.00*. However, in the event that [*sic*]:

(i) the final Loan amount can be decided only after the pledged shares have been delivered to the Grantor's agent/delivery account.

d. The loan period shall be fixed in accordance with this Agreement and shall expire *36* months after the date of this Agreement with a *24*-month prepayment lock-up period.

e. The Grantee reserves exclusive rights to extend the Loan for an additional *12* months, on the same terms as those set out herein. Under any circumstances, the maximum loan period shall be *4* years plus *1* month.

f. The Grantor will release the funds for the loan and the Grantee will furnish the securities within *2* to *5* working days in exchange for the funds.

For the purpose of this Agreement, where the Grantor receives the Pledged Securities after *12* noon on the specified date, the said collaterals may be considered as having been received within the next *2* to *5* trading days.

3. Loan Services

a. The total sum of loan interests, application fees and other charges shall be within 10%, and shall be deducted when the account has been credited with the funds.

4. Re-delivery of the Pledged Securities

a. In the event where the Grantee fails to pay the aforesaid amount on the *10*th day after the due date, the Grantor reserves the right to terminate the said Agreement and will have absolute ownership of the said Pledged Securities with full unrestricted rights.

b. In the event where the Grantee has complied with the Agreement, the Grantor agrees to return to the Grantee the relevant portion of the Pledged Securities or the relevant amount in Singapore/US dollars (at the discretion of the Grantor) within *25* banking days. However, in the event where:

(i) In the event where [*sic*] the Grantee opts to repay the Loan in advance (where applicable), the Grantee shall notify the Grantor (stating that the Loan has been fully repaid) via registered post or FedEx *6* calendar days before the said date. The notice will be valid only after written approval has been given upon the Grantor's receipt of the Consent to Transfer.

(ii) The Grantee may opt to renew this Agreement for an additional period of *12* months. Under such circumstances, the Grantor must receive the notice of application in writing within *10* banking days before the maturity of the said Loan. A fee of not less than the initial total value of the said collateral or 5% of the value of the collateral will arise from the renewal of the Loan period. (The Grantor reserves the exclusive right to decide on one or the other, or the more suitable, of the two.)

c. The Grantee confirms that the Grantor may carry out various trading and hedging strategies and that such trading and strategies may cause a delay in the immediate return of the said collateral towards the next repayment of the total Loan amount by the Grantee. The Grantor shall conform to the serial numbers for the contractual obligations of the re-delivery of securities (or cash figures) within reasonable time as stipulated by contract.

d. Any and all current or future bonuses from the Pledged Securities shall be retained by the Grantor to make up for the said Loan.

e. In the event of re-delivery of cash in part or in full, the Grantor reserves the right to fix the re-delivery price (defined to be the share price applied to the computation of the cash portion in the re-delivery of the collateral) and the terms are as follows:

(i) the closing price on the trading day after receipt of notice

(ii) the closing price on the trading day before the date of re-delivery

(iii) the average closing price *5* trading days after receipt of notice

(iv) the closing price *5* trading days before the date of re-delivery

f. In the event where the Grantee has repaid the Loan amount in full, the Grantor will be responsible for returning to the Grantee cash or shares not exceeding the premium when the value of securities, based on the computation on the date of Loan settlement in the contract, exceeds the value of the Pledged Securities. This may be done at the Grantor's discretion.

5. Terms, Restrictions and Further Agreements

a. In addition to this Agreement, the Grantee agrees to execute and sign all relevant Loan documents requested by the Grantor and, in the event of any breach of contract for the repayment of Loan, the transfer document.

b. In the event where the Grantee violates the conditions stipulated in this Agreement, the Grantee will no longer be entitled to any rights, claims or benefits in relation to the said Pledged Securities. The following circumstances will automatically and irrevocably result in an Event of Default [under the Loan Agreement]:

(i) In the event where the price of the collateral falls below *55*%, the Grantee will be required to repay the Loan in full immediately (within *72* hours). The Grantee may opt to make immediate repayment or fix this erroneous condition by transferring an additional number of shares equivalent to *50*% of the total number of the shares originally pledged, in order to regulate the Agreement. However, in the event where the share price falls below *55*%, the said Loan will be recalled immediately and, in addition, in the event of failure to make repayment within *72* hours, a breach of contract is constituted.

(ii) *Ban Joo & Company Ltd* enters into bankruptcy proceedings

(iii) *Ban Joo & Company Ltd* is delisted

(iv) Changes occur in different types of trading relating to *Ban Joo & Company Ltd*

(v) *Ban Joo & Company Ltd* comes under investigations by the Monetary Authority of Singapore

c. The Grantee represents and guarantees that:

(i) The Pledged Securities are fully owned by the Grantee

(ii) The Pledged Securities are free of encumbrances

(iii) The Pledged Securities are free of liens

(iv) The Pledged Securities may be freely traded

d. The Grantee again guarantees that all declarations and relevant documents furnished and the application for the said loan are authentic and complete, and that no facts or information and data required for assessment under the Loan have been omitted. The Grantee also guarantees not to use the funds from the Loan in furtherance of any improper or unlawful purposes (subject to the jurisdictions of the Hong Kong and Bahamas courts).

e. The Grantor may exercise and effect all other rights and restoration of the holders and owners of the pledge and liens to ensure payment, including (but not limited to) sale within the scope of securities laws and sale or pledge of the rights of such securities.

6. Notice

Any notice between the Grantor and the Grantee shall be deemed as executed once sent by registered post and the acknowledgement of the receipt thereof is given. The mode of communication is as follows:

Grantor:	Grantee:
Yuanta Asset Management International Limited	Hady Hartato [*sic*]/ *TELEMEDIA PACIFIC GROUP LIMITED*

Singapore Lue [*sic*]

7. Securities Co-operation Agreement Classified as Supplementary Agreement (1)

The Grantee fully authorises Mr Yeh Mao Yuan (Jack Yeh), a representative of the Grantor, to be the consultant and representative of the project under this Agreement until such time the contract is terminated upon the completion of the project.

8. Confidentiality

a. The contents of this Agreement shall be confidential and shall not be disclosed in any manner to any unrelated persons.

b. The Parties agree not to harm the legitimate interests of the other party and to keep the said transaction strictly confidential.

c. The Parties shall safeguard the confidentiality of the other party's trade secrets, technology and contacts.

d. No contact with banks, brokerage firms, insurance companies or parties (such as phone and written enquiries, and so on) shall be caused to take place without authorisation.

…

Attachment A

The Grantee will transfer to the Grantor's account the shares deposited into the separate private account he has opened with the Grantor's bank as arranged by the Grantor.

The Grantor agrees and authorises the Grantee to deliver the securities to the following destination bank account:

Name of Account: Yuanta Asset Management International Limited

Bank/Agency: Credit Agricole Corporate and Investment Bank, Singapore Branch

The Grantee agrees and holding rights [*sic*] for the Grantor to deliver the loan proceeds and securities investment to the aforesaid account, and this will have effect when the account is endorsed by the Grantee's authorised person.

Account name to be completed after Grantee’s opening of the account.

…

23 At the time this Agreement was signed, TPG had yet to open an account with Credit Agricole. However the parties' intention in this regard was reflected in Attachment A. Notwithstanding that the Agreement included reference to the Yuanta account with Credit Agricole, it became clear during the trial that Yuanta only opened an account with Credit Agricole sometime on or after 15 November 2010. There is no issue that the reference in cl 1a of the Agreement to "TAISAN Co (F2X–SIN)" was an error and that the parties intended such reference to be to "NexGen" shares.

Second Loan Agreement

24 The Second Loan Agreement dated 14 November 2010 was in the following terms:

> **NON-RECOURSE LOAN AGREEMENT COMPLETE WITH SHARE DELIVERY, SECURITIES, AND RE-DELIVERY AGREEMENT, AND SECURITIES CO-OPERATION AGREEMENT (2)**
>
> | | |
> |---|---|
> | Total Amount: | US Dollars 50 million |
> | Fees: | 10%/year (To be deducted during the one-time fund allocation.) |
> | Period (Years): | 3 years (The minimum period of use is *24* months; repayment shall be made upon the due date after *30* months OR notice of extension shall be given in writing form within *30* days) |
> | Margin Call: | Below 55% |
> | Ratio of Fund: Allocation to Market Value | 55% |
>
> Other terms to be the same as first contract
>
> …

25 I will refer to the First and Second Loan Agreements together as "the Loan Agreement".

Supplementary Agreement

26 The Supplementary Agreement dated 15 November 2010 was in the following terms:

> **SUPPLEMENTARY AGREEMENT -**
>
> **SECURITIES CO-OPERATION AGREEMENT**
>
> Party A: HADY HARTATO [*sic*]
>
> Party B: YEH MAO YUAN *Jack Yeh*
>
> Pursuant to a loan to be taken out, through friendly negotiations, by Party A from Party B or institutions by guarantee of or in co-operation with Party B, and a bank, to be secured by shares in Ban Joo & Company Ltd (B07.S1) held by Party A in the name of TELEMEDIA PACIFIC GROUP LIMITED with full control and discretion in the pledge or transfer thereof, and the amount so available is to enable the Parties to carry out diverse investments, the division of work between the Parties is as follows:
>
> 1. Party A shall put forward a total of 3.6 billion shares to obtain a loan from Party B or institutions by guarantee of or in co-operation with Party B. Party B shall be responsible for securing a loan based on 50%-55% of the closing price for the day of Ban Joo & Company Ltd [shares] in Singapore (subject to the Loan Agreement). In the event of an increase in the share price, Party B shall increase the amount of the Loan, and the percentage of the Loan will also increase concurrently. The expenses shall not exceed 10% of the annual loan expenses, and shall be deducted at the time the funds are disbursed. Interest expenses of the loan shall be borne by the Parties in the proportion of the shares.
>
> 2. The Parties shall, with the total amount of the Loan taken, open a joint account with the designated bank of Party B, and jointly set up a BVI company to carry out securities and other investments. The Parties shall each be entitled to 50% of the profits thereof, net of expenses.

3. The Parties agree that part of the Loan may first be used to exercise the warrant to buy the 300 million shares of Party A's listed company B07.S1, and to convert [the shares] into tradable shares within 5 days. Thereafter, the shares shall be pledged and the funds thereby obtained shall be deposited into the joint account of the Parties for joint management and investment.

4. In the event of the need for profit realisation and distribution when the Parties form the view that the joint investments in securities or other projects have reached a certain profit margin, the expenses shall be borne jointly by the Parties.

5. The Loan, to be taken by Party A from the institutions arranged by Party B and [secured] with the aforesaid shares held by Party A, may be utilised for other investments approved by the Parties, and the profits or losses arising therefrom shall be shared between the Parties in the same proportion: 50% each. In the event of the failure to procure a third party to buy over the shares of Party A when the price thereof have reached a certain level through Party A's speculative actions, the profits may be realised by utilising the limits available for Party B's operation. In the event that a third party is procured to buy over the joint investments of the Parties, the funds shall be for the purpose of the Parties' mutual co-operation. If the price of the pledged shares does not fall below that as agreed in the Loan Agreement (subject to the Loan Agreement), there shall be no covering of short positions by Party A. In the event of a fall below the agreed price, making it necessary to cover short positions, Party A shall cover such short positions in the proportions of the investments.

6. Party A agrees to progressively increase the total cumulative value of the shares held so that the Loan shall not fall below US$50,000,000 by first utilising and subsequently increasing the limits. The Non-Recourse Loan Agreement, complete with Share Delivery and Non-(*sic*) Redelivery of Securities Agreement, shall form an irrevocable part of this Agreement. Party A shall ensure the immediate transfer of 3.6 billion shares to Party A's account with Party B's bank within 7 days after the signing of the Agreement and the opening of the account. A swap

shall be carried out according to the shares and funds required by and agreed between the Parties after the shares have been transferred progressively into the bank account of Party B. Party B's account into which the funds shall be deposited shall be effective upon its having been counter-signed by a representative appointed by Party A (the same shall apply to the BVI company jointly set up [by the Parties]).

7 Party A agrees to Party B's making arrangements for a loan secured with securities computed up to the limit of 50% to 55% of the share price, the funds so available shall be for carrying out securities and other investments, operating on the account to be signed by Party A and Party B on behalf of the Parties. Party B shall, in accordance with the requirements of the co-operation, be responsible for increasing the Term of the Loan, which may be extended for another 1 to 2 years from 3 years after the expiration of at least 2 years. The Term shall be decided by the Parties and the conditions thereof shall be subject to the final Loan Agreement.

8. The Parties agree that the Loan arranged by Party B shall be used, firstly, to exercise the warrant in the Company. (1) The acquisition at 0.3 [*sic*] per share; (2) the acquisition of 25% shares of Party A's original shareholders; (3) Market operations that will increase the company's market capitalisation to the mutual benefit of the Parties (variations and adjustments to the order of priority hereof may be made through consultation between the Parties).

9. The Parties agree to the appointment of Party B to the Board of Directors as Executive Director. Party A agrees to Party B's trusts: Yuanta Asset Management or Crown Asset Management or Meihua International Finance Company, joining the company as shareholder with an initial shareholding of 4.9% to facilitate market operations.

10. Party B shall be responsible for the revaluation of the shares to increase the amount of the Loan as and when the value per share increases up to a certain price. This cycle will be repeated to ensure adequate funds are available for the investments. The Parties shall enter into a separate supplementary agreement on the quantum of increase in the value of Party A's

> shares that will trigger revaluation and the increase of the Loan amount.
>
> 11. The contents of this Agreement is confidential and shall not be disclosed by any of the Parties. The agreement shall automatically terminate upon the cessation of the business. In the event of losses caused by disclosure of confidential information, the defaulting party shall be responsible for such losses.
>
> 12. This Agreement is concluded with the principle of integrity. In the event of any additions or amendments thereto, the Parties shall, by mutual consent, enter into a supplementary agreement thereon, and the contents of such agreement shall form an irrevocable part of this Agreement.
>
> …

27 After the Agreements were signed, accounts were opened with Credit Agricole by TPG, Yuanta and AEM.

Yuanta and EFH

28 On 21 December 2010 Yuanta, as Borrower, entered into a Master Loan Agreement with Equity First Holdings, LLC ("EFH"), as Lender (Y1 [25]). The Master Loan Agreement included the following (C 79):

> **WHEREAS**, the Borrower has requested that the Lender provide a loan, and possible subsequent loans, to be secured by collateral of the Borrower, which collateral will be used, liquidated, sold or otherwise utilised by the Lender during the term of the loan; …

29 The "Pledged Collateral" was defined as 15m shares in NexGen (C 59). The "Loan Principal Amount" was defined as funds equal to 50% of the current Fair Market Value of the 15m NexGen shares on three consecutive Exchange Business days on a national or international exchange (C 82 2.1).

The "Fair Market Value" was defined as the average of the last sale on three consecutive Exchange Business days (C 58).

30 The Master Loan Agreement between Yuanta and EFH included the following:

> **2.5 Authority and Right to Sell and Buy Pledged Collateral.** The Borrower acknowledges that the Lender has the absolute right to sell and buy any or all of the Pledged Collateral during the term of this Agreement and the Loan Documents. However, the Lender shall be under no obligation to sell or otherwise dispose of any Pledged Collateral or to cause any Pledged Collateral to be sold or otherwise disposed of. In the event of a diminution in the Fair Market Value of the Pledged Collateral, the failure of the Lender to dispose of the Pledged Collateral shall under no circumstances be deemed a failure to exercise reasonable care in the custody or preservation of the Pledged Collateral. Any such sale or other disposition of any Pledged Collateral shall be deemed to be commercially reasonable under the Uniform Commercial Code, fully authorized and approved by the Borrower pursuant to this Loan Agreement and the Loan Documents, and otherwise proper in all respects.

31 Yuanta agreed that EFH was entitled to utilise the Pledged Collateral: as part of hedging transactions; transferring the shares within or among one or more depository accounts; and creating and trading derivative instruments backed in whole or in part by the Pledged Collateral (C 84 2.6). The Master Loan Agreement also included the following (C 84 2.7):

> … Upon repayment in full of the Obligations by the Borrower, the Lender shall return to the Borrower securities of [NexGen] equal to the amount which Borrower would have owned as of the date of such payment as if such Pledged Collateral had never been delivered to [EFH].

32 Yuanta and EFH also agreed that within five business days of Yuanta's satisfaction of its obligations, EFH would "reassign all right, title, ownership

and interest in identical securities in the amount" provided for in the agreement and "redeliver the Pledged Collateral, without recourse or warranty" to Yuanta. The Agreement also provided (C 85 2.11):

> … For the purpose of this Agreement and the Loan Documents, a return of identical securities means a return of the Pledged Shares as modified as a result of any split-up, revision, reclassification or other like change of the Pledged Shares. …

33 Yuanta, as Pledgor, and EFH, as Lender, also entered into a Master Pledge Agreement on 21 December 2010. That Agreement included the following (C 113A):

> …
>
> B. The Pledgor is the sole legal and beneficial owner of the 15,000,000 shares of [NexGen].
>
> C. The execution and delivery of this Master Pledge Agreement and the pledge by the Pledgor to the Lender of its rights in the Pledged Collateral (as hereinafter defined) constitute conditions precedent to the obligations of the Lender to make a loan to the Pledgor pursuant to the terms of the Master Loan Agreement.

34 The Master Pledge Agreement provided for Yuanta to pledge and assign to EFH the 15m NexGen shares (C 113B 2.1). This Agreement also included a similar provision to cl 2.11 of the Master Loan Agreement (extracted above at [32]) for redelivery of the Pledged Collateral to Yuanta at the conclusion of the term of the Agreement (C 113C 4.2).

35 The defendant was cross-examined in relation to his choice of EFH as a lender of funds for the joint venture project. He gave the following evidence (26-02-2016: tr 1-3):

Q. At the time that you entered into the master loan agreement with EFH, had you done any checks on the track record of EFH, their credibility?

A. No, but their representative mention it to me.

Q. What did they mention?

A. They said that they have a lawsuit.

Q. What lawsuit?

A. A 2008 lawsuit.

Q. Is this the lawsuit and the judgment that we see at F298?

A. I have not seen this document.

Q. I see. So when they told you that there was a lawsuit in 2008, you did not bother to find out what the outcome of that lawsuit was?

A. They told me.

Q. What did they tell you?

A. It was about inducement and deception, and there were being alleged that they had manipulated the market, but the case was not successful.

Q. So they did not tell you that there was a successful judgment against them in relation to their trading of the shares prior to any breach of the contract?

A. They briefly mention it.

Q. Did they tell you or did they not tell you?

A. They briefly mention it.

Q. When they briefly mentioned it, did you check the details of the case?

A. I didn't do the check myself.

Q. Someone else did a check for you?

A. Yes, their representative told me.

Q. So far as Yuanta was concerned, there were no further checks?

> A. Yes, Yuanta did not carry out any checks, but their representative told me.
>
> Q. Despite knowing that there was a successful claim against them for trading with shares, or the collateral before there was any breach of contract, you did not think it necessary or appropriate to enter into the addendum that would have protected the collateral in this case?
>
> A. I asked them and they promised that they would not carry out such act again in the market and they also said that because this contract includes this trading provision.
>
> Q. Mr Yeh, the trading provision is already in the master loan agreement but this addendum would have minimised the impact of that trading.
>
> A. I don't think so, because at that time they made guarantee to me and that was not the first time that I had transaction with them.

36 The "2008 lawsuit" referred to in the defendant's evidence was a case in which EFH was found to have been in breach of contract in selling pledged shares in a not dissimilar arrangement to the arrangement between Yuanta and EFH. However an important difference was that the contract in that case appears not to have had a provision allowing EFH to sell the shares during the term of the loan: *Teresa Serrano Segovia and Grupo Empresarial Seser, S.A. DE C.V. v Equities First Holdings, LLC* [2008] C.A. No. 06C-09-149-JRS.

37 The "addendum" referred to in this cross-examination was mentioned in a letter dated 15 January 2016 from EFH's solicitors, IceMiller, to the defendants' solicitors in which IceMiller responded to a suggestion that the sales of the pledged NexGen shares by EFH may have caused a drastic reduction in the share price. That letter included the following (F 170):

> … In this contract in particular, EFH and Yuanta included additional protections in the Master Loan Agreement to

> protect against that very possibility. The parties executed an addendum to the Master Loan agreement whereby EFH represented that it would "buy or sell in the market on any one exchange day not more than 30% of the higher of: 1) the previous five-day trading average, or 2) the previous three-month trading average". …

38 However on 17 February 2016 IceMiller wrote to the plaintiffs' solicitors advising (F 514):

> EFH and Yuanta contemplated but did not execute a fourth addendum that proposed capped trading volumes.

39 When the defendant was cross-examined about IceMiller's statement that EFH and Yuanta had "contemplated the fourth addendum", he denied there was any such discussion (25-02-2016: tr 66-69). He claimed that EFH said that they "will make sure that there was no hole in the market" and that because they could trade the shares "they would not create any impact to the market". He also claimed they did not say "they would minimise the impact" (25-02-2016: tr 70). The defendant accepted that in the Earlier Proceedings he had described EFH as his "partner" (24-02-2016: tr 92) and said he had "many transactions with EFH, either with Yuanta or with other companies" (25-02-2016: tr 67).

40 The plaintiffs submitted that the defendant's denial of the discussions about the addendum should not be accepted. However there is some evidence to support the defendant's denial. By January 2016 the plaintiffs had been pressing for an answer from the defendants during the Case Management Conferences as to the whereabouts of the shares. This apparently prompted the defendant to write to EFH and to EFH's solicitors directly.

41 On 28 January 2016 the defendant wrote to IceMiller, referring to the "addendum" to which IceMiller had referred in their letter of 15 January 2016 and asking for a copy of it. On 5 February 2016 IceMiller wrote to the defendant in the following terms:

> On my careful review I realised there was no such addendum executed in this matter. I am sorry to report I was mistaken in that statement and apologise for any confusion my erroneous assumption may have caused.

42 It was on 17 February 2016 that IceMiller wrote to the plaintiffs' solicitors in which the statement was made that EFH and Yuanta had contemplated the fourth addendum but did not execute it. There is nothing in the evidence otherwise to show that the defendant informed IceMiller that Yuanta was contemplating signing a fourth addendum.

Mr Koesnadi's shares

43 The plaintiff's evidence was that the defendant agreed to purchase Mr Koesnadi's 900m NexGen shares (that were held by TPI) for S$45m but that he wanted a deferral of the date for the payment of the purchase price because he was raising the funds for the acquisition. The plaintiff claimed that the defendant informed him that he wanted the shares to be sold initially to Yuanta and when the share price rose he was going to sell the shares to the three Taiwanese funds that he had mentioned to the plaintiff (which are referred to in cl 9 of the Supplementary Agreement (see [26] above)). The plaintiff claimed that he and Mr Koesnadi agreed to the defendant's request for a deferral of the date for payment of the purchase price on the condition that Crédit Agricole would provide a letter of "confirmation" that Yuanta would be able to pay the total purchase price of S$45m for the 900m shares.

44 On 20 December 2010 Mr Goh as a Director of Crédit Agricole Private Banking, wrote to Mr Koesnadi care of Niaga Finance Co Ltd in Hong Kong, in the following terms ("the Confirmation Letter") (B 118):

> CREDIT AGRICOLE (SUISSE) SA hereby confirm that our client, YUANTA ASSET MAGAGEMENT (*sic*) INTERNATIONAL LIMITED, would have the facilities to make installment payments to you totaling Singapore Dollars Forty-Five Million Only (SGD45,000,000.00).
>
> This information is supplied for your information only, under usual reserve, in strict confidence and without any commitment or responsibility on our part. Furthermore, it is for your own use exclusively, and we would have to hold you liable for any consequences which might arise from its transmission to any third parties. In issuing this letter, the Bank does not assume any obligation to notify or inform you of any developments subsequent to its date that might render its contents untrue or inaccurate in whole or in part at such later time.

45 On 20 December 2010 Mr Koesnadi wrote to Mr Goh in the following terms:

> Dear Mr. Brian,
>
> Re: Selling Ban Joo Shares
>
> I would like to inform you that I will sell my Ban Joo Shares to Yuanta Asset Management International Ltd, with value S$45,000,000.
>
> There is my bank account for payment deposit:
>
> [details provided]
>
> MESSAGE: FOR FURTHER CREDIT INTO A/C OF HARDI KOESNADI
>
> THANK YOU FOR YOUR ATTENTION

46 Mr Goh was cross-examined about his letter to Mr Koesnadi as follows (29-02-2016: tr 49-52):

Q. If you move to C409, you see that this is a comfort letter that the bank sent to Mr Hardi Koesnadi on December 2010. Do you see that?

A. Yes.

Q. You're saying you issued this letter because Yuanta had existing credit facilities.

A. Amounts like this.

Q. It's saying "… our client Yuanta".

A. Yes.

Q. So it's making an assertion here that Yuanta had existing credit facilities, correct?

A. Yes.

Q. Are you saying in this letter as well that these facilities are with Credit Agricole?

A. Okay, that's not what I was trying to portray in total.

…

Q. If you're not representing in this letter at C409 that Yuanta had facilities with Credit Agricole, what was the point of sending this letter?

A. It was upon the request of Mr Yeh.

Q. What was the point of it?

A. He didn't tell me.

Q. He asked you to phrase it in this way?

A. Probably. I think this was covered in the previous suit.

…

COURT: You are just being asked about it now. Do your best. Did he ask you to prepare it in this way?

A. I should think so.

…

MR TAN: Would you accept that anyone reading this letter would assume that what was being said here was that Yuanta did have facilities with Credit Agricole.

A. Okay, I didn't mean to --

…

I didn't mean to phrase it in such a way. Factually, he had credit -- okay, he had loans with third party financial, EFH, so I meant it to be together with what he had in Credit Agricole. So he had the facilities of more than this amount, so I didn't mean that he has all this in -- as a guarantee or something. It's not meant to be a guarantee of the.

Q. But you accept that that's not what the letter, in fact, says? Right now, none of the explanation is in the letter. I think that's --

A. Sure.

Q. -- quite clear.

A. Correct.

Q. Someone outside who doesn't know what Yuanta's facilities are or are not would get the impression that Credit Agricole is saying these are facilities with Credit Agricole. Can you accept that?

A. Probably.

…

Scorpio East

47 On 24 December 2010 the plaintiff forwarded to the defendant financial records and various agreements relating to Scorpio East that he had received the previous day (C 138-322).

48 On 3 January 2011 the plaintiff and the defendant received an email from Low Shiong Jin on the "Subject: Scorpio East" in the following terms:

> I have a investor willing to loan me S$4.4m to take 51% stake on the 37m shares.
>
> If possible, kindly let him sign and SnP and he will put in the money into SE first followed by the married deal when your funds are ready.

Letter of Instruction

49 On 30 December 2010 TPG wrote to Credit Agricole (Mr Goh) in the following terms:

> Following on today our telephone conversation between Mr Hady Hartanto and Mr Brian Goh for transfer 400,000,000 shares to Yuanta Asset Management International Limited for pledge its 3 years loan from your bank.
>
> It is enclosed our transfer letter.
>
> We requested that Your Bank and Yuanta need to give us five days prior notice before they need to transfer this shares.
>
> Thank you for your attention.

50 On 3 January 2011 the plaintiff wrote to Mr Goh in the following terms (C 960):

> I am going to BJ today. Tomorrow morning to USA back on 6 Jan. The fund needed is sin$4.5m ASAO (*sic*), and sin$4m for the shell on 10 Jan. If the loan can be draw (*sic*) this week? It is perfect. Let me know, if you get your lawyer to draft the agreement? Or this arrangement, by blank (*sic*) the transfer is enough? (but need your confirming noted, that will inform us 5 days before if any execution?)

51 At this stage the plaintiff apparently understood that the loan was coming from Credit Agricole (see the reference to "your bank" at [49] above). However Mr Goh did not correct the plaintiff's misapprehension. Rather on 3 January 2011 he wrote to the plaintiff in the following terms (C 960):

> The current arrangement will suffice. As for the preparation of the funds, I will do it as soon as possible.

Sale and Purchase Agreement

52 The plaintiffs rely on a Sale and Purchase Agreement ("the SPA") the cover page of which is dated 14 January 2011 and the following page of which

is dated 14 January 2010. There is an issue as to whether Yuanta signed the SPA, a matter to which it will be necessary to return. The SPA was between TPG, as vendor, and Yuanta, as purchaser. The Recitals to the SPA recorded that TPG was or would be the beneficial owner of 300m shares in NexGen, defined as the "Sale Shares", and that Yuanta had agreed to purchase from TPG and TPG had agreed to sell the Sale Shares on the terms and conditions set out in the SPA which included the following:

> **2. SALE AND PURCHASE OF THE SALE SHARES**
>
> 2.1 Subject to the terms and conditions of this Agreement, the Purchaser shall purchase from the Vendor and the Vendor shall sell to the Purchaser all and not part only of the Sale Shares free from all claims, liens, charges, pledges, mortgages, trusts, equities and other encumbrances, and with all rights now or hereafter attaching thereto at the Purchase Consideration.
>
> 2.2 The Purchase Consideration shall be payable by the Purchaser to the Vendor in full by way of cash on or before 31 May 2011. Until full payment of the Purchase Consideration shall be received by the Vendor, the Purchase Consideration shall constitute a debt owing by the Purchaser to the Vendor.
>
> 2.3 Payment of the Purchase Consideration shall be made by the Purchaser by delivering to the Vendor a cashier's order for the aggregate sum of the Purchase Consideration drawn on a bank in Singapore in favour of the Vendor or its nominee.

53 The "Purchase Consideration" was defined as "the sum of S$0.05 for each Sale Share making an aggregate of S$15,000,000 payable by the Purchaser to the Vendor for the purchase of the Sale Shares" (B 123 1.1).

54 Although the date on the SPA is 14 January 2010 it was accepted that this was an error and should have been 2011 (as was stated on the cover page). However it was not until 20 January 2011 that the plaintiff wrote by email to

Mr Robert Wong of Straits Law Practice LLC with a copy to the defendant in the following terms (C 324):

> Pls prepare the agreement between TPG and 1. Yuan Ta Asset Management Ltd buy and sell agreement 300m shares @5 cents, transfer the share now, and payment on or before May 2011.
>
> Pls prepare the promisory note for the transaction.
>
> 2. China Satelliet Communication Group Ltd buy and sell agreement 300m shares @7cents, transfer the share at Philips security now, and payment on or before 5 July 2011.
>
> Also prepare the promisory note for the transaction, and escrow at philips security the shares.

55 On 20 January 2011 Niaga Finance Company Limited ("Niaga Finance") with which TPG and TPI had accounts, wrote to TPI advising that as per its "instruction" it had paid US$610,000 into its HSBC Hong Kong account by debiting its Niaga account (B 199).

56 On 21 January 2011 Crédit Agricole wrote to TPG advising that there had been a "Securities Withdrawal" of 300m NexGen shares from its portfolio. The handwritten entry on this document is "to = Yuanta Asset Management" (B 191). There is no issue that on 21 January 2011 300m NexGen shares were transferred from TPG to Yuanta and that at this time they were trading at S$0.06 cents per share.

57 On 9 February 2011 Niaga Finance wrote to TPI advising that on its "instruction" it had paid US$900,000 into its HSBC Hong Kong account by debiting its Niaga account (B 200).

SGX Announcement – NexGen

58 On 25 January 2011 the defendant signed a form of notice intended for the SGX to record that Yuanta had become a significant shareholder of 300m NexGen shares. It is not in issue that when the defendant signed the notice it had not been completed. However after the plaintiff completed the form it was faxed back to the defendant in its completed state (H 13-20).

59 On 25 January 2011 the plaintiff, as Executive Deputy Chairman of NexGen, submitted an announcement, "Notice of a Substantial Shareholder's Interest" on behalf of NexGen to the SGX (B 129). The Notice recorded: Yuanta as the substantial shareholder; the registered holder as Crédit Agricole; the date of the change of interest as 21 January 2011; the number of shares the subject of the notice as 300m; and the number of shares held after the change as 300m. The footnotes to Part IV of the Notice dealing with the "Holdings of Substantial Shareholder" (Yuanta) were as follows (B 130):

> 1) The percentage of issued share capital is calculated based on 5,967,775,828 shares (excluding treasury shares) as of 21 January 2011.
>
> 2) Yuanta Asset Management International Ltd is deemed to be interested in 300,000,000 shares held by Credit Agricole (Suisse) SA as nominee.

The joint venture project

60 The parties' joint venture relationship was, it seems, not disciplined. It appears that the plaintiff and the defendant did not have regular meetings and their written communications were spasmodic. Notwithstanding the millions of dollars that were at stake, it appears there was no written business plan created or if it was, the parties did not rely upon it.

61 The plaintiffs have painstakingly prepared a very helpful Chart of Transactions (Ex P6) which includes in tabular form the relevant dates from January 2011 to October 2011: the shares transferred into the Yuanta account by TPG; the shares pledged by Yuanta to EFH; the 10 loan tranches from EFH to Yuanta; the sales of the NexGen shares by Yuanta; the repurchases of some of those shares by Yuanta; and the disbursement of the loan proceeds and the proceeds of sale. However it is appropriate at this juncture to set the significant transactions out in narrative form.

February 2011 transactions

62 On 1 February 2011 Yuanta transferred to EFH 30m of the 300m NexGen shares that TPG had transferred into its account.

63 On 11 February 2011 Yuanta sold 30m of the NexGen shares in the market at S$0.05 cents for a total amount of S$1,490,287.50. On 14 February 2011 Yuanta sold 1.5m of the NexGen shares in the market at S$0.05 cents for a total amount of S$74,514.37. These amounts were paid into the Yuanta account.

64 On 14 February 2011 EFH disbursed loan monies to Yuanta in the amount of S$897,880.50 apparently on the security of the 30m NexGen shares that were then trading at S$0.06 cents (loan tranche 1).

65 On 15 February 2011 S$808,092.45 and S$1.2m was transferred from Yuanta to AEM. On 15 February 2011 S$1,200,000 was transferred from AEM to Phillip Securities. On 18 February 2011 S$800,025.51 was

transferred from AEM to Niaga Finance for "further credit" of Mr Koesnadi's account (B 789).

66 On 15 February 2011 S$35,940.84 was transferred out of the Yuanta account to ThreeSix Five Capital Ltd; and S$4,515.02 was transferred out of the Yuanta account to LG Legacy Capital Inc. These two companies are associated with the defendant.

67 On 15 February 2011 the plaintiff wrote by email to the defendant, Ms Chan, and AEM's accountant, Chung Ho Shing ("Mr Chung"), in the following terms (Y2 Tab 5):

> Pls record the transaction
>
> 1. Apply the loan to CA (Credit Agricole), for sin$18m.
>
> a. CA will give 50% of the collateral value, and only can take up to 10% of the list-co market cap. In this case NGSC (Next Gen Sat Com Ltd) base on 6 cents/share, is sin$36.3m. So the loan is sin$18m.
>
> b. The colleteral (sic) is 700m NGSC shares belong to TPG, put in CA custodian, in which 300m shares transfer to Yuan Ta International Management Ltd (as trusstee (*sic*) of TPG), and 400m under TPG name.
>
> c. Attachment the excell (*sic*) sheet for the loan estimation.
>
> 2. AEM get 225m Warrant for free, for buy 900m shares of Hardi Koesnadi.
>
> a. the W will exercise asap at 3 cents, and will sell it at 5 cents up.
>
> b. Target profit is sin$4.5m to sin$6.75m.
>
> 3. From the loan and the profit of W, AEM will buy the shares in the market.
>
> 4. AEM buy from Hardi Koesnadi 900m shares @ 5 cents, with defer payment.

> a. First payment sin$4.5m. Had pay sin$1.7m on 31 Jan 2011, and AEM (fro (*sic*) the loan) pay sin$800k on 14 Feb 2011.
>
> b. The balance will be arrange by loan from CA, by put it back to guarantee the loan for 1 year (until 31 dec 2011).
>
> Will up date you weekly.

68 The attached Excel spreadsheet headed "CA – AEM Ltd program" (C 327) included an entry on 5 December 2010 in respect of 300m NexGen shares at S$0.06 with a collateral value of S$18m. It also included an entry for 23 December 2010 which stated "buy from Hardi Koesnadi @ 5cents" 900m NexGen shares and "Get W for free" 225m NexGen shares. The first entry in the Excel spreadsheet for any loan being approved was on 31 January 2011 at S$900,000 with a further approval of an identical amount on 14 February 2011. The reference in the heading to this spreadsheet to "CA" was clearly a reference to Crédit Agricole, consistent with the plaintiff's then claimed understanding that the loans were to be provided by Crédit Agricole.

69 On 17 February 2011 Yuanta transferred 45m NexGen shares to EFH.

70 On 18 February 2011 Yuanta sold 40m of the NexGen shares in the market at S$0.05 cents for a total amount of S$1,987,250 which was paid into the Yuanta account.

71 On 24 February 2011 S$1.8m was transferred out of the Yuanta account to AEM. On 28 February 2011 S$1,097,622.90 was transferred out of the Yuanta account to AEM.

72 On 24 February 2011 S$1,800,025 was transferred from AEM to Phillip Securities for "further credit" to TPG's account (B790).

73 On 28 February 2011 $1,219,581 was transferred into the Yuanta account from EFH (loan tranche 2). On the same day S$48,808.70 was transferred out of the Yuanta account to ThreeSix Five Capital Ltd and S$6,123.37 was transferred out to LG Legacy Capital Inc.

Acquisition of shares in Scorpio East

74 In March 2011 TPG acquired 37m shares in Scorpio East for a sum of S$4,179,829.95. These shares were purchased using margin facilities that TPG had with Phillip Securities.

75 On 29 April 2011 and 29 June 2011 the sums of S$1,200,024.50 and S$1,800,024.70 were withdrawn from the AEM account as "repayment" to TPG for its use of the margin facilities in Phillip Securities for the purchase of the Scorpio East shares.

March 2011 transactions

76 On 1 March 2011 Yuanta transferred 65m NexGen shares to EFH.

77 On 4 March 2011 S$500,000 was transferred from Yuanta to AEM.

78 On 4 March 2011 S$1,500,025.34 was transferred from AEM to Phillip Securities for "further credit" to TPG's account (B 791).

79 On 10 March 2011 S$1,377,874.90 was transferred from Yuanta to AEM.

80 On 10 March 2011 S$1,530,972.11 was transferred from EFH into the Yuanta account (loan tranche 3). On the same day S$7,680.27 was transferred from the Yuanta account to LG Legacy Capital Inc and S$61,264.29 was transferred from the Yuanta account to Gift Capital Inc, another company associated with the defendant.

81 On 10 March 2011 S$220,766.60 was transferred from AEM to Straits Law Practice LLC Clients account. TPG was the "ordering customer" in respect of this transaction (B 793). A further transaction was made on 10 March 2011 from AEM to NKC (or NRC) Corporation for S$1,279,233.40. Again TPG was the "ordering customer" for this transaction (B 792).

82 On 11 March 2011 TPG transferred 225m NexGen shares to the Yuanta account.

83 On 14 March 2011 Yuanta transferred 65m NexGen shares to EFH.

84 On 15 March 2011 Mr Chung produced a set of draft financial records for AEM including a "Summary of Facts" in the following terms (B 220-221):

> 1. According to the available information, the Company is a company incorporated in British Virgin Islands on 28 November 2006.
>
> 2. The present shareholders as well as directors of the Company are Supriadi and Jack Yeh.
>
> 3. The authorised [Capital] of the Company is US$50,000. The Company issued two shares one for each shareholder.
>
> 4. The Directors use the Company to deal with the transactions mentioned below.
>
> 5. At the very beginning, Jack Yeh paid S$800,000 to Hardy Koesnadi for purchase of some shares in Ban

Joo. This transaction has cancelled and Hardy Koesnadi should refund S$800,000 to Jack Yeh. This transaction does not have financial implication to the Company and is mentioned for record purpose only.

6. At the beginning of 2011, TPG loaned 300,000,000 shares held by TPG in Ban Joo to the Company free of interest and charges.

7. The company pledged the following number of shares in Ban Joo to Credit Agricole, a financial institution in Singapore. Credit Agricole made loans to Jack Yeh based on the number and market price of the pledged shares on the following dates:

[On 1 February 2011 30 million pledged shares at S$0.06 a share with a market value of S$1.8 million with a loan ratio of 50% for S$900,000;

On 14 February 2011 45 million pledged shares of at S$0.06 a share with a market value of S$2.7 million with a loan ratio of 50% S$1.35 million;

On 1 March 2011 65 million pledged shares at S$0.05 a share with a market value of S$3.25 million with a loan ratio of 50% for $1.625 million; and

On 14 March 2011 65 million pledged shares at S$0.04 a share with a market value of S$2.6 million with a loan ratio of 55% for S$1.43 million.

There was a total number of 205 million pledged shares with total loans of S$5.305 million.]

8. Upon receiving the loans from Credit Agricole, Jack Yeh deposited 90% of the loans from Credit Agricole to the bank account of Company having deducted 10% interest paying in advance.

…

9. The loans from Jack Yeh are subject to payment of interest at the first and second anniversaries after receiving the respective loans. The interest to be paid at the first and second anniversaries is set out in the above table. The loans will be repayable at the end of the third years after receiving the respective loans at the amount indicated in the above table.

10. In February 2011, the Company sold 55,000,000 shares in Ban Joo at the consideration of S$0.05 per

> share (or S$2,750,000) to a third party. The Company received S$2,750,000 having deducted transaction cost thereon.
>
> 11. In February 2011, the Company acquired 18,742,000 shares in Ban Joo from a third party at the consideration of S$0.04 per share (or S$749,680). The Company paid S$749,680 (including the transaction cost thereon).
>
> 12. In February 2011, the Company acquired a further 225,000,000 shares in Ban Joo from third party at the consideration of S$0.03 per share (or S$6,750,000). The Company paid S$6,750,000 (including the transaction costs thereon).
>
> 13. For the loans from Jack Yeh the Company should accrue interest thereon. Based on the available information, the annual compound interest rate of the loan from Jack Yeh is about 11.11%. The interest to be accrued for the period from the date of receiving the respective loans to 15 March 2011 is computed in note 3 to the financial statements.

85 The plaintiff and the defendant are at issue as to who was instructing or providing information to Mr Chung. In any event it is clear that these records included reference to "the company" (AEM) selling 55m NexGen shares in February 2011. It is not clear where that understanding came from, nor is it clear where Mr Chung obtained the information about AEM acquiring 18.742m NexGen shares in February. It is not in issue that 18.742m NexGen shares were repurchased on 18 March 2011 by Yuanta. However the defendant claims that the plaintiff instructed him and Mr Goh to sell shares to provide the plaintiff with urgently needed funds The plaintiff claims that he only became aware of the sales after they had occurred and instructed the defendant and Mr Goh to repurchase them as they had been sold without his authority. I will return to these issues later.

86 On 16 April 2011 Mr Chung wrote to the plaintiff and the defendant on the subject of "cash movement" for AEM. Mr Chung identified a number of "discrepancies" in respect of the loans to AEM that clearly he thought were coming from Credit Agricole. He reiterated the earlier statement that in February 2011 AEM had sold 55m NexGen shares but noted there was no corresponding deposit in respect of the sale of the shares. He questioned whether the incoming transfers totalling S$3m (S$1.2m on 15 February 2011 and S$1.8m on 24 February 2011) related to such sale. He also sought clarification in respect of payments that appeared to have been made to Phillip Securities and Niaga Finance.

87 On 22 March 2011 S$1,529,277.75 was transferred into the Yuanta account from EFH (loan tranche 4).

88 On 22 March 2011 there were two transfers out of AEM's accounts. The first was to TPG for S$384,972. The second was to Mr Chan Keng Chun for S$365,025.28 (B 794-795).

89 Although the plaintiff claimed that he instructed the defendant and Mr Goh to repurchase the shares, there was a further sale of 30m of the NexGen shares in the Yuanta account on 29 March 2011 at S$0.045 cents for a total price of S$1,341,258.75 which was paid into the Yuanta account.

90 On 30 March 2011 S$1m was transferred from the Yuanta account to TPI.

Scorpio East announcement

91 On 25 March 2011 Scorpio East announced the proposed appointment of Special Auditors, Stone Forest Corporate Advisory Pte Ltd ("Stone Forest"), who were to "ascertain the veracity" of "several material contracts" that had been entered into and/or terminated and report to the Audit Committee and the Singapore Exchange Securities Trading Limited ("SGX–ST"). That announcement recorded that Scorpio East wished "to apply to convert its trading halt into a trading suspension".

NexGen announcement

92 On 31 March 2011 NexGen announced that it had acquired China and Unifiednet Holdings Limited giving it a "100% stake in China Unifiednet, and access to 55% of the economic rights of a joint-venture company Hughes Unifiednet Holding (China) Company Limited" ("Hughes") (Ex D 3). That announcement recorded that the "deal" was worth S$52.13m with NexGen paying S$34.13m in cash and issuing 300m NexGen shares to the vendor at a price of S$0.06 each, subject to the fulfilment of various conditions.

93 The plaintiff was recorded as having said that the acquisition was in line with NexGen's plan "to establish our footprint in developing countries like China and Indonesia, where demand and growth potential for voice and broadband data services is vast". There was also reference to Hughes having entered into a 5 year agreement with a subsidiary of China Telecom to boost the satellite broadband infrastructure in the Sichuan Province of the PRC.

April 2011 transactions

94 On 4 April 2011 S$1,928,282.40 was transferred into the Yuanta account from EFH (loan tranche 5).

95 On 4 April 2011 S$288,677.67 was transferred out of the Yuanta account to an unknown party. On the same day S$1,552,832.02 was transferred out of the Yuanta account to AEM. On the same day S$77,156.51 and S$9,666.62 was transferred to Gift Capital Inc. On 5 April 2011 S$200,025.22 was transferred out of the Yuanta account to LG Legacy Capital Inc.

96 On 6 April 2011 Yuanta transferred 80m NexGen shares to EFH.

97 On 8 April 2011 Yuanta repurchased 36.258m NexGen shares at S$0.04 cents at a cost of S$1,459,710.82. The funds for that repurchase were transferred from AEM to Yuanta on 13 April 2011 (C 489).

98 On 15 April 2011 S$1,693,418.40 was transferred from EFH to Yuanta (loan tranche 6). On the same day two amounts, S$8,491.99 and S$67,761.64, were transferred out of the Yuanta account to Gift Capital Inc.

99 On 25 April 2011 Yuanta transferred 100m NexGen shares to EFH. On 29 April 2011 Yuanta transferred S$1.2m to AEM.

100 On 29 April 2011 S$1,200,024.50 was transferred from AEM to Phillips Securities for "further credit" to TPG.

May 2011 transactions

101 On 4 May 2011 TPG transferred 300m NexGen shares to Yuanta. On the same day EFH transferred S$1,828,587.54 to Yuanta (loan tranche 7). Also on 4 May 2011 Yuanta paid Gift Capital Inc two amounts, S$9,167.52 and S$73,168.07.

102 On 9 May 2011 Yuanta transferred 100m NexGen shares to EFH.

103 On 13 May 2011 Yuanta made a payment of S$500,000 to an unknown party. On 18 May 2011 a further payment of S$87,147.46 was transferred out of the Yuanta account to an unknown party.

104 On 18 May 2011 EFH transferred S$1,584,499.28 to Yuanta (loan tranche 8). On the same day Yuanta paid out two amounts, S$7,947.31 and S$63,404.78, to Gift Capital Inc.

105 On 20 May 2011 Yuanta transferred 100m NexGen shares to EFH.

106 On 30 May 2011 EFH transferred S$1,114,550.86 to Yuanta (loan tranche 9). On the same day Yuanta paid out S$61,300.30 to an unknown party and two payments of S$5,597.44 and S$44,606.72 to Gift Capital Inc.

June 2011 transactions

107 On 15 June 2011 EFH made a final transfer of S$1,047,281.84 to Yuanta (loan tranche 10). On the same day Yuanta paid out S$5,261.03 and S$41,915.89 to Gift Capital Inc; S$200,024.68 to LG Legacy Capital Inc; and S$1,000,024.68 to the defendant.

108 On 16 June 2011 Yuanta repurchased 7.065m NexGen shares at S$0.02 cents at a cost (paid out of the Yuanta account) of S$142,214.92. On 17 June 2011 Yuanta repurchased 39.435m NexGen shares at a cost of S$793,806.83 also paid out of the Yuanta account.

The S$1.8m transaction

109 On 22 June 2011 Crédit Agricole wrote to NexGen, the plaintiff and Mr Goh enclosing an instruction letter to transfer "the 700million shares". Crédit Agricole requested NexGen to give the instruction to the remitting bank accordingly (B 1165-1166).

110 On 24 June 2011 Crédit Agricole requested NexGen to "check on the status of the shares transfer" (B 1164-1165).

111 On 27 June 2011 the plaintiff wrote to the defendant in the following terms (B 1164):

> Pls confirm, that we need to transfer the fund, then they will release the shares?
>
> Can you ask Brian?
>
> You see below email, that I had done instruction for the transfer shares, but they need the fund coming first?

112 On 27 June 2011 the plaintiff wrote again to the defendant and Mr Goh in the following terms:

> Once TPG got the fund sin$1.8m, we will transfer immediately 700m shares of NGSC to CA under TPG name.
>
> For Courage Marine shares, I need to transfer exchange it to HK stock
>
> (fyi, Courage Ma already dual listed in HK on 24 June 2011 last week).

113 On 29 June 2011 Yuanta transferred S$1.8m to AEM (C473). On the same day the defendant, as authorised signatory of AEM, instructed Crédit Agricole to debit its account for S$1.8m and remit that amount to TPI's account with DBS Bank Ltd in Singapore.

Relationship sours

114 It appears that at about this time the relationship between the plaintiff and the defendant started to sour. It is not possible to pinpoint with any accuracy the date or the specific event that caused this. However the defendant gave evidence that it was after 30 June 2011 that the relationship broke down because of the plaintiff's failure to carry out what he referred to as the "promises" contained within the plaintiff's email of 27 June 2011.

115 On 10 August 2011 the defendant wrote to the plaintiff, with a copy to Mr Goh, in the following terms (C 339-340):

> 1. Total loan: *SGD14,374,331.68*; *10*% administrative fees: *SGD14,374,33.17*
>
> *SGD12,936,898.51*
>
> 2. Sale of 55 million shares *X 0.05 = SGD2,732,468.75*
>
> *SGD12,936,898.51 + SGD2,732,468.75 = SGD15,669,367.26*
>
> 3. *HADY*'S personal guarantee: 55 million shares *X 0.04 = SGD2,214,245*
>
> 4. *HADY*'s sum for personal use: *SGD13,102,934.13*
>
> 5. Remittance by Asian Energy for the share purchase: *SGD1,459,710.62*
>
> 6. *SGD15,669,367.26 – SGD13,102,934.13 = SGD2,566,433.13*
>
> *SGD2,566,433.13 + SGD1,459,710.62 = SGD4,026,143.75*

SGD4,026,143.75 – SGD2,214,245 = SGD1,811,898 (Yuanta's balance)

7. Shares converted from warrant: 225 million shares x 0.03 = 6.75 million (3.375 million per person)

   (225 million shares/2 = 112.5 million shares per person; this should be deposited into the Yuanta account)

8. The sum for your personal use: *SGD13,102,934.13*; Yuanta: *SGD1,811,898*

9. At the end of June, you once again requested for Yuanta to provide SGD 1.8 million for urgent use; you promised to place the following in the custody of the Yuanta account: *(A)* the shares of the listed maritime company + shares of Scorpio East + 700 million shares of Ban Joo. Subsequently, you requested that you attend to the loan for the maritime portion and deal with some debts. No issues with the other two. Now, the Scorpio East [documents] have yet to be signed and the Ban Joo shares are deposited into your *TPG* account; hence, you have to top-up the Yuanta account.

   The settlement is as follows:

   1) The sum for your personal use: SGD13,102,934.13

   2) Yuanta account: SGD1,811,898

   3) Shares converted from warrant: 225 million shares (each person is entitled to 112.5 million shares; this portion is to be transferred to Yuanta, failing which the funds shall be refunded to Yuanta).

   4) *SGD13,102,934.13 – SGD1,811,898 = SGD11,291,036* (If the 112.5 million shares converted from the warrant are transferred to Yuanta, 3.375 million will be deducted = *7916036* (you will use this sum first); this portion must be returned to Asian Energy or the shares are to be transferred to Yuanta).

   5) If Yuanta is to continue to [provide] the secured loan, shares to be held in custody will be provided. They are unable to provide them now as it was not previously explained in the

> contract; it is only when the loan is repaid at maturity that the shares will be returned.

The plaintiff seeks information about the shares

116 On 17 August 2011 the plaintiff's personal assistant, Ms Chan, wrote to Mr Goh consequent upon a conversation between the plaintiff and Mr Goh on 16 August 2011. That communication was in the following terms (B 1170):

> I learned from Mr. Hady, he talked with you Yesterday about next-Gen shares.
>
> Please kind give us two letters:
>
> Letter 1: it is confirmed that CA hold 1.225b shares;
>
> Letter 2: it is declared that 760m shares put at Raffles a/c; another 465m plus 300ms of Yuan Ta total 765m put at 3 banks
>
> Please kind give us on behalf 18 aug, 2011.(before AMG AND EGM of Next-Gen) on 19 aug)
>
> Thank you so much.

117 On 17 August 2011 very shortly after receiving Ms Chan's email Mr Goh responded in the following terms (B 1169):

> … as per previous correspondence, there is 760million shares held with CA Singapore under Raffles Nominee.
>
> 765million shares is currently held by 3 other banks – Bank of New York Mellon, Deutsche Bank and Morgan Stanley.
>
> We won't be able to issue any letter for the shares held with 3 other banks. As for the 760million, we have given instruction for the proxy.

Secret sale of 60m NexGen shares

118 The defendant then embarked on a process of selling the 60m NexGen shares that remained in the Yuanta account. On 19 August 2011, 10m NexGen shares were sold at S$0.024 cents for a total of S$238,472.60. On 22 August

2011, 16.740m NexGen shares were sold at S$0.0231 cents for a total price of S$384,232.97. On 23 August 2011, 17.924m NexGen shares were sold at S$0.023 cents for a total price of S$409,582.67. On 25 August 2011, there were two sales, the first of 7.171m NexGen shares at S$0.023 cents for a total price of S$163,865.06 and the second of 8.165m NexGen shares at S$0.022 cents for a total price of S$178,466.90.

Defendant presses for shares transfer

119 On 25 August 2011 the defendant wrote again to the plaintiff, with a copy to Mr Goh, in the following terms (C 338):

> Regarding the three promises that you made on 30 June:
>
> 1. The [documents] for the transfer of Scorpio East shares have to be signed and passed to *CA*.
>
> 2. Shares of the maritime company (I agreed to help because you needed equity financing for your cash flow).
>
> 3. *225m* shares from the *NEXT-GEN* warrant and *700*m shares to go to *CA*, half of the *225m* [shares] from the warrant is to go into the Yuanta account.
>
> In view of your three aforesaid promises, I had helped you by remitting SGD 1.8 million to you via telegraphic transfer. Now, none of these three promises have come through. Yesterday, you said that arrangements have been made for the *225m* [shares] from the warrant to be transferred to our account with *CA* – Credit Agricole Private Banking, but we have not seen any emails to date. Please see to it as soon as possible! Thank you!

Undisclosed payments

120 There was no disclosure in this communication of the sale of the 60m NexGen shares. Nor was there any indication given to the plaintiff that the defendant had been transferring monies out of the Yuanta account to his business associates, his associated companies and his relative. In addition to

the payments to his associated companies mentioned earlier the defendant made numerous payments out of the Yuanta account between 21 June and 5 September 2011. They included S$100,024.69 to Yeh I Hsiang (the defendant's nephew) on 21 June 2011; S$800,024.85 to the defendant on 27 June 2011; S$139,939.40 to Las Vegas De Palace Pte Ltd (apparently a "nightclub": 24-02-2016: tr 128) on 7 July 2011; S$248,024.09 to OCBC Securities on 24 August 2011; and a further three payments to OCBC Securities in the amounts of S$248,024.13, S$190,024.13 and S$240,024.13 on 29 August 2011. A further payment was made to the defendant on 29 August 2011 in the amount of S$180,024.13. Another payment of S$42,024.06 was made to Kok Wei Jian Alex (a friend of the defendant: 24-02-2016: tr 128) on 31 August 2011; and a further payment of S$250,024.12 was made to Kim Eng Securities Pte Ltd on 5 September 2011.

121 It is not in issue that the only funds (except for approximately S$20,000) that were in and/or paid into the Yuanta account were from the loans that were provided to it by EFH or from the sales by Yuanta of the NexGen shares in the Yuanta account.

Dispute about transfer of 225m shares

122 On 12 September 2011 Crédit Agricole wrote to the plaintiff advising that it had received an instruction from the defendant to transfer 225m NexGen shares from TPG to Yuanta on that day. Crédit Agricole advised that it would carry out the defendant's instruction accordingly as "he is one of the signatory of the account". Crédit Agricole also reminded the plaintiff to make "your own annoucement (*sic*) on SGX accordingly for the above mentioned transfer" (B 271).

123 The plaintiff responded to Credit Agricole on 12 September 2011 advising that the defendant was not the signatory for TPG and informing it that he would make contact and come to Singapore and prepare all the documents "pending for this issue" (B 271). On the same day Crédit Agricole responded further to the plaintiff advising that from the time the TPG account was opened the defendant had been an authorised signatory and accordingly it was able to accept the defendant's instruction. Crédit Agricole suggested that the plaintiff should liaise with the defendant in respect of the share transfer (B 271). The plaintiff responded on the same day claiming that Credit Agricole was "wrong"; the defendant was not a director of TPG; and that he regarded it as "wrong" that he was a signatory for TPG (B 270).

124 Later in the afternoon of 12 September 2011 the plaintiff wrote to Crédit Agricole in the following terms:

> Just talked to Jack Yeh,
>
> TPG will transfer to AEM Ltd 225m shares.
>
> And Yuan Ta management Ltd, will give the proof of the transfer 825m shares, that 60m shares still in CA Account, and 765m shares are trasnfer (*sic*) to DB, JP Morgan, and Bank of New York for pledge.
>
> (Pls copy me the receipt from DB, JM, and Bo NY about it. Also CA confirm the 60m shares in the custoditan (*sic*)).

125 On 13 September 2011 Credit Agricole wrote to the plaintiff enclosing a transfer of securities instructions for his signature (B 269-271). In response the plaintiff advised that he was in Hong Kong and that it was a holiday that day and he would follow it up the following day. The plaintiff also asked:

> Meanwhile, pls get me copy for 825m shares transfer to DB for pledge? And email to me.

126 In response to the plaintiff's request for the copy of the share transfer to Deutsche Bank ("DB") Crédit Agricole advised the plaintiff that he should obtain the details directly from the defendant (B 269). The plaintiff did not sign the transfer of securities instruction and the transfer of the 225m NexGen shares did not take place at this time.

Margin calls

127 In September 2011 the plaintiff received from the defendant three margin call letters, referred to by him as "top-up notices", directed to TPG dated 9 September 2011, 13 September 2011 and 26 September 2011 (B 275-283). These notices were not sent to the plaintiffs on the dates they bear but were sent to them by email on the later dates, referred to below. Each notice referred to the existence of an "Event of Default" under the provisions of the Loan Agreement (cl 5(b)(i)).

128 The notice dated 9 September 2011 called for a deposit of cash in the amount of USD$30,000 or 1,666,667 additional free-trading shares to be lodged with the Yuanta account within 3 business days. The notice dated 13 September 2011 called for USD$45,000 or a deposit of 2,647,059 additional free-trading shares into the Yuanta account within 3 business days. The notice dated 26 September 2011 called for USD$80,000 or a deposit of 6,153,846 additional free-trading shares into the Yuanta account within 3 business days.

129 On 24 September 2011 the plaintiff wrote to the defendant in the following terms (B285):

> Can you send official letter from the bank?
> The account still has sin$1.9m+

> You can use that money?

130 It is reasonable to conclude from the language used in this email that the plaintiff was under the impression that the original margin call had come from "the bank" and he was asking the defendant to cure the margin calls by using the amount that stood in the Yuanta account.

131 On 28 September 2011 the defendant responded to the plaintiff's communication of 24 September 2011 in the following terms:

> Based on your Agreement with Yuanta it is impossible for the bank to issue a letter. CA bank has provided information on the SWIFT [Code] to the correspondent bank. This indicates that inter-bank correspondence has been received. The 2nd paragraph: the margin call notice is also an agreement between you and Yuanta, who shall notify you! The deadlines for the first two sums (30M and 45M) have lapsed.
>
> As for the funds of $1.81 million in the Yuanta account, it cannot be utilised at the moment as you have fulfilled none of your promises, and the Scorpio East case is still under investigations*!!!* Yuanta has given you the receipts for the shares, and these have been given to you earlier in accordance with the promises made in the agreement. The shares will be returned if the loan is repaid at maturity.
>
> In addition, with regard to the 225 million shares converted from the warrant, you transferred the shares out again after they had been bought at 0.05 and transferred into the account. They were not cashed in when the price was high. All the funds were used by you. Hence, to prevent any impact from the Scorpio East case, I hope that 112.5 million shares will be transferred to the designated account, or all to the Yuanta account as securities!
>
> We hereby provide you with the margin call notice for the 3rd [loan] amount: please see to it as soon as possible and do not miss the deadline again! Please complete the share transfer and make an announcement as soon as possible. Thank you.
>
> Please refer to the attachments for the three margin call notices (30m, 45m and 80m).

> Please feel free to contact me if you have any queries.

132 This letter of 28 September 2011 was within weeks of the defendant's secret sale of the 60m NexGen shares that had been in the Yuanta account. It was within weeks of the defendant paying hundreds of thousands of dollars out of the Yuanta account to various entities referred to above, including amounts that could have easily rectified or cured the margin calls that were attached to the email. No mention was made of these matters in this email.

133 In cross-examination the defendant accepted that if Yuanta was going to terminate the Loan Agreement and forfeit the shares on the basis of the margin calls, it had to give notice to TPG and give it an opportunity to rectify the default. The defendant also accepted that Yuanta could only terminate the Loan Agreement and enforce the security upon the failure to rectify the default (24-02-2016: tr 38). The defendant accepted that the first top-up notice dated 9 September 2011 was sent by email and not by overnight delivery (24-02-2016: tr 40). He accepted he did not comply with cl 6 of the Loan Agreement (see [22] above) which required the notice to be sent by registered post together with an acknowledgement of the receipt (24-02-2016: tr 40-41). He also accepted that this was the position in respect of the notice dated 13 September 2011 (24-02-2016: tr 42). In addition to the top-up notices referred to by the plaintiff, the defendant was cross-examined about three further notices dated 27 September 2011, 28 September 2011 and 30 September 2011 (B 847-851) (24-02-2016: tr 42-43).

134 The defendant agreed that he copied the EFH margin call letters removing all references to EFH and pasted them into the emails that he sent to

the plaintiff. He agreed that he did this so that the plaintiff would not know that EFH was the lender (24-02-2016: tr 81).

135 The email dated 16 September 2011 (C 363-366) is rather confused. It refers to remedying the default within "10 business days" and later to affecting a remedy within "5 business days". The defendant was cross-examined as follows (24-02-2016: tr 46-49):

> Q. Now, under this notice that is in your email of the 16th, how many days does TPG have to rectify the margin call?
>
> A. 72 hours.
>
> Q. Okay. Well, can you turn to the next page B834. Just below the line that runs across the page, you see 5(i), where the fair market value – maybe the interpreter can read that sentence to Mr Yeh.
>
> A. So this was sent by me to him.
>
> Q. Yes, so that sentence tells you that the cure period, the period to cure was 10 days?
>
> A. Yes, it was stated 10 working days here.
>
> Q. Look at B836, the first full paragraph:
>
> "Please pay immediately attention to this matter. You have 5 business days to affect the remedy …" Yes?
>
> A. Yes.
>
> Q. But you say that in truth, it was 72 hours?
>
> A. I need to refer to the contract to see whether it is 72 hours or five business days.
>
> Q. Well, I can tell you that under the non-recourse loan agreement, it is 72 hours.
>
> A. Yes.
>
> Q. … But if it is 72 hours, you are sending a notice presumably effective on 13 September by way of an email only on 16 September. Yes?

A. Yes.

Q. By which time, the margin call would have been triggered?

A. Well, we can backdate based on this notice.

Q. Oh, you're backdating a notice?

A. It should be based on the date when I give him the notice of margin calls. Actually, it should be based on the time period which I gave him.

Q. What time period are you giving him? We have seen three different time periods.

A. Yes.

Q. So is it three days, five days, or 10 days?

A. Well, according to the agreement, it should be three days, but if I said five days or 10 days then it should follow what I say.

Q. Now, the reason why there is a notice dated 13 September 2011, is because you have a back-to-back margin call notice from EFH on 13 September 2011?

A. Yes.

…

Q. So it is not up to you, Mr Yeh, to decide how long to give TPG, because the collateral is not with you, Yuanta, it is with EFH.

A. Yes, the collateral was with EFH.

Q. So if EFH is triggering a margin call on 13 September 2011, it's critical and necessary for you to notify TPG.

A. Yes.

Q. Because you are blaming TPG for not curing the margin call.

A. Yes.

136 The defendant was also cross-examined as to whether he had notified TPG that Yuanta had terminated the Agreements. His evidence in this regard was as follows (24-02-2016: tr 44):

> Q. … And you confirm, Mr Yeh, that you didn't send any termination notices in relation to any of the shares?
>
> A. It's just on margin calls.
>
> Q. So TPG doesn't know and you have not notified them that you have exercised your right of termination in relation to the loans?
>
> A. Well, it was mentioned in the agreement if there was no ratification (*sic*) on their side, the contract would be automatically terminated.
>
> …

SGX announcement

137 On 24 September 2011 NexGen announced an "Update of Watch-List Status" (E 165). That announcement recorded that NexGen had submitted an application to SGX-ST on 12 August 2011 for its removal from the Watch-List. NexGen announced that on 23 September 2011 SGX-ST rejected NexGen's application for removal from the Watch-List because there was "uncertainty over whether the Company's profit achieved in FY2011 would be sustainable".

Meeting 27 September 2011

138 The plaintiff claimed in his affidavit evidence that he and the defendant (accompanied by his secretary, Ms Helen Sun) met at Marina Bay Sands in Singapore on 27 September 2011. The plaintiff claimed that he wanted the defendant to sign a statement confirming how many NexGen shares he had pledged for the loans and the amount of the loans that had been obtained. He also claimed that there was a break in the meeting so that the defendant's secretary could prepare documents that the plaintiff had requested. The meeting resumed a few hours later and the defendant's secretary provided

two written statements to be signed by the defendant and by the plaintiff. The first statement dated 27 September 2011, signed by the defendant was in the following terms ("the Yuanta document") (B 287-288):

> The Company, Yuanta International Asset Management Limited, in accordance with the "Securities Co-operation Agreement" signed with TELEMEDIA PACIFIC GROUP LTD on 15 November 2010 in which "non-recourse loan" includes the Delivery of Securities, the Re-delivery Agreement, as well as the Securities Co-operation Agreement, acknowledge receipt of transferred stock of 825 (the payment record that 765 million shares was transferred from CA BANK to the BANK OF NEW YORK – SWIFT has been provided, in addition to 60 million shares in Yuanta account) million shares were transferred, to act as Party B's or Party B's guarantee or partner corporations, to act as a loan towards joint investment projects.

139 The second statement, also dated 27 September 2011, signed by the plaintiff was in the following terms ("the TPG document") (B 289-290):

> I, Mr. Hady [Hartanto] of TELEMEDIA PACIFIC GROUP LTD, have received the joint loan that has been transferred into the account of Yuanta International Asset Management Limited, and which has been transferred out into S$13,102,934.12 Singapore dollars. Both parties jointly purchased options converted to the share amount of S$6,750,000 Singapore dollars, Mr. Hady [Hartanto] used S$4,541,035 Singapore dollars. Yuanta used S$1,811,898 Singapore dollars. The funding received is correct.

140 The plaintiff claimed that when the defendant handed him the signed Yuanta document at this meeting, the defendant said that he was no longer interested in investing in Scorpio East because of the investigations by the Commercial Affairs Department "which resulted in a sharp fall in the share price of Scorpio East". It is not clear from the plaintiff's affidavit whether the defendant said that the investigation had caused the "sharp fall" in the Scorpio East share price, or whether this was the plaintiff's observation. The plaintiff

claimed that the defendant said that the plaintiff could keep the Scorpio East shares for himself.

141 The plaintiff was not cross-examined about his evidence in relation to the meeting on 27 September 2011 or the documents that he claimed were signed at this meeting. The defendant's evidence in his reply affidavit was that although his signature is on the Yuanta document, he did not recall "when or why" he signed it. However he claimed he was "certain" that he did not meet with the plaintiff on 27 September 2011, because at that time the plaintiff was avoiding him because he had been demanding that the plaintiff meet the margin calls.

142 It is curious that neither party was cross-examined about this meeting or the content of these documents. It is also curious that neither party referred to the meeting or the documents in their final submissions. The parties did not include this meeting in their agreed chronology. The Yuanta document (see [138] above) contains a representation that Crédit Agricole transferred 765m NexGen shares to the Bank of New York. There was no reference to EFH in the document. The Yuanta document also contains a representation that there were 60m NexGen shares in the Yuanta account. This of course was well after the defendant had sold those shares.

143 The TPG document (see [139] above) is not free from ambiguity. It suggests that the plaintiff contributed S$4,451,035 to the purchase price (presumably of NexGen shares) of S$6.75m and the defendant contributed S$1,811,898. Those two figures add up to S$6,262,933 some S$487,067 less than S$6.75m.

144 It is perhaps not surprising that the parties did not mention this meeting or these documents again.

Further disputation

145 On 1 October 2011 the defendant wrote to the plaintiff requesting him to reply to his email with an "official letter" and advising that the "contract will become void if the deadline for the margin call is missed" (B 298).

146 On 3 October 2011 the plaintiff responded to the defendant's email of 1 October 2011 under the heading "Margin Call Notice", with a copy to Mr Goh. That email was in the following terms (B 295-298):

> Pls refer to the agreement:
>
> 1. Total loan for 3.6 billions shares, est sin$180m, can borrow sin$90m
>
>   The deal is you get the loan, for buy my partner shares and/or for the new project JV together. The loan under Yuan Ta, and TPG pledge the shares to guarantee the loan, from CA bank.
>
>   The shares will not be sold, andor re-financing by the bank (pledge to other institution).
>
> 2. In January 2011, you said only interested 25% (from my partner shares, 900m shares ~ sin$45m, you gave me Credit Agricole Singapore bank references, that you have credit sin$45m).
>
> 3. End Jan 2011, we agreed to pay my partner sin$2.7m as commitment, which the loan from the bank delay. I Pay first sin$1.8m. (see the first remittance to me).
>
> 4. TPG transfer 30m shares (~sin$15m) with the payment on or before 31 May 2011. Transfer from Straight Law firm to Yuan Ta at Credit Agricole.
>
> 5. After the transaction, you ask for the Warrant. I said only can give you my parts, means 75% (~225m Warrant) of the warrant TPG has, with condition only

> to exchange to shares, not for sale. This means we gave free value sin$4.5m.
>
> 6. After Yuan Ta got the bank financing, the shares drop and drop. I asked you many times, that the bank is not selling?? You guarantee they are not selling????
>
> 7. Until June 2011, I asked to proof the shares pledge custodian proof receipt?? You said will ask Brian to give to me, but delay until 27 July 2011.
>
> 8. Brian only gave the copy swift transfer to Mellon bank NY, for Yuan Ta account? In your receipt, you put into Bank of New York. The my understanding, you said borrow from DB 3 lots, JP Morgan 3 lots and Bank of New York. You said borrow from Credit Agricole? But it is not!!
>
> 9. Better you proof, which is the correct one, by copy the letter from the 3 bank about the transaction loan? Otherwise I will say that Yuan Ta never take the loan, and Yuan Ta sold the shares, which it is not right?
>
> 10. To clear this matter, and for the benefit our relationship, please make clear, what is the status with the shares? Who sell it? The bank or Yuan Ta?
>
> Our agreement is to give you the security borrow from the Credit Agricole bank under Yuan Ta name. We had done some, and there is any discrepancy wiht the spirit of the agreement. You need to pass to the company AEM Ltd the banks support for the loan. Now, the share pledge to the bank can not be traced? I hope you can proof, where is the share now?
>
> Otherwise, Yuan Ta or the bank is wrongly transfer the shares to the 3rd party, means they sold it, and make the market price drop! Total shares value is Sin$ 28.6m.

147 On 4 October 2011 the plaintiff wrote to the defendant in the following terms (B 295):

> Pls answer the queries, where is the shares?
>
> Who is the custodian?
>
> If can not show, means they sold it??
>
> Then we deal with it.

> The letter not from the bank, pls be open, so we can proceed.

148 Also on 4 October 2011 the plaintiff wrote again to the defendant in the following terms:

> I check from CDP, that 60m shares under YuanTa at CA also moved?
>
> Pls let me know, where is the shares?

Sale of 225m NexGen shares

149 On 10 October 2011 the defendant transferred 112.5m NexGen shares from the TPG account to the Crédit Agricole account of Yuanta's subsidiary, Fullerton Capital Enterprises Limited ("Fullerton"). The defendant then embarked upon a sale process of those shares between 10 October 2011 and 13 October 2011 in four tranches; 61.528m on 10 October 2011 at S$0.0103 cents for a price of S$629,634.94; 16.972m shares on 11 October 2011 at S$0.01 cents for a total price of S$168,621.06; 2.756m shares on 12 October 2011 at S$0.01 cents for a total price of S$27,381.55 and 31.244m shares at S$0.0094 cents on 13 October 2011 for a total price of S$291,791.93. All of these amounts were paid into the Yuanta account.

150 On 14 October 2011, 112.5m NexGen shares were transferred from the TPG account to the Fullerton account.

151 Notwithstanding that the defendant had secretly sold the 60m NexGen shares in August 2011, he wrote to the plaintiff on 14 October 2011, with a copy to Mr Goh, in the following terms (B 808):

> With regard to 60m shared in Credit Agricole, I moved it to other custody account. Because according to the previous e-mails, the promise you made on 30th of June, 2011, the fund

> could be used half by each of us, and for the sake of loan guaranteed by YUANTA, your shares dropped down to S$0.011, you did not make any arrangement for topping up funds or shares. so according to our previous notice, and for the benefit of Yuanta, YOU NEED AND MUST TO MAKE ANNOUNCEMENT, we hereby inform you that we moved a half shares of 225M to a nominated account by Yuantan. This is our notice to you!

152 The defendant then embarked on the sale of the balance of the 112.5m NexGen shares in four further tranches: on 17 October 2011, 15.438m shares at S$0.009 cents for a total price of $138,042.35; on 18 October 2011, 43.766m shares at S$0.008 cents for S$347,860.92; on 19 October 2011, 18.472m shares at S$0.008 cents for a total price of S$146,819.15; and on 20 October 2011, 34.824m shares at S$0.007 cents for S$242,189.60. All of these funds went into the Fullerton account.

153 On 14 October 2011 S$798,025.41 was transferred out of the Fullerton account to the defendant. On 20 October 2011 S$100,025.41 was transferred out of the Fullerton account to to one Teo Cheng Kwee (said to be the defendant's business partner). On 21 October 2011 S$1,000,025.55 was transferred out of the Fullerton account to the defendant.

Scorpio East SGX reprimand

154 On 20 October 2011 the SGX issued a reprimand in respect of Scorpio East and its directors and management ("the SGX Reprimand"). It included the following (B 1158):

> …
>
> 27. In the opinion of the Exchange, Hady Hartanto has not demonstrated the qualities expected of a director and member of the management of a SGX-listed company as required under Catalist Rules 406(3)(b) and 720.

> Hady Hantanto had breached Catalist Rule 103(6) for failure to act in the interests of shareholders as a whole. The Exchange reprimands Hady Hatanto for breaches of these Catalist Rules.
>
> 28. Based on SFCA's [Stone Forest Corporate Advisory Pte Ltd's] Report, Hady Hartanto signed the Alpha Contracts. Hady Hartanto did not ensure that any due diligence was carried out on Alpha Entertainment, including on its financial standing. He did not consult the Board nor assess the commercial viability of the Alpha Contracts before signing the Alpha Contracts.
>
> 29. SFCA noted that Hady Hartanto approved the termination of the Scorpio Contracts.
>
> 30. SFCA also noted that Hady was in favour of and involved in the "round-tripping" transactions. The "round-tripping" were transactions purportedly to mislead the Company's external auditors and were recorded as refunds from the producers of the terminated Scorpio Contracts when no such refunds had been received from the producers.

TPG Account closed

155 On 31 October 2011 Crédit Agricole wrote to the plaintiff in the following terms:

> Please find attached Zero Balance letter sent out for Telemedia Pacific Group Limited.
>
> There is a balance of SGD 93,074.72 in Asia Energy Management accounts, please let us know where would you like us to remit the monies to. Please confirm if we can proceed to close AEM's account after the remittance?
>
> Could you please give Brian a call when you are available? We have been trying to contact you for the past week.

156 On 31 October 2011 the plaintiff responded to the email from Crédit Agricole in the following terms:

> We have 225m NGSC B Zero 7.si [NexGen] shares in the account.

> Pls let me know, and confirm this.
>
> Mean while, pls send me the Yuan Ta management registered address.

157 On 1 November 2011 Mr Goh responded to the plaintiff in the following terms:

> The 225m shares in TPG was transferred out by 14 Oct 2011.

Present proceedings

158 The plaintiffs commenced the present proceedings in the High Court of Singapore by way of Writ of Summons filed on 26 May 2014 during the hearing of the Earlier Proceedings. There was no evidence to explain the delay in bringing these proceedings. However it appears that it was only during the Earlier Proceedings that the plaintiff discovered that the loans had been provided by EFH and that the shares had been pledged to it.

159 On 15 April 2015 the proceedings were consensually transferred from the High Court to the Singapore International Commercial Court under O 110 r 12 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). Although the proceedings had originally been set down for hearing in late 2015, the plaintiffs changed their legal representation and sought a later trial date, to which the defendants did not object.

160 The proceedings were heard on 22, 23, 24, 25, 26 and 29 February 2016. Thereafter the parties filed extensive written submissions and final oral submissions were heard on 22 April 2016, at the conclusion of which judgment was reserved. Subsequently the plaintiffs were granted leave to rely upon a further written submission dated 25 April 2016. The plaintiffs were

represented by Mr Paul Tan, Mr Yam Wern-Jhien, Ms Josephine Chee, Ms Wong Shi Yun and Mr Pradeep Nair. The defendants were represented by Mr Hee Theng Fong, Ms Toh Wei Yi, Mr Nicklaus Tan and Ms Jaclyn Leong.

161 The plaintiffs relied upon the plaintiff's three affidavits sworn on 20 November 2015, 23 December 2015 and 22 February 2016. The defendants relied upon the defendant's two affidavits sworn on 3 November 2015 and 6 January 2016. The defendant also relied upon the affidavit of Mr Goh sworn on 21 January 2016. The plaintiff, the defendant and Mr Goh were cross-examined.

162 The plaintiffs relied upon the expert opinions of Mr Tan Boon Hoo ("Mr Tan"), of TBH International Consulting and Mr Richard Hayler (Mr Hayler), of FTI Consulting. The defendants relied upon the expert opinion of Mr Tam Chee Chong ("Mr Tam"), of Deloitte & Touche. The experts gave their evidence in concurrent session on 29 February 2016. This evidence related to the impact that the trading of the NexGen shares by Yuanta and/or EFH may have had on the NexGen share price.

Issues for determination

163 There are numerous competing claims between the parties. Although the plaintiffs sought to expand their claims against the defendants in their Opening Statement at the commencement of the trial, including a claim of fraud (separately from all other claims originally pleaded), this was not permitted. The claims for determination are those that are pleaded.

164 I should record that although the Miscellaneous provisions of the Loan Agreement (cl 9) provided that it was to be construed in accordance with the laws of the Bahamas, it is agreed between the parties that there is no relevant difference with the laws of Singapore and they have addressed the claims on that basis. Those provisions also included an agreement to have disputes resolved by arbitration under the jurisdiction of Nassau. The parties apparently decided that they would waive any rights in this regard at the time the proceedings were commenced.

Construction of Agreements

165 A number of issues arise in respect of the construction of the Agreements. The plaintiffs contend that although the Loan Agreement expressly provides that the plaintiffs authorised Yuanta to "sell, trade or pledge" the NexGen shares "at its discretion" (see [22] above), when the Agreements are read together it can be seen that Yuanta was not authorised to sell the shares unless it was the "ultimate lender" and/or unless the plaintiffs were in default. The defendants contend that Yuanta had unfettered discretion to deal with the shares during the term of the Agreements, including by selling the shares.

166 The plaintiffs contend that on a reasonable reading of the Agreements it is clear the parties were in a joint venture relationship and owed fiduciary obligations to each other. The defendants contend that the only obligations between the parties under the Agreements are contractual and the parties did not owe any fiduciary obligation to each other.

Breach of contract

167 The plaintiffs claim that the defendants are in breach of the Agreements in disposing of the NexGen shares and keeping the proceeds of those sales. The plaintiffs also claim that the defendant induced Yuanta to breach the Agreements in this regard.

168 In response to these claims the defendants claim that they were instructed or requested by the plaintiff to sell 101.5m NexGen shares between February and March 2011. They also claim that the plaintiffs are in breach of the Agreements by using S$11,302,934.13 of the loan funds obtained for the joint venture project for their own purposes, without the knowledge or authority of the defendants. They claim that it was an implied term of the Agreements that the plaintiff and the defendant would each be entitled to, or entitled to use, 50% of the loan funds in AEM's account and that the plaintiff's conduct has prevented the defendant from enjoying that entitlement.

169 The plaintiffs also claim that Yuanta is in breach of the SPA, having paid only S$1.8m of the S$15m purchase price for the 300m NexGen shares. The defendants deny that the parties entered into the SPA and claim that if there were such an agreement, the plaintiffs have failed to bring to account amounts already paid by the defendants.

Fiduciary breaches

170 The plaintiffs claim that in selling the NexGen shares and keeping the proceeds of those sales, the defendants are in breach of their fiduciary obligations to them. The plaintiffs also claim that the defendant assisted Yuanta in its breach of fiduciary obligations owed to them.

Conversion

171 The plaintiffs claim the defendants are liable in conversion for disposing of the NexGen shares.

Conspiracy

172 The plaintiffs claim that with intent to injure the plaintiffs by unlawful means, the defendants conspired and combined together to defraud them and to conceal such fraud and the proceeds of such fraud from them.

Portfolio claim

173 As part of their claim for damages the plaintiffs claim that a consequence of the defendants' conduct was a fall in the price of the NexGen shares, causing a significant reduction in the value of the plaintiffs' NexGen share portfolio. The plaintiffs allege that the defendants knew, or ought to have known, that the disposal of the large amount of NexGen shares within a short period of time in 2011 would result in "the drastic fall of the price" of the NexGen shares for which the defendants are liable to the plaintiffs.

Issues on counterclaim

174 The defendants claim that the parties agreed that one of the joint investments of the project was the purchase of the warrant which was to be converted to 225m NexGen shares which were to be pledged for loans to be deposited into the AEM account for joint investment. The defendants allege that the plaintiffs were obliged to transfer the 225m NexGen shares converted from the warrant for pledging or to transfer 112.5m NexGen shares to Yuanta's account.

175 The defendants allege that on or around 30 June 2011, the plaintiff represented to the defendant that he would arrange for the transfer of the 225m NexGen shares or deposit 112.5m NexGen shares into the Yuanta account. The defendants claim that because the plaintiff failed, refused or neglected to transfer the 225m, or 112.5m, NexGen shares to Yuanta, the defendant instructed Credit Agricole on or around 6 October 2011 and 10 October 2011 to transfer the totality of the 225m NexGen shares to the Fullerton Account. The defendants claim that the plaintiff's failure, refusal or neglect in transferring the 225m, or 112.5m, NexGen shares has led to Yuanta suffering loss and damage ("the Warrant Claim").

176 The defendants also claim that pursuant to cl 3 of the Supplementary Agreement the NexGen shares obtained from the warrant were to be "cashed out". They claim that the plaintiff and the defendant were entitled to sell the 225m NexGen shares at a price of S$0.06 per share for the total sum of S$13.5m. It is alleged that because the plaintiff failed, refused or neglected to transfer the 225m NexGen shares converted from the warrant, the defendant was prevented from selling the shares at that price and could only sell them in November 2011 from the Fullerton Account at S$0.007per share, for the total sum of S$1.575m. The defendants claim loss and damage in the amount of S$5.175m in respect of this aspect of the Warrant Claim.

177 The defendants also claim that the plaintiff and the defendant entered into an oral loan agreement in June 2011 pursuant to which the defendant (or Yuanta) would provide an additional loan of S$1.8m to the plaintiff in consideration of which the plaintiff agreed to transfer an additional 700m NexGen shares to Yuanta. The defendants claim that Yuanta provided the sum

of S$1.8m by way of transfer from Yuanta's account to the AEM account and then to TPG's account with DBS Bank Ltd on 29 June 2011. The defendants claim that the plaintiff has refused and/or neglected to transfer the 700m NexGen shares in breach of the oral agreement ("the Oral Loan Agreement Claim").

Construction of the Agreements

178 There are two matters for determination in construing the Agreements. The first is whether the defendant's discretion to sell the pledged NexGen shares was unfettered. The second is whether the parties' contractual relationship gave rise to fiduciary obligations and, if so, the nature of those obligations.

Discretion to sell the pledged shares

179 In construing commercial contracts, the Court has regard to the language used by the parties, the commercial circumstances that the contracts address and the objects they were intended to secure. It is also permissible to have regard to the events and circumstances known to the parties at the time: see, eg, Lucky *Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069; *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR (R) 1029; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 325 ALR 188 (at [47]). Commercial contracts should be given a businesslike interpretation: *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579(at [22]).

180 The Loan Agreement was between Yuanta, as Grantor of the non-recourse loan and the plaintiffs, as Grantee (see [22] above). The

Supplementary Agreement was between the plaintiff and the defendant (see [26] above). The clear intention of the parties was that the Agreements should be read together as they agreed expressly that the Loan Agreement formed "an irrevocable part" of the Supplementary Agreement (cl 6 Supplementary Agreement).

181 The parties recorded that the plaintiffs were "desirous of delivering" the NexGen shares "as pledge for a non-recourse loan" (Recital Loan Agreement). The plaintiffs agreed to deliver 200m NexGen shares for pledging (adjusted to 3.6 billion shares in the Supplementary Agreement) as security for loans totalling US$50m. The plaintiffs expressly authorised Yuanta to sell, trade or pledge the NexGen shares "at its discretion" (cl 1(c)); and to hold or deposit the shares with various institutions, including any local or overseas depository institution or liquidation company or custodians at any local or overseas bank (cl 1(d) Loan Agreement). The parties also agreed on a mechanism pursuant to which the Loan amount was to be fixed (cl 2(a) Loan Agreement).

182 Yuanta agreed that upon receipt of the NexGen shares, as collateral, it would grant the plaintiffs a non-recourse loan for 36 months, the plaintiffs having the right to extend the loan for an additional 1 to 2 years (cl 7 Supplementary Agreement).

183 Clause 4 of the Loan Agreement took on a degree of importance in the debate about the extent of Yuanta's entitlement to sell the shares during the term of the agreement, the provisions of which are repeated here for convenience:

4. Re-delivery of the Pledged Securities

a. In the event where the Grantee fails to pay the aforesaid amount on the *10*th day after the due date, the Grantor reserves the right to terminate the said Agreement and will have absolute ownership of the said Pledged Securities with full unrestricted rights.

b. In the event where the Grantee has complied with the Agreement, the Grantor agrees to return to the Grantee the relevant portion of the Pledged Securities or the relevant amount in Singapore/US dollars (at the discretion of the Grantor) within *25* banking days. However, in the event where:

(i) In the event where [*sic*] the Grantee opts to repay the Loan in advance (where applicable), the Grantee shall notify the Grantor (stating that the Loan has been fully repaid) via registered post or FedEx *6* calendar days before the said date. The notice will be valid only after written approval has been given upon the Grantor's receipt of the Consent to Transfer.

(ii) The Grantee may opt to renew this Agreement for an additional period of *12* months. Under such circumstances, the Grantor must receive the notice of application in writing within *10* banking days before the maturity of the said Loan. A fee of not less than the initial total value of the said collateral or 5% of the value of the collateral will arise from the renewal of the Loan period. (The Grantor reserves the exclusive right to decide on one or the other, or the more suitable, of the two.)

c. The Grantee confirms that the Grantor may carry out various trading and hedging strategies and that such trading and strategies may cause a delay in the immediate return of the said collateral towards the next repayment of the total Loan amount by the Grantee. The Grantor shall conform to the serial numbers for the contractual obligations of the re-delivery of securities (or cash figures) within reasonable time as stipulated by contract.

d. Any and all current or future bonuses from the Pledged Securities shall be retained by the Grantor to make up for the said Loan.

> e. In the event of re-delivery of cash in part or in full, the Grantor reserves the right to fix the re-delivery price (defined to be the share price applied to the computation of the cash portion in the re-delivery of the collateral) and the terms are as follows:
>
> (i) the closing price on the trading day after receipt of notice
>
> (ii) the closing price on the trading day before the date of re-delivery
>
> (iii) the average closing price *5* trading days after receipt of notice
>
> (iv) the closing price *5* trading days before the date of re-delivery
>
> f. In the event where the Grantee has repaid the Loan amount in full, the Grantor will be responsible for returning to the Grantee cash or shares not exceeding the premium when the value of securities, based on the computation on the date of Loan settlement in the contract, exceeds the value of the Pledged Securities. This may be done at the Grantor's discretion.

184 The defendants submitted that Yuanta would only be required to return the NexGen shares or money of the same value when the plaintiffs wished to redeem the loan. Although it would appear that Yuanta was entitled to "fix the re-delivery price" based on the value of shares at the time of notice of repayment under cl 4(b)(i) or the date of re-delivery in accordance with cl 4(e), the defendant submitted that Yuanta was obliged to re-deliver cash equivalent to the value of the shares at the date they were pledged. The defendants did not explore this submission any further and although the plaintiffs were in agreement with this submission (understandably because the share price had fallen) it is not necessary to take this matter any further.

185 The defendants submitted that how and when the pledged shares would be sold before redemption was a matter for Yuanta in the exercise of its

discretion. They emphasised the significance of cl 4(b) contending that the defendants had the option to decide whether to return the shares or cash equivalent to the value of the shares when pledged.

186 Notwithstanding the emphasis placed upon cl 4(b) by the defendants throughout the trial, the plaintiffs made no mention of it in their final written submissions. When pressed during oral submissions as to how cl 4(b) should be construed in the circumstances, the plaintiffs finally submitted that the parties did not intend cl 4(b) "to be operative" (22-04-2016: tr 15-24). I should deal with one aspect the plaintiffs' final written submissions in respect of Yuanta's obligation of re-delivery. Those submissions included a claim that the defendant "accepted that he was obliged to return the NexGen shares to the Plaintiffs" (par [62]). In support of this claim the plaintiffs relied upon a section of the transcript of the defendant's evidence in which he was referred to the provisions of the Supplementary Agreement which recorded that the plaintiff was proceeding "to loan" 3.6 billion NexGen shares to the defendant and gave the following evidence (26-02-2016: tr 41):

> Q. It's plain, Mr Yeh, that the idea of a loan, is that you must return it.
>
> A. Yes, because I was responsible for the funds.

187 Notwithstanding the provisions of the Loan Agreement, the plaintiffs contend that this was an admission that the defendant and/or Yuanta were obliged to return the shares to the plaintiffs on maturity of the loan. This fails to address the provisions of the Loan Agreement which provided the discretion to the defendant to return the "relevant portion" of the shares or the "relevant amount" to the plaintiffs on the maturity of the loan. There was no submission that the discretion only related to whether the amount was in

Singapore dollars or US dollars. That is understandable having regard to the other provisions in cll 4(e) and (f). I do not accept that the defendant admitted that he was obliged to return the shares to the plaintiff. The defendant's case is that if the plaintiffs repaid the loan Yuanta had the discretion to return either the shares or the cash equivalent.

188 The Loan Agreement also provided:

> **5 Terms, Restrictions and Further Agreements**
>
> (a) In addition to this Agreement, the Grantee agrees to execute and sign all relevant Loan documents requested by the Grantor and, in the event of any breach of contract for the repayment of Loan, the transfer document.
>
> (b) In the event where the Grantee violates the conditions stipulated in this Agreement, the Grantee will no longer be entitled to any rights, claims or benefits in relation to the said Pledged Securities. …

189 Clearly the parties intended that if TPG breached the terms of the Loan Agreement it would lose all its right, claims or benefits in respect of the pledged NexGen shares and would be obliged to execute the "transfer document" transferring the pledged NexGen shares to Yuanta.

190 The parties agreed to proceed "in the spirit of goodwill and other desires deemed worthy of respect" (chapeau Loan Agreement) and recorded that they would not "harm the legitimate interests" of each other (cl 8(b) Loan Agreement). They also agreed to the applicability of the "requirements of the co-operation" if the plaintiffs wished to increase the term of the loan (cl 7 Supplementary Agreement) and that their agreement was "concluded with the principle of integrity" (cl 12 Supplementary Agreement).

191 The first paragraph of the Supplementary Agreement referred to the loan that was to be obtained "through friendly negotiations" to be taken out by the plaintiff from the defendant or institutions by guarantee of the defendant or in co-operation with the defendant and a bank. The parties agreed that the loans were to be secured by the NexGen shares that were held by the plaintiff in TPG's name "with full control and discretion in the pledge or transfer thereof".

192 The Supplementary Agreement set out the "division of work" between the plaintiff and the defendant. The plaintiffs authorised the defendant to be "the consultant and representative of the project", a role that was to continue until the termination of the Supplementary Agreement "upon the completion of the project" (cl 7 Loan Agreement). The "project" was not defined in the Loan Agreement. The expression "project" is not found anywhere else in the Loan Agreement and is not used in the singular or defined in the Supplementary Agreement. However the first paragraph of the Supplementary Agreement provides that the purpose of the loan was "to enable the Parties to carry out diverse investments". The parties agreed to set up "a BVI company to carry out securities and other investments" with the loans being deposited into the "joint account of the Parties for joint management and investment" (cll 2 and 3 Supplementary Agreement). The parties made provision for profit realisation and distribution when they formed the view that "the joint investments in securities or other projects have reached a certain profit margin" (cl 4 Supplementary Agreement). They also agreed that they could utilise the loan funds "for other investments" that they approved (cl 5 Supplementary Agreement). The parties also agreed that the loan funds "shall be for carrying out securities and other investments, operating on the account

to be signed by" the plaintiff and the defendant "on behalf of the Parties" (cl 7 Supplementary Agreement).

193 The object of the Agreements was to facilitate the "project" which involved: the plaintiffs delivering the NexGen shares into Yuanta's account; the provision of loans by Yuanta secured by the NexGen shares; or the procuring of loans by Yuanta and/or the defendant from a third party, or parties, utilising the NexGen shares as security; and the depositing of the loan funds into AEM's account to enable the parties to: (a) comply with the requirement in the Agreements in respect of the exercise of the 300m (reduced to 225m) warrants; and (b) to carry out securities and other investments with equal sharing in the profits or losses of the project.

194 The commercial circumstances included that at the outset of their negotiations a short time before the Agreements were executed, the plaintiff and the defendant were mere acquaintances and had not transacted any business together. They each had the desire and made the decision to pursue a business venture together obviously with the aim of making a profit. This included combining their respective commercial attributes; the defendant's so-called good credit rating and capacity to source US$50m in loans for the venture; and the plaintiff's capacity to provide the collateral for those loans in the form of 3.6 billion NexGen shares in a non-recourse loan arrangement.

195 Limited liability loan agreements have been "part of the repertoire of financiers for centuries": *BHP Billiton Finance Limited v Commissioner of Taxation* [2009] FCA 276 at [205]-[207]. The nature of the obligations and the manner in which liability may be limited will depend upon the provisions of the contracts into which the parties have entered. In *Commissioner of Taxation*

v Firth (2002 120 FCR 450 such circumstances were described as follows (at [74]):

> … Where the lender's recourse is limited to particular funds or assets, the possibility that the funds or assets will be insufficient to recoup the advance in full is a risk incurred by the lender. The risk will ordinarily be reflected in the rate of interest charged on the moneys borrowed. Nonetheless, the limited recourse feature of the transaction does not alter its character as a loan.

196 The loans were to be provided by either Yuanta or a third party arranged by the defendant. As it turned out the funds for the loans from Yuanta were provided by EFH. The security for the loans (the NexGen shares) was provided by the plaintiffs through TPG's account. The loans were ultimately for the joint benefit of the plaintiff and the defendant through their investment operations. If the loans could not be repaid, the risk did not rest with the defendants or AEM. The defendants could not be sued for the debt by EFH unless Yuanta had engaged in fraudulent conduct. True it is that TPG could not be sued by Yuanta for the debt as Yuanta could only have recourse to the shares, but the risk in respect of any breach of the Loan Agreement or failure to repay the loans was the plaintiffs' risk – the loss of the NexGen shares.

197 Yuanta would only obtain "absolute ownership" of the NexGen shares "with full unrestricted rights" if the plaintiffs failed to repay the loans (cl 4(a) Loan Agreement). If that occurred the plaintiffs were obliged to execute the "transfer document" pursuant to which they would "no longer be entitled to any rights, claims or benefits" in relation to the NexGen shares as pledged (cll 5(a) and (b) Loan Agreement). This has been referred to as the difference between obtaining "special property" and "general property", albeit that such

expressions have been referred to as an "unfortunate peculiarity" of English terminology: *The Odessa* [1916] 1 AC 145 at 159.

198 The purpose of the delivery of the NexGen shares to Yuanta was as a "pledge" and "as collateral" for the loans. In *Hilton v Tucker* (1888) 39 Ch D 669 Kekewich J said at 673:

> What is a pledge is common knowledge. It is scarcely necessary to state what it is, but I will take the words of Lord Justice Bowen in the case of Ex parte Hubbard. He says: "there is another entirely distinct transaction, which was known to the Romans and has been long familiar to English law, the transaction of a pawn or pledge, where there must be a delivery of the goods pledged to the pledgee, but only a special property in them passes to him, in order that they may be dealt with by him, if necessary, to enforce his rights – the general property in the goods remaining in the pledgor". The pledge, therefore, consists in the delivery.

199 In *Re Morritt, Ex Parte Official Receiver* (1886) 18 QBD 222 Fry LJ analysed the provisions of a bill of sale by way of security as a mortgage of chattels and compared it to a pledge. His Lordship said at 234-235 (although in dissent, it was not relevantly in respect of this point):

> A bill of sale by way of security, when not in reality a pledge, is a mortgage of chattels, and a mortgage of chattels is essentially different from a pawn or pledge. A mortgage conveys the whole legal interest in the chattels; a pawn conveys only a special property, leaving the general property in the pawnor: a pawn is subject in law to a right of redemption, and no higher or different right of redemption exists in equity than at law; a mortgage is subject, not only to the legal condition for redemption, but to the superadded equity. A pawn involves transfer of the possession from the pawnor to the pawnee. … A pawnee has a power of sale on default in payment at a time fixed.

200 In *The Odessa* Lord Mersey, delivering the judgments of their Lordships (Lord Parker of Waddington, Lord Sumner, Lord Parmoor and Sir Edmund Barton) said at 159:

> The very expression "special property" seems to exclude the notion of that general property which is the badge of ownership. If the pledgee sells he does so by virtue and to the extent of the pledger's ownership, and not with a new title of his own.

201 In *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249, McHugh, Gummow, Hayne and Heydon JJ said at 257 (footnotes omitted):

> 16. Both "pawn" and "pledge" are words having a long-established legal meaning. That is hardly surprising when the ancient origins of such transactions are recalled. For centuries, pawn or pledge (the terms are used interchangeably) has been recognised as one class of bailment of goods. It was treated as such in Roman law. This understanding of pawn or pledge was established very early in the common law and was reflected in the writings of the great commentators. It underpinned the way in which legislation regulating the activities of pawnbrokers was framed in Great Britain, in the Australian colonies and later in the Australian states.
>
> 17. Commentators and the courts have long recognised that pawn or pledge is "a bailment of personal property, as a security for some debt or engagement". They have identified such a transaction as distinct and different from mortgage where "the whole legal title passes conditionally to the mortgagee". This distinction was sometimes expressed in terms of the difference between the "special property" of the pledgee and the "general property" which remained in the pledgor. The "special property" of the pledgee was described as the right to detain the goods for the pledgee's security and "is in truth no property at all". That "special property" depends upon delivery of possession, whereas in the case of a mortgage of personal property the right of property passes by the conveyance and possession and is not essential to create or support the title.

202 The parties agreed on a mechanism to remedy any "erroneous condition" of the value of the collateral falling below 55% of the total sum of the loan (cll 2(b) and 5(b)(i) Loan Agreement). If this occurred Yuanta was entitled to make a margin call and TPG was given the option of making repayment or transferring additional shares (cl 5(b)(i) Loan Agreement). Clearly this is what was envisaged by the parties if the share price of the NexGen shares fell below the relevant value of the loan. In fact the margin calls made by Yuanta called for the payment of cash or the delivery of additional NexGen shares.

203 In submitting that Yuanta's entitlement to sell the pledged NexGen shares was unfettered, the defendants have placed emphasis upon cl 4(b) of the Loan Agreement pursuant to which Yuanta agreed to return "the relevant portion" of the NexGen shares "or the relevant amount" to the plaintiffs if they complied with the Agreement (cl 4(b)). Although not specifically emphasised by the defendants I apprehend that the language of cl 4(e) of the Loan Agreement referring to the "event of redelivery of cash in part or in full" is also relied upon in support of this contention.

204 The plaintiffs rely upon the abovementioned provisions of the Loan Agreement in relation to the absolute ownership of the pledged shares as support for the contention that Yuanta could not sell the pledged shares unless TPG was in breach of the Agreements. Although not specifically relied upon, it may be thought that cl 4(d) which provides that the current or future bonuses from the pledged shares were to be retained by Yuanta "to make up for the said Loan" also supports an intention that Yuanta was to retain (not sell) the pledged shares.

205 The defendants contended that the very commercial nature of the non-recourse loan is that the lender, Yuanta, can only look to the shares for recourse if there is default by the borrower, the plaintiffs. They submitted that it was clearly commercially sensible from Yuanta's perspective that it had the option of selling, trading, or pledging the NexGen shares in order to protect its interests. It submitted that it is not commercially sensible that Yuanta would be unable to protect its interests by a requirement to hold on to pledged shares with diminishing value for the duration of the loan term. Yuanta was obliged to provide, directly or indirectly, that is by itself or from a third party through Yuanta, loans to the plaintiffs at 50% of the stock market value of the pledged shares.

206 Although the Loan Agreement was between the plaintiffs and Yuanta, the Supplementary Agreement provided that the plaintiff was to cover any short positions in respect of the shares (cl 5 Supplementary Agreement). It also provided that the plaintiff agreed to progressively increase the total cumulative value of the shares so that the loan did not fall below US$50m (cl 6 Supplementary Agreement). The defendant agreed to be responsible for the "revaluation of the shares" so as to increase the amount of the loan "as and when the value per share" increased up to "a certain price". The parties recorded that such "cycle" was to be repeated "to ensure adequate funds are available for the investments" (cl 10 Supplementary Agreement).

207 The plaintiffs submitted that the provisions of cl 1(c) of the Loan Agreement authorising Yuanta "to sell, trade or pledge the Pledged Securities at its discretion" in the context of the Agreements read together, only applied in instances where Yuanta was the *ultimate* lender. The plaintiffs also

submitted that cll 1(d) (Yuanta's entitlement to hold or deposit the shares in a certain manner) and 4(c) (Yuanta's entitlement to carry out various trading and hedging strategies) only applied if Yuanta was the *ultimate* lender.

208 I understand the plaintiffs' submissions to mean that these clauses only applied if Yuanta was providing its own funds for the loans under the Loan Agreement. Yuanta was clearly authorised under the Agreements to obtain the funding from a third party. The plaintiffs' submissions effectively amount to a contention that there should be implied into the Loan Agreement a term that provides that cll 1(c) and 4(c), (e) and (f) do not apply unless Yuanta provides its own funds for the loans under the Loan Agreement. As attractive as this may be to the plaintiffs, such term is not so obvious that it goes without saying; it is not necessary to give the Loan Agreement business efficacy; and it is inconsistent with the express terms of the Loan Agreement: *B.P. Refinery (Westernport) Pty. Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266 at 282-3; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337.

209 It is clear that the parties had in mind that the whole of the 3.6 billion NexGen shares would be "progressively" transferred from the plaintiff to TPG's account with Crédit Agricole and then into Yuanta's account with Crédit Agricole. It is also clear that the loans to be obtained by the defendant were also to be obtained progressively as shares were pledged. It was not anticipated that US$50m would be provided in one tranche. This much is clear from the parties' use of the expression "multiple-times fund raising amounting to US$*3,000,000.00* each time" in cl 1(a) of the Loan Agreement.

210 The expression "relevant portion" of the shares in cl 4(b) of the Loan Agreement was intended to refer to the amount of shares that were pledged in respect of the particular tranche of loan provided under the Loan Agreement. If the plaintiffs decided to repay a loan tranche, Yuanta was obliged to redeliver to the plaintiffs that portion of the shares that were pledged in respect of that particular loan tranche ("the relevant portion"). However Yuanta had the discretion to redeliver to the plaintiffs a cash equivalent to the relevant loan tranche ("the relevant amount"). The loan tranche would only be 50% of the value of the security. If the loan were S$1m Yuanta would be obliged to return S$2m on maturity although the parties would probably set the repayment off against the redelivery and Yuanta would simply redeliver S$1m cash or a combination of shares and cash to the value of S$1m to the plaintiffs.

211 The parties agreed that Yuanta was entitled to sell, pledge or trade the shares during the course of the Loan Agreement and to engage in hedging and trading strategies. In those circumstances it is understandable that Yuanta was provided with the discretion to return a relevant amount of cash at the time of the loan repayment because the portion of the shares relevant to the loan may have been pledged elsewhere or the subject of its trading strategies or they may have been sold.

212 However this does not mean that the parties intended that Yuanta was entitled to sell the shares that it held irrespective of whether a loan had been provided to the plaintiffs. The parties intended that Yuanta could only deal with the shares in respect of which it was at risk of non-payment of the loan. If for instance Yuanta held 15m NexGen shares in its account but only 7m were collateral for a particular loan, Yuanta could not deal with the balance of the

shares (8m) that it was holding as available to be pledged or used as collateral for future loans. It was only the shares that had been collateralised in respect of any particular loan that could be used by Yuanta in the various strategies that it may have wished to adopt to protect its position in the non-recourse environment.

213 The fact is that Yuanta obtained the funds from EFH so that it could make the loans under the Loan Agreement. However the NexGen shares that were pledged as security for the loan tranches were pledged by Yuanta to EFH. Those shares that remained in the Yuanta account that were not pledged as security for loans but were available for pledging when loans were to be made were cocooned from any dealing by Yuanta until such a loan was made either by use of its own funds or from funds sourced from EFH. Yuanta was not entitled to sell, pledge or trade the NexGen shares or adopt hedging strategies with the NexGen shares unless it held them in exchange for a loan that had been made and in respect of which it was at risk. It was not at risk in respect of its arrangements with EFH because EFH held the shares and would have recourse to the shares if a margin call was not met, or interest on the loan was not met, or the loan was not repaid.

214 I am satisfied that Yuanta was authorised to sell the NexGen shares if they had been pledged against loans that had been provided under the Loan Agreement. It was not authorised to sell or otherwise deal with the shares that it held in its account that had not yet been pledged against a loan. As it turned out, the authority Yuanta had under the Loan Agreement to sell the shares was irrelevant because EFH held the pledged NexGen shares against the loans it provided to Yuanta.

Fiduciary obligations

215 The next question for determination is whether the parties owed each other any fiduciary obligations.

216 The plaintiff accepted in his evidence that he understood the Agreements into which he and TPG entered. There is no complaint of unfairness of the provisions of the Agreements. However, on one view of the commercial circumstances of these parties, it is rather extraordinary that the plaintiff would proceed to enter into a joint venture where his co-venturer makes no financial contribution and the risk of losing millions, possibly billions, of NexGen shares and possibly some cash (if used to remedy margin calls) is to be borne only by the plaintiffs. The only burden placed on the defendants was for losses suffered in the project. The defendants' reliance upon the following passage of Dawson J's judgment in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 ("*Hospital ProductsLtd*") at 147 is apt:

> Moreover, a fiduciary relationship does not arise where one of the parties to a contract has failed to protect himself adequately by accepting terms which are insufficient to safeguard his interests. Where a relationship is such that by appropriate contractual provisions or other legal means the parties could adequately have protected themselves but have failed to do so, there is no basis without more for the imposition of fiduciary obligations in order to overcome the shortcomings in the arrangement between them.

217 Where there is an underlying contractual relationship between the parties, the extent and nature of any fiduciary obligations owed in any particular case are determined by reference to the terms of the underlying contract: *Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323 at [367]. In addition to the principles of construction of commercial agreements

referred to earlier it is also important in this analysis to have regard to the extent, if any, that a party is entrusted with the power and authority to act in the interests of the other party with the power to affect those interests in a legal and practical sense: *Hospital Products Ltd* at 68, per Gibbs CJ.

218 It is not in issue that while not all fiduciaries owe the same duties in all circumstances, the core duties of good faith and loyalty lie at the heart of a fiduciary relationship: *Quality Assurance Management Asia Pte Ltd v Zhang Qing and others* [2013] 3 SLR 631 at [28]. Equally it is not in issue that a fiduciary is prohibited from making profits for himself out of his position as a co-joint venturer: *Kumagai-Zenecon Construction Pte Ltd and another v Low Hua Kin* [1999] 3 SLR (R) 1049 at [14].

219 The Further and Better Particulars of the Reply and Defence to Counterclaim ("Particulars") filed by the plaintiffs on 23 December 2015 alleged that the defendant owed the following fiduciary duties to the plaintiffs: (1) a duty to act in good faith and in the best interests of the plaintiffs; (2) a duty not to place themselves in a position in which their interests may conflict with the plaintiff's interests; (3) a duty to hold the NexGen shares on trust for the plaintiffs and deal with them in a way that the defendants honestly considered was for the joint benefit of the joint investment arrangement entered into between the parties; (4) a duty to maintain a proper system of account in respect of the shares and to render accounts; and (5) a duty to act in good faith and obtain the best possible price in relation to the defendants' sale of the pledged shares in exercising their discretion to sell those shares.

220 The defendants contended in their Opening Statement that the plaintiffs unjustifiably sought to expand the fiduciary duties allegedly owed by

the defendants beyond those contained in the Particulars, namely: (1) a duty not to make or retain secret profits; (2) a duty to preserve the collateral and its value, which included taking reasonable steps to monitor, forestall and resolve the margin calls and later interest payments; (3) a duty to ensure that any trading of the pledged NexGen shares and any enforcement against the security would be done in a manner not to disturb the value of the shares; and (4) a duty to take reasonable care in all its dealings relating to the NexGen shares and in procuring and managing the finance (Bundle A par 88).

221 Although the plaintiffs made submissions about the various categories into which the parties' relationship may fit (principal/agent; trustee/beneficiary; mortgagee/mortgagor; pledgee/pledgor; partnership; and joint venturers) it is clear that they were co-joint venturers. That relationship included Yuanta acting as trustee of the plaintiffs' NexGen shares that had been transferred into its account and had not been pledged against a loan.

222 The defendants contended that the presence of joint venture relationship does not automatically create fiduciary duties between the parties. In this regard the defendants relied upon the decision in *Ross River Limited & Anor v Waveley Commercial Ltd & Others* [2013] EWCA Civ 910 WL. In that case Ross River and Waveley Commercial entered into a joint venture agreement to develop land. Ross River's role was to provide finance. Wavely Commercial's role was to manage the development. On reviewing the provisions of the joint venture agreement and after referring to a number of cases cited by the primary judge, Lord Justice Lloyd said at [34]:

> … From these it is clear that, although the analogy with a partnership may suggest that fiduciary duties are owed in the context of a joint venture, the phrase "joint venture" is not a

> term of art either in a business or in a legal context, and each relationship which is described as a joint venture has to be examined on its own facts and terms to see whether it does carry any obligations of a fiduciary nature.

223 The defendant agreed that he and the plaintiff were joint venture "partners" (26-02-2016: tr 43). He did not dispute that the Agreements contain provisions which provide for the overarching spirit of goodwill and integrity to govern the joint venture business arrangement entered into between the parties (26-02-2016: tr 42-43). He accepted that the loan funds raised would be put towards the joint investments from which the parties would share equally in the profits and be equally responsible for any losses.

224 The plaintiff placed a great deal of trust in the defendants in transferring 825m NexGen shares to Yuanta to be pledged for the loans without receiving any payment from the defendants (by way of any initial contribution or otherwise). The plaintiffs submitted that the manner in which the defendants structured their dealings with them (namely, firewalling information through the device of the Yuanta account) caused them to be entirely dependent on the defendants in respect of the financing arrangements and the location of the NexGen shares that had been transferred to the Yuanta account.

225 The plaintiffs were entitled to expect that the defendants would act in the best interests of the joint venture. They appointed the defendant to act as the consultant and representative of the project throughout the period of the Agreements and were dependent upon him acting with integrity and goodwill. Equally the plaintiff had similar obligations and in particular an obligation to ensure that the investments were only for the purposes of the joint venture

project and not for any personal investments. The defendant was dependent on the plaintiff in this regard. Each party was exercising power or discretion for and on behalf of the other party to the joint venture.

226 Although the defendant did not contribute any shares at the outset of the project, it was anticipated that his claimed good credit rating would be used to facilitate the loans. There is no doubt that the parties were in agreement that the project was a joint project and that the "division of work" outlined in the Supplementary Agreement required goodwill between them, ensuring that neither would harm the legitimate interests of the other. Those provisions combined with the parties' recognition of the application of the "principle of integrity" to their joint project, was a basis for mutual trust between them in the relevant work they performed.

227 I am satisfied that there were aspects to the parties' relationship in which each owed the other fiduciary obligations. The plaintiffs owed to the defendant an obligation to ensure that the investments that were made for the joint project were for the mutual benefit and profit of each of the parties and that the plaintiffs would not make secret profits for themselves. Equally the defendant and Yuanta owed the plaintiffs an obligation to use the pledged shares as collateral or security for loans for the benefit of the joint venture. The defendant was obliged not to make profits from the shares that were held on trust prior to them being pledged against the loans that were obtained from EFH. I am satisfied that the plaintiff and the defendant owed each other a duty not to make or retain secret profits.

228 The plaintiffs' claim that the defendants owed them a duty to preserve the collateral and its value including taking reasonable steps to forestall and

resolve the margin calls and later interest payments does not arise in the contractual setting. Certainly there were contractual obligations between the parties in respect of the margin calls and if the defendant did not provide to the plaintiff a proper opportunity to meet the margin call then there may be a breach of contract sounding in damages. I am not satisfied that any fiduciary obligation should be overlaid on that contractual obligation.

229 There were other duties claimed by the plaintiffs that are not necessary for consideration having regard to the construction of the Agreements relating to the defendants' capacity to sell the shares. Clearly the defendants were not entitled to sell the NexGen shares that had not been pledged against a loan as those shares were held on trust for the plaintiffs until such loan was arranged and such security provided.

Determination of factual disputes

230 The determination of the parties' competing claims depends in part on the reliability or credibility of the plaintiff and the defendant and to a lesser extent, although not unimportantly, the reliability or credibility of Mr Goh. In determining the reliability of the evidence of a witness, the Court is assessing whether their "genuine recollection truly describes what was said, done, heard, seen or thought"; and in determining the credibility of a witness, the Court is assessing whether the evidence is "genuine". In other words assessing whether a witness is accurate in the former case or truthful in the latter case: The Hon. Justice R. D. Giles (as Giles IJ then was), "The Assessment of Reliability and Credibility" [1996] 2 Judicial Review 281.

231 As was the case in the Earlier Proceedings (J [87]), the parties' versions of events and conversations on various aspects of their respective claims are diametrically opposed. Although these parties were entering into a joint venture relationship in which multi-million dollar transactions were contemplated, using shares in a publicly listed company on the SGX as security, there was no real precision in the identification of the joint venture project or in keeping records to allow a transparent overview or review of the project. The assessment of the reliability of the evidence and the credibility of the parties and Mr Goh is affected by this lack of precision and records. I will now turn to the various factual disputes the determination of which will in large measure determine the parties' pleaded claims.

Sales of NexGen shares

232 There is a significant factual issue between the plaintiff on the one hand and the defendant and Mr Goh on the other, as to whether the plaintiff instructed the defendant and/or Mr Goh to sell some of the 300m NexGen shares that TPG had transferred into the Yuanta account on 21 January 2011 (for pledging as security for the loans to be utilised for the joint venture project) because he was in urgent need of funds to pay down a loan amount due to Phillip Securities before TPG could transfer any more NexGen shares to Yuanta. It is not in issue that the plaintiff instructed the defendant to repurchase the shares that had been sold. Nor is it in issue that the shares were repurchased.

233 Although it is now clear that in August 2011 without notice to the plaintiff the defendant sold 60m of the NexGen shares that TPG had transferred to Yuanta for pledging as security for loans for the project, it is

necessary to decide whether to accept the defendant's explanation about those sales. Similarly it is necessary to determine whether the defendant's evidence about the sale of the 225m NexGen shares in October 2011 should be accepted.

234 It was in their Defence and Counterclaim that the defendants alleged that from February 2011 to July 2011 Yuanta had sold 101.5m NexGen shares at the request or instruction of the plaintiff. It was also alleged that the 101.5m shares were repurchased in the same period "as the Shares were needed as collateral for the loans". It was claimed that the shares were repurchased "primarily" using the loan funds (A 23).

235 The original particulars to this claim alleged that the plaintiff's requests or instructions to sell the shares were given in two conversations between the plaintiff and the defendant: (A 23-24). The first was alleged to have occurred on 11 February 2011 when the plaintiff telephoned the defendant and instructed him to sell "some of the NexGen shares" that were held in the Yuanta account (A 24). It was alleged that on 18 February 2011 a "second" telephone conversation occurred between the plaintiff and the defendant in which the plaintiff instructed the defendant to sell "additional" NexGen shares in the Yuanta account (A 24). However these particulars were abandoned. In the amended particulars, the defendants alleged that there were "several occasions" (unspecified) on which the plaintiff "by way of telephone conversation" requested and/or instructed the defendant to sell part of the shares because the plaintiff was "in urgent need of funds" (A24-25).

236 In any event the defendants claim that the shares were sold and then repurchased between 18 March 2011 and 17 June 2011 and even if they were

sold without instructions or requests from the plaintiff, Yuanta was entitled to do so at its sole discretion pursuant to the provisions of the Agreements (A 26-28).

237 Mr Goh's affidavit evidence was that in or around October 2010 the defendant introduced the plaintiff to him as one of his "business associates". His evidence included the following:

> 13. In respect of the sale of shares on 11 February 2011, 14 February 2011 and 18 February 2011 ("**February Sales**"), Mr Hartanto had called me on my personal mobile phone on 10th February 2011, close to midnight.
>
> 14. During this phone conversation, Mr Hartanto said that he urgently needed funds to pay down an outstanding loan amount with Phillip Securities Pte Ltd ("**Phillip Securities**") before he would be able to transfer more shares to Yuanta for the purpose of pledging the shares to obtain loans. I was aware that, at that time, there was a business arrangement between Mr Yeh and Mr Hartanto, through their respective companies, whereby Mr Hartanto was to provide Next-Gen shares and Mr Yeh was to obtain loans by pledging these shares.
>
> 15. As such, he requested for shares that were, at that time, already deposited in the Yuanta Account to be sold in order to raise the funds to pay down this outstanding loan with Phillip Securities. Mr Hartanto did not specify the exact amount of Next-Gen shares to be sold. Instead, he only specified the amount of proceeds that he needed to obtain from the sale. I cannot recall the exact amount of funds that Mr Hartanto said that he needed during the telephone conversation, but this would be the amount of funds out of the sale proceeds that were transferred to Phillips Securities after the sale of the shares during this period.
>
> 16. As the Next-Gen shares were in the Yuanta account, I needed to check with Mr Yeh before I could proceed. Due to the urgency of Mr Hartanto's request, I proceeded to call Mr Yeh on his mobile phone

> immediately after my conversation with Mr Hartanto to inform him of Mr Hartanto's request and, specifically, to check if he was agreeable to the sale of some Next-Gen shares. Mr Yeh told me he would give me confirmation the following day.
>
> 17. Mr Yeh called me the following day i.e. 11 February 2011, probably on my personal mobile phone, since Mr Yeh usually called me on my personal mobile phone. During this phone conversation with Mr Yeh, Mr Yeh confirmed that I could sell some of the Next-Gen shares in the Yuanta account to raise the amount that Mr Hartanto had requested for to pay off his outstanding loan with Phillips Securities.
>
> 18. Mr Yeh did not give me special instructions in respect of the impending sale of shares, save that I should ensure that the share price of Next-Gen will not be depressed through the sale of Next-Gen shares. Later in the day, either my assistant, Ms Joanne Teo ("**Ms Teo**") or I spoke with Mr Yeh once more to inform him of the total number of Next-Gen shares that would need to be sold, based on the then market price, in order to raise the sum that Mr Hartanto requested for.
>
> …
>
> 19. Bearing in my mind Mr Yeh's instructions to ensure that the share price of Next-Gen shares would not be depressed through the sale of Next-Gen shares, I arranged for the sale of Next-Gen shares to be done in batches, up to the number of shares that needed to be sold, based on the market price of the shares, in order to raise the amount that Mr Hartanto requested for.
>
> 20. As such, I arranged for the shares to be sold in the following batches in February 2011: -
>
> a) 30 million Next-Gen shares sold on or around 11 February 2011;
>
> b) 1.5 million Next-Gen shares sold on or around 14 February 2011; and
>
> c) 40 million Next-Gen shares sold on or around 18 February 2011.

238 The defendant's affidavit evidence in respect of the sale of shares during February and also in March 2011 included the following:

> 44. On several occasions in the first half of 2011, Hady called me over the telephone and told me that he was in urgent need of funds and the funds already obtained from the pledge of the Next-Gen shares was insufficient. As such, he asked me to sell some of the Next-Gen shares deposited with Yuanta's account and transfer the proceeds to him as an advance of his share of the Investment Loan. I did not think that this was a problem because the funds from the Investment Loan that were subsequently disbursed could then be used to repurchase the shares, which would be needed to pledge to EFH for subsequent tranches of the loan.
>
> 45. As such, as per Hady's requests, I sold a total of 101.5 million Next-Gen shares in the following manner:-
>
> a. 30 million Next-Gen shares sold on or around 11 February 2011;
>
> b. 1.5 million Next-Gen shares sold on or around 14 February 2011;
>
> c. 40 million Next-Gen shares sold on or around 18 February 2011; and
>
> d. 30 million Next-Gen shares sold on or around 29 March 2011.

239 The plaintiff denied that he provided any instructions for the sale of the NexGen shares from the Yuanta account in this period. He claimed that when he found out that the shares had been sold, he instructed the defendant and/or Mr Goh to repurchase the shares. The defendant claimed that it was always the plan to repurchase the shares so that they could be used as collateral for the loan. The plaintiffs argued that it was illogical for the plaintiff to instruct the defendant and/or Mr Goh to sell the shares and then instruct them to repurchase them. They argued that if the plaintiff wished to raise funds on an urgent basis he could have sold the shares that he held without interfering with the shares in the Yuanta account that were to be pledged to obtain the loans for the joint venture project investments.

240 Like so many other aspects of this case, the plaintiff's and the defendant's affidavit evidence as filed was diametrically opposed. However in January 2016 the defendants made a decision to make an application to call Mr Goh to give evidence in the trial. The defendants were granted leave to call Mr Goh (over the plaintiffs' objections) on the condition that the plaintiffs had leave to have a subpoena issued to Crédit Agricole for the production of various documents including any tape recordings of conversations between the defendant and Mr Goh and the plaintiff and Mr Goh in the relevant period. The plaintiffs wished to pursue this course notwithstanding that during the Case Management Conference on 11 January 2016 the defendants' counsel said that "the defendants are certain that there are no such documents because the conversations were made through Mr Brian Goh's mobile phone and not with – and so, therefore, there would not be any phone recordings that will usually be made" (11-01-2016: tr 30-31). Mr Goh's affidavit included claims that the relevant conversation with the plaintiff was on his mobile phone and that his conversations with the defendant were usually on his mobile telephone. The significance of those claims is that such telephone conversations were not recorded, whereas any conversations that took place on Crédit Agricole's telephone system were recorded.

241 The subpoena was issued and Crédit Agricole produced tape recordings of conversations between the defendant and Mr Goh and the plaintiff and Mr Goh. Those tapes were transcribed by the plaintiffs' lawyers and were in evidence in the proceedings (Bundle G). Before referring to the content of those conversations, I should record that Mr Goh resiled from his evidence in paragraph 18 of his affidavit (which affects his claim in paragraph 19 of his affidavit) (see [237] above). Not only did Mr Goh claim in paragraph

18 that he was given instructions by the defendant to ensure that the share price would not be depressed through the share sales; he emphasised in paragraph 19 that he kept that instruction "in mind" in arranging for the sale of the NexGen shares to be done in batches. Mr Goh was cross-examined on this aspect of his affidavit evidence as follows (29-02-2016: tr 30-31):

> Q. Go to paragraph 18. You say that Mr Yeh gave you instruction to ensure that the share price would not be depressed. Do you see that?
>
> A. Yes.
>
> Q. There's nothing in the taped conversations to suggest that this was true?
>
> A. Correct.
>
> Q. In fact, Mr Yeh gave evidence that he did not give this instruction.
>
> A. Okay. Can I explain as well?
>
> Q. Yes, go ahead.
>
> A. It was the same thing. The -- his lawyer actually ask me did Mr Yeh give me instruction to sell down the shares? I said "No, he did not give me instruction to sell down the shares. He gave me instructions to sell", and it was thus phrased this way. I --
>
> COURT: Are you telling me that Mr Yeh did not say that you were to ensure that the share price would not be depressed?
>
> A. Correct.
>
> COURT: Thank you.
>
> A. He also did not say -- according to his lawyer, he also did not give me instruction to make sure that the price would go down.

242 Apart from what appears in this portion of the transcript, there was no explanation of how such evidence found its way into Mr Goh's affidavit. He was not cross-examined in respect of his claim in paragraph 19. However, it is

difficult to understand how Mr Goh could have given evidence that he kept the so-called "instruction" in mind when it did not occur.

243 The transcript of the conversations between the defendant and Mr Goh on 11 February 2011 at 5.25 pm includes the following (G 65-67):

> …
>
> Goh: In any case Ban Joo I confirm with you, sold 30 million shares, all of them at 5 cents.
>
> Defendant: Okay.
>
> Goh: Then after selling them, the last batch they bought themselves at 5½ cents.
>
> Defendant: They bought it up themselves?
>
> Goh: They bought it up themselves at 5½ cents.
>
> Defendant: Correct, he told me he wanted to buy it up to 5½ to 6 cents.
>
> (Speakers speaking simultaneously)
>
> Goh: I---the moment I finished selling, there was someone buying up.
>
> Defendant: He notified me.
>
> Goh: Ah. (Laughs)
>
> Defendant: It's alright, it's alright. On Monday you still continue to move 30 million shares.
>
> Goh: Can, okay.
>
> Defendant: After you have finished doing that, you do this batch immediately first.
>
> Goh: Correct, correct, okay. I have already informed them Ban Joo the second batch we do "si bai"--- you hold on. The other day did 3 million, correct, he did 4.5 million.
>
> Defendant: The other day did 30 million.
>
> Goh: Hey, 30 million, today---now do 45 million.
>
> Defendant: Ah, you try your best---

Goh: Orh, I will try my best to increase, increase (and) increase. Right, right.

Defendant: ---to speed up.

Goh: Okay.

Defendant: Then do it at the fastest rate. The best is you get other (people) to do together.

Goh: Right, right. I have spoken to them. But it won't be so fast.

Defendant: Ah-huh.

Goh: Mm.

Defendant: Deal with it at a faster rate.

Goh: Okay.

Defendant: Orh.

Goh: Okay.

Defendant: That---his option the other 25 per cent you were not the one who did it for him?

Goh: I don't know how he (inaudible) it. He didn't tell me.

Defendant: He said there was someone who extended a loan to him, he---he---he took out this 25 per cent.

Goh: I wasn't the one.

Defendant: He took it out---if he took it out, mine that one ---that one shouldn't be---shouldn't be---

(Speakers speaking simultaneously)

Goh: Correct, then yours will become no more. Then it becomes 2---225 million.

Defendant: Correct. Then why is it his---his friend 45 million still need me to shoulder it.

Goh: I think everything is his own. So you don't bother about him. We do the first batch first, 100 million; second batch 100 million; the third batch discuss first then (we) do.

Defendant: Okay.

Goh:	Maybe only---don't have at all, only left with 25 million. Hor?
Defendant:	Okay.
Goh:	Mm, okay.
Defendant:	Mm.

244 This conversation was on 11 February 2011, the day that the defendant had originally claimed in his abandoned particulars that the plaintiff had telephoned him and instructed him to sell the NexGen shares to obtain urgently needed funds. It was the morning after the plaintiff allegedly telephoned Mr Goh around midnight the previous evening, 10 February 2011, on his mobile phone to instruct him to sell the NexGen shares. It is at the very least odd that neither the defendant nor Mr Goh refer in this conversation to the very recent conversations with the plaintiff in which he claimed he was in urgent need of funds and that such funds should come from the sale of the shares that TPG had recently transferred to Yuanta to pledge for loans for the joint venture project.

245 Mr Goh was cross-examined about this conversation as follows (29-02-2016: tr 22-23):

Q.	There's nothing in this conversation that refers to any requests by Mr Hartanto to sell his shares; do you agree?
A.	Agree.
Q.	Instead, would you not agree that, looking at this, the impression one gets is that the person who really wanted to sell was Mr Yeh and not Mr Hartanto?
A.	According to this, yes.

246 Mr Goh was also referred to the transcript of his conversation with the defendant on 14 February 2011 at 5.48 pm which included the following (G 68):

> Goh: … I will be doing something, then another thing (I) confirm with you, today Ban Joo only sold 1.5 million shares at 5 cents.
>
> Defendant: (inaudible) 1.5 million shares?
>
> Goh: Correct, he didn't want to buy them up, everything he---now put it at 4½ cents for me now.

247 Mr Goh was cross-examined about this conversation as follows (29-02-2016: tr 23):

> Q. -- on the 14th. You actually wanted to sell more shares on that day.
>
> A. Probably.
>
> Q. But you couldn't move them, because no one was buying.
>
> A. I wanted to move them down, but I think what it meant was there's no buyer.

248 On 14 February 2011 the plaintiff wrote by email to Mr Goh's assistant at Crédit Agricole, Ms Teo, with a copy to Mr Goh and the defendant's personal assistant in the following terms:

> Dear Brian
>
> Just to confirmed, that I and Jack Yeh just talked:
>
> 1. SIN$ 800k send to my Indonesian *** send to Hardi Koesnadi Niaga Finance Co Ltd HSBC a/c no.
>
> 2. SIN$ 1.2m send to Philips Security. *** to exchange the 40m [Warrants] (from TPG) to shares, and will transfer to [Crédit Agricole] the shares.

249 Mr Goh was cross-examined in respect of a further conversation recorded on 18 March 2011 in which he discussed with the defendant the repurchase of the shares using the money in the Yuanta account (G 70-71) as follows (29-02-2016: tr 25-28):

> Q. Why is it that in your response to Mr Yeh, when he asked you, "Mr Hartanto said to use Yuanta's account", you then say "no problem".
>
> A. I can't remember.
>
> …
>
> Q. I'm suggesting to you, Mr Goh, regardless of whether Mr Hartanto spoke to you directly or to Mr Yeh, that the significance of asking you to use Yuanta's account was that Mr Hartanto wanted Mr Yeh to use his own funds. Do you agree?
>
> A. I wouldn't know.
>
> Q. You wouldn't know?
>
> A. I mean, I can't recall this.
>
> Q. That's why you say then "no problem" because you knew that there were funds coming in from the EFH loan, correct?
>
> A. I really cannot recall this whole --
>
> Q. You knew that, technically, you would be following Mr Hartanto's instructions to use the Yuanta account, correct?
>
> A. Like I said, I really can't recall this portion.
>
> Q. In substance, you and Mr Yeh were agreeing to use loan disbursements which belong to AEM to fund the buy back, correct?
>
> A. I don't agree.
>
> COURT: You don't agree, did you say?
>
> A. Because I don't remember this portion, so --
>
> COURT: When you say you don't agree, are you saying you don't recall or you don't agree --

A. I don't recall so I cannot -- I cannot agree.

…

Q. I'm putting to you the proposition that it is completely logical that if Mr Hartanto wanted to sell the shares in order to raise funds -- which is what I think you say in your affidavit -- that he would first ask you to buy back the shares and then on the very same day ask you to sell them back.

COURT: Completely illogical.

MR TAN: It is completely illogical.

A. Illogical, right?

Q. Yes, it's illogical.

A. Doesn't sound logical, yes.

…

Q. I'm putting to you the only logical explanation is that Mr Hartanto discovers that Mr Yeh has sold his shares without his request and he's asking you to buy them back, correct?

A. I really can't recall on -- what happened on this day.

250 One difference between the evidence given by Mr Goh and that given by the defendant in relation to these sales of the NexGen shares is that Mr Goh only referred to the sales in February 2011, whereas the defendant included reference to the sales in late March 2011. Mr Goh was cross-examined in relation to the absence of any reference in his affidavit to the sales on 29 March 2011 as follows (26-02-2016: tr 115):

Q. You don't say anything about the sale that took place on 29 March 2011. Go to paragraph 8 of your affidavit, B 1188.

A. All right.

Q. You recognise that there was a fourth sale on 29 March 2011 for 30 million shares. Do you see that?

A. Yes.

> Q. Your affidavit doesn't say that Mr Hartanto asked for the sale of those shares on that day.
>
> A. Yes.

251 Mr Goh was then referred to the transcript of the conversation with the defendant on 18 March 2011 and was cross-examined as follows (26-02-2016: tr 116-117):

> Q. The effect of that exchange, I'm suggesting to you, is that you are waiting for the shares to hit 4.5 cents before selling.
>
> A. Probably.
>
> Q. If you go to G33 -- the same bundle, page 33.
>
> A. Yes.
>
> Q. You'll see there is a call note of a sale done at 4.5 cents on 29 March, correct?
>
> A. Yes.
>
> Q. That's why you don't go so far as to say that this particular sale was requested by Mr Hartanto.
>
> COURT: Do you agree with that?
>
> A. Yes.

252 The plaintiffs claim that notwithstanding the overwhelming evidence that the plaintiff requested the defendant and Mr Goh to buy back the NexGen shares that had been sold without his instructions, the defendant and Mr Goh proceeded to sell further shares on 29 March 2011, once again, they claim, without the plaintiff's instructions.

253 The evidence relating to the secret sales of the 60m NexGen shares by the defendant in August 2011 and the 225m NexGen shares in October 2011 is relevant in determining whether I prefer the evidence of the plaintiff or the defendant generally and in particular in respect of the sale of the shares in

February and March 2011. The defendant embarked upon the process of selling the remaining 60m NexGen shares that were held in the Yuanta account over a period from 19 August 2011 to 25 August 2011. He also embarked upon a process of selling a further 225m NexGen shares between 10 October 2011 and 20 October 2011 in eight tranches. Accordingly, between 19 August 2011 and 20 October 2011 the defendant sold 285m NexGen shares. It is not in issue that the defendant distributed the proceeds of the sale of all of those shares to himself, his business partners and a relative.

254 The whereabouts of the shares was certainly in issue during the preparation of the proceedings and in the defendant's affidavits. In the defendant's affidavit sworn on 3 November 2015 he described a process that he referred to as "email chasers" sent to the plaintiff to respond to the margin call letters. He claimed that on 3 October 2011 the plaintiff finally responded to his email but "failed to give any satisfactory answer as to how he was going to meet the Margin calls". The defendant went on to claim (par 71): "Instead he became defensive and accused me of selling the Pledged Securities which is untrue and a baseless accusation". The defendant went further and claimed that on the following day, 4 October 2011, the plaintiff had emailed him again "to demand an answer to his ridiculous accusation" and also asked him "why 60million Next-Gen shares had been transferred out of the Yuanta account".

255 As late as November 2015 the defendant was claiming that the plaintiff's allegations that he had wrongfully sold the NexGen shares that had been provided by the plaintiff were "ridiculous", "untrue" and "baseless". The defendant was referred to an email dated 10 October 2011 that he wrote to the plaintiff with a copy to Mr Goh which included the following (C 393):

> With regard to 60m shared (*sic*) in Credit Agricole, I moved it to other custody account. …

256 The defendant was cross-examined about this communication as follows (24-02-2016: tr 75-77):

> Q. … So the first point you're making is that the shares were still with Credit Agricole. As of October 2011.
>
> A. Yes, based on the text.
>
> Q. And you were telling Mr Hartanto that your moving the shares to another account.
>
> A. Yes.
>
> Q. To a custody account.
>
> A. Yes.
>
> Q. So you are telling Mr Hartanto that the shares were still available?
>
> A. It's not that the shares were still available, it was just that the shares were under my custody.
>
> Q. When, in fact, you had already sold them in August 2011.
>
> A. Yes, it was my mistake, I remembered wrongly.

257 The defendant was then referred to another email that he wrote to the plaintiff on 14 October 2011, with a copy to Mr Goh, that included the following (C 403):

> *DEAR HADY,*
>
> NOTICE IS AGAIN GIVEN THAT:
>
> We have transferred the 60 million shares in CA to another of Yuanta's custody account.

258 The defendant was cross-examined about this email and gave the following evidence (24-02-2016: tr 77-80):

Q. … So again, you're representing to Mr Hartanto that the shares are in your control, when in fact you had sold them.

A. Yes, I remembered incorrectly.

Q. And at no point did you correct this impression subsequently?

A. Your Honour, at that time I had many investments and I had many other shares. So what I can say that it might be my mistake, I might have forgotten that I had already sold the shares. If Hady wanted the shares and if he was sincere, then maybe I could buy back the shares, or I could transfer the shares from other places.

Q. And just to confirm, at no point did the bank itself correct this point?

A. At that time, there were many shares in Credit Agricole account, so maybe he was not very sure of this.

Q. The "he", meaning Mr Brian Goh?

A. Yes.

Q. How many shares are you saying were left in the Credit Agricole account?

A. Some shares of other listed companies.

Q. I'm talking about the Yuanta account.

A. I mean I have other shares in other accounts.

Q. You are mixing up your accounts?

A. Yes.

Q. Well, I'll put it to you, … [a]t that point in time, there were no other NexGen shares in the Yuanta account with Credit Agricole.

A. I can't remember correctly because this was sometime ago.

Q. So the first time that … Mr Hartanto and his lawyers learned that you had sold the shares in August 2011, was when you made a disclosure, and I'll just refer you to bundle D, page 77, and can you see the items 10, 11, 12, 13, 14?

A. Yes.

Q. And these are the trade contract notes confirming the sale of the 60 million shares?

A. Yes.

Q. And in your first disclosure exercise, look at page D15, look at item 39, you have only provided the statement of account of the Yuanta account with Credit Agricole up to July 2011?

A. Yes.

Q. Stopping short of disclosing the fact that you had sold the shares in August 2011?

A. Yes, we were not sure at that time, but I think on page D16, there are other documents relating to the periods in 2011 -- August 2011.

Q. These are not emails that disclose the fact that you had sold the 60 million shares.

A. As I said, there were many transactions at that time, so maybe I made a mistake.

Q. Well, I think I have to put it to you Mr Yeh, that this was not a mistake. It was a deliberate nondisclosure of the fact that you had made the sale of shares in August 2011.

A. I disagree.

Q. Just "yes" or "no". And then we have you on email twice after that, confirming that the shares were still available or under your control.

A. Yes.

Q. I have to put it to you that that was also deliberate.

A. No.

Q. And I have to put it to you that your disclosure, not revealing the sale of the 60 million shares until we asked for those documents, we meaning the lawyers, asked for the documents, was a material nondisclosure on your part.

A. It was a negligence on my part, but now I remember that why I sold the shares in the first place.

259 In re-examination the defendant was taken to an email that was sent by the plaintiff to Crédit Agricole dated 12 September 2011, on which he was copied (C 357). In that email the plaintiff recorded his understanding that the 60m NexGen shares were still in the Crédit Agricole account. In re-examination the defendant was asked to describe the circumstances which led to such an email. His evidence was as follows (26-02-2016: tr 84-85):

> A. At that time, Hady wanted to know the whereabouts of the shares, so Hady finally contacted me and I ask Hady to -- I told Hady to check with the bank. So that's why Hady send this email to the bank, to check the whereabouts of the shares, and I remember that at that time, he was going to hold a shareholders meeting or a directors meeting, so he needed to know where the shares were. And at a time he had also promised the bank that he would transfer 225 million shares to the AEM account.
>
> COURT: Why didn't you tell him you had sold the lot of them?
>
> A. Your Honour, as I explained earlier, these might be a negligence on my part, because at that time I thought that I still have these shares with me. I forgot about the 60 million shares, so with regard to this, it was a negligence on my part.
>
> COURT: When did you remember about them?
>
> A. It was during the preparation of this case, when we were arranging the documents and consolidating the information.

260 Mr Goh was cross-examined about the defendant's communications with the plaintiff (into which he was copied) in which he was advised that the 60m NexGen shares had been moved to another of Yuanta's custody accounts. That evidence included the following (26-02-2016: tr 124-126):

> Q. But at the time, you were the accounts manager for the Yuanta account. You must have known that they were being sold.
>
> A. You're telling me it was already sold, right?

Q. Yes.

A. Okay.

Q. They were sold in August.

A. Okay.

Q. And this is October.

A. Mmm.

Q. Your client, Mr Yeh, is making a representation in an email, on which you are copied, saying that the shares have not been sold and that they have been moved into another of Yuanta's custody accounts. Yes?

A. Yes.

Q. You are also TPG's relationship manager and responsible for their account as well.

A. Yes.

Q. When you see an email like this, in which Mr Yeh is obviously speaking an untruth, you did not think it fit to correct this impression?

A. Were the shares in Yuanta's account?

Q. That they were sold.

A. The shares were in Yuanta's account before they were sold, right?

…

COURT: You did not see fit to correct the untruth in the email on page 394A. That's the question.

A. Okay, the -- Yuanta's account, the signatory would be Mr Yeh, so I don't think I'll be revealing his personal account to somebody else.

COURT: Mr Goh, you must have known that the shares were not in Yuanta's custody account that had been sold, mustn't you?

A. Yes.

COURT: Your client, Telemedia, was asking where the shares were, its shares, and it was told, as Mr Tan has put, an

> untruth. Do you see that? The question is did you not see fit to correct the untruth as a banker?
>
> A. Okay, my answer to that was what I said earlier.
>
> COURT: Which is?
>
> A. The shares were under Yuanta's account, so when Mr Yeh -- so he is the signatory and not Mr Hady.

261 Even on the basis that Mr Goh's position was that he would have been constrained from advising the plaintiff that the defendant's email contained an untruth was justified, there was absolutely nothing preventing Mr Goh from informing the defendant that his statements in his emails to the plaintiff about the whereabouts of the 60m NexGen shares were not accurate (to use a neutral term). Mr Goh did not do so but conceded that he should have done so (29-02-2016: tr 61).

262 The defendant's evidence in relation to the sale of the 60m NexGen shares in August 2011 was most unimpressive. The fact that he would inform the plaintiff that the 60m NexGen shares had been moved to a custodian account when, I am satisfied he was fully cognisant that he had sold the shares and distributed the profits from those sales to himself, his associates or relatives, demonstrates that he was willing to be dishonest with the plaintiff. Mr Goh's willingness to stand by as TPG's banker knowing that the defendant and/or Yuanta were misleading TPG into believing that the shares were still with Credit Agricole was equally unimpressive.

263 The defendant seems to have thought that he was entitled to help himself to the pledged shares because the plaintiff had failed to transfer 700m NexGen shares referred to in the email of 27 June 2011. Irrespective of the rights and wrongs of the plaintiff's failure to transfer those additional NexGen

shares, I regard the defendant's conduct in selling the 60m NexGen shares in August 2011 and the 225m NexGen shares in October 2011 and his communications with the plaintiff about the whereabouts of the NexGen shares as dishonest.

264 The plaintiffs submitted that the defendant's version of events in relation to the plaintiff instructing him to sell the NexGen shares because he was in urgent need of funds began "falling apart" when the defendant was cross-examined. It was submitted that the defendant gave contradictory evidence during his cross-examination in relation to the alleged phone calls as follows (25-02-2016: tr 103-105):

> Q. And none of these sales were notified to TPG?
>
> A. I disagree --
>
> COURT: So you told TPG that you were selling?
>
> A. -- your Honour, it was because Hady was the one who made the call to the bank. He felt embarrassed to call me directly, so the bank notified me and it was clear from this that this was how this whole incident began.
>
> …
>
> MR TAN: You have just answered the judge that the instructions were between Mr Hartanto and Mr Goh, because, according to you, Mr Hartanto was too embarrassed to tell you that he needed funds.
>
> A. Yes, this was at the beginning.
>
> Q. I think you're starting to change your answer, Mr Yeh, because you know where I'm going with this.
>
> A. No.
>
> …
>
> Q. Bundle B, page 648, paragraph 44. You say there:

> "On several occasions in the first half of 2011 [this is initially], Hady called me over the telephone and told me that he was in urgent need of funds ..."
>
> A. Yes.
>
> Q. So your answer to the Judge just now, shall we say, is not quite accurate.
>
> A. It is not inaccurate. It is not inaccurate, because he was really in need of fund.
>
> COURT: No, Mr Tan is suggesting when you said to me that Hady was too embarrassed to call you, that's not correct, because he called you and told you he needed funds anyway.
>
> A. Your Honour, when I replied to you, I meant that it was the first -- when he said he needed funds of about 3 million, he didn't call me directly, he called the bank first.
>
> COURT: You said he was too embarrassed and that's what Mr Tan --
>
> A. Yes, that was the first time.
>
> COURT: -- is suggesting is inaccurate.
>
> A. I was referring to the first time, but subsequently he called me.

265 The plaintiffs submitted that the defendant has no credibility on this issue. The change in the particulars is of some significance. The defendants removed the date of the alleged telephone calls which accommodated the claim by Mr Goh that the plaintiff had telephoned him around midnight on 10 February 2011 albeit that the particulars were amended before Mr Goh's affidavit was filed. The looseness of the amended particulars, changing from two specific dates on which the plaintiff allegedly telephoned the defendant, to a rather nebulous "several occasions" certainly allowed some room for movement.

266 The plaintiffs submitted that if the sales were legitimate and pursuant to the plaintiff's instructions, it was "curious" that a statement of account sent to the plaintiff on 5 October 2011 did not disclose any of those sales or incoming funds from those sales. It is appropriate at this juncture to set out the chronology in respect of that account.

267 On 18 July 2011 at the defendant's request Credit Agricole (Ms Teo) forwarded to him a table setting out the details of the loans. That table referred to the incoming funds and bringing to account the reduction by 10% for "charges" and adding "shares sold (55 mil @ 0.05 SGD2,732,468.75)" (C 332). When the plaintiff requested details of the account activity for AEM up to 5 October 2011 from Credit Agricole, Ms Teo sent him a table, with a copy to Mr Goh, in which those share sales were not recorded (C 391). The plaintiffs submitted that the table was "incomplete" in that the incoming cash transfers to the AEM account after 4 April 2011 were not displayed. They also submitted that the table was "conspicuously silent" on whether NexGen shares from the Yuanta account had been sold. The plaintiffs claimed that the defendant had instructed Credit Agricole to issue the table to the plaintiff in that form so as to ensure that the NexGen share sales were disguised and not brought to his attention. Mr Goh accepted during cross-examination that it was "possible" that the defendant asked him to prepare the table in this incomplete form (26-02-2016: tr 113).

268 The plaintiffs' submission is understandable in the circumstances of the later sales. However the plaintiff's own case is that he discovered that sales were taking place and instructed the defendant and Mr Goh to desist. It is also to be remembered that the shares were repurchased by June 2011.

269 I think it is far more significant that the table did not include the sale of 60m NexGen shares in August 2011.

270 The plaintiffs submitted that it is significant that Mr Goh did not defend the sale of 30m NexGen shares by Yuanta on 29 March 2011 as being one made on the plaintiff's instructions. The plaintiffs also relied upon the conversation between Mr Goh and the defendant on 18 March 2011 in which they were discussing the fact that Yuanta's funds were used to buy back the shares that had been sold (G 70-71). It was submitted that it was illogical that on 18 March 2011 there was an instruction to buy back the shares and yet a further sale of 30m NexGen shares on 29 March 2011. The plaintiffs submitted that the idea of the plaintiff requesting the defendant to sell the shares defied logic and that it became increasingly clear as the trial continued that this was a "desperately assembled afterthought".

271 The defendant's explanation for the sale of the 60m NexGen shares in August 2011 was first given in his affidavit filed in November 2015 as follows (B 651):

> 55. As to the remaining sixty (60) million Next-Gen shares out of the 825 million shares, these shares remained in the custody of the Yuanta Account. However, as a result of various subsequent breaches of the Written Agreements and an oral agreement made between Hady and I, I sold the remaining 60 million Next-Gen shares to mitigate the losses Yuanta had incurred as a result of the breaches.

272 One of the so-called "subsequent breaches" relied upon by the defendant in his affidavit that he seemed to think justified him selling the 60m NexGen shares was the plaintiff's "failure to meet the various Margin Calls" (B 651: par 56b). The defendant did not use the 60m NexGen shares to

respond to the margin calls. In any event the margin call notices were not issued to the plaintiffs until September 2011. I agree with the plaintiffs' submission that the meeting of the margin calls had no bearing on the defendant's decision to dispose of the 60m NexGen shares left in the Yuanta account.

273 The other reasons that the defendant gave for selling the 60m NexGen shares were that the plaintiff had utilised the loan proceeds himself; that he failed to keep his promise to transfer 225m NexGen shares; and he failed to transfer the 700m NexGen shares pursuant to the alleged oral loan agreement. In response, the plaintiff relies upon the transfer of 225m NexGen shares on 11 March 2011. In any event it is important to remember that the defendant caused Yuanta to help itself to the additional 225m NexGen shares in October 2011. If the defendant really intended the sale of the 60m NexGen shares to have some connection to the plaintiff's failure to transfer the 225m NexGen shares then Yuanta should only have transferred 225m NexGen shares less those 60m NexGen shares in October 2011.

274 It is necessary to decide whether I prefer the plaintiff's evidence or that of the defendant and Mr Goh in respect of whether the plaintiff instructed them to sell the pledged shares in February 2011. There are aspects to the whole process of what was occurring in February 2011 that are very unsatisfactory. It is not clear how it was that Mr Chung became aware that 55m NexGen shares had been sold (see [85] above). There are no records to support the proposition that the plaintiff/TPG were not in a position to deliver further NexGen shares to Yuanta for pledging without the so-called urgently needed funds being paid to Phillip Securities. It is obvious that there was a

relationship between the plaintiff and Phillip Securities and that margin facilities were being used for various investments by the plaintiff independently of any joint project with the defendants. If the plaintiff had sought from the defendant an advance of a personal loan to meet liabilities to Phillip Securities, it would be expected that the defendant would have sought to have the plaintiff repay those funds advanced for that purpose. The only mention of a personal loan was on the instruction in respect of the payment of S$1.2m on 29 April 2011 from AEM's account to Phillip Securities (C 471). This is well after the alleged instructions to sell the shares to provide the urgently needed funds to the plaintiff. It is also well after the further transfer of 225m NexGen shares by TPG to Yuanta on 11 March 2011. The suggestion that payments had to be made before any further shares could be transferred is therefore not supported by the conduct of the parties.

275 I regard the plaintiffs' submissions in relation to the illogicality of the sale of the pledged shares as powerful. The plaintiff's transfer of 300m NexGen shares in January 2011 and a further 225m NexGen shares in March 2011 to the Yuanta account when he was apparently instructing the defendant to sell the shares makes little or no commercial sense. The plaintiff could have sold the 225m NexGen shares to obtain the urgently needed funds rather than transferring them into the Yuanta account. Although it was suggested to the plaintiff that he needed funds in January 2011, his evidence that he converted 61m warrants for S$1.68m (or S$1.83m) was not challenged.

276 There were deficiencies in the evidence of the plaintiff, the defendant and Mr Goh. However I regard the defendant's evidence as lacking credibility. I do not accept his explanations of remembering incorrectly as genuine. I do

not accept his suggestion that his emails to the plaintiff advising that the 60m NexGen shares were in a custodian account were "negligent". I regard his claims as an attempt to deflect the Court from reaching a conclusion that his conduct in this regard was dishonest. I am satisfied that the defendant secretly sold the 60m NexGen shares and intended to dupe the plaintiff into believing that they had not been sold.

277 The dearth of documentary material supporting the alleged instructions from the plaintiff: the change in particulars in respect of those instructions; the absence of any mention of the instructions in the conversation within hours of when the instruction is alleged to have occurred; the fact that the defendant was willing to and did behave dishonestly in respect of the sale of the 60m NexGen shares in August 2011; and the fact that Mr Goh was willing to stand by and let Yuanta and the defendant give the plaintiffs information about the 60m NexGen shares that was untrue; are all matters I have taken into account in reaching the conclusion that I prefer the plaintiff's evidence over that of the defendant and Mr Goh in respect of this issue.

278 I do not accept the defendant's evidence that the plaintiff instructed him on the so-called "several occasions" to sell the NexGen shares in February and March 2011 to obtain urgently needed funds. I do not accept Mr Goh's evidence that the plaintiff telephoned him around midnight on 10 February 2011 to give such an instruction.

Identity of the lender

279 There is also a factual dispute about whether the defendant and/or Mr Goh made statements orally and/or in writing for the purpose of misleading

the plaintiff into believing that the loans for the joint venture project were to be provided by Credit Agricole. At this point it is appropriate to say something about the Earlier Proceedings.

280 The real issues in dispute in the Earlier Proceedings related to whether Credit Agricole had acted in breach of its mandate from TPG; whether the defendant's authority was revoked prior to the transfer of the 225m NexGen shares in October 2011; whether Credit Agricole was in breach of its implied or common law duty of care owed to TPG; whether TPG was contractually estopped from claiming against Credit Agricole; and whether TPG was estopped by representation from claiming against Credit Agricole: see the Judgment at [176].

281 Although there was reference to the Loan Agreement and the Supplementary Agreement in the Judgment in the Earlier Proceedings, the Court was not asked to construe those Agreements. However the trial judge did not accept the plaintiff's "suggestion that Credit Agricole was intended to be approached as a lender and advisor for the joint-investment arrangement": (Judgment at [146]); and did not accept the plaintiff's "position that Credit Agricole was intended to fund the joint investment": (Judgment at [148]). His Honour's findings in this regard related to whether Credit Agricole had breached its mandate from TPG.

282 It has not been suggested in the present proceedings that Credit Agricole was to be an "advisor" for the joint investment project. However, the plaintiff's case in the present proceedings was that he was led to believe that Credit Agricole was the lender of the funds for the joint venture project. The parties proceeded on the basis that the findings made by the trial judge in the

Earlier Proceedings did not preclude either party from dealing with the question of whether the defendant and/or Mr Goh induced the plaintiff into a belief that the lender was Credit Agricole. Indeed the defendant gave the following evidence in cross-examination without objection (24-02-2016: tr 100-101):

> Q. So it follows, Mr Yeh, that when you introduced Mr Hartanto to Mr Brian Goh in 2010, there was still a possibility that Credit Agricole would be the lender?
>
> A. To me, it is possible.
>
> Q. And that's why you asked TPG or Mr Hartanto to set up his account with Credit Agricole?
>
> A. No, that's not the main reason.
>
> Q. Now, you say that -- well, not the main reason, but a reason?
>
> A. It was only a minor reason, but mainly it was because I had good -- I had good credit rating and good relationship with the bank. So I wanted to use Credit Agricole as a platform for our cooperation.

283 It is not in issue between the parties in the present proceedings that it was possible that Credit Agricole might have been a lender for the joint venture project. However, it was acknowledged by the plaintiff that discretion was afforded to the defendant under the Agreements to source the funding from other institutions. The plaintiffs claim that the defendant directly and/or through Mr Goh, made statements (or remained silent) to suggest that Credit Agricole was the lender and intentionally kept the identity of the true lender, EFH, secret from the plaintiff to ensure that he would continue to transfer NexGen shares to Yuanta. This is denied by the defendant.

284 The letter of instruction from the defendant to Mr Goh on 30 December 2010 referred expressly to the "loan from your bank" (see [49]

above). Clearly Mr Goh must have understood that there was a real prospect that the plaintiff was under the impression that Credit Agricole was the lender of the funds for the joint venture project. Neither the defendant nor Mr Goh responded to this letter to inform the plaintiff that the bank was not the lender or that the lender was EFH.

285 It was suggested by the defendants that the plaintiff may have simply reached the erroneous conclusion that Credit Agricole was the lender without the defendant and/or Mr Goh causing him to reach such conclusion. The defendant was cross-examined about the email correspondence with the plaintiff in which the plaintiff was seeking an "official letter from the bank", regarding the top-up notices (see [129] above). In response the defendant had written to the plaintiff that it was "impossible for the bank to issue a letter" (see [131] above). The defendant gave the following evidence in cross-examination (24-02-2016: tr 65-68):

> Q. You don't say that the margin top-up notices are coming from someone else like EFH?
>
> A. Yes, it was not specified here.
>
> Q. Who is not a bank, right? EFH is not a bank?
>
> A. Yes, it is not a bank. It is a financial institution.
>
> …
>
> Q. Now, it's reasonable to assume, isn't it, reading what you've said here, that Credit Agricole bank is the one issuing the top-up notices?
>
> A. No, it was not issued by CA bank.
>
> Q. Yes, we know that, Mr Yeh. But you did not disclose this to Mr Hartanto?
>
> A. What should I disclose?
>
> Q. Mr Hartanto has just asked you where is the official top-up notices from the bank.

A. Yes, because I got the loan from EFH and EFH is not the bank, so it was not possible for Credit Agricole to issue the letter.

…

Q. Mr Hartanto is saying, please give me an official letter from the bank. So clearly in his mind, he believes that the entity that is holding the collateral is a bank. You then respond, saying that it is impossible for the bank to issue a letter, and you go on to name a bank. You're very specific. And you say Credit Agricole bank cannot issue the letter. And you give some excuse about interbank correspondence but you do not tell Mr Hartanto exactly what you said, which is that the collateral is no longer with the bank, it is with EFH.

A. But previously I had given him all the proof of the transfer of shares to the United States.

…

Q. And then you go on to say in the first paragraph that the margin call notice is also an agreement between you and Yuanta, who shall notify you, exclamation mark.

A. Yes, it is the -- between the relationship of Yuanta and him.

Q. So you are using, I am putting to you, that you are using the excuse that there is an agreement between TPG and Yuanta, not to disclose the fact that the collateral was with EFH.

A. No, this is not an excuse. This is clearly specified in our agreement.

Q. Even if that is true, Mr Yeh, there was nothing to stop you from correcting Mr Hartanto's impression that the collateral was being held by a bank.

A. Yes.

Q. And in fact you encouraged that impression by specifying Credit Agricole in your response or in your email.

A. The reason why Credit Agricole was mentioned here was because TPG and Yuanta had an account with

> Credit Agricole, and we also had an AEM account with Credit Agricole.
>
> Q. And Mr Haranto believed that his collateral was with Credit Agricole?
>
> A. That is what he believed.
>
> Q. No, you knew that Mr Hartanto was under the impression that the collateral was with Credit Agricole?
>
> A. I didn't know that Mr Hartanto has this impression.

286 The defendant was also cross-examined about Mr Chung's apparent impression that Credit Agricole was the lender (24-02-2016: tr 68-69). He then gave the following evidence (24-02-2016: tr 70-71):

> Q. And you did not correct the impression that Mr Steve Chung and therefore, Mr Hady Hartanto, had [thought] that the funds were coming from Credit Agricole?
>
> A. Yes, because I thought that it was not material. Because at that time, Hady wanted money and I also signed a confidentiality agreement with EFH.
>
> Q. Thank you for the explanation Mr Yeh, but if you could just focus on answering my question, that would be great.
>
> A. Okay.
>
> Q. Now, let's go back to the email on page C372. So knowing that Mr Hartanto thought that the funds were coming from Credit Agricole, and that the shares were with Credit Agricole, you were the one who identified Credit Agricole in this email?
>
> A. Yes.
>
> Q. Mr Hartanto's email to which you were responding, simply said a bank?
>
> A. Yes.
>
> Q. So I return to my original proposition, the proposition I put to you before, which is that you were plainly encouraging Mr Hartanto in his belief that the shares and the funds were with Credit Agricole.

> A. Of course he could have this impression.

287 In re-examination the defendant was asked about his evidence in cross-examination relating to Mr Chung's misapprehension. He gave the following evidence (26-02-2016: tr 81):

> Q. My learned friend asked why is it that you did not correct Steve Chung's mistake? You said: I thought it was not material. Can you, please, explain to the court why you said it was not material?
>
> A. Well, I thought that it was not material because at that time both parties had entered into an agreement and the shares had been transferred for loan purpose. The loan had been disbursed to the Yuanta account and subsequently been transferred to the AEM account. The money in the AEM account had been used by Hady and, at that time, Hady also agreed to a third-party loan. To Hady, he needed the funds. That's the most important part for him.

288 I am satisfied that up to 30 June 2011 the plaintiff formed the belief that Crédit Agricole was the lender, not from any express statement by the defendant but from the correspondence about Mr Koesnadi's shares on 20 December 2010 and the process of setting up the bank accounts for TPG and AEM with Crédit Agricole.

289 The plaintiff's affidavit evidence was that he was "shocked" when he was informed in the meeting with the defendant on 30 June 2011 that the 725m NexGen shares had been pledged to three banks, Deutsche Bank, JP Morgan and Bank of New York. Clearly from that time the plaintiff could not have been under the impression that Crédit Agricole held those shares, although he claimed that the defendant advised him that 60m NexGen shares were with Crédit Agricole. It must have been obvious to the defendant and Mr Goh when the plaintiff was seeking copies of the official letter from "the

bank" in respect of the margin calls, that he was under the misapprehension that Crédit Agricole and/or the three other banks to which reference was made on 30 June 2011 were the lenders of the funds for the joint venture project. The responses given by Mr Goh (with the defendant's knowledge) in his correspondence with the plaintiff ensured that the identity of the true lender, EFH, was never disclosed to the plaintiff.

290 I accept that up to 30 June 2011 the plaintiff believed that the funds were coming from Crédit Agricole and thereafter from that bank and the others named in the meeting on 30 June 2011. I am satisfied that the defendant and Mr Goh were aware that the plaintiff held that belief and kept EFH's identity as the lender secret from the plaintiff.

Was Scorpio East a joint investment?

291 There is a further factual dispute between the parties as to whether they agreed to jointly invest in Scorpio East. The outcome of the defendant's claim that the plaintiff misused the loan funds for such investment depends upon the determination of this issue.

292 The plaintiff's affidavit evidence was that when he and the defendant met in the period August to September 2010 they spoke about plans to jointly invest in and acquire up to a 30% stake in Scorpio East. They also discussed the potential management changes and the plaintiff claimed that the defendant shortlisted potential candidates to be nominated as a director of Scorpio East. The plaintiff also claimed that they discussed plans to raise capital for an investment in Scorpio East.

293 The plaintiff claimed that there were two payments made from AEM's account to fund TPG's purchase of the shares in Scorpio East and that the defendant was informed of these payments. In this regard he gave the following evidence (23-02-2016: tr 98):

> Q. Did you inform him at all that you were buying Scorpio East shares?
>
> A. Yes, your Honour.
>
> Q. Can you please show us any evidence, any email that you were buying Scorpio East shares? During the period March 2011. Any email showing that, yes, I was buying Scorpio East shares?
>
> A. I don't recall email or not, but in conversation, sure I tell him, your Honour.
>
> Q. Nothing in writing?
>
> A. I don't recall.

294 The plaintiff claimed that the first payment of S$1.2m was made on 29 April 2011 by transfer from AEM's account with Crédit Agricole to Phillips Securities. The defendant's signature appears on the debit instruction that authorised the transfer. That instruction stated "For Mr. Hady personal temporary loan". The second payment of S$1.8m was made on 29 June 2011 by transfer from AEM's account at Credit Agricole to TPI directly. Again only the defendant's signature appears on the debit instruction that authorised the transfer.

295 The plaintiff claimed in cross-examination that he could not recall whether at the time of the withdrawals he informed the defendant that they were for the purpose of buying Scorpio East shares and gave the following evidence (23-02-2016: tr 99):

> Q. I'll repeat the question, please listen carefully. When you withdraw the money, 1.2 million and 1.8 million from AEM, did you tell Mr Yeh that this money were withdrawn for the purpose of buying Scorpio East shares?
>
> A. I think so, yes, your Honour.
>
> Q. Again, am I right to say that you don't have any documentary evidence or email to prove that?
>
> A. Yes, your Honour.
>
> Q. And did you, when you withdraw the money from AEM, inform Mr Yeh that look, these are the sums of money to be used to reimburse Telemedia who has already purchased Scorpio East shares?
>
> A. I don't recall, your Honour.

296 The plaintiff was also asked why the defendant was not included in the board of directors or in the purchase arrangements in respect of Scorpio East if it was meant to be a joint investment. The plaintiff said that this was their agreement and that the defendant had proposed one candidate to be a director in the future. He was cross-examined as follows (23-02-2016: tr 99-101):

> Q. I'm putting it to you that you secretly went ahead to invest in Scorpio East without the knowledge of Mr Yeh.
>
> A. Not agree, your Honour.
>
> Q. Let's look further, still on the same page. You became the director of Scorpio East on 15 March. Of course, that's when you used the money to buy shares and use AEM money to redeem, to reimburse yourself.
>
> COURT: Reimburse?
>
> MR HEE: To reimburse Telemedia. Thank you. Now, when you became a director of Scorpio East starting from 15 March, did you inform Mr Yeh that, look, pursuant to our agreement, based on your theory, based on your case -- pursuant to our agreement, I became a director of Scorpio East; did you tell Mr Yeh?
>
> A. I think so, yes, your Honour.

Q. Is there anything in writing?

A. No. But we have in the communication, your Honour.

Q. Oral communication?

A. Yes.

Q. Now, prior to 15 March 2011, in your negotiation, leading to your acquisition of shares in Scorpio East, did you tell Mr Yeh that look, I am now negotiating with Scorpio East to buy the shares in Scorpio East. Did you tell Mr Yeh?

A. Yes.

Q. Anything in writing?

A. In the loop with Mr Low, Low Shiong Jin also your Honour, not in the communication, verbal communication, your Honour.

COURT: Anything in writing?

A. No, your Honour.

297 The plaintiff claimed in his Reply Affidavit that the defendant informed him that he was no longer interested in the Scorpio East shares and that he could keep the shares for himself. According to the plaintiff, the defendant lost interest in Scorpio East because it was being investigated by the Commercial Affairs Department in Singapore and its share price had fallen sharply (B 46 [99]).

298 The plaintiff brought defamation proceedings after the publication of the Stone Forest report that was referred to in the SGX Reprimand (see [154] above). That defamation suit was unsuccessful as was the appeal (23-02-2016: tr 104).

299 The reference in the SGX Reprimand to "round-tripping" in March 2011 was never explained in the evidence. However the plaintiff was cross-examined as follows (23-02-2016: tr 105-106):

> Q. Let's look at B1156 paragraph 14. The round-tripping scheme took place on 17 March 2011. Did you then tell Mr Yeh that look, you were also involved. We are in trouble.
>
> A. I informed Mr Yeh in March 2011 what happened with Scorpio, yes.
>
> Q. When you were investigated by SGX, did you tell SGX that look, I am not doing alone, Mr Yeh is my joint venture partner. Did you tell SGX?
>
> A. SGX not ask. I don't tell SGX.
>
> Q. Did you tell Stone Forest, that look, I am not alone, Mr Yeh is my joint venture partner. Did you?
>
> A. I believe in the Stone Forest, when they do litigation, I disclose the investment within Telemedia with Jack Yeh and James Lee. I disclose to Stone Forest.
>
> Q. And do you have any Stone Forest report to show that, yes, you disclose?
>
> A. Why we go to the court for this one, because Stone Forest don't give me the full report, your Honour.
>
> COURT: Can you answer the question?
>
> MR HEE: Do you? Do you have any Stone Forest report to show that, yes, you --
>
> A. I don't have Stone Forest report, your Honour.
>
> Q. I put it to you, Mr Hartanto, you actually use AEM's money not for the purpose of joint venture, but for your own purpose.
>
> A. Not agree, your Honour.

300 While the defendant conceded in his affidavit that he was initially "kept in the loop" regarding the Scorpio East investment he claimed that he did not receive the final terms and conditions and therefore did not proceed

with the investment. He claimed that he only realised that the plaintiff had proceeded with the investment when Mr Goh alerted him to a newspaper article reporting that Scorpio East was in trouble with the SGX. The defendant claimed that he was under the impression that the plaintiff had invested in Scorpio East using his own funds and had only found out that AEM funds were used when the plaintiff filed his Reply affidavit in these proceedings.

301 The defendant was cross-examined in relation to his claims in his affidavit about his lack of knowledge that the Scorpio East investment was part of the joint project. His evidence in this regard included the following (25-02-2016: tr 23):

> Q. One of the investments that was made from the AEM funds was the Scorpio East shares.
>
> A. Yes, this is one of investments, but he did not inform me.
>
> Q. But you recognised it was an investment?
>
> A. At the beginning it was.
>
> Q. When it went sour -- sorry, in other words, when the shares started to devalue, you left Mr Hartanto to bear the losses on those shares.
>
> A. You mean the Scorpio East shares?
>
> Q. Yes.
>
> A. Just let me explain.
>
> Q. No, just answer the question. When the shares went down in value ... [a]nd eventually were suspended, you left Mr Hartanto to bear the losses on the investment.
>
> A. He didn't inform me, and this is not a joint investment. He used the funds in AEM to make the investment and he did not inform me.

302 The defendant was then referred to his email to the plaintiff of 25 August 2011 in which he referred to one of the plaintiff's alleged promises made on 30 June 2011 in respect of the documents for the transfer of the Scorpio East shares having to be signed and passed to Crédit Agricole (C 338). He was cross-examined as follows (25-02-2016: tr 24):

> Q. In August, you wanted the Scorpio East shares?
>
> A. Usually he told me that he wanted to use this as a collateral and, subsequently, it was only until the Scorpio East incident Hady told me that he had made investment in Scorpio East. All along, I thought that the investment was made using his own funds. It was only until he filed the second AEIC for this matter, I found out he used AEM funds to make the investment.

303 The defendant was then referred to his email of 28 September 2011 to the plaintiff in which he explained why he could not use the S$1.81m in the Yuanta account to remedy the top-up notices. In that email the defendant had written that it could not be utilised "at the moment as you have fulfilled none of your promises, and the Scorpio East case is still under investigations!!!" (C 372). The defendant was cross-examined about this communication as follows (25-02-2016: tr 26-28):

> Q. Just before this email on 28 September, Mr Hartanto was asking you to please use the 1.81 million in the Yuanta account to repair the top up notices that you were sending.
>
> A. Yes.
>
> Q. And these are funds that belong to AEM.
>
> A. Under normal circumstances, the funds were with Yuanta and I was -- it was under my custody.
>
> COURT: They belonged to AEM, is the question.
>
> A. If it hadn't been transferred.

COURT: But the plan was that the money that came from the sales of the NexGen shares that went into Yuanta were to go to AEM, was it not?

A. Yes, under normal circumstances.

COURT: Yes, Mr Tan.

MR TAN: You are saying that the reason that you are withholding the AEM funds and not applying it towards the top up notices is because there is an investment in the Scorpio East shares that looked to be in trouble at that time.

A. This is one of the reasons.

…

Q. If you thought at this point in time that Mr Hartanto was using his own funds for the Scorpio East investment, then you would have no entitlement to the 1.81 million.

A. I don't understand.

COURT: What Mr Tan is putting to you is that if you believed that Mr Hartanto was using his own funds to invest in Scorpio, there was no basis for you to suggest that you could withhold $1.8 million using one of the reasons as the Scorpio East problem; do you agree?

A. I disagree.

304 The defendants submitted that the email of 25 August 2011 was a "chaser" for the Scorpio East shares as part of the arrangement for the defendant's loan to the plaintiff of S$1.8m in June 2011 rather than any recognition that Scorpio East was a joint investment. The defendants also relied upon the plaintiffs' failure to inform Stone Forest that the investment in Scorpio East was a joint investment. The plaintiff was a director of Scorpio East and was being investigated for his role in that regard. It is understandable that he would not advise Stone Forest of the joint investment; the defendant was not an officer of Scorpio East and the contracts the subject of Stone Forest's investigation did not involve the defendant.

305 I regard the email of 28 September 2011 and the earlier email relating to the prospect of utilising the funds in the Yuanta account to cure the top-up notice as important contemporaneous records to test the veracity of the defendant's claims that he did not know that Scorpio East was an investment in the joint project. The defendant's agreement in cross-examination that the Scorpio East investment was a joint investment "at the beginning" was an important concession. Clearly if the plaintiff had been using his own funds to invest in Scorpio East then it was quite illogical to suggest that the S$1.81m in the Yuanta account could be withheld on the basis that the Scorpio East shares had not been transferred to Credit Agricole and/or Scorpio East was the subject of investigation. It would have little to do with the parties' interest in the money in the Yuanta account if the plaintiff was off on a frolic of his own. These communications support the conclusion that the defendant was well aware that he had agreed to the investment and that the investment had been made in Scorpio East utilising the joint funds from the AEM account. That is why he used the Scorpio East situation as one of the reasons to withhold utilisation of the S$1.81m to cure the top-up notices.

306 I do not accept the defendant's evidence that he did not agree to a joint investment in Scorpio East. I do not regard his affidavit evidence and his evidence in cross-examination in denying such a joint investment as credible.

Mr Koesnadi's shares/the SPA

307 There is also a significant factual dispute about whether the defendant or Yuanta agreed to purchase Mr Koesnadi's 900m NexGen shares that were held by TPI.

308 As referred to earlier the plaintiffs claimed that the defendant/Yuanta agreed to the purchase and they relied on the Confirmation Letter dated 20 December 2010 and Mr Koesnadi's letter to Mr Goh of the same date as evidencing the fact of that agreement (see [43]–[45] above).

309 The plaintiff claimed that the defendant asked him for a deferral of the date for the payment of the purchase price because he was raising the funds for the acquisition. The plaintiff also claimed that he and Mr Koesnadi agreed to the defendant's request for a deferral of the date for payment of the purchase price on the condition that Crédit Agricole would provide the Confirmation Letter that Yuanta would be able to pay the total purchase price of S$45m for the 900m NexGen shares.

310 He also claimed that the defendant subsequently asked if the acquisition could be split into three tranches of 300m NexGen shares. He claimed that he and Mr Koesnadi agreed to that occurring and he instructed his lawyers to prepare the SPA and to "arrange for it to be duly executed" (B 20).

311 The plaintiff claimed that shortly before the first tranche of 300m NexGen shares were transferred from TPG to the Yuanta account on 21 January 2011, the defendant informed him that there would be a delay in the first loan disbursement. The plaintiff claimed that when he informed Mr Koesnadi of this delay, he became concerned about Yuanta's ability to make payment of the full purchase price of S$45m. The plaintiff claimed that Mr Koesnadi insisted that the defendant had to pay a deposit of S$2.7m for the first tranche of 300m NexGen shares. The plaintiff claimed that he spoke to the defendant who agreed to pay the S$2.7m deposit, but that he said that he would need help in raising that sum. He claimed that the defendant advised

him that the expected amount of the first loan disbursement would be about S$900,000; and that he advised the defendant that TPG would provide a bridging loan of S$1.8m to be paid to Mr Koesnadi on Yuanta's behalf leaving the remainder of S$900,000 to be paid out of the first loan disbursement to Mr Koesnadi.

312 The plaintiff claimed he then spoke with Mr Koesnadi who said that due to the delay he had changed his mind about the Warrants and was no longer agreeable for his share of the Warrants (75m) to be contributed as part of the transaction. The plaintiff claimed that this is why there were only 225m Warrants available for exercise, rather than 300m Warrants referred to in the Supplementary Agreement. The fact that there was a reduction in the available warrants from 300m to 225m is not in issue.

313 The plaintiffs relied upon what they described as "part-payments" in respect of this transaction. The first was a payment of S$800,000 on 18 February 2011 paid by AEM to Mr Koesnadi via TPG's account with Niaga Finance in Hong Kong. The plaintiffs claim that this amount was paid by AEM "on Yuanta's behalf". The second payment occurred on 30 March 2011 when S$1m was paid by Yuanta to TPI's account with HSBC in Hong Kong. Although the plaintiff was cross-examined in respect of whether there was any receipt from Mr Koesnadi, there are numerous documents that the plaintiffs claim support the payments being made to Mr Koesnadi. The first group of documents are email exchanges between the plaintiff and Mr Goh on 14 February 2011 confirming that the plaintiff has spoken to the defendant who confirmed that S$800,000 was to be paid to Mr Koesnadi into his account with Niaga Finance (B 1223). There is also a debit instruction note dated 15

February 2011 which was faxed to and co-signed by the defendant instructing Credit Agricole to transfer the S$800,000 to Niaga Finance with the message that it was for further credit to Mr Koesnadi's account. There is also the Debit Advice dated 22 February 2011 to Mr Koesnadi confirming the amount had been transferred to TPI (C 453-455). The plaintiffs also rely upon the Debit Instruction Note dated 30 March 2011 signed by the defendant as sole signatory for Yuanta instructing Credit Agricole to transfer the sum of S$1m to TPI (C 462).

314 The plaintiff claimed that he arranged for the transfer of the sums of US$610,000 and US$900,000 on 20 January 2011 and 9 February 2011 respectively from TPG's account to Niaga Finance, Mr Koesnadi's account with HSBC Hong Kong. The two sums transferred amounted to a total of US$1,510,000 or about S$1.9m at that time. The plaintiff claimed that these sums were meant to include TPG's S$1.8m bridging loan to Yuanta and other sums that were due as between Mr Koesnadi and himself.

315 The anticipated loan disbursement of S$900,000 was only S$808,092.45. This occurred on 15 February 2011 and shortly thereafter S$800,000 was transferred from the AEM account into TPG's account with Niaga Finance for further credit to Mr Koesnadi. The plaintiff claimed that by mid-February 2011 Mr Koesnadi had received S$1.8m from TPG, allegedly on Yuanta's account, and S$800,000 from AEM totalling $2.6m.

316 The defendant agreed that the plaintiff asked him if he was interested in purchasing Mr Koesnadi's shares but claimed that he informed the plaintiff that "if we made some profits in our Joint Venture, we could then consider using the said profits to purchase" those shares (B 661-662 [90]). The

defendant denied that he asked the plaintiff to split the purchase of Mr Koesnadi's shares into three tranches. He claimed that the 300m NexGen shares that were to be pledged for the loans were to be held by three different corporate entities instead of one corporate entity for the benefit of the joint venture investment. He explained that this was to avoid attracting the reporting obligations under the SGX rules.

317 The defendant also denied that he agreed to pay a deposit of S$2.7m to Mr Koesnadi. He claimed that the plaintiff's claim that TPG had provided a bridging loan in the sum of S$1.8m on Yuanta's behalf for the purchase of Mr Koesnadi's shares was "certainly untrue" (B 951).

318 The defendant denied ever seeing the SPA or being asked to sign it. He denied ever reaching the agreement recorded within it. He claimed that he only became aware of its existence during the course of these proceedings. The defendant emphasised that neither TPG nor the plaintiff had ever made any demands against Yuanta for the allegedly outstanding sum of S$15m (or S$13.2m) even though it was suggested that this sum was due on 31 May 2011 (or later, 31 December 2011). The defendant highlighted the fact that the bank transfer instruction forms in relation to the two sums of US$610,000 and US$900,000 provide no indication of the reasons for those transfers.

319 The defendants submitted that the sequence of events relied upon by the plaintiffs is simply not coherent. On the one hand the plaintiffs rely upon the email of 20 January 2011 from the plaintiff to his solicitors to draft an agreement. On the other hand they rely upon the SPA which is dated before the email, on 14 January 2011. The SPA was not between Mr Koesnadi and

Yuanta but between TPG and Yuanta. It also had a number of blanks within it including the number of days to fix the "Completion Date" (cl 1.1) (B 123).

320 Once again the parties' versions of events and conversations are diametrically opposed. In those circumstances it is important to have regard to the contemporaneous documents. The first set of documents is the Confirmation Letter and Mr Koesnadi's letter to Mr Goh of 20 December 2010. At this time it appears the plan was for Yuanta to purchase Mr Koesnadi's 900m NexGen shares.

321 The next document is the email from the plaintiff to his lawyers on 20 January 2011 in which he instructed them to prepare the "buy and sell agreement 300m shares @5 cents" between TPG and Yuanta, and "transfer the share now, and payment on or before May 2011" (C 324). The SPA is peculiarly dated "14 January 2010". Even on the basis that the year should have been 2011, it is still nearly a week before the plaintiff gives instructions to his lawyers for its preparation. There is nothing in the SPA in relation to the payment of a deposit of S$2.7m or indeed any deposit. The SPA provided for the whole of the S$15m to be paid on or before 31 May 2011 by delivery of a cashier's order for that amount (cl 2).

322 There is also the SGX Announcement dated 25 January 2011, four days after 300m NexGen shares were transferred from TPG to Yuanta on 21 January 2011 (see [59] above). The Announcement referred to the "married deal" without any reference to the SPA. The Announcement also referred to the date of change of interest as 21 January 2011, not 14 January 2011. Although the defendant denied any knowledge of the Announcement in his affidavit, it is clear that that he signed the blank form for it and received a

copy of the completed form. Irrespective of the defendant's lack of recollection about having signed the form, the Announcement makes no mention of the SPA and refers to a date different from the date of the SPA.

323 There is also the plaintiff's email of 15 February 2011 to the defendant and Mr Chung. Although it is extracted in full earlier (see [67]above) it is convenient to set out here those portions of the email relevant to this issue. They are as follows:

> 2. AEM get 225m Warrant for free, for buy 900m shares of Hardi Koesnadi.
>
> a. the W will exercise asap at 3 cents, and will sell it at 5 cents up.
>
> b. Target profit is sin$4.5m to sin$6.75m.
>
> 3. From the loan and the profit of W, AEM will buy the shares in the market.
>
> 4. AEM buy from Hardi Koesnadi 900m shares @ 5 cents, with defer payment.
>
> a. First payment sin$4.5m. Had pay sin$1.7m on 31 Jan 2011, and AEM (fro (*sic*) the loan) pay sin$800k on 14 Feb 2011.
>
> b. The balance will be arrange by loan from CA, by put it back to guarantee the loan for 1 year (until 31 dec 2011).

324 This email also asked the recipients to "record the transaction". There is no mention of any payment of a deposit of S$2.7m. Nor is there mention of a sale of 300m NexGen shares. Rather it is a transaction for AEM, not Yuanta, to buy 900m NexGen shares from Mr Koesnadi in respect of which AEM will get 225m warrants "for free". The "first payment" (whatever that may have been intended to mean) for AEM's purchase of Mr Koesnadi's shares is recorded as S$4.5m of which S$2.5m is recorded as having been paid; S$1.7m

having been paid by "Had" (which I am satisfied was intended to be a reference to "Hady", the plaintiff) and S$800,000 by AEM "fro[m] the loan". The balance was to be paid, as recorded, by a loan from Crédit Agricole.

325 There is also Mr Chung's report dated 15 March 2011 in which he referred to the S$800,000 payment by the defendant at "the very beginning" for the purchase of Mr Koesnadi's shares (see [84] above). Mr Chung recorded that the "transaction has cancelled" and that there should be a "refund" to the defendant. The payment was in fact made by Yuanta rather than the defendant and it would appear that Mr Chung did not bring the contents of the plaintiff's email of 15 February 2011 to account in this report.

326 In the light of these contemporaneous documents and the lack of any communication from the plaintiff during the period from January 2011 onwards to the commencement of these proceedings seeking payment under the SPA, I prefer the defendant's evidence over the plaintiff's evidence on these issues. Although the parties had originally discussed the prospect of Yuanta purchasing Mr Koesnadi's shares, I am satisfied that there was no binding agreement between TPG and Yuanta for such purchase. I am satisfied that the parties agreed that AEM would purchase those shares as recorded in the plaintiff's email to the defendant and Mr Chung on 15 February 2011 and appeared to agree on such a plan.

Exercise of the warrants/S$1.8m transaction June 2011

327 The parties are also in dispute in relation to the exercise of the warrants and about the nature of the S$1.8m transaction in June 2011. It is appropriate

to deal with these two areas of dispute together as there is some overlap of the facts in each area.

328 The provisions of the Supplementary Agreement relevant to the exercise of the warrants is as follows:

> 3. The Parties agree that part of the Loan may first be used to exercise the warrant to buy the 300 million shares of [the plaintiff's] listed company B07.S1, and to convert [the shares] into tradable shares within 5 days. Thereafter, the shares shall be pledged and the funds thereby obtained shall be deposited into the joint account of the Parties for joint management and investment.
>
> …
>
> 8. The Parties agree that the Loan arranged by [the defendant] shall be used, firstly, to exercise the warrant in the Company. (1) the acquisition at 0.3 [*sic*] per share; (2) the acquisition of 25% shares of [the plaintiff's] original shareholders; (3) Market operations that will increase the company's market capitalisation to the mutual benefit of the Parties (variations and adjustments to the order of priority hereof may be made through consultation between the Parties).

329 It is not in issue that the original intention to exercise the warrants to purchase 300m warrants was reduced to 225m warrants. This was because Mr Koesnadi withdrew his 75m warrants, that had apparently been part of the original arrangement for the purchase of his 900m NexGen shares, after the arrangement changed.

330 The plaintiff's affidavit in relation to the exercise of the warrants to purchase the 225m NexGen shares was that between 15 February 2011 and 22 March 2011, S$6.75m was withdrawn from the AEM account "for purposes of

the exercise of the 225 million Warrants". The plaintiff set this out in tabular form as follows:

Table 3: Amounts withdrawn from AEM Account for purposes of conversion of 225 million Warrants.

S/No.	Date	Amount withdrawn from the AEM Account (including bank charges) (S$)
1	15.02.2011	1,200,025.62
2	24.02.2011	1,800,025.64
3	04.03.2011	1,500,025.34
4	10.03.2011	220,766.60
5	10.03.2011	1,279,233.40
6	22.03.2011	384,972.00
7	22.03.2011	365,025.28
	Total	**6,750,073.88**

Note: S$6,750,000/$0.03 per share = 225,000,000 shares.

331 The plaintiff's affidavit evidence also included the following:

> 62. On 11 March 2011, Telemedia transferred 225 million NexGen shares from the Telemedia Account to the Yuanta Trust Account. **These were to be treated as shares converted from the 225 million warrants.**
>
> [emphasis added]

332 At this point of the evidence as served it was reasonable for the defendant to conclude that the plaintiff was claiming that he had withdrawn S$6.75m "for purposes of conversion" of the 225m warrants.

333 The defendant's affidavit included the following response to this part of the plaintiff's evidence:

> 74. It was always agreed between me and Hady that we intended to exercise the warrant forthwith upon entering the Supplementary Agreement and to immediately sell the abovementioned 300 million shares of Nex-Gen at S$0.06 per share.
>
> 75. However, Hady only exercised the warrant later on in March 2011, as opposed to within 5 days of the Supplementary Agreement i.e. 20 November 2010 as stipulated at clause 3 of the Supplementary Agreement.
>
> …
>
> 77. As stated above, it had always been intended by Hady and I that the 225 million shares in Next-Gen were to be promptly sold at S$0.06 per share (which was the prevailing price at that time) for a total sum of S$13.5 million. …

334 The defendant's complaint in paragraph 75 of his affidavit extracted above that the plaintiff had failed to exercise the warrant within "5 days of the Supplementary Agreement" that is, by 20 November 2010, is based on a misconception of the provisions of that Agreement. The plaintiff was not so obliged. Rather cl 3 provided that the parties agreed that part of the loan was to be used to exercise the warrant; and the stipulation that this was to occur "within 5 days" related to the time after the loan was provided and not 5 days from the date of the Supplementary Agreement.

335 It was in his affidavit in reply that the plaintiff claimed that in January 2011 TPG exercised 61m warrants on behalf of AEM and that because there was a delay in AEM receiving the loan funds, TPG used its own funds and paid NexGen an amount of S$1.68m for the exercise of the 61m warrants. That affidavit included the following:

> 7. After exercising the first batch of 61 million Warrants, I realised that it will not be practical to exercise all 225 million Warrants in this manner because NexGen will have to issue more shares which will then have the effect of diluting Telemedia's shareholding in NexGen. In order to maintain its shareholding, Telemedia would have to exercise an equal amount of warrants of its own, which will quickly deplete the warrant reserves in Telemedia's holding.
>
> 8. As such, instead of exercising the 225 million Warrants that Telemedia contributed to AEM, I decided that it would make more sense for Telemedia to simply give 225 million of its own shares to AEM. For Telemedia to maintain its shareholding in NexGen, Telemedia would either buy more NexGen shares from the open market, or from other shareholders. The sum of S$6,750,073.88 withdrawn from the AEM account was utilised towards the further purchase of the NexGen shares. This is what I did and Yeh was aware of this. For instance, Mr Chan Keng Chun ("**Mr Chan**") held some amount of shares in NexGen. We offered to transfer some of Telemedia's warrants and a cash amount to Mr Chan, in exchange for Mr Chan's shares. He agreed. This was why a sum of S$365,025.28 was paid to Mr Chan on or around 22 March 2011.
>
> 9. I did not see any issue with this because the net effect would still result in AEM getting 225 million shares at S$0.03 per share, totalling S$6,750,073.88. No loss was caused to AEM. In fact, Yeh knew about this which explained why he signed off on the Debit Instructions Notes (see paragraphs 63 and 64 of my AEIC). I do not understand why Yeh is making a claim in respect of this. …

336 The claim to which the plaintiff was referring in paragraph 9 is the defendants' contention in the Counterclaim that: (a) pursuant to cll 3 and 8 of the Supplementary Agreement the loan was to be utilised to exercise warrants for 300m (now 225m) NexGen shares at S$0.03 per share and to convert them into tradable shares within 5 days of the Supplementary Agreement (although, as referred to above (at [334]), this was within 5 days of the receipt of the loan); and (b) that the plaintiff and the defendant orally agreed that the shares

would be sold in the market forthwith after the exercise of the warrants (the market price of the NexGen shares at the time being about S$0.06) and the profits would be shared equally between the parties ("the 225m Shares Agreement").

337 The change in the plaintiff's evidence from his original claim that S$6.75m was withdrawn from the AEM account "for purposes of the exercise" of the 225m warrants to his claim that only 61m warrants were exercised was rather extraordinary, particularly having regard to his email to the defendant and Mr Chung on 15 February 2011. In cross-examination in respect of this email the plaintiff gave the following evidence (22-02-2016: tr 136-138):

> Q. So my question to you is, in short, you have agreed to sell the warrant shares to make a profit, correct?
>
> A. Not agree, your Honour.
>
> Q. Please explain why?
>
> A. … (Through interpreter) This email, is a minute of a meeting between Jack Yeh, me -- Jack Yeh, me and Mr Chung. Point number 2, which was asked by defence counsel, we wanted to record down that from a 300 million warrant, it becomes 2.25 warrant. Because of the purchase of 900 million shares from -- shares belonging to Hardi Koesnadi. And point 2a, indicated that 2.25 million warrant will be converted immediately to shares at the price of 3 cents. And in the future, it could be sold for price of more than 5 cents. And point 2 is -- point 2b is to be noted down by the auditor. So, the profit reaped by AEM was about 4.5 million to 6.75 million Sing. I did disagree with idea of selling the shares immediately in point 3 because --
>
> Q. Hold on, please Mr Hartanto I am not going into point 3. So looking at point 2, can you please confirm, from the answer that you have just given, that actually you have agreed to sell the warrant shares to make a profit; don't you agree?

> A. (Through interpreter) No. This is to be sold in the future, not immediately.
>
> Q. I am not asking you whether in the future or immediately. I'm asking you whether the warrant shares were to be sold to make a profit.
>
> A. Yes, agree.

338 "Point 3" to which the plaintiff was referring in this evidence in cross-examination was as follows:

> 3. From the loan and the profit of W, AEM will buy the shares in the market.

339 In later evidence referred to below, the plaintiff explained that the "profit of W" was an estimate or "paper profit" and the plan was to pledge the shares converted from the warrants to obtain a loan (with the shares purchased at S$0.03 but valued at approximately S$0.05 for a "profit" of S$4.5m) and purchase Mr Koesnadi's shares.

340 There is nothing in the email correspondence that amounts to a disclosure by the plaintiff to the defendant that he had decided to transfer TPG's NexGen shares rather than exercising the warrants to purchase the NexGen shares at S$0.03 per share. It is clear from the defendant's affidavit (par 75) that he understood that the plaintiff had exercised the warrants to purchase the 225m NexGen shares that were transferred to Yuanta on 11 March 2011. It is also clear from the defendant's email to the plaintiff on 25 August 2011 that he understood that the 225m NexGen shares had been converted from the warrants when he requested the transfer of 112.5m NexGen shares into the Yuanta account (see [119] above).

341 In later cross-examination on the content of the 15 February 2011 email, the plaintiff described the reference to "sin$4.5m to sin$6.5m" as "already paper profit" (22-02-2016: tr 142-145). He gave the following further evidence (tr 143):

> Q. What would the profits be used for?
>
> A. (Through interpreter) In this note, the profit upon the sale of the warrant shares, it has yet to be known. But at that particular time, the profit was estimated to be this amount, which is 4.5 million to 6.75 million.
>
> Q. Correct. So the intention, the intention was to use the profits from the sale of warrant shares to help purchase Koesnadi's shares, correct?
>
> A. (Through interpreter) No. After exercising the warrant, we will -- we will then -- we will load it back to the bank to make it into a collateral in order to disburse loan, then only we will buy the Hardi Koesnadi's shares from the market. So the money disbursed by the bank will be used from warrant to become shares. After that, then only we will use that to pay for the Hardi Koesnadi's shares. So the warrant is not to be -- so from warrant to shares, the shares are not meant to be sold but it is to be pledged back to the bank.
>
> Q. Now, even based on what you said is the plan, even on your case, as you did not exercise the warrant in time, so you could not proceed with the purchase of Koesnadi's shares immediately, correct?
>
> A. Correct.
>
> Q. And, to buy Koesnadi's shares, when the price was 5 cents, would cost about S$45 million, correct?
>
> A. Correct.
>
> Q. And that is the reason why Mr Yeh told you that, look, it is not realistic to expect AEM to make much profits, namely, 45 million, in order to buy Koesnadi's shares, correct?
>
> A. Not agree.
>
> Q. In fact, because of your delay in the exercise of warrant shares, in the exercise of warrant, and the unrealistic

> amount to buy Koesnadi's shares, both you and Mr Yeh agreed not to proceed with the purchase of Koesnadi's shares.
>
> A. Not agree, your Honour.
>
> Q. And in fact, that is the reason why Koesnadi refused to give 75 million warrants to AEM.
>
> A. Not agree, your Honour.
>
> Q. Let's look at your AEIC, paragraph 56. Page B27 --
>
> A. 56?
>
> Q. -- yes. Sorry page B27. Paragraph 56, five-six. You see:
>
> "I then spoke to Koesnadi about my proposal. He agreed to it, but said that due to Yeh's delay, he had changed his mind about the Warrants and was no longer agreeable for his share of the Warrants (75 million) to be contributed to AEM".
>
> That's different from Mr Yeh's version. But the conclusion is the same. He refused to give 75 million Warrants to AEM, correct?
>
> A. The difference --
>
> Q. No, whatever the reason, the fact remains that Koesnadi in the end decided not to give 75 million warrants to AEM, correct?
>
> A. Correct, your Honour.

342 The plaintiff did not exercise the warrants to purchase 225m NexGen shares at S$0.03 per share. The 225m NexGen shares were transferred from TPG to Yuanta on 11 March 2011 for pledging for loans for the joint venture.

343 It appears that the plaintiff withdrew the S$6.75m from the AEM account because he decided that the 225m NexGen shares transferred to Yuanta on 11 March 2011 "were to be treated as shares converted" from his 225m warrants at a sale price of S$0.03 per share. Although AEM was to

receive these warrants "for free" there was always going to be a cost to convert them to shares at S$0.03 per share, being S$6.75m.

344 The plaintiffs described this transaction in final submissions as follows (par 277(b)):

> … It was important, at that time, for [TPG] to maintain its majority shareholding in NexGen. As such [the plaintiff] decided instead that [TPG] would exchange its Warrants (plus cash) for shares from other shareholders of NexGen. This arrangement would still result in AEM obtaining 225m shares at S$0.03 per share, at a cost of S$6.75m.

345 I do not accept that the plaintiff informed the defendant that he was withdrawing the funds from the AEM account to reimburse TPG for transferring 225m NexGen shares to AEM on 11 March 2011. It is clear from the table that was created by the plaintiff, extracted earlier (see [330] above), that S$6m was withdrawn prior to the transfer of the 225m shares to Yuanta on 11 March 2011. It is understandable that such withdrawals might be made if the warrants had to be converted to shares prior to 11 March 2011, but this did not happen. There was no need for any "reimbursement" of the plaintiff or TPG at any time prior to 11 March 2011.

346 In any event it appears that the defendant presumed that the 225m NexGen shares transferred into the Yuanta account on 11 March 2011 were shares converted from the warrants. Although the defendants claimed that there was an agreement that the converted shares were to be sold immediately and the proceeds shared equally between the parties this was not done and there was no demand on the plaintiffs at this time to sell those shares.

347 This leads into the June 2011 S$1.8m transaction. The defendants alleged that the plaintiff entered into an oral agreement with the defendant in June 2011 for the defendant to provide him with a loan of S$1.8m and that in consideration of that loan the plaintiff would transfer 700m NexGen shares to Yuanta.

348 On 29 June 2011 S$1.8m was transferred from the Yuanta account to the AEM account and then to TPI's account with DBS Bank.

349 The plaintiffs alleged that TPG, on Yuanta's behalf, paid (by way of bridging loan) S$1.8m to Mr Koesnadi in two amounts, one on 20 January 2011 and the other on 9 February 2011 "as part payment of the S$2.7m deposit for the first tranche of 300m shares". The plaintiffs claimed that the S$1.8m transaction in June 2011 was a repayment of the bridging loan.

350 The plaintiff's affidavit evidence in respect of this transaction included the following:

> 82. Yeh and I met at the MBS, Singapore, on 30 June 2011. Goh was also present at the meeting. At the meeting, Yeh told me that 725 million NexGen shares had been pledged to 3 banks, namely, Deutsche Bank, JP Morgan and Bank of New York, and that there remained 60 million shares with Credit Agricole. I was shocked because my understanding was always that the shares would be pledged to Credit Agricole only. I asked Yeh why the shares were with three different banks. In response, Yeh said that it was some form of syndicated loan structure.
>
> 83. I was not satisfied with Yeh's explanation. I demanded proof that the 765 million shares were still with the three banks, and that the remaining 60 million shares were still with Credit Agricole. I also demanded documents evidencing the transfers of the shares from the Yuanta Trust Account to the three banks. I told

> Yeh that I would not transfer any more NexGen shares to the Yuanta account until Yeh furnished proof of the shares' whereabouts. Yeh, however, again insisted that I transfer a further 700 million shares into the Yuanta Trust Account. He even said that he already arranged for Yuanta to transfer a sum of S$1.8 million into the AEM account, as repayment of the deposit that I had previously paid to Koesnadi on Yuanta's behalf.

84. I told Yeh that if he could prove to me that the shares were with the said banks and have not been off-loaded into the market, I would arrange to transfer 700 million more NexGen shares from the Telemedia Account into the Yuanta Trust Account. At the end of the meeting, Yeh said he would ask Goh to provide me the information that I had requested for.

…

89. By an email dated 10 August 2011, Yeh alleged amongst other things that I had promised at our 30 June 2011 meeting to deposit a further 700 million NexGen shares in the Yuanta Trust Account as security for a S$1.8 million loan that was disbursed to the AEM account on 29 June 2011. I understand that this claim forms part of Yuanta/Yeh's counterclaim against Telemedia/me in these proceedings. This is a false claim. As mentioned at paragraph 82 above, I told Yeh at the 30 June 2011 meeting that I wanted proof of the NexGen shares whereabouts before depositing a further 700 million NexGen shares as collateral. … Further, the transfer of the S$1.8 million was not a loan provided by Yuanta, but was repayment of the S$1.8 million deposit that Telemedia had paid to Koesnadi on Yuanta's behalf.

90. By an email dated 25 August 2011, Yeh reiterated his request for the transfer of the further 700 million NexGen shares. In addition, he also asked for the shares in Scorpio East Holdings that AEM had acquired using part of the loan proceeds to be transferred to the Yuanta Trust Account to be pledged as further collateral. …

91. Oddly, in the same email, Yeh also demanded that Telemedia transfer to Yuanta half of the 225 million NexGen shares that remained in the Telemedia Account at that time stating that "*half of the 225 million [shares] from the warrant is to go into the Yuanta*

> *Account*". It seemed that Yeh had mistaken the 225 million NexGen shares that remained in the Telemedia Account at that time for the 225 million shares that were converted from the warrants held by Telemedia. As I have explained, Telemedia had already transferred the 225 million shares to the Yuanta Trust Account on 11 March 2011. Neither Yeh nor Yuanta had any entitlement to the 225 million NexGen shares that remained in the Telemedia Account.

351 The plaintiffs submitted that at the time the plaintiff was preparing his affidavit evidence he did not have the benefit of knowing that all of the funds in the Yuanta account (except for about S$20,000) were from loan or sale proceeds arising from the NexGen shares pledged by TPG; and that the S$1.8m transfer on 29 June 2011 could not have been a repayment by Yuanta of the bridging loan nor the provision of a further loan by Yuanta to TPG. Accordingly it was submitted that the S$1.8m transferred on 29 June 2011 were not Yuanta's own funds, but funds belonging to AEM.

352 The plaintiffs submitted that the defendant had attempted to mislead the plaintiff into believing that the S$1.8m were not funds to which the plaintiff had any entitlement but were loan funds, a position that he maintained in the proceedings and on which he instructed his lawyers to cross-examine the plaintiff.

353 The defendant was cross-examined in relation to the source of the funds in the Yuanta account as follows (25-02-2016: tr 10-12):

> Q. You knew, Mr Yeh, or you must have known, that the funds in the Yuanta account belonged to the sales and loan proceeds from Mr Hartanto's own shares.
>
> A. Because at that time there were many transactions, so I was not sure, but I only knew that at that time I transferred 1.8 million to him.

Q. So you are asserting a claim to 1.8 million, without knowing whether the source of the funds came from Yuanta or belonged to Mr Hartanto?

A. It came from Yuanta.

…

Q. … You are asserting a claim for 1.8 million without even knowing or checking whether that 1.8 million came from you or whether it belonged to proceeds that rightly belonged to Mr Hartanto?

A. I didn't pay notice to this at that time.

Q. I suggest to you, Mr Yeh, that it was more than that: that you knew, or that you must have known that those funds came from sales and loan proceeds of the NexGen shares and what you were doing was to start a paper trail in relation to that 1.8 million.

A. You say that it was the proceeds from the sale of shares. Which NexGen shares that you are referring to?

Q. Mr Yeh, I think you are digging in when there's no need for you to do so. We have already established as a matter of fact that all the funds in the Yuanta account came from the sales and loan proceeds of NexGen shares. You are a sophisticated financing individual. You know how to set up BVI companies. You know that you have many accounts in Credit Agricole. There is no evidence that you are mixing up the funds from one account with the other.

…

MR TAN: In Yuanta. In Yuanta. You must have known that when you were asserting a claim over the 1.8 million, that those were funds that rightfully belonged to Mr Hartanto.

A. I disagree.

COURT: Perhaps it would be fair: or half of them.

MR TAN: Yes. They belonged to the AEM account.

Q. So you would not even accept the proposition that the sales and loan proceeds from the NexGen shares belong to the AEM account?

> A. If the sale was carried out under Hady's instruction then it should belong to AEM account.

354 Notwithstanding the defendant's evidence in this regard, it is clear that the funds in the Yuanta account had come from the loans secured by the pledging of the NexGen shares or from sales of the NexGen shares. It is very difficult to understand how the defendant could maintain that this was a personal loan or even a loan from Yuanta to either the plaintiff or TPG in the circumstances.

355 The plaintiffs highlighted the fact that the funds were routed to AEM rather than paid directly to TPG. They also submitted that if the transaction were to be characterised as a loan of S$1.8m, then the consideration of an outright transfer of 700m NexGen shares would seem "a ludicrous deal". A conservative estimate of the value of those shares at the time was S$10.5m. It was submitted that even on the basis that the 700m NexGen shares were meant as collateral or security, the loan sum was exceedingly minuscule in comparison.

356 The plaintiffs also submitted that if the plaintiff was truly in need of funds he could simply have sold his own shares to raise funds or he could have asked the defendant to sell the 60m NexGen shares that were still in the Yuanta account. The plaintiffs highlighted an inconsistency between the defendants' Defence and Counterclaim and the defendant's affidavit. In the pleading the defendants had claimed that the consideration for the alleged loan was 700m NexGen shares. The defendant claimed in his affidavit that the consideration was not only the 700m NexGen shares but also the Scorpio East shares and shares in Courage Marine.

357 The plaintiffs also submitted that the payment instruction in respect of the S$1.8m was dated 29 June 2011 but that the alleged promise for the consideration was only made on 30 June 2011. When confronted with this chronology the defendant said that he thought that the evidence he had given in respect of the date of the promise was that it should be "around that time" (30 June 2011) (25-02-2016: tr 6-7).

358 The email of 27 June 2011 from the plaintiff to Mr Goh recorded that as soon as TPG received S$1.8m, 700m NexGen shares would be transferred immediately. That email also made reference to Courage Marine shares which needed to be dealt with in Hong Kong.

359 If the S$1.8m was, as the plaintiff claimed, a repayment to TPG, then it is very difficult to understand why there was any need for any consideration to flow to Yuanta. In their further written submission dated 25 April 2016 the plaintiffs dealt with the question as to how the Court should characterise the email of 27 June 2011 in the light of the parties' competing claims. That further submission was as follows:

> 4. Upon a further review of the evidence, we would like to draw Her Honour's attention to the transcript of 26 February 2016 (Day 5) at pages 34-38. The transcript records that the Plaintiffs' counsel had put the proposition to the 2nd Defendant that the "reason that you transferred the 1.8 [*million*] on 29 June was, really, to encourage Mr Hartanto to transfer yet more shares into the Yuanta account", and that this was the reason for the email at C328.
>
> 5. The Plaintiffs also humbly reiterate that if there is any doubt in relation to the evidence or the construction of any documents, an inference should be drawn against the Defendants in the light of all the evidence of their deception and concealment of the state of affairs during the material time, including but not limited to

> the misleading information conveyed to the 2nd Plaintiff at **C390-392**, the 2nd Defendant's obviously untruthful and inconsistent evidence given in Court, and the Defendants' lack of candour in discharging their discovery obligations. Indeed, the Plaintiffs submit that even today, the Defendants have not given full and frank disclosure of all relevant documents and information.

360 There are deficiencies in both parties' evidence. However on balance I am satisfied that the payment of S$1.8m from Yuanta to AEM to TPI, Mr Koesnadi's company, was in accordance with the plan referred to in the 15 February 2011 email for AEM to purchase Mr Koesnadi's shares. On balance I am satisfied that the proposal to transfer the 700m NexGen shares to Yuanta was, as the plaintiff claimed, for further pledging for loans. I am also satisfied that the plaintiff delayed that transfer because he was trying to find out from the defendant where the 765m NexGen shares that had been transferred to Yuanta were located. It is not possible to know exactly what the parties were intending in respect of the Scorpio East shares and the Courage Marine shares in this transaction but it is probable that they too were to be used as collateral.

361 I do not accept that the S$1.8m was a loan from the defendant to the plaintiff or TPG. Those funds were in the Yuanta account and were part of the joint venture project monies.

Yuanta account

362 There is a further issue in respect of the defendant's claim both to the plaintiff during their initial discussions and in his affidavit evidence that Yuanta had good standing or a good relationship with Crédit Agricole.

363 In his first affidavit the defendant claimed that at the time of his discussions with the plaintiff and at the time that he and the plaintiff met with Mr Goh, but prior to entry into the Agreements on 14 and 15 November 2010 Yuanta had an existing account with Crédit Agricole (B 630 [12]). The defendant went to the extent of highlighting that fact. In his affidavit in reply the defendant went further claiming that the "Yuanta Account was opened with Credit Agricole before Yuanta/my joint venture with TPG/Hady" (B 954 [32]). Indeed in responding to the plaintiff's claims in his affidavit that sums of money belonging to TPG were transferred out of the Yuanta account to other entities, the defendant claimed that this was a "baseless allegation". He once again said that the Yuanta account "was opened with Credit Agricole before Yuanta/my joint venture with TPG/Hady" and that it had "always been utilised by Yuanta and myself for other business transactions as well".

364 On being shown the BVI Financial Services Commission Register of Companies Search Report in respect of Yuanta, the defendant accepted Yuanta was only incorporated on 15 November 2010 (24-02-2016: tr 103). He was cross-examined further in relation to this aspect of his evidence as follows (24-02-2016: tr 105-115):

> Q. So it's clear that you only started looking to reserve the name on 12 November 2010?
>
> A. This happened very long time ago, so I can't remember correctly.
>
> Q. And the application for incorporation was on 15 November 2010?
>
> A. Yes.
>
> Q. Approved the same day?
>
> A. Yes.

Q. So in all your discussions with Mr Hartanto in 2010, leading up to the non-recourse loan agreement --

A. Yes.

Q. -- did you ever disclose that Yuanta was a company that didn't even exist at that time?

A. I didn't.

Q. And you made it a point in your affidavit, Mr Yeh -- … you made it a point to say in your affidavit, Mr Yeh, that Yuanta also had good credit rating and business relationships; and that was the reason why Mr Hartanto should put his shares with you?

A. No, I had a very good credit rating and business relationship. And of course, it also include Yuanta.

Q. So you are saying that Yuanta had good rating and business relationships?

A. Yes, for my part I will say that I have good credit rating and business relationship. But for Yuanta, it was a new company, so it has no bad records.

Q. Where do you say that at paragraph 11a of your affidavit?

A. My paragraph 11a is not wrong because Yuanta has no bad records. But most importantly, it was me who had no bad credit rating. I would say that the most important is that I don't have bad credit rating.

Q. That is a very different thing from saying that you had a good credit rating.

A. Because I am also the in-charge person of Yuanta.

…

Q. And you made it very, very specific at paragraph 11a of your AIEC, where you identified, "Yuanta and I enjoyed good credit rating and business relationships".

A. Yes.

…

Q. It follows Mr Yeh, that you could not have opened your Yuanta account in Credit Agricole prior to your incorporation on 15 November 2010.

A. … Yuanta had another account in Hong Kong at that time. I had another account in Hong Kong and the account was also under the name of Yuanta. It was also a BVI company. So since I wanted to enter into this new agreement, so I think it might as well, I used a new and clean company to enter into this agreement. Because for the previous Yuanta, I had other shareholders as well.

…

Q. Can I refer you to B957, paragraph 43 of your affidavit. This is your reply affidavit. The third sentence of paragraph 43, it says: "The Yuanta account was opened with Credit Agricole before Yuanta/my joint venture with TPG/Hady".

A. Yes, this happened long time ago, but I believe that it was before that.

Q. The question was, that you were making a statement in your affidavit that the Yuanta account was opened with Credit Agricole before "Yuanta/my joint venture with TPG/Hady". That's not true.

A. Yes, at that time, I thought that it was open before the joint venture. But I'm not very sure.

Q. You go on, Mr Yeh, to say: "It", which refers to the Yuanta account with Credit Agricole, "has always been utilised by Yuanta and myself for other business transactions as well".

A. Yes.

Q. That's also not true?

A. I think I might have mixed up the two companies, the Yuanta that I mentioned earlier and the new Yuanta.

Q. So are you now saying that the new Yuanta, as you call it, never had any substantial business at the time of the dating of the non-recourse loan agreement?

A. Yes, for the new Yuanta, there was none.

Q. And the point that you're trying to persuade the court in paragraph 43, is that the Yuanta account with Credit Agricole was used to carry out substantial business, and I would suggest to you, you are also saying here that it was not an account that was

specifically set up for your relationship with Mr Hartanto.

A. I think I might have mixed up the two companies, the old Yuanta and the new Yuanta. I can't remember correctly because this happened quite sometime ago.

Q. So the new Yuanta company, as you call it, was an account that you set up specifically for your transactions with Mr Hartanto and TPG?

A. This is one of the reasons.

Q. I'm not sure how to understand that response. Was the new Yuanta account, as you put it, specifically set up for your transactions with Mr Haranto and TPG? It's a "yes" or "no".

A. And I said, it was only part of the reasons.

Q. So you are still maintaining your position that the Yuanta account was used for other businesses?

A. It could be used for other businesses.

Q. Both incoming and outgoing of funds?

A. Yes, funds could be transferred from other accounts and I could use this account for other businesses.

Q. And you still maintain your position that these were substantial business transactions that were being channelled through the Yuanta account?

A. Even if we had no transactions in the past, we could have transactions in the future.

Q. No, I am asking you, are you saying that you had funds incoming from other businesses into the Yuanta account with Credit Agricole?

A. It can be done, because I remember that when Hady needed funds, I transferred some funds into this account.

COURT: Mr Tan wants to know whether you used the new Yuanta account for other business.

A. Not at the moment.

COURT: What is the name of the Yuanta company in Hong Kong?

A. I need to check the names, but it was a BVI company and we had done many transactions using this company.

COURT: What about the name of it?

A. I'm not very sure.

365 The explanation that the defendant gave in his affidavits in support of his denial that he had taken monies out of the Yuanta account inappropriately, was that the Yuanta account had been set up long before he entered into the Agreements with the plaintiffs and some of the monies in the account had been generated from his other business activities. It is now not in issue that the only funds that were transferred into the Yuanta account (except for S$20,000) were either funds raised from the loans from EFH or funds from the sales of the NexGen shares by the defendant.

366 The defendant's evidence in his affidavit was clearly inaccurate. His explanation in his cross-examination that he mixed up the two companies was most unimpressive. The defendant's willingness to give inaccurate affidavit evidence and emphasise it and then repeat it as he did in respect of this issue leads me to the conclusion that his evidence is very unreliable. This was compounded in his oral evidence when he suggested that there must have been a mix up of entities in his mind but then could not remember the name of the other entity in the so-called mix up. I do not regard the defendant as a credible witness in respect of this issue.

Breaches of contract claims

367 In their final submissions the plaintiffs contended that the defendants had committed the following breaches of the Agreements: (1) failing to obtain the requisite loans from Crédit Agricole; (2) transferring the NexGen shares to

EFH; (3) selling the 101.5m NexGen shares in February and March 2011; (4) selling the 60m NexGen shares in August 2011; and (5) failing to notify the plaintiffs of the margin calls from EFH and wrongful termination of the Agreements. The plaintiffs also claimed that the defendants are in breach of the Agreements by failing to service the interest on the EFH Loan Tranche 8 to 10; and concealing or failing to disclose material facts.

368 The plaintiffs also claim that the defendants are in breach of the SPA.

Failure to obtain loans from Crédit Agricole

369 The plaintiffs contended that it was a fundamental term of the Agreements that the loans were to come from Crédit Agricole. They claimed that the defendant accepted that both parties "had in mind" that Crédit Agricole would be the lender. They submitted that the elaborate lengths to which the defendants went in concealing EFH's identity, including during the course of the proceedings, betrays any suggestion that the identity of the lender was unimportant to the parties.

370 The defendants accepted that when he introduced the plaintiff to Mr Goh in late 2010 there was still a possibility that Crédit Agricole would be the lender (24-02-2016: tr 100-101). The plaintiff's evidence was that the reason that Crédit Agricole was not expressly referred to in the Agreements was because he gave the defendant "freedom" in respect of obtaining the loan (22-02-2016: tr 75). That so-called "freedom" was for the loan to be obtained from the defendant or institutions by guarantee or in co-operation with the defendant and the bank to be secured by shares (chapeau & cl 5 Supplementary Agreement). However the plaintiffs submitted that the

Supplementary Agreement constrains the defendant to obtain the loans from an "institution" that was "guaranteed by" or "in co-operation" with him. The plaintiffs submitted that this constraint shows that the parties placed importance on the identity and standing of the lender.

371 The plaintiffs also submitted that the expression "institution" must be read contextually in the light of the facts known to the parties at the time of the contract because such context and circumstances would reflect the intention of the parties when they entered into the contract and utilised such language: *Sandar Aung v Parkway Hospitals Singapore Pte Ltd (trading as Mount Elizabeth Hospital) and another* [2007] 2 SLR (R) 891 at [29]. It is true that the only "institution" made known to the plaintiff at the time of the execution of the Agreements with whom the defendant was working in co-operation was Crédit Agricole. The defendant agreed that he wanted to use Crédit Agricole "as a platform for our cooperation" (24-02-2016: tr 101). The plaintiffs submitted that there would have been no need for the elaborate arrangements of opening accounts for TPG and AEM and Yuanta with Crédit Agricole if it was not going to be the lender.

372 The plaintiffs' claim is that it was a fundamental term of the Agreements that the defendants were obliged to source the loans for the joint venture from Crédit Agricole. Having regard to the express terms of the Agreements and plaintiff's concession that the defendant had the freedom to obtain the loans from elsewhere I am not satisfied that there was such a fundamental term. The plaintiffs claim that the defendants are in breach of the fundamental term of the Agreements in failing to source the loans from Credit Agricole must fail.

Transferring the shares to EFH

373 The plaintiffs claimed that Yuanta and the defendant were in breach of the Agreements by failing to ensure that the terms of the lending arrangements with EFH were similar to the terms of the Loan Agreement with TPG. The plaintiffs relied upon what they submitted was an acceptance by the defendants that they had an obligation, in particular, to ensure that the margin call provisions of the agreement with EFH would be similar or the same as the margin call provisions with TPG. In this regard, the defendant gave affidavit evidence of his understanding of his obligations under the Agreements and was cross-examined as follows (25-02-2016: tr 106):

> Q. The effect of what you're saying at paragraph 21 is that the discretion that is given to you under the non-recourse loan agreement with TPG is for a very specific purpose.
>
> A. Yes.
>
> Q. Which is, a, to be able to offer the security to a third party lender?
>
> A. Yes.
>
> Q. b, to enter into arrangements with a third party lender on terms that are similar to the Yuanta agreement with TPG?
>
> A. Yes.
>
> Q. And that the margin call provisions in the loan agreement with the third party would be the same as the margin call provisions in Yuanta's agreement with TPG.
>
> A. Yes.

374 The Master Loan Agreement between Yuanta and EFH, set the margin call at a threshold that was 20 percentage points below the value of the loan provided (C 81). Under the Loan Agreement the margin call was set at a

threshold equal to the value of the loan provided. The defendant was cross-examined as to whether he accepted that there was a significant difference between the provisions of the Loan Agreement between Yuanta and TPG and the Master Loan Agreement between Yuanta and EFH. He accepted that the effect of the Loan Agreement between Yuanta and TPG was that the margin call was set at exactly the value of the loan (25-02-2016: tr 107). He also accepted that under that agreement Yuanta was protected against any fall in the value of the collateral, because once it hit the loan value, the lender could enforce the security (25-02-2016: tr 108). The defendant also accepted that under the EFH agreement, EFH was exposed up to a certain amount because it could only call on the collateral when it fell below the loan value. He also accepted that a sensible lender in such an arrangement who wanted to protect its position would start trading with the shares in order to hedge the exposure (25-02-2016: tr 109). The defendant was cross-examined further as follows (25-02-2016: tr 111):

> Q. This is a fundamentally different structure, in terms of the margin call provisions, from the margin call provision that we saw under the agreement between TPG and Yuanta.
>
> A. They are slightly different, but this is an agreement between me and EFH, while the other one is TPG and Yuanta.

375 The plaintiffs contend that the provisions of the Master Loan Agreement between EFH and Yuanta, would incentivise EFH to start selling the collateral the moment it received it so it could cover its position should the share price fall. The plaintiffs claimed that the defendant's decision to pledge the shares to EFH and to pledge them on the terms that it did, exposed the

collateral to unnecessary risk and to its inevitable disposal in the market the moment the shares were transferred to EFH.

376 It was submitted that despite the knowledge that the defendants had that EFH was trading with the collateral, they continued to pledge the shares to EFH and continued to do so even after being instructed not to pledge any further shares in April 2011. The plaintiffs also submitted that the defendants concealed these further pledges from them. The plaintiffs contended that in pledging the shares to EFH knowing that the shares would be sold immediately, the defendants breached their obligations to redeliver the shares upon maturity, to take reasonable care of the collateral, and to act in good faith and protect the legitimate interests of the plaintiffs.

377 EFH was entitled to sell the pledged NexGen shares but it also had redelivery obligations on repayment of the loans to "reassign all right, title, ownership and interest in identical securities in the amount" as pledged (cl 4.2 Master Pledge Agreement) (C 103).

378 Although the expert evidence (referred to later) suggested that lenders in non-recourse loan arrangements would act to protect themselves from a diminution in the value of the asset pledged, the plaintiffs have not established that EFH sold all the shares when they were pledged to it between February and June 2011. I am not satisfied that the plaintiffs have established that the defendants knew that EFH was selling the NexGen shares in that period.

379 There is a difference between the margin call provisions in the TPG and Yuanta agreements compared to the Yuanta and EFH agreements. However I am not satisfied that the difference is as described by the plaintiffs.

The plaintiffs entered into a non-recourse loan agreement that expressly authorised the defendants to sell the shares during the term of the loan agreement in respect of which the shares were pledged. They allowed Yuanta to redeliver the cash equivalent and were thus protected if the shares were not available.

380 I am not satisfied that the defendants were in breach of the Agreements by pledging the shares to EFH to obtain the loans for the joint venture.

Selling 101.5m NexGen shares in February and March 2011

381 The defendants' defence in respect of the sales of the NexGen shares in February and March 2011 is based on their claims that the defendant and Mr Goh were instructed to sell the shares to provide the plaintiff with urgently needed funds. I have found earlier that I do not accept the evidence of the defendant and Mr Goh that such instructions were given.

382 I am satisfied that the plaintiff instructed the defendant and Mr Goh to repurchase the shares that were sold and to bring them to account in the joint venture project. Those shares were to be available for pledging for loans to be secured for the joint venture investments.

383 The defendants' contention that even if the plaintiff did not instruct them to sell the shares, such sales were authorised under the Agreements is not sustainable. The only basis upon which the defendant explained the sales was that the plaintiff had requested and instructed him to make them. There was no explanation proffered as to why those sales would take place at the outset of the joint venture project with no instructions having been given by the

plaintiff. In any event the shares that were sold were not pledged against a loan at the time of the sale. The defendants were not authorised to sell those shares that were held on trust by Yuanta until they were pledged against a specific loan.

384 I am satisfied that the defendants were in breach of the Agreements in selling the 101.5m NexGen shares. True it is that those shares were repurchased. Although some of the shares were repurchased at a lower share price, it is clear that the additional funds from the sale of the shares in the first place were used by the defendant to pay to the associated companies ThreeSix Five Capital Ltd, LG Legacy Capital Inc and Gift Capital Inc. Those amounts are to be brought to account in due course.

Selling 60m NexGen shares in August 2011

385 In August 2011 the parties' relationship was souring and each was making claims upon the other. It seemed that each had become suspicious of the other. On the one hand the plaintiff was seeking information about the whereabouts of the NexGen shares and an account in respect of the shares that had been pledged and the loans that had been secured on the pledging of the shares. On the other hand the defendant was pressing the plaintiff for the transfer of the 700m NexGen shares that had been referred to in the email in June 2011.

386 The defendant sold the 60m NexGen shares and then used the monies from those sales to pay to the third parties referred to earlier in these reasons.

387 Having regard to my findings referred to earlier that I do not accept the defendant's explanation in respect of the sale of the 60m NexGen shares in August 2011, I am satisfied that the defendants were in breach of the Agreements in selling those shares. They had not been pledged against any loan made under the Loan Agreement and the defendant was not entitled to sell them.

388 The plaintiffs did not refer to the sale of the 225m NexGen shares by the defendant in October 2011 as part of the claims for damages for breach of the Agreements. The plaintiffs claimed that the defendants were in breach of their fiduciary duties in making secret profits from the sale of these shares. However I apprehended from the final oral submissions that the parties had also dealt with these sales as a breach of the Agreements. These shares were not pledged against any loan and the defendants were not entitled to sell them. However I have dealt with this claim below in relation to the alleged breaches of fiduciary duties.

Failing to notify the plaintiffs of the margin calls

389 It is not in issue that the defendant did not disclose to the plaintiffs that Yuanta was obliged to remedy margin calls from EFH. If the circumstances had been that Yuanta did not remedy the margin calls from EFH and the plaintiffs remedied the margin calls from Yuanta, Yuanta would still have been obliged to maintain its relationship with the plaintiffs and honour its obligations under the Loan Agreement notwithstanding that EFH could enforce the security under its Agreements with Yuanta. Yuanta would still have been obliged to comply with its redelivery obligations to the plaintiffs if

the loans were repaid by them by the redelivery of NexGen shares (by repurchase if they were no longer available) or the cash equivalent.

390 There is no doubt that the plaintiffs were well aware of the need to remedy the margin calls that were served on them by Yuanta under the Loan Agreement. This is evidenced in the plaintiff's request that the defendant use the shares or the cash in Yuanta's account to remedy the calls.

391 The defendant accepted in his oral evidence that Yuanta's margin call notices did not comply with the notice requirements under the Agreements that they be sent by registered mail. The plaintiffs claim that the defendant's failure to notify them of the margin calls in a timely fashion was significant because it deprived them of an opportunity to cure the margins. This submission does not have force in light of the fact that the plaintiffs did not take the necessary steps to remedy the margin calls. There was no suggestion at the relevant time that the notices were not valid or that they were not served in accordance with the Agreements. The plaintiffs recognised that there was a need to top up the security and once the plaintiff was advised that Yuanta was not in a position to use the funds or the shares in the Yuanta account in that regard (even if that was unreasonable), nothing further was done by the plaintiffs to remedy the margin calls. There were no claims made against the defendants until two and a half years later in May 2014, after they sued Crédit Agricole only in respect of the 225m NexGen shares that were transferred from TPG's account to Yuanta's account in October 2011. There was no explanation given in these proceedings for that delay and the trial judge in the Earlier Proceedings described the decision to sue Crédit Agricole without suing the defendants as "bizarre".

392 I am not satisfied that there was any breach of contract in the defendants' failure to serve the margin call notices within the time frame of the notice period in the EFH margin call notices. Yuanta was obliged to honour its contract with the plaintiffs irrespective of its obligations to EFH.

Failing to service the interest on EFH loans

393 The plaintiffs claimed that the defendants had no excuse for failing to pay the interest on EFH's Loan Tranches 8 to 10. That may be so. However the failure to pay the interest did not relieve Yuanta from its obligations to TPG to redeliver the shares or the equivalent in cash on maturity of the loans. I am not satisfied that Yuanta's breach of the EFH agreement was a breach of the Agreements with the plaintiffs.

Concealing or failing to disclose material facts

394 The plaintiffs claimed that the "non-disclosures" in relation to the identity of the lender, the terms of the lending and the unauthorised sales and trades, are breaches of the defendants' contractual obligation of good faith.

395 I have already found that the defendants were in breach of the Agreements in relation to the sale of the plaintiffs' shares. The failure to disclose those sales to the plaintiffs was also a breach of the defendants' contractual obligation of good faith.

396 The failure to provide an accurate and honest answer to the plaintiff when he was clearly under the impression that the shares were held by Crédit Agricole was also a breach of the defendants' contractual obligations of good faith.

397 I am not satisfied that the failure by the defendants to inform the plaintiff of the terms of the lending arrangements between Yuanta and EFH was a breach of the contractual obligation of good faith.

Inducement of Yuanta's breaches

398 The plaintiffs claimed that any breaches of the Agreements by Yuanta were induced by the defendant. There does not seem to be any issue that the defendant was the controlling mind of Yuanta and that the breaches committed by it were induced by him. I am satisfied the defendant induced Yuanta's breaches of the Agreements.

The SPA claim

399 Having regard to my findings (see [307]–[326] above), I am satisfied that the parties did not enter into the SPA. The plaintiff's claim in respect of the SPA will be dismissed.

Damages

400 The plaintiffs claim they have suffered loss and damage by reason of the defendant's breaches of contract, for which the defendants are liable to pay damages.

401 The plaintiffs claim that the 825m NexGen shares that were transferred into the Yuanta account have been "lost". The loans from EFH to Yuanta totalling S$14,374,331.68 have been used. The plaintiff has used S$10,286,422.27 for the purposes of the joint project. Yuanta has kept the balance of those loan proceeds and has utilised the sale proceeds from the sale

of the 60m NexGen shares in August 2011 and the sale of 225m NexGen shares in October 2011.

402 The parties are entitled to share equally in the profits of the joint project and are burdened equally with any losses of the joint project. The only way in which that can be ascertained is by some form of an accounting exercise. However it is reasonably clear that the defendant has taken for himself the sale proceeds of secret sales of the 60m NexGen shares in August 2011 and the 225m NexGen shares in October 2011.

403 The defendant was not entitled to sell the NexGen shares that had not been pledged against a particular loan. The plaintiffs are entitled to any profit made from the sale of its shares in February and March 2011, except they are only entitled to 50% of the profits from the sale of any shares treated as converted from the warrants that became an asset of the joint venture when the plaintiff was "reimbursed".

404 Neither the 60m NexGen shares sold in August 2011 nor the 225m NexGen shares sold in October 2011 were pledged against any loan. They remained in the Yuanta account held on trust until they were pledged against a loan. The plaintiffs are entitled to damages for the defendants' breaches in selling those shares. I will hear the parties on quantum.

405 The plaintiffs also make the portfolio claim with which I will deal later.

Breaches of fiduciary duties

406 The plaintiffs' claims, as pleaded, are that the defendant breached his fiduciary duties to the plaintiffs in the following ways: (1) by encouraging the plaintiff's mistaken belief that Crédit Agricole was the lender; (2) by instructing Mr Goh to encourage the plaintiff's mistaken belief that Crédit Agricole was the lender; (3) by failing to disclose their sales and trades, in particular the 60m shares in August 2011 and the 225m shares in October 2011; (4) by making secret profits; and (5) by keeping the loan monies that were for the benefit of both parties.

407 In final submission the plaintiffs alleged that the defendants breached their fiduciary duties by transferring the NexGen shares to EFH; selling some of the NexGen shares and retaining secret profits; retaining the full 10% of the loan when the EFH expense was only 3%; and failing to pre-empt, arrest and resolve the purported margin calls or defaults in interest payments (additional claims).

Encouraging the plaintiff's mistaken belief that Crédit Agricole was the lender

408 As I have said it was never made clear by the defendant why there was such secrecy in relation to the identity of the true lender. His evidence that he had entered into a confidential agreement with EFH was not a proper explanation for the secrecy. Any arrangement that he entered into for the purposes of obtaining loans for the project, even if there were confidentiality arrangements, did not exclude the plaintiff from knowing about such arrangements. The plaintiffs submitted that the real reason the defendant (and Mr Goh) kept the identity of the true lender secret was that it was in

accordance with their desire to encourage the plaintiff to continue under the misapprehension that Crédit Agricole was the lender.

409 It is apparent that EFH may have had a reputation as a fringe lender that had been found to be in breach of contract in respect of arrangements that were not dissimilar to the ones that were being entered into to obtain loans for the joint venture project. It was suggested to the defendant that the reason he did not inform the plaintiff of the identity of EFH was because the plaintiff may not have endorsed such an arrangement. However he denied that this was his motivation. The plaintiff did not give evidence that had he known that EFH was the true lender he would not have gone ahead with such an arrangement to obtain the loans. The highest he put it, sensibly in my view, was that he would have performed further checks in respect of EFH and that perhaps there may not have been a deal.

410 As I have found earlier the plaintiff was advised on 30 June 2011 that there were three other banks involved in holding the NexGen shares (see [289] above). He was never advised that the shares had been pledged to EFH even when he asked the direct questions as to the location of the pledged shares and the loan amounts that had been provided against the pledged shares.

411 The plaintiff could not have been under the impression that Crédit Agricole was the only lender after the meeting of 30 June 2011. Even so, the defendants owed a fiduciary duty of good faith to the plaintiffs in respect of the NexGen shares that were held on trust by Yuanta that had not been pledged against a loan. That included the 60m shares that were secretly sold in August 2011. When the plaintiff asked about those shares being used to remedy the margin calls, the defendant advised him, dishonestly, that he had

moved them to a custodian account. In this correspondence the defendant encouraged the plaintiff's belief that Crédit Agricole was involved in the loan arrangements. This was in breach of defendant's duty of good faith.

412 I am satisfied that the plaintiffs have established that the defendant was in breach of his fiduciary duty to the plaintiffs in encouraging the plaintiff's belief that Crédit Agricole was a lender.

Failure to disclose the sales and trades

413 The defendant owed fiduciary obligations to the plaintiffs not to mislead them in relation to the trades or sales of the shares that were held by Yuanta and were not pledged against a loan. The defendant's conduct in secretly selling the 60m NexGen shares in August 2011 and then suggesting to the plaintiff that the shares were still under his control was clearly in breach of his fiduciary duty to the plaintiff. The sale of the 225m NexGen shares in October 2011 and failing to account to the plaintiff in this regard was also conduct in clear breach of his fiduciary obligations to his co-venturer.

414 These breaches enabled the defendant to obtain the sale proceeds and use them for his own purposes.

Secret profits from the sales of shares

415 It is clear that the proceeds from the sale of the 60m NexGen shares in August 2011 were diverted to the defendant and his associates. Total sale proceeds from these sales amounted to S$1,374,620.20. Subsequently a sum of S$1,150,144.70 was transferred from the Yuanta account to the recipients

referred to earlier including the defendant. It is not disputed that these accounts did not relate to the joint venture.

416 The defendants were in breach of their fiduciary obligations to the plaintiffs in making secret profits by selling the plaintiffs' NexGen shares.

Retaining loan funds

417 The plaintiffs also claim that the defendants withheld some of the loan funds. The defendants claim that Yuanta received S$12,936,898 in loan funds from EFH, (after deducting their 10% fee). They claim that they only transferred S$11,302,934.13, mostly to the AEM account. The plaintiffs claim that even on the defendants' case that leaves a shortfall of S$1,633,963.87 in loan monies that should have been made available under the Loan Agreement.

418 However the plaintiffs claim that the defendants transferred a total of S$12,086,422.27 to AEM, leaving a shortfall of S$850,475.73 that the defendants have withheld and are liable to disgorge. The plaintiffs claim that on either view there will be a shortfall in the loan monies amounting to either S$1,633,963.87 (on the defendants' calculation) or S$850,475.73 (on the plaintiffs' calculation).

419 The defendants did not keep the plaintiffs informed of the progressive amounts of NexGen shares that were pledged to EFH as security for the loans. Nor did they advise the plaintiffs of the total loan funds that were provided on the security of the NexGen shares. The plaintiffs were dependent upon and trusted the defendant to provide the appropriate amount of the loans under the

Loan Agreement. The failure to do so was in breach of the defendants' fiduciary obligations to the plaintiffs.

System of account and proper records

420 There is no doubt that the plaintiffs have been put to inconvenience, expense and effort in trying to identify the location of the NexGen shares that it transferred to Yuanta's account. Although the defendant claimed in the Earlier Proceedings that he regarded EFH as his "partner", he claimed that he could not obtain any further information from EFH in respect of the whereabouts of the pledged shares.

421 The plaintiffs claim that the lack of forthrightness and good faith even in these proceedings speaks to the same lack of good faith in the defendants' dealings with the plaintiffs and also the notion that they must be held responsible for a significant part of the costs incurred as a result of their "repeated stonewalling". That is a separate matter and I do not regard that as part of the plaintiffs' claims in respect of the breach of fiduciary duty claim.

422 There were records kept from which the plaintiffs have now been able to construct the Chart of Transactions (Ex P6). Crédit Agricole kept records for the defendants, some of which were provided to the plaintiffs. However the form in which they were provided to the plaintiffs was "incomplete" because the defendant apparently instructed Mr Goh to produce the records in that form. That does not mean that there was a failure to keep proper records.

423 I am not satisfied that the plaintiffs have established that the defendants failed to keep proper records.

Additional claims

424 Although the plaintiffs' additional claims included matters with which I have dealt in relation to the sale of the NexGen shares and retaining the secret profits, the two claims that remain are the retention of the full 10% of the loans and the failure to pre-empt, arrest and resolve the EFH margin calls.

425 I am not satisfied that there is any basis upon which the plaintiffs can succeed in a claim that the defendants owed a fiduciary duty not to retain 10% of the loan funds. There was a clear contractual right for the defendant to retain that amount irrespective of any expense that was incurred by EFH, or for that matter any other lender with whom the defendants may have dealt.

426 I am not satisfied that the plaintiffs have established that the defendants owed a fiduciary duty to them to pre-empt or resolve or arrest the EFH margin calls. As I have said, the plaintiffs agreed that the defendants could re-deliver NexGen shares or the cash equivalent. The defendants were not contractually obliged to re-deliver the shares. In those circumstances they did not owe a fiduciary duty to the plaintiffs to pre-empt or arrest the EFH margin calls. The defendants' contractual obligations to the plaintiffs to re-deliver either NexGen shares or cash continued irrespective of whether the EFH margin calls were met.

Equitable compensation

427 The plaintiffs claim the net value of 1.05 billion "lost" shares. The calculation includes the value of the 825m pledged shares at S$41.625m at the time of their transfer, less loan sums transferred to AEM of S$11,302,934.13 leading to a net value of the 825m lost shares at S$30,322,065.87. The

plaintiffs seek to add to that the 225m shares that the defendants transferred from the TPG account and sold in October 2011 valued at S$0.06 per share, totalling S$13.5m. Accordingly the plaintiffs claim equitable compensation in the amount of S$43,822,065.87.

428 Yuanta transferred a total of 765m NexGen shares to EFH. Those shares were progressively pledged against loans provided to the joint venture project by Yuanta. It appears that EFH loaned Yuanta approximately 50% of the value of the pledged shares in each of the 10 loan tranches it provided. The plaintiffs claim that Yuanta had an obligation to obtain loans from third parties or provide loans from its own funds, based on the value of the shares at the time they were transferred into the Yuanta account. I am not satisfied that this is a reasonable claim. The loans were to be obtained or provided progressively. If the value of the shares had fallen by the time the loan was provided or obtained from a third party, it is unreasonable to require Yuanta to provide a loan at a higher valuation than the price at which the shares were trading at the time the loan was made.

429 The plaintiffs are to be compensated for the amount to which they would have been entitled had the defendants not breached their fiduciary obligations to them. That compensation is the profits made from the sale of the shares in February 2011 and the value of the 285m NexGen shares (60m in August 2011 and 225m in October 2011) that the defendants sold in breach of their fiduciary obligations (or the profits from those sales). I will hear the parties on quantum.

430 The plaintiffs also claim equitable compensation in respect of the portfolio claim with which I will deal later.

Conversion case

431 The plaintiffs claim that they had the immediate right to possession of the 1.05 billion NexGen shares (being the 825m transferred before June 2011 and the 225m transferred out of the TPG account in October 2011). The plaintiffs claim that they were entitled to the re-delivery of the shares upon the maturity of the loans and accordingly the title to the shares was always vested in the plaintiffs. Accordingly the plaintiffs claim that they had a right to immediate possession notwithstanding that the shares had been transferred from the TPG account to the Yuanta account.

432 Once Yuanta provided a loan that was secured by pledged shares, it was entitled at its discretion to sell the shares and/or to re-deliver a cash equivalent to the plaintiffs on maturity rather than re-delivering the NexGen shares. Accordingly I am satisfied that the plaintiffs' claim in conversion in respect of those shares that were pledged against a loan must fail.

433 However the plaintiffs' claim in conversion in respect of the shares that were not pledged against a loan is justified. Yuanta and/or the defendant had no entitlement to sell those shares being the 60m NexGen shares in August 2011 and the 225m NexGen shares in October 2011.

434 The plaintiffs are entitled to damages for the conversion of these shares by the defendants.

Conspiracy claim

435 The claim for conspiracy by unlawful means requires proof of the following elements: (a) that there was a combination of two or more persons

to do certain acts; (b) the acts were unlawful and performed in furtherance of the agreement between the combination of persons; (c) the alleged conspirators had the intention to cause damage or injury to the plaintiffs by those acts; and (d) the plaintiffs suffered loss as a result of the conspiracy: *EFT Holdings, Inc and another v Marinteknik Ship Builders (S) Pte Ltd and another* [2014] 1 SLR 860 at [112].

436 The conspiracy alleged by the plaintiffs is between Yuanta and the defendant. The mere fact that a controlling director of the co-conspirator, the company, may be the moving spirit of the company, does not negate what would otherwise be a conspiracy: *Nagase Singapore Pte Ltd v Ching Kai Huat* and others [2008] 1 SLR(R) 80 at [17] and [22].

437 Although the civil standard of proof is to be applied in respect of the claim the plaintiffs bear the burden "that is higher than on a balance of probabilities, but lower than proof beyond reasonable doubt": *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR 263 at [14]. Such a standard requires the tribunal of fact to act with "much care and caution before finding that a serious allegation" such as fraud has been established: *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 347. It is accepted that "cogent and compelling evidence commensurate with the seriousness of the allegation" is required before the Court concludes that the allegations are established on the balance of probabilities: *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and others* [2013] 1 SLR 1254 at [72].

438 The plaintiffs accept that they must prove that the defendants had an intention to injure the plaintiffs. That intention does not have to be the

"predominant" intention of the defendants. It suffices if it is a necessary corollary of the defendants' wrongful acts: *Chew Kong Huat v Ricwil (Singapore) Pte Ltd* [1999] 3 SLR(R) 1167 at [35].

439 The plaintiffs provided Particulars of the alleged unlawful acts or means by which they claimed they were injured (A 54-55). They alleged that those unlawful acts or means were false misrepresentations made by the defendant to the plaintiff that: (a) the defendants were linked to Yuanta Financial Holdings in Taiwan; (b) the defendants would be pledging the NexGen shares to obtain loans specifically from Crédit Agricole; and (c) Crédit Agricole would charge a handling fee and interest amounting to 10% of the loan sums to be disbursed to the AEM account.

440 The evidence in relation to the first alleged misrepresentation ebbed and flowed to the point that Counsel for the plaintiff was asked whether it was still a real issue in the proceedings (22-02-2016: tr 115). Counsel advised that such a link to Yuanta Financial Holdings in Taiwan "might be background". In those circumstances it is difficult for the plaintiffs to rely upon this allegation as part of the underlying unlawful means in their conspiracy claims against the defendants. The defendants submitted that in any event the plaintiffs had not adduced any credible evidence in support of this allegation. The defendants relied upon the following cross-examination of the plaintiff in this regard (22-02-2016: tr 111-114):

> Q. You are complaining that you thought Yuanta Asset Management was linked to Yuanta Financial Institution in Taiwan, that's what you thought, correct?
>
> A. No, it's what in == the representation from Jack Yeh to me.

> Q. You received what from --
>
> A. What he represent --
>
> …
>
> A. (Through interpreter) [T]hat he was -- this was what Jack Yeh had represented himself to be, since he was a Taiwanese.
>
> Q. Are you telling the Court that if Jack Yeh's company was not linked to the Taiwanese company, then you would not, based on your case, borrow money from Credit Agricole?
>
> A. No, we will do another due diligence, your Honour.
>
> Q. Are you saying that if Jack Yeh's company was not linked to the Taiwanese company, you would not have borrowed money from Credit Agricole?
>
> A. Maybe we don't have the deal, your Honour.
>
> …
>
> Q. … I just want you to answer my question. If Yuanta was not linked to the Taiwanese company, would you still have borrowed money from Credit Agricole?
>
> A. No, we will ask more, more strength, more due diligence, your Honour. I already say.
>
> …
>
> Q. Please answer my question. If Yuanta was not linked to the Taiwanese company, you still would have borrowed money from Credit Agricole, correct?
>
> A. If Credit Agricole give the facility, yes.

441 The defendants submitted that the plaintiff's answer that the defendant "represented himself to be, since he was a Taiwanese" shows that the plaintiff thought that Yuanta and/or the defendant were linked to Yuanta Financial Holdings simply because the defendant was Taiwanese and not because the defendant positively represented that he was linked to that institution.

442 I am not satisfied that the defendant claimed or represented to the plaintiff that he or Yuanta was linked to Yuanta Financial Holdings in Taiwan.

443 The defendants also submitted that the plaintiffs' case in respect of the second alleged misrepresentation has not been proved. In this regard the plaintiff's evidence in cross-examination was important. It was as follows (22-02-2016: tr 72-75):

> Q. And is Credit Agricole, being the lender, very important to you, very crucial to you?
>
> A. Yes, your Honour.
>
> Q. Why is it that when you sign the three agreements, you did not insist that Credit Agricole must be specified as the only lender; why?
>
> A. Because it's explained here, looking for another bank. The -- Yuanta will looking for a few bank, what -- he have the facility, your Honour. That's why they don't put the name because it's give him the free to bring do another bank come in, your Honour.
>
> Q. So are you telling the court that Credit Agricole is not the only lender?
>
> A. What they promise is looking for the bank is treated, like, enough. They have another bank will loan to Yuanta, which he claimed he have another bank -- another facility from another bank.
>
> COURT: Another facility from another bank?
>
> MR HEE: Facility from another bank, that is correct. Now make sure that we understand your case perfectly well. Are you telling the Court that it was your understanding that Credit Agricole was one of the three lenders?
>
> A. Not the three, he say one of the lender. Because we are looking for the -- he looking for the cooperation together.
>
> Q. Yes?
>
> …

> Q. Cooperation together. So what do you mean by a cooperation together?
>
> A. I explain like she can speak, okay? (Through interpreter) The background to this agreement between us, that he offered me to take over the shares from my company, 900 million shares to be placed into the three funds that they owned. What has been offered was a loan from the bank, before it was transferred to the existing -- the existing three funds that they owned. So from the start, we already know that the money will be from the bank, so he offered several banks. One of them, the first one was Credit Agricole. And in the end, Credit Agricole has agreed to offer to grant us a loan of 45 million and Credit Agricole has granted us that amount. So according to the agreement, Credit Agricole will then grant this loan. So as if this agreement that we have signed was signed before Credit Agricole granted -- agreed and granted -- sorry -- agreed that it would grant. So when we signed this agreement, it was not clear just yet which bank would grant us the loans. The reason why Credit Agricole was not written here in this agreement was that if it has -- that means I give Mr Yeh the freedom to -- when we signed this agreement, the bank has not given us the loan just yet. Yuanta promised that it will be able to get the loan from the bank.

444 The plaintiff's reference to giving the defendant "freedom" is understandable having regard to the terms of the Agreements. The choices were set out clearly and Crédit Agricole was not named as the only bank or institution from which the loans could be sourced.

445 There is a difference between an allegation of an express false misrepresentation that Crédit Agricole was the lender and a failure to advise the plaintiffs of the true identity of the lender. It is the former that the plaintiffs alleged was the unlawful act. The plaintiff admitted that the defendant had the freedom to arrange the loans from other institutions. If the defendant had

promised or represented that Crédit Agricole was the lender he would not have needed such freedom.

446 I am not satisfied that the defendant made a false misrepresentation to the plaintiff that the defendants would be pledging the NexGen shares to obtain loans specifically from Crédit Agricole.

447 The final alleged unlawful act was that the defendant made a false representation that Crédit Agricole would charge a handling fee and interest amounting to 10% of the loan sums to be disbursed to the AEM account.

448 The defendants relied on cl 3(a) of the Loan Agreement in which the parties agreed that the total sum of the loan interest, application fees and other charges "shall be within 10%" and deducted when the Yuanta account had been credited with the loan funds. The amendment to the Loan Agreement (the Second Loan Agreement) also referred to fees being so deducted during "the one-time fund allocation" at "10%/year". The defendants also relied upon cl 1 of the Supplementary Agreement which provided that the expenses "shall not exceed 10%" of the loan expenses to be deducted at the time the funds are disbursed. Additionally the defendant relied upon the plaintiff's evidence that he was fully aware that Yuanta/the defendant was entitled to 10% of the loan amounts as a handling fee. He gave the following evidence (23-02-2016: tr 107-108):

> Q. Now, coming back to C18 again, you were fully aware that Mr Yeh was entitled to 10 per cent of the loan amounts as you call it, "handling fee" all right?
>
> A. Yes, your Honour.
>
> Q. And are you telling the court today that you are not happy with him getting 10 per cent of the handling fee?

A. What do you mean I am not happy.

Q. Are you telling the Court today that you are not happy with him being entitled to 10 per cent of the handling fee, of the loan amount as handling fee?

A. Yes, your Honour.

449 The defendant submitted that given the clear terms of the Agreements that the defendants, in particular Yuanta, would be charging the 10% fees, it is impossible that the plaintiffs would have been misled into thinking that Crédit Agricole would be the party charging the 10% fees. I agree.

450 The plaintiffs have failed to establish that this representation was made.

451 The plaintiffs claimed that the defendants conspired together from the outset of their relationship with the plaintiffs to harm the plaintiffs. It was submitted that the defendants never intended to perform or take part in the joint venture project; and that from the outset the defendants had the intention of using the plaintiffs' NexGen shares for their own gain. I do not accept that the defendants never intended to carry out the joint venture project. Clearly they obtained loans and provided them pursuant to the Loan Agreement.

452 I should record that in final submissions the plaintiffs sought to rely on other unlawful acts or means being: misleading the plaintiff into believing that the lender was Crédit Agricole; committing a series of wrongful acts to conceal the identity of EFH; and the wrongful trading with the pledged shares. I have dealt with each of these claims elsewhere in respect of the plaintiffs' claims for damages for breach of contract and/or fiduciary duty. The plaintiffs have proved that the defendants failed to disclose the identity of the true

lender to them and they also established that the defendants sold a number of NexGen shares in breach of the Agreements and in breach of the defendant's fiduciary duties. However it is not appropriate to set out to prove these breaches and then characterise them as the unlawful acts or means of a conspiracy claim that was not previously pleaded in reliance on such acts or means. In such a serious claim of conspiracy the plaintiffs are to be held to their pleadings.

453 The unlawful means alleged were the express representations allegedly made to the plaintiff prior to the entry into the Agreements. The plaintiffs have failed to prove those express representations were made. The plaintiffs' failure to establish any of the unlawful acts or means as particularised puts an end to their claim in conspiracy and it will be dismissed.

Portfolio claim

454 The parties relied upon the expert evidence to prove, or disprove, the link between the disposals of the shares and the market impact. I agree with the plaintiffs' submissions that ultimately very little divided the expert opinions. All of the experts agreed that the disposals of the shares had an impact on the share price. The difference between the experts relied upon by the plaintiffs, Mr Tan and Mr Hayler and the expert relied upon by the defendants, Mr Tam, was the degree of that impact.

455 It is appropriate, at this juncture, to refer in some detail to the expert evidence.

456 The experts prepared a Joint Report dated 12 February 2016 ("the Report"). The Report defines "Admitted Share Sales" as sales of NexGen shares admitted by the defendant in his affidavit dated 3 November 2015; and "Disputed Share Transfers" as those transactions that the defendants claim were transfers of NexGen shares to EFH, but which the plaintiffs claim were wrongful disposals or otherwise resulted in shares being made available on the open market.

457 The Report deals with the questions: (1) whether the Admitted Share Sales could have caused a reduction of the NexGen share price ("Issue 1"); and/or (2) whether the Disputed Share Transfers could have caused a reduction of the NexGen share price if they were "disposed of" during the periods: (a) February to June 2011 at around the time that each tranche of shares was transferred to EFH; and (b) September to October 2011 at around the same time that each tranche was purportedly defaulted on (where the dates for tranches 1 to 7 are based on the last day for top-up payment; and the dates for tranches 8 to 10 are taken as 125 days from the Closing Date) ("Issue 2").

458 The experts assumed that up to 90% of the actual volume traded on each day was sales by EFH. On days when there was overlap of Admitted Share Sales and Disputed Share Transfers the combined volume traded on each day is capped at 90% notwithstanding that the Admitted Share Sales alone represented more than 90% of the traded volume on two of the sixteen days of relevant trading (11 February 2011 and 25 August 2011).

459 The experts agreed that the movement in share prices in public companies may be broadly attributed to "market, industry or company (fundamental and technical) factors".

460 Messrs Tan and Hayler ("Tan/Hayler") considered that the impact of both the Admitted Share Sales and the Disputed Share Transfers can most easily be identified by comparing the movements in the NexGen share price with the movements in the market and/or industry over the same period. In this regard they applied a two stage process: a comparison of the movements in the NexGen share price with movements in the SGX, measured by the Straits Times Index ("STI") and the Financial Times Stock Exchange ST Small Cap Index ("FSTS") ("Stage 1"); and if the NexGen share price underperformed the market/industry in any relevant period, they looked for negative news items relevant to company specific fundamental factors that may explain the share price movements ("Stage 2").

August 2011 Admitted Shares Sales

461 The NexGen share price decreased by 8% on the four near consecutive days of trading 19, 22, 23 and 25 August 2011 (no shares were said to have been traded on 24 August 2011). The shares sold on these days represented about 50% of the total volume traded over the five days.

462 Stage 1: the proxy for the industry was up over the relevant period and Tan/Hayler expressed the opinion that "industry factors" did not appear to explain the underperformance in the NexGen share price as against the industry performance: the Report at [4.20]–[4.21].

463 Stage 2: There was a positive announcement by NexGen on 12 August 2011 of its results for the quarter ended 30 June 2011 of a large increase in revenue (albeit from a low base) and a further announcement on 19 August 2011 that all of its resolutions had been passed at its annual general meeting

and extraordinary general meeting. There were no negative company specific news items in the period 19 to 25 August 2011 or the week preceding that period: the Report at [4.22]–[4.23].

464 Tan/Hayler concluded that the Admitted Share Sales in August 2011 "appear to have depressed" the NexGen share price: the Report at [4.24].

465 Mr Tam looked at the intra-day price movement of the NexGen share price on these days to see if there was any material movement in the share price with the sale of each tranche by Yuanta. He also looked at the share price 5 trading days after each sale to see if there was any material movement in the share price: the Report at [5.1.1]–[5.1.3]. He concluded that there was "no material movement" in the NexGen share price at either time: the Report at [5.1.4].

October 2011 Admitted Share Sales

466 Tan/Hayler observed that the NexGen share price decreased by about 42% over the whole period of Admitted Share Sales from 10 to 20 October 2011(except for 14 October 2011 when no shares were said to have been traded): the Report at [4.25]–[4.26]. The shares sold on these days represented about 65% of the total volume of shares traded: the Report at [4.27].

467 Stage 1: the proxy for the industry was slightly up over the period: the Report at [4.29]-[4.30]. The NexGen shares underperformed the industry and Tan/Hayler considered that industry factors did not explain the underperformance: the Report at [4.30]–[4.31].

468 Stage 2: Tan/Hayler considered announcements by NexGen and by Scorpio East to determine whether there was an impact on the NexGen share price.

469 These included the announcement by Scorpio East on 25 March 2011 of the appointment of a special auditor to investigate certain transactions and the creation and termination of contracts by the Group; Scorpio East's announcement on 7 September 2011 that the special auditor had determined that certain terminated contracts should have been disclosed and that the plaintiff was a party to the termination without prior approval of the board; the NexGen announcement on 24 September 2011 that its application to be removed from the SGX Watch List had been rejected; Scorpio East's announcement on 10 October 2011 that the plaintiff had commenced defamation proceedings against certain Scorpio East directors; and the SGX announcement on 20 October 2011 of a breach of rules by Scorpio East and a reprimand against the company and two directors including the plaintiff: the Report at [4.33]-[4.45].

470 Tan/Hayler concluded that the 24 September 2011 announcement by NexGen would have had "minimal, if any" impact on the share price: the Report at [4.35]; that the Scorpio East announcement on 25 March 2011 appeared "unlikely" to have had an impact on the share price; that the Scorpio East announcement on 7 September 2011 did not negatively impact the share price; and that the SGX announcement on 20 October 2011 would not be a reason for underperformance on that day. Tan/Hayler considered that the Admitted Share Sales in October 2011 "appear to have depressed the share

price": the Report at [4.49]. I will refer to Mr Tam's opinion in respect of these announcements below.

Disputed Share Transfers

471 The experts considered a scenario in which EFH sold the shares as quickly as possible from the dates of transfer, referred to as the "ASAP scenario": the Report at [4.50]. Although Tan/Hayler considered a second scenario, referred to as the "Volume Constraint scenario" this is no longer relevant having regard to the letter from EFH in which it has been made clear that there was no volume constraint agreement between Yuanta and EFH (the addendum).

472 Tan/Hayler concluded that the NexGen share price in the ASAP scenario generally underperformed the industry: the Report at [4.57]. They considered that industry factors did not explain such underperformance in the period 1 February 2011 to 13 June 2011 and to 28 July 2011: the Report at [4.62]–[4.63].

473 Tan/Hayler reported that they were not aware of significant company-specific news having been reported over the relevant period. Indeed on 14 February 2011 NexGen announced positive results for the quarter ended 31 December 2010 and made several announcements during April to June 2011 relating to its efforts to acquire a satellite business in China and data centre business in Indonesia. Tan/Hayler reiterated their views that the Scorpio East announcement in March 2011 did not appear to have any negative impact on the NexGen share price. They concluded that the Disputed Share Transfers

"appear to have depressed the share price of NexGen, if sales were made from the dates of transfer": the Report at [4.64]–[4.67].

474 Tan/Hayler also considered a number of other matters: the relative scale of trading; block trading; and "0" price and "0" volume data points. The amount received by the defendants from the Admitted Share Sales in relation to the collateral shares it sold directly, net of repurchases was around S$3.1m. The amount received by the defendants from Admitted Share Sales in relation to the 225m NexGen shares in October was around S$1.5m. The value of the 765m NexGen shares transferred by the defendants to EFH was around S$28.8m at the time of transfer. If EFH sold the shares from the dates of transfer the value to EFH would be around S$27.7m in the ASAP scenario. Tan/Hayler concluded that it appeared "with hindsight" that if EFH sold the shares from the dates of transfer the amounts it would have received would have been materially greater than the amount of the loan to the plaintiffs: the Report at [4.87]–[4.92].

475 Although Tan/Hayler attempted to analyse any block trades their evidence was ultimately of little assistance in respect of the impact that the defendant's conduct may have had on the NexGen share price. Similarly their analysis in respect of the "0" price and "0" volume data points does not assist.

476 Tan/Hayler's conclusions are that the NexGen share price decline is "likely attributable" to the Admitted Share Sales: the Report at [4.109]; and that, absent other factors, the Disputed Share Transfers depressed the NexGen share price if sales were made from the dates of transfer in the ASAP scenario: the Report at [4.112].

477 Mr Tam expressed the view that the NexGen announcement on 24 September 2011 was "an important and potentially price sensitive announcement" because NexGen was facing the prospect of delisting if it did not comply with the requirements to exit from the Watch List by 1 June 2012: the Report at [5.1.7]. He concluded that it was probable that irrespective of the share sales in October 2011 that the NexGen share price "may have continued its decline" into October 2011: the Report at [5.1.8]. He also concluded that the impact of the October share sales on the NexGen share price was "uncertain" because the price was already on the decline and the SGX's reprimand appeared to have further impact on the share price causing it to reach a "new low": the Report at [5.1.9]. This opinion needs to be viewed in light of the fact that the SGX announcement was not made until after the trade closing time on 20 October 2011, a matter that Mr Tam accepted when giving oral evidence.

478 Mr Tam analysed the share price during the period of the share sales. It decreased substantially over seven of the ten "windows"; it increased over two of the ten "windows"; and remained unchanged in one of the ten "windows". He concluded that it declined by 67% over the period 1 February 2011 to 13 June 2011. He also concluded that if the shares were sold on the dates under the ASAP scenario they would have represented 35% of the total volume trades. He expressed the opinion that to assume that 35% of the volume of trades caused a decline in the share price is to ignore how the balance shares (over 1.4 billion) were traded and their impact: the Report at [5.2.14].

479 Mr Tam emphasised that there were no queries from the SGX for unusual trading activities from which absence he concluded that it was

unlikely that EFH would have "dumped" NexGen shares during September 2011 to January 2012.

480 The experts concluded that the sale of the NexGen shares in February and March 2011 did not cause the share price to fall: the Report at [4.13] and [5.1.4]. Tan/Hayler concluded that the balance of the share sales after this period caused the NexGen share price to fall. Mr Tam's view was that it is not possible to conclude that such sales caused the share price to fall. Rather he suggested that the outcome is "inconclusive" given the presence of various other factors that probably had a negative impact on the share price at the time.

481 The defendants submitted that Mr Tam's view in this regard should be preferred given the various uncertainties in the experts' assumptions and the presence of the other factors that had a negative impact on the price. These other factors included the negative company news, a falling market and NexGen's poor financial performance.

482 The experts were asked to assume that EFH would have sold the pledged shares very soon after Yuanta transferred them. EFH's correspondence in respect of the NexGen shares did not disclose unequivocally that it had sold the shares. It is unsatisfactory that the plaintiff has had to expend money and effort in trying to find out from the defendant where the shares might be. The defendant clearly had a close business relationship with EFH, referring to it as its "partner". The rapidity with which he was able to enter into the Master Loan Agreement and the Master Pledge Agreement with EFH within weeks of entering into the Agreements with the plaintiffs is indicative of his close relationship with EFH. However the

defendant claimed that he was not able to find out whether EFH had sold the pledged shares, albeit that during his evidence he gave an indication that he might be able to have a discussion with EFH in this regard as late as February 2016.

483 The defendants submitted that the numerous possibilities and permutations by which EFH could have sold the shares, if at all, render the assumptions the experts were asked to make meaningless and dangerously speculative. The defendants submitted that it is inconclusive whether the conduct of EFH's disposals of the NexGen shares could have caused the price decline in 2011.

484 Mr Tam's opinion was that the defendant's sales of the 60m NexGen shares in August 2011 did not cause a decline in the share price. There was no material intra-day movement in the price of the shares on the dates of the sales. The fluctuation between the highest price and the lowest price for each day was not more than S$0.002. The total price movement between 19 August 2011 and 25 August 2011 was a decline of S$0.002. The defendants submitted that this is no more than the usual fluctuation caused by regular share trading activity and is not material or significant enough to be considered as underperformance.

485 Mr Tam also noted that there was no material movement in the share price 5 trading days after each sale (Ex D 1). He expressed the view that the NexGen share price was already on the decline from late September 2011 because of the significant negative and price-sensitive news that was announced in that month. That decline continued into October and coincided with the October 2011 sales.

486 The defendants emphasised the SGX announcement released on 24 September 2011 rejecting NexGen's application to be removed from the watchlist. That announcement recorded the SGX view that there was "uncertainty over whether the Company's profit achieved in FY2011 would be sustainable". The defendants submitted that this reason would cast serious doubts in investor's minds as to the financial performance of the company in general and also in respect of the projected profit being achievable. The defendants submitted that Mr Hayler's attempts to downplay the implication of this announcement should be rejected. Mr Hayler described the announcement as demonstrating that the SGX was being cautious. Be that as it may, I agree with the defendants' submissions that this SGX announcement was material and significant negative news in relation to NexGen at that time.

487 The experts' opinions are based on the two sets of assumptions provided to them. It is obvious that if those assumptions turn out to be incorrect, or if partially incorrect, then such opinions would need adjustment.

488 It is not in issue that the agreement between EFH and Yuanta entitled EFH to sell any number of the pledged NexGen shares at any time. The defendants contended that EFH may have sold them in tranches immediately after the transfer from Yuanta and other tranches only after the default in the margin call. They submitted that EFH could have sold the 10 tranches of shares in any order or sold a portion of the tranche or more than one tranche at each transaction. Alternatively EFH could have sold some of the shares in 2012, as opposed to 2011 or within a period with which the experts were not asked to deal. It was submitted that the numerous possibilities and permutations by which EFH could have sold the shares, if at all, make the

assumptions the experts were asked to adopt meaningless and dangerously speculative for the purpose of determining whether such conduct caused the NexGen share price decline in 2011. For these reasons the defendants submitted that it is inconclusive whether such disposals could have caused the decline in the NexGen share price.

489 Mr Tam expressed the view that the sale of the 60m NexGen shares by the defendants in August 2011 did not cause a decline in the NexGen share price because: there was no material intra-day movement in the price on the days of the sales; and there was no material movement in the share price 5 trading days after each sale. The share price in that period ranged between S$0.024 and S$0.022.

490 Tan/Hayler on the other hand expressed the opinion that the August 2011 sales had caused an underperformance of the NexGen shares against the market because the NexGen share price underperformed the share market from 19 to 25 August 2011; and there was no negative company news to which such underperformance could be attributed.

491 One of the aspects of the Tan/Hayler measurement of the underperformance was a comparison with other telecommunication companies being Singtel and M1. There is no issue that those two entities are large blue chip companies that are quite different from NexGen. The reverse takeover of NexGen was for the purpose of delivering the satellite business into that company. Prior to that takeover NexGen had been a textile manufacturer wholesaler/retailer. Thus the telecommunications business in NexGen was very young and it was far smaller than Singtel and M1. Additionally NexGen was on the watchlist of SGX. It was submitted that comparing NexGen's

performance with that of Singtel, with its market capitalisation of approximately S$59 billion and M1 with its market capitalisation of around S$2.4 billion is inapt. Similarly it was submitted that Tan/Hayler's use of the STI and FSTS was inapt because each index is made up of companies that are larger than NexGen with shares trading at higher prices than NexGen.

492 It was also submitted that it is far too simplistic to conclude that the NexGen shares underperformed the market just because the percentage increase registered by NexGen is less than the percentage increase registered by the comparable companies (the proxy indicators). The defendants highlighted the fact that because the NexGen shares were trading at such low prices, the most minute price fluctuation would be amplified in terms of percentage. For instance, if the share price were trading in the range of S$2.00, a decrease of S$0.001 would result in a percentage decrease of 0.05%.

493 Mr Tan noted that the proxy indicators performance increased in the period 19 to 25 August 2011 whereas the NexGen price decreased by 8%. He then concluded that the NexGen shares had underperformed against the market. In reaching this conclusion Mr Tan considered the 5 sales as a whole and did not analyse each tranche on its own.

494 The defendants analysed each sale during the period 19 to 25 August 2011. In respect of the first sale on 19 August 2011 there was a decrease of S$0.001 which amounted to a decrease of 4%. The STI and FSTS also registered the decrease although at a smaller percentage of 0.80% and 1.44% respectively. The defendants submitted that the decrease of the NexGen price of S$0.001 was consistent with the trend of the decrease in the market

performance for the day. They emphasised that the volume of the trade of NexGen shares accounted for only 22.8% of the total shares traded that day.

495 On 22 August 2011 when the second tranche of NexGen shares were sold there was a decrease of S$0.001 or 4.17% in the NexGen share price. The FSTS registered a drop of 0.32% and the STI registered a slight increase of 0.39%. It was submitted in this circumstance the comparison with the FSTS and STI is inconclusive as to whether the market had gone up or down. In any event it was submitted that the minute decrease in the NexGen share price of S$0.001 in both the first and second tranches should not be considered a material or significant decline in price and they do not reflect that the NexGen shares had underperformed the market.

496 The final three tranches on 23 August 2011 and 25 August 2011 did not register any movement in the NexGen share price. Whereas the STI and the FSTS each registered a small percentage increase. The defendants submitted that given there was no price decline on those two days it would be unreasonable to conclude that these sales had caused the NexGen share price to decline. It was submitted that it is speculative to assume that the NexGen share price would have increased without those three sales.

497 The defendants relied upon the fact that in August 2011 there was a sharp drop in stock prices in stock exchanges throughout the world. They submitted that thereafter severe volatility continued for the balance of the year. Correspondingly the STI Index and FTSE ST All-Share Index recorded a decline from August 2011 reaching its lowest point in October 2011.

498 In this regard the defendants relied upon a number of articles annexed to their Written Submissions (Annexure 2). The first is entitled "Investors lose a trillion dollars in one day" written by Steve Hargreaves on 9 August 2011, for Cable News Network. That article included the following:

> NEW YORK (CNN Money) – Investors lost a trillion dollars in the **stock market Monday** as the debt crisis in Europe, lackluster economic news and a **downgrade to the U.S. credit rating** spark fears of a double-dip recession.
>
> The Wilshire 5000 Total Market Index, the broadcast index of U.S. stocks, lost 891.93 points, or just over 7%, Monday. This represents a paper loss for the day of approximately $1.0 trillion.
>
> Monday is the largest percentage drop for the Index since December 1, 2008 when it fell over 9%.

499 In a similar article entitled "S&P 500 Extends Worst Slump Since 2008 Bear Market on Downgrade" written by Rita Nazareth for Bloomberg reference was made to "cheapness in the stock market" including "Treasuries". The final article relied upon by the defendants was "Dow plunges after S&P downgrade" written by Ken Sweet on 8 August 2011 for Cable News Network which referred to Wall Street having its "worst day" since the 2008 financial crisis.

500 The defendants submitted that in all the circumstances Mr Tam's opinion that the position is inconclusive should be preferred.

501 The experts differed in respect of the effect of the October 2011 sales on the NexGen share price. Once again the defendants were critical of Mr Tan for taking the October sales as a whole without analysing the individual tranches. It was submitted that Mr Tan's approach was "too simplistic". The defendants' analysis of the sales showed that on 10, 18 and 20 October 2011 a

price decrease of S$0.002 had occurred. On those same days the market had also decreased based on the decrease of the STI and FSTS. As they submitted in respect of the August 2011 sales, the defendants submitted that there would be a larger percentage movement of the NexGen shares simply by reason of the volume of shares and the low price at which the shares were traded. They submitted that the NexGen share price trend was consistent with the market trend on 10, 18 and 20 October 2011.

502 The sales on 11, 13 and 19 October 2011 registered no price movement for the NexGen shares, whereas the STI registered a decrease. In a further sale on 17 October 2011 the STI registered an increase whereas there was no movement in the NexGen share price. The only sale in which the NexGen share price declined even though the STI and the FSTS registered an increase occurred on 12 October 2011.

503 Tan/Hayler also expressed the view that the NexGen share price declined after 24 September 2011 but stabilised before 10 October 2011. Prior to 24 September 2011, the NexGen shares had been trading at prices above S$0.002. On 26 September 2011 the price declined to S$0.017. The price continued to decline from 27 September 2011 to 7 October 2011.

504 Mr Tan expressed the view that the NexGen share price fluctuated "from 3 October to 7 October but remained around SGD $0.012 until the start of the October Admitted Share Sales on 10 October 2011". The defendants highlighted the fact that there was no trading between 7 October 2011 and 10 October 2011 and that Mr Tan's opinion must be considered in this context.

505 It is not in issue that the NexGen share price continued to decline from 10 to 20 October 2011. However the defendants submitted that the gradient of decline in that period was no steeper than the gradient of decline registered in the period between 26 September 2011 and 7 October 2011. The defendants contended that if the October sales added to the impact of the 24 September 2011 announcement, one would expect the prices would register a steeper decline than during the period prior to the commencement of the October sales.

506 The defendants submitted that given the very material negative impact of the 24 September 2011 announcement and the poor-performing market in October 2011 the evidence is "inconclusive" that the price decline from 10 to 20 October 2011 was caused by the October 2011 sales.

507 Mr Tam expressed the opinion that the numerous announcements between 16 September 2011 and 20 December 2011 were negative in nature and could well have caused the NexGen share price decline during the latter part of 2011. It was submitted that there was a compounding effect of the 24 September 2011 announcement rejecting NexGen's application to be removed from the watch list; the SGX announcement on 20 October 2011 reprimanding the plaintiff in respect of his conduct at Scorpio East; the NexGen announcement on 30 October 2011 of the resignation of the plaintiff as Executive Director; the profit warning issued by NexGen on 5 November 2011 in respect of the results for the second quarter ended 30 September 2011; and the NexGen announcement on 19 November 2011 of the cessation of one Tan Jooi Boon's employment as executive director.

508 It was submitted that Mr Tan failed to consider the announcements after 20 October 2011 in his analysis given the obvious negative impact of them. Mr Tan took the view that it was inappropriate to consider announcements after the sale period of 10 to 20 October 2011.

509 The defendants also made submissions in relation to NexGen's financial performance generally. Mr Tam expressed the opinion that NexGen's financial position had deteriorated between 31 March 2011 and 31 March 2013. It made a substantial loss of S$66.7m for the year ending 31 March 2013. The defendants submitted that this poor financial performance renders the position even more inconclusive.

510 There is no issue that the NexGen share price has not recovered. The defendants rely upon this fact to contend that if the August and October 2011 share sales caused the price decline in 2011, one would expect the share price would recover after those sales. However Mr Hayler expressed the opinion that when a share price is driven down, it may be difficult for it to recover because the company may not be in as favourable position to raise equity because banks may be doubtful about the company's prospects if it is unable to explain the cause of the fall in the share price. The defendants contend that this is not a case in which a company would not have been able to explain the fall in the share price. They relied upon NexGen's inability to recover and to exit the watch list submitting that this was due to its poor financial performance.

511 Finally the defendants submitted that even if it were permissible to entertain the plaintiffs' portfolio claim, no actual loss has been suffered by the plaintiffs because the plaintiffs have not sold their NexGen shares. It was

submitted that the loss of profits from share trading must be assessed at the time of realisation of the loss of profit. Where there has been no realisation, it is nothing more than a paper loss and not an actual loss of which the plaintiffs complain. The defendants referred to the scenario where a party succeeds in claiming for alleged portfolio losses and then in the subsequent year the prices of the shares skyrocket and the party may reap a profit. This, it was submitted, would result in an unjustified windfall to that party.

512 The experts gave evidence concurrently on 29 February 2016 (tr 73-216). Consensus between the experts was reached in respect of the following matters: (a) the way in which shares are sold can impact the price of shares; (2) a number of other things as well as the share sales in October 2011 did have an impact on the price of the NexGen shares (although the experts were not in agreement about the percentage contribution of the "other things" to that decline); and (3) obviously if the share price declines the value of large portfolios of those shares will decline (tr 152-153).

513 The plaintiffs' claim that the defendants are liable for the reduction of the value of the plaintiffs' share portfolio is not straightforward. Irrespective of whether they can establish that the defendant knew or ought to have known that his conduct would cause the decline in the share price, they must first establish that the defendants' or EFH's trading of the shares caused the decline in the share price.

514 The plaintiffs' difficulties in ascertaining from EFH what actually happened to the shares have an impact on the assumptions that the experts were asked to make about the sales by EFH. Leaving to one side the cause of such difficulties, the plaintiffs have not established a proper basis for the

assumptions. It is not in issue that a lender in a non-recourse loan transaction would be motivated to protect itself from a decline in the value of the asset to which it may have recourse if there is default. However to assume, as the experts were asked to do so, that the lender would sell all the shares immediately on receipt is problematic. The combinations and permutations of possible sales to which the defendants referred are realistic and the experts were not asked to address these alternatives. Although the plaintiffs submitted that the defendant and Mr Goh knew that EFH was trading immediately on receipt of the shares, this was not supported by the evidence. Certainly Mr Goh was aware that others in the market were following him as he traded; it was not established that this was EFH.

515 I am satisfied that the 24 September 2011 announcement was seriously negative and I prefer Mr Tam's evidence in this regard over that of Mr Tan and Mr Hayler. I am also satisfied that there was a crisis in the market in August 2011 and that the market was on a downward trend during August 2011 and for some period beyond August 2011.

516 I am satisfied that the evidence is inconclusive in respect of whether the August 2011 and October 2011 sales caused the reduction in the NexGen share price. I am not satisfied on the balance of probabilities that those sales were the cause of the reduction.

517 There was a debate between the parties in respect of the portfolio claim as to whether the plaintiffs had to show a causal connection between the breaches of fiduciary duty and the loss in order to recover equitable compensation. Having regard to my findings it is not necessary to pursue that debate further other than to say that had it been necessary I would have

preferred the view that there has to be some causal link between the breach and the loss for which compensation is awarded: *Ohm Pacific Sdn Bhd v Ng Hwee Cheng Doreen* [1994] 2 SLR (R)633 at [27]; *Schonk Antonius Martinus Mattheus and another v Enholco Pte Ltd and another appeal* [2016] 2 SLR 881 at [22]; *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] 3 WLR 1367 at [135]–[136].

518 The plaintiffs' Portfolio Claim fails.

Counterclaims

519 The defendants claim that they are entitled to or entitled to utilise 50% of the loan proceeds that were paid by Yuanta to the plaintiffs/AEM pursuant to the Loan Agreement. The defendants also claim that the plaintiffs are in breach of the Agreements by failing to use the loans to exercise the warrant to obtain the 225m NexGen shares. They also claim that the plaintiffs are in breach of the oral loan agreement into which the parties allegedly entered in June 2011.

520 Before turning to those particular claims I should record that the defendants claimed that the plaintiffs withdrew "most of" the loan funds from the AEM account for their "own purposes without the knowledge, consent and/or agreement" of the defendants (A32 [25]). Part of this claim related to the funds that were utilised to take up an interest in Scorpio East. I have found that this was a joint investment. The balance of the funds were paid in respect of the reimbursement of the plaintiff for the provision of 225m NexGen shares treated as having been converted from the warrants. The relevant documents in respect of the withdrawals from the AEM account include the defendant's

signature. I am not satisfied that the defendants' claims in this regard are made out.

The loan proceeds claim

521 The defendants alleged in their Defence and Counterclaim filed on 22 October 2015 that there should be implied into the Agreements a term that the plaintiff and the defendant were each entitled to and/or entitled to utilise 50% of the loan funds obtained under the Loan Agreement at all material times.

522 In their Opening Statement the defendants alleged that the implied term was that the plaintiff and the defendant were entitled to and/or entitled to utilise 50% of the loan funds in the event that such funds were not used for the joint investments.

523 There is no gap in the Agreements that would permit such an implication: *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [29]. The express terms of the Agreements provide for the manner in which the loan funds were to be utilised and distributed (cll 5 and 8 Supplementary Agreement). As I have said, the "project" was not defined in the Agreements but it was clearly the investment activities upon which the parties would agree upon from time to time (cl 5 Supplementary Agreement).

524 The parties clearly intended that the loan funds would be utilised for their joint investment activities; that any profit from those joint activities would be shared equally; and any losses suffered would be borne equally by the parties. The parties did not intend and there is no basis to imply such an intention that they would each have access to 50% of the loan funds. They

went to the trouble of setting out the division of work in the Supplementary Agreement, requiring the plaintiff to manage the investments of the project and requiring the defendant to obtain the loans to be utilised in those investments.

525 The defendants claim in respect of their entitlement to 50% of the loan proceeds will be dismissed. However that does not affect the defendants' entitlement to share equally in the profits of the project or to bear 50% of the losses of the project.

The warrant claim

526 The defendants claim that the plaintiffs were in breach of the Agreements in failing to convert the 225m warrants to shares as agreed.

527 The Supplementary Agreement provided that the 225m warrants would be converted for pledging for loans to be obtained for the joint investment project (cl 3 Supplementary Agreement). The Supplementary Agreement also provided that the loans would be used to exercise the warrant to acquire the shares at S$0.03 and to acquire 25% of the shares of the plaintiff's "original shareholders" (cl 8 Supplementary Agreement). This was at a time when the parties anticipated that Mr Koesnadi's shares would be acquired either by the defendant or by AEM. As I have found earlier, that plan changed so that it was AEM that would obtain 225m warrants "for free" and acquire Mr Koesnadi's shares.

528 It seems that the defendants claim that the plaintiff was obliged to provide 225m NexGen shares, converted from the warrants, without any consideration irrespective of whether Mr Koesnadi's shares were purchased.

529 Had the plaintiff converted the 225m warrants at the time that he transferred the 225m NexGen shares to Yuanta on 11 March 2011, it would have cost S$6.75m to purchase that number of shares at S$0.03.

530 The plaintiff utilised the loans to 'pay for' for the 225m NexGen shares. That meant that S$6.75m was paid to the plaintiff for the provision of 225m NexGen shares to Yuanta for pledging for loans for the joint venture.

531 This aspect of the defendants' counterclaim appears to be in support of the defendants' alleged entitlement to have sold the 225m NexGen shares in October 2011 the proceeds of sale of which they kept.

532 The plaintiffs claim that this aspect of the defendants' case is very confused. They submitted that the defendants cannot possibly challenge the utilisation of S$6.75m from the AEM account towards the conversion of 225m warrants.

533 The Supplementary Agreement expressly provided that the loan funds would be used to convert the warrants. The plaintiff provided the 225m NexGen shares to Yuanta at a time when the share price was approximately S$0.045 but at a cost only of S$0.03. The failure by the plaintiff to convert the warrants for the purpose of providing the shares for pledging may technically be in breach of the Supplementary Agreement. However it meant that the plaintiffs' shares then worth approximately S$0.045 were transferred into the

joint venture for S$0.03. The parties agreed that the loan funds were to be used to convert the warrants into shares at a cost of S$6.75m (S$0.03 per share). That was always going to be a cost to the joint venture and that would have been paid to NexGen. As it happened it was paid to the plaintiff. Those shares became a joint venture asset.

534 The shares were then pledged for loans for the joint venture project. Ultimately that asset, should it have been extant at the time of the completion of the project, was to be shared equally by the parties.

535 I am not satisfied that the defendants are entitled to any relief in respect of the plaintiff's conduct in providing his own 225m NexGen shares to the joint venture rather than converting the warrants to provide them.

225m warrants oral agreement

536 Although the defendants claimed that the parties entered into an agreement pursuant to which the 225m NexGen shares converted from the warrant were to be "cashed out" as opposed to being made available for pledging for further loans, I am not satisfied that such an agreement was reached.

537 The email relied upon by the defendants refers to AEM receiving 225m warrants "for free" and that there was a "target profit" of between "sin$4.5m to sin$6.75m" (see [67] above). The email certainly refers to selling "at 5 cents up" to reach that target profit. However that email needs to be considered in the context of the express agreement in the Supplementary Agreement that the parties would convert the warrant into shares for the

purpose of obtaining future loans. As I have said earlier, the defendant believed that the 225m NexGen shares transferred into the Yuanta account on 11 March 2011 had been converted from the warrants. If there was an agreement that the converted shares were to be sold immediately and the proceeds shared equally between the parties it is reasonable to expect that the defendant would have sold those shares and shared the proceeds with the plaintiff. This did not happen and no demand was made on the plaintiffs at this time to sell those shares.

538 I am not satisfied that a separate agreement was entered into pursuant to which those shares were to be "cashed out" and the proceeds shared immediately between the parties.

539 This aspect of the defendants' claims will be dismissed.

The S$1.8m loan oral agreement

540 Having regard to my findings in relation to the competing claims in respect of the S$1.8m in June 2011, the defendants' claim in respect of this agreement will be dismissed.

Conclusion

541 The plaintiffs have established that the defendants' conduct in selling the NexGen Shares in February and March 2011; August 2011 and October 2011 was in breach of the Agreements and also in breach of the defendant's fiduciary duties. The plaintiff's claim in conversion in respect of these sales is also established. The plaintiffs are entitled to damages for these breaches and for the conversion of the shares. I will hear the parties on quantum.

542 The plaintiffs also made a claim for aggravated damages and punitive damages. Having regard to the outcome of the various claims I will hear the plaintiffs on whether they continue to press these claims and if so on what basis.

543 The plaintiffs' claim in conspiracy will be dismissed as will all other claims of breaches of contract including the SPA claim, breaches of fiduciary duty and the portfolio claim.

544 The defendants' Counterclaim will be dismissed.

545 If the parties are unable to agree on the form of final orders including the quantum of damages, interest and costs I will list the matter for further hearing. The parties are to make contact with the Registrar to fix a date for the making of final orders and/or further hearing in respect of these outstanding matters.

Patricia Bergin
International Judge

Paul Tan, Yam Wern-Jhien, Josephine Chee, Wong Shi Yun and Pradeep Nair (Rajah & Tann Singapore LLP) for the plaintiffs;
Hee Theng Fong, Toh Wei Yi, Nicklaus Tan and Jaclyn Leong (Harry Elias Partnership LLP) for the defendants.