IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 95

Civil Appeal No 21 of 2020

Between

JTrust Asia Pte Ltd

… *Appellant*

And

(1) Group Lease Holdings Pte Ltd
(2) Mitsuji Konoshita
(3) Cougar Pacific Pte Ltd
(4) Aref Holdings Limited
(5) Adalene Limited
(6) Bellaven Limited
(7) Baguera Limited
(8) Yoichi Kuga

… *Respondents*

In the matter of Suit No 1212 of 2017

Between

JTrust Asia Pte Ltd

… *Plaintiff*

And

(1) Group Lease Holdings Pte Ltd
(2) Mitsuji Konoshita
(3) Cougar Pacific Pte Ltd
(4) Aref Holdings Limited

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(5) Adalene Limited
(6) Bellaven Limited
(7) Baguera Limited
(8) Yoichi Kuga

… *Defendants*

JUDGMENT

[Tort] — [Misrepresentation] — [Fraud and deceit]
[Tort] — [Conspiracy]
[Civil Procedure] — [Pleadings]

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This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

JTrust Asia Pte Ltd
v
Group Lease Holdings Pte Ltd and others

[2020] SGCA 95

Court of Appeal — Civil Appeal No 21 of 2020 and Summons Nos 41 and 42 of 2020
Andrew Phang Boon Leong JA, Steven Chong JA and Quentin Loh J
7 July 2020

6 October 2020 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

Introduction

1 This is the third occasion this case has found its way to this court. The first concerned an appeal to reinstate a Mareva injunction, which was allowed, while the second also concerned the reinstatement of the Mareva injunction but this time following the dismissal of the claim after the trial below. The present appeal is against the Judge's dismissal of the claims by the appellant, JTrust Asia Pte Ltd ("JTA"), in deceit and conspiracy against the respondents in HC/S 1717/2017 (the "Suit") in *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2020] SGHC 29 (the "Judgment").

2 On the two earlier occasions, we were satisfied that there was sufficient evidence to support a *prima facie* case in JTA's claim for the tort of deceit

against the first respondent, Group Lease Holdings Pte Ltd ("GLH"), and the second respondent, Mr Mitsuji Konoshita ("MK"), as well as in the tort of conspiracy against the first to seventh respondents in the present appeal.

3 The heart of the case concerns a series of loans which the Judge found to be "undoubtedly unusual" and "suspicious" which we agree with. However, our finding does not stop there. We are satisfied that the loans were shams which directly resulted in creating a false and misleading picture of the financial health and profitability of the parent company of GLH which induced JTA to make several substantial investments in the parent company of GLH, Group Lease Public Co Ltd ("GL Thailand"), a Thai public listed company. Having examined the evidence which was adduced at the trial as well as the fresh evidence which was adduced for the appeal with leave, we allow the appeal for the reasons set out below.

Summary of facts

4 In the decision of *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2018] 2 SLR 159 ("*JTrust (CA 46)*"), we allowed JTA's appeal against the Judge's decision to set aside the Mareva injunctions (CA/CA 46/2018) and we reinstated the domestic Mareva injunctions ordered against MK, GLH and the third respondent, Cougar Pacific Pte Ltd ("Cougar") and expanded the Mareva injunctions against GLH and Cougar to worldwide Mareva injunctions (collectively referred to as the "Injunctions) (at [3] and [122]).

5 Following the trial of the Suit, the Judge dismissed JTA's claims in deceit and conspiracy against the first to seventh respondents on 12 February 2020. The extinction by judgment of JTA's claims discharged the Injunctions.

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The Judge ordered a temporary stay of the discharge to allow JTA the opportunity to make an application to this court. On 13 February 2020, JTA filed an appeal in CA/CA 21/2020 ("CA 21") against the Judge's dismissal of JTA's claims in the Suit.

6 On 1 June 2020, this court allowed JTA's application in part under CA/SUM 21/2020 ("SUM 21") for an order that the Injunctions be continued or renewed, pending the determination of CA 21 in *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2020] SGCA 54 ("*JTrust (SUM 21)"*). We reinstated the domestic Mareva injunction against MK and the worldwide Mareva injunction against GLH, but dismissed the application to reinstate the Mareva injunction against Cougar (at [103]).

7 The key facts for CA 21 have been summarised in our previous judgments in *JTrust (CA 46)* at ([8]–[30]) and *JTrust (SUM 21)* at ([10]–[21]), and it would suffice for the purposes of this decision to reproduce the material facts.

8 We start with the main parties involved. JTA is a Singapore-incorporated investment company and is wholly owned by J Trust Co, Ltd ("J Trust Japan"). GLH is a wholly owned subsidiary of GL Thailand. GLH has four directors, including MK and his brother, Mr Tatsuya Konoshita ("TK"), who is also a director of GL Thailand. MK was the chairman of GL Thailand until October 2017, when he relinquished his office after the publication of an incriminating news release by the Securities and Exchange Commission of Thailand ("the Commission"), the regulatory body in Thailand that oversees listed companies. After MK stepped down, TK assumed his office.

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9 Cougar is a Singapore incorporated company with the same registered address as GLH. Its sole shareholder is a company incorporated in Luxembourg called Pacific Opportunities Holdings SARL ("Pacific"), which was owned by Mr Tep Rithivit ("Rithivit"), a Cambodian businessman, until 12 June 2018. Rithivit was a director of Cougar from August 2015 to end 2017. Pacific was acquired by Saronic Holdings Ltd ("Saronic") on 12 June 2018, after the Suit was filed but prior to the commencement of the trial.

10 On 9 March 2017, the Stock Exchange of Thailand ("the Exchange") issued a public notice to GL Thailand, requiring it to provide to its investors information on loans that it had extended to two sets of borrowers ("the GLH Loans"). The first set is known as the "Singapore Borrowers", who comprise Cougar, Pacific, Rithivit and a Brazilian company called Kuga Reflorestamento Ltda ("Kuga"), which was also wholly owned by Pacific (which Rithivit was the sole shareholder of prior to 12 June 2018). The second set is referred to as the "Cyprus Borrowers". They comprise the fourth to seventh respondents, which are companies incorporated in Cyprus.

11 Yoichi Kuga ("YK"), who claimed to be the beneficial owner of Cougar, joined the action on 8 May 2019 and affiliates himself with the first to seventh respondents.

12 APF Group is a corporate group of companies with a complex structure which includes APF Group Co Ltd ("APF BVI"), APF Holdings Co Ltd ("APF Thailand"), Showa Holdings Co Ltd ("Showa"), Wedge Holdings Co Ltd ("Wedge") and a wholly-owned subsidiary of Wedge, Engine Holdings Pte Ltd ("Engine"). Engine was incorporated in Singapore to hold part of APF Thailand's stake in GL Thailand. JTA's case is that the APF Group is controlled by MK, who was at the apex of the APF Group, through the use of

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APF BVI which was in turn MK's "personal asset management and investment vehicle". The evidence will, as elaborated below, demonstrate that MK's use of the entities through the internal circulation of money within the APF Group gave rise to JTA's claims.

13 Between March 2015 and September 2017, while MK was the chairman of GL Thailand, JTA made a number of investments in GL Thailand. The investments were as follows:

(a) On 20 March 2015, JTA invested US$30m in GL Thailand under the first investment agreement ("1st IA") which provided that JTA would subscribe to US$30m worth of GL Thailand's convertible debentures. JTA completed the subscription on 22 May 2015. In December 2015, JTA exercised its right to convert the debentures into shares at 10 Thai Baht per share.

(b) In June 2016, JTA entered into a second similar investment agreement ("2nd IA") with GL Thailand, under which JTA subscribed for US$130m of GL Thailand's convertible debentures. The subscription for the convertible debentures was completed on 1 August 2016. JTA has yet to convert the debentures into shares. If JTA elects not to do so, it is entitled to be repaid its investment in 2021.

(c) On 1 December 2016, JTA entered into a third similar investment agreement ("3rd IA") with GL Thailand, under which JTA subscribed for a further US$50m of GL Thailand's convertible debentures and has likewise not converted the debentures into shares. The subscription of the convertible debentures was completed on

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20 March 2017. If JTA chooses not to do so, it is entitled to be repaid its investment in 2020. The debentures are already due for repayment.

(d) A fourth set of investments consisted of purchases of GL Thailand's shares and warrants on the open market. These purchases were made between March and September 2017.

14 The three investment agreements each contained *an express warranty in respect of the accuracy of GL Thailand's consolidated financial statements*. GL Thailand provided express warranties that its year-end 2014 financial statement (in the 1st IA) and year-end 2015 financial statement (in the 2nd IA and 3rd IA) were accurate and were prepared in accordance with the applicable accounting standards.

15 GL Thailand's financial statements were prepared on a consolidated basis (*ie*, that GL Thailand's financial statements incorporated the financial information of its subsidiaries, including GLH) (Judgment at [9]). Further details on the financial statements can be found at *JTrust (SUM 21)* ([6] *supra* at [18]) and will be explored in the main analysis below. The chronology of JTA's respective investments in GL Thailand and the dates on which GL Thailand's financial statements were released is also summarised at **Annex A**.

16 Prior to each of JTA's investments in GL Thailand, representations were made as to GL Thailand's financial health and profitability by MK to Mr Nobuyoshi Fujisawa ("Fujisawa"), the managing director and Chief Executive Officer of JTA, and Mr Shigeyoshi Asano ("Asano"), a director of JTA and J Trust Japan. Evidence adduced at the trial of the said representations will be explored in the main analysis (see below at [146]–[156]).

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17 On 9 March 2017, the Exchange required information from GL Thailand on the loans that it had extended to (a) the Singapore Borrowers; and (b) the Cyprus Borrowers (collectively referred to as "the Borrowers"). On 13 March 2017, GL Thailand responded to the Exchange's notice by issuing a clarificatory note.

18 On 16 October 2017, the Commission issued a news release stating that GLH had issued sham loans the interest on which was repaid using the loan principals under a round-tripping scheme designed to inflate GL Thailand's operating results and announced that it had filed a criminal complaint against MK (the "SEC Release"). Evidence was adduced at the trial of the alleged round-tripping scheme and that JTA's investments were routed in a circular way other than for the retail financing business of GL Thailand, the details of which will be examined below.

19 After the SEC Release on 16 October 2017, the opening share price of GL Thailand fell from 22.10 Thai Baht on 16 October 2017 to 15.50 Thai Baht on 17 October 2017. J Trust Japan's share price also fell sharply and J Trust Japan issued an announcement on 17 October 2017 that one of the reasons its share price had fallen was because the Exchange had temporarily suspended the trading of GL Thailand shares following the SEC Release.

20 After the Commission's news release, Ernst & Young ("EY"), who was the independent auditor of GL Thailand and its subsidiaries, issued on 13 November 2017 a report to the shareholders of GL Thailand ("EY Interim Report") revising GL Thailand's 2015, 2016, the first quarter of 2015 ("Q1 2017") and the second quarter of 2017 ("Q2 2017") profits and net assets downwards, which remained unchanged to date.

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The Suit

21 On 26 December 2017, JTA commenced the Suit against GLH, MK, Cougar and the Cyprus Borrowers. The claim was originally in the tort of unlawful conspiracy. Two months before the commencement of the trial, JTA amended its statement of claim and added the claim in the tort of deceit.

Tort of unlawful conspiracy

22 In relation to the claim for the tort of conspiracy, JTA alleged that the first to seventh respondents had an agreement to fabricate GL Thailand's accounting records, exaggerate GL Thailand's operating results and conceal the true nature of the GLH Loans in order to defraud JTA into believing that GL Thailand's financial performance was better than it truly was. The first to seventh respondents, with the intent to damage or injure JTA, allegedly committed unlawful acts in furtherance of their agreement by, *inter alia*:

(a) bringing JTA in as an investor and using the initial investment to issue loans at high interest rates which artificially inflated GL Thailand's earnings;

(b) transferring the monies from JTA's investment funds from GL Thailand to GLH;

(c) arranging for sham loans by GLH to the Borrowers and concealing the true nature and purpose of the loans;

(d) making fraudulent misrepresentations to JTA that GL Thailand and GLH were genuinely profitable companies in good financial health and that their financial accounting records represented a true, fair and accurate representation of their financial situation; and

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(e) diverting and misappropriating GL Thailand and GLH's monies for MK's benefit.

23 JTA further claimed that GL Thailand and one or more of the respondents shared common knowledge and intent through MK, who was the common actor in the conspiracy and at the material time was (a) a director and the Chairman of GL Thailand; (b) a director of GLH; and (c) had connections to Cougar and the Cyprus Borrowers, and/or was *the beneficial owner* of the Cyprus Borrowers at all material times.

Tort of deceit

24 JTA's claim for the tort of deceit was brought against MK and GLH, alleging that the GLH Loans were not genuine arm's length transactions and were falsely accounted for in the financial and accounting information provided by GLH and GL Thailand's financial statements. The GLH Loans should have been accounted for by GL Thailand and GLH as (a) interest-free loans; (b) irrecoverable transfers of money; and/or (c) related party transactions. However, the interest payments made by the Borrowers to GLH were in reality paid fully or partially out of the capital advanced to them by GLH and were therefore falsely accounted for by GL Thailand and GLH as income instead of repayments of capital. GLH manipulated its financial statements and presented a false and misleading picture of GLH's and GL Thailand's financial health with the intention of inducing JTA into investing in GL Thailand. GLH was liable for MK's deceit *via* the principles of agency and vicarious liability.

25 In addition, in the course of negotiating the investment agreements, JTA claimed that it relied on repeated representations by MK in person, over the phone, emails and LINE messages that (a) GLH and GL Thailand were

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genuinely profitable companies in good financial health; and (b) the financial statements of GL Thailand could be relied upon to provide a true and fair picture of GL Thailand's financial position. MK also impliedly represented that there was a reasonable basis for holding an opinion that GL Thailand and/or GLH were genuinely profitable companies which were in good financial health, which included representations that JTA's investments would be used to drive the growth of the retail financing business of GL Thailand in Southeast Asia.

Damages

26 JTA claimed damages as a result of GLH's and MK's misrepresentations and/or the conspiracy of the respondents (see details below at [230]–[231]).

The Judge's decision

Material findings of fact

27 The Judge made the following material findings of fact:

(a) GLH Loans were "suspicious" and "undoubtedly unusual" (Judgment at [14] and [19]).

(b) The Borrowers had no substantial commercial activity, or at least none that would justify the GLH Loans, and were incorporated shortly before the GLH Loans were made (Judgment at [14]).

(c) Loan documentation was prepared only after the GLH Loans had been advanced pursuant to the requests of auditors, and money was disbursed to the allegedly unrelated parties with no documentation (Judgment at [14]).

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(d) The requests for the GLH Loans on behalf of the Singapore Borrowers were made orally. The alleged purpose of the GLH Loans, *ie*, the development of land in Brazil, was in fact not carried out, as YK admitted and the value of the land in Brazil was also in doubt. Some of the transfers from GLH to the Cyprus Borrowers were marked as "internal transfer" or "same group transaction" (Judgment at [14]).

(e) After the money was transferred to the Borrowers, it passed through other companies before it was used to purchase shares in GL Thailand, artificially increasing GL Thailand's share value, and the shares were then put up as collateral for the GLH Loans. The loans to the Cyprus Borrowers were used to (a) acquire two villas in Cyprus, one of which was recorded as MK's personal residence; and (b) purchase government bonds and shares in various businesses (Judgment at [15]).

We pause to observe at this point that none of the Judge's above findings of fact are adverse against JTA.

Tort of deceit

28 In dismissing JTA's claim for the tort of deceit, the Judge made the following findings:

(a) A claim in the tort of deceit requires that the representation be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff (Judgment at [8]).

(b) Even though it was clear that MK was in charge at both GLH and GL Thailand, JTA had not made out its case that GLH's financial statements were prepared with the requisite dishonest intention.

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GL Thailand's financial statements were not prepared solely for JTA and were audited by professional accountants. GL Thailand was also a listed company with its own board of directors and hence the decisions of GL Thailand and GLH may not be solely attributed to MK (Judgment at [9]).

(c) On the question of proof of reliance, the cross-examination of Fujisawa and Asano demonstrated that J Trust Japan's board of directors did not appear to have read GL Thailand's financial statements in detail or they would have seen that the GLH Loans were in fact disclosed, albeit without full details. JTA seemed content to rely on a general impression of GL Thailand's profitability. It was more likely that JTA was satisfied with the performance of its investment thus far, and hence was prepared to continue investing money into GL Thailand (Judgment at [10]).

(d) As for MK's representations that GL Thailand was making great profits, both JTA and J Trust Japan must have been well-aware of the dangers of large investments, and to claim that JTA and J Trust Japan relied purely on MK's verbal assurances of profitability made through LINE messages and emails seemed overly simplistic. JTA's willingness to take MK's words at face value and its lack of due diligence bordered on negligence and made any reliance on MK's representations far less reasonable (Judgment at [11]).

(e) As for whether the representations were false, wilfully false, or made in the absence of any genuine belief of its truth, it was intrinsically tied up with JTA's submissions about GLH's and MK's intentions and reliance as JTA's plea was effectively that the round-tripping scheme

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was so extensive and elaborate that it must had been done with the necessary intent to deceive JTA (Judgment at [12]). Although the GLH Loans were unusual and might have raised questions, it was different from using that as a basis to allege fraud (Judgment at [14]). The GLH Loans, though suspicious, could be explained as GLH maintained that they were advanced on a goodwill basis between MK and the Borrowers (Judgment at [19]). JTA had not shown that the conduct of GLH and MK crossed the threshold of dishonest intent to prove fraud, especially where it involved large and established listed companies. GL Thailand's absence as a party to the proceedings also meant that it was denied the opportunity to refute or explain the allegations of fraud during the trial (Judgment at [20]).

Tort of unlawful conspiracy

29 In coming to his decision to dismiss JTA's claim for the tort of unlawful conspiracy, the Judge made the following findings:

(a) The GLH Loans were disbursed to various parties after receipt of the funds into the accounts of the Singapore Borrowers and Cyprus Borrowers. However, several parties were excluded from the action. The funds, according to JTA, found their way back to GL Thailand through various parties, including Showa, Wedge, Engine and APF BVI, all of whom were controlled by MK. Loans were also made to Rithivit, who passed the money through APF Thailand, which JTA alleges is also owned by MK. However, Showa, Wedge, Engine, APF BVI, APF Thailand, Rithivit, as well as the recipient of the investments, GL Thailand, were not parties to the action (Judgment at [6]). Even though the liability for the tort of conspiracy is joint and several, where

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a party omitted from the suit is a protagonist in the alleged conspiracy, it would be difficult for the plaintiff, as a matter of evidence, to prove its case (Judgment at [7]).

(b) JTA had to show Cougar's and the Cyprus Borrowers' intention to cause injury to JTA, which it had failed to do so. No conclusive evidence was adduced to attribute MK's fraudulent intention to Cougar and to show that the Cyprus Borrowers were merely instruments under his control. The existence of the GLH Loans, though unusual, could not itself amount to sufficient evidence for finding dishonest intention to injure JTA (Judgment at [21]).

Our preliminary observations

30 Before we address the merits of the appeal, it will be helpful to draw some preliminary observations in relation to the Judge's decision.

31 First, the Judge's decision to dismiss JTA's claims for deceit and unlawful conspiracy was not based on his assessment of the veracity of the witnesses called by the parties. His findings were instead based on his understanding of the relevant legal principles together with inferences which he drew from the primary facts before the court.

32 Second, the present appeal does not turn upon findings of fact which the Judge had resolved against JTA. Insofar as the inferences drawn by the Judge are concerned, this court would be as competent and in as good a position as the Judge to draw any necessary inferences of fact from the undisputed circumstances of the case and conduct a *de novo* review where inferences of fact are concerned: *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562 at [38].

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33 Finally, we observe that the Judge did not appear to have considered the following points in his decision.

(a) The focal point of JTA's case is that a round-tripping scheme was perpetrated by the respondents to artificially inflate GL Thailand's reported financial results and not for the retail financing business of GL Thailand, contrary to MK's personal representations. The Judge made no finding as regards the round-tripping scheme notwithstanding the evidence before him. He merely made a fleeting reference to JTA's "round-tripping" argument and no more (Judgment at [5] and [12]). Although he appeared to have accepted the movement of monies that correlated to the substance of round-tripping, as summarised above at [27(e)], he made no findings on the specific transactions. He also made no findings on whether interest payments made by the Singapore Borrowers and the Cyprus Borrowers to GLH were fully or partially paid out of the loans advanced to them by GLH and falsely accounted for by GL Thailand and GLH as income.

(b) The Judge also made no findings on the evidence adduced at the trial on MK's representations to Asano and Fujisawa. The Judge appears to have implicitly accepted that MK made verbal assurances of profitability in LINE messages and emails in general (Judgment at [11]), though he did not make any findings on the specific representations.

(c) The Judge also made no affirmative finding as to whether the GLH Loans were in fact advanced on a goodwill basis between MK and the Borrowers. He merely accepted that the suspicious GLH Loans "could be explained" by the goodwill defence and it was "not

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impossible" that MK had repaid the loans on behalf of Cougar because it had paid him first or through other sources (Judgment at [19]).

Summons Nos 41 and 42 of 2020: Leave to adduce further evidence

34 On 14 May 2020, we allowed the following applications for leave to adduce further evidence for CA 21 under CA/SUM 41/2020 ("SUM 41") and CA/SUM 42/2020 ("SUM 42").

(a) SUM 41 was an application by Cougar to adduce 36 documents ("Fidescorp Documents") disclosed by Fidescorp Ltd ("Fidescorp"), a Cyprus company that provided consulting and corporate services who was engaged by Cougar's previous management. On 8 October 2019, Cougar successfully applied to the District Court of Nicosia for an order against Fidescorp to compel Fidescorp to disclose the requested information and documents to Cougar by 30 November 2019, which Fidescorp did not comply with. Cougar then filed criminal contempt proceedings against Fidescorp's directors on 13 January 2020, with the first hearing fixed on 6 March 2020. On 5 March 2020, Fidescorp provided disclosure of the documents, which include the Fidescorp Documents which Cougar sought to adduce in SUM 41.

(b) SUM 42 was an application by JTA to adduce 15 documents ("Vontobel Documents"), which were disclosed by the Public Prosecutor's Office III of the Canton of Zurich, Switzerland ("the Swiss Prosecutor") on 12 November 2019, after the conclusion of the trial of the Suit.

35 Pursuant to O 57 r 13(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"), leave for further evidence will only be admitted on special

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grounds and only with the leave of this court. We found that the Fidescorp Documents and the Vontobel Documents satisfied the "special grounds" as set out in *Ladd v Marshall* [1954] 1 WLR 1489, namely the criteria of non-availability, relevance and credibility.

(a) First, we were satisfied that the further evidence could not have been obtained with reasonable diligence for use (see reasons for the documents' non-availability at [34(a)] and [34(b)]).

(b) Second, we found that the fresh evidence adduced is highly relevant and would have had an important influence on the result of the present appeal.

(i) The Vontobel Documents demonstrate that *inter alia* (a) MK was the beneficial owner of APF Thailand; and (b) the Borrowers were not truly independent of MK or GLH as MK was the one who repaid the GLH Loans through APF BVI.

(ii) The Fidescorp Documents demonstrate that (a) MK was the beneficial owner of Cougar; and (b) MK orchestrated various back-to-back transactions and approved loan agreements related to the round-tripping scheme.

Details of the relevance of the specific documents will be examined below.

(c) Third, we found no issue with the apparent credibility of the fresh evidence. Other than seeking leave to file an affidavit in response to the allegations made against them via the Fidescorp Documents and Vontobel Documents (which was granted), the respondents did not seek leave to adduce additional documents which might have shed a different

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light on the Fidescorp or Vontobel Documents. In any event, the authenticity of the fresh evidence was not challenged by the respondents.

36 Finally, we deal with the issue of the alleged illegality of the Vontobel Documents. The respondents objected to the admissibility of the Vontobel Documents, alleging that it involved illegality in Swiss law. The respondents relied on the doctrine that equity will not permit parties to resort to trickery or deception to circumvent legal rules and safeguards set out in *Mykytowych, Pamela Jane v VIP Hotel* [2016] 4 SLR 829 at [69]. The respondents averred that the Vontobel Documents were in contravention of an express order by the Swiss Prosecutor's office dated 19 December 2019, which ostensibly prohibited JTA from using the Vontobel Documents outside of the Zurich proceedings in which JTA obtained the Vontobel Documents. We reproduce the relevant portion of the order of the Swiss Prosecutor's office as follows:

> Upon receipt of an oral request by the defense counsel of today to prohibit the representative of the aggrieved party from continuing to send files from the present proceedings abroad for civil or criminal proceedings pending or to be instituted there;
>
> then considering that
>
> …
>
> - based on the events to date, ***the impression is that the criminal complaint has been filed mainly to obtain bank documents for foreign civil proceedings***,
>
> - it is necessary to prevent the transfer of files from criminal proceedings relating to the accused or information in which there is a private interest to other jurisdictions for use in judicial proceedings, without recourse to international mutual legal assistance,
>
> …
>
> **orders:**
>
> 1. With immediate effect, the parties and party representatives as well as their auxiliary persons ***are prohibited from***

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> ***forwarding any files from the criminal proceedings 2019/26893*** of the Public Prosecutor's Office III of the Canton of Zurich or knowledge therefrom ***to third parties in Switzerland or abroad, from allowing third parties to inspect files or from making notifications to them about procedural files***.
>
> The parties and party representatives must ensure that all employees and auxiliary persons involved in the case who have gained knowledge of these files are informed of this prohibition.
>
> Failure to comply with this order will result in prosecution under **Article 292 of the Swiss Criminal Code**, which states:
>
> ***"A person failing to comply with an order issued against him or her by a competent authority or a competent official with reference to the threat of punishment under this Article shall be punishable by a fine."***
>
> [emphasis in bold and italics in original; emphasis added in bold italics]

37 In our judgment, we found the respondents' objection to be unmeritorious for two main reasons. First, the Swiss Prosecutor's objection was eventually waived. MK's Swiss Counsel, Mr Tobias Zuberbühler, sent an email to the Swiss Prosecutor on 19 March 2020, enquiring the following:

> In an affidavit filed by [JTA] in Singapore, Wartmann & Merker alleges that [JTA] obtained your permission to file Vontobel-documents in the appeal proceedings before the High Court. Is this true, and if so, on what basis was such permission granted?

38 On 24 March 2020, the Swiss Prosecutor replied:

> In reply to your question, *I have not given any express permission for the submission of files in Singapore*. Such authorisation would have to be given in a written, challengeable order, with notification to the parties. It is, however, clear that *even before my information ban, files were submitted in the proceedings in Singapore which are known to the authorities in Singapore.* ***I therefore take the view that documents already submitted in the proceedings are known to the courts there and are therefore not affected by the information ban in Singapore***. I have communicated this opinion to the representatives of the aggrieved party without

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> expressly granting permission. [emphasis added in italics and bold italics]

39 Second, the alleged illegality of the Vontobel Documents had no impact on the probative value of the Vontobel Documents, given the fact that the authenticity of the Vontobel Documents remained unchallenged.

40 Accordingly, we found that the Fidescorp Documents and the Vontobel Documents were admissible as fresh evidence on appeal.

The key features of the deceit and unlawful conspiracy claims

41 JTA's claims in both the torts of deceit and unlawful conspiracy are largely premised on two principal features: (a) the GLH Loans were shams and not arm's length transactions; and (b) MK was the beneficial owner of the Borrowers. Before dealing with the merits of JTA's claims, we believe it will be helpful to deal first with the evidence that establishes the two integral ingredients of JTA's case.

The GLH Loans were shams

42 We first consider the first and central key feature of JTA's case in relation to the tort of deceit and conspiracy against the respondents, which is that the GLH Loans were alleged to be shams. This provides the necessary context before we assess the merits of JTA's claims. The central role played by the GLH Loans in JTA's case is as follows:

(a) Approximately US$95m in GLH Loans were made to the Borrowers (US$56.3m to the Singapore Borrowers and US$39.5m to the Cyprus Borrowers) in 2015 and 2016 and were accounted for by GLH

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and GL Thailand as arm's length transactions and valuable assets generating genuine revenue streams and profits.

(b) This was done even though the GLH Loans made no commercial sense to either GLH or the Borrowers, because, to their knowledge, the Borrowers never had any independent means to repay them.

(c) To GLH's and MK's knowledge, the GLH Loans were shams and not for GL Thailand's business of retail financing in Southeast Asia, as represented by MK to JTA.

(i) Instead, the monies to the Singapore Borrowers were transferred back-to-back by GL Thailand/APF BVI employees controlling the Singapore Borrowers' bank accounts to APF BVI/APF Thailand and back to GL Thailand to artificially inflate its share price; and

(ii) The monies to the Cyprus Borrowers were used, with MK's knowledge or instructions, to, *inter alia*, purchase a villa in Cyprus for MK's use and to be transferred to Cougar to make "interest payments" on its own loans from GLH.

(d) As the interest payments made by the Borrowers to GLH were in reality fully or partially paid out of the loans advanced to them by GLH, the interest payments on the GLH Loans were therefore falsely accounted for by GL Thailand and GLH as income instead of loan repayments. GLH manipulated its financial statements and presented a false and misleading picture of GLH's and GL Thailand's financial health.

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43 In the letter from GL Thailand to the Exchange dated 13 March 2017, GL Thailand declared that the source of funds that it used to provide the GLH Loans came from its cash flow generated from its operating and fund raising activities, including proceeds from the exercise of warrants by GL Thailand shareholders and proceeds from issuance of convertible debentures. This necessarily included JTA's investments.

44 We turn now to analyse whether the GLH Loans were indeed shams or arm's length transactions. We note that the Judge found that the GLH Loans were "unusual" and "suspicious", but were somehow insufficient to establish fraud. This finding was arrived at based on material findings of fact made by the Judge, summarised above at [27]. What we found unsatisfactory was that once the GLH Loans were observed by the Judge to be indeed "unusual" and "suspicious", he made no further findings on the *effect* of such an adverse finding against the respondents.

45 In our view, there is more than sufficient evidence to prove that the GLH Loans were in fact shams and not *bona fide*, independent, arm's length transactions.

Evidence of round-tripping of the GLH Loans

46 We start by examining the evidence of the round-tripping scheme that the Judge appeared not to have considered in detail. JTA's case is that the "round-tripping" scheme was perpetrated at two levels.

(a) First, GL Thailand advanced funds to GLH which were used for the GLH Loans, the proceeds of which flowed directly or indirectly to APF Thailand and APF BVI, and were subsequently used by Showa, Wedge, Engine and Cougar to exercise GL Thailand warrants and obtain

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further GL Thailand shares in order for MK to maintain control over GL Thailand for MK's benefit.

(b) Second, the interest payments made by the Singapore Borrowers and the Cyprus Borrowers to GLH were in reality fully or partially paid out of the loans advanced to them by GLH, and were therefore falsely accounted for by GL Thailand and GLH as income instead of as loan repayments. The financial data provided by GLH was consolidated into GL Thailand's financial statements and inflated GL Thailand's revenues, net assets and profits, giving the appearance of a growing financial performance by GL Thailand.

47 These two levels of round-tripping serve to prove that the GLH Loans were shams which were designed to misrepresent the profitability of GL Thailand. They also demonstrate that JTA's investments were ultimately used for the personal benefit of MK and not to drive the growth of GL Thailand's retail financing business in Southeast Asia, contrary to MK's representations. Before we examine the round-tripping evidence in detail below, it is important to bear the following considerations in mind:

(a) JTA' s case is that *all* the GLH Loans were shams and not merely those which were round-tripped.

(b) The round-tripping evidence serves to confirm the sham nature of *all* the GLH Loans even though JTA was only able to provide a sampling of some of the GLH Loans which were round-tripped at both levels. In other words, as explained below, the round-tripping is but a *feature* of the sham nature of *all* the GLH Loans.

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48 Although the Judge found several aspects of the analysis by JTA's expert, Mr Iain Potter's ("Potter") to be questionable, he failed to examine the crux of Potter's evidence in relation to the round-tripping and the objective evidence that Potter's opinion was premised upon. As we observed in *JTrust (SUM 21)* at [75], JTA's case on the round-tripping scheme was based on the objective documentary evidence before the court and not on the Commission's report which was not proved at the trial. We also noted that in finding several aspects of Potter's analysis to be "questionable", the Judge misunderstood the tenor of Potter's analysis. The *most suspicious feature* of the GLH Loans that the Judge should have focused on is the round-tripping. The documentary evidence also demonstrates the clear involvement of GLH, Cougar and the fifth respondent, Adalene Ltd ("Adalene"), in both levels of the round-tripping scheme, which we now turn to.

(1) First level round-tripping

49 A substantial proportion of the funds disbursed under the loans advanced to the Singapore Borrowers were channelled to entities controlled by MK to acquire shares in GL Thailand and round-tripped through a series of back-to-back and related party transactions back to GL Thailand in order to purchase GL Thailand shares for MK's benefit.

50 We now turn to examine the evidence adduced at the trial that proves the first level round-tripping of the GLH Loans. A flowchart provided by Potter summarising the various round-tripping series of transfers was adduced at the trial. It is set out below at Annex B.

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(A) MAY 2015: US$10M

51 GLH advanced two loans to the Singapore Borrowers in May 2015, in accordance with the documents appended to the 1st Expert Report of MK's and GLH's expert, Mr Abuthahir Gafoor ("Gafoor").

(a) First, there was a loan agreement for 136m Thai Baht (US$4m) on 12 May 2015 with a repayment date of 3 June 2015. Pursuant to the loan agreement dated 12 May 2015, 136m Thai Baht (US$4m) was transferred out of GLH's Kasikorn Bank account on the same date. The same sum of 136m Thai Baht (US$4m) was transferred into Rithivit's Kasikorn Bank account on 12 May 2015, as evidenced by Rithivit's bank statement.

(b) Second, there was a Credit Facility Agreement for US$15m between GLH on the one hand and Cougar, Kuga and Rithivit on the other dated 11 May 2015.

Only the facility agreement corresponding to the second of these two loans (dated 11 May 2015) was disclosed.

52 Pursuant to the Credit Facility Agreement dated 11 May 2015 between GLH and Cougar, Kuga and Rithivit (as joint borrowers), GLH disclosed that it had transferred 370m Thai Baht (US$11m) on 3 June 2015 and 136m Thai Baht (US$4m) on 8 June 2015 in GLH Loans to Rithivit's Kasikorn Bank account.

53 There was also an outgoing transfer of 276.1m Thai Baht (US$8.2m) to GLH from Rithivit's Kasikorn Bank account on the same day as the incoming transfer from GLH on 3 June 2015. As such, the transfer of 136m Thai Baht (US$4m) from GLH on 8 June 2015 was from the 276.1m Thai Baht (US$8.2m)

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returned to GLH from Rithivit's Kasikorn Bank account on 3 June 2015. As the 3 June 2015 transaction occurred on the same date as the loan dated 12 May 2015 for 136m Thai Baht (US$4m) was due to be repaid, Potter assessed that it is likely that part of the 276.1m Thai Baht transfer from Rithivit to GLH was a repayment of the loan dated 12 May 2015 for 136m Thai Baht (US$4m).

54 On the same day that the 12 May 2015 and 8 June 2015 transfers of 136m Thai Baht (US$4m) were each paid into Rithivit's Kasikorn Bank account, there were two outgoing transfers from Rithivit's Kasikorn Bank account to APF Thailand for the same amounts (*ie*, 136m Thai Baht (US$4m) each). On 29 June 2015, another outgoing transfer of 65.5m Thai Baht (US$1.9m) was made from Rithivit to APF Thailand.

55 The above documentary evidence suggests that out of the net amount of US$10.8m transferred by GLH to Rithivit's Kasikorn Bank account following the 11 May 2015 loan agreement, approximately US$10m was transferred to APF Thailand, of which 229m Thai Baht (US$6.4m) was then used by APF Thailand to purchase GL Thailand shares. YK also admitted under cross-examination that under his instructions, the US$10m which went into Rithivit's bank account was in fact transferred to APF Thailand.

56 The following documentary evidence also demonstrates that MK was in fact the beneficial owner of APF Thailand and hence the transfers back to APF Thailand would have been for MK's benefit:

(a) MK sent LINE messages to Fujisawa on 24 August 2017 that "[APF Thailand] lost in court and had over 10M shares seized. Unfortunately, since it lost, I'll make [APF Thailand] pay",

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demonstrating his ability to direct APF Thailand to pay for its judgment debts, which APF Thailand duly did; and

(b) MK's lawyers confirmed to MK's bankers (Document 1 of the Vontobel Documents) that MK was the beneficial owner of APF Thailand.

(c) The shareholder register of APF Thailand demonstrates that through various shareholdings in Sanwa World Service Co., Ltd, Sanwa World Media Co., Ltd and APF Capital Co., Ltd, MK together with TK, effectively own and/or control approximately 70% of APF Thailand.

This is contrary to MK's testimony that he was not the owner or controller of APF Thailand in his AEICs and under cross-examination. This also goes against his credibility as a witness. This is a finding this court is entitled to make on appeal, given that the Judge made no assessment in relation to the veracity of the witnesses.

(B) JULY 2015: US$15M

57 GLH's bank statements suggest that GLH received a sum of approximately US$15m on 16 July 2015, accompanied by the description "LOAN TO SUBSIDIARY", suggesting that GLH received these funds from GL Thailand.

58 Pursuant to a Credit Facility Agreement dated 9 July 2015 between GLH and Cougar with interest rates pegged at 17% per annum, a US$15m loan was granted from GLH to Cougar. The alleged purpose of the loan was to develop land in Brazil. The said loan was disbursed in two tranches:

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(a) US$2m was transferred directly from GLH to APF BVI's account on 16 July 2015. The US$2m was however recorded in Cougar's ledger as a loan from Cougar to APF BVI, even though no corresponding loan agreement between GLH and Cougar was disclosed in the proceedings. YK admitted under cross-examination that the $2m was transferred from GLH to APF BVI, which was controlled by MK.

(b) US$13m was transferred from GLH into Cougar's Bangkok Bank USD account on 24 July 2015 and subsequently transferred to Cougar's Bangkok Bank THB account on 27 July 2015. The amount of 452.4m Thai Baht (equivalent of US$13m transferred from the USD account) was transferred out on 28 July 2015 as a "BAHTNET" transaction. Prior to the trial, Potter's expert report originally indicated that from the available documentary evidence, the destination of the US$13m remained unknown. Mr Gwynn David Nevill Hopkins ("Hopkins"), the director of Cougar as of 29 June 2018, testified that the remaining US$13m was used by Cougar to buy GL Thailand shares, which YK admitted to under cross-examination. After YK's confirmation and Hopkin's testimony, Mr Potter's testified that this closed the loop for the US$13m.

Further, as noted by the Judge, YK admitted at the trial that although the alleged purpose of the US$2m loan dated 9 July 2015 was for the development of land in Brazil, it was in fact not used for such purposes (Judgment at [14]).

59 The documentary evidence suggests that:

(a) US$2m advanced by GLH under the 9 July 2015 loan agreement was transferred from GL Thailand to GLH, then paid directly to

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APF BVI (MK's personal asset management and investment vehicle); and

(b) US$13m was also transferred from GL Thailand to GLH, and subsequently to Cougar to purchase GL Thailand shares since the funds were in fact not used for its intended purpose. In any event, the burden would be on GL Thailand/GLH to account for the fund movements.

(C) AUGUST 2015: US$9.8M (350M THAI BAHT)

60 On 20 August 2015, GLH received 350m Thai Baht (US$9.8m) from GL Thailand, evidenced by the loan agreement between GLH and GL Thailand dated 20 August 2015. On 21 August 2015, GLH transferred 350m Thai Baht (US$9.8m) to Cougar, which corresponds with a loan agreement dated 21 August 2015 where GLH agreed to loan Rithivit, Cougar and Kuga 350m Thai Baht (US$9.8m) at an interest rate of 14.5% per annum. GLH's bank statements suggest that the transfer of 350m Thai Baht (US$9.8m) on 21 August 2015 was from the funds it received from GL Thailand on 20 August 2015.

61 On 21 August 2015, pursuant to a loan agreement between Cougar and APF BVI which MK signed on behalf of APF BVI, Cougar transferred 350m Thai Baht (US$9.8m) to APF BVI and the sum of 350m Thai Baht (US$9.8m) was transferred out of APF BVI on 24 August 2015. The transfer was effected by Mr Kiat Sunthonpuhsit, an employee of GL Thailand who was responsible for administering the GLH Loans. YK also admitted under cross-examination that the funds pursuant to the loan agreement dated 21 August 2015 were transferred from GLH to Cougar and then to APF BVI.

62 Thereafter, by way of a public announcement dated 16 November 2015, Showa, of which MK was a director, disclosed that it had received a loan of

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350m Thai Baht (US$9.8m) from APF BVI, which Showa in turn loaned to Wedge to fund Engine's exercise of subscription warrants and acquisition of additional shares in GL Thailand. Wedge issued a corresponding public announcement on the same date. Engine's statement of cash flows for the year 2015 also demonstrates that it received ¥3.8bn (US$31.2m) in loans from its immediate holding company, Wedge, and paid ¥3.9bn (US$32m) to purchase shares in GL Thailand. Part of this US$32m came from the loan of 350m Thai Baht (US$9.8m) from APF BVI. The objective documentary evidence demonstrates that 350m Thai Baht (US$9.8m) was originally loaned from GL Thailand to GLH on 20 August 2015, then transferred to Cougar as a GLH Loan on 21 August 2015 and round-tripped back to GL Thailand when Engine used those same funds to exercise subscription warrants and obtain further shares in GL Thailand.

(D) OCTOBER TO NOVEMBER 2015: US$8.9M

63 Pursuant to the facility agreement dated 1 October 2015 between GLH and Cougar, GLH transferred US$14.5m in GLH Loans to Cougar on 9 November 2015. The US$14.5m was transferred out on the same day from Cougar to APF BVI, pursuant to a loan agreement between Cougar and APF BVI, which was signed by MK.

64 Showa's public announcement dated 16 November 2015 disclosed that on 12 November 2015, APF BVI transferred US$9.3m of the US$14.5m as a loan to Showa, and of that amount, Showa advanced US$8.9m to Wedge, which then transferred the same sum to Engine, which used the said sum to exercise warrants and acquire shares in GL Thailand.

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65 The Fidescorp Documents demonstrate that MK had orchestrated the back-to-back transaction of US$14.5m from GLH to Cougar, then from Cougar to APF BVI in November 2015. In the email dated 6 November 2015 to Mr Savvas Pogiatzis ("Savvas") from Fidescorp, MK had personally instructed Savvas to make the US$14.5m transfer from GLH to Cougar, and thereafter to APF BVI, and provided the bank account information of APF BVI. This corroborates JTA's case that the US$14.5m was transferred from GLH ultimately to MK's personal investment vehicle on his instructions, which was for MK's benefit and not GL Thailand retail financing business.

66 In addition, no contrary evidence was adduced by the respondents to challenge Potter's flowchart and the supporting documentary evidence. MK *admitted* to the flow of transactions in the August 2015 transaction of 350m Thai Baht (US$9.8m) and the November 2015 transaction of US$9.3m. MK merely claimed that (a) the receipt of these funds by APF BVI were "entirely legitimate"; and (b) Showa took the two loans from APF BVI to enable Engine to exercise its warrants. As we observed in *JTrust (SUM 21)* ([6] *supra*), there is nothing illegitimate in itself for Engine to exercise its warrants. The significance of the above evidence is that it serves to identify the *source* of the funding for the exercise of the warrants (at [79]), which came originally from GL Thailand or GLH. Finally, we observe that the first level round-tripping also serves as evidence to demonstrate the falsity of the personal representations made by MK on the use of JTA's investments. In sum, the objective evidence demonstrates that the aggregate amount of **US$43.7m** was involved in the first level round-tripping.

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(2) Second level round-tripping

67 The second level of round-tripping in JTA's case pertains to GLH financing the payments of interest back to itself on existing GLH Loans by advancing new GLH Loans. The interest repayments which the Borrowers purportedly paid to GLH appear to have been made from the loans that had been advanced by GLH to the Borrowers in the first place.

68 In the trial below, JTA adduced documentary evidence of the transactions pertaining to the second level round-tripping between GLH, Adalene and Cougar.

69 Pursuant to a loan agreement between GLH and Adalene dated 29 September 2016 at an interest rate of 15% per annum, GLH transferred US$3m to Adalene on 29 September 2016. On the same day, pursuant to a loan agreement between Adalene and Cougar at an interest rate of 7% per annum, there was a back-to-back transfer of US$3m from Adalene to Cougar. It is immediately apparent that it made no commercial sense for Adalene to borrow from GLH at an interest rate of 15% per annum to on-lend the same sum to Cougar at an interest rate of 7% per annum.

70 On 30 September 2016, Cougar transferred approximately US$2.8m to GLH with the description: "Transfer ... to GROUP LEASEHOLDINGS ... As per loan agreement dd 2 11 15". The balance in Cougar's bank account prior to the transfer indicates that Cougar was only able to make the interest-related payment to GLH out of the monies loaned from Adalene. This payment corresponded with an invoice from GLH to Cougar dated 1 August 2016 which included interest on loans for the period of April 2016 to June 2016 totalling approximately US$2.5m.

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71 The objective evidence demonstrates that a large proportion of the loan advanced to Adalene on 29 September 2016 was immediately transferred to Cougar to repay interest on GLH Loans. US$2.5m in interest payments were made out from the funds advanced under another GLH Loan. Since the use of the loan principal to pay interest would reduce the assets of the Borrowers below the level required to repay the loan principal at the end of the loan's term, it should not have been recognised as income by GL Thailand. Yet, the interest income was reported as revenue and GLH's net profits were hence artificially inflated. GLH's false financial information was subsequently incorporated into GL Thailand's financial statements.

72 Further, the Fidescorp Documents, which were not before the Judge, demonstrate that on 16 October 2016, MK personally *approved* the loan agreement between Adalene and Cougar dated 29 September 2016 relating to the transfer of US$3m from Adalene to Cougar by way of an email to Savvas. Savvas' email dated 4 October 2016 also evidences an intention for parties to retrospectively approve and sign the loan agreements after the transaction had been executed:

> Dear [MK],
>
> Kindly find attached *the loan agreements drafted for the last transactions we have executed.* … Kindly approve so that we can sign them and file them properly.
>
> [emphasis added]

73 Two observations must be made in this regard.

(a) First, it is entirely suspicious that MK approved the loan agreement on 16 October 2016 *after* the date of the loan agreement and after US$3m had already been transferred from Adalene to Cougar on 29 September 2016. This is reminiscent of the Judge's finding that the

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loan documentation was prepared only after the GLH Loans had been advanced and money was disbursed to allegedly unrelated parties with no documentation whatsoever (Judgment at [14]).

(b) Second, the email contradicts MK's and YK's testimonies at trial. YK claimed that the transfer of US$3m from Adalene to Cougar was intended to be a payment for purchases of GL Thailand shares from an entity affiliated with YK. MK testified that he was "not involved" in this transaction, which is evidently untrue. This goes against MK's credibility as well.

74 The Fidescorp Documents also demonstrate another circular transaction in relation to the second level round-tripping, where Adalene transferred US$400,000 to Cougar for it to fund the interest payment of US$407,164.45 to GLH. This was personally instructed by MK, who stated in an email that the said transfer was required since "in [Cougar] we do not have this so Adalene needs to loan 400,000 USD to [Cougar]". This also clearly demonstrates MK's control over Cougar and Adalene.

75 Potter assessed that from the documents that had been disclosed, the Cyprus Borrowers were loss-making and had no capacity to service the GLH Loans' interest and repay the principals when they fell due (see below at [79]–[80]). Further, the Cyprus Borrowers were incorporated one to six months prior to the first GLH Loans being advanced to them. The Borrowers also did not receive any significant funding from other sources other than the GLH Loans. Yet, the Borrowers allegedly repaid GLH interest on the loans.

76 The key significance of the above evidence on the second level round-tripping is that it created the false appearance that loans were made to *unrelated*

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parties on an *arm's length basis* who agreed to pay high rates of interest with the loans fully secured over valuable assets. This allowed GL Thailand and GLH to report increasing profits from the GLH Loans (see below at [144]). However in reality, funds were transferred to the related parties who were unable to generate the returns necessary to repay either the interest that was due on the loans or the principal when it became due. Since the Borrowers were incurring expenses in addition to interest on GLH Loans, they were expending the loan principal to repay the GLH Loans. *No value was actually created and no profits should have been recognised.*

77 In our judgment, we find that the objective documentary evidence supports the two levels of round-tripping in the tune of a sum of at least US$46.6m. As explained above at [47], the round-tripping evidence only serves to corroborate the sham nature of *all* the GLH Loans.

The undoubtedly unusual and suspicious nature of the GLH Loans

78 We now turn to the evidence that the Judge did take into consideration in coming to his conclusion that the GLH Loans were undoubtedly unusual and suspicious.

79 First, as found by the Judge, the GLH Loans had little or no commercial rationale. No evidence was adduced that the Borrowers had legitimate commercial activities which would justify taking on or servicing the repayments of US$95m worth of loans at high interest rates. The Borrowers were also incorporated barely a few months before the GLH Loans were disbursed. The following evidence was adduced about Cougar and the Cyprus Borrowers.

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(a) Cougar reported a profit of S$2.1m in 2015 and a loss of S$8.4m in 2016. Cougar's financial statements for 2016 did not report any revenue in 2016 and it had no employees.

(b) AREF was incorporated in January 2016. AREF's bank statement from 1 January 2016 to 27 February 2016 disclosed no significant inflows of monies other than from a GLH Loan for US$2.9m.

(c) Adalene was incorporated in May 2015. Its income in 2015 totalled €32,765 and reported losses of nearly €1m in financial year 2015 ("FY 2015").

(d) Bellaven was incorporated on 23 March 2015 and in 2015, reported a net loss of €337,771, and had a net asset value of negative €337,771.

(e) Bageura was incorporated on 29 June 2015. It had no income in 2015 and suffered a net loss of US$185,666 and a net asset value of negative US$185,666.

80 Second, the Cyprus Borrowers demonstrated an ostensible inability to service the GLH Loans as they used the GLH Loan monies to purchase the following low-yielding assets, *inter alia*:

(a) Cypriot government bonds with a coupon rate of 2 to 3.5% per annum in stark comparison to the substantially higher interest rates of 14.5 to 17% per annum payable on the GLH Loans;

(b) Real estate in Cyprus, *inter alia*, Villa No. 2 which was allegedly used by the alleged beneficial owners of the Cyprus Borrowers, the Kiasrithanakorn family (referred to by the Judge as the Honda Family),

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as the basis for their Cyprus citizenship application and Villa No. 9 which was for MK's personal use; and

(c) US$5.2m invested in shares in three Cypriot companies, whose financial statements reveal that two were loss-making and one made modest profits totalling €84,376 between 2016 and 2018 which would have been insufficient to even meet the interest repayments under the GLH Loans.

81 Coupled with the objective evidence adduced of the second level round-tripping and that many of the repayments were in fact paid by MK through APF BVI (see below at [92]), it demonstrates that the Borrowers were simply unable to pay for the interest of the loans themselves, indicating that the GLH Loans were indeed shams. In this connection, it is also clear that JTA's investments had not been used to drive the growth of GL Thailand's retail financing business in Southeast Asia but had instead been utilised for these sham loans, contrary to MK's representations to Asano and Fujisawa.

82 Third, the Judge found that the loan documentation was prepared only after the GLH Loans had been advanced and money was disbursed to allegedly unrelated parties with no documentation whatsoever (Judgment at [14]). The Judge noted that Mr Boris Blaise Zschorsch ("Boris"), the group deputy chief financial officer of GL Thailand, only found out about the 2016 GLH Loans to the Cyprus Borrowers in 2017 and instructed Savvas of Fidescorp to prepare the loan documents via email. Savvas was a director of one of the Cyprus Borrowers, but also performed custodial services for GLH, and had control of the same bank accounts that the GLH Loans were disbursed from. This was a manifest conflict of interest.

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83 Counsel for the Cyprus Borrowers, Ms Deborah Barker *SC*, submitted that the Judge's observations were wrong and pointed out that there were some loan documents such as pledge agreements that existed well before the emails were exchanged in January 2017. The Borrowers entered into individual pledge agreements with GLH between November 2015 and February 2016, providing collateral for *some of the GLH Loans* disbursed and were substantiated by third party valuations of the pledged assets. After all the GLH Loans were disbursed in December 2016, the Cyprus Borrowers and GLH entered into a Global Pledge Agreement dated 28 December 2016 providing for collateral valued in excess of US$40m. Ms Barker emphasised that each of the individual pledge agreements entered into between the Cyprus Borrowers and GLH between November 2015 and February 2016 referred to the relevant loan agreements and the specific debts entered into. Thus, the Cyprus Borrowers argued that JTA could not assert that *all* the loan documentation was only created sometime in January 2017.

84 However, as JTA pointed out, the point remains that the collateral was *provided only after* the GLH Loans had been disbursed, which is in itself suspicious. For instance, the first GLH Loan to the Singapore Borrowers (for US$15m) was dated 11 May 2015. However, the first pledge agreement (for the shares in Kuga) was dated 14 August 2015. Similarly, the first GLH Loans to the Cyprus Borrowers were dated 18 September 2015, but the first pledge agreements were only executed on 2 November 2015. Additionally, we note that GLH only requested for the valuation reports for the collateral in January 2017, well after the GLH Loans had been disbursed. Coupled with the fact that correspondence that ostensibly emanated from the Borrowers were prepared by GLH (see below at [95]), the evidence points to a finding that the GLH Loans were indeed shams.

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85 The Cyprus Borrowers attempted to downplay the fact that loan documentation was created after the loans were disbursed, arguing that this would point at most to "sub-par corporate governance". However, this must be viewed in the right context. When one considers the sheer size of the GLH Loans and the newly incorporated status of the Cyprus Borrowers with no financial track record, it is extremely suspicious that there was no proper paper trail. We also found the absence of disclosure of GLH's internal minutes to show how and why its directors came to the view that the GLH Loans were in the best interest of GLH to be equally telling and highly suspicious. As we observed in *JTrust (SUM 21*) ([6] *supra* at [69]), it is extremely odd that no correspondence whatsoever with the Borrowers on the negotiations of the GLH Loans were disclosed. GLH's explanation that no such documents existed because the discussions relating to the purpose, assessment and approval of the GLH Loans "were done verbally, in person and in an informal setting" is in itself highly questionable, when one considers the huge amounts of moneys involved and the financial standing of the Borrowers.

86 Based on the evidence of the two levels of round-tripping, coupled with the unusual and suspicious nature of the GLH Loans and that many of the repayments were in fact paid by MK through APF BVI (see [91]–[96] below), the incontrovertible inference to be drawn is that (a) *all* the GLH Loans were shams created to disguise the true nature of the transactions and were not legitimate transactions earning proper profits; and (b) JTA's investments were in fact not used for the purpose of driving the growth of GL Thailand's retail financing business as was represented by MK to JTA.

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The "goodwill" defence

87 We now address GLH's and MK's "goodwill" defence in relation to the nature of the GLH Loans. Even though the Judge found that the GLH Loans were "undoubtedly unusual" and "suspicious", the Judge accepted GLH's and MK's "goodwill" defence that the GLH Loans were not shams but were extended to the Borrowers on a goodwill basis (Judgment at [14] and [19]). GLH's and MK's defence is that the alleged beneficial owners of the Borrowers (meaning, the Kuga family and the Kiasrithanakorn family), were known to GL Thailand and the GLH Loans were effectively underwritten by these beneficial owners who GL Thailand knew had the means to repay. The Judge accepted that the GLH Loans, albeit suspicious, could be explained as GLH maintained that they were advanced on a goodwill basis between MK and the Borrowers.

88 In our judgment, the Judge erred in accepting that the GLH Loans could be explained by the "goodwill" defence.

(1) Impermissible reversal of burden of proof

89 First, as we observed in *JTrust (SUM 21)* ([6] *supra*) at [68], the Judge misapplied the legal and evidential burdens of proof. The facts which were relied upon by the Judge in finding the GLH Loans to be suspicious and undoubtedly unusual coupled with Potter's expert evidence should be sufficient *prima facie* evidence that the GLH Loans were shams and not properly accounted for in GL Thailand's financial statements. This necessarily called for a reasonable explanation by GLH and MK for the GLH Loans. The evidential burden therefore shifted to GLH and MK to provide a reasonable explanation supported by evidence to show that the GLH Loans were genuine commercial

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transactions: *SCT Technologies Pte Ltd v Western Copper Co Ltd* [2016] 1 SLR 1471 at [19]–[24]. As JTA rightly submitted, the true nature of the GLH Loans lies especially within the knowledge of GLH and MK and the legal burden of proving that the GLH Loans were effectively loans given to the supposed beneficial owners of the Borrowers must lie with them – see s 108 of the Evidence Act (Cap 97, 1997 Rev Ed). It was insufficient for the Judge to be satisfied that the GLH Loans *could have been* advanced on a goodwill basis and that the explanations by GLH and MK *were not impossible*. This constituted an impermissible reversal of the burden of proof. It is critical to bear in mind that in a trial setting, unlike an interlocutory hearing, it is essential for the Judge to make a finding based on the evidence before him rather than to opine on possibilities which should properly have been explored at the trial.

90 The "goodwill" defence was also unsupported by *any* objective evidence. We note that the identities of the beneficial owners of the Cyprus Borrowers remain a mystery and no witnesses with direct knowledge of the events (from the Kiasrithanakorn family) were called by the Cyprus Borrowers at the trial to prove the "goodwill" defence. As we observed in *JTrust (SUM 21)* at [69], this failure should effectively have led to the rejection of the "goodwill" defence. As admitted by TK in cross-examination, none of the alleged beneficial owners were the Borrowers on record, nor were there any contracts or agreements with GLH for these persons to indemnify or guarantee the GLH Loans. Objectively, it also made no commercial sense to extend US$95m of loans in goodwill to the Borrowers who had no discernible commercial activities and had only been incorporated merely a few months before the GLH Loans were disbursed.

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(2) Early repayments of the GLH Loans

91 In the trial below, evidence was led that the Borrowers started making early "repayments" for the GLH Loans after the Exchange publicly queried the GLH Loans on 9 March 2017 (the bulk of the repayments were made from April to August 2017). In support of their defence, GLH and MK submitted that the GLH Loans were not "irrecoverable transfers of money" because the Borrowers had fully repaid 11 out of the 18 GLH Loans with interest between April and August 2017. Boris testified that the interest and principal repayments after 11 April 2017 amounted to US$34,736,150. This was intended to give an impression that the Borrowers had repaid GLH of their own volition and by their own means and hence the GLH Loans were in fact on an arm's length basis.

92 However, the Vontobel Documents demonstrate that contrary to Boris' testimony, it was actually MK's personal investment vehicle, APF BVI, that made some of the following "repayments" to GLH under MK's instructions:

(a) the alleged payment of US$1,110,219.25 by AREF and Adalene to GLH on 27 July 2017;

(b) the alleged payment of US$2,025,094.21 by the Borrowers on 27 July 2017;

(c) the alleged payment of US$15,852,328.78 by the Singapore Borrowers on 28 July 2017;

(d) the alleged payment of US$2,247,103 by Pacific on 14 August 2017; and

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(e) the alleged payment of US$13,625,770 by Adalene on 15 August 2017.

93 This corroborates JTA's case that the Borrowers had no real ability to repay the GLH Loans and squarely contradicts the "goodwill" defence that the Judge considered to be possible (Judgment at [19]). Further, the Vontobel Documents contradict the Cyprus Borrowers' case at the trial that the *Cyprus Borrowers* had repaid the GLH Loans early in order to avoid being implicated in the investigations against GL Thailand, which was apparently accepted by the Judge in his evaluation of Potter's analysis (Judgment at [17]). Instead, it was *APF BVI* that made some of the alleged repayments and not the Cyprus Borrowers, contrary to Boris' testimony. The Cyprus Borrowers' explanation for the early repayments by APF BVI was also vague and suspicious: due to "legal" issues, they preferred an early repayment of interest of the GLH Loans and that since APF BVI had an "existing relationship" with the Cyprus Borrowers, it was reasonable for the Cyprus Borrowers to request for payments to be made by APF BVI. Such an explanation also fails to address the fact that the GLH Loans were completely devoid of any commercial sense (see above at [90]).

94 We also observe that the Cyprus Borrowers started making early "repayments" of the GLH Loans after the Exchange publicly queried the GLH Loans on 9 March 2017 (the bulk of the repayments were made from April to August 2017), which were in fact paid by APF BVI and yet the Cyprus Borrowers called no witnesses to testify to this. The only correspondence involving any member of the Kiasrithanakorn Family was an email exchange between Lien and MK regarding the purchase of a villa in Cyprus in which Lien

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apparently apologised to MK for a "typo mistake" as regards the cost of the second villa.

95 Evidence was also adduced at the trial that letters, purportedly from Adalene seeking GLH's consent for early repayment of the GLH Loans, had in fact been prepared by GLH and MK. This suggests that GLH and MK controlled and gave directions to Adalene by orchestrating the early repayments of the GLH Loans. The Judge appeared not to have considered this aspect of the evidence.

96 MK testified that he had repaid the loans to GLH on behalf of Cougar because it had in turn paid him first or through other sources. However, no documentary evidence was adduced by MK to support this assertion. As we previously observed in *JTrust (SUM 21)* ([6] *supra*) at [66], such assertions are typically capable of being proved by objective documentary evidence and yet the Judge appeared to have accepted MK's unsupported evidence (Judgment at [19]).

97 At the hearing before us, counsel for MK and GLH, Mr Lawrence Teh, submitted that the decision by GLH to grant the loans to the Cyprus Borrowers, allegedly beneficially owned by the Kiasrithanakorn family, was intended to "strengthen" and "forge" the business relationship between GLH and the Kiasrithanakorn family, who were in the Cambodia retail financing market. However, this argument does not take MK and GLH very far. First, an adverse inference against GLH and MK must be drawn from the absence of witness testimonies from the Kiasrithanakorn family. Second, we find it particularly significant that the GLH Loans pertained to *large sums* of money and were not mere pocket change. While it is possible that "goodwill" could be generated from such loans, the fact that there was no paper trail for such huge sums of

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monies is undoubtedly suspicious. One would expect commercial entities to document the purposes of the loans of such large sums before they were disbursed. The failure to do so only points towards a conclusion that the GLH Loans were indeed shams.

98 Finally, we observe that the Judge's apparent acceptance – that the GLH Loan monies had passed through other companies before it was used to purchase shares in GL Thailand thereby artificially increasing GL Thailand's share value – is also inconsistent with his acceptance of the "goodwill" defence (Judgment at [15] and [19]).

99 In light of the above, the acceptance of the goodwill defence was premised on an inference wrongly drawn by the Judge without any evidential basis. Taking into consideration the Vontobel Documents and the Fidescorp Documents adduced as fresh evidence on appeal, the acceptance of the "goodwill" defence was plainly against the weight of the evidence. In our view, we would also have arrived at the same finding even without the Vontobel Documents and the Fidescorp Documents.

100 We therefore find that the "goodwill" defence should have been rejected and the GLH Loans were clearly shams.

MK's true control and/or beneficial ownership of the Borrowers

101 We now turn to the second key feature of JTA's case, which pertains to MK's true control and/or beneficial ownership of the Borrowers. In the trial below, there was a complete absence of evidence on the alleged beneficial ownership of the Singapore Borrowers and the Cyprus Borrowers by the Kuga

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family and the Kiasrithanakorn family respectively – a necessary ingredient of the goodwill defence.

102 We observe that JTA pleaded that in relation to the conspiracy claim:

> (b) GL [Thailand] and one or more of the Defendants shared common knowledge and intent through [MK]. The common actor in the conspiracy is [MK], who at the material time:
>
> (i) was a director and Chairman of GL [Thailand]. GL [Thailand] was at all times the sole shareholder of GLH;
>
> (ii) was a director of GLH; and
>
> (iii) *had connections to Cougar and the Cyprus Borrowers and/or was the beneficial owner of the Cyprus Borrowers at the material time.*
>
> [emphasis added]

103 In its closing submissions, JTA argued that the identity of Cougar's *beneficial ownership* is being tried in Luxembourg and is therefore not a question for the trial court and is irrelevant because the real question was not who *owned* Cougar but who had "*control of it*". On appeal, JTA asserted that MK was both the "controller and beneficial owner of [Cougar] and its bank accounts". At the appeal hearing before us, counsel for JTA, Mr Chan Leng Sun *SC* confirmed JTA's case (after some hesitation) that MK had *beneficial ownership* and not simply *control* of the Borrowers.

104 In our judgment, there is no real substantive difference between being the controller and having beneficial ownership of the Borrowers on the facts of this case. Drawing technical distinctions between the two in the present appeal would be overly pedantic. In our view, the evidence before this court suggests that Cougar and the Cyprus Borrowers were in fact controlled by their beneficial owner, MK.

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105 As previously observed, no witnesses from the Cyprus Borrowers came forward to testify (see above at [90]). Further, as mentioned above at [95], the letters, purportedly from Adalene seeking GLH's consent for early repayment of the GLH Loans, had in fact been prepared by GLH and MK.

106 As for the beneficial ownership of Cougar, we note that there is some evidence that YK had beneficial ownership of Cougar. For instance, Cougar's original Memorandum of Association named YK as President and Kuga Corporation as the sole shareholder. Further, several of Cougar's board resolutions were signed by YK and his father, Saburo Kuga, and Cougar's BizFile profile lodged with the Accounting and Corporate Regulatory Authority showed that YK and Saburo Kuga were Cougar's first directors.

107 The Judge considered that Potter only alleged that MK was a member of the key management personnel of Cougar on the basis of the consulting agreements, but agreed with the respondents that this was an agreement for consulting and not management services (Judgment at [19]). At the trial, MK alleged that he only managed the affairs of Cougar and the Cyprus Borrowers as a "consultant" on behalf of their ostensible beneficial owners (YK and the Kiasrithanakorn family respectively) and relied on these consultancy agreements.

108 However, we find that MK's assertion that he was merely a consultant of Cougar cannot be sustained. Such an assertion has been established to be wrong by the Fidescorp Documents. The Fidescorp Documents demonstrate that MK had instead exercised control over the bank accounts of Cougar and that Savvas and Fidescorp had acted on the instructions and directions of MK.

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(a) MK sent Savvas an email dated 15 September 2015 enclosing documents to enable Cougar to open an account with the Bank of Cyprus ("BOC"). In these draft documents, MK had declared himself to be the beneficial owner of Cougar.

(b) On 5 October 2015, MK also asked Savvas for the account balances of Cougar and the Cyprus Borrowers' BOC bank accounts.

(c) MK directed Savvas to carry out the following transactions, which Savvas complied with:

(i) A payment of US$1.2m from Cougar to GLH;

(ii) The back-to-back transfers of US$14.5m from GLH to Cougar, then from Cougar to APF BVI in November 2015 (see above first level round-tripping at [65]);

(iii) The back-to-back transfers of US$407,165.45 from Cougar to GLH and US$400,000 from Adalene to Cougar on 27 June 2016 (in order to enable Cougar to make an interest payment to GLH for the second level round-tripping);

(iv) A transfer of US$5.5m from GLH to Cougar on 30 May 2017; and

(v) A transfer of ¥490m from Cougar to its Japanese lawyers for a purchase of a Japanese property in Hyogo.

109 Based on the nature of the actions and directions given by MK, in no way can it be said that MK acted as a mere "consultant" of Cougar. Normal consultancy agreements would not have ceded this extent of control to MK.

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Instead, the documentary evidence suggests that MK was indeed the beneficial owner of Cougar.

110 Further, JTA rightly pointed out that even though YK claimed to be Cougar's beneficial owner, he proved to have limited knowledge of Cougar's affairs – which makes it rather unbelievable that MK had genuinely been acting on YK's instructions. For instance, YK's evidence at the trial that a US$3m transfer from Adalene to Cougar on 29 September 2016 was a genuine commercial transaction meant to pay for the purchases of GL Thailand shares by Adalene was contradicted by (a) his inability to adequately explain the circumstances underlying the transfer and the contradictions with the Cyprus Borrowers' evidence on the amount paid for the shares; and (b) the Fidescorp Documents, which now demonstrate that it was actually MK, and not YK, who had approved the loan agreement between Adalene and Cougar dated 29 September 2016 retrospectively, for the purposes of the second level round-tripping (see above at [67]). YK, the alleged true beneficial owner of Cougar, was also not featured in any of the communications between MK and Savvas in relation to the operation of Cougar's bank account. Most crucially, the evidence of the round-tripping on MK's instructions and the involvement of the Borrowers as complicit parties to the round-tripping scheme point towards the fact that the Borrowers were in fact beneficially owned by MK.

111 In light of the above evidence, the first to seventh respondents have not proven the true beneficial ownership of the Borrowers by the Kuga family and the Kiasrithanakorn family respectively. We find on a balance of probabilities that the Borrowers were instead beneficially owned by MK.

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Pleadings issue

112 We now turn to the pleadings issue. MK and GLH made several arguments as regards the insufficiency of JTA's pleadings in relation to MK's representations, as well as the round-tripping, which we will deal with in turn.

113 We first observe that JTA's case has three main pillars of the alleged misrepresentations by MK and GLH:

(a) GL Thailand and/or GLH were genuinely profitable companies in good financial health from GL Thailand's growing retail financing business;

(b) the financial statements of GL Thailand and GLH represented a true, fair and accurate representation of their financial situation; and

(c) the true nature of the GLH Loans was concealed from JTA, when the GLH Loans were shams and not arm's length transactions which did not serve any legitimate purposes, and did not drive the growth of GL Thailand's retail financing business in Southeast Asia. This was contrary to MK's representations that JTA's investments were intended to drive the growth of GL Thailand's retail financing business in Southeast Asia.

114 We also observe that MK made the alleged representations in two capacities: (a) in his *personal capacity* to Fujisawa and Asano, for which he is personally liable for; and (b) in his capacity as the chairman and director of GL Thailand and as a director of GLH to JTA, purportedly seeking to attract investments to enable GL Thailand retail financing business in Southeast Asia to grow.

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Whether JTA sufficiently pleaded the particulars of MK's representations

115 MK and GLH first submitted that JTA's pleaded case as regards MK's misrepresentations was extremely "general and inadequate". They argued that JTA did not plead the "form of any words that MK was alleged to have said to a particular representative of JTA" even though a claimant is required to set out specifically in his particulars of claim any allegation of fraud and details of any misrepresentation.

116 It is trite that allegations of fraud or misrepresentation must be pleaded with utmost particularity and this principle finds statutory expression in O 18 r 12(1) of the ROC. In an action in the tort of deceit, sufficient particulars of the fraudulent intent must be pleaded: *Singapore Civil Procedure 2020* vol 1 (Chua Lee Meng gen ed) (Sweet & Maxwell, 10th Ed, 2020) at para 18/8/15, citing *Tan Boon Hock v Aero Supplies Systems Engineering Pte Ltd & Ors*, unreported, Suit No. 2151/90. Full particulars of the misrepresentation relied on must be stated in the pleading, including the nature and extent of the misrepresentation, who the representor and representee are, whether the representation was made orally or in writing, and identifying the documents: *Bullen & Leake & Jacob's Singapore Precedents of Pleadings* vol 2 (Prof Jeffrey Pinsler SC gen ed) (Sweet & Maxwell, 18th Ed, 2016) ("*Bullen*") at para 20.20. Failure to adequately plead particulars of misrepresentation may lead to an unsuccessful claim: *Bullen* at para 20.20, citing *Wee Soon Kim Anthony v UBS AG* [2003] 2 SLR(R) 554.

117 We first examine the case law on the sufficiency of the pleadings in relation to allegations of fraud or misrepresentation for guidance.

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118 In *BOM v BOK and another appeal* [2019] 1 SLR 349 ("*BOM v BOK*"), this court found that the husband's pleadings were not deficient because the wife could not be said to have been taken by surprise at the trial, simply on account of the husband's failure to expressly use the word "fraud" (at [45]). The wife's Defence and Counterclaim clearly acknowledged the alleged misrepresentation and she knew exactly the case she had to meet (at [43]).

119 In *Kim Hok Yung and others v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank) (Lee Mon Sun, third party)* [2000] 2 SLR(R) 455 ("*Kim Hok Yung*"), the plaintiffs' pleading that:

> All the representations to the first plaintiff were made by the defendants, their aforementioned servants and/or agents:
>
> (a) knowing that they were false,
>
> (b) without any belief in their truth,
>
> (c) recklessly, without care as to whether they were true or false.

was found to be without sufficient particulars of the plaintiffs' fraudulent intent, and hence their claim was struck out (at [8]). The material inquiry is whether the defendants would know what case it is that they have to meet from this pleading.

120 In *Syed Ahmad Jamal Alsagoff (administrator of the estates of Shaikah Fitom bte Ghalib bin Omar Al-Bakri and others) and others v Harun bin Syed Hussain Aljunied and others and other suits* [2017] 3 SLR 386, the High Court found that the plaintiffs' general claim that "the Conveyance and Confirmation were ... *both executed in fraud*" and the defendants have "acted in fraud" was not properly pleaded because nothing was pleaded as to facts that would ground a recognised cause of action and fraud *simpliciter* was not enough (at [45]).

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121 In *EA Apartments Pte Ltd v Tan Bek and others* [2017] 3 SLR 559, the High Court found that the statement of claim was defective because the plaintiff failed to plead *any positive representation of fact*, merely alleged concealment and suppression of the Fire Safety Notices and argued that silence could on its own give rise to a misrepresentation (at [29]). Similarly, a general allegation that "all the accounts rendered to the plaintiff were untrue" was held to be insufficient particularisation of pleading: *Newport Dry Dock & Engineering Co v Paynter* (1886) 34 Ch D 88.

122 In our judgment, it is evident that JTA's pleadings are readily distinguishable from the above cases where the pleadings were found to be insufficiently particularised. JTA sufficiently pleaded and particularised GLH and/or MK's misrepresentations in its Statement of Claim ("SOC") and the relevant pleadings are reproduced as follows:

> **(i) GLH's fraudulent misrepresentations**
>
> …
>
> 20B. In so *providing such financial and accounting records, information and/or data to GL [Thailand], GLH represented that such financial and accounting records, information and/or data represented a true, fair and/or accurate state of its financial position.*
>
> 20C. In the alternative, to the extent that the matters pleaded in paragraph 20B above were matters of opinion, in so providing such financial and accounting records, information and/or data to GL [Thailand], GLH impliedly represented that:
>
> (a) it honestly held such an opinion; and
>
> (b) *there was a reasonable basis for such an opinion*
>
> …
>
> **(ii) [MK]'s fraudulent misrepresentations**
>
> 24C. In the course of negotiating the IAs, *[MK] represented to JTA that GL [Thailand] and/or GLH were genuinely profitable companies which were in good financial health and/or that the*

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financial statements of GL [Thailand] and/or GLH, or their financial and accounting records, information and/or data, represented a true, fair and/or accurate representation of their liabilities, financial situation and/or results.

24D. In the alternative, to the extent that the matters pleaded in paragraph 24C above were matters of opinion, in making the said representations to [JTA], [MK] impliedly represented:

(a) that he honestly held such an opinion;

(b) *that there was a reasonable basis for such an opinion.*

…

30. The loans to the Singapore Borrowers and the Cyprus Borrowers had the following attributes (amongst others):

(a) Interest rates were very high, at between 14.5% to 25% for most loans;

(b) The terms of the loans were very short (as short as 3 months), but the loans were often rolled over and extended for further 3 month periods and sometimes for a longer period of 2-3 years; and

(c) there was no commercial purpose to the loans.

…

30A. *The representations pleaded at paragraphs 20B, 20C, 24C and 24D above were false.* The loans to the Singapore Borrowers and the Cyprus Borrowers were not genuine arm's length transactions, and were falsely accounted for in the financial and accounting records, information and/or data provided by GLH and/or in GL [Thailand]'s financial statements so as to conceal the true nature and purpose of the loans, which was to present a false and misleading picture of GLH's and GL [Thailand]'s financial health.

Particulars

(a) Prior to the loans to the Singapore Borrowers and the Cyprus Borrowers, GL [Thailand] and GLH did not have a history of making loans with the attributes pleaded at paragraph 30 above.

(b) The loans were related party transactions that were not disclosed at the relevant time. At the time the loans were made, GL [Thailand], GLH and/or [MK] controlled or had significant influence over the Singapore Borrowers and the Cyprus Borrowers.

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> …
>
> (e) At the time the loans were made, the corporate Singapore Borrowers (i.e. Cougar, Kuga and Pacific Opportunities) and the Cyprus Borrowers had no discernible commercial activities which would have justified their taking on the loans or which would have enabled them to service the repayment of the loans.

[emphasis added]

123 JTA also provided particulars about the time period, form of communication and furnished three examples of emails and LINE messages dated 13 February 2015, 12 May 2016 and 13 July 2016 as examples of MK's alleged misrepresentations in its Further and Better Particulars dated 2 August 2019:

> **17. <u>Paragraph 24C of the SOC</u>**
>
> Of the allegation that "In the course of negotiating the IAs, [MK] represented to JTA that GL [Thailand] and/or GLH were genuinely profitable companies which were in good financial health and/or that the financial statements of GL [Thailand] and/or GLH, or their financial and accounting records, information and/or data, represented a true, fair and/or accurate representation of their liabilities, financial situation and/or results"
>
> Please state:
>
> (a) Whether the representations [MK] is alleged to have made were made in person or over the telephone, email, letter or other form of media, and whether they were written or oral.
>
> (b) If written, please identify the relevant documents.
>
> (c) If oral, please state:
>
> (i) The dates of these representations.
>
> (ii) The persons at JTA to whom these representations were made.
>
> (iii) Full particulars of the representations, *i.e.* the precise words that [MK] used in this regard.
>
> <u>Answer:</u>

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> (a) In person, over emails, over LINE messages, and/or over the telephone.
>
> (b) ***Emails and LINE Messages exchanged between [MK] and Mr Shigeyoshi Asano and/or Mr Nobuyoshi Fujisawa between January 2015 and August 2017***.
>
> (c) ***The representations were made during the course of phone calls and in-person meetings between [MK], Mr. Shigeyoshi Asano and/or Mr. Nobuyoshi Fujisawa between January 2015 and August 2017***. Examples of these representations included (in translated form):
>
> > (1) On 13 February 2015, [MK] sent an email to Mr. Shigeyoshi Asano specifically representing that GL's 2014 Q4 profit (after tax) was THB 93 million, and that for 2015 Q4 he expected the profit (after tax) to be THB 200 million.
> >
> > (2) On 12 May 2016, [MK] sent a LINE message to Mr. Shigeyoshi Asano and Mr. Nobuyoshi Fujisawa specifically representing that GL's "after-tax profit increased 100% compared to last year" after "the final accounting audit of GL was released".
> >
> > (3) On 13 July 2016, [MK] sent a LINE message to Mr. Shigeyoshi Asano and Mr. Nobuyoshi Fujisawa suggesting that GL was "at the forefront of the 1 trillion yen club" and that he would turn GL into a "super profit company".
>
> The meaning and effect of these representations, whether taken singularly or understood together with other representations of a similar nature, are as pleaded at paragraph 24C of the SOC.
>
> [emphasis in original omitted, emphasis in bold italics added]

124 In our view, it is sufficient that JTA pleaded the form of communication and time frame of the representations and provided examples of these representations. It would be unreasonable to require JTA to list every single LINE message, email or verbal representation it sought to rely on in its pleadings for the purposes of proving its claim. As observed by the High Court in *Kim Hok Yung* ([119] *supra* at [6]), the pleading of a cause of action founded on the tort of deceit must give full particulars of the basis for the averment or else it must be struck out, although the requirement of full particulars is *not an*

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invitation to the plaintiffs to plead evidence. What MK and GLH are essentially complaining about is JTA's alleged failure to plead the relevant *evidence* to support the averments.

125 We further note that MK would have had access to the LINE messages and emails that JTA relied on, since MK was a party to the correspondence. In *SIC College of Business and Technology Pte Ltd v Yeo Poh Siah and others* [2016] 2 SLR 118, we emphasised that the underlying consideration of the law of pleadings is to prevent surprises arising at trial (at [46]):

> Thirdly, it must be emphasised that procedure is the handmaiden of justice, not its master. In *V Nithia v Buthmanaban s/o Vaithilingam* [2015] 5 SLR 1422 ("*Nithia*"), this court embarked on a review of the law of pleadings and observed (at [2]) that the process of pleadings is to ensure, inter alia, that the plaintiff knows the nature and substance of the defence. A court should not adopt "an overly formalistic and inflexibly rule-bound approach" which might result in injustice (see *Nithia* at [39]). Ultimately, the underlying consideration of the law of pleadings is to prevent surprises arising at trial …

In our judgment, MK and GLH were not prejudiced by the nature and extent of JTA's pleadings. They knew exactly the case they had to meet.

Whether JTA sufficiently pleaded that it was represented that JTA's investments would be used to drive growth of GL Thailand's retail financing business in Southeast Asia

126 MK and GLH also submitted that the allegation that JTA's investments would be used to drive the growth of GL Thailand's retail financing business in Southeast Asia was not pleaded as part of JTA's case and hence was not one that JTA was entitled to advance. They also pointed out that none of the IAs contained a condition that JTA's investments would be used solely for GL Thailand's operations in Cambodia and Southeast Asia.

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127 We first observe it was not *explicitly pleaded* that GLH and/or MK had represented to JTA that its investments were to be used to drive the operations in Southeast Asia. The pleadings for GLH and/or MK's misrepresentations mainly focused on the genuine and expected profitability of GLH and GLThailand as well as the true commercial nature of the GLH Loans that they were not genuine arm's length transactions (see paras 20B, 24C, 30 and 30A of the SOC reproduced above at [122]) and the examples raised in the Further and Better Particulars at [17] reproduced above at [123]).

128 However, in our view, the representation that JTA's investments were to be used to drive the growth of GL Thailand's retail financing business in Southeast Asia was sufficiently pleaded. In para 24D(b) of the SOC (see above at [122]), it was pleaded that MK impliedly represented that "there was a reasonable basis" for holding an opinion that GL Thailand and/or GLH were genuinely profitable companies which were in good financial health. JTA also provided particulars of this "implied representation" as the answer to request 17(c) in its FNBP (see above at [123]). Before one invests in a company, it is entirely logical and reasonable to take into consideration the *nature of the alleged use of the investments.* In this connection, the reasonable basis for MK holding an opinion on the genuine profitability of GL Thailand and GLH would have included representations by MK to Asano and Fujisawa on the projected use of JTA's investments *ie*, to drive the growth of the retail financing business of GL Thailand in Southeast Asia. While we observe JTA's pleadings could have been better pleaded, we are satisfied that this point was adequately covered by JTA's pleadings.

129 Further, JTA's investments were made on the basis of the *projected* profitability of GL Thailand arising from the *expected growth* of GL Thailand's

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retail financing business in Southeast Asia. If GL Thailand used JTA's investments for the GLH Loans and the round-tripping, it clearly did not use it for GL Thailand's retail financing business. Therefore, the fact that a substantial portion of JTA's investments was in fact *not channelled* to the retail financing business in Southeast Asia but were used for GLH Loans and the round-tripping would serve as *relevant evidence* to prove JTA's pleaded case as regards the false and misleading picture of GLH's and GL Thailand's financial health. There can be no dispute that one does not plead evidence and it is therefore not necessary for JTA to have explicitly pleaded the fact that its investments were *not channelled* to drive the retail financing business of GL Thailand in Southeast Asia.

130 Finally, we emphasise that one must be careful not to descend blindly into technicalities when assessing the adequacy of pleadings, and must always bear in mind that their ultimate purpose is to define the scope of the issues for the court's determination and to ensure that the parties are not taken by surprise and deprived of the opportunity to adduce the relevant evidence: *BOM v BOK* [118] *supra* at [40]; *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 at [94] and *Fu Loong Lithographer Pte Ltd and others v Mok Wing Chong (Tan Keng Lin and others, third parties)* [2018] 4 SLR 645 at [61]. In some cases, evidence given at the trial could even overcome defects in pleadings, provided that the other party is not taken by surprise or irreparably prejudiced: *BOM v BOK* at [40]; *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [18].

131 MK was not only cross-examined on this issue but also admitted as much to it. During the trial, it was put to MK that he had specifically represented GL Thailand's growing retail financing business in Cambodia during the

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negotiations with Fujisawa and Asano in relation to JTA's investments in GL Thailand:

> Q. Yes. That is why when you discuss the possibility of JTA investing in GL [Thailand], you mentioned GL [Thailand]'s growing retail financing business in Cambodia, didn't you?
>
> A. It's part of that.
>
> Q. Yes. And you also mentioned the profits that JTA will make from the growth of that business?
>
> A. I think GL [Thailand] make profit.
>
> Q. Yes, from the business, the growing retail financing business in Cambodia. JTA, after investing in GL [Thailand], will make profits from the growth of that business?
>
> A. Cambodia was one of them.

In our judgment, it is clear that MK and GLH could not be said to have been taken by surprise and deprived of the opportunity to adduce the relevant evidence to their prejudice.

Whether JTA was required to plead the round-tripping

132 GLH and MK also submitted that the words "round-trip", "round-tripping" or the "two circular flows of money" as described at [46] above do not appear in JTA's pleadings. They argued that instead, it was only pleaded that JTA's investment monies were extended by GL Thailand to GLH and then extended to the Borrowers, who would then either use principal monies to (a) repay interest of loans; or (b) use the principal monies to purchase MK's shares in APF BVI. They argued that no evidence was led to support the initial pleaded round-tripping theory that the principal monies were used to *purchase MK's shares in APF BVI.*

133 In our judgment, the fact that the label of "round-tripping" was not pleaded or the fact that JTA pleaded that the principal monies were used to

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purchase MK's shares in APF BVI cannot be fatal to JTA's case on the round-tripping. We first observe that the substance of the second level round-tripping was in fact pleaded in JTA's SOC: "the interest payments received by GLH for the loans came from the capital that had been advanced to the borrowers by GLH in the first place". More importantly, the "round-tripping" need not be specifically pleaded because it is part of the *evidence trail* to prove JTA's pleaded case that the GLH Loans were shams, the false and misleading picture of GLH's and GL Thailand's financial health was painted and that JTA's investments were in fact used for *purposes other than* to drive the growth of GL Thailand's retail financing business in Southeast Asia.

134 As we observed in *JTrust (SUM 21)* ([6] *supra*) at [72], while "round-tripping" as a term of art could arguably have multiple definitions, it was expressly qualified by Potter in his expert report and under cross-examination that in the present context, "round-tripping" was used to describe "two circular flows of money" at both levels whereby the GLH Loans were routed in a circuitous manner through various companies under MK's control in order to present a false and misleading picture of the financial health of GLH and GL Thailand and that ultimately the GLH Loans were used for the personal benefit of MK and not GL Thailand.

135 Further, as JTA correctly pointed out, in JTA's Further and Better Particulars dated 2 August 2019, JTA specifically placed GLH and MK on notice that it would be relying on Potter's expert report dated 28 June 2019 in support of its claim. This was supplemented by Potter's further report dated 9 September 2019, which spelt out the two levels of "round-tripping" that would be relied on to support JTA's case. The Judge also allowed GLH and MK to file a supplemental affidavit to respond to Potter's further report (*ie*, MK's

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Supplemental AEIC). MK's and GLH's own expert, Gafoor, also did not respond substantively to Potter's further report and was instructed to provide expert evidence on the assumption that "the transactions were on an arm's length basis", even though Gafoor conceded that he was qualified and had the professional expertise to carry out the same analysis done by Potter. It thus cannot be said that there was prejudice to GLH and MK since (a) they knew the case they had to meet regarding the round-tripping; and (b) were given ample opportunities to respond to the evidential trail as adduced.

136 For all of the above reasons, we reject MK's and GLH's arguments in relation to the lack thereof or insufficiency of JTA's pleadings.

Deceit claim

137 In light of the above, we turn now to examine the merits of JTA's deceit claim.

Relevant legal principles

138 In *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 ("*Panatron*"), this court set out the elements required to establish the tort of deceit (at [13]–[14]). First, there must be a representation of fact made by words or conduct. Second, the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff. Third, it must be proved that the plaintiff had acted upon the false statement. Fourth, it must be proved that the plaintiff suffered damage by so doing. Fifth, the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true.

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The false representations of fact

139 In respect of its deceit claim, JTA relies on the fact that MK and GLH made two forms of misrepresentations: (a) GLH's representations through the medium of GL Thailand's financial statements which were warranted to be accurate; and (b) MK's personal representations.

GLH's representations through GL Thailand's financial statements

140 First, GLH represented its financial data through the medium of GL Thailand's financial statements, intending or knowing that GL Thailand would incorporate the same into GL Thailand's consolidated financial statements and communicate them to a class of persons including JTA.

141 GL Thailand's quarterly and annual accounts or financial statements were prepared on a consolidated basis and incorporated GLH's financial data such as its assets, liabilities, equity, income, expenses and cash flows. This was expressly stated in GLH's own financial statements (*eg*, GLH's financial statement for FY ending 31 December 2016) and was also confirmed under cross-examination by Tashiro, who was a director of both GL Thailand and GLH.

142 The nature of these representations, as presented in GL Thailand's financial statements, was that the GLH Loans were legitimate arm's length transactions generating real income and profits as part of GL Thailand's retail financing business. An implied representation of fact was made by GLH to JTA through GL Thailand's financial statements, under the authority and knowledge of MK, that GLH's financial data represented a true, fair and accurate state of GLH's financial position and that GLH was showing genuine profitability and growth.

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143 However, this was not the case. The GLH Loans were falsely accounted for as genuine, valuable, interest-bearing assets that artificially inflated GL Thailand's quarterly net profits for FY 2015, financial year 2015 ("FY 2016") and up to the third quarter of 2017. GL Thailand's financial statements were materially inaccurate with respect to the GLH Loans in the following ways:

(a) GL Thailand's financial statements for the second and third quarters of 2015 ("Q2 2015" and "Q3 2015"), FY 2015, the first three quarters of 2016 ("Q1 2016", "Q2 2016" and "Q3 2016") and FY 2016 omitted disclosure of US$36.3m of GLH Loans as related party transactions (*ie*, the direct and indirect transfers of US$36.3m to APF BVI and APF Thailand in the first level round-tripping of which US$18.7m was round-tripped back to GL Thailand for the purposes of acquiring GL Thailand shares). This was unrebutted by Gafoor as he was instructed to assume that the GLH Loans were indeed genuine, arm's length transactions. Potter applied the Thai Accounting Standards 24 on Related Party Disclosures and assessed that the omission of related party disclosures deprived the users of a company's financial statement (meaning, JTA in this case) the opportunity to understand the true nature of the transactions that the company was entering into (meaning, the GLH Loans).

(b) GL Thailand's financial statements from Q3 2015 through to financial year 2017 ("FY 2017") incorrectly recognised the interest income on the GLH Loans when there was no realistic expectation that the Singapore or Cyprus Borrowers would independently generate the returns necessary to make the repayments of interest and capital required under the GLH Loans through means other than holding GL Thailand

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shares and "round-tripping". Therefore, GL Thailand's revenues, net assets and net profits would have been materially overstated in GLH's financial statements for those periods.

(c) Provisions should have been made for substantial impairments of the GLH Loans as at 31 December 2015, 2016 and 2017 once the artificial inflation of GL Thailand's share price had been taken into consideration. GL Thailand's annual and interim financial statements for FY ending 31 December 2015 and 2016 overstated its revenues, net assets and net profits as it failed to recognise any impairment of the GLH Loans as at 31 December 2017.

144 The following table summarises GL Thailand's reported net profits and corrected net profits of GL Thailand once the interest income of the GLH Loans is excluded, as calculated by Potter:

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Period	Reported Net Profit (A)	GLH Loans Interest (B)	Corrected Net Profit (C = A - B)	% Overstated (D = B ÷ C)
	THB	***THB***	***THB***	***%***
Q1 2015	110,238,000	-	110,238,000	-
Q2 2015	129,470,000	227,398	129,242,602	0%
Q3 2015	150,270,000	48,244,997	102,025,003	47%
Q4 2015	192,912,996	86,530,847	106,382,149	81%
FY 2015	**582,890,996**	**135,003,242**	**447,887,754**	**30%**
Q1 2016	222,165,000	96,663,988	125,501,012	77%
Q2 2016	255,850,000	95,510,376	160,339,624	60%
Q3 2016	260,408,000	100,942,400	159,465,600	63%
Q4 2016	324,396,265	110,353,382	214,042,883	52%
FY 2016	**1,062,819,265**	**403,470,146**	**659,349,119**	**61%**
Q1 2017	327,356,000	117,469,949	209,886,051	56%
Q2 2017	336,852,000	105,027,523	231,824,477	45%
Q3 2017	224,171,000	90,271,708	133,899,292	67%
Q4 2017	120,833,122	-	120,833,122	-

145 But for the GLH Loans, the quarterly and full-year net profits of GL Thailand would have been substantially lower, thereby impacting the profitability of GL Thailand. This was consistent with the downward revisions of GL Thailand's profits by its own auditors, EY (see [20] above). Gafoor's own analysis in his expert report, which used "earnings per share" as a different metric from Potter, nevertheless demonstrated that GL Thailand's financial statements for both FY 2015 and FY 2016 were indeed misstated. On Gafoor's calculations of the revised financials of all of the GLH Loans, GL Thailand's consolidated net profits (in earnings per share) would have been overstated by 29.4% in FY 2015 and 45.5% in FY 2016. Indeed, Gafoor's evidence supports Potter's conclusion insofar as GL Thailand's financial statements were

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materially misstated, even on the basis of a different metric to measure GL Thailand's net profits.

146 It thus cannot be denied that GLH made false representations of fact to JTA through GL Thailand's financial statements.

MK's personal representations

147 We now turn to the second aspect of JTA's claim in deceit, which pertains to personal representations made directly by MK in person and over LINE messages and emails to Asano and Fujisawa, who were directors of JTA, and to JTA through press releases, announcements, Extraordinary General Meetings that (a) GLH and GL Thailand were genuinely profitable companies in good financial health; (b) JTA's investments were intended to drive the projected growth of GL Thailand's retail financing business in Southeast Asia; and (c) the financial statements of GL Thailand could be relied upon to provide a true and fair picture of GL Thailand's financial position.

148 Evidence was adduced at the trial on the representations relied on by JTA, which the Judge implicitly accepted were made by MK (Judgment at [11]).

(1) Representations prior to entry into the 1st IA and conversion of convertible debentures

149 Prior to JTA's entry into the 1st IA on 20 March 2015, the following representations were made by MK.

(a) In January 2015, MK met Fujisawa and Asano and they discussed GL Thailand's financial performance in 2014, its business and *MK's expected profit growth in 2015* due to the performance of *GL Thailand's Cambodia portfolio*.

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(b) After the meeting, MK followed up with an email dated 13 February 2015 to Asano, stating that GL Thailand's profits (after tax) for the fourth quarter of 2014 were 93m Thai Baht and he *expected profits to be 200m Thai Baht in the fourth quarter of 2015*, attributing this to successful performance in *Cambodia's monthly portfolio*.

(c) On 22 February 2015, in an email to Asano, MK stated that GL Thailand's "interest income in 2014 grew from 2013", reassured JTA that GL Thailand was *making substantial profits in Thailand and Cambodia* and that GL Thailand had "yet to reach the full potential".

(d) The following day, MK informed Asano that he was "planning to issue USD 70 million of convertible debentures as that was the amount which GL [Thailand] needed for the current period, and he suggested that *JTA invest USD 30 million*" [emphasis added]. MK also informed Asano that "the funds invested would be used for *GL* [Thailand]*'s retail financing business in Cambodia only*" [emphasis added], with no mention of loans made to the Borrowers.

(e) On 23 February 2015, MK sent an email to Asano representing that the funds of US$30m would be "the business fund for Cambodia":

> I was just about to write a reply to Mr. Fujisawa.
>
> I am anticipating 70M USD as the fund necessary in this term.
>
> Bank funding in Thailand would be totally fine, however, *if I could work with J-Trust, how about 30M USD 10B - CB?*
>
> *Also, the fund would be the business fund for Cambodia only.* I am planning to use W3 in Thailand only. ...
>
> [emphasis added]

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(f) On 6 March 2015, GL Thailand issued a news release in relation to GL Thailand's conclusion of an underwriting agreement of convertible bonds with JTA, stating that it was in the rapid business expansion period in Cambodia and the whole ASEAN region. The funds generated from the agreement would bring benefits to GL Thailand's business and expand profits of GL Thailand. In particular, it emphasised that *GL Thailand's business expansion of its operations in Cambodia would strongly contribute to an increase in GL Thailand's profits*.

150 Even after the 1st IA was executed and JTA had completed the subscription of GL Thailand's convertible debentures pursuant to the 1st IA, MK continued providing Fujisawa with positive updates on GL Thailand's financial performance and growth of GL Thailand's motorcycle retail financing business in Southeast Asia through emails and LINE messages.

(a) On 5 August 2015, MK sent an email to Fujisawa and Asano annexing the DBS Vickers Securities forecast report in respect of GL Thailand for *Q2 2015, projecting a further increase in GL Thailand's share price*.

(b) On 10 November 2015, GL Thailand released its financial statements for Q3 2015.

(c) GL Thailand announced its partnership with JTA on 28 December 2015 in a statement which specifically emphasised the "remarkable" profitability of GL Thailand's Cambodian operations and cited MK about GL Thailand's aggressive expansion in ASEAN due to its growth potential.

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(d) JTA thereafter exercised its right to convert the convertible debentures on 30 December 2015.

(2) Representations prior to JTA's entry into the 2nd IA

151 Prior to JTA's entry into the 2nd IA on 6 June 2016, the following representations were made by MK.

(a) On 15 February 2016, GL Thailand released its financial statements for FY 2015.

(b) MK admitted under cross-examination that he told JTA that *profits were growing in 2016*.

(c) On 6 May 2016, MK claimed in an email to Asano that GLH was GL Thailand's "biggest profit earner, whose profit [would] simply not diminish easily", that "[a]s for the performance, in the first quarter, [GL Thailand] reported the highest profits ever" and "*profits do not stop growing in Cambodia, Laos [and] Indonesia*" [emphasis added].

(d) On 12 May 2016, GL Thailand released its financial statements for Q1 2016. On 12 May 2016, MK sent LINE messages to Fujisawa and Asano, informing them that the final accounting audit of GL Thailand was released and GL Thailand's profits for 2015 had increased 100% compared to the previous year, that GL's Q2 2015 profits had increased by 120% and that "*limitless profit [was] being generated in Cambodia and Laos*" [emphasis added]. MK first claimed that he did not remember making representations about the limitless profits in Cambodia and Laos to Fujisawa. However, when confronted with the messages, MK still refused to acknowledge these

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representations, claiming that he did not understand if the translation was good and his impression of the wording was different, demonstrating his lack of credibility as a witness.

(e) On 18 May 2016, GL Thailand issued a press release on the 2nd IA, which stated that:

> [MK] is particularly bullish on the group's growth potentials in Cambodia where [GL Thailand] has pioneered the cost-effective digital finance platform which is now being applied to its businesses in other countries in the region. *He projected that [GL Thailand]'s portfolio in Cambodia will double from US$44m at the end of last year to about US$100m by the end of this year and further double to about US$200m next year.* Therefore, the new funds from the [JTA] convertible debentures are expected to be used up in two years.
>
> In Cambodia … [GL Thailand]'s thriving hire-purchase business covering motorcycles, agricultural machineries and solar panels has now expanded to cover financing for small and medium enterprises (SMEs) …
>
> [emphasis added]

(3) Representations prior to JTA's entry into the 3rd IA

152 Before JTA entered into the 3rd IA on 1 December 2016, MK made further representations to JTA that the funds being invested in JTA would be used for GL Thailand's thriving Cambodia operations.

(a) On 24 June 2016, MK stated at an Extraordinary General Meetings of GL Thailand's shareholders (which included JTA) that *the funds from the 2nd IA were to be used for GL Thailand's expansion of business in Cambodia* and enhance the diversification of portfolios in Cambodia by launching new finance products. On 27 June 2016, it was reiterated in a GL Thailand press release that the funds from the issuance

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of the convertible debentures and conversion of warrants would be used to *finance expansion in GL Thailand's existing markets of Thailand, Cambodia and Laos*.

(b) On 14 July 2016, in a LINE message to Fujisawa and Asano, MK stated that he foresaw "huge profits" in the third and fourth quarters of 2016 of "10 billion or so".

(c) Further, MK's LINE messages made multiple references to the financial statements and financial data of GL Thailand and GLH, contrary to MK's claim. For instance, on 11 August 2016, MK sent LINE messages to Fujisawa and Asano, stating that GL Thailand's "*financial statement this time ... it's beautiful*" [emphasis added] and asked them to look out for GL Thailand's return on equity and return on assets.

(d) On 15 August 2016, GL Thailand released its financial statements for Q2 2016. On 14 November 2016, GL Thailand released its financial statements for Q3 2016.

(4) Representations prior to JTA's open market purchases from 28 April 2017 to 11 September 2017

153 After the 3rd IA was entered into, MK continued making representations to Asano and Fujisawa when JTA was purchasing GL Thailand shares and warrants on the open market between April to September 2017.

154 On 28 February 2017, GL Thailand released its financial statements for FY 2016. GL Thailand's auditors, EY, released an independent report on GL Thailand's consolidated financial statements as at 31 December 2016 which

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highlighted the GLH Loans made to the Borrowers amounting to approximately US$59m at about 14.5% to 25% per annum. The interest earned during FY 2016 derived from these loans amounted to 485m Thai Baht, representing 38% of the consolidated profits of GL Thailand and its subsidiaries for FY 2016. This was the first time that JTA came to know of the details of the GLH Loans and the existence of the Borrowers. The release of GL Thailand's financial statements with EY's remarks resulted in a fall of GL Thailand's share price. This was reported in the media.

155 However, MK reassured Fujisawa over the phone that he should not worry as what had been reported in the media "was wrong" and that the Borrowers had bought some GL Thailand shares because they believed the share price would increase. With regard to the reference to the Cyprus Borrowers, MK explained that the Kiasrithanakorn family (referred to as the Honda family) were simply using a Cyprus vehicle *for tax purposes*. MK told Fujisawa that *the loans were still for the purposes of the Cambodian retail financing business* but they were being channelled by GLH through the Singapore and Cyprus Borrowers to *make use of their better legal and tax regimes*. MK repeated these points by way of LINE messages sent to Fujisawa on 6 March 2017:

> By making an announcement that the loans of dealership, etc. will be transferred from Singapore to Cyprus (some have already been transferred), and Cyprus will considered as a base for advancing into Eastern Europe and Africa, the market has come to a state like 'GL [Thailand] moves from Thailand to Cyprus. In the midst of the economic crisis…' and so on.. I'm sorry. *I'm just making use of the place where the taxes are simply cheaper than Singapore*, and where no tax is applied to the interest income of the loan. … No one moves to Cyprus market… Don't worry about it … As it is still terrible, the announcement will be made soon. *I think it would be good if there is a chance for [JTA] to get permission for 50M CD… We apologise for the inconvenience, but we will revamp the market immediately. It's a complete misunderstanding…* [emphasis added]

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156 MK then suggested to JTA on 6 March 2017 that given the fall in GL Thailand's share price, it would be an opportune time for JTA to invest further in GL Thailand at a discount by purchasing GL Thailand warrants through the following LINE messages:

> I think that [Fujisawa] considers this to be a very good chance. Warrant, etc can be bought in large quantities. […] Foreign stockholders can not buy [GL Thailand] stock right now … Unfortunately … as you have reached 49% … You can buy Warrant … All foreigners have no choice but to buy Warrant …

157 GL Thailand also issued a press statement on 6 March 2017, where MK stated that the GLH Loans were "extended to GL [Thailand]'s trusted long-time partners who are dealers in various products and services for which GL [Thailand] provides financing to end consumers" and these were "loans given to dealers of motorcycles, agricultural machineries, solar panels and various electrical appliances". The press statement stated that the GLH Loans were done in Singapore and Cyprus because "*the tax regimes in the two countries are favorable for such deals*" [emphasis added]. This was reiterated by MK's LINE messages to Fujisawa on 6 March 2017 that stated that the GLH Loans were merely a tax device:

> By making an announcement that the loans of dealership, etc. will be transferred from Singapore to Cyprus (some have already been transferred), and Cyprus will considered as a base for advancing into Eastern Europe and Africa, the market has come to a state like 'GL [Thailand] moves from Thailand to Cyprus. In the midst of the economic crisis…' and so on.. I'm sorry. *I'm just making use of the place where the taxes are simply cheaper than Singapore, and where no tax is applied to the interest income of the loan.* [emphasis added]

158 On 8 March 2017, MK repeated the above representations in a phone call with Asano, the minutes of which were recorded in a contemporaneous

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email from Asano to Mr Nobuiku Chiba from J Trust Japan's investor relations team:

> I just now had a phone call with Konoshita, and the overview is as follows.
>
> - The *companies in Singapore and Cyprus are Cambodian subsidiaries of the Honda Family*. They are having stocks held and are executing dealer financing via their company. Loans are being implemented from outside the country for *close to half of the dealers that cannot directly get a loan from within Cambodia for tax purposes because of the structure of the Tax ID tax system*
>
> - Motorcycles subject to that which was loaned, GL [Thailand] stocks, and hotel properties of the hotel enterprise owned by the Honda Family group enterprise are included in collateral. …
>
> [emphasis added]

159 Under cross-examination, MK denied that he made the above representations as was recorded by the contemporaneous minutes of the phone call. However, MK's denial was contradicted by another contemporaneous document – a slide chart prepared by JTA to inform its investors based on what MK had represented to Asano. The slide chart demonstrated that the GLH Loans were ultimately for the purpose of retail financing in Cambodia. When confronted with the slide chart, MK claimed that it was an internal document by JTA, was wrong and was different from what GL Thailand had published in March 2017.

160 However, MK's explanation was also untrue. On 13 March 2017, in response to the Exchange's public queries on 9 March 2017 seeking details of the GLH Loans, GL Thailand issued a statement claiming that the GLH Loans to the Cyprus Borrowers were provided as *part of GL Thailand's financing business in Cambodia* and the GLH Loans were not related-party transactions since the Borrowers were not connected parties.

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161 On 15 May 2017, GL Thailand released its financial statements for Q1 2017 followed by the release of its financial statements for Q2 2017 on 15 August 2017.

162 Given the above unchallenged evidence of Asano and Fujisawa, it is evident that MK made personal representations through LINE messages and emails, and to JTA through press releases, announcements, Extraordinary General Meetings that (a) GLH and GL Thailand were genuinely profitable companies in good financial health; (b) JTA's investments were intended to drive the growth of GL Thailand's retail financing business in Southeast Asia; and (c) the financial statements of GL Thailand could be relied upon to provide a true and fair picture of GL Thailand's financial position. These were however false representations of fact because (a) GL Thailand's financial statements were materially inaccurate and misstated in several aspects as a result of both levels of round-tripping (see above at [143]–[144]) and in no way could it be said that GL Thailand was *genuinely* profitable; (b) part of JTA's investments was not used to drive the growth of GL Thailand's retail financing business in Southeast Asia, but was instead used to fund the GLH Loans.

163 We note that the Judge observed that only US$95m out of JTA's US$210m of investments were traceable to the GLH Loans made to the Borrowers (Judgment at [18]). However, that is beside the point. As long as MK and GLH utilised *part* of the US$210m for *purposes other than* to drive the growth of GL Thailand's retail financing business, the falsity of MK's representation that *all* of JTA's investments would be used to drive the growth of GL Thailand's retail financing business would have been proven. This is because JTA never intended for *any* of its investments to be used for the GLH Loans and the two levels of round-tripping. Besides, the US$95m which was

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used to fund the GLH Loans formed a substantial portion of JTA's total investment of US$210m and could hardly be described as a *de minimis* amount.

164 Finally, as we found earlier at [99], we reject the "goodwill" defence as the GLH Loans were still not being used for the purposes of driving the growth of GL's retail financing business in Southeast Asia, contrary to MK's repeated representations.

165 In our judgment, JTA has sufficiently proven that false representations of fact were made by GLH and MK.

Reliance by JTA

166 In our judgment, there was reliance by JTA on MK's representations, as well as on GL Thailand's consolidated financial statements in (a) the conversion of the convertible debentures pursuant to the 1st IA; (b) entry into the 2nd and 3rd IA; and (c) JTA's open market purchases.

General impression of GL Thailand's financial statements

167 A misrepresentation need not be a sole inducement as long as it was a real and substantial inducement: *Panatron* ([138] *supra*) at [23]. The Judge found that the requirement of reliance on GL Thailand's financial statement was not satisfied as JTA was content on relying on a general impression of GL Thailand's profitability and it was more likely that JTA was satisfied with the performance of its investment (Judgment at [10]).

168 However, it is no defence to the tort of deceit that the plaintiff acted incautiously and failed to take steps to verify the truth of the representations that a prudent investor would have taken: *Panatron* at [24]. As we observed in

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JTrust (SUM 21) ([6] *supra*), it is no answer that Asano and Fujisawa failed to examine the consolidated financial statements in detail (at [52]). While an investor may not have fully appreciated the specific details in a financial statement, he is nonetheless entitled to rely on the "general impression of profitability" disclosed in GL Thailand's financial statements.

Conversion of convertible debentures pursuant to the 1st IA

169 The Judge took into consideration the fact that JTA could not claim that there were fraudulent misrepresentations in GL Thailand's financial statements that were published prior to the 1st IA since the GLH Loans were only made *after* entry into the 1st IA. The Judge found that this substantially diluted the force of JTA's submission that it had relied on GL Thailand's later financial statements when it made the second to fourth investments and converted the convertible debentures under the 1st IA (Judgment at [10]). The Judge then concluded that it seemed more likely that JTA was satisfied with the performance of its investment thus far and was prepared to continue investing money into GL Thailand.

170 In our judgment, the Judge erred in placing undue weight on this factor. It must be observed that even prior to JTA's *entry* into the 1st IA and its conversion of the convertible debentures, multiple representations were made by MK, which emphasised to JTA that GL Thailand was a genuinely profitable company in *good financial health* enjoying real returns from *expanding business operations in Cambodia* and that JTA's investments would be *utilised for GL Thailand's retail financing business in Cambodia* (see above at [149]). The Judge omitted to consider that JTA entered into the 1st IA on the basis of MK's representations which emphasised GL Thailand's *expectation of further profit growth in 2015* due to the performance of GL Thailand's Cambodia

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portfolio. Further, the Judge did not elaborate on how else JTA could have been "satisfied with the performance of its investment", which as we observed in *JTrust (SUM 21)* could only have been either on the basis of the revenue, assets and profits as reported in GL Thailand's financial statements or MK's personal representations of the current and expected profitability of GL Thailand (at [54]).

171 JTA only claimed for losses as a result of *exercising its option under the 1st IA for the conversion of the convertible debentures into GL Thailand shares* and that it did so in reliance upon GL Thailand's deceptive financial information that was communicated to JTA by MK and GLH through GL Thailand's financial statements. There is sufficient evidence that demonstrates this. Fujisawa's and Asano's unchallenged evidence establish that there was clear reliance on GL Thailand's financial statements as well as on MK's personal representations before JTA decided to convert the convertible debentures pursuant to the 1st IA.

(a) MK represented to Fujisawa on GL Thailand's *positive financial performance* and *growth of retail financing business* in Southeast Asia (see above representations at [149] and [150]). Sometime at the end of 2015, MK called Fujisawa and suggested that JTA should convert the convertible debentures into shares. MK said that if JTA did so, then GL Thailand would not have to pay any more interest to JTA in respect of the convertible debentures and would help to boost GL Thailand's share price.

(b) Fujisawa looked briefly at GL Thailand's financial statements for the first quarter of 2015 ("Q1 2015"), Q2 2015 and Q3 2015 released on 13 May 2015, 13 August 2015, and 10 November

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2015 respectively where they reported significant improvement in GL Thailand's revenue, assets and profits between 2014 and 2015.

(c) Asano reviewed GL Thailand's financial statements for Q1 2015, Q2 2015 and Q3 2015. Based on these financial statements and MK's verbal assurances that GL Thailand was *a genuinely profitable company with good financial health*, Asano obtained the impression that GL Thailand was "doing very well".

(d) Fujisawa testified that since GL Thailand's share price was increasing, the conversion price was lower than the market share price and converting the convertible debentures into shares was an attractive option for JTA.

Based on MK's personal representations and GL Thailand's financial statements, Asano and Fujisawa then decided that JTA should convert the convertible debentures that it held into shares. Thereafter, Asano presented a *proposal to convert the convertible debentures under the 1st IA* at the J Trust Japan Board of Directors meeting on 10 December 2015, which included information on GL Thailand's financial performance based on GL Thailand's Q3 2015 financial statements and MK's representations. Asano also explained to the Board of Directors that it was a good time for JTA to exercise its right to convert the convertible debentures because (a) it would strengthen JTA's cooperation with GL Thailand; and (b) enable JTA to realise profits on derivatives and reap capital gains as a result of GL Thailand's high share price. Thereafter, the Board of Directors of J Trust Japan and JTA passed resolutions to approve the conversion of convertible debentures on 10 December 2015. In our judgment, reliance is clearly demonstrated.

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2nd IA and 3rd IA

172 Equally, there is also sufficient evidence that JTA relied on the representations made by MK before JTA's entry into the 2nd IA (see above at [151]) and the 3rd IA (see above at [152]), along with GL Thailand's financial statements for FY 2015, Q1 2016, Q2 2016 and Q3 2016. In particular, MK told Fujisawa and Asano to look out for GL Thailand's "beautiful" financial statements and its return on equity and assets. It simply cannot be said that there was no reliance by JTA.

173 Further, the materials presented to the board meetings of J Trust Japan referred to information from GL Thailand's financial statements before it approved JTA's entry into the 2nd and 3rd IAs. This is contrary to GLH's and MK's submission that evidence of JTA's motivation to enter the 2nd and 3rd IAs did not cite GL Thailand's financial statements as a material factor. For instance, at a meeting to approve the 3rd IA on 31 October 2016, the meeting materials referred to information from GL Thailand's 2015 and Q2 2016 financial statements and expressly considered that "[a]lthough the net profit margin is on a decreasing trend, it is an extremely high level at 24.23%".

Open market purchase of GL Thailand warrants and shares

174 We also find that there was reliance on the representations by GLH and MK in JTA's decision for the open market purchases of GL Thailand warrants and shares.

175 GL Thailand's share price fell sharply after EY's remarks on GL Thailand's financial statements for FY 2016 on 28 February 2017, the Exchange's public notice to GL Thailand on 9 March 2017 and GL Thailand's clarificatory note to the Exchange's notice on 13 March 2017. GL Thailand's

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opening share price fell from 57.50 Thai Baht on 28 February 2017 to 34 Thai Baht on 10 March 2017, then to 17.70 Thai Baht on 13 March 2017 and finally to 12.40 Thai Baht on 14 March 2017.

176 After the release of GL Thailand's financial statements along with EY's remarks on 28 February 2017, MK had conversations with Fujisawa on the phone and through LINE messages about the falling share price of GL Thailand and EY's remarks. MK reassured Fujisawa that the GLH Loans were still for the purposes of Cambodian retail financing and were merely channelled through the Borrowers for tax purposes (see above at [154]–[155]). MK also told Fujisawa that when GL Thailand's investors properly appreciated the situation, GL Thailand's share price would recover soon and the sharp decline in GL Thailand's share price was thus only temporary. These representations were repeated via LINE messages sent to Fujisawa on 6 March 2017 (see above at [155]) and a phone conversation between MK and Asano on 8 March 2017 of which the minutes were recorded (see above at [158]). The press release by GL Thailand dated 6 March 2017 also declared that the GLH Loans were done in Singapore and Cyprus because of the allegedly favourable tax regimes in the two countries (see above at [157]). On 13 March 2017, GL Thailand issued a statement in its clarificatory note claiming that the GLH Loans to the Cyprus Borrowers were provided as *part of GL Thailand's retail financing business in Cambodia* and the GLH Loans were not related-party transactions since the Borrowers were not connected parties.

177 MK continued providing Fujisawa with positive updates on the growth of GL Thailand's retail financing business in Southeast Asia. Fujisawa's testimony is that he did not know that the loans were made to companies controlled by MK and that they were not genuine commercial loans. His

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immediate concerns were to protect the value of the investments made by JTA and to counter any potential drop in value. Since there was nothing to suggest that there had been any wrongdoing in relation to GL Thailand or its retail financing business and that GL Thailand's financial statements still showed good revenue, assets and profits, Fujisawa made a commercial decision for JTA to purchase more GL Thailand shares in the open market to stabilise GL Thailand's share price and benefit from any rise in share price given its continued profitability, on the basis of MK's reassurances and on *MK's suggestion* (see above at [156]).

178 On 13 March 2017, JTA proceeded to purchase 8,116,900 units of GL Thailand's warrants at the total price of 34,827,447.40 Thai Baht. After JTA started to purchase GL Thailand shares, MK continued to provide Fujisawa with positive reports on GL's financial performance and its share price through LINE messages. MK even sent Fujisawa assurances of the reversal of GL Thailand's share price through LINE messages on 2 April 2017:

> [o]nce this is done, it's gonna hit 1 trillion yen … Very quickly. […] If [GL Thailand's] stock price reverses normally, your profit will exceed 10 billion yen … […] This is going to reverse.

179 JTA was reassured by MK's messages that GL Thailand and its retail financing could still see further growth and improvement, as well as GL Thailand's financial statements for Q2 2017 which demonstrated an upward trend in GL Thailand's profits from Q1 2017 to Q2 2017. JTA purchased a total of 24,063,100 GL Thailand shares on the open market between 28 April 2017 and 11 September 2017, at a total price of 492,539,441.04 Thai Baht.

180 The Judge found that by early 2017, JTA was informed of the use of the Singapore and Cyprus Borrowers for tax reasons. The Judge took into

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consideration the fact that JTA's purchases of GL Thailand's shares on the open market were done "with the *full knowledge* of the GLH Loans" [emphasis added] (Judgment at [18]). However, the disclosure only came to light during MK's clarifications with Fujisawa and Asano in relation to GL Thailand's auditors' remarks on GL Thailand's financial statements for FY 2016. While JTA might well have learned about the GLH Loans by early 2017 through the remarks of GL Thailand's auditors on GL Thailand's financial statements for FY 2016, there is no evidence that JTA was equally aware of and condoned the "undoubtedly unusual" and "suspicious" nature of the GLH Loans, as well as the round-tripping. Even after JTA learned about the GLH Loans, MK continued to reassure Asano and Fujisawa that the loans were still for the purposes of the Cambodian retail financing business.

181 Further, it is clear that JTA did not know about the round-tripping and the wrongful use of its investments at the time of its purchase of the GL Thailand warrants and shares on the open market. If JTA genuinely had full knowledge of the GLH Loans (which includes the round-tripping), it would indeed have been odd for JTA to continue making open market purchases of GL Thailand's shares and warrants. If anything, it is reasonable to infer from JTA's continued open market purchases that JTA did not have full knowledge of the sham nature of the GLH Loans and clearly relied on MK's personal reassurances and GL Thailand's financial statements in its investment decision. It was only after the SEC Release that JTA instructed a forensic accounting firm in December 2017 to review GL Thailand's accounts from 2015 to 2017 and the GLH Loans.

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Warranties in the IAs

182 During the negotiations in respect of the 1st IA, JTA agreed to a limited due diligence based on publicly available information and GL Thailand's consolidated financial statements as of 9 March 2015 because GL Thailand had agreed to provide express warranties that its year-end 2014 financial statement (in the 1st IA) and year-end 2015 financial statement (in the 2nd and 3rd IAs) were accurate and were prepared in accordance with the applicable accounting standards. On 16 March 2015, during their negotiations of the terms of the 1st IA, JTA made it expressly clear through its lawyers in an email that it required "representation re accuracy of the financial statements".

183 MK and GLH sought to dilute the reliance placed by JTA on the accuracy of GL Thailand's financial statements, submitting that the warranties in the IAs were expressly confined to GL Thailand's consolidated financial statements for year-end 2014 (for the 1st IA) and for year-end 2015 (for the 2nd and 3rd IA). Because profits were inflated for GL Thailand's financial statements from Q2 2015 onwards, we accept that the warranty in the 1st IA would not be relevant in the alleged misrepresentations. MK and GLH also submitted that JTA had only expressly requested for the warranties before signing the 1st IA, and not for the 2nd and 3rd IAs. Further, the express warranty was made by GL Thailand (who is not a party to this action) and not by GLH or MK.

184 However, in our view, this does not change the fact that the accuracy of GL Thailand's financial statements, be it year-end or quarterly, was important to JTA. MK was in charge of both GLH and GL Thailand (Judgment at [9]) and the composition of the board of directors of both GL Thailand and GLH substantially overlapped in the period from 2015 to 2017. MK's and GLH's

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knowledge of the importance of the accuracy of GL Thailand's financial statements to JTA can thus be inferred from the parties' negotiations and the incorporation of the warranties in the IAs between GL Thailand and JTA. Further, GL Thailand's 2015 year-end financial statements warranted by the 2nd IA and 3rd IA would necessarily have incorporated financial information from its quarterly financial statements in 2015 (see above at [144]), which JTA relied on in its decisions to convert the convertible debentures in the 1st IA, enter into the 2nd and 3rd IAs, and its open market purchases. Coupled with MK's personal representations to JTA to refer to the "beautiful" financial statements in 2016, JTA relied on GL Thailand's consolidated financial statements in 2015 and 2016 (and by extension, its falsely inflated quarterly financial statements).

Alleged minuscule impact of GLH Loans

185 MK and GLH submitted that the total interest earned by GL Thailand in 2015 from the GLH Loans "amounted to a mere 5.4%" of GL Thailand's total 2015 revenue, hence demonstrating the "minuscule impact" of the GLH Loans revenue on the consolidated GL Thailand's financial statements.

186 However, this is the wrong metric to focus on. JTA rightly pointed out that even though the earned interest made up only 5.4% of the *total revenue*, it resulted in GL Thailand's *net profits* being artificially inflated by 30% for FY 2015, which would be considered material to an investor (where it is a misstatement of 10% or more in net profits). For FY 2016, the overstated profits was even higher at 61% (see [144] above). After all, it is indisputable that net profits of a company is a key metric that an investor relies on for the assessment of a company's intrinsic value relative to its share price.

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187 GLH and MK also asserted that at best, JTA's case was premised on the falsity of the "*degree* of profitability" [emphasis added] of GL Thailand. They argued that MK's representation that GL Thailand was "*genuinely profitable*" and in "*good financial health*" would therefore not be an operative representation on the *degree of GL Thailand's profitability*. However, in our judgment, it cannot be said that a company that had inflated a substantial proportion of its net profits with sham loans (see above at [143]) could legitimately be described as "*genuinely* profitable". More importantly, MK's representations clearly extended to degrees of profitability and made express references to GL Thailand's financial statements (*eg*, see above at [151] and [152]).

188 For the above reasons, we are satisfied that JTA's reliance was made out on the evidence and the Judge had erred in finding otherwise.

Dishonest intention

189 We turn now to the element of dishonest intention by GLH and MK.

Financial statements' purpose for GL Thailand's listing requirements

190 The Judge found GL Thailand's financial statements were prepared for the purpose of GL Thailand's listing requirements on the Exchange. However, that does not, in and of itself, exclude a finding of dishonest intention on the part of MK and GLH in fraudulently misrepresenting to a class of potential public investors including JTA. The Judge erroneously adopted a binary approach instead.

191 A representation made to a third person is actionable so long as it was communicated to a class of persons of whom the plaintiff is one, or even if it is

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made to the public generally, with a view of being acted on: *Panatron* ([138] *supra*) at [14]; *Thode Gerd Walter v Mintwell Industry Pte Ltd and others* [2009] SGHC 44 ("*Thode*") at [32]. So long as JTA, as one of the members of that class of persons to whom the representation was communicated, acts on the representation and suffers damage as a result, that would suffice as there is no requirement for the representation to have been made directly to JTA: *Thode* at [32]; *Richardson v Silvester* (1873) LR 9 QB 34 at 36 citing with approval the judgment of the court in *Swift v Winterbotham* (1873) LR 8 QB 244 at 253; *Chitty on Contracts* vol 1 (Hugh Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2019) at para 7-028.

192 MK and GLH intended for the false representation of GLH's financial information, which was indisputably incorporated in GL Thailand's financial statements, to be directed at the general public. It matters not that JTA obtained GL Thailand's statements from "publicly accessible sources" (Judgment at [9]). The dishonest intention would have extended to the class of potential investors who would reasonably be expected to rely on these financial statements before making any investment decision.

193 Moreover, JTA was also the biggest and most prominent institutional investor of GL Thailand and was publicly announced as GL Thailand's "strategic partner" on 9 March 2015. GL Thailand and its subsidiaries only had 357,446,000 Thai Baht (approximately US$11.3m) in cash and cash equivalents as of 31 December 2014. JTA's investment in the 1st IA alone of US$30m was almost three times the size of GL Thailand's cash and cash equivalents. It is implausible that MK and GLH did not know or intend for their largest potential investor, JTA, to rely on the information contained in GL Thailand's financial statements for their investment decisions. Further, there were express warranties

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in respect of the accuracy of GL Thailand's 2015 year-end financial statements in the 2nd IA and 3rd IA, which the Judge appeared not to have taken into consideration in the Judgment.

194 The Judge thus erred in finding that the falsehoods in the financial statements could not have been directed at investors like JTA merely because they were prepared for the purpose of GL Thailand's listing requirements.

MK's dishonest personal representations

195 JTA correctly pointed out that the Judge did not address the dishonesty of MK's own representations to JTA. In finding that JTA's willingness to take MK's words at face value and its lack of due diligence bordered on negligence (Judgment at [11]), the Judge implicitly accepted that MK did make the representations as alleged by JTA and that JTA had relied on them albeit incautiously. More significantly, the representations were made prior to each investment by JTA in GL Thailand. The representations demonstrate MK's intention for JTA to review GL Thailand's financial statements (*eg*, see above at [151(c)] and [152(c)]). MK's dishonest intention can be inferred from his false representations of fact targeted at JTA.

GL Thailand as a listed company with its own directors

196 The Judge also held that since GL Thailand was a listed company with its own board of directors, its decisions and that of GLH could not be solely attributed to MK (Judgment at [9]). However, the fact that the GLH Loans were approved by GLH's board every year should mean that if the loans were indeed shams, any such dishonest intention should be attributable to GLH's board of directors including MK. The Judge's reasoning is further contradicted by his own finding that MK was "in charge" at both GL Thailand and GLH (Judgment

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at [9]). Besides, it is not clear why it was even necessary for GLH's decisions to be *solely attributed* to MK since JTA's claim against MK was also based on MK's personal representations, over emails, LINE messages and over the telephone. If anything, MK's representations only served to reinforce the impression of expected growth and profitability of GLH and GL Thailand from the consolidated financial statements.

Provision of financial data by GLH to GL Thailand

197 The Judge also found that JTA had not shown how GLH's intent figured into the preparation of GL Thailand's financial statements. He observed that GL Thailand's financial statements incorporated GLH's financial data, but that in itself could not support JTA's assertion that GLH actively provided that data and thereby made representations to JTA as it intended or knew that such data would be communicated to JTA (Judgment at [9]). MK and GLH submitted that this finding is correct because GLH did not "provide" its financial data to GL Thailand for incorporation into its financial statements.

198 GLH's case is that it did not keep its own financial records or prepare its own accounts. GLH had no accounting department of its own and its records were kept by GL Thailand's accounts staff who were based in Bangkok and the actual book keeping and preparation of accounts for GLH was done by a third party service provider, Boardroom Solutions Pte Ltd ("Boardroom") who was instructed by and who liaised with GL Thailand's staff, not GLH's staff. GLH and MK submitted that it was GL Thailand, not GLH, who had access to GLH's accounts kept by Boardroom. GL Thailand's personnel unilaterally retrieved and used information of GLH that they needed, with no involvement from GLH. Therefore, GLH never represented or "provided" the figures or data to GL Thailand at all. GLH sought to distance itself, arguing that it had no input

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or control over how its financial information was presented at the group level in GL Thailand's financial statements and could not be liable for something that GL Thailand was solely responsible for.

199 However, this argument is plainly misguided. The evidence adduced at the trial was that when GLH entered into a transaction or a loan, it would first be entered into GLH's accounting records in the form of ledgers or spreadsheets. These ledgers or spreadsheets would be provided to Boardroom to prepare the official GLH accounts. GL Thailand's account team would thereafter obtain the financial information from all of GL Thailand's subsidiaries (including GLH) which would be drawn up and kept by Boardroom in order to prepare GL Thailand's consolidated accounts. GLH had to *positively* grant access to and provide its financial information to Boardroom Solutions and GL Thailand's account team. Given that GLH was GL Thailand's subsidiary, it is plain and obvious to us that GLH would have known that anything it reported in relation to its revenues and profits would likewise be reflected in GL Thailand's accounts and its consolidated financial statements.

200 Further, the Judge found that MK was in charge of both GL Thailand and GLH. The decisions made by GL Thailand would have been attributable to MK, who was also a director of GLH. The annual accounts of GLH and the GLH Loans were also approved by the GLH's board of directors. It also cannot be said that GLH was unaware of and did not dishonestly intend for GLH's financial data to be incorporated into GL Thailand's financial statements. The composition of the board of directors of both GL Thailand and GLH substantially overlapped for the period from 2015 to 2017. GLH's complicity in the round-tripping also indicates that GLH knew that the GLH loans were

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shams, some of the principal loan amounts were in fact used to repay the interest and GL Thailand's financial statements were falsely inflated.

201 In our judgment, the Judge's finding that GLH's financial statements were not prepared with the requisite dishonest intention was plainly wrong and against the weight of the evidence before the court. JTA had adequately demonstrated how GLH's intent figured in the preparation of GL Thailand's financial statements.

202 For the above reasons, we find that JTA has made out all the elements of its claim of deceit against GLH and MK and we therefore allow JTA's appeal for the deceit claim.

Unlawful conspiracy claim

203 We now turn to JTA's unlawful conspiracy claim. JTA's claim for the tort of conspiracy is that the first to seventh respondents had an agreement to fabricate GL Thailand's accounting records, exaggerate GL Thailand's operating results and conceal the true nature of the GLH Loans in order to defraud JTA into believing that GL Thailand's financial performance was better than it truly was.

Relevant legal principles

204 The elements of a tort of conspiracy by unlawful means are well established: (a) a combination of two or more persons and an agreement between them to do certain acts; (b) the conspirators intended to cause damage or injury to the plaintiff by those acts; (c) the acts were unlawful; (d) the acts were performed in furtherance of the agreement; and (e) damage was suffered

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by the plaintiff: *Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2008] 1 SLR(R) 80 at [23].

Intention to cause loss to JTA

205 The Judge dismissed JTA's claim in conspiracy because it failed to prove that Cougar and the Cyprus Borrowers had an intention to cause injury to JTA. The Judge observed that no conclusive evidence was tendered to demonstrate that MK's fraudulent intention was attributable to Cougar and the Cyprus Borrowers as they were merely instruments under his control and that though unusual, the existence of the GLH Loans alone could not amount to sufficient evidence for a finding of dishonesty (Judgment at [21]).

206 However, the Judge appeared not to have considered the objective evidence on the round-tripping and the involvement of Cougar and the Cyprus Borrowers. As we found above at [111], MK was the true beneficial owner of Cougar and the Cyprus Borrowers. Cougar was a knowing participant in the first level round-tripping under MK's instructions (see above at [51]–[64]), while Cougar and Adalene were complicit in the second level round-tripping (see evidence on second level round-tripping above at [69]–[76]). Given that JTA has also proved the two levels of round-tripping, it is evident that Cougar and the Cyprus Borrowers were complicit, knew that the GLH Loans were shams and the profits in GL Thailand's financial statements were consequently falsely inflated. The first to seventh respondents' intention to injure can thus be inferred from their involvement in the two levels of round-tripping.

207 We also observe that the Judge did not have the benefit of the fresh evidence which was adduced on appeal with leave. The Fidescorp Documents demonstrate that (a) MK controlled Cougar by instructing Fidescorp and Savvas

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in relation to the operations of Cougar's accounts, including the round-tripping; and (b) MK had access to the bank accounts of Cougar and the Cyprus Borrowers. The Vontobel Documents also demonstrate that the Borrowers were not truly independent of MK or GLH, as it was MK who had repaid the GLH Loans through APF BVI (see above at [92]).

208 MK and GLH submitted that the unlawful conspiracy claim is illogical because GLH, being a subsidiary of GL Thailand, had its fortunes tied to GL Thailand and if the GLH Loans were indeed "irrecoverable transfers of money" as claimed by JTA, GLH would bring about its own financial ruin and that of its parent company. MK and GLH submitted that since the object of the first level round-tripping comprised the passage of JTA's investment monies through various MK-controlled companies to acquire further shares in GL Thailand and maintain MK's control over GL Thailand, the object of the scheme was *not to cause injury* to JTA but in fact, *benefited* JTA as a sizeable shareholder because MK expected GL Thailand to continue to flourish and allow its share price to rise. This, they argued, indicates that the object of the scheme could not have been to cause loss to JTA.

209 JTA correctly characterised this as an argument that since a fraudster did not expect to be discovered, he did not intend to cause loss to his victims. The real effect of the scheme was to artificially inflate GL Thailand's financial results, its share price and to increase MK's share in GL Thailand *at the expense* of investors such as JTA, who were purchasing shares in GL Thailand at an inflated but illusory price in reliance on false representations by GLH and MK. JTA would never have invested in GL Thailand had it known about the use of its investments and the true nature of the GLH Loans. This exposed JTA to the risk of the eventual discovery of the fraud, which in fact materialised and caused

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losses to JTA. The injury caused to JTA would have been intended as a means to an end for MK's benefit: *EFT Holdings Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [101].

210 For the above reasons, we find that JTA has proven the element of intention to cause loss to JTA and find the first to seventh respondents liable under the unlawful conspiracy claim. We accordingly allow JTA's appeal for the unlawful conspiracy claim.

Exclusion of GL Thailand as a party

211 We turn to deal with a factor that the Judge considered in dismissing both the deceit claim and the unlawful conspiracy claim: the exclusion of GL Thailand as a party to the proceedings.

212 MK and GLH submitted that if JTA truly believed that GL Thailand's financial statements contained deliberate falsehoods, the party to sue for the misrepresentation should have been GL Thailand, not GLH. The Judge also noted that the exclusion of GL Thailand for "reasons unknown unfortunately made it difficult to understand the dynamics between the parties" (Judgment at [9]). We disagree with the Judge's observations and cannot see how GL Thailand's exclusion as a party would be fatal to JTA's claim.

213 There is no rule that every alleged conspirator must be made a defendant for a conspiracy action to succeed. Liability for the tort of conspiracy is joint and several, and a plaintiff is entitled to sue whomever he wishes: *Chan Kern Miang v Kea Resources Pte Ltd* [1998] 2 SLR(R) 85 at [20]. That said, if the party omitted from the suit is a protagonist in the alleged conspiracy, then the plaintiff will find it difficult, as a matter of evidence, to prove his case in the

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absence of the court hearing from that party: see *Fornet Enterprise Co Ltd v Howell Universal Pte Ltd and others* [2006] 2 SLR(R) 349 at [62]–[64]. Unless a good reason is provided for that party's omission as a defendant, the trial judge will have difficulty finding that the alleged conspiracy was proved: *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393 at [20]–[21].

214 We reiterate our views in *JTrust (SUM 21)* ([6] *supra*) on this issue at [89]:

> … it appears that MK was the main protagonist in the alleged conspiracy. The Judge found that MK was in charge of both GLH and GL Thailand (Judgment at [9]). The board of directors of GLH, as well as that of GL Thailand, were nearly identical at the material times. Unless it can be demonstrated how the omission to add GL Thailand as a party to the Suit constrained MK from adducing certain evidence, which we note was not even argued before the Judge, we fail to see how it would have made any evidential difference if GL Thailand had been added as a party to the Suit. The closing submissions of the respondents in the Suit made multiple references to the evidence given by "[w]itnesses from the management of GL [Thailand] and GLH" (meaning, MK, TK and Mr Tashiro). There is simply no evidence before the court that additional material witnesses would have been called to testify had GL Thailand been added as a party. In any case, it was entirely open to MK to call witnesses from GL Thailand for his defence even if GL Thailand was not a party to the Suit. There is no rule that witnesses are somehow limited to persons who are employed by the parties in the action.

215 We also reiterate our previous observations in *JTrust (CA 46)* ([4] *supra*), that the exclusion of GL Thailand was neither critical nor fatal to JTA's claim (at [49]–[50]), especially since JTA had a good reason for not including GL Thailand as a defendant:

> … If [MK] were omitted as a defendant, perhaps that would have a critical negative bearing on the viability of the Conspiracy Action but, in our view, not so with [GL] Thailand's omission.
>
> In any event, [JTA] has a good reason for not including [GL] Thailand as a defendant. The investment agreements are

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> governed by Thai law and provide for disputes to be subject to the jurisdiction of the Thai courts. It is therefore entirely legitimate for [JTA] to pursue its claim in contract on the debentures against [GL] Thailand in Thailand, as it has done, and to pursue a separate claim in tort in Singapore against those entities which are part of the alleged conspiracy to defraud it.

216 For the above reasons, the exclusion of GL Thailand as a party to the proceedings was not fatal to either the deceit or the unlawful conspiracy claims.

Abuse of Process

217 In the Suit, the respondents argued that JTA's act of taking control of Cougar was an abuse of process justifying the court's dismissal of JTA's claim in its entirety. On appeal, YK submitted that JTA's claim should be dismissed as the claim is an abuse of process. The Judge noted that Cougar was under the control, indirect or otherwise, of JTA who had funded Saronic's role in the litigation, who now controls Cougar (Judgment at [22]).

218 Evidence was led at the trial that JTA paid Rithivit to transfer his shares in POH to Saronic, and paid for Hopkins and Messrs Perun Consultants' ("Perun") fees. Perun was engaged by JTA on 23 May 2018. The arrangement between JTA and Perun involved the transfer of the shares of POH from Rithivit to Saronic, a newly incorporated company in Hong Kong with Hopkins as its sole shareholder and director. The transfer of the POH shares was effected by way of a share transfer agreement dated 12 June 2018 for the nominal sum of US$1. JTA's funding of all of Perun's and Hopkins' fees and expenses amounted to S$3m. Rithivit stated in a written document submitted to the Cambodian courts that he collaborated with JTA and the transfer of POH shares to Saronic was "in accordance to the main collaboration agreement between [Rithivit], [J Trust Japan] and [JTA]". As a result, Cougar maintained a neutral

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stance in the Suit. YK argued that the sting of the abuse of process lies in JTA having wrestled control of an adverse party and using that party to aid and advance its case, as Cougar did not challenge any of JTA's witnesses in cross-examination at the trial.

219 However, even taking YK's case at its highest that JTA had taken over control of Cougar, it has not been proven that there is any causal link between the alleged abuse of process and the fruits of the judgment. The taking control of Cougar took place on 12 June 2018 only *after* the alleged involvement of Cougar in relation to the GLH Loans and the two levels of round-tripping (see above at [9]). Hence it had nothing to do with the events which occurred *ie*, the deceit and unlawful conspiracy, before Saronic took over control of Cougar at the behest of JTA.

220 Even though it appears that Cougar had indeed aligned itself with JTA, we agree with the Judge's holding that JTA's conduct had not risen to the level where striking out its entire claim was justified. This is especially since JTA's claim was "not wholly unmeritorious in light of the unusual nature of the GLH Loans", as the Judge observed (Judgment at [23]). For the above reasons, we find that the Judge was correct not to strike out JTA's claim on the ground of abuse of process. It would have been wholly disproportionate particularly in light of our findings on the merits of JTA's claims against the respondents.

Damages

221 Having found MK and GLH liable for the deceit claim and the first to seventh respondents liable for the unlawful conspiracy claim, we now turn to the assessment of damages.

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Relevant Facts

222 We start by summarising the material facts relevant for the assessment of damages.

223 As mentioned above (at [13]), JTA invested in three tranches of convertible debentures issued by GL Thailand, namely, US$30m under the 1st IA dated 20 March 2015, US$130m under the 2nd IA dated 6 June 2016, and US$50m under the 3rd IA dated 1 December 2016. On 30 December 2015, the convertible debentures issued under the 1st IA were converted by JTA into 98.1m GL Thailand shares at 10 Thai Baht per share.

224 On 13 March 2017, JTA proceeded to purchase 8,116,900 units of GL Thailand's warrants at the total sum of 34,827,447.40 Thai Baht. Between 28 April 2017 and 11 September 2017, JTA purchased a total of 24,063,100 GL Thailand shares on the open market at prices ranging from 17 to 22 Thai Baht, at a total sum of 492,539,441.04 Thai Baht (including proceeds and commission).

Interests, dividends and warrants issued

225 GL Thailand paid the following dividends to JTA in relation to the converted debentures issued under the 1st IA:

(a) 13,773,240 Thai Baht on 26 May 2016 for the 98.1m shares; and

(b) 24,191,460 Thai Baht on 25 May 2017 for the 98.1m shares.

226 GL Thailand also paid a total of US$7.5m in interest for the 1st, 2nd and 3rd IAs, up until September 2017. Payments ceased because JTA filed a rehabilitation petition for the business reorganisation of GL Thailand

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("Rehabilitation Proceeding") against GL Thailand in the Central Bankruptcy Court of Thailand which triggered a stay of interest payments.

227 On 2 August 2016, GL Thailand issued one warrant for every 9 shares held and JTA received 10.9m W4 warrants in August 2016.

228 On 1 June 2017, JTA received 705,893 Thai Baht (after deduction of withholding tax) as dividend payment for 2,862,500 GL Thailand shares (acquired by JTA on 28 April 2017 as part of JTA's open market acquisitions of GL Thailand shares).

Disposal of warrants

229 JTA has since sold all but 500,000 of its units of GL Thailand warrants in the open market. JTA disposed of 471,800 units of GL Thailand warrants on 8 September 2017 for 2,127,487.74 Thai Baht, and a further 18,045,100 units of GL Thailand warrants on 26 September 2017 for 90,492,567.48 Thai Baht.

JTA's claim

230 Under the Suit, JTA claimed for damages as a result of the deceit and the conspiracy. JTA's case is that had it known GL Thailand's true financial performance, true nature of the loans, or that JTA's investments would have been misappropriated by MK for his own benefit, JTA would not have:

(a) converted the convertible debentures it obtained under the 1st IA;

(b) invested the aggregate sum of US$180m under the 2nd IA and 3rd IA; and

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(c) purchased in the open market 8,116,900 units of warrants of GL Thailand's shares and 24,063,100 shares of GL Thailand.

231 JTA claimed for (a) the principal sum paid by JTA for its investments in GL Thailand; (b) the costs and expenses incurred by JTA in connection with these investments; and (c) the consequential loss, being JTA's loss of opportunity of deploying the funds invested in GL Thailand into other investments; (d) minus the income (*ie*, dividends, interest, warrant issues) received by JTA to date as a result of its investments in GL Thailand, amounting to an aggregate sum of US$230,215,216.12.

232 JTA argued that it is entitled to all the monies it has paid over to GL Thailand, including opportunity costs and associated expenses because JTA should be restored to its position it would have been in had the torts of deceit and conspiracy not been committed: *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [387].

Potter's reference date

233 Potter's expert report dated 28 June 2019 calculates the losses suffered by JTA based on two scenarios:

(a) that it was and continues to be reasonable for JTA to hold the GLThailand shares on 31 May 2019, and Potter used complete market data up to 31 May 2019, being the last month prior to the issuance of Potter's report ("Scenario A"); or

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(b) that JTA could have disposed of its shares in GL Thailand on 26 December 2017 when it commenced legal proceedings in Singapore ("Scenario B").

234 In its claim, JTA adopted Potter's calculations based on Scenario A: as of 31 May 2019, it continues to be reasonable for JTA to hold GL Thailand shares. MK and GLH argued that it is arbitrary for Potter to select the two dates to assess the value of GL Thailand shares – since it does not account for the fact that GL Thailand's share price changes every day. However, this argument is unpersuasive since the court has to quantify the actual loss to JTA from a particular reference date. MK and GLH also did not offer any alternative date as a reference point. We see no issue with using 31 May 2019 as the reference date, since that was the last day of the month with complete data before the generation of Potter's report in June 2019.

235 In his calculation of damages, Potter broke down the losses suffered by JTA from the four investment decisions (*ie*, the conversion of the convertible debentures in the 1st IA, the entry into the 2nd and 3rd IAs, and the open market purchases) into: (a) JTA's absolute loss; (b) JTA's opportunity costs; and (c) subtracts the interest, dividends and warrants received by JTA. We will deal with the absolute loss suffered by JTA and the interest received by JTA for each investment decision before dealing with the opportunity costs claimed (at [255]–[256] below).

Losses suffered from the conversion of convertible debentures under the 1st IA

236 JTA claimed for the losses suffered as a result of the conversion of the convertible debentures obtained under the 1st IA into GL Thailand shares, in

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reliance upon the deceit of GLH and MK, as well as the conspiracy perpetrated by the first to seventh respondents.

237 Taking into account the dividends paid by GL Thailand in 2016 and 2017, proceeds received from disposal of GL Thailand warrants and assuming that JTA would have liquidated its 98.1m shareholding in GL Thailand on 31 May 2019 (Scenario A), the gross cash flow JTA would realise following the exercise of its conversion rights under the 1st IA would be approximately US$22.1m. Had JTA not exercised its conversion rights under the 1st IA as a result of the deceit or conspiracy, it would have realised approximately US$33.6m by way of interest payments and redemption of the principal sum. Potter calculated the absolute loss suffered by JTA as approximately **US$11.5m** (the difference between US$33.6m and US$22.1m) under Scenario A.

238 MK and GLH argued that JTA could have mitigated its loss by selling the converted GL Thailand shares at a profit any time from the date of conversion (on 30 December 2015) up to 30 October 2017 when the share price of GL Thailand shares fell below the conversion price of 10 Thai Baht. However, the deceit and conspiracy could not have been discovered prior to the publication of the SEC Release on 16 October 2017. MK and GLH are essentially asking JTA to mitigate its losses within two weeks of the SEC Release by selling the GL Thailand shares at a price above the conversion price. The fact remains that JTA was only able to reach a conclusion on the veracity of the Commission's news release following its own independent investigations in December 2017, by engaging a global risk consultancy firm, Control Risks, and a forensic accounting firm, MDD, to review GL Thailand's accounts and the GLH Loans. In light of the above, we reject MK's and GLH's arguments.

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239 We accept Potter's calculation for the absolute loss of US$11,524,135 suffered by JTA as a result of the exercise of conversion rights of the convertible debentures under the 1st IA.

Losses suffered under the 2nd IA and 3rd IA

240 Potter calculated the loss suffered by JTA under the 2nd IA and the 3rd IA (in Scenario A) as follows:

	2nd IA	**3rd IA**
Principal Sum	US$130,000,000	US$50,000,000
Opportunity Cost	US$22,982,736	US$6,793,064
Interest received	(US$5,525,146)	(US$1,062,500)
Total net loss	**US$147,457,591**	**US$55,730,564**

241 By way of the 2nd and 3rd IAs, JTA purchased convertible debentures, the terms of which provided that GL Thailand would redeem the convertible debentures by returning 100% of the principal sum to JTA upon maturity, and would make interest payments in the interim.

242 However, MK and GLH argued that no actual loss has been suffered by JTA, and that JTA is claiming for potential or prospective loss. MK and GLH pointed out that in Potter's assessment of the damages, Potter had been wrongly instructed to assume that JTA would not recover the principal sums (namely, US$130m and US$50m respectively) or the unpaid accrued interest payable under the 2nd and 3rd IAs. MK and GLH argued that the only way that JTA

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could demonstrate a loss is if GL Thailand was unable to repay the principal sum upon maturity, which JTA had not proven. The benefits which JTA acquired upon entry into the 2nd and 3rd IA are the rights and entitlements against GL Thailand in relation to the redemption of the US$180m upon maturity of the convertible debentures, as well as the payment of interest. Since JTA continues to hold these very rights and has not proven that these rights have decreased in value or are unenforceable against GL Thailand, MK and GLH argued that JTA has not proven actual loss.

243 In our view, JTA has proven actual loss for the 3rd IA, but not for the 2nd IA. We explain.

244 In relation to the 2nd IA, JTA is only entitled to be repaid the principal sums of its investments in 2021. As such, there is presently no actual loss suffered by JTA. We observe that in order for JTA to prove actual loss under the 2nd IA, it should have quantified the *actual diminution in value of its rights* in relation to the redemption of the principal sum under the 2nd IA upon maturity of the convertible debentures.

245 Further, JTA has not proven that GL Thailand will not be in a position to pay back the principal sum for the 2nd IA in 2021. JTA commenced actions against GL Thailand and MK in Thailand, by way of the Rehabilitation Proceeding, which has been dismissed by the Central Bankruptcy Court of Thailand in March 2019 (at first instance) and dismissed by the Thai Court of Appeal for Specialised Cases on 29 September 2020 (filed on appeal by JTA on 15 August 2019). The Central Bankruptcy Court of Thailand found that JTA had not adduced evidence to demonstrate that GL Thailand had defaulted on its debts or was facing financial problems that it would not be able to pay debts as and when they fell due. Further, GL Thailand continues to do business and

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remains a listed company in Thailand. GL Thailand made annual profits of 289.54m Thai Baht in 2018. On 5 March 2020, the Thai courts assessed the damages payable by JTA for wrongfully commencing the Rehabilitation Proceeding and ordered JTA to pay GL Thailand damages amounting to approximately US$96m. It is therefore not evident that GL Thailand would be unable to repay JTA in 2021 for the 2nd IA.

246 As for the 3rd IA, JTA is already entitled to be repaid the principal sum of its investment by GL Thailand since the convertible debentures have matured (see above at [13(c)]). In our view, actual loss has been proven. MK and GLH pointed out that on 23 March 2020, GL Thailand exercised its right to set off the judgment debt amount of approximately US$96m against the sum of US$50m (principal repayment) and the accrued interest due to JTA upon maturity of the convertible debentures under the 3rd IA. However, we find the purported set off to be misconceived for several reasons. First, the right to set off is available to GL Thailand arising from the Rehabilitation Proceeding and not in favour of the first to seventh respondents who are liable for JTA's claims. Second, this is an issue which may arise for consideration at the *enforcement* stage, while the issue at hand is presently one of *liability* against different parties. We therefore find that JTA can claim for the principal sum of US$50m owed under the 3rd IA, minus the interest received by JTA amounting to US$1,062,500.

Losses suffered under the open market purchases of warrants and shares

247 Potter's calculation that JTA suffered US$9,514,428 of net absolute loss from the open market purchases is based on the loss in value of the GL Thailand

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shares bought as of 31 May 2019 under Scenario A, not including opportunity cost.

248 MK and GLH argued that instead of being induced by GLH or MK to make its open-market purchase of GL Thailand shares and warrants, JTA did so "opportunistically" to exploit the fall in GL Thailand's share price after the Exchange queried GL Thailand in March 2017 about the GLH Loans since JTA was of the view that GL Thailand's shares and warrants were undervalued.

249 On the other hand, Fujisawa's unchallenged evidence is that had JTA known the true nature of the GLH Loans and GL Thailand's true financial performance, JTA would not have purchased GL Thailand's shares and warrants in the open market. JTA's motivations for doing so was to stabilise GL Thailand's share price and benefit in any rise in share price, otherwise the fixed conversion prices set out in the 1st, 2nd and 3rd IAs would not be as beneficial to JTA.

250 As this court held in *The "Asia Star"* [2010] 2 SLR 1154 at [24]:

> … the aggrieved party may recover any expenses incurred in the course of taking reasonable steps to mitigate its loss (see *McGregor on Damages* at para 7-091). In short, the aggrieved party cannot recover avoidable or avoided loss; it may, however, recover expenses reasonably incurred in the course of taking mitigation measures. The evaluation of the aggrieved party's conduct in mitigation ought to start from the date of the defaulting party's breach, and the burden of proving that the aggrieved party has failed to fulfil its duty to mitigate falls on the defaulting party … This burden is ordinarily one which is not easily discharged.

251 Where the defendant's wrongful act causes the claimant to act in such a way, in the exercise or defence of his rights, that he suffers damage, the plaintiff can recover such damage from the defendant: *McGregor on Damages* (James

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Edelman, Simon Colton & Jason Varuhas gen ed) (Sweet & Maxwell, 20th Ed, 2017) ("*McGregor*") at para 8-067. The law also allows recovery for losses and expenses reasonably incurred in mitigation, even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken: *McGregor* at para 9-102.

252 On the balance of probabilities, we accept Fujisawa's claim that these purchases were to "protect the value" of JTA's investments and to "counter any potential drop in value". Stabilising GL Thailand's share price is a clear act of mitigation of the losses incurred by JTA as a result of the fall in share price, and the fact that the open market price of GL Thailand's shares and warrants were undervalued at that time does not make it any less an act of mitigation. JTA was entirely reasonable in taking action to purchase from the open market to reasonably protect JTA's own interests, especially when it was MK who advised Fujisawa to purchase the shares on the open market as the sharp decline in GL Thailand's share price was only temporary and would thus recover soon (see above at [156] and [176]).

253 For the above reasons, we accept Potter's calculation of the absolute loss of US$9,514,428 suffered by JTA as of 31 May 2019 as a result of the open market purchases of the warrants and shares.

Legal costs and expenses incurred by JTA in connection with its investments in GL Thailand

254 We also accept JTA's claim for all the legal costs and expenses incurred in respect of the investment agreements amounting to US$30,059.49 and S$129,124.67, as well as the costs of S$2,693.13 in respect of the conversion of the convertible debentures under the 1st IA.

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Opportunity Costs

255 JTA claimed for consequential losses in relation to the opportunity costs for its conversion of the convertible debentures pursuant to the 1st IA, its investments in the 2nd and 3rd IAs and its open market purchases of GL Thailand shares and warrants.

256 In this regard, we agree with MK and GLH that there is an issue of proof in relation to the purported "opportunity costs" of JTA's investments. According to Potter, he calculated that the appropriate rate to use when assessing the opportunity costs of JTA's investment in debentures issued by JTA was 7% on investments in debt of a comparable business, and approximately 13.5% for JTA's investment in GL Thailand's equity. However, MK and GLH rightly pointed out that Potter has not produced evidence to demonstrate the rate of returns that JTA typically earned on its investments. Potter also did not explain what he considered to be "comparable equity investments" or a "comparable business". Under cross-examination, Potter conceded that he was not asserting that JTA would have invested the monies elsewhere, but that it was *open* to JTA to have done so. In any case, we find that JTA has not adduced sufficient evidence to prove that it would have invested the principal sums to achieve the estimated rate of return calculated by Potter in alternative investments but for their investments in GL Thailand. Potter's measurement of opportunity costs is therefore purely hypothetical in nature. Furthermore, there is no evidence that because of its investments in GL Thailand, JTA did not have other sources of funds for other investments. We therefore find that JTA should not be allowed to recover under this head of claim.

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Conclusion

257 In conclusion, we allow JTA's appeal against the Judge's decision in relation to its claims in the tort of deceit and unlawful conspiracy. We accordingly find the first to seventh respondents jointly and severally liable under the following heads of claims:

(a) The absolute loss of US$11,524,135 suffered by JTA for the conversion of the convertible debentures under the 1st IA;

(b) The absolute loss of US$48,937,500 suffered by JTA under the 3rd IA (*ie*, the principal sum of US$50m minus the interest received by JTA of US$1,062,500);

(c) The absolute loss of US$9,514,428 suffered by JTA as of 31 May 2019 as a result of the open market purchases of GL Thailand's warrants and shares; and

(d) Costs and expenses incurred by JTA in connection with the investment agreements and the conversion of the convertible debentures under the 1st IA amounting to US$30,059.49 and S$131,817.80.

258 We will hear parties on costs. Parties are to file their costs submission in respect of costs here and below limited to 10 pages each within 14 days from the date hereof.

Andrew Phang Boon Leong Judge of Appeal	Steven Chong Judge of Appeal	Quentin Loh Judge

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Pillai Pradeep G, Simren Kaur Sandhu and Caleb Tan Jia Chween (PRP Law LLC) for the eighth respondent.

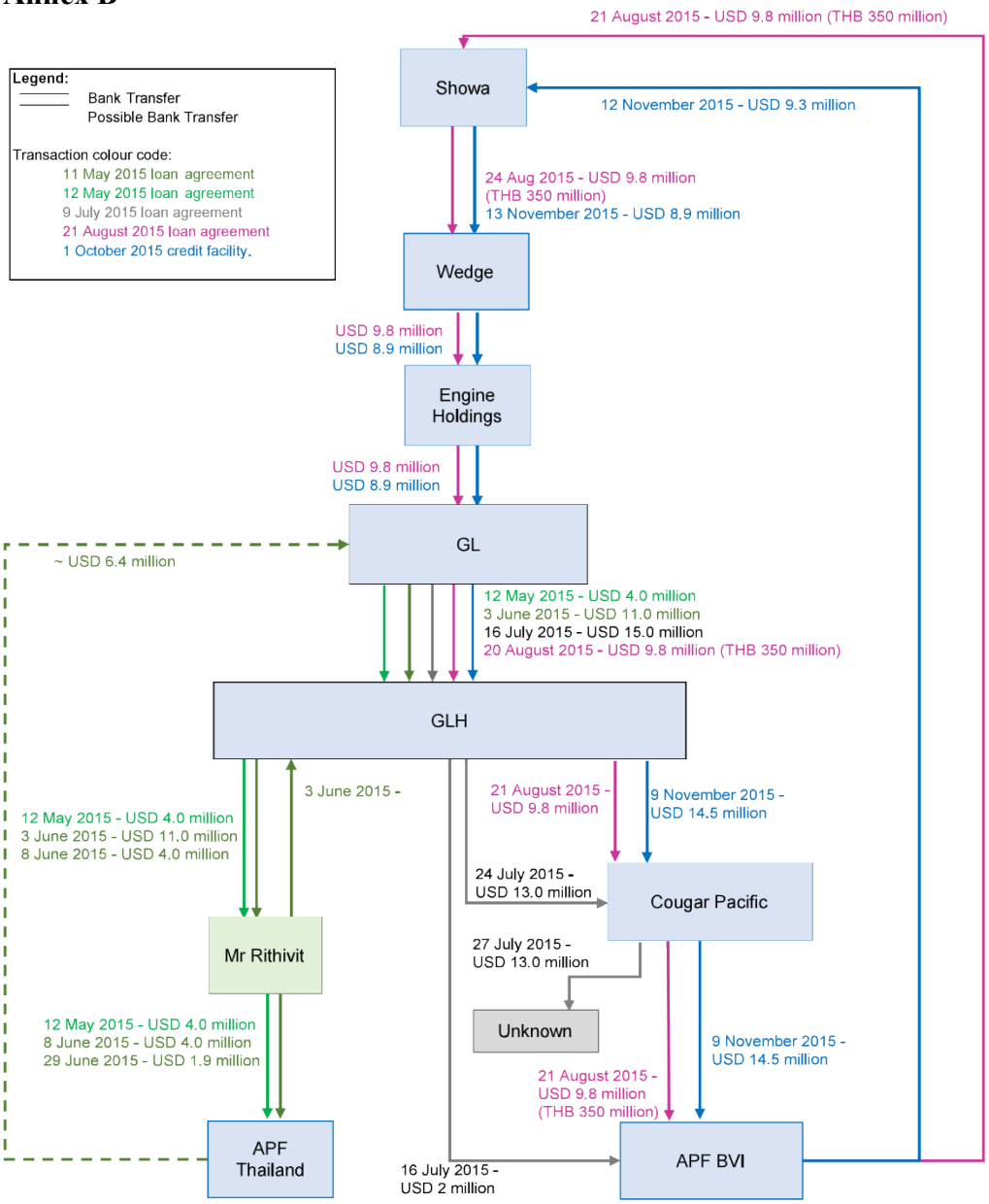
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Annex A

Date	Event
20 March 2015	**JTA enters into the 1st IA**
13 May 2015	GL releases its financial statements for Q1 2015
22 May 2015	**JTA completes its subscription for USD 30,000,000 of GL's convertible debentures pursuant to the 1st IA**
13 August 2015	GL releases its financial statements for Q2 2015
10 November 2015	GL releases its financial statements for Q3 2015
30 December 2015	**JTA converts the debentures that it had acquired under the 1st IA to GL shares**
15 February 2016	GL releases its financial statements for FY 2015
12 May 2016	GL releases its financial statements for Q1 2016
6 June 2016	**JTA enters into the 2nd IA**
1 August 2016	**JTA completes its subscription for USD 130,000,000 of GL's convertible debentures pursuant to the 2nd IA**
15 August 2016	GL releases its financial statements for Q2 2016
14 November 2016	GL releases its financial statements for Q3 2016
1 December 2016	**JTA enters into the 3rd IA**
28 February 2017	GL releases its financial statements for FY 2016
13 March 2017	**JTA purchases 8,116,900 units of GL warrants in the open market**
20 March 2017	**JTA completes its subscription for USD 50,000,000 of GL's convertible debentures pursuant to the 3rd IA**
15 May 2017	GL releases its financial statements for Q1 2017
15 August 2017	GL releases its financial statements for Q2 2017
28 April 2017 – 11 September 2017	**JTA purchases 24,063,100 GL shares in the open market**

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Annex B



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