JES International Holdings Ltd
v
Yang Shushan

[2016] SGHC 52

High Court — Suit No 815 of 2014
Kannan Ramesh JC
21–24, 28 July; 4–6, 11–12 August; 25 November 2015

Contract — Breach

Agency — Agency by estoppel — Implied authority of agent

Damages — Measure of damages

5 April 2016 Judgment reserved.

Kannan Ramesh JC:

Introduction

1 As the evidential tapestry was weaved before me, an intriguing story unfolded. At its heart, this is a story of two fathers, their respective children and companies, and agreements which they had each signed. The question of which agreement was operative and who they were between was a matter of significant discord. The two fathers are Jin Xin ("JX") and the Defendant, Yang Shushan. The two children are Jin Yu ("JY"), JX's daughter, and Yang Nan ("YN"), the Defendant's son. The two companies are the Plaintiff, JES International Holdings Ltd, and Scibois Co Ltd ("Scibois"). JX and the Defendant are respectively the moving spirits of these companies.

2 A shroud of intrigue cloaked the dispute because YN, despite being omnipresent in the evidential quilt-work, was a man missing. He did not surface as a witness in these proceedings. An attempt was made to explain his absence with scandalous and scurrilous allegations of conspiracy and improper alliances between him and JY made shockingly by none other than the Defendant, his father.

3 However much this story was laced by intrigue, the mist had to be pierced to get to the issues at the core of these proceedings. The Plaintiff's case is that pursuant to a sale and purchase agreement allegedly executed on 4 July 2014 by the Plaintiff, and the Defendant and YN ("the 4 July SPA"), the Plaintiff and the Defendant had agreed to a share swap. Under the share swap, the Plaintiff would purchase 51% of the shares in Scibois in consideration of which the Defendant and YN would be issued and allotted a total of 20% of the enlarged share capital of the Plaintiff as well as be paid a sum of US$30m. The share swap was to be performed in two tranches. The first tranche, which is salient to the present proceedings, involved the transfer of 120,802,800 ordinary shares in the Plaintiff to the Defendant ("the First Tranche JES Shares") in exchange for the Plaintiff receiving 20% of the shares in Scibois ("the First Tranche Scibois Shares"). The First Tranche JES Shares, or at least a part thereof, are at the centre of the battleground between the Plaintiff and the Defendant. The 4 July SPA stipulated a moratorium on the transfer or disposal of the First Tranche JES Shares, which kicked in upon the transfer of the same to the Defendant. Sometime in July 2014, the Defendant received the First Tranche JES Shares. He then transferred 60,000,000 of those shares ("the Collateral Shares") to a third party ("the Lender"). The Plaintiff asserts that this was in breach of the moratorium.

4 The Defendant's position is that the moratorium in the 4 July SPA does not bind him. Alternatively, he argues that the 4 July SPA was forged or executed without his authority. He alleges that the operative moratorium is contained in another agreement described as "the Supplementary Agreement Pertaining to (the Supplementary Agreement of) the Framework Acquisition Agreement" ("the SA2") executed between the Defendant and JX (on behalf of the Plaintiff) on 23 May 2014, and that there is no restriction on the mortgage or pledge of the First Tranche JES Shares under that moratorium. He asserts that the transfer of the Collateral Shares to the Lender does not breach the moratorium in the SA2.

5 Recognising that this judgment is of substantial length and complexity, for the reader's better understanding, I have set out, in an annex to this judgment, a table of references and abbreviations that I have used.

The background facts

6 Much of the facts are a matter of heated controversy. However, there are certain key facts that are relatively uncontroversial. I will set them out.

The dramatis personae

7 The Plaintiff is a company listed on the mainboard of the Singapore Exchange. Its principal business is shipbuilding. Its principal shareholder is a company called JES Overseas Investment Ltd ("JESOIL"), which, up to 4 July 2014, held 44.17% of the issued and paid-up capital of the Plaintiff. The principal shareholder of JESOIL is JX who holds 76% of its shares. JX was also at all material times the Chairman, Chief Executive Officer, and, as noted earlier, the moving spirit of the Plaintiff. He stepped down as the Plaintiff's Chief Executive Officer on 16 March 2015.

8 JY is JX's daughter, and was the Deputy Chief Executive Officer of the Plaintiff until she took over from her father as the Chief Executive Officer. She is also a significant shareholder of the Plaintiff.

9 The Defendant is a businessman. He is Chairman of Scibois, holding 40% of its shares. Scibois is incorporated in the British Virgin Islands. YN held the remaining 60% until he transferred the First Tranche Scibois Shares to the Plaintiff thereby decreasing his share in Scibois to 40%. The Defendant is the controlling mind and moving spirit of Scibois notwithstanding YN's interest. The Plaintiff presently holds 20% of Scibois' shares, being the First Tranche Scibois Shares.

10 Scibois owns 75% of the equity in Ste De Commerce Internationale Du Bois Au Congo Scibois Spril ("Scibois Congo"), a private company incorporated in the Democratic Republic of Congo ("DRC"). Scibois Congo owns and operates a forestry concession issued by the Government of the DRC ("the Concession"). The Concession is a forest harvesting licence valid until May 2036 covering an estimated area of 229,400 hectares. The transactions which are the subject of discord before me concern the Concession. According to the Defendant, the value of the Concession is US$3b, which would make Scibois' indirect interest worth approximately US$2.1b.

11 YN is in charge of the general operations of Scibois Congo. In 2014, when the transactions came into being, YN was only 33 years old. The Defendant claims that both he and YN have at all times had a poor command of the English language.

The planned issuance of Islamic bonds

12 The Defendant and JX were introduced to each other through mutual acquaintances sometime in the second half of 2013. The introduction morphed into a discussion at the end of 2013 on a possible collaboration between Scibois and the Plaintiff for the Plaintiff to issue Islamic bonds for US$500m on the back of the Concession. The idea essentially was to unlock the value of the Concession by using it as backing for the Islamic bonds. This would in turn make the Islamic bonds attractive to investors. The Plaintiff would be able to raise significant proceeds as a result, enabling it to diversify from its core shipbuilding business, which was not doing particularly well at that time. The Defendant was the prime mover behind the idea.

13 The proposed transaction was essentially a share swap involving the Plaintiff acquiring 51% of the equity in Scibois from the Defendant and YN, in exchange for shares of the Plaintiff that would be issued and allotted to them.

14 Towards this end, on 6 December 2013, the Defendant sent JX an email setting out his proposal for the share swap and the issuance of the Islamic bonds. The Defendant was anxious to get the show on the road, and sent a chaser to JX on 18 December 2014. This email was copied to JY and the Plaintiff's general manager, Zhu Xiao Yang ("Zhu"). This was the first documentary evidence of JY's involvement in the transaction.

15 Between 25 December 2013 and 8 January 2014, emails were exchanged by the Defendant and JY. Information on Scibois was sought by JY and provided by the Defendant, and a timeline for execution and completion of the transaction was proposed by the Defendant. This culminated in the Defendant sending an email to JY, Zhu and YN dated 11 February 2014 enclosing a document described as "Cooperation framework agreement on bond issuance

between Scibois and JES" ("the CAA"). This was the first time YN surfaced in the transaction. The intended parties to the CAA were the Plaintiff and Scibois. The CAA was, however, not executed.

16 JY's response was to forward to the Defendant and YN, via her email dated 28 February 2014, a Memorandum of Understanding. The parties identified therein were again, the Plaintiff and Scibois.

17 Negotiations and discussions actively continued between 28 February 2014 and 6 April 2014. There is controversy on whether YN was involved in the negotiations on behalf of the Defendant. I will examine the differing positions later. For present purposes, it is sufficient to note that the evidence does show that YN was involved, and was in fact an active participant, in the negotiations.

Execution of the Framework Acquisition Agreement and the first supplementary agreement

18 The negotiations resulted in the execution of an agreement described as "the Framework Acquisition Agreement" ("the FAA") on 6 April 2014. The FAA was, however, dated 8 April 2014. It is relevant that the parties to the FAA were the Plaintiff on the one hand, and the Defendant and YN on the other. It is also relevant that the FAA was in both English and Mandarin. It outlined the main terms that had been agreed concerning the share swap and the issuance of Islamic bonds. Significantly, cl 2.1 of the FAA provided that:

> The Parties agree that they shall use their best endeavours *to negotiate and enter into a definitive sale-and-purchase agreement* in relation to the Proposed Acquisition, upon the relevant terms and conditions set forth in this Agreement and such other terms which the Parties may agree [to] in the course of negotiations. [emphasis added]

19 It is also relevant that on the same day as the execution of the FAA, another agreement was executed by JX and the Defendant which covered many of the same terms as the FAA. This agreement was described as the "Supplementary Agreement Pertaining to the Framework Acquisition Agreement" ("the SA1"). What was the purpose of the SA1 and who the parties thereto were are matters of significant controversy. The Plaintiff's position is that the parties were JX and the Defendant, and that the SA1 served to bind the two of them to the mechanics and details of the Islamic bond issue envisaged under the FAA. The Defendant's position is that the SA1 was the real agreement between him and the Plaintiff, and that the FAA was executed only because it was required by the lawyers and the regulators for the purpose of regulatory compliance. It is relevant to point out that the public announcement made by the Plaintiff on 8 April 2014 was that it had entered into the FAA with the Defendant and YN. There was no reference at all to the SA1.

20 As a segue, an agreement dated 9 March 2014 was signed between the Defendant and JX described as "the Private Agreement". Under this agreement, the Defendant agreed to transfer to JX's son, one Jin Peng, 5% of the equity in Scibois in exchange for purported assistance rendered by JX to the Defendant to overcome his financial hardship. There is disagreement over what this agreement was for and when it was actually executed. However, in my view, this agreement is not material to the issues before me.

Events occurring after the execution of the FAA and the SA1

21 Negotiations took place with a view to executing a sale and purchase agreement between the parties to the FAA, as contemplated by cl 2.1 of the FAA. JY, the Plaintiff's solicitor, Lim Kok Meng ("Lim"), and the Plaintiff's Executive Director and Chief Financial Officer, Patrick Kan ("Kan"),

negotiated on behalf of the Plaintiff. On the other side of the fence, only YN was involved, with the Defendant conspicuously absent. Draft sale and purchase agreements were sent by JY to YN, and meetings took place between YN, and JY and Lim on the drafts. Needless to say, there are widely different positions on what was discussed, understood and agreed at these meetings, and the relevance of the same to the bargain that was made between the Plaintiff and the Defendant. In substance, the Defendant's position is that these meetings and email exchanges are not relevant because they concerned a sale and purchase agreement which was understood and agreed to be not the true bargain between the parties. Also, he denies knowledge of these meetings and email exchanges. Finally, he denies that YN was authorised to negotiate on his behalf.

22 A key feature in all the drafts of the sale and purchase agreements, meetings, and email exchanges was the moratorium clause which is at the centrepiece of this dispute. It is relevant that on 2 May 2014, JY sent JX an email the attachment to which contained specific reference to the said moratorium clause and an undertaking to be provided in relation thereto. This email was forwarded by JX to the Defendant by his email dated 4 May 2014. These emails are important pieces of documentary evidence for reasons I will explain later in this judgment.

The sale and purchase agreement dated 23 May 2014 and the SA2

23 Two agreements were signed on or about 22 or 23 May 2014. One was the SA2 and the other a sale and purchase agreement between the Plaintiff of the one part, and the Defendant and YN of the other ("the 23 May SPA"). The provisions of the SA1 and the SA2 were identical save in two respects. First, the timelines for performance of the share swap and the number of shares to be swapped were different. Second, and more significantly, the SA2 contained a

new provision, cl IV(1)(C) which is the fulcrum of the Defendant's case. Clause IV(1)(C) provided as follows:[1]

> Party A and Party B agreed as follows: before the funds from the debenture issue are in place, the 20% equity or shares transferred to both parties shall not be sold (unless with the written consent of both parties). The 20% equity or shares in the names of both parties *may be used as security for mortgage* during this financing period.
>
> [emphasis added]

The Defendant asserts that this is the moratorium clause that binds the parties. Naturally, the Plaintiff disagrees.

24 On the other hand, the 23 May SPA contained cl 5.4, which was absent from the FAA and which is instead the foundation of the Plaintiff's cause of action. The salient portion of cl 5.4 reads:[2]

> In consideration of the Purchaser's obligations in Clause 5.1 on Exchange Date, each of the Vendors irrevocably and unconditionally undertake that he shall observe a moratorium (as defined herein after) on the transfer or disposal of all his interest in the Consideration Shares. The "moratorium" shall be the period commencing on the Exchange Date (in the case of the First Tranche [JES] Shares) and the Completion Date (in the case of the Second Tranche [JES] Shares) and be up to and including the date falling twelve (12) months from the Completion Date. Without prejudice to any other rights and remedies of the Purchaser, if (a) Completion does not take place on Completion Date for any reason whatsoever, (b) any of the Conditions Precedent is deemed by the Purchaser to be not satisfied for any reason whatsoever, or (c) it shall be found prior to Completion that any matter which is the subject matter of a Warranty is not as warranted or represented, the Purchaser shall have the right to require the Vendors, by prior written notice, (and the Vendors irrevocably and unconditionally undertake with the Purchaser to agree to such request) to transfer all of the First Tranche [JES] Shares to the Purchaser

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[1] 2PB405A.

[2] 2PB371.

> (or such other person as the Purchaser shall direct) in exchange for the First Tranche [Scibois] Shares. …

Clause 5.4 stipulated a moratorium against the transfer or disposal of the shares that were to be transferred to the Defendant and YN pursuant to the share swap, and imposed an obligation on the Defendant and YN to transfer the Plaintiff's shares back in certain situations ("the Moratorium"). The 23 May SPA also required the Defendant and YN to provide an undertaking as regards the moratorium ("the Moratorium Undertaking").[3] The Moratorium and the Moratorium Undertaking covered the First Tranche JES Shares, including the Collateral Shares.

25 I shall examine the reasons for the introduction of the Moratorium later in this judgment. However, for present purposes, two facts are salient. First, there was an important change in the structure of the share swap transaction between the FAA and the 23 May SPA. Under the FAA, the shares in the Plaintiff were to be transferred or allotted to the Defendant and YN *upon completion*. However, under the 23 May SPA, the share swap was divided into two tranches with the first tranche taking place *before* completion and *before* the satisfaction of key condition precedents. Second, instead of shares being issued and allotted to the Defendant and YN, only the Defendant would receive shares from the Plaintiff under the first tranche and those shares would be borrowed under a share lending agreement between the Plaintiff, as borrower, and JESOIL, as lender. These shares were subject to recall at any time by JESOIL. That these borrowed shares were subject to recall and were to be transferred by the Plaintiff to the Defendant ahead of completion had an important bearing on why the Moratorium was introduced. This will become

[3] 2PB396.

apparent when I analyse the evidence. The Moratorium was also clearly relevant to the Securities Industry Council ("the SIC") as it required the Defendant and YN to undertake to re-transfer of the shares under the first tranche of the share swap should the lender (*ie*, JESOIL) recall the borrowed shares (see [46] below).

26 There is significant disagreement as to when the SA2 and the 23 May SPA were signed, and the effect of the SA2 and the 23 May SPA on each other. In sum, the Defendant's position is the same as that taken as regards the SA1, *viz*, that the SA2 was the true agreement between him and the Plaintiff. He further asserts that he was told by JX to disregard the 23 May SPA, as it was required by the lawyers and regulators. The Plaintiff's position is that the 23 May SPA was the agreement between the parties. The Plaintiff offers two alternative ways to reconcile the SA2 with the 23 May SPA. The first is that the SA2 only bound JX and the Defendant, but *not* the Plaintiff. The second is that the SA2 was signed on 22 May 2014, while the 23 May SPA was signed on 23 May 2014, and that JX had changed his mind as regards cl IV(1)(C) in the SA2 when he executed the 23 May SPA. There is also disagreement on whether the 23 May SPA was intended to be binding and was to be dated 23 May 2014.

Events occurring after 23 May 2014

27 Efforts were made to perform the 23 May SPA. JY and YN drove these efforts. The SIC gave approval for the share lending agreement on 27 May 2014.[4] The Moratorium Undertaking was also furnished on the same date by the Defendant and YN at the Plaintiff's request.[5]

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[4] 2PB418–419.

[5] 2PB424, 430.

28 However, a significant impediment to the performance of the share swap under the first tranche was the Defendant's delay in opening a securities account to receive the First Tranche JES Shares from the Plaintiff. Details of the account were eventually provided by YN on 25 June 2014.[6] Due to this delay, it was not possible to perform the 23 May SPA on its terms. As a result, efforts appear to have been made to execute another agreement on the same terms as the 23 May SPA. On 4 July 2014, by two emails, YN confirmed that the 23 May SPA might be "re-dated" 4 July 2014, and forwarded an execution page containing what appeared to be the signatures of the Defendant and YN. The Defendant disputes the authenticity of these emails and signatures. The Defendant also disputes YN's authority to "re-date" the 23 May SPA or to send the signed execution page. In short, the Defendant's position is that the agreement purportedly made on 4 July 2014 (*ie*, the 4 July SPA) does not bind him. Additionally, he asserts that he did not understand the terms of the 4 July SPA and that he was not aware that the Plaintiff would be borrowing shares from JESOIL for the purposes of transferring them to the Defendant.

29 The Plaintiff, however, regards the 4 July SPA as binding on the parties. The 4 July SPA was announced to the market by the Plaintiff on 4 July 2014.[7] On the same day, a share lending agreement was entered into between the Plaintiff and JESOIL ("the Share Lending Agreement").[8] Save for certain dates, the terms and structure of the transaction as set out in the 23 May SPA and the 4 July SPA were identical. For ease of reference, I will therefore use "the Moratorium" and "the Moratorium Undertaking" to refer to the identical clauses

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[6] 2PB443.

[7] 2PB513–523.

[8] 2PB458–469.

and undertakings found in both the 23 May SPA and the 4 July SPA and the term "SPA" to refer generically to the structure of the sale and purchase transaction which is identical in both the 23 May SPA and the 4 July SPA.

Events occurring after 4 July 2014

30 The share swap under the first tranche of the 4 July SPA took place. Crucially, the shares received from JESOIL under the Share Lending Agreement were transferred to the Defendant's securities account in two tranches of 30,000,000 shares on 6 July 2014 and 90,802,800 shares on 20 July 2014 without the Defendant providing a second moratorium undertaking under the 4 July SPA. The only undertaking that was given was that under the 23 May SPA (see [27] above).

31 The Defendant in turn transferred the said shares to the Lender in two tranches of 30,000,000 each on 11 July 2014 and 23 July 2014 (*ie*, the Collateral Shares), allegedly as collateral for a loan to be provided by the Lender to the Defendant, under an agreement dated 27 June 2014 described as the "Non-Recourse Collateral Security Loan Agreement" ("the Collateral Security Agreement"). The name of the Lender was redacted from the Collateral Security Agreement with the Defendant refusing to disclose the same. This is a critical transaction. As pointed out earlier (see [3] above), the Plaintiff's claim is that the transfer of the Collateral Shares under the Collateral Security Agreement was a breach of the Moratorium in cl 5.4 of the 4 July SPA.

32 The Defendant's refusal to provide the Moratorium Undertaking and the discovery by the Plaintiff of the transfer of the Collateral Shares to the Lender prompted the Plaintiff to commence these proceedings on 31 July 2014. An application was filed on the same day to restrain the Defendant from dealing with the First Tranche JES Shares. An order in terms of the said application was

made on 1 August 2014, and the 60,802,800 shares that remained in the Defendant's hands have been frozen since ("the Injunction"). The Defendant was also ordered to take immediate steps to recover and restore the Collateral Shares ("the Order of Court"). To-date, the Defendant has not complied with the Order of Court.

33 After the commencement of these proceedings, by its letter dated 3 March 2015, the Plaintiff terminated the 4 July SPA pursuant to cl 4.4 of the agreement on the basis that the transaction had not been completed by the long-stop date provided therein.[9] It was observed, in this letter, that the termination occurred automatically as certain condition precedents had not been satisfied by 4 January 2015 (*ie*, the long-stop date under the 4 July SPA). Therefore, the 4 July SPA was automatically terminated on 4 January 2015. This in turn triggered an event of default under the Share Lending Agreement.

Issues

34 Based on the facts recited above, the following broad issues arise for consideration:

(a) Did the Moratorium in the 4 July SPA govern the Defendant's dealing with the JES Consideration Shares (defined at [37] below)?

(b) In transferring the Collateral Shares to the Lender, did the Defendant breach the Moratorium?

(c) If the Defendant breached the Moratorium, what relief is the Plaintiff entitled to?

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[9] 3PB732–733.

35 Before I consider these issues, it is important to examine the structure of the SPA and the purpose of the Moratorium. I now turn to this.

The structure of the SPA and the purpose of the Moratorium

36 As mentioned earlier, the 23 May SPA and the 4 July SPA were identical save for their commencement dates. The structure of the transaction contemplated under each agreement is pertinent to understanding why the Moratorium and the Moratorium Undertaking were necessary.

37 The SPA envisaged that 51% of the shares in Scibois would be transferred to the Plaintiff in return for 301,007,000 shares of the Plaintiff representing 20% of its enlarged share capital ("the JES Consideration Shares") and payment of a cash consideration of US$30m ("the Cash Consideration"). Upon completion of the transaction, the Defendant and YN would collectively hold 20% of the enlarged share capital of the Plaintiff and the Plaintiff would hold 51% of the share capital of Scibois. It was further envisaged that the JES Consideration Shares would all be issued and allotted on completion of the transaction following enlargement of the share capital of the Plaintiff.

38 The transaction was to be performed in two tranches. The first tranche involved the transfer of the First Tranche Scibois Shares in return for the First Tranche JES Shares. Three points are relevant here:

(a) The First Tranche JES Shares were to be transferred by the Plaintiff to the Defendant only.

(b) The First Tranche JES Shares were to be obtained from JESOIL pursuant to a share lending agreement between the Plaintiff and JESOIL subject to the SIC exempting JESOIL from making a general offer under

r 14 of the Singapore Code on Take-overs and Mergers following an increase in JESOIL's percentage voting rights upon retransfer of the loaned shares.

(c) Transfer of the First Tranche JES Shares would take place on a date agreed, identified in the agreement as "the Exchange Date", which would be not later than ten business day after the date of the agreement, provided the Defendant notified the Plaintiff five business day before that date of the details of the securities account which was to receive the shares.

39 The second tranche was as follows:

(a) On the part of the Plaintiff: the issue and allotment of 181,204,200 shares from the Plaintiff's enlarged share capital ("the Second Tranche JES Shares") to the Defendant and YN divided in the proportion set out in cl 5.2 of the SPA, and payment of the Cash Consideration.

(b) On the part of the Defendant and YN: the transfer of 31% of the shares in Scibois ("the Second Tranche Scibois Shares").

(c) Completion would take place on a date falling not later than ten business days after satisfaction or waiver of condition precedents set out in cl 4.1, defined in the SPA as "the Completion Date". Clause 4.4 also provided that the transaction would be automatically terminated if completion did not take place by "the Long-Stop Date", defined in the agreement as six months from the date of the agreement.

It would be apparent from the above that the date of the SPA and the notification by the Defendant of the details of his securities account are of critical importance to the time for performance of the first and second tranches. This is relevant to why the 23 May SPA was "re-dated" and "re-executed" as the 4 July SPA.

40 The condition precedents covered several important steps. I highlight three in particular: (a) shareholder approval for the transaction and for the enlargement of the Plaintiff's share capital; (b) satisfactory due diligence on Scibois by the Plaintiff; and (c) a feasibility report showing that the Islamic bonds issue on the back of the Concession was viable. Completion of the first tranche was to take place even before these critical steps had been performed. This would mean that:

(a) there was clear risk that the transaction would not complete which would in turn result in the automatic termination of the SPA;

(b) the Plaintiff would have by then transferred to the Defendant shares representing 10% of the Plaintiff's share capital borrowed from the JESOIL under a share lending agreement (*ie*, the First Tranche JES Shares); and

(c) upon termination of the agreement, the Defendant had to return the First Tranche JES Shares and the shares borrowed from JESOIL.

These factors collectively show why the Moratorium and the Moratorium Undertaking were introduced in the SPA.

41 I have set out the salient portions of the Moratorium at [24] above. In substance, the Moratorium stipulates that:

(a) The Defendant and YN would observe a moratorium against transfer and disposal of the JES Consideration Shares.

(b) The period of the moratorium would be from the Exchange Date and the Completion Date to a date falling 12 months after the Completion Date for the First Tranche JES Shares and the Second Tranche JES Shares respectively.

(c) The Plaintiff had the right to require by prior notice the re-transfer of the First Tranche JES Shares in exchange for the First Tranche Scibois Shares if any one of three situations were to occur, and the Defendant and YN irrevocably and unconditionally undertook to effect the re-transfer. These three situation are namely:

(i) if completion did not take place on the Completion Date;

(ii) if the condition precedents were deemed by the Plaintiff to be not satisfied for any reason whatsoever; or

(iii) if prior to completion of the second tranche, if it was found that any of the warranties (as defined in the SPA) given by the Defendant and YN were not accurate.

In a similar vein, the Moratorium Undertaking stipulates that the Defendant and YN would not, during the moratorium period "dispose of, realise, transfer or assign any part of" their interest in JES Consideration Shares until the moratorium period had expired.

42 Seen collectively, it seems crystal clear that a fundamental purpose of the Moratorium was to safeguard the Plaintiff's interest by ensuring that the Defendant and YN were in a position to re-transfer and therefore return the First Tranche JES Shares in the event that:

(a) the transaction did not complete; or

(b) JESOIL demanded the return of the shares lent under the Share Lending Agreement.

Indeed, these were the same reasons offered by JY and JX in their testimonies concerning the purpose of the Moratorium.[10] JX testified that the accuracy of the information on Scibois provided by YN and the Defendant had to be verified so that an accurate picture could be obtained before completion.[11] Lim also testified along the same lines.[12] JY offered another reason for why the Moratorium lasted for 12 months after the completion of the transaction, *viz*, to avoid a crash of the Plaintiff's share price caused by the Defendant and YN dumping a substantial number of shares.[13] I note that this reason was also cited in the Court of Appeal decision of *Pacrim Investments Pte Ltd v Tan Mui Keow Claire and another* [2008] 2 SLR(R) 898 ("*Pacrim*") at [20] as one reason why moratoria such as this were insisted upon by the parties in such transactions. I accept JY's evidence in this regard.

43 The possibility of the transaction being terminated before completion was not remote. The Scibois shares would only have value if the Concession was valuable. The Concession was an asset subject to the laws of the DRC and held by a corporation incorporated there. The Defendant represented that the Concession was worth US$3b, a huge amount. The success of the planned Islamic bonds issue was premised on the integrity of this asset. The Plaintiff did

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[10] NE 28 July 2015, pg 86-87 and pg 90-93.

[11] NE 24 July 2015, pg 2-4.

[12] NE 28 July 2015, pg 131-132 and pg 153-154.

[13] NE 24 July 2015, pg 62.

not have any independent assurance of the value of the Concession. All it had was the Defendant's representation. The valuation of the equity in Scibois Congo and the integrity of the Concession suffered from some opacity. Hence, the condition precedents that provided for satisfactory due diligence and a feasibility study before completion were crucial. Indeed, the concerns over the integrity of the Concession surfaced in an email dated 23 May 2014 from Kan to YN and JY.[14] Kan, who, as noted earlier, was involved in the negotiations on the 23 May SPA, wrote to YN and JY to highlight that some negative information had been uncovered by EFG Bank as regards Scibois. The negative information was distilled from an article on the DRC by a body known as "Global Timber.Org.UK". The article stated:

> The legality of almost 21 million hectacres of concessions have been assessed … and most have been declared illegal. *Those issued most near to the cut-off date were of course most likely to be opportunistic/ suspect – …Yang Shu Shan.*
>
> *… Yang Shu Shan was permitted to list on the NYSE Euronext exchange in Paris subsequent to DRC declaring that what appears to be the new company's primary asset – its concession – is illegal.* [emphasis added]

YN was asked to clarify. It is not clear if he did.

44 There are four other factors that show quite evidently that a key purpose of the Moratorium was to safeguard the Plaintiff's position as regards the First Tranche JES Shares pending completion. First, cl 5.1 of the SPA which deals with performance of the first tranche, states that the First Tranche JES Shares were being transferred "in consideration of the mutual promises exchanged herein *(particularly the undertaking by the vendors in Clause 5.4) and as a gesture of good faith to complete the Proposed Acquisition*" [emphasis added].

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[14] 2PB413.

The reference to "good faith" is an acknowledgement that the First Tranche JES Shares were being transferred to show the Plaintiff's commitment to the transaction notwithstanding the uncertainty on whether the transaction would be completed.

45 Second, as I have explained above, the First Tranche JES Shares were to be borrowed from JESOIL under the Share Lending Agreement. Under that agreement, JESOIL was entitled to demand a return of the First Tranche JES Shares at any time. If the Plaintiff failed to deliver an equivalent number of shares within seven days of the demand, it was obliged to compensate JESOIL based on an agreed formula. It must be noted that the obligation to re-deliver the equivalent of the First Tranche JES Shares arises when the SPA is terminated. This brings into sharp focus the interplay between the Defendant's obligation to return the First Tranche JES Shares upon termination of the SPA, and the Plaintiff's obligation under the Share Lending Agreement to return the shares loaned thereunder. The Moratorium was therefore important to ensure that the Defendant was able to return the First Tranche JES Shares to the Plaintiff should the Plaintiff be obliged to return the shares loaned by JESOIL under the Share Lending Agreement.

46 Third, the SIC required the Defendant and YN to provide to the Plaintiff an additional undertaking as regards the First Tranche JES Shares ("the SIC Undertaking").[15] Notably, this was provided by the Defendant and YN on 27 May 2014, shortly after the execution of the 23 May SPA.[16] It echoed the language of the Moratorium in that Defendant and YN "irrevocably and

[15] 2PB430.

[16] 2PB424.

unconditionally undertake" to the Plaintiff that they would transfer the First Tranche JES Shares to JESOIL within seven days of a demand by JESOIL for return of the same under the Share Lending Agreement provided the Plaintiff covenants to issue and allot the same amount of shares within thirty days of the demand. Clearly, the SIC Undertaking was geared to ensure that the Defendant returned the First Tranche JES Shares to JESOIL. The purpose of the SIC Undertaking is clearly set out in JY's email to YN dated 25 May 2014 when she requested YN and the Defendant to provide the same:[17]

> For clause 3.1 of the agreement, we have received in principle approval from the Securities Industry Council (SIC). In accordance with Note 15 on Rule 14.1 of the Takeover Code which states, *inter alia*, that if the lender has the right to recall the borrowed shares by giving advance notice of 7 days or less to the borrower any time during the period of the loan, the lender, for the purpose of Rule 14, will not be deemed to have disposed of the voting rights attached to those shares when he lends them out, nor will he be deemed to have acquired the voting rights attached to those shares when they are returned to him. *SCI* [*sic*] *wants us to confirm that in the event the loaned shares need to be returned, how it can ensured that the lender of said shares can recall the loaned shares within 30 days after giving advance notice of 7 days. Therefore we require you and your father to sign the attached letter so that we can submit it to SIC.*
>
> [emphasis added]

It is therefore evident that the SIC Undertaking was insisted upon to reinforce the Moratorium. The fact that the Defendant and YN executed the SIC Undertaking also shows that they were aware of the Moratorium and the fact that the Plaintiff was borrowing the First Tranche JES Shares from JESOIL.

47 Fourth, in her email dated 25 June 2014, JY told YN that once the First Tranche JES Shares were transferred to the Defendant's securities account, he

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[17] 2PB426.

must open a separate "moratorium account" and re-transfer the same to that account.[18] The desire to segregate the First Tranche JES Shares emphasises the importance that was placed by the Plaintiff on the Moratorium.

48 In the round, the Moratorium and the Moratorium Undertaking were necessary because the First Tranche JES Shares were to be transferred ahead of completion "as a gesture of good faith" using shares borrowed from JESOIL under the Share Lending Agreement. They attempted to preserve the status quo by stipulating, *inter alia*, that the Defendant was not to deal with the First Tranche JES Shares until 12 months after the Completion Date, thereby seeking to ensure that the Defendant was in a position to return the said shares if the transaction was unwound. The SIC Undertaking fortified this obligation. There was a residual purpose served by the Moratorium, *viz*, preventing a collapse of the Plaintiff's share price by the Defendant and YN dumping a substantial number of the JES Considerations Shares (see [42] above).

Does the Moratorium in the 4 July SPA govern the Defendant's dealings with the JES Consideration Shares?

49 The Defendant argues that the Moratorium in the 4 July SPA does not govern his dealings with the JES Consideration Shares. He argues that the SA2 was the operative agreement between the Plaintiff and the Defendant, and that the 4 July SPA had no legal effect as he did not sign the 4 July SPA and/or give YN the authority to execute the 4 July SPA on his behalf. The issue is a simple one: which is the operative agreement between the Plaintiff and the Defendant – the 4 July SPA or the SA2? In the light of the various allegations that have been made in the pleadings, affidavits and under cross-examination in court, a

[18] 2PB441.

determination of this question requires an examination of YN's role and authority in the transaction, the state of the Defendant's knowledge, and the relationship between the various agreements. However, before delving into the substantive issues, I first set out some general observations on the Defendant's credibility and the inferences to be drawn from the evidence as this will set the context for my assessment of the evidence and the factual landings I have come to.

The Defendant's credibility and the inferences to be drawn

50 I must state at the outset that I have grave doubts over the Defendant's credibility. As will be apparent from my analysis of the facts, there were serious logical deficits and discrepancies in his evidence on important events. His evidence was protean, morphing to suit the convenience of the circumstance. He was evasive, often not responding to or ignoring questions posed in cross-examination. When faced with documents which clearly contradicted his testimony, he would either blatantly change his response or refuse to concede what would appear to be a fair point. I hasten to add that JX and JY were not always credible as well. However, on balance, on most of the key issues, their evidence was certainly more sound than the Defendant's.

51 Besides being an evasive witness, the Defendant deliberately flouted his discovery obligations. In particular, the Defendant's introduction of certain exhibits while being cross-examined was quite astounding. The Defendant readily conceded that he was advised of his discovery obligation but chose to deliberately withhold the documents and affirm a false affidavit for discovery.[19]

[19] NE 11 August 2015, pg 99-105.

He apologised for his conduct to the court but the very next day, while under cross-examination, produced yet another exhibit which had not been disclosed in discovery.[20] The excuse offered in both instances was that he was fearful that disclosure would not allow him to challenge YN's testimony in the event he testified.[21] Withholding documents deliberately from discovery is in itself ordinarily unacceptable conduct. However, using his son as an excuse for doing so made the conduct even more egregious. It was also perplexing to say the least.

52 Besides the Defendant's lack of credibility, I also draw an adverse inference against the Defendant for his failure to call YN as a witness. It is patently obvious from my evaluation of the evidence that YN was a crucial part of the evidential matrix. Indeed, he was an indelible presence at crucial events, and in critical documents and foundational agreements. His absence as a witness is therefore of huge significance. In this regard, the Plaintiff submits that an adverse inference should be drawn against the Defendant on certain issues of facts because of the Defendant's failure or refusal to call YN to offer testimony on them.

53 Section 116(*g*) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act") states that the court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. In *Cheong Ghim Fah and another v Murugian s/o Rangasamy* [2004] 1 SLR(R) 628 ("*Cheong Ghim Fah*"), the court elucidated four principles to be applied when considering whether an adverse inference ought

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[20] NE 12 August 2015, pg 52-53.

[21] NE 12 August 2015, pg 75 line 24 – 79 line 9.

to be drawn from the absence or silence of a witness who might be expected to give evidence on an important issue of fact (at [42]–[43]):

> (a) The inference ought to go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (b) There must be some evidence, however weak, adduced by the former on the issue before the court is entitled to draw the adverse inference.
>
> (c) If the reason for the absence or silence of the witness satisfies the court, then the adverse inference ought not to be drawn. If a credible but not wholly satisfactory explanation is given, the potential detrimental effect of the witness's absence or silence may be reduced or nullified.
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> (d) The reasons for a witness's absence ought to be "put" in cross-examination by the party intending to raise the adverse inference so as to afford the opposing party the opportunity to explain the said absence.

However, I should point out that item (d) above is not an absolute necessity if the party in question had sufficient notice of the issue and would be expected to have chosen either to explain or not to explain the absence of the witness (see *ECICS Ltd v Capstone Construction Pte Ltd and others* [2015] SGHC 214 at [49]).

54 It was clear that it was within the Defendant's means to call YN as his witness. The procedural history of the action revealed that on 22 September

2014, YN had affirmed an affidavit in support of the Defendant's application to set aside the Injunction ("YN's 22 September Affidavit"). As late as 22 April 2015, the Defendant had identified YN as his witness.[22] Inexplicably, the Defendant declined to call YN to give evidence at trial. The Defendant did not offer a credible or satisfactory explanation for YN's absence. It is clear that the Defendant knew of YN's whereabouts. During the trial, he initially conceded that YN was in Beijing but later shifted ground and said that YN was either in Beijing or Africa and that he has had no communication with YN since 27 October 2014 as he had stopped trusting YN.[23] I find this too convenient an excuse. The fact that the Defendant had put forward YN as one of his witnesses up till 22 April 2015, not long before the start of the trial and well after 27 October 2014 when seeds of distrust were allegedly sown, puts paid to the veracity of this evidence. The fact remains that YN is still the holder of 40% of the shares in Scibois and the Defendant has taken no steps to remove him. Seen collectively, there is hardly an odour of distrust. Applying the principles stated in *Cheong Ghim Fah*, I am of the view that there is sufficient basis to draw an adverse inference against the Defendant. I infer that the Defendant did not call YN as a witness as YN's evidence would be unfavourable to him. Indeed, the Defendant admitted as much.[24] This adverse inference drawn against the Defendant adds an additional string to the Plaintiff's evidential bow.

55 Finally, the Defendant has also appeared to have destroyed crucial evidence. On 21 July 2015, I granted the Plaintiff's application for an order to have forensic experts examine the Defendant's mobile phone ("the Mobile

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[22] Plaintiff's closing submissions, para 172.

[23] NE 11 August 2015, pg 121-123.

[24] NE 12 August 2015, pg 75-76.

Phone") and the data therein. In an affidavit filed on 23 July 2015, the Defendant deposed that he had communicated with YN from May 2014 to July 2014 primarily through calls and text messages using the Mobile Phone, but that the same was no longer in use because it had broken down. The Mobile Phone was examined by the Plaintiff's and the Defendant's expert, Felix Lum Hong Ching ("Mr Lum") and Robert Leighton Phillips ("Mr Phillips"), respectively. Their examination showed three critical facts:

(a) the Mobile Phone had not broken down as alleged by the Defendant;

(b) a factory reset of the Mobile Phone had taken place on 27 July 2014; and

(c) the data in the Mobile Phone had been destroyed as a result of the said factory reset.

56 It was common ground between the experts that a factory reset had to be a deliberate action. The Defendant's conceded that he had not parted with possession of the Mobile Phone until it was surrendered to Mr Lum for examination on 21 July 2015.[25] The reasonable conclusion from these two facts is that the Defendant had deliberately destroyed data in the Mobile Phone, as only he had the opportunity and motive to do so. It is also uncanny that the factory reset took place on 27 July 2014, which would ensure that all of the data in the Mobile Phone relating to the calls and text messages between YN and the Defendant concerning the 23 May SPA and the 4 July SPA would be deleted. The Defendant's deliberate destruction of evidence not only undermines his

[25] NE 12 August 2015, pg 65-66.

credibility but also allows me to draw an adverse inference under s 116(*g*) of the Evidence Act that if that evidence were available, it would have been unfavourable to him.

57 Therefore, unless there was clear documentary evidence to support an assertion that he has made, I generally treated the Defendant's testimony with circumspection and caution. I regarded the Defendant as not a credible witness. As mentioned earlier, that is not to say that I wholly accepted JY's or JX's testimony. Indeed, I had difficulty with aspects of their testimony particularly JX's. Hence, I proceeded on the footing that the documentary evidence was the most reliable and credible source of evidence, and formed my impressions and measured the credibility of a witness against that backdrop. Seen in that light, the Defendant fell palpably at the lower end of the spectrum of credibility as compared to JY and JX.

YN's role in the transaction

58 One of the Defendant's main submissions is that YN was not authorised to negotiate on his behalf on matters concerning the 23 May SPA and the 4 July SPA. He states that YN was authorised to handle only the transfer of shares in accordance with the SA2, and to open an account in Singapore between 11 and 13 May 2014 in anticipation of receipt of the Plaintiff's shares under the said agreement. I do not accept the Defendant's submission. In my assessment, the evidence shows quite clearly that the Defendant nominated YN to negotiate the transaction with the Plaintiff and that YN had actual authority to act for and on behalf of the Defendant in relation to the transaction. In the alternative, and at the very least, YN had apparent authority to deal with the matters relating to the transaction on the Defendant's behalf or the Defendant is estopped from denying YN's authority.

The law on actual authority, apparent authority, and agency by estoppel

59 The question of authority arises in the context of an agency relationship. An agency relationship is the fiduciary relationship which arises between a principal and an agent where the principal assents to the agent acting on the principal's behalf (see *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [147]). A principal is bound by the acts of an agent where the agent has actual authority to act on the principal's behalf. Actual authority may be express or implied, but in either case it must be judged objectively. As stated in *Bowstead and Reynolds on Agency* (Peter G Watts gen ed) (Sweet & Maxwell, 20th Ed, 2014) ("*Bowstead and Reynolds*") at para 3-003:

> Actual authority is the authority by which the principal has given the agent wholly or in part by means of words or writing (called here express authority) or is regarded by the law as having given him because of the interpretation put by the law on the relationship and dealing of the two parties. Although founded on the principal's assent, the conferral of authority is judged objectively.

60 On the other hand, a putative principal may also be bound by the acts of an agent if the agent has apparent or ostensible authority to act on the principal's behalf. For the purposes of the present case, it must be shown that:

(a) the Defendant had made representations (by words or conduct) to the Plaintiff that YN had authority to act on his behalf; and

(b) the Plaintiff was induced by such representation to enter into the contract namely, the 4 July SPA.

61 Finally, the Plaintiff also raises the doctrine of agency by estoppel. The doctrine of agency by estoppel was considered in the case of *Spiro v Lintern* [1973] 1 WLR 1002 ("*Spiro*"). In that case, the first defendant asked the second

defendant, his wife, to put their house up for sale. His wife negotiated and concluded the sale of the house to the plaintiff. This was done without the first defendant's authority. Subsequently, the first defendant gave the second defendant a power of attorney to negotiate and conclude a second sale. In the meantime, the first defendant behaved as if he had authorised the sale of the house to the plaintiff. The court held that the first defendant was estopped from asserting that the second defendant had entered into the first sale contract without his authority. Buckey LJ stated (at 1010–1011):

> Where a man is under a duty – that is, a legal duty – to disclose some fact to another and he does not do so, the other is entitled to assume the non-existence of the fact. In such circumstances the conduct of the first man amounts to a representation by conduct to the second that the fact does not exist.
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> …
>
> If A, having some right or title adverse to B, sees B in ignorance of that right or title acting in a manner inconsistent with it, which would be to B's disadvantage if the right or title were asserted against him thereafter, A is under a duty to B to disclose the existence of his right or title. If he stands by and allows B to continue in his course of action, A will not, if the other conditions of estoppel are satisfied, be allowed to assert his right or title against B … On similar grounds, in our judgment, if A sees B acting in the mistaken belief that A is under some binding obligation to him and in a manner consistent only with the existence of such an obligation, which would be to B's disadvantage if A were thereafter to deny the obligation, A is under a duty to B to disclose the non-existence of the supposed obligation. …

In the recent case of *The "Bunga Melati 5"* [2016] SGCA 20, the Court of Appeal opined at [8] that the difference between agency by estoppel and apparent authority was not, as it were, apparent. However, the Court of Appeal declined to decide whether there was in fact a real difference between the two doctrines (at [12]).

62 With these legal principles in mind, I turn to consider the evidence.

Application of the law to the facts

63 The Defendant knew that the FAA and a definitive sale and purchase agreement were required by the Singapore Exchange ("SGX") to satisfy regulatory requirements, and for the purpose of public announcement. The FAA specifically contemplated a definitive sale and purchase agreement being executed between the parties namely, the Plaintiff, the Defendant and YN. The Defendant conceded that he knew of this.[26] This was a concession that had to be made as the FAA was drafted in both English and Mandarin. That being the case, it was expected that the parties to the FAA would negotiate and conclude a sale and purchase agreement which would supersede the FAA. The Defendant did not engage in that process of negotiation. In his absence, who else could have filled that void but YN? YN was eminently suited for this role. He was an intended co-signatory, a majority shareholder of Scibois, one of the transferors of Scibois shares to the Plaintiff, and a transferee of the Plaintiff's shares. YN therefore had standing in his own right to be involved in the transaction – it concerned him and his shareholding in Scibois. More importantly, he was the Defendant's son and perhaps the person whom the Defendant trusted the most at the material time. Indeed, the Defendant conceded that the YN had a role in the negotiations save that he did not have any decision-making powers.[27] This was an important concession which I will revert to when I consider whether YN would have kept the Defendant updated on the negotiations. The Defendant also conceded that JX was under the impression that YN would be involved in the negotiations on the draft sale and purchase agreement.[28] In this regard, there was no allegation in the Defendant's Affidavit of Evidence-In-Chief ("AEIC")

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[26] NE 11 August 2015, pg 5.

[27] NE 4 August 2015, pg 62.

[28] NE 5 August 2015, pg 98.

that YN was not authorised by him to negotiate the draft sale and purchase agreement. I also note that YN did not state that he was not authorised to negotiate the SPA in his 22 September Affidavit. In fact, the tenor of the affidavit was that he was authorised to do so. Finally, on paper, YN was qualified for the task of negotiating the SPA, holding a first degree in Business and Finance, and a Masters in Business Administration.

64 The Defendant's conduct is telling. When the Defendant sent the CAA by way of his email dated 11 February 2014, YN was copied on the email.[29] YN was named as a party to the FAA and was present at the meeting on 6 April 2014 when the FAA was signed. The Defendant was aware that a draft sale and purchase agreement had been sent to YN by JY.[30] He was aware that YN was engaged in discussions with JY and Lim sometime on 15 May 2014, and with JY on or about 20 or 21 May 2014, on the terms of the sale and purchase agreement in May 2014 and that he had exchanged emails in this regard with JY.[31] In fact, YN was involved in every facet of the SPA from negotiation to performance. Yet, the Defendant did nothing to stymie YN's involvement in the process and in fact relied on his involvement for support. He did not tell JX or JY not to involve YN. Pertinently, JY, who was leading the negotiations for the Plaintiff, did not interact at all with the Defendant; her interactions were solely with YN. JX's and JY's testimonies were also consistent with YN being authorised or seen to be authorised to negotiate the transaction for the Defendant. They testified that YN was introduced by the Defendant as the person who would be negotiating on behalf of the Defendant. JY said that the

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[29] 1PB130.

[30] Yang Shushan's AEIC, para 54.

[31] NE 12 August 2015, pg 78.

introduction was made with a sense of pride.[32] They accepted that YN was authorised for the same reasons as outlined earlier (see [63] above).

65 In the face of such unequivocal conduct, one would have expected the Defendant to offer an explanation for his inaction or YN's active participation. He did not. This suggests to me that the Defendant did in fact nominate YN as his representative to negotiate the terms of the SPA. I should point out that the Defendant offered an explanation as to why he did not want YN involved. He testified that he had nominated YN initially, but in light of JX's decision not to nominate Zhu as the Plaintiff's representative, withdrew YN. That does not explain why YN could not be involved given that JX's replacement for Zhu was not himself but his daughter, JY. It would seem that the two children of the principal protagonists would be ideally placed to work out the terms of the SPA for their fathers. More importantly, it does not explain how and why YN became involved. The explanation is contrived and only serves to strengthen my conviction that the conclusion I have drawn is the correct one.

66 I do not accept the Defendant's allegation that YN had a poor command of the English language. This was offered to shield the Defendant from being aware of the Moratorium in the SPA. Put simply, if YN did not know of the Moratorium, he could not have told the Defendant about it. I discuss this point below (see [87]–[93] below). Lim's AEIC stated that YN has "a good working command of the English language".[33] JY offers the same perspective in her AEIC.[34] I accept their evidence in this regard. It will be apparent when I examine the evidence that YN was able to understand the terms of the SPA, including

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[32] Jin Yu's AEIC, para 27–28.

[33] Lim's AEIC, para 20.

[34] Jin Yu's AEIC, para 31 and 34.

the Moratorium (see [70]–[86] below). The very fact that the Defendant did not retain solicitors to advise him and YN on the transaction strongly suggests to me that YN was more than capable of understanding its terms, and the Defendant knew that. The Defendant would surely have sought legal assistance if he and YN were indeed handicapped by the English language.

67 Finally, I am buttressed in my conclusion by the inference to be drawn from the Defendant's failure to call YN as a witness and from the Defendant's deletion of crucial communications between himself and YN. The inference, per s 116(*g*) of the Evidence Act, is that evidence from these sources if available would be prejudicial to the Defendant's position. In other words, such evidence would go towards showing that the Defendant in fact authorised YN to negotiate and make decisions on his behalf.

68 For the foregoing reasons, I therefore find the Defendant had in fact authorised YN to negotiate with the Plaintiff on his behalf and to take all steps necessary to ensure that the transaction came to fruition. Further and in the alternative, I also find that the Defendant has held YN out as having the authority to do so and that the Plaintiff has relied on the Defendant's representations in this regard in entering into the SPA with the Defendant and YN.

Did the Defendant know about the Moratorium?

YN's knowledge

69 The Defendant has denied that he was aware of the Moratorium or the Moratorium Undertaking. It is relevant that he has not denied that YN knew of both. Two questions naturally arise: Was YN aware of the Moratorium and the Moratorium Undertaking? And, if he was aware of them, did he inform the

Defendant of the same? Perhaps, the second question ought to be cast in a slightly different way to bring into sharp focus the nub of the inquiry: Are there any compelling reasons why YN would not have told the Defendant?

70 It is important to set out some parameters here. First, YN had the means to be fully acquainted with the terms of the SPA. The evidence shows that he was deeply involved in the negotiations leading up the execution of the SPA, and indeed the performance of the same thereafter. Second, he had strong motivation to fully understand the transaction. He was a co-signatory, and a transferor and a transferee of shares under the SPA. His father, the Defendant, was a fellow signatory, and transferor and transferee. He was nominated to negotiate on the Defendant's behalf. On the Defendant's case, the value of the Concession owned by Scibois' subsidiary, Scibois Congo, was US$3b. With Scibois holding 75% of the equity in the subsidiary, YN and the Defendant's collective interest in Scibois would be worth US$2.1b. The transaction contemplated the transfer of 51% of this interest which would total on a straight-line basis an amount in excess of US$1.05b. It is inconceivable that YN would have applied a light touch to the transaction given the stakes. The motivation to fully understand the terms of the SPA is obvious.

71 These parameters suggest that YN must have been aware of the Moratorium and the Moratorium Undertaking. Has the Defendant offered any compelling reason for concluding otherwise? Apart from suggesting that YN's command of English was poor, the Defendant gave no reason, let alone a compelling one, to suggest a different conclusion. YN's own testimony would have been the best evidence of his purported inadequacies in the English language and of the fact that he was unaware of the Moratorium and the Moratorium Undertaking. But he was not before me as a witness. I have also concluded that the evidence points to the conclusion that YN had sufficient

proficiency in the English language to have understood the terms of the SPA. Additionally, it has not escaped me that many, if not all, of the emails which highlighted and dealt with the Moratorium were written in Mandarin, YN's mother tongue and most proficient language. It has not been alleged that these emails were not received or sent. All of these point to the conclusion that YN was aware and understood the purport of the Moratorium and Moratorium Undertaking. Moreover, the thread of documentary evidence suggests the same conclusion. I should note from the outset that none of the documents I shall discuss have been challenged by the Defendant as not being authentic or not having been sent and received. This creates a firm foundation for concluding what was known or understood by the parties sending and receiving the same.

72 The first piece of the puzzle is an email from JY to YN sent at 11.07am on 19 May 2014.[35] JY enclosed in this email a draft sale and purchase agreement which had been amended "according to [YN's] suggestion made in Singapore last week". The body of the email was in Mandarin though the draft sale and purchase agreement was in English. The contents of the email suggest that YN had reviewed a draft sale and purchase agreement at a meeting in the preceding week, and made comments which JY had incorporated into the draft that was attached to the email. This email shows that YN had a good appreciation of the terms of the transactions and was in fact keenly negotiating the same. It also shows that any purported deficiency in the English language did not handicap him in understanding the terms of the transaction. One further comment is apposite. Given that he was negotiating on the Defendant's behalf, it is reasonable to assume that YN would have proposed changes to the draft agreement after consultation with the Defendant. It would follow that the

[35] 2PB346-347.

Defendant was aware of the terms of the draft sale and purchase agreement that was attached to JY's email.

73 As for the meeting alluded to in JY's email above, it is common ground that a meeting did take place in Singapore between YN, JY and Lim at Lim's office in the week preceding 19 May 2014. There is dispute as to the exact date of the meeting but this is not material. The purpose of the meeting was to go through the important terms of the draft sale and purchase agreement. The testimony of both JY and Lim was that the important terms of the draft sale and purchase agreement were discussed principally in Mandarin and partly in English. JY testified that YN displayed an understanding of the terms, raising questions on the draft, negotiating on unfavourable terms and proposing amendments. JY testified that YN had raised concerns about cl 5.4 of the draft agreement, *ie*, the moratorium clause. YN appears to have carefully reviewed and understood the terms. Both JY and Lim were left with the distinct impression that YN had a good working command of English. JY must have. Otherwise, she would not have taken on board YN's comments.

74 I accept the evidence of JY and Lim this regard. If the meeting took place, it must been for a significant reason. Given YN's role in the negotiations and that the meeting was in Lim's office, the meeting must have been have been called to discuss important terms including the Moratorium. The Moratorium must have been specifically discussed because it was set out as a specific item in the schedule to JY's email dated 2 May 2014. I note that in YN's 22 September Affidavit, YN stated as follows:

> I met JES' Jin Yu and JES's lawyers in Singapore (a male lawyer) at the lawyer's office on one particular afternoon during the period 11 to 14 May 2014 when I happened to be in Singapore. I cannot remember which date it was, where the venue of the meeting [was] and the persons who were present.

> During this meeting, we orally re-confirmed to each other that the Vendors (my father and I) cannot sell JES shares, but that there is no restriction for us to pledge JES shares. Audrey Jin even expressed that JES agrees and has no objections if the Vendors pledged the JES shares.

This discussion would only have arisen if the Moratorium had been discussed. That would corroborate JY's and Lim's evidence that the Moratorium was discussed. YN must have been made aware of the moratorium clause in cl 5.4 of the draft sale and purchase agreement. The discussion at the meeting must have taken place in a language that YN was comfortable in. Thus, the question of YN's proficiency in English assumes less significance.

75 I make several observations on the passage from YN's 22 September Affidavit cited above insofar as it suggests that YN had been given an assurance that the JES Consideration Shares could be pledged. First, YN's reference to an oral re-confirmation would suggest there was an earlier assurance that was given. I saw nothing in the evidence to suggest that any effort was made to document this alleged assurance. This is surprising given its significance. Second, I find it difficult to understand why such an assurance was not worked into the language of the draft sale and purchase agreement given its importance to both parties and in light of the fact that amendments were in fact proposed to the draft under discussion. I note that Lim was present at the meeting and any responsible solicitor would have done exactly that. Third, it is inconceivable that JY and more particularly Lim would have given such an assurance when the importance and purpose of cl 5.4 was apparent. Again, these points make the absence of YN as a witness glaring and significant. Finally, I digress to point out that the Defendant had under cross-examination steadfastly refused to

concede that YN had met JY in Singapore in the week of 11 May 2014,[36] although he later acknowledged that the facts mentioned in YN's 22 September Affidavit were true.[37] This point is but one instance of the Defendant's evasive and protean evidence which I had mentioned earlier.

76 Returning to the documentary evidence, YN's reply to JY by an email sent at 12.12pm on 19 May 2014 is significant. In the opening paragraph of that email, he says:[38]

> I have received your email. I will translate the agreement, handover to my father to review, and thereafter go to your father's place to jointly sign the agreement.

Several points emerge from this passage. First, there is no reference to the alleged oral re-confirmation that was given at the meeting at Lim's office in Singapore. Second, there is no disagreement by YN that the amendments that were made arose out of comments made by him. Third, YN appears to have been largely satisfied with the contents of the draft sale and purchase agreement. Fourth, the draft was to be translated to Mandarin for the Defendant's review and final clearance. This suggests either that YN was sufficiently proficient in English to translate the draft into Mandarin or would engage someone qualified to undertake that task. Fifth, logically, he would have to explain the agreement to the Defendant. Sixth, there was a tentative meeting planned with JX at his place to execute the SPA. In the round, this email shows quite clearly that YN was aware of the terms of the draft sale and purchase agreement, and had evinced an intention to inform the Defendant of its terms.

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[36] NE 4 August 2015, pg 84-85.

[37] NE 5 August 2015, pg 6.

[38] 2PB345.

77 The email is also significant for two further reasons. First, it shows YN raising points with regard to the transfer of the Second Tranche Scibois Shares. This would suggest that he was actively involved in the negotiations. Second, in paragraph 11 of YN's 22 September Affidavit, YN asserted that he did not reply to JYs email dated 19 May 2014 as he did not understand the draft sale and purchase agreement. The existence of this email shows up that allegation.

78 By an email dated 22 May 2014 (6.13pm), JY forwarded an amended draft of the sale and purchase agreement to YN.[39] This email was again in Mandarin. The amendments that were made were specifically highlighted. Of interest is what was highlighted as regards cl 5.4 (*ie*, the moratorium clause):

> Clause 5.4 expressly states a one year moratorium on the shares; The last sentence says that if the first tranche 10% loaned shares needs to be transferred back to JES' majority shareholder, the stamp duty will be borne by your side; correspondingly, we shall pay the stamp duty for the transfer of the 20% BVI shares back to you and your father. (The stamp duty for the transfer of the 10% JES shares to your father now will be paid by us.)

79 There is a sub-text to this email. A meeting had taken place in JY's home in Shanghai sometime on 20 or 21 May 2014 where the draft sale and purchase agreement was discussed.[40] That meeting took place at JY's home because she had just become a mother and was on maternity leave. JY's testimony was that the meeting had taken place to iron out the issues that had been flagged in yellow in the draft that had been attached to her email dated 19 May 2014 as well as any further matters that had not been addressed at the meeting in Lim's office. She further testified that she went through the draft clause by clause and when

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[39] 2PB351-353.

[40] Plaintiff's Closing Submissions, para 210; Yang Nan's affidavit dated 22 September 2014.

it came to cl 5.4, she again reminded YN of its significance. YN then had asked if the Plaintiff's shares could be mortgaged and was told that was not possible but could be discussed. It was following this meeting that she had sent the email reproduced at [78] above.

80 Seen in this context, the specific amendment that was set out by JY as regards cl 5.4 suggests that a discussion did take place on the clause at this meeting. It would therefore follow that YN and JY specifically applied their minds to cl 5.4 and an amendment was made to deal with the stamp fees that would be incurred if the shares were retransferred upon the transaction being unwound. Indeed, what YN stated in reply to JY's email is particularly instructive:[41]

> Hi Director Jin,
>
> I have received the agreement, thank you very much. *There is no problem with the content of the agreement except for some minor amendments*:
>
> 1. In Appendix3 [the Moratorium Undertaking], names and other information has not yet been filled in; …
>
> …
>
> *The rest is fine. Thank you for your effort.*
>
> Moreover: Could you confirm if it is convenient to print on your side after the amendment? This is because my father has instructed me to email a clean copy to him and he will print it out at the business centre when he returns to the hotel (sorry), so I want to confirm with you as they should be signing the agreement either tonight or early tomorrow morning.
>
> [emphasis added]

81 I make the following observations. First, YN had clearly reviewed the agreement and proposed amendments. This must mean he was aware of the

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[41] 2PB351.

contents and was agreeable to the same in particular the changes to cl 5.4. In fact, he noted that in Appendix 3, which sets out the form of the Moratorium Undertaking, the parties' names and information had not been filled in. Second, the level of scrutiny that he had brought to bear is evident from the fact that he proposed minor amendments. Third, given YN's statement that he would be emailing a clean copy of the draft sale and purchase agreement to the Defendant, it is likely that the Defendant would have been informed of its terms. Fourth, that the Defendant was ready to travel either that evening or the next day to JX's office for the purpose of executing the SPA signifies that he and YN accepted the terms. Fifth, despite changes being made to cl 5.4, no effort was made to document the assurance that had allegedly been given that the shares could be pledged or mortgaged. In this regard, I note that in paragraph 13 of YN's 22 September Affidavit, YN had, while accepting that the meeting at JY's home had taken place, again alleged that JY had told him that the Plaintiff's shares could be pledged. This is not credible given the amendment that was proposed by JY and YN's response to the same in this email exchange.

82 Two further emails followed that evening. First, from JY at 8.15pm enclosing further revisions to the draft sale and purchase agreement.[42] Second, a response from YN at 9.00pm agreeing to the changes.[43] Again, these emails signify that YN was aware and approved of the terms of the draft sale and purchase agreement. As before, there was no reference to any assurance that was given by JY.

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[42] 2PB350.

[43] 2PB350.

83 Three significant email exchanges followed after the execution of the 23 May SPA. They fortify the conclusion that YN was aware of the Moratorium and the Moratorium Undertaking.

84 First, an exchange starting with an email dated 25 May 2014 from JY to YN.[44] In that email, JY requested YN and the Defendant to execute and forward the SIC Undertaking. A draft was attached to the email. Notably, YN, in his email in response dated 26 May 2014, specifically asked if the SIC Undertaking was the same as the Moratorium Undertaking.[45] JY pointed out the two were not the same and that the Moratorium Undertaking could be found at Appendix 3 of the 23 May SPA.[46] YN did not respond to challenge the Moratorium Undertaking.

85 Second, YN's email of 25 June 2014 notifying JY of the details of the Defendant's securities account for the purpose of transferring the First Tranche JES Shares.[47] In reply, JY requested the Defendant to deposit the said shares in a "moratorium account" following their transfer to the Defendant's securities account.[48] There was no response challenging this request.

86 Third, on 7 July 2014 (*ie*, after the execution of the 4 July SPA), JY sent YN an email notifying him, *inter alia*, that the Plaintiff had publicly announced the signing of the 4 July SPA and the transfer of the First Tranche JES shares

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[44] 2PB426.

[45] 2PB425.

[46] 2PB 425.

[47] 2PB443.

[48] 2PB441.

from JESOIL to the Plaintiff under the Share Lending Agreement.[49] In light of the transfer, she requested that the Defendant provide the Moratorium Undertaking.[50] YN's reply by way of his email dated 7 July 2014 is important. He stated that:[51]

> *I will send to you the moratorium undertaking document* after my father confirms that he has received the shares and returns to Beijing and I have passed it to my father for his signature.
>
> [emphasis added]

It would seem that even after the execution of the 23 May SPA and the 4 July SPA, YN was acknowledging the obligation to execute the Moratorium Undertaking. YN's email is a clear acknowledgement that there was an obligation to execute the Moratorium Undertaking. These emails are contemporaneous exchanges and would in the ordinary course of events constitute clear and cogent evidence of what was understood and agreed by the parties. Seen collectively, they show quite clearly that YN knew and approved of the Moratorium.

The Defendant's knowledge

87 Given my finding above that YN had actual authority to negotiate the transaction on the Defendant's behalf, the Defendant would accordingly be bound by the Moratorium if YN had agreed to the same. I also find that the evidence indicates that YN would have informed the Defendant of the Moratorium and the Moratorium Undertaking and that the Defendant in fact had actual knowledge of, and approved of the same. It is difficult to believe that YN,

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[49] 2PB528.

[50] 2PB528-529.

[51] 2PB528.

having been apprised of the Moratorium, would not have brought to the Defendant's attention. Common sense dictates that he would have. He was after all negotiating the transaction for both of them, which in and of itself would mean that the salient terms would have been highlighted to the Defendant. Also, YN, as a signatory to the transaction, would have wanted to ensure that his co-signatory would be familiar with the obligation that he, YN, was also assuming. There is no conceivable reason why he would not have. The adverse inference drawn against the Defendant for his deletion of communications and his failure to call YN strengthens this conclusion.

88 To conclude otherwise, would be to disregard the emails that were exchanged between YN and JY which I have covered above. In order to disregard these emails, I would have to arrive at two conclusions. First, that YN was engaged in a deliberate and dishonest exercise through the emails to mislead JY and JX into believing that he and the Defendant were agreeable to the Moratorium. Second, at the same time, YN was deliberately concealing from the Defendant the Moratorium and the obligation to issue a Moratorium Undertaking. There is nothing in the factual matrix that even remotely permits me to arrive at these conclusions. I make three points.

89 First, in the course of cross-examination, the Defendant was quizzed repeatedly on (a) whether he had spoken to YN as regards the contents of these emails, and (b) what conceivable reasons YN could have had for fabricating the said contents. Instead of being forthright with an explanation, the Defendant prevaricated with answers such as "I can't remember", "I don't know" or "I can't comment". One particular exchange with the Defendant is revealing:[52]

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[52] NE 11 August 2015, pg 67-70.

Mr Foo: Did you talk to Yang Nan about him staying in Beijing and that you were going to bring back the SPA for him to sign or send the SPA for him to sign?

Court: On or about 22 May.

…

A: I can't remember.

Q: Is it your evidence, Mr Yang, that you also did not confirm to Yang Nan that there was no problem with the SPA and that you were prepared to sign the SPA on either the night of 22 May 2014, or on the next day, 23 May 2014?

A: Yes, I didn't confirm with him.

Q: So again, the statement in Yang Nan's email to Ms Jin Yu on 22 May 2014 at 9 pm is untrue?

A: I don't know. I can't comment.

Court: Mr Yang, did you speak to your son on 22 May 2014 in the evening?

A: No.

Court: So how would your son know that you are going to leave the hotel at 9 am the next morning?

A: On that day at around 3 pm on 23 May, I arrived at JES meeting room, so Jin Xin and I signed the agreement at around 4 to 5 pm, we signed both the Chinese and English agreement. And then after that, I left for the train station from the meeting room and I didn't tell him that I would leave the hotel at 9 am.

Court: So it's your evidence that you did not speak to your son on 22 May 2014 in the evening?

A: Yes.

Court: Did you speak to him at any time on 22 May?

A: I can't remember.

Court: Why are you so sure that you did not speak to him in the evening?

A: I can't remember, but I remember that on 22 May I arrived at JES shipyard at about 4 pm and I took two photos. …

…

Court: I'm trying to understand something. These emails that Mr Foo has taken you through, emails from your son to Ms Jin Yu, appear to refer to conversations your son has had with you at the relevant time. Can you try to explain to me why your son would say such conversations took place when you say they did not?

A: I don't know. Because if you look at it now, I think they [*sic*] have many emails between --- there are many emails between Jin Yu and Yang Nan and I really don't know. And because at the time it has nothing to do with us, I'm only signing the agreement with Jin Xin.

This exchange raises a serious doubt in my mind as to credibility of the Defendant. It is difficult for me to comprehend how the Defendant was not able to recall conversations with YN in that period as regards the terms of the transaction – in particular the Moratorium – when at the same he had a vivid recollection of the events that lead to the execution of the 23 May SPA and the SA2. I note that the Defendant did not see fit to address these emails in his AEIC when clearly they were salient if not critical evidence.

90 Secondly, there is also JY's email of 2 May 2014 which JX had forwarded to the Defendant by way of his email dated 4 May 2014.[53] As both the emails were in Mandarin, there is no question of the Defendant not understanding their contents.

91 The schedule attached to the email made reference to the "shares moratorium" and the "shares moratorium undertaking".[54] Given that this email was forwarded to the Defendant by JX and concerned the pending sale and

[53] 1PB273.

[54] 1PB274.

purchase agreement, it is inconceivable that the Defendant would not have addressed his mind to its contents. Again, the Defendant was not able to offer a credible explanation as to why he would not have read this email.

92 Third and finally, the Defendant had stated in an affidavit filed on 23 July 2015 that from May 2014 to July 2014, he communicated primarily with YN over the telephone and through text messages, using the Mobile Phone. This would suggest that YN had kept the Defendant updated on the negotiations and the terms of the transactions. However, the text messages were not available because, as noted at [55]–[56] above, the data in the Mobile Phone had been deleted on 27 July 2014. The deletion of data occurred just a few days prior to the commencement of this action. This leads me to draw the adverse inference that the data that had been deleted would have shown that YN did inform the Defendant of the Moratorium and the Moratorium Undertaking. I note that by 27 July 2014, demands had been sent to YN by the Plaintiff requiring the provision of the Moratorium Undertaking pursuant to the 4 July SPA. Indeed, this adverse inference is fortified by the Defendant's failure to call YN as a witness. The timing of the destruction of the data also makes me most reluctant to believe the Defendant's evidence that YN did not inform him of the Moratorium and the Moratorium Undertaking.

93 In the round, the evidence taken together with the adverse inferences compels me to the conclusion that the Defendant was on the balance of probabilities fully aware of the Moratorium and the Moratorium Undertaking, and accepted and acknowledged it as a term of the 23 May SPA and 4 July SPA.

94 The one obstacle that perhaps stands in the way of emphatically concluding that the relationship between the Plaintiff and the Defendant is governed by the Moratorium in the SPA is the presence of cl IV(1)(C) in the

SA2. Clause IV(1)(C), which is crafted in Mandarin, is set out at [23] above. It allows the First Tranche JES Shares to be used "as security for mortgage" during the financing period. It must be pointed out that the SA2 was executed at or about the same time as the 23 May SPA. What impact, if any, does this clause have on the Moratorium?

95 Before I consider this question, I should point out that the English interpretation set out at [23] above is one that the parties eventually agreed to after controversy erupted during the course of the cross-examination of JX as to what the correct English translation of the clause ought to be. At the core of the controversy was whether the clause permitted a pledge or mortgage of the shares. The original translation stated that the First Tranche JES Shares "may be pledged or secured", but it was eventually accepted that latter translation set out above was the more accurate one. I thus proceeded on the basis of the latter translation.

The relationship between the SA1, the SA2, the 23 May SPA and the 4 July SPA

96 As noted earlier, the crux of the Defendant's defence is that cl IV(1)(C) of the SA2 permits him to create a mortgage the First Tranche JES shares. He argues that the Collateral Shares were mortgaged under the Collateral Security Agreement. The Defendant contends that the SA2 was an agreement between the Defendant, the Plaintiff, and JESOIL and that the SA2 was executed in the Plaintiff's office by JX and him immediately after the execution of the 23 May SPA. The Defendant further contends that the 23 May SPA was executed by him on the basis of an alleged representation by JX that: (a) the 23 May SPA was to satisfy regulatory requirements and for the purpose of a public announcement of the transaction; and (b) the true agreement between the parties was encapsulated in the SA2. Accordingly, the Moratorium under the 23 May

SPA (and indeed the 4 July SPA) is not relevant and does not bind, or has been superseded by cl IV(1)(C).

97 On the other hand, the Plaintiff, while not disputing the authenticity of the SA1 and the SA2, takes the position that these were agreements between the Defendant and JX, as controlling shareholders of Scibois and JES respectively. Alternatively, the SA2 was supervened by either (a) the 23 May SPA, or alternatively (b) the 4 July SPA which was signed well after the SA2. The former argument is on the basis as the SA2 was signed on 22 May 2014, before the execution of the 23 May SPA.

98 Several questions emerge for consideration:

(a) Who are the parties to the SA1 and SA2?

(b) What is the impact of the SA2 on the 23 May SPA?

(c) What is the implication of the re-execution of the 23 May SPA on 4 July 2014 resulting in the 4 July SPA?

I shall consider each question in turn.

Who are the parties to the SA1 and the SA2?

99 Who are the parties to the SA1 and the SA2? This question revolves around ascertaining what the common intention of the Defendant and JX was when they entered into the agreements at play. That is a question of fact that must be determined having regard to the objective evidence surrounding the execution of both agreements. The language of the SA1 and the SA2, while relevant, is not necessarily dispositive of the question. If it is found that the intention of both the Defendant and JX was for the Plaintiff to be a party to the

SA1 and the SA2, then the further question which arises is whether JX had any authority, actual or apparent, to enter into the SA1 or the SA2 on the Plaintiff's behalf bearing in mind that he was also executing the 23 May SPA with the Defendant at about that time.

100 It is not disputed that both the SA1 and the SA2 were prepared by the Defendant. Save for cl IV(1)(C) found in the SA2 and the respective dates of the agreements, the SA1 and the SA2 are virtually identical. Having assessed the evidence, I find that both the Defendant and JX intended the SA1 and the SA2 to be agreements between themselves personally as controlling shareholders of their respective companies. Given my conclusion, it is not necessary for me to consider if JX had the authority to contract on the Plaintiff's behalf. Nevertheless, I make some comments on this issue below in the event that I am incorrect in my conclusion on the parties' common intention.

101 I begin with the language of the SA1. For ease of reference, I set out the relevant portion of the SA1 (which may also be found in the SA2):[55]

> **I. The Two Parties to the Agreement:**
>
> **Party A: SCIBOIS Co., Ltd**
>
> Legal representative or controlling shareholder: Yang Shushan
>
> …
>
> **Party B: JES Overseas Investment Limited**
>
> **JES International Holdings Limited**
>
> Legal representative or controlling shareholder: Jin Xin
>
> …
>
> **II. Background of the two parties**

[55] 1PB231 (the SA1); 2PB 404 (the SA2).

> Party A: The controlling shareholder of SCIBOIS CO. LTD (hereinafter referred to as "SCIBOIS"), Mr. Yang Shushan, who has the exclusive decision-making right over [the] external affairs of SCIBOIS;
>
> Party B: The controlling shareholder of JES INTERNATONAL HOLDINGS LIMITED (hereinafter referred to as "JES") and JES Overseas Investment Limited, Mr Jin Xin, who holds 52.6% of equity in JES and, at the same time, has the right to finalise decisions on external affairs of JES; …

102 As can be seen from the above, while the SA1 and the SA2 identify "Party A" as Scibois, and "Party B" as JESOIL and the Plaintiff, the Defendant and JX are referred to as the "Legal representative or controlling shareholder" in the same clause. That would not be necessary unless the Defendant and JX were involved in some capacity in the agreements. The nature of their involvement is evident from cl II which sets out in clear and unequivocal language that the parties are indeed the Defendant and JX, in their capacities as controlling shareholders of Scibois, and JESOIL and the Plaintiff respectively. The choice of the words used to describe them makes interesting reading – as regards the Defendant, "the exclusive decision-making right over [the] external affairs of SCIBOIS", and as regards JX, "the right to finalise decisions on the external affairs of [the Plaintiff]". The use of such language in a clause which describes the background of the parties to the agreements in detail seems to me to be a clear pointer as to why JX and the Defendant were intended as parties – these were agreements intended to regulate the conduct of the controlling shareholders of the Scibois and the Plaintiff on the transaction that was contemplated under the FAA to be encapsulated in a sale and purchase agreement. It must be remembered that the SA1 was executed at about the same time as the FAA. The fact that JESOIL was named in the SA1 as a "party" and not the FAA would strengthen the view that the former was intended to regulate the relationship of the controlling shareholders of the Plaintiff and Scibois.

103 Although Scibois was named as "Party A" to the SA1 and the SA2, there is no reason for Scibois to be a party to the transaction as it is merely the target company. The reference to "Party A" would only make sense if it is a reference to the Defendant. This must also be the Defendant's position; if Scibois (and not the Defendant personally) was party to the SA1 and the SA2, the Defendant would not be able to rely on cl IV(1)(C) in the SA2. As a corollary of the Defendant's position, "Party B" would refer to JX and not the Plaintiff or JESOIL.

104 I turn next to the relationship between the FAA and the SA1. The FAA was a document that was prepared in both English and Mandarin. The Defendant conceded that he was aware of the terms of the FAA when he executed it.[56] He was aware that it was a document prepared for the purpose of a public announcement because the Plaintiff is a listed company.[57] According to the Defendant:

(a) he was given a draft of the FAA on or about 8 March 2014;[58]

(b) discussions on the SA1 took place between 28 March 2014 and 4 April 2014;[59]

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[56] NE 6 August 2015, pg 56.

[57] NE 6 August 2015, pg 65.

[58] Defendant's AEIC, para 19.

[59] Defendant's AEIC, para 23.

(c) JX had proposed that he and the Defendant set out the various terms that had been agreed between them notwithstanding that the FAA was planned to be executed;[60] and

(d) thereafter, several drafts of the SA1 were prepared and negotiated on resulting in the final version being agreed upon and printed on 4 April 2014.[61]

105 The Defendant would therefore have had a draft of the FAA when the various drafts of the SA1 were being prepared. Bearing in mind that the SA1 and the FAA pertained to the same transaction, I make three observations. First, if the SA1 and the FAA were meant to be between the same parties, why was there a need to document the terms that were agreed between the Defendant and JX in the SA1, a separate agreement, when the easier and obvious thing to do would be to reflect them in the FAA? The FAA was prepared by lawyers, and the Defendant and JX could have required the lawyers to work their agreement into the terms of the FAA. The Defendant offered no explanation as to why the terms of the SA1 were not worked into the FAA if it was to be between the same parties. Indeed, that would have been the proper thing to do given that it was known that the FAA was required for the purpose of announcement to the market and to satisfy regulatory requirements. In this regard, cl 2.4(a) of the FAA expressly makes the transaction subject to the approval of shareholders and the Plaintiff's board of directors.[62] Any suggestion by JX to document in a private document (*ie*, the SA1) terms which ought to be in the document that was to be approved by the shareholders of and directors of the Plaintiff and

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[60] Defendant's AEIC, para 24.

[61] Defendant's AEIC, para 27.

[62] 1PB226.

disclosed to the public (*ie*, the FAA) ought to have been met with suspicion. It would surely have immediately raised in the Defendant's mind the question (and concern) of whether those private terms would bind the Plaintiff. In this regard, an announcement of the FAA and its terms was made on 8 April 2014 by the Plaintiff. No reference was made to the SA1. The Defendant must have known about the announcement but made no attempt to correct it by insisting that the SA1 be also disclosed as a supplementary agreement to the FAA. The failure to incorporate the terms of the SA1 into the FAA is a strong indicator that the SA1 had been entered into by different parties and was meant to serve a different purpose.

106 Secondly, while there is language in the SA1 that suggests the parties to the SA1 and the FAA are the same, assessed against the backdrop of the objective evidence, the conclusion is in fact that the parties did not intend that. I set out the said language of the SA1 (which is also found in the SA2) here:

> **III. Content of cooperation**
>
> Upon friendly negotiation, the *two parties* hereto have reached a consensus regarding the joint issuance of Islamic debentures in Malaysia … In order to meet and conform to the requisite conditions for issuing Islamic debentures, the *two parties entered into the Framework Acquisition Agreement with regard to the acquisition and selling of Scibois equity*. …
>
> …
>
> The two parties undertake: to mutually abide by and strictly perform the supplementary agreement of the Framework Acquisition Agreement!
>
> This supplementary agreement *shall be deemed an inalienable part of the Framework Acquisition Agreement and shall have the same legal effect*!
>
> [emphasis added]

However, despite the reference to the FAA, the fact is that YN was not a signatory to the SA1 despite being a signatory to the FAA. Given that YN was

a significant transferor and transferee under the FAA, and the Defendant's son, omitting his name from the SA1 must have been deliberate. In this regard, I note that YN was present when the FAA when executed on 6 April 2014, which was also the date when the SA1 was executed. YN could very well have been included in the SA1 if the Defendant so desired. This provides a clear indication that the Defendant and JX did not intend the parties to the FAA and the SA1 to be the same.

107 Third, although the SA1 and the FAA pertained to the same transaction, there were material differences in the terms of both agreements. Under the FAA, YN and the Defendant were to transfer 51% of their equity in Scibois to the Plaintiff in two tranches of 20% and 31% respectively. Consideration for the second tranche was the payment of US$30m on a date to be agreed (see cl 2.3(b)(ii) of the FAA). Thus, at the end of the transaction, the Plaintiff would hold 51% of the equity in Scibois. However, cl IV(2)(A) and (B) of the SA1 provided for something quite different. Clause IV(2)(A) provided for a price adjustment or a return of 20% of Scibois' shares if payment was not made by 31 May 2014. This date was amended to 15 July 2014 under the SA2. Clause IV(2)(B) further provided that 11% of Scibois's shares that were to be transferred under the second tranche would be held on trust by the Plaintiff for the Defendant. These are materially different terms from those in the FAA. Given that the transaction that was being approved by the Plaintiff's board and shareholders and being announced to the market was that which was set out in the FAA, it is implausible that parties would have regarded the SA1 as binding on the Plaintiff.

108 The above suggests that the SA1 was intended to be a private agreement between the controlling shareholders of Scibois and JES, namely the Defendant and JX respectively. It was meant to dictate how each was to conduct himself

as regards certain aspects of the transaction in order to ensure that the ultimate objective of raising RMB1b in proceeds through the Islamic bond issue would be achieved.

109 Finally, I will address the Defendant's argument that JX, by affixing Plaintiff's stamp in multiple places on the SA1 and the SA2, signified his intention that the Plaintiff was a party to both agreements. I find this to be a difficult argument to accept for two reasons. First, affixing the Plaintiff's stamp does not change the complexion of the language used by the Defendant to describe the parties in cl II. Surely, the easiest thing to do, if the Defendant did intend the Plaintiff to be bound by the SA2 would be to amend cl I and II of the same to make that clear rather than rely on JX's act of affixing the Plaintiff's stamp. These were after all documents crafted by the Defendant. Second, the Defendant was well aware of the importance of the FAA from the perspective of corporate governance and regulatory requirements. The terms of the transaction had to be approved by the Plaintiff's board, announced to the market, and approved by its shareholders to bind the Plaintiff, given its listed status. An announcement was made on 8 April 2014 which made no reference to the SA1. This being the case, the mere fact that JX applied the Plaintiff's stamp repeatedly or otherwise does not make the SA1 (or for that matter the SA2) binding on the Plaintiff.

110 Given these circumstances, I find on a balance of probabilities that the Defendant and JX intended the SA1 to be an agreement between the two of them in their capacities as controlling shareholders and effective decision makers of the Plaintiff and Scibois. The purpose of the SA1 was to regulate their conduct with regard to the transaction contemplated by the FAA.

111 The Defendant's position is that the SA2 served to amend the terms of the SA1 by the inclusion of cl IV(1)(C) and the amendment of the dates for performance of the various transfer of shares contemplated therein. In other words, the parties remained the same. Hence, my conclusion on the parties to the SA1 applies with equal force to the SA2.

112 In the event that I am wrong on my conclusion concerning the intention of JX and the Defendant, I also find that JX did not have authority (whether actual or apparent) to enter into the SA1 (and the SA2) on the Plaintiff's behalf. On the issue of actual authority, no evidence has been led by the Defendant to show that JX was in fact authorised by the Plaintiff to enter into the SA1 or the SA2 on the Plaintiff's behalf. Any argument on apparent or ostensible authority must also fail as the Defendant quite clearly knew that JX required regulatory, board and shareholder approval for the transactions being contemplated under the FAA (which are in substance the same transactions contemplated under the SA1 and the SA2) (see [105] above). In his AEIC, the Defendant stated that he "*assumed* that [JX] had the authority to make the decisions … on [the Plaintiff's] behalf" [emphasis added].[63] A baseless *assumption* made by the Defendant is not sufficient to establish apparent or ostensible authority. The law requires there to be a relevant representation on the part of the Plaintiff, and reliance on the part of the Defendant. In relying on the representation made, the Defendant must act reasonably; the Defendant will fail if he is put on inquiry and unreasonably failed to make the necessary inquiries about JX's authority (see *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another suit* [2009] 4 SLR(R) 788 ("*Skandinaviska*") at [173]).

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[63] Yang Shushan's AEIC, para 30 and 58.

113 The evidence does not show that the Plaintiff had made any express representation that JX was able to contract on the Plaintiff's behalf. It may be argued that the Plaintiff made a representation by placing JX in a position as Chairman and Chief Executive Officer where he had "usual authority" to contract on the Plaintiff's behalf. "Usual authority" has been defined as "the authority which a person normally possesses in certain circumstances to act on behalf of another person, whether or not he is actually authorised to act" (see *Bowstead and Reynolds* at para 3-005). However, even if there was such a representation made on the part of the Plaintiff, the doctrine of apparent authority would nevertheless be inapplicable as there was no operative reliance or inducement on the Defendant's part. By the Defendant's own evidence, he knew that certain formalities were required for the transaction as the Plaintiff was a listed company.[64] It must be recalled that the Defendant is a seasoned businessman and not a babe in the woods. Given these circumstances, it was not reasonable for the Defendant to rely solely on JX's position as Chairman and Chief Executive Officer in *assuming* that JX had the authority to execute the SA1 and the SA2 on behalf of the Plaintiff without obtaining further approval for the transaction. Instead, the Defendant ought to have made further inquiries as to whether JX had the authority to bind the Plaintiff (if indeed JX had represented to the Defendant that he did) in his execution of the SA1 and the SA2, for example, by requesting for written evidence of approval from the Plaintiff's board of directors. That he did not do.

114 Ultimately, there could only be one agreement between the Plaintiff and the Defendant. That was the agreement that was to be placed before the Plaintiff's board and shareholders for approval and announced to the markets.

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[64] See, *eg*, NE 5 August 2015, page 67-68; 6 August 2015, page 64-65, 74.

That agreement was not the SA2. The Defendant knew this. Thus, I find that the SA1 and the SA2 do not bind the Plaintiff.

What is the impact of the SA2 on the 23 May SPA?

115 What then is the impact of the SA2 on the 23 May SPA? My conclusion on the parties to the SA2 would lead to the further conclusion that the SA2 does not bind the Plaintiff. Accordingly, cl IV(1)(C) of the SA2, ought not to bind the Plaintiff. However, does the fact that the SA2 and the 23 May SPA were executed in or around the same time lead to an alternative conclusion? I am of the firm view that it does not.

116 The transaction as contemplated under the FAA was for the issue and allotment of new shares in the Plaintiff to YN and the Defendant in consideration for the transfer of the first tranche of 20% of the equity in Scibois (see cl 2.3(b)(i) of the FAA). However, subsequently, a critical change was made to this aspect of the transaction for reasons that are not clear. I have canvassed in detail the substance of the change at [25] above. The change in the structure of the transaction from the FAA to the 23 May SPA brought about the introduction of the Moratorium in the 23 May SPA. It also precipitated a reaction from the Defendant.

117 That the Moratorium and the Moratorium Undertaking were brought to Defendant's attention by the documents is apparent from the documents that I had examined in the discussion on YN and the Defendant's knowledge of the same. As a result, the complexion of the transaction as regards the Defendant's ability to deal with the Plaintiff's shares had changed. In my view, this prompted the Defendant to introduce cl IV(1)(C) in the SA2.

118 However, the fact that the Defendant made the change to the SA2 rather than the 23 May SPA where the Moratorium and the Moratorium Undertaking resided is critical. The Defendant was well aware that:

(a) The 23 May SPA was the transaction that was contemplated by the FAA. Clause 2.1 of the FAA stipulates both in English and Mandarin that the parties to the FAA "shall use their best endeavours to negotiate and enter into a definitive sale and purchase agreement in relation to the Proposed Acquisition". The Defendant conceded that the 23 May SPA, and not the SA2, was that agreement.

(b) The transaction encapsulated in the 23 May SPA was the transaction that was to be submitted for approval to the SGX and the Plaintiff's board of directors and shareholders, as well as be announced to the public. This would include the Moratorium and the Moratorium Undertaking.

(c) The 23 May SPA was crafted by lawyers in accordance with the legal and regulatory requirements.

In these circumstances, that the Defendant did not see fit to work into cl 5.4 of the 23 May SPA cl IV(1)(C) of the SA2 suggests to me that cl (IV)(1)(C) was deliberately kept out of the 23 May SPA. The Defendant had every opportunity to introduce the said clause in the 23 May SPA in the course of the negotiations that led to the 23 May SPA. He clearly had cl IV(1)(C) in mind, and yet he did not make the change to the 23 May SPA. Additionally, the Defendant testified that the SA2 was shown to YN when the 23 May SPA was placed before him for execution. YN was well aware then that the Moratorium and the Moratorium Undertaking were part of the 23 May SPA. He would have reviewed the SA2 and would surely have highlighted the inconsistency between cl IV(1)(C), and

the Moratorium and the Moratorium Undertaking in the 23 May SPA. Yet there was no reaction from either him or the Defendant. The inexorable conclusion is that the Defendant consciously chose to keep the said clause out of the 23 May SPA. If it was deliberately kept out of the 23 May SPA, which was the agreement that parties had agreed under the FAA would be executed, it would seem difficult for the Defendant to sustain an argument that cl IV(1)(C) was part of the agreement between the Defendant, YN and the Plaintiff.

119 During the course of the trial, every opportunity was given for the Defendant to explain away these troubling points. However, apart from alleging that JX told him to disregard the 23 May SPA as it was a document required by the lawyers and the regulators, he offered no explanation. In his closing submissions, the Defendant made the quite shocking submission that:[65]

> [I]n any event, as between parties, the [SA2] was at all times meant to be and was the operative and prevailing agreement between the Plaintiff and the Defendant, with the [23 May SPA] serving only a very limited and narrow legalistic and "official" purpose and formality, that is, for the Plaintiff's use in connection with SGX requirements including getting the share transfer lodged with CDP [*ie*, the Central Depository] and the public announcement on the transaction to be made at the Plaintiff's end which did not involve the Defendant. …

Quite what this submission means and how it can be reconciled with the evidence is difficult to comprehend. It does suggest that the Defendant does not have a credible response to these questions.

120 Assessing the evidence as whole, I conclude that:

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[65] Defendant's Closing Submissions, para 49.

(a) the SA2 was an agreement between JX and the Defendant as controlling shareholder and moving spirits of the Plaintiff and Scibois;

(b) the 23 May SPA does not incorporate and is not subject to the SA2; and

(c) the SA2 is not an agreement, and by extension cl IV(1)(C) is not an obligation, that binds the Plaintiff.

121 Obviously, concluding as I have raises the question of why cl IV(1)(C) was consciously and deliberately worked into the SA2 by the Defendant. One plausible reason is that the Defendant did not want to take a risk with the transaction by introducing a variation to the Moratorium when it was important to the SIC (as evidenced from the request for the SIC Undertaking). The evidence suggests that the idea of unlocking the value of the Concession through the issuance of Islamic bonds by the Plaintiff originated from the Defendant. Obviously there was a huge personal gain for him in ensuring that the idea materialised. The evidence also makes clear that the Defendant wanted the transaction concluded quickly so that the Islamic bonds could be issued and the proceeds received expeditiously. The documentary evidence showed that he had, on several occasions, nudged and prodded the transaction forward (see [14]–[15] above). Interfering with the Moratorium could possibly have thrown a major spanner in the works. However, given my conclusion on the parties to the SA2 and the effect of cl IV(1)(C) *vis-à-vis* the Plaintiff, I do not have to decide this issue.

122 Finally, for completeness, I should address the Plaintiff's submission that the SA2 was superseded by 23 May SPA. The submission was along the following lines. The SA2 was executed on 22 May 2014 by JX and the Defendant. At that time, JX was agreeable to cl IV(1)(C). However, when it

came to the execution of the 23 May SPA on 23 May 2014, JX changed his mind on cl IV(1)(C). I find this submission completely contrived and reject it for several reasons.

123 First, it is clear from the Statement of Claim and JX's AEIC that his position is that the SA2 and the 23 May SPA were both executed on the same day, *ie*, 23 May 2014, albeit that the SA2 was executed in the morning and the 23 May SPA in the afternoon. It was only in the course of cross-examination that JX offered the date of 22 May 2014. He was not able to explain the inconsistency.

124 Second, the allegation that he changed his mind on cl IV(1)(C) is not found in JX's AEIC. I would have imagined that something as fundamental as this would have been specifically mentioned.

125 Third, if indeed JX had a change of mind as regards cl IV(1)(C), why was no attempt made to delete it from the SA2? It must be noted that JX's alleged change of mind was only as regards the said clause and not the SA2 in its entirety. That being the case, JX ought to have proposed excising the portion that was no longer applicable. That was not done.

126 Fourth, JX must have been aware in May 2014 that the execution of a sale and purchase agreement was imminent that month. Certainly, by 19 May 2014, JY knew that the Defendant and YN were planning to execute the SPA very shortly. It is only fair to assume that she would have told JX. Clearly, one of the primary reasons why the Defendant travelled to JX's office on 22 May 2014 was to execute the SPA. This is evident from the email that YN sent to JY

on 22 May 2014.[66] It is therefore difficult to believe that JX would have signed the SA2 first when he would have been aware that the 23 May SPA was to be signed in or around the same time.

127 Fifth and most importantly, JX must have been fully aware of the terms of the 23 May SPA and therefore the Moratorium and the Moratorium Undertaking therein, before he signed the SA2. He must also have been fully aware on 22 May 2014 that the execution of the 23 May SPA was to take place the next day at the very latest.[67] In these circumstances, it is incomprehensible that he would have agreed to cl IV(1)(C) on 22 May 2014 and had a change of heart the very next day.

128 I am therefore of the view that it is more likely that the SA2 and the 23 May SPA were executed at about the same time. I believe that the Plaintiff's submission was nothing more than a tenuous attempt to find an alternative ground for circumventing cl IV(1)(C) of the SA2. It lacks credibility. As noted earlier, the evidence of the Defendant was that the 23 May SPA was executed on the 23 May SPA followed immediately by the execution of the SA2. I accept his evidence to that extent.

What is the implication of the "re-dating" or re-execution of the 23 May SPA and as the 4 July SPA?

129 It therefore seems clear that cl IV(1)(C) of the SA2 was not part of the bargain between the Plaintiff and the Defendant. As at 23 May 2014, the terms of that bargain was encapsulated in the 23 May SPA. However, the Plaintiff's

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[66] 2PB351.

[67] 2PB351.

cause of action is based on the 4 July SPA. The 4 July SPA is the same transaction as the 23 May SPA except that the commencement date is later. The Plaintiff contends that the 23 May SPA was intended to be a confirmation of the terms of the SPA and the parties did not mean to execute and date the SPA on 23 May 2014.[68] The SPA was not intended to come into effect on 23 May 2014 because the parties were not ready to perform the obligations therein if the time for performance commenced from that date. As it had been incorrectly dated 23 May 2014 by JX and the Defendant, it was subsequently agreed that the SPA would be re-dated and re-executed. That, the Plaintiff asserts, happened on 4 July 2014.

130 On the other hand, the Defendant, while maintaining that the 23 May SPA served the limited purpose which he ascribes to it, takes the position that he is not bound by the 4 July SPA for two reasons. First, he did not re-execute 23 May SPA. Second, he did not authorise YN to re-date 23 May SPA and send the execution page of the 4 July SPA.

131 Several issues arise for consideration:

(a) Was the 23 May SPA intended to be a binding agreement between the Plaintiff, YN and the Defendant?

(b) Why was the 4 July SPA executed, and what was the effect of that on the 23 May SPA?

(c) Was the Defendant's signature on the execution page of the 4 July SPA forged?

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[68] Plaintiff's Closing Submissions, para 126–130.

(d) Was YN authorised to communicate with the Plaintiff concerning the 4 July SPA?

(1) Was the 23 May SPA intended to be a binding agreement?

132 It is seems clear to me that the 23 May SPA was intended to be a binding and effective agreement between the parties. In this regard, I do not accept the Plaintiff's position that JX and the Defendant only intended to confirm the terms of the 23 May SPA when they executed and dated it. The evidence does not support this.

133 Before I examine the evidence, I make two observations. First, it is not readily apparent why JX and the Defendant had to meet just to confirm the terms of the SPA when the same could very well have been done through YN and JY. After all, YN and JY were negotiating the terms in the lead up to 23 May 2014, and it would be reasonable to presume that JX and the Defendant were kept abreast of the same. Positions taken in negotiations must have been cleared with JX and the Defendant. Unless there had been issues that needed to be ironed out in person, it is difficult to see why there had to be a meeting between them simply to confirm the terms. In this regard, I note that the meeting on 23 May 2014 was only between JX and the Defendant, neither of whom was particularly proficient in English. The document the terms of which they were purportedly confirming – the 23 May SPA – was in English. This in itself would suggest that the meeting was not to confirm the terms but to execute an agreed document.

134 Second, if the meeting was intended merely for the Defendant and JX to confirm the terms of the SPA, then it is difficult to understand why they would sign and date it. They would surely have been told by YN and JY not to sign and date it. With these observations, I now turn to the evidence.

135 In paragraph 50 of her AEIC, JY said that she had told YN not to date the 23 May SPA as there were many steps that needed to be taken by the parties before performance of the obligations therein could take place. However, the emails that were exchanged between YN and JY before 23 May 2014 do not support this assertion.

136 First, YN, in his email dated 19 May 2014 (sent at 12.12am) in reply to JY's email of the same date (sent at 11.07pm) attaching a draft of the sale and purchase agreement, states that the once the Defendant approved the draft, he and the Defendant would travel to JX's office to jointly sign the same. In her response, JY did not tell YN not to sign or date the same.

137 Second, in YN's email dated 22 May 2014 (sent at 8.15pm) in reply to JY's email of the same date enclosing a further draft of the sale and purchase agreement, he makes it quite clear that the Defendant had requested a soft copy of the agreement to be sent over to him so that he could print out a copy for execution that evening or the next morning. JY replied enclosing another draft with further revisions.[69] JY agreed to print out the document for signing the next day, and made no mention that the document ought not to be dated. YN's reply is material. He accepted the revisions proposed by JY. He sought her assistance to have a copy printed out for execution by the Defendant and JX that evening or the next day, and requested her to remind JX to bring along "the company seal". There was no reply from JY to state that the meeting was simply for the parties to confirm the terms of the SPA. This is a clear indication that a binding agreement was intended with effect from 23 May 2014.

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[69] 2PB350.

138 Third, when amendments were made to the SA2 by JX and the Defendant at the meeting on 23 May 2014, the date for exchange of the First Tranche JES Shares for the First Tranche Scibois Shares was stipulated as 30 May 2014 (see cl IV(1)(A) of the SA2). Under the 23 May SPA, the deadline for the exchange of shares in the first tranche was 6 June 2014. The deadline set in cl IV(1)(A) of the SA2 for the exchange of First Tranche JES Shares was well within the timeline contemplated under the 23 May SPA. This again suggests that JX and the Defendant intended a binding agreement on the terms of the 23 May SPA.

139 In paragraph 51 of her AEIC, JY said that when she received the 23 May SPA, she was dismayed to note that it had been dated. She then contacted YN and agreed that an identical agreement would be signed once certain preliminary steps were completed. The emails that were written post 23 May 2014 do not reflect any dismay on her part. In fact, they suggest that JY was attempting to perform the 23 May SPA.

140 For example, in her email dated 25 May 2014, JY stated that the transfer of the First Tranche JES Shares would take place once the Defendant advised the Plaintiff of his securities account number. This would be consistent with cl 5.1(b) of the 23 May SPA. In the same email, JY said that the transfer of the First Tranche Scibois Shares would take place upon transfer of the First Tranche JES shares. Again, this is broadly in line with cl 3.1(a)(i) of the 23 May SPA. The First Tranche Scibois Shares were in fact transferred to the Plaintiff on 27 May 2014 although the share certificates were held back pending receipt of the First Tranche JES Shares. Similarly, in her email dated 28 May 2014 (sent at 10.12am), JY stated that once she was notified of the Defendant's securities

account, the Plaintiff could initiate the share transfer.[70] The parties were clearly acting under the impression that they had executed a binding agreement.

141 I am therefore of the view that JX and the Defendant executed and dated the 23 May SPA intending it to be binding and effective from 23 May 2014.

(2) Why was the 4 July SPA executed and what was the effect of that on the 23 May SPA?

142 There is no difference between the terms of the 23 May SPA and the 4 July SPA. The structure of both agreements was such that the First Tranche JES Shares (borrowed from JESOIL under the Share Lending Agreement) were to be transferred to the Defendant in return for the First Tranche Scibois Shares on a date within ten business days from the date of the agreement, described in the agreement as the "Exchange Date". This was provided certain documents specified in cl 5.1(a) (including the Moratorium Undertaking) were provided and the Defendant had notified the Plaintiff within five business day prior to the Exchange Date of details of his securities account for the purpose of receiving the First Tranche JES Shares. Accordingly, the date of the agreement had a direct bearing on the time within which the First Tranche JES Shares were to be transferred, and the date by which the Defendant ought to notify the Plaintiff of the details of his securities account.

143 Given that the 23 May SPA was dated 23 May 2014, the latest the Exchange Date could be under that was 6 June 2014, provided that the Defendant notified the Plaintiff five business days before that date of his security account details (*ie*, by 30 May 2014). However, by 30 May 2014, the

[70] 2PB435.

Defendant had not provided details of his securities account. There are emails evidencing requests from JY to YN for details of the Defendant's securities account from as early as 25 May 2014, and replies from YN stating that efforts were being made to open the account. YN eventually notified JY of the Defendant's securities account details in his email on 25 June 2014.[71] By then, the date for exchange of shares on the Exchange Date under the 23 May SPA had long passed.

144 JY's email dated 25 June 2014 makes it evident that steps were being taken to perform the transaction. She specifically said that the transaction was being submitted to the Plaintiff's board for approval on 25 June 2014, and that a public announcement was being planned within the week. The Share Lending Agreement was thereafter executed on 4 July 2014 in order to facilitate the transfer of the First Tranche JES Shares. As noted earlier, the Plaintiff's inability to transfer the First Tranche JES Shares because of the Defendant's failure to open a securities account caused YN to withhold release of the Scibois share certificates to the Plaintiff, notwithstanding that the First Tranche Scibois Shares had been transferred to and registered in the Plaintiff's name on 27 May 2014. The said certificates were only released to the Plaintiff after the First Tranche JES Shares were transferred to the Defendant's securities account. All of this is consistent with the intention of the parties to recalibrate the timelines for the performance of the SPA.

145 It therefore is obvious that, due to the Defendant's failure to notify the Plaintiff details of his securities account, a new commencement date for the SPA

[71] 2PB443.

needed to be set. The route taken was to execute on 4 July 2014 a fresh contract on the same terms as the 23 May SPA. This gave birth to the 4 July SPA.

146 The parties describe this event as a re-dating and re-execution of the 23 May SPA. In my view, it would a misnomer to describe it as such. In substance, a fresh contract on the same terms as the 23 May SPA came into being on or about 4 July 2014 when the parties signed a clean execution page, an act which the parties have described as "re-execution". The purported "re-dating" of the 23 May SPA was in fact an agreement on when the new effective commencement date of the SPA would be. The birth of the 4 July SPA resulted in the rescission of the 23 May SPA.

(3) Was the Defendant's signature on the execution page of the 4 July SPA forged?

147 The Defendant submits that his signature on the execution page of the 4 July SPA was taken by the Plaintiff from his original inked signature on the 23 May SPA and superimposed on the 4 July SPA. It is alleged that this is an act of forgery by the Plaintiff. On this basis, the Defendant asserts that he is not bound by the 4 July SPA. The Defendant also alleges that the Plaintiff had fabricated two emails which YN had purportedly sent to JY. The first is an email dated 4 July 2014 with a timestamp of 12.24pm. This email, which is written in English, states:[72]

> Dear Audrey:
>
> Confirmed the signing date of the contract between shareholders of SCIBOIS CO., LTD and JES international holding limited is 4th July 2014.
>
> Yanic YANG

[72] 2PB453.

4th July 2014

148 The second email was sent from YN's account to JY. While there is no content in this email, an image of the execution page of the SPA with YN's and the Defendant's signatures thereon ("the Execution Page Email") was an attachment to it.[73] The Defendant testified that YN had told him sometime after 15 July 2014 that he had sent two emails to JY on 4 July 2014 which contained two attachments. The Defendant produced two exhibits on the stand which he stated were the original attachments to the emails. However, he was unable or unwilling to produce the emails that YN had purportedly sent which attached the said two exhibits. It is in respect of these exhibits that I made my comments above at [51] about the Defendant deliberately flouting his discovery obligations.

149 I do not accept the Defendant's evidence for a number of reasons. First, apart from the Defendant's wanton disregard for his discovery obligations, I drew an adverse inference against the Defendant for failing to call YN as a witness. Indeed, YN would be the person best placed to give evidence on whether he had sent the two emails above on 4 July 2014, or whether the signatures on the attachment to the Execution Page Email were forged. The Defendant's failure to call YN leads me to infer that YN's evidence in this regard would have been unfavourable to the Defendant.

150 Second, the Defendant's case on fabrication and forgery is inconsistent with his affidavits and pleadings. In an affidavit affirmed on 22 December 2014, the Defendant deposed that:

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[73] 2PB456-457.

> 51. I categorically state that I did not sign another Sale and Purchase Agreement on 4 July 2014.
>
> 52. I certainly am not aware of Yang Nan sending out the email allegedly on 4 July 2014, stating that the Sale and Purchase Agreement had been signed on 4 July 2014. I also was not aware that Yang Nan sent another email attaching the signature page allegedly signed by himself and me.
>
> …
>
> 54. *I have not authorised him to sign the 2nd Sale and Purchase Agreement on my behalf*. I am not aware of what he had done.
> …
>
> [emphasis added]

151 The suggestion here is that YN had forged the Defendant's signature. The Defendant's position at trial was that it was the Plaintiff who had forged the signatures and emails. The two positions are inconsistent. The allegation at trial also departs from the Defendant's pleaded case. In the Defence, it was stated:

> The [SA2] was signed on the same day as the SPA *i.e.* on 23 May 2014. After the SPA was signed, parties proceeded to sign the [SA2]. The Defendant denies that the SPA was signed on 4 July 2014. Throughout, the negotiations were primarily conducted between the Plaintiff's Jin Xin and the Defendant. The Defendant did not give Yang Nan authority whether express or implied, to re-date the SPA and/or send the SPA to the Plaintiff. The Defendant also did not re-sign the SPA at any point in time after 23 May 2014.

152 The assertion here is that the Defendant did not re-execute the 23 May SPA or authorise YN to re-date the 23 May SPA and to send it to the Plaintiff. Implicit in this plea is the suggestion that YN had forged the Defendant's signature on the execution page and had re-dated and sent the 23 May SPA to the Plaintiff as the 4 July SPA. It is pertinent that the Defendant testified that he

had discovered the alleged fraud sometime in October 2014.[74] There is therefore no reason for this allegation to have not been raised in the Defendant's affidavit of 22 December 2014. Also, despite referring to a purported forensics report of one Liu Jian Wei from the Fada Institute of Medicine and Science in Beijing to the effect that the signatures of YN and the Defendant on the execution page attached to the Execution Page Email were photocopied and superimposed, the Defendant did not call the said Liu as a witness.

153 Third, the conduct of YN and the Defendant after 4 July 2014 is consistent with the re-dating of the 23 May SPA as the 4 July SPA. There was a public announcement by the Plaintiff on 4 July 2014 which expressly stated that the relevant agreement was the 4 July SPA. The Defendant did not attempt to correct the announcement. In her email dated 7 July 2014 to YN (sent at 11.33am), JY made reference to that announcement and the 4 July SPA, and requested that various obligations under cl 5.1 of the 4 July SPA be performed.[75] There was no dispute or challenge from YN or the Defendant and performance of cl 5.1 in fact took place save that the Defendant and YN refused to execute the Moratorium Undertaking.

154 There is an aspect of the evidence that might possibly support the Defendant's position. It concerns a dinner between JX, JY, JX's wife and the Defendant at a restaurant in Singapore. When that meeting took place was hotly disputed. JX and JY asserted that it took place on 3 July 2014. The Defendant stated that it occurred on 4 July 2014. If the Defendant is correct, it would be strange that YN would on 4 July 2014 send the execution page purportedly

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[74] NE 12 August 2015, pg 53.

[75] 2PB524.

signed by the Defendant by way of the Execution Page Email. It would have been more logical for JX or JY to have procured the Defendant's signature in person on 4 July 2014. However, JY and JX's evidence on the date of the dinner is corroborated by a bill for the dinner which makes it evident that the dinner took place on 3 July 2014 and involved four persons.[76] However, confirming that the date was 3 July 2014 does not fully answer all the doubts. JY testified that at this dinner, she told the Defendant about the need to execute the agreement on 4 July 2014 as the public announcement of the transaction was to be made then, and reminded the Defendant of the Moratorium. If the agreement was to be executed on 4 July 2014, surely the sensible thing to do was for the Defendant to sign it in person the next day. A plausible explanation would be that the Defendant was travelling on 4 July 2014.[77] Ultimately, any doubts which this dinner meeting raised are insufficient to displace the conclusion I have drawn.

155 The Defendant submitted that the burden was on the Plaintiff to produce the original 4 July SPA and prove the signature on the document to be his given that the he had challenged the authenticity of the document. The case of *Yeoh Wee Liat v Wong Lock Chee and another suit* [2013] 4 SLR 508 ("*Yeoh Wee Liat*") was cited in support. *Yeoh Wee Liat* does not assist the Defendant. The situation there was quite different. The party, Phuah, who had purportedly witnessed the share forms which the plaintiff sought to disprove, was the officer of the plaintiff. The court held that the burden was on the defendant to produce the original share transfer form to prove that the signature therein was Phuah's (at [31]). In the present case, however, the Plaintiff's case is premised *not* on an

[76] 2PB448.

[77] The Defendant's affidavit dated 22 September 2014, para 77.

original signed document, but the signed execution page of the agreement which had purportedly been sent by YN to JY by way of the Execution Page Email. *Prima facie*, that shows that the Defendant and YN had executed the 4 July SPA and conveyed their assent by forwarding the execution page as an attachment to the Execution Page Email. It is for the Defendant, who alleges that the signatures were forged, to prove otherwise. Crucially, as the Defendant has failed to call YN as a witness or otherwise show that the email evidence had been tampered with, he is unable to prove this.

156 In these circumstances, absent a credible explanation from the Defendant, my conclusion, on the balance of probabilities, is that the emails and the attachments which YN had sent to JY on 4 July 2014 are authentic.

(4) YN's authority as regards the 4 July SPA

157 Given that it was YN who had communicated to JY the Defendant's assent to the 4 July SPA, the question is whether YN was authorised to do so.

158 The "re-dating" of the 23 May SPA as the 4 July SPA was necessitated by the Defendant's failure to provide his securities account details in time. The transaction and the terms of both transactions were exactly the same. The "re-dating" did nothing more than to signify a new commencement date for a transaction that the Plaintiff and the Defendant had agreed to be bound by on 23 May 2014 with the execution and dating of the 23 May SPA. The parties had also manifested a commitment to perform the 23 May SPA by taking steps towards doing so. When performance of the 23 May SPA in accordance with its terms became impossible because of the Defendant's delay, it is axiomatic that the parties would have wanted to "re-date" the agreement, a mere formality, to facilitate the performance of the transaction. I have held above at [68] that YN was authorised to negotiate with the Plaintiff on the Defendant's behalf and to

take all steps necessary to ensure that the transaction came to fruition. Given YN's role in negotiating the transaction and facilitating performance of the 23 May SPA, it would be a natural and logical extension of his role for YN to have the authority to communicate the Defendant's assent to the 4 July SPA. Such authority would arise by necessary implication from the clear authorisation he had to ensure that the first tranche of the transaction was performed. I note that the Defendant has accepted that YN was authorised to facilitate performance of the transaction. That such authority can arise by implication is supported by *Skandinaviska* at [42] which states that actual authority can arise by implication where it is a necessary incident of the task that the agent has been authorised to perform. In this regard, the fact that YN is a co-signatory of the 23 May SPA only strengthens the conclusion that YN had actual authority to communicate the Defendant's assent to the "re-dating" of the 23 May SPA to the Plaintiff.

159 Further, I find that the Defendant's conduct after the 23 May SPA was executed amounted to a representation that YN had the authority to communicate the Defendant's assent to the re-dating of the 23 May SPA as the 4 July SPA. This includes the fact that the Defendant had allowed YN to (a) send the duly executed SIC Undertaking on 27 May 2014;[78] and, (b) inform the Plaintiff of his securities account number. The fact that the Defendant permitted YN to facilitate the performance of the 23 May SPA, or at the very least acquiesced in YN's conduct in this regard, cloaked YN with the authority to communicate the Defendant's agreement to the re-execution of the 4 July SPA. In the alternative, the representations also lead to the conclusion that the Defendant is estopped from denying YN's agency. It is clear that the Plaintiff relied on YN's authority as the Plaintiff proceeded to (a) announce the execution

[78] 2PB424.

of the 4 July SPA to the market and (b) transfer the First Tranche JES Shares to the Defendant. The Defendant, being a savvy businessman, would have had sight of the public announcement. Yet he did nothing to dispel the Plaintiff's belief that it had entered into the 4 July SPA with the Defendant. It is disingenuous of him to now disavow the 4 July SPA after having received the benefit thereunder in the form of the First Tranche JES Shares.

Conclusion

160 For the reasons stated above, I am of the view that the Moratorium in the 4 July SPA governs the Defendant's dealings with the First Tranche JES Shares.

Did the Defendant breach the Moratorium?

161 In light of my conclusion that the 4 July SPA is binding on the Defendant, the next question I will consider is whether the Defendant has breached the Moratorium.

The ambit of the Moratorium

162 Under the Moratorium, the Defendant undertook to "observe a moratorium … on the *transfer or disposal* of all his interest in" the JES Consideration Shares. For purpose of this action, only the First Tranche JES Shares are relevant. The Defendant submits the term "transfer and disposal" carries the plain and ordinary meaning that "there must be an absolute and final transfer or sale of the Defendant's interest in the shares by the Defendant".[79] A pledge or mortgage of shares is not covered by the term.

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[79] Defendant's Closing Submissions, para 168.

163 On the other hand, the Plaintiff contends that the Moratorium in cl 5.4 must be read with the Moratorium Undertaking in Appendix 3. If read together, the Moratorium does not permit the Defendant to "dispose of, realise, transfer or assign" the relevant shares. This means that the shares cannot be sold during the period of the moratorium.

164 I do not accept the Defendant's submission that the Moratorium in cl 5.4 is limited to prohibiting the "transfer and disposal" of the relevant shares. I prefer the Plaintiff's submission that the Moratorium in cl 5.4 ought to be read with the Moratorium Undertaking to ascertain the scope of the Moratorium. The Moratorium Undertaking fleshes out what is meant by the "transfer and disposal" of the shares. In my view, that surely must have been the intention of the parties for if otherwise, there would be two provisions which regulate the Defendant's dealings with the JES Consideration Shares – one under the Moratorium in cl 5.4 and the other under the Moratorium Undertaking. It is axiomatic that when terms in the contract are interpreted, the approach is both textual and contextual. It is an accepted principle of the construction of contracts that the whole contract is to be considered in the interpretation of specific terms (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [131]). As was stated by Lord Ellenborough in *Barton v Fitzgerald* (1812) 15 East 530 at 541:

> [T]he sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus* [*ie*, from what goes on before and from what follows]; every part of it may be brought into action in order to collect from the whole one uniform and constant sense, if that may be done.

The entire document ought to be examined to understand the precise meaning that should be attributed to a term. The Moratorium in cl 5.4 must therefore be read together with the Moratorium Undertaking. The phrase "transfer or

disposal" found in cl 5.4 would also include a prohibition on the disposal, realisation or transfer of the relevant shares.

165 A term with a phrase similar to that found in the Moratorium Undertaking was considered by the Court of Appeal in *Pacrim*. The clause there imposed a moratorium on the "sale, assignment or disposal" of the shares following completion of the transaction. The issue before the court was whether an equitable mortgage of shares by a pledge of share certificates accompanied by duly signed share transfers was in breach of the moratorium. The Court of Appeal held that it did not. It is instructive to note what the court said (at [22]):

> In our view, the meanings of the words "assign" and "dispose of" in cl 9 of the Acquisition Agreement *should be construed in the context of what a moratorium on transfers of shares in the securities market is normally intended to achieve, with particular regard to the specific context in which the Moratorium was given in the present case* (*viz*, as part of the Acquisition Agreement). Looking at the scheme of the Acquisition Agreement and its express terms, we found nothing in cl 9 that was intended to prevent Poh and Cho from utilising their economic resources, *viz*, the Consideration Shares, so long as such use was not inconsistent with the objectives of cl 9. In our view, therefore, the equitable mortgage of the Consideration Shares could not be considered to be an "assignment" or a "disposal" for the purposes of cl 9 of the Acquisition Agreement. There was nothing in the agreement as a whole that justified giving such an unnecessarily broad interpretation to these words. As we identified earlier … , the purpose of this clause was to restrict Poh and Cho from dealing with the Consideration Shares in such a way that they could be sold on SESDAQ within the Moratorium Period. *Whilst a sale of the Consideration Shares within the Moratorium Period would clearly be a breach of cl 9 of the Acquisition Agreement, an assignment (whether legal or equitable) would not be a breach unless it amounted to a sale of those shares or unless it enabled the assignee to sell the shares in the market during the Moratorium Period.* An assignment may be legal or equitable in form, according to the nature of the property involved, but it is the substance of the transaction that is relevant. The transaction may have the effect of either transferring all rights in the property in question absolutely or merely creating a security interest in such property. In our view, the term "assign" in cl 9 of the Acquisition Agreement bears the

> former meaning. Likewise, the words "dispose of" in this clause should be interpreted in the same way as "assign".
>
> [emphasis added]

166 Accordingly, particular regard must be given to the specific context in which the Moratorium was given. I had earlier examined the purpose and specific context of the Moratorium as regards the First Tranche JES Shares at [42]–[48] above. In my view, a primary purpose of the Moratorium was to prohibit any act that could potentially impact, impair or compromise the Defendant's ability to return the First Tranche JES Shares if the transaction was unwound or if JESOIL demanded the return of the same. The Plaintiff had intended to transfer the shares only as "*a gesture of good faith*", subject to cl 5.4 and the provisions of the Moratorium Undertaking. Pending completion, the shares were to be kept in a specific "moratorium account" to be opened by the Defendant. In other words, the intention was for the shares to be "locked up" at least pending completion. The facts in *Pacrim* were quite different. The moratorium there applied to shares that were transferred upon completion and there was no specific context to be taken into account to add gloss and colour to the language used. Seen in this light, any disposal of the First Tranche JES Shares would arguably be a breach of the Moratorium. The disposal does not necessarily have to be a permanent transfer of interest. Indeed, it is certainly arguable that a "pledge" or a "mortgage" of the JES Shares would be caught by the Moratorium. However, as will be apparent for the reasons below, I do not have to consider this issue given that the breach relied on by the Plaintiff is the transfer of the Collateral Shares under the Collateral Security Agreement.

The nature of the Collateral Security Agreement

167 It is common ground that:

(a) 30,000,000 of the First Tranche JES Shares were transferred to the Defendant on 6 July 2014, and were thereafter transferred by the Defendant to the Lender on 11 July 2014, pursuant to the Collateral Security Agreement.

(b) 90,802,800 of the First Tranche JES Shares were transferred to the Defendant on 20 July 2014 of which 30,000,000 shares were transferred by the Defendant to the Lender on 23 July 2014, pursuant to the Collateral Security Agreement.

(c) In total, 60,000,000 of the First Tranche JES Shares (*ie*, the Collateral Shares) were transferred by the Defendant to the Lender pursuant to the Collateral Security Agreement.

168 As noted earlier, details of the Lender under the Collateral Security Agreement were redacted and Defendant refused to disclose the same. The law of the United States of America was the chosen law of the agreement. However, parties led no evidence on how the agreement ought to be construed in light of US law and proceeded to make submission on its effect as if the agreement were governed by Singapore law. I have therefore proceeded to examine the agreement in the same way as I would an agreement governed by Singapore law. With these prefatory remarks, I now turn to the parties' submissions.

169 The Plaintiff submits that the Collateral Security Agreement is in substance a sale of the Collateral Shares to the Lender with a right of buy-back given to the Defendant. Accordingly, the Defendant has breached cl 5.4 of the 4 July SPA (*ie*, the Moratorium) as well as cl IV(1)(C) of the SA2 if the SA2 were to apply. On the other hand, the Defendant makes two alternative submissions. First, that the Collateral Shares are only pledged or mortgaged by the Defendant to the Lender under the Collateral Security Agreement. Second,

even if the transfer of the Collateral Shares under the Collateral Security Agreement amounted to a sale of the shares, it was not an absolute and final transfer of the Collateral Shares to the Lender, as there was a right of buy-back.

170 At the outset, I reject the Defendant's quite unusual second submission. Had there been a sale, the Moratorium would apply. *Pacrim* makes that clear (see *Pacrim* at [22]). That there is a right of buy-back does not change the conclusion that there would be a transfer or disposal of the Defendant's interest pending the exercise of the buy-back right if and when it is exercised. There is no certainty that the right would ever be exercised. I do not see how it can be argued that a sale is anything but absolute and final simply because there is a right of buy-back.

171 If the transaction under the Collateral Security Agreement is a sale with a right of buy-back, I am of the view that the Defendant has breached cl 5.4 of the 4 July SPA (*ie*, the Moratorium). Having examined the agreement, I accept the Plaintiff's submission it is indeed such a transaction.

172 There are several key indicators which suggest a sale with a right of buy-back was intended. First, if a security was in fact intended over the Collateral Shares (which were book-entry securities), the mechanism for doing so is expressly set out in s 130N of the Companies Act (Cap 50, 2006 Rev Ed). Section 130N(1), which was in force at the material time, makes it quite clear that except as provided under the section or any written law or regulations, no security interest may be created over scripless shares. A specific procedure is prescribed in this regard in subsidiary legislation under the Companies (Central Depository System) Regulations (Cap 50, Rg 2, 1994 Rev Ed) for the creation and notification of the instrument of charge or instrument of assignment. It is relevant in this regard that the Collateral Shares were transferred to the Lender.

Therefore, even if an assignment was intended for the purpose of creating a security interest, s 130N provides for the treatment of the same. It seems strange that this obvious route under s 130N was not adopted if a security interest was intended.

173 Second, as noted earlier, the Collateral Shares were transferred to the Lender's securities account pursuant to cl 2.1 read with cl 5.2 of the Collateral Security Agreement. There was therefore a transfer or disposal of the Defendant's interest in the Collateral Shares to the Lender.

174 Third, the Lender was given liberty to deal with the Collateral Shares once they were transferred. Clause 5.4 of the Collateral Security Agreement provides that "the Lender shall during the term of any Loan *treat the shares as its own* and will have right of ownership including but not limited to hypothecate, borrow, lend or hedge the collateral shares" [emphasis added]. The Lender's obligation is limited to returning the same number of shares in the event there is no event of default within three days of the end of the term of the loan. Such a free hand to deal with shares is patently inconsistent with shares that are being taken purportedly as a pledge or mortgage.

175 Fourth, upon the occurrence of an event of default, the Lender is entitled to treat the Collateral Shares as his own. Significantly, the Defendant has no obligation to repay the loan in such an event. That the Lender has no obligation to account for the proceeds or recourse to the Defendant for any shortfall is clear indication that no security interest by way of a pledge or mortgage was intended. An obvious distinction between a sale, and a mortgage or charge is the obligation to account for the proceeds in the case of latter. This was stated by Romer LJ in *Re George Inglefield Ltd* [1933] 1 Ch 1 at 27–28:

> It appears to me that the matter admits of a very short answer, if one bears in mind the essential differences that exist between a transaction of sale and a transaction of mortgage or charge. In a transaction of sale the vendor is not entitled to get back the subject-matter of the sale by returning to the purchaser the money that has passed between them. In the case of a mortgage or charge, the mortgagor is entitled, until he has been foreclosed, to get back the subject-matter of the mortgage or charge by returning to the mortgagee the money that has passed between them. *The second essential difference is that if the mortgagee realizes the subject matter of the mortgage for a sum more than sufficient to repay him, with interest and the costs, the money that has passed between him and the mortgagor he has to account for the mortgagor for the surplus. If the purchaser sells the subject-matter of the purchase, and realizes a profit, of course he has not got to account to the vendor for the profit.* Thirdly, *if the mortgagee realizes the mortgage property for a sum that is insufficient to repay him the money that he has paid to the mortgagor, together with interest and costs, then the mortgagee is entitled to recover from the mortgagor the balance of the money, either because there is a covenant by the mortgagor to repay the money advanced by the mortgagee, or because of the existence of the simple contract debt which is created by the mere fact of the advance having been made.* If the purchaser were to resell the purchased property at a price which was insufficient to recoup him the money that he paid to the vendor, of course he would not be entitled to recover the balance from the vendor.
>
> [emphasis added]

176 Fifth, the total number of shares offered as collateral under the Collateral Agreement is 300,000,000, drawn down in tranches of 30,000,000 each. The term of the loan is for 24 months commencing from the drawing down of each tranche. In other words, there would be separate loan periods as regards each tranche. There appears to be no right of early redemption, which is confirmed by the Lender's obligation to return the shares three days after the expiry of the loan period (see cl 2.3 and 5.4 of the Collateral Security Agreement). The Defendant conceded this.[80] Bearing in mind that the first two tranches were

[80] Defendant's closing submissions, para 212.

transferred on 11 and 23 July 2014, it is obvious that the Defendant would not be in a position to return the Collateral Shares, or for that matter the rest of the First Tranche JES Shares (if they had been transferred as well) to the Plaintiff if the 4 July SPA was not completed by the Long-Stop Date even if he was financially able to redeem the loan. It suggests that such a transaction must be caught by the Moratorium. This also suggests that the transaction was in fact a sale (with a right of buy-back) rather than a "pledge" or "mortgage".

177 Sixth, after the Collateral Shares were transferred to the Lender, the Defendant appeared disinterested in how the Lender dealt with them. This is particularly surprising given his obligation to return them to the Plaintiff if the 4 July SPA was unwound. I highlight two examples of the Defendant's nonchalance:

(a) right up to 22 July 2015, in the course of the trial, the Defendant did not bother to inquire into what had become of the Collateral Shares; and

(b) the Defendant did not know what the Lender had done with the Collateral Shares.

In fact, it was only on 22 July 2015 that counsel for the Defendant notified the court that the Lender might have in fact sold the Collateral Shares.

178 In the round, I am of the view that the Collateral Security Agreement was in fact a sale of shares with a right of buy-back. I am fortified in my view by the decision of the Federal Court of Australia in *Beconwood Securities Pty Ltd v Australia and New Zealand Banking Group Limited* [2008] FCA 594 ("*Beconwood*"). In *Beconwood*, the plaintiffs entered into a share lending and borrowing agreement with Opes. Shares were transferred by the plaintiff to a

company owned by Opes in return for funds. Funds advanced to the plaintiff were obtained from the defendant-bank. In due course, the shares were transferred from the company to the defendant-bank's nominees, and held for the defendant. The plaintiff contended that it had a security interest as mortgagor in the shares which were in the hands of the defendant-bank's nominees. The Federal Court of Australia rejected this argument, stating (at [50]):

> … the argument that the [share lending and borrowing agreement] can be characterised as a mortgage is simply unsustainable. It breaks down at many points. First of all, by the express terms of the [agreement], unencumbered title in both lent securities and collateral passes on delivery. Secondly, when the transaction comes to an end there is no obligation to hand back in specie the securities initially lent. Nor is there any obligation to return the collateral actually provided. The obligation falling on the borrower is to deliver the same number and type of securities. The same is true as regards the collateral. Third, there are the netting and set off provisions that come into effect on default. This is the means by which the parties mitigate credit risk, converting redelivery obligations into payment obligations. …

As I have concluded that there is no requirement for the transfer or disposal to be absolute to attract the Moratorium, I am of the view that that Defendant breached the Moratorium by entering into the Collateral Security Agreement, and thereafter transferring the Collateral Shares to the Lender, pursuant to the said agreement.

179 In any event, even if the Defendant's submission was right, an absolute and final transfer would have occurred on the authority of *Pacrim.* The Court of Appeal stated at [22] that an assignment would amount to a sale if the terms of the purported assignment allowed the "assignee" to sell the shares. In this regard, under cl 5.4 of the Collateral Security Agreement, the Lender had the right deal with the Collateral Shares as his own with all incidents of ownership. This included the right to sell the shares, which counsel for the Defendant

conceded did happen. It is evident, therefore, that the Defendant has breached the Moratorium.

Does cl IV(1)(C) of the SA2 assist the Defendant?

180 Given my conclusion on the effect of the Collateral Security Agreement, taking the Defendant's case at its highest and assuming that the SA2 was between the Defendant and the Plaintiff, cl IV(1)(C) of the SA2 does not assist him. For ease of reference, the clause is reproduced:

> Party A and Party B agreed as follows: before the funds from the debenture issue are in place, the 20% equity or shares transferred to both parties *shall not be sold* (unless with the written consent of both parties. The 20% equity or shares in the names of both parties may be used as *security for mortgage* during the financing period. [emphasis added]

It is clear from the language that a sale is prohibited and at best a mortgage is permitted. As the transaction under the Collateral Security Agreement involves a sale of the Collateral Shares, it would also fall foul of cl IV(1)(C). The carve-out of a mortgage that the Defendant has built his case on does not assist him. I make this point on the basis that Singapore law applies to the SA2 as no evidence or submissions on foreign law were led by the parties.

Damages

181 In paragraph 13(d) of its Statement of Claim (Amendment No 1), the Plaintiff has prayed for an order that the Defendant returns the Collateral Shares to his Central Depository securities account within 30 days of an order to do so, or pays damages in lieu of the value of the Collateral Shares as at 30 July 2014 or such other date as may be decided by the court. The Plaintiff has also prayed for damages for the Defendant's breach of the 4 July SPA.

182 Counsel for the Defendant has conceded that the Collateral Shares have been sold by the Lender. From the Defendant's submissions, it is clear that the Defendant is not in a practicable position to return the Collateral Shares because trading in the Plaintiffs' shares has been suspended and it would not be possible to secure the return of shares from the Lender under the Collateral Security Agreement.[81] Although it might theoretically be possible for the court to order the Defendant to privately purchase a total of 60,000,000 shares from persons who currently hold the Plaintiff's shares, I am of the view that this would be an onerous burden to place on the Defendant, given that the identities of such persons are not readily available. In any event, the parties are on the same page on this issue in that they both have submitted that I should not order a return of the Collateral Shares and should consider awarding damages instead.

183 In my opinion, ordering the Defendant to specifically perform the Moratorium is not a viable option. Accordingly, I decline to exercise my discretion to order specific performance of the Moratorium. A further option is to award damages in substitution of an order of specific performance of the Moratorium, or to award the Plaintiff damages for breach of the Moratorium in cl 5.4 of the 4 July SPA.

The loss suffered by the Plaintiff

184 Before assessing the damages that should be awarded to the Plaintiff for the Defendant's breach, it is necessary to determine what the loss suffered by the Plaintiff is.

[81] Defendant's Closing Submissions, para 212.

185 The Defendant submits that the Plaintiff is only entitled to nominal damages as the Plaintiff has not suffered any loss pursuant to the Defendant's breach of the Moratorium. He refers to cl 6.1 of the Share Lending Agreement between the Plaintiff and JESOIL, which stipulates that JESOIL has the right to recall the loaned securities by giving seven days' written notice to the Plaintiff. Upon receiving such notice, the Plaintiff is obliged to re-deliver an equivalent amount of the loaned securities to JESOIL or JESOIL's nominee. A failure to do so would amount to an event of default under cl 8 of the Share Lending Agreement. Under cl 8.3, if the Plaintiff fails to re-deliver an equivalent amount of securities to the Lender, the Plaintiff is required to pay the Lender damages equal to the "market value" of the shares to JESOIL. "Market value" is defined under the Share Lending Agreement as:[82]

> … the amount it would cost [JESOIL] to purchase a like amount of such securities at such time on the principal market for such securities, plus all brokers' fees, commissions, clearing fees, stamp duty, other transfer tax and other reasonable costs, fees and expenses that would be in connection with such purchase[.]

186 Under cross-examination, JY confirmed that as at 24 July 2015, JESOIL had not recalled the shares it had lent to the Plaintiff (*ie*, the First Tranche JES Shares) from the Plaintiff.[83] The Defendant submits that, as JESOIL has not recalled the shares from the Plaintiff, no event of default had occurred under the Share Lending Agreement, and therefore the Plaintiff has not suffered a present loss. The Defendant also submits that the Plaintiff is not entitled to claim for "future injury" as the Plaintiff has "not proven such injury".[84] Finally, the

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[82] 2PB460.

[83] NE 24 July 2015, page 45, line 5.

[84] Defendant's Closing Submissions, para 229.

Defendant further submits that in any event, the Plaintiff has not established that the Defendant would not be able to redeem the Collateral Shares or that the Lender would not be able to return them at the end of the relevant loan period.

187 The Plaintiff's counterargument is that the court is entitled to make an order of substantial damages to be paid on the basis of either the "broad ground" set out by Lord Griffiths in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd and others and another appeal* [1994] 1 AC 85 ("*Linden Gardens*"), supported by Lord Millet and Lord Goff in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 ("*Panatown*"), or the "narrow ground" articulated by Lord Browne-Wilkinson in *Linden Gardens*. Both the "narrow ground" and the "broad ground" have been accepted as part of Singapore law by this court in *Prosperland Pte Ltd v Civic Constructions Pte Ltd and other* [2004] 4 SLR(R) 129 ("*Prosperland 1*"), and by the Court of Appeal in *Chia Kok Leong and another v Prosperland Pte Ltd* [2005] 2 SLR(R) 484 ("*Prosperland 2*") and *Family Food Court (a firm) v Seah Boon Lock and another (trading as Boon Luck Duck and Noodle House)* [2008] 4 SLR(R) 272 ("*Family Food Court*").

188 I am not in full agreement with either the Plaintiff's or the Defendant's submission on this point. It appears that both parties have misunderstood (a) the loss that the Plaintiff has suffered, and (b) the basis of an award of damages on the "narrow ground" and the "broad ground". In these circumstances, I find it apposite to make some comments on both issues.

The "broad ground" and the "narrow ground"

189 The general rule is that a plaintiff is only entitled to recover damages on account of a breach of contract *for the actual loss suffered*. This is because damages are ordinarily compensatory in nature and are intended to put the

innocent party in the position he would have been in had there been no breach (though in exceptional cases restitutionary or punitive damages may be awarded).

190 As the Court of Appeal observed in *Family Food Court* at [35], the "narrow ground" is a rule of ancient origin, and was formulated in the specific context of the carriage of goods. The oft-quoted expression of the "narrow ground" is found in the following comments of Lord Diplock in *The Albazero* [1977] AC 774 at 847:

> The only way in which I find it possible to rationalise the rule in *Dunlop v. Lambert* so that it may fit into the pattern of the English law is to treat it as an application of the principle, accepted also in relation to policies of insurance upon goods, that in a commercial context concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into.

191 It may be observed from the above passage that originally, the "narrow ground" was only applicable in a *specific* situation, *viz*, where property originally vested in the plaintiff/promisee had been transferred to a third party after the contract had been entered into but before the breach had occurred. Also, the third party had not acquired, and was unlikely to acquire, any rights under the contract between the plaintiff/promisee and the defendant/promisor (for *eg*, due to a prohibition on assignment) (see also *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 31st Ed, 2012) ("*Chitty on Contracts*") at para 18–055). Where the breach by the defendant/promisor caused damage or loss to the property (*eg*, where damage was caused to the goods being carried, or where

buildings were defectively built), the plaintiff/promisor, not having the proprietary interest in the goods or property in question at the time of breach, could arguably be said to have suffered no loss. The "narrow ground" plugged this gap by enabling the plaintiff/promisee to recover from the defendant/promisor substantial damages for the loss suffered *by the third party*.

192 The "narrow ground" was extended in the case of *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68 ("*Darlington*"). In *Darlington*, the proprietary interest in the subject matter of the contract had always been vested in, and remained vested in, the third party to the contract. Unlike the cases of *Linden Gardens* and *Panatown*, where the contracts were between developers and contractors, *Darlington* concerned a situation where the plaintiff-bank had contracted directly with the defendant-contractor for building work to be carried out on land owned by a local council (*ie*, the third party). This arrangement was entered into so as not to fall foul of financial restrictions placed on the local council by government regulations. The bank and the council also entered into an agreement by which the bank undertook to procure the building work and to pay all sums due under the building contract. Crucially, the contract between the bank and the council provided that the bank was not to be liable to the council "for any incompleteness or defect in the building work". The building work was defective, and it was held that the bank could recover substantial damages from the contractor in respect of the council's loss. This extension of the "narrow ground" was endorsed in *Panatown*. Although the Court of Appeal in *Family Food Court* recognised that *Panatown* had endorsed the extension of the "narrow ground" in *Darlington*, the court, in considering the relationship between the narrow ground and the broad ground expressed some hesitation over the extension of the "narrow ground" in *Darlington*. It is thus not quite clear if the *Darlington* extension, if I may call it that, to the narrow ground is good law in Singapore.

193 There are two important qualifiers to the "narrow ground":

(a) the plaintiff will have to account to the third party for the damages he recovers from the defendant (see *Panatown* at 575 and *Prosperland 2* at [46]); and

(b) the rule does not apply where the third party has a direct remedy against the defendant. In this regard, a cause of action in tort does not qualify as a direct remedy (see *Prosperland 2* at [45] and *Family Food Court* at [47]).

194 If the elements of the "narrow ground" are satisfied, the court will then assess the loss from the perspective of the damage suffered by the third party as a consequence of the breach.

195 In the present case, the factual situation *does not* fit the specific situation the "narrow ground" was formulated to address. It must be recalled that in a situation where the "narrow ground" applies, the title to property that is damaged due to the defendant's breach of contract is in *the third party's* hands. Hence, in such a situation, the plaintiff has arguably suffered no loss in its own right (thereby necessitating an "exception"). However, in the present case, there is *no property* in JESOIL's hands that one can be said to have been damaged by the Defendant's breach of the Moratorium as title to the Collateral Shares passed from JESOIL to the Plaintiff under the Share Lending Agreement and from the Plaintiff to the Defendant under the 4 July SPA. When the Defendant breached the Moratorium by transferring the Collateral Shares to the Lender, there was no property in JESOIL's hands that was damaged. Indeed, it is even arguable that unless and until JESOIL requires the Plaintiff to perform its obligations under the Share Lending Agreement, JESOIL has itself suffered no loss by reason of the Defendant's breach of the Moratorium.

196 There is therefore no relevant "legal black hole" as the Plaintiff suffers loss in its own right. Let me explain. One of the purposes of the Moratorium was to ensure that in the event the transaction was not completed, the Defendant would be able to return the shares transferred. The Moratorium therefore protected the Plaintiff's position, in that if the Moratorium was performed, the Plaintiff would not be put to further expense to perform its obligations under the Share Lending Agreement. The loss that the Plaintiff suffers in the present case, as both the Plaintiff and the Defendant have obliquely recognised in their respective submissions, is represented either by (a) the cost the Plaintiff would incur in obtaining an equivalent number of shares so as to discharge its obligation to JESOIL under the Share Lending Agreement, or alternatively, (b) the measure of damages the Plaintiff would be required to pay JESOIL for breach of the Share Lending Agreement. Accordingly, it is not appropriate to resort to the use of the "narrow ground" in the damages analysis.

197 What about the "broad ground"? The "broad ground" on the other hand sits on a different and perhaps more conventional jurisprudential footing. The "broad ground" recognises that a contracting party has a performance interest in ensuring due performance of the contractual bargain. This is sometimes described as "expectation interest". If that party does not receive contractual performance, he would be regarded as having suffered damage. This is regardless of whether that party has a proprietary interest in the subject matter of the transaction at the time of the breach. Neither is the "broad ground" dependent on the existence of a "legal black hole" (see *Prosperland 2* at [55]). As observed in *Family Food Court* at [48], it may be a misnomer to label the "broad ground" as an "exception".

198 The approach to assessment of damages under the "broad ground" differs from the "narrow ground" in that damages are assessed from the

perspective of the plaintiff as it is his loss of performance or expectation interest that is being assessed. It is useful to quote from Chao Hick Tin JA's judgment in *Prosperland 2* (at [53]):

> [T]he basis on which a plaintiff is entitled to claim for substantial damages under the broad ground is that he did not receive what he had bargained and paid for. It has nothing to do with the ownership of the thing or property. As to the value of this performance interest, it seems to us that the observation of Lord Scarman in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277, that the fact that a contracting party has required services to be supplied at his own cost to a third party is at least *prima facie* evidence of the value of those services to the party who placed the order, is a useful pointer.

199 I would also highlight that in *Propserland 2*, the plaintiff/promisee appeared to be facing a potential claim from the third-party for the defects in the building works (*Prosperland 2* at [58]). In *Family Food Court*, the Court of Appeal observed (at [51]):

> … Prosperland was technically facing a potential claim for loss suffered by the MCST [*ie*, the third party] in respect of the defects in the condominium and was, in fact, prepared to make good those defects using the damages recovered in its suit against the Defendants. *Thus, arguably, the "fact" that Prosperland had suffered no substantial loss was not entirely accurate.* [emphasis added]

200 There is an argument to be made here that the "broad ground" is applicable in the present case, given that it is based on "an integral part of the common law of contract", *viz*, the Plaintiff's interest in the Moratorium being performed and receiving the benefit of which it had contracted for (*ie*, not being put to extra expense to perform the Share Lending Agreement). Further, the Plaintiff is facing a potential liability to JESOIL under the Share Lending Agreement. However, I acknowledge that the precise scope of the "broad ground" and its relationship with the "narrow ground" remains in a state of flux.

In *Family Food Court*, the Court of Appeal described the relationship between the "broad ground" and the "narrow ground" as "a thorny legal problem" (at [56]). Academic writers have also queried whether the "broad ground" only applies to cases of *defective performance* of contracts to render *services* (see generally *Chitty on Contracts* at para 18-062). It is not clear whether the "broad ground" is applicable where (a) the breach consists of a failure or refusal to perform on the defendant's part, or (b) the breach arises as a result of something *other* than a failure to render services. However, here, there is no need to resort to the "broad ground" to contend that the Plaintiff has suffered damages in the form of loss of a performance interest. The Plaintiff in fact has suffered a loss in that it faces a direct contractual exposure to JESOIL under the Share Lending Agreement by reason of its obvious inability to return the Collateral Shares without incurring further expense. The present case may therefore be resolved on conventional contractual principles without the need to resort to the "exceptions" of the "broad ground" or "narrow ground". I say no more about the interesting intellectual debate as to width of the applicability of the "narrow ground" and the "broad ground", or for that matter when one applies over the other. That is intellectual fodder for another day.

The Plaintiff's liability to JESOIL under the Share Lending Agreement

201 As mentioned above, the Defendant accepts that his breach of the Moratorium in cl 5.4 of the 4 July SPA makes the Plaintiff potentially liable in breach of contract to JESOIL under the Share Lending Agreement. The issue of remoteness of damage is not an issue in the present case as the Defendant was aware of the Share Lending Agreement (see [46] above). The Defendant's objection to an award of substantial damages is on the basis that the Plaintiff's loss is a prospective liability to JESOIL (given that JESOIL has not called for the performance of the Plaintiff's obligations under the Share Lending

Agreement). He argues that until that liability crystallises, the Plaintiff has not proved its loss and hence must only be entitled to nominal damages.

202 At first blush, the argument appears attractive. However, the Defendant's argument breaks down upon further scrutiny. The mere fact that the Plaintiff's liability to JESOIL is a "prospective" one is not a bar to an award of substantial damages. As observed in Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) ("*McGregor on Damages*") at para 9–024, the general rule is that damages will include not only damage accruing between the time the cause of action arose and the time the action was commenced, but *also for* future or prospective damage *reasonably anticipated* as the result of the defendant's wrong, whether such future is certain or contingent (see also *Chitty on Contracts* at para 26–011).

203 The Defendant's objection to substantial damages is in truth a complaint that the Plaintiff's loss is *uncertain*. It has been recognised in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 ("*Robertson Quay*") that "the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages" (at [28]). The approach that the court adopts is a flexible one. I can do no better than to quote from the useful guidance laid down by the Court of Appeal in *Robertson Quay* (at [30]):

> Different occasions may call for different evidence with regard to certainty of proof, depending on the circumstances of the case and the nature of the damages claimed. There will be cases where absolute certainty is possible, for example, where the plaintiff's claim is for loss of earnings or expenses already incurred (ie, expenses incurred between the time of accrual of the cause of action and the time of trial), or for the difference between the contract price and a clearly established market price. *On the other hand, there will be instances where such certainty is impossible, for example, where the loss suffered by the plaintiff is non-pecuniary in nature, or is prospective*

> *pecuniary loss such as loss of prospective earnings or loss of profits* (see generally McGregor on Damages at paras 8-003–8-064). The correct approach that a court should adopt is perhaps best summarised by Devlin J in the English High Court decision of *Biggin & Co Ld v Permanite, Ld* [1951] 1 KB 422 ("Biggin"), where he held (at 438) that:
>
> > [W]here precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can.
>
> [emphasis added]

204 Also, I would observe that the Defendant's submission that the Plaintiff's liability to JESOIL is "prospective" is incorrect. Under cl 8.1(g) of the Share Lending Agreement, the termination of the 4 July SPA is stipulated as an event of default. It is not disputed that the 4 July SPA had been automatically terminated on 4 January 2015 pursuant to cl 4.4 of the 4 July SPA as the transaction did not complete by the Long-Stop Date. The Plaintiff thus has a present obligation to JESOIL under cl 8.3 and 8.4 of the Share Lending Agreement, which provides that:

> 8.3 If an Event of Default occurs in respect of the Borrower *the Borrower shall forthwith re-deliver the Equivalent Securities to [JESOIL] (and notify [JESOIL] accordingly).* If the Borrower fails to do so or only re-delivers a portion of Equivalent Securities, *the Borrower shall pay the Lender damages equal to Market Value of the whole or such portion of Equivalent Securities (as the case may be) on the date such Event of Default occurs.*
>
> 8.4 In the event the Borrower fails to pay the aforesaid damages within three (3) Business Days of the date such Event of Default occurs, the Borrower shall pay interest at the rate of one per cent, per month (accrued on a monthly basis) on the amount from time to time outstanding in respect of that overdue sum for the period beginning on the date such Event of Default occurs and ending on the date of receipt by the Lender.
>
> [emphasis added]

205 Although it is arguable that the Defendant's breach of the Moratorium was not the cause of the termination of the 4 July SPA (which was terminated

on the basis that certain condition precedents had yet to be completed by the Long-Stop Date), the fact is that the breach of the Moratorium has caused the Plaintiff's inability to return the Collateral Shares to JESOIL under the Share Lending Agreement in turn triggering the pecuniary liability stipulated therein. The reality therefore is that the Plaintiff has a *present liability* to JESOIL under the Share Lending Agreement and in satisfying that liability, the Plaintiff will be out-of-pocket due to the Defendant's breach of the Moratorium. Had the Defendant observed his obligations under the Moratorium, the Plaintiff would be able to return the requisite number of shares borrowed under the Share Lending Agreement without incurring additional expense, even if the 4 July SPA was subsequently terminated through no fault of the Defendant. This would be the case as the Defendant would be able to return the shares to the Plaintiff (or the Plaintiff's nominee) having observed to the Moratorium, pursuant to cl 5.4 of the 4 July SPA. The Defendant's breach of the Moratorium has resulted in the Plaintiff being exposed to direct contractual liability to JESOIL or otherwise having to incur additional expense to perform the Share Lending Agreement. This is the loss that the court must quantify in this case.

206 Finally, the Defendant submits that the court should not award damages as the Plaintiff has not proven that the Defendant would be unable to redeem or repurchase the Collateral Shares from the Lender at the expiry of the loan period under the Collateral Security Agreement. I do not accept the Defendant's argument. The Plaintiff's loss crystallises upon the Defendant's breach of the Moratorium. That the Defendant may be able to perform the Collateral Security Agreement, thereby obtaining title to the Collateral Shares sometime in the future does not mean that the Plaintiff ought not to be awarded damages for the Defendant's present breach of contract. In any event, the burden must surely be on the Defendant to show that, having disposed of the Collateral Shares, he has the financial strength to redeem them, and is able to do so notwithstanding the

terms of the Collateral Security Agreement. I had earlier observed that the Collateral Security Agreement does not appear to permit that (see [176] above).

Quantifying the Plaintiff's loss

Damages in lieu of specific performance or common law damages?

207 Both parties agree that this is a case where I am able consider awarding damages in lieu of an order for the return of the Collateral Shares. The court has the power to order damages in lieu of or in addition to specific performance or an injunction under paragraph 14 of the First Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"). Paragraph 14 is on the same terms as the Chancery Amendment Act 1858 otherwise known as the Lord Cairns' Act.

208 It has been accepted that damages awarded in substitution for specific performance under the Lord Cairns' Act are not ordinarily awarded on a different basis from damages at common law (see *Johnson and another v Agnew* [1980] 1 AC 367 at 400). I accept that the same position is applicable under the SCJA. In *Lunn Poly Ltd and another v Liverpool & Lancashire Properties Ltd and another* [2006] EWCA 430 ("*Lunn Poly*"), Neuberger LJ stated (at [21] and [22]):

> … Damages under the Act are, of course, quasi-equitable in nature: they are awarded in lieu of equitable relief albeit that their direct origin is statutory. Nonetheless, that does not mean that damages can be assessed in any old way. The approach to assessing damages under the Act must not be arbitrary; nor should it be indefensibly consistent with the approach to assessment of damages and valuations in other fields; nor should it be unpredictable and therefore likely to lead to litigation.
>
> The court is not limited to any specific basis for assessing damages in lieu of an injunction under the Act. However, principle and practice suggest that the normal three bases are

> (a) traditional compensatory damages – ie a sum which compensates the Claimant for past present and future losses as a result of the breach but not for the loss of the covenant; (b) negotiating damages – ie a sum based on what reasonable people in the position of the parties would negotiate for a release of the right which has been, is being, and will be breached; and (c) an account – ie a sum based on an account, that is, on the profit the defendant has made, is making and will make as a result of the breach.

209 In the present case, neither party has demonstrated or argued that this general rule should be departed from. This is sensible as damages in this case, whether claimed in substitution for specific performance or otherwise, is claimed for the same breach of contract, *ie*, the Defendant's breach of the Moratorium. The parties' arguments centred on whether negotiating or compensatory damages should be awarded. I take each in turn.

Negotiating damages

210 The leading authority on the approach that the court should take to assessing such damages is *Wrotham Park Estate Co Ltd v Parkside Homes Ltd and others* [1974] 1 WLR 798 ("*Wrotham Park*"). As a result, this head of damages has come to be known as *Wrotham Park* damages. *Wrotham Park* damages has been recognised by this court in *Clearlab SG Pte Ltd v Ting Chong Chai and others* [2015] 1 SLR 165 ("*Clearlab*").

211 In *Lunn Poly*, Neuberger LJ described *Wrotham Park* damages as "negotiating damages" (see the extract quoted at [208] above). This is an apt description as damages are assessed on the basis of what a willing buyer (the contract breaker) and a willing seller (the party claiming the damages) would agree on as consideration in a hypothetical negotiation for the release of the relevant contractual obligation. Such assessment is ordinarily undertaken as at the date of breach though subsequent circumstances may be taken into account where that would be necessary for a more just and fair outcome (see *Lunn Poly*

at [23]–[24]). The fact that one or both parties would have refused to make the deal is therefore to be ignored (see *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2011] 1 WLR 2370 at [49]).

212 Having said that, the hypothetical bargain should not take place without any consideration for how the parties would have behaved in such a negotiation. The court must examine the likely parameters which the parties would have set for the negotiation. Such parameters are to be objectively assessed based on ordinary commercial considerations relevant to each party, having regard to the position each one was placed in. The court should not award damages on the basis of a hypothetical bargain out of bound with the parties' realistic expectations and commercial acceptability (*see Clearlab* at [342] and *Duncan Edward Vercoe v Rutland Fund Management Limited* [2010] EWHC 424 at [292]).

213 I therefore have to ask the question: what parameters would the parties have set in a hypothetical negotiation on the dates when the Defendant transferred the Collateral Shares to the Lender, for the Defendant to be released from the Moratorium?

214 Examining the circumstances at that time, it would seem to me that realistically speaking, no commercially acceptable agreement could hypothetically have been reached. I do not see how the Plaintiff, even hypothetically, would have agreed to release the Defendant from the Moratorium. I say this given the purpose of the Moratorium and the fact that the Collateral Shares had been borrowed from JESOIL under the Share Lending Agreement. Moreover, the SIC had required the Plaintiff to procure the SIC Undertaking from the Defendant and YN. It must be remembered that the hypothetical negotiations would be for the Moratorium to be lifted to enable the

Defendant to perform the Collateral Security Agreement. If the Plaintiff allowed that to happen, it would have put the entire transaction in jeopardy. Further, from a purely risk-perspective, to do so would effectively have put the Plaintiff at serious risk of not having the Collateral Shares returned by the Defendant. As a matter of commercial reality, the Plaintiff would not have run that risk as regards the First Tranche JES Shares for the reasons I have mentioned. I am also convinced that the Plaintiff would not have agreed to this given the position of the SIC.

215 The Plaintiff contends that the quantum of damages ought to be the value of the Collateral Shares on the dates of transfer by the Defendant to the Lender. I find this a puzzling submission when seen from the perspective of both the Plaintiff and the Defendant in a hypothetical negotiation. From the Plaintiff's perspective, that would amount to a sale of the Collateral Shares (which the Plaintiff accepts it would be[85]), which was not its intention under the 4 July SPA. Its intent was to safeguard the First Tranche JES Shares because of the Share Lending Agreement and the requirements of the SIC. Further, setting the price as at the date of the breach would leave the Plaintiff open to a potentially greater exposure to JESOIL under the Share Lending Agreement if the share price of the Plaintiff's shares had increased by the time the obligation to return the Collateral Shares to JESOIL crystallised.

216 From the Defendant's perspective, to set the price of the hypothetical agreement between the parties at the date of the breach would be effectively to require the Defendant to purchase the Collateral Shares outright. This is not what he would have wanted since he only needed them to raise funds from the

[85] Plaintiff's Closing Submissions, para 404(d).

Lender under the Collateral Security Agreement. The loan to value ratio under the Collateral Security Agreement was 50%. This means that under the Collateral Security Agreement, he would have raised 50% of the value of the Collateral Shares. The hypothetical agreement proposed by the Plaintiff would have required the Defendant to pay 100% of the market value of the Collateral Shares on the date of transfers to the Lender – an outright purchase – which is inconsistent with the Defendant's intention to use the Collateral Shares as "security" to raise funds. Furthermore, the Defendant and YN had transferred the First Tranche Scibois Shares as consideration for receiving the First Tranche JES Shares. The Defendant would effectively be paying "double consideration". I do not see how the Defendant would have conceivably accepted being required to pay the Plaintiff the price of the Collateral Shares at the time of their transfers to the Lender in consideration for being released from his obligations under the Moratorium.

217 I am therefore of the view given the commercial considerations bearing on each of the parties, it is unlikely that a bargain would have been reached between the Plaintiff and the Defendant in a hypothetical negotiation to lift the Moratorium to enable the Defendant to perform the Collateral Security Agreement. More pertinently, even if a bargain could have been reached, it would not have been on the terms which the Plaintiff now proposes. In any event, I find that compensatory damages are a more appropriate remedy in the present case. Accordingly, I decline to award *Wrotham Park* damages.

Compensatory damages

218 The Plaintiff has submitted that the loss should be assessed at the date when the Defendant breached the Moratorium. As the price of the Plaintiff's shares was $0.09 per share on 11 and 23 July 2014 (*ie*, the dates on which the

Defendant transferred the Collateral Shares to the Lender), the Plaintiff submits that it should be awarded a sum of $5,400,000 as damages.

219 The general rule for assessing damages for breach of contract is the date of the breach (see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 22.002–22.004). However, this general rule may be displaced where the plaintiff was (a) unaware of the breach at the time of its occurrence; or (b) unable to take mitigatory steps at the time of its occurrence. *Prima facie*, this would appear to support the Plaintiff's case. I am, however, not certain that this would be appropriate given the circumstances of the present case.

220 I have held that the Plaintiff's loss in the present case arising from the Defendant's breach of duty is the prospective expense it would incur when JESOIL seeks to recover the First Tranche JES Shares under the Share Lending Agreement. Under the Share Lending Agreement, the Plaintiff's obligation is to (a) re-deliver an equivalent amount of loaned securities; or (b) pay JESOIL damages equal to the market value of the loaned securities *on the date the event of default occurs*. The latter is defined as the amount it would cost JESOIL to purchase a like amount of shares on the principle market, including all consequential costs. As mentioned, the Plaintiff's liability to JESOIL under the Share Lending Agreement crystallised when the 4 July SPA was automatically terminated on 4 January 2015. Thus, the Plaintiff was obliged to immediately re-deliver an equivalent number of the First Tranche JES Shares to JESOIL or to pay JESOIL damages equal to the market value of the First Tranche JES Shares on 4 January 2015. The Plaintiff's loss can thus be arrived at either by (a) calculating the amount it would have to incur to obtain an equivalent number of shares in the market on 4 January 2015, or (b) calculating the amount it would incur as damages to JESOIL under the Share Lending Agreement. As the

formula for damages under the Share Lending Agreement makes reference to the market value of the Plaintiff's shares, the value to be arrived at under (a) and (b) would be broadly the same. However, I assess damages on the basis of (b) as this takes into account the true loss that the Plaintiff is exposed to by reason of the Defendant's breach of the Moratorium.

221 At this juncture, I should point out that while it might be theoretically arguable that the Plaintiff could issue shares to JESOIL in order to discharge its liability under the Share Lending Agreement, no evidence or submissions were led as to the availability or viability of such a course of action. Given the Plaintiff's status as a listed company, I am not certain that the Plaintiff is at liberty to issue shares as it pleases. The suspension of trading in the Plaintiff's shares would appear to make this an unlikely scenario. Further, the issuance of shares would come at a cost to the Plaintiff. In the circumstances, the Plaintiff's loss as a consequence of the Defendant's breach of the Moratorium ought to be quantified on the basis of its contractual exposure to JESOIL under the Share Lending Agreement *as at 4 January 2015*.

222 Evidence has been adduced of the price of the Plaintiff's shares from 1 July 2014 to 3 July 2015.[86] It appears that the Plaintiff's share price has been on a downward trend since July 2014. According to the trading tables, trading in the Plaintiff's shares appears to have stopped sometime in or around 27 February 2015. Hence, as at 4 January 2015, the Plaintiff was still able to purchase its shares on the SGX to discharge its liability to JESOIL under the Share Lending Agreement. As no trading occurred on 4 January 2015 (which was a Sunday), I refer to the prices of the shares on 5 and 6 January 2015

[86] 3PB741–748.

(Monday and Tuesday respectively). For both 5 and 6 January 2015, the adjusted closing price per share was $0.03. The price remained at $0.03 on 27 February 2015, the last day before the suspension of trading in the Plaintiff's shares.[87] Between 7 January 2015 and 27 February 2015, the Plaintiff's share price fluctuated between $0.03 and $0.04. No other evidence of the value of the Plaintiff's shares as at 4 January 2015 was adduced by the Plaintiff.

223 I accept the Plaintiff's share price on 5 and 6 January 2015 as the best evidence of the value of the Plaintiff's shares as at 4 January 2015. Using that price, the value of the Collateral Shares on that date would be a total of $1,800,000. Under the Share Lending Agreement, the Plaintiff has to bear all the cost of acquiring the shares from the market. However, the Plaintiff has not adduced any evidence of the amount of commission, brokerage charges, and other consequential expenses that it would have to bear. However such costs must necessarily be incurred. That is market practice. Given the paucity of evidence, I find it reasonable to award a further 1% of $1,800,000 to account for such expenses. In this regard, I reiterate the salutary words of the Court of Appeal in *Robertson Quay* that perfect mathematical accuracy need not be achieved, and the law does not impose an absolute or impossible burden on the Plaintiff either (at [49]). I also award the Plaintiff the amount that it would have to pay JESOIL as interest under cl 8.3 of the Share Lending Agreement from 4 January 2015 until the time of judgment, which is 15 months and 1 day. Calculated on a straight-line basis, the amount payable by the Plaintiff as simple interest under the Share Lending Agreement would amount to $270,600 (*ie*, 1% of $1,800,000 multiplied by 15 months and 1 day). This amount would form part of the Plaintiff's loss suffered as a result of the Defendant's breach of the

[87] 3PB745.

Moratorium. While an argument may be made that the Plaintiff ought to have mitigated its loss by discharging its obligation to JESOIL under the Share Lending Agreement once the 4 July SPA was terminated, the burden of proving that the Plaintiff failed to mitigate its loss is on the Defendant, and this burden has not been discharged here (see *The "Asia Star"* [2010] 2 SLR 1154 at [24]). Finally, I do not award any sums in respect of the remaining First Tranche JES Shares that were not transferred to the Lender (*ie*, the 60,802,800 shares which are the subject of the Injunction), as the Defendant did not breach the Moratorium in respect of these shares.

Conclusion

224 For the reasons above, there will be judgment for the Plaintiff on the following terms:

(a) damages assessed in the sum of $2,088,600;

(b) interest from the date of the writ until satisfaction of the judgment on the damages assessed; and

(c) costs to be taxed if not agreed.

225 For completeness, I also allow the Plaintiff's claims under paragraphs 13(a), (b) and (c) of the Statement of Claim (Amendment No 1). Costs of the action will be awarded to the Plaintiff, to be taxed if not agreed. I will also hear parties on the consequential orders, if any, that may be required concerning, *inter alia*, the First Tranche JES Shares subject to the Injunction (*ie*, the First Tranche JES Shares less the Collateral Shares) and the First Tranche Scibois Shares.

226 The Defendant's counterclaim is for the Injunction to be set aside. As it is predicated on his defence being made out, it is dismissed with costs.

Kannan Ramesh
Judicial Commissioner

Foo Maw Shen, Chu Hua Yi, Ooi Huey Hien (Rodyk & Davidson LLP) for the plaintiff;
Wu Xiaowen (Lexton Law Corporation) for the defendant.

Appendix: Glossary of Parties and Transactions

Abbreviation	Reference
YN	Yang Nan, the Defendant's son
JESOIL	JES Overseas Investment Ltd, the majority shareholder of the Plaintiff
JX	Jin Xin, the majority shareholder of JESOIL
JY	Jin Yu, Jin Xin's daughter (also known as Audrey Jin)
Zhu	Zhu Xiao Yang, the Plaintiff's General Manager
Lim	Lim Kok Meng, the Plaintiff's solicitor in the transactions that are the subject-matter of dispute
Kan	Patrick Kan, the Plaintiff's Executive Director and Chief Financial Officer
SIC	The Security Industry Council
CAA	Cooperation framework agreement on bond issuance between Scibosis and the Plaintiff
FAA	Framework Acquisition Agreement executed on 6 April 2014 and dated 8 April 2014
SA1	Supplementary Agreement Pertaining to the Framework Acquisition Agreement
23 May SPA	Sale and purchase agreement between the Plaintiff, the Defendant and YN executed on 23 May 2014

SA2	Supplementary Agreement Pertaining to (the Supplementary Agreement of) the Framework Acquisition Agreement executed on 23 May 2014
4 July SPA	Sale and purchase agreement between the Plaintiff, the Defendant and YN executed on 4 July 2014
The Share Lending Agreement	An agreement between the Plaintiff and JESOIL for JESOIL to transfer 120,802,800 ordinary shares in the Plaintiff to the Plaintiff dated 4 July 2015
The Collateral Security Agreement	Non-Recourse Collateral Security Loan Agreement between the Defendant and an unknown party dated 27 June 2014
The Lender	The counterparty to the Defendant under the Collateral Security Agreement
The First Tranche JES Shares	120,820,800 ordinary shares in the Plaintiff which were transferred from the Plaintiff to the Defendant
The First Tranche Scibosis Shares	20% of the shares in Scibois which were transferred from YN to the Plaintiff
The Collateral Shares	60,000,000 ordinary shares in the Plaintiff which were transferred from the Defendant to the Lender
The Second Tranche JES Shares	181,204,200 ordinary shares in the Plaintiff
The Second Tranche Scibois Shares	31% of the shares in Scibois