

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 190

Suit No 724 of 2014

Between

- (1) Tong Seak Kan
- (2) Kensington Park Holdings
Limited

... Plaintiffs

And

Jaya Sudhir a/l Jayaram

... Defendant

GROUND OF DECISION

[Contract] — [Illegality and public policy]
[Credit and Security] — [Money and moneylenders]

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Tong Seak Kan and another
v
Jaya Sudhir a/l Jayaram

[2019] SGHC 190

High Court — Suit No 724 of 2014

Hoo Sheau Peng J

8–11, 15–16, 18, 22–24 May; 18 July 2018; 30 January 2019

16 August 2019

Hoo Sheau Peng J:

Introduction

1 In this action, the plaintiffs, Tong Seak Kan (“Tong”) and Kensington Park Holdings Limited (“Kensington”), claimed against the defendant, Jaya Sudhir a/l Jayaram (“Sudhir”), for 20 sums of money paid to him, his corporate vehicles and his associates which Sudhir had allegedly agreed to be liable for.

2 For 18 of these payments which are listed in Annex A of the Statement of Claim (Amendment No 2) (“Statement of Claim”), Sudhir had acknowledged liability by signing a series of documents (“the repayment documents”). I reproduce the key columns of Annex A below, and shall refer to these payments as “Payment 1”, “Payment 2”, and so on:

S/N	Date of Transfer	Payor	Payee	Amount (US\$)	Amount (HK\$)
1.	28 August 2008	Lam Weng Ian Cecilia (“Cecilia”), Tong’s secretary	Hesselink Investments Limited (“Hesselink”)	100,000	
2.	29 August 2008	Tong	Hesselink	180,000	
3.	13 October 2008	Tong	Al-Rafidian Holdings Pte Ltd (“Al-Rafidian”)	400,000	
4.	7 November 2008	Kensington	Al-Rafidian	720,000	
5.	26 March 2009	Kensington	Al-Rafidian	500,000	
6.	20 May 2009	Kensington	Al-Rafidian	450,000	
7.	22 July 2009	Tong	Sudhir		308,000
8.	23 July 2009	Tong	Sudhir		300,000
9.	23 July 2009	Kensington	Al-Rafidian	180,000	
10.	7 August 2009	Kensington	Petunia Venture Corp (“Petunia”)	1,642,000	

11.	11 September 2009	Kensington	Al-Rafidian	600,000	
12.	9 October 2009	Kensington	Al-Rafidian	350,000	
13.	6 November 2009	Tong	Al-Rafidian	350,000	
14.	30 November 2009	Tong	Cynthia Jacinto (“Cynthia”)		10,000
15.	3 February 2010	Tong	Al-Rafidian	60,000	
16.	8 February 2010	Tong	Al-Rafidian	120,000	
17.	19 February 2010	Tong	Rianto Sutjipto Ronny (“Rianto”)	250,000	
18.	1 March 2010	Kensington	Al-Rafidian	250,000	
			Total	6,152,000	618,000

3 In support of the claim, the plaintiffs relied on *two* of the repayment documents. A formal agreement dated 30 December 2010 (“the 30 December 2010 Deed”) recorded Sudhir’s liability for Payments 6, 9 and 10 (amounting to US\$2,272,000), with the total sum standing at US\$3,250,000 (inclusive of interest). Relying on another document dated 3 March 2010, titled “List of Loans to Mr. Jaya Sudhir”, wherein Sudhir had acknowledged his indebtedness for Payments 1 to 18 above (“the 3 March 2010 Acknowledgement”), the claim

was made for the other 15 payments amounting to US\$3,880,000 and HK\$618,000.

4 In addition, two other amounts were claimed, being a sum of US\$500,000 paid to Rianto on or around 13 May 2010 (“the US\$500,000 payment to Rianto”) and a sum of US\$1,000,000 paid to Abiyoso Soetjipto (“Abiyoso”) on or around 21 May 2010 (“the US\$1,000,000 payment to Abiyoso”). It was alleged that Sudhir had also agreed to be liable for these two payments.

5 In response, Sudhir disagreed with the underlying purposes for some of these payments. On various grounds, he contested the enforceability of all the repayment documents. He denied liability for the claim.

6 At the conclusion of the trial, I allowed the plaintiffs’ claim in the total sum of US\$8,630,000 and HK\$618,000, with interest and costs. Sudhir has appealed against the decision. I now provide full reasons to expand on the brief reasons previously rendered.

Background

The parties

7 Tong is a businessman resident in Macau. Kensington is a company incorporated in the British Virgin Islands on 7 January 2008, in which Tong has a beneficial interest. Tong is also the Chairman of the Board of Directors of Macau Natural Gas Company Limited (“Macau Gas”), an entity incorporated in Macau on 13 December 2001.

8 Sudhir is a Malaysian businessman who controlled the following three companies: Firstfield Limited (“Firstfield”), Al-Rafidian and Petunia. In the

conduct of his business affairs, Sudhir was assisted by a Singaporean associate, Kundadak Ramesh Kudva (“Ramesh”).

The liquefied natural gas project

9 Sometime in late 2006, representing Macau Gas, Tong began sourcing for a long term supply of liquefied natural gas (“LNG”) for a LNG-receiving terminal in Macau.

10 Originally, Tong wanted to source for LNG from Malaysia. On 6 August 2007, Tong met with a Malaysian businessman, Mohamed Nazim Bin Tun Razak (“Nazim”). Nazim informed Tong that LNG was not available from Malaysia. Instead, Nazim suggested that Tong source for LNG from Indonesia. Nazim introduced Sudhir to Tong as a person with the necessary experience, capability and contacts to facilitate the process. One of Sudhir’s contacts was Anton Tjahjono (“Tjahjono”), the Chairman of the Indonesian Gas Association.

11 I shall refer to this planned project for the supply of LNG from Indonesia to Macau as “the LNG Project”. From sometime in August 2007 onwards, Nazim, Tjahjono and Sudhir worked to secure a LNG supply from an Indonesian state-owned entity known as Badan Pelaksana Kegiatan Usaha Hulu Minyak Dan Gas Bumi (“BPMIGAS”). BPMIGAS represented the Indonesian government in managing Indonesia’s oil and gas resources, and reported to the Minister of Energy and Resources.

12 Meanwhile, there were ongoing negotiations for a formal agreement to be entered into by Nazim, Sudhir and their associates for the provision of consultancy services to Macau Gas. Eventually, a consultancy agreement dated 30 October 2008 was entered into between Kensington, which was incorporated for the purpose of the LNG Project, and Firstfield (“the Consultancy

Agreement”).¹ By then, Sudhir was taking the lead in the provision of the consultancy services.

13 The key terms of the Consultancy Agreement were as follows:

(a) Under cl 3.1, Kensington engaged Firstfield as a consultant, to provide services, *inter alia*, so as to procure a long-term source of LNG from BPMIGAS for the LNG Project. To this end, Firstfield was to procure the signing of a Heads of Agreement (“HOA”) followed by a Sale and Purchase Agreement (“SPA”) between Macau Gas and BPMIGAS. The anticipated supply was 3,000,000 tonnes of LNG per year for the first 1½ years, and then an increased supply for the next 23½ years.

(b) By cl 3.2, Firstfield “shall be fully responsible for all the expenses incurred in the course of performing the [services]”.

(c) Firstfield’s compensation terms were set out in Clause 6. By cl 6.1, subject to a successful signing of the HOA and SPA, Kensington would pay Firstfield a consultancy fee of US\$4,000,000. A sum of US\$2,500,000 would be deposited with an escrow agent, with releases as follows: (i) US\$1,000,000 as a downpayment; and (ii) US\$1,500,000 upon the signing of the HOA. Another sum of US\$1,500,000 would be deposited with the escrow agent no later than 90 days before the designated date of the signing of the SPA, and would be released to Firstfield upon the signing of the SPA.

¹ Agreed Bundle of Documents Volume 1 (“1AB”) pp 1–10.

(d) By cl 6.3, in the event of failure of the LNG Project, and if the failure were to be caused by Firstfield, Firstfield would be liable to reimburse the payments to Kensington. This obligation would not arise if Macau Gas or Kensington were to fail to comply with the requirements of BPMIGAS.

(e) By cl 6.2, should the LNG Project be a success, Firstfield would receive a share of the freight in the transport of the LNG at the rate of “US\$0.22 per MMBTU” of LNG shipped. As one tonne of LNG is about 50 MMBTU, on the basis of a supply of 3,000,000 tonnes for 25 years, this would have meant a handsome sum of US\$825,000,000 for Firstfield over the course of the project.

14 In the period from August 2008 to March 2010, the plaintiffs made Payments 1 and 2 to Hesselink, Payments 3 to 6, 9, 12, 13, 15, 16 and 18 to Al-Rafidian, Payments 7 to 8 to Sudhir and Payment 17 to Rianto. Hesselink was a vehicle controlled by Nazim, while Rianto was an Indonesian associate of Sudhir who was brought on board the project in late 2009. In addition, the US\$500,000 payment to Rianto took place on or around 13 May 2010.

15 At the end of the day, the LNG Project did not materialise. It was the plaintiffs’ position that all these payments were in relation to the LNG Project, and Sudhir had agreed to be liable for them. Sudhir, however, denied that Payments 1, 2, 12, part of Payment 13 (US\$250,000 out of US\$350,000) and Payment 17 were connected to the LNG Project. He had no knowledge of the US\$500,000 payment to Rianto. Even for the payments related to the LNG Project, he bore no liability for them as these were paid to the Indonesian parties with the knowledge and consent of Tong.

Transfer of shares in Ocean King Limited

16 I move to the other dealings between the parties. On 7 August 2009 and 11 September 2009, Kensington made two payments to Petunia and Al-Rafidian in the sums of US\$1,642,000 and US\$600,000 respectively. These were Payments 10 and 11. On 9 October 2009, 11,000,000 ordinary shares in a company known as Ocean King Limited (“OKL”) were transferred by Petunia to Tong.

17 It was Tong’s case that the payments were meant as two separate loans granted to Sudhir on his requests, to further Sudhir’s venture to procure the listing of the OKL shares in the United Kingdom. Security was to be furnished by way of 6,500,000 and 4,500,000 ordinary shares in OKL respectively, to be transferred upon the listing. Sudhir had acknowledged liability for these sums of money, and the plaintiffs claimed the amounts against Sudhir.

18 Sudhir disputed that these payments were personal loans to him. He contended that Tong had purchased 11,000,000 shares in OKL, and paid for these by way of Payments 10 to 12 and part of Payment 13 (US\$250,000 out of US\$350,000). This amounted to a total sum of US\$2,842,000.

Friendly loan to Cynthia Jacinto

19 Tong also paid a sum of HK\$10,000 to Cynthia. This was Payment 14. According to Tong, on or about 30 November 2009, Sudhir called him while he was in Hong Kong, and requested a favour from him to lend a sum of money to Cynthia, his girlfriend, who was then in Hong Kong. Given the business relationship between them, Tong agreed to do so, and arranged for an employee of his to pass the sum of money to Cynthia at her hotel. Sudhir disputed liability for the amount.

The Sand Project

20 On 21 May 2010, Tong furnished US\$1,000,000 to Abiyoso, who was another one of Sudhir’s Indonesian associates involved in the LNG Project from late 2009. According to the plaintiffs, sometime in April 2010, Sudhir and Ramesh approached Tong about a project involving the supply of Indonesian sand to Singapore (“the Sand Project”). Ramesh asked Tong to provide an advance of US\$1,000,000. In return, he would be given a share of the profits should the project come to fruition. If not, Tong would be repaid the sum of US\$1,000,000, based on a security cheque furnished by Abiyoso. Tong was reluctant to do so. However, as Sudhir also agreed to be personally liable for the advance, Tong acceded to the request. Tong sought a repayment of the amount from Sudhir. Sudhir, however, denied any involvement in the Sand Project.

The repayment documents

21 As I stated at the outset at [2] above, a series of documents were signed by Sudhir acknowledging liability for the payments. Parties disputed the circumstances in which Sudhir signed the repayment documents. According to Tong, by early February 2010, he became worried about the huge amounts being advanced to Sudhir without any significant progress on the LNG Project. Tong began to ask Sudhir to acknowledge his liability for the amounts by way of the repayment documents. Sudhir alleged, *inter alia*, that he was tricked by Tong into signing the repayment documents, and that they were not meant to have any legal effect at all. I deal with the factual disputes from [73] onwards. For now, I will briefly describe the repayment documents in chronological order.

22 For Payment 16, a standalone loan agreement was signed dated 5 February 2010 in which Sudhir agreed to repay the loan to Tong (“the 5

February 2010 Loan Agreement”).² On the same day, in respect of Payments 1 to 16, a document dated 5 February 2010 titled “List of Loans to Mr. Jaya Sudhir”, was signed, whereby Sudhir acknowledged his receipt of Payments 1 to 16 as loans (“the 5 February 2010 Acknowledgement”).³

23 Subsequently, around the time of Payment 18, Sudhir acknowledged his indebtedness for Payments 1 to 18 in the 3 March 2010 Acknowledgement which stated as follows:⁴

List of Loans to [Sudhir]

[Table setting out details of Payments 1 to 18]

I, [Sudhir], holder of Malaysian Passport No..., hereby confirm receipt of all of the above loans. I understand that a part of these loans will be deducted as agreed if the HOA can be signed on or before 10 April 2010. However, if failed [sic], I will bear the responsibility of repaying all of these loans to [Tong].

For and on behalf of Al-Rafidian Holdings Pte Ltd

[Signature of Sudhir]

[Sudhir]

Executive Director

Dated 3 March 2010

24 Then, the 30 December 2010 Deed was entered into by Kensington with Al-Rafidian, Petunia and Sudhir.⁵ In the document, it was acknowledged that since August 2008, a series of loans had been made to Al-Rafidian and Petunia, with Sudhir’s consent. In respect of three of the loans, being Payments 6, 9 and 10 (amounting to US\$2,272,000), Al-Rafidian and Petunia agreed to repay

² 1AB21.

³ 1AB22.

⁴ 1AB24.

⁵ 1AB35–40.

US\$3,250,000 (based on interest of 2% per month from the time of the payments until the end of December 2010) to Kensington. The repayment was to be by way of instalments of US\$300,000 per month from the end of January 2011, with complete payment to be made by 30 September 2011. In other words, the instalment plan was for nine months. As for Sudhir, he personally guaranteed the instalment obligation of Al-Rafidian and Petunia. It was also stipulated that parties would endeavour to enter into further deeds to deal with remaining loan amounts.

25 Subsequently, there were two other formal agreements made on 28 February 2011 with Kensington, one involving Petunia acknowledging liability for US\$1,642,000 and the other involving Al-Rafidian acknowledging liability for US\$4,200,000. In these documents, Sudhir guaranteed the repayment obligations of Petunia and Al-Rafidian to Kensington. I shall refer to these collectively as “the 28 February 2011 Agreements”.⁶ I pause to reiterate that in this action, the plaintiffs only relied on the 3 March 2010 Acknowledgment and the 30 December 2010 Deed. However, in support of his defence, Sudhir relied heavily on the 28 February 2011 Agreements, along with a statement signed by the parties on 7 January 2011 (“the 7 January 2011 Statement”).⁷ I shall discuss these documents at [96] below.

The UOB cheques

26 For completeness, I should add that at the material time, Sudhir arranged for Al-Rafidian to issue seven UOB cheques to Tong. I shall refer to these as the “UOB cheques”. Tong said that these cheques were meant to provide

⁶ 1AB42-52.

⁷ 1AB41.

security for the outstanding amounts owed by Sudhir as Sudhir asked for more and more sums of money from Tong. Sudhir, however, claimed that he was tricked by Tong into issuing these cheques.

The parties' cases

The claim

27 With that, I turn to the parties' cases. In the Statement of Claim, the plaintiffs set out the material facts of the parties' dealings. Based on the 30 December 2010 Deed, Kensington claimed for US\$3,250,000 for Payments 6, 9 and 10 (inclusive of interest).⁸ Based on the 3 March 2010 Acknowledgement, Tong claimed for the remaining 15 payments in Annex A amounting to US\$3,880,000 and HK\$618,000.⁹ Tong also claimed for the US\$500,000 payment to Rianto for the LNG Project and the US\$1,000,000 payment to Abiyoso for the Sand Project, on the basis that Sudhir had agreed to assume liability for the amounts.¹⁰ In total, the plaintiffs claimed against Sudhir for US\$8,630,000 and HK\$618,000, with interest and costs.¹¹

The defence

28 As pleaded in the Defence (Amendment No 2) ("Defence"), Sudhir contended that he was not responsible for Payments 1 and 2 made to Hesselink; these were unconnected to him.¹²

⁸ Statement of Claim (Amendment No 2) ("SOC"), paras 29, 30, 32, 35 and 36.

⁹ SOC, paras 20, 33 and 36.

¹⁰ SOC, paras 19A–19F, 21–24, 33A, 34 and 36.

¹¹ SOC, para 36.

¹² Defence (Amendment No 2) ("Defence"), para 27.

29 From as early as September 2007, Tong was prepared to make disbursements and incur disbursements to ensure the success of the LNG Project. Three payments amounting to US\$84,337.53 were made to Tjahjono with the knowledge and/or instructions of Tong before the Consultancy Agreement was entered into. These were to be deducted from the amounts to be received by Al-Rafidian.¹³ In the course of the LNG Project, from the payments received from Tong, Al-Rafidian paid out to (and was reimbursed for the payments to) Tjahjono, Rianto and Abiyoso sums amounting to US\$2,780,000.¹⁴

30 For Payments 3 and 4, Sudhir claimed that Al-Rafidian received the sums as an escrow agent (“the escrow defence”), and then released the amounts to Indonesian parties.¹⁵

31 For Payments 5, 6, 9, a sum of US\$100,000 in Payment 13, Payments 15, 16 and 18, again, Sudhir contended that he was receiving moneys from the plaintiffs to pass them on to various Indonesian parties on the plaintiffs’ behalf, or that he was merely receiving moneys as reimbursement for sums he had disbursed to various Indonesian parties on the plaintiffs’ behalf.¹⁶

32 Specifically, for Payments 7 and 8, the sums were paid to Tjahjono to entertain an Indonesian ministerial delegation that visited Hong Kong and

¹³ Defence, para 12A.

¹⁴ Defence, para 21.

¹⁵ Defence, para 19.

¹⁶ Defence, para 20.

Macau from 23 to 26 July 2009. Again, this was with the knowledge and consent of Tong.¹⁷

33 I shall refer to the allegations of payments made with the knowledge and consent of Tong to Indonesian parties (without any liability on Sudhir’s part) so as to ensure the success of the LNG Project as “the conduit defence”.

34 In relation to Payments 10 to 12, and the remaining sum of US\$250,000 in Payment 13, Sudhir claimed that these four amounts were meant for the purchase of 11,000,000 shares in OKL by Tong.¹⁸

35 Turning to Payments 14 and 17, Sudhir claimed that he had nothing to do with the sums of money paid to Cynthia and Rianto respectively.¹⁹

36 For the US\$500,000 payment to Rianto, Sudhir denied any knowledge of the sum of money, and any liability to repay it.²⁰ Similarly, for the US\$1,000,000 payment to Abiyoso, Sudhir denied any knowledge of the Sand Project, or that he had agreed to be responsible for its repayment.²¹

37 Further, Sudhir challenged the enforceability of the repayment documents on three main grounds:

- (a) First, Sudhir alleged that all the repayment documents were a sham, and were not meant to be legally binding. Sudhir had been tricked

¹⁷ Defence, para 28.

¹⁸ Defence, paras 22–25.

¹⁹ Defence, paras 29 and 30.

²⁰ Defence, para 30A.

²¹ Defence, paras 36–40.

into entering into them by Tong’s representations that the documents were merely meant to assure and assuage his family members and business associates, and then later his creditors and the Macau court, of Tong’s ability to pay his debts (“the sham defence”).²²

(b) Second, and in the alternative, since the repayment documents were created to defraud Tong’s creditors and the Macau court, the documents were void for illegality (“the illegality defence”).²³

(c) Third, and in the further alternative, these were illegal moneylending transactions in contravention of s 15 of the Moneylenders Act (Cap 188, 1985 Rev Ed) and s 14 of the Moneylenders Act 2008 (Act 31 of 2008) (collectively “the MLA”). Therefore, the transactions were void and unenforceable (“the illegal moneylending defence”).²⁴

38 In any event, it was alleged that the 3 March 2010 Acknowledgment and the 30 December 2010 Deed were superseded by the 28 February 2011 Agreements.²⁵

Issues to be determined

39 This case turned on the facts. The plaintiffs’ claim may be analysed in three parts:

²² Defence, paras 32–35 and 41–49.

²³ Defence, paras 53–55.

²⁴ Defence, paras 56A–56B.

²⁵ Defence, paras 34, 43, 46, 47, 48 and 48A; Defendant’s Closing Submissions (“DS”) para 7.

(a) Whether Sudhir agreed to repay the plaintiffs for the 18 payments made to various parties as listed within Annex A, based on the 30 December 2010 Deed and the 3 March 2010 Acknowledgement. As set out below at [41], within this part, many issues arose for consideration;

(b) Whether Sudhir agreed to be liable for the US\$500,000 payment to Rianto; and

(c) Whether Sudhir agreed to be liable for the US\$1,000,000 payment to Abiyoso.

40 I deal with each part of the claim in turn.

Whether Sudhir was liable for the 18 sums in Annex A

41 To determine this part of the claim, the enforceability of the relevant repayment documents, *ie*, the 3 March 2010 Acknowledgement and the 30 December 2010 Deed, was the key issue. Nonetheless, the factual disagreements concerning the underlying purposes of the payments, as well as the specific defences raised, *ie*, the escrow defence and the conduit defence, formed the surrounding circumstances against which to evaluate the key issue. This was because Sudhir argued that there was no reason for him to assume liability for the payments, which then lent weight to his contention that all the repayment documents were not meant to have any legal effect. Therefore, I shall deal with these factual disagreements before turning to the specific defences concerning the enforceability of the repayment documents.

Whether 15 payments in Annex A were in relation to the LNG Project

42 I begin with the underlying purposes of 15 out of the 18 payments in Annex A, which the plaintiffs alleged to be in relation to the LNG Project. According to the plaintiffs, other than Payments 10, 11 and 14, the other 15 payments were advances made to Sudhir, his corporate vehicles and his associates in relation to the LNG Project.

43 In response, Sudhir did not dispute that Payments 10, 11 and 14 were unconnected with the LNG Project. However, he contended that various other payments, especially Payments 1, 2, 12, part of 13 (US\$250,000 out of US\$350,000) and 17, were also unconnected to the LNG Project.

Payments 1 to 4

44 Payments 1 and 2 (amounting to a total sum of US\$280,000) were paid to Hesselink (controlled by Nazim) on 28 and 29 August 2008. In other words, the payments were made prior to the signing of the Consultancy Agreement. However, Tong explained that it was subsequently agreed with Sudhir that Payments 1 and 2, as well as Payment 4 of US\$720,000 to Al-Rafidian, would be treated as the downpayment of US\$1,000,000 under cl 6.1 of the Consultancy Agreement (see [13(c)] above).²⁶

45 In response, Sudhir’s position was that these payments had nothing to do with him. Instead, these were expenses incurred by Nazim, and the plaintiffs merely reimbursed Nazim for such expenses. There was also no agreement that these would be deducted from the consultancy fee. Indeed, certain emails

²⁶ Tong’s affidavit of evidence-in-chief (“Tong’s AEIC”), paras 39–41; Plaintiff’s Closing Submissions (“PS”) paras 49, 61–65.

indicated that the plaintiffs had agreed to pay Nazim US\$450,000 for his expenses.²⁷

46 Turning to the evidence, it was undisputed that Nazim had brought Sudhir on board the LNG Project. Until around September or October 2008, Nazim was heavily involved in the negotiations leading to the Consultancy Agreement. In particular, in a draft of the agreement sent on 16 January 2008 by Haridass Ho & Partners, the lawyers broadly representing Nazim, Sudhir and the service providers, to Tong’s personal assistant, Javila Chang (“Javila”), it was stipulated that the expenses for the project would be borne by the party providing the consultancy services.²⁸ As Tong explained, thereafter, parties continued to negotiate the consultancy fee to be paid. In the midst of these negotiations, Nazim asked to be paid for his expenses. In August 2008, Tong made Payments 1 and 2, amounting to US\$280,000, to Hesselink.²⁹ Thereafter, Sudhir took the lead in the LNG Project, and the Consultancy Agreement was entered into with Firstfield on 30 October 2008. Up till 31 October 2008, emails involving Tong, Sudhir and Nazim showed that there continued to be negotiations about the payment of Nazim’s expenses, with Nazim wanting an additional payment so as to arrive at a total of US\$450,000.³⁰ Taking into account this backdrop, I found Sudhir’s allegation that the payments were completely unconnected to him unsustainable.

47 More importantly, I accepted that subsequently, it was discussed between Tong and Sudhir that Payments 1 and 2 would be treated as part of the

²⁷ Sudhir’s affidavit of evidence-in-chief (“Sudhir’s AEIC”), para 33; DS, paras 15–17.

²⁸ Tong’s AEIC, para 20; see also Agreed Bundle of Documents Volume 3 p 1308–1328.

²⁹ Tong’s AEIC, para 25.

³⁰ Tong’s AEIC, para 39 and pp 341–345.

US\$1,000,000 downpayment to be paid under cl 6.1 of the Consultancy Agreement.³¹ According to the plaintiffs, by making Payment 4 of US\$720,000 on 7 November 2018, Firstfield was paid the US\$1,000,000 downpayment in full. The plaintiffs' explanation on how the parties proceeded to treat Payments 1, 2 and 4 as the downpayment under the Consultancy Agreement was coherent. Tong also explained that Nazim continued to pursue an additional payment of US\$450,000 less US\$280,000 as discussed in the emails. However, Tong proceeded on the basis of the Consultancy Agreement thereafter, and no further sum was paid to Nazim.³²

48 At the same time, Tong explained that parties decided on an alternative to the escrow arrangement contemplated under cl 6 of the Consultancy Agreement. By September 2008, the consultancy fee had been agreed at US\$4,000,000, and Nazim had been pressing for a deposit of US\$2,500,000. On 16 September 2008, Tong sent Nazim a copy of a bank fixed deposit slip for HK\$15,500,000 (about US\$2,100,000) held by Macau Gas.³³ On 13 October 2008, at Sudhir's request, Tong transferred Payment 3 of US\$400,000 into Al-Rafidian's account.³⁴ Therefore, this amounted to US\$2,500,000 – which was arranged for before the entry into the Consultancy Agreement and held by Macau Gas and Sudhir respectively, rather than by any appointed escrow agent.³⁵

³¹ Tong's AEIC, para 40.

³² Tong's AEIC, para 43.

³³ Tong's AEIC, para 26 and pp 261–262.

³⁴ Tong's AEIC, para 29 and pp 274–275.

³⁵ PS, paras 53–59.

49 In contrast, Sudhir’s claim was that Payments 3 and 4 (totalling US\$1,120,000) were paid to Al-Rafidian as an escrow agent, so as to amount to the US\$1,000,000 downpayment.³⁶ This was unsatisfactory. There was no reason for the plaintiffs to make an overpayment of US\$120,000 as the downpayment, and Sudhir could not provide any reasonable explanation for this. Further, on the purported appointment of Al-Rafidian as the escrow agent, there was no mention of this at all in Sudhir’s affidavit of evidence-in-chief (“AEIC”). Sudhir appeared to have dropped the contention, as there was also no mention of the escrow defence in Sudhir’s closing submissions. As argued by the plaintiffs, there was no conceivable reason for the plaintiffs to entrust a company controlled by Sudhir to be the escrow agent.³⁷ Therefore, I rejected the escrow defence raised by Sudhir.

50 By the above, I concluded that Payments 1 to 4 were made broadly in accord with the Consultancy Agreement.

Payments 5 to 9, 12, 13, 15 to 18

51 Moving on, I found that Tong was able to provide a clear account of how Payments 5 to 9, 12, 13, and 15 to 18 were made in the course of the progress of the LNG Project. He also provided details of how the repayment documents and the UOB cheques came about as follows:

- (a) *Payment 5.* Tong explained that despite a few months of negotiations, instead of a HOA, on 15 January 2009, BPMIGAS provided Macau Gas with a draft “Memorandum of Understanding”

³⁶ Sudhir’s AEIC, para 34.

³⁷ Tong’s AEIC, paras 41 and 44; PS, para 54.

(“MOU”). In Tong’s view, the draft MOU lacked the necessary details for the LNG Project.³⁸ Nonetheless, on 20 March 2009, Sudhir approached Tong for a further payment, on the basis that the MOU was the equivalent of a HOA such that US\$1,500,000 would be payable to Sudhir based on cl 6.1 of the Consultancy Agreement. Tong disagreed with Sudhir. However, he sent an email to Sudhir, agreeing to vary the terms of the Consultancy Agreement by paying US\$500,000 upon the signing of the MOU, another US\$500,000 after confirming the pricing formula, and the final US\$500,000 upon confirming the quantity of the LNG supply.³⁹ In accordance with this, on 19 March 2009, Javila sent Ramesh an email informing him that the cheque for Payment 5 had been sent to his office. Eventually, the cheque was encashed on 26 March 2009.⁴⁰

(b) *Payment 6.* On 29 April 2009, Tong received a letter from BPMIGAS, stating that it was not possible to pursue the MOU. Tjahjono, however, assured Tong that all was still on track. At a meeting on 6 May 2009, only a Manifest of Intent (“MOI”) containing four clauses was signed with BPMIGAS.⁴¹ Subsequently, another version was signed, incorporating more clauses.⁴² However, there was no pricing formula within these documents. On or about 19 May 2009, Sudhir asked for an advance on the second payment of US\$500,000 referred to at [(a)] above, saying that the official confirmation of a pricing formula

³⁸ Tong’s AEIC, para 47.

³⁹ Tong’s AEIC, para 52 and pp 392–393

⁴⁰ Tong’s AEIC, para 53 and p 394.

⁴¹ 1AB11–13.

⁴² 1AB14–18.

would be obtained very soon. On that basis, Kensington issued a cheque of US\$450,000 to Al-Rafidian. Tong candidly admitted that while he was not sure why it was not the full sum of US\$500,000, it could be because he was not prepared to advance the full sum until the official pricing formula was confirmed.⁴³

(c) *Payments 7 and 8.* Then, Tjahjono arranged for a visit by the Indonesian Minister of Energy and Mineral Resources to Macau on 23 to 24 July 2009. On 22 July 2009, Sudhir arrived in Macau. He requested for two sums as spending money, and Tong advanced him cash of HK\$308,000 and HK\$300,000 on 22 and 23 July 2009 respectively. Sudhir signed acknowledgement slips for these advances.⁴⁴

(d) *Payment 9.* Further, Sudhir requested for a further advance of US\$180,000, which he said was required to cover expenses for the Macau visit. Tong agreed to advance the money. Kensington issued a cheque of US\$180,000 in favour of Al-Rafidian on 22 July 2009 which was sent to Sudhir's office.⁴⁵

(e) *Payment 12.* By October 2009, there was a slight turn of events. Sudhir and Tjahjono began to also try to secure a HOA with another Indonesian state-operated company, PT Perusahaan Listrik Negara ("PLN"), which held the rights to LNG from a particular LNG field. Sudhir requested for yet another advance of money, again on the basis of a set-off against the Consultancy Fee. To assure Tong of his intention

⁴³ Tong's AEIC, para 58.

⁴⁴ Tong's AEIC, para 60 and pp 419–420.

⁴⁵ Tong's AEIC, para 61 and p 421.

to repay, Sudhir handed him a UOB Cheque No 402180 post-dated to 5 June 2010 in the sum of US\$1,130,000 for Payments 5, 6 and 9 issued by Al-Rafidian in favour of Tong.⁴⁶ On the basis of proceeding with PLN, and upon Sudhir's request, Tong advanced US\$350,000 to Al-Rafidian by way of a cheque from Kensington on 9 October 2009.⁴⁷

(f) *Payment 13.* Around the same time, Sudhir wanted to bring Rianto on board the LNG Project. Sudhir said that Rianto had access to the Indonesian Minister of Energy and Mineral Resources, and wanted another advance of US\$350,000. As Tong had UOB Cheque No 402180 in hand, he advanced Payment 13, by way of telegraphic transfer, to Al-Rafidian on 6 November 2009.⁴⁸

(g) *Payment 15.* In late January 2010, Sudhir called Tong to ask for a further advance of US\$180,000. On 3 February 2010, Tong arranged for a telegraphic transfer of US\$60,000 to Al-Rafidian's bank account. Tong informed Sudhir and Ramesh that he would like Sudhir to acknowledge a list of all the loans advanced before the further sum of US\$120,000 were to be paid to him, and that he would be taking a loan from a third party for the sum and required a loan agreement for that purpose. Sudhir agreed.⁴⁹

(h) *Payment 16.* On 5 February 2010, by an email from Javila to Sudhir which was copied to Tong, Javila attached the unsigned copies

⁴⁶ Tong's AEIC, para 79 and p 600.

⁴⁷ Tong's AEIC, para 82 and p 628.

⁴⁸ Tong's AEIC, para 84.

⁴⁹ Tong's AEIC, paras 87–91.

of the 5 February 2010 Loan Agreement and the 5 February 2010 Acknowledgment. By way of an email, Ramesh sent copies of these documents, duly signed by Sudhir, to Javila.⁵⁰ After receiving the 5 February 2010 Acknowledgement and the 5 February 2010 Loan Agreement, Tong proceeded to provide the advance of US\$120,000 to Al-Rafidian on 8 February 2010.⁵¹

(i) *Payment 17.* By a letter dated 2 February 2010, BPMIGAS wrote to Macau Gas to state that it would no longer continue with the implementation of the project. Tong spoke to Sudhir, who assured him that with Rianto's help, they would be able to procure the HOA. Again, he asked for an advance of US\$500,000. Tong said that he would send Sudhir an updated list of loans for him to sign. Sudhir agreed to this. However, Sudhir asked on an urgent basis for a sum of US\$250,000, with the balance to be sent to Al-Rafidian. On 19 February 2010, Tong sent Rianto the sum of US\$250,000.⁵²

(j) *Payment 18.* On 1 March 2010, a cheque was issued by Kensington in favour of Al-Rafidian for the remaining US\$250,000, and sent to Ramesh.⁵³ By an email from Cecilia to Sudhir on 3 March 2010, Cecilia sent Sudhir the record of Payment 17.⁵⁴ This was followed by another email on the same day, where Cecilia sent the 3 March 2010 Acknowledgment listing all 18 payments to Ramesh for signing by

⁵⁰ Tong's AIEC, paras 92–94 and pp 655–662.

⁵¹ Tong's AEIC, para 95.

⁵² Tong's AEIC, paras 97–99.

⁵³ Tong's AEIC, paras 100–101.

⁵⁴ Tong's AEIC, para 102 and pp 668–669.

Sudhir. On 6 March 2010, Ramesh sent the document, duly signed by Sudhir, back to Cecilia.⁵⁵

52 To reiterate, Sudhir disagreed that he assumed liability for the amounts, and disputed the reasons why he signed the repayment documents and furnished the UOB cheques. I deal with those issues below. For now, I focus on the *narrow* question of whether these payments were in relation to the LNG Project, especially Payments 12, 13 (US\$250,000 out of US\$350,000) and 17 which Sudhir disputed to be for that purpose.

53 Based on the detailed account given by Tong, corroborated by the emails and draft documents which tracked the twists and turns of the LNG Project, I accepted that all these payments were in connection with the LNG Project, including Payments 12, 13 (US\$250,000 out of US\$350,000) and 17. In relation to Payment 12 and the part of Payment 13, I accepted Tong’s detailed account provided above, and shall set out why I rejected Sudhir’s version that these were for payment of the OKL shares from [59] onwards.

54 In relation to Payment 17, *ie*, the sum of US\$250,000 paid to Rianto, I noted that in Sudhir’s original defence, he stated that he “had no knowledge” of it. On 23 June 2017, he amended his defence to state that he did not know about this sum which Tong advanced directly to Rianto “*until subsequently*”.⁵⁶ However, in Sudhir’s AEIC, he said that Tong had paid this directly to Rianto as a “refundable preparation fee”.⁵⁷ Sudhir had been inconsistent in this aspect.

⁵⁵ Tong’s AEIC, paras 103–104, pp 670–672; Agreed Bundle of Documents Volume 5 (“5AB”) p 2678–2679.

⁵⁶ Defence, para 30A.

⁵⁷ Sudhir’s AEIC, para 44.

More importantly, the transfer slip concerning this payment was forwarded to Sudhir by the email dated 3 March 2010 from Cecilia: see [51(j)] above. Not long after that, Sudhir signed the 3 March 2010 Acknowledgment (which included Payment 17). I did not believe Sudhir's version that he did not know about Payment 17.

The conduit defence

55 I now turn to Sudhir's defence that even for any payments which he conceded to be made in relation to the LNG Project, including Payments 5 to 9, 13 (US\$100,000 out of US\$350,000), 15, 16 and 18, he was a mere conduit. He paid Indonesian parties on behalf of the plaintiffs, or received reimbursements for payments which he had made. Therefore, these were not loans to him, and there was no reason for him to assume liability for the payments.⁵⁸

56 It was undisputed that under the terms of the Consultancy Agreement, Kensington engaged Firstfield as a consultant, so as to procure a long-term source of LNG for the LNG Project. Firstfield was to be responsible for its expenses. Of course, it was entitled to advances of up to US\$4,000,000 based on the three milestone events. This was the consultancy fee. However, the real compensation would flow to Firstfield upon the successful completion of the project. Should the project not be successful, the advance payments would be repayable.

57 While Firstfield was the contracting party to the Consultancy Agreement, the parties did not seriously dispute that it was Al-Rafidian which was used by Sudhir as the vehicle to make and receive payments. Against the

⁵⁸ Sudhir's AEIC, paras 26–30, and 35.

backdrop of the Consultancy Agreement, I found Sudhir’s claim that he was merely a “conduit” in the process, making and receiving payments with the “knowledge and consent” of Tong, unbelievable. In view of Firstfield’s clear obligation under the Consultancy Agreement to secure the LNG supply and to be responsible for the expenses in the process, there was absolutely no reason for Tong to make any payments in relation to the LNG Project through Sudhir as a “conduit”. This aspect was covered in a few brief paragraphs in Sudhir’s AEIC, and he was unable to provide details as to how and when he purportedly made payments on Tong’s behalf.⁵⁹ While Tjahjono was initially meant to be a witness at the trial, and might have shed some light on how the expenses were incurred, he did not give evidence on behalf of Sudhir.

58 At the end of the day, it seemed to me there was little evidence of any input or instructions being given by Tong for payments to be made by Sudhir. This was in accordance with the Consultancy Agreement. Tong’s account that Sudhir had requested for such advances, on the premise that these would be deducted from the sums payable under the Consultancy Agreement accorded with the surrounding circumstances. As set out at [51] above, Tong carefully explained how the project progressed, and why he agreed to certain advances being given at certain points in time in order to ensure the smooth progress of the project. I found for the plaintiffs on this factual dispute, and rejected the conduit defence in relation to these payments.⁶⁰

⁵⁹ Sudhir’s AEIC, paras 26, 29 and 30.

⁶⁰ PS, paras 199–206.

Whether Payments 10 and 11 were personal loans to Sudhir

59 I turn to the payments in relation to the transfer of the OKL shares. To summarise, Tong’s case was that Payments 10 and 11 were personal loans to Sudhir, for Sudhir’s venture in the listing of the OKL shares. He did not purchase OKL shares; the shares were being held as security for the loans.⁶¹

60 Specifically, Tong’s evidence was that Sudhir first asked for a loan on 23 July 2009, during the visit to Macau at [51(c)]-[51(d)] above. Apparently, Nazim was also involved in the venture. At the meeting, Tong said he wanted some time to think about it. Subsequently, at a meeting in Singapore on 2 August 2009, Sudhir raised the matter again. As the LNG Project appeared to be going well, and Tong had built up personal relationships with Sudhir and Ramesh, he agreed to advance the money. Ramesh was meant to take care of the documentation.⁶²

61 Payment 10 was a sum of US\$1,642,000 (not US\$1,690,000 as originally asked for by Sudhir) paid to Petunia by Kensington on 7 August 2009, advanced on security of 6,500,000 OKL shares held by Petunia which would be transferred to Tong.⁶³

62 On 11 September 2009, Sudhir asked to borrow a further sum of US\$1,200,000, on the security of a further tranche of 4,500,000 OKL shares. Payment 11 was then disbursed on or around 11 September 2009, being a sum of US\$600,000 from Kensington to Al-Rafidian. Tong did not wish to lend

⁶¹ Tong’s AEIC, para 62; PS, paras 134–156, 245–250.

⁶² Tong’s AEIC, paras 64–65.

⁶³ Tong’s AEIC, paras 66 and 67.

Sudhir the full sum of US\$1,200,000, as he realised that he had already transferred very large sums to Sudhir in connection with the LNG Project. In fact, he asked Cecilia to prepare a summary of all payments made to Sudhir up to that point, and her email to him showed a total amount of US\$4,772,000 outstanding.⁶⁴ Payments 12 and 13 had nothing to do with OKL shares.⁶⁵

63 Sudhir’s version went like this. There was a single agreement by Tong to purchase 11,000,000 OKL shares from Petunia, and the payment was then made in four tranches, being Payments 10 to 12 and part of Payment 13 (US\$250,000 out of US\$350,000).⁶⁶ This amounted to a total sum of US\$2,842,000. In his AEIC, Sudhir described in two very short paragraphs how he shared with Tong the opportunity to subscribe to OKL shares. After Tong, an “astute investor”, conducted his own evaluation and analysis, he decided to purchase the 11,000,000 OKL shares.⁶⁷ Ramesh was tasked to assist with the arrangements for the sale and transfer of the 11,000,000 shares.⁶⁸

64 Having evaluated the evidence, I accepted the plaintiffs’ position. The facts and circumstances pointed away from Sudhir’s contention that these four payments were for the purchase of 11,000,000 OKL shares.

65 First, a letter dated 5 August 2009 by Petunia to Tong (signed by Ramesh) stated:⁶⁹

⁶⁴ Tong’s AEIC, paras 71–73 and pp 570–571.

⁶⁵ Tong’s AEIC, para 74.

⁶⁶ Notes of Evidence (“NE”) of 22 May 2018, p 32 lines 6–8.

⁶⁷ Sudhir’s AEIC, paras 36–37.

⁶⁸ Ramesh’s affidavit of evidence-in-chief (“Ramesh’s AEIC”), para 32.

⁶⁹ Agreed Bundle of Documents Volume 4 (“4AB”) pp 2081–2082.

Further to discussions with you, we confirm that [Petunia] will transfer 6,500,000... ordinary shares (“the Shares”) in the capital of [OKL] to you or your nominee for a consideration of US\$0.26 per ordinary share. The total consideration for the Shares shall be US\$1.69million...

Please note that the transfer will be made after [OKL] has been listed on AIM London.

On 6 August 2009, a revised letter was sent by Petunia, again signed by Ramesh, on similar terms, save that the “consideration” had been reduced to US\$1,642,000, without any mention of the price per share.⁷⁰ Thereafter, Payment 10 of US\$1,642,000 was paid to Petunia on 7 August 2009. Then, on 11 September 2009, another letter was sent by Ramesh to Tong, again on Petunia’s letterhead, in similar terms stating that “further to discussions with [Tong]”, Petunia would transfer 4,500,000 OKL shares to him, upon consideration of US\$1,200,000 once OKL had been listed.⁷¹

66 Leaving aside the nature of the transactions for the moment, contrary to Sudhir’s case, the documents did not reflect *one* agreement at the outset by Tong in relation to 11,000,000 OKL shares. Instead, the documents supported Tong’s contention that there were two transactions, separated by an interval of over a month. Admittedly, the use of “share price” and “consideration” in the letters suggested that the transfers were by way of sale of the shares. However, there remained a degree of ambiguity as the letters did not expressly state these were sale transactions. If these were sale transactions, I would have expected parties to execute more formal sale and purchase agreements.

⁷⁰ 4AB2086–2087.

⁷¹ 5AB2112.

67 More significantly, as argued by the plaintiffs, I found it at odds with a sale and purchase transaction that there was no proper valuation of the OKL shares. Sudhir conceded that Tong was an “astute investor”. If so, there was no explicable reason why Tong would have agreed to purchase the shares at the price of US\$0.26 per share without conducting a proper valuation. There was simply no evidence of how the share price was derived. In fact, the objective evidence by way of a letter from OKL to Petunia showed that the par value of the share was £0.0001 per share.⁷² This would have meant that Tong had agreed to buy the shares at a price many times above the par value. Given this context, Tong’s evidence that he was not concerned to obtain a valuation of the shares as it was merely some form of security for a personal loan to Sudhir rang true.

68 Even if US\$0.26 were to be the purchase price per share, it was inexplicable that over a day, the share price could be randomly reduced from US\$1,690,000 to US\$1,642,000 for the first tranche of 6,500,000 OKL shares. Under cross-examination, Sudhir said that he did not change the price, and he did not know why it was changed. Ramesh was the one who signed off on the revised letter of 6 August 2009.⁷³ Ramesh, however, stated in his AEIC that Sudhir had discussed the matter with Tong, and agreed to reduce the considerable payable for the shares. The contradiction by Ramesh undermined Sudhir’s defence.

69 As for the second tranche of 4,500,000 shares, Sudhir contended that it was meant to be sold for US\$1,200,000. I noted that by 12 October 2009, Tong had only made Payments 11 and 12, being US\$950,000 instead of the alleged

⁷² 4AB1935.

⁷³ NE of 22 May 2018, p 26 lines 6–16.

full sum of US\$1,200,000. Yet, the transfer of the 11,000,000 shares was executed on 12 October 2009,⁷⁴ and OKL sent Tong a letter to confirm the transfer of the shares on 28 October 2009.⁷⁵ In this regard, Payment 13 was made only on 6 November 2009. If indeed this was a sale and purchase transaction, there was no reason for the transfer of all the OKL shares to Tong when there remained a fairly substantial shortfall of US\$250,000 of the purchase price. Tong's explanation that 4,500,000 OKL shares formed security for a loan amount of US\$600,000 was more credible.

70 Further, what troubled me was the fact that it was rather late in the day before Sudhir claimed that US\$250,000 out of US\$350,000 of Payment 13 was in relation to the purchase of the OKL shares. He shifted his stance from the initial position that Payment 18 (in the exact sum of US\$250,000 but paid much later on 1 March 2010) was in relation to the OKL shares. This change came about by an amendment incorporated in the Defence, almost four years after the commencement of proceedings (and a month before the trial). This strongly indicated that by relying on a *part* of Payment 13 instead of the whole of Payment 18, Sudhir was merely trying to find a payment close in time to the transfer of the shares. Moreover, after the amendment was effected, Sudhir did not correct the portion of his AEIC which stated that Payment 18 (not Payment 13) was in relation to the OKL shares.

71 Viewed holistically, Sudhir's case was untenable. The objective facts and circumstances (as well as the documents produced) provided support for the plaintiffs' case. Therefore, I found that Payments 10 and 11 were personal loans

⁷⁴ 5AB2433–2434.

⁷⁵ 5AB2496–2497.

to Sudhir, secured by way of the 6,500,000 and 4,500,000 OKL shares. As I have found above, Payments 12 and 13 were simply advances to Rianto in relation to the LNG Project.

Whether Payment 14 to Cynthia was made on Sudhir's request

72 In relation to Payment 14, a sum of HK\$10,000, Tong stated that this was lent to Cynthia at Sudhir's request.⁷⁶ Originally, Sudhir denied that this had anything to do with him.⁷⁷ Under cross-examination, however, Sudhir admitted that he asked Tong to advance the money to Cynthia as she was a mother of his friend. He said it was his mistake to contend otherwise.⁷⁸ I found that it was Sudhir who asked Tong to advance the sum to Cynthia, and who agreed to be liable for the amount.

The enforceability of the repayment documents

73 Before turning to the challenges to the enforceability of the repayment documents, I observe that given the underlying purposes for each and every payment as discussed above, it seemed to me that there was every reason for Sudhir to assume liability for the payments, and to acknowledge his indebtedness in the repayment documents. With that, I go to Sudhir's claim that he was tricked into signing each and every one of the repayment documents.

⁷⁶ Tong's AEIC, para 86.

⁷⁷ Defence, para 29; Sudhir's AEIC, para 38.

⁷⁸ NE of 22 May 2018, p 108 line 1 to p 109 line 2.

The sham defence

The first set of allegations

74 The first set of allegations made by Sudhir was in relation to the repayment documents in February and March 2010.

75 Sudhir alleged that prior to 5 February 2010, Tong had represented to him that Tong had borrowed money from family members and business associates for the LNG Project and the OKL shares. As Sudhir was known to his family members and business associates, Tong wanted Sudhir to acknowledge that the sums of money were borrowed on Sudhir's instructions or by Sudhir. Such acknowledgements were to show Tong's family members and business associates that the money did go towards these purposes, and that Tong played the role of a middleman only. By doing so, Tong would get more time to sort out his finances. There was no intention to create any legal obligations.⁷⁹ Thus assured, Sudhir was tricked into signing the 5 February 2010 Acknowledgment and the 5 February 2010 Loan Agreement. These representations were repeated to procure him to sign the 3 March 2010 Acknowledgement.⁸⁰

76 Tong disputed Sudhir's allegations. I have set out Tong's account of what transpired above at [51(g)]-[51(h)], which led to the signing of the February documents. To summarise, by the time a sum of US\$180,000 was requested for in early February 2010, Tong was getting worried about the large advances made to Sudhir, as there appeared to be little progress on the LNG Project. He wanted some form of acknowledgment of liability on Sudhir's part.

⁷⁹ Sudhir's AEIC, paras 40–43.

⁸⁰ Sudhir's AEIC, paras 44–47.

Payment 15 of US\$60,000 was paid out on 3 February 2010, while Payment 16 of US\$120,000 was paid out on 8 February 2010 only after Sudhir's acknowledgment by way of the February documents.

77 As stated in [51(i)]-[51(j)] above, Tong explained that yet again, Payments 17 and 18 were requested by Sudhir. After making Payment 17, in an email dated 27 February 2010, Sudhir had sent him an update of the progress with regards the HOA indicating that "5th to the 8th of april shud be the signing." Therefore, Tong furnished Payment 18, and arranged for the acknowledgment of liability for the updated list of loans. Indeed, the 3 March 2010 Acknowledgment stated the date of signing of the HOA as 10 April 2010.

78 Having reviewed the matter, I did not accept Sudhir's account. First, Sudhir's account was at odds with the sequence of events. There did not appear to be any particular financial difficulty on Tong's part. In fact, consistently, Tong had been paying out sums to Sudhir, and continued to make Payments 16 to 18 during the material time. Sudhir's assertion that the scam began from before 5 February 2010 did not sit comfortably with this background. In contrast, it was Tong's version that Sudhir signed the documents to confirm his liability to receive the further advances by way of Payments 16 to 18 that accorded with the context.

79 Second, the alleged representations did not make much sense. I found it difficult to understand why Sudhir's acknowledgment of liability would assuage Tong's family members and business associates, just because he was known to them. Sudhir did not produce any evidence at all of his financial standing, or proffer any reason why the family members and other business associates would have such trust and confidence in him.

80 More significantly, Sudhir was an experienced businessman, who had, in his own words, “worked together on a number of deals relating to the Malaysia oil and gas industry”.⁸¹ He also described himself as someone who had “worked with various individuals as well as organisations in the oil and gas sector in Indonesia and was familiar with the industry”.⁸² I found it impossible to believe that Sudhir could have been tricked into signing these documents, so as to assume a liability for hefty sums of money in order to help Tong.

81 Further, it was not as if Sudhir did not have any reasonable time to consider if he should agree to the requests. The documents were sent to Sudhir or Ramesh by email, and then returned by email through Ramesh duly signed by Sudhir. In other words, Sudhir had ample time to reflect on what he was being asked to undertake, and further, he had every opportunity to discuss any concerns with Ramesh.

82 In all these circumstances, I rejected any contention that he was tricked into signing these documents on the premise that they were not intended to have any legal effect. I should add that as pleaded, Sudhir’s case was that he signed the 3 March 2010 Acknowledgment in his capacity as Al-Rafidian’s executive director, and not in his personal capacity.⁸³ In Sudhir’s AEIC, he merely said that he was “also asked to sign for and on behalf of [Al-Rafidian] because the monies were received largely by [Al-Rafidian]”.⁸⁴ From the wording in the 3 March 2010 Acknowledgement, it was clear to me that the document sought a

⁸¹ Sudhir’s AEIC, para 4.

⁸² Sudhir’s AEIC, para 6.

⁸³ Defence, para 35.

⁸⁴ Sudhir’s AEIC, para 45.

personal acknowledgment of liability from Sudhir to Tong. In fact, in the course of cross-examination, Sudhir agreed with this.⁸⁵

The second set of representations

83 I now go to the second set of representations. According to Sudhir, the representations became more elaborate in nature, so as to procure the signing of the 30 December 2010 Deed and the provision of the UOB cheques.

84 As pleaded, Sudhir’s account went like this. In meetings with Ramesh from 7 August 2010 to 25 October 2010, Tong told Ramesh that he was being “hounded by his family members and business associates”, and “facing legal suits in the Macau court”.⁸⁶ Thus, Tong wanted an agreement to show that Al-Rafidian and Petunia were borrowers of the money, and needed time to repay the moneys. Sudhir would guarantee the repayment.⁸⁷ This would assuage those who were hounding him, and buy more time for him to make arrangements to repay the loans. The agreement would replace the earlier agreements signed.⁸⁸

85 At further meetings on 6 December 2010, 28 December 2010 and 7 January 2011, these representations were made to Sudhir.⁸⁹ In Sudhir’s AEIC, he claimed that he was “taken aback” by Tong’s request for an agreement to be signed “at a lawyer’s office”, with someone to be a guarantor. However, Tong showed him a copy of a letter of demand from a lawyer, and implored him to help. Tong explained that there was a great urgency to sign a formal agreement

⁸⁵ NE of 22 May 2018, p 113, lines 19–25.

⁸⁶ Defence, para 41.

⁸⁷ Defence, para 42.

⁸⁸ Defence, para 43.

⁸⁹ Defence, para 44.

which his employee, Chen Min, would draft. Thereafter, Sudhir agreed, and he left Ramesh to deal with Chen Min. However, Sudhir insisted that the amount in the document be reduced to reflect the amount in the letter of demand only.⁹⁰ In relation to the UOB cheques issued around this period, Sudhir claimed that these were also meant to help Tong show his family members and business associates that he held security for the repayment of the alleged loans.⁹¹

86 Tong's version was as follows. From May 2010 onwards, he started asking for repayment of Payment 16, *ie*, the sum of US\$120,000 which was meant to have been repaid two months from 5 February 2010 (as provided for in the 5 February 2010 Loan Agreement). Apart from asking for more time to repay, Sudhir continued to ask for more advances from Tong. Thus, Tong wanted security cheques for the outstanding amounts.⁹² In addition to UOB Cheque No 402180 for US\$1,130,000 mentioned at [51(e)] above, as described in [118]–[119] below, Sudhir arranged for Al-Rafidian to issue a further three UOB cheques to Tong as security for the amounts he had taken, being:

- (a) UOB Cheque No 402197 (undated) for the sum of US\$5,231,000, which was meant to cover all the payments in Annex A (less the downpayment of US\$1,000,000 under the Consultancy Agreement and the cash payment to Cynthia).⁹³

⁹⁰ Sudhir's AEIC, paras 49–56.

⁹¹ Sudhir's AEIC, para 47.

⁹² Tong's AEIC, para 116.

⁹³ Tong's AEIC, para 118 and 1AB236.

(b) UOB Cheque No 402198 (dated 25 July 2010) in the sum of US\$750,000, meant to cover Payment 17, as well as the US\$500,000 payment to Rianto;⁹⁴ and

(c) UOB Cheque No 402199 (dated 25 August 2010) which was meant to cover the US\$1,000,000 payment to Abiyoso.⁹⁵

87 On 22 October 2010, Tong and Sudhir discussed the repayment of the advances, including cashing out UOB Cheque Nos 402180 and 402198 (for US\$1,130,000 and US\$750,000) respectively by 25 October 2010. Sudhir agreed to this. Tong followed up with an email to Ramesh, setting out the discussion. However, Ramesh indicated that Sudhir was facing a cashflow problem, and the repayments had to be in smaller instalments.⁹⁶ Again, Sudhir met with Tong to discuss repayment. That was when Sudhir issued three further UOB Cheques Nos 752751, 752752 and 752753 to Tong to replace the earlier cheques as security.⁹⁷ Sudhir also agreed to a certain instalment plan. On 26 October 2010, Ramesh sent an email to Tong, copying Sudhir, confirming the repayment plan of US\$300,000 per month commencing November 2010 until the amount were to be repaid in full.⁹⁸

88 However, by an email dated 10 December 2010 from Ramesh to Tong, copying Sudhir, Ramesh apologised for missing the first instalment payment,

⁹⁴ Tong's AIEC, para 122 and 1AB220.

⁹⁵ Tong's AEIC, para 123 and 1AB222.

⁹⁶ Tong's AEIC, paras 137–138 and pp 839–840.

⁹⁷ Tong's AEIC, para 139 and 1AB236–238.

⁹⁸ Tong's AEIC, paras 138–141 and pp 841–844.

and proposed to pay it by January 2011.⁹⁹ On 17 December 2010, Tong wrote an email to Ramesh stating that he had borrowed money from his family and friends, and that his reputation was at stake. Thus, he recommended that “a personal loan agreement... be witnessed and signed by all parties at a lawyer’s office, with [Sudhir] as borrower and someone as guarantor.” He wanted the promise of the repayment in January 2011 to be firm.¹⁰⁰ Therefore, a draft loan repayment agreement was drawn up, to record all the payments in Annex A, the US\$500,000 payment to Rianto and the US\$1,000,000 payment to Abiyoso. This was sent to Ramesh by Tong’s employee, Chen Min, on 29 December 2010, to reflect the sum of US\$7,732,300.¹⁰¹

89 In the meantime, on 27 December 2010, Tong asked Cecilia to inform Sudhir through Ramesh that Tong was being chased for Payments 6, 9 and 10 by way of a letter of demand from a lawyer.¹⁰² In response, Ramesh sent an email on 30 December 2010 to say that Sudhir was *only* agreeable to commit to a repayment schedule for US\$3,250,000, reflecting Payments 6, 9 and 10 with interest. They should then proceed to discuss the other outstanding amounts.¹⁰³

90 Thereafter, Chen Min amended the draft agreement and sent it to Ramesh by way of an email on 30 December 2010, including only Payments 6, 9 and 10.¹⁰⁴ Eventually, the 30 December 2010 Deed was executed. Its terms are

⁹⁹ Tong’s AEIC, para 144 and p 846.

¹⁰⁰ Tong’s AEIC, para 145 and p 847.

¹⁰¹ Tong’s AEIC, para 146 and pp 849–856.

¹⁰² Tong’s AEIC, para 147 and pp 859–860.

¹⁰³ Tong’s AEIC, para 148 and pp 861–868.

¹⁰⁴ Tong’s AEIC, para 150.

as set out at [24] above, with a proviso that parties would discuss the outstanding amounts which formed the subject matter of the 28 February 2011 Agreements.

91 Having weighed the evidence, I found Sudhir’s evidence completely unbelievable. As Sudhir conceded, the 30 December 2010 Deed was a far more formal document than the earlier documents. It also contained a concrete repayment plan. There were negotiations by parties on its terms. It seemed to me extremely illogical that parties would negotiate the terms of the formal agreement, if it was only meant to be a sham.

92 Once again, I was not at all convinced that Sudhir, an experienced businessman, could have been tricked into signing the deed, not just on behalf of Al-Rafidian and Petunia as borrowers, but also personally as a guarantor. Again, it was not as if Sudhir did not have time to consider the consequences of his actions, and he had Ramesh to discuss the matter with.

93 Further, the reason given by Sudhir for the emails from Tong to pursue payment and the responses by Ramesh and Sudhir to negotiate the terms of repayment was utterly contrived. Sudhir’s explanation was that from time to time, Tong would send such emails to give the semblance that he was pursuing repayment from Sudhir, and that Tong would require either Ramesh or Sudhir to respond to him to ask for time. Insofar as the replies were sent by Ramesh, they were sent on Sudhir’s instructions. Ramesh echoed such evidence.¹⁰⁵ Reading the contents of the relevant emails, it was evident that Tong was seriously pursuing repayment by Sudhir. It was also evident that Sudhir and Ramesh were seriously negotiating with Tong on the terms of repayment. There

¹⁰⁵ Ramesh’s AEIC, paras 96–97; Sudhir’s AEIC, para 48.

would be no need to do so if Sudhir bore no liability at all. I failed to see any merit in the claim that Tong orchestrated an elaborate scam which extended to fabricating the emails negotiating repayment.

94 Equally, I found unmeritorious Sudhir's explanation for the UOB cheques. In his AEIC, Sudhir explained in one brief paragraph that between March 2010 to December 2010, Tong had also sought his help to provide cheques to show that he had security for repayment of the alleged loans. Sudhir recalled that several cheques were blank and/or without any dates; Tong had said that he would fill them in, as and when required.¹⁰⁶ In my view, this was a completely farfetched claim. It was perplexing that Sudhir would take the risk of issuing cheques (including blank cheques) merely to help Tong maintain his charade.

95 I noted that by December 2010, Tong was anxious to ensure that Sudhir adhered to his repayment promises, and had put some pressure on Sudhir to do so. Tong admitted that in December 2010, he informed Sudhir that he was being chased by family members for a return of the sums of money, and also faced a lawyer's letter of demand. In fact, the email of 17 December 2010 contained such statements: see [88] above. However, the email of 17 December 2010 did not support Sudhir's allegation that Tong had said that the 30 December 2010 Deed would not be legally binding. As I shall expand on immediately below, I accepted that up until the signing of the 30 December 2010 Deed, Tong did not say to Sudhir that any of the repayment documents was not intended to have any legal effect. Up to this point in time, the repayment documents were not sham documents.

¹⁰⁶ Sudhir's AEIC, para 47.

The 7 January 2011 Statement

96 With that, I now deal with the effect of the 7 January 2011 Statement on the repayment documents. This, in fact, was the strongest piece of evidence in support of Sudhir’s case that the repayment documents were not meant to have any legal effect.

97 The 7 January 2011 Statement provided as follows:¹⁰⁷

To: [The plaintiffs]

Date: January 7, 2011

FM: [Al-Rafidian]

[Petunia]

You have informed us that you require the agreements to be signed with Kensington (US\$4.2m with [Al-Rafidian] and US\$1.642m with [Petunia]) as you have a number of legal matters in the court in Macau where you are being sued by creditors. You said that you need to show the agreements to the court, otherwise, you would be in trouble with the creditors and the court.

We accept in good faith that what you have represented to us is true.

We will enter into the agreements on the basis that you will not use them to sue [Al-Rafidian] and [Petunia] and any guarantor (if applicable). The agreements are to be strictly used by [the plaintiffs] for the purpose of showing the courts in Macau and Hong Kong (if applicable)... that [the plaintiffs] are able to meet their obligations.

98 In the Defence, Sudhir pleaded that the document was signed at a meeting on 7 January 2011.¹⁰⁸ In his AEIC, he stated that “[f]ollowing the signing of the 30 December 2010 Deed”, Tong asked for more formal

¹⁰⁷ 1AB41.

¹⁰⁸ Defence, para 47.

agreements to be signed. Sudhir then “asked [Tong] to put down in writing that these agreements that he was requesting were not to be used against [Al-Rafidian], [Petunia] and/or any guarantors to the agreements” .¹⁰⁹ Thereafter, the document was duly signed. Ramesh corroborated his evidence.

99 According to Tong, following the signing of the 30 December 2010 Deed, he continued to negotiate with Sudhir and Ramesh to sign further formal loan agreements in relation to the other outstanding sums. At a meeting in Singapore on 23 or 24 February 2011, Tong brought along two draft loan agreements. To convince Sudhir to sign them, he told Sudhir and Ramesh that he could be sued in the Macau courts by creditors, and this was because of Sudhir’s failure to repay him. He asked Sudhir to sign the further formal loan agreements so that he could at least show them to the court and to his creditors. What he said was clearly not true as he did not have any pending court matters at the time. He said it in the hope that it would spur Sudhir to sign the further formal documents. In response, Ramesh said that he wanted Tong to sign a statement confirming that he needed these loan documents to show them to the Macau court, and that Sudhir would not sign the further loan agreements unless Tong were to sign the statement. Tong then signed the 7 January 2011 Statement. Although the document was dated 7 January 2011, this was signed on or around the time of the signing of the 28 February 2011 Agreements.¹¹⁰

100 I accepted Tong’s version that he came to sign the 7 January 2011 Statement on or around 23 or 24 February 2011, and not Sudhir’s account that it was signed on 7 January 2011. Tong’s version was supported by the objective

¹⁰⁹ Sudhir’s AEIC, para 59.

¹¹⁰ Tong’s AEIC, para 166.

evidence that on 24 February 2011, the draft agreement involving Al-Rafidian stipulated an amount of US\$4,500,000 owing¹¹¹ instead of the figure reflected in the 7 January 2011 Statement by way of the phrase “US\$4.2m with [Al-Rafidian]”. It appeared to me that the amount of US\$4,200,000 was only finalised by the parties after 24 February 2011. That figure was then incorporated into the agreement involving Al-Rafidian, and also found its way into the Statement. In any event, despite the difference in the parties’ cases on the date of the signing of the Statement, what was critical was Sudhir’s acceptance that the 7 January 2011 Statement was signed *after* the 30 December 2010 Deed.

101 Thus, it was only after the 30 December 2010 Deed was signed that Tong said that he was being hounded by creditors, that he had legal problems, and that he would not use the further loan documents. While Tong explained that this was to get Sudhir to sign the further loan documents, such representations threw doubt on the validity of the 28 February 2011 Agreements. In this regard, it is not disputed that in two earlier sets of proceedings, High Court Suits Nos 842 and 844 of 2012, Kensington had relied on the 28 February 2011 Agreements to make claims against Sudhir. However, these actions have been discontinued, without prejudice to Kensington’s rights. In other words, given the 7 January 2011 Statement, the plaintiffs had chosen not to rely on the 28 February 2011 Agreements.¹¹²

102 Nonetheless, I did not find that there was a sham which had existed since 5 February 2010. I rejected Sudhir’s attempt to impugn all the repayment

¹¹¹ Agreed Bundle of Documents Volume 6 (“6AB”) p 3329–3334.

¹¹² Tong’s AEIC, pp 926–936.

documents on the basis of events which took place after the signing of the 30 December 2010 Deed. In my view, the evidence showed that at all times, Sudhir acknowledged his liability to the plaintiffs for the amounts, and was seriously negotiating the terms of repayment. These efforts were not part of a scam designed to fool Tong's creditors.

103 I now deal with Sudhir's argument that the 28 February 2011 Agreements superseded the earlier repayment documents.¹¹³ On the face of these agreements, there was no clause with such effect in either document. In any event, as Sudhir contended, these agreements were tainted by the representations contained in the 7 January 2011 Statement. This was not seriously disputed by the plaintiffs. As I have stated above, the validity of these agreements were in doubt. As such, they would not supersede the earlier repayment documents.

Conclusion

104 By the foregoing, I rejected the sham defence.

The illegality defence

105 I deal very quickly with the illegality defence. Essentially, this defence was premised on the very same representations relied on for the sham defence, *ie*, that the relevant repayment documents were created purely to deceive Tong's creditors and the Macau court, and were not intended to be legally binding. Therefore, Sudhir argued that the 3 March 2010 Acknowledgment and the 30 December 2010 Deed were void for illegality and unenforceable. As I have

¹¹³ DS, paras 10–14.

found, the allegations were devoid of merit. Accordingly, I rejected the illegality defence.

The illegal moneylending defence

106 As for the illegal moneylending defence, I should highlight that this defence was raised very late in the day, about one month before the commencement of the trial. Having raised it, Sudhir appeared to have abandoned it; it was not dealt with in his closing submissions at all. In any event, I deal briefly with Sudhir’s pleaded case that if Payments 1 to 18 were indeed loans to him, they were unenforceable by virtue of the MLA as they were loans granted by an unlicensed moneylender.

107 I note that by s 2 of the MLA, a moneylender means a person who carries on the business of moneylending. Section 3 provides that any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed, until the contrary is proved, to be a moneylender.

108 In *Subramaniam Dhanapakiam v Ghaanthimathi* [1991] 1 SLR(R) 164 at [10] and *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 at [38], it was made clear that at common law, the test for the carrying on of a business is that of the undertaking of the relevant transactions with “some degree of system and continuity”. Where the transactions are undertaken only incidentally to the provision of other services, the requisite degree of system and continuity to constitute a “business” would generally not be established. The mere act of lending money does not fall within the prohibition of carrying on the business of moneylending under the MLA. To contravene the prohibition, the regulated activity must have system and continuity to constitute the business of moneylending. Therefore, activity which is simply incidental to the person’s core business is insufficient.

109 As argued by the plaintiffs, they were not in the business of moneylending. I agreed. As established above, Payments 1 to 4 were advanced broadly pursuant to the Consultancy Agreement. Payments 5 to 9, 12 to 13, and 15 to 18 were advances provided in the course of the LNG Project. The commercial context was the LNG Project, and not a moneylending business. While Payments 10 and 11 were personal loans to Sudhir, and Payment 14 was a personal loan to Cynthia, these were on the basis of the business and personal relationship between Tong and Sudhir. There was hardly sufficient evidence to establish a system and continuity in moneylending to constitute the business of moneylending.

110 Turning to the matter of interest, I noted that it was only in relation to Payment 16 that Tong indicated, at the time of lending, that interest would be payable. This was set out in the 5 February Loan Agreement. As for all the other advances, they were furnished *without* any interest element at all. In the 3 March 2010 Acknowledgment, the plaintiffs did not claim for any interest at all, even in relation to Payment 16. Subsequently, when a repayment plan was being worked out, the interest element was negotiated, and then incorporated into the 30 December 2010 Deed for Payments 6, 9 and 10. Even then, the interest rate of 2% per month from the dates of the payments to 30 December 2010 was meant to take into account a nine-month grace period granted for the repayment plan from January 2011 and to 30 September 2011.

111 In my view, any presumption that the plaintiffs were moneylenders had been rebutted. It was clear that the plaintiffs were *not* in the business of moneylending. Accordingly, I rejected the moneylending defence.

Conclusion

112 In light of all of the above, by the terms of the 30 December 2010 Deed, I found that Sudhir had agreed to be liable to pay Kensington the claim in relation to Payments 6, 9 and 10 in the sum of US\$3,250,000. As for the other 15 payments, in accordance with the 3 March 2010 Acknowledgment, he had acknowledged liability to Tong in the sum of US\$3,880,000 and HK\$618,000, and was liable to pay these amounts to Tong.

Whether Sudhir was liable for the US\$500,000 payment to Rianto

113 I go to the next part of the claim. According to Tong, in late April 2010, Rianto arranged for a meeting in Indonesia with the new Minister of Energy and Mineral Resources. During the trip, he brought up the question of his fee. Tong told Rianto that this was actually Sudhir's responsibility, as Sudhir was the person responsible for all expenses under the Consultancy Agreement. After the trip, Sudhir asked Tong to advance a further sum of US\$500,000 to keep the deal moving along. On 13 May 2010, Tong transferred the sum of US\$500,000 to Rianto.¹¹⁴ Sudhir had agreed to repay the sum, and Al-Rafidian issued a UOB Cheque No 402198 to Tong dated 25 July 2010 of US\$750,000 (to cover the amount as well as Payment 17, which had been advanced on or about 19 February 2010 to Rianto).¹¹⁵

114 However, Sudhir denied any knowledge of this payment. He claimed that after Rianto and Abiyoso became involved in the LNG Project, Tong sidelined him, and he was not privy to their dealings.¹¹⁶

¹¹⁴ Tong's AEIC, paras 108–110; PS, paras 130–133.

¹¹⁵ Tong's AEIC, para 122 and p 719; PS, para 131.

¹¹⁶ Sudhir's AEIC, para 21.

115 From an email from Sudhir dated 13 April 2010, it was clear that Sudhir knew about the ministerial meeting, and had arranged for it.¹¹⁷ Thus, I did not accept that Sudhir did not know about the meeting, or that the payment of US\$500,000 was for the purpose of the LNG Project. Support for Tong's case also came in the form of UOB Cheque No 402198 issued to secure the two payments to Rianto, Payment 17 and the sum of US\$500,000. As stated earlier, the explanation by Sudhir that this cheque was provided as part of the sham to assuage Tong's creditors was simply unsatisfactory.

116 I accepted Tong's position that given that this was a payment in relation to the LNG Project, and Sudhir's acknowledgment of his liability for expenses for the LNG Project, as confirmed by way of the cheque for US\$750,000 to Tong, Sudhir was liable to Tong for the sum. I thus allowed Tong's claim for this amount.

Whether Sudhir was liable for the US\$1,000,000 payment to Abiyoso

117 According to Tong, the US\$1,000,000 payment was made to Abiyoso in relation to the Sand Project. I have set out the brief background above at [20].

118 To elaborate, sometime in April 2010, Ramesh asked Tong to advance a sum of US\$1,000,000, on the assurance that the Sand Project would generate a positive cash flow of S\$3,000,000 per month for a period of 18 months from June 2010. Tong would receive a share of the profits if successful. If not, Tong would be repaid the advance.¹¹⁸ As Tong was reluctant to provide the advance on the strength of Abiyoso's cheque of US\$1,000,000 as security, Ramesh

¹¹⁷ Tong's AEIC, para 108 and p 676.

¹¹⁸ Tong's AEIC, para 112.

informed him that Sudhir would provide an undertaking to be responsible for the amount if the Sand Project did not materialise.

119 To confirm the arrangement, Tong called Sudhir on the phone, and Sudhir furnished the assurance. Tong used the opportunity to emphasise to Sudhir that he expected the earlier payments to be repaid. Thereafter, Tong issued a post-dated cheque by Kensington (OCBC Cheque No 000030 dated 21 May 2010) of US\$1,000,000. Tong post-dated the cheque so as to have enough time to receive a cheque from Sudhir as security. On 20 May 2010, Ramesh sent an email to Tong, attaching an image of a cheque in the sum of US\$5,231,000 (UOB Cheque No 402197). This was to cover *all* the payments in Annex A (less the downpayment of US\$1,000,000 under the Consultancy Agreement and the cash payment to Cynthia).¹¹⁹ Two days later, Sudhir passed to Tong two more UOB cheques issued by Al-Rafidian to Tong, one for US\$1,000,000 (UOB Cheque No 402199) dated 25 August 2010 to cover the advance in relation to the Sand Project,¹²⁰ and the one for US\$750,000 (UOB Cheque No 402198) to cover the two advances to Rianto. As the Sand Project did not materialise, Tong claimed the sum of US\$1,000,000.

120 According to Sudhir, he was not involved in the Sand Project at all, and he denied making any representation to Tong on the matter. In one paragraph in his AEIC, he said that it was Rianto and Abiyoso who introduced the Sand Project to Tong. He did not mention Ramesh's involvement.¹²¹ In cross-

¹¹⁹ 6AB2880–2881.

¹²⁰ Tong's AEIC, p 720.

¹²¹ Sudhir's AEIC, para 65.

examination, he conceded that Ramesh was involved in the project.¹²² His position was that Ramesh did not represent him.¹²³

121 I was unable to accept Sudhir's bare denial. It was clear from the emails that Sudhir was involved in the Sand Project. In particular, I relied on the email of 14 May 2010 from Lee Mee Nah (who was Sudhir's assistant) to Tong, Rianto and Sudhir, copying Ramesh, sending a document in relation to the Sand Project.¹²⁴ I also referred to Ramesh's email of 23 January 2011 to Tong (copying Sudhir), in which Ramesh referred specifically to the cheque provided by Abiyoso to Tong, and set out problems with the Sand Project.¹²⁵ As pointed out by the plaintiffs, there was also Ramesh's email to Tong on 27 January 2011, in which he pointed out that he was to represent Sudhir in the Sand Project.¹²⁶

122 As such, I accepted Tong's case that Sudhir was involved in the Sand Project, and he had agreed to be liable for the sum of US\$1,000,000, should the project not materialise. In this regard, I noted that Sudhir was not able to remember when UOB Cheque No 402199 for US\$1,000,000 was given to Tong, and the specific purpose for the cheque.¹²⁷ There was no dispute that the Sand Project did not materialise. I found in favour of Tong for this claim.

¹²² NE of 22 May 2018, p 127 lines 7–14.

¹²³ NE of 22 May 2018, p 136 lines 15–19.

¹²⁴ 5AB2731.

¹²⁵ 6AB3301.

¹²⁶ 6AB3313–3315.

¹²⁷ NE of 22 May 2018, p 151 lines 7–15.

Conclusion

123 From my discussion above, it is clear that I did not find Sudhir to be a credible witness. In many aspects, his evidence was bare, vague and unsatisfactory. His case was also seriously undermined by the contemporaneous documents. Accordingly, based on what I stated in [112], [116] and [122] above, I granted judgment in favour of the plaintiffs in the sums of US\$8,630,000 and HK\$618,000, with interest at the rate of 5.33% from the date of the writ.

124 Turning to the issue of costs, the plaintiffs argued for costs to be awarded to them on an indemnity basis. Relying on *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Ptd Ltd* [2016] 5 SLR 103 at [23], the plaintiffs contended that one category of cases where the court should award indemnity costs is “where a party’s conduct in the course of proceedings is dishonest, abusive or improper”. On the basis of a high degree of unreasonableness in Sudhir’s conduct, the plaintiffs argued that an award of costs on an indemnity basis was warranted. Sudhir argued to the contrary.

125 It was not disputed that pursuant to O 59 r 5(b) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), in exercising its discretion as to costs, the court shall take into account the conduct of the parties. While I did not award costs to the plaintiffs on an indemnity basis, I certainly found aspects of Sudhir’s conduct to be relevant in fixing the quantum of costs.

126 In particular, I considered to be relevant Sudhir’s absence from the trial on a few days without any good reason. On 8 May 2018, the first day of the trial, Sudhir was in Sri Lanka, and could not be contacted by his counsel. Counsel was uncertain whether Sudhir wished to proceed with the matter, and this led to an adjournment of the hearing. On the afternoon of 11 May 2018,

when Sudhir was due to give evidence, he was absent. He was also absent on 15 May 2018. It transpired that he had chosen to undergo a non-emergency elective heart procedure without keeping his counsel fully informed of his intention. Such conduct resulted in a waste of trial time.

127 I also noted that upon the request of parties, a generous period of eight weeks was granted for the filing of the closing submissions which were filed on 18 July 2018. The plaintiffs' closing submissions comprising 180 pages dealt in detail with all the factual disputes. Meanwhile, Sudhir's closing submissions were merely 29 pages. Thereafter, Sudhir's counsel wrote in on 25 July 2018 to request for leave to file reply submissions. On 3 August 2018, I saw parties on the matter. Despite objections by the plaintiffs on both the request and the period of time requested for the filing of the reply submissions, I granted time for reply submissions to be filed by Sudhir by 11 September 2018. However, on the last day, Sudhir's counsel wrote to say that no reply submissions would be filed. Sudhir had caused further delay to the matter.

128 In view of Sudhir's tardy conduct in these proceedings, I granted costs to the plaintiffs on the basis of all 11 days originally fixed for the trial. In addition, I took into account factors such as the substantial value of the claim, the factual complexities in the matter (involving a number of business deals), the multiple defences raised by Sudhir, and his shifting stance on issues in the course of these proceedings. I awarded costs fixed at \$240,000. I fixed disbursements at \$73,000 (which included transcription and hearing fees, as well as other disbursements).

Hoo Sheau Peng
Judge

Harish Kumar, Jonathan Toh and Josephine Chee (Rajah & Tann
Singapore LLP) for the plaintiffs;
Tan Teng Muan and Loh Li Qin (Mallal & Namazie) for the
defendant.
