IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC(I) 02

Suit No 2 of 2019

Between

Solomon Lew

… *Plaintiff*

And

(1) Kaikhushru Shiavax Nargolwala
(2) Aparna Nargolwala
(3) Quo Vadis Investments Limited
(4) Christian Alfred Larpin
(5) Querencia Limited

… *Defendants*

JUDGMENT

[Agency] — [Evidence of agency]
[Contract] — [Breach]
[Contract] — [Formation]
[Contract] — [Remedies] — [Specific performance]
[Tort] — [Inducement of breach of contract]
[Trusts] — [Accessory liability]
[Trusts] — [Recipient liability]

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v
Kaikhushru Shiavax Nargolwala and others

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Singapore International Commercial Court — Suit No 2 of 2019
Simon Thorley IJ
29–31 October, 1, 4–8 November 2019, 8 January 2020; 10 January 2020.

5 February 2020 Judgment reserved.

Simon Thorley IJ:

Introduction

1 This is an action about a dispute over the ownership of a luxury villa, Villa 29, at the Andara Resort in Phuket, Thailand.

2 At the outset, it is necessary to be clear that the word "ownership" is used as a shorthand. Under Thai property law, foreign nationals cannot own land. The most that they can be granted is a 30-year lease over land which can be extended for a further period of 30 years. They can however own a building which is erected on land provided the necessary construction permit is issued in respect of the building. Three documents are thus required to give a foreign national the right to occupy property such as the villa in question: the land lease, the house registration and the construction permit.[1] Assignment of the three

[1] 1AB/339.

documents is a cumbersome process which can be simplified by issuing all three documents in the name of an offshore company. Providing the only assets of that company are the three documents of title (and any other documents relating to the property in question), transfer of "ownership" of the property can be effected much more simply by transferring the shares in the offshore company to the new owners.

3 Some care therefore needs to be taken when the question of ownership of Villa 29 arises since, as a matter of law, it is ownership of the shares in the offshore company that is being referred to but, colloquially, it is often the case that reference is made to ownership of the villa. In particular, two of the issues that arise in this case, the proper law of the alleged oral agreement and enforcement of such an agreement under Singapore law, raise questions as to whether the corporate veil of an offshore company should be lifted so as to give effect to the fact that the corporate entity is a proxy for what is in substance the ownership of an interest in land.

The background to the dispute

4 The Andara Resort (also referred to as "the Resort") is the culmination of a project founded by a Mr Allan Zeman which consists not only of villas such as Villa 29 but also of hotel suites, a leisure complex and other facilities so that the whole constitutes a leisure resort. Owners of the villas can either retain them for personal use or can use them for investment purposes by appointing the Resort as a letting agent. Equally the Resort provides facilities for assisting the buying and selling of villas and employs a sales manager for this purpose. Overall responsibility for running the estate lies in the hands of the General Manager of the Resort who, from 2011, has been Mr Daniel Meury. Mr Meury reports to Khun Natthakanya, the Chief Executive Officer ("CEO") of the

Paradise group of companies which is responsible for the Andara Resort. Khun Natthakanya is referred to by the nickname Khun Apple. Although her name appears as a recipient of a number of the e-mails in this case, she played no real part in the relevant events.

5 Villa 29 was being built in 2007 when Mr and Mrs Nargolwala, the 1st and 2nd Defendants, decided to buy it. They did this using a company incorporated in the British Virgins Island ("BVI"), Querencia Ltd ("Querencia"), the 5th Defendant, which was thus named in the three documents.[2] Additionally, it was registered as the owner of 26 shares in Andara Properties Investment Company (another BVI company) which in turn owned 49% of the shares in Andamandara Co Ltd (a Thai company) which owns the Andara Resort land.

6 The Andara Resort and the Nargolwalas agreed to use the Resort's lawyer, Mr Anurag Ramanat ("Mr Anurag"), jointly for this purpose. The Nargolwalas occupied Villa 29 when it was completed in 2008. They did so until around November 2014 when they moved into a second villa they had purchased, Villa 8 on a further development by Andara, known as Andara Signature. Thereafter Villa 29 was put up for sale and was made available for rental.

7 On occasions Villa 29 was rented by Mr Solomon Lew, the Plaintiff. In September 2017, Mr Lew decided that he wished to buy Villa 29 and contends that on 11 October 2017 a binding oral contract of sale was reached between him and Mr Meury, acting as the authorised agent of the Nargolwalas. The

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2 AEIC1/5/61 para 12.

Nargolwalas dispute both that Mr Meury was acting as their agent and that, even if he was, any such binding agreement was reached.

8 In late October 2017, Mr Christian Larpin, the 4th Defendant, approached a Mr Martin Phillips, a real estate agent in Phuket, as he was looking to buy one or more villas as an investment. In particular, Mr Larpin was interested in viewing Villa 11 at the Andara Resort for which Mr Phillips was the appointed agent. Although not the appointed agent for Villa 29, Mr Phillips was informed by his brother, Mr Lyndon Phillips, then on his last few days as the General Sales Manager at the Andara Resort, that Villa 29 was also available for sale.

9 I shall consider the history of the negotiations over Villa 29 between Mr Larpin and the Nargolwalas in more detail below but it is sufficient for present purposes to say that the negotiations were successful and that the appropriate Share Purchase Agreement ("SPA") for the transfer of the shares in Querencia to Quo Vadis Investments Ltd ("Quo Vadis") was executed on 14 November 2017. Quo Vadis, the 3rd Defendant, is a Hong Kong company controlled by Mr Larpin of which Mrs Dao Te Lagger is a director. Completion took place on 16 November 2017 and in consequence Mr and Mrs Nargolwala resigned as directors of Querencia on that day.

10 Mr Lew asserts that in entering the SPA and in completing the deal, the Nargolwalas acted in breach of the alleged oral agreement of 11 October 2017 and consequently acted in breach of their fiduciary duties to Mr Lew and in breach of trust in transferring the shares to Quo Vadis. He further contends that Mr Larpin (and hence Quo Vadis) had knowledge of the alleged oral agreement such that they were liable for inducing the breach and that Querencia acted

dishonestly in assisting the Nargolwalas in their breach of fiduciary duty and breach of trust. All of this is denied by the Defendants.

11 Finally, the Plaintiff and the 1st and 2nd Defendants disagree as to what is the proper law of the alleged oral agreement: Singapore law or Thai law. Initially these was also a measure of disagreement as to what was the proper law of the alleged agency agreement between the Nargolwalas and Mr Meury but it is now common ground that all questions relating to agency fall to be answered by applying whichever law is held to be the proper law of the alleged oral contract.

The issues

12 The following issues thus arise for decision:

(a) Proper law:

(i) Is the question of whether or not a binding oral agreement was reached on 11 October 2017 to be decided under Singapore or Thai law?

(ii) It is now accepted by all parties that the question of whether Mr Meury was authorised to act as an agent for the Nargolwalas is to be decided under the same law?

(iii) Equally it is accepted that any question relating to ostensible authority is to be decided under the same law?

(b) The agency:

(i) Was Mr Meury authorised to act as an agent for the Nargolwalas and, if so, what was the extent of that agency?

(A) Under Singapore law?

(B) Under Thai law?

(ii) Was his ostensible authority different from his actual authority (if any)?

(iii) If so, what is the effect of this:

(A) Under Singapore law?

(B) Under Thai law?

(c) The alleged oral contract:

(i) What agreement, if any, was reached on 11 October 2017? In particular, if any agreement was reached, was it a binding oral contract of sale or was it an agreement subject to contract or what was it?

(A) Under Singapore law?

(B) Under Thai law?

(ii) What is the effect of the 14 days' settlement term?

(A) Under Singapore law?

(B) Under Thai law?

(iii) If there was no binding oral agreement because of lack of an agency relationship, did the Nargolwalas nonetheless ratify the same by their conduct so as to make it enforceable?

(iv) If there was no binding oral agreement because of lack of an agency relationship, are the Nargolwalas nonetheless estopped from denying the existence of the agency relationship?

(v) If a binding oral contract was reached on 11 October 2017, is it enforceable:

(A) Under Singapore law?

(B) Under Thai law?

(d) The position of the 3rd and 4th Defendants:

(i) What was the actual knowledge of Mr Larpin with regard to the alleged oral contract at any given time?

(ii) Did Mr Larpin intend to induce the 1st and 2nd Defendants to act in breach of the alleged oral agreement?

(iii) Should he have made further enquiries at any given time?

(iv) Did Mr Larpin act in bad faith at any given time?

(v) Was Quo Vadis a *bona fide* purchaser for value without notice?

(e) The position of the 5th Defendant:

(i) Did Querencia assist the Nargolwalas in any breach of fiduciary duty or breach of trust by entering Quo Vadis' name into its register of members?

(ii) Did the Nargolwalas' knowledge constitute the knowledge of Querencia at the time when Quo Vadis' name was entered into the register?

(iii) At the time Quo Vadis' name was entered into the register, did Querencia have actual knowledge that the alleged oral agreement had been concluded between Mr Lew and the

Nargolwalas and that the Nargolwalas were bound by the terms thereof?

(iv) Did Querencia act dishonestly in entering Quo Vadis' name into the register?

The factual witnesses

13 Of the people mentioned above, Mr Zeman, Mr Anurag, Khun Apple and Mr Lyndon Phillips did not give evidence. The remainder did.

14 Mr Lew, the Plaintiff, is an Australian citizen who has built up a successful business empire in the fields of retail, property, equities, finance, foreign exchange and total investments.[3] He is not legally trained. He has a forceful personality and plainly over his business career has been involved, and it would appear, successfully involved, in many business negotiations. His personality is such that he will drive a hard bargain and will not hesitate to use as a tactic supplying his opposite number with misinformation which is intended to be accepted as true and which, if true, would enhance his negotiating position. Equally he will not disclose information which is true if disclosure would harm his negotiating position. He referred to such tactics as "deal talk" and plainly saw it as part of the rough and tumble of his business life.[4] The commercial market place in which Mr Lew operates is not a place for the mealy mouthed or faint hearted and I do not consider that the fact that a person is prepared to engage in "deal talk" in business means that he will do the same when giving evidence on oath in the witness box. When giving evidence, Mr Lew was

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3 T1/11/16-17.

4 T1/23/10-13.

composed, clear, precise and firm in his beliefs. I have concluded that those beliefs were beliefs which he truly held when giving evidence although, as will appear later in this judgment, some of those beliefs are inconsistent with contemporaneous documents upon which I have thought fit to place greater weight.

15 Mrs Roza Lew is a communicator by profession and conducted herself in the witness box as one might expect of such a person and gave her evidence in a straightforward and fair way. She acknowledged that she was neither a lawyer nor a business person and that she left all business dealings to her husband.

16 Mrs Te Lagger is Swiss. She is the Managing Director of Mr Larpin's group of companies in Hong Kong. In particular, she is and was in 2017 a director of Quo Vadis. Additionally, as a result of the SPA she became a director of Querencia. She gave evidence on behalf of both. She is plainly a well-respected colleague of Mr Larpin whom he entrusts with many of the administrative responsibilities of his businesses. It was she who dealt directly with the Nargolwalas, particularly with Mr Nargolwala, in seeking to iron out some of the issues in the legal documents relating to the sale and purchase of Querencia. English was not her native tongue but she spoke it well. I found her to be a precise, reliable and helpful witness who had a clear recollection of events.

17 Mr Meury is also Swiss. His native tongue is Swiss German but his English is good. He graduated from the Swiss Hotel Management School in Lucerne in 1988 and has been in the hotel industry since then. He has worked in Thailand since 1990. This included working at the Chedi Hotel from 2002 until 2008 where he first met Mr Lew. He became the General Manager at the

Andara Resort in 2011. He has plainly been a success there and has befriended many of the villa owners and the other guests. In particular, he became well acquainted with both the Nargolwalas and Mr Lew and regularly visited both when they were in residence. As a hotel manager it is his job to keep guests happy and it is apparent from the facts of this case that one of the ways this is done is by ensuring, whenever possible, that the guests are told what they want to hear and, likewise, that they are not told what they do not want to hear. This does however have the consequence that such guests may not get a full and complete picture of the actual state of affairs. Whilst such an approach may serve him well as a hotel manager it has led to a number of crossed wires in this case when Mr Meury acted as a go-between (to use a neutral term) between the Nargolwalas and Mr Lew over the possible sale of Villa 29. Mr Meury was called as a witness by the 3rd and 4th Defendants, not by the Nargolwalas or Mr Lew and was therefore cross-examined by counsel for Mr Lew and for the Nargolwalas. His recollection of events, particularly where there were no contemporaneous documents to refresh his memory, was poor. Further, he was clearly uncomfortable at times in the witness box since the dispute over the events of October 2017 in which he had played a major part had resulted in two families, both of which had become personal friends of his, being involved in litigation.

18 Mr Martin Phillips is a British citizen resident in Thailand where he is a real estate agent based in Phuket. He established his agency, Phillips Property, in 2005. He was the agent who acted on the sale of Villa 29 to Mr Larpin. He gave his evidence well although his recollection of precise details was somewhat hazy which is perhaps not surprising as the sale to Mr Larpin was no doubt one amongst a number that he was involved in at the time.

19 Mr Nargolwala is now a Singapore citizen having been brought up in India where he obtained a degree from Delhi University in 1969. He qualified as an accountant in London and has since had a successful career in banking, ending up as the CEO of Credit Suisse for the Asia-Pacific region from 2008 to 2010. Since that date he has held a number of non-executive directorships in public companies. When giving evidence he was polite, measured, coherent and cogent. He had a good grasp of detail and a relatively clear recollection of the events. His wife accurately said that he was a meticulous man. He remained patient during a long and, on occasions, somewhat repetitive cross-examination by counsel for Mr Lew and by counsel for Mr Larpin. All in all, he was an exemplary and impressive witness.

20 Mrs Nargolwala was also brought up in India and likewise obtained a degree from Delhi University. She is now a Singaporean citizen. She was quiet but firm when giving evidence but clearly found the experience stressful. She was less patient than her husband and was also less precise in her use of language. She was upset and angered by an e-mail from Mr Lew to Mr Zeman which was offensive both to her gender and her ethnic origin.[5] Her evidence on the important issues was, in the main, reliable, but her recollection of what precisely she said at an important telephone call with Mr Meury on 11 October 2017 was not perfect.

21 Mr Larpin is a Swiss national who is now a Hong Kong resident. His mother was Italian and his father Swiss. He is fluent in Italian and French and speaks reasonably good English. He also has been a successful business man. It is, I think, not unfair to say that he exhibited many of the stereotypical

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5 1AB/347.

characteristics of an Italian. He was loquacious in the extreme and spoke with his hands as well as with words. He was excitable and found difficulty in answering some questions directly. His recollection of some of the events was not always clear but the gist of his evidence was. I am satisfied that in his own way he was doing his best to assist the court.

The facts

22 Before addressing the issues, I shall make findings of fact relating to the events surrounding both the alleged oral contract and the purchase by Mr Larpin. Where the facts are in dispute, I make my findings on the basis of the balance of probabilities.

The events surrounding the alleged oral contract

23 When the Nargolwalas purchased Villa 8 on the Andara Signature estate, they put Villa 29 up for rental through the Andara Resort but also entered a one-year exclusive agency sales agreement with the Resort.[6] Mr Lyndon Phillips was acting on behalf of the Resort. The one-year period expired on 16 February 2016 and was not renewed but the property remained on the Resort's website and periodically the Nargolwalas were informed about interest from potential buyers but by September 2017 Villa 29 had not been sold.

24 In April 2017 Mr Lew rented Villa 29 and whilst staying there proposed to the lady who is now his wife and thus it had a special place in their affections. He considered making an offer for Villa 29 at that time but did not. They returned in September 2017 when Mr Lew began to take steps with a view to

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6 AEIC1/5/63 para 20, 2AB/1001.

purchasing it. From discussions with Mr Meury, he learned that a BVI company owned Villa 29 and following a dinner with Mr Meury on 6 September 2017, he sent an e-mail to Mr Meury offering US$5m for Villa 29 on a "walk in walk out" basis, the offer being open for seven days.[7] Mr Meury replied on the same day saying that he would try and do his best and get back to Mr Lew as soon as possible.

25 A number of text messages passed between Mr Meury and Mr Lew over the next few days in which Mr Meury gave the impression that the Nargolwalas were considering the offer and Mr Lew then texted Mr Meury to say that he had:[8]

> … full proxy & authority to close the deal at [US$5m]. [I] can promise you [I] will not pay one cent more. [I]t's a walk in walk out take it or leave it deal! [T]he offer is open for exactly 7 days … don't forget I will be sending some chocolates to the family in Switzerland! (you know what I mean) …

I shall return to consider the reference to chocolates to Switzerland later.

26 Mr Meury indicated that the owners would expect an offer that was slightly higher than their investment which was said to be close to US$5m but no further offer was forthcoming. On 16 September 2017 Mr Lew texted to say that since he was no longer under an obligation to the owners of Villa 29 he was going to send his property manager to Phuket to review villa opportunities and meet with a local agent.[9] This was, as Mr Lew accepted, untrue "deal talk", calculated to put pressure on Mr Meury to try to persuade the owners to come

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7 1AB/4.

8 1AB/9.

9 1AB/10.

back and accept his offer. For his part, Mr Meury indicated that he was "hoping [that] the seller would come back with an offer of [US$5.2m or US$5.25m] … but sadly he did not".[10]

27 This is "hotel manager talk" since when Mr Lew's offer was first made, Mr Meury spoke to Mr Zeman and it was agreed between them that they should not communicate the amount of the offer to the Nargolwalas because they knew that it would not be acceptable.[11] Mr Meury merely informed the Nargolwalas that there was interest in Villa 29. It is to be noted that in the course of his evidence Mr Meury repeatedly emphasised that he was not used to property negotiations. The Nargolwalas therefore had no knowledge of the terms of Mr Lew's offer and it thus lapsed.[12]

28 On 28 September 2017 Mr Lew texted Mr Meury to book Villa 29 for four nights from Sunday, 8 November 2017, on the basis that his property manager had sourced a few opportunities which again was "deal talk".[13] On Friday, 6 October 2017, Mr Meury sent an e-mail to Mr Nargolwala telling him that:

> … the Australian potential Buyer has booked Villa 29 again, arriving this coming Sunday for 4 days. … I do feel if we come back with another offer for him, that he … would be quiet [*sic*] keen on Villa 29. …

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10 1AB/10.

11 T3/148/9-149/9, T4/56/22-57/23, T4/107/19-108/15.

12 AEIC1/5/66 para 26, AEIC1/7/106 para 13.

13 1AB/11.

and asked if he could speak with Mr Nargolwala either later that day or the following day.[14]

29 This was somewhat strange language since Mr Meury accepted in cross-examination that he was not intending to get an offer from the Nargolwalas.[15] Whilst Mr Nargolwala accepts that Mr Meury might have told him when he, Mr Nargolwala, was in Phuket a few weeks before that someone was interested in buying Villa 29 and cannot rule out that an Australian was involved, he contends that it is not surprising that he should have no recollection of it as it was not of any consequence to him. He regarded the e-mail as being of something of no substance but agreed to Mr Meury's request that they speak on the telephone which they did on that afternoon.[16]

30 Neither party can now recall who placed the phone call. Mr Nargolwala's evidence-in-chief was to the effect that Mr Meury had asked him whether he would be keen to put forward an offer to sell Villa 29 for US$5m to which he replied that it was too low.[17] In cross-examination he was asked if he had been told that there had been an offer from the Australian to purchase Villa 29 for US$5m and said that he did not recall any amount being mentioned. He was however adamant that he had not been informed of this at any earlier date.[18]

31 Mr Nargolwala's evidence was as follows:[19]

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14 1AB/17.

15 T3/154/18-25.

16 AEIC1/5/66 paras 27-31, T5/48/3-49/20.

17 AEIC1/5/29-30.

18 T5/56/10-25.

19 T5/53/5-25.

> MR JEYARETNAM: And when you had that conversation, did you not at least tell Mr Meury that he should or could tell the potential buyer about whatever you discussed?
>
> A: I don't recall saying that specifically. All I said to him was, "If you have a buyer and he or she is interested in buying the villa, you know, get that buyer to give you some details of what he is intending to do and then we can have a discussion."
>
> Q: At the least you would have been expecting him to go back to the buyer to get the details of what he's intending to do, and as part of that, to say to the buyer that this was something you were asking for; correct
>
> A: Your Honour, that is correct to the extent that Mr Meury had reached out to me and said that he was doing so on the behest of this potential buyer, and therefore I can only assume that he was intending to go back and talk to that potential buyer.
>
> Q: And at this point, you didn't know what the potential buyer was looking at in terms of an offer?
>
> A: That is correct, your Honour.

32 Mrs Nargolwala's evidence was that she had been present during the telephone conversation and that Mr Meury had mentioned that there was an Australian individual who might be interested in purchasing Villa 29 and that his budget was US$5m. In addition, he had asked whether the Nargolwalas would put forward an offer to sell at that price but her husband had said that the price was too low.[20]

33 Mr Meury had little recollection about the details of this conversation but I am unable to accept his assertion that the Nargolwalas indicated that a price of US$6m would be acceptable to them.[21]

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20 AEIC1/7/106 para 14, T6/101/15-102/8.

21 AEIC1/9/130 para 12, T3/156/2-158/14.

34 I accept the substance of the Nargolwalas' evidence. Whilst neither has a full recollection of the details of the conversation and there is no contemporaneous note relating to it, I am satisfied that the e-mail of 6 October 2017 was incorrect in suggesting that the Nargolwalas had previously put forward any offer in relation to the possible sale of Villa 29.[22] Equally I accept that whilst they had been informed that there was a possible Australian buyer with a budget of US$5m, they were not told that he had made an offer and that they indicated that they were not interested in selling at that price.

35 On Monday, 9 October 2017, Mr Meury had a meeting with Mr Lew which resulted in an e-mail from Mr Meury to the Nargolwalas in which he reiterated that Mr Lew's offer was at US$5m and passed on Mr Lew's "deal talk" about his interest in other villas, including the statement that Mr Lew had put in an offer for another villa the day before.[23] Mr Meury suggested that Mr Lew would possibly accept an asking price of US$5.5m. He invited the Nargolwalas to call him and indicated that he was having dinner with Mr Lew and his fiancée that evening.

36 In fact, Mr Meury called and spoke to Mrs Nargolwala and repeated the substance of his e-mail. Mrs Nargolwala said that she was prepared to discuss the figure with her husband but would only do so if there was a clear indication of what price was being offered for Villa 29.[24] She gave evidence, which I accept, that at no point did she tell Mr Meury that he could put forward an offer

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22 1AB/17.

23 1AB/18.

24 AEIC1/7/107 para 15, T6/104/1-14.

on the Nargolwalas' behalf of US$5.5m.[25] Mr Meury has no recollection of the conversation.[26]

37 Mr Lew and his then fiancée entertained Mr Meury for dinner on Monday, 9 October 2017, and there may then have been a further meeting between them on the following day. There are no documents recording anything that was discussed between them about the possible purchase of Villa 29 but Mr Meury accepted in cross-examination that at some time during those conversations he told Mr Lew that the Nargolwalas were offering US$5.5m for the sale.[27]

38 This resulted in a "deal talk" text message from Mr Lew to Mr Meury late in the evening of 10 October 2017, Phuket time (recorded as 12.59am on 11 October 2017 in Melbourne):[28]

> You've just given me a big headache! We spent 2 days evaluating the market and are about to make an offer to purchase. We now have to decide which of the 3 properties which includes villa 29 would be best for us. Let's speak in the morning. Thanks for your determination Sol

39 The following morning, 11 October 2017, Mr Lew sent a text message to Mr Meury which contained further "deal talk" but the substance was that he was:[29]

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25 T6/105/11-14.

26 T3/161/2-4.

27 T3/163/5-13.

28 1AB/12.

29 1AB/23.

> … prepared to agree today to split the difference on a walk in walk out basis (everything stays) presume take over the company on a 14 day settlement for usa $ 5,250,000. …

This serves to confirm that Mr Meury must have told Mr Lew that the Nargolwalas' asking price was US$5.5m although this was not what the Nargolwalas had said and was something that they did not want him to do.[30]

40 Mr Meury then sent an e-mail to the Nargolwalas.[31] This e-mail and two other e-mails sent on 11 and 12 October 2017 are central to the matters in dispute.

41 Two matters should be noted. First, when the e-mails were being exchanged, Mr Nargolwala was in New York, Mrs Nargolwala was in Singapore and Mr Meury and Mr Lew were in Phuket. New York was 12 hours behind Singapore and 11 behind Phuket. Care therefore has to be taken in ensuring that the documents are read in the correct chronological order and to appreciate that, in Mr Nargolwala's case, he may have received more than one document when waking up in New York.

42 Second, it must be appreciated that e-mails are not written on oath. Seldom will it be fair on the writer to submit any given e-mail to the sort of detailed verbal analysis that might be appropriate when considering the interpretation of a statute or contract. At times during the cross-examination, counsel were minded to ask the witness to do this and I did not find it a helpful exercise.

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30 T5/69/22-70/14.

31 1AB/19.

43 The first e-mail is timed at 8.49am Phuket time on 11 October 2017, which would be 9.49pm on 10 October 2017 New York time.[32] It is from Mr Meury to both Mr and Mrs Nargolwala. Since it is important, I shall set it out in full.

> Good Morning Khun Aparna and Khun Kai,
>
> I am coming back with yet the latest answer and offer from our guests.
>
> They went to see to 2 or 3 other Villa's yesterday – and one of them they have put in an offer yesterday. He told me yesterday evening, that he needs to sleep over it, as he was already kind of focus on this other Villa [*sic*].
>
> He has now reached out to me, and he would agree today to split the difference on walk in, walk out basis – and offer US 5'250'000.-- in your accounts, with a settlement within 14 days.
>
> He would need an answer today, as he likes to leave back to Melbourne tomorrow, with a closed deal. Thank you [for] reconsidering his offer, given the present market situation, and the limited number's [*sic*] of serious offer we had.
>
> Looking forward to hear from you soon,
>
> many thanks,
>
> kindest regards,
>
> Daniel
>
> …

44 Stripped of the verbiage, this was clearly an offer made on behalf of Mr Lew of US$5.25m "in your accounts" on a "walk in, walk out basis", with "a settlement within 14 days". Some emphasis was placed on the statement that there was a need for an answer "today" as suggesting that the Nargolwalas would appreciate that, if they did not accept the offer on the 11th the offer would lapse. Mrs Nargolwala, who did receive the e-mail on the morning of the 11th,

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32 1AB/19.

when she was preparing to take an afternoon flight to Delhi to be with her mother who was seriously ill, did not however see the e-mail in this light. She said:[33]

> MR DANIEL: And you would have understood that what Mr Meury was communicating was that the buyer needed an answer that same day, October 11, so that he could leave back to Melbourne the next day with a closed deal?
>
> A: Your Honour, there was no sense of urgency in my mind. I didn't -- in fact, didn't respond to this email. Daniel followed it up with a call. So let's just put that in the context. I did not reply to it right away; I was not concerned about it, I was not concerned about the one day or his saying split the difference or any of the other stuff. I saw it flash up, I read it when I read it, and that was -- that's all I can say. I can only tell you my state of mind as best I can.

Mr Nargolwala gave evidence that he did not open the e-mail that evening in New York, it being his custom to retire early after long flights.[34]

45 It was suggested in cross-examination that Mrs Nargolwala should have been upset by the reference to "split the difference" as that would indicate that Mr Meury had indeed put forward an offer price from the Nargolwalas contrary to their instructions.[35] However, any detailed consideration of the wording of the e-mail by her was overtaken by a follow up phone call from Mr Meury.[36] Mrs Nargolwala's evidence-in-chief on this phone call was as follows:[37]

> 17. … During this call, Meury said that the potential buyer (again, he did not mention who) was prepared to pay USD 5.25

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33 T6/109/17-110/5.

34 T5/65/11-66/23, T5/76/18-77/8.

35 T5/67/4-5, T6/108/3-24.

36 T6/107/3-110/14.

37 AEIC1/7/108 paras 17-18.

> million *"net"* for the Villa on a *"walk-in-walk-out"* basis and the money would be deposited within 14 days. He also mentioned that the potential buyer wanted to complete the deal in 14 days.
>
> 18. It was not clear to me what Meury meant by USD 5.25 million "*net*". (i.e. whether the USD 5.25 million was inclusive of the other costs that would have to be incurred to effect a transfer of the property and/or who would be responsible for paying such costs). It was also not clear to me what was meant by "*walk-in-walk-out*" basis; for example, whether it meant that we (i.e. Kai and I) would (or would not) subsequently be held responsible for any repairs or rectifications that might need to be carried out in respect of the Villa. Furthermore, I wanted clarity on the process and date for completion and what would happen if the completion date could not be met. This was primarily because I was about to fly to India to be with my mother, who was very ill, and I could not be sure whether we would be in a position to conclude all the necessary steps and have completion done within the timeframe that the potential buyer had in mind. I told Meury that I needed an "*offer letter in writing*" with "*details*" so that I Kai and I could discuss the proposal [emphasis in original].

46 In cross-examination she amplified upon that evidence and it is unclear as to what she merely thought at the time were matters that needed clarifying and which of those matters she articulated to Mr Meury.[38]

47 In the passage of cross-examination at T6/113/2-20 she gave reasons why she thought she would have articulated the matters to Mr Meury but in subsequent passages it is apparent that she had no clear recollection of precisely what she did say and what she did not say. This aspect of cross-examination concluded as follows:

> MR JEYARETNAM: Is it your evidence today that you wanted confirmation from Mr Meury of the other costs that would be paid by Mr Lew?
>
> A: It is my evidence that I wanted clarification -- I wanted clarity on the terms. What did net mean, what did walk in walk out mean, I wanted the names of the buyer, his

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38 T6/112/25-117/4.

> contact details, his solicitors' details. I wanted the terms, this 14 days. I was leaving for India. I wasn't sure I could do anything in 14 days so I wanted clarity on the terms, is how I would put it.

48 Mr Meury's evidence-in-chief was brief.[39] He stated:

> Mrs Nargolwala told me that they were in principle agreeable, but needed an offer in writing, with Mr Lew's contact details before they could discuss Mr Lew's proposal.

49 He was cross-examined on this by both counsel for Mr Lew and for the Nargolwalas. His evidence to Mr Lew's counsel was as follows:[40]

> MR JEYARETNAM: Okay. After you told her that it was Mr Lew, did you remind her or reiterate during this conversation that Mr Lew needed his answer that same day?
>
> A: Yes, I'm sure I must have talked to her about that, correct.
>
> Q: Yes. And so at that point did she then say, "We will accept 5.25 million for the villa"?
>
> A: No, she wanted to talk to her husband first because he was not there.
>
> Q: Okay.
>
> A: No, sorry, no. Sorry, no, I was wrong. She did say yes because on that email you see she did say it was okay, but she wanted it in writing. She wanted a confirmation email that that's the deal and that's the details.
>
> …
>
> MR JEYARETNAM: Okay. Mr Meury, thank you for that, your earlier answer had surprised me. She did indeed -- Mrs Nargolwala did indeed say yes US$5.25 million was acceptable; correct?
>
> A: But she wanted it in writing, correct.

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39 AEIC1/9/131 para 14.

40 T3/172/5-173/5.

Q: And she said she wanted it in writing to confirm that it was Mr Solomon Lew, correct?

A: Yes.

Q: And she wanted to know what the next steps would be; correct?

A: Correct.

50 His cross-examination by counsel for the Nargolwalas was extensive and it is apparent that his recollection of the details of the call is even more hazy than that of Mrs Nargolwala.[41] The important evidence to my mind is his answer to a question based on the last lines of para 18 of Mrs Nargolwala's affidavit of evidence-in-chief ("AEIC") which reads:[42]

MR KUMAR: Then we go on to paragraph 18. A lot of it is what was going through Mrs Nargolwala's mind, so I don't need to really trouble you with that, but look at the last line, her evidence is: "I told Mr Meury that I needed an 'offer letter in writing' with 'details' so that Kai and I could discuss the proposal." First, do you recall she said "offer letter in writing"?

A: Yes.

Q: She wanted an offer letter in writing, correct? Three options; "yes", "no" or "I cannot remember"?

A: She asked for something in writing, a confirmation in writing, yes. I'm not sure if the word "offer letter" was used or if it's just a confirmation in writing.

Q: Okay. Did she tell you why she wanted it?

A: Of course obviously –

Q: Again, "yes", "no", or "I cannot remember"?

A: I can't remember.

Q: Yes. You were going to say something. You said "of course"?

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41 T4/72/3-88/1.

42 T4/85/14-87/3.

A: Yes, of course, based on that conversation with Khun Aparna that afternoon, I then went back to the office and wrote this email which is in 1AB21 to confirm.

Q: I know. I know. So I'm coming to that. I know your evidence is that she asked for an offer letter or something in writing. My learned friend says that Mrs Aparna Nargolwala asked you for confirmation. Can you recall whether that was the word she used, is the "yes", "no", or "I can't recall"?

A: I can't recall.

Q: Thank you. Did she ask you for the contact details of the buyer; again three options, "yes", "no", "I can't recall"?

A: Yes.

Q: She asked you for the contact details, right?

A: Mm.

51 On the basis of this, it is not possible to reach any definitive conclusion as to precisely what Mrs Nargolwala said to Mr Meury on that phone call. More specifically it is not possible to identify which of the matters which were concerning her she actually raised with Mr Meury. On the balance of probabilities however I am satisfied that the last sentence of para 18 of Mrs Nargolwala's AEIC "I told Meury that I needed an "*offer letter in writing*" with "*details*" so that … Kai and I could discuss the proposal" does constitute the substance of the conversation and that Mr Meury would have been left in no doubt that any agreement on price was subject to knowing exactly what the offer meant and that Mrs Nargolwala required Mr Lew to clarify his position.

52 Following that telephone call, Mrs Nargolwala sent the second e-mail to her husband in New York (timed at 2.46pm Singapore time) just before she left for the airport to travel to Delhi.[43] He therefore would have received it at 2.46am

[43] 1AB/20.

on 11 October 2017 in New York and he did not open it until the following morning. It reads:

> Daniel called to say that the buyer has agreed to the sale. I asked for an offer letter with details including name and contact details of the buyer. Also steps for proceeding. Apparently Solomon? Has a lawyer in Singapore but may be best to use Anurag in BKK. Leaving for the airport now. Talk from Delhi.
>
> Aparna

53 Taken at face value, this records the fact that the buyer has agreed to the sale. It does not say that she had agreed to the sale. When cross-examined on the wording she had used, it was suggested that the wording was emphatic and Mrs Nargolwala responded as follows:[44]

> MR JEYARETNAM: Yes. In this email, you actually start with these words: "Daniel" -- who is Mr Meury -- "called to say that the buyer has agreed to the sale." Do you see that?
>
> A: I do.
>
> Q: Now, those are actually very emphatic words, aren't they?
>
> A: They're words. How do you put emphasis on them on a piece of paper or on an email? They're not in italics; they're not underlined.
>
> Q: You say here that the buyer has agreed to the sale?
>
> A: I do.
>
> Q: Was that true?
>
> A: Absolutely. The buyer had been looking at many other properties and the buyer has finally decided that he wants to buy Villa 29. The buyer has agreed to the sale. It doesn't say I have agreed to the sale.

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44 T6/111/2-20.

54 I accept this evidence which is consistent with her evidence that she had asked Mr Meury for more details both relating to the contact details of the buyer and the proposed next steps. I shall consider the reference to Singapore lawyers and Mr Anurag further at [77]–[79] and [100] below.

55 When Mr Nargolwala opened those two e-mails that morning in New York he also received the third e-mail, this one sent by Mr Meury, at 3.57pm Thai time (4.57am in New York). It reads:[45]

> Dear Khun Aparna and Khun Kai,
>
> This is to confirm that our return guest, Mr Solomon Lew, has agreed on the offer for US 5'250'000.- in your accounts, On the walk in – walk out basis – and he confirms that the funds can be in your account within the next 14 days.
>
> We will pass him a copy of the BVI and all other documents later today.
>
> At the same time we will introduce him to Khun Anurag's law firm – and suggest strongly that he will use his services.
>
> As you aware, Allan knows him very well too over many years, and we trust that this can be a very smooth transaction.
>
> Do pls advise us on your Bank account details, so we can forward that to him.
>
> Appreciate your support, thank you,
>
> And kindest regards, safe travels to both of you.
>
> Daniel

56 This e-mail was sent after Mr Meury's telephone conversation with Mrs Nargolwala. It is very much a repeat of the first e-mail although it does give Mr Lew's name and indicates that some documents will be passed on to Mr Lew. Again there is a reference to Mr Anurag. The important part is the first sentence.

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45 1AB/21.

This does no more to confirm the fact, contained in the first e-mail that Mr Lew has agreed on the offer for US$5.25m. It does not record Mr Meury's belief that Mrs Nargolwala had agreed (in principle) to this figure. Further it does not contain any contact details for Mr Lew nor does it outline the proposed future steps other than the provision of some documents to Mr Lew. The Nargolwalas did not regard this e-mail as being the "offer letter in writing" which Mrs Nargolwala had requested and this is understandable.

57 On her arrival in Delhi Mr and Mrs Nargolwala spoke on the phone. Mrs Nargolwala is unsure whether she had read the third e-mail at this time but Mr Nargolwala had.[46] Two passages in his evidence read as follows:[47]

> MR JEYARETNAM: Okay. So having read through these three emails, did you call Mr Meury?
>
> A: No, I did not. I called my wife.
>
> Q: What did you tell your wife?
>
> A: Your Honour, my wife and I spoke, she had just landed in India on that day, in the evening, and we spoke about her email to me. She said that Daniel had sent an email with some terms and conditions laid out, but very, very loosely laid out, by a potential buyer. Who had also made offers on other villas in Phuket and as she did not understand many of these terms, like what does "in your account" mean. Because Daniel mentioned on the phone call she had with him it was net, what does "net" mean? What does "walk in, walk out" mean? Because neither of us had heard that term.
>
> She had specifically requested Daniel to provide us with the contact details of the buyer and his solicitors. And for them to put these conditions properly laid out in an offer letter together with some idea of what the process was going to be if he wanted all of this done within 14 days.

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46 T6/125/11-21.

47 T5/71/7-72/4, T5/72/20-73/11.

…

Q: Notwithstanding that this was the first time you spoke to your wife after being told that the buyer was splitting the difference, neither you nor your wife said anything at all about being unhappy with Mr Meury for telling the buyer 5.5?

A: We did not discuss that specifically, your Honour, because we were focused on getting details on what this offer really meant.

Q: You didn't discuss it at all, it didn't come up at all, right, that's your evidence?

A: No. My wife said that if it was 5.25 million, she thought that it was too low a price and that we shouldn't accept it and I said to her that you have to take this in the round. You have to look at whether our legal costs would be met, all transaction costs would be met, and there was no agent involved, so there would be no agency fee involved either. And, therefore, we needed to get all this information to make an assessment as to how this would stack up against any offers that we might receive, which would be more in the nature of a normal real estate transaction.

58 For her part Mrs Nargolwala said this:[48]

A: That's correct. But in fact -- to be -- well, I don't want to get ahead of myself but I -- if you want, I'll go into it now. I was not happy with this offer and when I spoke to Kai, he persuaded me that if we sold to anybody else, there would be an agency involved and, therefore, this low offer could only stack up if we took into account all the other costs that would be involved. So it was -- that's why he persuaded me that maybe we should think about it seriously and, therefore, it's even more preposterous to me that -- to say that I had accepted the offer because, firstly, I would never accept it without discussing it with Kai and, secondly, it was not an offer that I was keen on in the first place.

Q: When did you have this conversation with Mr Nargolwala where he persuaded you that if you sold to

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48 T6/118/9-119/3.

> anybody else, there would be an agency involved, et cetera?
>
> A: When I landed in India.

59 I make no apology for going into such detail in relation to the three e-mails at 1AB/19, 20 and 21 (see [43], [52] and [55] above). They are fundamental to the question of whether a binding oral contract was reached later that day but also serve to explain why thereafter the parties were at cross-purposes as to what was to happen next. These are my findings in relation to the events that occurred on 11 October 2017 concerning the three e-mails.

60 First, whilst it is unclear how much of Mrs Nargolwala's thinking set out in para 18 of her first AEIC was specifically communicated to Mr Meury I am satisfied that she did communicate that she had some concerns which needed to be resolved (even if they were not fully specified) and that she did tell "Meury that [she] needed an "offer letter in writing" with "details" so that [Mr Nargolwala] and [she] could discuss the proposal" [original emphasis omitted].

61 Secondly, I am also satisfied that Mr Meury understood that this was so although he may have been under a misapprehension as to the details required.

62 Third, so far as concerns the acceptability of the price to the Nargolwalas, I accept that Mrs Nargolwala did not expressly tell Mr Meury that the price of US$5.25m was acceptable. A conclusion that she did would be inconsistent with the subsequent discussion between Mr and Mrs Nargolwala on the telephone which contains reasoning for wishing to consider the details of the offer before accepting the price which are cogent and persuasive. I therefore doubt that Mr Meury's recollection that Mrs Nargolwala actually said that they were agreeable in principle is correct but she must have said something during

the conversation which led Mr Meury to believe that this was the case.[49] He could not in good faith have acted as he did subsequently if he had not formed the belief that the sum was, or, possibly, would be acceptable to the Nargolwalas once the details (which he saw as being minor) were sorted out by the lawyers. I do not consider that Mr Meury ever acted in bad faith.

63 Finally, as indicated above, I accept that Mr and Mrs Nargolwala did not regard Mr Meury's e-mail as being the offer letter in writing they were expecting in response to Mrs Nargolwala's request.

64 Having sent the third e-mail,[50] Mr Meury went to see Mr Lew and his fiancée at Villa 29. Mr Meury states in para 15 of his first AEIC that he informed Mr Lew that "the Nargolwalas were in principle agreeable to this latest offer, but wanted it in writing to consider further".[51]

65 Mr and Mrs Lew both dispute this. In para 22 of his first AEIC Mr Lew said:[52]

> Later in the day on 11 October 2017, Meury met with me at the Villa and orally informed me that the 1st and 2nd Defendants had accepted my Second Offer. My fiancée at the time, Roza Simota (and now wife, Roza Lew), was also present at this meeting. Meury and I shook hands on the agreement, and we celebrated our successful deal together with Roza whom he hugged. Meury also immediately called over two members of staff at the Villa whom he advised that I had bought the Villa. To the best of my knowledge, one of the staff members was Ms Sara Kanokwan.

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49 AEIC1/9/131 para 14.

50 AEIC1/9/131 para 14.

51 AEIC1/9/131 para 15, AEIC1/10/139 para 5.

52 AEIC1/1/11 para 22.

66 Mrs Lew's evidence was to like effect.[53]

67 All three were cross-examined on their evidence-in-chief. In cross-examination by counsel for Mr Lew, Mr Meury contradicted his evidence-in-chief when he said:[54]

> MR JEYARETNAM: You told them the Nargolwalas had accepted Mr Lew's offer; correct?
>
> A: Yes, I inform them at that time that the Nargolwalas accepted the offer.
>
> Q: And you congratulated them; correct?
>
> A: Correct, yes.
>
> Q: You welcomed them to the Andara family, correct?
>
> A: Correct, yes.
>
> Q: You shook hands with Mr Lew; correct?
>
> A: Yes, I shook hands with Mr Lew.
>
> Q: You hugged Mrs Lew in congratulations, correct?
>
> A: Yes, I did hug Mrs Lew.
>
> Q: And of course, Mr Lew was happy that he had gotten the positive answer that he had asked for within that day, correct?
>
> A: Yes, I think Mr Lew and Roza were delighted, I think, that the offer came through and it was accepted.

68 In cross-examination by counsel for the Nargolwalas, his recollection was that he had spoken to Mr Lew before sending the third e-mail because he told him that the Nargolwalas wanted confirmation in writing of the deal and

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53 AEIC1/3/248 para 8.

54 T4/15/13-16/5.

that he wanted to check with the Lews before writing the third e-mail.[55] He went on to say:[56]

> MR KUMAR: I just want to understand what exactly you said. Did you say Mrs Nargolwala or did you say you spoke to the vendors or did you say both of them? What did you say?
>
> A: I'm sure I have must have informed them that I spoke to Mrs Nargolwala and that she was happy to agree with the terms suggested.
>
> Q: That's what you said to them?
>
> A: Yes, exactly, and that she wanted something in writing, so that's why I went back to the office and sent that email to confirm the details of the deal.
>
> Q: You didn't share with Mr Lew that Mrs Nargolwala wanted Mr Lew's contact details?
>
> A: No, I didn't share that with Mr Lew, no, because, from my experience talking to our property director, that's something that you normally don't disclose right away, you know, when you make an offer or when you make the deal, you know.
>
> Q: Even if the other –
>
> A: Once you make a contract, of course, you fill in the details.
>
> Q: Once you make a contract you fill in the details?
>
> A: Then, of course, you need the details of the several and the buyer once you make a contract.
>
> Q: How do you make this contract you speak of?
>
> A: Obviously I'm not the one who's making a contract. This is supposed to be the job of the lawyer who will do the contract. That's why of course we asked for the lawyer's details from Mr Lew.
>
> Q: Your understanding at the time was that a lawyer or lawyers will prepare a contract?

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55 T4/98/15-99/18.

56 T4/129/16-131/19.

A: Of course, yes.

Q: Whose lawyer would prepare the contract?

A: Mr Lew's lawyer or Mrs Nargolwala's lawyer. I don't know. We never discussed that. The only thing I write in that confirmation email is what you can read here. I didn't say who is going to do what because, as you know, I'm not a property agent, you know, so I just do it very simple, what I've heard from Mrs Nargolwala, what I heard from Mr Lew, so I put it together in an email which I sent to Mr and Mrs Nargolwala.

Q: Did you share with Mr Lew that -- I mean, you've given your evidence that you told Mr Lew that he needs to appoint a Singapore lawyer. That's your evidence, right?

A: Yes, exactly.

Q: Did you tell Mr Lew that his Singapore lawyer would have to prepare the contract?

A: No, I didn't. I didn't go into details with Mr Lew or with Mrs Nargolwala whose job is to do what you know. I saw once we have the lawyer's details, the lawyers will work it out between themselves it. That was not my job to do.

69 In cross-examination Mr Lew stated that he never instructed Mr Meury to send the third e-mail and that it was not sent on his behalf.[57] He went on to deny both that Mr Meury used the words "in principle agreed" or that he asked him to put it in writing:[58]

MR KUMAR: I see. Let's look at the two things that he says. First, he says that the Nargolwalas were, in principle, agreeable. Now, your evidence is that he didn't say that he was only in principle agreeable, correct?

A: No, he said, "We have agreed. We have got an agreement and I will give you the documents by tomorrow before you leave", which he did.

Q: You would agree with me that in principle would suggest would not be unequivocal; correct?

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57 T1/63/20-64/2.

58 T1/66/19-67/17.

> A: No, we had an agreement. He said that the Nargolwalas had agreed.
>
> Q: … Let's look at the second thing that Meury says. Meury says that the Nargolwalas wanted the offer in writing to consider further. You disagree that Meury said that; correct?
>
> A: He absolutely did not say that and as I've stated earlier, if he would have asked me I would have put it into writing immediately.

70 Mrs Lew said that she never heard the words "in principle agreed" come out of Mr Meury's mouth. There was, she said, no doubt in her mind that the Lews had purchased Villa 29.[59]

71 Having heard all the witnesses, I have come to the conclusion that this was an occasion where Mr Meury acted as a hotel manager and not as a real estate agent. At the time, he felt in his own mind that the Nargolwalas had agreed in principle or at the least would agree to the deal once their concerns were met. He felt no need to speak to Mr Lew before sending the third e-mail and he trusted that the information that he gave the Nargolwalas in that e-mail would assist in moving matters forward. He realised that lawyers would have to be involved and that he would then cease to play a part and that thereafter the Nargolwalas' concerns would be dealt with by the lawyers.

72 When dealing with the Lews, he told them what they wanted to hear and thus told them that the Nargolwalas had agreed to Mr Lew's proposal, again assuming that the lawyers would sort things out in due course. He repeatedly emphasised in evidence that he was not a property agent and I doubt he appreciated at the time that there was any difference between an agreement in

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[59] T3/9/14-10/22.

principle and a binding agreement. Subsequently he has become aware and has sought to convince himself that he did tell the Lews that the Nargolwalas had only agreed in principle but on this aspect of the case I prefer the evidence of the Lews that he did not. I shall have to consider below what the legal effect was in all the circumstances of Mr Meury's statement that the Nargolwalas had agreed to Mr Lew's offer.

73 By the end of 11 October 2017 therefore, Mr Lew believed that the next step would be that contract documents would be supplied to his lawyers by the Nargolwalas' lawyers, but of course, the pre-requisite to this was that he had to instruct appropriate lawyers and inform the vendors of this so that the lawyers could be put in touch. On the other hand, the Nargolwalas were waiting for the offer letter in writing from Mr Lew's lawyers. I shall therefore consider the subsequent events first by reference to the Nargolwalas and then the Lews.

Events subsequent to 11 October 2017 – the Nargolwalas

74 Mr Nargolwala responded to Mr Meury in relation to the third e-mail:[60]

> Daniel
>
> I will be back in Singapore and will call you then. Hopefully by then we will have a better idea on progress. I can then pass the bank details to you.
>
> Best regards,
>
> Kai

75 Mr Meury responded:[61]

> Dear Khun Kai,

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60 1AB/27.

61 1AB/27.

> Good to hear from you -
>
> The buyer has just left Andara and will pass on the copy of the documents to his Lawyer in Singapore, and they will be in touch with Khun Anurag for any queries.
>
> He aims to have all settled soonest.
>
> …

76 Three matters flow from these e-mails. First, Mr Nargolwala was anticipating steps being taken by Mr Lew during the course of the next few days to progress matters.

77 Second Mr Meury's understanding was that the Nargolwalas wanted the matter to be handled by Singapore lawyers and that the role of Mr Anurag was to assist in any queries. This explains the brief reference to him in the second e-mail set out in [52] above.

78 The reason for this is that Mr Anurag had at all times acted on behalf of the Andara Resort. He had acted jointly for the Resort and the Nargolwalas on the purchase of Villa 29 and may have done the same in relation to Villa 8. He had also assisted the Nargolwalas in obtaining some necessary documents from the Thai authorities. He thus had intimate knowledge of the way in which dealings with properties at the Resort were conducted and was therefore the appropriate person for any lawyer responsible for a transfer of ownership of a property to discuss any queries with.

79 It was suggested that in fact the Nargolwalas had appointed Mr Anurag to act on their behalf on the possible sale to Mr Lew. This was not so. Mr Lew and his in-house lawyer apparently did and I shall consider this at [100] below.

80 Third, Mr Meury did indeed pass some documents in relation to Villa 29 to Mr Lew. Some of these documents were documents held by the Resort but

others were obtained by the Property Estate Manager, Khun Koy, from Villa 8. The Nargolwalas were unaware what documents had been passed over and did not authorise the documents from their villa to be removed. This was an occasion where Mr Meury unilaterally acted as he thought to be in the best interests of the parties but which possibly contributed to a further measure of misunderstanding between them.

81 On the evening of 11 October 2017, Mr Zeman came on the scene. News obviously travels fast at the Andara Resort because he sent an e-mail to Mr Nargolwala saying:[62]

> Congratulations! I hear you sold Villa 29 to my friend. He is definitely not an easy guy but at least it's done. Allan

82 Mr Nargolwala responded from New York after his telephone conversation with his wife in which he had persuaded her that if all other matters were sorted out to their satisfaction, the price was acceptable to them. He said:[63]

> Hi Allan
>
> Greetings from NY. I am not sure congratulations are in order yet. It will be interesting to see if he comes through as promised.
>
> Still some things to be worked out. I will be back this weekend and then will speak to Daniel to see how things are progressing.
>
> The price is significantly below what I think is reasonable but I have agreed on the basis that I am not into owning and managing multiple properties. So if he can do a clean and swift deal it will be good. Daniel has been great but as you say the buyer is not the most easy guy so lets see how serious he is.
>
> Best regards,
>
> Kai

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62 1AB/22, 26.

63 1AB/26.

83 Mr Zeman then sent a further e-mail early in the morning, Hong Kong time, on 12 October 2017 which reads:[64]

> The buyer called me last night to tell me he bought the villa at 6 million so I can congratulate him. This is already a great sign if you know this guy. I suggest you can google him to understand who he is. I think it will be okay! Allan

84 Mr Nargolwala was cross-examined on these e-mails.[65] He emphasised that he had agreed to consider selling at that price and that he would not push for a higher price if all the caveats such as what "net", and "in your account" meant were cleared up.

85 Mr Nargolwala did telephone Mr Meury on his return to Singapore. This was around 14 October 2017. In para 42 of his first AEIC he lists the matters which were discussed namely:[66]

(a) The price was in principle acceptable subject to the other terms being acceptable to both sides.

(b) His Singapore lawyers were to act on his behalf and would do so when there was more clarity on the terms Mr Lew had in mind.

(c) Mr Lew's lawyers should get in touch with him so that he could put them in touch with his lawyers.

(d) When he might expect to hear from Mr Lew's lawyers.

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64 1AB/26.

65 T5/97/9-100/9, T6/3/11-4/10, AEIC1/5/72 para 39(b).

66 AEIC1/5/73.

86 Mr Meury did not dispute this[67] and Mr Nargolwala's cross-examination on the issues raised in this paragraph was consistent with his written evidence.[68]

87 So far as the Nargolwalas are concerned, by 14 October 2017 they considered that the ball was firmly in Mr Lew's court. He was to instruct Singapore lawyers to act on his behalf, they were to contact the Nargolwalas' lawyers to clarify the terms of his offer and they were to be kept informed of progress.

88 Thereafter not a great deal happened so far as the Nargolwalas are concerned. On 17 October 2017, Mr Meury sent an e-mail to Mr Nargolwala saying that he had not heard back from Mr Lew but that he had been assured by Mr Lew that he would do so as soon as Mr Lew returned to Melbourne. Mr Meury asked Mr Nargolwala to let him have his bank account details and contact details of his lawyers because Mr Nargolwala was about to leave for Delhi. Mr Nargolwala responded:

> I would rather not pass on any details to him until we know whether he is serious and has put us in touch with his lawyer. After that, the details can be passed through the lawyer. I am always contactable by e-mail.
>
> Best regards,
>
> Kai

89 Mr Meury replied on the following day saying that he understood and would keep Mr Nargolwala informed once he heard back from Mr Lew.[69] Mrs Nargolwala's mother sadly passed away on 20 October 2017 in Delhi.

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67 T4/140/13-25.

68 T5/98/13-99/2, T5/133/6-135/24, T6/11/24-13/13.

69 1AB/31.

90 The next communications between Mr Nargolwala and Mr Meury are said to have taken place by text messages on or about 23 or 24 October 2017 when Mr Nargolwala was still in Delhi. An undated exchange of texts between the two was disclosed on discovery. Mr Nargolwala wrote:

> We are still in India. Has there been any news on villa 29 or is the deal dead now. I will be in London next week so would like to know if there is any action needed on my part next week.

91 Mr Meury replied saying:

> … I spoke to him yesterday and he told me that he passed on the copy of documents to his lawyer, and he will get back to us shortly …

92 Mr Nargolwala responded by saying that it would be good to get his lawyers' name so that "we can start the process in Singapore".[70]

93 The authenticity of this text chain was disputed by the Plaintiff. It was said that it had not been produced voluntarily and did not look like a regular WhatsApp chain. Mr Nargolwala gave evidence that he no longer had a copy of the messages since it was his practice to delete text messages at regular intervals. He recalls that he contacted Mr Meury to make sure that Mr Lew had not passed something on to Mr Meury which Mr Meury had inadvertently forgotten to pass on.[71]

> A: … I WhatsApped him around the 23rd, 24th, I just wanted to make sure that Mr Lew had not passed something on to Daniel Meury that Meury had inadvertently forgotten to pass on to me. And that was all that I was checking.

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70 1AB/2.

71 T5/108/17-23, T5/130/18-11, T6/11/10-13/13.

94 I accept this evidence and it ties in with text messages sent by Mr Meury to Mr Lew. The first, on 23 October 2017, asked whether Mr Lew or his lawyer needed any further information with regard to Villa 29. Mr Lew responded indicating that he was then with his lawyer. The following day Mr Meury texted again saying that the owner was "asking on any news … as he has not heard from us for 10 days".[72]

95 Taking all these matters into account I conclude that the WhatsApp exchange at 1AB2 is authentic.

96 The next communication between Mr Meury and Mr Nargolwala was on 27 October 2017 when Mr Meury e-mailed to say:[73]

> Dear Khun Aparna and Khun Kai,
>
> We just heard from Mr Lew, and he is ready to settle – he has already transferred the Funds to our account in Hong Kong – And once the shares are transferred the funds can go over to you right away.
>
> He will send us his Lawyers details once he is back from a meeting which is attending now.
>
> Today is just 2 weeks since we agreed on the price, whilst he was staying at Villa 29.
>
> I have not heard anything directly from Martin Phillips today.
>
> Will send you the Lawyers info as soon as we have them.
>
> Many thanks,
>
> Will call you shortly,
>
> Kindest regards,
>
> Daniel

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72 1AB/13.

73 1AB/48.

97 In fact the reference to funds being deposited in Hong Kong was incorrect but there is no need to dwell on the reasons for this. This was followed later the following day by a further e-mail from Mr Meury's personal assistant giving contact details of Mr Lew's lawyers but the name given was of a Thai lawyer with DLA Piper (Thailand) and not a lawyer in Singapore as had been requested.[74]

98 Mr Nargolwala is unsure whether he read these e-mails whilst still in Delhi or on his return to Singapore the next day. On reading them, he concluded that Mr Lew was not a serious buyer[75] and this is confirmed by Mrs Nargolwala.[76] Mr Nargolwala was cross-examined at some length on this evidence.[77] He explained why, even on receipt of the details of the Thai lawyer, he concluded that Mr Lew was not a serious buyer and that any potential deal with him was dead because none of the requests which he understood had been made to Mr Lew by Mr Meury had been followed through and that he, Mr Nargolwala, had been very patient waiting for 14 days and nothing had been done. He presumed (correctly as it turned out, see [120]–[122]) that Mr Lew's late action in appointing a Thai lawyer had been caused by his knowledge that a new potential purchaser had come on the scene. The upshot was that he gave cogent reasons for reaching the conclusion that Mr Lew was not a serious buyer and someone that he no longer wished to transact with. I am satisfied that this was the Nargolwalas' states of mind after receipt of the e-mails of Friday, 27 October 2017 (see also [140] below).

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74 1AB/49.

75 AEIC1/5/78 paras 51-52.

76 AEIC1/7/109 para 23.

77 T5/106/20-113/23.

99 On 5 November 2017, Mr Meury once again contacted Mrs Nargolwala when she informed him that since Mr Lew had failed to proceed within his own timeline they were no longer interested in dealing with him and Mrs Nargolwala recollects that she spoke to Mr Zeman along the same lines.[78] Mr Meury's evidence is that he told Mr Lew this and then reverted to Mrs Nargolwala to ask whether she would still be interested in dealing with Mr Lew and she said that she would not.[79]

100 In any event, that information was also relayed to Mr Anurag, who had been in communication with DLA Piper (Thailand), who sent an e-mail on 7 November 2017 to them saying that his client had instructed him to put the matter on hold.[80] There was some dispute as to whether the client in question was the Nargolwalas or the Resort or both. I do not consider that anything turns on this,[81] but it is clear that DLA Piper (Thailand) thought that Mr Anurag was acting on behalf of the vendors as an e-mail was sent to Mr Stephen Kenmar (Mr Lew's senior in-house lawyer) on 7 November 2017 informing him that "the vendor" had instructed Mr Anurag to put the matter on hold. Mr Kenmar responded on 8 November 2017 saying that he was seeking instruction but that "[i]n the interim, it would probably be prudent to place everything on hold".[82]

101 It was this information that caused Mr Lew to write the e-mail to Mr Zeman referred to at [20] above.[83] It is a thoroughly intemperate and offensive

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78 AEIC1/10/134 para 28, T4/40/4-22, T6/138/1-21, T6/174/25-175/8.

79 T6/175/13-22.

80 1AB/238.

81 1AB/239-243, 2AB/801 but see also 1AB/349.

82 1AB/223-224.

83 1AB/347.

e-mail which was plainly written in anger. It is however helpful in identifying Mr Lew's state of mind with regard to the alleged oral agreement as at 7 November 2017 and I shall therefore return to consider it further below.

102 It is apparent that Mr Zeman then became involved because he sent an e-mail to the Nargolwalas on 9 November 2017 saying that he had been receiving calls to see if they had made any further decisions and Mr Nargolwala replied:[84]

> … As the previous offer had seen no progress in the timeframe advised to us, we initiated discussions with other interested parties. These discussions are now at an advanced stage. As such we will not be in a position to consider any other decisions until the end of this month at the earliest. …

103 The previous day, on 8 November 2017, the Nargolwalas and Mr Larpin entered a Reservation Agreement which gave Mr Larpin exclusivity until 30 November 2017.[85]

104 Before considering the history of the dealings between the Nargolwalas and Mr Larpin, I shall step back in time to consider the events post 11 October 2017 from Mr Lew's point of view.

Events subsequent to 11 October 2017 – Mr Lew

105 On 12 October 2017 before Mr Lew left Phuket, Mr Meury gave him the documents referred to above.

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84 2AB/569.

85 2AB/572.

106 It is Mr Meury's evidence that he informed Mr Lew at this meeting that he should pass the documents to his lawyer in Singapore but he also gave him Mr Anurag's contact details.[86]

> MR JEYARETNAM: I think the next thing in point of time is on the 12th, when you do pass the documents to Mr Lew. And as you have said, you obtained the documents first by checking with Mr Nargolwala for his agreement, and then by following up with the property manager who then obtained the documents and gave them to you?
>
> A: Correct, yes, that is correct, your Honour.
>
> Q: And you then passed those to Mr Lew in an envelope, correct?
>
> A: In an envelope, a big envelope, yes.
>
> Q: And the idea was that he would then pass those to his lawyers?
>
> A: Yes, exactly, he will pass it to his lawyers in Singapore. We discussed this as well because the Nargolwalas preferred for the easy dealings, that he choose a lawyer in Singapore, because that will be convenient, because their lawyer is also in Singapore.
>
> Q: Mr Meury, are you sure that you talked about a lawyer in Singapore, because at the same time you were giving him the details of a Thai lawyer?
>
> A: Exactly. That was for his lawyer that he's going to use. He can reference anything about Thai laws and the Thai technical set-up in the set-up of the Andara property.

107 This is consistent with contemporaneous documents being his e-mail to Mr Nargolwala referred to in [75] above as well as a text message sent to Mr Lew on 16 October 2017 in which Mr Meury enquires when he might hear from Mr Lew "*or [his] lawyer in Singapore about the next step*" [emphasis added].[87] Mr Lew however disputes that he was told this and undoubtedly formed the

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86 T4/21/12-24/11.

87 1AB/13.

view that the reference to Mr Anurag was an indication that the Nargolwalas intended to instruct him in relation to the transaction and thus that Mr Lew should also appoint a Thai lawyer.[88] The reference to a Singapore lawyer in the text message of 16 October 2017 did not serve to alert Mr Lew to the misunderstanding.

108 They also had a discussion about the commission that the Andara Resort might be receiving on the sale. This is a continuation of the "Chocolates to Switzerland" incident referred to in [25] above. Both Mr Lew and Mr Meury recall this discussion but their accounts of it in their AEICs differ.[89] Mr Lew recalls that Mr Meury had indicated that matters relating to commission were in the hands of Mr Zeman and that any sum which he, Mr Meury, might receive was up to Mr Zeman. Mr Meury recalls that he said that any agency fees that might be payable to the Resort would be paid directly to the Resort but that there would be no commission because the Resort was not acting as an agent.

109 Both parties are however agreed that Mr Lew indicted that he would pay Mr Meury the sum of US$100,000 as a thank-you for his efforts on Mr Lew's behalf. Accordingly, when Mr Meury handed the documents to Mr Lew, he also gave him details of a Swiss bank account into which any sums which Mr Lew was minded to pay to Mr Meury could be transferred (hence the reference to "Chocolates to Switzerland").

110 In cross-examination, Mr Lew said that the offer was not part of commission due to Mr Meury but was offered as a gift.[90] In the witness box,

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88 T1/64/8-65/13, T1/80/1-12, T1/84/13-23, T1/89/18-90/7, T1/105/14-18.

89 AEIC1/1/14 para 25, AEIC1/2/38 para 22, AEIC1/10/140 para 7.

90 T1/35/4-23, T1/40/8-25.

whilst giving evidence-in-chief, Mr Meury clarified that there was no sales agency agreement with the Resort for the sale of Villa 29[91] and repeated this in cross-examination.[92] Indeed, as General Manager Mr Meury would be expected to know whether or not an agency agreement was in place and I therefore accept his evidence that he told Mr Lew that there was no commission agreement in place between the Nargolwalas and the Andara Resort. However, I also accept that Mr Lew certainly thought that Mr Meury and Mr Zeman were acting on behalf of the Nargolwalas in some way.[93]

111 I also accept Mr Lew's evidence that the subject of the sum of any payment to Mr Meury was not raised until after the alleged oral agreement was "made" on 11 October 2017 and that Mr Lew's offer was the offer of a gift to express his gratitude and was not in the form of commission for acting on Mr Lew's behalf.

112 Mr Lew then left Phuket to travel to Malaysia and Singapore before returning to Melbourne. He did not send the documents on in advance. He returned to Melbourne on Monday, 16 October 2017. On that day he received the text message referred to above from Mr Meury asking that he be informed either by Mr Lew or his lawyers in Singapore about the next step in the sale of Villa 29. Mr Lew replied that he had just arrived home and was onto it.[94]

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91 T3/102/35-103/8.

92 T4/106/5-23.

93 T1/19/12-18, T1/49/24-50/8, T2/169/22-170/6.

94 1AB/13.

113 Mr Lew's AEIC indicated that he immediately instructed his in-house lawyers on receiving the documents.[95] This was not the case. He only did so on his return to Melbourne. His evidence was that he probably did this in the middle of the week after his return. He was intending that Mr Kenmar should be responsible for overseeing the transaction but Mr Kenmar was away from the office having had an operation. It appears that the documents were handed to another lawyer, Ms Hannah Hopper, with instructions to hand them on to Mr Kenmar on his return.[96]

114 In any event, by 19 October 2017, his lawyers had turned their attention to the matter because Mr Lew sent a text to Mr Meury with an enquiry from his lawyers as to where the share certificates were located and Mr Meury responded that they were in Singapore with the owners.[97] On Monday, 23 October 2017, Mr Meury texted Mr Lew to ask whether he or his lawyer needed any further information to receive the response that he was currently with his lawyers. Mr Meury followed this up with a further text indicating that the owner was "asking on any news … as he has not heard from us for 10 days" to which, apparently there was no response.[98]

115 On 26 October 2017 Mr Meury again sought information from Mr Lew saying that "as it is already 2 weeks tomorrow … the present owners expect to hear from us tomorrow" to which Mr Lew replied that he would "check with

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95 AEIC1/1/14 para 26.

96 T1/50/24-51/11, T1/85/20-89/20, T1/102/9-21, T2/48-6-49/1, T2/148/18-149/13.

97 1AB/23.

98 1AB/13.

[his] in house counsel in the morning. I was led to believe we are all set for settlement!"[99]

116 In fact that was not the case. It was not until 24 October 2017 that Mr Kenmar approached a law firm in Thailand, Siam Law, that had worked with him before, by e-mail with a view to instructing them.[100] In that e-mail Mr Kenmar stated:

> … Our group has been negotiating the acquisition of another villa in Phuket …
>
> The acquisition is to be done by way of an acquisition of shares in Querencia Limited (a British Virgin Island company) … I understand that the vendors are [the Nargolwalas].
>
> We have not yet identified the entity which will undertake the purchase.
>
> The vendor is being represented by [Mr Anurag] …
>
> Please confirm that you can act for us in respect of this matter. This matter is **very urgent**.
>
> [emphasis in original]

117 Having received no response, on 25 and 27 October 2017 Mr Kenmar sent follow up e-mails. He received a response on Friday 27 October 2017 saying that Siam Law would do a conflicts check and get back on the following Monday. Late on the Monday they responded confirming that they were free to act but Mr Kenmar informed them that he had been forced to retain another law firm because:[101]

> … on Friday morning, the Vendor advised that if we did not provide them with the name of a lawyer acting for us, the sale would not proceed.

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99 1AB/14.

100 P2/4.

101 P2/1.

118 The other law firm was DLA Piper (Thailand). That firm was first approached by Mr Kenmar on Friday, 27 October 2017, by an e-mail which contained much the same details as in the e-mail to Siam Law referred to above but which contained the sentence:[102]

> A member of the family that controls our Group wishes to acquire a villa in Phuket.

119 On the Friday and over the weekend the necessary conflicts check were carried out which involved a long e-mail from Mr Kenmar.[103] The following extracts should be noted:

> … As discussed we wish you to act for us to purchase Villa no. 29 …
>
> As discussed on Friday, there is **considerable urgency** in completing this purchase …
>
> The Vendor is being represented by [Mr Anurag – giving his contact details] …
>
> I cannot definitely say how this purchase is taking place as I have seen no transaction details for this purchase. Are these documents prepared by the Vendor? If they are, can you please request a set of draft documents as a matter of urgency …
>
> Given that we may be purchasing shares in a company incorporated in the [BVI], do we need to retain a law firm in the BVI to act for us? …
>
> Taking into consideration Thai law and practice, particularly in the areas of land law and taxation law, we need your urgent advice as to who should undertake the purchase. …
>
> What searches and investigations should we undertaken [*sic*] in Thailand and the BVI to protect our interests in the transaction?
>
> … Given the very great urgency of this matter, please feel free to call me at any time when you need to including after business hours.

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102 1AB/59.

103 1AB/54-55.

> …
>
> [emphasis in original]

120 There is no record that Mr Meury (or indeed the Nargolwalas) advised Mr Lew on Friday 27 October 2017 that if the lawyer's name was not supplied, the sale would not proceed. What did happen was that late in the evening of 26 October 2017 Mr Meury sent a text to Mr Lew:[104]

> … understand another offer has come up … like to inform you confidentially … I think we really need to get back to the owner tomorrow … as the 2 weeks period is up already … thank you for looking into this urgently …

121 It was on the 26th that Mr Larpin was first shown Villa 29 by Mr Martin Phillips. Mr Lew's answers in cross-examination on this aspect were not wholly convincing when compared with the contemporaneous documents.[105] He sought to suggest that the information with regard to a new offer was probably "deal talk", that he did not feel there was any special urgency because he had a deal and that he had told the legal department at the outset that he wanted the job done quickly. The fact is that he did not speak to his legal department until the middle of the week beginning on 16 October 2017, his legal department first became involved on the 19th, no attempt was made to instruct a Thai law firm until the 24th and no law firm actually confirmed its ability to act until after receipt of Mr Kenmar's e-mail sent over the weekend of the 28/29th. It was this e-mail which included the words in bold "there is **considerable urgency** in completing this purchase".[106]

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104 1AB/14.

105 T1/114/22-121/4, T2/58/3-59/9.

106 1AB/54-55.

122 Mr Kenmar did not give evidence but the documents lead to the conclusion that Mr Lew was stirred into action by the suggestion that there was another offer and sought to instil a measure of urgency into the lawyers which had not previously been the case. In any event on the 27th Mr Lew did pass his Thai lawyers' name to Mr Meury who passed it on to the Nargolwalas.[107]

123 There was then, apparently, some communications between DLA Piper (Thailand) and Mr Anurag on 31 October 2017 but there are no details in the papers and neither Mr Anurag nor any lawyer from DLA Piper (Thailand) gave evidence. In a text message on the 31st Mr Lew told Mr Meury that his lawyers had told him that Mr Anurag was "waiting for instructions from the owner".[108] There is no record that Mr Anurag ever did contact the Nargolwalas for instructions.

124 On 3 November 2017 Mr Lew told Mr Meury that Mr Zeman had expressed disappointment that the contract had not been received from the vendor[109] but save for this nothing of substance appears to have happened so far as Mr Lew is concerned until the Lews entertained Mr Meury to lunch on Sunday, 5 November 2017. During lunch, Mr Meury told Mr Lew that he had instructed the wrong lawyers since the Nargolwalas wanted to use Singapore lawyers[110] and Mr Lew was prepared to do this.[111]

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107 1AB/48-53.

108 1AB/24.

109 1AB/24.

110 T4/38/23-39/5, T4/171/25-176/7.

111 T2/7/8-14, T3/3/8-21.

125 It appears however that Mr Meury did not convey to Mr Lew on 5 November 2017 the substance of his telephone calls with Mrs Nargolwala on that day where she informed him that they were no longer interested in dealing with Mr Lew (see [99] above) as Mr Lew sent text messages and e-mails to Mr Zeman and Mr Meury on 7 November 2017 saying that he had appointed lawyers in Singapore and that his Thai lawyers had been unsuccessfully trying to obtain the contract from the Nargolwalas' lawyers. This chain of messages ended with one to Mr Meury confirming that:[112]

> … Now the seller won't send the contract and you mentioned that they have another buyer! … Daniel we have now spent a sum of money on legal due diligence on the documents you handed over! Please ask Alan to talk to them today. …

126 It is noteworthy that whilst Mr Lew refers to the expenses which have been incurred, he does not say that the Nargolwalas should not be dealing with another buyer because of a concluded contract with Mr Lew. It is no doubt this text which caused Mr Zeman to contact the Nargolwalas on 9 November 2017 (see [102] above).[113]

127 On the same day Mr Lew sent the e-mail to Mr Zeman referred to in [101] above.[114] This reads:

> hi allan
>
> appreciate your assistance in this matter but let me assure you i will pursue this women for my expenses spent to date. i'm furious with her as it's her duty to prepare the contract of sale as agreed. the terms that Daniel confirmed was for a 14 day settlement walk in walk out. price for purchase of shares in off shore company was USA $ 5,250,000. we have never received

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112 1AB/15, 1AB/336.

113 2AB/569.

114 1AB/347.

> the contract from her. our lawyers DLA Piper Bangkok were appointed and have been chasing a contract. enclosed is an email sent to Kuhn Daniel with Lawyer info as requested by him.
>
> i will pursue this Bitch for my costs & non performance in Singapore.
>
> i had lunch with Daniel on Sunday & he advised me of 2 things. she doesn't like us you [*sic*] using a thai lawyer. daniel asked me on sunday if we can use a Singapore lawyer. So yesterday we appointed a Singapore Lawyer. we can settle in 48 hours. the second thing that daniel told me was that she might have a second buyer but daniel didn't think it was going to be an issue.
>
> i'm now hearing 3 things from you.
>
> price usa $8,250,000. (what drugs is she taking!)
>
> high season coming so income to be gained!!!
>
> potential buyer arriving 14 & 15 nov to view villa.
>
> i will be sending you an email received today from our thai lawyer saying that seller would like to put sale on Hold, not that she's not selling to us but she is putting the sale on Hold. not sure what on hold means. so notwithstanding our thai lawyer chasing daily she has never furnished us with a contract so that we could settle 14 days from receipt of contract.
>
> indians are known for being tricky. the hour you just spent with her was her trying to explain to you that she has done nothing wrong.
>
> i'm not joking i will pursue her vigorously! i'm sorry that i've got you involved but in the end that's why i bought the Villa.
>
> regards
>
> MENDEL [a nickname of Mr Lew]

128 I have set this out in full since, again, it reflects Mr Lew's thinking at the time. He was plainly very angry with Mrs Nargolwala but the one thing he does not say is that the Nargolwalas should not be entertaining a further offer since there was a concluded contract with him. Instead he refers to her duty to prepare "the contract of sale as agreed" and "she has never furnished us with a contract so that we could settle 14 days from receipt of contract".

129 On 11 November 2017 Mr Meury spoke to Mr Lew on the telephone which was followed by a long text message from Mr Lew which reads:[115]

> Hi Daniel I appreciated your call prior to you [*sic*] today's departure. I have already prepared a very strong legal demand to our friends in Singapore in the event they try & deny the transaction. As we both know settlement was to take place after receipt of contract of sale. No such contract was ever received by me. So I will be claiming Misleading & Deceptive conduct and Non Performance! I will also claim my legal costs to date plus future costs for remedy of agreement. Don't you just love her lawyers advise to us to just put the transaction on hold! She is not saying it's no deal what she is saying is ive potentially got another buyer so let's see if he will pay more then I can create an auction between the 2 buyers! She is sneaky and it showed in her request to you which you relayed at lunch on Sunday asking could I change Lawyers to a Singapore firm. We both know the reason for that as she wants to screw the Thai's out of Taxes. That point will also come in my statement of claim as well as having to rent a Villa for all the guests that I invited to join me over the December/January holiday period. She will be in for a big bill! I'm only sorry that the Andara group acting as her agent has been drawn into this. Thanks again & safe travels. SOL

130 This was followed by e-mails from Mr Lew to Mr Zeman on 13 November 2017 reiterating the points already made.[116] Finally, on 14 November 2017, for the first time, Mr Lew contacted Mr Nargolwala directly by e-mail.[117] The text of this e-mail is important as it was received on the very day that the SPA between the Nargolwalas and Mr Larpin (through Quo Vadis) was signed.

> Dear Mr Nargolwala
>
> my name is Solomon Lew from Melbourne Australia. we don't know each other but Allan Zeman a long standing friend of 45 years has described you to me over the last few months. obviously we are both well regarded globally.

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115 1AB/25.

116 2AB/652-653.

117 2AB/651.

we now potentially have a major dispute between us. your wife via the Andara group sold Villa 29 to me under specific terms and conditions. we via the Andara group agreed to buy villa 29 on a walk in walk out basis for USA $ 5,250,000. your wife agreed to furnish us with a contract which had shares in a Cayman Island Company which owned The rights to Villa 29. Settlement was to take place 14 days after receipt of contract. we had already spoken to the staff together with Daniel Meury to advise them that we had agreed to purchase Villa 29. we had hired Lawyers DLA Piper thailand to review the documents handed to us by the Andara group on behalf of the owners describing the property plus the Cayman Island registration and copies of Cayman island share certificates. DLA piper were in due diligence as well as calling or emailing daily to your appointed Thai lawyers Kuhn Anurag for the contract. on Sunday 5 nov i met with Daniel Meury in Melbourne where he asked me could we appoint a Singapore Lawyer to settle the Cayman Island shares as the owners wanted to avoid paying any income or other taxes to the Thai authority's. i responded affirmatively and advised my legal department to move this matter to our Singapore lawyers immediately for immediate settlement.

then on tuesday 7 november we received an email from our Thai Lawyers stating that your lawyers had emailed them to put this transaction on HOLD. they didn't represent that this transaction was cancelled they specifically wrote that this transaction is on HOLD. I immediately rang Mr Zeman who telephoned your wife in your absence overseas and described the long conversation. I believe he said the call went for nearly one hour. Zeman advised me after the call that your wife said she had another buyer who was going to inspect Villa 29 around 14 november at a increased price above the sum that had already been agreed with me. she was also complaining that she would be forgoing considerable income for the December/ January holiday period. we are now faced with a major impass where you and your Cayman Island company is potentially going to reneg [*sic*] on an agreed transaction. we are now fully aware of the behind the scenes moves from various discussions from Meury and Zeman on behalf of the Andara group who were acting as your selling agents.

Now the reason I'm writing to you and not our Lawyers is to head off our claims against you and your Cayman Island company as well as the Andara group. I believe we are both reasonable and sensible individuals and cherish our reputations.

I'm aware we are both not short of a dollar but for me it's now a point of principle and I will pursue rectification and

> performance of our agreement regardless of costs in all three jurisdictions. I do hope you take the above in the spirit of goodwill as party's [*sic*] like Andara & Zeman are going to be embroiled in some unpleasant revelations regarding the original purchase and true ownership of Villa 29. If you care to discuss this matter I'm available after 10 am tomorrow in my Melbourne office on telephone number … please ask for Danielle my EA.
>
> in the event i don't receive a response from you in the next 24 hours we will immediately notify our legal department to take action in three jurisdictions namely thailand, singapore and Cayman Islands.
>
> Solomon Lew
>
> please see below emails.

131 I shall have to consider the text of this e-mail in more detail when considering the events of 14 November 2017 involving the Nargolwalas, Mr Larpin and Mrs Te Lagger but first shall consider the history of the dealings between the Nargolwalas and Mr Larpin which led to the signing of the SPA on 14 November 2017.

Dealings between Mr Larpin and the Nargolwalas

132 In the early evening of 24 October 2017, Mr Larpin, who was then in Koh Samui, phoned Mr Martin Phillips ("Martin"), having previously phoned the offices of Phillips Property to obtain Martin's contact details. Mr Larpin was interested in purchasing property in Phuket as an investment and had found details of some potentially suitable villas on the Phillips Property website.

133 They discussed some possible villas including Villa 11 at the Andara Resort. Mr Larpin then made arrangements to travel to Phuket the following day. In the meantime Martin contacted his brother, Mr Lyndon Phillips ("Lyndon"), then still the General Sales Manager at the Andara Resort (his last day in this position was 26 October 2017), to ask which villas were still

available and was told that Villas 11 and 29 were available and that Lyndon could obtain access to both the following day.[118]

134 On 25 October 2017 Martin and Mr Larpin considered a number of villas and viewed Villa 11 and Villa 29 with Lyndon. During the viewing of the latter Lyndon mentioned that he had heard that another party was interested in buying Villa 29 but that he had not been involved in any discussions and he may have said that they were being conducted directly through Mr Meury and, possibly, Mr Zeman.[119] Mr Larpin did not enquire further.[120]

135 On 26 October 2017 Mr Larpin e-mailed Martin to seek further details of both villas and Martin responded with some of the information and indicated that he hoped to have all the documents requested by the following Sunday.[121] The e-mail contained the following passage:

> … I have spoken to the owner and will meet him at his home on Sunday in Singapore. He has confirmed that there is another offer that he is considering (as Lyndon mentioned). He does not wish to lose this offer and has suggested we discuss how you wish to proceed and will keep a very open mind. He hopes to have an update from me on Sunday that we can table. …

In cross-examination Mr Larpin confirmed that he did not follow up with Martin about that paragraph.[122]

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118 AEIC1/12/160-161, AEIC1/13/185-186.

119 AEIC1/12/163 para 15, AEIC1/13/189 para 21, T5/9/20-13/6, T7/14/13-15/4.

120 T7/14/13-20.

121 1AB/34, 37.

122 T7/18/16-19/6.

136 The discussions between Martin and Mr Nargolwala are evidenced by a number of e-mails passing between them on the 26th.[123] Two comments from Martin should be noted:

> I have a client who viewed V29 yesterday and seems prepared to make a very favourable offer and complete, subject to DD, quite quickly.
>
> …
>
> He has been quoted UD$8.5 million. We will not be dealing trough [*sic*] Andara but rather directly with your kind self and as such will need to discuss and agree our commercial terms with you.

137 On Saturday 28 October 2017 Martin spoke again to Mr Larpin when Mr Larpin said that he remained keen to make offers in respect of both villas. They discussed the way forward which Martin said would first involve the signing of a Reservation Agreement and a copy of a draft of such an agreement was e-mailed to Mr Larpin who, in response, indicated that he might make an offer on both villas and that the matter would be handled by Mrs Te Lagger.[124]

138 Martin then met with the Nargolwalas on Sunday 29 October 2017 in Singapore. Mr Nargolwala's account of the meeting was not disputed by Martin as being accurate.[125] The gist of Mr Nargolwala's account was that he wanted a "clean and swift deal" which would leave him with at least US$7m after deduction of any commission. He mentioned that another potential buyer "not too long ago made an offer to purchase the Villa but failed to follow up properly because … that potential buyer failed [to] act with diligence … as a result of this, we concluded that he was not a serious buyer ...".

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123 1AB/43-47.

124 1AB/203-211.

125 AEIC1/6/96 para 15, T5/25/10-26/12.

139 Mr Nargolwala was cross-examined on this in a passage which ends with Mr Nargolwala saying "It was an offer that was never accepted, never followed up by any documentation. As far as I was concerned, it was dead."[126]

140 It is however to be remembered that on 27 October 2017, Mr Nargolwala had been informed by Mr Meury that Mr Lew had appointed lawyers in Thailand.[127] But, as indicated in [98] above, I have accepted that even on receipt of the details of the Thai lawyer, the Nargolwalas had concluded that Mr Lew was not a serious buyer and the evidence relating to the meeting with Martin on 29 October 2017 is consistent with this.

141 Matters then proceeded in a conventional manner. The Nargolwalas entered a Fee Arrangement Agreement with Martin which provided for the payment of a commission of 7% of the sale price if this was equal to or above US$7.5m and thereafter the deal proceeded on the basis of an offer by Mr Larpin in the sum of US$7.9m.[128]

142 Following the ironing out of some details, which was facilitated by direct communications between Mrs Te Lagger and Mr Nargolwala, a Reservation Agreement dated 8 November 2017 was entered into by the Nargolwalas and Quo Vadis and a 10% deposit was paid to the Nargolwalas' solicitors, Lee & Lee, as a stakeholder.[129] The Reservation Agreement gave Quo Vadis exclusivity until 30 November 2017 and the deposit was paid on the basis

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126 T6/21/1-24/4.

127 1AB/49.

128 2AB/1009-14.

129 2AB/1015-1019.

that the shares in Querencia were to be acquired "on a debt free basis, and free from any encumbrance" (see Clause 1.1).

143 The necessary due diligence was then carried out and the transaction documents prepared and agreed. The SPA was signed by Mr Nargolwala in Singapore and was taken by Mrs Nargolwala to Phuket where it was signed by Mrs Nargolwala and by Mrs Te Lagger on behalf of Quo Vadis late in the afternoon of 14 November 2017.[130] The following provisions of the SPA should be noted:

> 1.1 The Sellers shall … on Completion sell to the Purchaser … the Sale Shares …. free from all liens, charges and encumbrances.
>
> 3.1 Completion of the sale and purchase of the Sale Shares shall take place … on or before 5 p.m. on the Completion Date … and … the Sellers shall deliver … (a) duly executed registrable share transfers … together with the share certificates in respect thereof; and (b) a Resignation letter executed by each of the Sellers.
>
> 4 [This is a standard form representation and warranty clause including in clause 4.2.1 a representation that] The Sellers will, on Completion, be entitled to sell and transfer to the Purchaser the full legal and beneficial ownership of the Sale Shares free from all liens, charges and other encumbrances …
>
> 4.2.11 All information relating to the Company which would materially affect the sale and purchase of the Sale Shares has been disclosed to the Purchaser.
>
> "Completion Date" means the date falling two (2) Business Days from the date of this Agreement …

144 On that same afternoon, Mr Zeman sent Mr Nargolwala an e-mail the text of which reads:[131]

> Dear Kai,

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130 2AB/1021-1031.

131 2AB/640, 646.

> I just tried to call you in Singapore but no answer. I understand congratulations are in order for the sale of Villa 29 and I am very happy for you. On the other hand, I was trying to call you to tell you there is a very unhappy buyer in Australia who has sent me an email that he intends to have his lawyers send you a letter claiming misleading and deceptive conduct for not delivering a contract to him as well as costs and compensation for his guests who intend to spend their December/ January vacations with him as well as all legal costs. I have tried to talk him out of it but he is a very forceful individual and I cannot change his mind. Please call me when you have a chance and hopefully things will die down. On the other hand, I am very happy for you. It's been a long time.
>
> Best regards,
>
> Allan

145 Mr Nargolwala then spoke to Mr Zeman, he thinks at around 6.00 or 7.00pm.[132] Mr Nargolwala recalls that Mr Zeman tried to assure him that he would speak to Mr Lew and "try to manage him" and that he told Mr Zeman that Mr Lew's claims were baseless and that he should really be blaming himself for failing to act with due diligence.[133] Consistent with this, in cross-examination, he said that Mr Zeman had said:[134]

> I am totally with you. I know that you have done nothing wrong. Solomon Lew is just spouting off and, you know, he is not an easy person but I have known him a long time and don't worry, I will manage him.

146 Later that evening Mr Nargolwala received the e-mail from Mr Lew the text of which I have set out in [130] above.[135]

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132 But see 2AB/645.

133 AEIC1/5/83-84 paras 64-65.

134 T6/78/21-25.

135 2AB/651.

147 Mr Nargolwala, in his AEIC, states that it was clear to him that Mr Lew was trying to bully his way through to get him to abandon the deal with Mr Larpin and sell Villa 29 to him instead. On receipt he telephoned his wife to ask her to contact Mr Meury to find out exactly what happened between him and Mr Lew because he was surprised that Mr Lew should consider that Mr Meury was the Nargolwalas' agent.[136]

148 Mrs Nargolwala then spoke to Mr Meury who told her that he had communicated with Mr Lew mainly by text messages and that he would share the relevant text messages with her. He did this on 15 November 2017.[137] These messages appear at 1AB/1 and 1AB/2 and constitute only a very few of the messages that passed between them but do indicate that Mr Meury was pressing Mr Lew to appoint a lawyer between 23 and 27 October 2017 and that this information had been passed on to Mr Nargolwala. In cross-examination, Mr Nargolwala was asked why he did not pass on the documents to Mr Larpin and said that he did not consider it appropriate to do so since they merely showed that Mr Meury was getting concerned as the 14 days' deadline was approaching and that Mr Lew's assurances were not resulting in any action.[138]

149 On the morning of 15 November 2017, Mrs Nargolwala had breakfast with Mr Larpin, Mrs Te Lagger and Martin at which Mrs Nargolwala indicated that an issue might have arisen with Villa 29 and it was agreed that Mr Larpin and Mrs Te Lagger would speak to Mr Nargolwala about this later in the day.[139]

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136 AEIC1/5/82 para 63, T5/142/6-143/4.

137 AEIC1/7/113 para 32, AEIC1/10/142 paras 15-16.

138 T5/144/13-22.

139 AEIC1/11/152 para 24, AEIC1/12/177 para 59, AEIC1/13/196 para 45, T7/19/7-18.

A telephone call then took place between Mr Nargolwala in Singapore and Mrs Nargolwala, Mr Larpin and Mrs Te Lagger in Phuket. A good deal of evidence was adduced in relation to this phone conversation and the parties' reactions to it.

150 Whilst Mr Nargolwala cannot now recall whether or not he forwarded the e-mail from Mr Lew on 14 November 2017 to his wife, the other parties have no recollection that he did.[140] Both Mr Larpin and Mrs Te Lagger said that they did not see the e-mail at this time and I accept their evidence.[141] In cross-examination the substance of what Mr Nargolwala recalls he said is contained in the following extracts.[142]

> MR JEYARETNAM: What did you tell Mr Larpin and Mrs Te Lagger about the email?
>
> A: I told them I had received an email from a Solomon Lew in Australia. I told them that it was, at least to my mind, was characterised as a bullying email. And that it was -- this individual was claiming that he had a right to buy the villa. I advised him he had never provided us with a written offer, had never provided us with any explanation of what his offer was, and had had no follow-up at all in the time period that he had stipulated he wanted to get the transaction done, and in my opinion, it was a vexatious claim.
>
> …
>
> Q: Were you concerned that if you told Mr Larpin that you had accepted the price in principle, he might put the transaction on hold until he had gotten to the bottom of it?
>
> A: I didn't consider that because I didn't consider it relevant, your Honour.

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140 T6/144/14-145/1.

141 AEIC1/13/196 para 46(a), AEIC1/11/152 para 24.

142 T5/137/18-141/9, T6/73/15-74/16.

> Q: As the new buyer, Mr Larpin -- let me put it the other way around. If Mr Larpin had asked for the email, would you not have shared that with him, since he's the new buyer?
>
> A: I would have happily done so, your Honour.
>
> Q: Was it a long conversation that you had?
>
> A: It was a relatively short conversation. I explained the basics of the -- of Mr Solomon Lew not having followed up on any of the commitments he appeared to have made through Daniel Meury. I told him that no documents had been signed, no deposit had been paid and this was the first communication that I had directly from Mr Solomon Lew. I did not have his email, I did not have his phone number and until this date today I had not set sight on Mr Solomon Lew.

151 Mrs Nargolwala confirmed this.[143] Mr Larpin in his AEIC stated at para 46(2):[144]

> I asked Mr Nargolwala if he had accepted this offer, and whether there was a concluded agreement. Mr Nargolwala said that he had not even met this person, and did not receive any written offer from this person. Further, Mr Nargolwala confirmed that he had not received any offer letter, and nor did he sign any contract with this individual. Consequently, Mr Nargolwala said that he could not, and had not, accepted any offer whatsoever in relation to the Villa from this individual.

152 In a long passage of cross-examination, Mr Larpin repeated the fact that he had been told that Mr Nargolwala had received a threatening and vexatious e-mail, that he had concluded that Mr Nargolwala was a "fit and proper gentleman" and that he chose to believe Mr Nargolwala. From what he had heard from Mr Nargolwala he regarded the e-mail as being an attempt at

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143 T6/155/11-156/4.

144 AEIC1/13/196.

blackmail.[145] Mrs Te Lagger's evidence supported this.[146] He went on to say that Mr Nargolwala offered to "abort the deal" but that he decided to, and indeed felt obliged to, complete the deal.[147]

153 Accordingly, completion did take place on 16 November 2017 in Singapore as required by the SPA, being two days after the SPA was signed, when the share transfer, the share certificates and the letters of resignation were all handed over. Thereafter Mrs Te Lagger in her capacity as director of Quo Vadis authorised the necessary alterations in respect of the shareholders and directors of Querencia to be made in the BVI.

154 This litigation then ensued as did litigation in the BVI in which a stop notice in respect of the shareholding in Querencia together with an interlocutory injunction to restrain any dealings in those shares was obtained.

The issues

155 On the basis of that factual background, I can now turn to consider the issues that arise in this case.

Issue 1: Proper law

156 There is a dispute between the Plaintiff and the 1st and 2nd Defendants as to which system of law should apply in order to determine whether a binding oral contract was made between them on 11 October 2017 and, if so, whether it

145 T7/19/7-25/12.

146 T3/54/20-56/3.

147 T7/25/13-27/13.

is enforceable under that law. Counsel for Mr Lew contended that the proper law for these purposes was Singapore law.

157 Somewhat surprisingly, having regard to the fact that at all times in their dealings both with Mr Lew and Mr Larpin the Nargolwalas had insisted on using Singapore lawyers and that the agreements that were reached with Quo Vadis were all expressly governed by the law of Singapore, counsel for the Nargolwalas contended that the proper law was Thai law. This became less surprising after evidence of Thai law was adduced which gives rise to an argument that a binding oral contract is potentially less easy to enforce under Thai law than it would be under Singapore law.

158 It is settled law that the principles to be applied in seeking to determine what is the proper law is the *lex fori*, in this case Singapore law. Those principles are well developed in relation to the case where there is no dispute that a binding contract exists but where there is no choice of law clause contained in the contract.

159 In *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] SLR 391 ("*JIO Minerals*") at [79] the Court of Appeal set out the following principles:

> It is well established that a three-stage approach is applied to determine the governing law of a contract …. At the first stage, the court considers if the contract expressly states its governing law ("the Express Law"). If the contract is silent, the court proceeds to the second stage and considers whether it can infer the governing law from the intentions of the parties ("the Implied Law"). If the court is unable to infer the parties' intentions, it moves to the third stage and determines the law which has the closest and most real connection with the contract ("the Objective Law").

160 The position is less clear however where the question to be answered is whether a binding contract was actually entered into by the parties in the first place. Applying the three-stage approach introduces an element of circularity in that it involves first trying to ascertain what the governing law would have been if a contract had been made and then applying that law to determine whether it has in fact been made. This has led to some commentators to suggest that no attempt should be made to apply the three-stage approach and that the more appropriate course is simply to apply the *lex fori* to answer the question.

161 This was considered by Mavis Chionh Sze Chyi JC in *Pegaso Servicios Administrativos SA de CV and another v DP Offshore Engineering Pte Ltd and another* [2019] SGHC 47 ("*Pegaso*"). An appeal was lodged against this judgment but the appeal was dismissed *ex tempore* on 30 October 2019. Chionh JC considered the matter at [70]–[73] of her judgment:

> 70 Firstly, as the defendants pointed out, the cases replied on by the plaintiffs … (chiefly, *Las Vegas Hilton Corp (trading as Las Vegas Hilton) v Khoo Teng Hock Sunny* [1996] 2 SLR(R) 549 ("*Las Vegas Hilton*") and *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("Pacific Recreation")) were cases where the issue of whether a contract had been formed was not itself in contention – unlike the present case. …
>
> …
>
> 72 Having regard to the formulation of the three-stage test, it would not make sense to apply the test in a case where one party denies altogether the existence of any agreement. In such a case, it would be illogical to apply the first stage of the test and to look at what the express provisions of the contract say – since one party disputes that there is any contract to look at. Nor would it make sense to apply the second stage of the test and to ask whether the parties' intention as to the governing law of the contract can be inferred from the circumstances. Indeed, there is nothing in the judgements in *Las Vegas Hilton* and *Pacific Recreation* to suggest that where the very existence of a contract is disputed, the appropriate system of law to apply in addressing that dispute may be discerned by the court

> leapfrogging the first two stages of the three-stage *Pacific Recreation* test to apply the third stage.
>
> 73 From the (admittedly insubstantial) case law available, it would appear that judicial views have been divided as to whether the *lex fori* (see *Oceanic Sun Line Special Shipping Co Inc v Fay* [1988] 79 ALR 9 at 55) or the "putative proper law" test (see *The Parouth* [1982] 2 Lloyd's Rep 351 at 353) should apply in considering whether a contract has been formed. As I indicated in delivering oral judgement, I favoured the application of the *lex fori* in a case like the present, where the existence of the entire contract is disputed, since it seemed to me to avoid the circularity of the "putative proper law" test which "assumes that a contract has been formed, and then determines the proper law on that basis in order to determine whether the contract has been formed" (Professor Yeo Tiong Min, S.C, *Private International Law: Law Reform in Miscellaneous Matters* (unpublished). To this finding I would add two other observations. First, I did not think an application of the "putative proper law" test would have led me to a different view about the applicability of Singapore law. *Inter alia*, I noted that in both the Rig Purchase Agreement and the draft Shipbuilding Contract, it was stipulated that the governing law would be Singapore law: see in this respect clause 4.1 of the former and clause 18.1 of the latter. Given that parties had negotiated the Rig Purchase Agreement and contemplated the execution of the draft Shipbuilding Contract with reference to Singapore law as the governing law, I considered that if it came to deciding the putative proper law of an alleged collateral contract for the return of the rig deposits paid pursuant to the Rig Purchase Agreement, that putative proper law would in all probability be Singapore law.

162 Having considered the authorities and some learned articles relied upon by the parties (Yeo Tiong Min, *Private International Law: Law Reform in Miscellaneous Matters* (unpublished); Tan Yock Lin, "Good Faith Choice of a Law to Govern a Contract" [2014] SJLS 307), I agree that there is a division of both judicial and academic opinion on the correct approach in circumstances such as the present case where the fundamental dispute between the parties is whether a contact was ever made. I do not however accept the submission made by counsel for the Plaintiff that the learned judge was deciding that the *lex fori* should apply in all cases where the existence of a contract was in dispute. As

the judge makes clear she favoured the *lex fori* approach in such a case but also concluded that the same result would have been reached by adopting the putative proper law test. She was not seeking to lay down a hard and fast rule that the *lex fori* should apply in all cases where the existence of a contract was in issue. This would, to my mind, be to introduce an approach which constitutes too much of a blunt instrument to serve the interests of justice. There will be cases where it is the appropriate course to take, as in the *Pegaso* case, but there will be others where the facts are sufficiently clear that justice can better be done by approaching the matter by reference to the three-stage test in *JIO Minerals*, with necessary adjustments to take into account that there is the fundamental dispute as to the existence of the contract in the first place.

163 With regard to the first stage, it may be unlikely that the Express Law will be stated in the case of a putative contract. However, the Implied Law stage is just as applicable to a putative contract as it is to a concluded contract. If the facts as found allow the court to reach a clear conclusion as to what would have been the parties' common intention as to the governing law of the contract if the same was concluded, then it would be unrealistic to disregard that and to determine that the proper law was in conflict with that common intention. Equally, the Objective Law stage may, in an appropriate case, lead the court to the clear conclusion that a particular law was the one that had the closest connection with the putative contract rather than the *lex fori*.

164 In both cases however, I consider that the court should reach a clear conclusion that a particular law should be applied rather than the *lex fori*. In cases of doubt, the counsel of prudence would be to apply the *lex fori*.

165 In the present case, I consider that the facts as found above do enable me to reach a clear conclusion by applying the second stage test, the Implied Law

stage. This is because of the Nargolwalas' insistence, at the time that the alleged contract was made that Singapore lawyers should be instructed and, hence, that Singapore law should apply.[148] Mr Nargolwala's attitude was succinctly expressed early in his cross-examination:

> MR JEYARETNAM: Of course. In relation to the sale of the Querencia shares, was it your wish to have Singapore lawyers represent you?
>
> A: It was.
>
> Q: And that would be Lee & Lee?
>
> A: That is correct.
>
> Q: And that applies both to the possible sale -- to use neutral language -- to Mr Lew as well as the eventual sale to Mr Larpin; correct, the desire to use Singapore lawyers Lee & Lee?
>
> A: That's correct, yes.

166 Whilst it is true that Mr Lew initially misunderstood that the Nargolwalas wanted Thai lawyers to be instructed, once the preference for Singapore lawyers was drawn to his attention at the lunch on 5 November 2017 (see [124] above) he readily agreed to the change and in doing so was, as his wife put it, both pleasant and obliging.[149] I have no doubt that had he understood that the Nargolwalas wished the matter to be dealt with by Singapore lawyers from the outset, he would likewise readily have agreed. It is thus clear on the facts of this case that both parties would have intended the governing law of the alleged oral contract to be the law of Singapore. There is therefore no circularity in this case of applying the Implied Law stage.

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148 AEIC1/5/70 para 36, AEIC1/7/109 para 20, T5/37/25-38/10, T5/40/1-9, 1AB/27.

149 T3/3/8-21.

167 Having reached this conclusion, it is, strictly speaking, unnecessary for me to consider the third stage, the Objective Law stage. However, in case the matter goes further, I shall do so. This stage involves attaching weight to the objective factors which point for or against any particular law. In this case counsel for the Plaintiff relied on the fact that Singapore was the Nargolwalas' place of residence, that the share certificate in Querencia was located in Singapore, that payment was to take place in Singapore and that any enforcement of the agreement would take place in Singapore. So far as concerns Thailand, he contended that although some of the constituent elements to the making of the agreement did take place in Thailand, such as the fact that Mr Lew was staying at Villa 29 at the time so that the handshake took place there and that documents were supplied by Mr Meury in Thailand, there were purely fortuitous. Whilst the benefit of the contract was to be enjoyed in Thailand by occupation of Villa 29, the agreement was for the sale of shares in a BVI company and the corporate structure was therefore to keep the holding outside Thailand.

168 For his part, counsel for the 1st and 2nd Defendants emphasised that the object of the alleged agreement was to provide Mr Lew with "ownership" of a villa in Thailand so that the *lex situs* favoured Thai law, that the negotiations had been carried out by Mr Lew and the (alleged) agent of the Nargolwalas in Thailand and was concluded by them in Thailand and that Mr Lew was content to instruct Thai lawyers. The submission based on the *lex situs* does invite the court to ignore the fact that the alleged agreement was for the sale of shares and to have regard to the substance of the matter. This does, in a sense, involve the court lifting the corporate veil but, in my judgment, this is not impermissible where one is considering the weight that should be attached to the substance of the matter and I consider that it would be wrong not to attach any weight to the

location of Villa 29 although regard must also be had to the fact that Querencia is a BVI company.

169 Taking all these matters into account I do not consider that it is possible by considering only the third stage to reach a clear conclusion which law, Thai or Singapore, has the "the closest and most real connection with the contract" although I incline to the view that the weight of the relevant factors tends to favour Singapore law. Accordingly, if this had been the only consideration, I would have decided that it was correct to apply the *lex fori*. However, for the reasons given I have concluded on the basis of the second stage approach that the clear intention of the parties was that Singapore law should apply. Accordingly, the proper law of the contract is Singapore law.

170 I shall therefore consider the remaining issues by the application of Singapore law and at the end shall consider whether any of my conclusions would have been different if Thai law was applicable.

Issue 2: The agency

171 Paragraph 11 of the Statement of Claim pleads that "it was represented to the Plaintiff that Meury and Zeman acted as agents and/or representatives for the 1st and 2nd Defendants in relation to the sale of the Querencia shares". In Further and Better Particulars it was stated that the representations were made by conduct, in the case of Mr Meury by the representations made by his conduct in early 2017 and from September 2017 to early November 2017 in communicating with the Plaintiff in respect of the sale of the shares.[150]

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150 Set Down Bundle Tab 1 page 7, Tab 9 page 51.

172 Para 5 of the Defence of the 1st and 2nd Defendants reads as follows:

> At all material times, neither Meury nor Zeman were authorised to act as agent for the 1st and 2nd Defendants in the terms alleged by the Plaintiff or carry out any act(s) that would bind the 1st or 2nd Defendants to any legal obligation to sell the Villa and/or transfer the shares in Querencia to anyone.

173 These Defendants were therefore denying the existence of any agency at all or, alternatively, denying that any agency that did exist extended to authorising Mr Meury or Mr Zeman to bind them legally.

The law on actual agency

174 It is well settled that the authority of an agent may be actual authority, either express or implied, or it may be ostensible, sometimes called apparent authority (see *eg*, *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 ("*Freeman & Lockyer*") at 488 and *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 at 583). Nothing turns on the plea that Mr Zeman had any authority to act on behalf of the Nargolwalas, the focus is on Mr Meury. There is no suggestion here that Mr Meury had express actual authority to act on behalf of the Nargolwalas; there was no written agency agreement or any other document expressly conferring authority on Mr Meury.

175 So far as concerns implied authority, there was little between the parties on the law. The Plaintiff has drawn my attention to Tan Cheng Han, *The Law of Agency* (Academy Publishing, 2nd Ed, 2017) ("*The Law of Agency*") at para 03.031 which reads:

> In general, authority is inferred from the conduct of the parties and the circumstances surrounding the transaction where such authority is said to be necessary for, or ordinarily incidental to, the express authority granted to an agent. It also arises where it is clear from the circumstances that a person is intended to

> have authority as an agent but such authority has not been expressly stipulated.

For their part the 1st and 2nd Defendants relied upon *Bowstead and Reynolds on Agency* (Peter Watts gen ed) (Sweet & Maxwell, 21st Ed, 2018) at paras 2.029–032 which is to like effect.

176 In an earlier passage from *The Law of Agency* the author correctly observes at para 03.027:

> Generally, cases involving implied actual authority are more complex compared to those involving express actual authority. In the latter, there will usually be no difficulty establishing that an agency relationship was intended. Often too, the scope of the agent's authority will be clear. On the other hand, where the agency relationship has arisen entirely by implication from the conduct of the parties and the circumstances of the case, *it will be necessary to imply from such conduct and circumstances both the existence of an agency and what the scope of the agent's authority is since the parties have not attempted to provide expressly for this.* [emphasis added]

The facts on actual agency

177 In the present case both the existence and scope of any implied authority vested in Mr Meury to act on behalf of the Nargolwalas has to be determined from the conduct of the parties and all the circumstances of the case. Mr Meury did not practice as a real estate agent and both the Nargolwalas and Mr Lew were aware of this. The manner in which the sale and purchase of villas such as Villa 29 is conventionally conducted can be seen from the two Agency Agreements in relation to Villa 29, the first being the agreement entered into by the Nargolwalas and the Andara Resort in 2015[151] and the second being the Fee Arrangement Agreement with Martin in November 2017.[152]

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151 2AB/1001.

178 The former appointed the Resort as the exclusive agent for marketing and disposal of Villa 29 in return for which the Resort would be paid 5% of the amount received by the Nargolwalas "upon successful *completion* of the Sale Transaction", pursuant to cl 3.1 [emphasis added]. Whilst cl 5 acknowledged that the relationship of principal and agent was established between the parties, cl 4 defined the responsibilities of the Resort as follows:

> 4.1 To promote and extend the sales and market the sale of the [Villa];
>
> 4.2 To brief and advise the Buyer on the current ownership structure ….
>
> 4.3 To liaise with [the Nargolwalas] or its counsel in respect of any enquiries made by [the] Buyer in connection with the sale and purchase structure … and the Sale Transaction.

179 The latter appointed Martin as a business facilitator who would identify and introduce potential buyers to the Nargolwalas. Here, cl B(iii) provided that the arrangement fee was on a sliding scale between 6.5 and 7% and was to be payable "within 5 business days from the *completion* of the sale and purchase of the [Querencia shares]" [emphasis added].

180 It will be seen that both of these agreements anticipate that any successful sale will culminate in *completion* which will involve the transfer of the shares in Querencia. This almost inevitably would involve the engagement of lawyers to draw up the necessary documents. I do not read either document as empowering the agent to bind the client in advance of the necessary documents being drawn up. The agent is to act, in both cases, as the person who assists in helping the parties negotiate so as to achieve a sufficient measure of

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152 2AB/1009.

agreement between them on which the lawyers could draw up the documents for completion. Only then would there be a binding agreement. At various stages in the trial expressions such as "agreement in principle" and "agreement subject to contract" were used to refer to the stage that negotiations would have reached before the matter was placed in the hands of the lawyers. Whilst this accords with everyday parlance, it has to be remembered that in law such expressions at best constitute an agreement to agree, not a legally binding agreement.

181 It is therefore clear that in the conventional transaction for the sale of a villa in the Andara Resort a real estate agent would be appointed who would have a relationship of principal and agent with the client (express in the case of the first agreement and implied in the case of the latter). The function of the agent was to act as an intermediary or go-between between the vendor and potential purchaser to assist in negotiations to lead to an agreement to agree. But his authority as agent would not have extended to concluding a legally binding contract, nor would any prospective purchaser be informed by the agent that he had such authority or have any reason to conclude that he did.

182 Mr Lew gave some answers in cross-examination which are confirmatory of this:[153]

> MR DANIEL: Good afternoon, Mr Lew. I just wanted to close off some questions on the first topic that I covered. We heard in your evidence that you mentioned that you'd bought -- I can't remember whether you said you bought a property in Phuket before or your son had bought a property in Phuket or in Thailand.
>
> A: The family has brought [*sic*] on at least two occasions that I know of.

153 T2/91/25-92/20.

Q: In Thailand?

A: Yes.

Q: Of course you have experience in buying properties, I presume, all over the world?

A: Yes.

Q: And selling properties all over the world?

A: Yes.

Q: Can we agree, Mr Lew, that someone of that experience would know that it is highly unusual to have an oral agreement for the sale and purchase of property?

A: Not at all. A man's word is his bond.

183 The expression "A man's word is his bond" is indicative of a statement binding in honour alone, a representation that the word is to be trusted not that it legally enforceable.

184 In the present case, the Nargolwalas did not enter any form of written agency agreement either with Mr Meury or with the Andara Resort. They were under no obligation to pay any commission to either in the event of a sale to Mr Lew. Indeed it was the fact that no commission was payable that influenced Mr Nargolwala to consider Mr Lew's offer of US$5.25m notwithstanding his wife's concern that the price was too low (see [57] above). There is thus no basis for concluding that any agency between the Nargolwalas and Mr Meury was expressly created. If there was one, it has to be implied.

185 I therefore turn to consider implied agency. Two questions arise. First, was any agency to be implied from the conduct of the Nargolwalas and Mr Meury in relation to the negotiations for the sale of Villa 29 and, secondly, if there was, what was the scope of that agency?

186 The conduct of Mr Meury when acting in the negotiations between the Nargolwalas and Mr Lew has both similarities and differences with a conventional sale and purchase negotiation. The differences were, first, that both parties appreciated that Mr Meury was not a real estate agent and were therefore using his good offices because he was friends with both parties.

187 Secondly, the Nargolwalas did not enter any form of written agency agreement either with Mr Meury or with the Andara Resort.

188 However, whilst Mr Lew had been told that there was no commission agreement, he did consider that Mr Meury and Mr Zeman were acting on behalf of the Nargolwalas and that this would not result in a payment to Mr Meury. It was this that led to the "Chocolates to Switzerland" discussions (see [25] and [108]–[111] above). Having regard to the fact that the first "Chocolates to Switzerland" discussion took place in September 2017, although Mr Meury did not know until after the events of 11 October 2017 what the sum was that Mr Lew was going to give him as a gift if the transaction went to completion, he could have been in no doubt that if he assisted Mr Lew to achieve this, he would be rewarded for doing so. In this respect therefore, unlike the conventional real estate agent Mr Meury did stand to benefit financially from the purchaser whereas the vendor was under no obligation to pay commission to anyone.

189 Third, it is apparent that Mr Lew's knowledge that Villa 29 might be available for purchase arose over dinner with Mr Meury on 6 September 2017 at which they must have discussed the possibility of Mr Meury acting as a go-between with the owners even if they did not discuss the price. This resulted in

the e-mail of 7 September 2017 (see [24] above).[154] This again is indicative of a closer relationship between the alleged agent and the purchaser than would exist in a conventional transaction. Indeed, at the outset, Mr Nargolwala saw Mr Meury as representing Mr Lew.[155]

190 The similarities were, first, that the customary work done by a real estate agent of communicating between the parties to seek to facilitate a deal was being done by Mr Meury. Both parties trusted him sufficiently to use him to pass messages between them.

191 Secondly, both parties anticipated that lawyers would have to be involved if the negotiations reached a sufficiently advanced stage.

192 The Plaintiff contends that Mr Meury had actual authority to act as an agent for the Nargolwalas. This is put in two ways. First, it is said that Mr Meury had implied authority to act generally as their agent in relation to the sale of the Querencia shares. Secondly, at a minimum, that he had authority to receive and convey messages on the Nargolwalas' behalf and thus to convey any acceptance of the offer to Mr Lew.

193 As to the first, the question at once arises as to what general authority such an agent has. The Plaintiff puts it in a number of ways: the authority "to act as their agent in the negotiations for the sale of the Querencia Shares to [Mr Lew]", "Meury was authorised to negotiate on the Nargolwalas' behalf and to take all necessary steps to close the transaction" and "the Nargolwalas throughout intended Meury to act as their agent in communicating with [Mr

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154 1AB/4, T3/129/15-131/3.

155 T5/69/22-70/5.

Lew]".[156] The 1st and 2nd Defendants put their case the other way round by inviting the court to ask "whether Meury had actual authority to conclude the alleged Oral Contract (or any binding contract) for and on behalf of the Nargolwalas".[157]

194 In the light of the findings of fact and having particular regard to the way in which Mr Meury acted as a go-between I consider that it is correct in the circumstances of this case to hold that Mr Meury was acting as an agent of the Nargolwalas. They entrusted him to act on their behalf in seeking to facilitate a deal with Mr Lew. But I cannot accept that his authority extended any further than the authority conferred on a properly appointed real estate agent who would only have authority to take matters forward to the stage where it was appropriate to pass the matter into the hands of lawyers. He would not have implied authority to take the matter any further than a non-binding agreement in principle.

195 Thus, whilst I accept that Mr Meury did have implied actual authority to receive and convey messages on the Nargolwalas' behalf, the scope of that authority did not extend "to take all necessary steps to close the transaction" if by this it is meant that he had actual authority to convey any acceptance of the alleged oral contract (or any binding contract) for and on behalf of the Nargolwalas. The actual authority of a properly appointed real estate agent would not extend this far so Mr Meury's cannot either. I therefore accept the alternative plea in para 5 of the 1st and 2nd Defendants' Defence that any

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156 Plaintiff's written closing submissions paras 87 and 88.

157 1st and 2nd Defendants' written closing submissions para 136.

agency that did exist did not extend to authorising Mr Meury or Mr Zeman to bind them legally (see [172] above).

196 The Plaintiff's second submission that the fact that Mr Meury had actual authority to convey messages on behalf of the Nargolwalas means that he did have actual authority to convey any legally binding acceptance of an offer to Mr Lew thus also fails. In my judgment, in the circumstances of this case, any such submission must be based upon a contention that he had ostensible authority to bind the Nargolwalas by way of an oral contract.

197 The Plaintiff contends that if Mr Meury did not have actual authority to bind the Nargolwalas, yet so conducted himself as to represent that he had, then, even if he acted contrary to the Nargolwalas' intentions or instructions, the Nargolwalas would be bound under the law relating to ostensible authority.

The law on ostensible authority

198 Both parties drew my attention to the explanation of the correct legal approach by Diplock LJ (as he then was) in *Freeman & Lockyer* at 503:

> An "apparent" or "ostensible" authority … is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract. …

199 The 1st and 2nd Defendants submitted that since the representation had to be made by the principal to the representee and since there was never any direct contact between the Nargolwalas and Mr Lew prior to 11 October 2017, there was no scope for the doctrine to apply in this case. I do not accept this. This is clear from a later passage on 503 in *Freeman & Lockyer*:

> The representation which creates 'apparent 'authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. …

200 The representation which creates "apparent" authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. The correct approach in a case such as the present was explained by Steyn LJ (as he then was) in *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 at 201 which reads:

> It is common ground that a plea of apparent authority can only be based on a holding out, or representation, as to authority of the agent by the principal sought to be held bound by the particular act. Our law does not recognize, in the context of apparent authority, the idea of a self-authorizing agent. See *Armagas Ltd. v. Mundogas S.A.,* [1986] 2 Lloyd's Rep. 109; [1986] 1 A.C. 717.
>
> It is possible to narrow down the issue of ostensible authority, which arises in the present case. A principal may clothe an agent with apparent authority in more than one way. The present case falls into a category, which, in *Armagas Ltd. v. Mundogas S.A.*, was described by Lord Keith as follows (p. 112, col. 2; p. 777 B):
>
> > … In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question.

> This type of apparent authority is often described as the usual authority of an agent. But it is important to remember that the idea of usual authority is used in two senses. First, it sometimes means that the agent had implied actual authority to perform acts necessarily incidental to the performance of the agency. Secondly, it sometimes means that the principal's conduct in clothing the agent with the trappings of authority was such as to induce a third party to rely on the existence of the agency. The issue in the present case is one of usual authority in the second sense. …

201 The nature and extent of any representation by conduct must therefore depend upon the circumstances of the case in question. Plainly the subjective understanding of the person to whom the representation is made will be material but it cannot be decisive if, objectively, the representee was reading more into the facts surrounding the alleged representation than a reasonable third party would have done.

202 The above considerations which surround the question of ostensible authority are, to my mind, inextricably intertwined with the question of whether any, and if so what, binding oral contract was entered into on 11 October 2017. I shall therefore consider the law on that topic before considering the facts in relation to both.

Issue 3: The alleged oral contract

203 Two primary questions arise. First, was any binding agreement reached on 11 October 2017? Secondly, if there was, what were the terms?

204 Paragraph 18 of the Statement of Claim reads as follows:

> Accordingly, by an oral agreement made on 11 October 2017 between the Plaintiff of the one part and Meury as agent for and on behalf of the 1st and 2nd Defendants of the other part, it was agreed that:

> (a) the Plaintiff would purchase the Querencia Shares from the 1st and 2nd Defendants for USD 5,250,000;
>
> (b) through the transfer of the Querencia Shares, the Plaintiff would obtain the right to use the Villa on an "as is" basis; and
>
> (c) completion of the transfer of the Querencia Shares would occur within 14 days from 11 October 2017 (collectively, the "Agreement").

205 This is denied in para 8 of the Defence where there is reference back to para 5 of the Defence which is set out above at [172]. The basis of the denial was thus either that no agency existed or, if it did, that it did not extend to the capacity legally to bind the Nargolwalas.

The law relating to oral agreements

206 The applicable legal principles were set out by the Court of Appeal in *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd and another* [2011] 4 SLR 617 at [24] and *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206 ("*OCBC Capital*") at [38]–[39]. In the latter decision the court stated as follows:

> 38 The applicable legal principles are relatively straightforward and were canvassed by this court most recently in *Norwest*. …
>
> 39 A useful summary of the applicable legal principles may also be found in a recent book, as follows (see Andrew Phang Boon Leong & Goh Yihan, "Offer and Acceptance" in ch 3 of *The Law of Contract in Singapore* (Academy Publishing, 2012) at paras 03-171 and 03-173):
>
> > … the particular facts as well as the language utilised are crucial. If, in other words, the actual facts and/or language merit it, the court will hold that a valid and binding contract has been concluded. As the Court of Appeal put it in [Norwest], 'whether there is a binding contract between the parties should be determined by considering all the circumstances, not just the inclusion of the stock phrase "subject to contract" (on the basis that the substance of the situation must always prevail)' …

> …
>
> However, in some cases, even if some terms remain to be negotiated, it is possible for parties to have agreed to a contract despite the presence of a 'subject to contract' clause. As the Court of Appeal said in *The Rainbow Spring*:
>
> > It is established law that negotiating parties may conclude a contract that binds each of them even though there are some terms that are yet to be agreed. The important question is whether the parties by their words and conduct have made it clear, objectively, that they intend to be bound despite the unsettled terms.
>
> [original emphasis omitted]

207 An assessment of whether or not a binding oral agreement was reached and, if so, what its terms were thus depends on an objective assessment of the words and conduct of the parties. In such an assessment the subjective understanding of the parties at the time will carry some weight but cannot be decisive. The approach is thus the same for assessing whether there was an agreement as that for assessing whether Mr Meury had ostensible authority to bind the Nargolwalas.

The facts surrounding the making of the alleged oral agreement

208 At [72] above I reached the conclusion that Mr Meury did not tell the Lews that the Nargolwalas had only agreed in principle to accept Mr Lew's offer, notwithstanding the fact that he understood that Mrs Nargolwala had concerns which needed to be resolved and that she needed an "offer letter in writing" so that she could discuss the matter with her husband (see [60] above).

209 However one thing that was clear was that lawyers would have to be involved and the question thus arises as to whether the objective understanding of what passed between the Mr Meury and the Lews constituted a binding oral

contract or whether it was merely the precursor to completion of the deal at a later date following the necessary due diligence and the drafting of legal documents.

210 Mr Lew has now convinced himself that it was the former but this is an occasion where I consider that greater weight should be attached to contemporaneous documents than the assertions of Mr Lew at a later date as to his state of mind. As the Court of Appeal observed in *OCBC Capital* at [41]:

> … It bears mention that the first port of call for any court in determining the existence of an alleged contract and/or its terms would be the relevant *documentary* evidence. Where (as in the present case) the issue is whether or not a binding contract *exists* between the parties, a contemporaneous written record of the evidence is obviously more reliable than a witness's oral testimony given well after the fact, recollecting what has transpired. Such evidence may be coloured by the onset of subsequent events and the very factual dispute between the parties. In this regard, *subjective* statements of witnesses alone are, in the nature of things, often unhelpful. Further, where the witnesses themselves are not legally trained, counsel ought not – as the Respondent's counsel sought to do in oral submissions before this court – to forensically parse the words they use as if they were words in a statute. This is not to state that oral testimony should, *ipso facto*, be discounted. On the contrary, *credible* oral testimony can be helpful to the court, especially where (as we shall see below in relation to supporting the Appellant's case) such testimony is given for the purpose of *clarifying the existing documentary evidence*. There is, however, no magic formula in determining the appropriate weight that should be given to witness testimony. Much would depend on the precise factual matrix before the court. However, it bears reiterating that the court would always look first to the most reliable and objective evidence as to whether or not a binding contract was entered into between the parties and such evidence would tend to be *documentary* in nature [emphasis in original].

211 In my judgment consideration of the contemporaneous documents points clearly to the conclusion both that Mr Lew considered at the time that the

alleged agreement was merely the precursor to completion at a later date and that an objective assessment of the documents leads to the same conclusion.

212 In reaching this conclusion I do not overlook the excitement expressed by the Lews on hearing Mr Meury's news but such excitement is equally justified when parties in negotiation agree on a fundamental aspect of a potential sale of a property, usually the price, knowing that other matters have to be resolved but believing, or at any rate hoping, that those matters will not present a stumbling block.

213 I have considered the events subsequent to 11 October 2017 so far as they relate to Mr Lew at [105]–[131] above. Mr Lew was given documents to pass to his lawyer, some of which were written in Thai and were therefore meaningless to him. He returned to Melbourne on 16 October 2017 when he received a text message from Mr Meury asking for information either from him or his Singapore lawyers. He then passed the documents to his in-house lawyers who proceeded, somewhat slowly, to action the matter, notwithstanding the concerns expressed by Mr Meury as to the passage of time.

214 Mr Lew's state of mind can be assessed both from his own documents and from those emanating from Mr Kenmar whose understanding as to the events of 11 October 2017 could only have come from Mr Lew. I shall deal first with Mr Kenmar's documents.

215 It was not until 24 October 2017 that Mr Kenmar began to approach Thai lawyers, as obviously Mr Lew had erroneously told him to do so and it is the e-mails passing between Mr Kenmar and those lawyers that, to me, provide the best insight as to Mr Lew's instructions to his lawyers and thus his personal view of the matter. In his e-mail to Siam Law (see [116] above) he did not state

that there was a concluded contract of sale, he referred to the fact that there were negotiations to purchase and that, as yet, the entity that was going to undertake the purchase had not been identified.[158] On 27 October 2017, he indicated some urgency in the matter as, if no lawyer was appointed "the sale would not proceed" (see [117] above).[159] This is wholly inconsistent with any belief that a contract of sale had already been concluded.

216 Similar comments were made in Mr Kenmar's e-mail to DLA Piper (Thailand) (see [118] above).[160] Read as a whole that e-mail is consistent, and consistent only, with an understanding that there was a need to complete the purchase, not that the purchase had already been completed. Mr Kenmar did not give evidence but the contents of these e-mails are indicative that he was treating the matter as a conventional sale and purchase transaction which would only be legally binding on the signing of the appropriate legal documents. Indeed, his agreement that the matter should be put on hold on 8 November 2017 is wholly inconsistent with a belief on his part that there was already a concluded contract (see [100] above).[161]

217 I turn now to consider the contemporaneous documents emanating from Mr Lew. When Mr Lew heard on 26 October 2017 that there was another potential buyer, he did not immediately require his lawyers or Mr Meury to contact the Nargolwalas to insist that since there was a binding contract with him they should cease dealing with any other potential purchaser. His complaint

158 P2/4.

159 P2/1.

160 1AB/54-55.

161 1AB/223-224.

in 1AB/15 and 1AB/336 was that sums had been expended on due diligence and he was considering the possibility of putting a stop to any share transfer (see [125] above). I cannot help but feel, having seen Mr Lew in the witness box, that if he had genuinely believed at that time that there was a concluded contract, he would have expressed himself in far more forceful terms.

218 This becomes even clearer when considering the e-mail at 1AB/347 of 7 November 2017 (see [127] above). Mr Lew was plainly furious when he wrote this e-mail to Mr Zeman. But the one thing he does not say is that there was a concluded contract. He refers to the fact that there was agreement that a contract of sale would be prepared containing the terms confirmed by Mr Meury but this is consistent with the deal progressing in the normal way with a formal written contract. He indicates that he would pursue Mrs Nargolwala for costs and non-performance in failing to provide the anticipated contract of sale, not that that there was already a concluded contract. The last sentence reads "i'm sorry that i've got you involved but in the end that's why I bought the Villa" which I accept could be indicative of an understanding on Mr Lew's part that there was a concluded contract but, read as a whole, I do not consider that this was the tenor of the document.

219 On 11 November 2017, Mr Lew texted Mr Meury (see [129] above).[162] This text includes the observation that "She is not saying it's no deal what she is saying is ive [*sic*] potentially got another buyer so let's see if he will pay more and then I can create an auction between the two buyers" which is wholly inconsistent with there being an antecedent concluded contract.

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162 1AB/25.

220 In a similar vein, on 13 November 2017 Mr Lew e-mailed Mr Zeman and again refers to the fact that the Nargolwalas were putting the transaction on hold rather than reneging on it.[163] Had he considered that there was a binding contract he would have said that they cannot renege on it.

221 Finally there is the e-mail of 14 November 2017 (see [130] above).[164] Read as a whole I consider that, aggressive and threatening as it was, it was not an e-mail written by a man who considered that there was a binding contract of sale from which the Nargolwalas could not renege.

222 I am thus left in no doubt that had the objective bystander enquired of the parties, particularly Mr Lew, present at Villa 29 on 11 October 2017 whether the proposed transaction was a conventional transaction with the terms to be embodied in a written contract before completion of the sale, the response would have been in the affirmative. This is confirmed by the passage in cross-examination referred to at [182] above where Mr Lew uses the expression "A man's word is his bond".

223 He thus considered that the alleged agreement was binding in honour alone and also considered that the Nargolwalas were acting dishonourably in failing to accept that their word was their bond. However, seen from the Nargolwalas' point of view, Mr Lew had not provided the details they sought and had not appointed lawyers within the time frame set by Mr Lew so that they felt free to consider Mr Larpin's offer.

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163 2AB/653.

164 2AB/653.

224 Be that as it may, I am satisfied that no binding oral contract was entered into on 11 October 2017 nor, indeed, that Mr Meury had ostensible authority to enter any such contract. Both subjectively and objectively the correct conclusion was that the statements made at the meeting on 11 October 2017 amounted at best to an agreement subject to contract. The Plaintiff contends that this is not a conclusion open to me on the pleadings. I disagree, para 8 of the Defence repeats para 5 which puts the 1st and 2nd Defendants' case that Mr Meury was not authorised to carry out any act that would bind the 1st and 2nd Defendants to any legal obligation. A conclusion that the agreement is at best an agreement subject to contract and thus not binding is a conclusion that no binding agreement was reached which is properly open on the pleadings.

225 The Plaintiff also contends that it is not open to the 1st and 2nd Defendants to put forward inconsistent rights in the alternative where the inconsistency offended common sense relying on *Ng Chee Weng v Lim Jit Ming Bryan and another* [2012] 1 SLR 457 at [36]. This is however not such a case. The 1st and 2nd Defendants are putting forward defences to the allegation that there was a binding oral contract which are not inconsistent. They are alternative, in the sense that agency is denied but that, if there is to be an implied agency, it does not extend to the authority to bind the principal. There is no offence to common sense in such a stance and it is open to them on the pleadings.

226 For these reasons the Plaintiff's primary case that there was a binding oral contract entered into between Mr Lew and the Nargolwalas through the agency of Mr Meury fails.

Issue 4: The 14 days' settlement term

227 The third term pleaded in para 18 of the Statement of Claim was:

> (c) Completion of the transfer of the Querencia Shares would occur within 14 days from 11 October 2017.

228 If there had been a binding oral agreement, it would have been necessary to consider the scope and effect of this clause because the transfer of the shares did not occur within 14 days.

229 This was a term included at the instigation of Mr Lew in order, no doubt, to encourage the Nargolwalas that he was a serious purchaser and that, if they accepted his offer, matters would be concluded swiftly. It is a straightforward term which obliges both parties to co-operate in good faith using their best endeavours to effect completion in the time available. Failure on the part of either party would result in a possible right of action for breach of contract, giving the other party the right to claim damages or to terminate the agreement.

230 Neither party contends that the failure to comply with the 14 days' time limit is of legal significance on the facts of this case. The 1st and 2nd Defendants contend that the fact that there was no communication to them of the name of Mr Lew's lawyer caused them to conclude that Mr Lew was not a serious buyer.[165] The Plaintiff contends that since there was no pleading on behalf of those Defendants either that time was of the essence or that they had purported to terminate the agreement, the agreement remained in force beyond the expiry of the 14 days' time limit.

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165 T5/105/17-111/25.

231 Accordingly, in the absence of any claim for breach of contract, any failure to comply with the 14 days' time limit is irrelevant to the outcome of this litigation.

Issue 5. If there was no binding oral agreement because of lack of an agency relationship, did the Nargolwalas nonetheless ratify the same by their conduct so as to make it enforceable?

232 The Plaintiff contends that, even if the Nargolwalas did not in fact accept Mr Lew's offer because of the lack of a sufficient agency relationship with Mr Meury, then, by their subsequent conduct once they became aware that Mr Meury had told Mr Lew that they had done so, in doing nothing to correct it they had ratified his actions. The fact therefore that I have concluded that there was no oral agreement, brings this argument into play.

233 Reliance is placed on a statement by Moore-Bick J in the Commercial Court in London in *Yona International Ltd and Heftsiba Overseas Works Ltd v La Reunion Francaise Societe Anonyme d'Assurances et de Reassurances and others* [1996] 2 Lloyd's Rep 84 ("*Yona International*") at 106:

> Ratification can no doubt be inferred without difficulty from silence or inactivity in cases where the principal, by failing to disown the transaction, allows a state of affairs to come about which is inconsistent with treating the transaction as unauthorized. …

234 The Plaintiff relies on a short passage of evidence from Mrs Nargolwala as supporting the proposition that she knew that Mr Meury had told Mr Lew that they had accepted the offer and that she did nothing to correct that.[166] This is based on her failure to correct Mr Zeman in his first e-mail of 11 October

166 T6/137/3-21.

2017 in which he congratulated the Nargolwalas on the sale of Villa 29 (see [81]–[84] above).[167]

235 The 1st and 2nd Defendants contend, first, that this is an issue that was not pleaded and should have been. I agree. It is a wholly separate plea from the general plea of agency and lack of any indication that the point was being taken could have taken the 1st and 2nd Defendants by surprise. However, I am reluctant to allow issues to be decided on pleading points provided that this can be done without prejudicing the other party. The point was squarely raised in the Plaintiff's written opening submissions and there was cross-examination clearly directed to this issue. In these circumstances, I prefer to deal with the substance of the matter which I consider can be done without injustice to the 1st and 2nd Defendants.

236 Dealing with the substance of the matter, the 1st and 2nd Defendants referred to me to other passages in *Yona International* at 103 which emphasise that mere inactivity can only constitute ratification if it amounts to clear evidence of an intention to adopt the act in question.

237 Reading the passage of cross-examination of Mrs Nargolwala relied by the Plaintiff as a whole in the context of the surrounding cross-examination[168] I am unable to accept that this amounts to any evidence, far less clear evidence, of an intention to adopt the act in question. She made it plain that she was leaving matters to her husband. On the other hand, Mr Nargolwala's response to the first e-mail from Mr Zeman would have left him in no doubt that Mr

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167 1AB/22, 26.

168 T6/135/5-137/25.

Nargolwala was not ratifying any deal and Mr Zeman's second e-mail responding to the comment that "I am not sure congratulations are in order yet" supports the conclusion that he did not consider that there was a binding agreement when he wrote, "This is already a great sign if you know this guy" (see [81]–[84] above). He would not have written this if he considered that Mr Nargolwala was accepting that there was a concluded agreement.

238 Hence, even if the issue had been specifically pleaded, the evidence does not support a plea of ratification. Indeed, to the contrary, it supports the conclusion that neither Mr nor Mrs Nargolwala ever concluded that Mr Meury's conduct had rendered them bound by an oral contract. This plea thus fails.

Issue 6: If there was no binding oral agreement because of lack of an agency relationship, are the Nargolwalas nonetheless estopped from denying the existence of the agency relationship?

239 As with the previous issue, this becomes a live issue due to the finding that no binding oral contract was concluded. The (unpleaded) assertion is that an estoppel arose because of the Nargolwalas' actions. Again the 1st and 2nd Defendants quite properly raise a pleading point but my attitude to it remains the same.

240 The legal requirements for the creation of an estoppel are well known and not in dispute. There must be a representation by one party, intended to be acted upon by the other party and which that other party does act upon to its detriment. The law relating to ostensible authority is founded upon the same principles. The relationship between the two was considered by the Court of Appeal in *The Bunga Melati 5* [2016] 2 SLR 1114 at [12]:

> This having been said, we do not think it is in fact necessary for us to decide in the present case whether there is a real difference between the two doctrines. In our judgment, it is

> uncontroversial that unconscionability underlies equity's intervention to make a putative principal liable even in the absence of actual authority. The doctrine of apparent authority has itself been analysed as an instance of estoppel: see *Freeman & Lockyer* at 503; and see also *Guy Neale v Ku De Ta SG Pte Ltd* [2015] 4 SLR 283 at [95]–[97]. At the broadest level, equity intervenes to estop the putative principal from denying as against a third party that another was its agent if in the circumstances, it would be unconscionable for the putative principal to do so. But such a broad articulation is analytically unhelpful because it fails to draw out the essential requirement that unconscionability must comprehend not only the element of *hardship* on the part of the third party but also *responsibility* on the part of the putative principal. In other words, there must be some act or omission on the part of the principal that leads to the third party acting or continuing to act in a particular way to his detriment or suffering hardship and it is this which gives rise to the requisite finding of unconscionability. This is why the inquiry is correctly to be undertaken within the traditional framework of estoppel that examines three elements which must be found to be satisfied, namely, (a) a representation by the person against whom the estoppel is sought to be raised; (b) reliance on such representation by the person seeking to raise the estoppel; and (c) detriment: see *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR(R) 292 ("*Hong Leong*") at [192]; and see also *United Overseas Bank Ltd v Bank of China* [2006] 1 SLR(R) 57 at [18] [emphasis in original].

241 The Plaintiff contends that the distinction between the two lies in the fact that when considering ostensible authority it is only permissible to have regard to the conduct of the parties up to the time of the incident in question whereas for estoppel in general it may be permissible to rely on later events.

242 In his opening written submissions the Plaintiff puts his case in two ways.[169] First, he asserts that the fact that Mr Meury was carrying on negotiations and conveying information from the Nargolwalas constituted a representation that he was acting as their agent. It is said that, relying on that,

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169 Plaintiff's opening submissions para 26.

Mr Lew called off his initial purchase of another villa and took steps towards the purchase of Villa 29. We now know that the former of these assertions was "deal talk" and the latter involved, on Mr Lew's part, the minimum of effort.

243 For the reasons given above, I do not consider that the mere fact that Mr Meury was carrying on negotiations and conveying information constituted a representation that he was acting as their agent with authority to bind them by way of an oral agreement so the requisite representation does not arise. Further, I am not satisfied that Mr Lew took such steps as he did in reliance upon a belief that a binding oral contract had been concluded. Such steps as Mr Lew did take are equally consistent with taking the steps with a view to progressing matters to completion without there being an antecedent oral contract. This submission thus fails.

244 Secondly, it is said that by reason of Mr Zeman's e-mails of 11 October 2017, which were sent after the alleged agreement was said to have been made, the Nargolwalas knew that he was acting on the basis that he had purchased Villa 29.

245 I have already considered these e-mails under Issue 5 at [234] and [237]. By parity of reasoning, this way of putting the case on estoppel cannot succeed.

Conclusion on the case against the 1st and 2nd Defendants

246 Thus, on the basis that Singapore law is the proper law as I have held, no binding oral agreement was concluded between Mr Lew and the Nargolwalas on 11 October 2017 and the 1st and 2nd Defendants were therefore not acting in breach of that agreement in concluding the contract of sale with Mr Larpin. It must also follow that the Nargolwalas did not have any knowledge that their subsequent dealings with Mr Larpin constituted a breach of that agreement. The

two fall back arguments, ratification and estoppel, also fail. The action against the 1st and 2nd Defendants will be dismissed.

247 Strictly speaking this makes it unnecessary for me to consider the remaining issues but I shall do so, in some cases relatively briefly, in case my conclusions on proper law or on any of the three issues are reversed on appeal.

248 The remainder of this judgment therefore proceeds on the basis either that the 1st and 2nd Defendants were acting in breach of contract in their dealings with Mr Larpin or that the proper law is Thai law.

Issue 7: Enforceability under Singapore law

249 If there had been a binding oral agreement between Mr Lew and the Nargolwalas, there is an issue as to whether it would be enforceable having regard to s 6(*d*) of the Civil Law Act (Cap 43, 1999 Rev Ed). This provides:

> **Contracts which must be evidenced in writing**
>
> **6.** No action shall be brought against —
>
> …
>
> (*d*) any person upon any contract for the sale or other disposition of immovable property, or any interest in such property;
>
> …
>
> unless the promise or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person lawfully authorised by him.

250 This sub-section has its origin in s 4 of the Statute of Frauds 1677 (c 3) (UK). Equivalent sections exist in the laws of a number of common law countries.

251 It relates expressly to the disposition of immoveable property or an interest in such property. It does not, on its face, relate to the sale of shares *per se*. The 1st and 2nd Defendants however contend that the section does apply to the disposition of the shares in a company if the company operates solely as a company holding an interest in property. The Plaintiff relies upon the fact that the interest of a shareholder is in the company itself whereas it is the company that has the interest in the property. I was referred to two old English authorities in support of this distinction, *Bligh v Brent* (1837) 2 Y&C Ex 268 and *Watson v Spratley* (1854) 156 ER 424 and a more recent decision of Andrew Phang Boon Leong J (as he then was) in *Ho Seek Yueng Novel v J&V Development Pte* [2006] 2 SLR(R) 742 at [50]. In the latter case Phang J held (*obiter*) that a right of first refusal to purchase real property did not fall within s 6(*d*) on the basis that the section contemplates an actual contract for the sale or disposition of an interest in immoveable property and that a right of refusal, unlike an option to purchase, did not amount to such a contract.

252 The Plaintiff also drew my attention to the Grounds of Decision of Assistant Registrar Lim Sai Nei ("AR Lim") given on 21 March 2018 on an application for pre-action interrogatories and pre-action discovery (Originating Summons No 1428 of 2017) in this case.[170] AR Lim decided that the facts of the case did not justify the order sought but went on to consider, again *obiter*, whether the application should be dismissed on the alternative ground that the Plaintiff's case for breach of the alleged agreement was bound to fail as it would be unenforceable having regard to s 6(*d*). In a fully reasoned passage of her decision at [59]–[65] she concluded that s 6(*d*) would not apply as the agreement

170 4AB/1899-1914.

was for the sale of shares, it was not an agreement for the sale of an interest in land.

253 The 1st and 2nd Defendants however drew my attention to two cases in the US where courts had declined to enforce a contract for sale of shares in a company the sole asset of which was an interest in property: *Pritsker v Kazan* 132 AD 2d 507 (1987) and *Yenom Corp v 155 Wooster Street Inc* 33 AD 3d 67 (2006). These cases were both decided by the Appellate Division of the Supreme Court of the State of New York, First Judicial Department under the US Statute of Frauds which is in equivalent terms to s 6(*d*). In neither case however was there an extensive consideration of the rationale behind ignoring the corporate structure.

254 Nonetheless, in the US, two courts have decided that in circumstances where a company's sole asset is property it is appropriate to have regard to the substance of the transaction, the sale of property, rather than the form, the sale of shares, and the 1st and 2nd Defendants invite me to adopt a similar approach in this case.

255 The circumstances in which it is appropriate under Singapore law to disturb the corporate structure are both limited and well defined. They do not include the case in point here. In the normal case the corporate veil is only lifted when a third party seeks to have redress against the controllers of a company rather than against the company itself. Here it is the controller of the company seeking to disturb the corporate structure but this, to my mind, does not justify any less reluctance to do so.

256 I consider that the reasoning of AR Lim is compelling even though she did not have the benefit of argument based on the US decisions. In my judgment,

if a further ground for disturbing the corporate structure is to be introduced into Singapore law, this should be done by the Court of Appeal and not by a judge of first instance. Accordingly, if there had been a binding oral agreement for the sale of the Querencia shares, I would have held that it did not fall foul of s 6(*d*) and would thus have been enforceable.

Issue 8: The position under Thai law

257 I turn then to consider the extent to which the outcome would have been different if the proper law of the alleged oral agreement was Thai law. Five matters arise:

(a) Had the parties agreed on all points of the alleged agreement so as to make it legally binding? Section 366 of the Thai Civil and Commercial Code ("TCCC").

(b) Was it necessary for any agency agreement between the Nargolwalas and Mr Meury to be evidenced in writing? Section 798 of the TCCC.

(c) Did Mr Meury have ostensible authority so as to bind the Nargolwalas? Section 821 of the TCCC.

(d) Would any agreement for the sale of the shares in Querencia be enforceable? Section 456 of the TCCC.

(e) Did Mr Lew's offer of a gift to Mr Meury make any agreement unenforceable? Section 825 of the TCCC.

258 I had the benefit both of written and oral evidence from experts in Thai law. Mr Ratthakarn Boonnua, a partner in Watson, Farley & Williams

(Thailand) Ltd, gave evidence on behalf of the Plaintiff and Mr Suraphon Rittipongchusit, a partner in Kennedys (Thailand) Ltd, on behalf of the 1st and 2nd Defendants. Both experts were well qualified to assist the court having practiced law in Thailand for numerous years. Both gave their evidence fairly and thoroughly and I am grateful to them for their guidance. In the final event, there was little between the experts on many of the points raised and where there was, the opposing submissions were articulated with clarity.

259 Dealing with the first of the above matters, s 366 of the TCCC provides:

> So long as the parties have not agreed upon all points of a contract upon which, according to the declaration of even one party, agreement is essential, the contract is, in case of doubt, not concluded. An understanding concerning particular points is not binding, even if they have been noted down.
>
> If it is agreed that the contemplated contract shall be put into writing, in case of doubt, the contract is not concluded until it is put into writing.

260 The experts are agreed that s 366 only applies where there are doubts in the eyes of the court concerning the conclusion of the asserted contract.[171] For the reasons given I do not have doubts concerning the conclusion of the alleged oral contract. I am satisfied that it was not concluded. Accordingly, s 366 does not apply.

261 As to the second matter, s 798 of the TCCC provides:

> If a transaction is by law required to be made in writing, the appointment of an agent for such transaction must also be made in writing.
>
> If the transaction is required to be evidenced by writing, the appointment of an agent for such transaction must also be evidenced by writing.

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171 T9/9/21-10/21, T9/99/16-100/24.

262 There is no dispute between the experts that actual authority of an agent to act on behalf of his principal can arise under Thai law either expressly or by implication under s 797 of the TCCC. The dispute between the experts turns on whether the requirement that the expert be appointed in writing relates only to the cases of express agency or whether it applies also to implied agency.

263 On this aspect, it appears that the matter has not expressly arisen for decision in Thailand. Both experts were cross-examined at length on this and the position is far from clear.[172] Mr Boonnua drew my attention to the Supreme Court Judgment No 1486/2525 and an extract from a book on Thai Civil Law both of which provide some support to his opinion although the former was a decision dealing with a settlement agreement to which s 851 rather than 798 was directly applicable. Mr Rittipongchusit contended that the Supreme Court judgment should not be construed so as to exclude the requirement of writing from all cases of implied agency but, in my view, both logic and the spirit of the provision require that it should. An implied agency is not itself going to be reduced to writing. If it was, it would be an express agency. An implied agency necessarily has to be deduced from all the circumstances of the case in question, whether this is to be based upon written or oral evidence or a combination of the two. It makes no sense in those circumstances that the implication of an agency should be conditional on it being evidenced in writing. On balance therefore, I prefer the evidence of Mr Boonnua that it is not.

264 So far as concerns ostensible authority, the experts are agreed that this can arise under s 821 of the TCCC which provides:

> A person who holds out another person as his agent or knowingly allows another person to hold himself out as his

172 T9/46/19-54/18, T9/105/18-119/11.

> agent, is liable to third persons in good faith in the same way as such person was his agent.

265 There was only a limited disagreement between the experts on the correct test for determining whether or not ostensible authority exists.[173] Put at its lowest, Mr Boonnua's opinion was that Mr Meury must have engaged in conduct that would have led Mr Lew to believe in good faith that Mr Meury was so authorised and that the Nargolwalas permitted Mr Meury to engage in such conduct. This test involves much the same considerations as the test under Singapore law set out at [198]-[200] above. Since I have held at [224] that on the basis of such a test Mr Meury did not have ostensible authority to bind the Nargolwalas by way of an oral contract, the same result would have arisen under Thai law. There is thus no need for me to conclude whether Mr Boonnua's test or the somewhat stricter test proposed by Mr Rittipongchusit is to be preferred.

266 For these reasons there would be no different outcome on the primary question of whether a binding oral contract was concluded on 11 October 2017 if Thai law was to be applied.

267 The fourth issue relates to enforcement and in this respect Thai law is governed by para 2 of s 456 which reads:

> An agreement to sell or to buy any of the aforesaid property, or a promise of sale of such property is not enforceable by action unless there is some written evidence signed by the party liable or unless earnest is given, or there is part performance.
>
> The provisions of the foregoing paragraph shall apply to a contract of sale of movable property where the agreed price is twenty thousand baht or upwards.

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173 AEIC2/17/115 paras 18-19, AEIC2/18/221 paras 23-26.

268 It is common ground that this section applies not only to contracts for the sale of immoveable property but also extends to all contracts where the contract sum exceeds 20,000 Baht, which the contract for sale of the shares in Querencia undoubtedly does. In this respect therefore Thai law differs from Singapore law. Under Thai law, if there had been a binding oral agreement for the sale of the Querencia shares, it would be unenforceable unless there was either (a) written evidence signed by the party liable or (b) earnest was given or (c) there was part performance.

269 The Plaintiff does not contend that earnest was given so there is no need to consider this aspect further. As to written evidence, the Plaintiff relied upon the e-mail correspondence passing between the Nargolwalas and Mr Meury or Mr Zeman at 1AB/21-22 and 1AB/26-27, particularly the e-mail from Mr Meury of 11 October 2017 (1AB/21). I have considered all these e-mails above (see [55]–[58], [62]–[63] and [81]–[84]).

270 I accept Mr Boonnua's evidence that since s 9 of the Electronic Transactions Act 2001 came into effect in Thailand, electronic communications such as e-mails can be considered to be "written evidence" and that in appropriate cases a name on an e-mail can constitute a document "signed by" a person. However it will be apparent from the analysis of that e-mail chain in [55]–[58], [62]–[63] and [81]–[84] that read either together or separately they do not amount to written evidence of the conclusion of the alleged oral contract.

271 Mr Boonnua gave evidence, which I also accept, that it is not only the actual performance of key obligations which constitute part performance. Something less may suffice and the question of what does suffice is dependent on the facts of each case. That said, there must be something concrete down the road to performance of one or more of the terms of the contract rather than a

mere intention to set off down the road. In the present case, by the time dealings between the Nargolwalas and Mr Lew were put on hold on 7 December 2017 (see [100] above), all Mr Lew had done was to appoint lawyers in Thailand and agreed to appoint lawyers in Singapore. The appointment of lawyers by both parties was a pre-requisite to any steps being taken towards performance of the alleged agreement. I am therefore satisfied that there was no part performance.

272 Thus, under Thai law, if there had been a binding oral agreement concluded on 11 October 2017, it would have been unenforceable.

273 The final matter concerns s 825 of the TCCC which provides:

> A principal is not bound by a contract entered into by his agent with a third person, if the contract was entered into by the agent in consideration of any property or other advantage privately given or promised to him by such third person, unless the principal has given his consent.

274 The 1st and 2nd Defendants contend that the "Chocolates to Switzerland" incidents referred to in [25] and [108]–[111] above constitute a relevant advantage privately given to Mr Meury by Mr Lew such that the Nargolwalas would not be bound by any contract entered into by Mr Meury as their agent. No issue of law arose on this section; it is a pure question of fact. For the reasons given, I do not consider that Mr Lew's conduct amounted to a legal obligation on his part to pay Mr Meury anything if Villa 29 was successfully purchased. There may have been an expectation on the part of Mr Meury that he might receive something from Mr Lew but the precise sum was not specified until after the alleged oral contract was concluded. Hence, s 825 would not have assisted the Nargolwalas.

275 The only difference therefore between the position under Singapore and Thai law is that, under Singapore law the alleged binding oral agreement would have been enforceable whereas, under Thai law, it would not have been.

Issue 9: Liability of the 3rd and 4th Defendants

276 Three causes of action are pleaded by the Plaintiff against the 3rd Defendant, Quo Vadis, and the 4th Defendant, Mr Larpin. The three causes of action are as follows.

277 The first is a claim in equity, which relies on Mr Lew's alleged equitable proprietary interest in the Querencia shares (see *Snell's Equity* (John McGhee ed) (Sweet & Maxwell, 33rd ed, 2015) at paras 24–002 to 24–003). It is alleged that once the binding oral agreement was concluded, the Nargolwalas held the shares on trust for Mr Lew and in breach of their duties as trustees transferred the shares to Quo Vadis. Since this is a company owned and controlled by Mr Larpin, his knowledge is to be imputed to the company. Further it is alleged that at the date of transfer of the shares Mr Larpin knew of Mr Lew's equitable interest so that an order for transfer of the shares from Quo Vadis to Mr Lew or to his order is appropriate.

278 The second is a claim for knowing receipt which is based upon (a) a disposal of the Plaintiff's assets in breach of fiduciary duty (b) beneficial receipt of assets which are traceable as representing those assets and (c) knowledge on the part of the recipient that the assets received are traceable to a breach of fiduciary duty (*Caltong (Australia) Pty Ltd (formerly known as Tong Tien See Holding (Australia) Pty Ltd) and another v Tong Tien See Construction Pte Ltd (in liquidation) and another appeal* [2002] 2 SLR(R) 94 at [31], quoting from *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 ("*Dollar*") at 700). In

all the circumstances it has to be unconscionable for the recipient to retain the benefit of the assets received (*George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 ("*George Raymond Zage*") at [23] citing *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 at 455).

279 The third is a claim for inducement of breach of contract where the Plaintiff contends that there are two necessary elements, (a) that the procurer of the breach knew of the existence of the contract though he need not know the precise terms and (b) the procurer must have intended to interfere with the Plaintiff's contractual rights, with the intention to be determined objectively (*Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [16]–[18]).

280 All three of these claims require, first, a finding that a binding oral contract was concluded on 11 October 2017 and secondly that Mr Larpin had actual knowledge of the existence of the contract or, objectively, had constructive knowledge, in the sense that such knowledge as he did have would have put a reasonable man on notice of the probability that a claim existed or should have caused him to make inquiries or sought advice which would have revealed the probable existence of such a claim (*Papadimitriou v Credit Agricole Corpn and Investment Bank* [2015] 1 WLR 4265 at [14]–[20]). The word "probable" in this passage is used in contrast to the word "possible". If a person is on notice as to the "serious possibility" of the existence of a right, then they should either have considered the facts known to them to conclude whether or not, in fact, the right *probably* existed or, if still not satisfied that it was more than *possible*, have made appropriate enquiries or taken advice to ascertain whether or not the existence of such a claim was *probable* – not merely *possible*. In *OBG Ltd and another v Allan and others* [2008] 1 AC 1 at [41] it was stated

that "a conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact." Likewise, in *Guy Neale and others v Ku Da Ta SG Pte Ltd* [2015] 4 SLR 283 at [116]–[118], the Court of Appeal emphasised that once a party has been put on inquiry, the onus is on him to make inquiries that are reasonable in the circumstances. That party must make genuine enquiries, not merely seek reassurance.

281 At the level of generality expressed above the 3rd and 4th Defendants do not disagree with the legal requirements of the three causes of action nor is there any dispute that these claims are to be adjudicated under Singapore law. What they do however dispute is, first, whether any contract did come into existence on 11 October 2017, a matter which I have decided in their favour and, secondly, that on the facts they had neither actual nor constructive knowledge of the existence of that contract even if it did exist.

282 I must therefore consider the second of these on the hypothesis that there was in fact a binding contract.

Mr Larpin's knowledge, actual or constructive?

283 I start by considering a pleading point taken against the Plaintiff on the plea in relation to the allegation that the 3rd and 4th Defendants had the requisite knowledge of the agreement of 11 October 2017. When the Statement of Claim was originally served on 2 July 2018, particulars (d) to para 23 averred that *"By 15 November 2017*, the 3rd and/or 4th Defendants were aware of and put on notice that the Agreement had been concluded …" [emphasis added].

284 At a hearing for an order for further particulars of this plea, counsel for the Plaintiff made it plain that, on the basis of documents then disclosed, the Plaintiff's case was that it was on 15 November 2017 that the 3rd and 4th

Defendants became aware of the agreement and that they were not raising any case that they were put on notice before that date. On that basis, no further particulars were ordered but it was made plain that if the Plaintiff wished to raise a case that knowledge was obtained by the 3rd and 4th Defendants before that date an application to amend the Statement of Claim would have to be made.

285 Thereafter, following further disclosure, the Plaintiff sought permission to amend to amend particulars (d) so as to read "*On or around 26 October 2017*, the 3rd and/or 4th Defendants were aware of and put on notice that the Agreement had been concluded ..." [emphasis added]. This was justified on the basis of the e-mail dated 26 October 2017 from Martin to Mr Larpin (1AB/37, see [135] above). This amendment was allowed. However it became apparent from the Plaintiff's written opening submissions, that reliance was being placed either on knowledge arising from Martin's e-mail of 26 October 2017 or, in the alternative, on knowledge arising from Mr Lew's e-mail to Mr Nargolwala of 14 November 2017 (2AB/651 and see [130] above), the contents of which were relayed to Mr Larpin on 15 November 2017 (see [150]–[154] above).

286 With some justification, the 3rd and 4th Defendants contend that the amendment to the pleading to allege knowledge on or around 26 October 2017, without expressly maintaining, as an alternative plea, the previously pleaded date of 15 November 2017, limited the case which the 3rd and 4th Defendants had to meet to disproving knowledge at the earlier date. However, I do not consider that the 3rd and 4th Defendants were really in any doubt from the time the amendment was made and from the submissions made on the application to amend that the Plaintiff was merely intending to bring the date forward and was not abandoning the later date. In their opening written submissions they contended that Mr Larpin did not have knowledge of the agreement *"on or*

about 26 October 2017, or at any time, even now" [emphasis added] and went on to discuss the e-mail of 14 November 2017.[174] In these circumstances whilst the clarity of language used by the Plaintiff in formulating his amendment is less than perfect, I do not consider that any injustice will be done in permitting the Plaintiff to rely, in the alternative, on the allegation that the requisite knowledge was obtained either by way of Martin's e-mail of 26 October 2017 or by way of the information that Mr Larpin received on 15 November 2017 from Mr Nargolwala concerning Mr Lew's e-mail of 14 November 2017.

287 I shall therefore consider both allegations starting with the e-mail of 26 October 2017. I have set out the material aspects in [135] above. There is no suggestion in this e-mail that a binding contract for sale has been reached. Quite the opposite. It states that there is another *offer* that Mr Nargolwala is considering, not that he has accepted it. So far as Mr Nargolwala is concerned, by the time he met with Martin on 29 October 2017, he was satisfied that any possible deal with Mr Lew was dead and told Martin this. Mr Larpin did not see fit to make any enquiries about this suggested offer (see [135] and [138] above).

288 The Plaintiff contends that a prudent purchaser ought to have made further enquiries to establish what the exact position was with regard to this offer. This is a somewhat ironic submission coming from Mr Lew's counsel, as Mr Lew freely accepted that in the course of his dealings he regularly dealt in "deal talk": untrue representations which have the ring of truth and which are calculated to be believed by the other party so as to enhance Mr Lew's negotiating position. Martin gave evidence that suggestions of other offers

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174 3rd and 4th Defendants written opening submissions, section VIII.

brings a measure of urgency to the possible sale and that he took such comments, "in passing, at face value".[175]

289 I do not consider that there was at this time any obligation on Mr Larpin to enquire further about this offer. There was no suggestion that it was anything more than an offer. There was no material which should have alerted either him or Martin to the possibility, far less the probability, that any such offer had been accepted. What he did was to move matters forward fairly rapidly so that the Reservation Agreement was entered into on 8 November 2017. This gave him exclusivity until 30 November 2017 and hence the security of knowing that if there was still another offer on the table, it would not be taken further until the expiration of that period.

290 Mr Larpin thus did not acquire actual or constructive knowledge of the alleged oral agreement by reason of the events of late October 2017.

291 On the afternoon of 14 November 2017, following the necessary due diligence on the part of Mr Larpin and Quo Vadis, the SPA was signed. This included the representation and warranty that the sellers were entitled to sell and transfer full legal and beneficial ownership to the shares and that full disclosure had been of all information that might affect the sale (see [143] above). On the basis of this Mr Larpin and Mrs Te Lagger on behalf of Quo Vadis were entitled to consider that all necessary steps had been taken to ensure that there was no defect in the vendor's title and that it was appropriate for the remaining funds to be transferred.

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175 T5/20/6-19.

292 It was in this state of mind that Mr Larpin and Mrs Te Lagger received the indication at breakfast on 15 November 2017 from Mrs Nargolwala that an issue might have arisen with Villa 29 (see [149]–[153] above). They did not see, nor did they ask to see, a copy of the e-mail from Mr Lew to Mr Nargolwala. The gist of it was conveyed to them and Mr Larpin asked whether Mr Nargolwala had accepted the offer and whether there was a concluded agreement. He was told that Mr Nargolwala had never met Mr Lew and that no written offer had been forthcoming nor had he signed any contract with Mr Lew. Mr Larpin and Mrs Te Lagger chose to believe Mr Nargolwala. This is understandable in circumstances where due diligence had been carried out by their lawyers and appropriate warranties had been given.

293 The Plaintiff however asserts that Mr Larpin should have done more, he should have asked to read the e-mail and then take steps to ascertain the truth of what the e-mail said. The furthest Mr Larpin went, on being informed of Mr Lew's name was to google the name to ascertain who Mr Lew was. I am prepared to accept that the prudent business man might but not necessary must have asked to see the e-mail. The difficulty, as I see it, with the Plaintiff's case is that a prudent business man, on reading it would not understand that the writer was asserting that an antecedent binding oral agreement had been reached. The language used is to my mind more consistent with an agreement in principle having been reached with the necessary and customary due diligence thereafter being carried out by lawyers in Singapore and/or Thailand in preparation for a binding contract for sale of the shares to be executed. He would have noted that this process was put on hold on 7 November 2017, the day before the Reservation Agreement was signed. The e-mail is plainly an angry and threatening document from a thwarted potential purchaser who had, in the vernacular, been gazumped. It is precisely to avoid this that documents such as

the Reservation Agreement are executed. Read as a whole it does not read as a document asserting that an antecedent binding oral agreement, an unusual occurrence in the property world, had been reached.

294 I remind myself that in law it is sufficient if the document would have alerted the prudent business man to the probability that such an agreement had been reached or, if there is a "serious possibility" that such an agreement had been reached, to make proper enquiries or to take appropriate advice. In my judgment however, the document does not raise a "serious possibility" that such an agreement had been reached. Had Mr Larpin received and read the e-mail, he would have asked much the same questions of Mr Nargolwala as he did when receiving the information over the telephone. He would have been fully justified in accepting Mr Nargolwala's word that there was no possibility that a concluded contract had been signed for the reasons he gave. This is not a case where Mr Larpin merely sought reassurance from Mr Nargolwala, the background facts and the reasons given by Mr Nargolwala for the fact that no contract existed are sufficiently compelling. I do not consider that it was reasonable to expect Mr Larpin to approach Mr Lew directly.

295 Accordingly, on the hypothesis that there was a concluded oral agreement, I conclude that neither Mr Larpin nor Mrs Te Lagger had either actual or constructive knowledge of that agreement so that the case against Mr Larpin and Quo Vadis fails on this ground also. Accordingly, even had the Nargolwalas been liable to Mr Lew, Mr Lew would only have been entitled to a measure of relief against the Nargolwalas but none against Mr Larpin or Quo Vadis.

Issue 10: The liability of the 5th Defendant

296 The case against Querencia is based upon the doctrine of dishonest assistance of the 1st and 2nd Defendants in relation to their breach of fiduciary duty and breach of trust. The Plaintiff asserts that the necessary elements of the doctrine are (a) the existence of a trust (b) a breach of fiduciary duty (c) assistance rendered by the third party towards the breach and (d) a finding that the assistance rendered by the third party was dishonest (*George Raymond Zage* at [20]–[22]). Dishonesty requires an assessment of whether the alleged wrongdoer's knowledge of the transaction was such as to render his participation contrary to normally acceptable standards of honest conduct. It is an objective test. The 5th Defendant accepts this as a correct statement of law.

297 The allegation is that all times the Nargolwalas were aware that the binding oral agreement had been reached and that their knowledge was to be attributed to Querencia on the basis that a company is to be imputed with the knowledge of the controlling minds of the company. Accordingly, the transfer of the shares to Quo Vadis constituted assistance towards the breach and it was dishonest because Querencia know that shares were held on trust for Mr Lew.

298 On the basis of my primary findings, elements (a) and (b) above are not satisfied and thus the case against the 5th Defendant cannot succeed. But, if these findings were wrong, the 5th Defendant contests the Plaintiff's assertion that elements (c) and (d) have been proved. It is thus necessary to proceed on the assumption that there was a binding oral agreement and that the Nargolwalas had the requisite knowledge of this.

299 The assumption of knowledge itself raises difficulties. It is only if the Nargolwalas had actual knowledge of the existence of the alleged agreement

that the doctrine can apply. They would only have had that knowledge if there was a finding that they had given actual authority to Mr Meury to bind them by way of an oral contract, had instructed him to do so and were aware that he had done so. This is far removed from the facts as found. The Plaintiff accepts that the requisite knowledge cannot arise in a case in which an agreement arises on the basis of ostensible rather than actual authority.

300 Querencia's primary contention is that any knowledge held to be possessed by the Nargolwalas cannot be attributed to Querencia at the date Quo Vadis' name was entered onto the register because the Nargolwalas were not the controlling minds of Querencia at the time; control having by then passed to Mr Larpin and/or Mrs Te Lagger. Secondly, it contends that even if the Nargolwalas had the requisite knowledge and such knowledge is to be attributed to Querencia, there was nothing dishonest in Querencia acting upon duly executed instruments of transfer which had been signed by the Nargolwalas pursuant to the SPA and for which the purchase price had been paid.

301 As to the primary contention, Querencia points to the fact that the Plaintiff's pleaded case is that the breach of fiduciary duty occurred when the Nargolwalas signed the SPA on 14 November 2017 and that Querencia was not a party to or in any way involved in that agreement. Consequent upon the signing of the SPA, completion took place on 16 November 2017 when the share transfers, the share certificates and the letters of resignation were all handed over. Thereafter the Nargolwalas ceased to have control over Querencia. Mrs Te Lagger, as a director of Quo Vadis, then gave the necessary instructions

to effect the change of directors and shareholders which was done on 17 November 2017.[176]

302 Hence, it is contended that the act of Querencia complained of in entering Quo Vadis' name on the register took place after the alleged breach of fiduciary duty and Querencia cannot therefore have assisted the Nargolwalas in entering the SPA. Equally it took place after the Nargolwalas ceased to have control over Querencia so that their knowledge cannot be imputed to Querencia.

303 The Plaintiff contends that it is wrong to seek to slice the entire transaction in this way. The SPA and the entry into the register are all part of the same transaction which transferred the legal rights over the shares to Quo Vadis. This transaction was wrongly instigated and rendered effective by the Nargolwalas. The final act of this was the entry in the register. On this basis it is said that acts both prior to and after the breach can constitute assistance in the breach. Reliance is placed on *Dollar*.

304 In that case, the question arose as to whether the knowledge of a former director of a company, who was responsible for causing the company to become involved in the transactions complained of but who had ceased to be a director when the transaction was actually entered into, should be treated as the knowledge of the company when it did enter the transactions. The English Court of Appeal held that it should. Hoffmann LJ (as he then was) said this (at 706h):

> Nor do I think it matters that by the time [Dollar] acquired Yulara's interest in the Nine Elms project … Mr Ferdman had ceased to be a director. Once his knowledge is treated as being the knowledge of the company in relation to a given transaction, I think that the company continues to be affected with that

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176 5th Defendant's written closing submissions paras 31-34.

> knowledge for any subsequent stages of the same transaction.
> …

305 The 5th Defendant contends that *Dollar* can be distinguished from this case because on the facts in *Dollar* Mr Ferdman had been the directing mind of the company when it received an initial payment in relation to the acquisition whereas here Querentia was not involved until it was presented with the executed share transfers. Reliance is placed on the decision in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] Bus LR 1126 at [123]–[128] for the proposition that in general it is wrong for a person controlling a company to be ascribed with knowledge that he or she does not actually have unless as a matter of principle or policy such a person should be treated as knowing something that they did not. That I accept, but the reasoning in *Dollar* identifies a justifiable policy reason for an exception to the general rule.

306 Further, I am unable to accept the 5th Defendant's submission that the facts of this case are not on all fours with those in *Dollar*. There was a continuing transaction, starting with the Reservation Agreement and the payment of the 10% deposit. This then proceeded via the SPA to the share transfers and ended with the entry on the register. From the outset, all parties accepted that this would be the course of events. In these circumstances, it would be unrealistic to conclude that any knowledge possessed by Querencia by virtue of the knowledge which was properly to be ascribed to it by virtue of the Nargolwalas' knowledge when they were the controlling mind of the company suddenly ceased to be its knowledge because one of the anticipated events in the overall transaction took place with the result that they ceased to be the controlling mind.

307 In my judgment on the facts of this case it would be wrong to divide the overall transaction into its component parts and to hold that any knowledge of the Nargolwalas ceased to be the knowledge of Querencia after 16 November 2017. That knowledge should be deemed to continue to be the knowledge of Querencia until the transaction was completed.

308 This does however throw up a somewhat confusing state of affairs. I have held that neither Mr Larpin nor Mrs Te Lagger had actual or constructive knowledge of the alleged oral contract. Yet it was Mrs Te Lagger who gave the instructions to effect the share transfer as, by then, she, as the director of Quo Vadis, had become the controlling mind of the company whose instructions the company must follow. The law however requires me to assume that the company which she now controls has knowledge that she does not. This is a necessary consequence of changes in corporate ownership. At the outset, the new owner will not be possessed of all the antecedent knowledge of the company. The liability of the company may therefore differ from that of the new shareholders. The 5th Defendant's primary argument that the Nargolwalas' assumed knowledge ceased on 16 November 2017 thus fails.

309 Its second argument is that that even if the Nargolwalas had the requisite knowledge and such knowledge is to be attributed to Querencia, there was nothing dishonest in Querencia acting upon duly executed instruments of transfer which had been executed by the Nargolwalas pursuant to the SPA and for which the purchase price had been paid.

310 The test for dishonesty was expressed in *George Raymond Zage* as follows at [22]:

> … for a defendant to be liable for knowing assistance, he must have such knowledge of the irregular shortcomings of the

> transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed adequately to query them. …

311 In *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2017] 3 WLR 1212, the UK Supreme Court held at [74]:

> … When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. …

312 The fact that a company's Memorandum of Association may require it to act upon an instrument of transfer cannot absolve it of taking proper care to ensure that the act it perceives it is required to do is in fact legally open to it.

313 On the assumption that the Nargolwalas had the requisite knowledge that entering into the transaction with Quo Vadis was a breach of the alleged oral agreement and that this knowledge is to be imputed to Querencia when it received the share transfers and was instructed to act on them by Quo Vadis, it must follow that Querencia should not have acted upon the instruction to transfer.

314 By any standards, if a person (or company) knows that a given transaction is in breach of trust, it must amount to dishonest conduct thereafter to take steps in furtherance of the transaction.

315 Thus, on the assumptions made as to the existence of a binding contract and the requisite knowledge, the case on dishonest assistance by Querencia would have been made out. But, since the case against the 3rd and 4th Defendants would have failed even if there was a binding agreement, the relief available to the Plaintiff against the 5th Defendant would have been limited to

an account or damages. The question of relief however does not arise as the claim against the 5th Defendant fails on the facts.

Conclusion

316 The action against all the Defendants is dismissed for the reasons given.

Simon Thorley
International Judge

Philip Antony Jeyaretnam SC, Lee Chia Ming and Lee Jiemin Nicolette (Dentons Rodyk & Davidson LLP) for the plaintiff;
Ramesh Kumar s/o Ramasamy, Tan Shu-Ning Alyssa and Lim Min Li Amanda (Allen & Gledhill LLP) for the first and second defendants;
Christopher Anand s/o Daniel, Harjean Kaur and R Shriveena Naidu (Advocatus Law LLP) for the third and fourth defendants;
Chua Han Yuan, Kenneth, Benjamin Niroshan Bala, Hannah Alysha binte Mohamed Ashiq (TSMP Law Corporation) for the fifth defendant.