IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 192

Suit No 273 of 2015

Between

Super Group Ltd (formerly known as
Super Coffeemix Manufacturing Ltd)

… *Plaintiff*

And

Mysore Nagaraja Kartik

… *Defendant*

GROUNDS OF DECISION

[Contract] — [Breach]
[Evidence] — [Presumptions] — [Electronic records]
[Evidence] — [Proof of evidence] — [Standard of proof for fraud]
[Limitation of Actions] — [Extension of limitation period] —
[Acknowledgement]

TABLE OF CONTENTS

INTRODUCTION **1**

BACKGROUND FACTS **2**

THE PLAINTIFF'S ACCOUNT 4

THE PLAINTIFF'S CASE 13

THE DEFENDANT'S ACCOUNT 16

THE DEFENDANT'S CASE 20

ISSUES TO BE DETERMINED **21**

ARE THE EMAILS AUTHENTIC? **22**

THE PARTIES' EVIDENCE 23

AN ANALOGY 25

THREE POSSIBILITIES 28

THE EXPERT EVIDENCE 30

Defendant's expert evidence *30*

Plaintiff's expert evidence *34*

AUTHENTICITY 35

Presumption of regularity for electronic records *36*

Has the plaintiff brought these electronic records within s 116A(1) *37*

DID THE DEFENDANT SIGN THE WRITTEN AGREEMENT? **42**

BURDEN OF PROVING FORGERY 43

FINDINGS ON FORGERY 45

Preliminary evidential points *45*

The defendant's evidence *47*

The expert evidence *50*

THE DEFENDANT'S ATTEMPTS TO PERFORM HIS OBLIGATIONS 51

Transfer of the Russian property *52*

Five post-dated cheques *54*

CONCLUSION ON FORGERY 56

WHETHER THE PLAINTIFF'S ACTION IS TIME-BARRED 57

WHETHER THE 4 APRIL 2009 EMAIL IS AUTHENTIC 60

WHETHER THE 4 APRIL 2009 EMAIL AMOUNTS TO AN ACKNOWLEDGEMENT 61

An acknowledgement under the Limitation Act *61*

Analysis of the 4 April 2009 email *62*

CONCLUSION 67

Super Group Ltd
v
Mysore Nagaraja Kartik

[2018] SGHC 192

High Court — Suit No 273 of 2015
Vinodh Coomaraswamy J
25–27 April; 14 August 2017

14 September 2018

Vinodh Coomaraswamy J:

Introduction

1 In early 2008, a company controlled by the defendant – and known as Master Beverage Industries Russia Pte Ltd ("MBIR") – owed the plaintiff about US$1.3m. It is the plaintiff's case that the defendant signed a written agreement in April 2008 in which he undertook to settle MBIR's debt by personally paying to the plaintiff US$600,000 and procuring the transfer to the plaintiff of a property in Russia valued at US$700,000.[1] It is common ground that the defendant has not paid the plaintiff US$600,000 and has not procured the transfer of the Russian property to the plaintiff. The plaintiff therefore brings this action against the defendant to claim the liquidated sum of US$1.3m, alternatively damages to be assessed for breach of contract.[2]

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[1] Statement of claim (Amendment No 1) at para 3; affidavit of evidence in chief of Lee Chee Tat, page 52.

2 The defendant denies liability to the plaintiff.[3] His case is that he did not sign any written agreement, whether as alleged by the plaintiff in April 2008 or at any other time. In any event, he says that the plaintiff's action is time-barred.

3 Following a trial on liability alone,[4] I have found that the defendant did sign a written agreement in April 2008, and that he did so in the terms alleged by the plaintiff. I have also found that the plaintiff's action is not time-barred. I have accordingly entered interlocutory judgment against the defendant for the liquidated sum of US$600,000 and ordered an assessment of the plaintiff's damages arising from the defendant's failure to procure the transfer the Russian property to the plaintiff as agreed.

4 The defendant has appealed against my decision. I now set out my grounds.

Background facts

5 The plaintiff is a public listed company in the business of manufacturing and exporting food products and beverages. It is best known for its coffee products.[5]

6 The defendant is a Singapore citizen who now resides permanently in Russia.[6]

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2 Statement of claim (Amendment No 1) at para 7(A).

3 Defendant's defence (Amendment No 2) at para 5.

4 Plaintiff's opening statement (18 April 2017) at para 3.

5 Statement of claim (Amendment No 1) at para 1; Lee Chee Tak's affidavit of evidence in chief at para 5.

6 Mysore Nagaraja Kartik's affidavit of evidence in chief at paras 7 to 9.

7 MBIR is a general wholesale trader trading in, amongst other things, coffee products.[7] At all material times, MBIR was owned and controlled by the defendant and a Russian business associate of his.[8]

8 In September 2006, the plaintiff agreed to supply coffee products to MBIR.[9] The defendant nominated a company other than MBIR to be the counterparty to the supply contract.[10] But the understanding was that it was MBIR who would receive and pay for the products which the plaintiff was to supply under the contract.[11]

9 The plaintiff duly entered into the supply contract in October 2006.[12] Pursuant to the parties' understanding, the plaintiff duly supplied coffee products to MBIR beginning in 2007 and invoiced MBIR for those products.

10 By early 2008, MBIR had accumulated unpaid invoices for the products totalling about US$1.39m.[13] It appears also that MBIR had raised some disputes with the plaintiff which were alleged to give rise to set-offs and cross-claims against the US$1.39m due under the unpaid invoices.

11 In an effort to resolve all of their claims and cross claims, MBIR and the plaintiff had a meeting on 22 February 2008.[14] MBIR was represented at the

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7 Lee Chee Tak's affidavit of evidence in chief at para 10; Mysore Nagaraja Kartik's affidavit of evidence in chief at para 5.

8 Mysore Nagaraja Kartik's affidavit of evidence in chief at para 16.

9 Lee Chee Tak's affidavit of evidence in chief at para 9.

10 Lee Chee Tak's affidavit of evidence in chief at paras 11 and 13.

11 Lee Chee Tak's affidavit of evidence in chief at para 12.

12 Lee Chee Tak's affidavit of evidence in chief at p 18.

13 Lee Chee Tak's affidavit of evidence in chief at para 14.

14 Lee Chee Tak's affidavit of evidence in chief at para 15.

meeting by the defendant. The plaintiff was represented at the meeting by, amongst others, Mr David Teo and Mr Lee Chee Tak. Mr Teo was then the chairman and managing director of the plaintiff. Mr Teo did not give evidence at trial. Mr Lee was then a director of the plaintiff.[15] Mr Lee did give evidence at trial.[16]

12 The defendant accepts that he attended the February 2008 meeting.[17] But his account of the meeting and of the events that followed it diverges sharply from the plaintiff's account. It is therefore convenient from this point forward to summarise the parties' accounts separately.

The plaintiff's account

13 The plaintiff's account of the February 2008 meeting is that the defendant proposed to settle MBIR's debt to the plaintiff by personally paying the plaintiff the sum of US$600,000 and by transferring to the plaintiff the Russian property as security for MBIR's debt.[18] As evidence of this, the plaintiff relies on three emails sent by the defendant to the plaintiff in February and March 2008, after the February 2008 meeting, by which the defendant reiterated and confirmed this proposal.[19]

14 First, on 29 February 2008,[20] the defendant sent to Mr Lee a draft undertaking which had been prepared by the plaintiff and amended by the

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15 Lee Chee Tak's affidavit of evidence in chief at para 15.

16 Lee Chee Tak's affidavit of evidence in chief at para 7.

17 Certified Transcript (Day 1) at page 136 lines 11 to 20.

18 Lee Chee Tak's affidavit of evidence in chief at para 16.

19 Lee Chee Tak's affidavit of evidence in chief at para 17.

20 Lee Chee Tak's affidavit of evidence in chief at pp 33 to 45.

defendant's then solicitors.[21] In the draft undertaking, the defendant proposes in his personal capacity to procure a transfer of the Russian property to the plaintiff "forthwith" in consideration of the plaintiff reducing MBIR's debt by US$700,000[22] and forbearing to sue MBIR for the remainder of its debt.[23] This undertaking was never signed.

15 The second email is dated 5 March 2008.[24] In this email, the defendant refers to the February 2008 meeting and acknowledges that the sum of US$1.3m appears to be due to the plaintiff while reserving MBIR's rights on its alleged cross claims.

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21 Certified Transcript (Day 1) at page 124 lines 4 to 7.

22 Lee Chee Tak's affidavit of evidence in chief at pp 37 and 43.

23 Lee Chee Tak's affidavit of evidence in chief at page 34, para 2.

24 Lee Chee Tak's affidavit of evidence in chief at p 46.

16 The third and last email is dated 11 March 2008.[25] This email bears the subject line "Minutes of meeting of 22nd Feb 2008". The defendant begins the email by referring to an exchange of correspondence between the parties' solicitors on 4 March 2008 before summarising the discussions at the February 2008 meeting. He confirms that the discussions resulted in a settled account between the parties showing US$1.3m owing by MBIR to the plaintiff. This sum is arrived at by taking into account the value of all goods supplied by the plaintiff to MBIR and deducting from that all of MBIR's cross claims against the plaintiff.

17 The defendant concludes the email with an offer to procure a transfer of the Russian property to the plaintiff and personally to pay the plaintiff an additional sum of up to US$600,000 to resolve the parties' claims and cross claims amicably:

> … with a view to resolving the matter amicably, I as a director of MBIR, has already provided a security on his property in Russia to [the plaintiff] which is actually valued at USD900,000. As [the plaintiff] is aware, land in Russia cannot be owned by foreigners. Hence the legal owner of the land is Promfinaktiv, which is 100% owned by me and not MBIR. The land alone is more than sufficient as a security of any debts owed to [the plaintiff] by MBIR. However, as indicated in the meeting on 22 February 2008, I in my personal capacity as a director of MBIR is willing to pay [the plaintiff] a sum of up to US$600,000 from his own personal resources when such resources are available. My discussions with Lee Chee Tak and Mr. David Teo in respect of MBIR's accounts with [the plaintiff] have been on this basis.
>
> We trust that [the plaintiff] will view this issue practically. Any litigation proceedings will not be in the interest of any party. With my personal assurances, we trust that the matter can be resolved amicably without the necessity of bringing all issues before the court.

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[25] Lee Chee Tak's affidavit of evidence in chief at pp 46 to 47.

The defendant in this email introduces a Russian company called Promfinaktiv, a corporate vehicle owned and controlled by the defendant though which he holds the Russian property. The defendant explains in this email that, because Russian law does not allow foreigners to own Russian land, a transfer to the plaintiff of his shares in Promfinaktiv is the only way in which he can effect a transfer of the Russian property to the plaintiff.

18 The parties met again on 2 April 2008. At this meeting, the defendant undertook to the plaintiff to do the same two things in full and final settlement of MBIR's debt to the plaintiff:[26]

(a) First, the defendant undertook to procure a transfer of Promfinaktiv, and with it the Russian property, to the plaintiff.

(b) Second, the defendant undertook to pay US$600,000 to the plaintiff. The defendant proposed to do this by way of two post-dated cheques in the sum of US$300,000 each, with the final cheque to clear by 9 May 2008.

19 The following day, 3 April 2008, Mr Lee sent an email to the defendant[27] enclosing a document recording in writing the agreement reached on 2 April 2008.[28] Mr Lee asked the defendant to print and sign the written agreement and to forward it to the plaintiff as soon as possible. It is the plaintiff's case that both the plaintiff and the defendant duly signed the written agreement. The defendant denies ever signing the written agreement.

[26] Lee Chee Tak's affidavit of evidence in chief at para 18.

[27] Lee Chee Tak's affidavit of evidence in chief at pp 49 to 50.

[28] Lee Chee Tak's affidavit of evidence in chief at para 20.

20 The plaintiff tendered the written agreement at trial.[29] I pause at this point to describe it. As I have mentioned, it is drawn up, not in the form of a contract, but as a record of the parties' agreement at the 2 April 2008 meeting. It does not bear any date indicating when it was drawn up or when it was signed. Two signatures appear at the foot of the document, side by side. The signature on the left is identified as Mr Teo's, signing for and on behalf of the plaintiff. The signature on the right is identified as the defendant's, signing "for himself and for and on behalf of Promfinaktiv Ltd".[30]

21 Pursuant to the April 2008 agreement, in order to fulfil his obligation pay the plaintiff US$600,000, the defendant issued in favour of the plaintiff five post-dated cheques bearing various dates in May 2008 in various amounts totalling US$600,000.[31] All of the cheques were dishonoured upon presentation.[32]

22 The next four emails on which the plaintiff relies were exchanged in April 2009, a year after the April 2008 meeting. In these emails, Mr Lee urges the defendant to perform his obligations under the April 2008 agreement:

(a) On 4 April 2009,[33] Mr Lee sends the defendant an email with the subject line "Our Agreement dated 2/04/2008". Mr Lee begins the email by referring to "said agreement to settle the outstanding account between our two companies". He notes that the matter is still not yet resolved and warns the defendant that the plaintiff will commence legal action to

29 Exhibit P1.

30 Lee Chee Tak's affidavit of evidence in chief at p 52.

31 Lee Chee Tak's affidavit of evidence in chief at p 56 to 57.

32 Lee Chee Tak's affidavit of evidence in chief at paras 24 to 25.

33 Lee Chee Tak's affidavit of evidence in chief at p 60.

recover the debt owed by MBIR to the plaintiff if the defendant does not give a "satisfactory final settlement proposal" by 7 April 2009.

(b) On the same day,[34] the defendant emails Mr Lee in reply. The defendant's email reads as follows:

> As I have earlier indicated i plan to amicably settle with your goodself and will give you a proposal the coming week.
>
> Looking forward to a amicable business relationship with super.

(c) On 9 April 2009,[35] Mr Lee emails the defendant stating that the plaintiff has not received a proposal and strongly advising the defendant to reply that very day with the action he intends to take.

(d) On 11 April 2009,[36] Mr Lee emails the defendant to press him to perform his obligations under the April 2008 agreement:

> … you are strongly advise to take immediate action to fulfill your obligation under our agreement dated 02/04/2008.
>
> For your information, we took the liberty to extend the deadline (07/04/09) given to you earlier on to 13/04/09 upon you request.
>
> Kindly take notice the above deadline will be final and appreciate very much your full co-operation to resolve this issue amicably because the cost of settlement will definitely be much higher thereafter notwithstanding the legal costs.

23 The email dated 4 April 2009 (described at [22(b)] above) is of critical importance in this case. As I have mentioned, one of the defendant's defences is that the plaintiff's action is time-barred. To counter that defence, the plaintiff

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34 Lee Chee Tak's affidavit of evidence in chief at p 61.

35 Lee Chee Tak's affidavit of evidence in chief at p 62.

36 Lee Chee Tak's affidavit of evidence in chief at p 63.

relies on the 4 April 2009 email as an acknowledgment within the meaning of s 26(2) of the Limitation Act (Cap 163, Rev Ed 1996).

24 Following the plaintiff's 11 April 2009 email (described at [22(d)] above), the defendant initiated steps to transfer Promfinaktiv to the plaintiff. As evidence of this, the plaintiff relies on the following eight emails sent between April 2009 and April 2010:

(a) On 13 April 2009,[37] the defendant replies to Mr Lee's email of 11 April 2009 (see [22(d)] above). The defendant tells Mr Lee that his Russian lawyers are going to speak to the plaintiff's lawyers regarding the transfer of the Russian property.

(b) On 29 May 2009,[38] the defendant emails Mr Lee. The defendant apologises for the delay and says that he has spoken to the plaintiff's lawyers about the transfer of the Russian property and will be transferring his shares in Promfinaktiv to the plaintiff. He asks the plaintiff to instruct its lawyers on who is to be the transferee of the shares. The defendant indicates that he expects the transfer to be carried out in the following week.

(c) On 31 July 2009,[39] the defendant emails Mr Lee forwarding an email exchange between the defendant's representatives and the plaintiff's Russian lawyers. The email encloses a draft sale and purchase agreement prepared by the plaintiff's Russian lawyers providing for the plaintiff's nominee to acquire Promfinaktiv. The email exchange with

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37 Lee Chee Tak's affidavit of evidence in chief at p 63.

38 Lee Chee Tak's affidavit of evidence in chief at p 66.

39 Lee Chee Tak's affidavit of evidence in chief at pp 67 to 78; Plaintiff's closing submissions at p 9.

the Russian lawyers and the draft contract are in the Russian language, with an English translation of the draft contract attached. The draft identifies "Super Coffee Corporation Pte Ltd" as the transferee of 100% of the shares in Promfinaktiv.[40]

(d) On 5 August 2009,[41] Mr Lee emails the defendant to point out to him that Promfinaktiv's corporate charter prohibits the transfer of shares to third parties. Mr Lee asks the defendant to have the charter amended immediately to facilitate the transfer of Promfinaktiv to the plaintiff's nominee.

(e) On 6 August 2009,[42] the defendant emails Mr Lee to inform him that the defendant has initiated the change in Promfinaktiv's charter. The defendant describes the process and conveys his expectation that the change can be effected within a matter of days.

(f) On 21 August 2009,[43] the defendant emails Mr Lee apologising for the delay in effecting the changes to Promfinaktiv's charter. He also informs Mr Lee that the "[n]ext step and final step" would be to submit the changes to the Russian tax authorities which he will do the following Monday.

(g) On 23 February 2010,[44] the defendant emails Mr Lee telling him that the changes to Promfinaktiv's charter have been effected, that the relevant documents are being notarised and legalised and that the

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40 Lee Chee Tak's affidavit of evidence in chief at page 77.

41 Lee Chee Tak's affidavit of evidence in chief at pp 79 to 82.

42 Lee Chee Tak's affidavit of evidence in chief at pp 79 to 82.

43 Lee Chee Tak's affidavit of evidence in chief at p 83.

44 Lee Chee Tak's affidavit of evidence in chief at p 86.

defendant is "ready to conclude the [sale and purchase agreement] with [the plaintiff's] lawyers".

(h) On 27 April 2010,[45] Mr Lee emails the defendant a 2007 valuation of the Russian property and asks him for an updated estimate of its value. It appears that this email is a follow up to a telephone conversation between the plaintiff and the defendant on the same subject.

It ultimately emerged that the defendant did not have clear legal title to the Russian property.[46] As a result, the defendant never did transfer Promfinaktiv or the Russian property to the plaintiff.

25 In November 2011, because the defendant had failed to perform both of his obligations under the April 2008 agreement, the plaintiff commenced action against MBIR to recover the sum of US$1.39m owing on the unpaid invoices. In April 2013, MBIR failed to comply with an unless order in that action. As a result, the plaintiff secured a judgment in default for the full sum against MBIR. MBIR has not paid the judgment debt or any part of it to date.[47]

26 In March 2015, the plaintiff commenced this action against the defendant to recover US$1.3m, or in the alternative damages for breach of the April 2008 agreement.[48]

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45 Lee Chee Tak's affidavit of evidence in chief at pp 79 to 82.

46 Lee Chee Tak's affidavit of evidence in chief at para 30.

47 Lee Chee Tak's affidavit of evidence in chief at para 31.

48 Lee Chee Tak's affidavit of evidence in chief at para 32.

27 In October 2015, MBIR was wound up by the court in proceedings unrelated to the subject-matter of this action.[49] In June 2016, MBIR was struck off the companies register.[50]

The plaintiff's case

28 The plaintiff's case on its account of the facts is a straightforward action for breach of contract. It proceeds as follows. The defendant signed the April 2008 written agreement. He is therefore bound by it. He has failed to perform his obligations under it. He is therefore liable to the plaintiff for breach of contract.

29 The plaintiff's principal difficulty is evidential: it is unable to prove by direct evidence that the defendant signed the April 2008 written agreement. I use the term "direct evidence" here and throughout this judgment in the technical sense given to that term by s 62(1) of the Evidence Act (Cap 97, Rev Ed 1997).

30 The plaintiff finds itself in this evidential difficulty because it accepts that the parties did not execute the April 2008 written agreement on the same occasion and in each other's presence. In other words, even on the plaintiff's case, Mr Lee did not see the defendant sign the written agreement and therefore cannot give direct evidence of that fact. All that the plaintiff is able to say is that the defendant returned the written agreement to the plaintiff, duly signed by the defendant, before end April 2008.[51] The defendant, on the other hand, presents

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49 ORC7298/2015 dated 30 October 2015 in HC/CWU 216/2015.

50 Mysore Nagaraja Kartik's affidavit, para 5 and page 21.

51 Plaintiff's further and better particulars dated 7 March 2016 (Amendment No 1) at para 1(d).

direct evidence – in the form of his own oral evidence – that he did *not* sign the document. Self-serving though his oral evidence might be, it is still direct evidence; its self-serving nature goes only to the weight to be attached to it.

31 In the absence of direct evidence that the defendant signed the April 2008 written agreement, the plaintiff has to rely on circumstantial evidence to establish this fundamental fact. The plaintiff relies on three strands of circumstantial evidence.

32 The first strand comprises the emails exchanged between the defendant and Mr Lee in 2008 (see [13] and [19] above).[52] The plaintiff relies on these emails as evidence that the parties had reached an oral agreement, the terms of which were then recorded in writing in the April 2008 written agreement. The plaintiff's point is that the preceding oral agreement makes it more likely that the defendant signed the April 2008 written agreement, because it does no more than record the terms of the parties' oral agreement reached on 2 April 2008.

33 The second strand of circumstantial evidence comprises the emails exchanged between the defendant and Mr Lee in April 2009 (see [22] above).[53] The plaintiff's point is that if the defendant did not sign the April 2008 written agreement, he would have protested when the plaintiff called upon him to perform his obligations under the agreement a year later in April 2009. But he did not protest.

34 The third strand of circumstantial evidence is the defendant's attempts, again without protest, to perform both of his obligations under the April 2008

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52 Lee Chee Tak's affidavit of evidence in chief at paras 27 and 29.

53 Lee Chee Tak's affidavit of evidence in chief at paras 27 and 29.

agreement. Thus, the plaintiff submits that the five post-dated cheques totalling US$600,000 which the defendant issued in favour of the plaintiff in May 2008 (see [21] above) were issued in performance of the defendant's obligation under the April 2008 agreement to pay the plaintiff US$600,000 by way of post-dated cheques. Likewise, the defendant's efforts between April 2009 and April 2010 to transfer Promfinaktiv to the plaintiff – as evidenced by the emails exchanged during this period (see [23] above) – were efforts by the defendant to comply with his obligation under the April 2008 agreement to bring about a transfer of the Russian property to the plaintiff.[54]

35 To summarise the plaintiff's case on limitation, it is first necessary to describe how the limitation issue arises. The plaintiff's case is that it entered into an agreement in writing with the defendant in April 2008. The plaintiff commenced this action in March 2015, well over six years later. If the plaintiff's cause of action for breach of the April 2008 agreement arose at any time before March 2009, being six years before the plaintiff commenced this action, the plaintiff's action is time-barred by s 6(1)(*a*) of the Limitation Act.

36 To meet this defence, the plaintiff relies on the email sent by the defendant to Mr Lee on 4 April 2009 (described at [22(b)] above) as an acknowledgment by the defendant of the plaintiff's claim in this action within the meaning of s 26(2) of the Limitation Act. The plaintiff's case, therefore, is that its right of action against the defendant is deemed by s 26(2) to have accrued on 4 April 2009 and not before. The plaintiff commenced this action within six years of 4 April 2009 and it is therefore not time-barred.

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54 Lee Chee Tak's affidavit of evidence in chief at para 29.

The defendant's account

37 The defendant's account of events at and following the February 2008 meeting amounts to little more than a denial of the plaintiff's account.

38 The defendant denies that there was any discussion of MBIR's debt to the plaintiff at the February 2008 meeting. The topic of discussion at the meeting was not how MBIR was going to repay its debt to the plaintiff. The topic of discussion, instead, was the problems which MBIR was facing in receiving the goods from the plaintiff and MBIR's resulting set-offs and cross claims against the plaintiff.[55]

39 The defendant denies that he signed the April 2008 written agreement. His evidence is that his credit card bills suggest that he was in Moscow and not Singapore between 29 March 2008 and 13 April 2008.[56] He therefore challenges the authenticity of his signature on the April 2008 written agreement[57] and asserts that it "is not [his] signature and was forged".[58]

40 The defendant denies that he had anything to gain by entering into an agreement – such as the April 2008 agreement – that would make him personally liable for the US$1.3m which MBIR owed to the plaintiff.[59] After all, he had only a half-share in MBIR and was not responsible for its debts.[60] His

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55 Transcript (Day 1) at p 137 (lines 6 to 25).

56 Mysore Nagaraja Kartik's affidavit of evidence in chief at para 15.

57 Mysore Nagaraja Kartik's affidavit of evidence in chief at para 26.

58 Mysore Nagaraja Kartik's affidavit of evidence in chief at para 21.

59 Mysore Nagaraja Kartik's affidavit of evidence in chief at para 25.

60 Mysore Nagaraja Kartik's affidavit of evidence in chief at paras 7 to 9, 22 and 25.

evidence is that it is not in his nature to undertake personal liability in that way and that US$1.3m is a large amount of money for him.[61]

41 The defendant denies that the five post-dated cheques which he issued in favour of the plaintiff totalling US$600,000 were an attempt to perform his obligation under the April 2008 agreement to pay US$600,000 to the plaintiff.[62] Instead, his evidence is that he issued these cheques to pay for coffee products which MBIR purchased from the plaintiff.[63] Further, although he accepts that he countermanded the cheques, his evidence is that he was justified in doing so, because the plaintiff failed to deliver the products.[64]

42 The defendant denies that the email correspondence about the transfer of Promfinaktiv to the plaintiff is evidence of the defendant's attempt to perform his obligations under the April 2008 agreement. Instead, the attempted transfer Promfinaktiv was in relation to a separate joint venture between the plaintiff and the defendant to package the plaintiff's products in Russia using packaging machines to be housed on the Russian property.[65]

43 The defendant denies the authenticity of 14 out of the 16 emails on which the plaintiff relies as evidence in this action and which I have summarised above (at [14]–[16], [22] and [24]):

(a) The defendant formally disputes the authenticity of five of these emails:[66] those dated 5 March 2008 (see [15] above), 11 March 2008

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61 Mysore Nagaraja Kartik's affidavit of evidence in chief at para 22.

62 Mysore Nagaraja Kartik's affidavit of evidence in chief at para 45.

63 Mysore Nagaraja Kartik's affidavit of evidence in chief at para 21.

64 Mysore Nagaraja Kartik's affidavit of evidence in chief at para 46.

65 Certified Transcript (Day 1) at page 130 line 7 to page 131 line 20.

(see [16] above), 4 April 2009 (see [22(a)] and [22(b)] above) and 9 April 2009 (see [22(c)] above). All of these emails were disclosed in the plaintiff's original list of documents filed on 7 September 2015.

(b) The defendant's evidence in chief disputes the authenticity of four additional emails:[67] those dated 3 April 2008 (see [19] above), 29 May 2009 (see [24(b)] above), 21 August 2009 (see [24(f)] above) and 23 February 2010 (see [24(g)] above). The defendant's position is that he had never seen any of these emails before this litigation and that he "believes" that he did not send them.[68] All of these emails were disclosed in the plaintiff's first supplementary list of documents filed on 22 April 2016.

(c) The defendant's reply written submissions, tendered after trial, reject the authenticity of a further five emails:[69] those dated 29 February 2008 (see [14] above), 11 April 2009 (see [22(d)] above), 31 July 2009 (see [24(c)] above), 6 August 2009 (see [24(e)] above) and 27 April 2010 (see [24(h)] above). All of these emails were disclosed in the plaintiff's second supplementary list of documents filed on 8 March 2017.

44 There are only two emails on which the plaintiff relies and whose authenticity the defendant has not disputed: the emails dated 13 April 2009 (see [24(a)] above) and 5 August 2009 (see [24(d)] above). Both of these emails were also disclosed in the plaintiff's supplementary list of documents filed on 8

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66 Notice disputing authenticity of documents (27 October 2015).

67 Mysore Nagaraja Kartik's affidavit of evidence in chief at paras 29 to 30 and Tab L of Exhibit MNK-3.

68 Mysore Nagaraja Kartik's affidavit of evidence in chief at para 30.

69 Defendant's reply submissions (30 June 2017) at para 4, page 6,

March 2017. However, the defendant's failure to challenge the authenticity of these two emails appears to result more from the defendant's oversight than from a considered decision to accept their authenticity. On the other hand, the defendant expressly accepts the authenticity of the draft undertaking attached to the email of 29 February 2008, even though he disputes the authenticity of the covering email itself.

45 Because the defendant denies the authenticity of these emails, he also denies that they are capable of being evidence of anything at all. In particular, he denies the plaintiff's case that these emails are circumstantial evidence that he signed the April 2008 written agreement and that he attempted to perform his obligations under the agreement.

46 Finally, the defendant denies that the plaintiff has brought its claim within the six-year limitation period applicable to claims for breach of contract[70] and, further, denies that he acknowledged his liability to the plaintiff within the meaning of s 26(2) of the Limitation Act.

The defendant's case

47 Based on his account of the facts, the defendant's case is as follows:

(a) His signature on the April 2008 written agreement is a forgery.[71]

(b) The plaintiff's action is time-barred under the Limitation Act.[72]

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70 Mysore Nagaraja Kartik's affidavit of evidence in chief at para 35.

71 Mysore Nagaraja Kartik's affidavit of evidence in chief at para 21.

72 Defendant's Defence (Amendment No 2) at para 7.

48 I should point out at this stage that the defendant's pleading is deficient in two material respects.

49 The first deficiency is that the defendant does not plead in terms that his signature on the April 2008 written agreement is a forgery. His pleaded defence is simply that he did not enter into the April 2008 agreement.[73] But he does assert expressly in his affidavit of evidence in chief that his signature on the April 2008 written agreement "was forged".[74] And both parties have prepared for trial on the basis that the defendant's case is that what purports to be his signature on the April 2008 written agreement is a forgery. The defendant's failure to plead forgery has caused no prejudice to the plaintiff. I therefore deal with the defendant's allegation of forgery on the merits rather than excluding it *in limine* on a technicality of pleading.

50 The second deficiency is that the defendant does not plead in terms that the 4 April 2009 email is a fabrication. The plaintiff in its statement of claim anticipates a limitation defence and therefore specifically and pre-emptively pleads the 4 April 2009 email as an acknowledgment by the defendant of his liability to the plaintiff.[75] Despite this, the defendant does not in his defence specifically plead in response that this email is a fabrication. His plea in response amounts simply to a denial that he sent that email.[76] However, the 4 April 2009 email is one of the emails the authenticity of which the defendant formally disputed by his notice filed on 27 October 2015. Both parties prepared for trial on the basis that the 4 April 2009 email – and indeed all of the emails

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73 Defendant's Defence (Amendment No 2) at para 5.

74 Mysore Nagaraja Kartik's affidavit of evidence in chief at para 21.

75 Statement of claim (Amendment No 1) at para 6.

76 Defendant's defence (Amendment No 2) at para 7.

on which the plaintiff relies – are fabrications. Once again, therefore, I deal with the defendant's allegations of fabricated emails on the merits, rather than excluding it *in limine* on a technicality of pleading.

Issues to be determined

51 The two principal issues which I must determine are therefore:

(a) Did the defendant sign the April 2008 written agreement?

(b) Is the plaintiff's action time-barred?

52 Before I determine these two principal issues, however, there is an anterior evidential issue which I must determine. Whenever a party adduces any evidence other than direct evidence, there are three evidential issues which must be addressed but which must be kept conceptually distinct in the analysis. The first is *authenticity* of the evidence. The second is *admissibility* of the evidence as going to the truth of the statements which the evidence contains. The third is the *weight* to be attached to the evidence.

53 Authenticity is a necessary condition of admissibility. It is true that formal proof of authenticity is commonly dispensed with in civil cases. But that should not be allowed to obscure the fundamental evidential point that, until authenticity is established, admissibility has no meaning. Evidence which has been fabricated is no evidence at all: it is incapable of proving anything other than, perhaps, the very fact that it has been fabricated.

54 The email evidence before me is critical to both of the principal issues which I have to determine. If the defendant is correct, and the emails are fabricated, there is no circumstantial evidence at all that the defendant signed

the April 2008 agreement[77] and his direct evidence to the contrary stands unrebutted. More specifically, if the 4 April 2009 email is fabricated, it can in no way amount to an acknowledgment within the meaning of s 26(2) of the Limitation Act and cannot operate to defeat the defendant's limitation defence.[78]

55 I must therefore determine the anterior evidential issue of whether the emails are authentic. And I must determine that anterior evidential issue before I can even consider the further evidential questions of whether the emails are admissible and the weight to be attached to them, let alone determine the two principal issues before me on the merits of this action.

Are the emails authentic?

56 Authenticity is a condition of admissibility. The plaintiff is the party who adduces these emails in evidence through Mr Lee. Section 106 of the Evidence Act places squarely upon the plaintiff the burden of proving the facts necessary to establish the threshold question of authenticity.

The parties' evidence

57 The plaintiff seeks to discharge this burden with a combination of direct evidence of fact and expert evidence of opinion.

58 The direct evidence of fact is Mr Lee's evidence that, on the dates and times stated on the face of each of the emails: (a) he composed and sent those emails which bear his name as the sender and the defendant's name as recipient; and (b) he received those emails which bear the defendant's name as the sender and Mr Lee's name as recipient. The expert evidence on which the plaintiff

[77] Plaintiff's closing submissions (16 June 2017) at paras 17 to 31.

[78] Plaintiff's closing submissions (16 June 2017) at paras 39 to 42.

relies is a report from an information technology expert, Mr Alireza Fazelinasab, who examined and analysed the metadata embedded in the email header of the original, electronic version of each of nine disputed emails. These nine emails are the emails disclosed in the plaintiff's initial list of documents (see [43(a)] above) and in its first supplementary list of documents (see [43(b)] above). Mr Fazelinasab's opinion is that the emails are authentic in that their "contents…remain complete and unaltered.[79]

59 To meet the plaintiff's case on authenticity, the defendant too relies on direct evidence of fact and expert evidence of opinion. The direct evidence is the defendant's oral evidence that he did not, at any time: (a) send the emails alleged to have originated from him; and (b) receive the emails alleged to have been sent to him. The expert evidence on which the defendant relies is an opinion from another information technology expert, Mr Pravin Kumar Pandey. Mr Pandey examined the same nine emails which Mr Fazelinasab examined and conducted the same type of analysis on their headers. Mr Pandey's conclusion, however, is that the authenticity of the emails "appears to be questionable".[80]

60 Neither expert expresses an opinion on the remaining five emails which the defendant challenged only in his reply submissions (see [43(c)] above). The defendant complains that he has been severely prejudiced by not having had a reasonable opportunity to produce an expert report from Mr Pandey analysing the headers in these additional five emails because the plaintiff disclosed these emails too close to trial.[81]

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79 Alireza Fazelinasab's affidavit of evidence in chief (2 March 2017) at paras 11 to 13.

80 Plaintiff's closing submissions (16 June 2017) at para 61; Pravin Kumar Pandey's affidavit of evidence in chief (1 March 2017) at p 28, para 18.1.

81 Defendant's reply submissions (30 June 2017) at para 4, page 9.

61 The defendant's complaint is not well-founded. The plaintiff disclosed these additional five emails almost seven weeks before trial. I consider that period to be sufficient time for the defendant to have commissioned a report on these five emails. I note that Mr Pandey took possession of the electronic copies of the nine disputed emails on 1 July 2016[82] and delivered his fairly detailed report on those emails within 11 weeks, on 16 September 2016.[83] Considering that the defendant was presented with these five additional emails to be analysed on 8 March 2017, and given that a fresh report from Mr Pandey on them would have had the considerable advantage of building upon work Mr Pandey had already done for his initial report on the nine disputed emails, it appears to me that almost seven weeks was a sufficient period for Mr Pandey to analyse these five further emails.

62 Quite apart from that, I also consider that this period of almost seven weeks was sufficient time for the defendant to secure at least a preliminary view from Mr Pandey whether there were any *additional* grounds for challenging these five additional emails over and above the grounds Mr Pandey had already identified and advanced for challenging the nine disputed emails in his initial report. Mr Pandey did not suggest any such additional grounds.

63 Despite these findings, I do not shut the defendant out from challenging these five remaining emails. Because of my finding at [62] above, however, I proceed on the basis that the authenticity of these five additional emails stands or falls with the authenticity of the nine disputed emails which Mr Pandey did examine and analyse.

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82 Pravin Kumar Pandey's affidavit of evidence in chief (1 March 2017) at p 9, para 4.1.

83 Pravin Kumar Pandey's affidavit of evidence in chief (1 March 2017) at p 6.

An analogy

64 The easiest way to conceptualise the parties' cases on authenticity and to understand the experts' reports is by drawing an analogy between an email and an ordinary letter, and to consider each disputed email as though it were instead a letter which the plaintiff alleges was sent by the sender to the recipient on or about the date which it bears. In the analogy which follows, I shall draw a distinction between an email's human-readable contents and to its computer-readable contents. That distinction is something of an oversimplification: the truth of the matter is that an email in its original form is entirely and only computer-readable. What I mean, then, when I refer to human-readable contents are those contents of an email which a standard email client in ordinary usage renders human-readable when displaying an email either on the screen or in print. An email's computer-readable contents, therefore, are those contents of an email which a standard email client in ordinary usage *does not* render human-readable when displaying an email either on the screen or in print.

65 On this analogy, the sender's letter to the recipient is the analogue of the textual content of an email which is human-readable. The sender's and the recipient's street addresses recorded on the letter's envelope are the analogues of the human-readable email address of the sender and the recipient of the email. The postal system is the analogue of the email system. The postmark and other sorting information imprinted on the envelope by the post offices through which the letter passes are the analogue of the computer-readable metadata attached automatically to each email as it is transmitted from server to server.

66 What the plaintiff is seeking to do in this case is, by analogy, to adduce in evidence through Mr Lee and to rely upon a number of letters. The plaintiff asserts that the letters which appear on their face to originate from Mr Lee and

to be addressed to the defendant were in fact written by Mr Lee and were in fact sent and delivered by the postal system to the defendant. The plaintiff asserts also that the letters which appear on their face to originate from the defendant and to be addressed to Mr Lee were in fact written by the defendant and were in fact delivered by the postal system to Mr Lee. Finally, the plaintiff asserts that all of these letters were in fact sent and received, on or about the dates indicated by the postmarks on the envelopes in which each letter was posted and received, on various dates between February 2008 and April 2010.

67 Taking the analogy further, what the defendant asserts is that the plaintiff has fabricated all of these letters and that none of them were ever sent by the ostensible author or delivered to the ostensible recipient through the postal system, whether on the dates which they bear or otherwise. The plaintiff's fabrication includes the contents of the letters, the signatures on them, the envelopes in which the plaintiff claims the letters were sent or received and the postmarks which the envelopes bear. The fabrication even encompasses the invisible computer-readable metadata in each email, for which there is no physical analogue in a letter. Thus, the defendant says, none of the disputed emails are capable of being evidence of anything.

68 An inquiry into the authenticity of email correspondence is aided by a feature of email correspondence which has no analogue in analogue correspondence. Every email, in its original electronic form, has a computer-readable header created and attached to the email by the email system. Embedded in the email header is metadata, *ie* data about the data in the email. An email's metadata includes data about, amongst other things: (a) the route which the email takes as it is relayed from server to server on its way to its addressee; and (b) a comprehensive set of time stamps. The information about

the route is recorded in the header as a series of internet protocol ("IP") addresses. The time stamps recorded in the header include the email's "Creation Time", "Submit Time", "Delivery Time", "Sent" and "Last Modification" time.

69 An email client will extract some – but crucially, not all – of the computer-readable metadata from the header and render it human-readable. Thus, the email address of the sender is automatically extracted from the metadata and rendered human readable by the recipient's email client. But of the several time stamps recorded in the header, only the "Sent" time is rendered human-readable. And the routing information including the IP addresses are not rendered human-readable at all. The metadata in a particular email's header which is not automatically rendered human-readable can be rendered human-readable and examined only by special tools. Further, this is possible only if one has access to the native, electronic version of the email. It is precisely this exercise which the parties' respective information technology experts have undertaken.

Three possibilities

70 The issue of authenticity is not only an anterior evidential issue. The finding on authenticity, one way or the other, has far-reaching ramifications for the credibility of the parties' witnesses and their respective cases.

71 I take as my starting point the fact that amnesia on either side can be discounted. I consider the chances that Mr Lee and the defendant could have sent and received so many emails which are so critical to the issues in question in this action and have forgotten all about all of them, even after a lapse of almost a decade, are so fanciful that they can be safely disregarded.

72 The manner in which the parties have presented their respective cases on authenticity to me therefore leaves one of only three possible conclusions open to me.

73 The first possible conclusion is that the emails are genuine. If so, all of the information set out in the emails' human-readable and the computer-readable contents can be taken at face value. It follows from this conclusion that: (a) each email was composed by its ostensible author and submitted to the email system from his email address; (b) the email system delivered each email to its ostensible recipient at his email address; and (c) the header records accurately the date and time at which the email was so submitted and delivered.

74 This conclusion leads to a finding that Mr Lee's evidence is the truth and the defendant's denials are false. But the result of this conclusion goes much further than that. Amnesia having been discounted, this conclusion excludes the possibility that the defendant is an honest but mistaken witness. Of necessity, this conclusion dictates that the defendant did write and receive the emails at or about the time they each bear, that he knows that he did, and that he is deceiving the court when he claims that he did not.

75 The second possible conclusion is that the emails are fabrications. If so, none of the emails – whether in the human-readable or in the computer-readable contents – is capable of being evidence.

76 This conclusion leads to a finding that Mr Lee's evidence is false and that the defendant's evidence is the truth. But, once again – amnesia having been discounted – it cannot be that the disbelieved witness is honest but mistaken.

Mr Lee must know that he has perjured himself by testifying that he sent and received these emails between February 2008 and April 2010. Further, because Mr Lee is presenting these emails to the court as authentic with knowledge that they are not, he must either have fabricated these emails himself or been complicit in their fabrication.

77 The final possible conclusion is an intermediate position. On this alternative, Mr Lee did: (a) send the emails which originated from him on the dates and times indicated on their face; and (b) did receive responses to them at or around the same time. But, unknown to him, he was corresponding with a third party who was impersonating the defendant. This conclusion leads to a finding that both Mr Lee and the defendant are honest witnesses and posits a third party who, through electronic trickery, impersonated the defendant electronically between 2008 and 2010 and made it appear to Mr Lee that the defendant was his correspondent. This possibility was referred to at trial as "spoofing". Emails can be spoofed without access to the computer of the ostensible sender and even without access to his email account.

78 But some of the disputed emails originated from Mr Lee and were addressed to the defendant. So, this conclusion also leads to a finding that the third party had access to the defendant's computer, or at the very least to his email account, so as to intercept Mr Lee's emails and ensure that the defendant would never receive them. Further, the third party would have had to have intercepted and diverted *only* Mr Lee's emails to the defendant in order to avoid arousing the defendant's suspicions by preventing *all* of his incoming emails from getting through.

The expert evidence

79 I now turn to consider the experts' evidence on authenticity. The key difficulty in this case is that there are discrepancies in the IP addresses and time stamps recorded in each email header. The experts draw differing conclusions from the discrepancies. It is Mr Pandey who points out the discrepancies and Mr Fazelinasab who attempts to explain them. It is therefore convenient to start with Mr Pandey's evidence. I am conscious throughout, however, that the burden of proof on the issue of authenticity rests on the plaintiff, and on the plaintiff alone.

80 I now consider each expert's evidence in turn.

Defendant's expert evidence

81 The defendant's expert, Mr Pandey, accepts that the "Submit Time" and "Delivery Time" recorded in the header of each email shows that each email was delivered to the recipient within a second of being submitted by the sender.[84] He accepts, further, that the "Delivery Time" recorded for each email is consistent with the "Sent" time visible in the human-readable text of each email.[85] And the header records the same email addresses for both the sender and the recipient as is visible in the human-readable content of the email.[86]

82 However, Mr Pandey points to the following discrepancies in the time stamps and routing information recorded in the headers:

(a) The header in all of the emails record that they were "Received" – as opposed to being "Delivered" – years later, on either 19 or 20 December 2012.[87]

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84 Pravin Kumar Pandey's affidavit of evidence in chief (1 March 2017) at paras 8.5, 9.5,

(b) The header for the first five emails record their "Creation Time" as being identical: 15 December 2015 at precisely the same time of the day, down to the second. Such a coincidence is "improbable" unless the first five emails were "created as a batch".[88]

(c) The header for the first five emails record their "Last Modification Time" as 24 November 2015, years after they were ostensibly sent.

(d) The header for the last four emails record their "Creation Time" as being identical: 3 June 2016 at precisely the same time of the day, down to the second. Such a coincidence is "improbable" unless the last four emails were "created as a batch".[89]

(e) The headers for the last four emails record their "Last Modification Time" as April 2016, with the exception of the 29 May 2009 email, whose header records its "Last Modification Time" as 29 May 2009.[90]

(f) Some of the disputed emails for which multiple electronic copies were made available to Mr Pandey have no header recording the

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10.5, 11.5, 12.7, 13.5, 14.5, 15.8 and 16.5.

85 Pravin Kumar Pandey's affidavit of evidence in chief (1 March 2017) at paras 8.2, 9.2, 10.2, 11.2, 12.2, 13.2, 14.2, 15.2 and 16.2.

86 Pravin Kumar Pandey's affidavit of evidence in chief (1 March 2017) at paras 8.6, 9.10, 10.9, 11.8, 13.7, 14.8, 15.8 and 16.8.

87 Pravin Kumar Pandey's affidavit of evidence in chief (1 March 2017) at pp 12, 14, 15, 17, 19, 20, 22, 23 and 26.

88 Pravin Kumar Pandey's affidavit of evidence in chief (1 March 2017) at p 27.

89 Pravin Kumar Pandey's affidavit of evidence in chief (1 March 2017) at p 27.

90 Pravin Kumar Pandey's affidavit of evidence in chief (1 March 2017) at pp 13, 14, 16, 17, 21, 22 and 26.

"Creation Time", contrary to what would be expected with authentic emails.[91]

(g) The routing information in the header contains only internal IP addresses. The external IP address of the sender and of the servers through which the email passed on its way to its recipient are not recorded in the routing information in the header. An email which had been transmitted over the internet – as opposed to one transmitted over an intranet – would record external IP addresses in its routing information. The absence of external IP addresses suggests that these emails were sent between two computers within a closed network.[92]

83 As a result of these discrepancies, Mr Pandey arrives at two conclusions:

(a) The electronic copies of the emails provided to him are likely not to be the original electronic copies of the disputed emails which the plaintiff claims to have sent to or received from the defendant;[93] and

(b) The authenticity of the emails provided to him "appears to be questionable".[94]

84 It is notable that Mr Pandey is unable to conclude from the 2012 "Creation Time" recorded in the headers of the disputed emails that they are likely to have been created in 2012 by transmission within the plaintiff's internal email network. Similarly, he is unable to conclude from the 2015 or 2016 "Last

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91 Pravin Kumar Pandey's affidavit of evidence in chief (1 March 2017) at p 27.

92 Pravin Kumar Pandey's affidavit of evidence in chief (1 March 2017) at pp 27 to 28.

93 Pravin Kumar Pandey's affidavit of evidence in chief (1 March 2017) at p 28, para 17.7.

94 Plaintiff's closing submissions (16 June 2017) at para 61; Pravin Kumar Pandey's affidavit of evidence in chief (1 March 2017) at p 28, para 18.1.

Modification Time" recorded in the headers that these emails were modified in 2015 or 2016. Certainly, under cross-examination, he acknowledged that he did not have enough information to conclude that the emails were likely to have been spoofed or fabricated.[95]

85 Nevertheless, the defendant relies on Mr Pandey's evidence as having established that the disputed emails are not genuine. Thus, the defendant submits that the "most damning" evidence is that the headers of the emails suggest that these emails were never transmitted over the internet.[96]

Plaintiff's expert evidence

86 The plaintiff's expert, Mr Fazelinasab, arrives at the following conclusions:

(a) The disputed emails are authentic, complete and unaltered and not the result of a fabrication; and

(b) The discrepancies in the headers which Mr Pandey identifies are the result of changes which arose in the ordinary course of communicating and storing the emails.

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95 Transcript (Day 3) at p 55 (lines 13 to 21).

96 Defendant's closing submissions (16 June 2017) at para 79.

87 For the second of his conclusions, Mr Fazelinasab relies on Mr Lee's evidence that the plaintiff's email system underwent a migration from Microsoft Outlook to Google's email servers in December 2012.[97] Mr Fazelinasab opines unequivocally that the discrepancies in the "Creation Time" and "Last Modification Time" recorded in the email headers are the result of the plaintiff's email migration.[98] Specifically, Mr Fazelinasab gave the following evidence:

(a) Using a tool which Google makes available on the internet for public use, he verified that the IP addresses recorded in the emails' routing information belong to Google's email servers.[99] Mr Fazelinasab conceded that these IP addresses are not unique to Google and are used as internal IP addresses in intranets around the world. But he maintained that the internal IP addresses recorded in the header belong to Google because the official tool that he used relies on more than just IP addresses to determine the origin of emails.[100]

(b) The headers in the emails have a boolean flag for "Google-migrated" set to true. That indicates that the emails were indeed migrated to Google's email servers as Mr Lee testified.[101]

(c) The fact that the headers record that the emails were "Received" in December 2012 corresponds with the email migration exercise to Google's servers, which took place in December 2012.[102]

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97 Lee Chee Tak's affidavit of evidence in chief (8 March 2017) at paras 37 to 38 and p 136.

98 Alireza Fazelinasab's affidavit of evidence in chief (2 March 2017) at paras 11 to 13.

99 Alireza Fazelinasab's affidavit of evidence in chief (2 March 2017) at para 13(a).

100 Transcript (Day 2) at pp 11 (lines 10 to 15) to 12 (lines 5 to 16).

101 Transcript (Day 2) p 8 (lines 3 to 7).

102 Alireza Fazelinasab's affidavit of evidence in chief (2 March 2017) at para 13(c).

(d) The "Creation Time" and "Last Modification Time" date stamps record the time in December 2015 and June 2016 that the emails were isolated and exported for the purposes of this litigation. This also explains why some of the emails share exactly the same "Creation Time". It is because they were exported at the same time in a batch process, just as Mr Pandey surmised.[103]

Authenticity

88 The email headers are critical on the anterior evidential issue of authenticity. But a header is not direct evidence of authenticity in the same way as Mr Lee's oral evidence is. The header is electronic data recorded automatically and contemporaneously by a computer when an email is sent and while it is *en route*.

89 For the headers to be admissible as evidence of the truth of their contents on the anterior evidential issue of authenticity, the plaintiff must establish their admissibility under a provision of the Evidence Act. Section 62(1) of the Evidence Act is of no assistance because the headers are neither oral evidence nor direct evidence.

Presumption of regularity for electronic records

90 The plaintiff relies on the presumption in s 116A(1) of the Evidence Act. That provision, for present purposes, entitles the court to presume that an electronic record has been produced accurately on a given occasion if that electronic record is produced by a device which, if properly used, ordinarily produces an electronic record. The presumption created by s 116A(1) is not, of

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103 Alireza Fazelinasab's affidavit of evidence in chief (2 March 2017) at para 13(d).

course, absolute. It is rebutted if sufficient evidence is adduced to raise doubt about the presumption. The provision and its accompanying illustration are as follows:

> **Presumptions in relation to electronic records**
>
> 116A.—(1) Unless evidence sufficient to raise doubt about the presumption is adduced, where a device or process is one that, or is of a kind that, if properly used, ordinarily produces or accurately communicates an electronic record, the court shall presume that in producing or communicating that electronic record on the occasion in question, the device or process produced or accurately communicated the electronic record.
>
> *Illustration*
>
> *A* seeks to adduce evidence in the form of an electronic record or document produced by an electronic device or process. *A* proves that the electronic device or process in question is one that, or is of a kind that, if properly used, ordinarily produces that electronic record or document. This is a relevant fact for the court to presume that in producing the electronic record or document on the occasion in question, the electronic device or process produced the electronic record or document which *A* seeks to adduce.

91 Within the rubric of s 116A(1) of the Evidence Act, the role of the evidence from the parties' experts is to assist me in determining whether sufficient doubt has been raised about the presumption such that I should not admit the headers of the disputed emails as evidence of the truth of their contents. I therefore have to consider two questions. First, has the plaintiff discharged its burden to bring these electronic records within s 116A(1) of the Evidence Act? If so, the rebuttable presumption applies *prima facie*. The next question then arises: has the defendant adduced "evidence sufficient to raise a doubt about the presumption"?

Has the plaintiff brought these electronic records within s 116A(1)

92 The defendant argues that the plaintiff has failed to bring these electronic records within s 116A(1) of the Evidence Act. More specifically, the defendant argues that the plaintiff has failed to adduce evidence in relation to the technical aspects of the email migration that the plaintiff claims took place in December 2012.[104] He takes the position that it is insufficient for the plaintiff to rely on Mr Lee's own evidence that he used a personal computer connected to the internet to migrate the emails.[105] He also argues that the plaintiff ought to have called the person who printed out the emails as a witness at trial before the emails can be adduced as evidence.[106]

93 Both of the defendant's arguments miss the point.

94 The first argument misses the point because it does not address the focus of the first question which arises under s 116A(1). The first question is whether the plaintiff has discharged its burden to bring these electronic records within s 116A(1). Adapting the language of s 116A(1) to the facts of this case, that requires only that the plaintiff show that the device (a personal computer) or a process (email) is of a kind which, if properly used, ordinarily produces an electronic record. The electronic records which the plaintiff wishes to rely upon are the email headers which contain metadata recording, amongst other things, the date and time on which the defendant sent a disputed email to Mr Lee and the date and time on which Mr Lee sent a disputed email to the defendant's email address. The question now is whether a personal computer and the email process ordinarily creates email headers. The defendant's point about the email

104 Defendant's reply submissions (30 June 2017) at para 60.

105 Transcript (Day 4) at p 44 (lines 12 to 21).

106 Transcript (Day 4) at p 45 (lines 21 to 30).

migration has nothing to do with that question. Within the rubric of s 116A(1), this point should properly be raised when analysing whether the presumption is rebutted, not when analysing whether the presumption arises at all.

95 The defendant's second argument too misses the point. It is risible to suggest that a person who prints an email ought to be called as a witness before that email becomes admissible under s 116A(1). The legislative purpose of s 116A(1) of the Evidence Act is to facilitate the use of electronic records as forensic evidence (*Telemedia Pacific Group Ltd v Credit Agricole (Suisse) SA (Yeh Mao-Yuan, third party)* [2015] 1 SLR 338 ("*Telemedia Pacific Group*") at [250]). In the case of an email, the electronic record is not the human-readable contents of the email in printed form. The electronic record is the computer-readable version of the email in its original electronic form. If an electronic record comes within the scope of s 116A(1), rendering that electronic record human-readable by using a standard email client to print it on paper does not create new evidence for which a new test of admissibility needs to be applied. The printed version does nothing more than set out the electronic record in human-readable form. It is not suggested that the printed versions are in any way inaccurate renditions of the human readable contents of the emails.

96 Applying s 116A(1) of the Evidence Act to the facts before me, I am satisfied that the presumption operates in the plaintiff's favour. I note that the provision was intended to avoid requiring the person who relies on the electronic record to have detailed technical knowledge of the process behind its production. Therefore, for the presumption to apply, it suffices that that person has a broad understanding of the process (*Telemedia Pacific Group* at [255]). Mr Lee's evidence as the lay operator of his email system (the process), comprising both his personal computer (the hardware) and the email client (the

software), suffices to satisfy me that the device or process in question which produced the disputed electronic records in his email inbox or sent folder was one which ordinarily produces electronic records. That is virtually axiomatic. The presumption arises.

97 With the presumption in place, the burden shifts to the defendant to prove on the balance of probabilities that the presumption should not apply. The defendant has failed to do this. Although Mr Pandey suggested a number of discrepancies with the headers of the disputed emails, this is insufficient to tilt the balance in the defendant's favour for the following reasons:

(a) First, Mr Fazelinasab opines that the discrepancies with the header identified by Mr Pandey are explained by the email migration which took place in December 2012 (see [87] above).

(b) Second, Mr Pandey accepts that the headers indicate that an email migration did take place. But even though he was aware that a migration could have taken place, he *did not* take into account the possibility of a migration affecting the header when preparing his report.[107] That is a factor which detracts significantly from the weight to be attached to his opinion.

(c) Third, Mr Pandey is not an expert in Google email migration.[108] His evidence in relation to the impact of a Google email migration on email headers is therefore based on his general understanding and not on any specific expertise in relation to Google email migration.[109]

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107 Transcript (Day 3) at pp 30 (lines 1 to 25) to 31 (lines 1 to 12).

108 Transcript (Day 3) at p 31 (lines 24 to 25).

109 Transcript (Day 3) at p 33 (lines 5 to 17).

(d) Fourth, Mr Pandey accepts that there are various ways to migrate emails to Google's servers, and that it was possible that different methods would affect email headers differently.[110]

(e) Fifth, and perhaps most importantly, Mr Pandey accepts that he does not have sufficient information to determine whether the emails are authentic or not.[111]

98 I therefore view Mr Pandey's findings with circumspection, particularly given that he failed to consider the possibility of an email migration when preparing his report and given that he is not an expert in Google email migration. Indeed, the concession from Mr Pandey that his evidence does not go so far as to opine that the emails are fabricated or spoofed underscores the defendant's inability to rebut the presumption under s 116A(1) of the Evidence Act.

99 I also discount the defendant's objection that the plaintiff has failed to call a representative of the external information technology contractor who handled the plaintiff's email migration in December 2012 to give direct evidence as to the actual process which took place. I accept that Mr Lee's direct evidence as to the migration is sufficient. Mr Lee testified that he personally sent and received the disputed emails and that they were initially saved on the plaintiff's servers. Mr Lee testified that these emails were migrated to Google's servers in December 2012.[112] Mr Lee testified that, for the purposes of this litigation, the disputed emails were simply retrieved from the inbox on his personal computer without having their contents modified. I am conscious that this was not Mr Lee's initial evidence. Mr Lee initially testified that he

110 Transcript (Day 3) at pp 32 (lines 10 to 25) to 33 (lines 1 to 4).

111 Transcript (Day 3) at p 56 (lines 14 to 21).

112 Lee Chee Tak's affidavit of evidence in chief at paras 36 to 37.

downloaded the emails from the plaintiff's email server into his computer's inbox with the help of Mr Ng Keng Feong, the plaintiff's information technology executive. The emails were then saved in the Microsoft Outlook ".pst" format, used for offline email archives, before they were uploaded to the Internet for the plaintiff's lawyers to retrieve.[113] But I accept as accurate Mr Lee's clarification that he did not download the emails from the server but merely retrieved the emails from the inbox on his personal computer before Mr Ng helped him to save the emails in the ".pst" format.[114]

100 In the light of all of the above, I accept Mr Fazelinasab's opinion that the discrepancies found in the headers of the disputed emails arose from the migration of these emails to Google servers. I therefore find that the defendant has failed to show that the presumption under s 116A(1) should not apply. I therefore find that the disputed emails are authentic.

101 On the same analysis and for the same reasons, I also find that the disputed emails are admissible as evidence of the truth of their contents under s 116A of the Evidence Act on the two principal issues which I have to determine on the merits of the plaintiff's action.

102 Of the three possibilities which I raised and enumerated above at [70]–[78], I therefore accept the first possibility and reject the second possibility. I find that Mr Lee is an honest witness and that the defendant is lying. I also reject the third possibility. While the defendant tried to suggest that there might have been spoofing of the defendant's email communications, I find that possibility to be wholly fanciful and to be wholly unsupported by the evidence.

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113 Lee Chee Tak's affidavit of evidence in chief at para 39.

114 Transcript (Day 1) at pp 99 (lines 11 to 25) to 101 (lines 1 to 24).

103 Having found on the threshold issue that all of the emails on which the plaintiff relies are authentic and admissible, I now proceed to determine the two principal issues before me.

Did the defendant sign the written agreement?

104 The first principal issue I have to determine is whether the defendant signed the April 2008 written agreement. The plaintiff's case is that the parties signed the April 2008 agreement, each signing separately, at some time in April 2008 and no later than the end of April 2008, following the oral agreement which the parties reached at the 2 April 2008 meeting.[115] The plaintiff accepts that it has no witness who can give direct evidence that the defendant signed the April 2008 written agreement.[116] The defendant concedes that the signature on the April 2008 written agreement looks like his.[117] But he maintains that he did not sign it and claims that his signature has been forged.[118]

Burden of proving forgery

105 The burden of proving forgery is on the party alleging it (*Yogambikai Nagarajah v Indian Overseas Bank and another appeal* [1996] 2 SLR(R) 774 ("*Yogambikai Nagarajah*") at [39]). Counsel for the plaintiff relies on *Yogambikai Nagarajah* for the proposition that the standard of proof for proving forgery is higher than the ordinary civil standard, *ie*, something higher than proof on the balance of probabilities.[119] This is not correct. An allegation of forgery amounts to an allegation of fraud. As the Court of Appeal held in

115 Plaintiff's closing submissions (16 June 2017) at p 5.

116 Transcript (Day 1) at p 50 (lines 4 to 12).

117 Transcript (Day 1) at p 151 (lines 2 to 6).

118 Mysore Nagaraja Kartik's affidavit of evidence in chief at para 21.

119 Plaintiff's closing submissions (16 June 2017) at para 58.

Gimpex Ltd v Unity Holdings Business Ltd and others and another appeal [2015] 2 SLR 686 at [183]–[184], the standard of proof in all civil cases – even when fraud is alleged – is proof on the balance of probabilities, nothing higher. The law does not require a party to a civil case who alleges fraud to adduce *more* evidence in order to tip the balance of probabilities in his favour.

106 It is true, however, that the law acknowledges that, on the probabilities inherent in the general course of human experience, the more serious an allegation is, the less likely it is that the allegation is true. That is why the law require a person alleging fraud to adduce *stronger* or more *cogent* evidence of fraud to discharge his burden than a person alleging, for example, negligence.

107 *In re H and other (Minors) (Sexual Abuse: Standard of Proof)* [1996] 1 AC 563 (at 586D), Lord Nicholls examined, albeit in the different context of family law proceedings, the interaction between the seriousness of an allegation in a civil case and the standard of proof resting on the party making the allegation:

> The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.
>
> Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his underage stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability its occurrence will be established. Ungoed-Thomas J expressed this neatly in *In re Dellow's Will Trusts* [1964] 1 WLR 451, 455: 'The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it'.
>
> This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.

Findings on forgery

108 After considering the evidence before me, I find that the defendant has failed to discharge his burden of proving on the balance of probabilities that the signature on the April 2008 written agreement is a forgery.

Preliminary evidential points

109 As a preliminary point, I note that the defendant takes issue with the plaintiff's evidence on the April 2008 written agreement itself. First, the defendant submits that the plaintiff ought to have called Mr Teo (who signed it on behalf of the plaintiff) as a witness to testify that the plaintiff had entered into the April 2008 agreement.[120] Second, the defendant submits that it weakens the plaintiff's case considerably that Mr Lee does not remember the order in which the parties signed the April 2008 written agreement.[121] Third, the

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120 Defendant's closing submissions (16 June 2017) at para 22.

121 Defendant's closing submissions (16 June 2017) at para 23.

defendant points out that the April 2008 written agreement bears a stamp suggesting that Mr Teo signed it in August 2011 and not in April 2008.[122]

110 None of these submissions assist the defendant.

111 On the defendant's first submission, the April 2008 written agreement bears a signature which the document itself describes as Mr Teo's signature. Mr Lee has given direct evidence that Mr Teo signed the April 2008 written agreement.[123] That evidence, if accepted, suffices in itself to prove Mr Teo's signature without any need for Mr Teo himself to testify. In any event, the defendant has not put the authenticity of Mr Teo's signature in issue.

112 On the defendant's second submission, the order in which each party signed the April 2008 written agreement is irrelevant to the only point now in issue, which is whether the defendant's signature is genuine. Any uncertainty about the sequence in which the parties signed the April 2008 written agreement can go, at best, only to Mr Lee's credibility as a witness and not to the merits of the plaintiff's case. But even on credibility, any small detraction from Mr Lee's credibility cannot overcome the mortal wound to the defendant's credibility by my finding that he has attempted knowingly to deceive the court by falsely characterising the disputed emails as fabrications when they are in fact genuine.

113 On the defendant's third submission, it is true that the plaintiff has offered no explanation for the August 2011 date stamp appearing on the original

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122 Defendant's closing submissions (16 June 2017) at para 24; Transcript (Day 4) at p 29 (lines 24 to 32).

123 Plaintiff's reply submissions (30 June 2017) at para 30; Transcript (Day 1) at p 44 (lines 8 to 19).

April 2008 written agreement. Ultimately, however, that is also irrelevant to the question of whether the defendant's signature is genuine. As counsel for the defendant concedes, even if I were to find that Mr Teo signed the April 2008 written agreement only in August 2011, the defendant would nevertheless be bound by the agreement if I were also to find that his signature on it is genuine.[124]

114 To discharge his burden of proof on forgery, the defendant relies on both his own direct evidence and on expert evidence.

The defendant's evidence

115 I consider first the defendant's direct evidence that his signature on the April 2008 written agreement is a forgery. There are a number of unsatisfactory aspects about the defendant's evidence. These aspects, coupled with my finding that the defendant knowingly lied that the disputed emails are fabricated, leaves the defendant bereft of all credibility.

116 The first unsatisfactory aspect of the defendant's direct evidence is that he is thoroughly equivocal on the issue of forgery. His initial evidence in his affidavit of evidence in chief is that he does "not recall entering into" the April 2008 agreement.[125] Later in his affidavit, he asserts affirmatively that his signature on the April 2008 written agreement is not his "signature and was forged".[126] Then, in the very same paragraph, he equivocates again by repeating that he does "not recall signing any such document".

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124 Transcript (Day 4) at p 33 (lines 1 to 28).

125 Mysore Nagaraja Kartik's affidavit of evidence in chief at paras 15 and 19.

126 Mysore Nagaraja Kartik's affidavit of evidence in chief at para 21.

117 Saying that one *did not sign* a document is quite clearly different from saying that one *does not recall signing* a document. The former disavows the signature entirely whereas the latter leaves open the possibility that the signature is genuine but the signer has forgotten about it. The defendant is a relatively sophisticated businessman, fluent in the English language. He clearly appreciates the distinction. His equivocation casts serious doubt on his allegation of forgery.

118 The second unsatisfactory aspect of the defendant's direct evidence is that he equivocates again on the meetings leading up to the April 2008 agreement and what was discussed during these meetings. For example, he initially accepted that he met the plaintiff's representatives on 2 April 2008.[127] But he subsequently resiled from this position, stating that he was unsure whether he was in Singapore at that time.[128] When pressed on his equivocation, he equivocated further, this time by retreating to a middle position: he testified that he does not remember whether he attended the meeting but accepts that he *could* have been there.[129]

119 The final unsatisfactory aspect of the defendant's direct evidence is his attempt to grasp at straws to support his position that his signature on the April 2008 written agreement is a forgery. For instance, he points out that his ostensible signature appears in *black* ink whereas he never signs documents in that colour because only signatures in *blue* ink are accepted in Russia.[130]

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127 Transcript (Day 1) at p 139 (lines 4 to 7).

128 Transcript (Day 1) at p 139 (lines 8 to 9).

129 Transcript (Day 1) at p 149 (lines 6 to 21).

130 Transcript (Day 1) at p 151 (lines 8 to 13).

120 This evidence is weak and a clear afterthought. It is weak because the April 2008 written agreement has no legal connection to Russia. It records an agreement between a Singapore citizen (the defendant) and a Singapore company (the plaintiff) reached at a meeting in Singapore in relation to a Singapore-sited debt owed to the plaintiff by a third party (MBIR) incorporated in Singapore. Further, the defendant adduced no evidence, even indirectly, to make good his assertion that it is mandatory in Russia to sign legal documents with blue ink or that it is his invariable habit to sign legal documents with blue ink even outside Russia.

121 The defendant's evidence on this point is an afterthought because it appears nowhere in his pleadings or in his affidavit of evidence in chief.

122 The defendant also argues that he could not have signed the April 2008 written agreement because it is likely that he was out of Singapore at that time.[131] But he produces little documentary evidence to support this claim. He merely adduces a credit card statement showing that he used his credit card in Russia on 29 March 2008 and again on 13 April 2008 and suggests on that basis that he was likely to have been in Russia throughout that period because he lives there.[132] But that does not prove that he was in Russia on or about 2 April 2008 or that he could not have signed the April 2008 written agreement. And, as I have pointed out above, when the defendant was pressed in cross-examination on this point, he conceded that he *could* have been at the 2 April 2008 meeting.[133]

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131 Mysore Nagaraja Kartik's affidavit of evidence in chief at p 73.

132 Mysore Nagaraja Kartik's affidavit of evidence in chief at p 38.

133 Transcript (Day 1) at pp 143 (lines 19 to 25) to 144 (lines 1 to 4).

123 In any event, I note that precisely where the defendant was when he signed the April 2008 written agreement is no part of the plaintiff's case. Its case is merely that the defendant signed the April 2008 agreement *somewhere* and returned it to the plaintiff by the end of April 2008.[134] Thus, although Mr Lee could not remember whether the defendant was in Singapore on or after 3 April 2008, he testified that the plaintiff would have despatched the April 2008 written agreement to Russia for the defendant's signature if that was where the defendant was at that time.[135] Thus, even if the defendant is right that he *was* outside Singapore on and after 3 April 2008, that has no bearing on whether he did or did not sign the April 2008 written agreement.

124 In summary, the defendant's direct evidence on the issue of forgery is equivocal when it should be unequivocal and relies on *non sequiturs*. I find that the equivocation and the *non sequiturs* are not the result of genuine uncertainty but are instead the result of a deliberate lack of candour.

125 I turn now to consider the expert evidence on which the defendant relies.

The expert evidence

126 The expert evidence on which the defendant relies is an expert report by the Health Sciences Authority of Singapore ("HSA") and The Forensic Experts Group ("FEG"). Both experts analysed the signature said to be the defendant's on the April 2008 written agreement and provide an expert opinion on whether it is in fact his signature. Both experts are unable to conclude that the signature is a forgery. The HSA opines that the signature "is too simple in design and limited in nature for an effective examination to be made".[136] In a similar vein,

134 Plaintiff's further and better particulars (Amendment No 1) at para 1(d).

135 Transcript (Day 1) at p 46 (lines 23 to 25).

the FEG opines that the simple design of the signature means that it cannot determine whether the signature is genuine or forged.[137]

127 The defendant relies on these reports to submit that the evidence is inconclusive as to whether he actually signed the April 2008 written agreement. That submission amounts to reversing the burden of proof on the question of forgery. It is the defendant's burden to prove positively that his signature on the April 2008 written agreement is forged. These expert opinions do not help the defendant to discharge his burden. On the contrary, as the plaintiff points out, the FEG report actually suggests that there is *no* forgery involved[138] by effectively ruling out three indications of forgery. Thus, the report confirms that there are neither "signs of cut and paste manipulation", "indication of impressed or handwritten guidelines which might be associated with a tracing process", nor "signature impressions which might be associated with a 'practising' process".[139]

128 I therefore find that the defendant has failed to produce sufficient evidence to establish on the balance of probabilities that the signature on the 2 April 2008 written agreement which is said to be the defendant's signature is in fact a forgery. I therefore find that the defendant did sign the 2 April 2008 written agreement.

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136 Mysore Nagaraja Kartik's affidavit of evidence in chief at p 67.

137 Mysore Nagaraja Kartik's affidavit of evidence in chief at p 73.

138 Plaintiff's reply submissions (30 June 2017) at para 8.2.

139 Mysore Nagaraja Kartik's affidavit of evidence in chief at p 73.

The defendant's attempts to perform his obligations

129 To the extent that it is necessary, I find also that the defendant attempted to perform his obligations under the April 2008 agreement. The evidence of these attempts goes beyond the defendant's failure to prove forgery and is positive evidence which supports the plaintiff's case that the defendant did sign the April 2008 written agreement and accepted that he was bound by it.

130 The defendant attempted to perform his obligations under the April 2008 agreement in two ways: (a) by attempting to transfer the Russian property to the plaintiff by transferring Promfinaktiv to the plaintiff; and (b) by issuing to the plaintiff five post-dated cheques totalling US$600,000.

Transfer of the Russian property

131 In cross-examination, the defendant accepted that he took steps to transfer the Russian property to the plaintiff. Because Russian law prevents a foreign company such as the plaintiff from owning property in Russia,[140] the steps which the defendant took were steps to transfer Promfinaktiv itself to the plaintiff or its nominee.[141]

132 These efforts by the defendant are borne out by the emails. For example, in an email dated 29 May 2009, the defendant tells Mr Lee that he will discuss with the plaintiff's lawyer a transfer of Promfinaktiv (see [24(b)] above).[142] Similarly, in an email dated 23 February 2010, the defendant tells Mr Lee that he is ready to conclude a share transfer agreement with the plaintiff's lawyers (see [24(g)] above).[143]

140 Transcript (Day 4) at p 24 (lines 14 to 26).

141 Transcript (Day 1) at pp 131 (lines 19 to 23) and 130 (lines 1 to 6).

142 Lee Chee Tak's affidavit of evidence in chief at p 66.

133 Although the defendant accepts that he was trying to transfer the Russian property to the plaintiff by transferring Promfinaktiv to the plaintiff, he explains that he was not doing so pursuant to the April 2008 agreement. Instead, he was doing so for the purposes of the parties' "joint venture packaging operations in Russia".[144] But there is no evidence to support a finding that any such joint venture ever existed. And there is evidence which contradicts its existence.

134 Thus, for example, the amended draft undertaking which the defendant sent to Mr Lee on 29 February 2008 (see [14] and [44] above) explicitly connected a transfer of the Russian property to a partial discharge of the debt which MBIR owed to the plaintiff. This strongly suggests that the steps which the defendant eventually took to transfer the Russian property to the plaintiff were ultimately referable to MBIR's debt to the plaintiff and not to any alleged joint venture packaging operation. The draft undertaking undercuts the defendant's contention that his attempts to transfer Promfinaktiv to the plaintiff were unconnected to MBIR's debt to the plaintiff and hence unconnected to the April 2008 agreement. When the defendant was confronted with the draft undertaking in cross-examination, he was at a loss for words. His response was only to complain that it is difficult to do business in Russia.[145]

135 It is also noteworthy that the defendant initially claimed not to remember instructing his solicitors at that time to amend the draft undertaking.[146] He admitted this only after counsel for the plaintiff threatened to issue a subpoena to the solicitor in question.[147] This prevarication further undermined what

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143 Lee Chee Tak's affidavit of evidence in chief at p 86.

144 Transcript (Day 1) at p 131 (lines 16 to 20).

145 Plaintiff's closing submissions (16 June 2017) at para 27.

146 Transcript (Day 1) at p 124 (lines 4 to 8).

remained of the defendant's credibility and reinforces my conclusion that the defendant signed the April 2008 written agreement and accepted that he was bound to perform his obligations under it.

Five post-dated cheques

136 The other way in which the defendant attempted to perform his obligations under the April 2008 agreement was by issuing five cheques totalling US$600,000 to the plaintiff. These cheques were issued in amounts ranging from US$50,000 to US$200,000 and were post-dated with dates ranging from 3 May 2008 to 31 May 2008.[148] All of the cheques were dishonoured upon presentation.[149] The defendant does not deny that he issued these cheques.[150] Once again, though, he claims that he did not do so in order to perform his obligations under the April 2008 agreement but in connection with other unrelated transactions with the plaintiff. Once again, his evidence is unsupported and inconsistent.

137 First, the defendant avers that he issued these five cheques to the plaintiff in the "normal course of business"[151] as payment for coffee products that MBIR purchased from the plaintiff under an agreement which MBIR purportedly had with the plaintiff in 2004.[152] He claims that he issued at least 20 to 25 cheques to the plaintiff in this way, totalling more than $2m.[153] It is also his evidence that all the other cheques issued in this way were honoured upon presentation.[154]

147 Transcript (Day 1) at pp 126 (lines 7 to 10) and 196 (lines 3 to 20).

148 Transcript (Day 1) at p 164 (lines 15 to 17); Lee Chee Tak's affidavit of evidence in chief at pp 56 to 57.

149 Lee Chee Tak's affidavit of evidence in chief at para 24.

150 Transcript (Day 1) at p 163 (lines 6 to 25).

151 Transcript (Day 1) at p 164 (lines 3 to 11).

152 Mysore Nagaraja Kartik's affidavit of evidence in chief at para 45.

138 I do not accept the defendant's evidence. There is no mention of these other 20 to 25 cheques in the defendant's affidavit of evidence in chief. The defendant also produced no documentary evidence to support his contention.[155] Expecting some documentary evidence is not asking too much. These additional 20 to 25 cheques are the defendant's own cheques drawn on his own bank. They ought to be easily available to the defendant, if they exist. Equally, there ought to be some documentary evidence available to the defendant of the underlying transactions to which these cheques are said to be referable either directly, from his own or MBIR's records, or indirectly, through discovery from the plaintiff.

139 Second, in a bid to show that these five cheques have nothing to do with the April 2008 agreement, the defendant explains that he countermanded the cheques because MBIR did not receive the goods in question from the plaintiff because they were blocked at Russian customs after a counterfeit claim was filed against them.[156]

140 I do not accept this evidence either. It is, to my mind, too much of a coincidence that the April 2008 agreement obliged the defendant to issue post-dated cheques totalling US$600,000 in favour of the defendant and that the defendant did precisely that shortly after, in April or May 2008. It is true that the April 2008 agreement required the defendant to issue *two* post-dated cheques totalling US$600,000 instead of *five* post-dated cheques totalling US$600,000. But the fact remains that these five cheques add up to US$600,000 as stipulated in the April 2008 agreement, and there is no evidence to support

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153 Transcript (Day 1) at p 164 (lines 3 to 11).

154 Transcript (Day 1) at pp 165 (lines 20 to 25) to 166 (lines 1 to 4).

155 Transcript (Day 1) at p 166 (lines 5 to 8).

156 Mysore Nagaraja Kartik's affidavit of evidence in chief at para 46.

the defendant's contention that he issued the cheques pursuant to another agreement or transaction. On the contrary, the only evidence showing that goods were blocked at customs pursuant to a counterfeit claim is a diplomatic note dated 28 December 2007. That is dated long before the defendant issued the five cheques, let alone his countermand of them.[157] This weighs heavily against the defendant's contention that these cheques were related to some earlier transaction and unrelated to the April 2008 agreement.

141 I also accept that the defendant issued five post-dated cheques instead of two because the plaintiff extended the defendant an indulgence by waiving the requirement under the April 2008 agreement for only two cheques.[158] This indulgence is consistent with the plaintiff's further indulgence in not suing the defendant upon breach of the April 2008 agreement or when the post-dates cheques were dishonoured. I accept Mr Lee's evidence that the plaintiff indulged the defendant because its wished to find an alternative resolution and continue working with him if possible.[159]

142 I therefore find that the defendant issued the five post-dated cheques to the plaintiff in an attempt to perform his obligations under the April 2008 agreement.

Conclusion on forgery

143 In conclusion, the defendant proved to be a thoroughly unreliable witness on the question of the forgery of his signature, just as he did on the

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157 Mysore Nagaraja Kartik's affidavit of evidence in chief at pp 32–34; Transcript (Day 1) at pp 166 (lines 5–25) to 167 (lines 1–11).

158 Transcript (Day 4) at p 10 (lines 4 to 12).

159 Transcript (Day 1) pp 87 (lines 11 to 25) to 88 (lines 1 to 10).

question of fabrication of the disputed emails. He was deliberately equivocal in his evidence in chief and palpably evasive under cross-examination. He showed himself unwilling to commit to a position on critical aspects of his case. The reports of the handwriting experts were of no aid to him, bearing in mind that he bore the burden of proof on the issue of forgery.

144 For all of the reasons I have set out above, I find that the defendant signed the April 2008 agreement, was contractually bound by it and accepted that he was so bound by taking steps to perform his obligations under it.

Whether the plaintiff's action is time-barred

145 The second principal issue that I have to determine is whether the plaintiff's action is time-barred. By the plaintiff's own case, the April 2008 agreement was signed in or around April 2008. But the plaintiff commenced this action in March 2015, more than six years later. Accordingly, the defendant pleads that this action is time-barred under s 6(1)(*a*) of the Limitation Act.

146 Section 6(1)(*a*), as will be known, prevents an action in contract from being brought more than six years after the cause of action accrues.[160] The defendant is correct that this action is time-barred if (but only if) the plaintiff's cause of action accrued before March 2009.

147 The defendant's case on limitation assumes that the plaintiff's cause of action on the April 2008 agreement accrued in April 2008. Taking that view implies that the April 2008 agreement required the defendant to carry out his obligations immediately and that he was in breach of contract as soon as he signed it. In fact, the agreement is silent on the time frame within which the

160 Defendant's closing submissions (16 June 2017) at para 113.

defendant is obliged to perform his obligations. Indeed, the fact that the defendant delivered and the plaintiff accepted the post-dated cheques and took time to procure the transfer of Promfinaktiv to the defendant suggests that neither party considered the defendant's performance obligation to be immediate. And so it must be an implied term of the April 2008 agreement that the defendant should perform his obligations within a reasonable period after April 2008. I assume in the defendant's favour that that reasonable period expired before March 2009, such that the plaintiff's action was commenced more than six years after the defendant breached the April 2008 agreement.

148 In response, the plaintiff argues that the 4 April 2009 email amounts to an acknowledgement within the meaning of s 26(2) of the Limitation Act. It submits that its cause of action therefore accrued on 4 April 2009, and that its action is not time-barred because the plaintiff commenced action before 4 April 2015.[161]

149 Section 26(2) of the Limitation Act provides that where a defendant acknowledges a cause of action to recover a debt or other liquidated pecuniary claim, the cause of action is deemed to have accrued on the date of the acknowledgement and not before that date:

> Where any right of action has accrued to recover any debt or other liquidated pecuniary claim…and the person liable or accountable therefor acknowledges the claim…, the right shall be deemed to have accrued on and not before the date of the acknowledgement….

150 It is apposite to note at this point that the defendant has by his own pleading failed to take full advantage of the limitation defence open to him. It is a well-established procedural rule that a defendant cannot avail himself of a

[161] Plaintiff's closing submissions (16 June 2017) at paras 100 to 111.

limitation defence unless he raises it by an express plea. It is therefore necessary to analyse the defendant's express limitation plea in order to understand the scope of the limitation defence as pleaded.

151 The pleadings in this action comprise only a statement of claim and a defence. There is no counterclaim and the plaintiff did not file a reply. The plaintiff's principal claim is for the liquidated sum of US$1.3m. Its alternative claim is for unliquidated damages for breach of contract. The issue with the defendant's limitation plea arises because only the plaintiff's primary claim is a claim "to recover [a] debt or liquidated pecuniary claim" to which s 26(2) applies. Section 26(2) does not apply to the plaintiff's alternative claim for unliquidated damages.

152 On the pleadings, unusually, it was the plaintiff who took the initiative to raise the limitation issue, albeit obliquely. Its statement of claim expressly and pre-emptively pleads that the defendant's 4 April 2009 email "acknowledged the debt owed by the Defendant to the Plaintiff"[162] under the April 2008 agreement. The defendant's response in its defence is: (a) to plead that the plaintiff's cause of action did not accrue within the six years preceding the commencement of this action;[163] and (b) to deny the plaintiff's pleading that the 4 April 2009 email amounts to an acknowledgment and to put the plaintiff to proof on that point.[164]

153 The defendant's limitation plea – and indeed the entire thrust of his affidavit of evidence in chief and submissions on the limitation point – accepts

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162 Plaintiff's Statement of Claim (Amendment No 1) at para 6.

163 Defendant's Defence (Amendment No 2) at para 7.

164 Defendant's Defence (Amendment No 2) at para 8.

that his limitation defence to the defendant's alternative unliquidated claim stands or falls with his limitation defence to the plaintiff's primary liquidated claim, even though s 26(2) of the Limitation act does not apply to the former. The defendant has therefore failed to plead the full protection of the Limitation Act in relation to the defendant's alternative claim.

154 The plaintiff's alternative claim will therefore not be time-barred if the plaintiff can establish that the 4 April 2009 email is authentic and is an acknowledgment sufficient to defeat the defence of limitation on the plaintiff's primary claim.

155 On limitation, the defendant argues that: (a) the 4 April 2009 email is not authentic;[165] and (b) that it does not constitute an acknowledgement within the meaning of s 26(2) of the Limitation Act.[166]

156 I deal with these two arguments in turn.

Whether the 4 April 2009 email is authentic

157 Having found that all of the disputed emails are authentic (see [96]–[100] above), it is not necessary for me to deal with the authenticity of the 4 April 2009 email separately. I add only that the defendant once again equivocates on whether he sent the email.[167] In his affidavit of evidence in chief, the defendant avers that he did not send the email.[168] When cross-examined at trial, he equivocated. He first said that the email *could have been* sent by him[169]

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165 Defendant's closing submissions (16 June 2017) at para 117.

166 Defendant's closing submissions (16 June 2017) at paras 145 to 159.

167 Plaintiff's closing submissions (16 June 2017) at paras 39 to 42.

168 Mysore Nagaraja Kartik's affidavit of evidence in chief at para 28.

and then said that he *did* send the email.[170] In re-examination, he said that he could not be sure because he could not remember whether he sent the email.[171]

158 In my judgment, one ought reasonably to expect the defendant to know whether he sent the email, especially when it is a key pillar of his defence. His prevarication in this respect reduced his already-diminished credibility and supports the finding I have already reached that the 4 April 2009 email is authentic.

Whether the 4 April 2009 email amounts to an acknowledgement

An acknowledgement under the Limitation Act

159 The final issue that I have to consider is whether the 4 April 2009 email amounts to an acknowledgement within the meaning of s 26(2) of the Limitation Act. I begin by examining the law on what constitutes an acknowledgement.

160 The plaintiff relies on the case of *Fairview Developments Pte Ltd v Ong & Ong Pte Ltd and another appeal* [2014] 2 SLR 318. In that case, the Court of Appeal held at [93] that an acknowledgment need only admit that a debt remains due. It is not necessary for the acknowledgment to state the amount that is due as long as the amount can be ascertained by reference to extrinsic evidence. Further, the statement which is alleged to be an acknowledgment must be seen and construed in context.

161 Contrary to the defendant's contention,[172] therefore, the test for whether a statement amounts to an acknowledgement within the meaning of s 26(2) of

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169 Transcript (Day 1) at p 156 (lines 7 to 9).

170 Transcript (Day 1) at p 183 (lines 2 to 6).

171 Transcript (Day 1) at pp 183 (lines 11 to 25) to 184 (lines 1 to 4).

the Limitation Act is not a strict one. Indeed, this was made clear in *Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) v Wiryadi Louise Maria and others* [2007] 4 SLR(R) 565 at [36] where the Court of Appeal emphasised that an acknowledgment does not have to be direct or explicit as long as it is a "sufficiently clear admission".

Analysis of the 4 April 2009 email

162 Construing the 4 April 2009 email in context, it is clear that the defendant did acknowledge his indebtedness to the plaintiff under the April 2008 agreement. I set out the body of the email in full:

> Subject: Re: Our Agreement dated 2/04/2008
>
> Dear mr.Lee
>
> As I have earlier indicated i *plan to amicably settle with your goodself* and will give you a proposal the coming week.
>
> Looking forward to a amicable business relationship with super.
>
> regards
>
> kartik
>
> [emphasis added]

163 In this email, the defendant expressly acknowledged the "Agreement dated 2/04/2008" in the subject line, and acknowledged that he planned to "settle" with the plaintiff in the body of the email. The defendant thus acknowledged his obligations to the plaintiff under the April 2008 agreement, at least a part of which was to pay the plaintiff a liquidated sum of US$600,000. That liquidated sum, though not mentioned in the 4 April 2009 email, is readily ascertainable by reference to the terms of the April 2008 written agreement.

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172 Defendant's closing submissions (16 June 2017) at para 148.

164 The defendant's acknowledgement is made even clearer when one considers that the 4 April 2009 email was the defendant's response to an email from Mr Lee, which refers to an "agreement to settle the outstanding account between [the parties]":

> Subject: Our Agreement dated 2/04/2008
>
> Dear Mr. kartik,
>
> We *refer to said agreement to settle the outstanding account* between our companies.
>
> Unfortunately, we are still not able to resolve this matter though we have been given you varies [*sic*] settlement options over the year upon your requests.
>
> Hence, kindly take notice that we will not hesitate to commence the necessary legal action to recover the FULL amount owing by MBI Russia Pte Ltd if we do not receive any satisfactory final settlement proposal from you by 7/04/2009.
>
> Please feel free to contact us should you require any further clarification.
>
> Thanks and regards,
>
> Lee Chee Tak
>
> [emphasis added]

165 The defendant argues that the 4 April 2009 email does not constitute an acknowledgement for a number of reasons. First, he points out that the email from Mr Lee to which it responds refers to an agreement "between our companies". He argues that Mr Lee was thus referring to an agreement between the plaintiff and MBIR, and not to an agreement between the plaintiff and the defendant personally.[173] But it is the defendant's own case that there was *no agreement* between the plaintiff and the MBIR.[174] Therefore, the only plausible reading of Mr Lee's email is that he was referring to the April 2008 agreement

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173 Transcript (Day 4) at pp 60 (lines 5 to 15) and 65 (lines 19 to 28).

174 Transcript (Day 4) at p 62 (lines 1 to 17).

between the plaintiff and the defendant personally. In my view, the word "companies" here signifies no more than the very common conflation of an individual with a company of which he is the principal.

166 Second, the defendant points out that the body of the 4 April 2009 email does not contain an express reference to the April 2008 agreement. He argues that the only reference to the 2 April 2008 agreement is in the subject line of the email (*ie*, "Re: Our Agreement dated 2/04/2008"), which is insufficient to constitute an acknowledgement of the debt because the text of the subject line originated from Mr Lee. All that the defendant did was to leave the subject line unchanged when he replied on 4 April 2009.[175] In a similar vein, the defendant argues also that the subject line refers to an *oral* agreement allegedly concluded at the 2 April 2008 meeting, and not to the April 2008 written agreement under which the plaintiff now claims.[176]

167 The defendant's first contention is misconceived. The point is not that the reference to the 2 April 2008 agreement originated from the defendant, but that the defendant in his response on 4 April 2009 neither changed the subject line which originated from Mr Lee nor rejected Mr Lee's suggestion that there was such an agreement. Instead, he merely told Mr Lee that he "plan[ned] to amicably settle with [the plaintiff]". Read together with the subject of the email, the defendant did acknowledge his obligation under the April 2008 agreement, at least part of which was to pay a liquidated sum of US$600,000.

168 The defendant's second contention is also misconceived. The April 2008 written agreement is titled "Record of agreement by parties at a meeting held

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175 Transcript (Day 4) at p 72 (lines 2 to 10).

176 Defendant's closing submissions (16 June 2017) at para 152.

on *2nd April 2008* at 3:30 p.m. to 4:45 p.m., at No. 2 Senoko South Road, Super Industrial Building, Singapore 038987" [emphasis added]. Therefore, as the plaintiff points out,[177] the subject of the 4 April 2009 email is a reference to the title of the April 2008 agreement, not to the oral agreement.

169 Third, the defendant argues that the use of the verb "plan" in the 4 April 2009 email does not amount to an acknowledgement because it merely evinces an aspiration on the defendant's part to perform his obligations under the April 2008 agreement at some point in the future.[178] And relying on the English Court of Appeal case of *Good v Parry* [1963] 2 All ER 59, the defendant argues that such a statement is not an acknowledgement within the meaning of s 26(2) of the Limitation Act.[179] But *Good v Parry* does not stand for the proposition alleged by the defendant. As will be seen, it stands for the proposition that an acknowledgement must contain an admission that a debt of an ascertainable quantum *exists*.

170 In *Good v Parry*, a landlord brought an action against a tenant for rent. The tenant argued that the action was time-barred under s 2 of the English Limitation Act 1939 (c 21) because the cause of action for arrears of rent accrued more than six years before the action was commenced. In response, the landlord adduced a letter which he claimed operated as an acknowledgement sufficient to extend the time within which he could bring the action. The salient portion of the letter stated as follows: "The question of outstanding rent can be settled as a separate agreement as soon you present your account" (*Good v Parry* at 60).

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177 Plaintiff's reply submissions (30 June 2017) at para 44.

178 Transcript (Day 4) at p 69 (lines 19 to 31).

179 Defendant's closing submissions (16 June 2017) at para 157.

171 The English Court of Appeal held that the letter did not constitute an acknowledgement. Lord Denning MR observed that an acknowledgment must be in relation to a quantified debt or to a debt that can be ascertained by calculation or extrinsic evidence without further agreement (*Good v Parry* at 61). He held that the statement fell short of an acknowledgement because there was no admission of any debt that was defined or ascertainable by calculation (*Good v Parry* at 62). Danckwerts LJ agreed, noting that the letter merely admitted the *possibility* of a claim, but not that a debt existed (*Good v Parry* at 62). Similarly, Davies LJ held that the letter did not acknowledge the existence of a claim, but that there *might* be one (*Good v Parry* at 62).

172 It is thus apparent that *Good v Parry* merely requires an acknowledgement to admit a debt, the quantum of which is either defined or capable of ascertainment by extrinsic evidence (David W Oughton, John P Lowry & Robert M Merkin, *Limitation of Actions* (LLP Reference Publishing, 1998) at p 153).

173 On the facts, the quantum of the plaintiff's liquidated pecuniary claim against the defendant, which was acknowledged by the defendant, can be easily ascertained by reference to the April 2008 written agreement as amounting to US$600,000. Accordingly, I find that the 4 April 2009 email is an acknowledgment within the meaning of s 26(2) of the Limitation Act.

174 In light of the defendant's failure to raise an express plea that an acknowledgement within s 26(2) of the Act does not suffice to defeat the plaintiff's alternative unliquidated claim, that finding suffices to defeat the defendant's limitation defence to both the plaintiff's primary claim as well as to the plaintiff's alternative claim.

175 The plaintiff's action is therefore not time-barred. It was commenced by the plaintiff within six years of the acknowledgment, *ie*, before 4 April 2015.

Conclusion

176 For the foregoing reasons, I find to be authentic: (a) all of the emails relied upon by the plaintiff; and (b) the defendant's signature on the April 2008 agreement. I also find that the plaintiff's action is not time-barred. Accordingly, I find liability in this action in the plaintiff's favour.

177 Further, although this action is bifurcated, the plaintiff has established in this phase of the proceedings that the defendant owes the plaintiff the liquidated sum of US$600,000. On that aspect of the plaintiff's claim, there are no damages to be assessed. I have therefore ordered the defendant to pay to the plaintiff:

(a) the sum of US$600,000 with interest thereon at the rate of 5.33% per annum from 24 March 2015 to 14 August 2017;

(b) damages for his failure to transfer the Russian property to the plaintiff, with such damages to be assessed by the court; and

(c) the costs of and incidental to this phase of this action, with such costs to be taxed if not agreed.

178 Because the defendant's liability to the plaintiff under the April 2008 agreement arises from the same underlying debt as MBIR's judgment debt to the plaintiff, there is at least a possibility of double recovery. Given that MBIR is defunct, (see [27] above), that possibility is fanciful and theoretical in the extreme. Nevertheless, to eliminate any prospect of double recovery, the

plaintiff has undertaken to the court to give credit to the defendant for any sums which the plaintiff recovers from MBIR against the defendant's liability to the plaintiff under the judgment in this action. That undertaking is a sufficient measure to eliminate even a theoretical risk of double recovery.

Vinodh Coomaraswamy
Judge

Bryan Ghows and Ahmad Firdaus Daud (Taylor Vinters Via LLC) for the plaintiff;
Edmond Pereira and Goh Chui Ling (Edmond Pereira Law Corporation) for the defendant.