IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 233

Suit No 59 of 2014

Between

POWER SOLAR SYSTEM CO LTD
(IN LIQUIDATION)

… *Plaintiff*

And

SUNTECH POWER INVESTMENT PTE LTD

… *Defendant*

GROUNDS OF DECISION

[Credit and security] — [Money and moneylenders] — [Loans of money]

[Evidence] — [Presumptions] — [Presumption of fact in loans of money]

[Contract] — [Contractual terms] — [Interpretation]

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v
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25 October 2018

Mavis Chionh JC:

Introduction

1 This was an action brought by the Liquidators of the Plaintiff (Power Solar System Co Ltd) against a company which was previously the Plaintiff's wholly-owned subsidiary (the Defendant, Suntech Power Investment Pte Ltd). The Plaintiff claimed from the Defendant a total sum of US$197,501,785. According to the Plaintiff's case, of the total sum claimed, a sum of US$55,560,000 was due and owing by the Defendant as the consideration for the transfer of all of the Plaintiff's shares in another company known as Suntech Power Co Ltd ("Shanghai Suntech"), while the claim for the balance amount arose from loans extended by the Plaintiff to the Defendant. The Defendant denied any liability to repay these amounts.

2 At the conclusion of the trial, I gave judgment for the Plaintiff in the sum of US$197,501,785 (with interest). As the Defendant has filed an appeal, I set out below the grounds for my decision.

The parties

3 The Plaintiff is a company incorporated in the British Virgin Islands ("BVI") and wholly owned by Suntech Power Holdings Co Ltd ("SPH"), a company incorporated in the Cayman Islands. The Plaintiff operated as an investment holding company, whereas SPH was a solar panel producer previously listed on the New York Stock Exchange. SPH was the ultimate holding company for multiple subsidiaries and affiliate companies. I will refer to this group of companies collectively as "the Suntech Power group". The Defendant, a company incorporated in Singapore, was previously also part of the Suntech Power group. The Defendant operates as an investment holding company engaged in equity investments. Between 8 October 2007 (the date of the Defendant's incorporation) and 15 May 2013, it was a wholly-owned subsidiary of the Plaintiff. A chart setting out the structure of this group of companies – as at April 2013 — is exhibited[1] in the affidavit of evidence-in-chief ("AEIC") of Yat Kit Jong ("Jong"), one of the Plaintiff's joint and several liquidators. Jong is from PricewaterhouseCoopers Consultants (Shenzhen) Ltd; the other liquidator is John Ayres from PricewaterhouseCoopers (British Virgin Islands) Ltd. Jong was the Plaintiff's main witness in the trial.

4 SPH was placed into provisional liquidation on 7 November 2013. It was subsequently placed in official liquidation on 27 January 2015. The Plaintiff was

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[1] Exhibit YKJ-3 of Jong's AEIC. See also Tab A-1 of the Plaintiff's Core Bundle of Documents ("PCBD").

placed into liquidation on 14 November 2013 via a sole shareholder's resolution passed by SPH's joint provisional liquidators.

Undisputed background facts

5 As can be seen from the corporate structure chart at exhibit YKJ-3 (in Jong's AEIC), one of the Plaintiff's other wholly-owned subsidiaries was a company in the People's Republic of China ("PRC") known as Wuxi Suntech Power Co Ltd ("Wuxi Suntech") which was engaged in the manufacture of photovoltaic ("PV") cells and modules. Wuxi Suntech was SPH's principal operating subsidiary in the PRC. In March 2013, following a petition filed in the Wuxi Intermediate People's Court ("WIPC"), Wuxi Suntech was placed in bankruptcy reorganisation under PRC law.[2] A group of ten individuals was appointed as Wuxi Suntech's bankruptcy administrator ("the Wuxi Administrator").

6 On or around 15 May 2013, the Plaintiff's shares in the Defendant and in another wholly-owned subsidiary – Suntech Power Japan Corporation ("Suntech Japan") – were transferred to Wuxi Suntech, purportedly as part of a debt restructuring exercise within the Suntech Power group.[3] The details of this purported debt restructuring exercise are found in [19] of Jong's AEIC. The upshot of this exercise, insofar as the Plaintiff and the Defendant were concerned, was that the Defendant became a wholly-owned subsidiary of Wuxi Suntech from 15 May 2013.

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2 Exhibit YKJ-9 of Jong's AEIC.

3 See [17] to [20] of Jong's AEIC.

7 The above arrangement did not last long. On 12 February 2014, Wuxi Suntech entered into an agreement with a company known as Fast Fame Global Limited ("Fast Fame") for the transfer to the latter of the entire equity interest in the Defendant.[4] The consideration for this transfer was US$1. Fast Fame was incorporated in the BVI on 3 January 2014 – the month prior to the transfer agreement,[5] and less than a fortnight before the commencement by the Plaintiff's Liquidators of the present suit. The writ of summons in the present suit was filed on 14 January 2014.

8 Subsequent to the transfer to Wuxi Suntech of its shares in the Defendant and Suntech Japan, the Plaintiff's shares in Wuxi Suntech itself were also transferred away from it to an entity named Jiangsu Shunfeng Photovoltaic Technology Co Ltd ("Jiangsu Shunfeng"). Jiangsu Shunfeng is a wholly-owned subsidiary of a company known as Shunfeng Photovoltaic International Limited ("Shunfeng"). It appears from disclosures made by Shunfeng to the Hong Kong Exchanges and Clearing Limited that Jiangsu Shunfeng, Wuxi Suntech and the Wuxi Administrator had entered into an agreement on 24 October 2013, whereby Jiangsu Shunfeng had agreed to purchase the entire equity interest in Wuxi Suntech for RMB3,000,000,000 on condition that the plan for the reorganisation of Wuxi Suntech received approval from the WIPC and from its shareholders.[6] The requisite approval was obtained from the WIPC on 15 November 2013[7] and from shareholders on 7 April 2014.[8]

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4 See [26] to [27] of Jong's AEIC. The transfer is alluded to at p 20 of the circular forwarded by the Shunfeng board to its shareholder: exhibit YKJ-25 at p 252 (second paragraph).

5 Exhibit YKJ-26.

6 See [23] of Jong's AEIC.

7 Exhibit YKJ-22.

9 Following the transfer of the Defendant to Fast Fame at the price of US$1, new directors were appointed to the Defendant's board. One of them is Bai Yun, who has affirmed most of the affidavits filed by the Defendant in the proceedings leading up to this trial. The Defendant has not disputed the Plaintiff's assertion that in addition to being a director of the Defendant, Bai Yun is also an officer of another PRC company known as Asia Pacific (China) Investment Management Co Ltd. Nor has the Defendant denied that Asia Pacific (China) Investment Management Co Ltd is itself a subsidiary of a company known as Asia Pacific Resources Development Investment Ltd; and that Asia Pacific Resources Development Investment Ltd is controlled by one Zheng Jianming, who is also the controlling shareholder of Shunfeng and Wuxi Suntech.[9]

10 The Defendant has also not denied that following its transfer to Fast Fame in February 2014, it proceeded in March 2014 to divest itself of a number of wholly-owned subsidiaries.[10]

11 On 4 September 2014, the Plaintiff applied successfully for a worldwide Mareva injunction against the Defendant.[11] This Mareva injunction still stands.

12 The trial of this matter was originally scheduled to commence on 22 May 2017 but this earlier set of trial dates was vacated after the Defendant filed its second application to strike out the Plaintiff's claim on 4 May 2017, its first application having been made without success in January 2015. The second

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8 Exhibit YKJ-23.

9 See [28] to [30] of Jong's AEIC.

10 See transcript of 15 May 2018, 18:15 to 20:16.

11 Order of court given by Justice Judith Prakash (ORC 5888/2014).

striking-out application was also dismissed and the Defendant later withdrew its appeal against that dismissal.

Summary of the parties' cases

13 The total sum of US$197,501,785 claimed by the Plaintiff in this suit comprises the following items:

(a) A loan of US$1,513,000 made by the Plaintiff to the Defendant on 24 September 2008. The money was used by the Defendant for payments to third parties in relation to an investment in an Australian mining project;[12]

(b) A loan of US$27,000,015 made by the Plaintiff to the Defendant on 10 November 2010. This sum was used by the Defendant for a shareholder loan to Rietech Investments Ltd (Hong Kong) ("Rietech"), which in turn used the money to make a capital injection into Zhengjiang Ren De New Energy Science & Technology Co Ltd ("Zhengjiang Ren De");

(c) A loan totalling US$123,428,770 made by the Plaintiff to the Defendant in two parts: the first being the sum of US$103,428,770 lent on 17 December 2010, and the second being the sum of US$20m lent on 24 December 2010. The monies were used by the Defendant to purchase shares in two companies – Best Treasures Consultants Ltd ("Best Treasures") and Invest Wise Enterprises Ltd ("Invest Wise");[13]

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12 See [42] to [43] of Jong's AEIC.

13 See [60] to [63] of Jong's AEIC.

(d) A sum of US$55,560,000 being the consideration due from the Defendant for the Plaintiff's shares in Shanghai Suntech. The Plaintiff transferred its 100% shareholding in Shanghai Suntech to the Defendant pursuant to an equity transfer agreement dated 8 August 2008 ("the Equity Transfer Agreement").[14] This Equity Transfer Agreement was governed by PRC law.

14 The Plaintiff's case was that the loans in question were unsecured, interest-free and repayable on demand; and that the unpaid share consideration was also repayable on demand pursuant to Art 3.2 of the Equity Transfer Agreement.

15 In respect of the loans, the Defendant stated in its amended Defence that it put the Plaintiff to strict proof of the relevant transfers of monies, and also denied in any event that these were loans or that it bore any liability to repay the monies.[15] The Defendant also asserted in its amended Defence that these transactions "were not duly authorised by the Defendant and/or undertaken in the best interests of the Defendant"; and that "in any event, the Plaintiff ceased to have any relevant right of action against the Defendant in respect of all or part of such alleged liability, following upon the acquisition by Wuxi Suntech of the Plaintiff's interests in the Defendant".[16]

16 In respect of the unpaid share consideration, the Defendant stated in its amended Defence that it put the Plaintiff to strict proof that "its alleged right to

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14 See [74] to [76] of Jong's AEIC.

15 See [7] to [8C] of the Defence (Amendment No 2) at Tab 9 of the Setting Down Bundle ("SDB").

16 See [8(d)] of the Defence (Amendment No 2) at Tab 9 of the SDB.

payment of the alleged consideration … had accrued, which is not admitted". The Defendant also asserted, in the alternative, that "the Plaintiff ceased to have any relevant right of action against the Defendant in respect of all or part of such alleged liability, following upon the acquisition by Wuxi Suntech of the Plaintiff's interests in the Defendant"; further, or alternatively, that any right which the Plaintiff might have to payment of the share consideration was time-barred under PRC law.

17 By way of background: the above-mentioned three loans were not the only loan transactions which the Liquidators said they had identified during their inquiries into the Plaintiff's financial affairs. As may be seen from [66] of Jong's AEIC, the Liquidators identified – as between the Plaintiff and the Defendant – a number of loan transactions totalling US$217,044,546.63 for the period from 2007 to 2013, although it should be noted that this figure does not take into account a repayment of US$10m made by the Defendant to the Plaintiff on 12 September 2008.[17] As for the claim for the unpaid share consideration of US$55,560,000, it may be seen from [71] to [77] of Jong's AEIC that this represented – according to the Liquidators – one of two equity transfer transactions where the consideration for the transfer of shares from the Plaintiff to the Defendant was outstanding from the latter. The summary of all the loan transactions and equity transfer transactions identified by the Liquidators for the period 2007 to 2011 may be seen in the table at [87] of Jong's AEIC, which shows them as totalling US$288,602,584.12. According to Jong, in bringing the present suit, the Liquidators had elected for various reasons to pursue claims only in respect of the above three loans and the unpaid share consideration of

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[17] See [67] of Jong's AEIC.

US$55,560,000. As will be seen, this became something the Defendant sought to take issue with during the trial.

18 In the course of the trial, the Plaintiff called two factual witnesses – Jong and also an auditor Seah Gek Choo from Deloitte & Touche LLP of Singapore ("Deloitte") (previously the Defendant's statutory auditors) – as well as one expert witness who testified on various aspects of PRC law relating to the construction of the Equity Transfer Agreement.

19 In the lead-up to the trial, the Defendant had informed that in addition to calling its own PRC law expert ("Sun"), it also intended to call a factual witness. This was one He Yue, who was stated to be an officer of Shanghai Suntech and whom the Defendant said had conducted an investigation into the transactions in issue in the Plaintiff's claims. An AEIC was filed on behalf of He Yue in which – *inter alia* – allegations of fraud were made about the underlying treatment of those transactions. However, the Defendant did not at any point apply to amend its pleadings to include these allegations of fraud. In any event, after the Plaintiff had closed its case, the Defendant disclosed that it had decided not to call He Yue. In the circumstances, He Yue's AEIC was not admitted as evidence in the trial. The Defendant did not call any other witness apart from its PRC law expert.

Summary of the key evidence relied on by the Plaintiff

20 In bringing this action, the Liquidators of the Plaintiff relied primarily on accounting and financial documents. These included the following:

(a) the underlying transaction documents, such as bank statements, instructions to the banks, and debit and credit notes;

(b) the reporting packages of the Plaintiff and the Defendant. Jong described these as being like a "management account", prepared on a monthly basis;[18]

(c) the Defendant's audited financial statements for the financial years ending 31 December 2009, 31 December 2010 and 31 December 2011;

(d) where applicable, contractual documents such as the Equity Transfer Agreement; and

(e) documents relating to the Wuxi debt restructuring exercise.

21 Jong explained that because the main operations of the Suntech Power Group took place in Wuxi, the accounting team in Wuxi handled not only Wuxi Suntech's accounting functions but also the accounting functions of the Plaintiff, the Defendant and SPH.[19] This accounting team was split into two when Wuxi Suntech was placed in bankruptcy administration, such that there came to be two accounting teams – one based in Wuxi Suntech and one in SPH. According to Jong, it was after Wuxi Suntech came under bankruptcy administration that the Liquidators encountered difficulties in obtaining financial documents from its accounting team. The Liquidators were permitted by the Wuxi administrator to download soft copies of such documents or to take photocopies, but were not able to obtain the originals of any of these documents.[20] As for the reporting packages, these were provided to the Liquidators by the Wuxi Suntech accounting team between end-2013 and early 2014, but with Shunfeng's

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18 See transcript of 15 May 2018, 99:16 to 99:18.

19 See transcript of 16 May 2018, 73:24 to 74:24.

20 See transcript of 15 May 2018, 95:21 to 97:5.

acquisition of Wuxi Suntech, "the information flow to [the Liquidators] reduced", such that by the later part of 2014, they were only able to obtain the reporting packages for the Plaintiff and SPH.[21]

22 At the start of the trial, the Defendant had indicated that it was objecting to the authenticity of all the documents relied on by the Plaintiff. This objection to authenticity was later withdrawn in the course of the trial, although (as will be seen) the Defendant continued to maintain its objections to the reliability and sufficiency of the Plaintiff's documentary evidence.

23 I will set out below the key pieces of evidence relied on by the Plaintiff in its claims on the three loans and the unpaid share consideration.

Evidence relied on by the Plaintiff for the US$1,513,000 loan

24 In respect of the claim for the loan of US$1,513,000, the Plaintiff produced documentary evidence, first, of the fund transfer it had made to the Defendant on 24 September 2008.[22] These documents comprised the Plaintiff's payment application form, instructions by the Plaintiff to ABN Singapore on 23 September 2008 for the fund transfer, the ensuing bank debit advice of the same date, the corresponding credit advice of 24 September 2008, and the Plaintiff's accounting ledger showing the US$1,513,000 booked in the inter-company balance as a receivable from the Defendant, with the comments "*transfer from PSS* [*ie*, the Plaintiff] *to Singapore*".

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21 See transcript of 15 May 2018, 99:4 to 99:25.

22 Exhibit YKJ-33.

25 The Plaintiff's case was that this loan of US$1,513,000 was used by the Defendant to pay US$1.5m to a company named Koolgarra Mining Pty Ltd as "Initial Funding" for an investment in an Australian mining project, and also to pay AUD13,174.82[23] to an Australian law firm (M/s Colin Biggers & Paisley) its fees for work done in relation to the proposed investment. The Plaintiff produced the following documentary evidence:[24] the Initial Funding Agreement entered into between the Defendant, Koolgarra Mining Pty Ltd, and another company named Koolgarra Silica Resources Pty Ltd; the bill rendered by M/s Colin Biggers & Paisley; the Defendant's payment application forms for the two payments; the Defendant's instructions to the bank for the two fund transfers; and the corresponding debit advices dated 24 September 2008 (for the transfer of US$1.5m to Koolgarra Mining Pty Ltd) and 26 September 2008 (for the transfer of AUD13,174.82 to M/s Colin Biggers & Paisley).

Evidence relied on by the Plaintiff for the US$27,000,015 loan

26 In respect of the claim for the sum of US$27,000,015, it was the Plaintiff's case that this was a loan to the Defendant for the purpose of enabling it to make a shareholder loan to a Hong Kong company (Rietech) which then used the money to make a capital injection into another company (Zhengjiang Ren De). The Defendant has not disputed the Plaintiff's description of Rietech and Zhengjiang Ren De as its "indirect subsidiaries":[25] the precise relationship between the three entities may be seen in the charts at Tab A-1 of the Plaintiff's Core Bundle of Documents.

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23 It does not appear to be disputed that *per* the exchange rates at the material time in 2008, this amount of AUD13,174.82 translated into US$11,298.72: see the debit advice from ABN Singapore at page 545 of Jong's AEIC (exhibit YKJ-34).

24 Exhibit YKJ-34.

25 See [58] of Jong's AEIC.

27 In support of this claim, the Plaintiff produced documentary evidence of the fund transfer to the Defendant on 10 November 2010.[26] These documents comprised, first, internal email correspondence on 8 November 2010 alluding to the payment application for "the registered capital for Zhengjiang Rebde [*sic*] paid by HK Rongde"[27] and noting that "[d]ue to the fund shortage of HK Rongde, this payment application is from Singapore Suntech". Also included in these documents were the relevant payment application form; the Plaintiff's instructions to the bank on 10 November 2010 for the fund transfer; the bank notification of outgoing funds and the corresponding notification of incoming funds; the Plaintiff's bank statement for the month of November 2010 showing the fund transfer to the Defendant on 10 November 2010; and the relevant accounting ledger of the Plaintiff showing the US$27,000,015 booked in the inter-company balance as a receivable from the Defendant.

28 The Plaintiff also produced documents[28] showing that on the same day (10 November 2010), the Defendant had transferred the same amount to Rietech. These documents comprised the relevant payment application form; the Defendant's instructions to the bank on 10 November 2010 to transfer US$27,000,015 to Rietech as a "Shareholder Loan … for capital injection to Zhengjiang Rende"; the bank notification of outgoing funds; the Defendant's bank statement for the month of November 2010 showing the incoming transfer of US$27,000,015 from the Plaintiff on 10 November 2010 and the outgoing transfer of the same amount to Rietech on the same day; and the relevant

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26 Exhibit YKJ-44.

27 It does not appear to be disputed that the appellations "HK Rongde" and "Singapore Suntech" referred to Rietech and the Defendant respectively.

28 Exhibit YKJ-45.

accounting voucher documenting the receivable of US$27,000,015 from Rietech and recording that it was "[f]or capital injection to Zhengjiang Rende".

Evidence relied on by the Plaintiff for the US$103,428,770 and the US$20m loans

29 In respect of the claim for the sums of US$103,428,770 and US$20m (totalling US$123,428,770), the Plaintiff's case was that these were loans to the Defendant for the purpose of the latter's purchase of shares in two companies – Best Treasures and Invest Wise[29] – from a company known as Golden Potential Limited ("Golden Potential") and an individual named Chen Qiuming. In support of this claim, the Plaintiff produced documentary evidence[30] which included the Defendant's board resolution of 1 December 2010 in which its directors approved the purchase of all of Golden Potential's outstanding shares in Best Treasure for a consideration of US$59,350,000 and all of Chen Qiuming's outstanding shares in Invest Wise for a consideration of US$64,078,770; as well as share purchase agreements for the two transactions dated 1 December 2010. In the share purchase agreement relating to the purchase of Golden Potential's shares in Best Treasure, Chen Qiuming was listed as the person to whom all notices and other communications under the agreement were to be sent.

30 In respect of the loan of US$103,428,770, the Plaintiff produced the following documentary evidence:[31] the payment application form; the Plaintiff's instructions to the bank on 17 December 2010 for the fund transfer to the

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29 As may be seen from the charts at Tab A-1 of the PCBD, Best Treasure and Invest Wise became wholly-owned subsidiaries of the Defendant.

30 Exhibit YKJ-48.

31 Exhibit YKJ-46.

Defendant; the bank debit advice and the corresponding notification of incoming funds; the Plaintiff's bank statement for the month of December 2010 showing the outgoing payment; and the Plaintiff's accounting ledger showing the US$103,428,770 booked in the inter-company balance as a receivable from the Defendant.

31 In respect of the loan of US$20m, the Plaintiff produced the following documentary evidence:[32] the payment application form; the Plaintiff's instructions to the bank on 24 December 2010 for the fund transfer to the Defendant; the bank debit advice and the corresponding notification of incoming funds; the Plaintiff's bank statement for the month of December 2010 showing the outgoing payment; and the Plaintiff's accounting ledger showing the US$20m booked in the inter-company balance as a receivable from the Defendant.

32 The documentary evidence adduced by the Plaintiff also showed the Defendant arranging for the amounts of US$103,428,770 and US$20m to be transferred to Golden Potential on 17 December 2010 and 24 December 2010 respectively. These documents[33] included the payment application; internal email communications; the Defendant's instructions to the bank for the fund transfers; the corresponding bank notifications of outgoing funds; the Defendant's bank statement for the month of December 2010 showing the outgoing transfers on 17 December 2010 and 24 December 2010; and the Defendant's accounting voucher recording the payment of US$59,350,000 for

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[32] Exhibit YKJ-47.

[33] Exhibit YKJ-48.

the Best Treasure shares and US$64,078,770 for the Invest Wise shares as a "long-term investment".

Evidence relied on by the Plaintiff for the claim for unpaid share consideration of US$55,560,000

33 In respect of the claim for unpaid share consideration of US$55,560,000, in addition to the Equity Transfer Agreement,[34] the Plaintiff also produced the relevant licences and approvals from the various PRC authorities for the equity transfer; the resolutions of the same date by Shanghai Suntech's directors and shareholders, approving the transfer of its shares from the Plaintiff to the Defendant; and the Plaintiff's accounting ledger showing the US$55,560,000 booked in the inter-company balance as a receivable from the Defendant, with the comments "Shares of Shanghai Shuntech [*sic*] to be transferred to Singapore USD 55,560,000" and "Shares of Shanghai Suntech to be transferred to Singapore Suntech 100%2008".

34 As the Defendant raised the issue of time-bar as a defence to this claim, the Plaintiff also relied on the evidence of its PRC law expert, Yang Wantao ("Yang"), on the position in PRC law in relation to time-bar; and in particular, on the legal rules and principles applicable to the construction of Art 3(2) of the Equity Transfer Agreement. This was the provision in the agreement which dealt with the payment of the share consideration.

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[34] Exhibit YKJ-52.

The Plaintiff's reliance on the Defendant's audited financial statements and management accounts

35 In addition to the evidence set out above, the Plaintiff also relied more generally on the Defendant's audited financial statements for the financial years ending 31 December 2009,[35] 31 December 2010,[36] and 31 December 2011;[37] as well as the Defendant's management accounts. Jong has explained in some detail in his AEIC how these financial records support the Plaintiff's claims.[38]

36 In gist, in each of the three sets of audited financial statements, the Defendant recognised an amount "due to immediate holding company" – that is, the Plaintiff; and the amount stated in each of these financial years corresponded with the Liquidators' findings as to the amount owing by the Defendant for that particular year. As at 31 December 2011, the Defendant's last available set of audited financials reported the "[a]mount due to immediate holding company" as being US$288,602,584.[39] The Liquidators noted that the total amount owing – as reported in these audited financials – tallied with the total amount they themselves had arrived at after investigating the various transactions between the Plaintiff and the Defendant;[40] further, that their investigations showed that the total amount owing included the four loans and the unpaid share consideration claimed in these proceedings.[41]

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35 Exhibit YKJ-53.

36 Exhibit YKJ-54.

37 Exhibit YKJ-55.

38 See [79] to [91] of Jong's AEIC.

39 See p 921 of exhibit YKJ-55 in Jong's AEIC.

40 See [87] of Jong's AEIC.

41 See Table 5 of Jong's AEIC.

37 As for the Defendant's management accounts, this was a reference to the Defendant's reporting package as at 28 February 2014.[42] These reporting packages were provided to the Liquidators by the accounting team in Wuxi Suntech up to sometime in 2014. In gist, the Defendant's reporting package as at 28 February 2014 showed a total amount of US$288,604,546.63 payable by the Defendant to the Plaintiff.[43] Again, the Liquidators noted that this amount tallied with the amount they had arrived at after investigating the transactions between the Plaintiff and the Defendant; further, that their investigations showed the amount owing to include the four loans and the unpaid share consideration claimed in these proceedings. The difference between this amount and the total amount of US$288,602,584 stated to be owing by the Defendant as at 31 December 2011 is on account of the further payment made by the Plaintiff on the Defendant's behalf on 28 February 2013. This was a sum of US$1,962.51 in payment of the bill rendered to the Defendant by its corporate secretary.

The Plaintiff's reliance on Wuxi restructuring documents

38 Apart from its own financial records and the Defendant's accounts, the Plaintiff also relied on documents emanating from the Wuxi restructuring exercise. It appears that to record the various restructuring of the various "intercompany accounts payables and receivables and intercompany debts among Suntech Entities", Intercompany Claims Transfer Agreements Nos 1 and 2 were signed on 15 May 2013 between Wuxi Suntech and the Wuxi Administrator on the one hand and SPH on the other, while Intercompany Claims Transfer Agreement No 3 was signed on the same date between Wuxi Suntech and the Wuxi Administrator on the one hand and the Plaintiff on the

42 See [91] of Jong's AEIC; also exhibit YKJ-57.

43 See p 932 of exhibit YKJ-57 in Jong's AEIC.

other.[44] Page 4 of each of these Intercompany Claims Transfer Agreements recorded that "Suntech Singapore [*ie*, the Defendant] owes US$265,604,567.58 of borrowing to PSS [*ie*, the Plaintiff]".[45] The Plaintiff pointed out that this figure of US$265,604,567.58 was the exact amount which was derived when the sum said to be payable by the Plaintiff to the Defendant (US$22,999,979.05[46]) was deduced from the total amount owed by the Defendant to the Plaintiff (US$288,604,546.63).

39 As recounted earlier, as part of the Wuxi restructuring exercise, the Plaintiff's shares in the Defendant, as well as in Suntech Japan, were transferred to Wuxi Suntech. The Plaintiff further relied on the Net Asset Valuation ("NAV") of the Defendant as of 31 March 2013 attached to the Sale and Purchase Agreement prepared for the purpose of this transfer. Jong's second affidavit in these proceedings explained in detail how the evidence of the NAV of the Defendant corroborated the Plaintiff's claims.[47] In gist, the total amount owed by the Defendant to the Plaintiff (US$288,604,546.63) made up part of the Defendant's total liabilities of US$560,596,253.96. The total liabilities of US$560,596,253.96 were then netted off from the Defendant's total assets of US$633,036,638.12, resulting in an NAV figure of US$72,440,384.16 – which then formed the basis of the transfer price of the Defendant (US$70m) for the purposes of the disposal of the Singapore and Japan entities.

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44 PCBD Tab H pp 476-528.

45 See pp 476, 499 and 517 of PCBD Tab H.

46 See the Defendant's last set of audited financial statements for the FY ending 31 December 2011 which records this sum as owing from the Plaintiff: p 133 of PCBD Tab C.

47 See [60] to [64] of Jong's affidavit of 24 May 2017 at Tab 15, Volume 3 of Plaintiff's Bundle of Interlocutory Affidavits ("PBIA").

40 In the Plaintiff's submission, therefore, documents pertaining to the Wuxi restructuring provided additional corroboration of the Plaintiff's claims.

Summary of the Defendant's key arguments

41 The Defendant raised a number of arguments against the Plaintiff's case which may be summarised as follows.

(a) The Defendant decried the Liquidators' lack of "personal knowledge" of the transactions on which the present claims were based, and charged that the Liquidators should have called as witnesses the former members of the Plaintiff's senior management. In particular, the Defendant argued for an adverse inference to be drawn against the Plaintiff under s 116(*g*) of the Evidence Act (Cap 97, 1997 Rev Ed) (the "EA") for not producing as a witness one Dr Shi Zhengrong, the founder of SPH, and a director of both the Plaintiff and the Defendant at the material time[48] – whom the Defendant described as the "controlling mind" of both companies.

(b) The Defendant argued that the Plaintiff's position on the amounts claimed "kept shifting", and in particular, that:

> if there was indeed a total sum of US$288,602.584.12 or US$265,604,567.58 owing between the parties, it is baffling that the Plaintiff is only pursuing the 4 Alleged Fund Transfers against the Defendant, whilst abandoning well more than USD100m in potential recovery.[49]

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48 See *eg*, [4(a) to (c)] and [33(d)] to [37] of Defendant's Closing Submissions.

49 See *eg*, [6(d)] and [50] to [53] of Defendant's Closing Submissions.

(c) The Defendant argued that insofar as its claims on the four loans were concerned, the Plaintiff should be precluded from relying on the English Court of Appeal's decision in *Seldon v Davidson* [1968] 1 WLR 1083 ("*Seldon*").[50] *Inter alia*, the Defendant submitted that *Seldon* had not been accepted as part of Singapore law; and that the decision was in any event "contrary" to s 103 of the EA. The Defendant also submitted, more generally, that the decision in *Seldon* was wrong in law; and that even if it were not wrong, its application should be confined to the facts of that case.

(d) The Defendant sought to attack the quality of the evidence produced by the Plaintiff for its claims on the four loans and the unpaid share consideration. In particular, in respect of the four loans, the Defendant alleged that the Plaintiff's evidence failed to demonstrate features which – according to the Defendant – were typical "hallmarks" of a loan.[51]

(e) In respect of the claim for the unpaid share consideration, the Defendant argued that this claim was time-barred under Chinese law.[52]

(f) The Defendant also suggested in its closing submissions that even if I found in favour of the Plaintiff, any amount found to be due should be "set off" against a sum of US$22,999,979.05 which the Defendant claimed was owed to it by the Plaintiff.[53]

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50 2DBOA Tab 29. See also [66] to [100] of Defendant's Closing Submissions.

51 See *eg*, [6] to [8] and [26] to [32] of Defendant's Closing Submissions.

52 See [104] to [121] of Defendant's Closing Submissions.

53 See [102] to [103] of Defendant's Closing Submissions.

Issues

42 Having regard to the arguments raised by both parties, I considered the following issues in determining whether the Plaintiff succeeded in proving its claim.

(a) First, the following preliminary issues which would have had an impact on all of the claims made by the Plaintiff:

(i) whether an adverse inference ought to be drawn against the Plaintiff for its failure to call certain witnesses; and

(ii) whether the Plaintiff had shifted its position with regard to the amounts claimed, and if so, whether this was significant.

(b) Second, in relation to the claims on the four alleged loans, whether the Plaintiff had shown that these were sums that were to be repaid by the Defendant and that the Defendant had not made such payment.

(c) Third, in relation to the claim for the unpaid share consideration, whether the Plaintiff's claim was time-barred.

(d) Finally, the residual arguments made by the parties in relation to all of the Plaintiff's claims.

Preliminary issues relevant to all the claims made by the Plaintiff

On the Liquidators' lack of "personal knowledge" and the absence of testimony from Dr Shi and other former members of the Plaintiff's senior management

43 At the outset, I should state that insofar as the Defendant appeared to insinuate something untoward in the Liquidators having "no personal knowledge of the matters being claimed" and having "constructed the Plaintiff's entire claim based on the companies' financial records"[54], I found such insinuation baseless and mischievous. It can hardly be unusual for the liquidator in the winding-up of a company to have no personal knowledge of the transactions in which the company was involved during its lifetime, and to rely on his investigation of the company's financial records to form a view about the company's assets as well as potential claims to be pursued on its behalf.

44 As to the Defendant's submission that an adverse inference should be drawn against the Plaintiff for not calling as witnesses Dr Shi and/or other former members of the Plaintiff's senior management, I was satisfied that that there was no reason to draw such an inference in this case.

45 The Court of Appeal has made it clear that there "is no fixed and immutable rule of law for drawing such inference": "[w]hether or not in each case an adverse inference should be drawn depends on all the evidence adduced and the circumstances of the case" (see *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 ("*Tribune Investment*") at [50]). As VK Rajah JC (as he then was) pointed out in *Cheong Ghim Fah and another v Murugian s/o Rangasamy* [2004] 1 SLR(R) 628[55] ("*Cheong Ghim Fah*") at [39]:

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54 See [4(a)] of the Defendant's Closing Submissions.

> [s]ection 116(*g*) encapsulates a common sense rule. In the scheme of our adversarial litigation procedures, it is perfectly permissible for a party not to call witnesses or adduce evidence on any material point in issue. Section 116(*g*) mirrors the common law approach that a party cannot take issue with the raising of inferences about matters that the party has chosen to consciously conceal or hold back. The inference must, it has to be emphasised, be reasonably drawn from the matrix of established facts.

Rajah JC also held, following the English Court of Appeal's decision in *Wisniewski v Central Manchester Health Authority* [1985] 5 PIQR P324, that whilst the drawing of an adverse inference may "go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness", there must first have been "some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue" (at [42]).

46 Thus in *Tribune Investment*, for example, the trial judge found that as the plaintiffs had failed to make out a *prima facie* case on any of its claims and that their main witness was unreliable and unworthy of belief, it was unnecessary to draw any adverse inference against the defendant for not calling certain witnesses whom the plaintiffs contended were material to the defence. It should be noted that the trial judge in *Tribune Investment* also found that in any event, the defendant's main witness had been involved in various key events from which the dispute between the parties arose, and there was nothing to show that he was not a material or relevant witness to the proceedings. The trial judge's decision was upheld by the Court of Appeal (at [51]).

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[55] PSBOA Tab 8.

47 In *Cheong Ghim Fah*, on the other hand, the plaintiff having established that there was an accident in which the defendant's motorcycle collided with the deceased (the plaintiff's husband) on a straight road with light traffic, Rajah JC found that the defendant's decision not to appear at the trial – in the absence of any legitimate reason for absence – warranted an adverse inference being drawn against him. As Rajah JC noted (at [44]): "a common sense approach should prevail. A person who has nothing to conceal would usually want to cooperate in such enquiries and vindicate himself. The defendant was not just a material witness; he was the *sole* witness to what transpired" [emphasis in original].

48 In similar vein, in *Chapman v Copeland* (1966) 110 SJ 569 (cited by Rajah JC in *Cheong Ghim Fah* at [40]), a case of a fatal road accident where the plaintiff widow relied on evidence of brake and tyre marks, the defendant driver's decision not to give evidence was held to warrant an adverse inference being drawn. The court in that case explained that whilst there was no obligation on the defendant to give evidence at the end of the plaintiff's case, given the circumstances in that case:

> if he chose not to do so, he could not complain if, on a very narrow balance of probability, the evidence justified the court in drawing the inference of negligence against him … [W]here the defendant, quite legitimately, in a case in which there was nothing but accident mathematics, chose not to give evidence to the contrary, he could not complain.

49 In *ARS v ART & another* [2015] SGHC 78 ("*ARS v ART*"), a key aspect of the plaintiff's claim against the first defendant related to two oral agreements which the plaintiff alleged parties had entered into. The first defendant denied the existence of the two oral agreements. It called as a factual witness a sales manager (Zachary) who had been actively involved in the dealings relating to the alleged oral agreements, and who gave evidence denying or doubting the

existence of the oral agreements. The only witness for the plaintiff was Saul, its major shareholder and director. The trial judge found it noteworthy that the Plaintiff had not called either Saul's son-in-law (Abel), or a former employee at its Singapore office (Tobias), both of whom appeared to have been extensively involved in the dealings relating to the alleged oral agreements. The learned judge found that the documentary evidence available to show that these alleged agreements had been validly concluded was "limited", and that the evidence of both men – especially Abel – would have been material to the issue of whether the two oral agreements existed. He also held that Saul could certainly have arranged for both men to testify, given that Abel was his son-in-law and that he (Saul) was still in touch with Tobias (at [138]). There was no evidence that the two men were unavailable. In addition, the learned judge found Saul to be evasive when asked why Tobias was not called as a witness. He held, therefore, that the circumstances of the case warranted an adverse inference being drawn against the Plaintiff for not calling Abel and Tobias.

50 In the present case, two things need to be borne in mind from the start. First, it was not disputed that Dr Shi – and for that matter, the other former members of the Plaintiff's senior management – had not been and were not resident in Singapore[56]. As such, it would not have been possible for the Plaintiff to compel their attendance at trial via the service of subpoenas issued by this court. Considerable efforts would have been required to track down the exact whereabouts of the individuals concerned, to interview them, and then to cajole them into travelling to Singapore to testify. In this connection, it should also be noted that the Defendant itself admitted that the previous management of the

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[56] See [32] of Plaintiff's Reply Closing Submissions; also, e.g., [11] of Jong's 3rd affidavit of 30 January 2018 at Tab 5, 3 PBIA which stated that Dr Shi is an Australian citizen who travels regularly to the PRC and Japan.

Plaintiff – or at least Dr Shi – had at one stage left the company under something of a cloud: the Defendant's closing submissions refer, for example, to Dr Shi having been "forced to leave the Suntech Group in 2012 amidst allegations of mismanagement and misappropriation of funds".[57] Realistically speaking, therefore, Dr Shi – and possibly other former members of senior management – would scarcely have been eager to testify at the trial in Singapore.

51 Secondly, the Defendant elected not to call any factual witnesses of its own at the trial. This meant that there was no evidence before me to substantiate a version of facts different from that put forth by the Plaintiff. In this connection, it should also be pointed out that the evidence put forward by the Plaintiff encompassed evidence drawn from the Defendant's own financial records; and the figures in the Defendant's accounts tallied with those in the Plaintiff's financial records: see [36] above. These included – for example – the Defendant's audited financial statements.[58] As another example, the evidence showed that Dr Shi and one Amy Zhang – both directors of the Plaintiff as well as the Defendant at the material time – had signed off on the Plaintiff's instructions to the banks for payment of the four loan amounts to the Defendant; and they had concurrently signed off on the Defendant's instructions to the banks for the disbursement of these sums pursuant to the various transactions outlined above at [13].[59] I will deal with the evidence of these financial records in greater detail in [106] to [133] of these grounds when I address the Defendant's

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57 See [4(e)(iii)] of Defendant's Closing Submissions. It should be noted that in cross-examination, Jong testified that following his removal from office "in 2011 or 2012", Dr Shi returned to the company as one of its directors in late 2013 and remained there till late 2014: see transcript of 15 May 2018, 104:14 to 104:20.

58 See again [79] to [91] of Jong's AEIC.

59 See PCBD Tab D pp 142 and 170–172; Tab E pp 255 and 267; Tab F pp 296 and 313–314.

criticisms of the quality of the Plaintiff's evidence, but for now, it suffices to note that the Defendant provided no evidence to suggest that these records did not actually mean what they said.

52 When queried whether the Liquidators had made enquiries of Dr Shi and other former directors about each of the transactions concerned in this suit, Jong was frank in his response. He pointed out that the Defendant's outstanding liabilities were clear and "self-explanatory" from the financial records obtained from the accounting team in Wuxi Suntech; and that as such, he had not seen a need to approach the Plaintiff's former directors.[60] As he put it:[61]

> [A]s liquidator, I think we abide by the rules of *prima facie* evidence … [I]t is more important what the records or the evidence of the company that can provide is… the basis of our decisions … [I]t is not typical in my experience, that whatever we have in the accounts and we go back to check with the people … People may forget, people may mistaken … [I]n my view, it's always the party that disagree with the agreement have to come out and prove why the agreements were incorrect. It is not typical for us to, even though we have … documents that actually support the claim, we go back and … ask everyone all these question and get a further evidence to support what has already been supported by the books and records of the company … [T]here are many, many transaction that the company have had for the entire group. You can imagine, there are many many transactions. And from a cost benefit perspective, it's just not feasible.

53 In my view, this was not an unreasonable attitude to take. In carrying out his investigation of the company's financial records, a liquidator would be entitled to take into consideration *inter alia* the fact that a particular debt has been consistently acknowledged as such in audited accounts. Whilst he has extensive powers to go behind documents, he is not bound to take extraordinary

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60 See transcript of 15 May 2018, 101:22 to 102:15.

61 See transcript of 16 May 2018, 47:9 to 48:17.

steps and incur extraordinary costs to do so, unless there is some reasonable basis to be suspicious about the genuineness of the documents and/or the legal validity of the debt. I found guidance and support for this view in the judgment of the Court of Appeal in *Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd* [2009] 4 SLR(R) 458 ("*Fustar*") at [20]–[21].[62] Whilst the court's judgment in that case was focused on the position of a liquidator when charged with assessing a creditor's proof of debt, its observations about the extent of a liquidator's power to go behind documents and the circumstances in which he should do so are germane and helpful in the context of the present case.

54 In the present case, as Jong highlighted in cross-examination, the Liquidators were conscious in the lead-up to the trial of having to justify to the Plaintiff's creditors the reasonableness of the costs being incurred in the pursuit of claims. As noted earlier, Dr Shi and other former members of the Plaintiff's senior management were out of jurisdiction; and considerable efforts would have had to be made to track them down, to interview them, and then to persuade them to voluntarily travel to Singapore to testify at the trial. I did not find it unreasonable for the Liquidators to have assessed the feasibility of doing so on the basis of a cost-benefit analysis, taking into account the evidence they had in hand, and to have determined upon such analysis that they did not need the former directors' evidence to pursue the present claim.

55 From Jong's testimony,[63] it also emerged that SPH's board of directors – which included Dr Shi – had remained in place at least up until late 2014. The board members – including Dr Shi – were provided with the reporting packages

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62 1 PBOA Tab 13.

63 See transcript of 15 May 2018, 103:14 to 106:20.

or management accounts which formed part of the evidence relied on by the Liquidators; they could have raised objections to the contents of these reporting packages if they had disagreed with those contents (but there is no evidence that they did); and they were apprised of and authorised the Liquidators' proposal to commence the present suit.

56 I further noted that the Liquidators *did* in fact make several attempts to contact Dr Shi to procure evidence from him for use in these proceedings. Jong explained that these attempts had been made because their solicitors had informed them that the Defendant had "strongly pushed" the point as to whether Dr Shi would be called as a witness.[64] In April 2015, for example, attempts were made by the Liquidators to get Dr Shi to affirm an affidavit to be used in the present proceedings, but whilst Dr Shi seems to have kept up a veneer of affability in his email responses, he clearly did not affirm the affidavit forwarded to him.[65] Another approach to Dr Shi was made in November 2017, when Jong managed to have a brief telephone conversation with him. According to Jong, Dr Shi had told him during this telephone conversation that he (Dr Shi) had no reason to doubt the accuracy of the Defendant's audited financial statements.[66] The Liquidators then followed up on this telephone call by emailing Dr Shi the draft of a short "Financial Statement Confirmation" to confirm that the contents of the Defendant's financial statements for the year ending 31 December 2010 were true and correct.[67] Again, Dr Shi did not sign this draft statement. The point, however, is that the Plaintiff did take action to procure evidence from Dr Shi –

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64 See transcript of 16 May 2018, 49:2 to 49:25.

65 See DBD pp 22–24.

66 See transcript of 15 May 2018, 134:9 to 134:17.

67 See DBD pp 25–27.

and it was rebuffed. Indeed, the Defendant conceded as much in its closing submissions.[68]

57 This case was thus very different from cases such as *Cheong Ghim Fah* and *ARS v ART*. The factual matrix in each of those cases made it reasonable for the trial court to expect one of the parties to call certain witnesses to confirm or to clarify a certain state of affairs – and to infer, in the absence of such witnesses, that the party concerned was deliberately concealing or withholding evidence potentially adverse to its case. In contrast, in the present case, I was of the view that the factual matrix did not justify such adverse inference being drawn against the Plaintiff for not calling Dr Shi and/or other former directors.

58 I would add that the Defendant's description of Jong as a "self-serving" witness was baseless and mischievous. This attempt to cast doubt on Jong's integrity and objectivity as a witness appeared to be premised on the contention that it was in Jong's "interests, as professionals involved in the liquidation exercise, to maximise recovery for the Plaintiff".[69] These comments were baseless and mischievous because recovery *vis-à-vis* the wound-up company's debts is effected for the benefit of the general body of its creditors; and it was Jong's duty as liquidator to maximise such recovery. I should not be surprised if he did take some professional pride in his work – but that is beside the point, since there was no evidence at all to suggest that his objectivity and credibility as a witness were tainted by some underlying agenda to advance his professional standing and/or career prospects. Indeed, I observed that Jong was forthright – even guileless – in his testimony he readily admitted, for example, the mistake

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68 See [4(e)] of Defendant's Closing Submissions.

69 See [4(b]) of Defendant's Closing Submissions.

he had made in approving the filing of a claim by SPH in the Chinese courts for US$13,690,234.84[70] (a matter I shall come to later in this judgment). I did not find his evidence to be at all "self-serving".

On the Plaintiff's alleged "shifting" of position with regard to the amounts claimed

59 I address next the Defendant's arguments on the Plaintiff's alleged "shifting" of its position with regard to the amounts claimed in the present suit.

60 In gist, the Defendant took issue with the fact that whilst the Liquidators' letter of demand on 23 December 2013 had referred to a total debt amount "exceeding US$288 million",[71] and Jong's AEIC had also referred to a total debt amount of US$288,602,584.12,[72] the Plaintiff's statement of claim in the present suit had initially stated a total debt amount of US$263,910,599.28 (and not US$288,602,584.12), which amount had then been amended to the present figure of US$197,501,785. Jong was cross-examined at length about the amendments which had been made in the course of these proceedings to the amounts claimed in the Statement of Claim.[73] The Defendant's contention, in a nutshell, was that the Plaintiff had dropped a number of claims because they were not supported by the documentary evidence and/or there were "defects" in the documents.[74]

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70 See transcript of 15 May 2018, 30:2 to 31:19.

71 4DCB pp 2423–2425.

72 See *eg*, [87] and Table 5 of Jong's AEIC.

73 See *eg*, transcript of 14 May 2018, 65:17 to 94:21.

74 See transcript of 14 May 2018, 94:1 to 94:21.

61 As a preliminary point, I noted that at the end of the day, what I had to decide in this trial was whether the claims making up the total amount of US$197,501,785 were proven on the evidence adduced: the fact that there might have been other claims which were not pursued in this trial was not strictly relevant to the issue of proof of the present claims for US$197,501,785. Nevertheless, since the Defendant's argument appeared to be that the dropping of some claims cast doubt on the credibility of the documentary evidence relied on for the present claims, I reviewed the testimony given by Jong in explaining the reasons for the dropping of certain claims, as well as the surrounding evidence.

62 In his AEIC, Jong had already explained that when the statement of claim was filed on 14 January 2014, the Plaintiff had put in a claim for the total amount of US$263,910,599.28 – and not US$288,602,584.12 – because at the point of filing, it did not have available certain supporting documents. Jong's AEIC also stated that the total amount was amended to US$197,501,785 in July 2014 because the Liquidators were concerned about preventing the Defendant from dissipating its assets in the PRC. The Liquidators found it necessary, therefore, to file proceedings against the Defendant in the PRC by pursuing part of the Plaintiff's claim in the PRC courts "to support asset preservation action so as to stop the Defendant from dissipating its key assets in the PRC".[75]

63 At trial, Jong further testified that in addition to the need to file some claims against the Defendant in the PRC, the Liquidators also weighed the costs of pursuing certain claims against the potential benefits. The eventual decision to drop certain claims was also motivated by the consideration that claims that

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[75] See [94] of Jong's AEIC.

were not so "straightforward" might not be worth pursuing because of the costs which would have to be incurred to prove those claims and the consequent likelihood of "a prolonged hearing and trial".[76] In this respect, Jong explained that "straightforward claims would typically include a direct fund transfer from [the Plaintiff] into [the Defendant, and … the supporting documentations are easier to follow"; whereas for claims that were not so "straightforward", "for example … some of the money would be paid on behalf of [the Defendant] even though there are other supporting documents".[77]

64 Jong categorically denied the Defendant's suggestion that the Plaintiff had dropped some of its claims because they were not supported by the documentary evidence and/or there were "defects" in the documents.

65 Having reviewed the evidence, I found Jong's explanations for the dropped claims to be cogent and convincing. I accepted that a key reason was the need to bring part of the claim in the PRC so as to "support asset preservation action". It will be remembered that in February 2014, Wuxi Suntech had transferred its entire equity interest in the Defendant for US$1 to a BVI company called Fast Fame; and that following this transfer, the Defendant had proceeded in March 2014 to divest itself of several wholly-owned subsidiaries (see [6] to [10] above). As to the cost-benefit analysis which Jong said had been applied by the Liquidators to the claims in Singapore, this too appeared to me to be eminently reasonable. As Jong pointed out, whilst the Liquidators had a duty to maximise recovery for the creditors, they also had to be responsible in evaluating the costs of pursuing claims.

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[76] See transcript of 14 May 2018, 89:6 to 89:11.

[77] See transcript of 14 May 2018, 89:18 to 89:25.

66 In the circumstances, I did not agree with the Defendant that the amendments to the Plaintiff's total claim amount revealed some underlying "defect" in their documentary evidence.

67 The Defendant also argued that if indeed the Plaintiff were owed in excess of US$288m (per the Liquidators' letter of demand) or US$265,604,567.58, it was "baffling that the Plaintiff [was] only pursuing the 4 Alleged Fund Transfers against the Defendant".[78] Again, having regard to Jong's explanation as to why certain claims had not been pursued by the Liquidators (see [62] to [64] above), I did not find the Plaintiff's conduct in any way "baffling" or illogical.

68 I also considered the other arguments made by the Defendant as to alleged "defects" in the Plaintiff's documentary evidence regarding the claimed loans. I did not find these arguments to be made out either. Before I go to the Defendant's arguments on the quality of the Plaintiff's documentary evidence, I will address their arguments on the application of *Seldon* to the present case. This entails first an examination of the issues relating to the nature of a loan and the burden of proof in a claim for recovery of a loan. [69] to [145] below relate to the Plaintiff's claims on the four alleged loans and do not deal with the claim for unpaid share consideration which is dealt with in [146] to [193].

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78 See [50] of Defendant's Closing Submissions.

The Plaintiff's claim on the four alleged loans

The applicable legal principles

The nature of a loan

69 The definition of a loan transaction was examined by VK Rajah J (as he then was) in *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR(R) 733 ("*City Hardware*"). One of the main questions before Rajah J was whether certain transactions between the plaintiffs and the defendants in that case amounted to moneylending transactions – and if so, whether they contravened the Moneylenders Act (Cap 188, 1985 Rev Ed) (the "MLA"). In considering this question, Rajah J found it necessary to determine the preliminary issue of whether the transactions amounted to lending or the loan of money in the first place. Noting at [23] that the MLA "does not assist in explicitly defining what constitutes lending or the loan of money", the learned judge found assistance instead in the following extract from Clifford L Pannam, *The Law of Money Lenders in Australia and New Zealand* (The Law Book Company Limited, 1965):

> A loan of money may be defined, in general terms, as a simple contract whereby one person ("the lender") pays or agrees to pay a sum of money in consideration of a promise by another person ("the borrower") to repay the money upon demand or at a fixed date. The promise of repayment may or may not be coupled with a promise to pay interest on the money so paid. The essence of the transaction is the promise of repayment. As Lowe J. put it in a judgment delivered on behalf of himself and Gavan Duffy and Martin JJ.: "Lend' in its ordinary meaning in our view imports an obligation on the borrower to repay.' Without that promise, for example, the old *indebitatus* count of money lent would not lay. *Repayment is the ingredient which links together the definitions of 'loan' to be found in the Oxford English Dictionary, the various legal dictionaries and the text books. In essence then a loan is a payment of money to or for someone on the condition that it will be repaid.* [emphasis in original]

70 Rajah J also cautioned at [24] that:

> [w]hat constitutes lending must of course remain a question of fact in every case. Careful consideration has to be given to the form and substance of the transaction as well as the parties' position and relationship in the context of the entire factual matrix.

71 The above analysis was endorsed by the Court of Appeal in *Donald McArthy Trading Pte Ltd v Pankaj s/o Dhirajlal* [2007] 2 SLR(R) 321 at [11]–[12].

72 *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) summarises the key principles at para 39–258 as follows:[79]

> A contract of loan of money is a contract whereby one person lends or agrees to lend a sum of money to another, in consideration of a promise express or implied to repay that sum on demand, or at a fixed or determinable future time, or conditionally upon an event which is bound to happen, with or without interest.

73 A similar, though briefer, definition may also be found in *Law Relating to Specific Contracts in Singapore* (Steven Chong editor-in-chief & Cavinder Bull gen ed) (Sweet & Maxwell, 2016, 2nd Ed) ("*Specific Contracts*"), where it is stated at para 6.2.1: "Essentially, a loan is a payment of money to or for someone on the condition that it will be repaid".[80]

The burden of proof in a claim for the recovery of a loan

74 I have spent a little more time outlining the nature of a loan because one of the Defendant's main arguments was that "[a]ll the hallmarks of a loan [were]

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79 2PBOA Tab 36.

80 2PBOA Tab 40.

conspicuously missing"[81] in the four loans claimed by the Plaintiff and that as such they could not really be. These "hallmarks", according to the Defendant, included factors such as "evidence of any board resolution authorising the Plaintiff to dispense the alleged loans (or the Defendant to receive the alleged loans" and "guarantee and/or collaterals provided by the Defendant". The Defendant also stressed the fact that the alleged loan transactions were not explicitly described as "loans" in the Plaintiff's and the Defendant's accounts.[82] However, the above authorities make it clear that there are only the following essential elements in a loan of money: payment (or an agreement to pay) by one person of a sum of money in consideration of a promise by the other person to repay the money. Insofar as the Defendant sought to suggest by [6] of its closing submissions that all the factors listed therein must be proven by a lender who seeks recovery of a loan, that suggestion is unfounded in law.

75 Broadly speaking, a claimant such as the present Plaintiff who asserts that he gave the defendant a loan of money and who seeks recovery of that loan has to prove the following two essential facts: first, that he has paid the defendant a sum of money; and secondly, that there is an obligation on the defendant's part to repay the money. The burden of proof that lies upon such claimant or alleged lender is what has been referred to as the "legal burden of proof", which "describes the obligation to persuade the trier of fact that, in view of the evidence, the fact in dispute exists": per the Court of Appeal in *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855[83] ("*Britestone*") at [58] and in *SCT Technologies Pte Ltd v Western Copper Co Ltd* [2016] 1 SLR

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81 See [6] of Defendant's Closing Submissions.

82 See [28] of Defendant's Closing Submissions.

83 1PBOA Tab 8.

1471[84] ("*SCT Technologies*") at [17]. That "he who asserts must prove" is a "trite" common law rule which finds statutory expression in ss 103 and 105 of our EA: see *SCT Technologies* at [17]; also *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2010] 1 SLR 286 at [14].

76 I say that "broadly speaking" the legal burden of proof in a loan claim will fall on the claimant because this is not invariably the case in all such claims. As the Court of Appeal noted in *SCT Technologies*, the pleadings in a case will determine the incidence of the legal burden of proof. In some cases, the legal burden of proof may fall upon the defendant or alleged borrower, if for example – instead of simply denying the alleged debt or the underlying transactions which it relates to – he admits the existence of the amounts claimed and seeks to avoid liability through the positive allegation of payment (that is, a "confession and avoidance" plea). For example, in *Young v Queensland Trustees Limited* [1956] 99 CLR 560, a case cited by the Court of Appeal in *SCT Technologies* (at [24]), the executor of the deceased's will sought recovery from the defendant of a fixed sum of money comprising several loans made to the defendant by the deceased during her lifetime. The defendant admitted in his defence to these loans but stated that he had repaid each of the loans during the deceased's lifetime. The first instance judge gave judgment for the executor, and on appeal, the defendant argued that the judge should have placed the burden on the executor to disprove the payments. The High Court of Australia rejected this argument, holding that "[t]he law was and is that, speaking generally, the defendant must allege and prove payment by way of discharge as a defence to an action for indebtedness in respect of an executed consideration" (at 569–570).

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[84] 2DBOA Tab 28.

77 I pause here to note that in the present case, the parties are agreed that the Defendant has *not* pleaded a confession and avoidance: the Defendant has simply denied the alleged debts. The Plaintiff does not dispute that it bears the legal burden of proof in respect of its four loan claims. The Plaintiff also does not dispute that it bears the corresponding evidential burden of proof, which has been described as "the need of the party to adduce evidence to discharge his legal burden (or the need of the opposing party to adduce evidence to prevent the proving party from discharging his legal burden)": *SCT Technologies* at [18]. However – and this seems to be something which (with respect) the Defendant has not appreciated – this evidential burden can and often does shift in the course of a trial. This was explained by the Court of Appeal in *Britestone* at [58] to [60] of its judgment:

> 58 … There are in fact two kinds of burden in relation to the adduction of evidence. The first, designated the legal burden of proof … describes the obligation to persuade the trier of fact that, in view of the evidence, the fact in dispute exists … The second … falls short of an obligation to prove that a particular fact exists. It is more accurately designated the evidential burden to produce evidence since, whenever it operates, the failure to adduce some evidence, whether in propounding or rebutting, will mean a failure to engage the question of the existence of a particular fact or to keep this question alive. As such, this burden can and will shift.
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> 59 The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him. Since the terms 'proved', 'disproved' and 'not proved' are statutory definitions contained in the [EA], the term 'proof', whenever it appears in the [EA] and unless the context otherwise suggests, means the burden to satisfy the court of the existence or non-existence of some fact, that is, the legal burden of proof: see ss 103 and 105 of the [EA]. However, this is not to say that the evidential burden, which is the burden to adduce sufficient evidence to raise an issue for the consideration of the trier of fact, does not exist. It exists as the tactical onus to contradict, weaken or explain away the evidence that has been led; there is no distinction between such tactical onus and the evidential burden.

> 60 To contextualise the above principles, at the start of the plaintiff's case, the legal burden of proving the existence of any relevant fact that the plaintiff must prove and the evidential burden of adducing some (not inherently incredible) evidence of the existence of such fact coincide. Upon adduction of that evidence, the evidential burden shifts to the defendant, as the case may be, to adduce some evidence in rebuttal. If no evidence in rebuttal is adduced, the court may conclude from the evidence of the plaintiff that the legal burden is also discharged and making a finding on the fact against the defendant. If, on the other hand, evidence in rebuttal is adduced, the evidential burden shifts back to the plaintiff. If, ultimately, the evidential burden comes to rest on the defendant, the legal burden of proof of that relevant fact would have been discharged by the plaintiff. The legal burden of proof – a permanent and enduring burden – does not shift.

78 The manner in which a claimant in a trial who starts out bearing both the legal and the evidential burdens of proof goes about discharging these burdens was also explained in an article by Denning J (as he then was) titled *Presumptions and Burdens* (1945) 61 LQR 379 ("*Presumptions and Burdens*"), which was cited by the Court of Appeal in *Anti-Corrosion Pte Ltd v Berger Paints Singapore Pte Ltd & another appeal* [2012] 1 SLR 427 at [37]. Denning J started by noting that where the law imposes on a party the legal burden of proof in respect of a certain fact or issue, that legal burden does not shift. He cited the examples (*inter alia*) of cases where the issue was whether a defendant was negligent; or whether a ship was unseaworthy; or whether goods had been lost without the default of the bailee; or whether a will was the last will of a free and capable testator. Noting that the burden of proving such issue rested on the person putting forward the proposition, Denning J went on to explain the manner in which such a person would go about adducing such proof (at 379–380):

> In order to discharge a legal burden, the person on whom it lies will often prove relevant facts or rely on presumptions from which he asks the Court to infer the fact in issue which he has to establish in order to succeed. In the instances I have taken he will prove … that the thing which caused the accident was under the control of the defendant; or that the ship was lost

> within a short time of sailing; or that the goods were stolen; or he will rely on the presumption that the testator was of testamentary capacity. Those relevant facts or circumstances are often said to raise a 'presumption' or make a '*prima facie*' case, and so they do in the sense that from them the fact in issue may be inferred, but not in the sense that it *must* be inferred unless the contrary is proved. The Court will decline before the end of the case to rule whether the fact in issue should be inferred. It will leave it to the other party to take his own course. He may seek to repel the inference by argument, as by submitting that the facts proved only raise a suspicion as distinct from a legitimate inference; or by contradicting the evidence; or by giving evidence of other facts to explain why the fact in issue should not be inferred; or by raising suspicions which counter-balance the presumptions. As the case proceeds the evidence may first weigh in favour of the inference and then against it, thus producing a burden, sometimes apparent, sometimes real, which may shift from one party to the other as the case proceeds or may remain suspended between them. The party on whom it rests must call evidence or take the consequences which may not necessarily be adverse: for the place where the burden eventually comes to rest does not necessarily decide the issue: because at the end of the case the Court has to decide as a matter of fact whether the inference should be drawn or not. These presumptions and burdens are therefore *provisional* only. It is a mistake to raise these provisional presumptions into propositions having the force of law. They are recognised by the law but their force depends on ordinary good sense rather than on law. They are only guides to the Court in deciding whether to infer the fact in issue or not. [emphasis in original]

79 From the foregoing passages, it can be seen that there is an important distinction to be drawn between the *legal* and *evidential* burdens in each case. The former does not shift and stems from the trite proposition that he who asserts a fact must prove that fact. The latter may shift over the course of the proceedings and is simply an evidential aid to assist the court in deciding whether, in any given case, a fact can be inferred from the surrounding evidence and thus results in the legal burden of proof being discharged.

The case of Seldon v Davidson

80 I have cited the above authorities and commentaries in some detail because they are useful in aiding our understanding of the judgments delivered in *Seldon*. This was a case which the Plaintiff relied on for the proposition that once it proved the fact of payment of a sum of money in circumstances where a presumption of advancement did not arise, then the evidential burden of proving that the sum of money was not paid as a loan fell to the Defendant, who would have to adduce evidence to discharge this evidential burden. In *Seldon*, the plaintiff sued the defendant – her former chauffer and handyman – for the return of a sum of money which she alleged she had lent him. The defendant admitted receipt of the money but claimed that it had been a gift; alternatively, that if the money was a loan, it was repayable only when he was able to do so. On the case being called on for hearing, the plaintiff submitted that it was for the defendant to begin, and the county court judge so ruled. The defendant obtained an adjournment to appeal that ruling to the Court of Appeal. When the appeal came before the Court of Appeal, the court expressed reservations about whether the ruling by the county court judge had been a "mere ruling in the course of the trial" which did not appear to fall within the rules providing for appeals to the Court of Appeal. Having noted their reservations, the court proceeded nevertheless to hold that it was not prepared to say the county court judge had given a wrong ruling. The appeal was dismissed.

81 In the trial before me, the Plaintiff relied in the main on the following passage from the judgment of Willmer LJ in *Seldon* (at 1088B–G)

> *Payment of the money having been admitted,* prima facie *that payment imported an obligation to repay in the absence of any circumstances tending to show anything in the nature of a presumption of advancement.* This is not a case of father and child, or husband and wife, or any other such blood relationship

> which could have given rise to a presumption of advancement …
>
> [Referring to the case of *Cary and others, executors of Greatorex v Gerrish* (1801) 4 Esp. 9 which was cited to the court] That is a case which no doubt bears a certain similarity to the present case, but it is, I think, distinguishable on grounds which appear from the judgment of Lord Kenyon. When this question was discussed before him, he said:
>
> > 'No evidence is offered of the circumstances under which the draft was given; it might be in payment of a debt due by the testator: or the defendant might have given cash for it at the time.'
>
> No such considerations arise in the present case; indeed they are clearly ruled out, because we have from the defendant in this case a clear admission of the payment of the money, and no suggestion that it was paid in settlement of an existing debt, or that it was given in return for cash, or anything of that sort. In the absence of any such circumstances, money paid by the plaintiff in circumstances such as these is prima facie repayable on demand. If the defendant seeks to evade repayment of the money which was paid to him, it seems to me that the judge was right in placing the onus upon him to prove the facts which he alleges show that the money was not repayable.
>
> [emphasis added]

82 The Plaintiff also relied on the judgment by Edmund Davies LJ who had agreed with Willmer LJ that "proof of payment imports a prima facie obligation to repay the advancement in the absence of circumstances from which presumption of advancement can or may arise". The learned judge added that while Willmer LJ had expressed the view that such a loan would be repayable on demand, he took the view that "if not repayable on demand, [it was] at least repayable within a reasonable time of a request for repayment" (at 1090F–G).

83 It should also be noted that whilst the county court judge in *Seldon* was reported as having ruled that the defendant bore the *legal* burden of proving one or other of his defences (at 1084F–G), neither Willmer LJ's nor Edmund Davies LJ's judgment made any reference to the *legal* burden of proof being imposed

on the defendant instead of the plaintiff. Rather, their view appeared to be that the defendant having admitted receipt of the money and it being clear that no presumption of advancement arose on the facts, the trial should proceed on the basis that it was for the defendant to call evidence of his assertion that he had received the money as a gift. Whilst Willmer LJ referred in his judgment to the "onus" being on the defendant to show that the money was not repayable, it does not appear to me that he believed somehow that the *legal* burden of proof had shifted to the defendant: in the same passage, he made it clear that the inference that the money was repayable was only a "*prima facie*" inference (see *Seldon* at 1088F–G). To paraphrase the words of Denning J in *Presumptions and Burdens*, Willmer LJ appeared to be doing no more than pointing out that the evidence of payment and the absence of circumstances justifying a presumption of advance were enough to "make a '*prima facie*' case … in the sense that from them the fact in issue [*ie*, the obligation to repay] *may* be inferred, but not in the sense that it *must* be inferred unless the contrary is proved" [emphasis in original].

84 Read in context, therefore, the proposition that proof of payment in the absence of circumstances giving rise to a presumption of advancement "imports a prima facie obligation to repay" the money paid really amounted to a presumption of fact; namely, that a fact in issue in the loan claim – the obligation to repay – "may be inferred, but not in the sense that it must be inferred unless the contrary is proved". Just like other presumptions (such as the presumption of advancement), such a presumption is an evidential instrument which operates where there is no direct evidence that may reveal the intention of the parties: see for example *Lau Siew Kim v Yeo Guan Chye Terence and another* [2008] 2 SLR(R) 108 at [59]. As Denning J noted in his article, these factual presumptions are not inevitable in every case. These points were made by the New Zealand

High Court in *Zheng and Yu and anor v Qiu and Yu* [2007] NZHC 1827[85] ("*Zheng v Qiu*") at [44] and [46], where Stevens J held that:

> [44] It seems clear that the Court of Appeal in *Seldon* was speaking about a factual presumption that it was prepared to apply in the particular circumstances of that case. A factual presumption is to be distinguished from a presumption of law (which may be rebuttable or irrebuttable) depending upon its nature and legal characterisation. The basic difference between presumptions of fact and law is the source from which they are derived. Presumptions of law are derived from the law (for example from statute) whereas presumptions of fact are derived from logic and common sense …
>
> [46] With respect to factual presumptions, both the judgments of Willmer and Edmund Davies LJJ in *Seldon* make it clear that it is not in every case that the factual presumption (which they found could apply from a payment of money) would be held to apply. In fact, the circumstances in the 19th century cases of *Cary* and *Welch* were examples in which the presumption did not apply. The principle that the English Court of Appeal was endorsing in *Seldon* was that the presumption might not apply in circumstances where the payment was made in settlement of an existing debt, or was given in return for cash or something of that nature. Such an approach is consistent with the notion that, in the case of factual presumptions, the Court may or may not decide to apply them depending upon the particular circumstances of the case: see *Cross & Tapper on Evidence* (9ed 1999) at 113-114.

85 In the context of a claimant such as the present Plaintiff who must prove first that he paid the defendant money and secondly that there is an obligation on the defendant's part to repay the money, *Seldon* enables him to submit to the court that once he proves payment in the absence of circumstances justifying a presumption of advancement, a presumption arises of the obligation to repay. Assuming this factual presumption applies, the evidential burden then shifts to the defendant who must either call evidence to prevent the claimant from discharging his legal burden of proof or take the consequences. If the Defendant

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[85] 3 DBOA Tab 40.

is able to discharge this evidential burden, the evidential burden of proof shifts back to the Plaintiff to satisfy the court that the money is repayable. In this respect, therefore, the Plaintiff's reading of *Seldon*[86] was in my view correct. Conversely, the Defendant was incorrect in submitting that *Seldon* was "plainly inconsistent with section 103 of the [EA]" and with "common law" rules on the "burden of proof on the party making an affirmative claim".[87] With respect, this submission was premised on a failure to appreciate the distinction between legal and evidential burdens of proof and/or the nature of the presumption which the English Court of Appeal in *Seldon* was espousing.

86 In a situation where there is no direct evidence available, the court - in assessing whether the plaintiff has adduced enough evidence to make out his case on a balance of probabilities – will need to draw inferences from the available indirect evidence. Faced with a situation where one party advances money to another with no discernible explanation for the payment of money (such as a legal obligation to pay under a contract or a factual explanation that the money was a gift to a family member), the natural inference that the court is entitled to draw is that the sum of money was advanced as a loan which would be repaid. Indeed, this is how rational parties who deal at arm's length typically behave – they do not give away money for no reason. Seen in this light, it is entirely explicable why it should fall to the defendant to raise plausible explanations for why the plaintiff may have advanced him the money once the plaintiff has established that (i) the money was advanced and (ii) on the face of it, there was no good reason why the money was advanced. This also accords with Edmund Davis LJ's statement that the ultimate question in principle is

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86 See [130] of Plaintiff's Closing Submissions.

87 See [80] to [86] of Defendant's Closing Submissions.

"what is *to be inferred* as to the nature of the transaction when the simple payment of money is proved or admitted between strangers" [emphasis added] (at 1090F–G).

87 Another argument raised by the Defendant in claiming *Seldon* was wrongly decided was the related point that the English Court of Appeal had wrongly treated the defence in *Seldon* as being one of a plea of confession and avoidance – and that this error had led it to impose the legal burden of proof on the defendant. For the reasons explained at [83] to [86] above, I rejected this argument.

88 Yet another argument raised by the Defendant related to its contention that the judges in *Seldon* had erroneously "relied on resulting trust analysis to justify the presumption that the monies paid were repayable on demand".[88] In particular, the Defendant cited the judgment of Mason NPJ – delivering the majority decision of the Hong Kong Court of Final Appeal in *Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd & anor* [2015] 6 HKC 527[89] ("*Big Island*") – at [91] to [98]. *Inter alia*, Mason NPJ had opined that "the imposition of a resulting trust was designed evidently [by the appellate court in *Seldon*] to justify an order for the repayment of the money paid on the footing that it was a loan" (at [91]).

89 With respect, the above observation was not quite accurate. The decision reached by the Court of Appeal in *Seldon* did not in fact involve "the imposition of a resulting trust … to justify an order for the repayment of the money paid on the footing that it was a loan". No such order was made. On the facts available,

88 See [91] to [92] of Defendant's Closing Submissions.

89 1DBOA Tab 3.

the Court of Appeal simply decided it was not wrong for the trial to proceed on the basis that it was for the defendant to call evidence of his assertion of a gift. There was no finding by the court that a resulting trust had arisen on the facts. Nor did it appear that the two judges who delivered judgments were unaware that the plaintiff "did not claim that there was a resulting trust" in the house purchased by the defendant (as Mason NPJ noted at [91]): both judges expressly referred to the plaintiff seeking recovery of the money she had paid the defendant (see for example *Seldon* at 1087A–B and 1090B–C). Reading their judgments in context, it appeared to me that the references to a resulting trust of the house meant no more than this: if *Seldon* had been a case where the plaintiff was laying claim to an interest in the house, then it being admitted that the purchase money came from her and that the circumstances did not justify a presumption of advancement, a presumption of resulting trust in the house would have arisen which the defendant would have had to call evidence to rebut. Instead of claiming an interest in the house, however, the plaintiff had claimed recovery of the money paid. In such circumstances, bearing in mind the fact that a court would have been ready to presume a resulting trust in the house had she claimed an interest in it, the court should be ready to presume that the payment of the money imported a *prima facie* obligation to repay.

90 The above reasoning would explain Willmer LJ's remark that this was "not a case of father and child, or husband and wife, or any other such blood relationship which could have given rise to a presumption of advancement". Mr Sears (the defendant's counsel) was (at 1088B–D, see also Edmund Davies LJ's decision at 1089H–1090A):

> constrained to admit that the house which had been bought with the aid of the money paid by the plaintiff was no doubt prima facie subject to a resulting trust in favour of the plaintiff. *That being so, it would be strange indeed if the same*

> *considerations did not apply to the money paid by the plaintiff to the defendant to assist him in the purchase of the house* [emphasis added].

This would also explain why the English Court of Appeal has in a subsequent case stated that *Seldon* was *not* a "trust case" but that it was "none the less instructive": *Patel v Mirza* [2014] EWCA Civ 1046[90] ("*Patel v Mirza*") at [90].

91 I would respectfully add that insofar as it was suggested in *Big Island* that "the proposition … that the payment of money *prima facie* imported an obligation to repay" should be confined "so that it has no application at all to commercial transactions" (at [99]), I did not see any sound logical or policy reason to adopt such an approach. *Seldon* has certainly been applied by other courts in cases involving commercial transactions. One example from English case law is *Re a company, ex parte Shooter; Re a company, ex parte Broadhurst and others (No 2)* [1991] BCLC 267 ("*Re a company*"). In that case, Harman J was conducting an inquiry – in the context of minority oppression proceedings – into the status and quantum of payments made to a football club (the company) by one K (the chairman and controlling shareholder of the company) and a company called CIP which K controlled. In finding that certain amounts were due by the company to K and CIP, Harman J considered the decision in *Seldon* and held (at 283*g*–*i* and 284*a*–*b*):

> I accept that the law is as Edmund Davies LJ put it, '… when the simple payment of money is proved or admitted between strangers … proof of payment imparts a prima facie obligation to repay …' It seems to me that ruling must apply with additional force to payments by a limited company established for trading purpose to another limited company …
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> From that proposition it was submitted that unless there were clear evidence that a payment to a company was a gift, referred

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90 2PBOA Tab 24.

> to in argument as a donation which is merely a longer word for the same thing, the mere fact that [K] was the chairman of the company and so perhaps likely to wish it well did not establish that his payments were gifts. I accept that second proposition and have tried to apply it to all payments by [K] to the company.

92 Another example of an application of *Seldon* in a case involving commercial transactions is the New Zealand case of *Barring Horticulture New Zealand Ltd (in liq) v Barring & Anor* [2016] NZHC 304, where the New Zealand High Court held at [28] that:

> the principle applicable to shareholder/director current accounts that advances made without consideration, in the absence of evidence otherwise, are repayable on demand, must apply equally to advances to related entities. The case law relating to shareholder/director current accounts is a specific example of a more general principle espoused in *Seldon v Davidson*.

As the New Zealand High Court in *Zheng v Qiu* has pointed out at [44] and [46]:

> [44] the Court of Appeal in *Seldon* was speaking about a factual presumption that it was prepared to apply in the particular circumstances of that case …
>
> …
>
> [46] … [B]oth the judgments of Willmer and Edmund Davies LJJ in *Seldon* make it clear that it is not in every case that the factual presumption (which they found could apply from a payment of money) would be held to apply.

There is no need to confine a factual presumption such as that set out in *Seldon* to "non-commercial" cases, or indeed to any pre-defined category of cases. After all, as Denning J put it in *Presumptions and Burdens,* the force of factual presumptions "depends on ordinary good sense rather than on law. They are only guides to the Court in deciding whether to infer the fact in issue or not".

93 I would also add that whilst in *SCT Technologies*, our Court of Appeal did not comment on *Seldon* when it examined the decision in *Big Island*, this

was unsurprising given that the respondent in the appeal before it had from the outset pleaded full repayment of the debt claimed and thus put the legal burden on itself of proving such repayment. What is perhaps interesting, even telling, is that having examined *Big Island*, the Court of Appeal held at [27] that:

> [w]hat *Big Island* demonstrates is that, if the Respondent in this case [*ie*, in *SCT Technologies*] had simply run its defence on the basis that the debt disclosed by the three invoices did not exist, then the burden would have been squarely on the Appellant to prove that the debt did exist.

Whilst Mason NPJ had in *Big Island* "described the creditor in such a situation as also carrying the burden of proving the debtor's 'failure to repay'", the Court of Appeal clarified that it understood him as simply saying "that the creditor in these circumstances must prove that his claim is premised on a subsisting debt in order to make good his case": the court did:

> not read this part of the judgment in *Big Island* as suggesting that the creditor must conclusively show a lack of repayment on the part of the debtor for that would essentially place on him (*ie*, the creditor) the all too onerous burden of proving a negative

(*SCT Technologies* at [27]).

94 Following from the last observation, there would seem to be nothing in our case law to suggest our courts have rejected or would be inclined to reject *Seldon*. Indeed, whilst it may be true that *Seldon* has not been cited as the *ratio decidendi* in a Singapore case, there are both High Court and Court of Appeal decisions which refer to *Seldon*. Far from disagreeing with the court's reasoning in *Seldon*, our courts have either implicitly accepted that reasoning or distinguished *Seldon* on the facts without doubting the correctness of the English court's decision.

95 In *Wee Kah Lee v Silverdale Investment Pte Ltd* [2000] 2 SLR(R) 838[91] ("*Wee Kah Lee*"), the plaintiff and several other persons were shareholders in the defendant company. The defendant was the developer of a residential property. Each shareholder had contributed to the defendant's paid-up capital and advanced loans to the defendant for the purchase of the land, development expenses and payment of interest on bank loans. The plaintiff sued the defendant for the recovery of the sums he had advanced to it, claiming that these were loans repayable on demand. The fact that the advances were loans was not disputed: the question before the court was whether there should be an implied term in respect of when the loans were repayable. Tay Yong Kwang JC (as he then was) held that in order to give business efficacy to the property development project, and applying the test of necessity, there should be an implied term that the loans would be repaid only after all moneys due to the defendant had been received and all creditors had been paid their dues. Tay JC cited *Seldon* as an authority for this proposition. It is pertinent to note that in so doing, he expressly acknowledged the principle stated in that case that "[i]n ordinary circumstances, payment of money imports a *prima facie* obligation to repay the money in the absence of circumstances from which a presumption of advancement can or may arise" (at [42]).

96 In *Lai Meng v Harjantho Johnny* [1999] 2 SLR(R) 738[92] ("*Lai Meng*"), the appellant was a general manager in a company incorporated by the respondent and his wife. The appellant was entitled to a share of the company's profits as part of his remuneration. Subsequently, when the appellant's friends Koh and Neo invested in the company, the appellant was allotted 40,000 shares.

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91 2PBOA Tab 35.

92 2DBOA Tab 22.

The respondent sued the appellant for the repayment of a loan of S$40,000 allegedly provided to the appellant to pay for his shares. The appellant contended that he had given up his profit-sharing arrangement with the company on the basis that it would be replaced by the allotment of the 40,000 shares; and that he did not know whether the respondent and Koh had paid for those shares or whether Koh alone had paid for the shares. The district judge dismissed the respondent's appeal but he appealed successfully to the High Court. The appellant then appealed to the Court of Appeal which allowed his appeal. The Court of Appeal noted that the district judge had accepted the appellant's assertion about giving up his profit sharing arrangement with the company on the understanding that it was to be replaced by the allotment of 40,000 shares in the company; and that the district judge had also found that the appellant would not have accepted this arrangement if he had been required to pay for the shares. The Court of Appeal also noted that the appellant's defence showed that he denied the existence of a loan and asserted that he was not required to pay for the shares. It followed that it was "open to the district judge to find that the appellant had not taken a loan from the respondent even though Koh had not paid for the shares" (*Lai Meng* at [13]). In coming to this conclusion, the Court of Appeal held that this case was clearly distinguishable from *Seldon* whilst clearly – if implicitly – accepting the principles stated in that case. The court explained as follows (at [15]–[16]):

> 15 [In *Seldon*], Willmer LJ explained … that his decision was premised on the fact that there had been a clear admission of the payment of the money, and 'no suggestion that it was paid in settlement of an existing debt, or that it was given in return for cash, or anything of that sort'. In the absence of such circumstances, money paid by the plaintiff in circumstances such as these is *prima facie* repayable on demand. As such, if the defendant wanted to evade repayment of the money which was paid to him, the trial judge was right in placing the onus upon him to prove that the money was not repayable …

> 16 Unlike the defendant in *Seldon v Davidson*, the appellant in the present case denied that he had received any money from the respondent in the form of a loan. He has proven that he took the 40,000 shares in exchange for his right to a share of the company's profits. Thus, although the respondent used his own money to pay for the appellant's 40,000 shares, it did not follow that the money had been loaned by the respondent to the appellant to enable the appellant to purchase the 40,000 shares in question …

The fact that our appellate court took pains to distinguish *Seldon* on the facts clearly indicated its implicit acceptance of the correctness and validity of the decision in that case.

97 The proposition highlighted above in Willmer LJ's decision in *Seldon* has also been reproduced in *Specific Contracts* at para 6.2.13. The same text cited both *Wee Kah Lee* and *Lai Meng* as Singapore cases in which *Seldon* had been referred to.[93]

98 I make two final points regarding *Seldon*. The first concerns whether *Seldon* may be regarded as "representing English law" – which proposition the Defendant demurs. In so demurring, the Defendant has had to concede that in the last 50 years since the decision in *Seldon*, it has been consistently cited as an authority by the English courts.[94] Apart from *Patel v Mirza*, another example of a recent case is *Chapman v Jaume* [2012] EWCA Civ 476,[95] in which the English Court of Appeal had to deal with a dispute between two co-habitants. One of them (Mr Chapman) had moved into the home of the other (Mrs Jaume) and had paid for building works on the home. Subsequently, their relationship ended, and Mr Chapman brought a claim for repayment of the payments made for the

93 See footnotes 35 and 36 to para 6.2.13.

94 See [71] of Defendant's Closing Submissions.

95 2DBOA Tab 8.

building works. The first instance judge rejected his claim. On appeal, his counsel cited *Seldon* to the Court of Appeal; specifically, the passages from the judgments of Willmer and Edmund Davies LJJ reproduced above at [81]–[82]. The Court of Appeal remarked that it was unfortunate that the attention of the first instance judge had not been drawn to *Seldon* (at [23]). Noting that there was authority that no presumption of advancement existed between co-habitants, the Court of Appeal went on to apply the reasoning in *Seldon* and concluded that "on the facts found by the judge, he ought to have drawn the inference that the money was repayable within a reasonable time after demand" (at [25])

99 Having examined the English cases mentioned by the Defendant in its closing submissions, I rejected the Defendant's statement that "none of the cases … had critically reviewed [*Seldon*]". If by that statement the Defendant meant that the courts in these cases had blindly cited *Seldon* without considering the import of the decision, that statement was both sweeping and baseless. If on the other hand, all that the Defendant meant was that none of these cases had expressed criticism of *Seldon*, that statement *per se* did nothing to advance its case.

100 Having regard to the English cases in which *Seldon* has been applied, I also did not think it credible for the Defendant to argue against its application on the basis that the UK Supreme Court has yet to rule on it.[96]. Until such time as the UK Supreme Court might express a different view, the proposition in *Seldon* – that "proof of payment imports a prima facie obligation to repay the advancement in the absence of circumstances from which presumption of

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[96] See [72] of Defendant's Closing Submissions.

advancement can or may arise" – certainly represents the current position in English law.

101 The second and final point I make regarding *Seldon* concerns the line of Australian cases which the Defendant referred to (but did not elucidate) in which *Seldon* was not followed.[97] As the Defendant itself has observed, the courts in these cases rejected *Seldon* on the basis that they were bound by the decision of the High Court of Australia in *Heydon v The Perpetual Executors, Trustees and Agency Co (W.A.) Ltd* [1930] 45 CLR 111[98] ("*Heydon*"). In this regard, it should be observed that *Heydon* was decided before *Seldon*, and that the High Court's judgment is a brief one. In *Heydon*, the plaintiff brought a claim – as the executor of the estate of one Bessie Albo de Bernales – for the recovery of a sum of £150 from the defendant on the basis that this sum had been a loan by the deceased, or alternatively, on the basis of money had and received. The defendant admitted receiving the deceased's cheque for £150 but alleged that the money was a gift. On appeal, the High Court held (at 113) that the plaintiff bore "the burden of proving the facts in support of either one or other cause of action set out in the statement of claim". Insofar as this appeared to be a reference to the legal burden of proof, and having regard to the views I expressed above (at [80]–[99]) on how *Seldon* may be understood, I did not think the High Court's decision in *Heydon* was in any way contrary to the reasoning adopted in *Seldon*. Insofar as the evidential burden was concerned, it may be noted that the defendant had given evidence of her friendship with the deceased and of the deceased's intention to make her a gift of the £150. The High Court recorded that the plaintiff conceded he had "no further evidence to offer now than he had then" (at 113), before going

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97 See [74] of Defendant's Closing Submissions.

98 2DBOA Tab 16.

on to state that the "evidence thus given did not satisfy any of the Judges that in fact any case had been made out, or that the money had been lent, and it does not satisfy us either that any of the allegations made in the statement of claim are correct."

102 In the circumstances, it appeared to me that all the High Court in *Heydon* was saying was that the legal burden of proof did not shift from the plaintiff; and the defendant having given some evidence of her allegation about a gift to which the plaintiff had no further evidence in response, the evidential burden to give some explanation of the fact that she received the money would have been discharged. Since the plaintiff did not have any further evidence to contradict the defendant's explanation, the legal burden, which had always remained on the plaintiff, was not discharged. Thus, insofar as the Australian cases that the Defendant cited had declined to follow *Seldon* on the basis of *Heydon*, I would respectfully differ from the analysis in those cases. For the reasons set out above, I was of the view that the decision of the High Court of Australia in *Heydon* only dealt with the issue of the legal burden, not the evidential burden; and to that extent it could be read consistently with *Seldon*.

103 I summarise the applicable legal principles as follows:

(a) A loan is in essence a payment of money to or for someone on the condition that it will be repaid.

(b) Accordingly, the Plaintiff must prove first that it paid the Defendant money; and secondly that there is an obligation on the Defendant's part to repay the money.

(c) The English authority of *Seldon* is applicable in Singapore law.

(d) *Seldon* does not alter the general principles on legal burden of proof which are encapsulated in ss 103 to 105 of our EA. Instead, *Seldon* enables the Plaintiff to submit that once he proves payment in the absence of circumstances justifying a presumption of advancement or any other plausible explanation as to why the sum of money was advanced, the court is entitled to infer that the sum of money was meant to be repaid and thus a presumption arises of the obligation to repay. The question really is whether in each case there is something in the circumstances surrounding the payment of money that would disentitle the plaintiff from asking the court to infer that an obligation to repay can be inferred from the payment of money. It is a factual question to be evaluated on a case-by-case basis. Assuming the factual presumption applies, the evidential burden shifts to the Defendant. If the Defendant is able to discharge this evidential burden, the evidential burden of proof shifts back to the Plaintiff to satisfy the court that the money is repayable. If no evidence in rebuttal is adduced by the Defendant, it may be concluded from the Plaintiff's evidence that the legal burden is also discharged and a finding against the Defendant may be made on the issue of its obligation to repay.

104 Having set out the applicable legal principles, I turn now to explain how these principles applied to the facts of the present case.

Application to the facts

105 The Defendant s arguments in rebuttal of the Plaintiff's case on the loan claims fell into two main categories. First, the Defendant focused on criticising

the evidence adduced by the Plaintiff. The upshot of these criticisms appeared to be that the Plaintiff could not invoke the presumption of fact in *Seldon* because the Plaintiff could not rely on the evidence which showed that the transfers had been made. Second, the Defendant referred to some other documents which, in its submission, showed that the transfers of the sums of money were for reasons other than loans. This second set of arguments appeared to go towards the submission that even if the presumption of fact in *Seldon* applied and the evidential burden shifted to the Defendant, the burden was discharged. I address each of these categories of criticisms in turn.

The Defendant's criticism of the quality of the Plaintiff's evidence

106 In its amended Defence the Defendant had put the Plaintiff to strict proof of the relevant transfers of monies on which the loan claims were premised. In its closing submissions, however, the Defendant conceded that "there is evidence of the Alleged Transfers".[99] Notwithstanding this concession, the Defendant argued that the Plaintiff could not rely on its own accounts as evidence, nor could it rely on the Defendant's accounts as evidence because the Defendant was an affiliate of the Plaintiff. The Defendant thus appeared to be arguing that although these accounts showed that the transfers had been made, the Plaintiff could not rely on either set of accounts and thus the Plaintiff had failed to establish that the transfers of money had been carried out.

107 I rejected these submissions for the reasons that follow.

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[99] See [26] of Defendant's Closing Submissions.

(1) Whether the Plaintiff could rely on its own accounts as evidence

108 First, the Defendant argued that s 34 of the EA precluded the Plaintiff from relying "exclusively" on its own accounts to establish the Defendant's liability for the claimed loans. This proposition did not take the Defendant's case very far, since the Plaintiff did not dispute it as a general statement of principle. Instead, the Plaintiff asserted that its case was supported not just by its own accounts but by other documentary evidence including the Defendant's audited financial statements and documents relating to the Wuxi restructuring exercise. In this respect, therefore, the present case was clearly distinguishable on the facts from the cases cited by the Defendant.

109 In *Chandradhar v Gauhati Bank* 1967 AIR 1058[100] ("*Chandradhar*"), for example, where the respondents (a bank) sued the appellants for the recovery of monies allegedly advanced to them, one of the main questions raised in the High Court was whether a sum of Rs 10,000 was proved to have been advanced to the appellants on 19 March 1947. The appellants denied any such advance, and the main appellant – in whose name the bank account was – gave testimony. The respondents did not produce any evidence of it other than a copy of an entry in their account books which simply stated: "To amount paid to Gauhati branch as per D/advice, dated 6th March 1947". The appellants disputed that the advance had been proved and cited s 34 of the Indian Evidence Act (which is *in pari materia* with our s 34). In hearing the appellant's appeal against the judgment given by the High Court, the Indian Supreme Court held that in light of the appellants' pleadings and the main appellant's testimony (at 1968):

> … the bank had to prove that the sum of Rs. 10,000 was in fact advanced on March 19, 1947, and could not rely on mere entries

[100] 2DBOA Tab 7.

> in the books of accounts for that purpose. This is clear from the provision in s. 34 of the Evidence Act … Section 34 says that such entry alone shall not be sufficient evidence, and so some independent evidence had to be given by the bank to show that this sum was advanced.

110 The court noted that the bank had merely produced the single entry in the account books; and that the only witness called on behalf of the bank was an officer who had nothing to do with the branch where the transactions had been entered into. In the court's view:

> [i]f this amount of Rs. 10,000 was paid by the bank on the order of the appellants or any one of them that order should have been produced in support of the entry, and then the entry would have been helpful to the bank as a corroborative piece of evidence. But the bank did nothing of the kind.

Having regard to s 34 of the EA, therefore, the appellants could not be charged with liability for the sum of Rs 10,000.

111 From the above, it is clear that the evidence relied on by the respondents in *Chandradhar* was so sparse as to be non-existent. This was certainly not the position the present Plaintiff found itself in.

112 Also clearly distinguishable on the facts was the Singapore case of *Re Ice-Mack Pte Ltd (in liquidation)* [1989] 2 SLR(R) 283 ("*Re Ice-Mack*"). In this case, the applicant company – AA Valibhoy & Sons (1907) Pte Ltd – filed a proof of debt against Ice-Mack Pte Ltd ("the company") which was in liquidation. The applicant and the company were associate companies as they were both managed by one Mr Mohd Yunus Valibhoy who was a director of both companies and held a "dominant position" in both.

113 On the applicant's appeal against the liquidator's rejection of its proof of debt for a sum of S$2,428,418.49, the High Court noted that the applicant had

presented its case "in a series of bits and pieces", and that its case "depended almost entirely on the acceptance of the evidence of its accountants and its own audited accounts, which it allowed to surface at need" (at [20]). In gist, the evidence offered by the applicant to substantiate its claims comprised – apart from its own audited accounts – pages extracted from its own ledgers, an isolated certificate from its own accountants, and an audit confirmation signed by Mr Valibhoy himself. Despite the liquidator repeatedly requesting documentary evidence of the alleged debt (such as "credit and debit notes, the vouchers and receipts, and other documentary evidence"), such evidence was not forthcoming (at [21]). The court also noted that in exhibiting extracts from its own audited accounts, the applicant had gotten itself into "an unenviable position" whereby it appeared that "as at 31 December 1982, just before it was wound up on 11 March 1983, the company did not owe any money to the applicant at all"; that in fact, the audited accounts as at end 1982 appeared to show Mr Valibhoy himself owing the applicant S$2,538,190.19; and that it appeared the applicant had then found it "necessary" to "reconstruct its claim against the company" (at [9]). This it sought to do by producing the certificate from its accounts which purported to "confirm" that a sum of S$2,428,418.49 owing from the company to the applicant had been "transferred to the account of [Mr Valibhoy]"; and it was then alleged by Mr Valibhoy that he had agreed with the applicant that despite the "transfer" of the S$2,428,418.49 debt to him, the applicant would claim the said sum from the liquidator and account to him for the same (at [8]–[9]). However, as the court pointed out in its judgment, "no evidence at all was produced to substantiate this averment of an important agreement" (at [10]). It was in this context that the High Court made the following remarks:

> Given the close relationship between these two associate companies, the dominant position in them of Mr Valibhoy and his family, the paradoxical situation in this case in which the person now filing all the affidavits on behalf of the applicant was

> the same person who controlled and managed the company before it was wound up, and the great ease with which inter-company transactions between the companies were clearly devised and implemented, it was necessary at the very least to put the applicant to strict proof of its assertions.

114 To quote the Court of Appeal in the subsequent case of *Fustar* at [15] (*supra* [53]), *Re Ice-Mack* was a case where:

> It appeared to the court that Mr Valibhoy was attempting to secure a claim at the expense of other legitimate creditors. Given the absence of any primary supporting documents, the presence of worrying discrepancies in the creditors' own audited accounts and Mr Valibhoy's own contradictory explanations, the court unhesitatingly rejected the proof of debt.

The facts of *Re Ice-Mack* were thus very far from those of the present case.

115 In *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360[101] ("*Popular Industries*"), the plaintiffs claimed that the defendants had failed to deliver goods allegedly contracted for and that they were entitled to loss of profit resulting from the non-delivery. The plaintiff sought to prove the alleged loss of profit by relying on the oral testimony of their auditor and a sheet of calculations he produced. It was not disputed that the auditor's testimony and his sheet of calculations were based on the plaintiff's account books – but strangely, these accounts were never produced in evidence. Edgar Joseph Jr J found this a "glaring omission" and held the auditor's oral evidence as well as the sheet of calculations inadmissible as a result.

116 In the present case, the Defendant has cited Edgar Joseph Jr J's further remarks to the effect that even had the plaintiffs' accounts been produced in evidence, they:

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[101] 1DBOA Tab 5.

> … could not by themselves have been sufficient to charge the defendants with liability having regard to the provisions of s 34 of the Evidence Act so that the entries themselves would have had to be proved by someone having personal knowledge of the transactions reflected in such entries. The accountant and auditor Mr So, despite what he might say, was not such a person as he, like any accountant, would of necessity have to rely upon information derived from documentary sources and explanations provided by his clients when preparing the accounts.

117 It would be neither appropriate nor helpful, however, merely to refer to these remarks in isolation from the facts of *Popular Industries*. The auditor (Mr So) in *Popular Industries* was the sole witness giving evidence to prove the plaintiffs' claim for loss of profits. In so doing, he purported to testify as to the plaintiffs' sales performance, overhead expenses and profit margins over a five-year period. These were transactions which the defendants had no part in and were not privy to. Indeed, Mr So admitted that all his figures were simply derived from the plaintiffs' own account books and were not corroborated by any other evidence before the court. In those circumstances, it was hardly surprising that Edgar Joseph Jr J should have rejected his assertion that "the plaintiffs would have realized the profits shown" in his sheet of calculations had they received the contracted goods. As the learned judge put it (quoting Wadegaonkar J in *Beni v Bisan Dayal & Anor* AIR (1925) Nag 445):

> [m]ere entries in books of account are not by themselves sufficient to charge any person with liability (vide s 34 of the Evidence Act). The reason is that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of third parties.

118 In contrast, in the present case the fund transfers for the claimed loans were not only evidenced by supporting documents such as credit and debit notes, instructions to banks and the like, and recorded in the Plaintiff's own accounts as receivables due from the Defendant; they were also recorded in the

Defendant's accounts as liabilities owed to the Plaintiff. In addition, as seen from Jong's evidence (summarised earlier at [24] to [32]), the purposes for which the Plaintiff said the fund transfers were made all related to payments which the Defendant had to make – payments relating to investment in a mining project, to enable a shareholder loan to an indirect subsidiary, to finance the purchase of shares – and these corresponding pay-outs were also recorded in the Defendant's accounts.[102]

119 The Defendant argued that the Plaintiff should not be permitted to rely on the evidence of the entries in the Defendant's accounts. For one, it was alleged that no "granular breakdown" had been provided of the total debt amount of either US$288,602,584 shown in the Defendant's last available set of audited financial statements as at 31 December 2011, or of the US$288,604,546.63 shown in the Defendant's reporting package as at 28 February 2014.

120 I did not think this allegation was accurate. As the Plaintiff has pointed out, the sub-ledger in the Defendant's reporting package for the period up to 28 February 2014 recorded each transaction entered into by the Defendant in its lifetime.[103] The figures for the individual transactions – when summed up – tallied with the total indebtedness to the Plaintiff shown in the Defendant's audited financial statements and in the Plaintiff's own accounts.

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102 See the Defendant's reporting package for the period up to 28 Feb 2014, pp 168–182 of the Plaintiff's Supplemental Bundle of Documents ("2PBD"), especially pp 169 and 174.

103 See pp 168–182 2PBD.

(2) Whether the Plaintiff could rely on the Defendant's accounts as evidence

121 Next, the Defendant argued that the Plaintiff should not be permitted to rely on the Defendant's accounts because "a claimant cannot rely on its affiliate's account books as corroborative evidence to prove a debt owing as between them". According to the Defendant, insofar as the main source of the information in the Plaintiff's and the Defendant's accounts were concerned, Dr Shi was the common thread, which meant that the Defendant's accounts could not serve as independent corroborative evidence for the Plaintiff's claims.[104] The Defendant cited *SIC College of Business and Technology Pte Ltd v Yeo Poh Siah and others* [2016] 2 SLR 118[105] ("*SIC College*") as authority for this proposition.

122 First, insofar as the Defendant was suggesting that *SIC College* had established a general principle barring a corporate plaintiff from relying on the accounts of a related entity as evidence of a debt owing between them, this was clearly an inaccurate over-statement. In *SIC College*, the respondents – Ken Yeo, Koo and Chua – were three former employees of the appellant. The appellant sued the respondents claiming that they were parties to a scheme to enrich a company they had set up at the appellant's expense. Nearly a year after the writ was first filed, Ken Yeo brought a counterclaim against the appellant allegedly arising from 18 advances made to the appellant on a running account basis. The appellant denied that there had been any such advances and instead alleged that Ken Yeo had used the accounting books to create fictitious entries. At the trial of the counterclaim, the key piece of evidence relied on by Ken Yeo was a print-

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104 See [56] to [58] of the Defendant's Closing Submissions.

105 2DBOA Tab 30.

out from the appellant's system, which purported to list the alleged 18 transactions on a running account basis. The appellant challenged the evidence of the print-out. The trial judge eventually allowed Ken Yeo's counterclaim after excluding several transactions. In allowing the appeal and ordering a retrial, the Court of Appeal made the following observations:

> 52 The Appellant contends that the *key* piece of evidence relied upon by the Judge was the Printout. The Printout had been extracted from the Appellant's system and provided by Koo, but Koo was not called to give evidence, and the admissibility of this piece of evidence was challenged on the basis of hearsay. While the Printout was *prima facie* admissible under s 32(1)(*b*) of the Evidence Act as a statement made in the course of trade, business, profession or other occupation, the court is nevertheless required to properly consider the discretion to exclude such evidence under s 32(3). This involves a balancing exercise involving weighing the significance of the evidence against its unreliability or other harm which might compromise fair adjudication (with the effect of being substantively unjust or procedural oppressive) …
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> 54 … [T]he Judge found that even though Ken Yeo was not the person who made the entries, he was the supplier of the information on the transactions, which were (partly) substantiated by bank statements … However, the Printout was relied on to *corroborate* or *prove* Ken Yeo's assertions, which was that the moneys were transferred on a certain basis … One of the reasons why Koo should have been called in the first place is to examine the veracity of *facts found within* the Printout …
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> 55 While it was ultimately within the scope of the Judge's discretion to admit the evidence, the admission of the Printout was not in itself sufficient, without other evidence, to prove a *debt* because s 34 of the Evidence Act states that such statements 'shall not alone be sufficient evidence to charge any person with liability'. The obvious danger of relying on account book entries is even greater if the claimant or one of his affiliates was the one who was making the records. This danger remains even if accountants had given an unqualified opinion on the previous consolidated accounts that formed the basis for the first transaction on the ledger.
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> [emphasis in original]

123 It is plain from the above extract that the Court of Appeal did not lay down any general principle barring a corporate plaintiff from relying on the accounts of a related entity to show a debt owing between them. Instead, the court was concerned with highlighting the "obvious danger" of a claimant in a case relying on records that he himself – or someone affiliated to him – had made in order to prove his claim. This is practical good sense. Whether in any case the "danger" of allowing a claimant to adduce accounting entries he (or his "affiliate") has made as evidence of his claim is so great as to render that evidence "unreliable" – or to "compromise fair adjudication" – is a question that can only be answered on a case-by-case basis. It should be noted that in the same passage in which it made these remarks, the Court of Appeal also stated that it was within the scope of the trial judge's discretion to admit the evidence of the print-out. The court went on to hold that whilst there was "some merit" to the appellant's arguments, "taking the evidence that was considered by the Judge in *isolation*" [emphasis in original], it was "unable to say that Ken Yeo ha[d] failed to discharge his burden of proof on the counterclaim" (at [57]).

124 In any event, the Defendant's argument ignored a number of important factual differences between *SIC College* and the present case. Based on the facts in *SIC College*, there was basis for the court to conclude that Koo (who had prepared the print-out) was someone "affiliated" with Ken Yeo: in particular, together with Chua, they had filed a common defence to the appellant's claims against them (at [14] and [16]). In contrast, in the present case, there was no evidence to suggest that David King – who had, as financial controller of the Suntech Power group, overseen the preparation of the accounts by the group's accounting department in Wuxi – was in some way "affiliated" with Dr Shi and/or that he was somehow "not independent" of Dr Shi. Even more importantly, the Defendant's argument ignored the fact that in *SIC College*, the

person who had supplied the information on the transactions in the print-out (Ken Yeo) was the very person whose claim the print-out was intended to prove (Ken Yeo). This was clearly not the case before me, where the person alleged to have been the main source of the information in the Defendant's accounts (Dr Shi) was not the person putting forward the claims which these accounts were said to provide corroborative evidence of (the Plaintiff in liquidation).

125 I also noted that the Defendant made the rather sweeping submission that documents emanating from the Wuxi restructuring should not be regarded as independent corroborative evidence but failed to explain why this was so apart from making the bald statement that the documents had been signed by Dr Shi and David King when they "were the Plaintiff's officer holders".[106] Having regard to my findings at [119]–[124] above, I did not see how this fact in itself could render the Wuxi restructuring documents so unreliable that reliance on them would compromise fair adjudication.

126 In considering the evidential value of the Wuxi restructuring documents, I did bear in mind the fact that they referred to the Defendant's total indebtedness to the Plaintiff and did not go into a detailed breakdown of the individual transactions which made up the total debt figure. It must be remembered, however, that the Liquidators arrived at the Defendant's total indebtedness *vis-à-vis* the Plaintiff after a comprehensive examination and summation of individual transactions.[107] That the total debt figure they arrived at tallies with the figures in the Defendant's accounts *and* the Wuxi restructuring documents

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106 [58] of the Defendant's Closing Submissions.

107 See *eg*, [36] to [88] of Jong's AEIC.

demonstrates a certain degree of consistency which went towards assisting the Plaintiff to shift the evidential burden to the Defendant.

127 I should add that whilst the Defendant accused the Liquidators of trying to "reverse engineer the figures",[108] this allegation was not borne out. The Defendant's only argument in this respect appeared to be based on the fact that the Liquidators' summation of the individual transactions tallied with the total debt figures shown in the Defendant's accounts and the Wuxi restructuring documents. This amounted really to a circular argument which – if accepted – would have placed the Liquidators in an impossible "Catch-22" position. If their summation of the individual transactions had not resulted in a total debt figure matching the total indebtedness in the Defendant's accounts and/or the Wuxi restructuring documents, no doubt the Defendants would have said that such discrepancy showed the Liquidators' computations to be arbitrary and baseless – and yet perversely, when the summation of the individual liabilities tallied exactly with the total debt shown in the other documents, such consistency was denounced as being indicative of "reverse engineering". Moreover, insofar as the Defendant appeared to be insinuating some sleight of hand on the Liquidators' part, this was entirely unwarranted. As seen from Jong's evidence (summarised earlier at [24] to [32]), each individual transaction making up the Defendant's total indebtedness to the Plaintiff was evidenced not only by entries in the parties' accounts but also by other documentary evidence such as payment applications, instructions to banks, bank credit/debit notes, and (where applicable) contractual documents and bills. The Liquidators' computations have been carefully explained on affidavit; and I did not find their explanations at all contrived.

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[108] [48] of the Defendant's Closing Submissions.

128 The Defendant also argued that in any event, insofar as proving the four loan claims was concerned, the Plaintiff must be barred from referring to evidence of any fund transfers or individual transactions or liabilities other than the four loan claims *per se*. According to the Defendant, evidence of all other transactions apart from the four loan claims was "inadmissible" because "none of [the other transactions] were pleaded";[109] and a party could not lead evidence on matters which had not been pleaded.

129 The Defendant cited *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd and others* [1992] 2 SLR(R) 382[110] ("*Multi-Pak*") (at [24]) for the above proposition. With respect, however, *Multi-Pak* provided no support for the Defendant's argument. The passages in the judgment which precede the paragraph relied on by the Defendant made it clear that the Court of Appeal was simply reaffirming the well-established principle that facts material to a party's claim (or defence) must be pleaded (see *Multi-Pak* at [22]–[23]). This principle is encapsulated in O 18 r 7(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). The same rule – which the appellate court cited at [22] of *Multi-Pak* – states clearly that it is material facts which must be pleaded, "but not the evidence by which those facts are to be proved". In respect of the four loan claims, the material facts were the transfer of the relevant sums of money, the purpose of these transfers, and the obligation on the Defendant's part to repay the sums. These have been pleaded by the Plaintiff. In respect of other transactions which did not form part of the four loan claims, these formed evidence which went towards supporting the Plaintiff's case on the four alleged loans.

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109 [52] of the Defendant's Closing Submissions.

110 2DBOA Tab 25.

130 The Defendant contended that the Plaintiff's reliance on evidence of transactions other than the four alleged loans constituted an "ambush" which had "effectively deprived the Defendant of an opportunity to properly investigate and respond to these transactions".[111] With respect, this contention was in my view disingenuous. At the very latest, the Defendant would have been well aware upon receipt of Jong's AEIC of 24 April 2017 that the Plaintiff was making reference to evidence of transactions other than the four alleged loans. The previous 2017 trial dates had been vacated by virtue of the Defendant's last-minute striking-out application. I found it unbelievable that the Defendant should have had no opportunity at all to "investigate and respond to these transactions" in the intervening period.

131 It must also be pointed out that throughout these proceedings, the Defendant had repeatedly asserted prior to the trial its lack of access to relevant documents and lamented its disadvantaged position as a result of this alleged lack of access. In Bai Yun's 13th affidavit filed on 9 February 2018, for example, it was stated that when he and the present directors of the Defendants took over, "the Defendant had no documents relating to the Audits" previously conducted of its finances, and that it was the Plaintiff which had disclosed "records purportedly belonging to the Defendant".[112] However, shortly after the completion of evidence-taking in the trial and prior to the filing of closing arguments, the Defendant chose – in an astonishing turn of events – to file a sixth supplementary list of documents.

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111 [53] of the Defendant's Closing Submissions.

112 See pp 2–3 of that affidavit.

132 The documents thus disclosed comprised various accounting records and other documents of the Defendant. Neither party sought leave from me to put in any of these documents, but what was telling was that the affidavit verifying this sixth supplementary list was filed by the Defendant's director Bai Yun[113] (who did not appear as a witness at the trial) and stated that the documents had been obtained by the Defendant from Wuxi Suntech. Even more tellingly, statements made by Bai Yun in his affidavit revealed that the Defendant had apparently been able to obtain documents from Wuxi Suntech without difficulty. According to Bai Yun's affidavit, when it "became clear to the Defendant" in "the course of the trial" that a certain issue had to be checked arising from documents adduced by the Plaintiffs, the Defendants made a request to Wuxi Suntech – and were provided with images of the relevant documents "on 16 May 2018, which were then tendered to Court on the same day" (*ie*, the third day of the trial). When as a follow-up the Plaintiff's solicitors asked on 22 May 2018 to inspect the originals, the Defendants made a further request to Wuxi Suntech – and within a week, the documents were forwarded by Wuxi Suntech to the Defendant's solicitors.[114]

133 In short, it appeared to me that not only did the Defendant have ample lead time to investigate the transactions other than the four alleged loans, it had the means to obtain its own evidence to "respond" if it so wished.

(3) Conclusion on the Defendant's criticism of the Plaintiff's evidence

134 For the foregoing reasons, in my judgment, the Plaintiff was entitled to rely on both its own accounts and the accounts of the Defendant in establishing

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113 16th affidavit of Bai Yun filed on 13 June 2018.

114 See [6] to [8] of Bai Yun's 16th affidavit.

that the relevant transfers had been carried out. The Defendant did not allege that there was any presumption of advancement which operated in its favour *vis-à-vis* these transfers – nor did the facts before me suggest that a presumption of advancement should be invoked.

135 Applying *Seldon*, therefore, a presumption arose that the Defendant was obliged to repay the monies. With the operation of this presumption, the evidential burden in the case shifted to the Defendant; and it was up to the Defendant to discharge that evidential burden.

136 I would add that even if I was wrong in my analysis of *Seldon* and that the mere fact of the transfers coupled with the lack of evidence of any presumption of advancement did not mean that a presumption of fact in favour of the Plaintiff arose, I would have independently drawn that inference from the evidence that the Plaintiff adduced. For the reasons I have set out in this section, I found that the documentary evidence was sufficiently detailed and cogent such that, in the absence of further explanation by the Defendant, I would have reached the conclusion that the Plaintiff had transferred the sums of money to the Defendant as loans. It would then also be incumbent on the Defendant to furnish an explanation for these transfers.

The Defendant's submission that the transfers were not meant to be loans

137 In attempting to discharge its evidential burden, the Defendant contended that there was evidence showing that the transfers were never meant to be loans. I also did not accept these arguments for the reasons that follow.

138 First, in respect of the alleged loan of US$27,000,015, the Defendant harped on the fact that the documentation relating to this transaction had

described the transfer of this sum from the Plaintiff to the Defendant as a "transfer" and had not used the word "loan" – whereas the subsequent transfer of this sum from the Defendant to Rietech (the Defendant's subsidiary) was described in the documentation as a "Shareholder Loan to Rietech for capital injection to Zhenjiang Rende".[115] The Defendant contended that "[i]f the parties had meant to treat the initial fund transfer – or for that matter, any of the Alleged Fund Transfers – from the Plaintiff to the Defendant as a 'loan', they would have described it as exactly that". For the reasons explained earlier (see [69]–[73] above), I did not find this argument to be of any persuasive force.

139 Secondly, the Defendant argued that the US$27,000,015 transfer could not be a loan because in a management representation letter dated 16 August 2012[116] signed by Dr Shi and David King (the then-financial controller of the Suntech Power group), in referring to this transfer by the Plaintiff and a corresponding transfer of US$10m by SPH to the Defendant, it had been stated:

> [i]n 2010, there was a transfer of funds from [SPH] and [the Plaintiff] to [Rietech] for the capital investment and injection in [Rietech] of US$37,000,015. We confirm that [the Defendant] acts as a middle party in this arrangement. *In the event that [Rietech] defaults on the payment of the amount owing from [Rietech] to us, we will not be liable to repay the same amount to [SPH] and [the Plaintiff].* [emphasis added]

140 The management representation letter of 16 August 2012 was provided to the Defendant's auditors Deloitte, in connection with the audit of the Defendant's financial statements for the financial year ending 31 December 2011. Having considered [28] of the letter against the contents of the Defendant's audited financial statements for that financial year, I did not find

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115 See [29] of the Defendant's Closing Submissions.

116 See p 95 of 2PBD at [28].

that this paragraph had the effect of negating any obligation on the Defendant's part to repay the US$27,000,015 received from the Plaintiff. As seen from the italicised words above, the representation that the Defendant would "not be liable to repay" the amount to the Plaintiff was plainly stated to be conditional on a default by Rietech in repaying the Defendant. In the audited financial statements, the amount of US$27,000,015 continued to be included in the liabilities owed by the Defendant to the Plaintiff as at 31 December 2011, thereby accounting for the total amount of US$288,602,584 shown to be payable to the Plaintiff.[117] Indeed, when asked by the Defendant's counsel whether [28] of the management representation letter was "a qualification to the fact that 37 million is recorded as a liability of [the Defendant] to SPH and [the Plaintiff]", Seah Gek Choo – the witness from Deloitte – stated firmly that "the 37 is part of the year-end balance".[118] Asked how she would satisfy herself whether there had been a default by Rietech, she testified that "[i]n this case, it's not relevant because, as at the year end, there was no indication of default".[119] I would add that there has been no evidence of any subsequent default by Rietech. In the circumstances, I found no merit in the Defendant's argument in relation to the amount of the US$27,000,015.

141 Next, in respect of the alleged loan of US$20m, the Defendant contended that "the Plaintiff's own evidence shows that the funds were the Defendant's own funds".[120] The basis for this contention appeared to be an internal email

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117 See note 11 at p 24 of the Defendant's audited financial statements for the FY ending 31 Dec 2015 (at p 92 of the AEIC filed on 4 May 2018 by the auditor Seah Gek Choo); also [82] and Table 5 of Jong's AEIC.

118 See transcript of 16 May 2018, 86:8 to 87:7.

119 See transcript of 17 May 2018, 19:9 to 19:25.

120 See [61(a)] of the Defendant's Closing Submissions.

dated 15 December 2010 which alluded to the funds for the US$20m transfer coming from the proceeds of sale of "Asia Silicon". The Defendant alleged that Asia Silicon was its subsidiary company. However, this allegation did not appear to be borne out on the evidence available. As the Plaintiff pointed out, the evidence available suggested that Asia Silicon had become the Plaintiff's subsidiary by the time of the sale to Gigawise: the Defendant's own sub-ledger records showed that in December 2010, the Plaintiff had incurred a liability to the Defendant for "Transfer of Asia Silicon shares", and that this had the effect of increasing the Plaintiff's total liabilities *vis-à-vis* the Defendant from US$2,999,979.05 to US$22,999,979.05.[121]

142 As an aside, I should add that I found it odd that although the issue of the provenance of the US$20m was mentioned by He Yue in the AEIC he affirmed on 7 April 2017 (at para 97), He Yue was withdrawn as a witness at the last minute during the trial, thereby depriving the Plaintiff of the opportunity to test the allegations he had made and leaving the Defendant with no factual witnesses. More importantly, the assertion that the US$20m transfer was not repayable because it came from the Defendant's own funds was never pleaded as part of the Defence. Considering that this was a positive assertion, there was no excuse for the Defendant's failure to plead this. Since "the court cannot make a finding based on facts which have not been pleaded" (*per* the Court of Appeal in *Ong Seow Pheng and others v Lotus Development Corp and another* [1997] 2 SLR(R) 113 ("*Ong Seow Pheng*") at [41]), I had no hesitation in rejecting the Defendant's argument in relation to the amount of US$20m.

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[121] See p 174 of 2PBD. For the financial year ending 31 December 2010, the Defendant's audited financial statements also recorded that Asia Silicon was "disposed of during the year for a cash consideration of approximately US$20 million" but did not specify the party to whom the company was transferred: see p 109 of PCBD Tab C.

143 Finally, the Defendant's Closing Submissions put forward – for the first time in these proceedings – the proposition that the alleged loan transactions were really "intended to be investments".[122] The Defendant did not explain what exactly the terms of this "investment" were – but more fundamentally, this proposition was also never pleaded and no evidence at all was adduced to support it. In the circumstances, I had no hesitation in rejecting this argument as well.

144 Accordingly, since the Defendant had not provided any explanation for the fact of the transfers, I found that it had not discharged the evidential burden that was placed upon it by virtue of *Seldon*. The factual presumption that the Defendant was obliged to repay the sums transferred thus remained.

Summary of my findings in relation to the four alleged loans

145 I summarise my findings in relation to the four alleged loans as follows:

(a) The relevant fund transfers having been conceded and there being no presumption of advancement in this case, there was *prima facie* an obligation on the Defendant's part to repay the monies by virtue of the *Seldon* presumption. The evidential burden in respect of the Plaintiff's loan claims thus shifted to the Defendant.

(b) Even assuming that I was wrong in my analysis of *Seldon* or that *Seldon* was for any reason inapplicable, having regard not just to the Plaintiff's financial records but also to the Defendant's audited financial statements and other accounting records and to

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122 See [64] of the Defendant's Closing Submissions.

the Wuxi restructuring documents, the totality of the evidence adduced by the Plaintiff sufficed for me to infer that the Defendant had an obligation to repay and to shift the evidential burden to the Defendant to explain the fact of the transfers.

(c) The Defendant called no evidence of its own in rebuttal of the Plaintiff's evidence. The various arguments it raised failed to contradict, weaken or explain away that evidence.

(d) In the circumstances, I was satisfied that the Plaintiff had discharged its legal burden of proof in respect of the loan claims.

The Plaintiff's claim for unpaid share consideration and the Defendant's assertion of time-bar

146 I next deal with the Plaintiff's claim for the sum of US$55,560,000. This sum represented the consideration to be paid by the Defendant for the Plaintiff's entire shareholding in Shanghai Suntech, pursuant to the Equity Transfer Agreement.[123] The Defendant did not dispute the share transfer but contended that the Plaintiff's claim for the sum was time-barred under PRC law.

147 Both parties agreed that the construction of the terms of the Equity Transfer Agreement was governed by PRC law. Both parties also agreed that pursuant to Arts 135 and 137 of the General Principles of the Civil Law of the PRC,[124] the limitation period applicable to the Plaintiff's claim for the share consideration was two years from the date when the Plaintiff – as the creditor –

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123 See 1DCB pp 466-475 for the certified translation of the Equity Transfer Agreement.

124 Promulgated by the National People's Congress on 1 Jan 1987 and amended on 27 Aug 2009. Articles 135 and 137 are reproduced at Appendix 2 (p 21) of the 4th affidavit of Yang Wantao filed on 26 April 2017.

knew or should have known its rights had been infringed upon. The chief issue in contention between the parties was the proper construction of cl 3.2 of Equity Transfer Agreement which reads as follows:[125]

> [t]he Parties to this Agreement agree that the Transferee will remit the Equity Transfer Price entirely to the bank account designated by the Transferor at one time within ten (10) working days as from the Transfer Effective Date; or the method of payment of the Equity Transfer Price and transfer the shares [*sic*] may be carried out in any manner as recognized by the Parties.

148 The Plaintiff's case as pleaded[126] was that:

> although the initial deadline for the payment of the consideration of USD 55, 560,000.00 was stated in [cl. 3.2 of] the Equity Transfer Agreement… to be due within ten (10) working days of the share transfer taking effect i.e. by 9 December 2008 ("the **Deadline**"), it was understood as between the Plaintiff and the Defendant (who were then related companies) that the due date for the payment of the consideration would, albeit the Deadline having lapsed, be extended until demanded by the Plaintiff…
>
> The Plaintiff and the Defendant had evinced an intention to depart from the default position in the Equity Transfer Agreement of the Defendant having to make payment by the Deadline to a bank account appointed by the Plaintiff. Instead, parties intended for such payment to be repayable on demand[127].

Having regard to the above, the Plaintiff's case was that its claim would not be time-barred because the Liquidators had issued their letter of demand to the Defendant on 23 December 2013[128] (in which the Liquidators' computation of the Defendant's total indebtedness included the unpaid share consideration of

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125 1DCB p 468.

126 See [9(1)] of the Reply (Amendment No. 2) at Tab 19 of the SDB.

127 See [9(b)(i)] and [9(12)] of the Reply (Amendment No. 2).

128 6AB p 2086-2087.

US$55,560,000). The present suit, which was filed on 14 January 2014, would have been well within the two-year time period beginning 23 December 2013.

149 The Defendant contended, on the other hand, that cl 3.2 did not permit any alternative to the stated timeline of ten working days from the Transfer Effective Date for payment of the share consideration. If the Defendant's submissions were accepted, then the Plaintiff's claim would be time-barred because the Plaintiff's claim would have arisen ten days from the Transfer Effective Date in late 2008, and the present suit, which was filed in January 2014, would have been filed more than five years after the Plaintiff's cause of action had arisen. Thus the issue of whether the Plaintiff's claim was time-barred turned directly on the interpretation of cl 3.2 of the Equity Transfer Agreement.

150 As an aside, I noted that the term "Transfer Effective Date" was defined in cl 5 of the Equity Transfer Agreement as being "the date when this Agreement, the Company's Articles of Association and other documents required by the Chinese Laws are approved by the Examination and Approval Authorities and the approval documents are obtained". The Plaintiff stated in their amended Reply[129] that the default deadline of ten working days from this "Transfer Effective Date" would have been 9 December 2008, which date they appeared to have derived by taking 25 November 2008 as the "Transfer Effective Date", 25 November 2008 apparently being the date when the commerce and industry change registration for the share transfer was approved.[130] In its Closing Submissions, the Defendant adopted this view as well – which created a minor anomaly because its own expert Sun had asserted in her expert report that the

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129 See [9(b)(i)] of the Reply (Amendment No. 2) at Tab 19 of the SDB.

130 See pp 826-828 (Exhibit YKJ-52) of Jong's AEIC.

"Transfer Effective Date" was 29 October 2008, being the date on which the Shanghai Foreign Investment Committee gave its approval for the equity transfer,[131] and that the deadline for payment was 12 November 2008.[132] However, nothing much turned on this in the end, since the Plaintiff's and the Defendant's respective positions on the construction of cl 3.2 remained the same whether one took 9 December 2008 or 12 November 2008 as the start-date from which to compute a period of ten working days.

The weight to be accorded to Yang's evidence

151 Before I address the parties' respective arguments on the construction of cl 3.2, I will address their arguments on the weight to be accorded to Yang's evidence. The issue of what weight if any should be accorded to his evidence arose because the Defendant alleged that he was not capable of being an independent expert on the PRC law issues in contention. The Defendant based its allegation on two grounds.[133] First, it said Yang had agreed in the witness stand that he had a "general duty" to "protect the Plaintiff's interests in the claims being pursued in these Singapore proceedings". Secondly, it claimed that Yang had also agreed in cross-examination that he would "likely be engaged by the Plaintiff to enforce a judgment of this Court (comprising a ruling on the Share Transfer Claim) against the Defendant in the PRC".

152 Insofar as the second point was concerned, Yang in fact said no such thing. When the Defendant's counsel suggested that he would expect his law firm to be "spearheading enforcement of the Singapore judgment in China",

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131 1 DCB p 486.

132 See [4.5] of Sun's expert report at p 42 of her affidavit filed on of 16 May 2017.

133 See [124] of the Defendant's Closing Submissions.

Yang had stated that this was "theoretically" possible but had then pointed out that the limited amount of assets available for enforcement in the PRC proceedings made it "very unlikely" that there would be "duplicate" proceedings in the PRC to enforce a Singapore judgment. It is helpful in this regard to reproduce Yang's response to counsel in full:[134]

> I would say, actually, it's difficult for me to simply say 'yes' or 'no', because I think that theoretically, any people, it's natural, right? But on the other side, actually, in Shanghai court, there was [an] issue discussed, what I state to the court was, because apparently Shanghai Suntech's assets and liabilities, they have very limited net value, so for any enforcement, even if when the plaintiff wins enforcement judgment in Shanghai, probably the case would already been wipe out in the company. So it's very unlikely to have duplicate enforced proceedings. Why that was raised was, in the Shanghai court, it was raised by the defendant counsel say – say Shanghai court, if you exercise jurisdiction, all other claims are also going to come to Shanghai court. That could be a burden to the court. Then I explain to the court, in my view, because the assets [are] so limited, probably couldn't satisfy all the claims, so long as we have judgment, we enforce even the 11 million, maybe the company is gone, so there's no need for additional claim. So because of that, I think what you raise, theoretically, it's natural, but, in this case, I don't know whether it's really realistic or not.

153 Insofar as the remark about "general duty" was concerned, this came about after the Defendant's counsel had cross-examined Yang about a letter he sent on 4 September 2014 to the Plaintiffs' then-solicitors, informing them of a potential disposal by the Defendant of Shanghai Suntech shares which was not covered by the freezing order imposed on the Defendant in the PRC proceedings.[135] The Defendant's counsel had suggested to Yang that he "reported these events to the Plaintiff's Singapore counsel because [his] duty, as the Plaintiff's lawyer, included protecting the plaintiff's interests in the claims being

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134 See transcript of 16 May 2018, 122:15 to 123:12.

135 Page 4 of Yang's 3rd affidavit of 17 September 2014 at Tab 8 of 3 BPIA.

pursued in these Singapore proceedings".[136] It was in response to this suggestion that Yang replied: "I think I would agree. I have a general duty." The Defendant's counsel did not follow up to suggest to Yang that this "general duty" therefore precluded him from being able to function act independently as an expert witness. Subsequently, Yang explained that prior to taking on the appointment as expert witness, he had obtained an express waiver from the Plaintiff whereby the latter had acknowledged that as expert witness, his first duty would be to the court and not to them. He also explained that he had required the Plaintiff – via this waiver – expressly to waive any claim against him or his firm, because he wanted to avoid the possibility of the Plaintiff "later thinking … what [he] told in court … might make them cause their damages or cause their difficulty".

154 Whilst Yang was indeed acting as counsel for the Plaintiff in the PRC proceedings, there was no evidence to show that the success of those proceedings depended on the success of the Singapore proceedings – or *vice versa*. As seen from above, an attempt was made to show that Yang had a selfish interest in ensuring the success of the Singapore proceedings because it would mean that his firm would be handling subsequently enforcement of the Singapore judgment within the PRC – but the attempt was rebuffed by Yang, and no evidence was called to contradict him. Any suggestion that he might nevertheless wish to appease an erstwhile client (albeit in a different jurisdiction) by giving an expert opinion skewed in its favour was met with the fact that he had obtained from the Plaintiff a waiver which acknowledged the primacy of his duty to the court and waived any claims it might otherwise bring against him as a result of any evidence he gave as expert.

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[136] See transcript of 16 May 2018 at 119:16 to 120:2.

155 To support its arguments about Yang's lack of independence, the Defendant cited the case *Kaufman, Gregory Laurence and others v Datacraft Asia Ltd and another* [2005] SGHC 174 ("*Kaufman*")[137] as an authority involving a "similar" situation. However, there was nothing "similar" at all about the facts in *Kaufman*. In that case, the dispute centred on the interpretation of an agreement entered into by the plaintiffs and the defendants ("the Letter Agreement"), which was governed by the laws of Japan. The plaintiffs claimed that they were entitled, by reason of the provisions of the Letter Agreement, to be given certain information and documents by the defendants; and they also wanted an account of what was due to them by reason of the provisions of the Letter Agreement. They argued, *inter alia*, that the terms of the Letter Agreement created a relationship of entrustment between the parties. The defendants denied that the Letter Agreement had any such effect. Both sides produced expert witnesses on Japanese law to persuade the High Court of its interpretation of the Letter Agreement. The plaintiffs objected to the defendants' expert, one Mr Okada, on the ground that he had been for years a partner of Freshfields, which was the law firm that had *inter alia* advised the defendants and had been involved in the negotiations on the wording of the Letter Agreement. Prior to the commencement of the action, Freshfields had also responded to the plaintiffs' solicitors by taking a position on the meaning and effect of some of the clauses in the Letter Agreement, and these were the very same clauses that Mr Okada was required to give his opinion on. The High Court noted that Mr Okada was not a member of the team defending the defendants and had not given instructions to counsel. The court held that "Mr Okada's independence cannot be impugned". It went on to hold, however, that it could not dismiss the possibility that if the defendants lost the action, they might

[137] 2DBOA Tab 20.

consider recovering costs by taking action Freshfields if they judged that Freshfield's advice on the interpretation of the Letter Agreement had caused them to incur unnecessary costs in defending the action. The court held that because of this "remote" but "distinct" possibility, it would scrutinise Mr Okada's evidence with care where it conflicted with that of the plaintiffs' expert (Mr Abe): it should accept such conflicting opinions only where it found them to be reasonable, measured and backed by authority or where Mr Abe's contrary evidence was clearly unsound or had not been properly arrived at after consideration of all relevant factors (at [33]).

156 From the foregoing, it is clear that the expert in *Kaufman* was placed in a much more sensitive and difficult position than Yang in the present case – and even in those circumstances, the High Court did not find the expert's independence to be impugned. The court assessed that there remained a "remote" possibility of conflict of interest because of the risk of the defendants suing Freshfields if they lost the case – but that "remote" possibility did not even exist in the present case because of the express waiver given by the Plaintiff to Yang.

157 For the reasons set out above, I did not find Yang's independence to be impugned, and I rejected the Defendant's argument that his expert evidence should be given no weight. In my view, the most that could be said by the Defendant was that since the Plaintiff continued to be Yang's client, even with an express waiver, he might be subconsciously predisposed towards wanting the Plaintiff to do well in the litigation. I stress that there was no evidence before me of any such predisposition on Yang's part: indeed, he struck me as quite a candid witness. It was out of an abundance of caution that I decided I should scrutinise Yang's evidence with care where it conflicted with Sun's, and accept such

conflicting opinions only where they were reasonable, measured and backed by authority or where Sun's contrary evidence was clearly unsound or had not been properly arrived at after consideration of all relevant factors.

158 Additionally, whilst the Defendant has claimed that Yang was straying beyond his remit as an expert witness and advocating on the Plaintiff's behalf in the course of his evidence[138], I did not find this to be so. Whilst he did at some points in his evidence allude to how certain clauses in the Equity Transfer Agreement should be construed, his focus appeared to me to be on elucidating how he believed a PRC court would approach the construction of these clauses given the existing legal framework in the PRC. This was not inappropriate in my view. The Court of Appeal has noted in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*")[139] that an expert has to put forward "not only his view of the effect of the foreign statute in question, but also the foreign rules of construction which he applied in reaching his views" (at [79]). Accordingly, it would be both relevant and useful for an expert witness on PRC law to elaborate on how the PRC courts would apply PRC statutes and rules to construe a contract.

159 To set the fundamental framework for the interpretation of cl 3.2, Yang pointed *inter alia* to Art 125(1) of the PRC Contract Law[140] promulgated by the National People's Congress. This provides that:

> In case of any dispute arises between the parties to a contract over the understanding of any clause of the contract, the true

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138 See e.g. [115] of Defendant's Closing Submissions.

139 2PBOA Tab 23.

140 See p 18 (Appendix 1) of Yang's further expert report in his 5th affidavit filed on 24 April 2018.

> meaning of such clause shall be determined according to the words and sentences used in the contract, the relevant clauses of the contract, the purpose of the contract, trade practices and the principle of good faith.

160 The Defendant did not dispute the applicability of Art 125(1). However, parties had differing positions as to how the various factors set out in Art 125(1) would apply in the case of cl 3.2.

On the text of cl 3.2 within the overall context of the Equity Transfer Agreement

161 Yang's evidence was that looking at the words and sentences used in cl 3.2, it was clear that the said clause provided for two alternative "approaches" to payment of the share consideration. I reproduce cl 3.2 in full for convenience:

> The Parties to this Agreement agree that the Transferee will remit the Equity Transfer Price entirely to the bank account designated by the Transferor at one time within ten (10) working days as from the Transfer Effective Date; or the method of payment of the Equity Transfer Price and transfer the shares [sic] may be carried out in any manner as recognized by the Parties.

162 According to Yang, the "first approach" – as encapsulated in the first sentence of cl 3.2 – represented the "default" position. If this "default" approach was not adopted, then the alternative, "second approach" would be for payment to be effected in any other method that the parties agreed on.[141] Yang derived this "second approach" from the words "or the method of payment of the Equity Transfer Price and transfer the shares may be carried out in any manner as recognized by the Parties".

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141 See [33] of Yang's expert report at p 13 of his 4th affidavit filed on 26 April 2017.

163 Sun disagreed that cl 3.2 could be read in the above manner. She insisted that the clause "very clearly expressed … only one method of payment, and that is within ten working days as from the transfer effective date".[142] She also stated that since there was only one method of payment provided for in cl 3.2, cl 14.3 of the Equity Transfer Agreement would have required any amendments to that one method of payment to be made in writing signed off by the parties. However, this interpretation entailed ignoring entirely the second sentence in cl 3.2 – without any explanation as to what the effect of this second sentence might be. When Sun was asked what meaning should then be attributed to the second sentence in the clause beginning with the word "or" after the semi-colon", she was unable to provide any coherent response.[143] Eventually she said that this second sentence in cl 3.2 did not expressly or clearly say anything "about the method of payment and the time of payment".[144] This regrettably did not make much sense because the second sentence in cl 3.2 did in fact expressly refer to "the method of payment" of the share price and the transfer of the shares by stating that they "may be carried out in any manner as recognized by the Parties". It is reasonable to expect that corporate entities entering into a commercial contract must have intended each distinct sentence in a contractual clause to bear some distinct meaning – unless there is evidence to suggest otherwise. Yang's interpretation, which would give effect to every sentence in cl 3.2, should *prima facie* be preferred over Sun's interpretation, which would render the second sentence in cl 3.2 otiose.

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142 See transcript of 17 May 2018 at 30:17 to 30:25.

143 See transcript of 17 May 2018 at 39:17 to 42:7.

144 See transcript of 17 May 2018 at 43:5 to 43:9.

164 I should add that although in its Closing Submissions, the Defendant argued that the words "method of payment" could not under PRC law be construed as encompassing or referring to the timing of the payment,[145] this proposition was never put to Yang in cross-examination; and Sun herself gave no such evidence in her expert report. Indeed, in her evidence, Sun spoke at times of "the method of payment and the time of payment" but also at times of "only one method of payment, and that is within ten working days as from the transfer effective date". She was not asked by the Defendant's counsel to confirm that "method of payment" could never under PRC law encompass or refer to the timing of payment. In the circumstances, the Defendant had no basis for arguing that under PRC law, the words "method of payment" would never be capable of referring to the timing of the payment.

165 I also noted that whilst Sun claimed that cl 14.3 required that all amendments to the contract be in writing and signed by both parties before they could be valid, she did not manage to explain how the words of cl 14.3 gave rise to this requirement. The relevant portions of cl 14.3 state as follows:

> 14.3.1 The Parties agree that, after this Agreement goes into effect, the Parties may have further negotiations as regards any matter under this Agreement and enter into another written agreement, which constitutes an integral part of this Agreement;
>
> 14.3.2 This Agreement may be modified if such amendment is in writing and signed by both the Parties, and such modification will constitute an integral part of this Agreement[.]

166 These clauses appeared therefore to be couched in permissive terms: there did not appear to be any word or phrase capable of being construed as mandating strictly the signed documentation of all amendments as a pre-

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145 See [109] of the Defendant's Closing Submissions.

requisite to validity. Sun's statement in her expert report[146] that "no evidence of any purported amendment or variation shall be admissible" in the absence of signed written amendments appeared to be her own gloss on cl 14.3 which was not supported by the terms of the said clause or by any provision of PRC law. I found it telling that in the further expert report enclosed in her second affidavit filed on 19 April 20018, in repeating that cl 14.3 "*requires* that *all* variations be recorded in a written agreement signed by both parties", she merely cited again the same paragraph from her first expert report.

167 Sun also refused to engage on the issue of how Arts 36, 37 and 77 of the PRC Contract Law might affect her argument as to why cl 14.3 should be read as allowing only written, signed amendments. Yang had cited these provisions of the PRC Contract Law in order to demonstrate that PRC law expressly empowered parties to form (including to amend) contracts through their conduct, even if there existed a prior requirement of written form.[147] Article 36 provides, for example, that:

> [i]f a contract is required to be concluded in written form by laws, administrative regulations, or as agreed by parties, and parties fail to conclude the contract in written form but one party has performed its principal obligations which have been accepted by the other party, the contract should be deemed as established.

Article 77, as another example, states that a "contract may be modified if the parties reach a consensus through consultations". These provisions of the PRC Contract Law raised question marks over Sun's insistence that cl 14.3 be read – even in the absence of any mandatory language – as allowing only written and

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146 See [4.27] of Sun's expert report at p 54 of her 1st affidavit of 16 May 2017.

147 See [24] of Yang's further expert report at p 12 of his 5th affidavit filed on 24 April 2018.

signed amendments. It was regrettable that she chose not to address the effect of these legislative provisions beyond making the bald assertion that they were "not relevant".[148]

168 Sun additionally asserted at para 4.27 of her first expert report that "strictly speaking" any amendments to the terms of the Equity Transfer Agreement had to be approved by "the approving authority". She referred to cl 5 of the Equity Transfer Agreement as the basis for this assertion – but cl 5 did not in fact say anything of the sort. There was also no attempt by Sun, while she was in the witness stand, to respond to Yang's view that "amendment[s] to payment method [did] not constitute a 'significant or substantial change' requiring approval by government authority". In support of his view, Yang had in his further expert report adduced evidence of the judicial interpretation provided in this area of the law by the Supreme People's Court ("SPC") of the PRC,[149] in which the SPC had stated that:

> Where a supplemental agreement reached by the parties on the issues concerning a foreign-funded enterprise does not constitute any significant or substantial change to the approved contract, the people's court shall not determine the supplemental agreement as ineffective on the ground that it has not been approved by the foreign-funded enterprise examination and approval organ.
>
> The term 'significant or substantial change' as mentioned in the preceding paragraph shall include changes in registered capital, corporate form, business scope, business term, investment contribution of the shareholders, form of contribution, merger of the company, split of the company, equity transfer, etc.

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148 See [10] of Sun's further expert report at p 15 of her 2nd affidavit filed on 19 April 2018.

149 Article 2 of the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Disputes Involving Foreign-Funded Enterprises (1) (Law Interpretation [2010] No. 9, effective 16 August 2010 at p 19 of Yang's 5th affidavit filed on 24 April 2018.

169 The changes considered by the SPC to amount to "significant or substantial change" were plainly changes which would affect the corporate structure and scope of business of the foreign-funded enterprises; and it was hardly surprising that changes to the timelines for payment of the share consideration were not mentioned as being one such "significant or substantial change". I would add that whilst the PRC law regime is not a common law regime and there is strictly no doctrine of *stare decisis*,[150] a judicial interpretation by the highest appellate tribunal within the PRC legal system provided an indication as to how the relevant PRC statutory provisions were understood by PRC courts, and as such, assisted me in understanding the state of the law in the PRC. Again, it was regrettable that no attempt was made by Sun to address the judicial interpretation cited.

170 In any event, Sun's entire testimony – including her evidence as to the need for amendments to be in writing, signed, and "approved" by "the approving authority" – was based on her insistence that cl 3.2 "expressed … only one method of payment, and that is within ten working days as from the transfer effective date". As I have noted, this insistence was not borne out by the words of cl 3.2; and Sun also could not explain what then one was to understand from the second sentence in that clause (see [163] above).

171 Sun further opined that any contractual clause which provided for payment to be made "in any manner as recognized by the Parties" was an "[arrangement] for payments to be made over indefinite periods [and] will not be recognized under the P.R.C. Contract Law as a valid payment term or condition pursuant to Article 16(1) of the Foreign Investors Provisions".[151] With

[150] This was acknowledged by Yang himself: see [18] to [19] of his further expert report at p 10 of his 5th affidavit.

respect, this was not an accurate representation of what the second sentence in cl 3.2 actually said, since it made no reference to payment being made "over indefinite periods".

172 As to Art 16(1) of the Foreign Investors Provisions,[152] what it actually stated was that a foreign investor acquiring equity interest in a foreign-invested enterprise:

> … shall, within three months of the date of issuance of the business license of the foreign-invested enterprise, pay the consideration in full to the shareholders transferring equity interests. Where special circumstances require a longer period, subject to the approval of the examination and approval authority, the foreign investor shall pay 60% or more of the total consideration within six months of the date of issuance of the business license of the foreign-invested enterprise, with the remainder of the consideration to be paid within one year, and the company shall distribute profits in proportion to the registered capital actually paid-up.

173 Whilst Art 16(1) of the Foreign Investors Provisions stipulated certain timelines for payment to be made for equity transfers in a foreign-invested enterprise, it did not provide that contractual clauses which failed to conform to the stated timelines would "*not be recognized under the P.R.C. Contract Law as a valid payment term or condition*",[153] as Sun asserted. Nor did Sun back up the italicised statement by producing the specific provisions of the PRC Contract Law which had the effect she postulated. This omission was fatal to her position. In particular, given the hierarchy of PRC statutes (which our Court of Appeal referenced in *Pacific Recreation*), the inter-relationships between the various statutory provisions was crucial: it would have been relevant for me to

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151 See [6] of Sun's further expert report at p 15 of her 2nd affidavit.

152 See Appendix 4 (p 24) of Yang's 4th affidavit.

153 See [6] of Sun's further expert report at p 15 of her 2nd affidavit.

understand what the PRC Contract Law said – if anything – on the subject of invalid contractual clauses and how any such Contract Law provisions interacted with Art 16(1) of the Foreign Investors Provisions.

174 In this connection, Yang gave the following evidence in cross-examination as to the hierarchical structure of PRC law:[154]

> … [T]he first tier is legislation, which would be laws passed by National People's Congress, and then the second tier would be the State Council, administrative regulations. In those after there would be what we call the department rules, or administrative rule, which would be rules issued by various ministries. Those legislations, administrative regulations or the administrative rule, they have different impact at different legal nature …

175 According to Yang, within this hierarchy, the question as to whether a contract was valid or not would be answered "only" by "looking at the national legislation and the State Council, the administrative regulation", whereas breach of the administrative rules issued by the Ministry of Commerce – such as the Foreign Investors Provisions – would not invalidate the contract. Yang's evidence was not challenged, nor was it refuted by Sun when she took the witness stand.

176 Furthermore, Sun's assertion that the second limb of cl 3.2 (or the "second approach" to payment as Yang called it) would "not be recognized under the P.R.C. Contract Law as a valid payment term or condition" – and that "such arrangements would be rejected by the P.R.C. authorities when applying for the approval of the foreign-investment and registration of the change in shareholding"[155] – was refuted by the facts before me. The Equity Transfer

154 See transcript of 16 May 2018, 127:22 to 130:2.

155 See [6] of Sun's further expert report at p 15 of her 2nd affidavit.

Agreement was submitted to the Shanghai Foreign Investment Commission when the requisite application for approval of the equity transfer was made; and the Commission gave its approval without raising any objections or reservations as to cl 3.2. These facts were pointed out to Sun in the course of cross-examination.[156] Unfortunately, having conceded these facts, she did not explain how in the circumstances her assertions about the invalidity of the "second approach" to payment could still be maintained.

On the purpose of the contract

177 In the course of the inquiry into the proper interpretation of cl 3.2, parties also referred me to a document called the "Suntech Power Holdings Co., Ltd Sign-off Memo"[157] ("the Sign-off Memo"). This was essentially a document signed by the then-management team of the Plaintiff's and the Defendant's ultimate parent company (SPH), endorsing the transfer of the equity interest in Shanghai Suntech and alluding to certain aspects of the transaction. The signatories included Dr Shi and Amy Zhang, whom parties agreed were also common directors of both the Plaintiff and the Defendant at the material time. As such, it was not disputed as between the parties that the Sign-off Memo provided an indication of their mutual understanding of the terms of the equity transfer. What they disagreed on was the nature of that understanding.

178 In this connection, two main points of interest arose from the Sign-off Memo. First, it will be recalled that Sun had given evidence that cl 3.2 "expressed … only one method of payment, and that is within ten working days as from the transfer effective date"; further, that any amendment to the timeline

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156 See transcript of 17 May 2018, 34:8 to 35:15.

157 1DCB pp 413-414.

for payment would have to be effected in writing and signed off by both parties. Although the Defendant claimed the Sign-off Memo provided supporting "contextual evidence" for Sun's interpretation, it in fact stated a different timeline for payment from that postulated by Sun: instead of referring to "*ten working days* as from the *Transfer Effective Date*", the Sign-off Memo stated the payment timeline as "Within *10 days* from *Signing Date*". The Defendant argued that this showed that parties "intended for payment to be made within a fixed duration, i.e. within 10 days after the share transfer or the signing date of the ETA" [emphasis in original].[158] With respect, this argument was not only contrived – it did not even represent Sun's evidence. Indeed, the proposition that parties had provided in cl 3.2 for payment "within a fixed duration, i.e. within 10 days after the share transfer or the signing date of the ETA" was not even put to Yang when he pointed out the differences between the first limb of cl 3.2 and the "term of payment" stated in the Sign-off Memo.[159]

179 It should be noted that the Sign-off Memo alluded to a different timeline for payment from that stated in the first sentence of cl 3.2 without any evidence of such modification having been the subject of a signed, written contractual amendment. Moreover, whilst the first sentence in cl 3.2 referred to payment via transfer of monies into a bank account nominated by the transferor, the Sign-off Memo stated that the payment could "be offset completely without actual payment because the Transferee [was] 100% owned by the Transferor" – again with no evidence of such modification having been the subject of a signed, written contractual amendment.

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158 See [110(a)] of the Defendant's Closing Submissions.

159 See transcript of 16 May 2018, 135:10 to 136:12.

180 As things turned out, the share consideration was not paid within ten days of the signing date, nor has there been any evidence of it being "offset". The point, however, is that insofar as it specified payment arrangements clearly differing from what was stated in the first sentence of cl 3.2, the Sign-off Memo contradicted Sun's thesis that the parties had drafted cl 3.2 so as to permit only one method of payment and that any modifications had to be in writing and signed.

181 Secondly, the purpose of the contract was stated in the Sign-off Memo to be an "internal shareholding restructuring" for "better corporate tax planning at Suntech Holding level". Notably, the Sign-off Memo did not say the timing for the payment of the share consideration was important; it said that the timing for the equity transfer was important because Shanghai Suntech was "currently a relatively new company with limited profit record so the transfer can be priced at paid-in capital of the Company, otherwise the share transfer has to be based on market value which will result in much higher transfer cost". This evidence appeared to me to provide support for Yang's proposition that given the main purpose of the Equity Transfer Agreement was to effect a share transfer, a PRC court would likely find that "the timing of the payment of the share transfer price was not the key focus of the parties".[160]

On the parties' trade practices

182 In addition to the factors discussed above, Yang also opined that the manner in which the parties had conducted themselves constituted evidence relevant to any attempt to interpret cl 3.2 It will be recalled that under Art 125(1) of the PRC Contract Law,[161] in the event of any dispute between the parties over

[160] See [46] of Yang's expert report at p 17 of his 4th affidavit.

the understanding of a contractual clause, one of the factors to be taken into account in determining the true meaning of the disputed clause is the parties' "transaction practices". Yang referred to Art 7(1) of the Interpretation of the Supreme Court on Certain Issues Concerning the Application of the PRC Contract Law (II), in which the SPC had stated:[162]

> Any of the following circumstances that does not violate any compulsory provision of law and administrative regulations shall be recognized as a 'trade practice': 1. the practice usually adopted in the place where the trade is conducted or specific industry or areas and known or ought to be known to the other party at the conclusion of the contract; and 2. the practice regularly adopted by the parties.

183 In this respect, Yang opined[163] that in the present case, relevant evidence would include the accounting treatment accorded by the parties to the unpaid share consideration; specifically, the fact that the Defendant had in its audited financials for 2009 to 2011 consistently recognised the unpaid US$55,560,000 by including the amount in the computation of its total indebtedness to the Plaintiff; the recognition in these audited financials that the Defendant's total indebtedness *vis-à-vis* the Plaintiff was unsecured, interest-free and repayable on demand; and the fact that the outstanding indebtedness had also been recognised in the Defendant's reporting packages.

184 In her expert report, Sun stated that there was "no evidence as to whether the 'reporting packages' are documents produced by [the Defendant]". This view was based on instructions given by the Defendant[164] and arose ostensibly from

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161 See Appendix 3 of Yang's expert report at p 22 of his 4th affidavit.

162 See pp 18-19 (Appendix 1) of Yang's further expert report in his 5th affidavit.

163 See [39] and [47(b)] of Yang's expert report in his 4th affidavit.

164 See [4.8(a)] of Sun's expert report at p 46 of her 1st affidavit.

the Defendant's refusal to recognise the authenticity of the documents. However, in the course of the trial, the Defendant conceded the issue of authenticity.

185 Sun also claimed that the Defendant's reporting packages contained no breakdown of the individual transactions which made up the aggregate indebtedness *vis-à-vis* the Plaintiff. However, as highlighted at [120] above, the sub-ledgers in the Defendant's reporting packages actually list each and every transaction in the Defendant's lifetime; and as highlighted earlier, the total indebtedness shown in the reporting packages also tallied precisely with the total indebtedness recorded in the Defendant's audited financials and in the Plaintiff's accounts.

186 In her further expert report, Sun asserted that "P.R.C. Courts would not accord any weight" to the Defendant's audited financial statements because "*the audited financials were prepared by persons who are not a party to the Equity Transfer Agreement*" [emphasis added].[165] The italicised portion of the statement was factually wrong, because the Defendant's audited financial statements were prepared by the Defendant's management and signed off by its directors.[166] This fundamental factual error led me seriously to question whether Sun had even examined the Defendant's audited financials before dismissing their evidential value. She did not cite in any event any specific provisions of PRC law and/or judicial pronouncements to support her assertion that the audited financials would not be given any weight by the PRC courts in interpreting the Equity Transfer Agreement. Indeed, given the definition of "trade practices" in Art 7(1) of the Interpretation of the Supreme Court on Certain Issues Concerning the

165 See [9] of Sun's expert report at p 15 of her 2nd affidavit.

166 See exhibits YKJ-53, YKJ-54, YKJ-55 of Jong's AEIC for the Defendant's 2009, 2010 and 2011 audited financial statements.

Application of the PRC Contract Law (II), there appeared to be no reason why parties' accounting practices in respect of a particular debt should not be relevant evidence in the court's consideration of the contractual clause relating to that debt.

187 In the circumstances, I accepted that in determining the meaning of cl 3.2, the accounting treatment accorded by the parties to the amount of US$55,560,000 formed relevant evidence to be taken into consideration.

Conclusion on the Plaintiff's claim for the unpaid share consideration

188 Having considered the facts before me, I did not find Sun's evidence to be sound, nor did she appear to have arrived at her conclusions after consideration of all relevant factors. In contrast, I found Yang's evidence to be reasonable, measured and backed by authority. As I have explained, I did not find Yang to have crossed the line into advocating for the Plaintiff. Whilst he did at various points in his evidence speak of how he thought the PRC courts would treat a particular issue or a piece of evidence put forward by the Plaintiff, there was nothing impermissible or untoward about this process (see [158] above).

189 I accepted his evidence that cl 3.2 provided for two alternative approaches to payment. The first approach – which was the default position – stipulated that the transferee [*ie*, the Defendant] would transfer the money entirely to the bank account designated by the transferor [*ie*, the Plaintiff] at one time within ten working days from the Transfer Effective Date. If this "default" approach was not adopted, then the alternative, "second approach" would be for payment to be carried out in "any manner as recognised by the Parties". I rejected the Defendant's submission that the "second approach" was invalid under PRC

law. I also rejected the submission that assuming the "second approach" was valid in law, any agreement on an alternative "second approach" had to be made in writing and signed.

190 I next considered the Plaintiff's submission that the parties had, using the "second approach" provided for in cl 3.2, agreed that the outstanding share consideration should be payable on demand. I considered the evidence of the words and sentences used in cl 3.2, the purpose of the contract, and the parties' trade practices (in terms of the accounting treatment accorded to the amount of US$55,560,000). Having regard to the matters examined at [161] to [187] above, I found that the evidence did indeed show the parties to have come to a consensus that the outstanding share consideration would be payable on demand pursuant to the "second approach" provided for in cl 3.2. I do not find it necessary to repeat all the evidence examined in these preceding paragraphs, but will say that I found the following to be especially helpful.

191 The words and sentences used in cl 3.2 – and in particular the alternative provision for payment to be "carried out in any manner as recognized by the Parties" – indicated clearly that the parties never intended to put in place a single inflexible set of terms for payment of the share consideration. This is borne out by the fact that the Sign-off Memo signed by SPH senior management (including individuals who were common directors of the Plaintiff and the Defendant) on the same day as the Equity Transfer Agreement expressly alluded to payment terms which differed from the default "first approach" stated in cl 3.2 (see [178] to [180] above).

192 Moreover, although the "first approach" provided for the Plaintiff to nominate a bank account into which payment would be made, no bank account

was nominated, and there was no evidence either of the Defendant having requested the Plaintiff to make such nomination. This supported the Plaintiff's case that the parties had intended all along to adopt a flexible approach towards the payment of the share consideration. The reason for this became clear when one considered that the purpose of the equity transfer – as stated in the Sign-off Memo – was to effect "internal shareholding restructuring" for "better corporate tax planning at Suntech Holding level". In other words, the equity transfer was effected for strategic purposes: the flow of funds to the Plaintiff arising from the transfer of the shares was not the parties' key focus. Subsequent to the equity transfer taking effect, the fact that the outstanding payment was booked by the Defendant in its accounts as part of the total unsecured liabilities payable on demand to the Plaintiff – as well as the corresponding records in the Plaintiff's accounts – showed that there was a consensus between the parties that the outstanding amount would be payable on demand. The demand was duly made by the Liquidators in their letter of 23 December 2013; and the writ in these proceedings having been filed in January 2014, the Plaintiff was well within the two-year limitation period specified under PRC law.

193 For the reasons given above, I found that the Plaintiff had made out its claim for the unpaid share consideration of US$55,560,000.

Remaining points raised by the Plaintiff and the Defendant at various stages of the proceedings

194 Finally, I address a number of remaining points which were raised by the Plaintiff and the Defendant respectively at various stages of these proceedings.

The Defendant's submission that the Plaintiff's causes of action were extinguished or relinquished

195 First, it will be recalled that the Defendant had pleaded in its Defence that the Plaintiff "ceased to have any relevant right of action against the Defendant in respect of all or part of such alleged liability, following upon the acquisition by Wuxi Suntech of the Plaintiff's interests in the Defendant".[167] This was a positive assertion on which the Defendant would have borne the legal and the evidential burden: see [75] above. However, the Defendant chose not to call any factual witnesses. No evidence was produced by the Defendant to support the assertion that the Wuxi Suntech restructuring had resulted in the Plaintiff's causes of action against the Defendant being somehow extinguished or relinquished. Indeed, the issue was not brought up by the Defendant at all in the course of the trial, and no questions relating to this issue were put to Jong. As such, the only finding possible was that the Defendant had failed to make out this aspect of its pleaded Defence.

The Defendant's plea of set-off

196 Secondly, in its Closing Submissions, the Defendant argued that "even if the Plaintiff [succeeded] in establishing the Alleged Loan Claims, the amount owing by the Defendant should be set-off against the amount [of US$22,999,979.05 owing] to the Defendant". However, this purported right to a set-off was never pleaded by the Defendant; and the court cannot make findings on facts which have not been pleaded (see *Ong Seow Pheng* (*supra* [142]) at [41]. The Defendant sought to rely on [8(d)] of the Defence, but I did not find it possible to read the words "the Plaintiff ceased to have any relevant right of

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167 See [8(d)] of the Defence (Amendment No. 2) at Tab 9 of the SDB.

action against the Defendant in respect of all or part of such alleged liability" as being an adequate pleading of the defence of set-off.

197 In any event, as the Plaintiff pointed out, there was no evidence to suggest that there had been – or that there should be a netting-off between the amounts owed by the Plaintiff to the Defendant and *vice versa*. Jong, in re-examination, stated clearly that he did not agree there had been any set-off of the liabilities owed between the parties. Conversely, the Defendant's own sub-ledger consistently showed that the liabilities of the Plaintiff to the Defendant remained on the Defendant's ledger until the amount of US$22,999,979.05 was written off as a bad debt following the Plaintiff's liquidation in November 2013.[168]

198 In the circumstances, I did not find any basis for the Defendant's reliance on a purported set-off.

The Defendant's plea of lack of authorisation

199 In the interests of completeness, it should also be pointed out that the Defendant had pleaded in their amended Defence that the loan transactions on which the Plaintiff based its claims were "not duly authorised by the Defendant and/or undertaken in the best interests of the Defendant". Again, this being a positive assertion, the Defendant would have borne the legal and the evidential burdens of proving this aspect of their defence. However, this point was not pursued in the course of the trial, and the Defendant led no evidence on it. As

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168 See p 181 of 2PBD where the said amount was written off in January 2014 as "Provision for PSS-BVI bad debts".

such, the Defendant must be taken to have abandoned this aspect of their defence.

The Plaintiff's submission that an adverse inference ought to be drawn against the Defendant for failing to call certain witnesses

200 Thirdly, I address the Plaintiff's submission that an adverse inference should be drawn against the Defendant under s 116 of the EA for failing to call relevant witnesses in the trial.[169] I have already examined the authorities in this area (see [45]–[49] and [57] above). Bearing in mind the guiding principles established in these authorities, I considered the respective roles played by Bai Yun and He Yue in these proceedings.

201 In respect of Bai Yun, as the Plaintiff has pointed out, he affirmed nearly all of the Defendant's affidavits in these proceedings up to the point the trial commenced – and even thereafter. Although in some of these affidavits he took pains to state that he and the other current directors of the Defendants had no personal knowledge of the subject matter of the Plaintiff's claims,[170] he also put forward in several of these affidavits various defences and arguments on behalf of the Defendants. Thus, for example, in his 15th affidavit (filed less than a week before the trial began),[171] he stated that the Wuxi Restructuring was "an integral part of the Defendant's Defence" and that "following the Wuxi Restructuring, the Plaintiff ceased to have any relevant right of action against the Defendant". He then purported to offer a brief explanation as to why this was so, whilst stressing that the "exact mechanics of the Wuxi Restructuring will be explored

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169 See [49] to [56] of the Plaintiff's Closing Submissions.

170 See *eg*, [12] of Bai Yun's 6th affidavit of 27 January 2016.

171 Bai Yun's 15th affidavit of 10 May 2018.

at trial".[172] Given the positive assertions made by Bai Yun as to "integral" aspects of the Defendant's defence, it was extremely odd that the Defendant elected not to call him as a witness in the trial, nor to offer him for cross-examination. The Defendant proffered no explanation as to why Bai Yun was unavailable as a witness in the trial; and given that he filed a 16th affidavit on the Defendant's behalf not long after the evidence in the trial was concluded, it did not appear that he was in any way incapacitated or inhibited from testifying as a defence witness.

202 I also noted that Bai Yun had filed the affidavits verifying the Defendant's lists of documents in these proceedings – which affidavits required him to affirm that "[n]either the Defendant, nor its solicitors nor any other person on its behalf" had or ever had in its possession, custody or power any documents relevant to any matter in question in this action. What was interesting was that while Bai Yun had filed his 3rd affidavit verifying the Defendant's 3rd list of documents on 7 March 2018, the Defendant's 4th and 5th lists of documents were filed on 14 May 2018 and 18 May 2018 respectively without any verifying affidavits. Bai Yun's 16th affidavit verifying these two additional lists of documents – as well as a 6th list of documents – was eventually filed on 13 June 2018, after evidence-taking in the trial had been completed and whilst parties were preparing their closing submissions. The belated filing of this 16th affidavit, coupled with the Defendant's failure to call Bai Yun as a witness, meant that the Plaintiff was deprived of the opportunity to question him about the Defendant's access to relevant evidence. This was a relevant issue given that the Defendant had maintained throughout the proceedings its lack of relevant documents.[173]

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172 See [13] to [18] of Bai Yun's 15th affidavit.

203 As for He Yue, he was stated to be the Defendant's sole factual witness at the trial; and the AEIC filed on his behalf purported to put forward various details relating to the transactions on which the Plaintiff's claims were premised. It was also represented that these details were based on his "review of the relevant documents" and "confidential discussions"[174]. Given the matters which his AEIC purported to speak to, it was again extremely odd that no coherent explanation was offered for the last-minute decision to withdraw him as a witness. All that was said in the Defendant's closing submissions was that the Defendant's directors had no "personal knowledge of the various transactions in issue", and that "[a]ccordingly, in light of such objections taken by the Plaintiff against He Yue's [AEIC]', a decision had been made "not to lead evidence from" him.[175] With respect, this explanation made no sense: the Defendant would have been aware of the risk of objections to He Yue's evidence from the outset; this knowledge could hardly have come upon them only mid-trial. Given that an AEIC had been filed by He Yue, it was also very odd that no explanation was given as to why he was not offered for cross-examination.

204 Having regard to the above circumstances, I found it reasonable that an adverse inference be drawn against the Defendant in respect of its failure to call either Bai Yun or He Yue to give evidence in the trial.

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173 See *eg*, pp 2–3 of Bai Yun's 13th affidavit filed on 9 Feb 2018 where he claimed that the Defendant did not have the documents pertaining to its previous Audits.

174 See e.g. [35] and [89] of He Yue's AEIC.

175 See [22] of the Defendant's Closing Submissions.

Conclusion

205 For the reasons given in these written grounds, I was satisfied that the Plaintiff had proved its claims for the four loans and the unpaid share consideration; and I gave judgment according to the total sum of US$197,501,785 (with interest). The Plaintiff was also awarded the costs of the proceedings which I fixed at $120,000 (excluding reasonable disbursements) after hearing submissions from both parties.

Mavis Chionh Sze Chyi
Judicial Commissioner

Ashok Kumar, Gregory Leong and Cephas Yee (BlackOak LLC) for the plaintiff;
Danny Ong, Yam Wern-Jhien, Vince Gui and Danitza Hon (Rajah & Tann Singapore LLP) for the defendant.