IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC(I) 04

Suit No 5 of 2016 (HC/Summons No 2398 of 2016 and HC/Summons No 3128 of 2016)

Between

CPIT INVESTMENTS LIMITED

… *Plaintiff*

And

(1) QILIN WORLD CAPITAL LIMITED
(2) QILIN WORLD CAPITAL LIMITED

… *Defendants*

JUDGMENT

[Civil Procedure] — [Judgments and orders]

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CPIT Investments Ltd
v
Qilin World Capital Ltd and another

[2016] SGHC(I) 04

Singapore International Commercial Court — Suit No 5 of 2016
(HC/Summons No 2398 of 2016 and HC/Summons No 3128 of 2016)
Vivian Ramsey IJ
28 July 2016

15 September 2016 Judgment reserved.

Vivian Ramsey IJ:

1 In this judgment I deal with two applications made by the Defendants (collectively "Qilin"), one relating to an injunction granted by the High Court on 18 January 2016 ("the Injunction") and the other relating to a Consent Order made on 12 February 2016 ("the Consent Order"). These proceedings which involve an international commercial transaction have now been transferred to the Singapore International Commercial Court.

2 In the first application, Summons No 3128 of 2016 ("the Variation Application"), Qilin seeks a variation of the terms of the Injunction to allow the Second Defendant to sell 2,860,000 shares in Millennium Pacific Group Holdings Limited ("Millennium"). In the second application, Summons No

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2398 of 2016 ("the Fortification Application"), Qilin applies for the Plaintiff ("CPIT") to provide fortification of its undertaking to the Court in relation to any damages that Qilin might suffer and the court might order as a result of the Consent Order.

3 There is an issue in these proceedings as to whether the First Defendant, a Hong Kong company, or the Second Defendant, a British Virgin Islands company, is the relevant party. They both have the same name. I shall also refer to the relevant party as "Qilin".

Background

4 CPIT and Qilin entered into two related agreements dated 16 November 2015 under which CPIT provided 25,000,000 Millennium shares as collateral for a non-recourse loan from Qilin of HK$31,250,000. Those two agreements were a Stock Secured Financing Agreement made between CPIT and Qilin ("the Loan Agreement") and a Control Agreement made between CPIT, Qilin and Prominence Financials Limited ("the Control Agreement").

5 The loan was disbursed on 2 December 2015 and CPIT transferred the shares. CPIT contends that Qilin then unlawfully transferred and/or sold and/or disposed of those shares and that, as a result, CPIT terminated the two agreements on 4 January 2016. Qilin contends that it was entitled to deal with the shares as it did and that, in any event, because CPIT failed to cure an Event of Default, it became the full legal and beneficial owner of the shares with effect from 22 December 2015. The main issue in these proceedings therefore relates to Qilin's entitlement to deal with the shares during the term of the two agreements.

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6 These proceedings were commenced in the High Court on 12 January 2016. On the same date CPIT applied for an injunction prohibiting Qilin from disposing of the unsold shares and the proceeds of sale of any shares which had been sold (Summons No 164 of 2016). On 13 January 2016, CPIT applied for a worldwide Mareva injunction against Qilin up to the total value of HK$31,250,000 (Summons No 170 of 2016).

7 On 13 January 2016, the court fixed the hearing date for the applications as 15 January 2016, before Kan Ting Chiu J and on 14 January 2016, notice of the hearing date was given to Qilin, together with copies of the applications.

8 At the hearing at 10:00am on 15 January 2016, Qilin's solicitors, RHT Law Taylor Wessing LLP ("RHT") sought an adjournment of the hearing for the applications to be dealt with on an *inter partes* basis. The hearing was adjourned until 5:00pm while Qilin considered whether it would give an undertaking pending the *inter partes* hearing. In the event, an acceptable undertaking was not offered and the hearing was adjourned to 18 January 2016.

9 At 10:00am on 18 January 2016, after hearing argument from counsel for CPIT and Qilin, the Court granted the Injunction in the following relevant terms:

> **UPON THE *EX PARTE* APPLICATION** of [CPIT] by way of HC/Summons No. 164/2016 filed on 12 January 2016, and UPON READING the 1st Affidavit of Chan Kwong Chi Vicky filed on 12 January 2016 and the 1st Affidavit of Lee Kai Ming filed on 14 January 2016 on behalf of the [CPIT], and **UPON HEARING** Counsel for [CPIT] and Counsel for [Qilin] on a contested ex parte basis on 15 January 2016 and 18 January 2016, and subject to [CPIT's] undertaking to abide by any order the Court or a Judge may make as to damages in case the Court or a Judge should hereafter be of opinion that

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> [Qilin] shall have sustained any by reason of this order which the Plaintiff ought to pay, it is ordered that:-
>
> > 1. [Qilin] by themselves their agents or employees or otherwise be restrained, and an injunction is hereby granted retraining [Qilin], whether by themselves, by their agents or servants or howsoever otherwise from transferring, selling, charging, or in any other way disposing of the 25,000,000 shares of [Millennium], a listed company in the Growth Enterprise Market of the Stock Exchange of Hong Kong Limited in Hong Kong. which were originally deposited by [CPIT] into a brokerage account no. C083103 maintained by Prominence Financials Ltd in Hong Kong in [CPIT's] name on or around 24 November 2015 (the "Pledged Shares") until the trial of or determination of this action or until further order;
> >
> > 2. Where, prior to any order being obtained from this Honourable Court or prior to the same being served or otherwise for any reason whatsoever, any part of the Pledged Shares have been parted with, sold, charged or disposed of, an order is hereby granted restraining [Qilin], whether by themselves, by their agents or servants or howsoever otherwise from parting, transferring or otherwise dealing with any proceeds of the sale (or its equivalent), except according to any order(s) of Court, until the trial of or determination of this action or until further order;…
> >
> > [emphasis in original]

10 On 27 January 2016 and 11 March 2016, pursuant to the terms of the Injunction, Qilin filed the Affidavits from Cheng Yin Kong in which it was disclosed that Qilin had sold the Millennium shares, except for 2,860,000 shares and that there were proceeds from the sale of the shares of HK$25,3 82,415.78 held in various accounts. As a result, the 2,860,000 shares became the subject of prayer 1 of the Injunction and the proceeds became the subject of prayer 2 of the Injunction.

11 When the Mareva injunction application came before the court on 18 January 2016 it was adjourned until later in the afternoon for Qilin to consider whether it would offer an acceptable undertaking. As an acceptable

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undertaking was not then offered, the Court, after hearing argument from counsel for the parties, heard and dismissed the Mareva injunction application. CPIT filed a request for further arguments which was refused. CPIT then filed an application for leave to appeal which was heard on 28 January 2016.

12 At that hearing on 28 January 2016 RHT indicated that Qilin was prepared to provide security for CPIT's claim in the sum of HK$31,250,000 and, in light of that proposal, the hearing was adjourned to 5 February 2016. Morgan Lewis Stamford LLC, the solicitors for CPIT ("MLS") and RHT then exchanged correspondence. This led to an agreement which was recorded in the Consent Order on 12 February 2016 (Summons No 387 of 2016) and the earlier Order in relation to the Mareva injunction application was rescinded.

13 The relevant terms of the Consent Order are as follows:

> **UPON THE APPLICATION** made by [CPIT] by way of HC/Summons No. 387/2016 coming on for hearing on 28 January 2016, 5 February 2016 and 12 February 2016, **AND UPON HEARING** Counsel for [CPIT] and Counsel for [Qilin] and **UPON THE UNDERTAKING** of [CPIT] that, if the Court later finds that [Qilin's] provision of security pursuant to this Order has caused loss to [Qilin], and decides that [Qilin] should be compensated for that loss, [CPIT] shall comply with any order the Court may make, **BY CONSENT**:
>
> It is ordered that:
>
> 1. Order 1 of the Order of Court of the Honourable Justice Kan Ting Chiu in respect of HC/Summons No. 164/2016 dated 18 January 2016 ("**the "Prohibitory Injunction Order**"), shall continue to remain in effect
>
> 2. Order 2 of the Prohibitory Injunction Order be varied such that [Qilin] shall pay the total sum of HK$25,382,415.78, being the proceeds of sale under the said Order disclosed in the 1st Affidavit of Cheng Yin Kong filed on behalf of [Qilin] on 27 January 2016 currently held in the following accounts (the "**Sale Proceeds**"), to the client account of [Qilin's] solicitors [RHT] (OCBC Account No. ***) within 7 days from the date the Consent Order dated 27 January 2016 in Hong Kong proceedings HCMP No. 149/2016 (the "**HK Order**") is varied

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> by the Hong Kong Court to give effect to this Order made herein, for the sole purpose of enabling RHT to provide an undertaking to [CPIT] as security for [CPIT's] claim in the action in the form of the draft letter annexed hereto at Annex A (the "**LOU**"), such variation to come into effect only upon receipt by [CPIT] of the original LOU issued by RHT within two (2) days from the date of the Order made herein:
>
> > a. sale proceeds of HK$31,945.68 held in [Qilin's] account with Haitong International Securities Company Limited in Hong Kong;
> >
> > b. sale proceeds of HK$470.10 held in [Qilin's] account with RHB Securities Singapore Pte Ltd in Singapore;
> >
> > c. sale proceeds of HK$25,350,000.00 split between [Qilin's] account with Prominence Financials Limited in Hong Kong and [Qilin's] account with Hongkong Shanghai Banking Corporation in Hong Kong.
>
> 3. [Qilin] pay the further sum of HK$2,149,584.22 to the client account of RHT (OCBC Account No. ***) within 7 days from the date the HK Order is varied by the Hong Kong Court to give effect to this Order made hereon.
>
> 4. Within five (5) days of [CPIT's] receipt of the original LOU issued by RHT, [CPIT] and [Qilin] shall take steps, by consent, to vary paragraph 2 of [Qilin's] undertaking to the Court in the HK Order to give effect to Order 2 above.
>
> 5. To the extent that any part of the Sale Proceeds are not for any reason received in the aforesaid client account of RHT within the time above stated, [CPIT] shall have liberty to apply for restoration of Order 2 of the Prohibitory Injunction Order in its original terms. …
>
> [emphasis in original]

14 Pursuant to the Consent Order, RHT issued a letter of undertaking dated 15 February 2016 to CPIT.

15 By the Variation Application Qilin seeks to vary Order 1 of the Injunction so that it is "at liberty, forthwith, to sell the named 2,860,000 shares in [Millennium] (Stock Code #8147) (which shares are the subject of the said Summons) and which shares are currently deposited in the 2nd Defendants' account with RHB Securities Singapore Pte Ltd ("the RHB Account"), and

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that the sale proceeds thereafter be preserved pending the final disposal of the action herein."

16 By the Fortification Application, Qilin seeks an order that CPIT "does within seven (7) days from the date of the Order to be made hereon, provide fortification of its undertaking to the Court that if the Court later finds that [Qilin's] provision of security pursuant to the Order of Court made in HC/SUM 387/2016 has caused loss to [Qilin], and decides that [Qilin] should be compensated for that loss, [CPIT] shall comply with any order the Court may make" and seeks fortification in the sums of US$509,678.35 and HK$2,343,750.00.

17 I now turn to consider the two applications.

The Fortification Application

18 Mr Renganathan Nandakumar, who appears with Mr Vernon Voon and Ms Sharon Chung on behalf of Qilin, submits that, in the absence of the prohibitory injunction, Qilin would have sold the shares and obtained HK$3,575,000.00 at HK$1.25 per share but presently, at HK$0.22 per share, those shares are only worth HK$629,200.00, so that Qilin has suffered a loss of HK$2,945,800.00. He also says that the drastic fall in share price of the shares has meant that CPIT's sole or primary asset had been tremendously depleted. On this basis Qilin seeks fortification of CPIT's undertaking under the Consent Order in the sums of US$509,678.35 and HK$2,343,750.00.

19 Mr Nandakumar refers to the Singapore High Court decision in *CHS CPO GmbH (in bankruptcy) and another v Vikas Goel and others* [2005] 3 SLR(R) 202 ("*CHS*") in which Andrew Phang Boon Leong JC (as he then was) set out the legal principles applicable to a fortification application. Ms

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Wendy Tan, who appears with Mr Kenneth Chua on behalf of CPIT, agrees that this decision sets out the relevant principles on an application for fortification of an undertaking. In summary, Mr Nandakumar submits that an applicant must show a real risk of loss which is governed, *inter alia*, by the contractual principles relating to causation, remoteness of damage and mitigation. In addition, the court has to ascertain whether there are sufficient assets within or outside the jurisdiction that would be readily available to satisfy any liability under the undertaking.

20 Mr Nandakumar submits that there is a real risk of loss in this case. He refers to the exhibits to Man Yun Wah's ("Mr Man") 3rd Affidavit and says that Qilin has suffered losses arising from (a) interest paid on funds borrowed for two funding deals in the sum of US$509,678.35 and (b) losses arising from revenue of HK$2,343,750 which has been foregone because Qilin was precluded from utilizing the funds frozen by the injunction to enter into another loan agreement on the same terms of the Loan Agreement. He also states that, if not for the injunction, Qilin would have sold the remaining Millennium shares, at HK$1.25 per share, for a total of HK$3,575,000 but as the value is now only HK$0.22 per share, they are only worth HK$629,200 so that Qilin will have suffered a loss of HK$2,945,800.

21 He refers to the passage in *CHS* at [15] where it was properly emphasized that it is the risk of loss arising from the relevant injunction and not the loss claimed in the proceedings. If there is sufficient risk of loss, then Mr Nandakumar relies on *CHS* at [38] to [39] which indicate that the applicant has only to demonstrate that there is "an at least reasonable basis for legal liability".

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22 Mr Nandakumar submits that the usual principles of causation and remoteness are satisfied in relation to the loss. He refers to the judgment of the English Court of Appeal in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2016] 1 WLR 160 ("*Pugachev*") where an order for fortification was quashed on the basis that there was no evidential basis for the conclusion that the defendant was likely to suffer loss as a result of the injunction. In particular he relies on the judgment of Lewison LJ at [99] in relation to the evidence necessary to justify an application for fortification and to the passage in the judgment of Floyd J (as he then was) in *Bloomsbury International Limited v Holyoake* [2010] EWHC 1150 (Ch) ("*Holyoake*") at [25].

23 Ms Tan submits that Qilin cannot seek to fortify the undertaking which was part of the Consent Order. She submits that where a consent order records an agreement between the parties, it can only be set aside on grounds which would justify the setting aside of a contract and relies on *Wiltopps (Asia) Ltd v Drew & Napier and another* [1999] 1 SLR(R) 252 ("*Wiltopps*") at [27] which was cited with approval by the Court of Appeal in *Poh Huat Heng Corp Pte Ltd and others v Hafizul Islam Kofil Uddin* [2012] 3 SLR 1003 ("*Poh*") at [18]. She says that there is no basis to vary or set aside the Consent Order and therefore the application should be refused.

24 Further, Ms Tan submits that where a party does not seek fortification of the undertaking when the relevant injunction order is made, the Court has no power subsequently to impose such an additional term on the grant of an injunction. She relies on the passage in *Singapore Civil Procedure 2015* vol 1 (G P Selvam gen ed) (Sweet & Maxwell, 2015) ("*Singapore Civil Procedure* vol 1") at para 29/1/31 which cited the English High Court decision in *Commodity Ocean Transport Corp v Basford Unicorn Industries Ltd, The Mito* [1987] 2 Lloyd's Rep 197 ("*The Mito*").

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25 As a third ground for rejecting the application Ms Tan submits that there is no credible evidence that this is an appropriate case for fortification to be ordered based on the principles in *CHS* because the evidence does not establish that there is a real risk of loss.

26 In relation to the sums put forward in Qilin's submissions, she submits that the sums are not supported by evidence. First, in respect of the sums of US$151,231.87, US$159,640.10 and US$198,806.38 by way of interest paid on funds borrowed by Qilin under loan agreements made under a Master Framework Agreement dated 9 March 2016, she submits that Mr Man's 3rd Affidavit and the documents exhibited to it do not substantiate that Qilin has suffered a loss or that it would be caused by the Consent Order. Rather, she says that the term sheets exhibited to Mr Man's 3rd Affidavit indicate that Qilin committed to lending at least HK$1,435,000,000 and US$308,282,718.61, even excluding other sums in euros, IDRs and shares. She submits that, on this basis, there is no evidence that Qilin's lending business would suffer by having provided the security of HK$27,532,000.

27 Secondly, in relation to the alleged revenue foregone, she submits that there is no evidence that Qilin could have entered into another loan agreement on identical or even similar terms to those in the Loan Agreement with CPIT. She refers to the Indications of Intent exhibited to Mr Man's 3rd Affidavit and says that these are inadequate to establish that Qilin could have entered into similar loan agreements. In any event, she submits that there is no evidence of causation showing that the Consent Order was the cause of those transactions failing to materialise.

28 Further, Ms Tan submits that the undertaking is not illusory as the evidence shows that there are sufficient assets to satisfy any liability under the

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undertaking. She says that it is undisputed that CPIT is a substantial shareholder of Millennium, with Mr Man in his 5th Affidavit saying that CPIT owns 186m further shares in Millennium.

29 She says that Qilin is currently in possession of 2,860,000 of CPIT's shares in Millennium and cannot rely on any decrease in the price of Millennium shares in support of its Fortification Application. She says that Qilin must have been aware that shares fluctuate in value but did not make this part of the agreement in the Consent Order. Further, she says that, before Qilin entered into the Agreements dated 16 November 2015, it was aware of possible downward movements in the share price and it is not uncommon for listed companies to have to defend lawsuits from time to time. In addition, she contends that Qilin's wrongful conduct caused the drop in the price of Millennium shares by the unauthorised bulk selling of the Pledged Shares and she also relies on evidence to suggest that Qilin worked together with Mr Charles Zhi to commence a number of spurious proceedings against Millennium. Essentially, she says that Mr Man has exhibited to his 5th Affidavit a winding up petition for Millennium which Qilin must have obtained from Mr Zhi who, in the past, has commenced a large number of proceedings against another Hong Kong listed company which the Hong Kong courts found were vexatious. Mr Zhi also commenced separate proceedings against Millennium.

Decision

30 Although various references are made to the undertaking in relation to the Injunction, the application by Qilin relates to the undertaking in relation to the Consent Order.

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31 I deal first with the nature of the Consent Order in this case.

The Consent Order

32 As set out in [11] and [12] above, the Consent Order was made to compromise the application for a Mareva Injunction made by CPIT. Various discussions took place between the solicitors for the parties, MLS and RHT, starting from before the first hearing on 18 January 2016. When that hearing took place and the application was refused, a proposal was made by Qilin. This led to the hearing for leave to appeal on 27 January 2016 being adjourned and, in due course, to the Consent Order being made on 12 February 2016.

33 The terms of the Consent Order and RHT's letter of undertaking, together with the necessary variation of the terms of the Injunction were negotiated between the solicitors for the parties in a series of letters and marked up drafts exhibited at Exhibit CKCV-2 of the 3rd Affidavit of Chan Kwong Chi Vicky ("Ms Chan"). Those documents show that, as would be expected, the detailed terms of the Consent Order and Undertaking by Qilin's solicitors were carefully considered and negotiated by the two experienced firms of solicitors.

34 In the Court of Appeal decision in *Poh*, Chao Hick Tin JA, giving the judgment of the Court, set out the applicable law on consent orders at [18]. In particular he said:

> … To constitute a consent order, there must be a real agreement between the parties, which is to be contrasted with the scenario where a party merely does not object to a course of action (see *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 WLR 185 at 189F–189G, which was followed in *Wiltopps* at [18] and *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 ("*Wellmix*") at [29], and distinguished in *Bakery Mart* at [13]).

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35 In *Wiltopps*, Lee Seiu Kin JC (as he then was) reviewed the English Court of Appeal decision in *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 All ER 377 ("*Siebe Gorman*") where Lord Denning considered at 380 the meaning of an order made "by consent" and said:

> It should be clearly understood by the profession that, when an order is expressed to be made 'by consent', it is ambiguous. There are two meanings to the words 'by consent' … One meaning is this: the words … may evidence a real contract between the parties. In such a case the court will only interfere with such on order on the same grounds as it would with any other contract. The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without obligation.

36 Given the way in which the Consent Order was negotiated in this case, there can be no doubt that it constituted a consent order arising from a real agreement between the parties. It contained detailed terms which the parties had negotiated and incorporated into a court order.

37 The question is whether the Consent Order can be varied by the Court so as to add a term requiring fortification of the undertaking as to damages which CPIT gave as part of the Consent Order.

Variation of Consent Orders

38 Again, in the Court of Appeal decision in *Poh*, Chao Hick Tin JA summarised the law on this aspect at [18], where he said:

> There are two possible bases upon which the Appellants can be precluded from opening up an issue which they consented or agreed to before the AR. Much would necessarily depend on what exactly was consented to or agreed upon, and its context. *First*, the agreement between the parties could constitute a consent order. It is well established that a judgment or order obtained by consent is final and can form

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> the basis for the application of the doctrine of *res judicata* (see K R Handley, *Spencer Bower and Handley: Res Judicata* (LexisNexis, 4th Ed, 2009) at para 2.16). A consent judgment or consent order is binding and cannot be set aside save for exceptional reasons (see the High Court decision of *Wiltopps (Asia) Ltd v Drew & Napier* [1999] 1 SLR(R) 252 ("*Wiltopps*") at [27] (an appeal to the Court of Appeal against the High Court's decision was dismissed without any written grounds being issued (see the editorial note to *Wiltopps*)) and *Bakery Mart Pte Ltd v Ng Wei Teck Michael* [2005] 1 SLR(R) 28 ("*Bakery Mart*") at [11]). …
>
> [emphasis in original]

39 The reference in *Poh* to a consent judgment or consent order being binding and not being able to be set aside "save for exceptional reasons" raises the question of what amounts to exceptional reasons.

40 In *Wiltopps*, reference was made to the English Court of Appeal decision in *Purcell v F C Trigell Ltd* [1971] 1 QB 358 ("*Purcell v Trigell*") where Lord Denning drew a distinction between interlocutory orders and final judgments and said at 363:

> I think that a party, who gets leave, can appeal from a consent order on wider grounds, at any rate in interlocutory matters. He can appeal, for instance, on the ground of his own mistake: see *Mullins v Howell* (1879) 11 Ch D 763, where Sir George Jessel MR said, at p 766: 'There is a larger discretion as to orders made on interlocutory applications than as to those which are final judgments.' But there is no ground here so far as I can see for setting aside this consent order. It was deliberately made, with full knowledge, and with the full agreement of the solicitors on both sides. It cannot be set aside. But, even though it cannot be set aside, there is still a question whether it should be enforced. The court has always a control over interlocutory orders. It may, in its discretion, vary or alter them even though made originally by consent.

41 The majority of the English Court of Appeal, Winn LJ and Buckley LJ took the view that there was no distinction between interlocutory and final consent orders. Buckley LJ said at 366:

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> On the question of the contractual effect of an agreed order relating to some procedural matter in an action, I can see no valid distinction in principle between a consent order of that nature and a consent order of a final nature. … There was clearly consideration for the agreement on each side and the order must in my judgment have contractual effect. Why that aspect of the order should be less effective than if the subject matter had been not an interlocutory step in the action but some final order I do not myself follow.

42 In *Wiltopps*, although it was not necessary to decide the point, Lee Seiu Kin JC said at [27]:

> On my part, I would prefer the view of the majority in *Purcell v F C Trigell Ltd*, *ie* that a consent order of this nature can only be set aside on grounds that would justify the setting aside of a contract. The consent order records an agreement supported by consideration and I cannot see any ground for applying different rules to it. Furthermore, to hold otherwise would dilute the utility of such consent orders and parties would take their undertakings less seriously. …

43 In *Bakery Mart Pte Ltd v Ng Wei Teck Michael and others* [2005] 1 SLR(R) 28 ("*Bakery Mart*"), cited by the Court of Appeal in *Poh*, Belinda Ang Saw Ean J summarised the principle at [11] where she said:

> The general principle is that the court will not interfere to set aside a consent judgment or order after it has been made and perfected otherwise than in a fresh action brought to set aside such a judgment on grounds of fraud or on any of the grounds upon which an agreement can be set aside. The exceptions to the general principle are where there has been a slip in drawing up the judgment or order which has been entered and where there has been an error in expressing the manifest intention of the court: see generally *Ainsworth v Wilding* [1896] 1 Ch 673 approved by the Privy Council in *Kinch v Walcott* [1929] AC 482; *Indian Overseas Bank v Motorcycle Industries (1973) Pte Ltd* [1992] 3 SLR(R) 841; *Wiltopps (Asia) Ltd v Drew & Napier* [1999] 1 SLR(R) 252.

44 In *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 ("*Wellmix*"), Andrew Phang Boon Leong J (as he then was) held that there was not, in fact, a consent order, applying amongst other decisions,

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Siebe Gorman. However, he went on at [79] to consider the extent to which the Court had a discretion of the type suggested in *Purcell v Trigell* where Lord Denning said:

> … But, even though the order cannot be set aside, there is still a question whether it should be enforced. The court has always a control over interlocutory orders. It may, in its discretion, vary or alter them even though made originally by consent.

45 Phang J considered that this discretion was supported by O 92 r 4 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) which provides:

> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

46 In support of the existence of such a discretion he said at [89] to [91]:

> 89 However, I would be prepared to accept that, the objections in the preceding paragraphs notwithstanding, it would still be desirable to allocate to the court a residuary discretion of the type suggested by Lord Denning MR in *Purcell*. In this regard, I also respectfully differ from the view preferred by Lee JC in the *Wiltopps* case, and I do so for the following main reason.
>
> 90 It must be borne in mind that a consent unless order, whilst technically a contract between the parties, is one that allows one party to wholly deprive the other of its legal rights in the context of litigation. Even though such an order has been agreed upon between the parties, there may, in my view, arise certain special circumstances where it would nevertheless be unjust for the party in whose favour the consent order operates to insist on its enforcement in the absence of a high degree of intentionally contumacious or contumelious conduct.
>
> 91 Such a discretion is, in the final analysis, merely an aspect of the court's power to have ultimate control over its own procedure. This is not at all unreasonable, in my view, and does, on balance, conduce to justice and fairness. The focus is still on procedure, rather than substance. It might be argued that the substantive rights of the plaintiff would be adversely affected. This is arguably the case but it must never be

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> forgotten that an unless order is part of the procedural armoury and is not based on the substantive merits of the case as such. Thus, an unless order (whether by consent or otherwise) deals, in the final analysis, with the *litigation process and, on this score, the courts ought to have the final say*.
>
> [emphasis in original]

47 However, Phang J was anxious to point out at [93] that "any 'interference' by the court in this particular regard would be rare and would need to be thoroughly justified in the circumstances of the case."

48 In *Airtrust (Singapore) Pte Ltd v Kao Chai-Chau Linda* [2014] 2 SLR 693 ("*Airtrust*"), George Wei JC (as he then was) referred to the principles to be applied to consent orders in these terms at [22]:

> … In this regard, reliance has also been placed on the principle that where a consent order represents a "real contract" between the parties and is recorded before the court, the court should only vary or set aside the consent order pursuant to ordinary principles of contract law (see *Low Heng Leon Andy v Low Kian Beng Lawrence* [2011] SGHC 184, *Wiltopps (Asia) Ltd v Drew & Napier* [1999] 1 SLR(R) 252 and *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117). Nevertheless, it is reasonably clear that even in the case of a contractual consent order, the court retains the residual discretion to vary its terms where this is necessary to prevent injustice. This is especially so where the court is dealing with a "consent unless" order, which if not adhered to, will deprive a party of its rights.

49 That residual discretion to vary the terms of a consent order to prevent injustice was, as George Wei JC said at [23], based on the terms of O 92 r 4 of the Rules of Court:

> In arriving at my decision, I accept that even in the case of a contractual consent order, the court retains the residual discretion to vary or set aside the terms of the consent order. After all, O 92 r 4 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC") states that nothing in the ROC "shall be deemed to limit or to affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to

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> prevent an abuse of the process of Court". Whether a distinction is to be made between a contractual "consent unless" order and other forms of contractual consent order is not a matter which this court must rule on today. Suffice it to say that in the interests of justice, greater care must be taken in those cases where the court is dealing with a "consent unless" order. …

50 On analysis, *Wellmix* and *Airtrust* are concerned with the inability of the court to prevent injustice if the terms of an interlocutory consent order are strictly enforced. This applies in cases such as "unless orders" where a party applies for judgment or seeks an extension of the time for compliance. Those matters have also exercised the English Courts. In *Ropac Limited v Inntrepreneur Pub Company (CPC) Limited* [2001] CP Rep 31 ("*Ropac*"), Neuberger J (as he then was) had to consider the enforcement of a consent unless order for the possession of premises where the condition of the unless order had not been complied with. That condition required payment of a sum by a particular date, with time being of the essence. Half that sum was paid by that date and half was paid some ten days late. Having reviewed the authorities Neuberger J concluded that under the former Rules of the Supreme Court the consent order "would have been sufficiently clear terms to have justified interference by the Court only in circumstances which would justify interference with a contract." Although he found that the provisions of the then recent Civil Procedure Rules were "more flexible, so that the Court does have jurisdiction to grant relief, *ie* to extend time", he declined to do so.

51 In the subsequent English Court of Appeal case of *Weston v Dayman* [2006] EWCA Civ 1165 the Court had to consider a consent order discharging a receivership and whether it was to be interpreted as releasing the defendant receiver from all liability for any failure properly to manage the estate of the receivership during the period of the receivership. The Court of Appeal held that it was. There was then an argument that the Court was able to vary the

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order under the Civil Procedure Rules or under the "liberty to apply" provision. In considering those arguments, Arden LJ giving the judgment of the Court of Appeal referred to *Ropac* and said at [24] and [25]:

> 24. … Neuberger J held in a nutshell that, even when parties have come to a consent order, in that case on an extension of time, there was an exceptional jurisdiction whereunder the court could still extend time. In my judgment, wherever the jurisdiction comes from — and it could come from the liberty to apply in this order — the court must be very careful in exercising a discretion to vary the terms of an order which represents a contract between the parties. Mr Warwick argues forcibly that this jurisdiction should be exercised so as to enable these proceedings to proceed to trial, because Elias J has already given permission, because it must surely be the policy of the court to allow proper claims to be brought against officers of the court in respect of mismanagement, and because the point was only taken by the receiver in her defence. It was not taken at the earlier stage, at which she was represented, when Elias J gave permission. In addition, of course, the damage to which he refers was not damage of which Mr Weston could have been aware at the date of the order.
>
> 25. I will proceed on the basis (without deciding the point) that CPR 3.1(7) applies to paragraph 10 of the order of 23 January 2003. I would accept that the court should accede to an application for variation where it is just to do so but in my judgment one of the aspects of justice is that a bargain freely made should be upheld. Mr Weston clearly obtained benefits under the order of 23 January 2003. It may well be that those benefits are not as great as he thought, but that is not a matter for this court. In those circumstances I do not consider it would be right for this court to exercise its discretion to vary the order as sought. …

52 On the basis of those decisions, I come to the following conclusions about the ability of this Court to vary the terms of a Consent Order:

(a) The general principle is that a consent judgment or consent order is binding and cannot be set aside save for exceptional reasons: see *Poh* at [18].

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(b) Those exceptional reasons are those referred to in *Wiltopps* and *Bakery Mart*: see *Poh* at [18]. In *Wiltopps* it was stated at [27] that "a consent order of this nature can only be set aside on grounds that would justify the setting aside of a contract" and in *Bakery Mart* it was stated at [11] that:

> … the court will not interfere to set aside a consent judgment or order after it has been made and perfected otherwise than … on grounds of fraud or on any of the grounds upon which an agreement can be set aside. The exceptions to the general principle are where there has been a slip in drawing up the judgment or order which has been entered and where there has been an error in expressing the manifest intention of the court…

(c) The exceptional reasons referred to, *obiter*, in *Wellmix* and derived from Lord Denning's judgment in *Purcell v Trigell* do not find support in *Poh* which does not cite that decision in this context. Instead, *Poh* cites *Wiltopps*, a decision with which Phang J differed in *Wellmix* at [89] on the issue of the proper interpretation of *Purcell v Trigell*.

(d) There may be rare cases where O 92 r 4 can be relied on in relation to enforcement of consent orders or to extend time in relation to consent orders: see *Wellmix* at [80] and *Airtrust* at [24].

53 In the present case the Consent Order included an undertaking as to damages by CPIT but made no provision for CPIT to fortify that undertaking by providing additional security. To add a term for CPIT to fortify its undertaking in this way would amount to a variation of the Consent Order. It would add a new requirement to the carefully drafted and negotiated terms of the Consent Order.

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54 There is no basis put forward upon which the Court could vary the Consent Order on grounds that would justify the setting aside or variation of a contract. If Qilin now has concerns about the financial position of CPIT and its ability to meet the undertaking as to damages, that was not something that formed part of the agreement in the Consent Order and no term was agreed by which a change in the financial circumstances of CPIT, if there has been one, could be relied on to obtain a change to the agreed terms. There is no ability otherwise for one party to obtain a variation to the terms of an agreement because of change of circumstances.

55 There are therefore no exceptional reasons of the type envisaged in *Poh*, *Wiltopps* or *Bakery Mart* which would justify the variation of the terms of the Consent Order by way of fortification of the terms of the agreed undertaking as to damages.

56 To the extent that rare cases where O 92 r 4 can be relied on in relation to enforcement of consent orders or to extend time in relation to consent orders or where the "liberty to apply" provision may be relied on, per *Weston v Dayman*, there is nothing on the facts of this case which would make it possible to rely on such provisions.

Subsequent fortification of an undertaking

57 As the matter has been argued, it is convenient also to deal with the basis on which an undertaking might be fortified after the Injunction was originally granted on the basis of an undertaking which was not fortified.

58 As set out in para 29/1/31 of *Singapore Civil Procedure 2015* vol 1:

> A defendant should apply for the security at the time when the injunction is granted and the undertaking is given. The court

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> has no power subsequently to impose such an additional term on the grant of an injunction (*Commodity Ocean Transport Corp. v Basford Unicorn Industries Ltd, The Mito* [1987] 2 Lloyd's Rep. 197).

59 The decision of Hirst J (as he then was) in *The Mito* related to an application for a party to fortify an undertaking relating to a freezing order which the court had by then discharged. At 199 to 200 Hirst J said:

> When such security is originally sought it is sought as a condition for the grant of the injunction, in other words the plaintiff is told: 'if you want this injunction you have to pay the price by fortifying the undertaking to damages'. The plaintiff can then either agree or disqualify himself from obtaining the injunction … Mr McClure says that the plaintiff has already paid a price here when the cross-undertaking was given, which is perfectly correct as far as it goes: but the plaintiffs did not ever agree nor were they ever asked to pay the *extra* price that is the fortification of the undertaking by security. If they had been asked to do so, it may very well be that they would … "have declined to take an injunction". Of course, Mr McClure accepts, as he must, that the court has no power to impose an undertaking on the plaintiffs; and here I think if I were to make this order I would in essence ex post facto be imposing an additional term to the undertaking without any knowledge one way or the other as to what the situation would have been if it had been sought by the defendants in the first place. That is something which I think is wrong in principle to do.
>
> [emphasis in original]

60 That principle was applied by Neuberger J (as he then was) in *Miller Brewing Company v The Mersey Docks and Harbour Company* [2003] EWHC 1606 (Ch) where he added at [50]:

> Apart from it being wrong in principle, there may be consensual problems with the very notion of imposing such an obligation, as is illustrated by the discussion in the Australian case, *First Netcom Pty Ltd v. Telstra Corp Ltd.* [2000] 179 Australian Law Reports 72, at paragraphs 18 to 26. Paragraphs 25 and 26 record that the Federal Court said this …:
>
> > "… in strictness the only order made by the court on an application for interim relief is the injunction itself.

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> It is true that the operation of the injunction may be expressed to be conditional on the performance of a condition precedent, but the court does not direct, let alone order, the performance of such a condition and it is entirely at the plaintiffs' election that the consequence is mentioned. It further follows that such conditions cannot of their nature be a condition subsequent. Either the interim injunction comes into operation upon being made or it does not, in other words the condition cannot be imposed or superimposed retrospectively."

61 More recently in *Thai-Lao Lignite (Thailand) Co. Ltd v The Government of The Lao People's Democratic Republic* [2013] EWHC 2466 (Comm) Popplewell J considered a case where fortification was originally given but where further fortification was sought because of an increase in the estimate of costs suffered as a result of a freezing order. At [45] he said:

> The Court cannot require a claimant to give an undertaking. When fortification of a cross undertaking is required, it is not imposed by an order of the court that it must be given. It is part of the undertaking offered by a claimant, and the grant of the order is conditional upon the undertaking being complied with. This is reflected in the standard wording of the Commercial Court freezing order. Requiring fortification is an adjunct to the undertaking offered by a claimant, and is only "required" in the sense of being the price which the claimant will have to pay if he wants his order to operate in futuro. The fortification now sought by the Central Bank is an adjunct to the undertaking originally voluntarily given by the Claimants, and to attach a fortification requirement to such undertaking now, after the Central Bank accounts have been removed from the scope of the Freezing Order, would be in substance to impose upon the Claimants an undertaking they did not give. Moreover it would be to impose a retrospective burden upon the Claimants whilst at the same time depriving them of the opportunity of considering whether to assume that burden as the price of obtaining the Freezing Order over the Central Bank accounts.

62 I consider that these decisions indicate that there are two principles which militate against the subsequent grant of fortification of an undertaking where no such fortification was originally provided. The first is that the Court

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decides whether to grant an injunction based on the conditions which it considers to be appropriate at that time. A party seeking an injunction cannot be forced to give an undertaking or to fortify it but the Court will not grant an injunction unless the conditions of an undertaking including, if considered necessary, fortification, are fulfilled. If fortification is not made a condition initially then the injunction is granted on the basis that fortification was not required and to fortify the undertaking later would be to impose an undertaking which the party did not agree to give. The second, related principle is that if fortification is granted at a later date then it would relate back to the original undertaking and therefore impose a retrospective burden as the price of the original injunction.

63 Whilst the fact that the fortification is sought after the discharge of the injunction heightens the impact of those principles, I consider that they apply equally where the injunction is continuing. In addition, in the present case, although the Injunction was not originally granted as part of a Consent Order, it is evident that when the Consent Order was made the parties considered the extent to which the terms of the Injunction should be varied and no provision as to fortification was requested. The absence of any condition of fortification as part of the undertaking for the original Injunction together with the absence of any agreed fortification as part of the arrangements under the Consent Order, when considered in the light of the principles identified above, mean that, in my judgement, fortification should not be ordered at this stage. The imposition of such fortification which was not originally a condition of the grant of the Consent Order and which would have retrospective effect is not something that is appropriate in this case.

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Is fortification otherwise appropriate

64 Even if this were to be a case where fortification might, in principle, be granted, I do not consider that Qilin has made out a case for it to be ordered.

65 As set out in *CHS*, for fortification of an undertaking, there must be a real risk of loss arising from the grant of the injunction and the fortification is then required to ensure that there are sufficient assets within or outside the jurisdiction that would be readily available to satisfy any liability under the undertaking. In the recent decision in *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2015] 1 WLR 2309 ("*Energy Venture Partners*"), the English Court of Appeal considered the principles to be applied in relation to fortification. In that case, a party against whom a freezing order had been made was given liberty to apply to increase the sum by which an undertaking should be fortified. The judge at first instance had applied the principles set out by Mr Michael Briggs QC (as he then was) in *Harley Street Capital Ltd v Tchigirinski* [2005] EWHC 2471 (Ch).

66 On appeal, at [13] Tomlinson LJ summarised three requirements which had been identified by Mr Briggs as needing to be satisfied by a defendant seeking fortification as:

> … [F]irst, that the court has made an intelligent estimate of the likely amount of loss which might result to a defendant by reason of the injunction; secondly, that the applicant for fortification has shown a sufficient level of risk of loss to require fortification; and, thirdly, that the contemplated loss would be caused by the grant of the injunction.

67 At [52] the Court of Appeal endorsed that approach as being "entirely appropriate and in accordance with principle." At [53] to [54] Tomlinson LJ also added some observations on the proof required to establish the risk of loss:

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> 52. … since the claimant has obtained a freezing order preserving assets over which it may be able to enforce on the basis of having shown the court that it has a good arguable case, it is only appropriate that if the defendant can show that it too has a good arguable case that it will suffer loss in consequence of the making of the order, it should equally be protected. …
>
> 53. … In this interlocutory context, showing a sufficient level of risk of loss to require fortification is synonymous with showing a good arguable case to that effect. In some cases the assessment of loss may at the interlocutory stage be difficult. It is in such cases that an intelligent estimate is required. An intelligent estimate will be informed and realistic although it may not be entirely scientific.
>
> 54. As to causation, it is sufficient for the court to be satisfied that the making of the order or injunction was a cause without which the relevant loss would not have been suffered, as Gibbs J put it in the High Court of Australia in *Air Express Ltd v Ansett Transport Industries (Operations) Pty* (1981) 146 CLR 249, 313. …

68 To the extent that it makes any difference, I consider that the applicable standard, as expressed in *CHS* of "an at least reasonable basis for legal liability" is the standard to be applied in this jurisdiction. Otherwise I derive assistance from the other guidance in *Energy Venture Partners*. I therefore turn to consider whether Qilin has established a good arguable case of a sufficient level of risk of loss caused by the Consent Order.

69 Under the Consent Order Qilin deposited a sum equivalent to the then value of the Millennium shares. In his 3rd Affidavit Mr Man states at para 25:

> The making of the Injunction Orders is and was a cause of the loss suffered by the 2nd Defendant without which the relevant loss would not be or would not have been suffered."

At para 27 he then states: "Annexed hereto are copies of the following documents in support of the 2nd Defendant's application herein…". He then refers to:

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> (a) Recent signed term sheets, and closing statements evidencing deals that were done …
>
> (b) Funding documents in respect of 2 funding deals. For these deals the 2nd Defendant had to pay 10% and 12% respectively for the funding due to lack of funds caused by the Injunction Orders …
>
> (c) Signed Indication of Intent and settlement information, which the 2nd Defendant was unable to execute due to the lack of funds caused by the Injunction Orders …
>
> (d) Signed Indication of Intent which the 2nd Defendant was unable to execute due to the lack of funds caused by the Injunction Orders … and
>
> (e) Further signed block term sheets.

70 At para 28 Mr Man then says the losses suffered by Qilin include the following:

> i. interest paid on the funds borrowed amounting to US$151,231.87 and US$159,640.10 for the 1st funding deal;
>
> ii. interest paid on the funds borrowed amounting to US$198,806.38 for the 2nd funding deal;
>
> iii. revenue foregone from utilising the funds frozen by the Injunction Orders to enter into another loan agreement on the same terms as the Loan Agreement between the Plaintiff and 2nd Defendant, that is 6% pre-payment lockout +1% placement/origination fee +0.5% administration charge = 7.5% of HK$31,250,000.00, or HK$2,343,750.00.

71 The question is whether this evidence is sufficient for Qilin to discharge the burden of establishing a sufficient risk of loss or that the loss was or would be caused by the Consent Order. Mr Nandakumar relied on the passage from Floyd J's judgment in *Holyoake* where at [25] he said in relation to losses sought to be relied on:

> It is not easy at this stage definitively to relate many of these instances to the preventive or coercive effects of the order. Nevertheless I think it is realistic to suppose that the existence of the freezing order could cause significant damage to Mr Holyoake. Firstly, it is clear from the evidence that Mr Holyoake has an extensive asset portfolio. It is almost

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> inevitable that the existence of the freezing order will cause him loss. The assets discussed in the evidence are worth millions of pounds. It is entirely reasonable to suppose that damage will be incurred on a commensurate scale by Mr Holyoake if he is unable to deal freely and properly with his assets. Secondly, the freezing order is a very extensive one, and does not relate solely to one or two assets. As Mann J observed in *Sinclair Investment Holdings SA v Cushnie*, it will be easier to foresee a risk of loss in such cases.

72 However, in *Pugachev* where the judge at first instance had relied on similar reasoning, the Court of Appeal allowed the appeal finding that the evidence did not support that conclusion. Lewison LJ said at [99]:

> It is not difficult to imagine a case in which a defendant is able to give evidence that up to the grant of a freezing order he was in the habit of making deals or engaging in business ventures over a sustained period and that his established pattern of business enterprise would be stifled by the grant of an order freezing all his assets. In such a case the defendant may have real difficulty in predicting what particular business opportunities are likely to arise in the future. But it would be necessary in such a case to establish by evidence a continuing pattern of business activity.

73 Lewison LJ then said "[w]hat evidence is there of business activity during that period? The short answer is that there is virtually none."

74 In the present case, Qilin relies on Mr Man's evidence. As Ms Tan submitted, the term sheet documents exhibited to Mr Man's 3rd Affidavit show that Qilin has sufficient assets to commit to lending at least HK$1,435,000,000 and US$308,282,718.61, excluding other sums in euros, IDRs and shares. It is therefore difficult, in the absence of any evidence, to see why Qilin has incurred interest charges because of the sums restrained under the Consent Orders rather than for other reasons. No explanation is provided by Mr Man, other than by way of assertion.

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75 In relation to the loss of revenue because Qilin was unable to enter into another loan agreement on similar terms to those in the Loan Agreement, Mr Man has exhibited Indications of Intent to his 3rd Affidavit. However, it is not evident that, but for the Consent Order, Qilin could or would have entered into similar loan agreements. There is no explanation in the affidavit to show that Qilin did not complete the loan agreements because of the Consent Order rather than the potential loan agreements merely not materialising as completed transactions.

76 Whilst Counsel's submissions seek to provide further evidence of the nature of Qilin's business, as pointed out in *Pugachev*, it is necessary for there to be evidence of the way in which Qilin's business would be affected or, in this case, has been affected by the Consent Order. I do not consider that there is sufficient evidence and, in the absence of that evidence, I would have been reluctant to draw the type of inferences which Floyd J was able to draw from the evidence in *Holyoake* but which could not be drawn in *Pugachev*.

77 For those reasons I do not grant the fortification of the Consent Order sought in the Fortification Application.

Variation Application

78 Mr Nandakumar submits that following the grant of the Injunction on 18 January 2016 there has been a material change of circumstances and that, relying on a passage in *Singapore Civil Procedure 2015* vol 1 at para 29/1/42, he submits that an injunction granted after a full *inter partes* hearing can be varied if there has been a material change in circumstances.

79 The change of circumstances relied on by Mr Nandakumar arises from a fall in the value of the Millennium shares which are the subject of Order 1 of

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the Injunction. He says that Millennium became the subject of a suit in the High Court in Hong Kong on 15 April 2016 and then issued an announcement about that suit on 9 June 2016. He says that Qilin received information on or around 7 July 2016 that CPIT was seeking to sell the Millennium shares in its possession at a discount of 35% and it also came to Qilin's attention that CPIT no longer exists or operates at its two last known addresses in Hong Kong. He further says that on or around 11 July 2016 a winding-up action was commenced against Millennium in the Hong Kong Courts.

80 Mr Nandakumar says that between 9 and 15 June 2016 the share price of the Millennium shares fell from HK$1.40 to HK$1.25; on 24 June 2016 it fell from HK$1.22 to HK$0.93; on 27 June 2016 it fell to HK$0.56; on 12 July 2016 it fell to HK$0.25 and on 22 July 2016 it stood at HK$0.207 and on 28 July he said it was about HK$0.20.

81 As a result, he says that, in the light of the uncertain financial position of CPIT and to ensure that the parties' interests are not prejudiced and to mitigate the potential losses due to the fluctuation in share prices, Order 1 of the Injunction should be varied so that the 2,860,000 shares in Millennium can be sold and the sale proceeds preserved pending the final disposal of these proceedings. He submits that, in circumstances where CPIT has not been open as to its financial position and where Qilin is unable to avail itself of its only recourse of selling the Millennium shares, Qilin is placed in a very vulnerable position and so seeks the variation.

82 Ms Tan submits that there should be no variation of Order 1 of the Injunction. First, she refers to the background which led to the Consent Order made on 12 February 2016. She says that the Consent Order superseded the Order of 18 January 2016 and that Qilin is seeking to vary the Consent Order.

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Further she says that the balance of convenience points against allowing a sale of the shares when the share price has fallen. Further she contends that Qilin has brought the variation application in bad faith.

83 She refers to Order 1 of the Consent Order which states that Order 1 of the Injunction shall continue to remain in effect. She submits that a variation of Order 1 of the Injunction would amount to a variation of the Consent Order which, as set out above, is only permitted where such variation can be made on the basis of normal contractual principles, which she says do not apply here.

84 Secondly, she submits that the balance of convenience is in favour of dismissing the Variation Application. She says that the price of shares fluctuates and that possible falls in the value of the Millennium shares were known to Qilin in the form of announcements made by Millennium on 5 June and 15 October 2015 as dealt with in the 3rd and 4th Affidavits of Ms Chan. She says that when CPIT pledged the shares to Qilin in December 2015, Qilin valued the shares at HK$2.50 and that it was only when the share price was HK$0.56 on 27 June 2016 that Qilin first suggested that the shares might be sold.

85 She says that Qilin did not proceed expeditiously and that although a hearing was fixed for 7 July 2016, RHT made a request to re-fix/vacate hearing dates on 5 July 2016. In that request RHT said that it had come to Qilin's attention that the price of Millennium shares on the Hong Kong Exchange had stabilised and that the drop in the price of the Millennium shares might be attributed to, *inter alia*, certain developments in Millennium which might adversely affect CPIT's financial standing. RHT said that, arising

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from these developments, Qilin was of the view that there was therefore no requirement to have the application heard on an urgent basis.

86 As a result, she submits that given the fall in the price of Millennium shares and the absence of urgency, it made more sense to wait for an increase in the share price rather than to sell them after the price had "crashed". She further submits that the disposal of Millennium shares was likely only to drive the price down further.

87 In addition, Ms Tan refers to Qilin's contention that its only recourse under the loan agreement is to the Millennium shares and says that this contradicts Qilin's pleaded counterclaim for the loan amount of HK$31,250,000. She says that the Millennium shares were not preserved for Qilin's benefit but as part of the security that Qilin gave CPIT for CPIT's claims. She refers to the letter of undertaking issued by RHT in which it was stated that:

> [Qilin] have 2,860,000 of the Pledged Shares, which are, for the sole purpose of the issuance of the undertaking herein, valued at the sum of HK$3,718,000.00 as at 28 January 2016, based on the market price of shares in Millennium at HK$1.30 per share as at 28 January 2016.

She says that this shows that the remaining Millennium shares represent CPIT's security which Qilin had agreed to provide.

Decision

88 The Injunction was made after hearing submissions from the parties and in order to preserve the shares which, in these proceedings, CPIT says were unlawfully disposed of by Qilin but Qilin says it was entitled to dispose of.

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89 The terms of the Consent Order were negotiated on the basis that those shares had a particular value and therefore the sums secured by the Consent Order depended on the shares being retained as shares. The parties could have agreed to the sale of the shares in Order 1 of the Injunction but did not and proceeded on the agreed basis that they had a certain value. Whilst it is evident that the price of the Millennium shares is now well below the value which the parties put on those shares at the time of the Consent Order, by the time of the hearing of the Variation Application the value of the Millennium shares had already decreased significantly.

90 I have come to the conclusion that I should not allow the Variation Application. First, although Order 1 of the Injunction was not a consent order, the parties made the Consent Order on the basis of Order 1 of the Injunction, each accepting that the share value could, on the usual basis, rise or fall. Secondly, whilst shares have a commercial value, shares also have a non-monetary value to a particular party and the court decided to grant the Injunction to preserve the Millennium shares as an asset. I do not consider that a fall in the value of those shares justifies converting that asset into cash. Thirdly, share values do fluctuate. Whilst there may be underlying reasons why the value of Millennium shares has fallen, they appear to have stabilized and may increase in value. Converting the shares into cash at this stage does not appear to have any advantage.

91 Accordingly, I do not consider that Qilin have established that there is any good reason why the Millennium shares should be converted to cash at this stage. I therefore do not allow the Variation Application.

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Postscript

92 Subsequent to the hearing, RHT wrote to the Court on 1 September 2016 saying that it had come to Qilin's attention that CPIT was in the process of negotiating with potential investors for the sale of its 1,288,900,000 Millennium shares. RHT referred to a Voluntary Announcement dated 30 August 2016 ("the Announcement") and submitted that the Court could take judicial notice of it, referring to ss 58 and 59 of the Evidence Act (Cap 97, 1997 Rev Ed) and *Zheng Yu Shan v Lian Beng Construction (1988) Pte Ltd* [2009] 2 SLR(R) 587.

93 On 2 September 2016 MLS responded to RHT's communication, objecting to the further evidence and arguments by Qilin and challenging the basis on which the matter is sought to be put before the Court.

94 I would, in any event, be reluctant to accept further evidence or argument after the parties have had a full opportunity to put in evidence and make submissions. If I were persuaded that new evidence which arose subsequent to the hearing would have a major impact on the Fortification or Variation Applications then I would have considered whether it was appropriate to give directions for further argument.

95 The relevance of the new evidence, as indicated in RHT's letter of 31 August 2016, is that CPIT is negotiating to dispose of a substantial part of its assets. I do not consider that this provides any ground to re-open any of the issues which have arisen on the Fortification Application and which I have dealt with above. Nor do I consider that the fact that CPIT has made a commercial decision to negotiate to sell its Millennium shares, if Qilin is correct, can be taken to support the Variation Application. The Injunction

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preserves certain Millennium shares as assets but that does not prevent CPIT from selling other shares, if that is what it is doing, and nor does it mean that the shares preserved in the Injunction should be converted into cash.

96 Accordingly, I do not accede to Qilin's request that I should take judicial notice of the Announcement and I do not consider that I should direct that there should be further argument.

Conclusion

97 For the reasons set out above I dismiss the Fortification and Variation Applications. I will hear any consequential matters (including the issue of costs) at the further Case Management conference on 23 September 2016, if they are not agreed.

Vivian Ramsey
International Judge

Tan Poh Ling Wendy and Kenneth Chua (Morgan Lewis Stamford LLC) for the plaintiff;
Renganathan Nandakumar, Vernon Voon and Sharon Chung (RHTLaw Taylor Wessing LLP) for the defendants.

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