**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2018] SGHC 69**

Suit No 605 of 2015

Between

(1) Mann Holdings Pte Ltd

(2) Chew Ghim Bok

… *Plaintiffs*

And

Ung Yoke Hong

… *Defendant*

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# GROUNDS OF JUDGMENT

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[Debt and recovery] — [Loan or deposit]

## TABLE OF CONTENTS

# Mann Holdings Pte Ltd and another
# v
# Ung Yoke Hong

**[2018] SGHC 69**

High Court – Suit No 605 of 2015
Lai Siu Chiu SJ
26, 27, 30 October, 23, 24 November; 11 & 15 December 2017

23 March 2018

**Lai Siu Chiu SJ:**

## Introduction

1 At the conclusion of the trial of Suit No 605 of 2015 ("this Suit") and after considering the parties' closing submissions, I delivered oral judgment in favour of Mann Holdings Pte Ltd ("the first plaintiff") and Chew Ghim Bok ("Chew") (collectively "the plaintiffs") against Ung Yoke Hong ("the defendant" also known as "Vincent") in the sum of RM4m (Malaysian Ringgit 4 million) with interest at 5.33% from the date of the writ of summons (19 June 2015) and costs to be taxed on a standard basis unless otherwise agreed.

2 As the defendant has appealed against my judgment (in Civil Appeal No. 6 of 2018), I now set out the grounds for my decision. These grounds of decision should be read in conjunction with this court's earlier decision dated 8 June 2016 in *Mann Holdings Pte Ltd v Ung Yoke Hong* [2016] SGHC 112

("the stay decision"), which related to the defendant's unsuccessful application for a stay of proceedings on the ground of *forum non conveniens*. The defendant's appeal against the dismissal of his stay application was subsequently dismissed by the Court of Appeal.

**The facts**

3 The first plaintiff is a Singapore investment company. Tan Poh Hua ('Sam Tan") is its director and was the person who incorporated the company. One of the first plaintiff's investments is a Singapore company called Enviro Investments Pte Ltd ("Enviro"). Chew is a Singaporean and is also an investor in Enviro. Enviro is a wholly-owned subsidiary of a Singapore-listed company called Enviro-Hub Holdings Ltd ("Enviro-Hub"). Enviro-Hub's business includes recycling of plastics, ferrous and non-ferrous metals, recovery and refining of platinum group metals as well as conversion of waste plastics to fuel. Ng Ah Hua ("Raymond") is the executive chairman of Enviro-Hub and is also a substantial shareholder of the company.

4 The defendant is a Malaysian citizen who (together with his wife Chong Siew Choo ("Chong")) holds 97% of the issued shares in a Malaysian company called Metahub Industries Sdn Bhd ("Metahub"). He is also Metahub's managing director. Metahub is in the business of recycling, waste management, tin refining and manufacturing.

5 Around October 2014, the defendant's brother Ung Yoke Hooi ("William"), who had known Raymond for about 30 years as a friend and business associate, contacted Raymond to tell him that the shareholders of Metahub were looking for a third party to acquire their entire 100% shareholdings in the company.[1] Enviro's shareholders (including the plaintiffs)

commenced negotiations in or about November 2014 for the buy-out of all the shares in Metahub from its shareholders as they saw synergy in the recycling and waste management activities of the two companies. The key persons from Enviro who negotiated with the defendant on its intended purchase were Raymond and William. It was William who first introduced Raymond to the defendant some 20 years earlier.

6 Negotiations on behalf of Metahub were conducted by the defendant and Kevin Chee Ho Chun ("Chee"), who is a director and 1% shareholder of the company. There was a preliminary meeting between the parties on 18 November 2014 followed by two other meetings on 12 December 2014 and 14 January 2015. Negotiations between the parties continued until March 2015. Apparently Chee is legally trained as he drafted the initial sale and purchase agreement ("SPA") for the parties as well as its numerous amended versions.

7 It was contemplated that should Enviro acquire Metahub, the first plaintiff and Chew would each own 20% of Metahub's shares while William would hold 9% of the shares. In his affidavit of evidence-in-chief ("AEIC") Raymond deposed that it was his condition that William must be involved in the acquisition if Enviro took over Metahub.[2]

8 The plaintiffs contended that from the outset, they had made it clear to the defendant and Chee that neither Enviro nor Enviro-Hub were in a position to pay any deposit or make an advance payment for the proposed acquisition unless certain conditions precedent were fulfilled by Metahub, including the completion of the due diligence process by the purchasers.[3]

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[1] Raymond's AEIC ("RAEIC") at [2.1.1]

[2] RAEIC at [2.1.2]

9 The defendant however was adamant from the start of negotiations that either Enviro or Enviro-Hub must pay a deposit before he would allow a due diligence exercise to be carried out. Consequently, negotiations came to a deadlock and the impasse continued until December 2014.

10 Raymond deposed that on or around 16 December 2014, he was on holiday in Barcelona, Spain when Chee telephoned him pressing him to agree to Chee's version of the draft SPA that had been emailed to Enviro on 12 December 2014, as well as to pay the initial deposit of RM5m stated in the draft. Raymond deposed he was so put off by Chee's telephone call that he told Chee he was calling off the proposed acquisition by Enviro.[4] The defendant subsequently telephoned Raymond to ask him to reconsider his decision to call off the acquisition.[5]

11 On Raymond's return to Singapore on or around 21 December 2014, William spoke to Raymond and apparently told him the defendant was facing cash-flow problems and that the defendant needed some short-term loans to tide him over. William added that if his brother's problem could be resolved, the defendant would allow Enviro or Enviro-Hub to carry out the due diligence process on Metahub.

12 In the same month, Raymond arranged a meeting in Johor between the defendant, Sam Tan and Chew (who is a close friend of Raymond). In that meeting and at subsequent discussions, the plaintiffs claimed (but which the defendant denied) that the defendant confirmed his cash-flow problems and

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[3] Plaintiffs' closing submissions ("PCS") at [4.1.12]

[4] RAEIC at [2.2.10]

[5] RAEIC at [2.2.12]

the fact that he needed a loan of RM5m which he represented that he would be able to repay in full after a few months.

13 The plaintiffs eventually agreed to extend a loan of RM4m ("the loan") while William would separately extend a loan of RM1m, to the defendant. Raymond instructed solicitors to draft a loan agreement for the plaintiffs' loan of RM4m.

14 The first draft of the loan document was prepared around 31 December 2014. The agreement itself was executed on or about 2 January 2015 ("the loan agreement") by the defendant at Legoland theme park in Johor Bahru in the presence of Raymond and William (who witnessed the defendant's signature).

15 On or about 6 January 2015, Sam Tan and Chew signed the loan agreement in Singapore on behalf of the plaintiffs. Amongst the salient provisions in the loan agreement are the following:[6]

(a) Clause 1.2 – the loan was to be repaid in full within two months or upon completion of the acquisition of shares in Metahub whichever was the earlier;

(b) Clause 1.3 – in the event the acquisition of shares was terminated, the loan would be repaid in full immediately; and

(c) Clause 2 – the defendant would charge 20% of the shares he held in Metahub to the plaintiffs as security for the loan.

[6] Exhibit TPH-1 of Sam Tan's affidavit dated 9 October 2015

16 On 6 January 2015, Chew on behalf of himself and the first plaintiff remitted the loan to the defendant's Malaysian bank account via telegraphic transfer. The defendant executed transfer forms in blank to charge 20% of his shares in Metahub to the plaintiffs. The transfer documents are currently in the custody of the Chief Financial Officer of Enviro-Hub Ms Tan Lay Mai ("Ms Tan"). Sam Tan subsequently forwarded a soft copy of the loan agreement to the defendant by email on 23 January 2015 at the defendant's request.

17 According to the plaintiffs (but denied by William), Chew on behalf of William remitted RM1m to the defendant on or about 22 January 2015.

18 The proposed acquisition of Metahub's shares was subsequently aborted on or around 26 March 2015, apparently due to Enviro's inability to procure the requisite financing from either Malaysian or Singapore banks. By an email dated 27 March 2015, Sam Tan demanded repayment of the loan from the defendant.[7]

19 The defendant refused to repay, contending that the loan was a non-refundable deposit for the intended acquisition of shares in Metahub and not a loan. He further ignored the letters of demand sent to him by the plaintiffs' and William's solicitors in April and May 2015 respectively. Instead, the defendant deposed in his second affidavit that the plaintiffs' solicitors had no authority from William to send him the second letter of demand dated 6 May 2015 (for RM1m) and his solicitors had written to the plaintiffs' solicitors on or about 16 September 2015 to demand an explanation. The defendant claimed he had checked with William and was told that the plaintiffs' solicitors had not been authorised to act for William.

[7] Exhibit UYH-14 of the defendant's first affidavit dated 18 September 2015

20 The defendant produced a statutory declaration from William dated 21 October 2015 wherein William declared that: (i) he had never provided Chew with money to be remitted to the defendant as a loan; (ii) that the defendant signed the loan agreement in his presence only as an acknowledgment of the requisite deposit under the SPA for the Metahub shares, as the SPA itself could only be signed after the due diligence exercise had been conducted and (iii) he was present at all the meetings between the parties and the subject of a loan to the defendant was never mentioned at all.[8]

21 The plaintiffs filed their writ of summons and statement of claim in this Suit on 19 June 2015 claiming repayment of the loan pursuant to cl 1.3 of the loan agreement (at [15] above) which they alleged the defendant had breached.

22 As alluded to earlier in [2], the defendant unsuccessfully applied for a stay of proceedings in this Suit. When he failed in his application before this court and the Court of Appeal, he and his fellow shareholders in Metahub commenced proceedings in the Malaysian (Johor Bahru) High Court against the plaintiffs as well as against William, for their failure to complete their purchase despite the fact that the transaction was aborted and no SPA had been executed.

**The evidence**

23 The plaintiffs' evidence in support of their claim was adduced from four witnesses namely Ms Tan, Sam Tan, Raymond and Chew. The defendant testified for his defence (in Mandarin) together with his fellow shareholders from Metahub, namely Tan Hwa Yeong ("Alex Tan") who was the marketing director at the material time, Gan Eng Leong ("Gan") the then head of quality

[8] Exhibit UYH-18 of the defendant's second affidavit dated 23 October 2015

control and Yee Kwong Yik ("Jason Yee") the sales director of the company at the material time. Chee and William did not testify for the defendant notwithstanding the roles they played in the aborted SPA and in the loan extended to the defendant respectively. Apparently Chee was in court on the first day of the trial of this Suit.

***The plaintiffs' case***

24 The plaintiffs' version has been outlined in the preceding paragraphs [3] to [15] and no further elaboration is required except with regard to certain correspondence between the parties leading to the signing of the loan agreement, to which I shall now turn.

25 On 30 December 2014, Raymond emailed to the defendant the draft loan agreement prepared by the plaintiffs' solicitors and which was copied to William. There was no message attendant with the draft.

26 On 31 December 2014, Steven Koh, the Finance/Human Resource Manager of Enviro-Hub, emailed the draft loan agreement again to the defendant with this message:

> As per instructed by Mr Ng, please see attached for the 1st draft of the Loan Agreement.
>
> Mr Ng had highlighted that the 20% charged shares are meant for discussion purpose.

There was no response from the defendant to the draft or either of these two emails.

27 On 22 January 2015, Sam Tan emailed the defendant and Ms Tan to say:

> Please NOTE that the date is not filled yet.

The attachment to the email was the loan agreement which by then had been signed by both sides. On the following day, Sam Tan emailed a soft copy of the loan agreement to the defendant apparently at the latter's request. As with the earlier emails from the plaintiffs, the defendant did not respond to this message.

28 In tandem with the emails from the plaintiffs to the defendant on the loan agreement, there were (on a daily basis and several times a day at times) emails between Chee and Ms Tan from 19 November 2014 onwards concerning the various drafts of the SPA for the share transaction. In this connection, Chee had sent an email to Ms Tan on 9 March 2015 regarding the share transaction. It contained *inter alia* paragraphs 2.1.1 and 2.1.3 that state as follows:[9]

> From the first representation that payment is not a problem, we are now subjected to "exploring for payment" which effectively you are indirectly telling us the acquirers are in no financial position to pay the balance purchase price (after deducting the deposit of RM5 Million) and complete the take over.
>
> […]
>
> Your exploration of other method of financing is through a Malaysian bank where your Singapore bank has rejected you…

29 Ms Tan replied on 9 March 2015 to Chee's above email as follows:[10]

> First of all we would like to clarify that the RM5m is currently in form of loan to Mr Vincent not a deposit payment for the acquisition (you may refer relevant agreement signed).

[9] Agreed Bundle ("AB") at p 382

[10] AB at p 378

> We take point 2.13 representing your board including Mr Vincent. We have no choice but to execute the loan agreement with Mr Vincent. We will arrange our lawyer for the necessary.

30 On 25 March 2015, for the very first time, the defendant responded by email to Ms Tan and the plaintiffs.[11] The lengthy email was obviously drafted on professional or legal advice because it was beautifully crafted (as the court pointed out to the defendant during his cross-examination). Although the defendant claimed that Chee (who is legally trained) had helped him draft the email, the court is more inclined to think that the language of the draft suggests that it was the work of a legal professional. In relation to the RM5m sum that he had received, the defendant's email stated as follows:

> I refer to your email to Mr Chee below.
>
> I totally disagree with the content thereof and wish to put on record the following:
>
> At all times parties never intended that the RM5Million paid as a loan to me as I have never requested for a loan.
>
> You were never in the know about my discussion with Raymond in early January when I put to him that if he is still interested on [*sic*] the acquisition and to do the due diligence, I will need to be paid the deposit which I originally requested for RM10M but finally agreed at RM5M.
>
> Even after the money was remitted and I was required to submit documents to bank Negara, your side agreed that a copy of the unsigned SPA be given to the bank to show that the RM5M is the deposit for the purchase of Metahub shares.
>
> When I was requested to sign the document purportedly a loan agreement I objected but was told by Raymond it is only for comfort and more as an acknowledgement that the RM5M was paid and never had we agreed that it is actually a loan to me….

31 Not surprisingly, the defendant's email was refuted by Ms Tan in her email reply sent on the next day. The relevant extracts of her email state:[12]

[11] AB at p 382

[12] AB at p 383

> First of all the RM 5 million was never a deposit as per loan agreement signed, this is very clear.
>
> Secondly you mentioned about Bank Negara request for documentation proof for source of fund. I think you should [*sic*] able to recall that on 23 January 2015 you called me for the SPA and I have clearly explained to you that the RM 5 million is a loan by [the second plaintiff] and [the first plaintiff] ("lenders") and told you that the SPA has yet to be agreed or signed, so you cannot provide Bank Negara with the draft SPA. And I have on the same day send you (copy to Mr William Ung) the loan agreement NOT draft SPA. I think you should able (sic) to retrieve the day before (22 Jan) Mr Sam Tan has sent you a signed copy of the loan agreement as supporting document for Bank Negara as per your request too.
>
> Furthermore after the Loan Agreement has been signed, the draft SPA for discussion has been amended to provide for the completion of the acquisition of the Metahub Shares by Enviro Investment to be conditional upon the redemption of the charge of your shares pursuant to the Loan Agreement between yourself and the lenders.
>
> At all material times, it was made very clear to you that the Board was not prepared to commit to the acquisition and/or to execute the Sale and Purchase Agreement without a preliminary insight into the affairs of the company and further deliberations by the Board. It was then suggested by you that we could commence preliminary financial and legal due diligence upon the loans disbursed to you by lenders.
>
> We totally disagree with your statement claiming that "your side had insisted the purchase will go through and after receiving the RM5M". As a listed company, we have not on any occasion committed to the purchase and hence the draft SPA have not been finalized and/or executed to date. If you can further recall that you called us and asked us if we can finalise and execute the SPA before CNY as you wish to announce the same to your employee, we told you unlikely as there are too many uncertainty and our Board will not grant any approval until there is clearer picture for the prospect of this investment/acquisition.
>
> […]
>
> We regret that we are unable to accede to your request to complete the Sale and Purchase within one week from your email and in the circumstances, we are left with no choice but to abort the proposed acquisition as well as further discussions on the same.

32 On 27 March 2015, Sam Tan sent an email to the defendant requesting repayment of the RM5m advanced to the latter.[13] As there was no response from the defendant or payment of the aforesaid sum, the plaintiffs' solicitors followed up with a letter of demand dated 23 April 2015.[14]

33 On 24 April 2015, the defendant sent a lengthy email to Ms Tan which, judging from its language, was again probably drafted by his legal advisers.[15] The defendant reiterated the contention in his earlier email of 25 March that Raymond had asked him to sign the loan agreement as acknowledgement of receipt of RM5m and that he had never taken a loan. Further, in his capacity as the executive chairman of Enviro-Hub, Raymond had made various representations to the defendant namely:

(a) that the share transaction would be completed;

(b) that the defendant should liquidate his stocks to pare down Metahub's existing loans, which he did, and he had almost redeemed the banking facilities of Ambank; and

(c) that the draft SPA was not a problem and Raymond had "committed to signing dates on 12-12-2014, 18-12-2014 and in January 2015" at meetings in the presence of the defendant's shareholders and others (including Ms Tan) prior to his departure for Italy.

34 In support of his contention that there was no loan and no loan agreement, the defendant's email had this to say:

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[13] AB at p 388

[14] AB at p 390

[15] AB at p 392

> there was never any loan granted although a document was purportedly signed. The reason for the signing document was clearly explained above and your Mr Raymond is fully aware of the reason thereof.
>
> At all times both me and Mr Raymond had never intended or agreed to a loan and therefore the sum received by me was RM5 Million reflective of the actual deposit sum for the verbally agreed selling price of RM50 Million.
>
> Without prejudice, your alleged loan agreement states that a sum of RM4 Million shall be a loan to me. However, a sum of RM5 Million was remitted into my account and there is not a single document from your end which says that the RM5 Million remitted to me was a loan and neither did the proof of remittance forwarded to me says so. If your allegation is true (which is denied) why was the remittance RM5 Million which is reflective of the deposit sum for the intended sale instead of only RM4 Million which you alleged is a loan as stated in the alleged undated and unstamped loan agreement?
>
> There was no loan at all and that is why there is no dated agreement or stamped alleged loan agreement. Till to date there is no validly executed, dated and stamped loan agreement in parties possession. However, after your failure to complete the intended sale and purchase agreement, you then on hindsight claimed that the RM5 Million is a loan and not a deposit which is liable to be forfeited.

### *The defendant's case*

35 The defendant's defence (repeated in his affidavits) was that he was not in need of funds and he never asked the plaintiffs for a loan. Instead, the money he received from the plaintiffs was the requisite non-refundable deposit under the SPA.

36 The emails set out in [25] to [34] should be contrasted with the email chain which focussed on the SPA.

37 According to Ms Tan's AEIC, there were no less than four drafts of the SPA that Chee prepared or Enviro-Hub amended, between 19 November 2014 and 12 December 2014.[16] Chee forwarded the first draft SPA to Ms Tan on 19 November 2014. This was followed in rapid succession by the other drafts which were always sent to Ms Tan by email. To say that the defendant was anxious to complete the SPA as quickly as possible would be an understatement. The emails which are relevant to the court's findings will now be elaborated upon below.

38 The constant tone throughout the email chain between Chee and Ms Tan was the former's repeated chasing of the latter to approve and sign the SPA as quickly as possible as well as to pay the deposit stipulated by Metahub under cl 3.02 of the SPA. The stated consideration for the transaction was RM50m for the sale to Enviro-Hub or its special purpose vehicle (which turned out to be the first plaintiff).

39 Chee's first draft SPA[17] stipulated under cl 3.02 that the purchaser must pay a deposit of RM10m upon the execution of the SPA with the balance RM40m payable within one month from the date of approval of the transaction by the Foreign Investment Committee ("FIC") of the Malaysian government.

40 The table below shows the parties' negotiations on the draft SPA between November 2014 and March 2015:

| **No.** | **Date** | **Sender** | **Recipient** | **Message** |
|---|---|---|---|---|

[16] Tan Lay Mai's AEIC at [2.2.6] – [2.2.17]

[17] AB at p 27

| | | | | |
|---|---|---|---|---|
| 1 | 19 November 2014 | Chee | Ms Tan | Forwarding 1st draft of SPA after parties met on 18 November 2014 |
| 2 | 28 November 2014 | Chee | Ms Tan | Pressed for a response to his email of 19 November 2014 stating the SPA must be signed by 12 December 2014 |
| 3 | 28 November 2014 | Ms Tan | Chee | Advised shareholding of 1st plaintiff had been decided and Enviro-Hub would be involved in the acquisition |
| 4 | 8 December 2014 | Chee | Ms Tan | Pressed again for a response to his draft SPA |
| 5 | 8 December 2014 | Ms Tan | Chee | Enviro-Hub would be meeting on 9 December 2014 to discuss the acquisition and draft SPA |
| 6 | 10 December 2014 | Chee | Ms Tan | Forwarded engrossed SPA for execution |
| 7 | 11 December 2014 | Ms Tan | Chee | Forwarded Enviro-Hub's amendments on draft SPA |
| 8 | 12 December 2014 | Chee | Ms Tan | Forwarded "proposed final draft agreement" after parties' meeting that morning at 11am. Unless there were further amendments, asked that agreement be signed and deposit paid |

| | | | | |
|---|---|---|---|---|
| | | | | by 18 December 2014 |
| 9 | 15 December 2014 | Ms Tan | Chee | Forwarded Enviro-Hub Board's amendments on draft SPA |
| 10 | 16 December 2014 | Chee | Ms Tan | Raised strong objections to the amendments to draft SPA proposed by Enviro-Hub. Said the transaction would be called off if SPA not signed and deposit not paid by 18 December 2014 |
| 11 | 27 February 2015 | Chee | Ms Tan | Inquiring on the progress of the SPA |
| 12 | 4 March 2015 | Chee | Ms Tan | Sending a reminder as he had not received her response |
| 13 | 6 March 2015 | Ms Tan | Chee | Informed Chee that bankers not supportive of acquisition due to diminishing profit in Metahub and Enviro-Hub was reviewing possible funding structure |

41 More elaboration is called for regarding Chee's email of 16 December 2014 (No 10 above) for reasons that will become apparent later. The relevant extracts of that email are as follows:[18]

[18] AB at p 278

> 1 the reasons for agreeing at the selling price of RM30M was that the transaction will be simplified and the payment will be speedy so that [the defendant] can utilise the funds to settle his company's CIMB loan with the main purpose of discharging the corporate guarantee given by Metahub;
>
> 2 the sale of Metahub is based on the book value of the company instead of its true value if a revaluation exercise is undertaken or premium for goodwill has been taken into account;
>
> Premised on the above, Vincent has agreed with the price of RM30M and on further agreement that the share sales agreement be signed on 12 December 2014. When a request was made to postpone the signing up to the 18th December 2014, he graciously acceded to such request. However much to his disappointment, the signing cannot be effected because your Board has disagreed with terms which was already previously agreed.
>
> […]
>
> To sign an agreement without a deposit sum being paid is as good as not signing an agreement. This is especially so when the condition precedent also subjects the sale of the shares to a due diligence being "satisfactory" with no parameters and basis being outlined.
>
> […]
>
> 2 Condition Precedent
>
> Let us reiterate what was earlier agreed was that the completion of the sale will be effected within 3 months. Your request is double the agreed time frame again because your board thinks it is realistic.

42 In his second email to Ms Tan on 16 December 2014, Chee corrected the selling price in his earlier message from RM30m to RM50m.

43 The bone of contention between Metahub and Enviro-Hub on the terms of the SPA centred on the issue of the deposit payable under cl 3.02 of the draft SPA prepared by Chee. Chee's version of the clause was as follows:

Consideration

The consideration to be paid by the Purchaser(s) to the Vendor(s) is Ringgit Malaysia Fifty Million (RM50,000,000.00) only (hereinafter referred to as "Purchase Consideration"), which shall be paid as follows:

(i) a sum of RINGGIT MALAYSIA FOUR MILLION (RM4,000,00.00) only being the deposit sum on the date of execution of this Agreement (hereinafter referred to as the "Part Deposit") and a further sum of RINGGIT MALAYSIA ONE MILLION (RM1,000,000) within fourteen (14) days from the date hereof (hereinafter referred to as the "Balance Deposit"). The Part Deposit and Balance Deposit shall be collectively referred to as the "Deposit";

(ii) the balance of purchase price of RINGGIT MALAYSIA FORTY FIVE MILLION (RM45,000,000.00) (hereinafter referred to as the "Balance Purchase Price") shall be paid by the Purchaser(s) within ONE (1) month from the date the approval of the FIC having been obtained (hereinafter referred to as the "Completion Date");

(iii) It is hereby agreed that the Purchaser's Solicitors shall be irrevocably authorised to retain a sum of RINGGIT MALAYSIA TWO MILLION (RM2,000,000.00) only from the Balance Purchase Price as agreed retention sum and the said retention sum shall be unconditionally released to the Vendor(s) upon the expiry of THREE (3) months from the Completion Date Provided That there shall be no claims whatsoever against the Vendor(s).

44 Enviro-Hub's amended version of cl 3.02 reads as follows:

The consideration to be paid by the Purchaser(s) to the Vendor(s) is RINGGIT MALAYSIA FIFTY MILLION (RM50,000,000.00) only (hereinafter referred to as "Purchase Consideration"), which shall be paid as follows:

(i) a sum of RINGGIT MALAYSIA FOUR MILLION (RM4,000,00.00) only being the deposit sum on the date of execution of this Agreement (hereinafter referred to as the "Part Deposit") and a further sum of RINGGIT MALAYSIA ONE MILLION (RM1,000,000) within fourteen (14) days from the date hereof (hereinafter referred to as the "Balance Deposit"). The

> Part Deposit and Balance Deposit shall be collectively referred to as the "Deposit" to be paid by the Purchaser to the Purchaser's solicitors as stakeholders pending the fulfilment of the Conditions Precedent set out in Section 3.03(i) hereinbelow. Upon this Agreement being deemed unconditional, the Deposit shall be released to the Vendor(s) as part payment towards the account of the Purchase Consideration.
>
> (ii) the balance of purchase price of RINGGIT MALAYSIA FORTY FIVE MILLION (RM45,000,000.00) (hereinafter referred to as the "Balance Purchase Price") shall be paid by the Purchaser(s) within THREE (3) months from the Unconditional Date (hereinafter referred to as the "Completion Date") to be paid by the Purchaser pending the fulfilment of the Condition Precedent set out in Section 3.03(ii) to (v) hereinbelow.
>
> (iii) It is hereby agreed that the Purchaser's Solicitors shall be irrevocably authorised to retain a sum of RINGGIT MALAYSIA TWO MILLION (RM2,000,000.00) only from the Balance Purchase Price as agreed retention sum and the said retention sum shall be unconditionally released to the Vendor(s) upon the expiry of THREE (3) months from the Completion Date Provided That there shall be no claims whatsoever against the Vendor(s).

45 The underlined portions of cl 3.02 above were the amendments that Enviro-Hub inserted into the draft SPA that Chee emailed to Ms Tan on 12 December 2014 the relevant portions of which message read as follows:

> Dear Lay Mai,
>
> Please find attached the proposed draft final agreement incorporating our comments in yellow pursuant to our meeting at 11am today.
>
> I trust that the agreement has been fully finalised and the attached copy shall be the approved copy for parties' execution. Kindly instruct your solicitors to fair the agreement for your company's execution (UNLESS THERE ARE FURTHER AMENDMENTS) and thereafter forward the signed copy of the agreement to us with the deposit sum for our shareholder's execution on or before 18th December 2014.

**My decision**

46 It is noteworthy that throughout his email correspondence, Chee referred to the various drafts that he forwarded to Ms Tan as "the final draft". However, as the court pointed out to the defendant in the course of his cross-examination, just because Chee used the terminology "final draft" repeatedly did not mean that factually those drafts were "final":[19]

> Ct: Mr Ung, tell me, just because Mr Chee and/or you keep telling Enviro-Hub's Tan Lay Mai, "This is the final draft, this is the approved draft", it doesn't mean Enviro-Hub accepts that this is the final draft. It doesn't mean they agree with you it's finalised/approved. Unless you can show to us any email, anything in the documentation to say Enviro-Hub says, "Yes, we agree this is the final document." The fact that Mr Chee and/or yourself keeps saying to Enviro-Hub this is finalised, this is the approved document to be signed, it doesn't mean that Enviro-Hub accepts that it is. Do you agree?

The court's view is reinforced by Chee's own words in his email dated 12 December 2014 (at [45] above) where he used the words in parenthesis "(UNLESS THERE ARE FURTHER AMENDMENTS)", thereby recognising and accepting the possibility that Enviro-Hub would amend his draft further. After some prevarication, the defendant eventually agreed with the court that the 16 December 2014 email showed the parties were still *not* in agreement on the terms of the draft SPA:[20]

> Ct: Until I rule otherwise Mr Ung. You will answer counsel's questions. We are asking you on an email that Mr Chee sent to Lay Mai. It is clear that as of 16 December 2014, both sides are not in agreement on the terms of the sale and purchase agreement. You must accept that, based on Mr Chee' email –and Mr Chee is your representative –and the email is also carbon-copied to you, because you are vincent@metahub.com.my.

[19] Notes of Evidence ("NE"), Day 5 Page 518 Lines 2 – 13

[20] NE, Day 5 Page 522 Line 15 – Page 523 Line 2

> A: I agree with what your Honour has said, but I disagree with what counsel had said.

47 While on the one hand, the defendant expected the court to recognise an unsigned draft SPA as having legal effect, he asserted on the other hand that the court should disregard the (executed) loan agreement that had been performed by the plaintiffs by their extending him the loan. It bears repeating here what I said at [44] in the stay decision:

> The defendant's case also required the court to believe that a Singapore listed company *viz* Enviro-Hub and/or its wholly owned subsidiary Enviro would pay a non-refundable deposit of RM4m to carry out a due diligence exercise on a company (Metahub) which they may or may not acquire and for which no purchase and sale agreement had been executed. This would mean that the two companies had disregarded the interests of their shareholders as well as all rules of good corporate governance. The defendant's version of events also ignored the fact that the plaintiffs here are neither Enviro nor Enviro-Hub.

48 The defendant had also overlooked an important factor. Even if *arguendo*, Raymond did make any or all of the representations in [33] that the defendant alleged (which the court disbelieved), those representations were not made on behalf of either or both plaintiffs and would not bind them at law.

49 The court was also sceptical of Chee's email dated 16 December 2014 (at [41] above) for another reason. It is the court's view that the statement in paragraph 1 therein was untruthful. The court took judicial notice of the fact that it is common practice in the banking industry for loans extended to corporate entities (in this case Metahub) to be secured by personal guarantees from its directors and/or shareholders. It is absurd and makes no commercial sense for a lending bank to take a guarantee from the same corporate borrower.

50 I do not think it is at all speculative for this court to surmise that the defendant, in his capacity as the director and majority shareholder of Metahub (with or without his wife), would have given a personal guarantee in this case to CIMB Bank for the loan extended to the company. I have no doubt too that CIMB Bank was putting pressure on the defendant to repay the loan extended to Metahub, totally or partially. That would explain why Chee stopped chasing Ms Tan relentlessly to sign the SPA and to pay a deposit after the defendant received the loan in early January 2015. It is equally likely that the defendant utilised the loan (and the further RM1m from William) to repay and/or reduce Metahub's outstanding liability to CIMB Bank and/or to its other bankers.

51 In this regard, Chee's message to Ms Tan of 27 February 2015,[21] which was re-sent by Chee to Ms Tan on 4 March 2015 when she did not respond, is telling:

> Dear Lay Mai,
>
> Happy Chinese New Year to you!
>
> I would be grateful if you could kindly enlighten us on the progress of the completion of the sale and purchase of the shares of Metahub. As you are aware, the original intention of all parties was to conclude the sale at the soonest possible and the execution of the agreement was originally agreed on 12-12-2014. However, at the buyer's request we had agreed to our request for conducting the due diligence first and it must be noted that almost 2 months have passes but we have not heard from you on the final outcome of the due diligence neither have we received your draft sale and purchase agreement despite our request.
>
> As you are further aware, one of the conditions for the share sale was that I will not be retained and shall leave Metahub on the completion of the sale and take over. Pursuant therefrom it is of great concern to me as I will need to ensure that I am gainfully employed after leaving Metahub. I am in the process of finalising my new job offer and I hope the completion date

[21] AB at p 369

> for the sale and purchase can be determined so as to enable me to fix my commencement date for my new posting.
>
> I sincerely hope you will notify me of the final dates for completion next week.

52 The above email reveals a number of interesting facts. First, it was surprising that someone like Chee, who had been so heavily involved in the drafting and negotiations of the SPA since the very beginning, was not apprised of the status of the SPA between the two parties. Second, Chee's email was even more surprising given his earlier email of 16 December 2014 set out at [41] above. By 16 December 2014 if not earlier, Enviro-Hub had made it plain to the defendant that the payment of any deposit was subject to fulfilment of the Conditions Precedent in cl 3.03 of the draft SPA.

53 Clause 3.03(i) (as amended by Enviro-Hub) reads as follows:

> the Purchaser(s) being satisfied with the outcome of a due diligence audit on the legal, financial, technical and business aspects of [Metahub] (hereinafter referred to as "Due Diligence Audit") by the Purchasers at their own cost and that the management, directors and/or shareholders of [Metahub] successfully remedied and/or rectified specific issues/concerns uncovered from the Due Diligence Audit parties agreed that the Due Diligence Audit will not exceed six weeks' duration,

54 It was clear from Enviro-Hub's proposed amendment of cl 3.03 that there would not be payment of any deposit to Metahub without conditions, contrary to the defendant's pleaded case. Why would Enviro-Hub do a *volte face* subsequently? In any case, it was not Enviro-Hub that extended the loan to the defendant.

55 It was not in dispute that even though the draft SPA never progressed to the stage of being signed, the due diligence exercise on Metahub was carried

out. This was due to the signing of the loan agreement – in exchange for the plaintiffs' monies, the defendant allowed the due diligence exercise to be carried out, and this was done by Enviro-Hub in January 2015.

56 One of the reasons that the SPA was aborted (according to the plaintiffs) was Metahub's refusal to provide a forecast for their business. This was evidenced in Chee's email to Ms Tan dated 16 December 2014 where he said *inter alia* that: [22]

> Forecast
>
> We are not agreeable to your board's request for the forecast for the following reasons:
>
> a. we are not a public listed company where a company prepares a forecast just to fulfil the listing requirement. As such we do not have a readily available forecast;
>
> b. the previously agreed terms of sale was premised on book value with no premium, goodwill or potential earnings. We do not see the basis for us preparing a forecast.
>
> Vincent regrets to note that after so much time has been spent and re-assurances given we are still unable to have the agreement signed despite parties' common understanding and agreement that the agreement be completed much earlier. You have explained many times that your board wanted the terms this way despite us having explained many times that what was agreed earlier is different from what your board wishes despite us having made compromises out of goodwill. Therefore, we regret to inform you that we are not agreeable to your counter proposals and if the share sale agreement is not executed on or before 18th December 2014 (as requested by your end) together with the payment of the deposit sum, then we shall have no other alternatives but to deem that your company is no longer interest to complete the sale and purchase of the shares in Metahub.

57 The terms of the draft SPA were never agreed between the parties. Yet, the defendant expected this court to give credence to the various drafts of that

[22] AB at pp 278 – 279

agreement but ignore a signed loan agreement for which he had received valuable consideration from the plaintiffs. As was said by the court in *Foo Jong Long Dennis v Ang Yee Lian Lawrence & Another* [2016] 2 SLR 287 (at [81]):

> (a) As a starting point, in matters of commerce, there is a rebuttable presumption that the parties intend to create legal relations in any commercial arrangement that they propose (see *Chua Kin Leng (Cai Jinling) v Phillip Securities Pte Ltd* [2006] SGHC 221 at [24]);
>
> (b) The onus on a party who asserts that a commercial arrangement is not to have legal effect is a heavy one (see *Tan Eck Hong v Maxz Universal Development Group Pte Limited* [2012] SGHC 240 at [60]).
>
> (c) Where the parties perform the terms of the commercial arrangement, it is likely that they intend to enter into legal relations pursuant to the commercial arrangement (see *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 at 27).

58 In the face of the (signed) loan agreement, the onus was on the defendant to prove that the agreement was not to have any legal effect. However, the defendant failed to discharge that burden of proof.

59 It would be appropriate at this juncture to consider the defendant's testimony which the court did not find satisfactory on the whole.

60 Earlier (at [30] and [33]), the court had observed that the defendant only responded to the emails concerning the loan on 25 March 2015 *after* his receipt of the plaintiffs' monies. The court had questioned the defendant on his previous silence to all the emails from Enviro-Hub regarding the loan agreement. The following exchange took place between the defendant and the court in the course of his cross-examination:[23]

[23] NE, Day 5 Page 554 Line 13 – Page 555 Line 1

> Ct: Don't you think, Mr Ung, if you say you didn't take any loan, all the more reason you should reply?
>
> A: Your Honour, I mentioned before that I don't write such things, that's why there was no reply from me. And, in addition, I have asked Raymond and I trusted him, and that's why I signed all the documents.
>
> Ct: That is not true also, because at AB376, there's an email from you, and then at AB392 there's another email from you. I know you told the court that it was Mr Kevin Chee who helped you to draft. But the point is that you do, when there is a need for you to do so, reply direct by email.
>
> A: I did not reply him because I was of the view that I did not take up the loan.

The court viewed the defendant's explanations for failing to respond to any of the emails from Enviro-Hub (before 25 March 2015) as neither logical nor convincing.

61 Indeed, the defendant's answers in cross-examination were patently untrue as can be seen from another exchange between him and the court during his cross-examination:[24]

> Ct: Mr Ung, earlier you told the court, and you also said yesterday, that you don't know how to send emails, you have never sent emails. Do you want to reconsider your answer in the light of the fact that you have a beautifully crafted email at AB382?
>
> …
>
> A: I told Mr Chee the contents orally, and thereafter he translated it for me, and Mr Chee also typed out the contents and forwarded me the contents. And thereafter, he told me to send it via this method.
>
> Ct: Well, since Mr Chee is not coming to court as your witness, we are in no position to ascertain whether what you are now telling us is true or correct, isn't it? Correct?
>
> A: But the fact is I don't know English.

[24] NE, Day 5 Page 542 Line 22 – Page 543 Line 13

62 The plaintiffs had relied on the case of *Pender Development Pte Ltd and another v Chesney Real Estate Group LLP and another* [2009] 3 SLR(R) 1063 ("*Pender*") in their submissions. The facts there were somewhat similar to this case. Bravo Building Construction Pte Ltd ("Bravo") alleged that an executed loan agreement between the parties pursuant to which it received $8.284m from Chesney Real Estate Group LLP ("Chesney") was not enforceable because the sum was not really a loan but a deposit under a broader agreement (*ie,* a second marketing agreement) made between Chesney and its associated company Pender Development Pte Ltd. The judge has this to say in the following paragraphs:

> 25 Bravo argued that the loan agreement was not in fact an independent agreement. According to Bravo, the moneys extended under the Loan Agreement were in truth the Deposit and that the terms and conditions of the Agreement thus applied. Although counsel for Bravo did not say this explicitly, he was effectively arguing that the Loan Agreement was a sham agreement, that is to say, that the parties did not intend for it to have legal effect[…]
>
> […]
>
> 27 Having considered these points and the fact that the Loan Agreement was concluded on the same day as that on which the Second Marketing Agreement was signed, I accepted that the Loan Agreement was related to the Agreement. However, it did not necessarily follow that the Loan Agreement was meant to have no legal effect. This conclusion would have been the result of a leap of logic and I could not agree for the following reasons: first, given that this was an arm's length commercial transaction, the parties would not have entered into agreements lightly, what more an agreement which appeared to have been carefully drafted. It would have been most unusual for the parties to go to the extent of preparing and executing an agreement which was not intended to have legal effect and which was in fact contrary to the parties' true intentions. Commercial parties do not, in the normal course of events, prepare and execute detailed written contracts that are not what they purport to be.
>
> […]

> 29 Third, Bravo's position becomes even more untenable when one considers the fact that Bravo actually took steps to comply with the terms of the Loan Agreement. It executed the corporate guarantee required under cll 21.1 and 7.1 of the Loan Agreement. It also procured the Insurance Bond from India Insurance with the intention to secure performance of the Loan Agreement at a cost of $327,963.56 pursuant to its obligations to do so under cll 2.2 and 7.2 of the Loan Agreement. It is unbelievable that Bravo would have incurred such costs for the sake of an agreement which was not intended to be effective. Last, Bravo's failure to respond upon receipt of the demand for repayment was also telling. If indeed the moneys extended under the Loan Agreement were the Deposit, Bravo would have refuted Chesney LLP's claim, and one would think rigorously. Instead, Bravo chose not to respond.

63 As was pointed out by the court to the defendant (at [60] above), the defendant should have responded to the emails emanating from Enviro-Hub set out at [25] to [27] to refute that the sum advanced to him was a loan. That would have been a common-sensical response by anyone in the defendant's position if there was indeed no loan. If not, the defendant should have at the very least (with Chee's assistance) emailed Raymond and/or Enviro-Hub to record Raymond's assurance(s) that the loan agreement was only meant to be an acknowledgment of receipt of RM4m deposit. The defendant took neither course of action.

64 The fact that the defendant took steps to comply with the terms of the loan agreement further undermined his case (see [29] of *Pender* quoted above). The defendant had apparently provided security for the loan by way of a legal charge of 20% of the total number of shares in Metahub, pursuant to cl 2 of the Loan Agreement. Clause 2.3 states:

> Pursuant to the first legal charge, the [defendant] shall upon the execution of the Agreement deposit with the [plaintiffs], the following documents:

> (i) The original share certificate of the Metahub Shares bearing Certificate No. 20;
>
> (ii) Certified True Copy of the Memorandum & Articles of Association of Metahub;
>
> (iii) The duly executed share transfer forms for the transfer of the Metahub Shares to the [plaintiffs];
>
> (iv) The necessary resolutions for the transfer of the Metahub Shares to the [plaintiffs]; and
>
> (v) The waiver in writing of any pre-emption rights by the other shareholders of Metahub.

65 There was evidence before the court that:

(a) the defendant delivered to Raymond and Ms Tan two undated share transfer forms each for 100,000 shares,[25] one in favour of the first plaintiff and the other in favour of Chew.[26] 200,000 shares equated to 20% of the total shares in Metahub. The defendant's signatures on the two forms were not witnessed nor were any seals affixed;

(b) a written waiver of pre-exemption rights was given by two shareholders of Metahub namely Alex Tan and Jason Yee.[27] Similar waiver letters from Chong and Chee were unsigned; and

(c) there was an undated resolution of Metahub's shareholders signed by the defendant, Alex Tan and Jason Yee (but not signed by Chee) approving the transfer of 100,000 shares each to the first plaintiff and Chew from the defendant.[28]

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[25] AB at pp 7 – 8

[26] NE, Day 2 Page 141 Line 12 – Page 142 Line 7

[27] AB at pp 9 – 10

[28] AB at p 22

66 It was obvious that the defendant had deliberately furnished half-completed security documents to the plaintiffs in purported compliance with cl 2 of the loan agreement. When questioned as to why the plaintiffs did not take steps to have the defendant rectify the omissions in the share transfer forms, Ms Tan replied in cross-examination that when she requested for the share certificate from the defendant, he declined to do so, saying that the said certificate comprised his entire shareholding (*ie*, 590,001 shares) and not only the 200,000 to be charged to the plaintiffs.[29]

67 In cross-examination, Chew acknowledged that the administrative paperwork on the security documentation could have been better handled.[30] He viewed the charge of 20% of the defendant's shares as added comfort and ancillary to the loan agreement upon which he primarily relied to hold the defendant liable for the loan. In answer to the court's question, Chew admitted that he did not wish in any case to end up as a minority shareholder in an unlisted company (Metahub).[31]

68 The shortcomings on the part of the plaintiffs were also acknowledged in their closing submissions.[32] The plaintiffs submitted (and the court accepted) that just because the paperwork on the taking of securities was incomplete, that did not mean that the loan agreement itself was a sham.

69 There was one other aspect of the defendant's testimony which undermined his credibility. The defendant's case that the loan was a non-

[29] NE, Day 1 Page 105 Lines 6 – 14

[30] NE, Day 2 Page 307 Line 6 – Page 308 Line 22

[31] NE, Day 2 Page 312 Lines 7 – 17

[32] PCS at [5.4.22]

refundable deposit under the SPA was re-iterated throughout his defence (amendment no.1) as seen in the following paragraphs therefrom:

> 6(a) The sum of RM 4 million which the Plaintiffs allegedly loaned to the Defendant was in fact, paid to the Defendant pursuant to an oral agreement reached between himself and one Mr Raymond Ng Ah Hua ("Raymond Ng") purportedly on behalf of the Plaintiffs and Enviro Investments whereby the said RM 4 million would serve as a non-refundable deposit in furtherance of the intended purchase of all the shares in Metahub.
>
> […]
>
> (r) At the aforesaid meeting (i.e. on 6 January 2015 at Legoland in Johor Bahru), which was also attended by William Ung, Raymond Ng produced the Alleged Loan Agreement and requested that the Defendant sign the same. The Defendant objected to this and specifically told Raymond Ng that he did not need a loan, and further, that it was already agreed that the RM 4 million was a non-refundable deposit payment for the Proposed Acquisition.
>
> (s) Raymond Ng then reassured the Defendant that the payment of RM 4 million was indeed a non-refundable deposit as agreed. He also said that the Alleged Loan Agreement was merely to serve as an acknowledgment of receipt of payment as the finalised SPA was not formally signed yet. Raymond Ng reassured the Defendant that there would not be any problem and that the Proposed Acquisition would be completed once the due diligence was done.
>
> (t) It was under these circumstances that the Defendant signed the Alleged Loan Agreement, and it was clearly not intended to be binding between the parties. The payment of RM 4 million was not and could not have been a loan, but was instead payment towards the first tranche of the non-refundable deposit for the Proposed Acquisition of the Metahub shares by Enviro Investments.

70 Yet, when he was cross-examined, the defendant appeared to suggest that the non-refundable deposit was in fact refundable under certain conditions. His confusing testimony was clarified in re-examination in the following extracts:[33]

Prakash: Can you identify the conditions which you said you had agreed to for them to include?

Ct: Tell us what were the four conditions.

A: First, to pay us the deposit before we would allow them to conduct due diligence.

[…]

Prakash: Do you know which are the conditions you've agreed to allow them to insert into the SPA?

A: Page 256, (iv)

Ct: You are talking about SGX approval for the transaction to acquire your company shares?

A: Yes.

Ct: What else? Two more.

A: Maintain my recycling licence. The approval from the environmental department.

Ct: (iii) at page 256?

A: I think so.

Ct: What's the last condition, then?

A: The first item on page 255, (i). 3.03, the first item. Yes, due diligence.

Ct: There's only three, isn't it: due diligence; he maintains his licence for the Malaysian authorities; SGX approval. Three.

A: One being that they must be satisfied with the due diligence, failing which, the deposit would have to be returned.

[…]

Prakash: Would you clarify whether any of the conditions precedent were not accepted?

Ct: By whom?

Prakash: By you. Did you reject any of the conditions precedent? When you said you agreed to accept their conditions, did you exclude any of the conditions precedent?

---

[33] NE, Day 5 Page 570 Line 23 – Page 572 Line 22

> A: I was okay with all those that I've mentioned earlier. They agreed to pay the deposit and I allowed them to carry out the due diligence. It was more of a concession on our part, on both parties.

71 Taken at face value, the above testimony completely undermined the defendant's case as he had consistently maintained that the conditions precedent were not acceptable to him (and recorded accordingly in Chee's email to Ms Tan of 16 December 2014).

72 Not only was the defendant's above evidence inconsistent with his pleaded case, the defendant also often took great liberties with the truth, sometimes to an absurd extent. One instance of this was his evidence regarding the telephone conversation that took place between him and Raymond set out at [10] above ("the Barcelona call").

73 In his AEIC,[34] Raymond deposed that after Chee's call, the defendant telephoned him and attempted to persuade Raymond to change his mind on Enviro-Hub's calling off the acquisition. Raymond told the defendant he would reconsider the matter after his return to Singapore which was around 21 December 2014.

74 After his return to Singapore, Raymond spoke to William who informed him that the defendant was facing financial difficulties and needed funds to tide him over. That conversation eventually led to the signing of the loan agreement between the plaintiffs and the defendant.

75 I note that the Barcelona call was not mentioned at all in the defendant's AEIC. When cross-examined by Mr Joseph Tay on the Barcelona call, the

[34] RAEIC at [2.2.12]

defendant said that it was Raymond who called him not *vice versa*. Next, the defendant claimed that Raymond called to complain about Chee whom he wanted to be taken off the transaction. This was due to Chee's mistake in putting RM30m instead of RM50m as the selling price in his email of 16 December 2014, even though Chee immediately corrected his error in a second email to Ms Tan later that same day.

76 The following extracts from the defendant's evidence shows *inter alia* why the court found the defendant to be an untruthful witness:[35]

> Q You say that Raymond is angry at Chee because Chee got the selling price wrong. That's what you're saying, correct?
>
> A: Yes.
>
> Q: But why would Raymond be angry if the selling price is 30 million? It's cheaper for them.
>
> A: Because Raymond told me that his board saw the figure and thought he had a part to play in it. He has some hidden agenda. So Raymond told me to instruct Chee, actually, to rectify the mistake as soon as possible.
>
> Q: That doesn't make sense, right? If the board sees that they can buy your company for a cheaper price, they must be very happy. Your story doesn't make any sense.
>
> A: They wouldn't believe that it would drop from 50 to 30.
>
> Ct: Mr Ung, do you accept that throughout the negotiations, all the draft sale and purchase agreements stated the consideration as RM50 million, never RM30 million?
>
> A: Yes.
>
> Ct: Mr Tay.
>
> Q: So there is no change in the selling price as reflected in the drafts, correct?
>
> A: Yes.

[35] NE, Day 5 Page 528 Line 11 – Page 529 Line 15

> Q: It's just that Chee typed an email and he typed a figure wrongly in one email. That's all, correct?
>
> A: Yes.
>
> Q: This is a minor issue right? Raymond would not be angry over this kind of issue right? Nobody would be angry over this kind of issue, correct?
>
> A: I don't think so.

77 The court had no doubt that Raymond's testimony on the Barcelona call, and in general, correctly reflected what transpired between him and the defendant. No one in Raymond's position as executive chairman and shareholder of Enviro-Hub would have been so foolhardy as to make any or all of the representations alleged by the defendant. It bears remembering that while the defendant was desperate to sell off his shares in Metahub, Enviro-Hub was neither overly enthusiastic nor similarly desperate to take over the company.

78 I turn next to an incident that cast the defendant in an even worse light. The defendant had applied on 16 November 2017 via Summons No. 5261 of 2017 ("the Summons") to give his evidence by video-link pursuant to s 62A of the Evidence Act (Cap 97, 1997 Rev Ed).

79 The Summons was supported by the defendant's 8th affidavit filed on 16 November 2017 where he *inter alia* deposed as follows:-

> 5(a) I am unable to leave Malaysia as a result of the Certificate of Prohibition issued against me by the Inland Revenue Board of Malaysia which prohibits me from leaving the jurisdiction;
>
> […]
>
> 6 On or around 2 October 2017, I received a letter from the Inland Revenue Board of Malaysia (the "IRB") informing me that a Certificate of Enforcement pursuant to subsection

> 104(1) of the Malaysian Income Tax Act 1967 had been issued against me in relation to my outstanding tax obligations (the "Certificate of Prohibition").
>
> 7 This certificate which is issued by the Inland Revenue Board to the Inspector General of Police and the Director of Immigration of Malaysia prohibits me from leaving Malaysia until and unless I settle my outstanding tax obligations. Consequently, it is an offence under Malaysian law if I leave the jurisdiction without settling my alleged outstanding tax obligations. A copy of the letter dated 2 October 2017 from the Inland Review [*sic*] Board of Malaysia (in the Malay language) and the English translation of the said letter are exhibited herein and collectively marked "UYH-1".

80 The (undated) English translation exhibited in the defendant's 8th affidavit of the letter dated 2 October 2017 from the Malaysian tax authorities ("the tax letter") read as follows:

> Inland Revenue Board Malaysia
> Department of Corporate Tax
> Duta Branch
> 5th floor, Block 8,
> Komplex Bangunan Kerajaan
> Jalan Tunku Abdul Halim
> 50600 Kuala Lumpur
>
> Mr Ung Yoke Hong
> 12, Jalan Setia Tropika 15/1,
> Taman Setia Tropika
> 81200 Johore Bahru
> Johor
>
> Dear Sir,
>
> Certificate of Enforcement pursuant to sub-section 104(1) Income tax Act 1967
>
> PLEASE TAKE NOTE a certificate of enforcement pursuant to Sub-section 104(1) Income Tax Act 1967 has been issued to the Inspector General of Police and the Director of Immigration Malaysia to prevent you from leaving the country UNLESS and until your tax assessment of RM854,309.00 has been fully settled.
>
> PLEASE TAKE FURTHER NOTICE that the issuance of this certificate of enforcement makes it an offence if you try to leave

> the country without having fully paid your tax assessment to the Inland Revenue Board.
>
> A copy of Sub-section 104(1) and 115 of the Income Tax Act 1967 is enclosed herewith for your attention.
>
> Kindly be advised that upon full payment of the tax assessment you are required to obtain a certificate of clearance otherwise the prohibition on leaving the country will remain enforceable against you.

81 Mr Tay, counsel for the plaintiffs, had on 23 November 2017 (in the course of the defendant's cross-examination) informed the court that the defendant's English translation of the tax letter may be incorrect. The court after looking at the actual tax letter in the Malay language, agreed. Questioned by Mr Tay and then the court, the defendant's lame excuse (which the court did not accept) was that he had engaged "a general translator".[36]

82 To ensure that the court's understanding of the tax letter in Malay was correct, one of the Supreme Court's Malay interpreters translated the tax letter, and the interpreter's translation reads as follows:

> TAKE NOTICE that a certificate under subsection 104(1) of the Income Tax Act 1967 which contained details of the tax, sums and debts so payable by you has been issued to the Commissioner of Police and Director-General of Immigration seeking them to take necessary action to prevent you from leaving Malaysia unless and until you have paid all the income tax the sum of RM854,309.00 (Malaysian Ringgit Eight Hundred Fifty-Four Thousand and Three Hundred and Nine) or until you furnish a satisfactory security for the said sum.
>
> 2 DO ALSO TAKE NOTICE that with the issuance of such certificate, it will be an offence if you leave or try to leave Malaysia without settling the tax in full or furnishing a security for the sum stated in the said certificate.
>
> 3 A copy of the certificate including the extract of section 104 and 115 of the Income Tax Act 1967 is attached herein for your information and attention.

[36] NE, Day 4 Page 482 Line 23

> 4 You are advised to obtain the revocation letter after settling the abovementioned tax, if not, you may be prevented from leaving Malaysia.

83 The defendant's translated version of the tax letter as shown in [80] was clearly selective and deliberately left out the underlined last lines of paragraphs one and two.

84 It was obvious that the defendant would go to any lengths (including lying in his 8th affidavit as can be seen from the foregoing) in order to avoid coming to Singapore to testify for this case, for reasons best known to himself. It was untrue that he would not be allowed to leave Malaysia unless he paid his outstanding tax. He only needed to put up security for the outstanding tax in order to leave Malaysia.

85 There is one final issue the court has to address before concluding these grounds of decision. As observed at [23], the defendant had not called either Chee or William as his witnesses. Yet, on the first day of trial (according to Mr Tay and which the defendant's counsel confirmed), Chee was sitting in court in the public gallery. Chee was not material to the plaintiffs' claim based on the loan agreement but he was a crucial witness for the defendant's defence which was entirely based on the draft SPA which Chee had prepared. Indeed, in the defendant's 2nd affidavit filed on 23 October 2015 in support of his stay application, he admitted as much at paragraph 42:

> In addition, I would also add that apart from the Singapore parties on the purchasers' side, Chee is also a critical witness as he was present during most if not all of the initial discussions in November and December 2014 pertaining to the Proposed Acquisition, and he will have to be called to prove that there was no concurrent discussion between the Plaintiffs and/or Raymond and I for a personal loan to be extended to me. As Chee is a Malaysian citizen residing and working in

> Malaysia, I am advised and verily believe that he is not compellable in a Singapore court.

86 When the court questioned the defendant's counsel on Chee's voluntary presence in court notwithstanding the fact that he was not the defendant's witness, no satisfactory explanation was provided.[37] When he was questioned by the court, the defendant's explanation[38] that

> …I did request that he come and be a witness, but there's nothing I could do if he refused.

was equally unconvincing. Not only did Chee not refuse – he turned up in court without (it seems) being asked to do so.

87 In the defendant's closing submissions[39] he sought to rely on this court's stay decision (at [47] and [56]) as an excuse for not calling Chee or William to testify. His reliance on the court's comments is disingenuous. This can be seen from the following paragraphs of the stay decision:

> 47 I turn next to the issue of witnesses. If the court accepts the plaintiff's position that the claim had nothing to do with the sale transaction, then the employees of Metahub were not necessary witnesses in any event. If indeed they were required to testify in a Singapore court, case-law states that the issue of compellability does not arise in relation to employees. Assuming *arguendo* that the defendant's position is correct, then a very material witness for him would be his brother William.
>
> 48 In this regard it is noteworthy that William had furnished a statutory declaration to the defendant (see [33]) corroborating the defendant's version of events. Equally noteworthy is the fact that William did not require any receipt and/or documentary evidence of his loan of RM1m to the defendant (according to the plaintiffs) or of his payment of

[37] NE, Day 3 Page 334 Line 10 – Page 337 Line 3

[38] NE, Day 4 Page 459 Lines 17 – 19

[39] Defendant's closing submissions at [159]

$200,000 to Raymond as his contribution to purchase the defendant's shares in Metahub (according to William). Further, why did William not file an affidavit on the defendant's behalf instead of making a statutory declaration? It is also strange that William denied making a loan to the defendant when the defendant admitted to receiving RM5m in total as a non-refundable deposit while the plaintiffs' claim is only for RM4m. Where did the extra RM1m remitted to the defendant come from?

49 The non-compellability of William as a witness in Singapore if the case is not stayed cannot be viewed independently without regard to his relationship to the defendant (as his counsel sought to persuade the court to do). It was absurd to treat William as an independent non-party witness and I declined to do so. As he did not file any affidavit, there was nothing on record to indicate William's unwillingness to testify in a Singapore court on the defendant's behalf as the defendant claimed.

[…]

56 The issue of witness compellability was also considered by the Court of Appeal in an earlier case on *forum non conveniens* namely *Rickshaw Investments Ltd.* There the issue was whether the Singapore suit commenced by the plaintiffs should be stayed in favour of concurrent proceedings in Germany commenced by the defendant. The court had this to say at [25]:

> With respect, we disagree with the judge [who had held that the location of witnesses was not an important factor], as we find that the location of the key witnesses is an important factor to be considered, and the fact that key witnesses are located in Singapore is a factor that points towards Singapore being the most natural forum to hear the substantive disputes. The assessment of the respective witnesses' credibility is also crucial – especially in so far as the claim for fraudulent misrepresentation or deceit is concerned. Indeed, in so far as the claims for breach of fiduciary duty and breach of confidence are concerned, the principal witnesses (as we have already noted in [23] above) are located in Singapore. It is significant, in our view that they are *clearly* compellable to testify in the Singapore proceedings, whereas this is not the case in so far as the German proceedings are concerned.

> Here, both plaintiffs are based in Singapore and so too are their witnesses Sam Tan, Raymond and Ms Tan. I find that they are important witnesses. As observed earlier, the defendant's witnesses who are based in Malaysia are not essential or crucial witnesses to the case. Taken together with this court's earlier observations (at [43]) on the non-enforceability of an exclusive jurisdiction clause in the unsigned sale agreement as opposed to the enforceability of a non-exclusive jurisdiction clause in the signed loan agreement which was the subject matter of the plaintiffs' claim, the issue of compellability of witnesses weighed in favour of Singapore as a more appropriate forum than Malaysia.

88 It can be seen from the above extracts from the stay decision that the court made no reference at all to Chee. Just like his explanation for Chee's absence, the defendant's explanations during cross-examination on William's absence were equally unconvincing:[40]

> Q: William is an important witness for your case, correct?
>
> A: Yes.
>
> Q: But you have not called him as a witness for your case, correct?
>
> A: I spoke to him, but he did not come. I spoke to him.
>
> Q; You did not mention in your AEIC that you spoke to him and asked him to come. You did not mention that in your AEIC, correct?
>
> A: I did not, that's right.
>
> Q: Even though, according to you, William supports your case, the court does not have the opportunity to hear William's evidence now. Correct?
>
> A: That's right.
>
> Q: You say that William supports your case, and William is your brother, so the normal expectation is that William will be here to provide his support by giving evidence. Agree?
>
> A: Disagree.

[40] NE, Day 4 Page 436 Line 12 – Page 437 Line 24

> Ct: Mr Ung, the meeting at Legoland, there were only three persons: yourself, Mr Raymond Ng and your brother. If your brother had come to court, he would have corroborated your evidence, so that it is two persons' words, yours and your brother's, against the word of one person, Mr Raymond Ng. Don't you think that that would have helped your case considerably? It might have determined when I make my decision as to who is telling the truth. You have somebody, your brother, who can corroborate your evidence, and it is only Mr Ng's word alone for the plaintiffs. Don't you think that Mr William Ung, your brother, would have been a very crucial witness to help your case? If he can give you a statutory declaration, why can't he give you an affidavit of evidence-in-chief and come to court? After all, he is your brother. Correct?
>
> A: I've informed him but I can't force him.
>
> Court: Despite the fact that he's your brother, you can't persuade him?
>
> A: I spoke to him, but I can't force him to come. He had his own things to do.

89 Even if the court did not draw an adverse inference against the defendant for not calling Chee to testify, such an adverse inference must be and was drawn against the defendant for William's absence from court, pursuant to s 116(g) of the Evidence Act in the light of the defendant's evidence set out in [88]. Section 116(g) of the Evidence Act states:

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> *Illustrations*
>
> […]
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

**Conclusion**

90 Due to the findings set out earlier, the court was of the view that the defendant's testimony was not credible and he had failed to discharge the burden to prove that the draft SPA was an enforceable agreement while the signed loan agreement was not to be given effect. The plaintiffs on the other hand, had proven their case that the sum transferred to the defendant was a loan and not a non-refundable deposit. Accordingly, the court awarded judgment to the plaintiffs on their claim.

Lai Siu Chiu
Senior Judge

Joseph Tay Weiwen, Chng Yan and Fong Zhiwei, Daryl (Shook Lin & Bok LLP) for the plaintiffs;
Mulani Prakash P and Tanya Thomas Vadaketh (M & A Law Corporation) for the defendant.