IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC(I) 16

Suit Nos 7–9 of 2018

Between

(1) Hai Jiao 1306 Ltd

… *Plaintiff in S 7/2018*

(2) Hai Jiao 1207 Ltd

… *Plaintiff in S 8/2018*

(3) Hai Jiao 1307 Ltd

… *Plaintiff in S 9/2018*

And

Yaw Chee Siew

… *Defendant*

JUDGMENT

[Contract] — [Contractual terms] — [Express terms] — [Best endeavours]
[Contract] — [Breach]
[Contract] — [Misrepresentation]

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v
Yaw Chee Siew

[2020] SGHC(I) 16

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(Consolidated with Suit Nos 8 and 9 of 2018)
Kannan Ramesh J, Patricia Bergin IJ and Sir Henry Bernard Eder IJ
11–15, 18–21 November 2019, 9–10 January, 11, 14 February, 8 May 2020

13 July 2020 Judgment reserved.

Sir Henry Bernard Eder IJ (delivering the judgment of the court):

Introduction

1 The plaintiffs are three special purpose vehicles controlled by ICBC Financial Leasing Co Ltd ("ICBCL"). Each of them is incorporated in the Marshall Islands. ICBCL is a state-owned company in the People's Republic of China ("PRC"), and is a wholly-owned subsidiary of Industrial and Commercial Bank of China ("ICBC"). ICBCL is in the business of ship leasing with strong roots in the maritime and offshore industry.

2 The defendant, Mr Yaw Chee Siew (the "defendant" or "Mr Yaw"), is an individual who was at all material times the sole director and Executive Chairman of Otto Marine Limited ("OML"). OML was a Singapore-incorporated company originally listed on the main board of the Singapore Stock Exchange ("SGX") until its delisting on 6 October 2016. At its heyday,

OML controlled a large fleet of offshore vessels through its group of companies, collectively, the Otto Marine Group ("OM Group"). Following its delisting and until it entered liquidation on 5 October 2018, OML was wholly owned by Ocean International Capital Limited ("Ocean International"), a company incorporated in the British Virgin Islands which was beneficially owned by the defendant and of which the defendant was the sole shareholder and director.

3 In 2013 and 2014, ICBCL provided substantial financing to OML in relation to three super-large anchor handling tugs, *ie*, the "Go Phoenix", "Go Pegasus" and "Go Perseus" (collectively, the "vessels"). The agreed financing was up to the value of US$255m, of which US$185.5m was paid by ICBCL to OML and the remaining US$69.5m was in the form of OML's seller's credit. In summary, the financing took the form of what was, in effect, a sale-and-leaseback of each of the vessels whereby each of the plaintiffs became registered owners of each of the vessels and then chartered them back to companies in the OM Group under separate bareboat charterparties. In summary:

(a) The Go Phoenix and the Go Pegasus were both chartered by the second plaintiff (*ie*, Hai Jiao 1207 Ltd) and the third plaintiff (*ie*, Hai Jiao 1307 Ltd) respectively to Otto Fleet Pte Ltd ("Otto Fleet"), a subsidiary of OML under separate bareboat charterparties both dated 26 July 2013 (respectively the "Go Phoenix BBC" and the "Go Pegasus BBC"). In addition, a corporate guarantee was issued by OML in favour of the second plaintiff and third plaintiff, guaranteeing as primary obligor the due and punctual performance by Otto Fleet of all its obligations under the two bareboat charterparties, including its payment of charter hire amongst other things.

(b) The Go Perseus was chartered by the first plaintiff (*ie*, Hai Jiao 1306 Ltd) to another separate entity within the OM Group, Go Offshore (L) Pte Ltd ("Go Offshore") under a separate bareboat charterparty dated 26 December 2014 (the "Go Perseus BBC"). In addition, OML and Go Offshore's parent company, Go Marine Group Pty Ltd ("Go Marine"), which was itself a wholly owned subsidiary of OML, extended a corporate guarantee jointly and severally in favour of the first plaintiff, guaranteeing as primary obligors the due and punctual performance by Go Offshore of all its obligations under the Go Perseus BBC.

We refer to the Go Phoenix BBC, Go Pegasus BBC and the Go Perseus BBC collectively as the "BBCs"; Otto Fleet and Go Offshore collectively as the "Charterers"; OML and Go Marine collectively as the "Guarantors"; and the three corporate guarantees extended by OML and/or Go Marine in favour of each of the plaintiffs, as the case may be, collectively as the "guarantees".

4 Thereafter, crude oil prices suffered a marked decline, leading to significant fluctuations in oil prices coupled with an overall deterioration in upstream capital expenditure of oil and gas projects. This in turn had knock-on effects, which included depressed demand for offshore vessels, shipbuilding and subsea services. The utilisation and charter hire rates of the vessels were also severely impacted by the sharp decline in oil prices. The result was that financial difficulties hit the Charterers as well as OML and its related entities.

5 As a result, the defendant was desirous of delisting OML so that it would be easier for him to personally fund the Charterers and the Guarantors in order to enable punctual performance of the payment obligations under the BBCs and the guarantees. However, delisting OML would be a breach of a term in each of the BBCs and therefore the plaintiffs' consent was required.

6 Following various meetings and discussions in the course of mid-2016, the plaintiffs consented to the delisting of OML in consideration of the defendant agreeing to issue letters of support. These letters of support were drafted by ICBCL and sent to the defendant for his execution of the same (we subsequently refer to these letters as the "First Letters of Support"; see [54] below); they were subsequently amended, and eventually issued to the plaintiffs in September 2017 after extensive delay and protracted negotiations (in this amended form, the letters are subsequently referred to as the "Second Letters of Support"; see [140] below). The three Second Letters of Support were in identical form, but for the formal parts and provided in relevant parts as follows:

> To: [Hai Jiao 1207 Limited] [Hai Jiao 1306 Limited] [Hai Jiao 1307 Limited]
>
> From: Yaw Chee Siew, the majority shareholder and the Executive Chairman of Otto Marine Limited
>
> Dear Sirs:
>
> In consideration of your consent to the restructuring and potential delisting arrangement in relation to Otto Marine Limited (the "Guarantor") and…… (the "Charterer"), and forbearance at your sole discretion towards the Charterer and/or Guarantor, I, Yaw Chee Siew, hereby issue to [Hai Jiao 1207 Limited] [Hai Jiao 1306 Limited] [Hai Jiao 1307 Limited] (the "Owner") this Letter of Support that I will use best endeavours to support the Charterer and the Guarantor in meeting all obligations under or in relation to the Bareboat Charter Agreement between [Hai Jiao 1207 Limited] [Hai Jiao 1306 Limited] [Hai Jiao 1307 Limited] and the Charterer, and the relevant Guarantee issued by the Guarantor.
>
> This Letter shall not be construed as a guarantee and/or an indemnity. This Letter is legally binding and its obligations enforceable in accordance with its terms.
>
> 1. At all times during the terms of this Letter:
>
> (a) Upon delisting of the Guarantor from SGX, I shall use best endeavours to continue to own and hold no less than 70% percent of the legal and beneficial title to all the shares of the Guarantor;

> (b) I shall use best endeavours to procure that the title, rights and interests in the shares of the Charterer's Company are not pledged or in any way encumbered other than in accordance with the Bareboat Charter Agreement.

2. At all times during the term of this Letter, I shall use best endeavours to:

> (a) procure the Guarantor and Charterers to have sufficient liquidity to make timely payment of any amounts payable by the Guarantor and Charterers under or in respect of the Bareboat Charter Agreement and the Guarantee; and
>
> (b) procure the Guarantor and Charterers to remain solvent and a going concern at all times under the laws of the of its jurisdiction of incorporation or applicable accounting standards so long as any Charter Hire and/or any other obligations under or in respect of the Bareboat Charter Agreement and the Guarantee is outstanding.

3. If the Guarantor and Charterers at any time have insufficient liquidity or cashflow to meet any obligations under or in respect of the Bareboat Charter Agreement and the Guarantee as they fall due, I shall use best endeavours to procure for the Charterer (but shall in no way guarantee), before the relevant due date of the relevant obligations, sufficient funds by means as permitted by applicable laws and regulations so as to enable the Guarantor and Charterers to meet such obligations in full as they fall due.

4. Any rights and obligations which I have under this Letter will remain valid and binding notwithstanding any bankruptcy, receivership or liquidation of, or moratorium involving the Guarantor and Charterers.

5. This Letter shall remain in full force or effect so long as any obligation under or in respect of the Bareboat Charter Agreement or Guarantee remains outstanding.

6. This Letter and any non-contractual obligations arising out of or in connection with this Letter shall be governed by and construed in accordance with English law.

7. The terms of this Letter shall take effect retrospectively from 7 October 2016, and the parties

> shall be entitled to enforce their rights and obligations under the Letter from that date.

7 As stated above, OML was delisted on 6 October 2016. However, substantial amounts due under the BBCs remained unpaid. Thereafter, the first plaintiff eventually terminated the Go Perseus BBC on 15 November 2017; the second and third plaintiffs terminated the other two BBCs a little later on 31 January 2018. On 21 March 2018, OML was placed in judicial management. However, this failed, and OML subsequently entered liquidation on 5 October 2018. The result is that the plaintiffs have lost substantial sums of money and have outstanding claims including claims for loss of charter hire and damages.

8 The present proceedings were commenced by three separate writs of summons but were consolidated by order of court. In summary, the plaintiffs advance three main claims against the defendant personally *viz*:

(a) A claim for damages for breach of contract, *ie*, breach of what are said to be the obligations of the defendant as contained in the relevant letters of support – in particular, the obligation by the defendant to use "best endeavours" to support the Charterers and the Guarantors.

(b) A claim for damages for loss allegedly caused to the plaintiffs as a result of certain misrepresentations allegedly made by or on behalf of the defendant during the various meetings and discussions in the course of 2016 and relied upon by the plaintiffs. That case is advanced at common law on the basis that the said representations were made fraudulently or negligently and/or under s 2(1) of the Misrepresentation Act (Cap 390, 1994 Rev Ed) (the "Misrepresentation Act").

(c) A claim for damages for breach of what the plaintiffs say were one or more collateral undertakings by the defendant.

The total value of the claims advanced by the plaintiffs exceeds US$200m plus interest and costs.

9 The defendant denies any liability. Further, there are substantial issues concerning quantum which we deal with below.

10 In this Judgment, we set out the relevant factual background including certain important findings of fact before considering the main substantive issues as well as issues of quantum. However, before doing so, we should mention certain important preliminary matters in particular with regard to the overall shape of the trial and the evidence tendered by the parties.

The trial

11 The main part of the trial took place over nine days in November 2019. During that period, the following witnesses gave oral evidence and were cross-examined:

(a) On behalf of the plaintiffs:

(i) Mr Hong Xing (also known as Jacky Hong): Executive Director in the Shipping Finance Department of ICBCL. He joined ICBCL in July 2011 and left in March 2018.

(ii) Ms Cao Jiangxin: Senior Manager in the Oil and Gas Offshore Department of ICBCL.

(iii) Mr Yang Changkun: Head of Shipping Finance Department at ICBCL. He joined ICBCL in April 2013 and left in September 2018.

(b) On behalf of the defendant:

(i) The defendant himself, Mr Yaw.

(ii) Ms Chong Sieh Jiuan: Former Chief Financial Officer ("CFO") of OML ("Ms Chong").

(iii) Mr Ooi Kok Chye: Vice President, Treasury of OML ("Mr Ooi", also known as KC Ooi).

In passing, we should mention that the conduct of the trial was severely disrupted by, in particular (a) the necessity to deal with a number of outstanding applications on the first day of the trial; (b) the production by the defendant in the course of the trial of an avalanche of further documents by way of further disclosure; and (c) various applications on behalf of the defendant to serve additional affidavits of evidence-in-chief and call additional witnesses. It is unnecessary to refer to these events in detail. However, we should note that the result was that whereas the trial had originally been fixed to be completed within the allocated nine days in November 2019, this proved impossible and it became necessary to adjourn the remainder of the trial for the purpose of hearing the expert evidence and final closing oral submissions.

12 Following the first tranche of the trial, the parties served written factual closing submissions, and the adjourned trial resumed for a further two days in January 2020 when the following experts gave evidence and were cross-examined:

(a) On behalf of the plaintiffs, Mr Lee Antony Manning ("Mr Manning"). He is a chartered accountant as well as a licensed insolvency practitioner. He was previously a partner at Deloitte in London for 14 years and is currently a partner in Resolve Advisory.

(b) On behalf of the defendant, Roderick John Sutton ("Mr Sutton"). He is a practising Certified Public Accountant in Hong Kong and a Chartered Accountant in Australia. He is a Special Advisor to the Asia Pacific Region of FTI Consulting and is based in Hong Kong and Singapore.

In broad terms, the expert accounting evidence covered two main issues *viz*:

(a) The assets that were available to the Charterers, OML and the defendant to meet the payments due under the BBCs. This is relevant, in particular, to the plaintiffs' breach of contract claims.

(b) What the plaintiffs would have been likely to recover had they declared events of default under the BBCs, terminated them and taken recovery action against the Charterers and/or the Guarantors in 2016. This is relevant to the plaintiffs' misrepresentation claims.

13 Following that hearing, the parties served written closing submissions on the expert evidence. A final hearing took place over two days in February 2020 when counsel made final closing oral submissions. Thereafter, in May 2020, further written submissions were invited for parties to address the issue of whether there was to be a single mortgage over the Parkcity Everly Hotel Bintulu (the "Bintulu Hotel") in favour of all three plaintiffs for US$14m, or a mortgage for US$14m in favour of each plaintiff. We elaborate on this issue below (see [132] and [363] onwards below).

Striking out of the Defence/Adverse inferences

14 In the lead up to the trial during 2019, there were numerous case management conferences as well as various separate applications concerning,

in particular, applications on behalf of the plaintiffs for peremptory orders against the defendant and/or an order striking out all or some of the Defence on the basis of the alleged failure of the defendant to provide proper disclosure of documents and/or his alleged failure to comply with previous orders of the court with regard thereto and/or with regard to an Asset Discovery Order against the defendant made by the court on 23 July 2019.

15 These applications culminated in four separate hearings *viz* on 30 September 2019 and 10 October 2019 (before Ramesh J), 18 October 2019 (before Eder IJ) and the first day of the trial, *ie*, 11 November 2019 (before the full court). The outcome of the first two hearings was the subject of a separate detailed Judgment by Ramesh J which summarises the important procedural history in relation thereto and which we do not propose to repeat: see *Hai Jiao 1306 Limited and others v Yaw Chee Siew* [2020] 3 SLR 142 in particular at [16]–[33]. For present purposes, it is sufficient to note that although the Defence was not struck out, the court ordered certain adverse inferences to be drawn. So far as relevant, we deal with these adverse inferences below.

16 At trial, the plaintiffs' position was and remained that the defendant continued to be in breach of various orders of court as well as his general disclosure obligations; that this had seriously prejudiced the fair trial of this case and that the court should therefore strike out, in whole or in part, the defences on liability as to the defendant's breaches of his best endeavours obligations; and alternatively, that appropriate further adverse inferences be drawn against the defendant. We mention these matters at this stage if only to indicate our conclusion that we reject the plaintiffs' submission that we should strike out the whole or part of the Defence. We deal with the parties' respective submissions with regard to this aspect of the case, the reasons for our conclusion and also

the questions as to what, if any, further adverse inferences should be drawn later in this Judgment (see [198] to [210] below).

Admissibility of documents/Expert evidence

17 We should also mention that there was considerable controversy during the trial with regard to (a) the admissibility of certain documents; and (b) the expert evidence. We will deal with these matters when addressing the substantive issues as to which of the said documents/evidence are relevant. However, it is convenient at this stage, for context, to address briefly the plaintiffs' submission that various documents sought to be relied upon by the defendant were inadmissible on the basis of (a) the failure to prove authenticity; and/or (b) the rule against hearsay.

Authenticity of documents

18 As to authenticity, the plaintiffs relied upon the principles relating to proof of documents as set out by the Court of Appeal in *Jet Holdings Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769 ("*Jet Holdings*"), which they summarised as follows:

> (a) Whether or not documents exhibited to an affidavit could be admitted into evidence as authentic documents would depend on the satisfaction of the relevant provisions (*ie*, ss 63–67) of the Evidence Act (Cap 97, 1997 Rev Ed) (the "Evidence Act"). The mere fact that the documents were exhibited to an affidavit does not, without more, automatically admit the documents into evidence (see *Jet Holdings* at [36]).
>
> (b) The aim of ss 63–67 of the Evidence Act is to ensure that the best evidence is available before the court, which is why, as a general rule,

all documents must be proved by primary evidence (which is defined in s 64 of the Evidence Act as meaning the document itself produced for the inspection of the court). Where the original document cannot be produced, secondary evidence may be given in the circumstances set out in s 67 of the Evidence Act (*Jet Holdings* at [38]).

(c) Whilst formal proof of the documents concerned (*ie*, authenticity) is dispensed with by the inclusion of such documents in an agreed bundle of documents, the party seeking to introduce the documents will still have to prove the truth of their contents in the absence of any agreement or admission to the contrary (*Jet Holdings* at [44], [76]).

(d) In the absence of an agreed bundle of documents, the party seeking to introduce the documents into evidence must satisfy the relevant provisions (*ie*, ss 66–67) of the Evidence Act. However, a balanced approach ought to be taken to ensure that the best evidence is before the court without unduly burdening the party seeking to introduce the documents concerned by producing the original documents or calling the maker of the documents sought to be introduced into evidence (particularly in cases of complex litigation involving numerous documents) (*Jet Holdings* at [48]–[50], [56]).

(e) Thus, where the party seeking to introduce the documents concerned has not satisfied the relevant provisions of the Evidence Act, the opposing party ought to promptly object to the admission of such documents at that point in time and, in any event, before the documents have been marked and admitted into evidence. If there has been no objection taken by the opposing party at that particular point in time, that party cannot subsequently object to the admission of the documents.

> This applies *a fortiori* where the opposing party subsequently cross-examines the relevant witnesses on those documents in an attempt to discredit the truth of the contents stated therein (*Jet Holdings* at [51], [56]).

19 In this case, it was submitted on behalf of the plaintiffs that the defendant had failed to agree any bundle of documents with the plaintiffs; and that the plaintiffs had filed the following Notices of Non-Admission in respect of various lists of documents filed by the defendant *viz*:

> (a) a Notice of Non-Admission of Authenticity of Documents dated 13 November 2019 as to documents listed at S/N 1–32 of the defendant's Supplementary List of Documents dated 8 November 2019 and S/N 1–19 of the defendant's Supplementary List of Documents dated 10 November 2019;
>
> (b) a Notice of Non-Admission of Authenticity of Documents dated 13 November 2019 as to documents listed at S/N 1–2 of the defendant's Supplementary List of Documents dated 5 November 2019; and
>
> (c) a Notice of Non-Admission of Authenticity of Documents dated 15 November 2019 as to documents listed at S/N 1–36 of the defendant's Supplementary List of Documents dated 14 November 2019.

Further, it was submitted on behalf of the plaintiffs that the defendant had entirely failed to prove the documents in accordance with ss 63 to 67 of the Evidence Act during the trial; and that, accordingly, the foregoing documents are inadmissible under the Evidence Act.

Rule against hearsay

20 As to the rule against hearsay, the plaintiffs relied upon the principles enunciated by the Court of Appeal in *Gimpex Ltd v Unity Holdings Business Ltd and others and another appeal* [2015] 2 SLR 686. For present purposes, it is sufficient to note that it was the plaintiffs' submission that, as explained in that case, even where a document has been proven in accordance with ss 63 to 67 of the Evidence Act, if the truth of its contents have not been proven by way of witness testimony of a person with *personal knowledge* of the information contained therein, then the document is inadmissible on the basis that it is hearsay. *A fortiori*, a document which has not been introduced into evidence by way of witness testimony to prove the truth of its contents (either as an exhibit to an affidavit of evidence-in chief or otherwise by cross-examination) is generally inadmissible. On this basis, the plaintiffs took the hearsay objection in relation to various classes of documents, including but not limited to: (a) documents exhibited in affidavits of evidence-in-chief filed by the defendant's factual witnesses (including the defendant himself) where these witnesses have confirmed under cross-examination that they did not have personal knowledge of the contents of the said documents; and (b) documents not introduced into evidence by way of any affidavits of evidence-in-chief filed by either the plaintiffs' or defendant's factual witnesses or through the examination of the relevant factual witnesses at trial.

21 So far as relevant, we deal with these submissions with regard to authenticity and hearsay at the appropriate juncture later in this Judgment.

The facts

22 In broad terms, the BBCs were in substantially similar terms. For present purposes, the most relevant provisions were as follows:

(a) Each BBC was for a period of 96 months, *ie*, eight years.

(b) Charter hire was payable in advance at regular quarterly intervals (falling on 2 February, 2 May, 2 August and 2 November) throughout the year (clause 32.1.6 in each of the BBCs). As the BBCs were, in effect, financial leasing arrangements, payments of charter hire were on a "hell or high water" basis (clause 38.6 in each of the BBCs).

(c) The daily charter hire for the Go Phoenix and Go Pegasus was initially fixed at US$21,700, and the daily charter hire for the Go Perseus, at US$23,950. Late payment of the charter hire attracted default interest at the rate of 10% per annum.

(d) The Charterers were obliged to pay all earnings obtained through the employment of the vessels into a specified earnings account (clause 46 read with Additional Clauses, clause 32.1.14 in each of the BBCs; henceforth the "Earnings Account"), *over which the plaintiffs had a charge*, which was duly registered.

(e) Events of Default under the BBCs (see, for example, clause 48 of the Perseus BBC; henceforth referred to as "Event(s) of Default") included:

(i) Failure to pay charter hire or any sum under the BBCs.

(ii) The declaration of the Charterers/the Guarantors as insolvent or their entry into winding up, dissolution, liquidation or bankruptcy.

(iii) The delisting of OML, which (as stated above) was, at the time when the BBCs were entered into, a company listed on the SGX. (This term was subsequently deleted from the BBCs

pursuant to addenda entered into between the parties – as to which see further below at [68]).

(f) If any such Event of Default occurred, the plaintiffs were entitled to terminate the relevant BBC, whereupon the Charterers would be obliged to pay all unpaid charter hire as well as charter hire which was to become due and payable until the end of the charter period, and all other sums due and payable but which had been unpaid.

23 The BBCs were the subject of various addenda. So far as relevant, we deal with these below (see [24], [68] and [142] below).

Decline in the offshore & marine market: Negotiations on unpaid charter hire

24 On 3 August 2015, the Go Perseus BBC was amended by way of an Addendum whereby the parties agreed *inter alia* to the revision of charter hire rates for the Go Perseus BBC and the provision of additional security documents for all of the BBCs. Similar Addenda were entered into with respect to the Go Phoenix and Go Pegasus BBCs.

25 On 2 December 2015, a meeting took place in Shanghai between Mr Yang Changkun, Mr Hong Xing, the defendant, Mr Michael See ("Mr See"), Chief Executive Officer ("CEO") of OML and Group CEO of the OM Group, and Mr Alan Seah ("Mr Seah") of Northcape, OML's brokers. At the meeting, the defendant requested that the plaintiffs agree to reduce the charter hire rates under the BBCs in the short and medium term in light of the adverse market conditions affecting the vessels' utilisation. In this connection, the defendant assured the plaintiffs *inter alia* that he would do his best and utilise his professional network to find employment for the vessels, including making

alternative arrangements to deploy the vessels in non-oil related work, such as deep-water pipe laying work; and that he would, in his personal capacity, continue to provide financial and non-financial support to the OM Group.

26 By early 2016 each of the Charterers was in default under the BBCs by reason of their late payment of charter hire. On 17 February 2016, ICBCL wrote to OML noting that the charter hire for each vessel due on 2 February 2016 had not been received. OML responded on 19 February 2016 advising that two of the three vessels (Go Phoenix and Go Perseus) were in "negative cashflow". OML sought ICBCL's "understanding to consider the restructuring of the lease agreement to defer the payment[s]" and advised that "upon the restructuring we will aggressively sell one of the vessels to lighten the burden".

27 On 25 February 2016 ICBCL notified OML that its failure to pay the charter hire without any explanation or rescheduling in advance was "unacceptable"; and requested payment before any meeting could take place "for further arrangement".

28 Thereafter, further meetings took place between representatives of ICBCL and the OM Group to discuss issues arising out of the financing of the vessels. At these meetings, ICBCL and the plaintiffs were generally represented by some or all of the following individuals: for ICBCL, Mr Yang Changkun, Mr Hong Xing and Ms Cao Jiangxin. The OM Group, on the other hand, was represented by some or all of the following individuals: the defendant, Mr See, Mr Ooi and Ms Chong.

Meeting on 3 March 2016 – the suggestion of privatisation is made

29 On 3 March 2016, Mr Yang Changkun and Mr Hong Xing met Mr See in ICBCL's office in Beijing. The defendant did not attend that meeting but he

was aware that Mr See was attending. The purpose of the meeting was to discuss the current financial position of the Charterers and the potential restructuring of the BBCs. During the meeting, Mr See informed the plaintiffs' representatives that the Charterers were having difficulty paying charter hire under the BBCs as the vessels' earnings were insufficient. However, he assured them that the defendant had personally assisted OML to make full payment of the charter hire for the vessels in 2015 and that the OM Group had the support of its other financiers (including Overseas-Chinese Banking Corporation Limited ("OCBC"), United Overseas Bank ("UOB"), and DBS Bank ("DBS")) in tiding it through this difficult period. Mr See then informed the plaintiffs' representatives that the defendant wished to delist OML and sought the plaintiffs' consent to the delisting. In this connection, Mr See explained the reason for the decision to delist OML on the basis that OML had suffered huge losses in 2015 due to the continuous decline in oil prices but was able to remain solvent by relying heavily on the defendant's personal financial support; and that the defendant remained committed to the survival of the OM Group and would take all steps necessary, including the injection of funds in his personal capacity, to ensure the solvency of the OM Group. However, as matters stood then, Mr See explained that it did not make sense for the defendant to inject further personal funds into OML as he was merely one of the many shareholders in the publicly-listed company; that doing so at his personal expense would only benefit the other shareholders; and that delisting presented a solution to this dilemma by allowing the defendant to inject further personal funds into OML.

30 On 11 March 2016, Mr Hong Xing informed OML by email that any proposed refinancing or restructuring could only be submitted to ICBCL's credit committee "on the basis that there is no outstanding payment".

Meeting on 17 March 2016

31 On 17 March 2016, a further meeting took place in Singapore between Mr Yang Changkun, Mr Hong Xing and Mr See. The main purpose of the meeting was for the plaintiffs' representatives to assess whether major financiers continued to be supportive of the OM Group so as to enable the plaintiffs to assess the proposed delisting of OML. In this respect, Mr See arranged for the plaintiffs' representatives to meet with representatives of OCBC. Although Mr See had purportedly attempted to arrange meetings with UOB and DBS, those meetings ultimately did not take place. For present purposes, it is sufficient to note that the plaintiffs' representatives were satisfied that OCBC remained supportive of the OM Group.

32 Following the meeting with OCBC, Mr See further represented to the plaintiffs' representatives that:

(a) the defendant and his family collectively owned and had an interest in approximately 60% of the shares in OML and had continued to provide financial support to OML on a number of occasions;

(b) the continued listing of OML on the SGX limited the amount of financial support that the defendant and his family could provide to OML; and

(c) the delisting and privatisation of OML would allow decisions to be taken quickly as well as allow the defendant and his family to provide further financial support to the OM Group.

33 In addition, Mr See advised ICBCL that OML was "planning to start privatisation in the near future" and that "after privatisation, the [Yaw] family's holding ratio will not be lower than 90%, which is more conducive to quick

decision-making and further support". Mr See said that he hoped that ICBCL would support OML's plans.

34 In light of these assurances (and the apparently supportive attitude of OCBC), the evidence of Mr Yang Changkun (which we accept) was that the plaintiffs' representatives decided to continue further discussions regarding the proposed delisting of OML and reduction of charter rates with a view to seeking the approval of the plaintiffs' and ICBCL's management.

Meeting of 15 April 2016

35 To facilitate the approval process, Mr Yang Changkun and Mr Hong Xing arranged a meeting with the plaintiffs' and ICBCL's management (including Mr Yang Changkun's superior, Mr Ji Fuxing, Deputy CEO of ICBCL) and the defendant. The meeting was attended by the defendant personally and Mr See, as well as (amongst others) Mr Yang Changkun and Mr Hong Xing as the plaintiffs' representatives.

36 During the meeting, the defendant pressed for a reduction in charter hire under the BBCs so that the Charterers could continue fulfilling their payment obligations under the BBCs, and the Guarantors under the guarantees. In addition, the evidence of Mr Yang Changkun (which we accept) was that the defendant made the following representations *viz*:

(a) In the past year, he had extended financial support to the OM Group in his personal capacity, which had been used in part to pay charter hire under the BBCs.

(b) He was willing to continue supporting the OM Group. However, the continued listing of OML and his status as a majority shareholder

(holding or controlling approximately 60% of the shares) severely limited his ability to provide such financial assistance. The privatisation would remove the limitation to his ability to personally support the company. The defendant would then be able to provide further financial support to the OM Group (using his personal resources, including his family's connections) which was necessary for the group's survival.

(c) He would, in connection with the delisting process, personally inject approximately S$150m into OML. These sums would be used to, *inter alia*, provide working capital for OML.

37 In light of these reassurances, Mr Ji Fuxing indicated during the meeting that he was, in principle, agreeable to the delisting of OML on various conditions including full payment of all outstanding charter hire under the BBCs by 23 April 2016; the reduction of charter hire for two vessels to less than US$9,000 each; and OML undertaking to accelerate the payment of US$7m as the principal for the third vessel within a certain time (preliminarily fixed at 60 days) after delisting, so as to ensure that the book value of the vessel in ICBCL's account would not be higher than the market value.

38 A record of the discussions at that meeting includes the following:

> Mr Yaw said that he greatly values the cooperation and relationships with financial institutions. In the past year, he provided funds in various forms to support Otto Marine to enable it to pay rentals to us. However, as a company listed on the main board of [the] Singapore Exchange, Otto Marine is subject to various restrictions on the transfer of funds between the company and its substantial shareholder. Considering that the depressed maritime market may persist for at least 2 years, he hoped to have our consent to commence privatisation as it will ensure stronger support to Otto Marine in the future.
>
> …

> Mr. Ji Fuxing agreed to their estimation about the future of the maritime market, saying that this is also a process of 'survival of the fittest'. A company with strong asset management ability and shareholder support will have brighter prospect[s] only if it can pull through the current difficulties. Under the current market conditions, we understand that it is extremely difficult for a maritime company to raise fund[s] in the capital market as a listed company. Therefore, we intend to agree to the delisting arrangement of Otto Marine and will also make appropriate adjustment to the rentals so as to ensure that Otto Marine is able to pay rentals in a timely manner for a protracted duration in the future.

39 Shortly after this meeting, a conversation took place on 17 April 2016, the key points of which were captured in an email sent by Mr Ooi to one Joseph Lau (the defendant's cousin) and the defendant on 18 April 2016. This conversation discussed a loan being granted by RHB Bank Berhad, Singapore Branch ("RHB") in the net amount of S$70m, which was to be used towards the privatisation of OML. The loan would be made in two tranches. A first tranche of S$70m would be made available to the defendant, who would then loan the sum as a bridging loan to OML to "settle the [medium term notes] due on 1st August 2016". A second tranche of S$70m would be made available to OML *after* successful privatisation, with OML to use the proceeds to repay the bridging loan from the defendant who would then "return the same amount to RHB to clear the 1st tranche bridging loan".

40 On 19 April 2016, one Cezzane See of OML wrote by email to Mr Hong Xing referring to the meeting on 15 April 2016, expressing her "utmost gratitude" for ICBCL "accepting our proposed restructuring ideas for the Go Pegasus, Go Phoenix and Go Perseus". That email confirmed that this was subject to OML clearing the outstanding February 2016 charter hire by the end of April 2016. Mr See followed up on this email the next day, 20 April 2016, by confirming to Mr Hong Xing that the defendant had called him about the matters referred to in the email. Mr See indicated that OML was "committed to

have the matter resolved", and requested ICBCL's support, while at the same time acknowledging that ICBCL's agreement was "subject to Feb settlement".

41 During March and April 2016, the outstanding charter hire for the vessels that had been due on 2 February 2016 was paid. The amount of US$1,508,850 due in respect of Go Perseus was paid on 29 April 2016. The amount of US$1,367,100 due in respect of Go Phoenix was paid on 28 April 2016. The amount of US$1,367,100 due in respect of Go Pegasus was paid in three instalments: US$239,000 on 9 March 2016; US$224,965 on 13 April 2016; and US$903,135 on 29 April 2016.

ICBCL approves the OML delisting and restructuring of the BBCs

42 The internal process at ICBCL for approval of the change in arrangements with the OM Group occurred in late April and early May 2016. As submitted on behalf of the plaintiffs, this was not a mere rubber-stamping exercise but was a process involving various important stages. The first step of this process involved an application by ICBCL's Shipping Finance Department to its Project Review Committee. The application dated 21 April 2016 was initially prepared by Mr Hong Xing. It was thereafter approved by one Mr Lyu Zhuo before subsequently being approved by Mr Yang Changkun (respectively the Group Head and Department Head of ICBCL's Shipping Finance Department). In broad terms, it was recommended that ICBCL agree to the delisting of OML and reduction of the charter hire for the Go Perseus for two years, subject to payment of the sum of US$70m or the provision of security in lieu within 90 days of privatisation by OML, and certain other measures to reduce ICBCL's risks:

> As the depressed maritime market may persist for 2 year[s] or longer, in order to ensure that Otto Marine is able to make timely payment of the hire to us and prevent the disruption of

> capital chain and avoid breach of contract, we intend to agree to the privatization of Otto Marine, reduce the bare boat hire of Go Perseus to USD9,000/day for 2 years (8 terms) before recovery to USD23,950/day. In order to reduce the risk exposure of our project, we will require Otto Marine to make accelerated repayment of USD70 million as principal or provide security of equal amount within 90 days of privatization, change the option of charterer to purchase the vessel into the option of owner to sell the vessel at the end of the lease, and adjust the vessel repurchase price at the end of each year, so as to ensure that the IRR at the end of each year will remain unchanged after the adjustment.

43 The grounds in support of the recommendations included the following:

> In the past year, the substantial shareholder of Otto Marine provided fund support to Otto Marine by various means to pay hire to us. However, as a listed company in Singapore, Otto Marine was subject to various restrictions on the transfer of funds between the company and its substantial shareholder. The current market value of Otto Marine is only USD35 million, [while] its shareholders' equity is USD207 million. Therefore, Otto Marine is of the opinion that maintaining its status as a listed company is not meaningful. Currently the substantial shareholder of Otto Marine holds 61% shares in the company, and about USD22 million is needed to repurchase the remaining shares. … The substantial shareholder will provide a total of about SGD150 million (about USD110 million) for the privatization, which will mainly be the own fund[s] of the substantial shareholder. Otto Marine intends to start privatization in May, and complete the process in September, so as to enable the substantial shareholder to provide more fund support to the company in the future.

44 Mr Yang Changkun's *unchallenged* evidence was that he consented to the application in reliance on the following representations/assurances of the defendant:

> (a) The defendant had injected his personal funds into the Charterers/the Guarantors and had procured them to make timely payment of the charter hire payments under the BBCs to the plaintiffs.

(b) The defendant would continue to inject his personal funds into the Charterers/the Guarantors to keep them as going concerns, and procure them to (a) make timely payment of charter hire, and (b) perform their other payment obligations under the BBCs/the guarantees.

(c) OML's delisting was to facilitate the provision by the defendant of further funding to OML.

(d) The defendant would inject personal funds of approximately S$150m in connection with the delisting and would inject further funds into the Charterers/the Guarantors as and when necessary to keep them as going concerns and procure them to make timely payment under the BBCs/the guarantees.

45 On 22 April 2016, ICBCL's internal auditor considered this application. The internal auditor noted that the market value of OML was only about US$35m, whereas shareholder's equity was US$207m. It therefore considered that "privatisation [was] economically meaningful to some extent". In addition, the internal auditor noted that Mr See had communicated that the privatisation would involve the redemption of S$70m of mid-term notes maturing in August 2016 and the injection of working capital. The substantial shareholder, meaning the defendant, was also said to be providing "a total of about SGD150 million … for the privatization, which will mainly be the own fund[s] of the substantial shareholder". That said, the internal auditor expressed its doubts over this proposed course of action, noting that "[c]onsidering the current general depression of the shipping market, whether the shareholder may complete the privatization as scheduled and inject sufficient fund[s] to repay the debt is somewhat uncertain".

46 In the event, the internal auditor supported the proposal, subject to three conditions: (a) that all outstanding charter hire be paid before execution of the agreement; (b) that an additional mortgage in the sum of not less than US$8m in aggregate be provided for the vessels by 31 December 2018; and (c) that the privatisation process of OML be monitored to ensure that the debts remained payable in spite of the privatisation, and that accelerated payment of US$7m be made by "the shareholder" (*ie*, the defendant) in respect of the Go Perseus within 90 days after completion of privatisation.

47 The proposal next went before ICBCL's Project Review Committee on 5 May 2016. The Project Review Committee approved the proposal subject to the conditions proposed by the internal auditor, and introduced an additional condition of its own: that a letter of support be obtained from the defendant to provide "fund support" in the event the Charterers faced difficulties in paying the charter hire. The minutes of the committee's meeting record:

> The change shall be conditional on the repayment of all outstanding hires before execution of agreement.
>
> The change is also subject to the following management requirements:
>
> 1. Additional mortgage not less than USD8 million in aggregate shall be provided for the 3 Vessels by 31 December 2018;
>
> 2. The privatization process of Otto Marine shall be monitored to ensure that the debts remain payable to us in spite of the privatization, and that accelerated payment of USD7 million be made by the shareholder in respect of the third vessel project within 90 days after completion of privatization.
>
> 3. A support letter from Yaw Chee Siew, the actual controlling party, shall be obtained after the completion of privatization of the charterer, agreeing to provide fund support in the event of difficulty of the charterer in the payment of hire.

48 That same day, 5 May 2016, a Vice President of ICBCL's Project and Investment Approving Department inserted a comment that the "[s]hareholder

support letter shall be obtained within 90 days of privatization"; another Vice President agreed with this comment the next day. The application was approved on 6 May 2016 (see [51] below).

49 In addition, ICBCL proposed to restructure the BBCs. This was conveyed by an email from ICBCL to OML on 28 April 2016. The key terms of the restructured BBCs were that: (a) all outstanding charter hire would be paid before the end of April; (b) the daily charter hire for both the Go Phoenix and Go Perseus would be reduced to US$9,000 from 2 May 2016 to 2 February 2018; (c) at the end of the charter period for the Go Pegasus, the lessor (*ie*, the third plaintiff) would have a put option to sell the vessel to OML at US$35,870,000 (net of OML's seller's credit); (d) OML's delisting would be accepted; (e) OML would place a US$7m deposit ("the Deposit") in the "[l]essor's" account within 60 days of the delisting, which would not be refundable (though not apparent from ICBCL's email, it became clear that "the lessor's account" was a reference to a bank account of the first plaintiff's choosing – the first plaintiff was to notify the Charterer, Go Offshore, of the specific bank account the Deposit was to be transferred to); and (f) OML would provide an additional ship mortgage of not less than US$8m before 31 December 2018. OML was also reminded that the next payment date was 2 May 2016.

The First Letters of Support

50 Meanwhile, during the approval process, ICBCL raised the possibility of the defendant providing a personal guarantee in consideration of ICBCL's consent to the restructuring. This was to take into account the fact that the guarantee from OML would cease to be security from a listed company upon delisting. This requirement was conveyed orally by Mr Hong Xing to the

defendant through Mr See; the defendant refused to provide a personal guarantee, and this was conveyed to Mr Hong Xing. Following this, by an email dated 25 April 2016, Mr Hong Xing wrote to Mr See stating that the Vice President of ICBCL's Risk and Credit Department had "compromised" and requested instead a "letter of support" to be provided by the defendant.

51 On 6 May 2016, the application was formally approved by ICBCL's management. Accordingly, the evidence of Mr Yang Changkun (which we accept) was that ICBCL and the plaintiffs agreed to the proposed restructuring of the OM Group and the delisting of OML from the SGX, on the basis *inter alia* that the following conditions were satisfied:

(a) the outstanding charter hire under the BBCs had to be paid;

(b) OML would make payment of the Deposit to the plaintiffs within 90 days of the delisting of OML; and

(c) the defendant would execute the letters of support within 90 days of the delisting of OML.

52 The nature of this last "condition" was the subject of some confusion and conflicting evidence at the trial. According to Mr Yang Changkun, even though the internal requirement was for the defendant to deliver the letters of support within 90 days of the delisting of OML, this requirement was conveyed orally by the plaintiffs through Mr Hong Xing to the defendant as a "condition precedent" to the proposed restructuring and delisting. That this was the common understanding of the parties at the material time is also supported by two fairly contemporaneous emails dated 6 and 19 September 2016 respectively sent by Stephenson Harwood LLP ("Stephenson Harwood"), lawyers for OML (we elaborate on these emails at [81] below). As stated in paragraph 20 of his

affidavit of evidence-in-chief dated 17 September 2019, the defendant accepts that in or around May 2016, he "… agreed to issue Letters of Support in favour of the First Plaintiffs in consideration for the Plaintiffs' agreement to the de-listing of the Guarantor." Notwithstanding, according to paragraph 19 of the same affidavit, the evidence of the defendant was that the plaintiffs did not "at this juncture, make the execution and delivery of the said letter of support a condition precedent to [the delisting of OML]"; and that "the notion of a letter of support being a condition precedent only surfaced in or around July 2017."

53 These two statements are not easy to reconcile. In our view, the confusion arises because of the use of the term "condition precedent". Plainly, if the agreement was that the defendant would execute the letters of support only within 90 days of the delisting of OML, the provision of such letters of support in executed form by the defendant could not be said to be a "condition precedent" to the delisting if the latter were intended to mean that such letters of support had to be provided *before* the delisting. However, given the nature of the discussions that had taken place and the circumstances which existed in and following April/May 2016, it would seem likely that the agreement or at least mutual understanding of the parties was that the plaintiffs' consent to the delisting was on the basis that the defendant would provide letters of support to the plaintiffs; and that the agreement or at least mutual understanding of the parties to provide such letters of support was, in that sense, a "condition precedent" to the plaintiffs' consent to the delisting of OML albeit the letters of support would only be executed after the delisting. In other words, the plaintiffs' consent to the delisting of OML was conditional upon the defendant agreeing to provide the letters of support within 90 days of the delisting of OML. To a certain extent, this debate is, in our view, somewhat arid because of subsequent events including the terms of the Addenda agreed by the parties in July 2016 (as to which see [68] below).

54 Be that as it may, on 5 May 2016, ICBCL wrote to OML and Stephenson Harwood attaching draft letters of support (*ie*, the First Letters of Support) to be provided to each of the plaintiffs by the defendant; and, requesting OML to arrange for the defendant to sign the First Letters of Support, leave them undated and send a scanned copy of each to ICBCL by email with the originals to follow in the post.

More delays in payments

55 According to the defendant, the Charterers continued to face difficulties in making payments of the charter hire due on 2 May 2016. On 9 May 2016, Mr See wrote to Mr Hong Xing indicating that it would be "very tough" to pay the charter hire due that month, and that payment of the charter hire due in May 2016 could not be a "CP", or condition precedent, for the delisting of OML. He explained the significant difficulties OML had in finding work for the vessels. Mr Hong Xing replied indicating that he could not accept Mr See's "proposal" (*ie*, ICBCL could not accept any more delays in payment), and that if ICBCL had realised that even the first tranche of charter hire due after the restructuring would not be paid, he did not believe the restructuring would have been approved.

56 Even as the charter hire due to ICBCL was not paid, however, on 18 May 2016 Mr See sent a text message to the defendant in the following terms:

> I called and have asked kc and sj to take out the 450k from icbc to uob
>
> No point pay partial to icbc as their [*sic*] is 3m
>
> Hence paying uob 1m outstanding (using icbc 450k and end of week another 550k from GO) will resolve uob 1m and their loan payment straight away drop by 50%
>
> This will strike off one immediate item

> I have asked them [to] do it this morning

57 ICBCL, for its part, continued to pursue OML for payment. On 24 May 2016, Mr Hong Xing sent an email to Mr See, with the subject title "Due and Payable charterhire, urgent!!!". He wrote: "[w]e are pushed [*sic*] very hard for the due and payable charterhire of all three ships, please check and confirm urgently when it will be paid as it has been due on 2nd of May".

58 Mr See then wrote to the defendant, informing him that Mr Hong Xing had "called everyday" and expressed the concern that he (Mr Hong Xing) "may not be able to hold". In response to Mr See, the defendant wrote:

> How much [do] we still owe them? I remember is about $2.5m now? I may be able to do $500k to max $1m, but that will be jeopardising what I am critically doing now.

59 Mr See responded to the defendant on the same day in the following terms:

> We owe Usd2.5m after paying Usd450k last week.
>
> I have told him not possible this week and that we are trying next week
>
> I doubt he will call this week anymore but we will see what can be done next week
>
> Separately, meeting UOB tomorrow morning, I have strategise [*sic*] with Garrick that we will push for 6 months interest payment only although they have agree[d] on 50% dropped in P+I.

60 The defendant responded to Mr See on the same day in the following terms:

> Cannot have them [calling] us everyday chasing like this. My suggestion is to try to pay them $1m on the express condition that they will hold off for another 30 days or more.

61 In response, Mr See advised the defendant that he would call Mr Hong Xing the following morning and noted that the payment of US$1m was to be made to ICBCL that week.

62 On 26 May 2016, US$269,957.30 of the amount due of US$828,000 was paid in respect of Go Phoenix; and US$270,000 of the amount due of US$828,000 was paid in respect of Go Perseus. On 16 May 2016, US$499,980 of the amount due of US$1,397,480 was paid in respect of Go Pegasus.

Announcement of the voluntary delisting

63 On 7 June 2016, a further meeting took place between *inter alia* Mr Yang Changkun, Mr See and the defendant to follow up on the status of the restructuring. During the meeting, the defendant confirmed the proposed restructuring was progressing as expected. The defendant and Mr See outlined the proposed timelines for the delisting (targeting October 2016) and the defendant then further confirmed that he had no problems funding the restructuring exercise. Additionally, he again emphasised his willingness to invest his personal wealth and other resources (including procuring the backing of his family and the Samling Group, which was a group of companies owned and run by the defendant and his family) to support the OM Group.

64 However, on the very next day, *ie*, 8 June 2016, OML (as "the Company" in the excerpt below) and Ocean International (as "the Offeror" in the excerpt below) made a Joint Announcement of the proposed voluntary delisting of OML from the Official List of the SGX.

65 The Joint Announcement included the following:

> 6.1 The Offeror is a special purpose vehicle incorporated in the British Virgin Islands for the purposes of making the Exit

> Offer. It is a private company and does not have any published audited accounts. Its principal activities include that of investment holding. As at the Joint Announcement Date, the Offeror has an issued and paid-up share capital of one (1) share, which is held by Yaw. Yaw, who is the Executive Chairman of the Company, is the sole director of the Offeror.
>
> 6.2 Yaw is also a controlling shareholder of the Company (***Controlling Shareholder***) and he has a direct interest in 539,835 Shares and an indirect interest in 129,420,518 Shares which are held by CEO Technology Asia Ltd (***CEO***) and Business Companion Investments Ltd (***BCI***). As CEO and BCI are wholly owned by Yaw, Yaw is deemed interested in 129,420,518 Shares held by the two entities and accordingly, Yaw has a total interest in 129,960,353 Shares, representing approximately 61.2% of the total issued share capital of the Company.

66 ICBCL was caught by surprise by the announcement of the voluntary delisting of OML. Upon learning of the announcement, Mr Hong Xing immediately wrote to Mr See protesting that OML had made the delisting announcement without ICBCL's consent, which had "obviously breach[ed] Clause 48 of the [BBCs]". Thus, ICBCL "strongly request[ed]" OML to either (a) pay all outstanding charter hire immediately following which "[ICBCL] will agree to the delisting" or (b) withdraw the delisting announcement.

67 On 12 June 2016, Mr See replied on OML's behalf stating in material part:

> … Per discussion with Mr CK Yang, Mr Luke, Mr Yaw and myself on last Thursday, delisting Otto Marine will actually allow the company to become leaner, stronger and more competitive. The payment partial[ly] settled is a temporary issue and we will ensure on time payment upon the delisting.
>
> With the delisting, it is likely that there will be further consolidation and amalgamation among the group of companies and this will further strengthen the company's portfolio.
>
> Following the delisting, there will be injection of funds by Mr Yaw and possible rationalisation of assets and resources management that will aid the next trajectory growth of the company's strategic direction[.]

> …
>
> During our April 2016 discussion in ICBC Leasing Beijing office with the present of Mr Yaw, Mr Michael See, Mr Yang and Mr Hong Xin[g] and our last Thursday meeting with Mr CK Yang and Mr Luke, we appreciate ICBC Leasing support for our delisting and we understand that you have no objection towards our delisting, given that the purpose of the delisting is for a better good. In this regard, we will kindly request for your kind understanding and support that you have been providing to Otto Marine.
>
> Please kindly rest assured that upon delisting, we undertake to make the necessary payments that fall due and look forward to future collaboration with ICBC Leasing in our greater business plans moving forward.
>
> We seek your support and confirmation for our delisting.

July 2016 Addenda

68 On 12 July 2016 the plaintiffs and the Charterers entered into Addenda to each of the BBCs (the "July 2016 Addenda"). The recitals to the Addenda for the Go Perseus and Go Phoenix BBCs (in each case entitled Addendum No 2) were in substantially similar form and included the following:

> The Charterers have requested for various further amendments to the Charter as set out in this Addendum No. 2, including but not limited to, (i) the revision of the Charter Hire with effect from the next Payment Date as more particularly set out in the excel worksheet appended as Schedule 4 hereto, (ii) the payment of a deposit, (iii) the removal of the delisting of the Guarantor from the SGX as an Event of Default, and (iv) including additional undertakings by the Charterer.

Further, pursuant to clause 32.1.6 of Schedule 3 of the respective Addenda to these two BBCs, the charter hire rate was lowered to US$9,000 per day.

69 An Addendum, entitled Addendum No 3, was similarly agreed in respect of the Go Pegasus BBC on 12 July 2016, but its recitals were different. Instead, the recitals relevantly read:

> The Charterers have requested for various further amendments to the Charter as set out in this Addendum No. 3, including but not limited to, (i) an inclusion of a put option at the end of the Charter Period for the sale of the Vessel, (ii) the removal of the delisting of the Guarantor from the SGX as an Event of Default, and (iii) including additional undertakings by the Charterer.

Unlike the Go Perseus and Go Phoenix BBCs, the charter hire rate under clause 32.1.6 of the Go Pegasus BBC was not lowered pursuant to this Addendum.

70 Each of these three Addenda included the following clause 5.1 *viz*:

> **5.1 Condition Precedent documentation**
>
> The Charter shall be amended and supplemented by this [Addendum] with effect on and from the date (the "**Effective Date**") on which the Owners notify the Charterers in writing in the form set out in Part II of Schedule 1 hereto that the Owners have received all of the documents and evidence set out in Part I of Schedule 1, in form and substance satisfactory to it.

71 Consistent with clause 5.1, Part I of Schedule 1 contained a list of what were described as "Condition Precedent Documents" including (in paragraph 7): "Any further documentation which may be required by the Owners".

72 The Go Perseus BBC, but not the other BBCs, as amended included clause 44.38 pursuant to which Go Offshore (the Charterer) agreed, subject to certain events that are not material, as follows:

> The Charterers shall, within sixty (60) days from the date of delisting of Otto Marine Limited from SGX, unconditionally and irrevocably pay a sum of USD 7,000,000 (the "**Deposit**") to the Owners (to such bank account as may be notified to the Charterers by the Owners).

73 It is also not in dispute that the defendant had not signed and delivered the First Letters of Support by this time. Mr See had informed ICBCL that the defendant was travelling, and in order not to hold up the execution of the July 2016 Addenda, the plaintiffs agreed that the July 2016 Addenda could be signed

on condition that the First Letters of Support would be executed by the defendant and delivered to the plaintiffs as soon as possible thereafter.

74 However, the defendant did not take any steps to execute and deliver the First Letters of Support to the plaintiffs. Although the defendant's representatives (*ie*, Ms Chong, Mr See and Mr Ooi) had repeatedly reassured the plaintiffs as well as their lawyers, Wikborg Rein Singapore Pte Ltd ("Wikborg"), that the First Letters of Support would be provided in due course, it remained the case that delivery of the First Letters of Support was not forthcoming (see [78]–[84] below). This state of affairs persisted up to and even after OML's delisting in October 2016. (As elaborated below, although it appears that the defendant did sign the First Letters of Support at some time prior to 10 November 2016, they were never actually delivered or handed over to the plaintiffs or ICBCL).

August 2016 meeting

75 In or around end July 2016, there was an internal reorganisation in ICBCL. A new department, known as the Energy Department, was set up and all offshore projects were transferred to within its purview. Mr Hong Xing was transferred to this department and began working on the project relating to the vessels with new colleagues from the Energy Department. Mr Yang Changkun, however, remained in the Ship Financing Department and thus was not involved in the project during this period until the projects were transferred back to the Ship Financing Department in December 2016.

76 Between 3 and 5 August 2016 a team from ICBCL travelled to Singapore and Batam to carry out project handover and customer due diligence for the vessels. During that visit, a meeting took place between the parties' representatives *viz* on the plaintiffs' side Mr Hong Xing, Ms Cao Jiangxin as

well as other various persons from the Energy Department; and on the defendant's side, Mr See and Ms Chong. In the course of that meeting, there were some general discussions with regard to the financial position of the OM Group. In particular, during those discussions, certain representations were made by Mr See and/or Ms Chong *viz*:

(a) The most recent round of charter hire payments by the Charterers had been made using funds personally injected by the defendant.

(b) The defendant and his family remained supportive of the Charterers/OML. The defendant remained committed to support the business of the OM Group and had ample financial resources, including the resources of the Samling Group, to support the OM Group.

(c) The defendant would inject funds of approximately S$140m into OML in connection with the delisting and would inject further funds as and when necessary to support the business of the OM Group.

(d) The delisting of OML was to allow the defendant to provide greater financial support for the Charterers/the Guarantors.

77 An internal report of that visit noted that having regard to the low international oil price and the decline in the global utilisation ratio and hire rate of marine support vessels, "the overall operation of Otto Marine is challenging". The report also included the following:

> However, as [OML's] substantial shareholder has initiated privatisation and continued injecting funds to support it, the following matters shall be further implemented for risk control of our projects:
>
> 1. Closely following up the privatisation process of Otto Marine.
> …

> 2. Following up and determining the main use of SGD140 million made available by the substantial shareholder for the privatisation.
>
> 3. Following up the repayment of USD7 million after the completion of privatisation.
>
> 4. Following up the bidding process [for] our vessels. Considering the possibility of selling off Go Perseus and closely monitoring the market price of this type of vessel.

Requests for the First Letters of Support

78 On 12 August 2016, SGX approved OML's application for delisting.

79 On 6 September 2016, Wikborg wrote to Mr See in terms that included the following:

> … As you may recall, it was agreed that Mr Yaw would provide the attached support letters to ICBC prior to closing of the latest amendments. However, we have not received the signed letters. Please could you **urgently** arrange for Mr Yaw to sign the attached letters (which are in agreed form and were cleared by Otto and its counsel previously). Please ensure that a witness signs as well and all witness details are filled in. All 3 letters should be dated **12 July 2016** (same date as all the amendment deeds).
>
> Please let us have a scanned copy of the 3 signed letters **by COB today** with the originals to follow to my address below.
>
> [emphasis in original]

Mr See asked that either Ms Chong or Mr Ooi "handle" this issue.

80 On 13 September 2016, Wikborg wrote again to OML requesting it to have the defendant sign the First Letters of Support. When there was no response, a further request was made by Wikborg on 15 September 2016. There were further follow-up communications on 19 September 2016. By this time, OML's lawyers, Stephenson Harwood, were writing to Ms Chong and Mr Ooi asking for the signed First Letters of Support.

81 On 19 September 2016, Mr Ooi finally responded to Stephenson Harwood. He wrote that he was "advised the signing of the Letter is upon delisting of [OML], which should be after the Exit Offer closed on 30th September 2016". Stephenson Harwood's response, however, was that this was not the case. Instead, Stephenson Harwood clarified to Mr Ooi that "the signed letters were a condition precedent which should have been delivered to [ICBCL] at the time the bareboat charters for the three vessels were amended", and it was only because Mr Yaw was travelling at that time that closing proceeded on the condition that the "letters would be signed and delivered to [ICBCL] as soon as possible thereafter".

82 Mr Ooi then wrote to the defendant attaching the unexecuted First Letters of Support, requesting that the defendant return a signed copy through email with the originals to follow. The defendant replied with the following:

> I need you to read it carefully to make sure it is ok to sign. [Basically] [it] is a best effort support letter to get Otto to pay.

83 Mr Ooi replied to the defendant on 20 September 2016 in the following terms:

> In my personal opinion, I take this letter of Support as a form of Personal Guarantee. This is despite they call it [*sic*] as Letter of Support or use the term 'best endeavours'.
>
> Essentially, the main points are:
>
> 1) This letter is legally binding and its obligation is enforceable (not just best effort support letter or provide comfort or best endeavour).
>
> 2) This letter will remain valid and binding notwithstanding of any bankruptcy, receivership or liquidation of the Guarantor-Otto Marine Charterer-Otto Fleet (This clearly mean they are going after you in person ultimately).
>
> 3) This letter shall remain in full force and effective so long as the obligation or the Guarantee remain outstanding (sound very much like a PG).

> 4) This letter shall be governed by English Law (mean at all time it's legally binding).
>
> 5) This letter is calling for you to ensure that the Guarantor/Charterer is solvent and able to meet their obligation in full on timely manner (sound very much like Rakesh case in RSOV but at higher liability).

84 There was no response given to ICBCL or Wikborg and a further follow-up email was sent on 22 September 2016 suggesting that ICBCL could attend upon the defendant so that he could sign the First Letters of Support "soonest". After further communications both by email and text message, ICBCL was informed by Wikborg on 27 September 2016 that OML had "assured" a "commitment" for the defendant to sign the First Letters of Support and that the board/management acknowledged that it must be signed. It was suggested that the delay was "simply because" the defendant "ha[d] not been in Singapore the last couple of weeks". Nothing further happened and on 6 October 2016 a further follow-up email was sent to Mr Ooi seeking an "update" with a request for the First Letters of Support to be provided by close of business on 7 October 2016.

OML delists from the SGX

85 On 7 October 2016, OML delisted from the SGX.

86 In passing, we should mention that it was the plaintiffs' case that based on the defendant's assurances, the delisting should have enabled the defendant to procure even more funding for OML (both from himself and his family) to enable OML to continue as a going concern, and (more importantly from the perspective of the plaintiffs) to ensure that the Charterers/the Guarantors made timely payment of sums due under the BBCs/the guarantees. However, it was submitted on behalf of the plaintiffs that this was far from the case. In fact, as further submitted on behalf of the plaintiffs, even at the time of OML's delisting,

the Charterers were in default of their obligations to pay the 2 August charter hire instalment under the BBCs. This persisted despite various email reminders sent by Ms Cao Jiangxin to Mr See and Ms Chong (on 21 September 2016, 8 October 2016, *ie*, *immediately* after the delisting, and 11 October 2016). This charter hire instalment was only finally paid on 25 October 2016 after the plaintiffs issued a letter of demand from their legal department on 18 October 2016 requiring payment within seven days. Even this payment, however, was short as it did not include default interest payable under the BBCs (an issue only finally resolved by a further payment on 27 October 2016). This is further discussed below (see [88] and [89]).

ICBCL makes further requests for payment of charter hire and delivery of the executed First Letters of Support

87 On 8 October 2016, ICBCL wrote to OML advising it was very glad to hear of the delisting on 7 October 2016. That communication included the following:

> As have [*sic*] stressed many times before, we saw the cash injection from Mr Yaw is an [*sic*] very important signal that Otto can tide over the hard market. Our senior management also have been concerned about this project. In view of your delist announcement, we will report the project status to decision makers in recent days, thus, it's quite urgent for us to know the payment date of the rest of charter hire for 3Q 2016, we really hope Otto can complete the payment before next weekend(15 October 2016). Very appreciate [*sic*] if you can let me know once you have the detail[ed] financial plan.

88 As stated above, a charter hire instalment had been due on 2 August 2016, but was only finally paid on 25 October 2016 after the plaintiffs issued a letter of demand on 18 October 2016 requiring payment within seven days. But, again as stated above, even this payment was short as it did not include default interest which had also become due, which payment was only made on 27 October 2016.

89 Meanwhile, ICBCL's further attempts in early October 2016 to have the First Letters of Support signed by the defendant were unsuccessful. On 10 October 2016, Wikborg wrote to OML in terms that included the following:

> Please bear in mind that the only reason why we did not sign this previously at the closing with the rest of the documents is because Mr Yaw was not around and Otto requested that we proceed with the signing nevertheless on the understanding that the letter will be signed ASAP. We accommodated Otto's request in good faith and it is not very encouraging to receive no response from the company?

90 On 12 October 2016 Mr Seah (of Northcape) wrote to Mr Hong Xing telling him that Mr See had just returned from Malaysia the previous day where he had given a presentation about OML to the Samling Group management and stating in relevant part:

> Michael just came back from Malaysia yesterday wherein he gave a presentation of Otto Marine to the Samling Group management. **After delisting Otto Marine is now under the ownership of Samling Group and will fall under Samling Energy.**
>
> As you know, Samling Group has several industries under them eg timber, real estate, palm oil plantations, car distributorship as well as oil and gas fields.
>
> Good news from the meeting yesterday was that **Samling Group has reaffirmed their support for Otto Marine and will inject fresh working capital into Otto Marine.**
>
> With respect to the Letter of Support, Michael has gone through it. The wording seems okay, he will arrange for the process to be expedited.
>
> [emphasis added in bold]

As is apparent from the reproduced extract, OML was to fall under the Samling *Energy* Group which specialised in the energy industry – Samling Energy is one of several groups under the umbrella of the larger and diversified Samling Group.

91 It is the plaintiffs' position that by this time, there were already several defaults on the part of the Charterers/the Guarantors which entitled the plaintiffs to immediately terminate the BBCs and call upon the guarantees. These were:

(a) the Charterers'/the Guarantors' failure to make full and timely payment of the charter hire due on 2 August 2016;

(b) the defendant's failure to execute and/or to deliver the First Letters of Support to the plaintiffs, which was a condition under the July 2016 Addenda (and upon which they were premised); and

(c) the delisting of OML which, but for the July 2016 Addenda which in turn was conditional upon the delivery of the First Letters of Support, would have been an Event of Default.

92 Moreover, it is the plaintiffs' case that Mr See (acting as the defendant's representative) had caused Mr Seah to send the 12 October 2016 email to the plaintiffs and had allowed the representations in the email to continue so as to induce the plaintiffs to forbear from immediately taking steps to enforce their rights under the BBCs and/or the guarantees; and that this ploy succeeded. In this context, the plaintiffs rely on the unchallenged evidence of Mr Hong Xing that: (a) he relied upon the representations in the email and, as a result, did not make recommendations to ICBCL's management to adopt a more aggressive approach against the Charterers/the Guarantors in respect of the foregoing defaults; and (b) in the absence of these representations, he would have recommended that the Charterers/the Guarantors be treated as a defaulting customer and for the plaintiffs to take steps (or threaten to take steps) to enforce their rights under the BBCs/the guarantees and the First Letters of Support.

93 On 14 October 2016, Mr Clarence Lun, the then General Counsel of OML, forwarded copies of "revised" letters of support to Wikborg and Mr Hong Xing for "further review". Mr Lun stated that he had amended the wording from "best endeavours" to "reasonable endeavours" as that would "suffice [for] the purposes for the letter of support". Mr Lun also suggested that provisions for arbitration be included together with a "tiered dispute [resolution] clause for mediation". In passing, we should note that this is the same Mr Lun who has also acted as counsel on behalf of the defendant in these proceedings.

94 That same day, on 14 October 2016, Wikborg replied stating that the "drafts were in agreed form", and that ICBCL was "not accepting any changes". Mr See, who had been copied to this correspondence, then intervened, noting that the form was "like a guarantee", but it "[had] been clear that it should not be a guarantee but [a] mere support letter". Mr See forwarded this correspondence to the defendant, who had previously not been party to the correspondence, informing him: "Fyi … We are pushing back on wordings". Wikborg replied to Mr See, stating that the First Letters of Support were not worded as a guarantee and requested that Stephenson Harwood advise OML accordingly.

95 On 17 October 2016, Mr Hong Xing replied to the correspondence confirming the position taken by Wikborg. He stated the following:

> The Letter of Support is the CP of the Otto delisting, we have submitted the agreed form before signing other documents, as agreed by both parties, it should be signed two months ago and dated immediately upon delisting.
>
> any changes to the letter of support [are] unacceptable.

96 On 18 October 2016, Mr Lun sent an email to Wikborg and Mr See with copies to *inter alios* Mr Hong Xing referring to the fact that Wikborg had

highlighted in their email that the First Letters of Support were "… essentially a letter from Mr Yaw to confirm that he will support [OML] and its related subsidiaries and is not enforceable as a personal guarantee per se". Mr Lun then stated that "[f]ollowing your confirmation, we have no further issues or queries".

97 Further defaults followed with the Charterers/the Guarantors defaulting on the 2 November 2016 charter hire instalments. Various emails were sent by Mr Hong Xing and Ms Cao Jiangxin in this regard to Mr See and Ms Chong. Thus, for example, on 3 November 2016, Ms Cao Jiangxin sent Mr See an email reminding him that the main reason why the plaintiffs had consented to the delisting was for the defendant to provide financial support to the Charterers/OML so that payments to the plaintiffs would be made punctually. The email states in this regard:

> We understand Otto fleet's hard situation during the downturn, this is the reason why we agreed to rent reduction a[n]d delisting application. Indeed, the three [vessels] are hard to get long term contract or sold under current market, **thus, the main purpose of delisting is Mr Yaw's capital support could help Otto's operation situation include pay lessor's charter hire on time**. ICBCL risk management department and decision level also see pay on time as an important signal that Otto can execute contract better after delisting.
>
> [emphasis added in bold]

No substantive response to this email was ever received.

98 It is apparent that by 10 November 2016 the defendant had in fact signed the First Letters of Support, as scanned copies of the signed First Letters of Support were sent to the defendant, Mr See and Mr Ooi for their records. It is not disputed, however, that these scans and the signed copies were never delivered or handed over to the plaintiffs or ICBCL.

ICBCL asks that pending issues be settled urgently

99 On 24 November 2016 Mr Hong Xing wrote to Mr See referring to previous discussions and stating that certain "issues are still pending" with a request that he arrange for them to be "settled urgently". The pending issues were listed as: (a) the Deposit to be paid within 60 days from the delisting, *ie*, before 6 December 2016; (b) the First Letters of Support to be signed by the defendant and dated immediately upon the delisting; and (c) payment of the charter hire due on 2 November 2016.

100 On 5 December 2016, Ms Chong replied on OML's behalf. She described the depressed market outlook for the industry and proposed that certain changes be made:

> … the market outlook for the industry is persistently depressed and cash flow remains stretched and challenged. We thank you for your continued support and indulgence.
>
> In connection with your concerns, we would appreciate if you can consider the following proposed solutions:-
>
> 1、As the market outlook and industry dynamics remain extremely challenged, we remain financially challenged and hence we implore you to allow us to relook into the payment of the deposit of USD7,000,000.
>
> 2、Mr Yaw has signed the letter of support. Our lawyer is conducting the final review of the letter to ensure that the contents and format are in accordance to what has been agreed with you. As we are all travelling, we will ensure that you receive it by end of this month.
>
> 3、As an update, Go Phoenix and Go Perseus are not working. Only Go Pegasus is working. We have received the Go Pegasus charter and is in the process of remitting to you the instalment in connection with the charter collected.
>
> We are grateful for your continued support and indulgence.

101 On 7 December 2016, Mr Hong Xing responded rejecting the proposal and stating in material part:

> It is Otto's obligation to pay charter hire and deposit **on time** as per contract, otherwise, it will definitely damage our trust to [*sic*] Otto Marine and Mr Yaw.
>
> We would like to emphasise again that this transaction is not pure asset based finance, it is guaranteed by Otto Marine group and support by Mr Yaw, the charter hire shall be paid whether Go Phoenix and Go Perseus are working or not.
>
> The main reason we accept delisting of Otto is Mr Yaw promised to inject SGD 143M capital, and we have been promised the USD 7,000,000 deposit will be included in the capital injection. Could you confirm whether the capital injection has been received and the breakdown of use of proceeds.
>
> Regarding the letter of support, it has been agreed by both party that it will be signed and dated on the delisting date which was 6th Oct, 2016, please provide the signed one to Wikborg Singapore soon, if it can not be provided before our meeting next week (15th Dec), we would like to invite Wikborg Singapore to witness the signing of the letter during our meeting with Mr Yaw next week.
>
> Meanwhile, since Otto Marine is not listing company any more, we can not get enough information from your website, so it is strongly request[ed] [that] the financial report shall be sent to us soon when it is ready, and any material news related to Otto shall [*sic*] let us know soon.
>
> We understand it will be long time to go through the downturn of offshore industry, so it is very important to build trust with both part[ies], any charter hire shall be paid on time unless it is agreed by both part[ies], this is the only way to get understanding and further support from our credit committee in the future.
>
> [emphasis in original]

The question as to the financial position of OML and the defendant at this time is a critical part of this case. So far as relevant, we deal with this below when considering the plaintiffs' case with regard to the defendant's obligations.

102 On 9 December 2016, by email to a number of people including Mr See and Mr Lun, ICBCL requested OML to scan a copy of the signed First Letters of Support (referred to in this communication as "the signed letters of undertaking") and to have the originals sent by courier to ICBCL "soonest

possible". An alternative suggestion was made for ICBCL to collect the First Letters of Support that afternoon. The reference to the term "undertaking" appears to have concerned OML and it then sought an opinion from Mr Lun as to whether the First Letters of Support were in fact letters of undertaking.

103 On 12 December 2016, ICBCL sought an "update" from OML as to the status of the delivery of the First Letters of Support. On 15 December 2016, Wikborg again requested that the scanned copies of the First Letters of Support (although described again in the email as "letters of undertaking") be sent urgently to them. Mr See directed Wikborg to take up the matter with Mr Lun. On 16 December 2016 Wikborg wrote to Mr Lun, asking that he "**immediately** scan copies of the [First Letters of Support]" [emphasis in original] to them. Mr Lun did not respond immediately but an email in evidence records that he did pick up a call from Wikborg on 19 December 2016.

104 On 21 December 2016, Mr Lun wrote to Wikborg seeking further clarification on the First Letters of Support. He was concerned about the use of the term "letters of undertaking" and stated OML's position that "the letters are merely a letter of comfort and do not have any legal obligation". He indicated that OML would like to "enquire on the purpose and intent of the letter" before it released the First Letters of Support.

December 2016 Meeting

105 On 15 December 2016, representatives of ICBCL, including Mr Hong Xing and Ms Cao Jiangxin, had a meeting with the defendant and Mr See in Singapore. During the meeting, the former's representatives expressed their concerns that, despite the defendant's earlier representations that he would inject funds into OML and that those funds would be used to fulfil the Charterers'/the Guarantors' payment obligations under the BBCs/the

guarantees, there remained approximately US$10.05m outstanding as of the date of the meeting. Mr Hong Xing and Ms Cao Jiangxin demanded *inter alia* that the defendant furnish the plaintiffs with the First Letters of Support without further delay and provide long-term solutions such as asset replacement/refinancing of the debts of OML by using other assets and properties owned by the defendant personally, whether in Malaysia or elsewhere. The defendant agreed to the above and assured Mr Hong Xing and Ms Cao Jiangxin of his continued support for the OM Group.

106 During the meeting, the defendant and Mr See explained in detail the current financial and operating conditions which caused OML's financial pressure and promised to pay part of the outstanding amount in the current month, while also requesting for partial waiver of default interests. They also advised that OML owed the banks an aggregate of US$290m, of which 60% was owed to OCBC and the balance to the two other banks, namely DBS and UOB. The defendant and Mr See stated that OML had appointed PricewaterhouseCoopers ("PwC") to prepare a restructuring plan for its current bank debts. They also said that OML "ha[d] a total of 43 vessels, 10 of which are free from encumbrance[s] at [that time]"; that "the current utilisation ratio of the 46 vessels [of OML was] 56%"; that there was approximately a 50% resignation rate of OML's managerial personnel; and that the remaining employees had accepted an average salary cut of 20% to save costs.

107 The defendant and Mr See also said that the utilisation rate of Go Phoenix in 2016 was 30% whilst the utilisation rate of Go Pegasus in the same year was 100%. The third vessel, Go Perseus, had been "put on sale" at a price of US$60m with a potential purchaser from Norway having been identified. ICBCL commented that if OML was unable to give a deadline for the sale, it would look for other purchasers concurrently.

108 The record of the meeting included the following:

> The substantial shareholder of Otto Marine provides SGD143 million for the privatisation, of which SGD73 million *will be* used to repay debts due, SGD36-38 million *will be* used to buy over shares from other shareholders, USD3.05 million *will be* used to pay hires to ICBC and the remaining funds *will be* used to pay salaries to more than 400 crew members (USD4-5 million per month) and for fuel and other operating expenses. Otto Marine will prepare a breakdown of payments and submit the same to us in the near future.
>
> Otto Marine promise before completion of privatisation that the 3rd quarter hire and USD7 million loan would be paid to us from the privatisation funds. However, in practice, local lending banks and customers benefit from geographical advantage and we do not have first priority in the repayment. We highlight that we have communicated with local law firm and will instruct them to carry out local collection of debts. Otto Marine shall pay sufficient attention to the payment of hires to us.[1]

109 The evidence of Mr Yang Changkun (which we accept) was that in reliance on the representations made during this meeting, the plaintiffs did not take any immediate enforcement action against the Charterers/the Guarantors.

The First Letters of Support are withheld

110 On 27 December 2016, Mr Lun sent an email to ICBCL stating that he had "decided to hold back the release of the letters for now" and explained his reasons. He suggested that ICBCL's reference to the First Letters of Support as a letter of "undertaking" demonstrated some "divergence" between the parties' understanding because OML's position was that the First Letters of Support were "merely letters of comfort". Mr Lun stated:

> … I have verily been informed that parties **do not intend** for the substantive content of the letter to be a personal guarantee from Mr Yaw per se, **or a legally binding document wherein**

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[1] The italicised words were changed from "will be" to "has been" as a translation correction (Transcripts, 15 November 2019, pages 2 to 9).

> **your clients will look to legal recourse against Mr Yaw personally should the payment obligations not be met**.
>
> [emphasis added in bold]

111 In that email, Mr Lun also disclosed that he had separately sought formal legal advice from a reputable law firm (*ie*, Dentons Rodyk & Davidson LLP ("Dentons Rodyk")) on the First Letters of Support. A copy of their written advice (dated 23 December 2016), which was addressed to him, was attached as an enclosure to a letter from Dentons Rodyk to Mr Lun. In particular, the advice considered the nature of the obligation to use "best endeavours" in light of the decision of the Court of Appeal in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 ("*KS Energy*"). The main conclusions are set out in paragraph 11 of the letter from Dentons Rodyk in the following terms:

> In the present context, we think that it is more likely than not, that extending a loan to the Charterer and/or Guarantor to enable them to meet their obligations, provided that Mr Yaw has the means to do so, would be something that he would probably have to undertake, barring good reasons why he cannot do so. We think that in order for the 'best endeavours' clauses to have bite, the Court would not allow Mr Yaw to entirely insulate his personal wealth when it would be within his ability to loan monies to Guarantor and Charterer to enable them to comply with their various obligations. Further, bearing in mind that Mr Yaw does not play a very active management role in the Guarantor and/or Charterer, and assuming that the Letters are provided on the basis that he is the ultimate majority shareholder and on the strength of his personal wealth, ***we think that the Letters must be construed as meaning that he would use his best endeavours to provide support, by drawing on his personal wealth to do so, should this become necessary to procure the liquidity/solvency of the Guarantor and/or Charterer to meet their obligations*** *(or by taking other such steps as he is able to, in order to procure compliance)*. It is also our view that the [*sic*] *barring any circumstances (which we are not instructed of) which would show that parties did not contemplate that Mr Yaw may have to make personal financial sacrifices in order to provide the required support, that* ***the best endeavours that he would have to make, would include him having to make personal financial sacrifices.***

> [emphasis added in italics; additional emphasis in bold italics]

112 In his covering email, Mr Lun suggested that this advice seemed to be "contrary to the intent between the parties" and he made the following proposals:

> I understand the long-standing relationship between parties, and the time endowed to build up such trust. If the intention between the parties, as agreed are that Mr Yaw will support the company, I propose that we reword the content of the letter in accordance with parties[']' intention. Alternatively, we will be privileged if you could write a formal letter to confirm that the letter of support is merely a letter of comfort to confirm that Mr Yaw will support the company and there is no legal recourse against him personally.
>
> I trust you understand my position and where I am coming from, and I hope that the trust and goodwill built up between parties will allow parties to reach a swift and amicable resolution towards this issue. Please accept my most sincere apologies that I have held back from supplication of the documents for the present moment.

113 Mr Lun also requested ICBCL to write a letter to confirm that "the content of the letter does not require Mr Yaw to draw on his personal wealth to fulfil the financial obligations and/or that [ICBCL] will not call on the letter to bring proceedings against Mr Yaw personally". During discussions with ICBCL, Mr Lun suggested that he would propose some amended wording by 5 January 2017. On 5 January 2017 ICBCL wrote to Mr Lun noting that his amendments had not been received and asked him to "revert". However, he did not do so. As stated above and at the risk of repetition, the First Letters of Support had, in fact, already been signed by the defendant by then – but they were never delivered to the plaintiffs or ICBCL.

ICBCL issues letters of demand

114 On 6 January 2017, ICBCL, through its solicitors Rajah & Tann Singapore LLP ("Rajah & Tann"), issued letters of demand to OML, demanding

that it make payment of the outstanding charter hire for the period of 2 November 2016 to 2 February 2017 for the vessels, as well as the Deposit, which had been due 60 days from the delisting on 6 December 2016 in respect of the Go Perseus BBC.

115 Even as the charter hire to ICBCL remained outstanding, however, emails disclosed in these proceedings reveal that the defendant was nevertheless remitting funds to other business ventures that belonged to him. One of these was a payment of at least A$100,000 to Balamara Resources Limited ("Balamara"), a company in which the defendant had an interest (we elaborate on Balamara at [311] and [334] below). Separately, the defendant was also collaborating with his brother, Yaw Chee Ming, and his cousin, Joseph Lau, to submit a bid for United Engineers Limited, a Singapore listed company. In a similar tenor, evidence was also adduced showing that OML and/or the defendant had access to multiple other funds sources during this period of time which could have been, but were not, drawn on to satisfy outstanding charter hire payments. So far as relevant, we deal with these in greater detail below in our analysis on the defendant's alleged breaches of his best endeavours obligations (see *inter alia* [219] and [220] below).

February 2017 meeting

116 On 14 February 2017, a team from OML comprising Mr See and one Ms See Hui Shan attended a meeting with ICBCL in Beijing to discuss arrangements for payment of outstanding charter hire and the current financial and operating conditions of OML. The OML team indicated that it had appointed PwC to prepare a bank debt restructuring plan, which involved four banks and financial institutions accounting for 80% of OML's total debt. ICBCL, for its part, proposed that there be a debt swap, noting that ICBC has

overseas branches in Malaysia, Indonesia, Vietnam and other countries where the defendant's family had properties. During the meeting, Mr See requested a yet further reduction in charter hire rates.

117 Thereafter, there were numerous further meetings, discussions and negotiations between the parties' representatives which culminated in the execution of further Addenda to the BBCs in September 2017 (see [142] below) and the execution of a second set of letters of support (see [140] below). Nothing much turns on the intervening events but we summarise them below for the sake of completeness.

118 On 21 February 2017, Mr See wrote to Mr Hong Xing summarising the three critical points of the 14 February 2017 meeting: (a) that the overdue charter hire due on 2 November 2016 and 2 February 2017 had to be "settled" as soon as possible; (b) that the Deposit could be deferred only if the overdue charter hire was paid; and (c) that ICBCL was open to discussing the restructuring of the charter hire to a lower rate for the next three years, but only if the charter hire already outstanding was paid. Mr See made two proposals for ICBCL's consideration *viz* (a) that ICBCL extend a short-term loan to the defendant personally, which the defendant would then use to pay the outstanding charter hire; and (b) that ICBCL restructures the charter hire rates for the vessels.

March 2017 meetings

119 On 3 March 2017, ICBCL's Malaysian Branch held a meeting with the defendant. ICBCL's log of this meeting records that the defendant "introduced the situations of the companies under his name, saying that when [OML] delisted last year, he provided SGD143 million, and that cash flow was currently tight". The meeting log records that the defendant intended to obtain financing

from ICBCL's Malaysia Branch, with the proceeds used to pay the outstanding charter hire and future charter hire payments. ICBCL's Malaysia Branch indicated that it was willing to provide financing to the Samling Group, but the personal credit of the defendant alone would be insufficient. The branch would only co-operate with companies with good cash flow under the defendant's name.

120 On 9 March 2017, Mr Hong Xing and Mr Yang Changkun attended a meeting with Mr See in Singapore. Mr See updated then that charters had been found for the vessels, which would assist in payments of the charter hire due to ICBCL. In addition, the meeting log recorded by Mr Hong Xing indicates that according to Mr See, the defendant intended to obtain financing of US$20m from ICBCL's Malaysian Branch through a company within the Samling Forestry Group, which would be used to pay the charter hire due to ICBCL.

121 On 21 March 2017, one Mr Yang Yuguo, a Vice President of ICBCL, met the defendant in Kuala Lumpur. The defendant is recorded in the meeting log to have said that given the severe market downturn, the business of the OM Group faced an "unprecedented challenge". The defendant noted that although many marine enterprises had opted to deal with the market downturn by way of bankruptcy protection, he and his family paid "great attention to long-term good cooperation relationship with financial institution[s] including [ICBCL]"; "[a]s such, [the defendant] decided to provide SGD143 million personally to privatize [OML], and repaid bonds and part of the debts". The defendant acknowledged, however, that the severity of the downturn had exceeded his forecasts, and that OML "had been unable to maintain normal operation after delisting". He had therefore appointed PwC to draft a restructuring plan, with negotiations with the major financing banks of OML in the final stages and expected to complete by April 2017. Under this restructuring plan, there would be a fund deficiency of

US$50m in the coming three years, but the defendant promised that "he [would] continue to support [OML] and provide the amount of USD50 million".

Presentations made referring to OML as part of the Samling Energy Group

122 On 23 March 2017, the defendant wrote to Mr See and one Edmond Wang ("Mr Wang") attaching a presentation that his brother would be making to the "very top government officers" in Kuching at the end of the month. The government officials were interested to form a consortium to undertake oil and gas business headed by a local Sarawak company, and the defendant indicated that he wanted the presentation to "start with Hyoil's portfolio to show our ability to develop oil field to production" Hyoil Pte Ltd ("Hyoil") is a company under the Samling Energy Group involved in exploration and production projects in Indonesia; the defendant has substantial interest in Hyoil, and we elaborate on this below at [347]. The defendant asked that Mr See and Mr Wang review this presentation. Each of the presentation slides bore the Samling Energy Group logo at the bottom right hand corner; the third slide also indicated "Otto Marine Limited/Go Marine Group/Cash Atlas" under the heading "Samling Energy Group", and the tenth slide had pictures and short descriptions of the vessels under the heading "Some of Our Operated Fleet".

123 On 9 April 2017, Mr See sent an email to one Frankie Toh concerning a possible partnership between OML and High Seas Marine & Industrial Services Co Ltd. In this email, Mr See wrote: "[a]s you are aware, we are part of the esteem [*sic*] and reputed Malaysia conglomerate Samling [Energy] Group".

ICBCL issues fresh letters of demand

124 On 2 May 2017, ICBCL issued fresh letters of demand to OML, demanding payment of the outstanding charter hire for the period of 2 November 2016 to 2 August 2017 for the vessels, as well as the Deposit.

125 OML made a fresh proposal to restructure its debts with the plaintiffs. On 5 May 2017, Mr Jason Goh, Group CFO of OML ("Mr Goh") sent Mr Hong Xing a draft set of slides containing OML's company and industry updates, as well as the company's proposal.

126 On 9 May 2017, Mr Hong Xing replied indicating that ICBCL would not consider any proposal unless the outstanding charter hires were paid, and that ICBCL would only "revert" on the proposal "when the outstanding charterhires [were] paid".

127 On 11 May 2017, ICBCL's lawyers served further letters of demand for payment. These were substantially the same as the letters of demand served on 2 May 2017, but with the insertion of the following on the top right hand corner of the first page:

> **STATUTORY DEMAND PURSAUNT TO SECTION 254(2)(a) OF THE COMPANIES ACT (CAP. 50)**
>
> NB: This demand must be dealt with within 3 weeks after its service on you or a winding-up order could be made in respect of you.

ICBCL demands the defendant to perform his obligations under the First Letters of Support

128 On 2 June 2017, Rajah & Tann wrote to the defendant demanding that he perform his obligations under the First Letters of Support stating in material part:

> 10. Both the Charterers and Guarantor have breached their obligations under the Bareboat Charterparties and Guarantees by, *inter alia*, failing to pay the outstanding charter hires for the period of 2 November 2016 to 2 August 2017 and default interest thereon (the "**Outstanding Hire**"). Despite our clients' repeated requests and demands for payments of the Outstanding Hire, the Charterers and Guarantor have to-date unreasonably failed, refused, and/or neglected to make payment of the sums as claimed forthwith. …
>
> 11. In the premises, and pursuant to the terms of the Letters of Support, we **hereby demand** for you to immediately put the Charterers and Guarantor in funds such that they are able to make payment of the Outstanding Hire to our clients. We further **demand** that you provide proof of remittance and/or transfer of funds by you to the Charters and Guarantor by no later than **9 June 2017**.
>
> [emphasis in bold and bold underlines in original]

June 2017 meeting

129 On 16 June 2017, a team from OML, led by Mr See, gave a presentation to ICBCL. Mr See explained that OML was actively carrying out debt restructuring and obtaining new funding. In particular, OML was actively seeking the support of its substantial shareholder, the defendant, "to obtain financing from ICBC overseas branches, secured against the other assets of the family of [the defendant], for use as payment for the outstanding hires to [ICBCL]". In response, ICBCL highlighted the importance of timely payment of outstanding charter hires, and noted that it had issued demands through its lawyers to OML and the defendant requiring payment of charter hire, with the possibility of further legal action if no payment was received.

130 On 19 June 2017, notes of this meeting prepared by Mr Goh were emailed to the defendant. Mr Goh reported to the defendant that all outstanding charter hire had to be paid, otherwise ICBCL would not be able to accept the new proposed daily charter hire rate of US$6,000. In addition, Mr Goh reported

that ICBCL had also emphasised that it was "critical" that some payments be made by June 2017.

131 On 27 June 2017, Mr See wrote to the defendant informing him that ICBCL had responded indicating that it was agreeable to a reduction in the daily charter hire rate, but ICBCL's Credit Department required further assurance in the form of a personal guarantee from the defendant for any outstanding charter hire moving forward, and additional security, given that OML had failed to comply with the key terms of the last restructuring that (a) the charter hire be paid on time; (b) the Deposit be paid; and (c) the First Letters of Support be executed and delivered to ICBCL.

Change in the terms of the Otto Project

132 On 19 July 2017, ICBCL's Marine Engineering Risk Asset Management Group put forward a proposal to its management to change the charter arrangements for the vessels. It was proposed that the parent company of OML, Ocean International, provide an additional mortgage with collateral of at least US$14m in value. After repeated negotiations the parties agreed that the Bintulu Hotel (as defined at [13] above), a four-star hotel in Sawarak, East Malaysia (Plot No 1, Lot 3062, Jalan Tun Razak 97000) owned by companies controlled by the defendant's family, be mortgaged. The outstanding charter hire amounting to approximately US$6,864,511 would also be deducted from OML's seller's credit for the vessels. In addition, daily charter hire would be reduced to US$5,000 for each vessel, and the charter hire would be paid monthly instead of quarterly.

133 A property valuation obtained for the Bintulu Hotel indicated a market value of RM70m, and a forced sale value of RM49m.

ICBCL issues further demands for payment

134 On 15 August 2017, ICBCL issued further letters of demand to OML, demanding payment of the outstanding charter hire for the period of 2 November 2016 to 1 November 2017 for the vessels, as well as the Deposit.

ICBCL continues to chase for the executed First Letters of Support

135 On 18 August 2017, Mr Hong Xing wrote to Mr Goh, emphasising that the First Letters of Support had to be signed by the defendant and provided to ICBCL urgently. He stated that ICBCL had been very patient with OML as regards the charter hire which had been outstanding since November 2016, and was trying to find a compromise solution that could be approved by its credit committee, but this was challenging as it would be the third restructuring in two years. He further stated that ICBCL would need the signed First Letters of Support "to show [the defendant's] support" to the credit committee.

136 On 21 August 2017, Mr Goh replied attaching copies of (what purported to be) the First Letters of Support informing Mr Hong Xing that the originals were held in escrow with OML's counsel pending completion of the current transaction.

137 On 1 September 2017, Mr Hong Xing responded. He objected to the contents of the letters of support sent by Mr Goh, noting pertinently that:

> We note that the letters of support executed by Mr. Yaw are not on the wording we have provided. Moreover, the letters were signed by Mr Yaw but were not sealed, and the originals of those letters have not been delivered to us. Further, the letters were executed before Mr Yaw's personal assistant, Ms Cheryl Tan, instead of a lawyer or commissioner for oaths.

138 On 7 September 2017, ICBCL's legal department followed up with an email to Mr Goh pointing out that the signed copy by the defendant was

"substantially different from the draft provided by [ICBCL]", and that "[s]ome clause[s] required by [ICBCL] [had] been deleted by [OML]". They attached a copy of the relevant letters of support marking out in yellow highlight all differences between the two versions of the letters.

139 On 18 September 2017, OML's then legal counsel, one Mr Mark Ortega ("Mr Ortega"), replied that he had not seen ICBCL's draft before but indicated that OML was "agreeable to the wording of the draft with the differences highlighted in yellow". Even so, however, by 26 September 2017 the signed First Letters of Support had not been sent to ICBCL; Mr Hong Xing thus sent an email to Mr Ortega and Mr Goh on that date indicating that the First Letters of Support were "one of the most important [conditions precedent] for the amendments, [ICBCL] can not move forward without it".

The Second Letters of Support

140 On 27 September 2017, Mr Ortega sent to ICBCL the signed letters of support; these letters of support (*ie*, the Second Letters of Support) were signed by the defendant in the presence of a lawyer and were all dated 26 September 2017. As signed by the defendant, the Second Letters of Support were all in substantially identical form to the First Letters of Support save for the following key changes:

(a) in the second unnumbered paragraph, the addition of the words "This Letter shall not be construed as a guarantee and/or an indemnity";

(b) in clause 3, the addition of the words "(but shall in no way guarantee)" on the fourth line; and

(c) the addition of a new clause 7 which provided as follows:

> 7. The terms of this Letter shall take effect retrospectively from 7 October 2016, and the parties shall be entitled to enforce their rights and obligations under the Letter from that date.

The Second Letters of Support have been reproduced at [6] above.

141 ICBCL's Marine Engineering Risk Asset Management Group sent a request on 27 September 2017 to its Marine Engineering Risk Asset Leadership Group, titled "Request for Execution of Supplementary Document to Charterparty with [OML]". This request reflected the terms negotiated with OML, which included: (a) accumulated unpaid charter hire for the vessels for the period 2 November 2016 to 1 August 2017 being deducted from OML's seller's credit; (b) actual daily charter hire for each vessel being reduced to US$5,000, with the difference between this quantum and the original charter hire being deducted from OML's seller's credit; (c) the charter period for each vessel being extended by two years; (d) the charter hire being paid on a monthly basis; (e) the Bintulu Hotel being mortgaged to ICBCL's project company (*ie*, the plaintiffs) as collateral, for an amount of US$14m; (f) OML having the right to repurchase the vessels early at a stipulated repurchase price; and (g) provision by the defendant of the signed letters of support (*ie*, the Second Letters of Support), "undertaking that his shareholdings in [OML] shall not be less than 70% during the charter period, and [that] he [would] use his best endeavours to support [OML] to pay rental to [ICBCL]".

September 2017 Addenda

142 On 29 September 2017, further Addenda were entered into between each of the plaintiffs and OML (the "September 2017 Addenda"). These were, respectively, Addenda No 3 to the Go Perseus and Go Phoenix BBCs, and Addendum No 4 to the Go Pegasus BBC. The principal terms of the September

2017 Addenda were that the charter hire rates would be reduced even further, subject to additional undertakings by the Charterers which included (a) the defendant's execution and delivery of the Second Letters of Support (which had been sent to ICBCL on 27 September 2017 as noted above); and (b) as a condition subsequent to the coming into effect of the amendments, the procuring by 31 October 2017 of a mortgage in favour of each of the plaintiffs in the amount of US$14m over the Bintulu Hotel.

Attempts to obtain a mortgage over the Bintulu Hotel

143 Between 13 October 2017 and 18 October 2017, unsuccessful efforts were made to obtain a mortgage over the Bintulu Hotel in favour of the plaintiffs. In summary, there were difficulties in registering a fresh charge in favour of the plaintiffs because an earlier mortgage in favour of Malayan Banking Berhad ("Maybank") had not been discharged. An update was given to ICBCL on 2 November 2017 that the charge was in the process of being discharged, with OML's lawyers waiting for the land titles to be released by Maybank. By 23 November 2017, the outstanding loan to Maybank had been settled. However, no mortgage was registered in favour of the plaintiffs.

Go Marine enters voluntary administration

144 On 24 October 2017, Go Marine announced that it and its subsidiary, Go Offshore Pty Ltd (Go Offshore Pty Ltd is an Australian registered company; not to be confused with Go Offshore as defined at [3(b)] above), had initiated a voluntary administration process in Australia. The voluntary administration process was sparked largely by the failure to reach a deferred payment plan in respect of overdue taxes with the Australian tax authorities. A report prepared by ICBCL indicates that it wished to register a claim as a contingent creditor in

the administration of Go Marine arising from Go Marine's guarantee obligation for the Go Perseus BBC.

The first plaintiff terminates the Go Perseus BBC and demands that the defendant perform his obligations under the Second Letters of Support

145 On 15 November 2017, the first plaintiff terminated the Go Perseus BBC with immediate effect. A number of Events of Default were cited in the letter of termination, including the failure to pay the instalments of charter hire due on 2 February 2017, 2 May 2017, 2 August 2017 and 2 November 2017, and the Deposit; as well as the fact that Go Marine had entered into administration.

146 On 20 November 2017, the first plaintiff wrote to the defendant to request that he perform his obligations under the Second Letters of Support. That same day the first plaintiff also wrote to OML demanding payment under the guarantee it had issued in respect of the Go Perseus BBC.

147 Following termination, the outstanding amount due under the Go Perseus BBC and the related guarantee issued by OML as of 20 November 2017 (the date of the first plaintiff's statutory demand to Go Offshore and OML), as submitted by the plaintiffs, was as follows:

	Description	**Amount (US$)**
(a)	All Charter Hire due and payable but unpaid under the Go Perseus BBC up to the Termination Date	$2,825,000
(b)	Interest accrued on (a) from the due date of payment to the Termination Date at the rate of 10% p.a.	$124,857.81
(c)	All balance Charter Hire due and payable under the Go Perseus BBC to the end of the Charter Period if it was not terminated	$62,041,150
(d)	Interests accrued on (c) from the Termination Date to-date at the rate of 10% p.a.	$84,987.88

(e)	The Deposit	$7,000,000
(f)	Interest accrued on (e) from the due date to the Termination Date at the rate of 10% p.a.	$669,315.07
(g)	Any sums other than the Charter Hire due and payable under the Go Perseus BBC	$197.51
(h)	Interest accrued on (g) from the due date to the Termination Date at the rate of 10% p.a.	$20.73
(i)	Costs, expenses, damages and losses incurred by the Owners to-date as a consequence of this Charter having been terminated prior to the expiry of the Charter Period	$7,614.31
TOTAL AMOUNT		**$72,753,143.31**

Shortly after, on 30 November 2017, Go Offshore filed an application to be placed under judicial management in HC/OS 1340/2017. The application was withdrawn at Go Offshore's request on 20 February 2018. Go Offshore subsequently made an application for a winding up order.

The second and third plaintiffs terminate the Go Phoenix and Go Pegasus BBCs

148 On 31 January 2018, the second and third plaintiffs terminated the Go Phoenix and Go Pegasus BBCs respectively.

149 The outstanding amount due under the Go Phoenix BBC and the related guarantee issued by OML to the second plaintiff as of 6 February 2018 (which is the date when the second plaintiff issued a statutory demand to Otto Fleet and OML), as submitted by the plaintiffs, was as follows:

	Description	Amount (US$)
(a)	All Charter Hire due and payable but unpaid under the Go Phoenix BBC up to the Termination Date	$2,365,000.00

(b)	Interest accrued on (a) from the due date of payment to the Termination Date at the rate of 10% p.a.	$169,241.37
(c)	All balance Charter Hire due and payable under the Go Phoenix BBC to the end of the Charter Period if it was not terminated	$42,421,600.00
(d)	Interests accrued on (c) from the Termination Date to-date at the rate of 10% p.a.	$69,734.14
(e)	Costs, expenses, damages and losses incurred by the Owners to-date as a consequence of this Charter having been terminated prior to the expiry of the Charter Period	$35,009.95
TOTAL AMOUNT		**$45,060,585.46**

150 The outstanding amount due under the Go Pegasus BBC and the related guarantee issued by OML to the third plaintiff as of 6 February 2018 (which is the date when the third plaintiff issued a statutory demand to Otto Fleet and OML), as submitted by the plaintiffs, was as follows:

	Description	**Amount (US$)**
(a)	All Charter Hire due and payable but unpaid under the Go Pegasus BBC up to the Termination Date	$6,679,114.00
(b)	Interest accrued on (a) from the due date of payment to the Termination Date at the rate of 10% p.a.	$460,672.35
(c)	All balance Charter Hire due and payable under the Go Pegasus BBC to the end of the Charter Period if it was not terminated	$45,548,300.00
(d)	Interests accrued on (c) from the Termination Date to-date at the rate of 10% p.a.	$74,873.92
(e)	Costs, expenses, damages and losses incurred by the Owners to-date as a consequence of this Charter having been terminated prior to the expiry of the Charter Period	$35,009.97
TOTAL AMOUNT		**$52,797,970.24**

Mr See resigns from OML

151 Meanwhile, on 8 December 2017, Mr See wrote to the defendant thanking him for his guidance over the 11 years he had worked in OML and informing him that he wished to resign as CEO of OML, with his last day in office being 6 February 2018. A series of emails between him and the defendant shows that the defendant was keen to retain him as an advisor. Pertinently, in an email sent by the defendant to Mr See on 15 January 2018, the defendant told Mr See that "as part of [his] role, [he] will still need to represent [the defendant] to discuss, negotiate, if necessary, restructure and deal with various bankers in [his] new capacity".

ICBCL attempts to contact OML

152 The evidence discloses that OML became increasingly distant with ICBCL. On 24 January 2018, as part of its routine business operations, ICBCL wrote to Mr Ooi seeking information from OML. An ICBCL representative stated that he had attempted to call Mr Ooi's office line several times but he had received no answer; and OML's front desk had given excuses that Mr Ooi was in a meeting on each occasion. It is apparent that even by 23 February 2018, almost a month later, OML was still avoiding ICBCL. A more strongly-worded email was sent by ICBCL this time, indicating that OML's actions since 2017 were not "friendly", and even now, in February 2018, the defendant and OML's management were "refusing to sit down to discuss with [ICBCL] about the current situation". ICBCL declared this to be "huge[ly] embarrassing and without any due respect to [it]".

The first plaintiff commences legal proceedings against OML

153 On 5 February 2018, the first plaintiff commenced proceedings against the defendant for breaches of his obligations under the First and Second Letters of Support.

OML enters judicial management

154 On 20 February 2018, OML filed an application to be placed under judicial management in HC/OS 217/2018. On 21 March 2018, OML was placed under judicial management.

The second and third plaintiffs commence legal proceedings

155 On 3 April 2018, the second and third plaintiffs commenced legal proceedings against the defendant for breaches of his obligations under the First and Second Letters of Support.

Summary chronology of events post termination of each of the BBCs

156 At the risk of some repetition, it is convenient to set out a summary chronology of principal events following termination of each of the BBCs:

Go Perseus

15 November 2017 – Notice of Termination to Go Offshore

20 November 2017 – Statutory Demand to the Guarantors

20 November 2017 – Statutory Demand to Go Offshore

20 November 2017 – Letter of Demand issued to the defendant

30 November 2017 – Go Offshore's application for judicial management in HC/OS 1340/2017 ("the JM application")

5 February 2018 – Commencement of action against defendant

8 February 2018 – Go Offshore filed an affidavit to state that it intended to withdraw the JM application

20 February 2018 – Leave granted to Go Offshore to withdraw the JM application

20 February 2018 – OML applied for judicial management

13 April 2018 – Go Offshore applied to be wound up

12 September 2018 – OML applied to be wound up

Go Phoenix

31 January 2018 – Notice of Termination to Otto Fleet

6 February 2018 – Statutory Demand to Otto Fleet

6 February 2018 – Statutory Demand to OML

8 February 2018 – Letter of Demand to the defendant

20 February 2018 – OML applied for judicial management

3 April 2018 – Commencement of action against defendant

12 September 2018 – OML applied to be wound up

8 October 2018 – Statutory Demand to Otto Fleet

10 July 2019 – Otto Fleet ordered to be wound up

Go Pegasus

31 January 2018 – Notice of Termination to Otto Fleet

6 February 2018 – Statutory Demand to Otto Fleet

6 February 2018 – Statutory Demand to OML

8 February 2018 – Letter of Demand to the defendant

20 February 2018 – OML applied for judicial management

3 April 2018 – Commencement of action against the defendant

12 September 2018 – OML applied to be wound up

8 October 2018 – Statutory Demand to Otto Fleet

10 July 2019 – Otto Fleet ordered to be wound up

Against this background, we turn to consider the three main claims advanced by the plaintiffs.

Claim 1: Breaches of the best endeavours obligations contained in the First and Second Letters of Support

157 As stated above, although the First Letters of Support were apparently signed by the defendant some time prior to 10 November 2016, they were never delivered or handed over to the plaintiffs. However, in our view, the latter is of no significance because (a) in the Defence, the defendant does not dispute that the First Letters of Support were valid and effective; and (b) it is, in any event, common ground that the Second Letters of Support dated 27 September 2017 were ultimately signed by the defendant and delivered to the plaintiffs, and that these Second Letters of Support expressly stated (by the additional clause 7) that the terms "*... shall take effect retrospectively from 7 October 2016, and the parties shall be entitled to enforce their rights and obligations under the Letter from that date*" [emphasis in original]. Thus, we proceed on the basis that the parties are entitled to rely on their rights and obligations under the Second Letters of Support as from 7 October 2016 (we henceforth refer to these rights and obligations as those under "the Letters of Support").

158 The claims advanced by the plaintiffs under this head fall under two main limbs *viz*:

(a) **Amounts due under the BBCs up to the date of termination of each of the BBCs (the "Pre-Termination Claims")**

In summary, the plaintiffs say that the defendant breached his best endeavours obligations under the Letters of Support which breach(es) in

turn caused the Charterers/the Guarantors to commit various defaults of their respective obligations under the BBCs/the guarantees, *ie*, among other things, the Charterers/the Guarantors failed to make timely payment of the following sums falling due under the BBCs to the plaintiffs during the pendency of the BBCs, as set out in the table below.

Date	Sums payable to the plaintiffs under the BBCs
2 November 2016	Charter hire instalments of US$3,053,480
6 December 2016	The Deposit (of US$7m) payable to the first plaintiff under the Go Perseus BBC
2 February 2017	Charter hire instalments of US$2,953,910
2 May 2017	Charter hire instalments of US$3,053,480
2 August 2017	Charter hire instalments of US$3,652,400
2 November 2017	Charter hire instalments of US$3,652,400

Against these sums, the amounts of charter hire due on 2 November 2016 and 2 February 2017 were subsequently reduced by sporadic payments made by Charterers/the Guarantors. These payments and their significance will be addressed below at the appropriate juncture (*ie*, in our discussion on the issue of quantum).

(b) **Amounts due on termination of each of the BBCs (the "Termination Amount(s)"), and failure of the defendant to procure funds to meet the Termination Amounts**

The amounts claimed under this head overlap with the previous limb and, as claimed by the plaintiffs, are as follows:

(i) The Go Perseus Termination Amount as of 20 November 2017, *ie*, the date of the first plaintiff's statutory demand to Go Offshore and OML:

	Description	Amount (US$)
(a)	All charter hire due and payable but unpaid under the Go Perseus BBC up to the Termination Date	$2,825,000
(b)	Interest accrued on (a) from the due date of payment to the Termination Date at the rate of 10% p.a.	$124,857.81
(c)	All balance charter hire due and payable under the Go Perseus BBC to the end of the charter period if it was not terminated	$62,041,150
(d)	Interests accrued on (c) from the Termination Date to-date at the rate of 10% p.a.	$84,987.88
(e)	The Deposit	$7,000,000
(f)	Interest accrued on (e) from the due date to the Termination Date at the rate of 10% p.a.	$669,315.07
(g)	Any sums other than the charter hire due and payable under the Go Perseus BBC	$197.51
(h)	Interest accrued on (g) from the due date to the Termination Date at the rate of 10% p.a.	$20.73
(i)	Costs, expenses, damages and losses incurred by the plaintiffs to-date as a consequence of this charter having been terminated prior to the expiry of the charter period	$7,614.31
TOTAL AMOUNT		**$72,753,143.31**

(Note: If the defendant had performed his best endeavours and procured the payment of the Deposit and charter hire payments under the Go Perseus BBC, the total amount payable upon termination would have been ***US$62,133,970.43****.)*

(ii) The Go Phoenix Termination Amount as of 6 February 2018, *ie*, the date of the second plaintiff's statutory demand to Otto Fleet and OML:

	Description	Amount (US$)
(a)	All charter hire due and payable but unpaid under the Go Phoenix BBC up to the Termination Date	$2,365,000.00
(b)	Interest accrued on (a) from the due date of payment to the Termination Date at the rate of 10% p.a.	$169,241.37
(c)	All balance charter hire due and payable under the Go Phoenix BBC to the end of the charter period if it was not terminated	$42,421,600.00
(d)	Interests accrued on (c) from the Termination Date to-date at the rate of 10% p.a.	$69,734.14
(e)	Costs, expenses, damages and losses incurred by the plaintiffs to-date as a consequence of this charter having been terminated prior to the expiry of the charter period	$35,009.95
TOTAL AMOUNT		**$45,060,585.46**

(Note: If the defendant had performed his best endeavours and procured the payment of the Deposit and charter hire payments under the Go Phoenix BBC, the total amount payable upon termination would have been ***US$42,526,344.09****.)*

(iii) The Go Pegasus Termination Amount as of 6 February 2018, *ie*, the date of the third plaintiff's statutory demand to Otto Fleet and OML:

	Description	Amount (US$)
(a)	All charter hire due and payable but unpaid under the Go Pegasus BBC up to the Termination Date	$6,679,114.00
(b)	Interest accrued on (a) from the due date of payment to the Termination Date at the rate of 10% p.a.	$460,672.35
(c)	All balance charter hire which shall become due and payable under the Go Pegasus BBC to the end of the Charter Period if it was not terminated	$45,548,300.00
(d)	Interests accrued on (c) from the Termination Date to-date at the rate of 10% p.a.	$74,873.92

(e)	Costs, expenses, damages and losses incurred by the plaintiffs to-date as a consequence of this charter having been terminated prior to the expiry of the charter period	$35,009.97
TOTAL AMOUNT		**$52,797,970.24**

(Note: If the defendant had performed his best endeavours and procured the payment of the Deposit and charter hire payments under the Go Pegasus BBC, the total amount payable upon termination would have been ***US$45,658,183.89****.)*

In relation to each of the above claims for the Termination Amount under each of the BBCs, the plaintiffs say that the defendant committed yet further breaches of his best endeavours obligations by failing to take any steps towards procuring funds for the Charterers/the Guarantors to meet these Termination Amounts.

The proper construction of the Letters of Support

The parties' submissions on the construction of the Letters of Support

159 There was common ground between the parties as to the general principles of construction as laid down in a number of recent cases and as summarised, for example, by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [131] and in England by Popplewell J in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* [2018] 1 Lloyd's Rep 654. These principles are now so well known that we do not need to repeat them. However, we should mention that although the Letters of Support were subject to English Law, the parties did not run any arguments or lead any evidence showing that there is any difference between Singapore law and English law on the principles of construction. We have therefore proceeded to apply Singapore law.

160 There was much greater controversy as to the nature and precise scope of the defendant's obligations under the Letters of Support.

161 On the plaintiffs' side, they summarised their position as follows:

(a) The Letters of Support were intended to provide the plaintiffs with financial assurance just short of a personal guarantee issued by the defendant.

(b) Consistent with this, the overarching purpose under the Letters of Support (which the defendant was to exercise his best endeavours to procure) was the performance of the Charterers'/OML's and Go Marine's obligations (particularly, towards payment) under the BBCs/the guarantees. In furtherance of this purpose, the Letters of Support prescribed five other specific purposes (as listed at paragraph 160 of the plaintiffs' factual closing submissions) which the defendant was to procure *concurrently* using his best endeavours.

(c) The exercise of best endeavours under the Letters of Support required the defendant to:

(i) Do everything reasonable in good faith to procure the contractual outcome; including taking all reasonable steps which a prudent and determined man, acting in the obligee's interest and anxious to procure the outcome, would take.

(ii) This included using his personal financial resources (including obtaining financial support of the Samling Group and leveraging on his connections with the Samling Group) to achieve the purposes under the Letters of Support.

(iii) Concomitantly, where required, the defendant was obligated to sacrifice his personal financial interests to achieve these purposes.

(d) In support of the foregoing, the plaintiffs sought to rely upon certain matters by way of a "factual matrix". This included the advice received by the defendant from Dentons Rodyk in late 2016 (see [111] above) to the effect that "…the [the defendant] would use his best endeavours to provide support, by drawing on his personal wealth to do so should this become necessary to procure liquidity/solvency of OML and/or the Charterers to meet their obligations (or by taking such steps as he is able to, in order to procure compliance)… [and] would include him having to make personal financial sacrifices."

(e) The defendant's best endeavours obligations under the Letters of Support came into effect on 7 October 2016 (the date of OML's delisting) and continued in force notwithstanding the entry into judicial management and/or winding up of the Charterers/OML.

162 In support of the foregoing and with particular regard to the scope and nature of a "best endeavours" obligation, the plaintiffs summarised the applicable legal principles to be distilled from the authorities as follows:

(a) A best endeavours undertaking requires the obligor to do everything reasonable in good faith to procure the contractual outcome; including taking all reasonable steps which a prudent and determined man, acting in the obligee's interest and anxious to procure the outcome, would take (*IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335 ("*IBM*") at 345; *KS Energy* ([111] *supra*) at [46] and [94]).

(b) Non-absolute obligations, such as "best endeavours" obligations serve a useful commercial purpose. It is common to encounter situations where an obligor may not be in a position to ensure that the contractually-stipulated outcome is procured, but the obligee requires some assurance that its interests are protected, and that the obligor will not surreptitiously prioritise other goals. Best endeavours obligations ensure that the obligor's and obligee's interests are aligned by contract, by requiring the obligor to take all reasonable steps necessary to procure the contractually-stipulated outcome: *KS Energy* at [94].

(c) It is not a promise merely to act if and to the extent that it is in conformity with the obligor's arrangements: *Gaia Ventures Ltd v Abbeygate Helical (Leisure Plaza) Ltd* [2019] EWCA Civ 823 at [81].

(d) What constitutes best endeavours in each case is a fact-sensitive exercise and, like any other contractual clause, must be interpreted contextually taking into account the surrounding factual matrix (*Jet2.com v Blackpool Airport* [2012] EWCA Civ 417 ("*Jet2*") at [41], *KS Energy* at [44]).

(e) The fact that the contract contains a deadline as to when the task is to be completed does not mean the obligation to use best endeavours ends then. The date should be understood to be a target and not a cut-off for the obligation (*Astor Management AG and another v Atalaya Mining plc and others* [2017] EWHC 425 (Comm) ("*Astor*") at [75] and [76]).

(f) Generally, the best endeavours obligor must subordinate his financial interests to obtaining the contractual result. Whether and, if so, the degree to which the obligor can take his own commercial interests into account depends on the nature and terms of the contract (K Lewison,

The Interpretation of Contracts (Sweet and Maxwell, 6th Ed, 2015) ("*Lewison*") at pp 769 and 771 and *Jet2* at [35]).

(g) Where certain steps are specifically stipulated as part of the exercise of best endeavours, they have to be taken even if they require the sacrifice of a party's commercial interest: *Rhodia International Holdings Ltd and another v Huntsman International Llc* [2007] EWHC 292 (Comm) at [35] (in the less stringent context of "*reasonable endeavours*").

(h) The *status quo* prior to the assumption of the best endeavours obligation is important. If an act was already being done, a justifiable explanation needs to be given for cutting back on the *status quo* after the assumption of the best endeavours obligations (at [72]).

(i) An obligor cannot sit back and say it could not reasonably have done more where, if it had asked the obligee, it might have discovered other steps to be taken (*KS Energy* at [93(d)] citing *EDI Central Limited v National Car Parks Limited* [2011] SLT 75 ("*EDI*") at [59]).

(j) If an obligee can point to steps which the obligor could have taken, the burden of proof shifts to the obligor to show that (a) it took those steps, (b) those steps were not reasonably required or (c) those steps would have been bound to fail (*KS Energy* at [93(e)] and *EDI* at [59]).

163 As for the defendant, he accepted that he was under a duty to do what could reasonably have been done in the circumstances to support OML and the Charterers; that that involved taking all reasonable steps a prudent and determined man, acting in his interests (which include his interests as a

shareholder who had incurred significant expenditure in securing the delisting of OML) and anxious to support OML and the Charterers would take; and that as a director of OML, this might involve managing and influencing OML as appropriate in the circumstances. However, the defendant rejected any further or additional obligations. In particular and contrary to the plaintiffs' submissions, he rejected that the Letters of Support provided security "*just short of a guarantee*"; or that the exercise of best endeavours required him to do the things as referred to in the previous paragraph; or that his obligations continued following the Charterers and OML entering judicial management and/or being wound up. Further, it was submitted on behalf of the defendant that the plaintiffs' case ignored the object of the endeavours that were to be exercised; that the relevant duty was not, as the plaintiffs contended, a duty to act solely in the obligee's interests – rather, it was "a duty to act in the defendant's interests with him as the majority shareholder of OML anxious to support OML"; and, most importantly, that the defendant was not required to use his personal resources and/or sacrifice his personal interests in order to comply with the best endeavours obligation.

164 In support of the above, it was submitted on behalf of the defendant that the following principles emerge from the authorities:

(a) A best endeavours obligation imposes a duty to do what can reasonably be done in the circumstances and, in the context of a company and its officers, the standard of reasonableness is that of a reasonable and prudent board of directors acting properly in the interests of their company: *Midland Land Reclamation Ltd and another v Warren Energy Ltd* [1997] EWHC Technology 375 ("*Midland Land Reclamation*"). Accordingly, a best endeavours obligation does not require directors to act in a way which would ruin the company or to act

in complete disregard of the interests of the shareholders, but only to do what could reasonably be done in the circumstances: *Terrell v Mabie Todd & Co Ltd* (1952) 69 RPC 234.

(b) Best endeavours means what it says it means – it does not mean second best endeavours (*Midland Land Reclamation* quoting from *Sheffield District Railway Company v Great Central Railway Company* (1911) 27 TLR 451). It has been said that the obligor has a duty to do everything reasonable in good faith with a view to procuring the contractually-stipulated outcome within the time allowed. This involves taking all those reasonable steps a prudent and determined man, acting in the interests of the obligor and anxious to procure the contractually-stipulated outcome within the available time, would have taken: *KS Energy* at [47(a)]. This is consistent with the English Court of Appeal's decision in *IBM* where the purchaser was obliged to make an application for planning permission "and use its best endeavours to obtain the same." The Court of Appeal held that the test was "what would an owner of the property in this case who was anxious to obtain planning permission do to achieve that end?"

(c) A best endeavours obligation does not require a party to act beyond his own commercial interests, subject to the caveat that in some cases the contract may specify steps which have to be taken regardless of the commercial interest of the party required to take them: see *EDI* at [19]–[20] where it is stated:

> The party on whom the obligation is placed will be expected to explore all avenues reasonably open to him, and to explore them all to the extent reasonable. But unless the contract otherwise stipulates, he is not required to act against his own commercial interests …

Further, in fulfilling his obligation, the obligor can take account of his own interests: *KS Energy* at [47(c)].

(d) A best endeavours obligation is not an absolute obligation. It is not the next best thing to an obligation or a guarantee: *Midland Land Reclamation*. Similarly, a best endeavours obligation is not a warranty to procure the contractually-stipulated outcome: *KS Energy* at [47(d)].

(e) In construing a best endeavours obligation, it is important to concentrate on the object of the endeavours that are to be exercised: *Jet2* at [28].

(f) The test for determining whether a best endeavours obligation has been fulfilled is an objective test: *KS Energy* at [47(b)].

(g) In terms of what steps must be taken so as fulfil a best endeavours obligation and whether such obligation has been breached, this requires a fact-intensive inquiry: *KS Energy* at [47(f)]. Such inquiry should also take account of the guidance provided at [93] of *KS Energy*, although the weight to be attributed to each factor will obviously differ depending on the circumstances of the case (given its significance, the paragraph in *KS Energy* at [93] that was referenced by the defendant is reproduced later in this Judgment at [176] below).

(h) As to the specific parts of a contract, it is trite law that the recital to a contract does not by itself impose additional legal obligations on parties, as per *Tiger Airways Pte Ltd v Swissport Singapore Pte Ltd* [2009] 4 SLR(R) 992 at [34]:

> While recitals do not impose legal obligations on the parties, they can often be of assistance to the courts in the construction of contractual terms. *McMeel* [Gerard

> McMeel, The Construction of Contracts: Interpretation, Implication, and Rectification (Oxford University Press, 2007)] explains that ([25] *supra* at para 4.25):
>
> > The recitals have some role to play in the construction of the operative provisions of the deed or contract. They are an obvious source of readily accessible 'background' or 'factual matrix'.

This is consistent with the Court of Appeal's decision in *Management Corporation Strata Title Plan No 1933 v Liang Huat Aluminium Ltd* [2001] 2 SLR(R) 91 at [7]:

> … First, a recital in an instrument can only assist in the construction of the substantive terms thereof; it cannot override or control the operation of the substantive terms, where such terms are clear and unambiguous. In *Walsh v Trevanion* (1850) 15 QB 733 at 751, Patteson J laid down the following rule of construction on the recital in relation to the operative part of a deed:
>
> > [W]hen the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed. On the other hand, when those words are of doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix the true meaning of those words.
>
> Further, the relationship of a recital in a deed to its operative part was explained by Lord Esher MR in *Ex parte Dawes; In re Moon* (1886) 17 QBD 275 at 286 as follows:
>
> > Now there are three rules applicable to the construction of such an instrument. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred.

165 Further, it was submitted on behalf of the defendant that in construing the Letters of Support, the court should take into account the surrounding circumstances and factual matrix *viz*:

(a) ICBCL/the plaintiffs had chosen not to require a personal guarantee from the defendant when providing finance for the Go Pegasus and Go Phoenix in 2013 and the Go Perseus in 2015.

(b) ICBCL/the plaintiffs were aware from at least March 2016 that OML had other significant creditors. Mr Hong Xing recorded in the note of his meeting with Mr See on 3 March 2016 that the outstanding balance owed by OML to OCBC was US$300m. Mr Hong Xing also noted that UOB and DBS were owed around US$100m by OML and that the three banks were co-operating with OML to adjust repayment schedules. Mr Hong Xing also met with OCBC representatives on 17 March 2016 to discuss OML.

(c) ICBCL's consent for the delisting was forthcoming at the earliest opportunity (*ie*, April 2016) with little persuasion, although it did take the opportunity to request a form of personal security from Mr Yaw – being the Letters of Support.

(d) ICBCL was aware well before the date on which the First Letters of Support were to have effect (7 October 2016) that OML would not be receiving a capital injection of S$143m, as that was the total fund associated with securing the delisting of OML.

(e) The Letters of Support were "in no way" to be personal guarantees. This was expressly acknowledged by ICBCL when it agreed

to insert express wording to that effect in the Second Letters of Support and is expressly acknowledged on the face of the Letters of Support.

(f) Having brought up the possibility of a personal guarantee before April 2016, ICBCL accepted that the Letters of Support represented a "concession." It follows that the parties intended and understood that the Letters of Support provided a lesser form of support as compared to a personal guarantee.

166 As to the specific terms of the Letters of Support, it was submitted on behalf of the defendant that the plaintiffs' case ignores what was said to be the "object" of the endeavours that are to be exercised. In particular, it was submitted on behalf of the defendant that the wording of the opening paragraph and the Letters of Support as a whole made clear that the defendant's obligation was to use best endeavours to "*…support the Charterer and the Guarantor*". On this basis, it was submitted on behalf of the defendant that his obligation was limited to providing support to OML by managing and influencing its business effectively; that the provision of such limited form of "support" was consistent with putting the Charterer and the Guarantors in the position of being able to meet their contractual obligations under the BBCs and the guarantees; but that these specific obligations did not place a more onerous burden on the defendant than the overarching objective to support OML.

167 More specifically, it was submitted on behalf of the defendant that, on their proper construction, the Letters of Support did not require the defendant to use best endeavours to pay the sums due under the BBCs or the guarantees; that, on the contrary, such construction was inconsistent with the language and therefore "plainly wrong"; and that the ordinary and natural meaning of the words used in the Letters of Support is inconsistent with the defendant agreeing

to provide his personal financial resources and sacrifice his personal financial interests.

168 In support of the foregoing, the defendant relied on a number of points which we would summarise as follows:

(a) The opening words in clauses 2(a) and 2(b) of the Letters of Support which provide in effect that the object of the obligation to use best endeavours is "to procure" that the Guarantor/Charterers have sufficient liquidity to make the stipulated payments and that the Guarantor/Charterers "…remain solvent and a going concern…". In particular, it was submitted on behalf of the defendant that the natural meaning of "*procure*" is only to persuade or cause a third party to do something; and that this limited meaning is supported by the different wording in clause 3 of the Letters of Support which refers specifically to the Defendant using best endeavours to "…*procure for the Charterer … sufficient funds*". This is markedly different from the defendant agreeing to provide his own money. If the parties had intended for the Defendant to use his own funds, the Letters of Support would have said so: they might, for example, have been framed as placing an obligation on the Defendant to use best endeavours to provide funds. But that is not what the Letters of Support say.

(b) The words used in the second unnumbered main paragraph ("*This Letter shall not be construed as a guarantee and/or an indemnity*") and in clause 3 ("*…(but shall in no way guarantee)…*") make it clear that the defendant was not agreeing to use personal funds to perform his obligations under the Letters of Support.

(c) The plaintiffs' construction is "absurd" because it requires the court to construe the Letters of Support as providing some sort of "super-guarantee" under which the defendant assumed unlimited personal liability for the whole indebtedness under the BBCs or the vessels but also of OML and undertook to make his family members assume those liabilities in addition. The effect of this would be that the defendant was bound to pump in sufficient funds to enable OML to pay all its creditors, regardless of its viability as a going business concern. This is an absurd construction. Further the plaintiffs' construction is untenable because it advocates an open ended obligation on the part of the defendant to use his personal resources and sacrifice his personal financial interests.

(d) The plaintiffs' case wrongly isolates OML's obligations and indebtedness to the plaintiffs without having regard to OML's creditors and financial standing as a whole. Moreover, the defendant's obligations *vis-à-vis* the Charterers did not differ to those he owed in respect of OML.

169 As to these rival submissions and the multiple authorities cited by the parties, our observations and conclusions are as follows.

The law on best endeavours obligations

170 The law regarding the construction of "best endeavours" clauses, or "all reasonable endeavours" clauses has been authoritatively laid down by the Court of Appeal in two decisions. The first of these is *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474 ("*Travista*"). The appellant in *Travista* was a foreign company which entered into a sale and purchase agreement with the owners of the strata title units in a condominium property. The agreement provided that completion was to take place within six

weeks from the receipt of a qualifying certificate from the relevant authority or within three months of the agreement, and the appellant was to use "best endeavours" to obtain the certificate. The appellant duly made efforts to obtain the certificate, but was unable to do so within the deadline, leading to the respondents rescinding the agreement. The appellant appealed, arguing that it had exercised best endeavours to obtain the certificate.

171 The Court of Appeal laid down the following propositions of law (at [22]):

> … The law is well established. A best endeavours clause in a contract obliges the covenantor to 'take all those reasonable steps which a prudent and determined man, acting in his own interests and anxious to obtain planning permission [or to perform such other applicable obligation], would have taken' (see *IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335 … at 345; referred to in *Justlogin Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2004] 1 SLR(R) 118 at [47]. As Kan Ting Chiu J stated succinctly in *Ong Khim Heng Daniel v Leonie Court Pte Ltd* [2000] 3 SLR(R) 670… at [42]:
>
> > A covenant to use best endeavours is not a warranty to produce the desired results. It does not require the covenantor to drop everything and attend to the matter at once; the promise is to use the best endeavours to obtain the result *within the agreed time*. Nor does it require the covenantor to do everything conceivable; the *duty is discharged by doing everything reasonable in good faith with a view to obtaining the required result within the time allowed*.
> >
> > [emphasis added]
>
> The test to determine whether a party has exercised best endeavours is an objective one. But, it is also a composite test in that the covenantor may also take into account its own interests. While the covenantor has a duty to use its best endeavours to perform its contractual undertaking within the agreed time, the duty is discharged upon the covenantor "doing everything reasonable in good faith with a view to obtaining the required result within the time allowed"… This test also involves a question of fact. As stated by Choo Han Teck J in *Group Exklusiv Pte Ltd v Diethelm Singapore Pte Ltd* [2003] 4 SLR(R) 582 at [11]:

> The facts that are relevant in such cases must include the nature of the approval sought, the practice, if any, of those in the trade concerned, the availability of an appeal process, evidence of futility of further efforts and so on.

172 The facts of *Travista* showed that the appellant had obtained from the relevant authority "in principle" approval for the purchase of the property, subject to it providing a banker's or insurance guarantee for the sum of S$3.05m it had placed as a deposit. The Court of Appeal found that the appellant could easily have obtained that guarantee in a short time (at [24]), but it had unnecessarily prolonged the process by coupling its request for the guarantee with a request for financing of the property redevelopment project as a whole, which made it more difficult and more time-consuming for the banks and the appellant to agree on the terms of the credit facilities sought. The Court of Appeal also observed that the burden was on the appellant to demonstrate that the banks would not have agreed to provide financing in the form of a guarantee separately from overall financing for the project, but the appellant could not do so because it had never applied for the guarantee on a stand-alone basis: at [27]. The Court of Appeal therefore held that the appellant "had not even attempted to use its best endeavours in this respect".

173 The second case is the decision of the Court of Appeal in *KS Energy* ([111] *supra*). In that case, the respondent had entered into a contract with a third party, PCSB, to provide a workover pulling unit ("WPU") for the latter. The appellant and respondent then entered into a joint venture agreement to procure a WPU. The appellant's role was to arrange for the construction of the WPU to sell to the joint venture company. The contract provided that the appellant was to "use all reasonable endeavours to procure the WPU is constructed and ready for delivery" by a specified time. The appellant entered into a contract with a rig builder, Oderco, to construct the WPU. The WPU was

ultimately not constructed in time for delivery to the joint venture company, with the ultimate result that PCSB rescinded its contract with the respondent. The respondent commenced proceedings against the appellant.

174 The Court of Appeal endorsed the propositions of law laid down in *Travista* and summarised them thus (at [47]):

> (a) The obligor has a duty to do everything reasonable in good faith with a view to procuring the contractually-stipulated outcome within the time allowed. This involves taking all reasonable steps which a prudent and determined man, acting in the interests *the obligee*... and anxious to procure the contractually-stipulated outcome within the available time, would have taken.
>
> (b) The test for determining whether a 'best endeavours' obligation has been fulfilled is an objective test.
>
> (c) In fulfilling its obligation, the obligor can take into account its own interests.
>
> (d) A 'best endeavours' obligation is not a warranty to procure the contractually-stipulated outcome.
>
> (e) The amount or extent of 'endeavours' required of the obligor is determined with reference to the available time for procuring the contractually-stipulated outcome; the obligor is not required to drop everything and attend to the matter at once.
>
> (f) Where breach of a 'best endeavours' obligation is alleged, a fact-intensive inquiry will have to be carried out.

175 The Court of Appeal in *KS Energy* further observed that the position taken in *Travista* was generally in line with the English cases, save that *Travista* allowed the obligor to take into account its own interests and thus represented a "slight departure" from those English cases which suggested that the obligor was in a *quasi*-fiduciary position *vis-à-vis* the obligee and thus had to completely align its interests with the latter's interests: at [48]. In addition, the Court of Appeal considered that an "all reasonable endeavours" clause

essentially imposed the same standard of conduct as "best endeavours" clauses: at [62].

176 The Court of Appeal then conducted a comprehensive survey of the case law, before endorsing additional guidelines regarding the *operation and extent* of both "all reasonable endeavours" and "best endeavours" clauses (at [93]):

> (a) Such clauses require the obligor 'to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted' … or 'to do all that it reasonably could' …
>
> (b) The obligor need only do that which has a significant … or real prospect of success … in procuring the contractually-stipulated outcome.
>
> (c) If there is an insuperable obstacle to procuring the contractually-stipulated outcome, the obligor is not required to do anything more to overcome other problems which also stood in the way or procuring that outcome but which might have been resolved. …
>
> (d) The obligor is not always required to sacrifice its own commercial interests in satisfaction of its obligations …, but it may be required to do so where the nature and terms of the contract indicate that it is in the parties' contemplation that the obligor should make such sacrifice …
>
> (e) An obligor cannot just sit back and say that it could not reasonably have done more to procure the contractually-stipulated outcome in cases where, if it had asked the obligee, it might have discovered that there were other steps which could reasonably have been taken …
>
> (f) Once the obligee points to certain steps which the obligor could have taken to procure the contractually-stipulated outcome, the burden ordinarily shifts to the obligor to show that it took those steps, or that those steps were not reasonably required, or that those steps would have been bound to fail …

177 On the facts of *KS Energy*, the appellant in that case *had* exercised all reasonable endeavours. The Court of Appeal found that the appellant's behaviour bore all the hallmarks of a prudent and determined company acting in the respondent's interests and anxious to procure the construction and

delivery of the WPU within the time allowed. The appellant had consistently pushed its sub-contractor to perform, asked the sub-contractor for recovery schedules as construction fell behind time, deployed its own representative to the sub-contractor's yard to monitor the progress of construction, assisted with the procurement of equipment needed to construct the WPU, made sizable payments on the sub-contractor's behalf, and eventually took over construction of the WPU itself: *KS Energy* at [110], [115]–[117], [126]–[127] and [136].

178 The Court of Appeal also observed that even if the appellant had breached its obligations to exercise all reasonable endeavours, the respondent could not prove that but for the appellant's breach, the WPU would have been completed and delivered to PCSB so as to avoid PCSB's termination of its contract with the respondent. In other words, even if the appellant had breached the "all reasonable endeavours" clause, that was not a but for cause of the respondent's loss: *KS Energy* at [141]–[146].

179 The Court of Appeal's observations as to the time within which the appellant had to exercise all reasonable endeavours is also relevant. The court observed that the deadline stipulated in the joint venture agreement represented the "upper limit" of the appellant's obligations, in that the appellant need not have tried any harder than to procure the construction and delivery of the WPU within that deadline: *KS Energy* at [102]. *If* the deadline had been exceeded however, the obligation to exercise all reasonable endeavours would have continued beyond the relevant deadline: *KS Energy* at [103]. The parties would have contemplated the possibility of salvaging the situation had the deadline not been met.

180 As for English law, there has been no authoritative summary of all the relevant principles in any one case, but the cases address different aspects of "best endeavours" obligations under English Law.

181 *Jet2* ([162(d)] *supra*), a decision of the English Court of Appeal, is one of the leading cases. The following principles can be elucidated from it. First, in general an obligation to use best endeavours, or all reasonable endeavours, is not in itself regarded as too uncertain to be enforceable, provided that the object of the endeavours can be ascertained with sufficient certainty: at [18] (per Moore-Bick LJ). This is because the court granted with a definite objective is able to determine whether the party with the obligation had made all endeavours which were reasonable in the circumstances: at [48] (per Lewison LJ, citing Lord Reed in *R&D Construction Group Ltd v Hallam Land Management Ltd* [2010] CSIH 96 ("*R&D Construction*")).

182 Second, there must minimally be objective criteria against which the endeavours can be measured and assessed, otherwise effective enforcement is not possible: *Jet2* at [49] (per Lewison LJ, citing *R&D Construction*). Lewison LJ excerpted the following quote from *Phillips Petroleum Co (UK) Ltd v Enron (Europe) Ltd* [1997] CLC 329 at p 343 (per Potter LJ):

> Finally, the unwillingness of the courts to give binding force to an obligation to use 'reasonable endeavours' to agree seems to me to be sensibly based on the difficulty of policing such an obligation, in the sense of drawing the line between what is to be regarded as reasonable or unreasonable in an area where the parties may legitimately have differing views or interests, but have not provided for any criteria on the basis of which a third party can assess or adjudicate the matter in the event of dispute. In the face of such difficulty, the court does not give a remedy to a party who may assert, 'well, whatever the criteria are, there must have been a breach in this case'. It denies the remedy altogether on the basis of the unenforceability in principle of an obligation which may fall to be applied across a wide spectrum of arguable circumstances.

183 The above two requirements, (a) that the object of the requirements be sufficiently certain and (b) that there are sufficient objective criteria by which to evaluate the reasonableness of the endeavours, were referred to as the "two essential requirements" by Andrews J after her survey of the relevant authorities in the more recent decision of *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 817 (QB).

184 Third, the extent to which a person who has undertaken to use his best endeavours can have regard to his own financial interests depends on the nature and terms of the contract in question. Thus, on the facts of *Jet2* itself, the court held that the respondent airport operator was required to keep the airport open outside normal opening hours, even if doing so meant it incurred a loss, because the appellant airline operator's ability to schedule aircraft movements outside those hours was fundamental to the appellant's business and therefore fundamental to the agreement: at [32] (per Moore-Bick LJ). Longmore LJ agreed, and observed that the fact that a party has "agreed to use his best endeavours presupposes that he may well be put to some financial cost, so financial cost cannot be a trump card to extricate himself from what would otherwise be his obligation": at [70]. However, both judges agreed that if the airline operator itself could not have operated profitably at the airport, then the airport operator was not obliged to incur losses to promote or prop up a failing business: see [32] and [70].

185 Fourth, as for burden of proof, we note the statement in, for example, *Astor* ([162(e)] *supra*) at [71] that it is important to remember that the burden of proof is on the party alleging failure to comply with the obligation to use best endeavours. In so far as the Judge was there referring to the *legal* burden of proof, we entirely agree; and we bear that well in mind when considering the particular allegations of the breach(es) of the best endeavours obligations here.

However, we do not consider that this is in any way in conflict with the observations of the Court of Appeal in *KS Energy* ([111] *supra*) at [92] and [93(f)] that once the obligee points to certain steps which the obligor could have taken to procure the contractually-stipulated outcome, the burden *ordinarily* shifts to the obligor to show that it took those steps, or that those steps were not reasonably required, or that those steps would have been bound to fail. As we read what is there stated, the Court of Appeal was not considering the *legal* burden of proof but rather the *evidential* burden of proof.

186 Fifth, when a contract imposes an obligation to do something by a particular date, this does not mean that the obligation expires on that date. Rather, the date specified should reasonably be understood as a target, not a cut-off for the obligation: *Astor* at [75]. In cases of an absolute obligation, the failure to perform by the specified date would constitute a breach of contract. But in cases of undertakings to use all reasonable endeavours, although failure to perform would not by itself constitute a breach of contract, it would be unreasonable, absent some special factor, to regard failure to achieve the objective by the given date as a sufficient reason for releasing the party which has given the undertaking from any future performance.

Our observations on the proper construction of the Letters of Support

187 As to the specific terms of the Letters of Support, we would make the following observations.

188 First, it is important to note that each Letter expressly states on its face that it is "*... legally binding and its obligation enforceable in accordance with its terms*". Thus, the suggestion made at certain stages in the course of 2016 that the Letters of Support were only letters of "comfort" and did not create legally enforceable obligations is demonstrably incorrect (see *inter alia* [104] above).

On behalf of the plaintiffs, it was submitted that the defendant's attempts to renege from providing the Letters of Support and to deny their enforceability, as well as his subsequent conduct in these very proceedings as late as November 2018 where he denied the validity and binding nature of his obligations, taken cumulatively, constituted a repudiatory breach by the defendant. That may well be right but any such repudiation was never accepted by the plaintiffs. As such, it is a thing writ in water; and we simply note that this threshold point (*ie*, that the Letters of Support are not enforceable) is no longer pursued by the defendant.

189 Second, we do not accept the plaintiffs' submission that the Letters of Support are to be characterised as being "*just short of a guarantee*". Such a description is riddled with uncertainty and does not contribute to any meaningful understanding of the Letters of Support. If they are not guarantees (as the plaintiffs and the defendant accept) there is no need to tether them to the concept of a guarantee and distance them therefrom by any form of loose measurement such as "just short of a guarantee". In our view, such characterisation is wrong and misleading. As submitted on behalf of the defendant and quite apart from the "factual matrix" relied upon by the defendant, the Letters of Support are plainly not on their face guarantees as that term is generally understood. On the contrary, they state expressly on their face: "*This Letter shall not be construed as a guarantee and/or indemnity*". There is an obvious and important difference between, on the one hand, an obligation by way of guarantee, and, on the other hand, an obligation to use "best endeavours"; the characterisation of the Letters of Support as being "*just short of a guarantee*" is unhelpful.

190 Third, contrary to the defendant's submission, we do not consider that it is right to characterise the first paragraph of the Letters of Support as a mere

"recital". On the contrary, in our view, it stands as a general undertaking given in consideration of the plaintiffs' consent to the restructuring of the BBCs, the delisting of OML, and the plaintiffs' "*forbearance*" towards the Charterers and the Guarantors that the defendant "*…will use best endeavours to support the Charterer and the Guarantor*".

191 Fourth, the Letters of Support expressly refer to the defendant using "*best endeavours*". Those words appear not only in the opening paragraph but also in clauses 1(a), 1(b), 2 and 3. In our view, those words create enforceable obligations consistent with the authorities to which we have already referred subject, of course, to the other specific terms of the Letters of Support.

192 Fifth, there is, in our judgment, an important distinction to be drawn between, on the one hand, clauses 2(a) and 2(b) and, on the other hand, clause 3 of the Letters of Support. In particular, clauses 2(a) and 2(b) are, in our view, limited to procuring the Charterers and OML to *use their own resources to*: (a) maintain sufficient liquidity to make timely payment of amounts due under the BBCs/the guarantees including charter hire (in the case of clause 2(a)), and (b) maintain solvency and going concern status for so long as *inter alia* charter hire or any other sums are outstanding under the BBCs/guarantees (in the case of clause 2(b)). In the event that those outcomes are not achieved despite the defendant's best endeavours, clause 3 requires the defendant to use his best endeavours to procure *for the Charterers* sufficient funds from whatever other sources that may be available (including his own personal wealth and that of his family) to *inter alia* meet their obligations under the BBCs. In our view, this construction reconciles the use of "procure" in clause 2 with "procure *for*" in clause 3 and gives proper effect to clause 3 which would otherwise be redundant. In other words, for clause 3 to apply, the Charterers and OML must first have insufficient liquidity or cashflow to meet charter hire. If that was the

case, the outcomes in clause 2(a) and clause 2(b) would in any event not have been achieved. The companies would not have sufficient liquidity nor would they be solvent or going concerns. If clauses 2(a) and 2(b) were read as requiring the defendant to use his personal wealth to maintain liquidity, solvency and going concern status as part of his best endeavours obligation, there would not be a need for clause 3: thus, failure on the part of the defendant to use his wealth would not afford a cause of action to the plaintiffs on the basis of clauses 2(a) and 2(b). Clause 3 must serve a different purpose and impose a different obligation.

193 In so far as may be necessary, such construction of clause 3 of the Letters of Support is also supported by and consistent with the factual matrix which formed the backdrop to the defendant's agreement to and execution of the Letters of Support, *ie*, that he was required to utilise his personal financial resources in exercise of his best endeavours obligations. As to such "factual matrix", we do not propose to repeat what we have already stated in the earlier part of this Judgment. For present purposes, it is sufficient to note that the Letters of Support were agreed against the backdrop of the Charterers/the Guarantors operating in a depressed market that materially affected their ability to meet their obligations under the BBCs/the guarantees; that the defendant had represented (whether personally or through Mr See) that he/his family were already utilising their own financial resources to fund the Charterers' charter hire payments under the BBCs and would continue to do so after the delisting; and that the purpose of the delisting and the plaintiffs' consent thereto was to enable or at least facilitate such continued funding. However, we do not consider that the advice received by the defendant from Dentons Rodyk in late 2016 can properly be regarded as relevant "factual matrix" even though such advice was shared with the plaintiffs.

194 Sixth, it is important to emphasise that it does not follow from our conclusions as stated above that the effect of clause 3 of the Letters of Support was to impose on the defendant an open-ended obligation on his part to use his personal resources to fund the Charterers/the Guarantors or that the Letters of Support constituted a "super-guarantee" under which the defendant assumed unlimited personal liability for the whole indebtedness under the BBCs and the guarantees; or (still less) that he assumed an absolute or unqualified obligation to make his family members assume those liabilities; or that the defendant was "bound" to inject sufficient funds to enable OML/the Charterers to pay all their creditors, regardless of their viability as an ongoing business. As stated above and consistent with the authorities cited, the obligation to use best endeavours does not require unlimited expenditure. For the avoidance of doubt, and again consistent with the authorities cited above, we fully accept the propositions identified in *Travista* ([170] *supra*) and *KS Energy* ([111] *supra*) – in particular that the obligor of a best endeavours obligation is not always required to sacrifice his own commercial interests in satisfaction of his obligations but may be required to do so where (as we consider to be the position in the present case) the nature and terms of the contract indicate that it is in the parties' contemplation that the obligor should make such sacrifice. However, per the authorities, such obligation is not unqualified, unlimited or open-ended and, importantly, the obligor need only do that which has a significant or real prospect of success in procuring the contractually-stipulated outcome.

195 Seventh, it is important to say something with regard to the object of the separate obligations in clauses 2(a), 2(b) and 3 (as just explained above at [192]) and the extent to which they may overlap as to which there was much debate in the course of closing oral submissions. Our observations are as follows:

(a) First, it is important to note that none of these paragraphs imposes any obligation on the defendant to make any payment directly to any of the plaintiffs. This is another important feature of the Letters of Support which distinguishes them from an ordinary "guarantee".

(b) Clause 2(a) is a specific obligation requiring the defendant to use best endeavours to procure the Guarantor/the Charterers to have "*…sufficient liquidity…*" to make timely payments of any amounts payable under the BBCs/the guarantees (referred to as the "Liquidity Obligation"). As such, its aim is to ensure specific liquidity to meet charter hire and any other sums as and when they fall due – and not general liquidity which is captured by clause 2(b).

(c) Clause 2(b) overlaps to some extent with clause 2(a) but its main focus is the general solvency of the Guarantor/the Charterers as a "going concern at all times" so long as charter hire or any other obligations under the BBCs/the guarantees are "outstanding" (referred to as the "Going Concern Obligation"). To that extent, it looks beyond amounts payable under the BBCs/the guarantees (which is the primary remit of the Liquidity Obligation), and places emphasis on the solvency of the Guarantor/the Charterers and their status as a "going concern at all times".

(d) Clause 3 addresses the position where the Guarantor/the Charterers at any time have "insufficient liquidity or cashflow" to meet any obligations under or in respect of the BBCs/the guarantees as they fall due (referred to as the "Sufficient Funds Obligation"). The reference to "liquidity" is plainly a reference back to clause 2(a) (*ie*, the Liquidity Obligation).

(e) As to clause 3, two further points require consideration. First, we note that the wording requires the defendant to use best endeavours to procure for the Charterer (not the Guarantors) sufficient funds "*…before the relevant due date of the relevant obligation…*" Thus, the question arises as to whether any (and if so what) obligation arises *after* the due date of the relevant obligation if such obligation remains outstanding. Second, this point ties in with the more general submission on behalf of the plaintiffs that the defendant remained under an obligation to procure further funds for the Guarantor/the Charterers even after these companies entered into an formal insolvency process such as judicial management or liquidation. In that context, the plaintiffs relied, in particular, on clause 4 of the Letters of Support and the fact that a company may still be rehabilitated even following judicial management. This latter submission was hotly disputed on behalf of the defendant. In particular, it was submitted on behalf of the defendant that (a) the plaintiffs' position is contrary to settled law that (i) the obligation to use all reasonable endeavours only requires the obligor to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted, and (ii) if there is an insuperable obstacle to procuring the contractually-stipulated outcome, the obligor is not required to do anything more to overcome other problems that may have been resolved; and (b) once the Guarantor/the Charterers were insolvent, that was the end of the road in so far as any best endeavours obligations were concerned. In particular, it was submitted on behalf of the defendant that it was at that point that all previous endeavours were exhausted because (i) by definition, once the companies were insolvent they were no longer "solvent and a going concern" in accordance with the Going Concern Obligation, and (ii) performance of the Liquidity

Obligation and Sufficient Funds Obligation would not have had a significant or real prospect of success because this would have required the defendant to procure finance for an insolvent company. In that context, there was also some debate in the course of final submissions as to whether the provision of further funding of the Guarantor/the Charterers by the defendant at such time, *ie*, when these companies were insolvent, for the purpose of making specific payments to the plaintiffs would in any event have been impermissible as a preferential payment (and therefore outwith the Sufficient Funds Obligation). So far as relevant, we consider these points briefly later in this Judgment (see [281]–[294] below).

Whether the defendant breached the Letters of Support

196 We turn then to consider the plaintiffs' case that the defendant was in breach of each of his best endeavours obligations under clauses 2(a), 2(b) and 3 of the Letters of Support.

197 In broad terms, the main focus of the plaintiffs' case under this head rested on the alleged failure by the defendant to utilise two main sources of funding to enable the Charterers/the Guarantors to make payments due under the BBCs/the guarantees *viz*:

(a) Funds available to OML/Charterers; and/or

(b) Personal financial resources of the defendant or available to him via third parties (including the defendant's family). (In light of our conclusions above, this part of the plaintiffs' case is relevant only in the context of clause 3 of the Letters of Support.)

In addition, it was submitted on behalf of the plaintiffs that the defendant was in breach of his obligation to use best endeavours under the Letters of Support by failing to procure a mortgage over the Bintulu Hotel in favour of the plaintiffs. We consider these three main limbs of the plaintiffs' case below, together with what the defendant says were the steps which he took in the exercise of best endeavours.

Non-disclosure of financial documents and adverse inferences

198 This part of the plaintiffs' case rested very heavily on an analysis of the financial information derived from documents provided by the defendant or obtained from the liquidator of OML and other companies within the OM Group. This was the subject of detailed evidence by, on the one hand, Mr Manning and, on the other hand, Mr Sutton.

199 A summary of the plaintiffs' case with regard to such evidence appears from Annex A attached to this Judgment.

200 However, it is important to note that such analysis was severely hampered by important gaps in the documents. For example, in deciding what funds were available to the Charterers/the Guarantors to make payments under the BBCs and the guarantees, one would have expected OML and other relevant companies in the OM Group to have management accounts on a weekly or monthly basis. These would be standard accounting documents for companies like OML (bearing in mind that OML was not delisted until 7 October 2016) and the other companies within a group such as the OM Group. In the ordinary course, these accounts would show available cash and projected cash flows usually of (say) the next month, three months, six months and 12 months within each of the companies within the OM Group and (possibly) on an intragroup basis. However, these accounting documents were never produced.

201 It is worth noting that certain documents which were said to be management accounts were produced by counsel on behalf of the defendant at a very late stage of the trial. This gave rise to a heated debate on the very last day of the trial as to the admissibility of such documents. However, in the course of such debate, it became plain that these documents were either not what they purported to be and/or were obviously irrelevant because they related to different companies or different periods. We say no more about them.

202 One important financial document that was produced and was the focus of much attention in the course of the trial was the 2016 Q2 Financial Statements Announcement for OML. These included a balance sheet for both the "Group" (inferably the OM Group, albeit this was not ascertained at trial) and OML itself as at 30 June 2016 together with a comparative statement as at the end of the immediately preceding year, *ie*, 30 June 2015. In summary, these showed *inter alia* substantial surpluses of total assets over total liabilities *viz* US$186.607m (US$1,372.684m – US$1,186.077m) and US$185.861m (US$955.833m – US$769.972m) for the Group and OML respectively as at 30 June 2016. The breakdown also showed as at that same date cash and bank balances of US$10.183m and US$1.207m for the Group and OML respectively; as well as current trade receivables of US$263.542m and non-current trade receivables of US$47.417m for the Group. On its face, this balance sheet indicates that as at 30 June 2016, both the Group and OML were balance sheet solvent. However, in our view, the document is of little, if any, assistance in the present case because it is simply a snapshot of the financial position of OML and the Group as at 30 June 2016. It says nothing about the financial position of OML or the Group in the period after that date nor what cash was available or might have been raised within OML or the Group to pay the amounts subsequently falling due under the BBCs towards the end of 2016 and thereafter. For the purpose of that exercise, it would be the management accounts or other similar financial

documents which would be expected to provide the best overall picture of the financial health of OML and the Group. However, as stated above, these were not in evidence and we were not provided with any proper explanation for their absence.

203 Quite apart from the absence of any management accounts or other similar financial documents, there were further significant gaps in the defendant's disclosure. In light of such gaps, the plaintiffs' position was and remained that the defendant continued to be in breach of various court orders and/or his general disclosure obligations, that this has seriously prejudiced the fair trial of this case and that the court should therefore strike out, in whole or in part, the defences on liability as to the defendant's breaches of his best endeavours obligations. In particular, the plaintiffs submitted that there were numerous bank statements and various other financial documents which the defendant had failed to disclose. These are summarised in paragraphs 105 to 115 of the plaintiffs' factual closing submissions (the "plaintiffs' List of Undisclosed Documents"). We address the pertinent documents in this list in our analysis below.

204 In these circumstances, it was submitted on behalf of the plaintiffs that striking out was an appropriate and proportionate response to what the plaintiffs submitted was the defendant's persistent, contumelious and grave breaches of this court's orders and his discovery obligations (despite opportunities granted by the court time and again to come clean).

205 Alternatively, it was submitted on behalf of the plaintiffs that appropriate adverse inferences be drawn against the defendant. In support of that submission, the plaintiffs relied on s 116(g) of the Evidence Act and the guiding principles enunciated by the Court of Appeal in *Sudha Natrajan v The*

Bank of East Asia Ltd [2017] 1 SLR 141 ("*Sudha*"). In light of the foregoing, it was submitted on behalf of the plaintiffs that the appropriate inferences to be drawn in the present case are as follows:

(a) The defendant failed to disclose the various bank statements referred to in the plaintiffs' List of Undisclosed Documents because, if produced, they would have been unfavourable to the defendant.

(b) In particular, they would have revealed that he had sufficient financial resources (in the form of cash in bank accounts in his name or otherwise controlled by him) to have procured the full and timely payment of all sums (including charter hire and the Termination Amounts) payable by the Charterers/the Guarantors to the plaintiffs under the BBCs/the guarantees.

206 As to these submissions, the defendant acknowledged in his 22nd affidavit that he had failed to disclose the following bank accounts:

(a) Australia and New Zealand Banking Group Limited bank account no xxxx-xxxx8 – for 2016 to 2018 other than May 2018;

(b) Bank of America Corporation ("BOA") bank account no xxxxx-xxxx5 – for 2016 to 2018 other than May 2018;

(c) RHB bank account no xxxxxxxxxxxxx0 – for 2016 to 2018 other than December 2018;

(d) RHB bank account no x/xx/xxxxxx/x1– for January, February and December 2017;

(e) Standard Chartered Bank ("Standard Chartered") bank accounts – for January 2017 to December 2017, and February to May 2018;

(f) UOB (Singapore) bank accounts – January 2018; and

(g) UOB (Australia) bank account – March and April 2016, June to August 2016, October 2016, January 2017 to February 2018 and June to December 2018.

207 In summary, the explanation given by or on behalf of the defendant for this failure was that he has bank accounts all over the world and that it was a "*herculean task*" to gather every single one of his Singapore and overseas bank accounts; that he had repeatedly requested from his banker the bank statements for his Standard Chartered bank accounts, but these had not yet been given to him; that as the statements for his BOA account were in a storage facility in USA, they would be difficult to retrieve; and, that by requesting for these statements and chasing his assistants and bankers, he had done what was reasonably necessary of him to obtain those undisclosed documents. In light of the foregoing, it was submitted on behalf of the defendant that no adverse inference should be drawn for the following reasons:

(a) The lack of disclosure was neither deliberate concealment nor conscious omission to withhold the evidence but rather due to extraneous forces and circumstances not within his control. This was not a blameworthy failure on his part.

(b) The delay by the defendant's bankers and assistants in retrieving his overseas bank accounts constituted a valid and sufficient justification for the non-disclosure: to draw an adverse inference against the defendant in these circumstances would be unjust and unfair to him as the omissions were due to factors beyond his control.

208 In any event, it was submitted on behalf of the defendant that, as alluded to in *Sudha* at [23], the court cannot speculate as to what the evidence may say without stating some basis for the drawing of the specific adverse inference; that, in any event, the inference in favour of the plaintiffs' case should only be a "weak one"; and that as stated in *R v Inland Revenue Commissioners, Ex parte T C Coombs & Co* [1991] 2 AC 283, which was cited in *Cheong Ghim Fah and another v Murugian s/o Rangasamy* [2004] 1 SLR(R) 628, if the failure to give evidence can be credibly explained, even if not entirely justified, the effect of silence in favour of the other party may be either reduced or nullified.

209 As to the other documents identified in the plaintiffs' List of Undisclosed Documents which the plaintiffs say the defendant has failed to disclose, it was submitted on behalf of the defendant that these (a) did not come within the Asset Disclosure Order; or (b) are not relevant for the purposes of the present proceedings.

210 As to these submissions, our observations and conclusions are as follows:

> (a) As stated above, the defendant has acknowledged that he has failed to disclose at least certain bank statements. In our view, the explanation which he has provided for such failure is unsatisfactory and inadequate. In our view, such explanations as were provided were, to a large extent, vague and mere bluster. We are unpersuaded that such failure was beyond the defendant's control. We readily accept that the task of producing these documents would involve a certain amount of effort. However, we do not think that such task could properly be described as herculean. All of these documents are within the last five years and, in the ordinary course, we can see no proper reason why they

could not be produced. We bear well in mind that the defendant has had more than sufficient time to carry out the necessary enquiries. If there were real difficulties in producing the documents, we would have expected some evidence or at least correspondence with the relevant banks themselves to explain these difficulties. But no such correspondence or at least no adequate correspondence or satisfactory explanation was ever provided.

(b) As to the other documents which the plaintiffs say have not been produced, we are prepared to assume in the defendant's favour (although without deciding the point) that such documents may not strictly fall within the Asset Disclosure Order. However, be that as it may, we are satisfied that, quite apart from the terms of the Asset Disclosure Order, the documents in question were plainly relevant and disclosable, and should have been produced in the ordinary way.

(c) In light of the above, we are satisfied that the defendant's conduct amounts to persistent, contumelious and grave breaches of this court's orders and/or his discovery obligations (despite opportunities granted by the court time and again to come clean).

(d) In such circumstances, we have carefully considered whether this is an appropriate case to strike out, in whole or in part, the defences on liability as to the defendant's breaches of his best endeavours obligations. In our view, there is a very strong case for so doing. However, we recognise that that would be a most draconian step. In the event and with some hesitation, we have drawn back from that precipice. In so doing, we have borne in mind that the trial has now been completed, and that we have now considered the documentary evidence such as it is and heard the oral evidence on both sides (including, of

course, the evidence of the defendant himself); further, that, in our view, justice can be done by drawing the adverse inferences as suggested by the plaintiffs but limited to the Pre-Termination Claims. Thus, the adverse inferences to be drawn are as follows:

(i) The defendant failed to disclose the various bank statements referred to in the plaintiffs' List of Undisclosed Documents because, if produced, they would have been unfavourable to the defendant.

(ii) In particular, they would have revealed that he had sufficient financial resources (in the form of cash in bank accounts in his name or otherwise controlled by him) to have procured sufficient funds for the Charterers/the Guarantors to make the full and timely payment of all the Pre-Termination Claims payable to the plaintiffs under the BBCs/the guarantees.

(e) At the risk of repetition, it is convenient to summarise why we consider that it is just and appropriate to make the adverse inferences as suggested by the plaintiffs *viz*:

(i) There is no doubt that the defendant has failed to comply with court orders with regard to disclosure. Indeed, that is accepted by the defendant.

(ii) The documents in question are potentially highly significant in the context of the present proceedings.

(iii) The defendant has had ample time to provide the documents in question.

(iv) The explanations which the defendant has provided for such failure are unsatisfactory and inadequate. In our view, such explanations as were provided were, to a large extent, vague and mere bluster.

(v) It is noteworthy that the gaps in the documents in question cover not only a number of different bank accounts but also individual months or periods. It is difficult to understand how or why the defendant has been able to provide some of the documents in question but not others; and no satisfactory explanation has been provided as to the reasons for the foregoing.

(vi) We do not accept the suggestion by counsel on behalf of the defendant that the gaps in the disclosure are not (at least in part) significant on the basis, for example, that there are bank statements both before and after the "gaps" which show the same or similar amounts in such accounts. As submitted on behalf of the plaintiffs, the obvious point is that without full and proper disclosure, it is impossible to know what movements there were in these accounts during the period(s) where there are gaps.

(vii) As already stated, we are satisfied that the defendant's conduct amounts to persistent, contumelious and grave breaches of this court's orders and/or his discovery obligations (despite opportunities granted by the court time and again to come clean).

(viii) The adverse inferences suggested by the plaintiffs and which we accept should be drawn are, in our view, proportionate and appropriate in the circumstances. For the avoidance of doubt, such adverse inferences are not necessarily determinative

of any particular conclusions which we may reach. Rather, such conclusions will have regard not only to such adverse inferences but also the totality of the evidence.

The expert evidence

211 As for the expert evidence, there was unfortunately little agreement between on the one hand, the plaintiffs' expert, Mr Manning, and, on the other hand, the defendant's expert, Mr Sutton.

212 Given the failure by the defendant to give proper disclosure and the gaps in the evidence, we do not underestimate the difficulties faced by both experts in giving their evidence. Be that as it may, it is important to note that the plaintiffs were very critical of the evidence adduced by Mr Sutton. As a result of a myriad of objections by the plaintiffs, Mr Sutton's first report was (rightly) withdrawn by counsel on behalf of the defendant in the course of the first part of the trial. Following the adjournment, Mr Sutton then produced a "new" report. However that new report incorporated at least some parts of his first report which were objectionable and was the subject of a raft of further objections by counsel on behalf of the plaintiffs as summarised in Annex C to the plaintiffs' closing submissions on the expert evidence, which is unnecessary to set out in detail. For present purposes, it is sufficient to note that it was submitted on behalf of the plaintiffs that much, if not all, of Mr Sutton's opinion evidence lacked factual foundation and was otherwise inadmissible; that it was of little assistance due to its limited scope, difficulties with his methodology and his apparent lack of independence; and that it was littered with unstated assumptions and conclusory statements. As a result, it was the plaintiffs' submission that Mr Sutton's evidence should be rejected entirely, or, if allowed into evidence at all, given little (if any) weight.

213 In support of that submission and their specific objections to Mr Sutton's new report, the plaintiffs relied upon a number of general principles which, it was submitted, can be distilled from the relevant provisions of the Evidence Act, O 40A of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (the "Rules of Court") and a review of the cases *viz*:

(a) Expert opinion evidence upon a point of scientific, technical or other specialised knowledge is relevant where the court is likely to derive assistance from such opinion evidence: s 47(1) of the Evidence Act. However, the court has the discretion to reject such opinion evidence if it is of the view that it would not be in the interests of justice to consider the same: s 47(4) of the Evidence Act.

(b) Expert opinions must comply with the requirements of O 40A of the Rules of Court, including stating the instructions given to the expert and setting out clearly facts known by the expert to be true as opposed to assumed facts, failing which the court is entitled to reject the opinion: see *Pacific Recreation Pte Ltd v SY Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [74] and [75].

(c) Experts have a duty to assist the court on matters within their expertise, which overrides any obligation to the party instructing them. To this end, an expert should provide his unbiased and independent opinion (he is not to be an advocate of his instructing party's cause) and must give testimony that may harm or damage the contentions of his instructing party, if the facts warrant it (see O 40A r 2 of the Rules of Court and, for example, *Vita Health Laboratories Pte Ltd and others v Pang Seng Meng* [2004] 4 SLR(R) 162 ("*Vita Health*") at [80] to [83] and *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm*) [2007] 4 SLR(R) 460 ("*JSI Shipping*") at [63]). In the appropriate case, the court

will not hesitate to disregard or even draw an adverse inference against expert evidence that exceeds the judicially determined boundaries of coherence, rationality and impartiality: see *JSI Shipping* at [63].

(d) In *JSI Shipping*, the Court of Appeal identified several instances of partisan behaviour on the part of the respondent's expert (at [59] and [60]):

(i) the making of sweeping generalisations which the court found "redolent of a predisposition to shore up the respondent's stance";

(ii) the inclination to make suppositions and assumptions in favour of the respondent;

(iii) selective reference to evidence supporting the respondent's case, while omitting qualifications adverse to the respondent's case; and

(iv) the inclusion of baseless allegations in the report of the respondent's expert.

(e) Moreover, if there is a range of opinions on matters dealt with in the report, the expert should summarise the range of opinions and give reasons for the expert's opinion: see O 40A r 3(2)(*e*) of the Rules of Court. An expert should not attempt to conceal any adverse opinions which have come to the expert's knowledge: *Pacific Recreation* at [87].

(f) Expert opinion must be based upon facts which have been proved in evidence. Expert opinion based upon facts which are not proved in evidence is inadmissible (see *Phipson on Evidence* (H M Malek *et al* eds) (Sweet & Maxwell, 19th Ed, 2018) at paragraph 33-33;

T Hodgkinson & M James, *Expert Evidence: Law and Practice* (Sweet & Maxwell, 4th Ed, 2015) at paragraph 9-016; *Singapore Tourism Board v Children's Media Ltd and others* [2008] 3 SLR(R) 981 ("*STB*") at [76] to [80]).

(g) Reasonable steps should be taken to independently verify underlying facts upon which the expert's opinions are based where it is within the expert's capacity to do so. Failure to do so may suggest inappropriate affiliation between the expert and the cause for which the expert's evidence is given: see I R Freckelton & H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (Thomson Reuters, 4th Ed, 2009); *STB* at [80]–[87] and *Vita Health* at [88].

(h) The obligation is on both the instructing party's solicitor and the expert to ensure that the expert is provided with all relevant materials before the expert's report is finalised: P Matthews & H M Malek, *Disclosure* (Sweet & Maxwell, 5th Ed, 2016) at paragraph 22.19.

(i) Relatedly, an expert should make it amply clear if there are any issues or problems in relation to the access to, collation and/or reliability of relevant evidence (and reservations or qualifications in this regard) prior to cross-examination: see *Vita Health* at [86].

214 In our view, most, if not all, of the criticisms of and objections to Mr Sutton's evidence are entirely justified. In particular, we accept that much of his evidence lacked factual foundation and was otherwise inadmissible; and that it was littered with unstated assumptions and conclusory statements which were unsupported in whole or in part by the factual evidence. We also found it of little assistance due to its limited scope and difficulties with his methodology.

In addition, we regret to say that we were troubled by his apparent lack of independence in at least certain respects.

215 In fairness, we should also mention that the defendant was very critical of the evidence adduced by the plaintiffs' expert, Mr Manning. In particular, it was submitted on behalf of the defendant that Mr Manning had adopted an extreme approach which demonstrated a basic lack of common sense; that this suggested that his evidence should be approached with more caution that might otherwise be the case; and that he was not providing as much assistance as he might have provided. Whilst we do not necessarily accept all of Mr Manning's evidence, our general view is that he was, on the whole, an excellent witness who provided his independent expert evidence in a fair, balanced and measured way which we found most helpful in reaching our conclusions.

216 In considering the expert evidence, we also bear well in mind the authorities cited by counsel on behalf of the defendant to the effect that the court is not bound slavishly to accept the uncontradicted evidence of an expert but must closely scrutinise it (as, we would add, in the same way as all other evidence): see *Saeng-Un Udom v Public Prosecutor* [2001] 2 SLR(R) 1; *Desert Palace Inc (trading as Caesars Palace) v Poh Soon Kiat* [2009] 1 SLR(R) 71.

The specific alleged breaches of the Letters of Support

217 As to the alleged breach(es) by the defendant of the best endeavours obligation, it was the plaintiffs' submission that it readily became apparent through the course of the trial that the defendant did not in fact take any steps to procure the overarching purpose of the Letters of Support, *ie*, ensuring that the Charterers/the Guarantor performed their obligations owed to the plaintiffs under the BBCs/the guarantees. In particular, the plaintiffs relied upon the following matters as confirmed by the defendant in evidence *viz*:

(a) He had never given any instructions to *inter alia* Mr See, Mr Ooi, or anyone to utilise sums available to the Charterers/the Guarantors to pay the plaintiffs.

(b) Likewise, he did not take any steps to prevent the diversion of funds that should have been directed towards paying the plaintiffs (or channelled towards the Earnings Account in accordance with the terms of the BBCs) even though he was aware of these circumstances.

(c) Instead, he prioritised payments to other creditors (such as OCBC and DBS) over payments to the plaintiffs, a point on which the defendant was cross-examined as follows:

> MR TOH: … Mr Yaw, I suggest to you that Otto prioritised payments to the two banks, DBS and OCBC ahead of my clients because, unlike these parties who got a personal guarantee from you, my clients were only given letters of support. Do you agree?
>
> A: No. I didn't prioritise them that way.
>
> Q: Right.
>
> A: The way I look at it was this: I do give an importance to OCBC on the ground that they are providing me fresh, new facilities, which I put into Otto Marine, and I thought that was important that I continue. The relationship has to be my priority for the benefit of Otto Marine. As far as paying DBS is concerned, yes, I do have a PG, I admit that, but when you talk about 600,000, I'm sure according to either monthly or quarterly or maybe twice monthly I don't know, but that is the obligation that the company has to do. The company do that. Whether – that is my understanding. I don't think I prioritise DBS over anybody from that standpoint, okay. And the way – the other thing I want to differentiate is that I have

> a mortgage, I have a bank loan with them and a bank loan to me is a big priority, is a big concern. I have to make sure my facilities with the bank loan is in good standing as a priority. The relationship I have with you is a lease payment. So whether I put that as a priority, yes, I do put it as a priority, but do I rank them pari passu with the bank loan? I don't know. I can't answer you today. I don't want to compare them apple to apple. I do look at it, one as a bank loan, the other one as a lease payment."

As submitted on behalf of the plaintiffs, the defendant could not give any sensible explanation as to why this should be the case when questioned by counsel for the plaintiffs. In fact, the evidence shows that the defendant had even procured or allowed OML to repay companies controlled by him in priority to the plaintiffs. These payments, which were to three such companies namely, Ample Skill Limited ("Ample Skill"), Brizill International Limited ("Brizill") and Ocean International, are elaborated on further below.

(d) The defendant never took any specific steps in response to any of the numerous letters of demand sent by the plaintiffs (or on their behalf by their solicitors Rajah & Tann). Thus, it was submitted on behalf of the plaintiffs that as a result, the Charterers began defaulting on their obligations under the BBCs almost immediately after the Letters of Support came into effect (following the delisting). The 2 November 2016 charter hire payment and the Deposit (falling due on 6 December 2016 under the Go Perseus BBC) were both not paid. Despite the defendant having been notified of the same and apart from a few sporadic payments, the Charterers thereafter continued throughout in default of their payment obligations under the BBCs until the plaintiffs terminated the same in November 2017/January 2018.

218 In broad terms, we accept these submissions. However, it remains necessary to consider the specific alleged breaches bearing in mind the particular dates when sums became payable under the BBCs as summarised above, and whether the conduct of the defendant amounted to one or more breaches of his best endeavours obligations to provide support to the Charterers/the Guarantors under the Letters of Support – principally under the unnumbered paragraph and/or clauses 2(a) and/or 3 of the Letters of Support. Importantly, it is also necessary to consider whether any such failure was causative of any loss to the plaintiffs. As to the latter and putting aside any question of burden of proof, it is necessary to consider whether, even if the defendant had exercised best endeavours, it would have made any difference – we deal with this facet in greater detail when addressing the issue of quantum below (see [384] onwards).

219 In support of their case, the plaintiffs relied upon varying instances in which the defendant allegedly failed to procure the Charterers/the Guarantors to utilise funds available to them pursuant to one or more of the stated purposes in the Letters of Support *viz*:

(a) The defendant's failure to utilise substantial sums in OML's bank accounts.

(b) Payments by OML of US$6,407,392.22 to Ample Skill, Brizill and Ocean International in 2017.

(c) Payments to Mr See in 2016 and 2017 amounting to approximately S$3m.

(d) OML's failure to collect receivables, including some US$2.6m of receivables from Cash Atlas and the US$5.623m balance purchase

price for RSOV Marine Pte Ltd ("RSOV") (a vessel owning company) from Port Golden Holdings Limited ("Port Golden").

(e) Diversion of the vessels' earnings namely, a diversion of US$450,000 to UOB, diversion of the Deep Ocean sub-hire payment of US$430,000 (December 2016), and diversion of the sub-hire payments from Inpex Operations Australia ("Inpex") of US$5.46m (April to October 2017).

(f) Failure to fully utilise an alleged loan facility of US$30m between Ample Skill and OCBC (the "Ample Skill Facility") to obtain working capital to pay the charter hire and other amounts payable to the plaintiffs.

As evident from the above list, there are numerous different corporate entities and/or impugned transactions involved – we will provide the relevant details at the appropriate junctures below when discussing the defendant's purported breaches in relation to these entities/transactions.

220 In addition, the plaintiffs relied on the following additional steps which they alleged the defendant could have taken *viz*:

(a) the utilisation of the defendant's own funds or assets including cash and shares in both public and private companies which (if necessary) he could have sold or pledged in order to raise funding;

(b) the obtaining of financial assistance from other third parties including, in particular, from the Yaw family/the Samling Group; and

(c) raising funds by way of a mortgage of the Bintulu Hotel.

In light of our conclusions with regard to the proper construction of the Letters of Support, these alleged breaches are concerned principally with clause 3 of the Letters of Support provided clauses 2(a) and 2(b) were not breached (*ie*, the defendant despite his best endeavours was not able to keep the companies afloat or procure that the companies had sufficient liquidity to pay charter hire). We deal with these matters below.

221 For the sake of completeness, we should mention that, as originally pleaded, the plaintiffs advanced a discrete allegation of breach of the Letters of Support *viz* that the defendant failed to make a capital injection of S$143m into OML upon or after its delisting and, in so far as he did, that he failed to take steps, exercise best endeavours or ensure that such funds were used to pay the plaintiffs the sums due under the BBCs/the guarantees. However, we do not understand that this allegation was specifically relied on by the plaintiffs in their final submissions. In any event, we do not consider that such an allegation assists the plaintiffs for the following brief reasons *viz*:

(a) The capital injection of S$143m is not a specific obligation spelt out under the Letters of Support.

(b) If the S$143m was truly a capital injection intended to be used for the purpose of clause 2(a), then failure to do so would be a breach of the best endeavours obligation contained in that clause.

(c) However, the difficulty with any such argument is that (a) it assumes that all of the S$143m was freely available as working capital; (b) the evidence does not suggest it was; and (c) the plaintiffs knew this. For example:

(i) Although Mr Hong Xing's notes of the 15 April meeting refer to the defendant providing about S$150m, it was clear even at this stage that this was not intended solely to provide working capital. Mr Hong Xing's notes of this meeting explain as follows:

> As understood, currently Mr Yaw directly and indirectly holds 62% stake, and the market value of Otto Marine is about SGD40 million. Mr Yaw plans to provide about SGD150 million, of which **SGD20-30 million will be used to repurchase the shares, and SGD70 million will be used to repay the debentures maturing in August, and the balance will be used to supplement the working capital of the company**.
>
> [emphasis added]

(ii) When ICBCL's Shipping Finance Department approved the delisting of OML on 21 April 2016, it noted that "the substantial shareholder [would] provide a total of about [S$150m] *for the privatisation*, which will mainly be the own fund[s] of the substantial shareholder" [emphasis added].

(iii) In the report of the August 2016 meeting (*ie*, some two months after OML had announced plans to delist), it was noted that the main use of the "S$140m made available by the substantial shareholder [was] *for the privatisation*" [emphasis added].

(iv) It is clear that for OML to delist, it had to retire bonds and buy-out minority shareholders which would substantially deplete the sum of S$143m that the defendant had raised for privatisation. ICBCL knew this.

(v) Notably, post delisting, when there was a failure to pay charter hire and the Deposit, ICBCL did not allege that there was

any breach on the part of the defendant by reason of not injecting S$143m into OML.

222 We deal with each of the plaintiffs' specific allegations of breach of the defendant's best endeavours obligations below. At this stage, it is sufficient to note that the defendant denies any breach of his best endeavours obligations under the Letters of Support. Moreover, it is important to note that it was the defendant's case that he took various steps in 2016 and 2017 to support OML and/or the Charterers and (although he did not accept that he was obliged to take all or, indeed, any of these steps, in order to comply with those obligations) this satisfied any obligations he owed under the Letters of Support. In summary, these steps were said to be as follows:

(a) The defendant caused or procured to be disbursed funds of around S$143m to OML, comprising a loan of S$73m from RHB to redeem S$70m of medium term notes which were due to mature on 1 August 2016 (see [39] above), and S$70m of funding to procure the privatisation of OML and for OML's working capital purposes.

(b) The defendant caused or procured to be disbursed funds of approximately US$41.7m to OML, comprising US$5.2m from Mr Yaw, and around US$36.5m from Ample Skill (which, as mentioned at [217(c)] above, is a company owned and controlled by the defendant).

(c) The defendant agreed to a consent order with a creditor of his under a personal guarantee, Mr Rakesh Tulshyan. This was necessary for OML to remain solvent and to avoid triggering cross default provisions on its other loan agreements guaranteed by the defendant.

(d) The defendant caused or procured steps to be taken towards the timely recovery or receivables by subsidiaries of OML through litigation and arbitration.

(e) The defendant sought to persuade his brother Datuk Yaw Chee Ming, one of the beneficial owners of the Bintulu Hotel, to grant a mortgage over the Bintulu Hotel in favour of the Plaintiffs as security for the Charterers and/or OML's liabilities.

For present purposes, it is sufficient to say that the defendant has failed to adduce admissible and/or cogent evidence in support of what is alleged in sub-paragraphs (a), (b) and (c) above and/or such allegations do not assist the defendant for the reasons stated in paragraphs 377–399 of the plaintiffs' final submissions, which we accept and which are unnecessary to repeat. In any event, it remains necessary to consider the specific allegations advanced by the plaintiffs. As to sub-paragraphs (d) and (e), we deal with these allegations below in the course of dealing with the plaintiffs' case.

Failure to utilise sums in OML's bank accounts

223 In November/December 2016 (in the period when the November 2016 charter hire instalments and the Deposit fell due) OML had (a) an opening balance for November 2016 in its Standard Chartered SGD account (no xx-x-xxxxxx-3) of S$4,394,772.10; (b) a balance of US$204,501.30 in its Standard Chartered USD account (no xx-x-xxxxxx-8); and (c) a balance of S$6,266,704.64 in its RHB SGD account (no x/xx/xxxxxx/07) for the entire period of November 2016. While the former two accounts were substantially depleted by end November 2016, there appears, as the plaintiffs submit, to have been no movement in the RHB SGD account no x/xx/xxxxxx/07 during that month.

224 These funds were not, however, utilised towards paying the charter hire of US$3,053,480 due on 2 November 2016 and the Deposit due on 6 December 2016. In cross-examination, the defendant was unable to provide any coherent explanation as to why these sums were not so utilised towards payment of the November 2016 charter hire under the BBCs:

> MR TOH: Do you have an explanation why – as to why you didn't cause some part of this combined sum of S$10 million to be paid to my clients in satisfaction of the charter hire that became due in early November 2016?
>
> A: ***I don't have an answer***, except that I assume they have priority, maybe for crew, or whatever. I don't know, sir.
>
> [emphasis added in bold italics]

225 Similarly, OML maintained a bank balance of US$233,408.92 in its UOB account (no xxx-xxx-xxx-8) even as of December 2017. When asked why these sums were not used to pay sums outstanding to the plaintiffs at the relevant time, the defendant had no answer. Thus:

> Q: … So, as at the end of 2017, there was still a sum of US$233,000 sitting in this bank account. Do you see that, Mr Yaw?
>
> A: Yes.
>
> Q: Why were there no steps taken to use this sum of money to pay the charterers?
>
> A: I'm sorry if I don't know the detail, but my understanding at that time was that really the cash – we didn't have – the cash flow was very tight. Now you ask me why was this sum not been used for a specific payment; ***I cannot answer you***."
>
> [emphasis added in bold italics]

226 On the evidence, we are thus satisfied that these funds were available to OML at the relevant time for payment of the monies due to the plaintiffs under the BBCs. Further, it is our conclusion that (a) in these circumstances and

consistent with the guidelines set out by the Court of Appeal in *KS Energy* ([111] *supra*), the burden of showing why the payment of these funds to the plaintiffs was impossible or not reasonably required (for example, because they were required to be paid to some other party) falls squarely on the defendant; and (b) on the evidence, the defendant has failed to satisfy that burden. Indeed, on the evidence, it is our conclusion that there is no cogent reason why these funds could not have been paid to the plaintiffs and that, to this extent, the defendant was thus in breach of his obligation to use best endeavours as required under (at the very least) the opening unnumbered paragraph and in particular clause 2(a) of the Letters of Support. In concluding this point, we note that the charter hire instalments due between 2 November 2016 and 2 November 2017 were never fully paid and that part of these sums remain outstanding today. Relatedly, we add that sporadic sums were eventually and gradually transferred to the plaintiffs between October 2016 and January 2018 in part-satisfaction of the outstanding sums. Be that as it may, it does not affect our conclusion that clause 2(a) of the Letters of Support were breached, given that it remains that there were available sums that were not applied in satisfaction of outstanding charter hire payments. The fact that there was part payment affects the issue of quantum which we address at the end of the discussion on the Letters of Support.

Diversion of funds to the companies owned or controlled by the defendant

227 It appears from the defendant's own evidence that, during the course of 2017, OML paid sums totalling US$6,407,392.22 to the defendant's own corporate vehicles, Brizill, Ample Skill, and Ocean International. This can, for example, be seen from the excel spreadsheet referred to at paragraph 45 of the defendant's affidavit of evidence-in-chief and exhibited as "YCS-21" which purportedly lists all payments made by OML during 2017. For the sake of

completeness, we should mention that it was the plaintiffs' submission that these excel spreadsheets were inadmissible as hearsay and should accordingly be excluded from the record. However, we do not accept that submission as the spreadsheets were derived from the business records of OML and the defendant was the sole director. He has personal knowledge of these fund movements from both the transferor's and transferee's points of view. These purported payments were summarised by the plaintiffs in a table in their factual closing submissions, which we now reproduce (with certain amendments):

Date	Name of recipient of funds	Amount (US$)
3 January 2017	Ample Skill	6,465.86
20 January 2017	Ample Skill	36,025.92
9 February 2017	Ample Skill	8,490.94
20 February 2017	Ample Skill	29,586.55
24 February 2017	Ample Skill	9,583.47
3 March 2017	Ample Skill	10,568.90
24 March 2017	Ample Skill	47,615.51
28 March 2017	Ocean International	1,155,000.00
18 April 2017	Ocean International	569,650.80
19 April 2017	Brizill	1,901,333.21
24 April 2017	Ample Skill	72,830.26
13 June 2017	Ample Skill	119,872.33
15 June 2017	Brizill	54,433.43
30 June 2017	Ample Skill	148,170.79
3 July 2017	Ample Skill	264.25
20 September 2017	Ample Skill	425,000

25 October 2017	Ample Skill	450,000
2 November 2017	Ample Skill	462,500
12 December 2017	Ample Skill	450,000
27 December 2017	Ample Skill	450,000

(1) Payments to Brizill

228 As appears from the table above, a total of US$1,955,766.64 was paid to Brizill in two separate payments in April and June 2017. In considering these payments, it is noteworthy that on 2 May 2017, ICBCL issued letters of demand to OML demanding payment of charter hire for the period 2 November 2016 to 2 August 2017 and the Deposit. This was followed by a proposal by OML to restructure the debts which Mr Hong Xing rejected resulting in a statutory demand being served on 11 May 2017. In June, further proposals were made by Mr See to ICBCL to restructure the debts. However, the defendant was unable to provide any explanation for such payments. In cross-examination, the defendant initially stated that he did not know the purpose of the payments:

> MR TOH: Based on this document, Otto made payment of 1.956 million to Brizill International Limited in April and June 2017. Again, Mr Yaw, were you paying companies that you owned and controlled, were you not?
>
> A: No. ***I don't know what is the reason. I can't explain it today***.
>
> [emphasis in bold italics]

229 Subsequently, however, the defendant's evidence was that the payments to Brizill were to discharge long-standing loans made by Brizill to OML since OML's initial public offering as well as other unspecified and unsubstantiated purposes:

> Q: Mr Yaw, the question is:

> 'Question: Yes, you see, Mr Yaw, the court would have been better assisted if you provided full discovery of all the Brizill bank accounts, right. Then we would have ascertained how the flow of the money went. But it is what it is, so let's move on to a different document …
>
> RAMESH J: Sorry, one further question, Mr Yaw, this payment that went out to Brizill was, you say, to pay off liabilities of Brizill. Is that correct?
>
> Answer: No, I don't think it [to] pay of [liabilities] of Brizill. I think Brizill may then have put it into other part of the operation. I don't know, sir. I honestly don't remember.'
>
> Q: In relation to your answer, you say:
>
> 'No I don't think it pay off [liabilities] of Brizill.'
>
> Can you clarify the sentence?
>
> A: I was merely to say that ***because Brizill all along since IPO has lent the money to Otto Marine this may have been a payment from Otto Marine to pay off the Otto Marine liability to Brizill***.
>
> Q: Then you went on to mention:
>
> 'I think Brizill may have then put it into other part of the operation.'
>
> What do you meant [*sic*] by, 'The other part of the operation.'?
>
> A: No, what I mean is ***Brizill may have used the money for other thing***.
>
> [emphasis added in bold italics]

230 In our view, this evidence is, on its face, entirely speculative and wholly unsatisfactory. Further, it is noteworthy that there are no documents to substantiate the reasons for the payments or why those payments were made at that time. Moreover, even if the money "may" have been used as the defendant suggested, it was submitted on behalf of the plaintiffs that, on the evidence, there is simply no justification for the repayment of sums allegedly owed to

Brizill in priority to the outstanding charter hire instalments (and the Deposit) due to the plaintiffs. We agree. At the very least, there is no cogent evidence which might provide such justification. As such, this was, in our view, a breach of clause 2(a) of the Letters of Support, *ie*, to procure that there was sufficient liquidity to make timely payment of at least part of the charter hire due as at that date. The defendant's best endeavours obligations must be breached if he had used the cash to pay liabilities which were effectively owed *to him* particularly since there is no evidence that Brizill had other pressing financial commitments that required the funds. The same observation applies to the payments to Ocean International and Ample Skill referred to below.

(2) Payments to Ample Skill and Ocean International

231 As for the payments to Ample Skill and Ocean International, the defendant has asserted that these sums had been used by these companies to pay back banks which had lent money to them (which in turn had been lent by Ample Skill and Ocean International to OML).

232 In considering such assertions, it is important to bear in mind the timing and relevant context of these payments. In particular:

(a) The first seven payments to Ample Skill span the period 3 January to 24 March 2017. The two payments to Ocean International were on 28 March 2017 and 18 April 2017. This was followed by two further payments to Ample Skill on 24 April 2017 and 13 June 2017.

(b) The period 3 January to 24 April 2017 can be bookended by (a) the meeting on 15 December 2016 when ICBCL demanded payment of outstanding sums, and (b) ICBCL's letter of demand dated 2 May 2017.

(c) In that period, ICBCL issued a letter of demand on 6 January 2017 and there were several meetings on 14 February 2017, 3 March 2017, 9 March 2017 and 21 March 2017 with ICBCL's representatives where proposals were made by Mr See and the defendant to restructure the Charterers'/the Guarantors' debts.

(d) The Brizill payments which were on 19 April 2017 and 15 June 2017 bookend the eighth and ninth payments to Ample Skill on 24 April 2017 and 13 June 2017. Thus, the comment at [230] above on Brizill applies here.

(e) Thereafter, there were seven payments to Ample Skill from 30 June to 27 December 2017. In or around that period, proposals were made to restructure the debts (in June); the September 2017 Addenda (concerning the Bintulu Hotel) were signed on 29 September 2017; Go Marine was placed in voluntary administration on 30 October 2017; and Go Offshore applied for judicial management on 30 November 2017 followed by OML on 20 February 2018.

(f) Meanwhile, from 10 October 2016, ICBCL and Wikborg were demanding the Letters of Support, and from 14 October 2016, Mr Lun started finding a variety of reasons not to release them. ICBCL continued to press for the Letters of Support including demands on 2 June 2017 and 18 August 2017 until they (*ie*, the Second Letters of Support) were eventually provided on 27 September 2017.

233 In light of the foregoing, it is difficult if not impossible to accept the defendant's assertion that the payments made by Ample Skill and Ocean International were to pay back banks which had lent money to them (which in

turn had been lent by Ample Skill and Ocean International to OML). On the contrary, it suggests, at the very least, egregious conduct on his part.

234 Moreover, such an assertion is not supported by any or any cogent evidence before the court. In particular, as submitted on behalf of the plaintiffs:

(a) There is no evidence at all before the court that any sums were paid by these companies to banks from the payments received from OML. The reason for this is the defendant's failure (in breach of his discovery obligations) to provide full discovery of the bank account statements of Ample Skill, Brizill, and Ocean International.

(b) Further, there is no cogent evidence of any borrowing by Ample Skill or Ocean International. Although the defendant has purported to exhibit to his 2nd supplementary affidavit of evidence-in-chief copies of (a) an alleged Term Facility Agreement dated 29 June 2016 between *inter alia* Ocean International and RHB (the "RHB Term Facility Agreement"); and (b) the Ample Skill Facility, which was under an alleged Facility Agreement dated 28 June 2017 granted by OCBC to Ample Skill (the "Ample Skill FA"), the defendant has not proven the authenticity of either of these documents at trial in the manner required by ss 63 to 67 of the Evidence Act. This is despite Notices of Non-Admission having been filed by the plaintiffs in respect of the same.

(c) Furthermore, there is no evidence whatsoever that either of the alleged facilities extended to Ample Skill or Ocean International respectively were ever drawn down. For example, the defendant has never disclosed copies of any utilisation request(s) which would have been sent to either RHB or OCBC to draw down on the respective facilities. Moreover, the defendant stated that he did not have any

recollection of any such utilisation request(s) being sent and that given his role he would have no personal knowledge regarding such matters.

235 The relevant passages of the transcript relating to the preceding sub-paragraph are reproduced below:

Q:	… Mr Yaw, can you tell us is there any evidence of any drawdown notice of this loan facility [i.e. the purport RHB facility to Ocean International]?
A:	I assume there is.
Q:	Sorry?
A:	I assume there is.
Q:	If you assume there is, *can you help us with the relevant drawdown notice by way of evidence*? Any particular document that you would like to refer to?
A:	***Again, I really – from my understanding, I leave this to the company, okay?*** My responsibility, I always thought I came up with the money and I let them to handle the detail, make sure it's paid to the proper places. That's my responsibility. ***When you say whether this account was used – I can't answer you. I thought every – I assumed everything is done properly.***
RAMESH J:	Sorry, Mr Yaw, I think the question is this, right? Go back to the loan documentation. The way the loan is drawn down is by way of utilisation request which is set out in table 3 at page 157. Can you see that it's – if you look at page 20 of the document, clause 5, you will see that … 5.1 says: 'The borrower may utilise the facility to bring to agent duly completed utilisation request not later than the specified time.' That's clause 5.1 and the utilisation request is at schedule 3, page 517, and it has to be signed by an authorised signatory for and on behalf of Ocean International Capital Limited.
A:	Yes.

Q: You were the *sole shareholder and sole director* right?

A: ***Yes.***

Q: Of Ocean Capital?

A: Yes.

Q: *You would have signed -- if this had been drawn down, who would have signed it?*

A: I ***don't know at that time who else I authorised in the company to sign. Maybe I have signed it. I don't know, sir.***

Q: But you're saying that it was drawn down?

A: Yes.

Q: To its full value?

A: I assume, because there's nothing left in there.

Q: ***There's no document in discovery, is there?***

[emphasis added in italics; additional emphasis in bold italics]

236 For the sake of completeness, we should mention that following this evidence, it was claimed by counsel on behalf of the defendant that there might have been some documents served on the plaintiffs' lawyers during the trial relating to the foregoing. However, there was no document formally discovered/disclosed in respect of these matters; and none was specifically identified.

237 With respect to the payments to Ocean International, in addition to the submissions raised above, it was submitted on behalf of the plaintiffs that if the payments to Ocean International were, as alleged, for repayment of a one-off US$70m loan from RHB, one would expect that the payment dates would be for similar amounts and at regular intervals. However, that is not the case. Rather, as appears from the table produced at [227] above, the payments to Ocean International were for US$1.155m on 28 March 2017 and

US$569,650.80 on 18 April 2017. In other words, they were isolated payments, made very close together in time, and of very different amounts. In any event, clause 6 (Repayment, Prepayment and Cancellation) of the purported RHB Term Facility Agreement contemplates the first repayment date to be 30 September 2018 (long after the dates of the alleged payments).

238 As regards Ample Skill, the position is, at best, highly questionable. For example, some of the payments made by OML to Ample Skill (as set out in the table above) were made prior to the purported Facility Agreement dated 28 June 2017 granted by OCBC to Ample Skill. In other words, these payments could not have been made to Ample Skill to enable it to repay OCBC. Indeed, as submitted on behalf of the plaintiffs, (a) it is extremely unlikely that the payment made on 30 June 2017 was to repay sums borrowed by Ample Skill from OCBC under the alleged facility when it was only granted on 28 June 2017; and (b) it is also worth noting that the payments to Ample Skill after July 2017 were at irregular intervals (20 September 2017, 25 October 2017, 2 November 2017, 12 December 2017, 27 December 2017). As mentioned above, one would have expected that if the sums were to be used for repayments of a loan (as alleged by the defendant), they would have been arranged in regular intervals.

239 Thus, on the evidence, it is our conclusion that the funds identified in the table above were available to OML at the relevant time and could have been paid to the plaintiffs in satisfaction of the amounts due under the BBCs instead of being paid to Brizill, Ample Skill and Ocean International. In these circumstances and again consistent with the guidelines identified by the Court of Appeal in *KS Energy* ([111] *supra*), the burden of showing why the payment of these funds to the plaintiffs was impossible or was not reasonably required (for example, because they were required to be paid to some other party) falls squarely on the defendant. On the evidence, we are unpersuaded that the

defendant has satisfied that burden. Indeed, on the evidence, it is our conclusion that the explanations provided by the defendant should be rejected; that there is no cogent reason why these funds, *ie*, US$6,407,392.22, could not have been paid to the plaintiffs; and that, to this extent, the defendant was thus in breach of his obligation to use best endeavours as required under (at the very least) the opening unnumbered paragraph and/or clause 2(a) of the Letters of Support when he failed to use these monies to support the Charterers/the Guarantor to make timely payments in respect of the Pre-Termination Claims, and instead procured, caused, or allowed the diversion of these sums to what were his own corporate vehicles.

Payments to Mr See

(1) Purchasing a car for and giving a S$2.32m bonus to Mr See

240 Despite the defendant's constant refrain in evidence that he/OML had insufficient resources to pay the charter hire falling due in the latter part of 2016 and 2017, the defendant continued to have resources to be extremely generous to Mr See including (a) on 11 November 2016 (just shortly after the Charterers defaulted on payment of the November 2016 charter hire instalments) the defendant agreed for OML to purchase a brand-new Mercedes S-Class at S$399,888 for Mr See's use; and (b) in an email dated 2 March 2017 (sent shortly after the Charterers had made further defaults on the February 2017 charter hire instalments), the defendant agreed to pay Mr See S$2.32m within 90 days of the date of the email. In cross-examination, the defendant said that this was a bonus for Mr See. However, there has been no suggestion that these payments were made pursuant to any existing contractual obligation; and it is difficult to understand what Mr See had actually done to deserve such largesse. The defendant also added that "to the best of [his] recollection", he believed that the aforementioned car and/or bonus was partially paid by "the company",

presumably a reference to OML. To that extent and having regard to the terms of the Letters of Support, we do not consider that these payments were necessary or reasonably required in any relevant sense. Thus, it is our conclusion that the decision by the defendant to allow these monies to be used for the benefit of Mr See instead of payment of at least part of the Pre-Termination Claims was a breach by him of (at the very least) the opening unnumbered paragraph and/or clause 2(a) of the Letters of Support.

(2) Disbursements of approximately US$250,000 in 2017

241 In addition, the defendant's own evidence (in the form of the excel spreadsheet exhibited to his affidavit of evidence-in-chief at "YCS-21") reveals that Mr See was also paid sums in excess of US$250,000 in 2017 as disbursements (in addition to his salary as well as the "bonus" above). A table setting out the details of the disbursements paid to Mr See during this period is set out below.

Date (2017)	Description	Amount (US$)
6 January	Staff Claim (Cheque)	1,485.69
25 January	Staff Claim (Cheque)	7,652.19
8 February	Payment for Purchase of Car (Cheque)	96,784.11
8 February	Staff Claim (Cash)	451.92
9 February	Staff Claim (Cash)	4,200.75
14 February	Staff Claim (Cheque)	13,592.82
27 February	Staff Claim (Cheque)	10,038.62
1 March	Staff Claim (Cash)	3,247.35
17 March	Staff Claim (Cheque)	8,340.95

Date (2017)	Description	Amount (US$)
1 April	Staff Claim (Cash)	7,616.88
19 April	Staff Claim (Cheque)	15,594.47
1 May	Staff Claim (Cash)	1,285.87
2 May	Staff Claim (Cash)	1,960.17
4 May	Staff Claim (Cheque)	749.84
9 May	Staff Claim (Cash)	460.54
17 May	Staff Claim (Cash)	460.34
24 May	Staff Claim (Cheque)	15,261.00
26 May	Staff Claim (Cash)	859.40
7 June	Staff Claim (Cash)	233.67
11 June	Staff Claim (Cheque)	-
14 June	Staff Claim (Cheque)	5,038.67
14 June	Staff Claim (Cash)	1,237.67
19 June	Staff Claim (Cheque)	1,129.86
3 July	Staff Claim (Cheque)	7,065.81
7 July	Staff Claim (Cash)	465.87
18 July	Staff Claim (Cash)	1,519.90
14 August	Staff Claim (Cheque)	5,260
17 August	Staff Claim (Cash)	1,631.26
25 August	Staff Claim (Cash)	1,177.60
13 September	Staff Claim (Cheque)	22,950.13
25 September	Staff Claim (Cheque)	366.72
12 October	Staff Claim (Cheque)	5,661.79

Date (2017)	Description	Amount (US$)
5 December	Staff Advance (Cheque)	1,057.67
6 December	Staff Claim (Cheque)	6,609.04
31 December	Staff Claim (Cash)	1,184.39
TOTAL		**251,575.29**

242 On behalf of the plaintiffs, it was submitted that these payments could and should have been used to pay amounts due under the BBCs, and that the fact they were not and that the defendant allowed such payments to be made as stated above constituted a breach by him of his obligations to the plaintiffs under the Letters of Support. We recognise that apart from the payment on 8 February 2017 (for the purchase of a car), the purpose of these payments is somewhat uncertain. However, on their face, these are each described as a "Staff Claim" and they are generally for relatively small amounts during 2017, *ie*, when the OM Group was still active. As such, we think that these payments (as well as the payment for the car on 8 February) should be regarded as being reasonably required in the ordinary course of legitimate operations of OML's business and should be allowed. On this basis, we are unpersuaded that the failure by the defendant to ensure that these monies were used to pay amounts under the BBCs constituted a breach by him of clause 2(a) of the Letters of Support.

Failure to collect receivables

243 In summary, it was the plaintiffs' case that the defendant failed to take any or any sufficient steps to collect various receivables due to OML and that such failure constituted a breach by the defendant to use best endeavours – in particular, to procure the Charterers/the Guarantors to have sufficient liquidity to make timely payment to the plaintiffs (as required by clause 2(a)) of the

amounts payable under the BBCs. This was disputed by the defendant and indeed the defendant advanced a positive pleaded case that he had "*caused or procured steps to be taken towards the timely recovery of receivables by subsidiaries of [OML] and/or [the Charterers], through litigation or arbitration proceedings*". Particulars of these various alleged litigation or arbitration proceedings relied upon by the defendant were subsequently served by the defendant pursuant to a formal Request for Particulars by the plaintiffs.

244 In broad terms, the plaintiffs' case was that the steps allegedly taken by the defendant were, in truth, non-existence or wholly inadequate. In particular, it was submitted on behalf of the plaintiffs that (a) the defendant did not come up with a recovery plan for the outstanding receivables; and (b) he did not give any specific directions as to how the collection efforts or recovery efforts were to be undertaken but instead, he left it to a committee within OML to carry out the recovery of receivables. Moreover, it was submitted on behalf of the plaintiffs that no objective or corroborative evidence that any such steps were in fact taken towards the recovery of the relevant receivables has been placed before the court. Although the defendant stated at paragraph 55 of his affidavit of evidence-in-chief that the status of OML's efforts to recover various receivables were documented in weekly legal reports prepared by OML's legal department, these weekly legal reports have not been disclosed.

245 At paragraph 56 of his affidavit of evidence-in-chief, the defendant refers to a report dated 10 April 2018 with regard to attempts that were made to recover certain receivables. However, that document does not relate to steps taken at the relevant time by the management of OML to recover the outstanding receivables. Instead, that document purports to describe the steps taken by the judicial managers following OML's entry into judicial management on 21 March 2018. In any event, as submitted on behalf of the plaintiffs, (a) the

document is of unknown provenance – it is not even clear who the maker of the document is or the purpose for which it was prepared; and (b) the defendant plainly does not have personal knowledge of the matters referred to in that report. Crucially, there is no or no sufficient evidence of the legal proceedings purportedly commenced by OML and its subsidiaries against the various third parties.

246 For present purposes, the two main receivables which the plaintiffs say the defendant failed to use best endeavours to collect were (a) approximately US$2.6m from Cash Atlas and (b) US$5.623m balance purchase price from RSOV from Port Golden. We deal with these below.

(1) Failure to collect US$2.6m from Cash Atlas

247 The evidence with regard to this part of the case is scanty. In summary, it appears that Cash Atlas was a company incorporated by the defendant's cousin, Joseph Lau; and that Cash Atlas had bareboat chartered the Go Phoenix (presumably from Otto Fleet) and then sub-chartered the vessel to another company referred to as "Swiber-Alam". An email from Mr See dated 8 January 2018 stated that Cash Atlas owed some US$2.6m under that bareboat charter. There is no cogent evidence before the court that Otto Fleet or OML ever took any steps to collect this sum – or indeed any part of it – from Cash Atlas or to take back possession of the vessel. Indeed, there is no evidence that any letter of demand was ever sent; and the defendant's own evidence is that he never sent a letter of demand. Moreover, the receivables due from Cash Atlas are not one of the receivables in relation to which the defendant alleges litigation/arbitration proceedings were commenced. There is no doubt that this was a very substantial amount by way of accounts receivable and, if collected even in part, would have assisted in discharging the obligations under the unnumbered paragraph and

clauses 2(a) and/or 2(b) of the Letters of Support. As such, it is our conclusion that the defendant's failure to take any steps to collect this sum or any part of it constituted a *prima facie* breach of his best endeavours obligations of the unnumbered paragraph and those specific provisions of the Letters of Support. The defendant did not call any evidence to establish that it would have been pointless or at least not reasonable to have made efforts to collect this sum to show either that there was no breach or that any breach caused no loss.

248 As to that, the defendant's pleaded case was that Cash Atlas did not pay Otto Fleet/OML pursuant to its bareboat charter because Cash Atlas had not been paid by their sub-charterers Swiber-Alam. According to the defendant's own evidence, he was not happy with that explanation; and despite chasing "a lot" and getting angry and frustrated, he was unable to collect the money. However, there was no documentary evidence of any such suggested "chasing". At best, there is an early email dated 10 May 2016 (*ie*, some 18 months prior to Mr See's email) in which the defendant purportedly refused to enter further charters with "Alam Maritime Global" because (at that stage) they still owed some US$1.6m for past (unspecified) work. However, that seems of little, if any, relevance to the present issue. Further, as submitted on behalf of the plaintiffs, the fact that Swiber-Alam had not paid Cash Atlas under their sub-charter is legally irrelevant with regard to Cash Atlas' payment obligations to Otto Fleet/OML. As submitted on behalf of the plaintiffs, there is no evidence that Cash Atlas would have been unable to pay the charter hire under its own bareboat charter with Otto Fleet/OML had the latter insisted on payment and taken the proper steps to recover the accounts receivable from Cash Atlas. Moreover, it is noteworthy that on the basis of the defendant's explanation, it is somewhat strange that Cash Atlas did not withdraw the vessel from Swiber-Alam and equally strange why Otto Fleet/OML did not withdraw the vessel from Cash Atlas.

249 For these reasons, it is our conclusion that the defendant has failed to discharge the evidential burden to justify his failure to take any steps to collect this outstanding charter hire from Cash Atlas as well as the legal burden by reason of his pleaded case; and that such failure constitutes a breach of his best endeavours obligations under the unnumbered paragraph and clauses 2(a) and/or 2(b) of the Letters of Support.

(2) Failure to collect US$5.623m balance purchase price for RSOV from Port Golden

250 Once again, the evidence in respect of this part of the plaintiffs' claim is scanty. In essence, it was the plaintiffs' case that the defendant failed to take any steps, or to procure steps to be taken, towards the recovery of substantial receivables (in excess of US$5m) payable to Supply Fleet Pte Ltd ("Supply Fleet") (a subsidiary of OML) by Port Golden.

251 In summary, it was submitted on behalf of the plaintiffs:

(a) Port Golden is a BVI company of which one Mr Jonathan Leung ("Mr Leung") (a close business associate of the defendant) was at the material time the sole director.

(b) On or about 30 May 2017, Supply Fleet (with the defendant's consent) entered an agreement for the sale of its shares in RSOV (as mentioned above at [219(d)], RSOV is a vessel owning company) to Port Golden. The purchase price for the shares was US$5.68m.

(c) The liquidators of Supply Fleet confirmed to the plaintiffs that only 1% of the purchase price had been paid and that the balance of 99% (or around US$5.623m) remained outstanding.

(d) As to that, the defendant's evidence was that despite not having any recollection as to whether he had had sight of the share sale and purchase agreement, he was aware of the transaction and its structure. According to the defendant, Mr Leung had allegedly walked out of the transaction, refusing to perform it; and that he did not take any steps to procure payment of the outstanding sum of US$5.623m due to Supply Fleet. Thus, the defendant's evidence was:

> Q: We have seen the liquidators' confirmation that only 1 per cent out of this 5.68 million was ever collected. Mr Yaw, why did you not take steps to collect the remaining 99 per cent?
>
> A: This is – look, he [Mr Leung] thought it was a good investment to invest and then he change[d] his mind after putting up 1 per cent. And I get stuck with this stupid thing. ***So, no, when he refused to do it, I didn't chase after him*** because I don't know how to chase anymore because he say I don't want to do this.
>
> [emphasis added in bold italics]

(e) However, the defendant sought to excuse his failure to take steps by making a bald assertion that payment of the balance amount of 99% was deferred for 12 months after the date of the share sale and purchase agreement, such that by the time it fell due, OML had already entered judicial management. No cogent evidence was adduced to substantiate this bald allegation that the balance of the purchase price was not due until the intervention of judicial management.

252 In support of the foregoing, counsel on behalf of the plaintiffs highlighted a number of points *viz*:

(a) Although the defendant alleged that Mr Leung reneged on the RSOV transaction, he did not seek to introduce evidence by Mr Leung

in this regard notwithstanding the fact that the latter had provided an affidavit of evidence-in-chief following leave being granted to the defendant to call him as a witness. In the event, the court was informed that Mr Leung was unable to give evidence allegedly due to unspecified personal exigencies.

(b) Even if the relevant payment only fell due after OML had entered into judicial management, the defendant could nevertheless have taken steps to procure the recovery of the receivables by Port Golden/Mr Leung or alert the judicial managers to such receivables. As stated above, the defendant's best endeavours obligations under the Letters of Support continue to be in force pursuant to clauses 4 and 5 of the same.

(c) At the trial, counsel for the defendant raised the objection that the plaintiffs did not specifically plead that the defendant had failed to recover receivables due to Supply Fleet for the sale of its shares RSOV. However, this misses the point. The defendant's own pleaded case (at paragraph 35(c) of the Defence) is that he had performed his best endeavours obligations *inter alia* by having "*caused or procured steps to be taken towards the timely recovery of receivables by subsidiaries of [OML] and/or [the Charterers]…*" One of OML's subsidiaries specifically mentioned in this context was in fact Supply Fleet.

253 In response, it was submitted on behalf of the defendant that even if the US$5.623m could have been collected from Port Golden (a) it was owed to Supply Fleet: a different company from either of the charterers or OML and (b) there is no evidence that Supply Fleet would have been able to lend the money to the Charterers or OML to enable them to use those monies to pay amounts due under the BBCs. On behalf of the plaintiff, it was submitted that there was

no merit whatsoever in these points because (a) Supply Fleet was a wholly-owned subsidiary of OML and there is no reason to believe that OML could not have procured Supply Fleet to transfer these funds to it; and (b) by this time, OML had been delisted and the defendant was therefore in full control of OML. We agree. Moreover, it was submitted on behalf of the plaintiffs that these points appear to ignore the defendant's own pleaded case, which is that he personally paid a settlement sum on behalf of Supply Fleet to Mr Rakesh Tulshyan to settle a separate claim made in HC/S 371/2016; that this was allegedly done in discharge of the defendant's best endeavours obligations under the Letters of Support; and that had the aforesaid sum of US$5.623m been recovered from Port Golden, it could have been used to reduce the amount which the defendant paid (out of his own pocket) to Mr Rakesh Tulshyan and increase the amount of resources available to make payment to the plaintiffs.

254 At the very least, it was submitted on behalf of the plaintiffs that the Port Golden transaction (involving the transfer of a substantial subsidiary of OML to a third-party without taking any steps to collect the purchase price) calls for a cogent explanation, particularly given the defendant's capacity as a director of OML, which the defendant has conspicuously failed to provide.

255 In our judgment, the position here is similar to that in relation to the debt due from Cash Atlas *viz* there was a clear substantial debt (*ie*, US$5.623m) due from Port Golden; on the defendant's own evidence, he took no steps to recover or even to chase for this sum or any part thereof; and, as such, such failure constituted a *prima facie* breach of his best endeavours obligations of the unnumbered paragraph and clauses 2(a) and/or 2(b) of the Letters of Support. The defendant did not call any evidence to establish that it would have been pointless or at least not reasonable to have made efforts to collect this sum to show either that there was no breach or that any breach caused no loss.

Diversion of the vessels' earnings

256 Under the BBCs, the vessels' earnings were to be utilised towards payment of charter hire. Thus, for example, clause 32.1.14 and clause 46 of the Go Perseus BBC provide, in effect, that all earnings would be paid into the Earnings Account (as defined at [22(d)] above) and would not be utilised except for purposes approved by the plaintiffs:

> Clause 32.1.14
>
> '**Earnings Account**' means USD account no. xxxxxxxxxxxxx13 in the name of the Charterers with Industrial and Commercial Bank of China, Singapore Branch …
>
> …
>
> Clause 46
>
> The Charterers undertake and agree that throughout the Charter Period they will:-
>
> 46.1 procure that all earnings and other monies in respect of the Vessel, payable to the Charterers (including any payment under any Time Charter), are paid to the Earnings Account; and
>
> 46.2 not make any withdrawals from the Earnings Account without the prior written consent of the Owners.

257 Clause 51.1.4 of the Go Perseus BBC further provides *inter alia* that the Charterers would "*charge to [the Plaintiffs] all their rights, title and interest in and to the Earnings Account and any amount deposited into and standing to the credit of the Earnings Account from time to time*". The other BBCs contain similar provisions.

258 As submitted on behalf of the plaintiffs, the intent behind these provisions is plainly to enable the plaintiffs to obtain security and exercise control over the use of the earnings of the vessels to ensure that these would not be diverted for other purposes without the plaintiffs first being paid their charter hire under the respective BBCs, *ie*, to compel and restrict the Charterers to

utilise the earnings garnered by employment of the vessels so they would be used to pay the plaintiffs charter hire under the BBCs in a timely fashion.

259 In summary, it was the plaintiffs' case that despite these provisions and the defendant's obligations under the Letters of Support to exercise his best endeavours, the defendant illegitimately procured, caused or allowed the vessels' earnings to be diverted towards purposes other than payment of charter hire to the plaintiffs under the BBCs as set out below.

(1) Diversion of US$450,000 in funds to pay UOB (May 2016)

260 This fund diversion appears to have taken place as early as 18 May 2016 with the defendant's knowledge. (This would have been after the defendant had agreed in principle to issue the First Letters of Support, but before their execution). In particular, WhatsApp records of exchanges between Mr See and the defendant show Mr See to have informed the defendant of the intended diversion of funds (to be paid to the plaintiffs) for payment to UOB on 18 May 2016, as follows:

> I called and have asked kc and sj to take out the 450k from icbc to uob
>
> No point paying partial to icbc as their is 3m
>
> Hence paying uob 1m outstanding, (using icbc 450k and end of week another 550k from GO) will resolve uob 1m and their loan payment straight away drop by 50%
>
> This will strike off one immediate item

261 In our view, it would seem that that this was indeed a diversion of funds in breach of the terms of the BBC. However, although it is fair to say that this took place after the defendant agreed in principle to provide the Letters of Support, it was before the Letters of Support were executed or took effect. That

being so, we find it impossible to conclude that this diversion can properly be regarded as a breach of the Letters of Support.

(2) Diversion of Deep Ocean sub-hire payment (December 2016)

262 This diversion of funds took place after the defendant executed the First Letters of Support and/or at least after the date when the Second Letters of Support were stated to take effect. The said funds were derived from a sub-hire payment made to either the Charterers or OML (as to which it is not clear, as seen below) by Deep Ocean. Evidence of this diversion appears in the form of an email dated 29 December 2016 to the defendant, which states:

> Payment of Dec2016 wages and AWS are from the two sources:
>
> 1) Alanya payment of half a month Usd225k
>
> 2) Partial of Deep Ocean payment received GBP200k
>
> …
>
> Deep Ocean payment of Usd430k ***should be paid to ICBCL bank account***, *GO has used partial* and *balance of GBP200k will be transferred to Otto bank account.*"
>
> [emphasis added in italics; additional emphasis in bold italics]

263 As can be seen from this email, a payment of around US$430,000 which should have been utilised towards paying the plaintiffs was instead partially utilised by the Charterers or their parent company (for unknown purposes) with the balance of £200,000 (or around US$260,000) being remitted to OML to be used to pay wages of its staff. Instead of OML providing financial support to enable the Charterers to fulfil their obligations under the BBCs, the Charterers' earnings were being used to support the (other) financial obligations of OML. It is noteworthy that it was only a few days after this diversion, *ie*, on 3 January 2017 that the first payment to Ample Skill took place (see [227] above).

264 There is no doubt that the defendant was fully aware of this impermissible diversion of funds from the Charterers; and he admitted in cross examination that he did nothing to stop it. In evidence, his only explanation was that he was trying "*…to raise more money for the company because at that time the cash was very tight…*" In our view, such an explanation is no justification for this diversion of funds; and, as submitted by the plaintiffs, amounts to a breach of one or more of the defendant's obligations to use best endeavours under the Letters of Support.

(3) Diversion of Inpex Charter sub-hire payments (April to October 2017)

265 Under this head, it is the plaintiffs' case that the defendant failed to take any steps to ensure that sub-hire payments made by Inpex, which were in connection with the charter of the Go Phoenix in the period from April to October 2017 (the "Inpex Charter"), were paid into the Earnings Account in accordance with the terms of the BBC for that vessel. In particular, it was submitted on behalf of the plaintiffs as follows:

(a) The daily rate under the Inpex Charter was approximately US$26,000, or around US$780,000 per month;

(b) On this basis the total hire paid by Inpex for the period from April to October 2017 (seven months) would have been in the region of US$5.46m;

(c) All these charter hire payments were either used by the Charterers for their own purposes or paid over to OML;

(d) Had these sums been paid into the Earnings Account in accordance with the terms of the BBCs, the plaintiffs could have

required these sums to have been used towards the payment of charter hire owing to the plaintiffs.

(e) Moreover, if at the relevant time, OML, the Charterers, or the defendant had had sufficient funds to pay charter hire due under the BBCs without resorting to the funds in the Earnings Account, then these sums would have represented a secured fund which could have been used to pay the plaintiffs even after the Charterers/the Guarantors entered judicial management and/or liquidation.

(f) The plaintiffs denied that they had waived their rights under the relevant clauses of the BBCs (*eg*, clause 32.1.14 of the BBCs) or agreed that the charter hire should not be paid into the Earnings Account and/or that operating expenses might be deducted from charter hire payments under the Inpex Charter; and in so far as may be necessary, the plaintiffs submitted that any waiver would, in any event, have been invalid by virtue of clause 56 of the BBCs.

266 In principle, we accept that any sub-hire payments from the Inpex Charter should have been paid into the Earnings Account. However, the evidence in relation to this claim is, once again, scanty and the plaintiffs' clam somewhat problematic in certain respects for the following reasons:

(a) First, a copy of the Inpex Charter was not in evidence but it appears that the charter period for the Inpex Charter was closer to six months (*ie*, April–September 2017) rather than seven months.

(b) Second, as stated above, the claim is advanced on the basis of a daily rate of US$26,000 equivalent to approximately US$780,000 per month for the Inpex Charter. That figure appears in an email dated 10

August 2017 from Mr Goh. However, there is another email from Michelle Pek at Go Marine to Mr See, Mr Stanley and Mr Ortega dated 21 September 2017 which states in material part:

> Appended below please find the USD charter collections from INPEX and the payments been made to Otto for your information pls.
>
> USD Charter receipt

Charter received	
Apr	342,022.78
May	361,460.00
Jun	349,800.00
Jul	361,460.00

Charter paid to Otto	
Apr	180,000.00
May/Jun	366,000.00
Jul	186,000.00

(c) As to these figures, there was some debate as to whether the figures in the column under the heading "Charter received" means "gross hire" or "net earnings", *ie*, charter hire less operating costs. On the basis of this email, it was submitted on behalf of the defendant that the figures in the first column showed gross hire and that the actual amount of gross hire received was therefore substantially less than the figure of US$26,000 per day suggested by the plaintiffs and indeed was approximately half that sum. On the evidence, it is simply impossible to reconcile these figures. But if the figures in the reproduced tables are correct and are to be taken as the approximate monthly gross hire, then the total gross hire that would have been received over the six month period would have been much less than that claimed by the plaintiffs, *ie*, approximately US$2m rather than the figure of US$5.46m.

(d) On behalf of the defendant, it was submitted that, in any event, the Charterers would have been entitled to deduct from any gross hire that was paid or should have been paid into the Earnings Account their operating costs which were said to fall in the range US$18,000–US$21,000 per day equivalent to approximately US$540,000–US$630,000 per month; and that on this basis the actual net earnings would have been approximately US$150,000 per month, *ie*, only US$900,000 (6 x 150,000) over the six month period or, at most US$240,000 per month (if the gross hire figure is taken as US$780,000 per month), *ie*, approximately US$1.4m over the six month period. Further, it was submitted on behalf of the defendant that whatever the strict legal position was or may have been, the plaintiffs had waived their right to have the vessel's (gross) earnings paid into the Earnings Account.

267 These points are not easy to resolve in particular because the terms of the Inpex Charter are uncertain; and the evidence as to what charter hire was payable and paid is not only sketchy but contradictory. Further, although there is no written agreement or contemporaneous document evidencing any "waiver" of the Charterers' obligation to pay earnings into the Earnings Account and although, again, the evidence is sketchy, it seems highly probable that, at the very least, there was a course of conduct whereby operating expenses were deducted from charter hire paid under the Inpex Charter and that this must have been known to the plaintiffs. It is right to say that there is no specific evidence that this was so but it seems highly improbable that the position could have been otherwise and, in such circumstances, we do not consider that the plaintiffs would be entitled to rely on clause 56 of the BBC.

268 In light of the above, our conclusion is that the plaintiffs have failed to establish that the sum of US$5.46m was "wrongly" diverted but that, on a balance of probabilities, some US$900,000 (*ie*, the much lower net earnings figure put forward by counsel on behalf of the defendant) which should have been paid into the Earnings Account was wrongly diverted during the period April to September 2017. Further, it is our conclusion this was the result of the failure by the defendant to exercise best endeavours under the Letters of Support.

US$30m new working capital facility purportedly granted by OCBC in favour of Ample Skill

269 Finally, under this section, it is necessary to consider what has been referred to as the Ample Skill Facility under the Ample Skill FA dated 28 June 2017 (as defined at [234(b)] above). Ample Skill, as explained earlier (at [217(c)] and [227] above), was wholly owned by the defendant. In summary, it was the defendant's pleaded case that he had, in the exercise of his best endeavours under the Letters of Support "*procured a further working capital loan of about USD 30 million from OCBC Bank in 2017 in favour of Ample Skill to be used for the Guarantor as part of a bilateral debt restructuring exercising between [OML] and OCBC*".

270 However, the evidence relating to this alleged facility is most unsatisfactory. To the extent that such evidence exists, the position is both confused and confusing.

271 As submitted on behalf of the plaintiffs, there is no admissible evidence before this court which evidences this alleged facility. In particular, although the defendant purported to exhibit a copy of the Ample Skill FA between Ample Skill and OCBC as an exhibit to his 2nd supplementary affidavit of evidence-

in-chief, the defendant has not proven the document in the manner required by ss 63 to 67 of the Evidence Act.

272 Be this as it may, it appears on the face of the document itself that the purpose of the Ample Skill FA was primarily to restructure OML's existing loans from OCBC in respect of the financing of ten vessels (the "OCBC Vessels") owned by various subsidiaries within the OM Group. To this end, the Ample Skill FA contemplated that the OCBC Vessels (or the relevant vessel owning companies) would be transferred from the OM Group to Ample Skill or its subsidiaries. Particulars of the OCBC Vessels and the relevant vessel-owning companies are set out at Schedule 3, Part 3 of the Ample Skill FA. Pursuant to clause 3.1 of the Ample Skill FA, the facility comprised two components:

(a) The RCF I Facility was to be used to refinance existing facilities extended by OCBC to OML, its subsidiaries and/or its associated companies as well as to refinance existing facilities granted to Ample Skill by way of a facility letter dated 16 September 2016 (which the defendant has not disclosed). The RCF I Facility Limit is defined in clause 1.1 as "…US$203,000,000, less any amount cancelled or reduced pursuant to the terms of [the Ample Skill FA]".

(b) The RCF II Facility was to "finance the working capital requirements of… [Ample Skill] and its Subsidiaries, and… the Otto Group" [emphasis added]. The RCF II Facility Limit is defined in clause 1.1 as "… US$30,000,000, less any amount cancelled or reduced pursuant to the terms of [the Ample Skill FA]". However, clause 4.5 of the Ample Skill FA states:

> **4.5 Additional Condition for Utilisation of the RCF II Facility**

> The amount available for Utilisation under the RCF II Facility shall be the **lower** of: (a) three (3) times the amount provided by [the Defendant] to the Otto Group as described in Clause 19.26 (Loan or Equity Injection into the Otto Group; and (b) the RCF II Facility Limit [i.e. USD 30 million].
>
> [emphasis in original]

Further, clause 19.26.1 provides that "*[Ample Skill] shall procure that [the Defendant] shall provide [OML] and its Subsidiaries with a new loan or inject additional equity of up to US$10,000,000 (the "**Capital Injection**")*" [emphasis in original]. In other words, the amount that could be borrowed under the RCF II Facility was in fact three times of any new funding provided by the defendant to the OM Group, up to a maximum of US$30m. Additionally, the Ample Skill FA stipulated that OCBC would obtain *inter alia* the following security, *viz*, (a) a personal guarantee from the defendant for US$87.25m: see, for example, clause 1.1 of the Ample Skill FA (defining the terms "Guarantee" and "Guarantor"); (b) a pledge over Ample Skill's holdings of around 270 million shares in another company, *ie*, Balamara (see [115] above); and (c) mortgages over the OCBC Vessels.

273 In summary, as submitted on behalf of the plaintiffs, it would appear that the main purpose of the Ample Skill FA was a bilateral restructuring of OML's debt owed to OCBC. It was in fact nothing more than a transaction under which the defendant gave OCBC additional security in respect of alleged existing loans previously granted to OML. The provision of new working capital was in fact a peripheral aspect of the Ample Skill FA with the main focus being to restructure the existing OML loans, the effect of which was that OCBC (a) was effectively insulated from the potential insolvency of OML, having substituted Ample Skill as its borrower in place of OML, and (b) obtained a whole suite of security with

a value far exceeding the value of purported working capital facility of no more than US$30m granted to OML.

274 For these reasons, we do not consider that the Ample Skill FA is of any assistance in demonstrating the exercise of best endeavours by the defendant under the Letters of Support.

275 In any event, it remains wholly uncertain as to whether any and, if so, what part of the Ample Skill FA was ever drawn down. Although the defendant made bare assertions (at paragraphs 21 and 25 of his 2nd supplementary affidavit of evidence-in-chief and under cross-examination) that the facility was fully drawn down, it was apparent during cross-examination that he had no personal knowledge as to whether this was in fact the case, and such assertions were wholly unsupported by any documentary evidence. If OCBC had disbursed the sum of US$30m under the facility to Ample Skill/OML, this would plainly be documented.

276 Further, the defendant's position that the facility had been fully drawn down is inconsistent with his own pleaded case, which is that he only personally injected US$5.2m into OML in 2017 (which injections took place on or after 29 June 2017). Bearing in mind the terms of the Ample Skill FA as referred to above and taking the Defendant's case at its highest, the maximum amount which could have been drawn down would have been US$15.6m, *ie*, three times of any new funding made by the defendant.

277 We should note that it was submitted on behalf of the plaintiffs that in so far as the Ample Skill FA was in evidence and to the extent the defendant failed to procure the full draw down thereunder to enable the Charterers/the Guarantors to meet their respective obligations under the BBCs/the guarantees,

this by itself constituted a breach of his best endeavours obligations under the Letters of Support. In other words, the plaintiffs submitted that, if anything, they were entitled to rely upon the foregoing to show, positively, that the defendant should have procured the further/full drawing down of the facility and used the drawn down sums towards paying off the outstanding sums due to the plaintiffs under the BBCs and the guarantees. In support of that submission, the plaintiffs advanced a number of detailed arguments as to how this might have been achieved. However, we do not accept the plaintiffs' primary submission: in our view, the evidence falls far short of enabling the plaintiffs themselves to advance this positive case – in particular because the plaintiffs' own case is that this was nothing more than a restructuring of an existing credit facility by substituting one debtor for another. In these circumstances, we do not consider that it is necessary or appropriate to consider the detailed arguments as to how any funds that might have been drawn down might have been used towards paying off the outstanding sums due to the plaintiffs under the BBCs/the guarantees.

278 For all these reasons, it is our conclusion that the evidence with regard to the Ample Skill Facility (such as it is) is of no assistance to either the defendants or the plaintiffs.

Failure by the defendant to utilise his personal financial resources to procure sufficient funding for the Charterers/the Guarantors

279 In summary, it is the plaintiffs' case that the defendant had funds or assets in his own name which he had or could have made available or other funds or assets which he could have called upon from third parties (including his family) to procure sufficient funding for the Charterers/the Guarantors. They submit that the defendant's failure to utilise or procure such funds, and to apply such funds in satisfaction of the Charterers' obligations under the BBCs,

constituted a breach of his best endeavours obligations under the Letters of Support. As a consequence of this breach, the outstanding sums payable to the plaintiffs under the BBCs/the guarantees were not paid in a timely fashion (or at all). For the reasons stated above and which we do not repeat, we have already concluded that the defendant's obligation to exercise best endeavours extended to the procurement *for the Charterers* and utilisation of such funds by virtue of the unnumbered paragraph and clause 3 of the Letters of Support. This section of this Judgment is therefore concerned with the alleged breach(es) of these obligations.

280 Further, for reasons also stated above and which we again do not repeat, we reject the defendant's primary defence that as a matter of law, he was not obliged under the Letters of Support to exercise best endeavours to use or procure these funds *for the Charterers*. We also draw the following adverse inferences from the defendant's breach(es) of court orders and/or his general disclosure obligations:

(a) that the defendant failed to disclose the various bank statements referred to in the plaintiffs' List of Undisclosed Documents because, if produced, they would have been unfavourable to the Defendant; and

(b) that in particular, they would have revealed that he had sufficient financial resources (in the form of cash in bank accounts in his name or otherwise controlled by him) to have procured the full and timely payment of at least the Pre-Termination Claims payable by the Charterers/the Guarantors to the plaintiffs under the BBCs/the guarantees.

As previously stated, however, these inferences are not necessarily determinative; and it is necessary to consider the whole of the evidence in order to reach a final conclusion.

(1) The extent and limits of the defendant's obligation to utilise his personal financial resources under clause 3 of the Letters of Support

281 Before embarking on that exercise, it is also necessary to consider in more detail the scope of the defendant's obligations under clause 3 of the Letters of Support. In essence, the analysis falls into two main parts. The first relates to the plaintiffs' claims for loss under the Pre-Termination Claims (the "Pre-Termination Loss(es)"). Here, we have to examine whether the defendant had the wherewithal (either from his own personal resources or from third parties) to meet the Pre-Termination Losses (either in full or in part) after setting off the monies that were, in breach of clause 2(a), not utilised or wrongly diverted away from the companies instead of being used to make payment of dues under the BBCs/the guarantees as discussed above. In other words, the difference between the sums that fell due before termination of the BBCs, and the sums that were diverted in breach of clause 2(a). Under clause 3, the defendant had to use best endeavours to procure for the Charterers sufficient funds to meet such dues, subject to applicable laws. If we are persuaded that he had the means either in full or in part to do so and that he was in breach of his best endeavours obligations, damages to that extent will follow.

282 The second part of the analysis relates to loss following from, or arising as a result of, the termination of the BBCs (the "Post-Termination Loss(es)"). Here, the relevant questions are (a) whether there is an obligation to continue procuring funds for the Charterers/the Guarantors to enable payments to be made under the under BBCs and the guarantees; and (b) whether that obligation

ceased, whether by operation of law (applying the test in *KS Energy* ([111] *supra*)) or by reason of the "applicable law" caveat in clause 3.

283 On the first question, it was submitted on behalf of the plaintiffs that the defendant remained under an obligation to use best endeavours to procure further funds for the Charterers/OML following termination of the BBCs and even after these companies entered into judicial management or indeed were wound up. We make two observations here. First, in so far as the submission is that the obligation under clause 3 extended to procuring funds for OML (as opposed to the Charterers) to meet its obligations under its guarantee, that would be correct as explained earlier. Second, none of the Charterers was in a formal insolvency process as at the date of the relevant BBCs (though Go Offshore filed for judicial management on 30 November 2017, 15 days after the Go Perseus BBC was terminated).

284 That said, as a general proposition, the defendant would not be able to fund a company in an insolvency process for the specific purpose of paying historical liabilities owed to one creditor only. That would offend the *pari passu* rule. As the companies are insolvent, such funding would be in fulfilment of a *specific* debt which, ordinarily, the estate and its creditors would have to bear. That would not be in the interests of the estate and its creditors. General funding for the benefit of the estate as a whole (*ie*, all creditors) may be possible as part of a rehabilitation exercise under judicial management but that is not the case advanced by the plaintiffs. Further, the provision of such general funding as part of an effort to rehabilitate the relevant companies is inconsistent with the language of clause 3, which requires funds to be procured to meet only the liabilities under the BBCs/the guarantees. Rather, pursuant to clause 3, the plaintiffs' contention is, and indeed must be, that funding is procured for the Charterers for the specific purpose of meeting the liabilities under the BBCs/the

guarantees. Even if funding for the specific purpose of meeting liabilities under the BBCs/the guarantees were possible, which we do not accept, the plaintiffs have led no evidence of the prospect of such offer of funding being accepted by the judicial manager/liquidator. Even if any such offer of funding was accepted, it is also quite impossible to determine what the terms of the funding would have been.

285 In support of their submission, the plaintiffs advanced two main arguments: (a) under clause 4 of the Letters of Support, the obligations thereunder are said to "*remain valid and binding notwithstanding any bankruptcy, receivership or liquidation of, or moratorium involving the Guarantor and Charterers*"; and (b) a company might be rehabilitated following judicial management.

286 We have already briefly touched upon the parties' submissions on the scope and effect of clause 4 of the Letters of Support and do not propose to repeat what we have already said. For present purposes, it is sufficient to note that it was submitted on behalf of the defendant that the plaintiffs' position is contrary to settled law that (a) the obligation to use all best endeavours only requires the obligor to go on using such endeavours until the point is reached when all such endeavours have been exhausted and (b) if there is an insuperable obstacle to procuring the contractually-stipulated outcome, the obligor is not required to do anything more to overcome other problems that may have been resolved.

287 Further, it was submitted on behalf of the defendant that once the Charterers (and Guarantors) were insolvent, that was the end of the road in so far as any best endeavours obligations were concerned; that it was at that point that all previous endeavours were exhausted because, by definition, once the

companies were insolvent they were no longer "solvent and a going concern" in accordance with the Going Concern Obligation, *ie*, clause 2(b) of the Letters of Support; that performance of the Liquidity Obligation, *ie*, clause 2(a) and Sufficient Funds Obligation, *ie*, clause 3 would not have had a significant or real prospect of success because this would have required the defendant to procure finance for an insolvent company; and that there is a limit to the defendant's obligations.

288 In summary, it was submitted on behalf of the defendant that the Guarantor and the Charterers entered into an insolvency process in liability positions that were too large to salvage; that in accordance with the authorities (*viz Jet2* ([162(d)] *supra*) and *Astor* ([162(e)] *supra*)), once it became clear that the Guarantor and Charterers could never expect to operate as going concerns, the defendant was not obliged to incur losses (and of course the defendant's case was that he was not under such an obligation in the first place) in seeking to support a failing business; and that regardless of the nature of the defendant's best endeavours obligations, once that stage was reached, the defendant's obligations, in particular under clause 3 of the Letters of Support, ceased.

289 As to these submissions, our observations and conclusions are as follows:

(a) We readily accept that clause 4 of the Letters of Support is expressed in very wide terms.

(b) In principle, we also accept that it follows that the effect of clause 4 is that the rights and obligations under the Letters of Support do not *automatically* cease on the occurrence of an event of bankruptcy, receivership, liquidation or moratorium of the Charterers/OML.

(c) However, clause 4 does not, of itself, create any new or discrete obligations. The overriding point of importance is that the defendant's obligations are limited to the exercise of "best endeavours" for the purposes stated in the body of the Letters of Support and, as the authorities make plain, such obligation is not open-ended or unlimited. In particular, the obligor need only do that which has a significant or real prospect of success in procuring the contractually-stipulated outcome. Borrowing words from the decision of the Court of Appeal in *Jet2,* although financial cost cannot be a trump card to extricate an obligor from what would otherwise be his obligation, an obligor is not obliged to promote or prop up a failing business – at least where there is no significant or real prospect of such business being able to operate satisfactorily.

For all these reasons, it is our conclusion that the obligation under clause 3 of the Letters of Support ceased upon the commencement of formal insolvency proceedings by the Charterers. As discussed above, the obligation is to procure funds "*for the Charterers*" and the commencement of formal insolvency proceedings by the Charterers makes the performance of that obligation not possible. The commencement of a formal insolvency process would therefore be the long-stop date for the obligation under clause 3. Thus, for the Go Perseus BBC, the relevant long-stop date would be 30 November 2017, when Go Offshore filed for judicial management. As for the Go Phoenix and Go Pegasus BBCs, the relevant long-stop date would be when Otto Fleet was ordered to be wound up on 10 July 2019 (noting that Otto Fleet was served a statutory demand on 8 October 2018 which it did not satisfy).

290 But that is not the end of the inquiry. The Go Phoenix and Go Pegasus BBCs were terminated on 31 January 2018 well before the commencement of formal insolvency proceedings by Otto Fleet. The termination of the Go Perseus

BBC was on 15 November 2017, 15 days before the commencement of formal insolvency proceedings by Go Offshore. Given that the dates for termination of the BBCs pre-dated the commencement of formal insolvency proceedings by the relevant Charterers, a separate question arises: for the purpose of computing the plaintiffs' claim for Post-Termination Loss, did the defendant's obligations under clause 3 end even earlier than the relevant long-stop dates?

291 As regards the Go Phoenix and Pegasus BBCs, in our judgment, by 31 January 2018, OML and Otto Fleet, and indeed the entire OM Group, were too far gone to be saved without the intervention of a formal insolvency and restructuring process and even then, such judicial management (and the prospect of successful rehabilitation) was gravely uncertain, as the subsequent liquidation of OML showed. The following facts are pertinent. First, Go Offshore had filed for judicial management on 30 November 2017. Second, in recognition of the overall financial malaise, the plaintiffs terminated the Go Pegasus and Go Phoenix BBCs on 31 January 2018, and issued statutory demands on 6 February 2018 which were not satisfied. This raised the presumption of insolvency under the Companies Act (Cap 50, 2006 Rev Ed). Third, shortly after the termination of these BBCs, OML, the parent company of Otto Fleet, filed for judicial management on 20 February 2018. Collectively these confirmed that the situation for the OM Group as a whole looked bleak and was no longer salvageable by 31 January 2018.

292 As such, it would not be reasonable to expect the defendant to throw good money after bad. The fact that the plaintiffs had terminated the BBCs is an admission that they too thought there was no utility in keeping the BBCs alive in the hope that the defendant could perform clause 3. Thus, it is our conclusion that as regards the Go Phoenix and Go Pegasus BBCs and the corresponding guarantees, the defendant's obligation under clause 3 ended on

31 January 2018 (the date of termination of those BBCs). No Post-Termination Loss is therefore claimable under clause 3 of the Letters of Support.

293 As noted earlier, the Go Perseus BBC was terminated earlier than the other BBCs, *ie*, on 15 November 2017, and the Charterer, Go Offshore, applied for judicial management on 30 November 2017. Given that formal insolvency proceedings were commenced by Go Offshore just 15 days after the termination of the Go Perseus BBC, it must be that Go Offshore was no longer financially viable on 15 November 2017. The situation was too far gone to be saved without the intervention of formal insolvency proceedings. Go Offshore's judicial management application cements the point. Accordingly, it would not be reasonable to expect the defendant to throw good money after bad at that stage (*ie*, 15 November 2017). In any event, after the commencement of formal insolvency proceedings on 30 November 2017, there was no longer any possibility of funding Go Offshore for reasons provided earlier. For these reasons, it is our conclusion that the defendant's obligations under clause 3 of the Letter of Support in relation to the Go Perseus continued until that date, *ie*, 15 November 2017, but no later.

294 The foregoing is subject to an important caveat with regard to the plaintiffs' claim that the defendant failed to provide the mortgage over the Bintulu Hotel. We deal with this claim later in this Judgment. In summary, it is our conclusion that the defendant did indeed fail to provide such mortgage; that such failure was a breach of the defendant's best endeavours obligations under the Letters of Support; that, as a result of such breach, the plaintiffs suffered loss in that they were deprived of security to cover their losses including Post-Termination Loss even after 31 January 2018; and that the defendant is accordingly liable in damages to that extent.

(2) The defendant's alleged liabilities

295 Before considering the various assets which the plaintiffs say were available to the defendant, it is important to note that the defendant asserted in his supplementary affidavit of evidence-in-chief that his net asset position was very limited because he had numerous personal "liabilities" said to total some US$376,810,000 in respect of certain alleged personal guarantees issued to various third parties including OCBC, DBS, "Sunchase" (which we understand refers possibly to SunChase Investments LLC), "LSH" (which is an acronym for Lei Shing Hong, and which we understand refers possibly to Lei Shing Hong Capital (Singapore) Pte Ltd) and RHB. We fully recognise that any such "liabilities" (whether actual or contingent) could potentially be very important and even critical to an assessment of the defendant's overall financial position and, in particular, to whether or not he complied with his best endeavours obligations under the Letters of Support. However, there are a number of significant difficulties in evaluating the defendant's assertion.

296 First, as stated in paragraph 8 of the defendant's affidavit of evidence-in-chief, his evidence with regard to his alleged "liabilities" refers to the position as at May to July 2019. However, as submitted on behalf of the plaintiffs, such evidence is irrelevant to the state or extent of his liabilities (if any) during the relevant period which is the focus of the present proceedings, *ie*, 2016–2018.

297 Second, the defendant's various assertions as to his so-called "liabilities" were generally unsupported by any proper contemporaneous documentation with regard to their existence or quantum. Further, he does not provide any factual account of the circumstances allegedly giving rise to the issuance of these purported personal guarantees, the underlying debt (including, critically, its quantum) at the relevant period, the identity or financial status of

the borrower he was guaranteeing (*eg*, the defendant never stated with any meaningful precision which specific entity he was referring to when he mentioned "Sunchase"), and/or the value of alternative security which the lender might have recourse to before it might be necessary for the lender to make a call upon one of his personal guarantees. As submitted on behalf of the plaintiffs, this information would be critical to any proper assessment of the defendant's potential liability under the alleged personal guarantees and the likelihood (if any) that they would be called upon. On this basis alone, the plaintiffs submitted that the defendant had failed to discharge the burden of proof on him to prove these fundamental matters, and that these were irremediable defects in the factual evidence. We accept that submission.

298 For the avoidance of doubt, we fully recognise that a significant part of Mr Sutton's expert evidence and his overall conclusions were based upon or at least took account of these so-called "liabilities". However, the validity and cogency of such expert evidence necessarily depends upon a sufficient factual foundation, *ie*, proper proof of the existence and terms of any personal guarantees and any relevant facts which might assist in determining if they were "due" or, if not, if and when they might be called upon. Without such proper primary factual proof, such expert evidence is of little, if any, value. Here, there was no such sufficient primary factual proof. Moreover, Mr Sutton's opinions were founded upon the assumption that the various personal guarantees asserted by the defendant were "due" in that calls had been made on them; but there was no independent evidence to support that assumption and certainly no contemporaneous documentary evidence to that effect. Such documentation would certainly exist and would have been subject to disclosure by the defendant if these guarantees had, in truth, been "due".

299 For these reasons, it is our conclusion that the evidence of Mr Sutton in this context does not assist the defendant. We agree with the plaintiffs that the defendant's evidence in respect of these so-called "liabilities" should be given little to no weight.

300 We should note that the plaintiffs advanced a number of more detailed submissions with regard to these so-called "liabilities". For example, the guarantee said to have been provided to OCBC (giving rise to an alleged "liability" of US$87.5m) could only have been issued in or around June 2017 and would thus be irrelevant to the defendant's best endeavours obligations prior to that date; and, as admitted by the defendant, LSH (in whose favour the defendant asserted that his "liability" was some US$308.5m) is a company owned by his family. In any case, these are unnecessary considerations given our conclusion as stated in the previous paragraph.

301 We turn then to consider the evidence and the parties' submissions with regard to the defendant's own assets or those that he might have been able to call upon from certain third parties.

(3) Personal bank balances and deposits

302 The starting point is the defendant's total known cash balances (based on the documents that have been disclosed) during the relevant period. We set out below these cash balances for the period between November 2016 and August 2018 as relied upon by the plaintiffs in their factual closing submissions, although consistent with our conclusions as set out above, the relevant balances are those existing up to 31 January 2018 covering the period in respect of all Pre-Termination Loss claims for the BBCs as well as any Post-Termination Loss claims for the Go Perseus BBC from 15 November 2017 to 31 January

2018 (hereinafter referred to compendiously as the "Potentially Relevant Claims"):

Month	Sum of closing balances	Sum of maximum balances
November 2016	US$5,218,571.57	US$8,012,944.43
February 2017	US$5,100,211.32	US$5,727,612.40
May 2017	US$5,143,623.37	US$5,533,990.00
August 2017	US$5,095,099.61	US$7,877,119.89
November 2017	US$4,473,473.49	US$6,046,876.69
February 2018	US$4,538,633.54	US$5,487,540.81
May 2018	US$3,385,062.40	US$4,471,479.01
August 2018	US$3,858,445.26	US$4,108,557.84

We note that based on the underlying financial documents, it appears that some of the numbers above, which were provided in the plaintiffs' factual closing submissions, are inaccurate, albeit the plaintiffs only erred on the side of marginally *understating* the closing and maximum balances in the defendant's various bank accounts. We will hold the plaintiffs to their submitted case (which, in any event, does not unfairly prejudice either party on both issues of liability and quantum).

303 Further, during the period October 2016 to August 2018, it appears from the bank statements for the defendant's RHB bank accounts that the defendant received numerous cash deposits of substantial value. The deposits are summarised in the tables below. Again, consistent with our conclusions as set out above, the relevant deposits are those made up to 31 January 2018. The amounts reflected in the table were provided by the plaintiffs in their factual

closing submissions, subject to certain corrections based on the underlying financial documents:

RHB x/xx/xxxxxx/09

S/N	Relevant month	Deposits
1	October 2016	S$134,880.35
2	November 2016	S$3,327,685.13
3	December 2016	S$752,557.79
4	January 2017	S$1,200,246.04
5	April 2017	S$820,083.20
6	June 2017	S$6,191,202.39
7	August 2017	S$500,587.06
8	September 2017	S$3,844,182.16
9	October 2017	S$350,831.83
10	November 2017	S$100,002.44

RHB x/xx/xxxxxx/04

S/N	Relevant month	Deposits
1	January 2017	US$3,000,108.65
2	February 2017	US$10,847.70
3	March 2017	US$819,995
4	April 2017	US$165,002.35
5	June 2017	US$400,004.24
6	July 2017	US$1,565,134.51
7	August 2017	US$5,564,965

S/N	Relevant month	Deposits
8	September 2017	US$2,612,241.93
9	November 2017	US$2,347,635.07
10	December 2017	US$3,933,468.17
11	January 2018	US$558,964.96

304 *Prima facie*, we accept that these funds up to 31 January 2018 could have been – but were not – utilised by the defendant to satisfy his best endeavours obligations under the Letters of Support. However, as stated above, we also readily accept that the defendant's failure to use such funds for that purpose does not necessarily constitute a breach of the best endeavours obligations under the Letters of Support on the basis that if an obligee can point to steps which the obligor (subject to a best endeavours obligation) could have taken, it is always open for such obligor to show that these steps were not reasonably required or that they would have been bound to fail. However, in such circumstances, the burden of proof – at least the evidential burden of proof – is ordinarily on the obligor to prove such matters: see *KS Energy* ([111] *supra*) at [93(e)]; *EDI* ([162(i)] *supra*) at [91].

305 Here, no adequate or sufficient explanation has been provided by the defendant as to why these funds could not have been utilised to support the Charterers/the Guarantors to make timely payments in respect of the Potentially Relevant Claims. Although the funds in these accounts might subsequently have been withdrawn in whole or in part by the defendant, no satisfactory explanation or evidence has been provided by the defendant as to when or how such funds were withdrawn or for what purpose (legitimate or otherwise), still less to establish (a) that the utilisation of these funds was not reasonably required (for whatever reason) to support the Charterers/the Guarantors to make timely

payments in respect of the Potentially Relevant Claims, or (b) positively that such funds were reasonably required for some other (and, if so, what) purpose. In any event, any such enquiry would require consideration of the totality of the funds and assets available to the defendant; and, at the risk of repetition, that is simply unavailable because of the defendant's failure to provide proper disclosure as referred to above.

306 In expressing the above conclusion, we should emphasise that we have taken fully into account the defendant's assertion (raised, for the first time, at trial) that he was unable to utilise monies in another RHB fixed deposit account (no x/xx/xxxxxx/07) because some US$3.8m of these funds was subject to a pledge since 2008 to support a facility of a company owned by his family. However, apart from the defendant's bare and unparticularised assertion, we accept the plaintiffs' submission that there is simply no admissible evidence as to the existence, terms, and status of the alleged pledge which had purportedly been in existence since 2008 (including whether it had previously been discharged); and/or the status of the underlying loan (*ie*, whether and to what extent it was outstanding) which the pledge purportedly secured.

307 Thus, on the evidence, it is our conclusion that the defendant has failed to demonstrate the existence of the alleged pledge, and to show that any such pledge prevented him from using his monies to support the Charterers/the Guarantors to make timely payments in respect of the Potentially Relevant Claims. To that extent, we accept that the defendant was in breach of his best endeavours obligation under the Letters of Support.

(4) Shares in public listed companies

308 The defendant had, at all material times in 2016 and up to 31 January 2018, shareholdings in various listed companies including Weyland Tech Inc,

New Age Exploration Limited, Sumatra Copper & Gold PLC, Sihayo Gold Ltd, Intrepid Mines Limited, and Perjawa Holdings Bhd. Mr Manning estimated the total value of these shareholdings at various times in 2016 and 2017 to be between US$3m to US$4.7m. (Mr Manning did not take the values of Intrepid Mines Limited and Perjawa Holdings Bhd into account in arriving at this valuation). These valuations are broadly in line with the estimates made by the defendant's expert (Mr Sutton) at specific points in time (*ie*, 31 December 2016 and 31 December 2017), *viz*, around US$4.32m and US$4.45m respectively. The plaintiffs' position is that the defendant could have liquidated these publicly traded shares in listed companies at the material times and utilised the sale proceeds to provide support to the Charterers/the Guarantors, and that his failure to do so constituted a breach of his best endeavours obligations under the Letters of Support.

309 During the trial, the defendant gave various explanations as to why this was not possible. In particular, he asserted for the first time in cross-examination that he could not sell these shares despite the fact that they were shares in listed companies, because the trading volumes were too thin; and that he had attempted an off-market sale of these shares at various (unspecified) times but had not managed to sell them. However, there was no explanation from the defendant as to why, if that was the case, he did not make the point earlier (in any of the three affidavits of evidence-in-chief which he had filed by 20 November 2019). Further, as submitted on behalf of the plaintiffs, the defendant has not provided any contemporaneous documents which might support his bald assertions. In the circumstances, we are unable to accept the defendant's explanations.

310 For these reasons and in the absence of any other explanation as to why these shares could not have been sold and the proceeds utilised to support the

Charterers/the Guarantors, it is our conclusion that the failure to do so constituted a breach of the defendant's best endeavours obligations to support the Charterers/the Guarantors to make timely payments in respect of the Potentially Relevant Claims.

(5) Shares in privately held companies

311 It is common ground that the defendant also held various shares or had interests in numerous private companies at the material times up to 31 January 2018. As a result of the defendant's failure to provide proper disclosure, the full extent of such assets remains uncertain. However, it is the plaintiffs' case that the defendant could have raised funds by selling or pledging his shareholdings in at least the following companies (of which certain disclosure had been provided) and that the failure to do so and to use the proceeds to support the Charterers/the Guarantors was a breach of his best endeavours obligations under the Letters of Support. The relevant companies are: Perdana ParkCity Sdn Bhd ("Perdana ParkCity"); Yaw Holding Sdn Bhd ("Yaw Holding"); Ample Skill/Balamara; Hyoil; Yawson Investment Group Ltd ("Yawson"); and Business Companion Investment Limited ("BCI"). We consider the defendant's shareholdings in each of these companies below.

(A) PERDANA PARKCITY

312 Company searches on Perdana ParkCity show the defendant to be the holder of 500,000 shares (or a 7.87% stake) in that company. It is obvious from the limited publicly available financial information regarding Perdana ParkCity that it is a very valuable company: it had total net assets (assets minus liabilities) in 2016 and up to (at least) 31 January 2018 between RM1.2bn to 1.3bn. On this basis, the defendant's share of the company's equity would be around RM100m. During the three years (2016, 2017 and 2018), it had very sizeable revenues

(respectively RM905,593,732, RM841,013,234, and RM631,471,361) and profits after tax (respectively RM250,058,426, RM201,259,431, and RM158,916,944). In 2014, 2015, and 2016, the company paid total dividends of RM20,000,000, RM40,000,000 and RM16,000,000 respectively. The defendant's share of these dividends, based on his 7.87% shareholding, would have totalled RM5,981,200. Moreover, in each of the two years in 2017 and 2018, Perdana ParkCity declared dividends of RM100,000,000. Assuming that the defendant's share of the dividends was 7.87% of the total (*ie*, in proportion with his shareholdings), he would have obtained dividends of RM7,870,000 for each of these years.

313 On this basis, it was submitted on behalf of the plaintiffs that the defendant could have sold or alternatively pledged his shares in Perdana ParkCity (and/or any dividend payments derived from the same) as collateral security for a bank loan at a suitable multiple of the historic annual rate of dividends declared by the company (this was addressed in Mr Manning's report which we discuss shortly); and that his failure to do so constituted a breach of his best endeavours obligations under the Letters of Support.

314 In cross examination, the defendant confirmed that he had never attempted to sell or pledge his shares in Perdana ParkCity at the relevant time. In summary, his evidence was that he had only held 500,000 redeemable Preference B shares in that company (which he characterised as "*a loan of [RM500,000]*" to Perdana ParkCity) with a total value of only RM500,000; and that the dividends referred to above were not paid to him in his capacity as a holder of the redeemable Preference B shares although he accepted that some form of dividend was paid to him during the relevant period.

315 However, the defendant's evidence that he only held redeemable Preference B shares is unsupported by contemporaneous documents and is inconsistent with the company searches referred to above. The only document that the defendant has put forward in support of his claim is a "*Special Resolution No 3: Amendment to the Articles of Association on Rights of Class B Redeemable Preference Shares*" (exhibited at pp 16–17 of his 2nd supplementary affidavit of evidence-in-chief) (the "PPC Special Resolution"). However, it was submitted on behalf of the plaintiffs that that document is inadmissible because it had not been properly proven despite the plaintiffs' challenge to its authenticity and also because it falls foul of the hearsay rule. It was further submitted on behalf of the plaintiffs that in any event, little, if any, weight should be given to the document even if it were admitted in evidence because:

(a) it was disclosed at a very late stage;

(b) it was another good example of "selective" disclosure, *ie*, the defendant had failed to provide any other documents which might support his bald assertions (including, for example, the full Articles of Association, any emails from his email addresses *viz* csyaw@ppcity.com.my and csyaw.om@ppcity.com.my, or documentary evidence as to (i) how the foregoing dividends in the relevant years were distributed and (ii) any resolutions passed by the directors as to the dividends payable to holders of the Preference B shares); and

(c) the document is plainly redacted and also incomplete (it appears to consist of three pages but only two pages have been exhibited by the defendant).

316 Further, without waiving the plaintiffs' objection to the authenticity of the purported PPC Special Resolution, it was submitted on behalf of the plaintiffs that the terms of that document contradicted the defendant's position that he did not receive any share of the dividends. In particular, sub-paragraph (iv) of Article 5B of the PPC Special Resolution states in material part:

> The holders of the RPS "B" **shall be entitled to dividends** at a rate to be determined by the Directors on the nominal amount of the RPS "B" in issue and held by them. Such right to dividend shall be cumulative, and together with any arrears in dividend, shall rank ahead of any payment of any dividends on any other classes of shares in the capital of the Company, **and no dividend shall be declared in respect of any other classes of shares in respect of any financial year or accounting period of the Company without declaring the dividend payable in respect of the RPS "B"**.
>
> [emphasis added]

317 In light of the foregoing, it was submitted on behalf of the plaintiffs that the court should draw an adverse inference against the defendant in respect of his shareholdings in Perdana ParkCity and find that the defendant held/holds 7.87% of the total issued ordinary shares in Perdana ParkCity; alternatively, that even if the defendant held Preference B shares, the defendant would at least have obtained a share of the dividends declared during the relevant years on an equal footing with other ordinary shareholders; and that accordingly, the defendant's interest (whatever its nature) in Perdana ParkCity could have been sold or pledged for enough value such as to enable him to obtain further funding in furtherance of his best endeavours obligations.

318 In broad terms, we accept those submissions. However, we are uncertain as to the actual value of such interest; whether it would have been possible in practice for the defendant to pledge the shares; and, if so, on what terms. The evidence of Mr Manning in his first report was that the defendant could, short of selling his shares, have raised finance by pledging his shares and any

dividend payments thereunder as collateral for a loan from a bank "*at a suitable multiple of the historic annual rate of dividends declared by the company (say 5 to 10 times)*". On this basis, it was submitted on behalf of the plaintiffs that even taking the lowest rate of dividend paid to the Defendant of US$315,000 in 2016, the defendant could have obtained financing of between US$1.5m to US$3m by pledging these shares.

319 Mr Sutton disagreed. Thus, in cross-examination, his evidence was as follows:

> A: A bank who has a relationship with a family member or a family group is not going to agree to take a pledge, a minority pledge, over 4.5 per cent of a family company unless there is an understanding that if they enforce, a family member is expected to bail them out. I think exactly for the relationship issue that Mr Manning identified that there would need to be a pre-coded understanding with the family as to they're expected to buy the shares. I don't consider that there is a genuine third-party market for those shares. It provides no control. It provides no input into strategic direction and anyone who bought those shares would be coming along for a ride with the family. And I don't know, as you say, there may be restrictions on who can own the shares too …

320 Mr Manning agreed that there was no genuine third-party market for these shares. However, in cross-examination his evidence was that he:

> … [did not think] it [was] unreasonable to assume that a very strong banking relationship would be prepared to extend to lending against shares in a very successful company in the full knowledge that those shares, if they needed to be redeemed, would be redeemed by another family member who would want to buy those shares anyway. The question is how much, and we simply don't know how much.

321 In our judgment, this answer highlights the critical weakness of this part of the plaintiffs' case: even assuming that the defendant had a substantial stake in Perdana ParkCity, it was still only a relatively small minority stake in what

was a family company and, as both experts agreed, there was no genuine third-party market for these shares. It follows that the possibility of any pledge would have depended on the existence of very special circumstances (as to which we are extremely doubtful); and even then, Mr Manning did not know and could not say what the value of any such pledge might have been. For these reasons, we are unpersuaded that the failure by the defendant to pledge these shares constituted a breach by the defendant of his best endeavours obligation in the Letters of Support or otherwise caused any relevant loss to the plaintiffs. For the sake of completeness, we should mention that the plaintiffs did not run the case that the dividends that were declared to the defendant in 2016 and 2017 (of which we have no evidence) could have been used to fund the payment of the dues under the BBCs/the guarantees.

(B) YAW HOLDING

322 It is undisputed that the defendant held 3,750 shares (or a 4.51% stake) throughout the period from (at least) 2016 to early 2019 in Yaw Holding. In summary, it is the plaintiffs' case that the defendant could have sold and/or pledged these shares to provide support for the Charterers/the Guarantors in performance of his best endeavours obligations under the Letters of Support.

323 Yaw Holding is the ultimate holding company of the Yaw family for the Samling Group. As submitted on behalf of the plaintiffs, it would seem that Yaw Holding was, at all material times, a very sizeable company indeed. As mentioned in the Samling Group website, the Samling Group consists of three arms: Samling Strategic Corporation Sdn Bhd (timber based), Glenealy Plantations Sdn Bhd (oil palm based), and Perdana ParkCity (property development). As stated above, the equity in Perdana ParkCity alone for the period of 2016 to 2018 was RM1.2 to 1.3bn.

324 Despite this, and in breach of the Asset Disclosure Order, the defendant has failed to provide discovery of any financial information regarding Yaw Holding or the value of his interest in that company. The prejudice to the plaintiffs resulting from the defendant's failure to make disclosure is even more pronounced given the complete absence of any publicly available financial information regarding Yaw Holding during the relevant period.

325 In addition to the defendant's failure to make proper disclosure with regard to his interest in Yaw Holding, his evidence with regard thereto was most unsatisfactory. Initially, he vacillated and was unable, or unwilling, to state clearly whether he had received dividends in the period from 2016 to at least 31 January 2018 for his shares in Yaw Holding. After stating that he did receive dividends in the form of "red packets" from his brother at Chinese New Year, he retracted the answer stating variously that he did not remember, or that Yaw Holding did not declare any dividends, or that even if Yaw Holding did declare a dividend he never received it.

326 On behalf of the plaintiffs, it was submitted that (a) it is not credible that the defendant should be unable to recall whether he received dividends from his family's key holding company for the Samling Group; and (b) given Yaw Holding's role as the ultimate holding company in the Samling Group, the company was "reasonably likely" to have declared dividends on a regular basis (so that the profits of the Samling Group would be distributed at regular intervals to the Yaw family). We accept that submission.

327 Even so, in the absence of proper disclosure by the defendant and for the same reasons as we have concluded with regard to the defendant's shares in Perdana ParkCity, it is a matter of some uncertainty as to whether it would have

been possible for the defendant to sell or pledge his shares in Yaw Holding and, if so, the value of any such sale or pledge.

328 The evidence of Mr Sutton was that unless there was significant cooperation from family members, he did not think that it would have been possible to pledge or raise money on the back of these shares. That may well be right. However, there was no specific evidence to suggest that such cooperation would not be forthcoming, and we can see no reason why this would be so.

329 The position is further complicated by the fact that, out of the blue, the defendant asserted for the first time in his 2nd supplementary affidavit of evidence-in-chief (filed only on 8 November 2019 on the eve of the trial) that he had in fact sold his shares in Yaw Holding to his brother, Yaw Chee Ming, by way of an instrument of transfer dated 8 February 2019 for RM100m. However, the only document relied upon by the defendant to evidence this alleged share transfer is a purported Letter of Confirmation dated 15 October 2019, purportedly issued by one Chew Theam Hock, which states as follows:

> In my capacity as company secretary of the Company, I hereby confirm that:
>
> Yaw Chee Siew, who was the registered holder of 3750 ordinary shares ("Shares") in [Yaw Holding], had by an instrument of transfer dated 8 February 2019 for a consideration of RM 100 million (as stated in the instrument of transfer), transferred all the Shares to Yaw Chee Ming as settlement of debts owing to Yaw Chee Ming. The transfer to Yaw Chee Ming was approved by the Board of Directors of Yaw Holding on vide the resolution of the board of directors dated 7th February 2019 (as enclosed). At this juncture, the aforesaid instrument of transfer for the transfer of the Shares and also the original share certificates evidencing the Shares have been lodged with me as the Company Secretary of Yaw Holding and the process of registration is currently underway. The instrument of transfer has been sent for adjudication of stamp duty and upon adjudication and proper stamping, I will have authority, as Company Secretary to register the transfer and effect the change in register of members of Yaw Holding.

330 The plaintiffs have challenged the authenticity of this document and, absent proper proof, we accept that it is strictly inadmissible. Moreover, the defendant has chosen not to provide discovery of obviously relevant documents including (a) the purported resolution of the Board of Directors of Yaw Holding dated 7 February 2019 purportedly approving the sale of the shares; (b) the alleged share transfer instrument dated 8 February 2019; and (c) any documents that might provide an explanation supporting the valuation of RM100m. Thus, it was submitted on behalf of the plaintiffs that the purported share transfer in February 2019 was a convenient means for the defendant to put forward a low valuation for his shares in Yaw Holding at RM100m, without the plaintiffs having any information to challenge the same.

331 According to the defendant, the share transfer had been made in settlement of debts owed to Yaw Chee Ming in respect of financial support rendered by him for the alleged S$73m RHB loan, purportedly secured against a corporate guarantee issued by Yaw Holding, which the defendant had procured to redeem certain medium term notes in or around the time of the delisting (see [39] and [222(a)] above). However, there is no documentary evidence whatsoever to support these further assertions. Moreover, as submitted on behalf of the plaintiffs, the defendant's account of events is incoherent. In particular, the evidence of the defendant is hopelessly vague as to the circumstances under which such payment allegedly came to be made by Yaw Chee Ming, the date on which such payment was made, and the amount paid. No explanation has been given as to why it fell on Yaw Chee Ming to pay part of the corporate guarantee purportedly issued by Yaw Holding in respect of the RHB loan.

332 Moreover, company searches for Yaw Holding (both as of 2 May 2019 and 11 October 2019) continued to reflect the defendant as holding 3,750 shares (or a 4.51% stake) in the company.

333 In light of the above, our conclusions are as follows:

(a) The defendant did in fact receive substantial dividends from Yaw Holding in 2016 to 2018.

(b) There is no proper proof of the alleged transfer of shares in Yaw Holding.

(c) Even if the share transfer had in fact taken place, there are very real reasons to doubt the *bona fides* of the purported transaction for the transfer of the defendant's shares in Yaw Holding to his brother and the purported valuation of RM100m in respect of the shares.

(d) In the abstract and for reasons similar to those we have expressed in relation to the defendant's interest in Perdana ParkCity, it is fair to say that there might be some uncertainty as to whether the defendant could have sold or pledged his relatively small interest in a private company like Yaw Holding to obtain any and, if so, what monies or funding. However, regardless of our doubts as to the value of the defendant's shares in Yaw Holding, the defendant's own evidence was that he had transferred them to his brother in February 2019 for RM100m and, as such, we accept the plaintiffs' submission that the defendant could have sold or pledged his shares in Yaw Holding for at least that sum. Moreover, there is no reason to suppose that such transfer could not have taken place earlier so as to enable the defendant to perform his best endeavours obligations under the Letters of Support.

(e) For these reasons, it is our conclusion that the defendant's failure to do so constituted a breach of his best endeavours obligations to provide support to the Charterers/the Guarantors to make timely payments in respect of the Potentially Relevant Claims.

(C) AMPLE SKILL/BALAMARA

334 In summary, it was the plaintiffs' case that the defendant wholly owned Ample Skill; that at the material times between 2016 up to at least 31 January 2018, Ample Skill's major asset was 270 million shares (or approximately 33% of the outstanding shares) of another company, Balamara; that the value of Balamara was, at minimum, US$1.7bn with the result that the defendant's interest in Ample Skill had a derived value of approximately US$545m; that the defendant could have sold and/or pledged his indirect shareholding in Balamara (or, for that matter, his shareholding in Ample Skill) for this amount and used the proceeds to support the Charterers/the Guarantors; and that his failure to do so constituted a breach of his best endeavours obligations under the Letters of Support.

335 It is common ground that the defendant was the indirect owner of the shares in Balamara through his shareholding in Ample Skill. The value of the defendant's shareholding in Ample Skill would therefore reflect the value of Ample Skill's shareholding in Balamara. However, there was a major dispute as to (a) the value of Ample Skill's shares in Balamara; and (b) whether or not the shares in Balamara could in fact have been sold and/or pledged.

336 As for value, Balamara was a delisted company and as such there was no ready market that could serve as a basis for valuation. In support of its case that the shares were worth US$545m, the plaintiffs relied primarily on certain documents and the evidence of Mr Manning with regard to a deal involving

OCBC in the latter part of 2017. In particular, based on an email exchanged between one Daniel Kwan of OCBC's Mezzanine Capital Unit and Mr See dated 3 August 2017, it appears that in late 2017 OCBC agreed to convert a US$30m facility plus "premium" to what it estimated at that time would be a 0.938% stake in Balamara. As we understand, this was what we have already referred to as the Ample Skill FA. Significantly, the stated valuation of Balamara which OCBC appears to have been prepared to accept based on the email was, at that stage, US$3.2bn. Thereafter, in November 2017, the documents show that OCBC agreed to purchase shares in Balamara at a valuation of the company at between US$1.7bn to US$3.2bn. In evidence, the defendant confirmed that this transaction had gone ahead and that there was a transfer of 12,400,000 shares against "payment" of US$30m of outstanding liability that he owed to OCBC. Balamara's annual report as of 30 June 2018 shows OCBC to have a shareholding of 12,400,000 (being 1.75% of the total outstanding shares rather than 0.938%). This would suggest that OCBC eventually purchased the shares using a lower valuation of Balamara at US$1.7bn. On this basis, this would indicate a value of US$545m for Ample Skill's remaining 32.08% stake in Balamara.

337 The foregoing valuation was disputed by the defendant. In particular, it was suggested by counsel on behalf of the defendant that the indicated transfer did not in fact occur or, possibly, was on different terms than those stated above. However, the documents speak for themselves and, despite attempts by counsel on behalf of the defendant to suggest otherwise, the evidence of the defendant confirming the transaction was relatively clear.

338 Notwithstanding, Mr Sutton's evidence was that the defendant's indirect shareholding in Balamara had a value of, at most, about US$32m (or possibly only US$22m). That figure was based on a valuation conducted by Moore

Stephens dated 1 July 2019 (the "Moore Stephens Report") which valued each share at between A$0.01 and A$0.031.

339 The reasons for the difference between this latter valuation and the OCBC valuation are obscure. One obvious possible reason is the difference in date, *ie*, the Moore Stephens Report is dated 1 July 2019 whereas the transaction with OCBC was apparently based on valuations in the mid or latter part of 2017. Further, it appears that the valuation in the Moore Stephens Report was prepared for a very different purpose, *ie*, the conversion of the defendant's convertible debt into shares. It is also plain from the face of the Moore Stephens Report that the authors relied on financial information and instructions provided to them including a separate valuation referred to as the "Independent Mineral Asset Valuation Report – Balamara Resources Ltd" apparently prepared by a third party, Mining Insights, in June 2019 – again much later than the valuations which must have formed the basis of the OCBC transaction. However, these instructions/information were not available – and Mr Sutton confirmed in evidence that he had had no access to them. In these circumstances, it is difficult, if not impossible, to assess the accuracy, completeness, reliability or relevance of the Moore Stephens Report.

340 In contrast, as submitted on behalf of the plaintiffs:

(a) The transaction with OCBC represents an actual transaction which took place at the material time (*ie*, 2017) under which an apparently willing buyer (OCBC) purchased Balamara shares from the defendant at an agreed price;

(b) OCBC is a regulated financial institution; it would be a sophisticated buyer, well able to take the necessary steps to value the shares. Moreover, it would have a responsibility to its shareholders to

ensure such transactions are at a fair value. In our view, these are powerful reasons for preferring the contemporaneous valuation placed on the defendant's Balamara shares by OCBC.

(c) Even if one were to apply the highest valuation in the Moore Stephens Report (*ie*, A$0.031 per share) to the OCBC Transaction, the total value of the 12.4 million Balamara shares received by OCBC in discharge of the defendant's US$30m liability would only be US$384,400. This would represent a recovery of less than 1.3% of the outstanding debt owing to OCBC. As submitted on behalf of the plaintiffs, it would make absolutely no sense for OCBC to enter the transaction if the valuation in the Moore Stephens Report were correct.

(d) It is also telling that the defendant has selectively failed to disclose the independent valuations upon which the OCBC Transaction (for US$30m) had proceeded, as referred to in Daniel Kwan's email dated 3 August 2017. These independent valuations, which would have been in the defendant's possession, custody and/or power, are plainly relevant and would have provided a basis of comparison with the Moore Stephens Report.

341 We fully recognise that the task of assessing the value of the defendant's indirect interest in these Balamara shares (via Ample Skill) is particularly difficult. However, that difficulty (like many other difficulties in this case) is due almost entirely to the failure of the defendant to provide proper disclosure. In these circumstances, doing the best we can on the evidence available and bearing in mind the failure of the defendant to provide proper disclosure, it is our conclusion that the value of the defendant's indirect interest in the shares in Balamara was as advocated by the plaintiffs, *ie*, approximately US$545m.

342 As stated above, the second major dispute with regard to Ample Skill's shares in Balamara was whether they could have been utilised to raise financing to support the Charterers/the Guarantors. The plaintiffs accepted that these shares were, in effect, pledged to OCBC in connection with the Ample Skill FA and it was common ground that the consent of OCBC would have been required for any financing to be raised. On behalf of the plaintiffs, it was submitted that the defendant could reasonably have asked OCBC to release some of its security in these shares or to ask for more financing; alternatively that the defendant could have tried to obtain third party financing by granting a second priority charge over the shares. This was disputed by the defendant. Certainly, as Mr Manning accepted, the consent of OCBC would have been necessary; and we also accept that there is some uncertainty as to the precise amount of additional financing that might have been raised. However, on the basis that the shares were worth (as we have found) some US$545m and that OCBC were prepared to convert the debt of US$30m to equity at a premium in November 2017 resulting in a 1.75% holding based on a total valuation of either US1.7bn and US$3.2bn, it is our conclusion that any shortfall in the amounts payable in respect of the Potentially Relevant Claims which could not have been filled by the other aspects of the defendant's wealth could have been filled by these shares in one or more of the ways advocated by the plaintiffs.

(D) YAWSON

343 Yawson is one of the various corporate investment vehicles utilised by the defendant to hold assets on his behalf. The defendant is the controlling shareholder with an 80% stake in Yawson. Mr Leung holds the remaining 20% of the outstanding shares in Yawson and managed the company on behalf of the defendant. The purported Consolidated Income Statement of Yawson as at 31 December for 2016 to 2018, which was disclosed by the defendant, states

that Yawson declared a dividend of US$39.2m in the year ending 2018. Based on the defendant's shareholding of 80%, it would appear that the defendant's share of the dividend would have been US$31.36m. It appears from Yawson's Consolidated Statement of Financial Position for 2016 to 2018 that the defendant had repaid US$21,704,728 in respect of loans made to him by the company in 2018: according to the entry "Amount due from YCS", it appears that the sums due from the defendant were reduced from US$44,995,190 in 2017 to US$23,290,462 in 2018. On this basis, the net cash amount received by the defendant in connection with the declaration of dividends in 2018 would have been US$9,655,272 (*ie*, US$31.36m less US$21,704,728). The dividend therefore benefitted the defendant in that it put cash into the hands of the defendant while, at the same time, allowing him to discharge his indebtedness to the company. As regards the latter, given that he owned 80% of the shares in Yawson, the repayment was effectively moving money from one pocket to another.

344 Moreover, based on the same statements, it appears likely that the defendant could have arranged for the declaration of a similar dividend in late 2017, if necessary, or could have increased his borrowings from Yawson (which could have released such funds to the defendant, if required). Notably, the company's profit after tax for 2018 was relatively modest at US$955,970. In other words, the company's total accumulated profits (from which dividends could be declared) would only have been US$955,970 less in 2017 than in 2018. Thus, on the basis of this evidence, it was submitted on behalf of the plaintiffs that the defendant could have received dividends of at least around US$8.7m (*ie*, US$9,655,272 less the company's profit after tax for 2018 of US$955,970) if the dividend had been declared in 2017 by Yawson.

345 In evidence, the defendant confirmed the accuracy of the information set out in the Consolidated Income Statement and Consolidated Statement of Financial Position of Yawson. However, when questioned about the declaration of dividends above, the defendant simply stated that he did not remember and was unable to provide any cogent explanation as to why any other conclusion should be reached. Similarly, in evidence, Mr Sutton did not disagree that Yawson had enough cash to pay the defendant some US$8m in 2017. Although he could not recall that figure, he accepted that Yawson was in a net asset position in 2017 assuming that the defendant's loan account was collectible.

346 Thus, it is our conclusion that the defendant could have received dividends of at least around US$8.7m (*ie*, US$9,655,272 less the company's profit after tax for 2018 of US$955,970) if the dividend had been declared in 2017 by Yawson; and that the defendant acted in breach of his best endeavours obligations when he failed to procure the issuance of the foregoing dividend by Yawson in 2017 to provide the Charterers/the Guarantors with the requisite support under the Letters of Support to make payments in respect of the Potentially Relevant Claims.

(E) HYOIL

347 So far as Hyoil is concerned, the defendant again failed to provide proper disclosure with the result that the information before the court was very limited despite numerous applications by the plaintiffs over an extended period and repeated court orders for specific discovery.

348 What is plain is that Hyoil is a Singapore company in which the defendant had a 99% stake between 2016 to 2018, and that Hyoil is (or at least was) a company with substantial value. In fact, the defendant's own evidence

puts Hyoil's value at US$5,105,607.18 as of 31 December 2016 and US$9,969,655.85 as of 31 December 2017.

349 However, it was the plaintiffs' case that Hyoil was, in fact, much more valuable than these figures indicate. This was on the basis of a contemporaneous valuation of Hyoil's portfolio prepared by Palantir Solutions dated 12 May 2016 (the "Hyoil Valuation") which was commissioned by Hyoil on the basis (which Palantir was expressly asked to assume) that Hyoil's assets included rights to three oil fields (namely, Bawean PSC in the Camar Field, Bulu PSC in the Lengo Gas Field, and Krueng Mane PSC in the Jambu Ayer Utara Gas-Condensate Field). This placed the then net value of Hyoil between US$477m to US$1.159bn.

350 These figures were disputed by the defendant on two main grounds. First, he asserted that Hyoil had, in fact, bought the rights to only one of these fields, *ie*, the Camar Field; and, second, although the value of such rights were stated to be in the range from US$77m to US$132m, such valuation depended on further investment, *ie*, it was the *future* value of that field that could be arrived at from further investment.

351 The former assertion is impossible to test because of the defendant's failure to provide proper disclosure. The second assertion suffers from a similar difficulty but, in any event, is difficult, if not impossible, to reconcile with the Hyoil Valuation which appears to give a net *present* value (as at May 2016) to the rights to the field in unqualified terms without any further investment. In any event, as submitted on behalf of the plaintiffs, the defendant has not stated or otherwise put forward any evidence that Hyoil did not proceed to develop the Camar Field (or any other fields which it had purchased in part or in whole). To the contrary, the purported financial statements for Hyoil which were disclosed

by the defendant show that as of 2017, the defendant alone had lent substantial sums of approximately US$13m to Hyoil, with at least US$3m of these loans being made from 2016 to 2017. This is entirely consistent with Hyoil having proceeded with the development of at least the Camar Field.

352 In light of the above, it is was submitted on behalf of the plaintiffs that this was yet another instance where the court should draw an adverse inference against the defendant and, at the very least, conclude that Hyoil's assets were worth at least US$77m to US$132m. We accept that submission in part but given the burden on the plaintiffs, the appropriate figure is the lower of the two figures, *ie*, US$77m.

353 In evidence, the defendant confirmed that he had not attempted to sell or pledge the shares in Hyoil in order to raise financing to support the Charterers/the Guarantors; and we accept that the failure so to do was a breach of the defendant's best endeavours obligations under the Letters of Support. It is fair to say that the precise amount of funding that might have been raised by such sale or pledge is somewhat uncertain. However, at the very least, it is our conclusion that any shortfall in the amounts payable in respect of the Potentially Relevant Claims which could not be filled by the other aspects of the defendant's wealth could have been filled by the defendant's shares in Hyoil in one or more of the ways advocated by the plaintiffs.

(F) BCI

354 BCI is another company wholly owned and controlled by the defendant. The defendant's own evidence is that this company should be valued at US$2,169,896.65 as at 31 December 2016 and US$1,568,121.28 as at 31 December 2017. There is no evidence that the defendant sold or pledged his shareholdings in BCI to obtain funds to support the Charterers/the Guarantors

under the Letters of Support or attempted to do so; and we accept that the failure so to do was a breach of the defendant's best endeavours obligation under the Letters of Support. Again, it is fair to say that the precise amount of funding that might have been raised by such sale or pledge is somewhat uncertain. However, at the very least, it is again our conclusion that any shortfall in the amounts payable in respect of the Potentially Relevant Claims which could not be filled by the other aspects of the defendant's wealth could have been filled by his interest in BCI in one or more of the ways advocated by the plaintiffs.

(G) REAL ESTATE HOLDINGS

355 As a final point, it is the plaintiffs' case that the defendant also had at the material times various interests in real estate which, it is said, had a net worth of at least around US$2m and which the defendant should have sold or, at least raised finance against, as part of his best endeavours obligations under the Letters of Support. These properties include:

(a) a residential apartment at 10 Draycott Park #07-08, Singapore 259405 (the "Draycott Property"). The defendant's own position is that the property can be valued at US$1.384m (after repayment of the mortgage loan taken by the Defendant in respect of its purchase). This figure is not challenged by the Plaintiffs.

(b) a property at No 49, Ming Yuen Western Street, North Point, Hong Kong (the "Ming Yuen Property"), through a holding company, Benefit High Limited which appears to have had a value of about 5,320,000 Hong Kong dollars ("HKD") (or around US$680,000 applying a conversion rate of HKD7.84:US$1.00).

356 The Draycott Property was used by the defendant for his own residential purposes. As such, we do not consider that there was any obligation to sell that property as part of his best endeavours obligations; and it is a matter of speculation as to what further finance might have been raised against it. The position with regard to the Ming Yuen Property is more uncertain; but, like the Draycott Property, it is a matter of speculation as to what further finance might have been raised against it. In the event, given our overall conclusions as set out below, it is unnecessary to reach a final conclusion with regard to these two properties.

(H) ABILITY TO PROCURE FUNDING FOR/FROM PRIVATELY HELD COMPANIES

357 In summary, it is the plaintiffs' position that the defendant could have utilised the following financial resources towards paying the plaintiffs sums due under the BBCs/the guarantees:

(a) US$10,548,069 loaned to Hyoil by the defendant as of 31 December 2016;

(b) US$2,643,748.74 loaned to Hyoil by the defendant as of 31 December 2017;

(c) US$15,223,500 funding from Yawson, disbursed to various projects in 2016; and

(d) A$3,693,050 loaned to Balamara by the defendant in the period from 2016 to 2018.

358 As to the above, various technical and/or evidential objections (partly in the nature of pleading points) were raised on behalf of the defendant. In our view, these were without merit. The other main submission advanced on behalf

of the defendant (in particular with regard to the funding from Yawson) was that there was no evidence as to when the relevant funds were promised or provided to the various projects. That may be so. However, as submitted on behalf of the plaintiffs, it would seem on the evidence that these monies could have been used to support the Charterers/the Guarantors; and, if and to the extent that this was impossible or that these monies were reasonably required for some other purposes, then the (at least evidential) burden fell on the defendant to explain by appropriate evidence (supported, if necessary, by relevant documents) why this was impossible or what those other reasonable requirements were. In the event, we do not consider that the defendant has discharged that burden by appropriate evidence; and, on that basis and to that extent, it is our conclusion that the defendant failed to use best endeavours under the Letters of Support to support the Charterers/the Guarantors in respect of the Potentially Relevant Claims.

Financial assistance from the Samling Group

359 It was submitted on behalf of the plaintiffs that certain documents obtained through disclosure reveal that, after the delisting, OML was "integrated" into the Samling Energy Group and, in effect, became part of the defendant's family business. In very broad terms, there are certainly indications to that effect although the precise nature of such "integration" is unclear. For example, there is an email in October 2016 reporting that according to Mr See: "*After delisting, [OML] is now under the ownership of Samling Group and will fall under Samling Energy.*" Similarly, there is a presentation subsequently made by the defendant's brother, Yaw Chee Ming, to Sarawak government officials in Kuching regarding the Samling Energy Group at the end of March 2017, where OML was represented as a company under the Samling Energy

Group. In this regard, the defendant sent an email to Mr See dated 23 March 2017 with the subject header "Samling Energy group" which states:

> My brother [Yaw Chee Ming] will be making a presentation to the very top government officers in Kuching this month end. They have requested for the meeting to include a presentation about our oil and gas business under the group, as they are interested to formed a consortium to undertake big oil and gas business head by a local Sarawak Company.
>
> I would like the presentation to start with Hyoil's portfolio to show our ability to develop oil field to production. Followed by our oil and gas services side.
>
> This is a very important presentation, as this is a chance for us to be the partner with the local government to develop oil field in Sarawak. Please help me to put this presentation together before the end of the month.

A perusal of the slides that were prepared for the above presentation (for example, slide 3) reveals, amongst other things, that OML and Hyoil were being marketed as part of the Samling Energy Group. Moreover, it is telling that a number of emails concerning OML were sent or copied to the defendant's brother, Yaw Chee Ming, who manages the Samling Group as a whole.

360 As submitted on behalf of the plaintiffs, the foregoing is entirely consistent with the representations made by the defendant and/or his representatives during the various meetings in, for example, March, April and June 2016 (as referred to above) to the effect that the defendant's family would provide financial support.

361 In light of the above, it was submitted on behalf of the plaintiffs that the defendant could have obtained financial support for the Charterers/the Guarantors from the Samling Group. However, the defendant's own evidence was that he had no recollection of having asked his family or anyone within the Samling Energy Group for any form of financial assistance or funds to be

injected into OML; and that he had never asked anyone in his family or the Samling Energy Group for any form of financial assistance to ensure the charter hire payments under the BBCs were paid on time. On this basis, it was submitted on behalf of the plaintiffs that the defendant was in breach of his best endeavours obligations under the Letters of Support.

362 In principle, we accept those submissions. However, in order to make good their case under this head, the plaintiffs must show that if the defendant had used his best endeavours, he would have been successful in procuring one or more members of his family and/or the Samling Group to provide any and, if so, what, financial assistance. The plaintiffs have failed to establish this. On this basis, we do not consider that the plaintiffs have established that this breach of the defendant's best endeavours obligations caused any relevant loss.

Failure to procure mortgage(s) over the Bintulu Hotel

(1) Dispute over the terms of the mortgage

363 Each of the relevant September 2017 Addenda to the BBCs expressly provided for delivery of a mortgage (or charge) over the Bintulu Hotel to secure the due and punctual performance by the Charterers of their obligations under the BBCs and the performance by the Guarantors of their obligations under the guarantee, for an amount of not less than US$14m. Specifically, clause 5.3 of the Addenda dated 29 September 2017 in respect of the Go Perseus BBC and the Go Phoenix BBC, and clause 5.4 of the Addendum of the same date in respect of the Go Pegasus BBC were in substantially similar form and provided in material part as follows:

> On or before 31 October 2017 (the "**Condition Subsequent Satisfaction Date**") the Charterers shall deliver to the Owners documents, in a form and substance satisfactory to Owners,

> evidencing that the condition set out in Schedule 1A (the "**Condition Subsequent**") has been fully complied with.
>
> Failure by the Charterers to satisfy the Condition Subsequent by the Condition Subsequent Satisfaction Date shall be an Event of Default under the Charter, and shall render the amendments to the Charter introduced by way of this Addendum No. 3 null and void….
>
> Schedule 1A
>
> Evidence satisfactory to the Owners that **a valid mortgage or charge** over the Parkcity Everly Hotel, Bintulu, Sawarak, East Malaysia (Plot No 1, Lot 3062 Jalan Tun Razak 97000) to secure the due and punctual performance by the Charterers of their obligations under this Charter and the performance by the Guarantor of their obligations under the Guarantee, **for an amount of not less than USD14,000,000,** [has] been granted and registered in favour of the Owners.
>
> [emphasis added]

364 On behalf of the plaintiffs, it was submitted that the effect of each such Addendum was that each Charterer should provide a separate mortgage for an amount of not less than US$14m. Following the trial, we invited the parties to file further written submissions on this point with regard in particular to the possible counter-argument that instead of the foregoing, the effect of these provisions taken together was to require the defendant to procure a single mortgage in favour of all three plaintiffs to a total value of US$14m (the "alternative construction").

365 In these further written submissions, the plaintiffs maintained their position as summarised above and sought to bolster their case that there were to be three separate mortgages each to the value of US$14m by advancing a number of points, which we would summarise as follows:

(a) The alternative construction is inconsistent with the terms of the September 2017 Addenda and Schedule 1A of each Addendum.

(b) The alternative construction would require re-definition of the following terms used in Schedule 1A, *viz* (a) "*Owners*" to refer to all three plaintiffs, instead of the relevant plaintiff who was party to the particular Addendum and BBC; (b) "*Charterers*" to refer to both Go Offshore and Otto Fleet collectively, instead of the relevant Charterer who was party to the particular Addendum and BBC; and (c) "*Charter*" to refer to the BBCs *collectively*, instead of only the BBC to which the particular Addendum applied. This could only be achieved by rectification of all three Addenda which the defendant has not pleaded or sought.

(c) In any event, in order for the alternative construction to succeed, the defendant would have to demonstrate a clear mistake on the face of the instrument and clarity as to the correction to be made. This is not made out on the facts. Moreover, the defendant has not pleaded, much less proved, a case for rectification or estoppel by convention. See *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 3 WLR 267 and *Lewison* ([162(f)] *supra*) at p 269, paragraph 5.11:

> "If a contract contains an express definition, then in the absence of a claim for rectification or a plea of estoppel, evidence of the negotiations is not admissible for the purpose of contradicting the definition, even where it is alleged that the parties negotiated on the basis of an agreed meaning".

(d) The plaintiffs' case that the September 2017 Addenda required separate and distinct securities over the Bintulu Hotel to be held by each plaintiff is further reinforced by the following factual matrix:

(i) Each of the BBCs (and relevant Addenda) is an independent and separate contract, giving rise to independent and separate obligations between different parties in respect of

different vessels. The Owners under the BBCs are all separate entities. In addition, there were two different Charterers.

(ii) Separate guarantees were issued to each of the respective plaintiffs by OML in connection with each of the BBCs.

(iii) Similarly, pursuant to the three Addenda, three separate Letters of Support were issued by the defendant as financial assurance of the performance of the BBCs and the guarantees.

(iv) The drafting of separate security documentation above for each of the BBCs can be contrasted with the Deposit (provided for under the July 2016 Addenda), where only a single security was required. In that case, the Deposit was only provided for under the Addendum for the Go Perseus BBC.

(e) The requirement for security of US$14m for each of the plaintiffs must also be seen in light of:

(i) The amounts outstanding at the time to the plaintiffs under the BBCs. By the time the relevant Addenda were signed in September 2017, Go Offshore and Otto Fleet owed the plaintiffs a total sum of approximately US$18m (being outstanding charter hire and the Deposit).

(ii) The size of the payment deferrals under the BBCs being agreed by the plaintiffs pursuant to the September 2017 Addenda, which deferred amounts the plaintiffs would have wanted to secure through the mortgages/charges. Under the September 2017 Addenda, the plaintiffs agreed to further reductions in daily hire (US$23,950 to US$5,000 for the first plaintiff; US$21,700 to US$5,000 for each of the second and

third plaintiffs) for the period from August 2017 to August 2020. These reductions would subsequently be repaid through charter hire payments to be made after August 2020. Over the three-year period, the deferrals amounted to US$20,750,250 for the first plaintiff and US$18,286,500 each for the second and third plaintiffs. These deferrals were subject to the fulfilment of the condition subsequent set out in Schedule 1A of each of the September 2017 Addenda (additional security by way of mortgages/charges over the Bintulu Hotel).

(iii) Given the foregoing, it would have made no sense for the plaintiffs to have agreed to have competing interests under one mortgage/charge worth US$14m. This is particularly since, given the relationship between the Charterers and the common Guarantor for the BBCs (*ie*, OML), any potential default would likely take place in respect of all of the BBCs around the same time (as eventually transpired in this case) such that the security, if called upon, would have to be called upon by all three plaintiffs.

(f) While the plaintiffs have consistently maintained their position on the interpretation of the relevant provisions of the September 2017 Addenda throughout the proceedings, the defendant has never contested otherwise whether in affidavits filed by the defendant or in submissions.

(g) The defendant's willingness to accept the plaintiffs' position is unsurprising as this was the common understanding between the parties and the basis upon which Malaysian lawyers, Reddi & Co, were instructed for both the plaintiffs and the Charterers to discharge the

existing mortgage over the Bintulu Hotel and register three fresh mortgages/charges in favour of the respective plaintiffs. Thus:

(i) In Rajah & Tann's email dated 10 October 2017, Rajah & Tann explained to Reddi & Co that the intention was for charges to be granted "*in favour of the Owners (i.e. Hai Jiao 1207 Limited, Hai Jiao 1306 Limited and Hai Jiao 1307 Limited), each for up to an amount not less than USD14,000,000*" [emphasis added].

(ii) Reddi & Co confirmed these instructions in its email dated 13 October 2017, that there would be "*3 separate charge[s] over the Hotel and each charge shall be for an amount of USD14,000,000.00*" [emphasis added].

(iii) Further to the foregoing, Reddi & Co's email dated 19 October 2017 (copied *inter alia* to the Charterers) referred to the registration of the "*3 Memoranda of Charge in favour of the Owners*" concurrently with the discharge of the existing mortgage over the Bintulu Hotel.

(h) The plaintiffs have been deprived of the opportunity to lead evidence in connection *inter alia* with the emails above, and to cross-examine the defendant at trial in light of the defendant's previous tacit acceptance of the plaintiffs' construction. It therefore does not lie in the defendant's mouth to now backtrack on the interpretation of the relevant provisions.

366 On behalf of the defendant, it was submitted that the alternative construction was in accordance with the plain and ordinary language of the

September 2017 Addenda, the surrounding circumstances and the commercial purposes of the parties. In summary:

(a) On a plain and ordinary reading of the language of Schedule 1A of the September 2017 Addenda, it is apparent that the parties contemplated *a single mortgage* to secure the due performance of the *obligations for all three charterparties*;

(b) The reasonable business person test shows that a single mortgage was prescribed since the September 2017 Addenda all referred to the same Bintulu Hotel, a single mortgage or charge, and failed to specify multiple mortgages for each individual plaintiff;

(c) The Bintulu Hotel was valued at only RM70m (US$16.3m) with an even lower forced selling price of RM49m (around US$11.4m). Therefore, it would have been impossible to expect the Charterers /defendant to obtain three mortgages for a combined value of US$42m (RM180m) as the mortgages far exceeds the market and forced sale value of the Bintulu Hotel.

(d) The valuation of the Bintulu Hotel was, in fact, within the knowledge and available to the plaintiffs prior to execution of the September 2017 Addenda:

(i) On 7 July 2017, an email was sent by Mr Goh to Mr Hong Xing attaching the email regarding the valuation of the Bintulu Hotel at RM70m.

(ii) In ICBCL's Request for Change of the Terms of the Otto Project, ICBCL also stated that according to the valuation report, the Bintulu Hotel's "*....market fair price is RM70 million*

> *(approximately US$16.3 million), and the force selling price is RM49 million (approximately US$11.4million). Our proposed amount of mortgage is RM61 million (approximately US$14.2 million), and the mortgage procedures shall be completed by 31 October 2017*" [emphasis added];

(e) The objective view also points towards a single mortgage since (as explained below) it is impossible to obtain three individual mortgages which exceed the market and forced sale values of the Bintulu Hotel and given the tight timelines for the Charterers to arrange it (between 29 September and 3 October 2018);

(f) Viewed holistically, it would seem that obtaining a single mortgage for all three plaintiffs comports with the actual value of the Bintulu Hotel and, furthermore, the tight timeline of four days afforded to the Charterers meant that the security of three individual mortgages was extremely improbable;

(g) In order to give effect to the commercial purpose of the transaction, the parties cannot have intended, and the charterers cannot have agreed, to be subject to the impossible task of obtaining three mortgages which is about three times the market value and about four times the forced sale value of the Bintulu Hotel;

(h) In order for the contract to be commercially effective, logical, sensible and/or feasible, a single mortgage is the only option as three separate mortgages equates to an insurmountable condition.

367 As to these submissions, our observations and conclusions are as follows:

(a) One of the main difficulties is that the present proceedings were commenced by way of three separate writs issued by each plaintiff; and the parties' respective pleadings were, in our view, unclear on this point.

(b) Equally, the parties' opening written statements did not specifically address this issue. It was only in their final written submissions that the plaintiffs' case that they were *each* entitled to a separate mortgage to the value of US$14m was clearly articulated. It is fair to say that the defendant's final written submissions did not contest that the Charterers were obliged to procure mortgages over the Bintulu Hotel for each of the plaintiffs; that the only argument raised by the defendant challenging his liability for US$42m was that in fact that the Bintulu Hotel was only worth US$12.06m to US$17.227m; that the defendant's liability was accordingly limited to the value of the Bintulu Hotel; and that no arguments whatsoever were made by the defendant to advance the alternative construction. It was in light of the foregoing that the court considered it appropriate to invite further written submissions on this point.

(c) In our judgment, the starting point is the proper construction of the three September 2017 Addenda and Schedule 1A thereto. As to that, we do not accept the plaintiffs' submission that the alternative construction would require redefinition of the terms of each of the September 2017 Addenda or that, for the alternative construction to succeed, it would be necessary to order rectification or uphold a plea of estoppel by convention (neither of which is pleaded). Rather, we accept the defendant's submission that the effect of the provisions in the three September 2017 Addenda was that there should be a single mortgage or charge for an amount of not less than US$14m in favour of all three

plaintiffs as joint mortgagees. In our judgment, this is entirely consistent with the plain and ordinary language in each of the September 2017 Addenda.

(d) In so far as may be relevant, the alternative construction is also consistent with (a) ICBCL's own statement in the Request for Change referred to above that based on the valuations received "…*Our proposed amount of mortgage is RM61 million (approximately US$14.2 million)*…"; and (b) what appears to have been the common intention of the parties as confirmed in (for example) paragraphs 104 and 108 of the affidavit of evidence-in-chief of Mr Yang Changkun and paragraphs 31, 37, 59 and 61 to 63 of the affidavit of evidence-in-chief of the defendant himself.

(e) We readily accept that the email exchanges between Rajah & Tann and Reddi & Co in October 2017 referred to above and relied upon by the plaintiffs indicate that the intention was that there should be three separate charges over the Bintulu Hotel each for up to an amount of US$14m but, in our view, such "evidence" is inconsistent with the evidence of Mr Yang Changkun and the defendant himself as referred to in the previous paragraph. It is also noteworthy that the emails referred to post-date the September 2017 Addenda and, as a matter of law, cannot affect the proper construction of the said Addenda. Even if that is wrong and it was the common intention to have three separate mortgages/charges, this still begs the question as to whether each mortgage/charge was, in effect, to be cumulative and provide total security of US$42m.

368 For these reasons, we accept the alternative construction, *ie*, the effect of the September 2017 Addenda and Schedule 1A taken together was to require the defendant to procure a single mortgage in favour of all three plaintiffs to a total value of US$14m.

369 It was not disputed by the defendant that he had a personal obligation to exercise best endeavours to procure such a mortgage under the Letters of Support. For the avoidance of doubt, such an obligation would arise under the first unnumbered paragraph of the Letters of Support. It was also common ground that such mortgage was never provided.

(2) Whether the failure to procure the mortgage was a breach of the Letters of Support

370 To reiterate, the plaintiffs' case was that the defendant had failed to exercise best endeavours to procure a mortgage on the Bintulu Hotel. This was disputed by the defendant. Indeed, it was the defendant's own pleaded case that he had exercised his best endeavours to procure the mortgage in satisfaction of his obligations under the Letters of Support which, as just stated, would arise under the first unnumbered paragraph of the Letters of Support.

371 Pursuant to the order of court dated 10 October 2019 (made following the defendant's persistent and contumelious breaches of his obligations to provide e-Discovery of documents contained in the email repositories csyaw@ppcity.com.my and csyaw.om@ppcity.com.my), an adverse inference now operates against the defendant to the following effect: (a) that the defendant failed to exercise his best endeavours to procure the mortgage of the Bintulu Hotel in favour of the plaintiffs; and (b) that, but for such failure, the mortgage would have been procured in favour of the plaintiffs.

372 Nothing in the evidence which emerged at trial serves in any way to rebut this presumption/adverse inference against the defendant. On the contrary, as submitted on behalf of the plaintiffs, if anything, such evidence only serves to reinforce the said adverse inference for the reasons set out below.

373 In summary, the defendant's pleaded case and evidence at paragraphs 59–63 of his affidavit of evidence-in-chief as to the steps he had allegedly taken to procure the mortgage over the Bintulu Hotel were to the effect that he started persuading the shareholders of Kemena Resort Sdn Bhd ("Kemena"), Joseph Lau and Yaw Chee Ming, sometime in the months of October and November 2017. The Bintulu Hotel was registered in the name of Kemena. However, a decision was made not to sacrifice the Bintulu Hotel for the solvency of companies run by the defendant (*ie*, the Charterers and the Guarantors), especially where the solvency of these companies could not be guaranteed.

374 However, at trial, the defendant's evidence was that it was untrue to say that Yaw Chee Ming and Joseph Lau were the beneficial owners (through their shareholding in Kemena) of the Bintulu Hotel; that he did not in fact approach Joseph Lau with a view to persuading him to agree to grant the mortgage; and that he had instead approached Joseph Lau to discuss the matter because, in his role as Group CEO of Perdana ParkCity, Joseph Lau would be responsible for handling the details and the paperwork for the mortgage if it was to be effected. Thus, it was submitted on behalf of the plaintiffs that if this latter account were true, it confirms that Joseph Lau was very much in a subordinate position to the defendant within Perdana ParkCity; that the mortgage over the Bintulu Hotel fell under the purview of Perdana ParkCity; and that it would follow that any correspondence relating to the procuring of the mortgage would have passed through the Perdana ParkCity email accounts.

375 Further, the defendant's evidence at trial was that the mortgage fell through because Yaw Chee Ming did not agree to (or had changed his mind regarding) the mortgage. However, it was submitted on behalf of the plaintiffs that based on the company searches at hand, Yaw Chee Ming was neither a shareholder nor director of Kemena; that he had no role whatsoever in Kemena; and that there was therefore no basis for him to make decisions in respect of the Bintulu Hotel.

376 In any event, as further submitted on behalf of the plaintiffs, the defendant's evidence at trial with regard to his alleged attempts to persuade Yaw Chee Ming to grant the mortgage over the Bintulu Hotel was vague in the extreme and, in our judgment, lacked credibility. Moreover, if the defendant's account were true, one would expect contemporaneous documentary evidence (including email exchanges) relating to the foregoing as well as Yaw Chee Ming's alleged refusal to grant the mortgage. We also bear in mind that the defendant is the Group Executive Chairman of Perdana ParkCity, the company which appeared to have purview over the Bintulu Hotel which, without more, would at the very least tend to suggest that the defendant himself was the decision-maker as to whether or not to proceed with the mortgage over the Bintulu Hotel.

377 It is also important to note that the defendant's explanation at trial as to why the mortgage was never provided is inconsistent with or at least different from the explanation supported by an affidavit by the defendant which underpinned an application made by the defendant prior to trial in SIC/SUM 75/2019. There, the defendant explained that the Board of Directors of Kemena had declined to grant the mortgage as it had been advised that the mortgage was illegal under Malaysian law. In the event, that application was refused by the

court. This undermines the credibility of the explanation proffered by the defendant at trial as to why the mortgage was never provided.

378 In light of the foregoing, and bearing in mind the adverse inference against the defendant, it is our conclusion that in breach of his obligations under the Letters of Support, the defendant failed to exercise his best endeavours to procure the mortgage over the Bintulu Hotel; and that, as a result, they were collectively deprived of security in the amount of about US$14m in connection with sums payable under the BBCs.

379 There remains the question of quantum, *ie*, what is the true damage that flows from the defendant's aforementioned breach of his best endeavours obligations under the Letters of Support by failing to procure the mortgage over the Bintulu Hotel. The quantum inquiry for the defendant's breach by failing to procure the mortgage over the Bintulu Hotel is unique (vis-à-vis the defendant's other breaches as canvassed above) given that the mortgage over the Bintulu Hotel, if procured, would have been a security interest of value, and not a cash sum paid to the plaintiffs. It would be apt to address this issue at this juncture.

380 Under the compensatory principle, the court must determine where the injured promisee would be if the promisor had performed his/her contractual obligations. Here, the defendant's failure to perform his best endeavours obligations had effectively deprived the plaintiffs of a security interest worth about US$14m (we address the issue of the appropriate value of the mortgage, which was also in dispute, below shortly), and left the plaintiffs as *unsecured* creditors for the said sum in the insolvency of the Charterers/the Guarantors. Had the defendant exercised best endeavours and successfully procured the mortgage over the Bintulu Hotel, the plaintiffs would have had enforceable security worth about US$14m. The plaintiffs would then have been able to

realise this security to make up for the Pre-Termination Losses and/or Post-Termination Losses they suffered (up to the amount of US$14m). This is the true damage suffered by the plaintiffs.

381 As submitted on behalf of the defendant, the issue of the *value* of the mortgage must depend on the value of the Bintulu Hotel at the relevant time. As to this, the defendant relied on (a) an email from one Mr Robert Ting dated 16 June 2017 (which was forwarded to Mr Hong Xing by Mr Goh) which suggested that the value of the Bintulu Hotel was about RM70m; and (b) a valuation report dated 20 July 2017 which estimated a value (based on certain assumptions) of around RM70m or RM49m on a forced sale basis. There was some dispute between the parties as to the US dollar equivalent of these figures varying between (at the lower end of the range) about US$11–12m and (at the upper end of the range) about US$15–17m. On this basis, it was suggested on behalf of the defendant that the bottom end of the lower range, *ie*, US$11m represents the maximum amount of loss recoverable by the three plaintiffs. On behalf of the plaintiffs, it was submitted that the report had not properly been adduced in evidence and was inadmissible. However, in the event, we do not consider that this matters in the present context. On the assumption that the mortgage had been in place, we accept that there is some uncertainty as to whether or not the plaintiffs would have needed to exercise their rights by way of a forced sale. Ordinarily, however, it would obviously be in the interest of all concerned including the mortgagor (*ie*, the plaintiffs*)* to achieve the highest possible price. On that basis, we consider that in this hypothetical scenario, all concerned would have sought to avoid a forced sale; that the overwhelming likelihood is that the parties would have co-operated to seek to obtain the highest possible price by way of a private rather than a forced sale; and that, on a balance of probabilities, any sale would have achieved a price of at least US$14m. For these reasons, it is our conclusion that the loss suffered jointly by the plaintiffs

under this head and recoverable from the defendant is the amount of the would-be mortgage, *ie*, US$14m.

382 It remains to consider what part of this US$14m is recoverable by each plaintiff. On one view, the amount recoverable by each plaintiff should be in accordance with the *pari passu* principle, *ie*, in proportion to the debts owed by each Charterer to each plaintiff. Alternatively, it is arguable that that sum should be split equally between all three plaintiffs so that each plaintiff should be entitled to recover one-third of the sum of US$14m. This point was not addressed at trial. We hope the appropriate split can be agreed by the parties failing which we will hear further submissions.

Conclusion with regard to the alleged breach(es) of the Letters of Support

383 For the reasons stated above, it is our conclusion that the defendant was in breach of his obligations under the unnumbered opening paragraph of the Letters of Support and/or under clauses 2(a) and/or 3 of the Letters of Support in one or more respects referred to above with regard to the Potentially Relevant Claims. We accordingly allow the plaintiffs' claims under the Letters of Support, albeit only to this extent. We turn then to the issue of quantum.

Quantum of damages

Pre-Termination Claims

384 In light of the numerous transactions/instances amounting to various breaches of the Letters of Support by the defendant as canvassed above, we set out below several tables consolidating our conclusions.

385 The first table below details the funds that were available to the Charterers/the Guarantors/the defendant at various points in time which could have been used in satisfaction of the Potentially Relevant Claims. This table reproduces in part similar tables provided by the plaintiffs in their factual closing submissions, albeit we have amended several of the figures therein based on the underlying financial documents; these documents revealed certain errors in the plaintiffs' figures. The relevant currency conversions (from Singapore dollars to US dollars) adopted were as per the plaintiffs' submissions – the defendant has not seriously challenged these.[2] The indicated charter hire owed is *before deducting the sporadic part-payments* made to the plaintiffs at various points in time as earlier alluded to (see [158] above) – these sporadic payments will be addressed subsequently. For ease of reference, we also include the paragraph numbers in this Judgment corresponding to the relevant funds available/instances of breach:

S/N	Item	Amount	Paragraph Reference
2 November 2016 charter hire instalment – <u>US$3,053,480</u>			
1	Opening balance (November) in OML's Standard Chartered SGD account no xx-x-xxxxxx-3	S$4,394,772.10 (around US$3.26m)	[223]–[226]
2	Opening balance (November) in OML's Standard Chartered USD account no xx-x-xxxxxx-8	US$204,501.30	[223]–[226]
3	Cash deposits paid into the defendant's RHB SGD account no x/xx/xxxxxx/09 in November 2016	S$3,327,685.13 (around US$2.46m)	[303]

[2] All other Singapore dollar to US dollar conversions herein use the foreign currency exchange rate during the relevant period.

S/N	Item	Amount	Paragraph Reference
4	Loans provided by the defendant to Hyoil in 2016	US$10,548,069	[357(a)]
Total:		**US$16,472,570.30**	
The Deposit due on 6 December 2016: US$7,000,000			
1	Closing balance (November) in OML's RHB SGD account no x/xx/xxxxxx/07	S$6,266,704.64 (around US$4.67m)	[223]–[226]
2	Funding procured by the defendant from Yawson to fund other projects in 2016	US$15,223,500	[357(c)]
Total:		**US$19,893,500**	
2 February 2017 charter hire instalment – US$2,953,910			
1	Purchase price of car gifted to Mr See (promise made on 11 November 2016)	S$399,888 (around US$277,700)	[240]
2	Diversion of Deep Ocean sub-hire payment (December 2016)	US$430,000	[262]–[264]
3	Value of the defendant's shares in public companies if liquidated on 31 December 2016, as per valuation by Mr Sutton	US$4.45m	[308]–[310]
4	Payments by OML to Ample Skill in January 2017	US$42,491.78	[227]
5	Cash deposits paid into the defendant's RHB SGD account no x/xx/xxxxxx/09 in December 2016 and January 2017	S$1,952,803.83 (around US$1,356,113.77)	[303]

S/N	Item	Amount	Paragraph Reference
6	Cash deposits paid into the defendant's RHB USD account no x/xx/xxxxxx/04 in January 2017	US$3,000,108.65	[303]
7	Loans provided by the defendant to Balamara through Ample Skill in January 2017	A$450,000 (around US$307,020)	[357(d)]
Total:		**US$9,863,434.20**	
2 May 2017 charter hire instalment – US$3,053,480			
1	Payments by OML to Ample Skill, Brizill and Ocean International from February to April 2017	US$3,804,659.64	[227]
2	Diversion of Inpex Charter sub-hire for April 2017	US$150,000	[266(d)], [268]
3	Cash deposits paid into the defendant's RHB SGD account no x/xx/xxxxxx/09 from February to April 2017	S$820,083.20 (around US$600,000)	[303]
4	Cash deposits paid into the defendant's RHB USD account no x/xx/xxxxxx/04 from February to April 2017	US$995,845.05	[303]
5	Loans provided by the defendant to Balamara through Ample Skill in February to April 2017	A$750,000 (around US$510,000)	[357(d)]
6	First tranche of payment of "bonus" to Mr See (within 30 days of the email by the defendant dated 2 March 2017)	S$1,000,000 (around US$740,000)	[241]–[242]

S/N	Item	Amount	Paragraph Reference
Total:		**US$6,800,504.69**	
2 August 2017 charter hire instalment – US$3,652,400			
1	Payments by OML to Ample Skill and Brizill from May to July 2017	US$322,740.80	[227]
2	Diversion of Inpex Charter sub-hire for May to July 2017	US$450,000	[266(d)], [268]
3	Cash deposits paid into the defendant's RHB SGD account no x/xx/xxxxxx/09 from May to July 2017	S$6,191,202.39 (around US$4.586m)	[303]
4	Cash deposits paid into the defendant's RHB USD account no x/xx/xxxxxx/04 from May to July 2017	US$1,965,138.75	[303]
5	Second tranche of payment of "bonus" to Mr See (within 90 days of the email by the defendant dated 2 March 2017)	S$1,320,000 (around US$970,000)	[241]–[242]
Total:		**US$8,293,879.55**	
2 November 2017 charter hire instalment – US$3,652,000			
1	Payments by OML to Ample Skill from August to October 2017, including the payment made on 2 November 2017	US$1,337,500	[227]
2	Diversion of Inpex Charter sub-hire for August to September 2017	US$300,000	[266(a)], [266(d)], [268]

S/N	Item	Amount	Paragraph Reference
3	Cash deposits paid into the defendant's RHB SGD account no x/xx/xxxxxx/09 from August to October 2017	S$4,695,601.05 (around US$3.45m)	[303]
4	Cash deposits paid into the defendant's RHB USD account no x/xx/xxxxxx/04 from August to October 2017	US$8,177,206.93	[303]
Total:		**US$13,264,706.93**	
Summary (total between 2 November 2016 and 2 November 2017)			
Total outstanding charter hire:		**US$23,365,670**	
Total funds/value of assets available:		**US$74,588,595.67**	

386 From the above, it is clear that at each relevant point in time (*ie*, when the Deposit and the relevant charter hire instalments were due between 2 November 2016 and 2 November 2017), there were sufficient funds that could have been applied in satisfaction of the Potentially Relevant Claims. It may be observed that we have not exhaustively canvassed every potential fund source available to the defendant (*eg*, we have omitted to indicate the values of the defendant's shares in privately held companies and/or any pledge that could have been made using these shares as security) – it is not necessary to do so given that a degree of uncertainty exists with respect to their precise values, *and* more importantly, taking into account the fund sources with far clearer value and/or which could be more readily liquidated, there were more than sufficient funds available for the defendant to have satisfied the Potentially Relevant Claims.

387 The implication of the above on the issue of quantum is that the defendant will have to compensate the plaintiffs, by way of damages, the sums owed *in full*. To the extent that the total funds available exceeds the total sums owed (and also that certain shareholdings/fund sources have not been taken into account in the table above), these are irrelevant – the defendant is only liable *to the full extent of the sums that were outstanding*.

388 With this in mind, we next set out the exact sums that were due to each plaintiff. There are two points of note:

(a) First, as alluded to, the final quantum of outstanding and unpaid charter hire owed to the plaintiffs requires adjustment as there were sporadic part-payments made by the Charterers/OML towards the charter hire instalments. For the avoidance of doubt, we considered and do not accept the defendant's submissions on this issue (*ie*, the extent of sporadic payments made to the plaintiffs). The defendant's case in this regard was built upon Mr Sutton's first report, which we, as mentioned, have not accepted (see [211]–[216] above). We accordingly accord no weight to the defendant's submissions in this respect.

(b) Second, the figures that the court accepts as regards the charter hire owed (*before* adjustment to account for the sporadic payments) are based on the plaintiffs' submissions, which applied the relevant charter hire rates as per the July 2016 Addenda. This is correct – by virtue of the defendant's failure to provide the mortgage over the Bintulu Hotel, clause 5.3 of the September 2017 Addenda (*ie*, the condition subsequent clause) was not satisfied, and consequently the various charter hire rate revisions in Schedule 3 of the September 2017 Addenda were rendered null and void. The applicable charter hire rates were therefore those

prior to the September 2017 Addenda (*ie*, US$9,000 daily for the Go Perseus and Go Phoenix, and US$21,700 daily for the Go Pegasus; see [49], [68] and [69] above).

389 The tables below detail the sums due to each plaintiff after taking into account the relevant sporadic payments. While some of the sporadic payments appear to have been made as late as end 2017 and even early 2018, we have taken the liberty (given that the evidence is equivocal as to which specific charter hire instalment each part payment was made towards) to regard these part payments as being in satisfaction of the oldest outstanding debts (*ie*, the charter hire instalment that fell due the earliest). Such an approach does not affect the final sum outstanding. We also add that there were various discrepancies between the figures provided in (a) the Statements of Claim; (b) the various statutory demands served on the Charterers/the Guarantors (see [156] above); (c) a table of outstanding charter hire payments introduced into evidence by Ms Cao Jiangxin in her affidavit of evidence-in-chief; and (d) Annex A to the plaintiffs' factual closing submissions, which is also Annex A to this Judgment. We resolved all such discrepancies in favour of the plaintiffs' pleaded case in the respective Statements of Claim, which were mostly corroborated by the statutory demands served on the Charterers/the Guarantors. All sums listed in the tables below are in US dollars:

(a) In respect of the first plaintiff:

Date	Accrued charter hire	Payment(s) made	Outstanding charter hire
Nov 16	828,000	828,000	0
Dec 16	7,000,000 (the Deposit)	0	7,000,000

Date	Accrued charter hire	Payment(s) made	Outstanding charter hire
Feb 17	801,000	460,000	341,000
May 17	828,000	0	828,000
Aug 17	828,000	0	828,000
Nov 17	828,000	0	828,000
Total	11,113,000	1,288,000	**9,825,000**

(b) In respect of the second plaintiff:

Date	Accrued charter hire	Payment(s) made	Outstanding charter hire
Nov 16	828,000	828,000	0
Feb 17	801,000	801,000	0
May 17	828,000	119,000	709,000
Aug 17	828,000	0	828,000
Nov 17	828,000	0	828,000
Total	4,113,000	1,748,000	**2,365,000**

(c) In respect of the third plaintiff:

Date	Accrued charter hire	Payment(s) made	Outstanding charter hire
Nov 16	1,397,480	1,397,480	0
Feb 17	1,351,910	63,076	1,288,834
May 17	1,397,480	0	1,397,480
Aug 17	1,996,400	0	1,996,400

Date	Accrued charter hire	Payment(s) made	Outstanding charter hire
Nov 17	1,996,400	0	1,996,400
Total	8,139,670	1,460,556	**6,679,114**

390 With the above outstanding sums in mind, it is our conclusion that for the defendant's breaches of his obligations under the Letters of Support, the plaintiffs are entitled to damages in the sums set out in the paragraphs that follow.

391 For the defendant's breaches of the Letters of Support by failing to ensure timely payment of charter hire/the Deposit due to the plaintiffs, each plaintiff has suffered losses, and is entitled to damages equal to the value of such losses as set out in the table below (all sums listed are in US dollars).

Date	Sum Payable	First plaintiff	Second plaintiff	Third plaintiff	Total
2 Nov 2016	Charter hire Instalment	0	0	0	0
6 Dec 2016	The Deposit	7,000,000	0	0	7,000,000
2 Feb 2017	Charter hire Instalment	341,000	0	1,288,834	1,629,834
2 May 2017	Charter hire Instalment	828,000	709,000	1,397,480	2,934,480
2 Aug 2017	Charter hire Instalment	828,000	828,000	1,996,400	3,652,400

2 Nov 2017	Charter hire Instalment	828,000	828,000	1,996,400	3,652,400
Total		9,825,000	2,365,000	6,679,114	**18,869,114**

392 The plaintiffs are also entitled to damages in the sum of US$14m as a result of the defendant's breaches of the Letters of Support in failing to exercise best endeavours to obtain the mortgage in respect of the Bintulu Hotel. The reasons for our conclusion in this regard have been provided earlier in this Judgment (see [379]–[382] above). The sum awarded is to be split between the plaintiffs in such proportion as may be agreed by the parties or otherwise ordered by the court following receipt of further submissions.

393 The damages awarded to the plaintiffs for their claim for breach of the Letters of Support is therefore US$32,869,114. Apart from the above, the plaintiffs will not be awarded any further damages for unpaid charter hire. Specifically, there cannot be any damages for the claims that post-date the Potentially Relevant Claims, for reasons provided earlier in this Judgment.

The Termination Amounts

394 The Termination Amounts sought by the plaintiffs (see [158(b)] above) cannot be awarded.

395 As a starting point, the plaintiffs correctly point out that each of the BBCs contain what is, in substance, an accelerated payment clause that triggers upon termination. For example, clause 49.4.3 of the Go Perseus BBC stipulates that upon termination, all balance charter hire "which [would have] become due and payable… if [the BBC] was not terminated" would be payable by the Charterers. In our view, the nature of clause 49.4.3 is that it results in a

contractual debt of the said amount in favour of the relevant plaintiff upon termination of the relevant BBC. In other words, clause 49.4.3 is an acceleration clause that brings forward the due dates of all future charter hire instalments to the point of termination.

396 However, and be that as it may, the defendant's obligations under the Letters of Support do not extend to paying the Termination Amounts. At the date of the termination of the BBCs (*ie*, 15 November 2017 for the Go Perseus BBC and 31 January 2018 for the Go Phoenix and Go Pegasus BBCs), the respective Charterers and OML were too far gone and it would have been a case of throwing good money after bad – we have explained this point earlier in this Judgment (see [291]–[293] above). Accordingly, given that the Termination Amounts crystallised only at the juncture where the respective Charterers and/or OML were already too far gone to be saved, they are not recoverable from the defendant. The two implications of our finding in this regard are that: (a) the defendant's failure to pay the Termination Amounts to the plaintiffs upon the termination of the BBCs was not a breach of his best endeavours obligations; and (b) the Termination Amounts are not recoverable as damages under the Pre-Termination Claims. We therefore reject the plaintiffs' claims for the Termination Amounts.

Charge over sums equivalent to the Inpex Charter sub-hire payments

397 Lastly, the plaintiffs, in factual closing submissions, have argued for a charge over the Inpex Charter sub-hire payments to the tune of US$5.4m. Their argument is that the sub-hire payments, if duly deposited in the Earnings Account, would have represented a "secured fund" that would have outlived the Charterers'/the Guarantors' entries into insolvency. We disagree.

398 Preliminarily, we have already found that the amount that had been diverted from the Inpex Charter sub-hire payments was the sum of US$900,000, not US$5.4m. Thus, relief, if granted, would be only for the former amount.

399 Our rejection of this argument is first on the basis of the pleadings. While the plaintiffs have prayed in the Statement of Claim for "sum[s]" and "damages" with respect to the defendant's breach of the Letters of Support due to the diversion of the Inpex Charter sub-hire payments, they have not prayed specifically for the relief of a charge. Neither have they prayed for specific performance/invocation of the relevant clause in the BBC that confers them a charge over funds in the Earnings Account. In contrast, the plaintiffs have specifically pleaded for a mortgage over the Bintulu Hotel, and even cited the relevant clause of the September 2017 Addenda to that effect. We do not believe that "sum[s]" or "damages", as per the Statement of Claim can be understood to mean a security interest in this sense absent specific language.

400 Assuming *arguendo* that we are incorrect on the above, the plaintiffs' claim still cannot succeed. In essence, the plaintiffs have not proven that the Go Phoenix Earnings Account, into which the Inpex Charter sub-hire payments ought to have been deposited, would not have been depleted before 31 January 2018.

(a) The defendant's best endeavours obligations, specifically under clauses 2(a) and 2(b) of the Letters of Support, must be understood as an obligation for him to procure the Charterers/OML to ***immediately apply funds that were available, as and when they became available, to outstanding charter hire instalments***. To that effect, the moment any Inpex Charter sub-hire payment was deposited in the Earnings Account, it would have been used to satisfy outstanding charter hire instalments

between April to September 2017. That in fact was the raison d'être of the Earnings Account – the funds therein were to be used for prompt payment of charter hire.

(b) It is also untenable for the plaintiffs to argue that they would have preserved any money in the Earnings Account and utilised instead the other funds available to the defendant/the Charterers/OML between April to September 2017 – (a) they have not proven that they would have adopted such a course of action, and (b) we are of the view that given the prevailing circumstances (multiple outstanding payments and unanswered letters of demand), that is not what would have been done. ICBCL and/or the plaintiffs would have immediately applied any funds that were made available via the Earnings Account towards outstanding charter hire.

Interest

401 We deal with the issue of interest (both late payment interest pursuant to the default rate under the BBCs, as well as interest on the Judgment sum) at the end of this Judgment.

Claim 2: Misrepresentation

Summary of the plaintiffs' claim for damages for misrepresentation

402 In the alternative, it was the plaintiffs' case that the defendant was liable for damages for fraudulent or negligent misrepresentation. In essence, such case was advanced on the basis that various representations were made by or on behalf of the defendant in the course of various meetings in 2016 with regard to the provision by the defendant of continuing financial support to the Charterers/OML; that the plaintiffs relied upon such representations by agreeing

to the delisting of OML and/or in not terminating the BBCs at an earlier stage, *ie*, if such representations had not been made, the plaintiffs would not have agreed to the delisting of OML and would have terminated the BBCs at an earlier stage; that, if the BBCs had been terminated earlier, then the plaintiffs would not have suffered any loss or at least their losses would have been much less than they turned out to be; and that accordingly, the plaintiffs are entitled to recover damages at common law or, alternatively, under s 2(1) of the Misrepresentation Act.

Applicable principles

403 As to the applicable principles, it was submitted on behalf of the plaintiffs (and we accept) that these may be summarised as follows:

(a) It is trite that a tortious claim in fraudulent misrepresentation/deceit may be brought at common law where (a) there is a representation of fact by words or conduct, (b) made with the intention that it should be acted upon by the plaintiff, (c) made with knowledge of its falsity or in the absence of any genuine belief that it is true, (d) which the plaintiff acted upon, (e) and has suffered damage from so doing (*Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 at [26]; *Derry v Peek* (1889) LR 14 App Cas 337 ("*Derry v Peek*") at 350).

(b) Similarly, it is uncontroversial that a claim for negligent misrepresentation at common law may be brought (a) where the defendant has made a false representation of fact, (b) which has induced reliance, (c) where the defendant owes a duty of care and (d) which the defendant has breached, (e) thereby causing damage to the plaintiff (see *IM Skaugen SE and another v MAN Diesel & Turbo SE and another*

[2018] SGHC 123 at [121]; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465).

(c) Alternatively, a party who has relied upon a negligent misrepresentation in entering a contract may bring a statutory claim pursuant to s 2(1) of the Misrepresentation Act which reads as follows:

> **2.**—(1) Where a person **has entered into a contract after a misrepresentation has been made to him by another party** thereto and as a result thereof **he has suffered loss**, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, **unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true**.
>
> [emphasis added in bold]

(d) The elements of the statutory claim are similar to those at common law, except that it is for the defendant to prove the absence of negligence (see *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 at [66]). Moreover, there is no need for the plaintiff to prove the existence of a duty of care owed by the defendant to the plaintiff (see *Sheila Kazzaz v Standard Chartered Bank* [2020] 3 SLR 1 at [128]).

(e) As for the requirement of reliance:

(i) The lack of reasonable reliance is irrelevant to the plaintiffs' claims based upon fraudulent misrepresentation/deceit. The cause of action for fraudulent misrepresentation/deceit would be made out simply by the plaintiffs proving that there had been reliance, in the sense that they had been induced by the representations to *inter alia* allow

the delisting. It is no defence that they acted incautiously and failed to take those steps to verify the truth of the representations (see, for example, *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [24]).

(ii) The position is the same for the plaintiffs' claims pursuant to s 2(1) of the Misrepresentation Act (which we have already set out above) because of the fiction of fraud.

(iii) In other words, reasonable reliance would only be relevant (if at all) to the merits of the plaintiffs' claim for common law negligent misrepresentation. In the context of negligent misrepresentation, the concept of "reasonable reliance" goes towards the issue of whether the court should impose a duty of care. This is separate and distinct from the concept of actual reliance, which relates to causation (and applies in all cases of actionable misrepresentation).

General salient facts

404 As to the facts, the consideration of the plaintiffs' misrepresentation claims is somewhat complicated because of the "rolled-up" pleas advanced by the plaintiffs, and the various hypothetical counter-factual scenarios relied upon by the plaintiffs. These counter-factual scenarios supported the various alternative ways in which the plaintiffs advanced the different strands of their case (as set out in Section VIII of their Statements of Claim). In addition, the evidence led by the plaintiffs was, in certain respects, different from and somewhat narrower than their pleaded case. Be all this as it may, the plaintiffs' case as set out in their final submissions was as follows.

405 As to the alleged representations, the plaintiffs' case was that the following representations were made to them by the defendant (or were made on his behalf) during the various meetings and discussions in 2016 (specifically, the March, April, June, October, and December meetings) as referred to above, *viz*:

(a) The defendant intended to and would utilise or otherwise make available his own personal wealth and/or financial resources and/or assets and/or exercise his best endeavours to support the businesses of the Charterers/OML so as to enable them to continue as going concerns and to meet their respective liabilities under the BBCs/the guarantees (the "Financial Support Representation").

(b) The defendant intended, and had the means, to ensure timely payment of sums due to the plaintiffs under the BBCs, including payment of the Deposit to the first plaintiff within 60 days of OML's delisting (the "Timely Payment Representation").

(c) The defendant had procured and/or intended to and would procure the Samling Group (initiated by his family) to support the businesses of the Charterers/OML so as to enable them to continue as going concerns and meet their respective liabilities under the BBCs/the guarantees (the "Samling Support Representation").

(d) The defendant intended to and would, in connection with the delisting of OML, make capital injection(s) to OML of S$143m and/or such sums as were necessary to allow the Charterers/OML to continue as going concerns and enable the Charterers/OML to meet their respective liabilities under the BBCs/the guarantees (the "Capital Injection Representation").

(e) The defendant had, and/or had reason to believe that he would come to have in due course, sufficient funds and/or financial resources and assets available to him to make the capital injection of S$143m to OML in connection with the delisting (the "Delisting Means Representation").

(f) The defendant intended to and would procure that the capital injection(s) would be utilised *inter alia* towards the payment of the Deposit and other sums falling due to the plaintiffs under the BBCs/the guarantees (the "Funds Utilisation Representation").

These representations are collectively referred to as "the six Alleged Representations". *Critically*, the plaintiffs do not allege that the six Alleged Representations, as reproduced above, were made *verbatim* by the defendant or on his behalf. The six Alleged Representations are what the plaintiffs *purportedly understood* from what the defendant and/or his representatives actually said at the various meetings, which will be canvassed shortly in the Table in the next paragraph. This distinction is material for reasons that will be made apparent.

406 In support of the foregoing, the plaintiffs relied upon the evidence of Mr Yang Changkun, Mr Hong Xing and Ms Cao Jiangxin as summarised in a Table contained in their factual closing submissions which we reproduce below (subject to certain typographical corrections with regard to the dates of certain meetings) as follows:

Meeting	Representation	Relevant passages
3 March 2016 Meeting	Financial Support Representation	*OML had suffered huge losses in 2015 due to the continuous decline in oil prices <u>but was able to remain solvent by relying heavily on the defendant's personal financial support</u>.*

Meeting	Representation	Relevant passages
	Timely Payment Representation	*The Defendant remained committed to the survival of the OML Group and would take all steps necessary, including the injection of funds in his personal capacity, to ensure the solvency of the OML Group… Delisting presented a solution to this dilemma which would allow the defendant to inject further personal funds into the company.*
17 March 2016 Meeting	Financial Support Representation Timely Payment Representation Samling Support Representation	***The defendant*** *and* ***his family*** *collectively owned and had an interest in approximately 60% of the shares in OML and had continued to provide financial support to OML on a number of occasions.* *The delisting would allow decisions to be taken quickly as well as allow* ***the defendant*** *and* ***his family*** *to provide further financial support to the OML Group.*
15 April 2016 Meeting (attended **personally** by the defendant)	Financial Support Representation Timely Payment Representation Samling Support Representation Capital Injection Representation Delisting Means Representation Funds Utilisation Representation	*The privatisation would remove the limitation to his ability to personally support the company. The defendant would then be able to provide further financial support to the OML (using his personal resources, including his family's connections) which was necessary for the group's survival.* *He would, in connection with the delisting process, personally inject approximately S$150m into OML. These sums would be used to, inter alia, provide working capital for OML and for payment of sums due to the Plaintiffs under the BBCs.* *(Representation of family support continuing from 16 March 2016 Meeting and further confirmed below).*
9 June 2016 Meeting (attended **personally** by the defendant)	All Representations (see above)	*During the meeting, the defendant himself confirmed the proposed restructuring was progressing as expected. The defendant and Mr See outlined the proposed timelines for the delisting (targeting October 2016) and* ***the defendant*** *himself then further confirmed that he had* ***no problems funding the restructuring***

Meeting	Representation	Relevant passages
		exercise. *Additionally, he again emphasised his willingness to invest* ***his personal wealth*** *and other resources (****including procuring the backing of his family and the Samling Group****) to support the OML Group.* *(Capital Injection, Funds Utilisation Representations continuing from 15 April 2016 Meeting).*
12 October 2016 Meeting (Mr Seah/ Mr See)	All Representations	*Good news from the meeting yesterday was that* ***Samling Group has reaffirmed their support for Otto Marine and will inject fresh working capital into Otto Marine****.* *(Financial Support, Timely Payment, Capital Injection, Funds Utilisation Representations continuing from 15 April 2016/7 June 2016 Meeting).*
15 December 2016 Meeting (attended **personally** by the defendant)	Financial Support Representation Timely Payment Representation Samling Support Representation	*The plaintiffs' representatives demanded inter alia that the defendant… [p]rovide long-term solutions such as asset replacement/refinancing of the debts of Otto Marine by using other assets and properties owned by the defendant personally, whether in Malaysia or otherwise.* *The defendant agreed to the above and assured the Plaintiffs' representatives of his continued support for the OML Group. He asked for more time to arrange payment of the outstanding charter hire and to meet the foregoing requirements.*

For ease of reference and to avoid confusion with the many tables produced in the earlier parts of this Judgment, we henceforth refer to this table as the "Table above".

407 Further, the plaintiffs relied on three particular emails which, they submitted, recorded at least some of the foregoing undertakings and/or representations:

(a) An email dated 12 June 2016 (referring to the meeting on or about 9 June 2016 in the Table above), in which Mr See reiterated to the plaintiff that "*[f]ollowing the delisting, there will be injection of funds by [the Defendant]*" and that "*we will make the necessary payments that fall due*".

(b) An email dated 12 October 2016 (sent, it would appear, on the basis of the representations made at the meeting on 12 October 2016 referred to in the Table above), in which Mr Seah of Northcape wrote to Mr Hong Xing stating *inter alia* the following: "*[Mr See] just came back from Malaysia yesterday wherein he gave a presentation of [OML] to the Samling Group management… Good news from the meeting yesterday was that the Samling Group has reaffirmed their support for [OML] and will inject fresh working capital into [OML]…*"

(c) An email dated 5 December 2016 from Ms Chong requesting the first plaintiff to consider *inter alia* allowing OML to "*re-look*" into the payment of the Deposit. In the reply email dated 7 December 2016, the first plaintiff rejected this request, referring to the defendant's undertakings and/or representations above. In particular, the first plaintiff's email stated that: "*The main reason [the plaintiffs] accepted the delisting of [OML] is [that the defendant] promised to inject SGD 143 [million] capital, and we have been promised the USD[7 million] deposit will be included in the capital injection*".

408 Further, it was submitted on behalf of the plaintiffs that the Financial Support, Timely Payment, Capital Injection and Funds Utilisation Representations, all involved representations as to the defendant's then *present intention* to carry out future acts; and that it is well-established that a statement of present intention is treated as a statement of present fact – the fact being the present state of mind of the representor: J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (Sweet & Maxwell, 4th Ed, 2017) ("*Cartwright*") at [3-42]. We will deal with this submission (so far as it is relevant) below.

409 In further support of their misrepresentation claims, the plaintiffs relied upon the further facts and matters summarised below.

Issue-specific facts

(1) Inducement/Reliance

410 In summary, it was the plaintiffs' case that they were induced by and relied upon the representations as summarised in the Table above to do the following:

(a) Consent to the delisting and, on this basis, to execute the July 2016 Addenda to amend the BBCs which*, inter alia,* removed the delisting of OML as an Event of Default under the BBCs. (With respect to the representations made through the March, April and June Meetings).

(b) Not to rescind and/or withdraw their consent to the delisting following the execution of the July 2016 Addenda, and to forbear from terminating the BBCs after the delisting or shortly thereafter in light of the Charterers/OML's subsequent defaults (for example, when the Charterers failed to pay charter hire falling due on 2 November 2016).

(With respect to the representations made through the March, April and June Meetings, which were continued in the October and December Meetings).

411 In support of the foregoing and at the risk of repetition, the plaintiffs relied on various matters which we would summarise as follows:

(a) As to the plaintiffs' consent to delisting:

(i) The contemporaneous records of the plaintiffs' internal approvals process, *ie*, the Approval Form for Change of Approval Items reflects the fact that the plaintiffs' employees relied upon the representations in reaching the ultimate decision (made on behalf of the plaintiffs) to consent to the delisting. Thus, in the section titled "Reasons for the Change" (which set out the rationale for the proposal put up by Hong Xing on 21 April 2016), the Approval Form states *inter alia*:

> … **The substantial shareholder will provide a total of about SGD150 million (about USD110 million) for the privatization**, which will mainly be the own fund of the substantial shareholder. Otto Marine intends to start privatization in May, and complete the process in September, **so as to enable the substantial shareholder to provide more funds support to the company in the future.**
>
> [emphasis added in bold]

(ii) Mr Yang Changkun approved the application on 21 April 2016. In giving his approval, Mr Yang Changkun's unchallenged evidence was that he had in fact relied on all of the representations above. (In so far as the defendant's counsel challenged Mr Yang Changkun's evidence, this related to the

reasonableness of the reliance and not the fact of the reliance itself).

(iii) The section titled "Comment of Project Review Committee" which records the decision of the committee to approve the proposed changes (ultimately reflected in the July 2016 Addenda) states, *inter alia*:

> …
>
> 2. The privatization process of Otto Marine shall be monitored to ensure that all debts remain payable to us in spite of the privatization, **and that accelerated payment of USD7 million be made by the shareholder** in respect of the third vessel project within 90 days after completion of privatization.
>
> 3. **A support letter from [the Defendant]**, the actual controlling party, shall be obtained after the completion of privatization of the charterer, agreeing to provide fund support in the event of difficulty of the charterer in payment of hire.
>
> [emphasis added in bold]

(iv) The defendant's admitted agreement to the terms of the First Letters of Support and the requirement for their delivery to the plaintiffs in connection with the delisting simply reinforces the point.

(v) Given the background to the request, it is reasonable for the plaintiffs to have relied upon the representations in deciding to consent to the delisting. This also accords with common sense. There is no other good reason for why the plaintiffs would have given their consent to the delisting.

(b) As to the plaintiffs' decision not to rescind and/or withdraw their consent to the delisting and terminate the BBCs:

(i) The plaintiffs allowed the signing of the July 2016 Addenda to proceed despite not receiving the First Letters of Support by 12 July 2016 (the day of the signing) because it had been (mis)represented to them that the defendant was travelling and that the First Letters of Support would be provided to them as soon as possible. The defendant's failure to deliver the First Letters of Support would thus have entitled the plaintiffs to withdraw and/or rescind their consent *vis-à-vis* the Charterers. But in reliance on the defendant's representations, the plaintiffs desisted from doing so.

(ii) The failure to pay charter hire falling due on 2 November 2016 and the Deposit in full and on time constituted an Event of Default which would have entitled the plaintiffs to terminate the BBCs. Each of the plaintiffs' witnesses has affirmed in their respective affidavits of evidence-in-chief that, in the absence of the representations, the plaintiffs would have terminated the BBCs and proceeded to take enforcement steps against the Charterers/OML (specifically, Mr Hong Xing at paragraphs 37 to 42; Mr Yang Changkun at paragraphs 90 to 95; and Ms Cao Jiangxin at paragraphs 36 to 41).

(2) Falsity of representations

412 In summary, it was the plaintiffs' case that the representations were false for reasons which we would summarise as follows:

(a) The defendant failed to place any evidence before the court that he had in fact procured any disbursement of funds of S$143m in

connection with the delisting. Moreover, even if those sums were disbursed to OML, they were not capital injections by way of equity.

(b) The Charterers began defaulting on their payment obligations immediately after the delisting and the defaults lasted throughout the remainder of the duration of the BBCs.

(c) The defendant did not take steps to ensure the payment of the Deposit to the first plaintiff.

(d) The defendant did not make any capital injections post-delisting.

(e) The defendant never gave directions to ensure timely payment of sums payable to the plaintiffs under the BBCs and the guarantees.

(f) The defendant never sought financial assistance from the Samling Group.

(g) In so far as the representations were made on the defendant's behalf by Mr See, they were false.

(3) Liability under the Misrepresentation Act

413 In support of its case under the Misrepresentation Act and, in that context, the statutory requirement that the plaintiffs had entered a contract with the defendant after the representations had been made to them, the plaintiffs relied on what they alleged was a "contractual agreement" in or around May 2016, between the plaintiffs and the defendant whereby the plaintiffs consented to OML's delisting (through the signing of the July 2016 Addenda), subject *inter alia* to the defendant's execution and delivery of the First Letters of Support to the plaintiffs.

(4) Liability at common law for fraudulent misrepresentation

414 In support of their case that the representations were made fraudulently in the sense used by the court in *Derry v Peek* ([403(a)] *supra*), it was submitted on behalf of the plaintiffs that the same facts going towards proving falsity go towards proving fraudulent intent. In summary:

(a) Despite the defendant's representations to the effect that he had sufficient means and intended to support the Charterers/OML such that they would be able to meet their payment obligations to the plaintiffs following the delisting (see the Financial Support, Timely Payment and Funds Utilisation Representations), the Charterers/OML began defaulting on their obligations under the BBCs/the guarantees almost immediately after the delisting completed.

(b) Despite the Capital Injection, Financial Support or Timely Payment Representations, there is no evidence that the defendant procured either the S$143m capital injection in 2016 in connection with the delisting or any further injection of funds in 2017.

(c) The defendant did not, at the relevant time, even take steps to ensure that he had a clear understanding of his personal asset position or financial means before making the six Alleged Representations to the plaintiffs. This would be an obvious step one would expect a reasonable, prudent businessman to take before making such representations to the plaintiffs, particularly where, as the defendant's own evidence suggests, his personal asset position at the relevant time was not strong.

(d) In any event, the defendant's own evidence is that he never gave instructions (despite being the controlling shareholder and director of OML) to OML's management to ensure that funds available to OML

were utilised toward paying the plaintiffs. In particular, the defendant never gave instructions for the purported S$143m "capital injection" to be utilised towards paying the Deposit to the plaintiffs. Moreover, the evidence suggests that the defendant never intended to give such instructions.

(e) The defendant also confirmed that he never requested any financial assistance from the Samling Group either before or after the delisting and, more importantly, that he would never have intended to do so.

(f) Moreover, in so far as the representations comprise false statements of present intention and were made personally by the defendant, it follows that they must have been fraudulently made. The defendant must have known his own mind at the relevant time, *ie*, that he was not telling the truth. As observed in *Cartwright* (at [3-42]):

> A statement of intention is a representation of the speaker's present plan for his future conduct. If he does not have that belief or that plan at the time he speaks, he is not telling the truth about his present state of mind. His representation can be characterised as a fraudulent misrepresentation of fact and therefore actionable.
>
> [emphasis added]

(g) In so far as the representations were made by Mr See without the defendant's knowledge and authority, they are fraudulent because Mr See had no basis for believing the truth of the statements.

(5) Liability at common law for negligent misrepresentation

415 The plaintiffs have pleaded, in the alternative, a claim for negligent misrepresentation at common law. However, the claim for negligent

misrepresentation is only brought with respect to the representations in so far as they *do not* consist of statements of present intention. As explained on behalf of the plaintiffs, the reason behind this is that a person cannot make negligent statements as to his own present intention. Thus, the plaintiffs' claim for negligent misrepresentation covers the defendant's representations that:

(a) He had the means to ensure timely payment of the sums due to the plaintiffs under the BBCs (in relation to the Timely Payment Representation);

(b) He could procure the Samling Group to support the Charterers/OML so as to enable them to continue as going concerns and to fulfil their obligations under the BBCs/the guarantees (*ie*, in relation to the Samling Support Representation); and

(c) He had, and/or had reason to believe that, in due course, he would come to have sufficient funds and/or financial resources and assets available to him to make the capital injection of S$143m to OML in connection with the delisting (*ie*, the Delisting Means Representation).

416 In support of their case under this head, it was submitted on behalf of the plaintiffs that the defendant plainly owed the plaintiffs a duty of care when making the representations, considering that (a) the defendant was the controlling shareholder and Executive Chairman of OML and, together with or acting through Mr See, met with and communicated with the plaintiffs' representative in connection with the delisting; (b) the defendant/Mr See knew that the plaintiffs/ICBCL had to decide whether to consent to the delisting as the same constituted an Event of Default under the BBCs; and (c) the representations were made in the course of formal business discussions,

meetings, and correspondence with the intent to induce the plaintiffs to consent (or not to withdraw/rescind their consent) to OML's delisting.

417 Accordingly, it was submitted on behalf of the plaintiffs that the defendant would have known or intended that the plaintiffs would reasonably rely on the representations in, *inter alia*, consenting to the delisting.

418 Further, it was submitted on behalf of the plaintiffs as follows:

(a) The issue of reasonable reliance arises in the context of negligent misrepresentation as part of the inquiry into whether or not a duty of care should be imposed;

(b) That such an inquiry relates to whether the representor should have foreseen (taking into account the nature of the relationship between the parties) that the representee would rely upon the representor in the making the statement, without independently seeking to verify the same, so as to justify the imposition of a duty of care: see *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2018] 1 WLR 4041 in particular per Lord Sumption at [6] and *Cartwright* at [6-22].

(c) In other words, the concept of "reasonable reliance" is the mirror image of the concept of "voluntary assumption of responsibility", giving rise to a duty of care: see the decision of Andrew Phang J (as he then was) in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric (practising under the name and style of W P Architects)* [2007] 1 SLR(R) 853 at [70].

(d) This question relating to the reasonableness of reliance is separate and distinct from the question of actual reliance which relates

to causation (*ie*, whether the misstatement caused the plaintiffs' loss). Thus, *Cartwright* (at [6-22], fn 105) draws a distinction between the claimant's reliance on the defendant's care in making the statement as opposed to reliance on the statement itself, stating that:

> These are two very different senses of "reliance": to say that the claimant relied on the statement is an issue of causation: below, para 6-53: to say that the claimant relied on the defendant's skill is part of the test for a duty, but in itself hardly a satisfactory test…

(e) At [6-53], *Cartwright* then analyses the test of reliance in the context of causation in the following terms:

> **Causation; reliance.** The defendant is liable only for the loss he caused. In most claims in negligence for misrepresentation the claimant asserts that he relied on the statement, ***in the sense that he received and acted upon the defendant's statement in such a way that he then suffered the loss claimed***. Proof of such reliance is therefore an element in the proof of causation of damage: if it cannot be shown that the claimant relied on the statement in taking the action consequent upon which he claims to have suffered loss, he will not have established a causal link between the statement and the loss. In applying this test, the courts have asked whether the statement influenced the claimant's conduct to a material degree, and whether it played a real and substantial (though not necessarily decisive) part in inducing the claimant to act. The burden of proof of reliance is on the claimant.
>
> [emphasis added in bold italics; emphasis in bold in original]

(f) The inquiry as to the reasonableness of such reliance should be directed towards the specific representations being relied upon to found the cause of action. It is not a general inquiry into whether or not the representee undertook due diligence as to a transaction.

(g) The defendant has never raised a lack of reasonable reliance specifically in his pleadings. The defendant's pleadings on their face are limited to actual reliance.

419 Here, on the facts, it was submitted on behalf of the plaintiffs that it was plainly reasonable for the plaintiffs to rely upon the defendant's representations in consenting to the delisting (and subsequently in continuing not to rescind/withdraw the consent and/or terminate the BBCs in light of the various defaults committed by the Charterers/OML). In support of that submission, the plaintiffs relied upon various matters which we would summarise as follows:

(a) The representations had been made specifically for the purpose of inducing the plaintiffs to consent to the delisting of OML and the requested reduction in charter hire. These representations were conveyed in formal settings such as meetings between the parties or their representatives with a specific declared objective in mind, *ie*, the delisting of OML.

(b) The reasonableness of the plaintiffs' reliance on the representations is further buttressed by the fact that the representations (at least to the extent of the Financial Support, Timely Payment and Samling Support Representations) were incorporated into the terms of the First Letters of Support.

(c) On these facts alone, it is clear that the defendant must have known, and in fact intended, for the plaintiffs to rely upon the representations.

(d) The defendant's knowledge/intention is also reinforced by the nature of the representations, which consist of three overarching statements:

(i) That the defendant intended to take various steps to support the Charterers/OML financially and otherwise so as to ensure that they would continue as going concerns and fulfil their respective payment obligations to the Plaintiffs (see the Financial Support, Timely Payment, Capital Injection, and Funds Utilisation Representations). In so far as the representations relate to the defendant's *own* intention to take various steps to support the Charterers/OML so that they could fulfil their payment obligations towards the plaintiffs, this was something *solely* within the defendant's knowledge. It is difficult to understand how the defendant would have expected the plaintiffs to independently verify this aspect of the representations.

(ii) That the defendant had the means to take these steps (see the Timely Payment and Capital Injection Means Representations).

(iii) That the defendant had the ability to procure assistance from the Samling Group (see the Samling Support Representation).

(e) In so far as the defendant had represented that he had sufficient means to take the relevant steps:

(i) The defendant is a scion of the Yaw family and had himself been on the Forbes' rich list. The defendant was the

chairman, managing director and controlling shareholder of OML (a very substantial listed company which the plaintiffs had, following the conduct of due diligence, decided to do business with). All of these point to the fact that the defendant was plainly a wealthy individual.

(ii) The defendant, as an established businessman, would be expected to know his own financial means.

(iii) It is wholly unclear what steps the plaintiffs could have taken to independently verify this information. It would be wholly unreasonable and uncommercial to expect the plaintiffs to effectively audit the defendant's assets to ascertain his financial means.

(iv) In any event, the defendant would have known that the plaintiffs had not in fact taken steps to verify his representations: they had not approached him to ask for proof of his asset position at the time. This further reinforces the point that the defendant would have known that the plaintiffs would rely on his representations, and that he in fact intended for the plaintiffs to do so.

(v) In so far as the Samling Support Representation relates to the defendant's ability to procure financial assistance from the Samling Group for the Charterers/OML, it was well-known that the defendant is a scion of the Yaw family which owns the Samling Group. It was the defendant, and not the plaintiffs, who would be best placed to speak to the financial resources available to, and the willingness of, the Yaw family to bail OML out of the financial quagmire. It would be wholly unreasonable and

uncommercial to require the plaintiffs to have required someone else in the Yaw family to verify this statement by the defendant.

420 On the facts, it was submitted on behalf of the plaintiffs that there was plainly a breach by the defendant of his duty of care. In particular, it was submitted on behalf of the plaintiffs that the defendant had plainly acted negligently in making the representations regarding his financial means to make a "capital injection" of S$143m and/or ensure timely payments to the plaintiffs. Thus, it was submitted on behalf of the plaintiffs:

(a) As for the Timely Payment Representation, this would have required the defendant to understand the Charterers/OML's obligations in connection with the BBCs and the Charterers/OML's financial position (as compared with his personal asset position) but the defendant did not in fact have such an understanding. For example, in cross-examination, the defendant could not even state the months (much less the specific date) on which the charter hire instalments under the BBCs fell due:

> Q: So as far as your own personal knowledge is concerned, do you know, let's say for the Perseus charter party, when the charter hire fell due?
>
> A: **I don't monitor the specific date**, but my people do monitor the specific date.
>
> [emphasis added in bold]

In light of his own evidence, it is also questionable whether the defendant had in fact taken steps to properly assess the state of the Charterers'/OML's finances at the time when the Representations were being made to assess their correctness. Thus:

> Q: I will press on for a couple more minutes and then I will leave the point. Mr Yaw, I wasn't talking about you consulting the running or management accounts of the company on a specific date, I'm merely asking you before you agreed to this addendum to Perseus BBC, did you or did you not look at the management accounts or the running accounts of Otto Marine or the charterer to form a view as to its impending liquidity?
>
> A: **I don't -- I don't know.**
>
> [emphasis added in bold]

A prudent, reasonable businessman would have equipped himself with a working knowledge of the primary terms of the BBCs such as what charter hire payments fell due. Without any personal knowledge or involvement, how, it may rhetorically be asked, was the defendant able to represent to the plaintiffs that he would ensure that the Charterers/OML meet, *inter alia*, the most basic of financial obligations under the BBCs or the guarantees respectively? There was thus no reasonable basis on the facts for the defendant to make the Timely Payment and Delisting Means Representations to the plaintiffs.

(b) As for the Samling Support Representation, the defendant's own position is that he did not have the ability to require support from the Samling Group. Thus, he states in his affidavit of evidence-in-chief (at paragraph 66):

> … I disagree that the best endeavours obligations under the Letters of Support require me to procure financing or leveraging from my family and/or my family's businesses and/or the Samling Group. I cannot be liable for the independent financial decisions made by my family and/or their businesses on whether to support the Guarantor and/or Charterers, and which are contingent on factors outside my control.

Moreover, as it subsequently transpired (on the defendant's own evidence), he did not in fact obtain any support from the Samling Group towards to assist the Charterers/OML to perform their payment obligations to the plaintiffs.

(6) Damages

421 In summary, it was the plaintiffs' case that if the misrepresentations had not been made, they would have taken various recovery measures with the result that the plaintiffs would have:

(a) Terminated the BBCs and taken repossession of the vessels in May/June 2016 or after October 2016. The plaintiffs would have been entitled to terminate the BBCs on those dates because the Charterers' charter hire payments were in arrears during these periods.

(b) Prevailed upon the Charterers/OML/the defendant to pay the outstanding sums to them.

(c) Alternatively, if the Charterers/OML/the defendant failed to pay the outstanding sums to the plaintiffs, placed OML into liquidation by around May/June 2016 or after October 2016, with the result that they would have recovered from a larger pool of assets in the liquidation.

422 As acknowledged by counsel on behalf of the plaintiffs, with respect to (a) and (c) above, the date of the repossession of the vessels (whether May/June or after October 2016) would depend on the court's finding as to when the misrepresentations took place. Thus, it was submitted on behalf of the plaintiffs that if the court finds that the misrepresentations were first made during the March, April or June Meetings, any remedial steps that the plaintiffs avoided taking as a result would have been around May/June 2016. If, however, the court

finds that the misrepresentations were made during the October or December Meetings, then the remedial steps that the plaintiffs avoided taking as a result would have been after October 2016.

423 On this basis, the plaintiffs advanced the following alternative damages claims:

(a) Damages Case 1: Damages for the depreciation in the value of the vessels between 2016 to 2018 in the sum of US$57,382,608 (in the event that the misrepresentations were made by May 2016) and US$43,882,608 (in the event that the misrepresentations were made by October 2016).

(b) Damages Case 2: Damages in the sum of US$172,487,026.28 (May 2016) or US$169,080,372.51 (October 2016) on the basis that, if the misrepresentations had not been made, they would have prevailed on OML to pay them the outstanding sums in full.

(c) Damages Case 3: Alternatively to Damages Case 2, damages in the sum of US$32.25m, representing the difference between (a) the amount likely recoverable by the plaintiffs had they placed OML into liquidation in 2016, and (b) the amount likely recoverable by the plaintiffs under the present liquidation which was commenced in 2018.

424 As to these above figures, the plaintiffs relied, in particular, on the evidence of their experts, Mr Manning and one Mr James Frew. For present purposes, we would simply note that these figures were disputed by the defendant who relied, in particular, on the expert evidence of Mr Sutton and also a report dated October 2016 prepared by M3 Valuations Pte Ltd. The main focus of such disputes concerned in particular (a) the valuations to be attributed

to the vessels at various dates (which are of direct relevance to Damages Case 1); (b) the likelihood of OML being prevailed upon to pay the outstanding sums under the BBCs at various dates (which is of direct relevance to Damages Case 2); and (c) the likely recovery of any sums in any liquidation in 2016 or in the present liquidation (which is relevant to Damages Case 3).

Summary of the defendant's case

425 By way of defence, various points were raised by counsel on behalf of the defendant. In summary, the main points were as follows:

(a) While it was accepted that certain of the alleged representations had the potential to be actionable, this was not the case with regard to alleged statements of opinion or belief as they are not alleged statements of fact, and the plaintiffs have not pleaded that the defendant expressly or impliedly stated that he honestly held those opinions or beliefs.

(b) The alleged statements about the defendant using his personal resources and providing and procuring "support" are, in any event, too vague to be actionable. In this context, counsel on behalf of the defendant relied upon *Marme Inversiones 2007 SL v Natwest Markets plc and others* [2019] EWHC 366 (Comm) at [120]–[123].

(c) It was accepted that (a) a statement of fact may (or may not, depending on the circumstances) amount to a continuing representation, that is, a statement which is deemed to be repeated day by day until corrected; and (b) a continuing representation may be true when first made but if it ceases to be true to the knowledge of the maker, and he allows it to go uncorrected, he may commit a fraudulent misrepresentation if another person relies on a deemed repetition of the

(now falsified) statement. Nevertheless, in order to demonstrate that a continuing representation arising from a statement of present intention is false, it is necessary to prove that, when the maker *originally* made the alleged statement, he did not truly intend to do what he said he intended to do. In other words, it is not sufficient to prove that he *no longer* held that intention at a later date on which he is deemed to have repeated the statement. In this context, counsel on behalf of the defendant relied upon *WPP Group plc v Reichmann* [2000] All ER (D) 1409 at [63]–[64]; and *Tudor Grange Holdings Ltd v Citibank NA* [1992] Ch 53 at pp 67–68.

(d) Here, the plaintiffs bear the burden of proving that the defendant's alleged statements were untrue. As such, in relation to the claims based on alleged statements of present intention, the plaintiffs must prove that the defendant was deliberately lying. The plaintiffs have failed to discharge that burden.

(e) The affidavits of evidence-in-chief of the plaintiffs' witnesses had the hallmarks of being drafted by lawyers and were "self-serving"; that the latter was perhaps not surprising given that these witnesses appear to have been under pressure in respect of the increasing credit risk that was posed by the ongoing business relationship with OML; that there were certain inconsistencies or discrepancies between the evidence of such witnesses and the meeting notes produced in discovery by the plaintiffs; and that some notes were apparently missing.

(f) With regard to the specific representations alleged by the plaintiffs:

(i) As to the Capital Injection Representation, the defendant denied that there was any specific representation of an "injection" of S$143m. Rather, the contemporaneous evidence made it clear that the defendant only said that he intended to procure funding of S$143m in total, most of which was to be used to secure the delisting of OML and only part of which would be available as new working capital for the delisted company. That is what in fact happened. There is no evidence to support a wider representation that the intended to procure such further working capital as might be necessary to allow OML and/or the Charterers to continue as going concerns and to enable them to meet their respective liabilities under the Guarantee and the BBCs. It is inherently unlikely that the defendant would have stated that he intended to write what amounted to a blank cheque.

(ii) As to the Funds Utilisation Representation, this was also denied. In that context, it was submitted on behalf of the defendant that according to the plaintiffs' notes, there was no discussion of this at the 3 March meeting or 17 March meeting. Rather, the purpose of the funding was explained in general terms at the April meeting but, as appears from Mr Hong Xing's own notes, the plaintiffs appreciated that only the balance of funds (following utilisation of those funds which were necessary to secure the delisting) would be used to supplement the working capital of OML. There is no reference in those notes to the defendant procuring that the funding would be utilised towards the payment of the Deposit or future sums falling due to the plaintiffs. The defendant did state that he intended for some of the capital injection to be utilised towards the payment of charter

hire due to the plaintiffs – but only a figure of US$3m appears in the contemporaneous documents.

(iii) As to the Financial Support Representation, the contemporaneous documents do not support a finding that the defendant or Mr See represented that the defendant would continue to provide such financial support post delisting so as to enable OML and the Charterers to continue as going concerns and be able to perform their obligations under the BBCs and the guarantees. The only reference to the defendant providing funding in the notes of the April meeting is to the provision of about S$150m in the context of the delisting of OML. As acknowledged by his counsel in the course of final submissions, the defendant accepted in evidence that he said at the April meeting that he would support OML "*…as much as possible. I will support it…*"; that at the August meeting, he made a "*…commitment to support [OML] as much as possible from day one before IPO, since IPO…*"; and that in relation to the meeting on 15 December 2016, he probably made another statement that he would support OML. However, it was submitted on behalf of the defendant that these vague, general statements could not reasonably be understood to mean that the defendant was writing a blank cheque, particularly not to persons in the position of the plaintiffs' representatives who were well aware that the defendant had not provided a personal guarantee, that he was not willing to do so, and that legally binding obligations of that nature are not undertaken lightly, casually or without being formally reduced to writing.

(iv) As to the Delisting Means Representation, this was denied. In any event, it was submitted on behalf of the defendant that the alleged representation would not be actionable as it is a statement of opinion or belief.

(v) As to the Timely Payment Representation, this was denied.

(vi) As to the Samling Support Representation, this too was denied. In this context, the defendant's evidence was clear: he had not (and his advisors would not have) represented that the Samling Group intended to support the business of the Charterers/OML to enable them to continue as going concerns and to meet their liabilities under the BBCs/the guarantees. To the extent that the plaintiffs relied on certain emails, it was submitted on behalf of the defendant that these did not assist the plaintiffs; and that, in any event, any statements contained therein were too vague to be actionable, too vague to be falsified, and certainly too vague to be relied upon.

(g) As to falsity, it was submitted on behalf of the defendant that the plaintiffs bear the burden of proving that the alleged representations were untrue; that in so far as the alleged representations are statements of present intention, proof from the plaintiffs that the defendant lied is required; that the plaintiffs have failed to discharge that burden; and that, on the contrary, the evidence points in the opposite direction. In particular, it was submitted on behalf of the defendant that he did provide financial support to OML but that ultimately OML was overwhelmed by adverse market conditions.

(h) As to reliance, it was submitted on behalf of the defendant that the plaintiffs were well aware by March 2016 that the shipping market was "terrible" and that the business of OML and the Charterers was in a "parlous state"; that against that background, the plaintiffs wanted to support the delisting of OML because the alternative of terminating the BBCs was far less attractive; that this was the case is borne out by the fact that the plaintiffs decided as early as April 2016 to support the delisting; that accordingly, the plaintiffs' contention that they only supported the delisting in reliance on the representations ought to be rejected; and that even after delisting, the plaintiffs made a commercial decision not to terminate. Further, it was submitted on behalf of the defendant that no competently run bank makes significant lending decisions on a casual basis; that if it intended to act on assurances from a borrower or surety, it would have insisted on those assurances being reduced to (specific and detailed) written form, for the sake of certainty and legal enforceability; that it would have performed its own due diligence to verify what it was being told; that a brief perusal of the evidence in this case reveals that ICBCL was no exception to this principle; that it kept the banking and finance departments of law firms like Wikborg and Rajah & Tann busy drawing up complex and lengthy legal documentation in relation to its investment in OML – documentation which was designed to be clear and legally watertight; and that the suggestion that the plaintiffs blithely relied upon vague statements by the defendant and by officers of OML, which were at best vague and in most cases not even explicit but are said by implication, without getting anything in writing, and without doing thorough due diligence, lacks credibility. Thus, in summary, it was submitted on behalf of the defendant that the reality was that the plaintiffs did not rely

(and certainly did not reasonably rely) on any alleged representations, because that is not how banks do business.

(i) As to the quantum of damages, it was submitted on behalf of the defendant that in order for the plaintiffs to establish that they have suffered loss by reason of any actionable misrepresentation, they must establish that in the absence of the representations (a) they would have acted in the way they assert; and (b) that by so acting, they would have suffered no or less loss; and that the plaintiffs failed to surmount both hurdles.

Observations, analysis and conclusions

426 As to these submissions, our observations, analysis and conclusions are as follows.

What representations were made

427 We bear well in mind the defendant's general observations and criticisms with regard to the nature and reliability of the evidence of the plaintiffs' witnesses. We readily accept that, as submitted on behalf of the defendant, there was an increasing risk for the plaintiffs in the relevant period in regard to their exposure in relation to the instant financing. It is also fair to say that there were at least some discrepancies between some of the contemporaneous records and the evidence given by the plaintiffs' witnesses. However, we do not find the latter particularly surprising given that (a) the relevant events occurred some time ago and (b) such discrepancies were largely not of major significance.

428 Specifically, we note the submission made on behalf of the plaintiffs that it was not in fact open to the defendant to dispute the evidence of the plaintiffs'

witnesses on what representations were made because such evidence was never challenged in cross-examination. We accept that submission. In any event, it is our conclusion that the plaintiffs' witnesses were, in our view, patently honest witnesses who were doing their best to give truthful evidence with regard to their involvement in the relevant meetings and events. Moreover, it is important to note that (a) no other cogent evidence was tendered by or on behalf of the defendant to contradict or otherwise doubt the alleged representations as summarised above; and (b) despite some discrepancies, the accounts of the plaintiffs' witnesses were largely corroborated by the records of the meetings (including minutes, emails or internal reports).

429 Thus, subject to one important caveat, we accept the evidence of the plaintiffs' witnesses that the representations set out in the Table above were made during the meetings *as there stated*; and that subject further to the question of the authority of Mr See and Ms Chong (which we consider below) such representations were made by or on behalf of the defendant. For the avoidance of doubt, we should emphasise that our conclusion goes no further than what is stated in the Table above. The *significance/meaning* behind these representations, properly understood, is a separate question which we now turn to.

Issues with the Capital Injection, Delisting Means and Funds Utilisation Representations

430 The one important caveat we would make concerns what the plaintiffs have described as the Capital Injection Representation, the Delisting Means Representation and the Funds Utilisation Representation. As formulated, we do not accept that any such representations were made. We reach this conclusion for the following reasons.

431 Together, the Capital Injection Representation, Delisting Means Representation and Funds Utilisation Representation comprise three main and conjoined elements in connection with the delisting:

(a) that the defendant would make a capital injection of S$143m and/or such other sums may be necessary for the Charterers/OML to continue *as going concerns* and to meet the payment obligations under the BBCs/the guarantees;

(b) that the defendant would use the said capital injection to meet those obligations; and

(c) that the defendant had the means or would come into the means to make the said capital injection.

432 As a starting point, it must be emphasised that these could not have been *express* representations. There is simply no evidence of the defendant or his representatives using the language as reproduced by the plaintiffs in their allegations at [405(d)] to [405(f)] above. As one clear illustration of this, the evidence relied upon by the plaintiffs as set out in the Table above makes no mention of a figure of S$143m. Rather, the only part of the evidence relied upon by the plaintiffs in the Table above with regard to the specific injection of certain funds (notably not S$143m but "…*approximately SGD150 million*…") is in the context of the meeting on 15 April 2016, where the plaintiffs cite the evidence of Mr Yang Changkun. In paragraph 60 of Mr Yang Changkun's affidavit of evidence-in-chief, he asserts that it was at that meeting that the defendant had represented that "….*he would, in connection with the delisting process, personally inject approximately SGD150 million into OML. These sums would be used to, inter alia, provide working capital for OML and for payment of sums due to the Plaintiffs under the BBCs…*"

433 In which case, the plaintiffs' case must be that the Capital Injection Representation, the Delisting Means Representation and the Funds Utilisation Representation were *implied representations* based on what the defendant actually said on the various occasions, *ie*, what the plaintiffs claimed to have understood from the defendant. In this regard, it is important to first understand the true scope and effect of these alleged representations:

(a) The Capital Injection Representation and the Funds Utilisation Representation concern what the defendant said he would do. In other words, these representations concern the defendant's *intention or state of mind*. The allegation in relation to the Capital Injection Representation and the Funds Utilisation Representation is that the defendant represented that upon or subsequent to delisting, the defendant would make a capital injection of S$143m or *such other sums* that would enable the Charterers/OML *to continue as going concerns* and meet the payment obligations under the BBCs/the guarantees. In other words, the plaintiffs' assertion is that they did not understand the defendant's representation to be referring to a one-off capital injection. A one-off capital injection upon or shortly after delisting cannot ensure that the companies continue as going concerns and meet the payment obligations over the life of the BBCs. The capital requirements for that outcome to be achieved could not be accurately assessed upon delisting or shortly thereafter as such assessment would depend on how the operating environment evolved.

(b) The Delisting Means Representation relates to whether the defendant believed that he had the means to make the capital injection – whether S$143m or S$150m. While this appears to be based on a state of mind, it actually turns on whether the defendant did make the relevant

capital injection. If he did, it would show that he had the right state of mind, *ie*, he would have proven that he did have the relevant means.

The plaintiffs are therefore making a broader case: that the defendant, in effect, represented that upon or subsequent to delisting he intended to make capital injection(s) to keep the companies afloat and enable payments to be made over the life of the BBCs. In other words, this was a *continuing obligation* to make capital injections.

434 However, we do not consider that the evidence supports such an enlarged promise. We deal first with the Capital Injection Representation and the Funds Utilisation Representation.

(a) In truth, this aspect is really a case based on the Financial Support Representation and the Samling Support Representation *viz* that the defendant intended to: (a) use his personal wealth, and (b) procure the Samling Group to support the Charterers/OML to ensure that they remained as going concerns and met their payment obligations under the BBCs. In so far as any capital injection was concerned, the evidence shows that what was actually said was that the defendant would inject a sum of S$150m or so *for the purpose of the privatisation of OML.* The conversation here was only with regard to a *one-off injection*; it did not carry with it the broader implications the plaintiffs allege. In other words, there was no commitment by the defendant to provide *long-term continued funding* to keep the Charterers/OML as going concerns.

(b) It was also clear to all involved that such an injection was not solely for working capital. The plaintiffs understood that the monies would be used for two principal purposes – (a) delisting obligations, *ie*, buying out minority interests and retiring bonds; and (b) working capital.

We have already expressed our views in this regard in the context of the Letters of Support. In any event, those views remain equally relevant in the present context and bear repetition:

(i) Although Mr Hong Xing's notes of the 15 April meeting refer to the defendant providing about S$150m, it was clear even at this stage that this was not intended solely to provide working capital. Mr Hong Xing's notes of this meeting explain as follows:

> As understood, currently Mr Yaw directly and indirectly holds 62% stake, and the market value of Otto Marine is about SGD40 million. Mr Yaw plans to provide about SGD150 million, of which **SGD20-30 million will be used to repurchase the shares, and SGD70 million will be used to repay the debentures maturing in August, and the balance will be used to supplement the working capital of the company**.
>
> [emphasis added in bold]

(ii) When ICBCL's Shipping Finance Department approved the delisting of OML on 21 April 2016, it noted that "substantial shareholder will provide a total of about SGD 150m *for the privatisation* which will mainly be the own fund of the substantial shareholder." [emphasis added]

(iii) In the report of the August 2016 meeting (*ie*, some two months after OML had announced plans to delist) it was noted that the main use of the "SGD 140m made available by the substantial shareholder [was] *for the privatisation.*" [emphasis added].

(iv) It is clear that for OML to delist, it had to retire bonds and buy-out minority shareholders which would inevitably

deplete the sum of S$143m that the defendant had raised for privatisation. ICBCL knew this.

(v) Notably, post delisting, when there was a failure to pay outstanding charter hire and the Deposit, ICBCL did not allege that there was misrepresentation by the defendant by reason of not making a capital injection of S$143m into OML.

(c) Thus, the plaintiffs were fully aware that there would *not* be a capital injection of around S$150m (or any other particular sum) upon delisting for *purely working capital purposes*. What was said and understood was that there would be a one-off S$150m capital injection which would be made available *for multiple purposes associated with the privatisation*. There was *no* promise that the defendant would pump in such sums as was necessary to ensure that the Charterers/OML remained afloat and were able to meet their payment obligations *over the life of the BBCs*. That is something contained in the Letters of Support – in particular, clause 3. Also, we do not consider that there was any representation still less any promise that the capital injection or what might be left of it, would be used to pay the Deposit or the charter hire, etc; properly understood, this actually pertains to the Funds Utilisation Representation. This is in fact captured – and regulated – by clause 2(a) of the Letters of Support.

435 As for the Delisting Means Representation, in so far as the plaintiffs' allegation, properly understood (as explained above at [433]), is that there was a representation by the defendant that he had the ***means*** *to support capital injection(s) for the* ***continuing purpose*** *of keeping the Charterers/OML as* ***going concerns***, no such representation was made. This follows from our

conclusion that the defendant did not represent that he would *make* a capital injection of such an expansive nature (let alone that he had the means to do so).

436 Therefore, as formulated, we do not accept that any representation was made to the effect that the defendant would, or even intended to, inject into OML approximately S$150m (or indeed any specific sum) as working capital only or indeed as additional working capital, for the purpose of keeping the Charterers/OML as going concerns. In our judgment, it is plain from the totality of the evidence that no such representation was, or was intended to be, made by or on behalf of the defendant, whether expressly or impliedly.

437 For all these reasons and for the avoidance of doubt, we accept that the representations set out in the Table above (specifically in the right column) were made by or on behalf of the defendant save that we do not accept that he made any express or implied representation that he would inject any specific sum (whether approximately S$150m, S$143m or any lesser specific sum) as *working capital* into OML nor that the plaintiffs understood that any such representation had been made by or on behalf of the defendant.

Authority

438 It is important to note that the defendant's case was to deny the authority of Mr See and Ms Chong to make representations on his behalf to the plaintiffs. We do not accept that submission for the reasons advanced on behalf of the plaintiffs which we would summarise as follows:

(a) In cross-examination, the defendant accepted (or at least did not deny) that both these individuals were his representatives.

(b) Mr See and Ms Chong were respectively the CEO and CFO of OML, which was at all material times effectively under the control of the defendant (as the controlling shareholder and Executive Chairman of OML). Mr See and Ms Chong clearly played a liaison or intermediary role between the defendant and the plaintiffs/ICBCL. In particular, most if not all email correspondence to the plaintiffs communicating the defendant's position was sent by either Mr See or Ms Chong. For example, email exchanges on 24 May 2016 between Mr See and the defendant show Mr See to be taking instructions from the defendant as to how to respond to the plaintiffs' repeated chasers for payment of outstanding charter hire. This chain of emails ends with Mr See's email (timed at 10.33pm on the same day) stating that he would convey the defendant's position to Mr Hong Xing: "*Noted on payment of usd1m to ICBCL this week. I will call Jacky [ie, Mr Hong Xing] tomorrow morning.*" Upon being questioned on this exchange of emails, the defendant confirmed that Mr See was authorised to act as his representative *vis-à-vis* the plaintiffs:

> Q: [Referring to Michael See's email above] Mr Yaw, so would I be right, therefore, to say that since you don't communicate by email with ICBC Leasing, in fact, **Michael See was the person, the go-between, between you on one hand and ICBC Leasing on the other. Is that correct?**
>
> A: Sometimes.
>
> Q: Other times, Mr Yaw?
>
> A: I think Michael See has many communication [*sic*] with them.
>
> [emphasis added in bold]

(c) And similarly, in relation to a separate series of questions:

> Q: *So Mr KC Ooi, like Michael See,* would be a go-between, an intermediary between you on one

> hand and ICBC Leasing on the other. Would you agree with that?
>
> A: I don't know whether there's a go-between, okay, but they both work for the company.
>
> Q: Yes. *And they pass messages on from ICBC to you and vice versa, is that correct?*
>
> A: ***This case, yes***.
>
> Q: *Generally*?
>
> A: Again, I don't know, *I don't read all the communication with ICBC, okay, so if they think it's important for me to know, then in this case involve me, then they send it to me*."
>
> [emphasis added in italics; additional emphasis in bold italics]

(d) In other words, whenever the defendant wished to communicate with the plaintiffs, he would do so through Mr See. This clearly establishes that Mr See was clothed with authority (or at least apparent authority, depending on the specific occasion) by the defendant to make representations on his behalf to the plaintiffs.

(e) The defendant confirmed in evidence that he had delegated the task of discussing the terms of the First Letters of Support, a critical aspect of the plaintiffs' approval of OML's delisting, to Mr See.

(f) The defendant has also confirmed that he was aware of Mr See's attendance at the 3 March 2016 meeting in Beijing to discuss the BBCs (though not the precise contents of the discussions). There is no reason to believe that the defendant was not similarly aware of the other meetings which transpired between Mr See/Ms Chong and the plaintiffs on other occasions. The defendant has not taken such a position either in his pleadings or in his evidence. Further, in our judgment, it is

inconceivable that Mr See/Ms Chong would not have briefed the defendant fully given the stakes involved.

(g) It is also telling that, in so far as the defendant purported to challenge Mr See's and Ms Chong's authority, he did not call either of them to give evidence on their alleged lack of authority. This is particularly telling in the case of Ms Chong, who eventually did take the stand on Day 9 of the trial.

(h) In any event, the representations allegedly made by Mr See and Ms Chong at meetings/discussions not personally attended by the defendant were entirely consistent and, in most cases, a mere continuation of statements made either by the defendant himself and/or his representatives at meetings which he personally attended.

439 For all these reasons, we accept that to the extent that representations were made at the meetings as summarised in the Table above, they were made either by the defendant himself or on his behalf.

440 It is then necessary to consider the various different bases upon which the plaintiffs advance their misrepresentation claims and, in particular, (a) what was the meaning of each of the abovementioned representations, properly understood in their contexts, and whether they bore the meaning of any of the six Alleged Representations as argued by the plaintiffs; (b) whether such representations, correctly understood, were false and, if so, whether they were made fraudulently; (c) whether they were relied upon by the plaintiffs and, if so, whether such reliance was reasonable; and (d) whether the plaintiffs have suffered any and, if so what, damage.

441 So far as relevant, we propose to deal with these issues with regard to the various representations set out in the Table above and in the emails relied upon by the plaintiffs in chronological sequence.

The March/April representations

442 It is convenient to take these representations together.

443 We have no doubt that certain parts of these representations would *prima facie* amount to potential actionable misrepresentations in so far as these were sufficiently unambiguous statements of fact – for example, the representation that OML had suffered huge losses in 2015 and that the defendant and his family collectively owned and had an interest in approximately 60% of the shares in OML. These quite clearly satisfy the first requirement that there must be a clear statement of a certain fact made by the misrepresentor (see [403] above). However, we are unpersuaded that some of the representations carried the meaning/significance that the plaintiffs attach to them. In our view, they were *too vague* to have that effect. At best, these were in effect "snippets" of conversations made in the course of business meetings where the defendant either by himself or through his representatives was seeking indulgences from the plaintiffs with a view to arriving at a commercial solution. In context, as a matter of business reality, we do not consider that such snippets expressed in such circumstances are properly characterised as potential actionable misrepresentations.

444 Take, for example, the representation that the defendant would, in connection with the delisting, personally inject approximately S$150m and that "*…these sums would be used to, inter alia, provide working capital for OML and for payment of sums due to the plaintiffs under the BBCs…*" We accept that this representation is potentially important, but what exactly does it mean? We

have already expressed our views on this above (see [434]–[435] above). More specifically, what does *"approximately"* S$150m mean? What is the effect of the words "*inter alia*"? What does "*working capital*" mean? What part of what sum "would be used" for "*working capital*"? And what part of what other sum "would be used" for "payment of sums due" under the BBCs? In our view, this representation is hopelessly vague so as to not amount to a potential actionable representation in the context of the March meetings. Similar objections can be made to the other representations referred to in the March/April meetings.

(1) Falsity

445 We are unpersuaded that several of the representations were false either at the time that they were made or (to the extent that they were continuing representations) at any material time thereafter, still less that they were made fraudulently. Bearing in mind that the burden of proving falsity (and any representation made fraudulently) lies on the plaintiffs and taking each of the alleged representations in the March/April meetings in turn:

(a) It seems uncontroversial that OML had suffered huge losses in 2015 due to the continuous decline in oil prices but was able to remain solvent by relying heavily on the defendant's personal financial support.

(b) Quite apart from the fact that the stated representation that the defendant "*…remained committed to the survival of the OML Group…*" has not been specifically pleaded, it is so vague as to be virtually meaningless. In any event, in broad terms, we are unpersuaded that this statement was false at the time it was made or at any material time thereafter in any relevant sense, still less that such a representation was made fraudulently.

(c) The representation that the defendant "…*would* ***take all steps necessary, including the injection of funds in his personal capacity****, to ensure the solvency of the OML Group… Delisting presented a solution to this dilemma which would allow the Defendant to inject further personal funds into the company…*" is, again, extraordinarily vague, and is of no assistance to the plaintiffs for several reasons:

(i) The representation reproduced above (taken from the plaintiffs' submissions) is somewhat different from the equivalent pleaded representation in the Statement of Claim, *ie*, "[t]he Defendant wished to delist the Guarantor so that the Defendant and his family members could continue to provide financial support to the Guarantor and the Charterer." The differences highlight the weakness in the plaintiffs' case in this respect: taking the pleaded case, it is hard to see how such a representation could possibly have been false, still less that it was made fraudulently. The defendant's desire to delist OML, and his purposes for so desiring, were not disputed.

(ii) In any event, addressing the plaintiffs' case as per its submissions, what does "all steps necessary" mean? The rest of these words would, on the plaintiffs' case, seem to prove too much. These words could not have been intended, or reasonably understood, to be an open-ended legally binding representation by the defendant that he would personally ensure the continued solvency of the entirety of the OM Group extending beyond the term of the BBCs into the far distant future. And, if not that, what do these words mean and what were they reasonably understood to mean? To a large extent, these observations reinforce our view that these words are too vague to be understood as the plaintiffs

claim, *ie*, as a promise to make ongoing capital injections to keep the Charterers/OML afloat at all costs by the defendant (who was, of course, not at this particular meeting in March when this representation was made) for reasons already stated above.

(iii) In our view, the most that these words might mean is that the defendant would use reasonable endeavours to support the OM Group.

We are thus unpersuaded that such a representation was false at the time it was made or at any material time thereafter in any relevant sense, still less that such a representation was made fraudulently.

(d) It seems uncontroversial that "*…the defendant and his family collectively owned and had an interest in approximately 60% of the shares in OML and had continued to provide financial support to OML on a number of occasions*". In any event, we are unpersuaded that such a statement was false, still less made fraudulently.

(e) Similarly, it seems uncontroversial that "…*The delisting would allow decisions to be taken quickly as well as allow the Defendant and his family to provide further financial support to the OML Group…*" In any event, we are unpersuaded that such statement was false at the time it was made or at any material time thereafter in any relevant sense still less that such a representation was made fraudulently.

(f) In the same vein, the statement that "*[t]he privatisation would remove the limitation to [the defendant's] ability to personally support the company*" is quite clearly true.

(g) Finally, the already thoroughly-discussed statement that the defendant would "*personally inject approximately SGD150 million into OML*" may, taken strictly on its face, appear false given that (as stated earlier) there is no clear evidence that the defendant did make such a capital injection (see [222(a)] and the conclusion of [222] above, as well as [434(c)] above). That said, what is pertinent is that the primary objective of the said capital injection (*ie*, facilitating OML's privatisation, and *not* solely for use as working capital) was successfully procured, suggesting that the falsity was for all intents and purposes an inconsequential one. In other words (though not strictly an issue of falsity), there was simply no damage.

(2) Reliance

446 In any event, we are also unpersuaded that the plaintiffs did in fact rely upon any of the March/April representations; or, if they did, that it was or would have been reasonable for the plaintiffs to do so.

447 In the normal course, any bank or financial institution in the position of the plaintiffs would not or, at the least, would not reasonably be expected to rely on vague statements made by or on behalf of their borrower in the course of meetings forming part of commercial negotiations intended to seek a solution to the type of difficult financial circumstances which obtained during the course of 2016 – still less statements made by some individual purportedly on behalf of another individual in the position of the defendant who was (as in the case of at least some of the representations) absent from such meetings. Such banks or financial institutions would want and generally only act upon documentation which was, as submitted on behalf of the defendant, designed to be clear and legally watertight. Thus, we accept the submission on behalf of the defendant

that the suggestion that the plaintiffs blithely relied upon statements by the defendant and by officers of OML, which were at best vague and in most cases not even explicit but were discernable only by implication, without getting anything in writing, and without doing thorough due diligence, lacks credibility and should be rejected. That is not how banks and other financial institutions do business. Rather than rely on such vague statements, any financial institution in the position of the plaintiffs would insist on some form of written agreement – and that is what happened: the main thrust of the March/April representations was, in effect, captured in clause 3 of the Letters of Support which was a heavily negotiated document.

448 In truth, the position in April 2016, *ie*, after the March representations were made, was that, as Mr Yang Changkun accepted in cross-examination, OML was in "*dire straits*"; that the plaintiffs would have suffered "immediate losses" if they had not agreed to the delisting; and that if OML had gone into liquidation, they would have been worse off. That is why they supported the delisting of OML. As part of that exercise, it is plain – and entirely understandable – that the plaintiffs were not prepared or willing to rely simply on the representations that had been made. Instead of relying solely upon the representations, they insisted upon and ultimately obtained the Letters of Support. In that connection, it is important to note that although the Letters of Support were not actually signed until much later, it is the plaintiffs' own case that, as referred to above, a "*contractual agreement*" was reached in or around May 2016 between the plaintiffs and the defendant whereby the plaintiffs consented to OML's delisting (through the signing of the July 2016 Addenda), subject *inter alia* to the defendant's execution and delivery of the First Letters of Support to the plaintiffs. In our view, the plaintiffs' insistence on the provision of the First Letters of Support is inconsistent with or at least undermines their case that they relied upon the representations.

449 In this context, it is important to bear in mind that the plaintiffs' case on reliance as summarised above is that they (a) consented to the delisting and, on this basis, they also agreed to execute the July 2016 Addenda to amend the BBCs; (b) forbore from rescinding and/or withdrawing their consent to the delisting following the execution of the July 2016 Addenda; and (c) forbore from terminating the BBCs after the delisting or shortly thereafter in light of the Charterers'/OML's subsequent defaults. In our view, this highlights the fundamental flaws in the plaintiffs' case on reliance: if any one or more of the representations made in the March and April meetings were so important, it beggars belief that they were not expressly incorporated in the Letters of Support. Rather, the plaintiffs were content to proceed as they did, *ie*, obtaining the defendant's agreement to the Letters of Support as a "compromise" after they had unsuccessfully sought a guarantee from the defendant.

450 In our view, the overwhelming likelihood is that the position would have been no different even if the representations had not been made. At the risk of repetition, as accepted by Mr Yang Changkun, if the company had gone into liquidation, the plaintiffs would have been worse off. In other words, the plaintiffs commercially assessed that they would be better off supporting a restructuring and waiting out rather than terminating the BBCs and seeking recovery against the Charterers/the Guarantors through a liquidation process in (say) April or May 2016. Needless to say, the plaintiffs did not know in (say) May 2016 and thereafter what the position would be in 2018 and they made their own assessment that it would be better to wait it out.

451 For all these reasons, it is our conclusion that the plaintiffs did not rely or did not reasonably rely upon the March and April representations. Rather, they decided shortly thereafter to agree to the delisting on condition that the

defendant provided the Letters of Support; and at all material times thereafter, the plaintiffs relied upon the express terms of the Letters of Support.

June representations

452 The representations at the meeting on 9 June 2016 fall into three parts. It is convenient to deal with each part in turn:

(a) The first part seems uncontroversial, *ie*, "…During the meeting, the defendant himself confirmed the proposed restructuring was progressing as expected. The defendant and Mr See outlined the proposed timelines for the delisting (targeting October 2016)…" This can by no means be an actionable misrepresentation.

(b) The second part ("…the defendant himself then further confirmed that he had no problems funding the restructuring exercise…") would also seem uncontroversial – although it is worth noting that such a representation was not specifically pleaded. Certainly, at the time such a representation was made, it appears to have been true. In any event, we are unpersuaded that such statement was false at the time it was made or at any material time thereafter in any relevant sense still less that such a representation was made fraudulently. Moreover, the delisting did in fact take place subsequently and there were no problems funding that exercise.

(c) The third part ("…Additionally, [the defendant] again emphasised his willingness to invest his personal wealth and other resources (including procuring the backing of his family and the Samling Group) to support the OML Group.…") is much more controversial, and warrants discussion. First, it is important to note that

> this representation was not specifically pleaded. Be that as it may, the defendant gave evidence that readily confirmed that he had stated that he would support OML; but, once again, these words are, in our view, exceptionally vague. They beg so many questions as to be virtually meaningless. But even if that is wrong, the words are no more than an expression of a "willingness" at that stage to do what is there stated and, in our view, they cannot have been intended or reasonably understood to constitute an open-ended, legally binding representation by the defendant to invest his personal wealth and other resources to support the OM Group extending for the term of the BBCs. It is critical to note that this representation is based on the defendant's state of mind, *ie*, it is, at best, a statement of what the defendant intended or was "willing" to do; and we are unpersuaded that such statement as to his intention was false at the time it was made or at any material time thereafter in any relevant sense still less that such a representation was made fraudulently.

453 As set out above, the plaintiffs also rely on an email dated 12 June 2016 (referring to the earlier meeting), in which Mr See reiterated to the plaintiff that "*[f]ollowing the delisting, there will be injection of funds by [the defendant]*" and that "*we will make the necessary payments that fall due*". It is important to bear in mind that this email comes from Mr See (who did not give evidence) and merely seeks to record what was apparently said in the earlier meeting. As such, we do not consider that it constitutes independent admissible evidence as to what may or may not have been said by or on behalf of the defendant personally at that earlier meeting, still less a potential actionable representation by the defendant himself. In any event, such a statement is, in our view, too vague to amount to a promise by the defendant to dedicate his personal resources to keep the Charterers/OML afloat for an unindicated length of time (see similarly our analysis above at [434(c)]). With this in mind, we are

unpersuaded that it was false at the time it was made or at any material time thereafter in any relevant sense, still less that such a representation was made fraudulently.

454 In any event, we do not consider that the plaintiffs relied or reasonably relied upon these June representations for reasons similar to those already stated in relation to the March/April representations. By that stage, the defendant had been requested – but refused – to provide any personal guarantee and the intention to delist had already been announced a few days before, *ie*, on 8 June 2016. On the plaintiffs' own case, in place of any such personal guarantee, there was already a "*contractual agreement*" in May 2016 that the defendant would (a) provide what ultimately became the First Letters of Support, drafts of which had already been provided to the defendant some five weeks earlier (on 5 May 2016), and (b) execute the July 2016 Addendum. Plainly, the plaintiffs had decided to rely, and continued at all material times to rely, on what became the First Letters of Support rather than on any extra-contractual representations. If the plaintiffs had wanted to rely upon the latter, they could (and in our view should) have incorporated them in some form or other by way of an extension to, or amendment of the First Letters of Support, which the plaintiffs plainly regarded as constituting the agreements between them and the defendant and which were, in effect, intended to govern their relationship going forward. Moreover, for the avoidance of doubt, even if these June representations had been not been made, we are sure that the plaintiffs would simply have proceeded in the same way that they did and would not have acted any differently.

October representations

455 The representations at the meeting on 12 October 2016 (*ie*, "…Good news from the meeting yesterday was that Samling Group has reaffirmed their

support for [OML] and will inject fresh working capital into [OML]") are, again, so vague as to be virtually meaningless when read in context, and could not have been intended or reasonably understood to amount to a promise by the defendant to provide indefinite amounts of capital to ensure the Charterers'/the Guarantors' survival (the email dated 12 October 2016 also relied upon by the plaintiffs is to identical effect). Moreover, on its face, it purports to be a "reaffirmation" made not by or on behalf of the defendant personally but by or on behalf of the Samling Group. In our judgment, it is quite impossible to suggest that such a statement was intended or reasonably understood to constitute a representation that the defendant *himself* would procure "support" or procure "fresh working capital" from the Samling Group. In any event, the question would remain as to what and how much "support" or "fresh working capital" is being referred to. Once again, the lack of any specificity renders such a statement (even if understood as a representation that the defendant would *personally* procure such funding) so vague as to be virtually meaningless. At best, this statement might, at a very basic level, constitute a representation by the defendant confirming the fact that the Samling Group had "reaffirmed" their support for OML and their intention to inject fresh working capital into OML. Put another way, while we accept that the Samling Support Representation, as argued by the plaintiffs, was one reasonable way of construing the statements made by the defendant and/or his representatives, the *extent* of the support promised does not go quite as far as the plaintiffs allege.

456 In any event, we do not consider that the plaintiffs relied or reasonably relied upon these October representations. By this time, the delisting of OML had of course already taken place, *ie*, on 8 October 2016; the parties had entered into the July 2016 Addenda; and the defendant had agreed (or at least the plaintiffs thought that the defendant had agreed) to provide the First Letters of Support. As previously noted earlier in this Judgment, it is right to say that the

defendant had not executed or delivered the First Letters of Support to the plaintiffs and that various issues were raised by Mr Lun on behalf of the defendant, particularly with regard to these documents in late 2016 (see *inter alia* [110]–[113] above). However, again as noted above, the plaintiffs continued to press for such First Letters of Support. This is consistent with what we have previously stated: that the plaintiffs plainly regarded, and at all material times continued to regard, these First Letters of Support as constituting the agreements between the plaintiffs and the defendant and that they were, in effect, intended to govern their relationship going forward. For the avoidance of doubt, we entirely accept that it is theoretically possible that a party in a contractual relationship with another party may make extra-contractual representations which, if relied upon, may give rise to separate extra-contractual liability in certain circumstances. However, on the facts, we do not consider that that is the position in the present case. We maintain our conclusion that even if these representations had not been made, the plaintiffs would not have acted differently.

December representations

457 As stated above, the plaintiffs rely on email exchanges on 5 and 7 December 2016. As pleaded, the allegation with regard to this exchange is as follows:

> Ms Chong sent an email dated 5 December 2016 requesting the 1st Plaintiff to consider *inter alia* allowing the Guarantor to "*re-look*" into the payment of the Deposit. In its reply email dated 7 December 2016, the 1st Plaintiff rejected this request, referring to the Defendant's undertakings and/or representations above. In particular, the 1st Plaintiff's email states that:
>
> "*The main reason [the 1st Plaintiff] accepted the delisting of [the Guarantor] is [that the Defendant] promised to inject SGD 143 [million] capital, and we have been promised the USD[7 million] deposit will be included in the capital injection*".

> [emphasis in original]

The foregoing statement was not contradicted at any material time by the defendant, Ms Chong or Mr See. However, this exchange does not contain any further discrete representations and, so far as relevant, we have already addressed the points which they raise.

458 In addition, the plaintiffs rely on what are said to be certain representations made at a meeting on 15 December 2016:

> [The plaintiffs' representatives] demanded for the defendant and Mr See to:-
>
> […]
>
> [p]rovide long-term solutions such as asset replacement/refinancing of the debts of [OML] by using other assets and properties owned by the defendant personally, whether in Malaysia or otherwise.
>
> The defendant agreed to the above and assured [the plaintiffs' representatives] that he would continue to support [the OM Group]. …

Once again, such statements have not been pleaded and, in any event, are in our view too vague to amount to any meaningful promise by the defendant to provide indeterminate sums to ensure the survival of the Charterers/the Guarantors. It must be borne in mind that throughout this period, the plaintiffs were continuously pressing for the delivery up of executed copies of the First Letters of Support and the performance of what the plaintiffs considered were the defendant's obligations thereunder. These statements during that meeting were made in that context. Similar to what we stated above, we do not regard that these statements made in that meeting were intended to or were reasonably understood as constituting potential actionable representations separate from or over and above the obligations contained in the First Letters of Support. Nor do we in any case consider that the defendant's "agreement" to provide the

indicated long-term solutions or the "assurance" given of his continued support for the OM Group were false at the time or at any material time thereafter in any relevant sense, still less that such "agreement" or "assurance" was made fraudulently.

459 Further, we do not consider that the plaintiffs relied or reasonably relied upon these December representations. Their focus was on the Letters of Support; and that is why they continued to press for delivery up of executed copies. In our judgment, such remedy as the plaintiffs may have lies squarely in breach of the obligations contained in the Letters of Support. Our conclusions in this regard are set out in the earlier part of this Judgment.

460 For all these reasons, we would reject the plaintiffs' claims for misrepresentation.

Damages

461 We consider that there were numerous major difficulties with regard to the quantum of damages claimed by the plaintiffs. However, given our conclusions as stated above, it is unnecessary to say anything more on this topic.

Claim 3: Breach of collateral undertaking(s)

462 In light of what we have already said with regard to the plaintiffs' claim for misrepresentation, it is our conclusion that the plaintiffs' claim for damages for breach of one or more collateral undertakings is quite hopeless. At no stage was there any agreement between the plaintiffs and the defendant giving rise to any binding undertaking on the part of the defendant save on the terms of the Letters of Support. We accordingly reject the plaintiffs' claim in this regard.

Conclusion

463 We find the defendant liable for breaches of the Letters of Support to the extent stated earlier in this Judgment, and make the following orders:

(a) Judgment for the plaintiffs against the defendant in the sum of US$32,869,114, split between the plaintiffs as follows:

(i) The sum of US$9,825,000 for the first plaintiff;

(ii) The sum of US$2,365,000 for the second plaintiff;

(iii) The sum of US$6,679,114 for the third plaintiff; and

(iv) The remaining sum of US$14m, representing the value of the Bintulu Hotel mortgage, is to be split between the plaintiffs in such proportion as may be agreed by the parties. If the parties are unable to agree on this issue, they are to file submissions within 14 days from the date of this Judgment, limited to five pages each.

(b) The Judgment sum is to be paid with interest. Parties are to file their submissions on the issue of interest, addressing specifically the interest payable under the BBCs pursuant to the default interest rate, as well as the interest payable on the Judgment sum itself. Parties are to file these submissions within 14 days from the date of this Judgment, limited to 15 pages each inclusive of any relevant annexes.

(c) The plaintiffs' remaining claims in misrepresentation and for the defendant's alleged breaches of collateral undertaking(s) are dismissed.

464 We will hear the parties on costs. Parties are to file their submissions on costs within 14 days from the date of this Judgment. These submissions are to

be limited to 25 pages each, inclusive of any relevant annexes. They are to be filed together with the aforementioned submissions on interest payable and, if applicable, submissions on the issue of how the sum of US$14m is to be split between the plaintiffs.

Kannan Ramesh Judge	Patricia Bergin International Judge	Sir Henry Bernard Eder International Judge

Toh Kian Sing *SC*, Ting Yong Hong, Davis Tan Yong Chuan, Lau Chuan Ying, Rebekah, Wang Yufei, Yu Qianqian, Bhieman Anandakumar (Rajah & Tann Singapore LLP) for the plaintiffs;
Clarence Lun Yaodong, Tan Yingxian, Selwyn, Giam Zhen Kai, Lim Jia Ying, Alicia Puah, Samuel Lim Jie Bin, Lin Yu Mei, Leng Ting Kun, Ammani Mathivanan (Foxwood LLC) for the defendant.

Annex A

A.1 Annex A has been referred to at [199] of this Judgment. It contains a table that was appended to the plaintiffs' factual closing submissions. In this table, the plaintiffs detail what, according to them, were the funds and assets available to the defendant which could have been used by him in satisfaction of his best endeavours' obligations.

A.2 The said table is reproduced on the following page.

		2016		2017				2018			
		Aug-16	Nov-16	Feb-17	May-17	Aug-17	Nov-17	Feb-18	May-18	Aug-18	Nov-18
[A]	**Charter Hire Amounts**										
(i)	Hire Due (USD)[1]	3,053,480.00	3,053,480.00	2,953,910.00	3,053,480.00	3,652,400.00	3,652,400.00	3,533,300.00[2, 3]	6,196,200.00	6,196,200.00	6,196,200.00
(ii)	Outstanding Amount (USD)	-	238,185.20	2,492,292.72	3,053,480.00	3,652,400.00	3,652,400.00	3,533,300.00	6,196,200.00	6,196,200.00	6,196,200.00
[B]	**Bank Balances**										
(i)	**Closing** balance for the month (USD)	7,336,101.46	5,218,571.57	5,100,211.32	5,143,623.37	5,095,099.61	4,473,473.49	4,538,633.54	3,885,062.40	3,858,445.26	3,819,886.38
(ii)	**Maximum** balance for the month (USD)	12,455,330.05	8,012,944.43	5,727,612.40	5,533,990.00	7,887,119.89	6,046,876.69	5,487,540.81	4,471,479.01	4,108,557.84	3,838,796.06
[C]	**Shares of publicly listed companies - Valuation (unless otherwise stated)**										
	(Companies: Weyland Tech Inc. (fomerly known as Sinobiomed Inc.), New Age Exploration, Sumatra Copper & Gold PLC, Sihayo Gold Ltd., Intrepid Mines Limited, and Perjawa Holdings Bhd.)										
(i)	Plaintiffs' Expert's valuation	USD 3,000,000.00 to USD 4,700,000.00 (excluding Intrepid Mines Limited & Perjawa Holdings Bhd.)									
(ii)	Defendant's Expert's valuation	USD 4,450,000.00		USD 4,320,000.00				See 2017			
[D]	**Shares in privately held companies - Valuation (unless otherwise stated)**										
(i)	Perdana ParkCity Sdn Bhd (7.87%)	MYR 16,000,000 (in dividends) (Approx. USD 3,865,600)		USD 1,888,000 (in dividends)				USD 1,888,000 (in dividends)			
		Lee Manning: Shares can be pledged to 5 to 10 times of historical dividend amount! (2-BAEIC, p. 243, [62])									
(ii)	Yaw Holding Sdn Bhd (4.51%)	Minimum value of USD 24,130,000.00 (being an approx. equivalent of MYR 100 million)									
(iii)	Ample Skill Ltd (100%) / Balamara Resources (33% in 2016, 32.08% in 2017, owned through Ample Skill Ltd)	USD 561,000,000.00		USD 545,360,000.00				See 2017			
(iv)	Yawson Investment Group Ltd (80%)	N.A.		USD 8,700,000.00 (in dividends, which Defendant could have procured)				USD 9,655,272 (cash dividends, which Defendant actually received)			
(v)	Hyoil Pte Ltd (99%)	Palantir Solutions' Valuation: USD 477,000,000 to USD 1,159,000,000						See 2017			
		USD 5,054,551.11 (min.)		USD 9,869,959.29 (min.)							
(vi)	Business Companion Investment Limited (100%)	USD 2,169,896.65		USD 1,568,121.28				See 2017			
[E]	**Real Estate Properties**										
(i)	Draycott Property	USD 1,023,329.60 (being an approx. equivalent of SGD 1,384,000.00)									
(ii)	Ming Yuen Property	USD 680,000.00 (being an approx. equivalent of HKD 5,320,000.00)									
[F]	**TOTAL ASSETS**										
(i)	**Lowest value (USD)**	**605,758,878.82**	**603,641,348.93**	**601,319,621.49**	**601,363,033.54**	**601,314,509.78**	**600,692,883.66**	**601,713,315.71**	**601,059,744.57**	**601,033,127.43**	**600,994,568.55**
(ii)	**Highest value (USD)**	**612,578,107.41**	**608,135,721.79**	**603,647,022.57**	**603,453,400.17**	**605,806,530.06**	**603,966,286.86**	**604,362,222.98**	**603,346,161.18**	**602,983,240.01**	**602,713,478.23**

Note (1): A working capital facility of USD 30 million was obtained by Ample Skill Ltd from OCBC Bank in July 2017 to finance working capital of its subsidiaries and the Otto Group.
Note (2): This table does not deal fully with Liquid Funds available to the Defendant at the relevant time; for which see Section XIII(B) of the submissions.
Note (3): This table does not take into account the 3 mortgages, each of USD 14,000,000, which the Defendant was to procure over the Bintulu Hotel.

[1] The charter hire figures below do not include the Deposit of USD 7,000,000 falling due on 6 December 2016 to the 1st Plaintiff.
[2] The 1st Plaintiff terminated the GO PERSEUS BBC on 15 November 2017, accelerating the charter hire such that USD 87,388,188.56 fell due in respect of charter hire, interest and damages under the GO PERSEUS BBC.
[3] The 2nd and 3rd Plaintiffs terminated the GO PHOENIX and GO PEGASUS BBCs on 31 January 2018, accelerating the charter hire such that USD 53,623,878.47 and USD 66,498,764.41 fell due in respect of charter hire, interest and damages under the GO PHOENIX and GO PEGASUS BBCs respectively.