IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 91

Suit No 1268 of 2016

Between

Borneo Ventures Pte Ltd

… *Plaintiff*

And

Ong Han Nam

… *Defendant*

JUDGMENT

[Contract] — [Breach]
[Contract] — [Contractual terms] — [Warranties]

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Borneo Ventures Pte Ltd
v
Ong Han Nam

[2020] SGHC 91

High Court — Suit No 1268 of 2016
Lai Siu Chiu SJ
22–26, 29–31 July, 18 September, 16 October 2019

5 May 2020 Judgment reserved.

Lai Siu Chiu SJ:

Introduction

1 The claim in Suit No 1268 of 2016 ("this Suit") is by Borneo Ventures Pte Ltd ("the Plaintiff") against Ong Han Nam also known as Edward Ong ("the Defendant") for breach of contract.

2 The Plaintiff is a company incorporated in Singapore and is a wholly owned subsidiary of GSH Corporation Limited ("GSH"), a public listed company. The executive chairman of GSH is Goi Seng Hui who is also known as Sam Goi ("Goi").

3 The Defendant is a Malaysian and is the sole owner of a British Virgin Islands ("BVI") incorporated company called Eagle Origin Limited ("Eagle"), which in turn owns 22.5% of the shares in a company called The Sutera Harbour Group Sdn Bhd ("SH Group"). Besides Eagle and the SH Group, the Defendant

also owns other companies and shares in other companies such as Sutera Harbour Holdings Sdn Bhd ("SH Holdings").

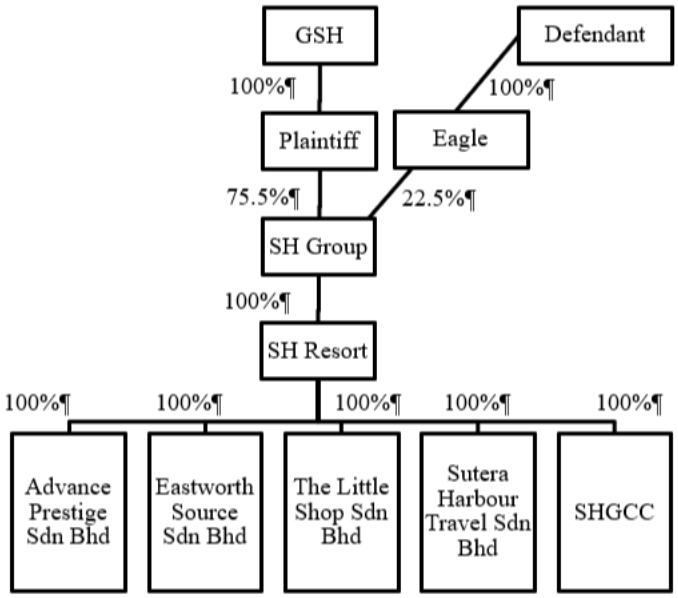
The facts

4 The Defendant, through Eagle, had been the sole owner of SH Group (previously known as JV Amazing Sdn Bhd) prior to the acquisition. Pursuant to a Subscription Agreement dated 30 December 2013 ("the SA"), the Plaintiff acquired 77.5% of the share capital in SH Group and thereby became its majority shareholder for a consideration of about RM700m. This acquisition under the SA was completed on 26 March 2014. The SA was preceded by a term sheet dated 18 October 2013 ("the Term Sheet").

5 SH Group is the holding company of a fully integrated resort called Sutera Harbour Resort Sdn Bhd ("SH Resort"), covering approximately 384 acres located at Kota Kinabalu, Sabah. The SH Resort consists, *inter alia*, of two five-star hotels with extensive convention and banquet facilities, which the Defendant developed from the 1990s until July 2000 when SH Resort was completed and officially opened by the then Malaysian Prime Minister.

6 The SH Resort is in turn the parent company of five companies, namely, (i) Advanced Prestige Sdn Bhd ("Advanced Prestige"); (ii) Eastworth Source Sdn Bhd ("Eastworth Source"); (iii) The Little Shop Sdn Bhd; (iv) Sutera Harbour Travel Sdn Bhd; and (v) Sutera Harbour Golf & Country Club Bhd ("SHGCC"). The Defendant has been a director of SHGCC since 19 December 1991. For ease of reference, the court will refer to all five companies collectively as "the Sutera Target Group".

7 The corporate structure of the various companies mentioned above, after the completion of the SA, is best depicted in the chart below:



8 Besides all the above companies, the Defendant also owns a construction company called Pembinaan OCK (Malaysia) Sdn Bhd ("Pembinaan OCK") as well as a Singapore company called OCK Investment Pte Ltd ("OCK Investment"). As will become apparent, the Defendant also owned or controlled a number of other companies relevant to the present dispute. These will be discussed where relevant below.

9 SHGCC owns and has title to a 99-year leasehold estate in state land located at Sembulan District, Kota Kinabalu, Sabah, with an area approximating 95.58 hectares or 238.63 acres ("the Sembulan Land"). In the SA, the Defendant had warranted to the Plaintiff, *inter alia*, that SHGCC owned the Sembulan Land without encumbrances.

10 The Plaintiff alleged that by a sale and purchase agreement signed on 21 March 2014 ("the S&P") but which was apparently back-dated to 1 March

2014, SHGCC agreed to sell to the Defendant's company, Omega Brilliance Sdn Bhd ("OBSB"), a portion of the Sembulan Land measuring 1.459 acres ("the Subject Land") for RM1,000 as consideration ("the Transaction").[1] The S&P was signed by the Defendant on behalf of OBSB which company had been incorporated on 7 February 2013. The Defendant had become its director on 22 March 2013. OBSB is wholly owned by a BVI company called MDS International Limited[2] ("MDS") which sole shareholder is the Defendant.

11 A power plant known as the co-generation facility ("the Co-Gen Facility") is situated on the Subject Land. The Co-Gen Facility was developed by a company called Profound Heritage Sdn Bhd ("PHSB") between 1997 and 1999, at a cost of RM155m with financing from Malayan Banking Bhd ("Maybank") and Bank Islam (L) Ltd ("Bank Islam") (however, see [149] below discussing the actual use of the loan from Bank Islam). The loan from Maybank was for RM118,250,000 ("the RM118.25m loan") while the loan from Bank Islam was for US$24m ("the US$24m loan"). PHSB was owned and controlled by the Defendant until it was wound up by an order of court in Malaysia on 11 January 2012 for failing to pay its debts. The court-appointed liquidators were Mr Ooi Woon Chee ("Ooi") and Mr Ong Hock An ("Ong") (jointly "the Liquidators") who were from KPMG Corporate Services Sdn Bhd ("KPMG"). PHSB came out of liquidation on 19 June 2015.[3] The Co-Gen Facility was operated by PHSB and supplied electricity to the SH Resort.

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1 Statement of Claim ("SOC") at para 6

2 See company search on OBSB at 1AB3965

3 According to KPMG's letter to the plaintiff's solicitors dated 28 March 2009 at 2AB1745

12 I should add that PHSB was itself owned by Vibrant Square Sdn Bhd ("Vibrant") who had as its shareholder another BVI company called Osterly Holdings Limited ("Osterly"), which held 30% of the shares in Vibrant, while the remaining 70% were owned by one Datuk Zarazilah ("Zarazilah"). Osterly's shares are owned by the Defendant. Further, the evidence adduced in court from the Defendant was that Zarazilah held the 70% shares in Vibrant in trust for him. As the Defendant owned all the shares in Osterly (which held 30% of the shares in Vibrant) and Zarazilah held the remaining 70% in trust for him, that meant that the Defendant was the ultimate owner of and wholly controlled PHSB.

13 Since at least 2002 (see [164] below), tenancy agreements had been entered into between SHGCC and PHSB on an annual basis for the rental of the Subject Land. On 1 December 2012, the Liquidators of PHSB entered into a year's tenancy with SHGCC to rent the Subject Land at RM5,558 per month.

14 After PHSB was wound up, the Defendant entered into negotiations and reached an agreement with Bank Islam to settle the outstanding debts owed by PHSB. Under the settlement terms, PHSB would make payment of RM33.6m to Bank Islam to discharge the charge which Bank Islam held over PHSB's plant and machinery and all other securities. The settlement sum of RM33.6m, together with various fees payable under the settlement agreement for a total of RM34.438m, was paid to Bank Islam on or about 28 March 2013 by OBSB and/or the Defendant on behalf of PHSB. As noted below at [157], however, the Defendant admitted that the money came from another of his companies, Investasia Sdn Bhd ("Investasia").

15 On 12 July 2013, OBSB (represented by the Defendant) and the Liquidators of PHSB executed an asset sale agreement ("the ASA") for the sale

of PHSB's plant and machinery to OBSB in consideration for the RM33.6m paid to Bank Islam on PHSB's behalf in March 2013, as recounted by Recital D of the ASA. Under cl 2.2.4 of the ASA, the Subject Land was expressly excluded from the sale but the Co-Gen Facility was included.

16 Prior to completion of the SA on 26 March 2014 (see [4] above), the Defendant had issued to the Plaintiff a disclosure letter dated 18 March 2014 ("the Disclosure Letter") (which was wrongly dated 18 March 2013) where no mention was made of the S&P or the Transaction.[4] The relevant paragraphs from the Disclosure Letter, addressed to both the Plaintiff and TYJ Group Pte Ltd (a company within the GSH Group), read as follows:

> 3 This Disclosure letter forms an integral part of the transactions effected by or under the [SA]. Each item disclosed (or deemed disclosed) in this Disclosure Letter shall be deemed to be a disclosure in respect of all warranties notwithstanding that an item disclosed may be disclosed by reference to a particular paragraph or paragraphs, or clause or clauses in the [SA].
>
> …
>
> 6 Without limiting the generality of the disclosures referred to above, [SH Group], [SH Holdings], [SH Resort] and [the Defendant] also wish to make specific disclosures against the Warranties and these are set out in the schedule attached hereto. Each item disclosed shall, however, be deemed to be a disclosure in respect of the Warranties and shall not be limited to the paragraph or clause which is referred to in the schedule.

The Plaintiff only found out about the S&P more than a year later, when a tax review was conducted on SHGCC's accounts by its auditors.

17 On 29 February 2016, SHGCC commenced proceedings in the Malaysian High Court in Kota Kinabalu against (a) OBSB and (b) the

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4 SOC at para 7.

Defendant in relation to the Subject Land in Suit No BKI-22NCvC-21/2-2016 ("the Malaysian Suit"). SHGCC's claims, *inter alia*, were (i) for the Defendant's breach of the fiduciary duties that he owed to SHGCC as its director; (ii) for a declaration that the S&P is null and void and has no legal effect; (iii) for an order that OBSB remove all its installations and structures on the Subject Land; (iv) for damages in the alternative, and (v) for payment of double rent from OBSB for occupation of the Subject Land.[5]

18 The Plaintiff commenced arbitration proceedings against the Defendant in Singapore by a notice of arbitration dated 3 October 2016,[6] to which the Defendant filed a response on 17 October 2016.[7] To avoid paying the high costs involved in the arbitration proceedings, the Defendant proposed to the Plaintiff that the dispute be brought to court instead. The Plaintiff agreed, and the arbitration proceedings were terminated by consent on 30 November 2016. On the same day, the Plaintiff filed this Suit.

19 Notwithstanding the fact that it was the Defendant who requested the Plaintiff to opt for curial instead of arbitral proceedings, the Defendant applied to court to stay this Suit on 27 December 2016 ("the Stay Application"). The Stay Application was granted by an Assistant Registrar ("the AR") on 7 April 2017. The AR ordered a limited stay of all proceedings in this Suit against the Defendant until 31 July 2017 and awarded costs to the Defendant. The date 31 July 2017 was chosen by the AR as the trial of the Malaysian Suit had been fixed to take place between 19 and 22 June 2017.

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5 Statement of claim ("SOC") at 1AB4006

6 At 1AB6063

7 At 1AB6236

20 The Plaintiff appealed against the decision of the AR by way of a Registrar's Appeal which this court heard and allowed. The Defendant then appealed to the Court of Appeal against this court's decision (see *Borneo Ventures Pte Ltd v Ong Han Nam* [2017] SGHC 320). Subsequently however, the Defendant withdrew his appeal (on 29 January 2018) and this Suit came up for hearing before this court.

The Malaysian Suit

21 As the Defendant placed great reliance on the favourable outcome to him in the Malaysian Suit (indeed it was the gravamen of his defence that the judgment binds the world), it is necessary for this court to address those proceedings in some detail.

22 In the Statement of Claim ("the SHGCC SOC")[8] in the Malaysian Suit, SHGCC alleged that the Defendant was the *alter ego* as well as the directing mind and will of OBSB. The SHGCC SOC pleaded that PHSB was granted a licence (before its liquidation on 11 January 2012) under the relevant Electricity Act 1990 to generate electricity for sale and distribution.

23 The SHGCC SOC then referred to the tenancy agreement between SHGCC and PHSB over the Subject Land for which PHSB paid monthly rent to SHGCC. The tenancy agreement was terminated on 30 November 2013 and was not extended or renewed. Pursuant to the ASA, PHSB sold the plant and machinery located on the Subject Land to OBSB. However, the Subject Land itself was expressly excluded from the sale.

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[8] At 1AB4035

24 By the S&P (which SHGCC contended was actually signed on 24 March 2014 but backdated to 1 March 2014), the Subject Land was purportedly sold by SHGCC to OBSB for a consideration of RM1,000 even though its market value exceeded RM250,000. The S&P was signed by two directors of SHGCC namely, Foo Kia Inn ("Foo") and Zarazilah on the instructions and direction of the Defendant. The Defendant himself signed the S&P on behalf of OBSB as its director together with Ms Wong Lee Ken ("WLK"), another director of OBSB who was concurrently the Chief Financial Officer ("CFO") of SHGCC at the material time.

25 SHGCC alleged it only discovered the S&P and the Transaction in August/September 2015 during a tax review exercise carried out by SHGCC's tax consultants. On or about 25 September 2015, SHGCC returned to OBSB the sum of RM1,000 paid for the Transaction.

26 As the SA was only completed on 26 March 2014, SHGCC alleged that the Defendant took expedited steps to cause the sale and disposal of the Subject Land by way of the S&P and the Transaction, given that the S&P was signed on 24 March 2014.

27 Consequently, SHGCC alleged that the Defendant had breached the fiduciary duties he owed to SHGCC as well as his duties as trustee of the assets of SHGCC. It was alleged that the Defendant owed obligations as a trustee in respect of SHGCC's assets, in particular the Subject Land. SHGCC further alleged that in causing SHGCC to enter into the S&P and in permitting OBSB to remain in possession of the Subject Land, the Defendant had acted *mala fide* and against the interests of SHGCC.

28 The SHGCC SOC claimed, *inter alia*, against the Defendant and OBSB:[9]

(a) a declaration that the S&P purportedly dated 1 March 2014 was null and void and/or voidable and of no legal effect;

(b) a declaration that SHGCC was entitled absolutely to the Subject Land; and

(c) damages including aggravated and exemplary damages.

29 In his Defence and Counterclaim in the Malaysian Suit,[10] the Defendant, averred, *inter alia*, that there was a common expectation or assurance shared between SHGCC and PHSB (and with OBSB after July 2013) ever since the development of the Co-Gen Facility on the Subject Land that the Subject Land was to be a separate parcel of land from the Sembulan Land, and that it would be owned and occupied by the developer of the Co-Gen Facility ("the Common Expectation").

30 The Defendant alleged that in reasonable reliance on the Common Expectation, PHSB (and since 2013, OBSB) had planned and carried out various actions which included developing the Subject Land to house, and constructing, the Co-Gen Facility at a cost of approximately RM155m ("the construction cost").

31 The Defendant averred that in order to borrow monies to cover the construction cost from Bank Islam, *ie* the US$24m loan, he was required to

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9 At 1AB4043

10 At 1AB4048

and did give an undertaking to Bank Islam that he would execute a charge over the Subject Land upon subdivision of the Sembulan Land. From 1999 onwards, the Defendant averred that PHSB was able to generate sufficient electricity to supply the SH Resort. After PHSB was wound up on 11 January 2012, the Defendant negotiated with Bank Islam to come to a settlement regarding the US$24m loan and to buy over the assets of PHSB including the Co-Gen Facility.

32 The Defendant claimed that prior to the execution of the SA, he had informed Goi (who represented the incoming investors including the Plaintiff) on multiple occasions, that the Co-Gen Facility and the Subject Land upon which it was sited was not part of the deal. The Defendant also alleged that representatives from GSH had also conducted a due diligence exercise between October and December 2013.

33 The Defendant contended that OBSB and PHSB would suffer a detriment should SHGCC renege upon or dishonour the Common Expectation as PHSB would have relied on it to develop the Subject Land thereby incurring the requisite expenditure, expertise, and time over the years without the benefit of a registered leasehold ownership over the Subject Land. The Defendant averred that it was unconscionable for SHGCC to resile from or dishonour the Common Expectation.

34 Thus, in the Malaysian Suit, the Defendant counterclaimed against SHGCC[11] *inter alia*, for:

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11 At 1AB 4059

(a) a declaration that SHGCC was estopped from denying OBSB's proprietary interest in the Subject Land; and

(b) an order that SHGCC be directed to transfer the whole interest in the Subject Land to OBSB and deliver up the issued document of title with OBSB as the registered leaseholder of all the interest in the Subject Land free from encumbrances.

35 Although it was expected to be completed in June 2017, the trial in the Malaysian Suit did not conclude until 31 July 2017 with judgment delivered on 31 October 2017.[12] The High Court at Kota Kinabalu dismissed the claim of SHGCC against OBSB and the Defendant and allowed the Defendant's counterclaim. SHGCC proceeded to file an appeal in November 2017. The High Court released written grounds for its decision on 7 May 2018 (the "Malaysian Judgment"). SHGCC's appeal was heard on 27 September 2018 and dismissed by the Court of Appeal of Malaysia.[13]

36 SHGCC then applied to the Federal Court of Appeal for leave to appeal to the Federal Court but its application was dismissed on 17 January 2019.[14]

The pleadings

37 The basis of the Plaintiff's Statement of Claim was the SA. The Plaintiff alleged, *inter alia*, that in view of the Defendant's interests in both SHGCC and OBSB, and the fact that the consideration of RM1,000 paid by OBSB to SHGCC in the Transaction was significantly less than the market value of the

12 At 1AB5957

13 At 1AB6025.

14 At 1AB6060

Subject Land, the sale was transacted at a gross undervalue; the Transaction had clearly not been contracted on an arm's length basis.[15] Consequently, the Defendant breached warranties that he had given to the Plaintiff in the SA, namely paras 4.1(c), 4.1(g), 6.6(b), 11.1, 11.2(a), and 18.2 (read with Schedule 4) of Schedule 2 of the SA and thereby breached cl 6.1 of the SA.[16] For reference, I set out some of the key provisions of the SA.

38 Paragraphs 4.1(c) and 4.1(g) of Schedule 2 state:

> Subject to any provisions to the contrary, whether express or implied, contained in this Agreement, between the date of this Agreement and Completion, the Sutera Target Group or [SH Group]:
>
> …
>
> (c) have not disposed of, and will not dispose of, any of its assets other than assets disposed of in the Ordinary Course of Business;
>
> …
>
> (g) have not except for inventory or equipment in the Ordinary Course of Business, sold, abandoned or made any other disposition of any of its properties or made any acquisition of all or any part of the properties, share capital or business of any other person; …

39 Paragraph 11.1 of Schedule 2 states:

> Contracts between the Companies and Vendors
>
> Save as disclosed in the Disclosure Letter, there are no existing contracts, arrangements, understandings or engagements to which any of the companies in the Sutera Target Group or [SH Group] are a party and in which [SH Holdings], [SH Group] or [the Defendant] and/or any director, officer, employee or shareholder of any of the companies in the Sutera Target Group of [SH Group] and/or any person connected to any of them is directly or indirectly interested.

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15 SOC at para 13.

16 SOC at para 13.

40 Paragraph 18.2 of Schedule 2 states:

> The relevant companies within the Sutera Target Group (as identified in Schedule 4) (the "Relevant Land Owners") has good marketable title to the Land and is the beneficial and legal owner in sole possession of the Land from all encumbrances.

41 The relevant portion of Schedule 4 states:

> … [SHGCC] is the sole legal and beneficial owner of the parcel of Land under 99 years lease of state land situated at Sembulan, District of Kota Kinabalu, Sabah held under Title No. 017544875 (expiring on 31 December 2091) with a total area measuring approximately 95.58 hectares (238.63 acres).

42 By reason of the Defendant's breach of the above warranties in the SA, the Plaintiff alleged that the Defendant had also breached cl 6.1 of the SA which reads as follows:

> [SH Group], [SH Holdings], [SH Resort] and [the Defendant] hereby jointly and severally represent and warrant with [the Plaintiff] in terms of the representations and warranties more particularly set out in Clauses 6.4 and in Schedule 2 hereto (such representations and warranties collectively referred to as "Warranties"), which representations and warranties shall form part of this Agreement and [SH Group], [SH Holdings], [SH Resort] and [the Defendant] each further represents and warrants that the Warranties shall be fulfilled, true and accurate at the date of this Agreement, and shall continue to be fulfilled, true and accurate at each of the Completion of the [SH Resort] Acquisition, Proposed Capitalisations and Proposed JVA Loan (as the case may be) in all respects as if they had been given afresh on such date.

43 Further, under cl 8.1 of the SA, the Defendant was liable to indemnify the Plaintiff for any losses suffered as a result of the Defendant's breaches of the warranties in the SA.[17] The relevant sections of cl 8.1 state:

> [SH Group], [SH Holdings], [SH Resort] and [the Defendant] hereby jointly and severally and irrevocably covenant to keep

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17 SOC at para 16.

> the Investors fully and effectively indemnified against all actions, claims, costs, damages, deficiencies, demands, expenses, liabilities and losses (including all legal costs incurred on a full indemnity basis) that may be suffered incurred or sustained by the Investors in consequence of or in connection with:
>
> > (a) any breach or inaccuracies of any of the Warranties;
> >
> > …
> >
> > (c) without prejudice to the generality of the foregoing, against any depletion of the assets of the [SH Group] and/or any entity of the Sutera Target Group resulting from any claim or demand made against [SH Group] and/or any entity of the Sutera Target Group in respect of any liability (including contingent liability) for which no provision has been made in the accounts of [SH Group] and/or any entity of the Sutera Target Group (as the case may be) or which has not been disclosed in writing to the Investors as at the date of this Agreement; …

44 The court would point out that there is a limitation of liability clause in cl 8A.1(c)(i) of the SA which the court will return to later (see [267] below). The clause states:[18]

> **8A. LIMITATION OF LIABILITY**
>
> 8A.1 The Investors agree and covenant with each of the Parties (other than the Investors) that, notwithstanding any provision of this Agreement to the contrary, any claim by an investor in respect of any breach of the Warranties or any other provision of this Agreement (hereinafter in this Clause referred to as a "Claim") shall be subject to and/or limited by the following:
>
> …
>
> > (c) the Parties (other than the Investors) shall have no liability in respect of any claim by an investor if and only to the extent that:
> >
> > > (i) the fact, matter, event or circumstance giving rise to such Claim (a) has been disclosed to the Investors in the Disclosure Letter as a potential

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18 At 1AB209

> liability of or loss to any of the companies in the Sutera Target Group or (b) resulted (whether partly or entirely) from any matter done or omitted to be done at the request or with the approval of the Investors, or (c) resulted (whether partly or entirely) from a voluntary act, omission, or transaction carried out after the Completion of the [SH Resort] acquisition, Proposed Capitalisations and Proposed JVA Loan by the [SH Group] or Sutera Target Group, its directors, employees or agents or successors in title; …

45 The Plaintiff alleged that despite the expiry of the tenancy agreement between PHSB and SHGCC, and the absence of any novation, OBSB continues to occupy the Subject Land and did not remove the structures and installations erected thereon. Despite demands made to OBSB to enter into a fresh tenancy agreement or to vacate the Subject Land, OBSB did neither. Neither had OBSB paid the monthly rent of RM5,558 for October and November 2013. OBSB was therefore liable to SHGCC for unpaid rent and double rent for holding over the Subject Land.[19] The Plaintiff alleged that, to date, the Transaction has not been completed because the Subject Land has not been subdivided and legal title remains with SHGCC.

46 The Plaintiff therefore claimed against the Defendant:

(a) a mandatory injunction that the Defendant restrains OBSB from completing the Transaction and/or from enforcing the S&P;

(b) a mandatory injunction that the Defendant procure OBSB to discharge/terminate the S&P forthwith;

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19 SOC at para 22

(c) an order that the Defendant indemnifies the Plaintiff for all losses suffered by the Plaintiff as a result of the Defendant's breaches of the warranties; and

(d) further or in the alternative, damages.

47 In his Defence and Counterclaim (Amendment No 2), the Defendant:

(a) Contended that SHGCC is the registered owner of the Sembulan Land of 95.58 hectares (238.63 acres) which did not include the Subject Land.

(b) Averred that the judgment dated 31 October 2017 in the Malaysian Suit had dismissed SHGCC's claim and awarded judgment to the Defendant and OBSB on their counterclaim. In the circumstances, SHGCC is estopped from denying OBSB's proprietary interest in the Subject Land which SHGCC has been ordered to transfer to OBSB.

(c) Stated that the Malaysian court had accepted and upheld the defence by the Defendant and OBSB of the Common Expectation that was shared by SHGCC and PHSB, the developer and prior owner of the Co-Gen Facility on the Subject Land, and, commencing from July 2013, between SHGCC and OBSB, that the Subject Land would be a separate parcel of land to be occupied and owned by OBSB.

(d) Averred that the Common Expectation was supported *inter alia* by the following facts/evidence which was not negated by other agreements referred to by SHGCC in the Malaysian Suit:

(i) Pursuant to the development plan (under drawing no. SHR/BLT/2805) dated December 1997 for the development of

the Co-Gen Facility on the Subject Land prepared by SHGCC's and PHSB's common architect and jointly signed and consented to by SHGCC and PHSB ("the Development Plan"), PHSB had expended the sum of RM155m to develop the Subject Land into the Co-Gen Facility because of the power needs of the SH Resort. This was on the basis of the Common Expectation that the developer would have rights of occupation and ownership as no person would have undertaken the development if it had no rights or occupation or ownership of the Co-Gen Facility.

(ii) From the time of development of the Co-Gen Facility until completion in 1999 and from 1999 until 1 December 2002 when a tenancy agreement was entered into between SHGCC and PHSB ("the 2002 Tenancy"), PHSB had occupied and operated the Subject Land without any written agreement.

(iii) The Common Expectation is not negated by the S&P and/or the 2002 Tenancy which SHGCC alleged were admissions by OBSB and the Defendant that SHGCC is the registered and beneficial owner of the Subject Land.

(iv) The redemption of PHSB's debt by OBSB and/or the Defendant in the sum of RM33.6m owed to Bank Islam was only for the assets on the Subject Land and not for the Subject Land itself. This did not negate the Common Expectation as no one would pay the redemption sum of RM33.6m unless the redeemer believed that there was an expectation or assurance that the land on which the assets were constructed would be his.

(v) The SA neither affirms nor nullifies the Common Expectation.

(vi) OBSB and the Defendant succeeded on a balance of probabilities in establishing the Common Expectation and the elements necessary to invoke the equitable principle of proprietary estoppel against SHGCC.

(e) Averred he would rely on the Malaysian Judgment at the trial of this Suit.

(f) Asserted that PHSB and OBSB had relied on the Common Expectation and would suffer a detriment should the Common Expectation be dishonoured, denied or reneged upon, as they would have developed the Subject Land, incurring the costs of the requisite expenditure, expertise and time over the years, without the benefit of a leasehold ownership over the Subject Land, for which the subdivision of the Subject Land was intended.

(g) Averred that the Co-Gen Facility and the Subject Land were not part of the acquisition by the Plaintiff under the SA as:

(i) In the course of discussions with Goi when they met to discuss the investment in the SH Resort, the Defendant was asked on about two occasions if the Co-Gen Facility would form part of the SA deal, and the Defendant had informed Goi that the Co-Gen Facility and the Subject Land were not part of the deal for the new investors which included the Plaintiff, and Goi understood this to be the position.

(ii) At a meeting in Singapore (sometime from October 2013 but before the signing of the SA on 30 December 2013) with the new investors represented *inter alia* by Gilbert Ee Guan Hui ("Gilbert"), Francis Lee Choon Hui ("Francis") and Kenneth Goi

Kok Ming, the Defendant had handed over to the attendees a copy of the report and valuation of SHGCC dated 24 April 2013 ("the Valuation Report"), which valued the net land area on which SHGCC was developed as an area of 94.90 hectares (234.5 acres) and which excluded the Subject Land where the Go-Gen Facility was situated.

(iii) Therefore, the Plaintiff had full knowledge or ought to have knowledge of the Co-Gen Facility and its working relationship with the SH Resort companies since it was the power generated by PHSB (and later OBSB) that supplied electricity to the entire resort. OBSB which occupies and operates the Co-Gen Facility is not part of the SH Group and did not comprise part of the acquisition under the SA.

(iv) Pursuant to a loan facility made available to PHSB by Bank Islam in 1999 of US$24m, *ie* the US$24m loan, Bank Islam stipulated as a condition that it should have an exclusive charge over the Subject Land. As a result of Bank Islam's right of security over the Subject Land, other financial institutions that had provided financing to the development of SH Resort in 1999 disclaimed and excluded the Co-Gen Facility and the Subject Land from the ambit of security over the Sembulan Land.

(v) Pursuant to settlement negotiations reached in March 2013 with Bank Islam, PHSB's outstanding debts to Bank Islam were discharged through the payment of RM33.6m by the Defendant through OBSB on or about 29 March 2013. The settlement also redeemed Bank Islam's security over the Subject Land.

(h) Averred that the Plaintiff was at all times aware of the subdivision exercise – since the late 1990s, SHGCC had applied to the Lands and Survey Department Sabah ("LSDS") to subdivide the Sembulan Land so as to facilitate the transfer of the subdivided parcels of land on which the substations and the Co-Gen Facility were sited to Sabah Electricity Sdn Bhd ("SESB") and to the developer/owner of the Co-Gen Facility respectively. SHGCC was aware that the portion of the Sembulan Land, namely the Subject Land, which was the subject of subdivision was not intended to and did not belong to SHGCC.

48 The Defendant added that on or about 1 October 2014, SHGCC had accepted the amended offer contained in a letter from the Director of LSDS to revise/reduce the annual rent stated in its previous letter of offer dated 27 July 2007 and to delete the prohibition of transfer to anyone save for SESB and the Sabah state government. The representatives who signed the amended offer on behalf of SHGCC were from the Plaintiff.

49 The Defendant further averred that pursuant to the due diligence exercise carried out by the Plaintiff's legal and financial teams in Singapore and Malaysia prior to the execution of the SA, the Plaintiff had knowledge or reasonably ought to have had knowledge of: (i) the extent of SHGCC's interest in the Sembulan Land, which would include any restrictions or limitations on, the use of the various parcels within that land; (ii) SHGCC's application for subdivision of the Sembulan Land; (iii) PHSB's and OBSB's proprietary interest in the Subject Land; (iv) the discharge of PHSB's outstanding debt with Bank Islam by the Defendant through OBSB and (v) the extent of any security encumbrance over the Sembulan Land (which excluded the Subject Land) that was being discharged as a result of the new investors (which included the

Plaintiff) having discharged the debts of SH Resort with the payment of RM700m.

50 The Defendant denied he had breached any warranties in the SA or in Schedules 2 and 4 thereof as alleged by the Plaintiff.

51 The Defendant counterclaimed for a declaration that Schedule 4 of the SA should be rectified to read as follows (proposed rectification emphasised in italics):

> Sutera Harbour Golf and Country Club Sdn Bhd is the sole legal and beneficial owner of the parcel of land under 99 years lease of state land situated at Sembulan, District of Kota Kinabalu, Sabah, held under Title No. 017544875 (expiring on 31 December 2091) with a total area measuring approximately 95.58 hectares (238.63 acres) *save for the parcels of land measuring approximately 1.68 acres on which the Co-Gen Facility and sub-stations are situated.* [emphasis added]

52 It is not necessary to address the Plaintiff's Reply and Defence to the Defence and Counterclaim as the Plaintiff essentially joined issue with the Defendant's allegations in his Defence and denied his Counterclaim.

The evidence

53 Due to the many issues raised by the Defendant in the lengthy Defence that he filed, the Plaintiff called numerous witnesses to rebut the Defendant's allegations. The Plaintiff's witnesses comprised of (i) Goi, (ii) Madeline Lee May Ming ("Madeline"), the lawyer from the Kuala Lumpur firm of Mazlan & Associates ("M&A") who had carried out the due diligence exercise for the Plaintiff before the execution of the SA; (iii) Gilbert, the group Chief Executive Officer ("CEO") of the GSH; and (iv) Alex Ng Soon Heng ("Alex") the group Chief Financial Officer ("CFO") of GSH.

54 The Defendant on his part had three witnesses, namely himself, WLK and Chong Choong Kim ("Chong") who was the valuer who had prepared the Valuation Report dated 24 April 2013 for the Defendant on behalf of CH Williams Talhar & Wong (Sabah) Sdn Bhd ("CH Williams"), which the Defendant relied upon in his defence.

The Plaintiff's case

Goi's testimony

55 Goi's testimony was intended to rebut the Defendant's claim[20] that the latter had informed Goi in their meetings from October 2013 onwards that the Co-Gen Facility and the Subject Land were a separate development and were not part of the deal for the new investors. Goi[21] testified that in his discussions with the Defendant in October 2013, in relation to the proposed acquisition of a majority stake in the SH Resort, the Defendant did not at any time inform Goi that the plot of land on which the Co-Gen Facility was situated was not part of the acquisition deal. Goi had only inquired of the Defendant whether the power plant business was included in the sale and the Defendant said it was not, because the power plant had many problems and "it wouldn't make money".[22]

Gilbert's testimony

56 Part of the Defendant's defence[23] was his assertion that the Plaintiff knew from the Valuation Report of SH Resort, which he had extended to Gilbert

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20 At para 12(1) of the DCC

21 PW1

22 See transcripts on 22 July 2019 at p 17.

23 At para 12(2)

and others at a meeting held in Singapore, that the Subject Land on which the Co-Gen Facility was situated was excluded from the sale to the Plaintiff. In his affidavit of evidence-in-chief ("AEIC"), Gilbert deposed that the Valuation Report (which numbered almost a hundred pages) was simply handed to him and the other representatives of GSH at a meeting around October 2013 in Singapore without explanation or presentation of its contents. It was meant only as a reference point for discussions with the Defendant in their negotiations concerning the pricing for the acquisition of a majority stake in SHGCC by GSH.

57 Once a broad agreement had been reached with the Defendant, Gilbert deposed that he left the details and documentation to Alex to handle together with the Defendant's team's which included WLK. Periodically, Alex would update Gilbert on the progress of the acquisition and would also discuss various decisions to be taken with Gilbert.

58 Gilbert denied the Defendant's allegation that GSH had reached an understanding with the Defendant that the Subject Land would be excluded from the acquisition.

59 Gilbert explained why GSH invested in SHGCC. He disclosed that before the second half of 2013, the Defendant and the Sutera Target Group were facing financial difficulties and significant pressure from various financial institutions. GSH came to know about the situation and decided it would invest in the Sutera Target Group to help the Defendant, although initially Goi was only interested in two parcels of land that the Defendant owned (namely Plots A and B which are dealt with below at [145]–[146]). Gilbert said the negotiations had been conducted on the basis that GSH would acquire the companies in the Sutera Target Group, rather than just the specific assets. GSH

would take over the companies on an "as is where is" basis and that would include the assets held in the names of each of the companies to be taken over without any exclusions.

60 Gilbert confirmed that throughout the discussions with the Defendant, it was understood that the power plant business was not part of the acquisition. However, there were no specific discussions with the Defendant on the *ownership* of the Subject Land on which the power plant was situated or whether such land was part of the acquisition. In fact, the Defendant did not discuss the ownership of the Subject Land at all. The Defendant certainly did not disclose to anyone from GSH present at the October 2013 meeting referred to at [56] above that PHSB or OBSB or anyone else owned or had an interest in the Subject Land.

61 On 30 December 2013 when Gilbert signed the SA on behalf of the Plaintiff, neither he nor Alex nor GSH were aware that PHSB or OBSB or any other entity had or was claiming any interest in the Subject Land.

62 Prior to completion of the SA on 26 March 2014, the Defendant had provided GSH with the Disclosure Letter dated 18 March 2014 (see [16] above). In the Disclosure Letter, however, the Defendant did not state: (i) that SHGCC did not own the Subject Land, (ii) that PHSB or OBSB or any other entity owned or had any interest in the Subject Land, and (iii) that he intended to sign the S&P for the sale of the Subject Land by PHSB to OBSB.

63 While the Defendant failed to make disclosure of such an important matter as his intended sale of the Subject Land by PHSB to OBSB, he chose to give specific disclosure of such seemingly insignificant matters as a pending case before the Sabah Labour Office by a chef seeking compensation and/or

reinstatement after being dismissed from SHGCC. Three days after the Disclosure Letter, the Defendant executed the S&P of the Subject Land to OBSB by PHSB at a consideration of RM1,000 which he then backdated to 1 March 2014. The existence of the S&P was never communicated to GSH prior to or following completion.

64 In cross-examination, counsel for the Defendant, Mr Andy Lem ("Mr Lem"), placed great emphasis on the Valuation Report that the Defendant had handed over to GSH. Mr Lem pointed out to Gilbert that the Valuation Report clearly stated that the net area of the Sembulan Land was 94.9 hectares after deducting the area of the substations. That meant that the Co-Gen Facility and the Subject Land were excluded. Gilbert disagreed, pointing out that GSH did not rely on the Valuation Report to determine the exact assets of SHGCC or what GSH was buying. GSH would carry out its own due diligence exercise. Gilbert was only interested in the indicative value of SHGCC's land being RM324m. Moreover, the Valuation Report did not list all the assets owned by SHGCC – these included a large vessel called *Columbus* that was worth a substantial sum of money. In re-examination, Gilbert added that there were two other vessels belonging to SHGCC which had not been listed as its assets in the valuation.

65 Gilbert's attention was drawn to the letters concerning subdivision. The first letter was dated 27 July 2007[24] ("LSDS's 2007 Letter of Offer") which was well before GSH came into the picture. On behalf of SHGCC, the Defendant and its other director Foo had countersigned to accept LSDS's 2007 Letter of Offer.

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[24] At 1AB1983

66 Gilbert testified he was neither shown a copy nor was he informed, of the contents of LSDS's 2007 Letter of Offer when he and Francis countersigned LSDS's letter dated 1 October 2014[25] ("LSDS's 2014 Letter of Offer") to accept its offer of a reduction in annual rent from RM117,500 (as stated in LSDS's 2007 Letter of Offer) to RM31,800. LSDS's 2014 Letter of Offer referred to 95.58 hectares of Land. On the face of the contents of LSDS's 2014 Letter of Offer, Gilbert said he would not have known of the Defendant's intention to carve out the Subject Land from the Sembulan Land by way of subdivision.

Madeline's testimony

67 As the Defendant's pleadings had alluded to the due diligence exercise carried out on behalf of the Plaintiff[26], Madeline[27] was called by the Plaintiff as a witness. In her AEIC, Madeline deposed that M&A's scope of work was to carry out legal due diligence checks on the Malaysian components for the intended transaction under the SA, including the Sembulan Land. The due diligence exercise commenced officially on 30 November 2013 and M&A issued its due diligence report dated 13 March 2014 ("the DD Report") at the conclusion of the exercise.

68 The representatives that Madeline dealt with were Alex from GSH and WLK from the Defendant's side. In carrying out the work, Madeline deposed that no one from M&A visited the SH Resort in Sabah. What M&A did was to obtain the corporate secretarial records of the Sutera Target Group from the

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25 At 1AB2551

26 At para 14 of his (amended) Defence

27 PW3

office of its corporate secretary, Jaschin Management Consultants Sdn Bhd based in Kuala Lumpur.

69 Madeline also viewed documents sent by WLK and her team which were in response to a legal due diligence checklist ("the DD Checklist") that M&A had prepared.

70 As for the due diligence exercise conducted on the Sembulan Land, Madeline and M&A had come to know that there was then a pending application with the LSDS office for subdivision and conversion of the Sembulan Land. Her knowledge was sourced from:

(a) being informed that the original title for the Sembulan Land was with the Sabah Land Office when she tried to locate the title deed; and

(b) a directors' resolution of SHGCC dated 20 September 2012 that authorized the surrender of the title for the purpose of the pending application.

71 Madeline and M&A were also informed of the following facts:

(a) that the Defendant owned and controlled a company called PHSB which was in liquidation;

(b) that PHSB operated the Co-Gen Facility which supplied electricity to SH Resort and other neighbouring properties; and

(c) that the Co-Gen Facility was located on the Subject Land.

72 However, Madeline deposed she and M&A were never told by WLK or the Defendant that:

(a) the intention or purpose behind the subdivision and conversion application was to demarcate PHSB's alleged proprietary interest in the Subject Land and/or for the eventual transfer of the Subject Land to PHSB, OBSB, the Defendant or anyone else; or

(b) that SHGCC was not the legal and beneficial owner of the Subject Land or any part thereof.

Further, WLK did not disclose that PHSB, OBSB or the Defendant had any interest in the Subject Land or that the Defendant intended to execute a sale and purchase agreement to convey the Subject Land to OBSB.

73 Madeline referred to Section 8 of the DD Checklist which dealt with property records and assets, where:

(a) Item number 2 requested:

> Copies of all lease agreement, tenancy agreements and sale and purchase agreements and the details, covenants and restrictions relating to the properties[.]

(b) Item number 10 requested:

> Any document evidencing a trust or nominee holding of any property of or holding of shares or interest in any Subject Company[.]

(c) Item number 17 requested parties to:

> Provide all options, contracts or other agreements relating to any immovable properties owned in whole or in part by the Subject Land[.]

WLK's answer was "N/A" to all three items.

74 Under Section 11 of the DD Checklist which referred to "Material Contracts and Commitments":

(a) Item number 3 requested:

> Any subsisting agreements, contracts, concession agreements made with third parties by the Subject Companies (including letters of intent, offer letters, memorandum of understanding and all other forms of agreements)[.]

(b) Item number 4 requested:

> Any agreements other than on standard terms and conditions of business[s].

(c) Item number 8 requested:

> Any agreements with respect to any Subject Company's securities or assets, including but not limited to the agreements in relation to the rights under which consent to disposal is required, rights of first refusal, pre-emptive rights and voting agreements[.]

(d) Item number 14 requested:

> Any material agreements relating to acquisition, disposal, mergers or reorganisations of businesses, or assets of any Subject Company[.]

(e) Item number 18 requested:

> Any other contracts whose existence ought to be disclosed[.]

WLK indicated "N/A" to all the above items.

75 Under Section 12 ("Directors and Directors' Interest"), item number 2, M&A requested:

> Details of any subsisting agreements or arrangements with any Subject Company, in which any director or a member of his family, or any entity associated with him/them are interested, including details of the amounts of any outstanding loans granted or other amounts payable by any Subject Company, for the benefit of any such persons[.]

WLK indicated "N/A".

76 Madeline pointed out that the resolution of SHGCC dated 20 September 2012[28] authorising the surrender of the land title for the subdivision and conversion exercise did not go further to explain the purpose of the subdivision and conversion. She added that she and M&A did not find any other resolutions passed by SHGCC that authorised the disposal or transfer of ownership of any part of the Sembulan Land or the Subject Land. She noted from the title deed that the approved purpose of the Sembulan Land was for erecting a "tourist complex" – the construction of the Co-Gen Facility was not part of the approved purpose. Consequently, she deposed that it was reasonably concluded that SHGCC's application for subdivision and conversion was to regularise the Sembulan Land to accommodate the Co-Gen Facility.

77 Madeline deposed that she had also looked into the various charges that were found in the records that she checked. Amongst them was a charge from SHGCC in favour of Maybank for a loan of RM118,250,000 extended to PHSB on 15 June 1999, *ie* the RM118.25m loan. SHGCC had given this charge as a third party charge on behalf of PHSB, as reflected in a directors' resolution of SHGCC dated 18 November 1998; this was not uncommon practice and did not indicate that PHSB had any proprietary interest in the Subject Land.

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[28] At 1AB 3382

78 Madeline deposed that she was not given and did not have sight of the letter dated 16 June 1999 from Maybank addressed to Bank Islam stating that the former, as the lender to SHGCC and PHSB, recognised the latter's rights under a lease agreement dated 16 June 1999 between the latter and PHSB in relation to the ownership of the Co-Gen Facility. Maybank stated that it specifically excluded the Co-Gen Facility and the Subject Land from the ambit of Maybank's charge dated 7 October 1998. Madeline and M&A also did not have sight of a letter dated 16 January 2013 from Bank Islam to SHGCC[29] requesting a copy of LSDS's Amended Offer to SHGCC pursuant to SHGCC's application for subdivision and conversion. The request was premised on Bank Islam having an interest in the Subject Land due to a letter of undertaking from SHGCC to execute a charge over the Subject Land in favour of Bank Islam. Having reviewed the letter, however, Madeline deposed that nothing was said about PHSB having any proprietary interest in the Subject Land.

79 Madeline and M&A were aware at the time the due diligence exercise was being conducted that PHSB was already in liquidation. When they requested from WLK statements of accounts relating to the Maybank and Bank Islam loans, WLK said the documents were with the Liquidators of PHSB. Madeline testified she and M&A never received those statements of accounts. Madeline pointed out that if indeed PHSB had a proprietary interest in the Subject Land as the Defendant asserted, the Liquidators would have known and asserted such an interest on behalf of PHSB as part of their duty to collect and realise all the assets of PHSB. She surmised that since the Liquidators did not at any time assert that PHSB had a proprietary interest in the Sembulan Land or the Subject Land, it must mean that PHSB did not have any such interest.

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[29] At 1AB-1061

80 During cross-examination, Ms Sharmini Selvaratnam ("Ms Selva") drew Madeline's attention to the Valuation Report, where it clearly stated that the Sembulan Land is 95.58 hectares after deducting the area of the substations on the Subject Land, indicating that the Subject Land was therefore excluded from the valuation. Madeline's response was that she did not know the basis of the valuation – she was not looking at the valuation as her focus was on legal due diligence. She had only looked at the Valuation Report to check what encumbrances were on the Sembulan Land, not for the valuation itself. In any case, the Valuation Report was prepared in 2013, well before GSH entered the scene. Neither did the Valuation Report tell her that SHGCC did not own the land on which the substations were built or that the substations did not belong to SHGCC. Further, the Valuation Report valued some, not all, of the assets of SHGCC. Ultimately, Madeline said she relied on land search results rather than the Valuation Report as conclusive evidence of the ownership of the Sembulan Land. Hence, the Valuation Report "doesn't mean anything"[30] to her. In re-examination, Madeline added that the Valuation Report did not mention there was a caveat on SHGCC's land by Bank Islam referred to below.[31]

81 Madeline was referred to a loan restructuring document reflected in a security sharing agreement dated 31 January 2002 ("the SS Agreement")[32] between Malayan Trustees Bhd ("MTB") as trustee for the bondholders, the Sutera Target Group, the Defendant, SHGCC, First Time Holdings Ltd, PHSB

30 At transcripts pg 153 on 23 July 2019.

31 At [84]

32 At 1AB820

and scheme creditors whereby SH Resort issued bonds to its lenders. The SS Agreement contained a Letter of Disclaimer[33] clause which states:

> The Trustee and each of the Scheme Creditors agree that upon execution of this Agreement, the Trustee shall be authorised to issue a letter of disclaimer substantially in the form and substance set out in Appendix IV hereto in favour of PHSB whereby the Trustee agrees to disclaim their rights, interest and benefit over the Excluded Area and agree that in the event of any action taken by the Trustee to obtain an order for sale pursuant to any of the SHGCC Charges (other than the SHGCC Third Charge), they would apply for sale of the SHGCC Property to be made subject to PHSB's interests in the Excluded Area and they would ensure that PHSB's interest in the Excluded Area would be fully disclosed in such foreclosure proceedings.

The "Excluded Area"[34] was defined as the Subject Land in the SS Agreement. Madeline was told that PHSB's interest in the Subject Land was clearly spelt out in the SS Agreement, supporting the Defendant's case. MTB issued the Letter of Disclaimer to PHSB on 29 January 2002[35] and besides the above extract, the Letter of Disclaimer signed by MTB contained the following paragraph: [36]

> PROFOUND HERITAGE SDB BHD (Company No 278658-X) ("PHSB") is the occupier of all that piece of Land measuring approximately 1.449 acres together with a generation plant erected on the SHGCC Property, more particularly set out in Annexure A enclosed herewith ("the Excluded Area").

Annexure A was a site plan of the Sembulan Land and Subject Land.[37]

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33 At sn 4.05 at 1AB845

34 At 1AB828

35 At 1AB805

36 See 1AB 806

37 See 1AB 809

82 Madeline responded, however, that PHSB was stated in the above extract in MTB's Letter of Undertaking to be "the occupier" and not "the owner" of the "Excluded Area".

83 To further substantiate the Defendant's case, Ms Selva drew Madeline's attention to the Facility Agreement between PHSB and Maybank dated 15 June 1999 for the RM118.25m loan. In contrast to the SS Agreement, the Subject Land was not excluded from the charge that SHGCC provided as security for the said loan, which Madeline acknowledged.[38]

84 Madeline's AEIC had alluded to her having sight of Bank Islam's caveat over the Subject Land dated 6 December 2010 ("Bank Islam's caveat") in the course of her due diligence exercise. The caveat related to the US$24m loan which was extended by Bank Islam to PHSB and for which PHSB executed a debenture dated 16 June 1999[39] ("Bank Islam's Debenture"). In Bank Islam's Debenture, the security provided by PHSB to Bank Islam did not include the Subject Land. Further, Madeline testified that by the time of the due diligence exercise, the US$24m loan had been paid off. Consequently, she did not delve further into Bank Islam's caveat.

85 Madeline was also cross-examined on SHGCC's letter of undertaking dated 16 June 1999[40] ("Sutera Letter of Undertaking") wherein SHGCC undertook to execute a charge in favour of Bank Islam over the Sembulan and Subject Lands. She was also questioned on Bank Islam's letter of release dated

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38 Transcript, 23 July 2019 at p 163, ln 17.

39 At 1AB602

40 At 1AB 687

30 January 2002[41] wherein, in consideration of the Defendant's entering into a memorandum of charge over his shares, Bank Islam released the Sutera Target Group including SHGCC from their agreements and undertakings (including the Sutera Letter of Undertaking) in relation to the US$24m loan referred to above at [84]. The court will return to the US$24m loan in the course of reviewing the Defendant's evidence.

86 Madeline was also questioned on the subdivision application made by SHGCC. As this issue was also raised in the cross-examination of Gilbert and Alex, the court will address this issue below.

87 Based on the various documents referred to in the foregoing at [80], [81], and [83]–[85], Ms Selva's questioning of Madeline sought to show that the latter knew or that she ought to have known, that the Subject Land did not belong to SHGCC due to (i) the Valuation Report, (ii) the application for subdivision of the Sembulan Land, and (iii) the numerous banking documents. Madeline consistently disagreed with her.

Alex's testimony

88 Alex,[42] the Plaintiff's last witness and the CFO of GSH, was in overall charge of the due diligence exercise (working together with the financial and legal due diligence teams) as well as the finalization of the terms of the SA.

89 In his AEIC, Alex pointed out that the Valuation Report (upon which the Defendant placed so much reliance) was not a document that GSH requested

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41 At 1AB 815

42 PW4

and was not a document prepared for the acquisition. He had only glanced at it to get a general idea of the value of SHGCC at the October 2013 meeting when the Defendant's team handed it over.

90 Alex deposed that in the days leading up to the signing of the SA, there were heavy negotiations between the Defendant and GSH/the Plaintiff relating to its terms. There were lengthy meetings held at SH Resort attended by the Defendant, WLK, Francis and himself. At these meetings, neither the Defendant nor WLK raised any issues regarding Schedule 4 of the SA (see [41] above).

91 At the time when the SA was signed, no one in GSH/the Plaintiff was aware that PHSB, OBSB or any other person had or was claiming any interest in the Subject Land. Neither did the Defendant disclose in writing to GSH/the Plaintiff that any person had any beneficial interest in any part of the Sembulan Land apart from SHGCC. On the contrary, the Defendant had specifically warranted that the whole of the Sembulan Land was legally and beneficially owned by SHGCC under para 18.2 of Schedule 2 of the SA (see [40] above) read with Schedule 4. Further, under cl 6.1 of the SA, the representations and warranties in the SA were to hold true and be accurate as at the date of the SA (30 December 2013) and as at completion (26 March 2014). In addition, the Defendant had provided the Plaintiff with the Disclosure Letter, which did not refer to the S&P, the Transaction, or the fact that any party claimed an interest in the Subject Land (see [16] above).

92 Alex deposed that that the due diligence exercise did not reveal any documents or information that showed the Defendant's intention to transfer the Subject Land to PHSB or OBSB or any other person following the subdivision of the Sembulan Land. He added that the Plaintiff was unaware of the S&P (see

[10] above) which Alex alleged was prepared and executed surreptitiously without the knowledge and consent of GSH or the Plaintiff. Because of the thousands of transactions which took place for the business of SH Resort, Alex deposed that he did not know or notice that SHGCC had not been receiving rent from the Co-Gen Facility for the occupation of the Subject Land since October 2013. This was also because the amount of rent was insignificant in comparison to the revenue received from SH Resort's business. Further, no one had highlighted to him that rent for the Subject Land had not been received by SHGCC since October 2013.

93 Alex referred to the valuation report that was prepared after completion of the SA by Azmi & Co dated 2 September 2014 ("the 2014 Valuation Report").[43] This was prepared at the request of the auditors for the purpose of assessing whether there were any impairments of the book value of SHGCC's assets. At the request of Azmi & Co, a copy of the Valuation Report was extended to them. Azmi & Co relied on the Valuation Report to prepare the 2014 Valuation Report.

94 Alex deposed that he discovered the existence of the S&P in mid-2015 during the review by Ernst & Young ("E&Y") of SHGCC's accounts. E&Y chanced upon an entry in the said accounts which recorded a gain of RM1,000. E&Y queried Dickson Chong ("Dickson"), the person in charge of the accounts for the SH Group, who said he was unaware of the particular entry. Dickson investigated and traced the entry to the S&P, which copy he found in the files in the office. He then brought the S&P to the attention of E&Y and Alex.

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43 At 1AB 1818-1922

95 Upon further inquiry, Alex ascertained that WLK had handled the S&P and the Transaction. The S&P was executed on behalf of SHGCC by its former directors while the Defendant and WLK executed it on behalf of OBSB. After execution, WLK bypassed Dickson and handed the S&P directly to one Joanne, the finance manager of SHGCC, to book the entry into the accounts of SHGCC.

96 E&Y highlighted to Alex that the S&P attracted real property gains tax and advised that a real property gains tax return should have been filed within 60 days of the S&P but it was not. That meant that SHGCC could be liable to a penalty of three times the determined amount of real property gain tax, which could be a significant amount if the market value of the Subject Land was used for computation in the event that it was found not to be a transaction at arm's length. The directors of SHGCC could also be charged and fined or jailed.

97 Alex deposed that his immediate focus was to avoid prosecution of the directors of SHGCC and the imposition of tax penalties. Consequently, SHGCC took steps to immediately file the real property gains tax return with the authorities and then seek an indemnity from the Defendant for any tax liability arising thereafter.

98 After informing Gilbert, Alex then prepared a letter for the Plaintiff (which Gilbert signed) to the Defendant dated 4 September 2015[44] ("the 4 September letter") where he narrated the facts stated above in [95]–[97] above. The Plaintiff went on to give notice under cl 8A.2 of the SA and alleged that the Defendant had breached cl 7.2(b) and as well as paras 4.1(c), 6.2(a), 6.3(a)(i), 6.4(b), 6.6(b), 11.1 and 11.2 of Schedule 2 therein, which were to hold true up

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44 At 1AB2555

to completion by virtue of cl 6.1 of the SA. Pursuant to cll 8.1(a), (b), (c) and (d) of the SA, the Plaintiff asserted that the Defendant was liable to fully indemnify the Plaintiff against any loss, and any real property gains tax as well as any tax penalty arising from the S&P and the Transaction.

99 In his reply to the 4 September letter dated 9 September 2015,[45] the Defendant did not deny the existence of the S&P but merely requested the Plaintiff to instruct E&Y to do the necessary filing and to advise him thereafter.

100 After the Plaintiff had taken legal advice, it decided to and did return the RM1,000 to OBSB, after giving notice of its intention to do so in its solicitor's letter to OBSB dated 25 September 2015.[46] E&Y were instructed not to proceed to file the real property gains tax return as the Plaintiff took the stand that the S&P was not an arm's length transaction and was void. The Plaintiff's solicitors also gave notice that it would not sell or transfer the Subject Land to OBSB. The Plaintiff's solicitors wrote a separate letter to the Defendant on the same day which contents were similar to the letter to OBSB.

101 Alex subsequently discovered from the Malaysian Suit that the S&P had been executed on 21 March 2014 but was backdated to 1 March 2014 on the instructions of WLK to the solicitor, Timothy Soo from the law firm of Jayasuriya Kah & Co ("JK&C") who had drafted the document. He further ascertained that tenancy agreements had been signed between SHGCC and PHSB since 2001 for occupation by PHSB of the Subject Land where the Co-Gen Facility was located. Under the last tenancy agreement dated 1 December 2012, the monthly rent was RM5,558. SHGCC had charged rent until January

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45 At 1AB2558

46 At 1AB2564

2014 by way of debit notes. However, the debit note for January 2014 was subsequently cancelled and a credit note was raised on or about 24 January 2014 to reverse the effect of the debit notes rendered by SHGCC from October to December 2013. This was done after the SA was signed but before completion.

102 Alex had also become aware that SHGCC had issued a prospectus dated 27 December 2012 ("the Prospectus") to the public for the issuance of preference shares in the company. In the Prospectus, SHGCC was clearly stated to be the owner of the Sembulan Land, including the Subject Land. In the subsequent prospectuses issued by SHGCC and dated 29 January and 30 June 2014 respectively, the same statement appeared.

103 As Alex was questioned on the Valuation Report and 2014 Valuation Report by Mr Lem on the same basis as Gilbert and Madeline, the court deems it unnecessary to review that aspect of his evidence in detail. The nub of Mr Lem's questions centred on the area of the Sembulan Land stated in the two reports. In the Valuation Report, the net land area was stated to be 94.90 hectares or 234.50 acres after deducting areas for substations. In the 2014 Valuation Report however, the area of the Sembulan Land was stated to be 95.58 hectares or 236.18 acres; the difference was 1.68 hectares. On 8 January 2016,[47] Azmi & Co issued an amended certificate of valuation correcting the area of the Sembulan Land from 95.58 to 94.90 hectares consistent with that stated in the Valuation Report. Mr Lem stated (with which Alex disagreed) that the Plaintiff never took issue with the land area of 94.90 hectares because it knew the Subject Land was never part of SHGCC's assets. The court notes here that it was in evidence that for both valuation reports, it was the Defendant or

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47 At 1AB2606

the Defendant's office who informed both CH Williams and Azmi & Co that the area of land for valuation was or should be 94.90 hectares. No independent survey of the Sembulan Land was conducted by either valuer. Given that the stated area was entirely based on the Defendant's own reporting, the probative value of these reports was minimal.

104 Mr Lem went further to question Alex on the inclusion of the Valuation Report in the financial statements of SHGCC for 2014 and subsequent years. Alex pointed out that preparation of the financial statements of SHGCC for 2014, which reflected the revaluation exercise in 2013, would have been under the charge of WLK from the previous management. In fact, it is of little or no consequence to the court whether the yearly accounts of SHGCC referred to the Valuation Report or to the 2014 Valuation Report as there were shortcomings in both valuations and this issue was not directly relevant to the dispute at hand.

105 The court turns to other aspects of Alex's cross-examination which have a direct bearing on the issues to be decided in this Suit.

106 Alex's attention was drawn to Bank Islam's letter dated 21 March 2013[48] ("Bank Islam's Offer Letter") addressed to the Defendant. By then (as referred to in the heading of the letter) PHSB was in liquidation but the Defendant remained liable to Bank Islam as guarantor for the loans Bank Islam had extended to PHSB. Bank Islam referred to a meeting it had held with the Defendant and two previous letters it had written to the Defendant. Bank Islam then stated it would accept as settlement terms: (i) the receipt of RM33.6m from the Defendant by 29 March 2013; (ii) payment of RM250,000 by 29 March

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48 At 1AB1117

2013 for the legal fees it had incurred; and (iii) the Defendant's withdrawal of any existing litigation against Bank Islam with no order as to costs. The Defendant countersigned Bank Islam's Offer Letter on 22 March 2013 to signify his acceptance of Bank Islam's terms.

107 Alex's attention was also drawn to the Defendant's letter dated 26 March 2013[49] addressed to the Liquidators. The Defendant informed the Liquidators that he had reached a settlement with Bank Islam, that the settlement sum of RM33.6m would be paid by OBSB and that this sum represented the purchase price of the power plant and machinery of PHSB (collectively "the Assets") located at the Co-Generation Facility. The Defendant stated he nominated OBSB as the buyer to enter into the sale and purchase agreement with PHSB. This agreement became the ASA executed on 12 July 2013 (see [15] above). The Defendant added that the sale and purchase would *exclude* the Subject Land for which OBSB would enter into a separate agreement with the landowner, SHGCC.

108 Mr Lem reminded Alex of the judgment in the Malaysian Suit that upheld the Common Expectation that PHSB (and its successor OBSB) would be entitled to possession and ownership of the Subject Land and the Co-Gen Facility because of money PHSB had expended on the development of the Co-Gen Facility. Mr Lem said the S&P was regarded as a mere formality by the Defendant, as pleaded in the Defence which adopted the language of the judgment in the Malaysian Suit, and, contrary to Alex's allegation, the Defendant did not deliberately hide the S&P from the Plaintiff; Alex unsurprisingly disagreed.

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49 At 1AB1122

109 As for the various prospectuses that SHGCC issued (see [102] above) which were reviewed by M&A, Mr Lem sought to convince Alex (who disagreed) that the purpose of those documents was to determine the reciprocal and affiliation agreements that were entered into by SHGCC for its members to use facilities of 36 other clubs and to make available such agreements for inspection by its members. No evidence in this regard was presented by the Defendant and the court accordingly disregards the Defendant's explanation.

The Defendant's case

The Defendant's testimony

110 The Defendant was the first witness for his defence. His AEIC was lengthy resulting in his cross-examination taking three days. Most of the facts set out in his AEIC have been canvassed with the Plaintiff's witnesses and it is not necessary to repeat them.

111 In his AEIC, the Defendant set out the genesis of the SH Resort which he had started constructing in the early 1990s, with the Co-Gen Facility being built between 1997 and 1999. The Defendant deposed at length as to all the financial institutions and financial instruments that he and/or his companies, including the SH Group, dealt with from the time of or before construction of the SH Resort commenced.

112 Throughout his AEIC, the Defendant repeatedly referred to the Common Expectation that PHSB had that it would own the Subject Land because it had expended RM155m to develop the Co-Gen Facility situated thereon. This issue will be dealt with in greater detail below (see [135]–[138]).

113 The Defendant referred to numerous banking and other documentation which were generated before GSH and the Plaintiff came into the picture. Amongst such documents was a letter from Bank Islam to KPMG dated 12 March 2012 (after PHSB had gone into liquidation on 11 January 2012) giving notice that under Bank Islam's Debenture (see [84] above), Bank Islam as a secured lender had an interest over the assets of PHSB including the Subject Land. Bank Islam had given a similar notice on the same day to MTB. Both these letters were copied to, *inter alia*, Maybank and SHGCC.

114 The US$24m loan (referred to in [84] above) to PHSB had been secured by the Defendant's personal guarantee as well as the pledge of his 51% shares in SH Holdings.

115 During cross-examination, the Defendant admitted that by 2012, the SH Group was in serious financial difficulties and was owing loan stockholders almost RM2 billion. In some cases, the loans extended to his companies, including PHSB, were secured by the Defendant's personal guarantees and/or the pledge of his shares in various companies including SH Holdings. In fact, a winding up petition was ultimately filed against SH Holdings. More will be said of the winding up proceedings below (at [134]).

116 Consequently from early 2013, the Defendant desperately looked for investors to save SH Group as well as himself from financial ruin. He found his white knight in GSH, which then worked through the Plaintiff. The Plaintiff's investment of RM700m into the Sutera Target Group was used to settle all of the outstanding indebtedness due to the SH Group's bondholders as well as the loans of Maybank and Bank Islam. As a result of the Plaintiff's investment, the Defendant not only paid off all the loans owed by him and or his various companies but he also walked away with a windfall of RM127m.

117 During cross-examination, the Defendant agreed that he did not state in his AEIC that he had told Goi that the *land* on which the Co-Gen Facility was located, *ie* the Subject Land, was not for sale. He had only told Goi that the *Co-Gen Facility* was not for sale. The Defendant felt it was "obvious for anybody as a businessman" that if he was not selling the building, he would not be selling the land,[50] so he assumed when he talked to Goi about the exclusion of the Co-Gen Facility from the sale that the Subject Land was similarly excluded.[51] He admitted it was a mistake on his or his lawyers' part in not checking that the SA contained an exclusion of the Subject Land from the sale to the Plaintiff.

118 When questioned by the court, the Defendant said it never occurred to him to tell Goi that the Subject Land was not owned by SHGCC. He denied the suggestion made by counsel for the Plaintiff, Ms Engelin Teh, SC ("Ms Teh"), that he had failed to inform Goi because he knew the Subject Land belonged to SHGCC.

119 The Defendant was cross-examined on the various warranties he had given under the SA which were set out above at [38] to [42]. He agreed that on 28 December 2013, the day when the SA was signed at SH Resort after last minute amendments were made to the document, neither he nor WLK informed the GSH representatives that PHSB or OBSB owned the proprietary interest in the Subject Land. Further, no amendment was made to the statement that SHGCC was the sole legal and beneficial owner of the whole of the Sembulan Land, stated to be "95.58 hectares", which included the Subject Land.[52] Again,

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50 At transcripts pg 326 on 24 July 2019

51 At transcripts pg 334 on 24 July 2019

52 At transcripts p 372 on 24 July 2019

the Defendant's excuse for not spotting the omission that morning when the parties were still amending the SA was that he had overlooked the error.

120 Subsequently, between 28 December 2013 and 2 January 2014, there were emails exchanged between WLK and Alex making further amendments to the SA (notwithstanding that it had been signed) on which the Defendant sought and obtained advice from his Singapore lawyer ("WA"). Even at that stage, the Defendant did not state he wanted the Subject Land to be excluded from the sale. He agreed that on hindsight he should have done so. He repeated his defence that PHSB was the then owner of the Subject Land and the S&P was only a formality. He maintained he made a mistake and it was his oversight in not informing his solicitors of the need to amend Schedule 4 (see [41] above) to exclude the Subject Land.

121 It is noteworthy that in cross-examination, the Defendant agreed that not only did he not inform the Plaintiff's representatives or Goi or M&A/Madeline that the Subject Land was not part of the sale or that the Subject Land would be transferred to OBSB, he did not at any time instruct WLK to inform the Plaintiff either. He claimed he did not look at the DD Checklist provided by M&A/Madeline nor the answers that WLK provided to the questions stated herein.

122 Even more telling was the Defendant's admission during cross-examination[53] that he even "overlooked" informing his lawyer, WA, of the S&P even though WA had been advising him throughout his negotiations with GSH, before as well as after the signing of the SA.

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53 At p 402 of the transcripts on 24 July 2019

123 Despite his above admissions, the Defendant denied the Plaintiff's suggestion that he had hatched a plan to exclude the Subject Land from the sale only in January 2014 after GSH had committed itself to the investment in the Sutera Target Group by signing the SA on 28 December 2013. He claimed that he had given instructions to JK&C to prepare the S&P a year earlier (in April 2013) but the lawyers had delayed its preparation.

124 The Defendant denied the Plaintiff's suggestion that he had instructed WLK to rush through the S&P and then backdate it to just before he was due to provide the Disclosure Letter to the Plaintiff. He further denied hiding the S&P from Goi or the Plaintiff. He presumed they knew about it and that the Subject Land was not part of the deal.[54] It should be noted in this regard that on 24 January 2014, WLK had sent an email to JK&C chasing JK&C for an update on the subdivision exercise as she claimed that the Subject Land was supposed to be transferred to OBSB after the sale of the Co-Gen Facility.[55]

125 The Defendant further claimed it was WLK not he, who had instructed JK&C to prepare the S&P, although he admitted that she kept him informed by copying him on her correspondence with JK&C commencing from 20 March 2014. He denied the suggestion that the fact that JK&C were rushed to prepare the S&P but that it was signed *after* the end of the due diligence exercise (on 13 March 2014) and *after* the Disclosure Letter was sent (on 18 March 2014), revealed that he wanted to avoid disclosing the S&P through either means.[56] However, the Defendant was unable to explain the delay in the signing of the S&P even though JK&C had it ready by 26 February 2014. Neither could he

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54 At p 399 of the transcripts on 24 July 209

55 See her email to Daniel Tan of JK&C at 1AB2500

56 At p 472 of the transcripts on 25 July 2019

explain the backdating of the S&P to 1 March 2014 when it was actually signed on 21 March 2014, nor why the signing preceded the completion of the SA on 26 March 2014.

126 The Defendant admitted that he and WLK had prepared Schedule 4 to the SA and yet in his Counterclaim, the relief he prayed for was rectification of Schedule 4 on the basis that SHGCC's ownership of its property had been incorrectly stated. He denied that his counterclaim was an afterthought.

127 It was clear from his evidence under cross-examination that the Defendant: (i) did not inform Goi that the Subject Land would not be included in the Plaintiff's acquisition and (ii) did not inform the Plaintiff's representatives at the signing of the SA on 28 December 2013 of the same. Neither did he or WLK disclose this to the Plaintiff during the due diligence exercise nor did either of them provide the Plaintiff with any documentation that stated that the Subject Land would be transferred to PHSB or OBSB upon subdivision. The Defendant, however, disagreed that it was deliberate non-disclosure on his part. He explained that the omission from the Disclosure Letter was because it was "irrelevant" and the S&P was "a formalisation of the ownership and doing the housekeeping", [57] an answer that did not make sense since he also apparently "overlooked" informing his lawyers of the matter at the time he signed the Disclosure Letter, although he now claimed that he wished that WLK had highlighted it to him.[58]

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57 At p 393 of the transcripts on 24 July 2019

58 At p 393 of the transcripts on 24 July 2019

128 One damning piece of evidence against the Defendant was JK&C's letter dated 26 March 2014 to him[59] forwarding two original stamped copies of the S&P dated 1 March 2014 and requesting him to forward the document to SHGCC, the vendor. The Defendant did not inform nor pass the document to the Plaintiff's representatives who were present that same day for completion of the SA. No explanation was given other than his excuse that he believed WLK would follow up, although he admitted that he did not make any arrangements with WLK to do so.[60]

129 Ms Teh pointed out to the Defendant that instead of a sale and purchase agreement, he could have procured SHGCC to execute a trust deed in favour of OBSB if the former was indeed holding the Subject Land in trust for the latter as he said. The Defendant claimed it was on KPMG's advice at the time that he had settled the US$24m loan from Bank Islam, and that KPMG had told him that PHSB did not have legal title to the Subject Land at the time the ASA was executed (see [15] above). As the Liquidators therefore could not transfer the Subject Land to OBSB, KPMG recommended to him that a separate sale and purchase agreement should be prepared.

130 The Defendant agreed that Zarazilah and Foo who signed the S&P as directors on behalf of SHGCC were also appointed by him as directors of OBSB. Ms Teh had described these two directors of SHGCC as the Defendant's "cronies" who had known him for a long time and who would sign whatever the Defendant wanted. The Defendant disagreed. He denied that the execution of the S&P was done surreptitiously and, even if it were, then WLK and JK&C

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59 At 1AB2549

60 At p 480 of the transcripts on 25 July 2019

were responsible. He again described the S&P as a "housekeeping" issue, according to his understanding from WLK.

131 Ms Teh put to the Defendant that the execution of the S&P and its concealment from the Plaintiff was not his only dishonest action. As part of the acquisition of SH Group, it had been agreed that the non-trade debts owed to the Defendant's companies amounting to around RM8.78m were to be waived. However, it was discovered that the Defendant had transferred monies from SH Resort to his own companies as repayment of some of those debts. On 13 February 2014, Alex and Gilbert had attended a meeting with the Defendant and WLK where WLK confirmed that such payments had been made.

132 The Defendant was questioned on the repayment of intercompany debts owed to the Defendant's companies, *viz* Sutera Sanctuary Lodges ("SSL") and Kinabalu Nature Resorts Sdn Bhd. The RM5.8m paid to SSL included non-trade debt of RM2.8m. The Defendant therefore had to refund SH Resort RM2,832,000. The Defendant's conduct prompted the Plaintiff/GSH to have PriceWaterhouseCoopers ("PWC") station staff at SH Resort to monitor payments being disbursed from the office. In cross-examination, the Defendant insisted he did not have to repay the RM2,832,000. When the court queried why then did he do it, the Defendant gave a convoluted explanation[61] that Gilbert wanted to claw back the sum as it would reduce or otherwise affect the net tangible asset value of the Sutera Target Group, which the Defendant had represented would be RM324m.

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61 At p 516 of the transcripts on 25 July 2019

133 Despite his questionable dealings, the Defendant claimed that he did not believe that the deal would be scuttled had he informed the Plaintiff of the S&P or stated it in the Disclosure Letter. He claimed that besides GSH, there were two other investors who were interested, although he also acknowledged that they may not have invested in the Sutera Target group.

134 What emerged during the Defendant's cross-examination was the considerable financial pressure he was under before the Plaintiff came on the scene. This was reflected in the winding up petitions that were filed against SH Holdings and PHSB. While PHSB was eventually wound up, the Defendant managed to stave off the winding up petition filed by MTB against SH Holdings on 29 January 2013. The sums for which the winding up petition was filed against SH Holdings exceeded RM1.5 billion (as stated in the board resolution of SH Resort dated 26 February 2014[62]). The Defendant had managed to obtain a postponement of the hearing of the petition from 12 February 2014 to 30 April 2014. The adjourned hearing date was *after* the Plaintiff's acquisition under the SA was completed on 26 March 2014. The Defendant and SH Holdings were thereby saved.

135 The court turns to the evidence that was adduced from the Defendant pertaining to his defence of Common Expectation (see [47(d)] above). He explained that he based the defence on the fact that he owned and controlled SHGCC and PHSB (and OBSB) at the time of the subdivision. Ms Teh pointed out, however, that that required the Defendant to do a "mental exercise" in which he "talked to [him]self" while wearing the hats of SHGCC and PHSB.

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62 At 1AB3636

This can be seen from the following extracts from the Defendant's cross-examination:[63]

> Q: Am I correct to say that you are the one in SHGCC who provided the common expectation and assurance, and you are the person in PHSB who provided the same common expectation and assurance?
>
> A: Yes
>
> Q: So you talked to yourself to tell yourself that this is what you are going to do; that's effectively what happened?
>
> A: Yes.
>
> Q: And you talked to yourself on behalf of both parties, to come to a common expectation that if PHSB were going to build a co-gen facility on the subject land at its own cost, SHGCC would give the subject land to PHSB. You talked to yourself when you made that decision, correct?
>
> A: By implementation.
>
> Q: The implementation came later. At the time when this common expectation occurred, you were talking to yourself on behalf of both parties; correct?
>
> A: I don't have to talk to myself. It was a plan in my mind all along and then I implement it later on.
>
> Q: So it was a mental exercise in your mind that if one company did this, the other company would do that. It was a mental exercise in your mind; correct?
>
> A: Yes.

136 When the court pointed out to the Defendant that it could not have been a common understanding but only a unilateral understanding in such a case as there was nobody else sharing the Common Expectation with him, the Defendant agreed.[64]

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63 At p 544 of the transcripts on 25 July 2019.

64 At p 664 of the transcripts on 26 July 2019

137 Ms Teh asked the Defendant how, even if PHSB had the Common Expectation from SHGCC, did OBSB benefit from that same Common Expectation, and what had OBSB done in order to do so. The Defendant's reply was that OBSB bought over from Bank Islam all the rights of PHSB including the Subject Land by way of the ASA and therefore inherited PHSB's rights. The Defendant repeatedly said that OBSB "stepped into the shoes of PHSB", which the court told him was a misconception on his part.[65]

138 As the court will go on to detail below, in examining the defence of the Common Expectation, it would appear that the Malaysian court may well have been misled by the Defendant in arriving at its decision to uphold that defence which was the gravamen of the Defendant's case, in view of the Defendant's admissions set out at [135]–[136] above.

139 According to the Defendant, PHSB built the Co-Gen Facility and when it supplied electricity to SH Resort, it was paid for what it supplied. The Co-Gen Facility was apparently built out of necessity. The Defendant disclosed that when he was developing SH Resort in its early days, he was told by SESB that there was not enough power to be supplied to the resort. There were outages and frequent blackouts. The Defendant told SESB that a five-star resort could not operate with such frequent blackouts. Hence, he proposed building a power plant with SESB's consent and the government's permission.

140 Due to its financial difficulties, PHSB stopped generating electricity in 2002 and SESB took over. Subsequently when PHSB resumed operations, it no longer supplied electricity directly to the SH Resort but to SESB.

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65 At p 669 of the transcripts on 26 July 2019

141 The evidence adduced also showed that the Malaysian court was not apprised of the banking facilities and/or financial arrangements of PHSB which would have had a bearing on its determination of the existence of the Common Expectation. In particular, the fact that Sutera Target Group companies, and not PHSB, had paid for the Co-Gen Facility was not disclosed to the Malaysian court.[66] Two of the key loans at issue were the RM118.25m loan by Maybank and the US$24m loan by Bank Islam.

142 PHSB had obtained the RM118.25m loan under Maybank's letter of offer dated 8 April 1997.[67] However, as the Defendant eventually conceded, the RM118.25m loan was never meant to be and was never repaid by PHSB.[68] Instead, as part of the conditions for Maybank's facilities[69], three of the Sutera Target Group companies namely (i) Advance Prestige; (ii) Eastworth Source and (iii) SHGCC had to and did repay RM9.46m, RM9.46m and RM4.73m respectively, for a total of RM23.65m of the loan, by way of capital contributions to Maybank. Three of the Defendant's other companies, Spiral Globe Sdn Bhd, Investasia and Linyi Sdn Bhd ("Linyi"), paid the difference of RM94.60m. OCK Investment also gave a corporate guarantee for RM82.775m as additional security to Maybank. This was confirmed by the Defendant in cross-examination.[70] Further, the three Sutera Target Group companies separately paid for electricity supplied by PHSB.

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66 At p 563 of the transcripts on 25 July 2019

67 At 1AB326

68 At p 560 of the transcripts on 25 July 2019

69 See 1AB 328

70 At transcripts p 302 on 24 July 2019

143 The Defendant sought to explain his misinformation by explaining that the total construction cost of the Co-Gen Facility was RM150m of which RM118.25m came from the loan of Maybank. However, he was unable to furnish evidence that PHSB paid the difference of RM31.75m between RM150m and RM118.25m.[71]

144 In June 1999, PHSB had to restructure its loan with Maybank as it was unable to comply with the terms of the RM118.25m loan. The RM118.25m loan was then turned into a term loan, under the terms set out in Maybank's letter dated 15 June 1999[72] for which Maybank required further security. This was provided by *SHGCC* by a charge over its land and assets. In this regard, the Plaintiff drew the court's attention to a letter to Maybank dated 17 June 1999 from SH Resort and PHSB[73] wherein the two companies informed Maybank that the hotel equipment belonging to SHGCC would be charged to Maybank.

145 Gilbert had testified that the Plaintiff only found out much later about SHGCC's charge to Maybank when it discovered that the Defendant had charged Plots A and B (which previously belonged to Investasia and Linyi, two of the Defendant's companies, respectively) to Maybank. GSH Properties (Malaysia) Pte Ltd and Ocean View Ventures Pte Ltd ("Ocean View") had purchased Plots B and A respectively from the Defendant for over RM157m.

146 When the Plaintiff discovered the charges over Plots A and B after PHSB's winding up, it intervened. Maybank then agreed to accept RM41m as a compromise ("the compromise sum") to release and discharge all securities

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71 At transcripts p 562 on 25 July 2019

72 See 1AB 446

73 At 1AB689.2.

including charges, provided by Investasia, Linyi and SHGCC. Of the compromise sum, RM6m was borne by SHGCC, Investasia and Linyi each paid RM2.5m, while RM30m was borne by the Defendant. However, the entire compromise sum was in fact funded by GSH through its various companies. The RM30m due and payable by the Defendant was set-off from the purchase prices of Plots A and B and, as such, RM15m of the purchase price of each plot was deemed to have been paid. These terms were set out in Ocean View's letter dated 11 March 2014[74] (which Gilbert signed) to the Defendant, who then accepted the terms.

147 The existence of the above charges were not the only instances of the Defendant's failure to comply with the Disclosure Letter and his failure to disclose important matters to the Malaysian court, as can be seen from the events set out below. The use of the RM118.25m loan was also suspect.

148 The Defendant had deposed in his AEIC[75] that Pembinaan OCK built the Co-Gen Facility and he had exhibited in his AEIC[76] a certificate of valuation by Pembinaan OCK dated 15 March 1999 with a figure of RM155m for which Pembinaan OCK claimed final payment on 3 March 1995. As the Defendant admitted that he owned 99.4% of Pembinaan OCK[77] (directly and indirectly), it meant he received almost the entire RM155m from PHSB for himself.[78] The

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74 At 1AB1156

75 At para 31

76 At exhibit OHN-46 & 1AB24

77 See the company search in exhibit P-3; see also p 576 of the transcripts on 25 July 2019

78 At p 574 of the transcripts on 25 July 2019

Defendant conceded that the Malaysian court was not aware of the fact that payment had gone to his company.

149 The Malaysian court was also unaware that the US$24m loan was not used to build the Co-Gen Facility as the Defendant claimed. In fact, it was meant to be working capital as stated in Bank Islam's letter dated 12 May 1999 to PHSB.[79] It was clearly stated there that the purpose of the loan was for working capital as well as payment of advances to a holding company and on-lending to the related companies, namely Advance Prestige and SHGCC. As Vibrant was the holding company of PHSB and wholly belonged to the Defendant, that meant, in effect, that the Defendant was paying himself. When pressed during cross-examination, the Defendant admitted that the Malaysian court was unaware that the US$24m loan was not used to develop the Co-Gen Facility.

150 Additionally, Bank Islam received the Sutera Letter of Undertaking dated 16 June 1999[80] under the terms of the US$24m loan. Under the Sutera Letter of Undertaking, it was SHGCC which agreed that it would, *inter alia*, execute a charge in favour of Bank Islam under the Sabah Land Ordinance for the Subject Land after subdivision. It was signed by the Defendant and Foo.

151 In addition, by another letter also dated 16 June 1999 to Bank Islam[81] (again signed by the Defendant and Foo), SHGCC undertook to deposit all its income, sale proceeds and all other payments whatsoever into an escrow account and execute a memorandum of charge. SHGCC further undertook

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79 See 1AB425

80 At 1AB687-688

81 At 1AB715

jointly with PHSB, in a third letter to Bank Islam dated 16 June 1999[82] to repurchase the Co-Gen Facility assets (upon expiry of the US$24m loan or its early termination) for the sum of US$1.00 or a sum equivalent to the residual value of the assets.

152 In the words of Ms Teh (with which he did not disagree), the Defendant "repeatedly inflicted financial obligations on SHGCC … to enable PHSB to obtain loans from Maybank and Bank Islam".[83] She said it was PHSB that was beholden to SHGCC and not *vice versa*. The Defendant's explanation for his actions was that in 1999 he was fighting for his survival due to the Asian financial crisis. He lost RM450m overnight as he had borrowed US$330m with the exchange rate at RM1.254 to US$1.00 which rate rose to RM4–4.20 to US$1.00 causing his debt to balloon to more than RM1 billion. That was probably why the Defendant's and his companies' total indebtedness to their lenders was in the region of RM2 billion; the total debt included the RM118.25m loan which had ballooned to RM233m by March 2009. With respect, however, the court does not see the relevance of the 1998–1999 Asian financial crisis to the Defendant's defence.

153 The evidence produced by the Plaintiff also showed that PHSB could not have been incorporated for the purpose of developing the Co-Gen Facility as the Defendant claimed. The Defendant had bought it as a shelf company. PHSB was incorporated on 16 October 1993 and it was not known at the time that the Co-Gen Facility would be needed.[84]

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82 At 1AB691

83 At p 601 of the transcripts on 25 July 2019

84 At p 530 of the transcripts on 25 July 2019

154 In cross-examination, the Defendant disclosed that besides supplying electricity to SHGCC, PHSB also supplied electricity to the entire development at SH Resort including Pacific Sutera Hotel (owned by Eastworth Source), the Magellan Hotel (owned by Advance Prestige), the bungalows, the condominium, and the properties known as Grace Ville. The Defendant acknowledged that these properties would have been affected by the inadequacy of the electricity supply in the 1990s. Ms Teh then pointed out that it therefore did not make sense for SHGCC to give PHSB the piece of land for developing the Co-Gen Facility when the electricity was enjoyed by the other properties as well. The Defendant did not provide a clear response, except to suggest that the land was SESB's all along.[85]

155 The Defendant had claimed that by the ASA, OBSB paid the Liquidators RM33.6m to buy over the assets of PHSB in order to supply electricity to SH Resort and also to Kota Kinabalu itself. However, under cross-examination, he conceded that OBSB only supplied electricity to SESB and it was SESB that supplied electricity to SH Resort. Further, after one year of operation, OBSB ceased supplying electricity in 2015 and the Co-Gen Facility became dormant.

156 The Defendant agreed that in the ASA, SHGCC was described as the landowner and the registered proprietor of the Subject Land while PHSB was stated to be the tenant. At the time of the ASA (on 12 July 2013), PHSB was still the tenant of the Subject Land. The Defendant could have but did not, novate the tenancy to OBSB and could not explain why that was not done. He denied Ms Teh's suggestion that it was because he was in discussions with prospective investors – Ms Teh had suggested that he intended to carve out the

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85 At pp 525–526 of the transcripts on 25 July 2019.

Subject Land from the Sembulan Land and he realised a tenancy agreement signed with OBSB as the tenant would adversely affect OBSB's position that it was the proprietary owner of the Subject Land.

157 As for the purported payment of RM33.6m by OBSB to Bank Islam, the evidence showed that OBSB apparently paid RM33.6m to Bank Islam on 29 March 2013,[86] which went to discharge PHSB's debt to Bank Islam (see [14] above). However, further cross-examination of the Defendant[87] revealed that the money had in fact come from Investasia, contrary to the Defendant's letter to Bank Islam dated 4 February 2013[88] that payment would come from the sale proceeds of two plots of land.

158 It was further revealed in the Defendant's cross-examination that the payment made on behalf of OBSB to Bank Islam on 29 March 2013 came from the Sabah Development Bank ("SD Bank") pursuant to a term loan for RM147.7m that the Defendant's company, Asia Impel Sdn Bhd ("Asia Impel"), had obtained from SD Bank, as reflected in SB Bank's letter dated 3 October 2012 to Asia Impel.[89] The sum of RM34,438,000 paid to Bank Islam comprised of RM33.6m as consideration under the ASA, legal fees of RM250,000 and Liquidators' fees of RM588,000; the breakdown was stated in Bank Islam's letter to the Defendant dated 22 March 2013.[90]

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86 As confirmed in Bank Islam's letter to the defendant dated 1 April 2013 in 1AB1129

87 On 26 July 2019 at transcripts pp 727-728

88 At 1AB 1113

89 At 2AB426

90 At 1AB1120

159 In fact, Asia Impel was the owner of Investasia.[91] The Defendant had informed SD Bank that the drawdown of RM34,438,000 from that term loan was meant to be partial settlement of sums owed to PHSB by Investasia under the terms of a share sale agreement dated 30 August 2012. The Defendant's statement is patently untrue as PHSB went into liquidation on 11 January 2012 and could not possibly have entered into any agreement after that date. The Defendant had no answer when he was confronted with this discrepancy. It therefore appeared that the money was advanced by SD Bank on the basis of a non-existent debt allegedly owed by Investasia to PHSB.

160 The usage of SD Bank's loan by OBSB was not made known to the Malaysian court. Furthermore, the Defendant (with WLK's assistance) subsequently routed SD Bank's loan through his other BVI companies[92] with the net result that OBSB did not have to repay the sum to Investasia. Indeed, that debt was written off. Exhibit P-4 which shows how the SD Bank's loan was channelled through the defendant's BVI companies is reproduced in Annexure A to this judgment. Had this factor been made known to the Malaysian court that OBSB did not pay for PHSB's assets as the Defendant pleaded in his Defence, it is unlikely that the court would have arrived at the findings it made on the Common Expectation between SHGCC and PHSB.

161 It was also revealed that the sum of RM33.6m that was paid to Bank Islam served in addition to discharge the Defendant's liability of US$1.08m under his personal guarantee to Bank Islam.[93] His shares in SH Holdings that

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91 At p 733 of the transcripts on 26 July 2019

92 As shown in exhibit P-4

93 At p 752 of transcripts on 26 July 2019

were pledged to Bank Islam for the US$24m loan were released. These facts were also not disclosed to the Malaysian court.

162 Despite his denial, there is no doubt that the Defendant had misled SD Bank as to the purpose of the advance, stating that it was for the purpose of settling a debt that Investasia owed to PHSB, which debt was fabricated for this purpose, rather than explaining that it was for OBSB to obtain PHSB's assets, as that would be outside the stated purpose(s) of SD Bank's loan.

163 It is also telling that the Defendant did not inform the Liquidators of PHSB's alleged proprietary interest in the Subject Land at the time of the ASA or at any other time – he said he "overlooked" it. If such an interest existed, then, contrary to the Defendant's testimony (as pointed out by Ms Teh), the Liquidators could not have advised him to enter into a separate sale and purchase transaction for the Subject Land. The court will address, as part of its findings below at [245]–[255], the particulars that the Defendant pleaded in his Defence concerning OBSB's alleged reliance on the Common Expectation to its detriment.

164 Contrary to the Defendant's contentions that PHSB only paid rent for the Subject Land from 2012 onwards, the Plaintiff's documentary evidence showed that there were tenancy agreements signed between SHGCC and PHSB as early as 1998, which were not signed in 2001–2002 and backdated, as the Defendant claimed. The tenancy agreement for 1998 did provide that SHGCC would lease the Subject Land to PHSB rent-free for a period of one year in consideration of PHSB's generating and supplying electricity to SHGCC. However, in subsequent tenancies, the rent was RM5,558 per month. In this

regard, the following finding in the Malaysian Suit[94] is obviously incorrect as it was based on the Defendant's misrepresentation of the facts:

> From the time of development of the Co-Generation Facilities until completion in 1999 and from 1999 until 1 December 2002 when the one year Tenancy Agreement was entered, [PHSB] had occupied and operated the Subject Land without any written agreement of any sort. This in itself is further evidence of the common expectation or assurance between [SHGCC] and [PHSB].

165 The audited accounts of PHSB produced by the Plaintiff also showed that PHSB had paid rent to SHGCC for the years 1999 to 2002. In the annual audited accounts of PHSB, it was also stated that the Co-Gen Facility was situated on land owned by a company in which certain directors of PHSB were also directors, even after the company's liquidation. It should be noted in this regard that the statutory declaration relating to the accuracy of the audited accounts was signed by WLK.

166 Other questionable practices on the part of the Defendant were revealed during his cross-examination. It was adduced from the Defendant that he owns 99.4% of Pembinaan OCK[95] that built the whole development of SH Resort. The Defendant did not disclose to any of his bankers that he owned Pembinaan OCK which was paid RM155m, which was financed in part from the RM118.25m loan that the Defendant obtained from Maybank. In effect, the Defendant paid himself for the development of SH Resort (see [148] above). Neither did he declare his interest in Pembinaan OCK as a director of PHSB in its annual audited accounts from 2002 to 2010.

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94 See 1AB6002

95 See company search in exhibit P-3

167 Another aspect of the Defendant's evidence that is relevant to the court's findings relates to the valuer responsible for the Valuation Report,[96] namely Chong from CH Williams (see [54] above). In cross-examination, the Defendant denied instructing Chong/CH Williams to carry out the valuation. He claimed that Chong only checked through the documents and the development plan which would have stated everything, including the land that was to be surrendered to SESB. He acknowledged however that the Valuation Report did not state that the substation and the Co-Gen Facility were excluded from the valuation exercise because those plots of land did not belong to SHGCC. Neither did the Valuation Report state that SHGCC did not own the whole of the Sembulan land that was valued or that PHSB or OBSB or any other entity owned the Sembulan land. The Defendant agreed that he had not informed Chong that PHSB or OBSB owned the Subject Land on which the Co-Gen Facility was located.

168 When pressed by Ms Teh, who suggested that the Valuation Report was not discussed at the two presentation meetings he had with GSH's representatives, the Defendant claimed that he could not recall. However, he agreed that he did not highlight to GSH's representatives that SHGCC did not own the whole of the Subject Land on which the Co-Gen Facility stood. Questioned why, the Defendant again said he thought the power plant was "not part of the deal".[97] He further assumed that the GSH representatives would read the Valuation Report and note therefrom that the net area of SHGCC's land was 94.9 not 95.58 hectares because it excluded the Subject Land upon which the Co-Gen Facility was located. It is noteworthy in this regard, however, that the

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96 At 1AB1725

97 At p 428 of the transcripts on 24 July 2019

Valuation Report[98] clearly stated under the "Terms of Reference" that it was the Defendant who instructed Chong to exclude the substations and Co-Gen Facility from the valuation, and not that Chong had surveyed the Sembulan Land himself to arrive at 94.9 hectares as the area for SHGCC's land.

169 It was clear from Ms Teh's further cross-examination of the Defendant that the Valuation Report was not, as the Defendant seemed to suggest, prepared for potential investors to inform them the Subject Land would not be included in the sale. Instead, the Valuation Report was meant for corporate internal review purposes.

170 The Defendant was referred to an earlier valuation report done by Chong on 18 June 2007 ("the 2007 Valuation Report") that was exhibited in Chong's AEIC.[99] He claimed that he had also commissioned it for potential investors. However, the 2007 Valuation Report clearly stated that the valuation was carried out on behalf of Deutsche Bank for the purpose of his securing banking facilities. As the court's review of the Defendant's evidence shows, his credibility was significantly tarnished by this and other inconsistencies.

Wong Lee Ken's testimony

171 As Chong's evidence was not particularly significant, the court first addresses the evidence of the Defendant's third and last witness, WLK. WLK's AEIC was comparable to the Defendant's in length and her cross-examination was also fairly lengthy. She filed a supplementary AEIC ("SAEIC") on the first day of the trial which the Plaintiff's solicitors did not object to, subject to the

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98 At 1AB1731

99 As exhibit CCK3

issue of costs which will be decided by this court in its determination of this Suit.

172 WLK, a trained accountant was the CFO of SH Holdings, SHGCC and SH Resort for almost 7 years until 31 March 2013 as well as the company secretary of SHGCC until 24 April 2014. She was also the CFO of PHSB from September 2007 until 30 September 2013 and a director and company secretary of OBSB until August 2014 and January 2015 respectively. At the material time, WLK's work was to oversee the financial operations of the SH Group as well as other companies related to the Defendant including OBSB and PHSB. Currently, WLK is self-employed and runs her own restaurant business in Kota Kinabalu.

173 WLK referred to the two meetings in October 2013 that she and the Defendant attended in Singapore with Goi and GSH's representatives including Gilbert and Alex. The first was at Traders Hotel and the second meeting was at GSH's office in Changi. She expanded on the two meetings in her AEIC as amended by her SAEIC, focussing on the Valuation Report that she said she handed to GSH's representatives at the second meeting, which she asserted would have informed the Plaintiff that the Subject Land was expressly excluded from the sale. However, in cross-examination, she confirmed Gilbert's testimony (see [56] above) that at the second meeting, she merely handed over the Valuation Report and there was no discussion whatsoever on its contents.

174 WLK's AEIC also dealt with the banking facilities granted by Bank Islam to PHSB as well as the meetings and negotiations with the Plaintiff/GSH that led to the execution of the SA as well as the events that took place after the

completion of the SA. She deposed[100] that the Defendant was prompted to look for investors because of the winding up petition presented against SH Holdings on 29 January 2013, due to the company's failure to redeem loan stocks amounting to over RM1.5 billion (see [134] above) on their maturity date of 26 February 2010.

175 Whenever the Defendant met with prospective investors commencing from late 2012, WLK would attend those meetings in order to assist the Defendant in his presentation and to provide financial information on the SH Resort.

176 WLK was involved in drafting, first, the Term Sheet and then, later, the SA, between October and December 2013 by facilitating the communications between the parties and their respective lawyers. She would go through the drafts to check the accuracy of figures or details such as names of companies and addresses but did not concern herself with the actual terms drafted as that was dealt with by the Defendant himself with his solicitor, WA. She acted as the conduit pipe forwarding drafts with comments from WA to Alex and forwarding drafts with the Plaintiff's solicitors' comments to WA.

177 WLK also dealt with the due diligence exercise conducted by M&A/Madeline in relation to the Plaintiff's investment and deposed that she completed the DD checklist that M&A required. The Plaintiff's representatives from PWC carried out financial due diligence at the office of SH Group for which she would produce management and audited accounts, as and when those documents were required. Sometimes, WLK forwarded to PWC soft copies of

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100 At paras 15-17 of her AEIC.

documents. She deposed that she also provided documentation relating to the existing liabilities of the Sutera Target Group and its related companies. The documentation included information relating to PHSB's loan(s) from Bank Islam (for US$24m) as well as the financing obtained by PHSB from Maybank.

178 After PHSB was placed into liquidation by Maybank, WLK dealt with the Liquidators. She provided the Liquidators with the necessary financial information indirectly via three of their staff which included Jasmin Jaffar ("Jasmin") of KPMG. She also kept Alex apprised of developments in the liquidation of PHSB.

179 WLK added that in relation to preparing the affidavit for the directors of PHSB to verify its Statement of Affairs post-liquidation, she had verbally informed Jasmin that PHSB had an interest in the Subject Land, that it was in the process of subdivision, and that the Subject Land would be transferred to PHSB after a separate title had been issued. She claimed Jasmin told her that the Subject Land could not be included in PHSB's list of assets as there was nothing in writing to show PHSB's ownership of the Subject Land before the subdivision.

180 She added that the Liquidators would also have been aware of PHSB's interest in the Subject Land as Bank Islam had written to the Liquidators on 12 March 2012[101] giving notice that Bank Islam was a secured lender and had an interest over the assets of PHSB including the Subject Land. She added that when arrangements were being made for PHSB to redeem the Co-Gen Facility from Bank Islam and for OBSB to acquire the same, the Liquidators had

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101 At 1AB1009

informed her that PHSB was unable to sell the Subject Land to OBSB as it did not have title to the Subject Land. The Liquidators suggested that separate arrangements had to be made for the transfer of the Subject Land to OBSB. That was why subsequently, in April 2013, she requested JK&C's Daniel Tan to draft the S&P for execution by OBSB and SHGCC to formalise the transfer of the Subject Land to OBSB. In this regard, she drafted the letter dated 26 March 2013[102] that the Defendant wrote to the Liquidators.

181 As she was busy with the pending winding up petition of SH Holdings, the Term Sheet and drafting of the SA, WLK deposed that she did not follow-up with Daniel Tan until January 2014 both on the subdivision of the Subject Land and the S&P. She received a draft on 26 February 2014 but only managed to finalise the S&P on 20 March 2014. It was only then on 21 March 2014 that she received the S&P from Timothy Soo of JK&C for execution purposes. She arranged for its execution by the directors of SHGCC and OBSB and requested the company secretary of SHGCC to prepare the requisite directors' circular resolution relating to the execution of the S&P.

182 In relation to the tenancy agreements between SHGCC and PHSB, WLK explained[103] that there had to be some consideration for the use of the Subject Land by PHSB pending subdivision. Hence, in order to avoid any issues that may arise with the tax department, she had the tenancy agreements prepared for the years from 2007 to 2012. PHSB's rental expenses would also be tax-deductible. SHGCC issued debit notes to PBSB for the rent payable. According to her, after OBSB bought the Subject Land from PHSB, no rent was paid to

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102 At 1AB1122

103 See her AEIC paras 80 to 84

SHGCC. In fact, it was WLK who arranged for SHGCC's debit notes to be cancelled or for credit notes to be issued, for the months October 2013 to January 2014 as, by October 2013, OBSB had taken possession of the Co-Gen Facility. The court will address this further below at [196].

183 In cross-examination by Mr Mark Yeo ("Mr Yeo"), WLK did not agree that the subdivision exercise for the Sembulan Land to excise the Subject Land was only to facilitate charging the Subject Land to Bank Islam. She said it was also to transfer the Subject Land to PHSB because of PHSB's investment in the Co-Gen Facility.

184 There was a settlement agreement signed by Linyi, SH Resort and SH Holdings with Maybank on 17 June 2010[104] to hold off Maybank's proceedings against the three companies for SH Resort's failure to redeem the bonds of stockholders on their due dates. As a result of SH Resort's failure to do so, MTB had earlier made a call on 1 March 2007 on the guarantee dated 21 January 2002 that Maybank had issued for RM30m ("the Maybank Guarantee") on behalf of SH Resort. It further resulted in a judgment being obtained against SH Resort on 12 November 2008 by Maybank on the Maybank Guarantee.

185 WLK claimed that in the course of the due diligence exercise, she had told Alex (in regard to the subdivision exercise of the Subject Land) of the interests of PHSB and SESB, but also that because PHSB was in liquidation, it needed to be transferred to OBSB. This evidence was not stated anywhere in WLK's AEIC. The result was that the Plaintiff made an application, which the court granted, to recall Alex to the witness stand.

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104 At 1AB 900

186 When Alex was recalled as a witness, he stated quite categorically[105] that WLK did not inform him of the subdivision and planned transfer of the Subject Land to OBSB as she claimed. He testified that he first knew of the subdivision exercise some time in February 2014 through Madeline and another lawyer (one Rodney) after they discovered, that one of the land titles of SHGCC had been surrendered to the LSDS for subdivision purposes when they were trying to discharge the charges on the Sembulan Land.

187 It was clear from WLK's testimony that her knowledge of PHSB having a proprietary interest in the Subject Land came entirely from the Defendant or from what she gathered from staff at SH Resort; she had no personal knowledge nor had she seen any documents that reflected any such interest.

188 WLK confirmed Madeline's testimony that she and the Defendant never told Madeline that the purpose of the subdivision exercise was to transfer the Subject Land to PHSB. Neither did she or the Defendant inform Madeline that the transfer would eventually be to OBSB or to the Defendant.[106] Further, WLK confirmed that she did not "volunteer" information to Madeline that SHGCC was not the owner of the Subject Land. She did not disclose the S&P either; she only provided information when specifically asked by Madeline or when she completed the DD Checklist.

189 However, WLK disagreed with Madeline's AEIC where Madeline[107] deposed that she was not told or given the following correspondence:

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105 See transcripts at p 1524 on 31 July 2019

106 At pp 1302-1303 of the transcripts on 31 July 2019

107 At para 18

(a) LSDS's letter of offer to SHGCC dated 29 October 2004;

(b) SHGCC's letter to LSDS dated 12 January 2005;

(c) LSDS's amended offer to SHGCC dated 27 July 2007 (*ie*, LSDS's 2007 Letter of Offer");

(d) SHGCC's letter to LSDS dated 28 January 2014; and

(e) LSDS's letter to SHGCC dated 1 October 2014 (*ie*, LSDS's 2014 Letter of Offer").

190 Mr Yeo drew WLK's attention to the DD Checklist which did not show she had handed the above items to Madeline. In fact, the DD Checklist showed no information was provided on the subdivision at all. WLK explained she had extended copies to Madeline by email. She claimed, however, that no discovery of the emails had been or could be given because those emails "will disappear after a month or something"[108] as she used the TransferBigFiles software.

191 Additionally, after Mr Yeo painstakingly went through the documents WLK had listed in para 39 of her AEIC, it was noted that the following documents were not disclosed by WLK to Madeline in the due diligence exercise (with which WLK disagreed):

(a) Maybank's letter of offer to PHSB dated 8 April 1997;[109]

(b) Bank Islam's letter to PHSB dated 12 May 1999;[110]

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108 At p 1307 of the transcripts on 31 July 2019

109 At 1AB326

110 See 1AB 425

(c) the certificate in respect of representations and warranties from PHSB to Bank Islam dated 16 June 1999;[111]

(d) the certificate of undertaking from PHSB to Bank Islam dated 16 June 1999;[112]

(e) the letter of undertaking in respect of charges from SHGCC to Bank Islam dated 16 June 1999;[113]

(f) the letter of exclusivity from Maybank to Bank Islam dated 16 June 1999;[114]

(g) the letter of exclusivity from PHSB to Maybank dated 17 June 1999[115]; and

(h) the letter of disclaimer from MTB to PHSB copied to SHGCC dated 29 January 2002.[116]

192 Under cross-examination, WLK prevaricated and finally said she could not remember whether she had mentioned the S&P to Madeline during the due diligence process. She added that since she was not asked, she did not provide a copy of the S&P to Madeline. Her answer was absurd – as Mr Yeo pointed out, the due diligence team would not ask for a document they did not know existed. WLK then changed her testimony to say she did not provide the S&P as it was not yet signed at the time the due diligence was being conducted. In

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111 At 1AB690

112 At 1AB691

113 At 1AB687

114 At 1AB689

115 At 1AB689.2

116 At 1AB805

addition, it never crossed her mind that this was a required disclosure at that time;[117] she insisted it was never her intention to deliberately hide anything from the due diligence team adding that they would eventually find out in any case – an answer, however, that did not exonerate her for that omission.

193 WLK then sought to justify her answer further by her statement[118] that the Subject Land was such a small piece of land that it might not be a material disposal from SHGCC's point of view. The court pointed out that the Subject Land had an area of approximately 1.5 acres or 73,180 sq ft, which is not a small area, with which WLK had to agree.[119]

194 There were other instances where WLK's testimony called into question her objectivity or impartiality. In regard to PHSB's alleged proprietary interest in the Subject Land, WLK said that while PHSB was not the registered owner, it had an interest in the Subject Land, but she also somehow maintained that the Subject Land was not an asset of PHSB[120] – a statement which was a contradiction in terms.

195 WLK was responsible for instructing JK&C to prepare the S&P. According to Timothy Soo's email to her dated 26 February 2014,[121] the draft S&P was ready that day. The Disclosure Letter was dated 18 March 2014, yet

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117 At p 1336 of the transcripts on 31 July 2019

118 At p 1342 of the transcripts on 31 July 2019

119 At p 1346 of the transcripts on 31 July 2019

120 At p 1402 of transcripts on 31 July 2019

121 At 1AB2545

she failed to disclose the S&P in the schedule to the Disclosure Letter. Questioned on her omission, WLK said:[122]

> I don't know. It didn't come to my mind, or the question that was asked, according to the section of this schedule, it doesn't really trigger me to put that disclosure in.

Neither did it occur to WLK to make the disclosure when she requested Timothy Soo to finalise the S&P on 20 March 2014. Her answers were not only unconvincing but, in my view, untrue. Both the timing and the nature of the S&P would have suggested to WLK that it should be disclosed. Further, when questioned who had requested her to provide details for the schedule, she could not remember and hazarded a guess that it was either the Defendant or his solicitor.

196 WLK also gave instructions for the reversal of the debit notes issued by SHGCC to OBSB for rent payable from October to December 2013 for the Subject Land, but her explanation was baffling. She said OBSB did not need to pay rent because it was going to be the owner of the Subject Land and, further, it had no capability to generate revenue.[123] Yet, she gave instructions for the reversal in January 2014 even though the S&P had not been signed then. Further, the fact was that the Subject Land had been excluded from the ASA. She claimed that it never occurred to her that her actions were unfair to the Plaintiff as an investor who would be putting RM700m into the SH group. WLK drew a distinction between OBSB and PHSB, which previously paid rent, on the basis that PHSB had charged the Subject Land to Bank Islam and it had not redeemed the charge. This was, however, an irrelevant distinction in terms of

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122 At p 1481 of transcripts on 31 July 2019

123 At pp 1403 & 1410 of the transcripts on 31 July 2019

the payment of rent – PHSB continued to pay rent when the charge had not been redeemed, and it was not clear to the court how the redemption of the charge would mean that OBSB did not need to pay rent.

Chong Choon Kim's testimony

197 Nothing turns on the testimony of the valuer, Chong, in relation to the Valuation Report[124] save that he contradicted the Defendant's testimony[125] and confirmed it was indeed the Defendant who instructed him to prepare the Valuation report[126] and to exclude the substations and the land on which the substations were built (including the Subject Land) from his valuation.

The subdivision of the Sembulan and Subject Lands

198 As can be seen from the above review of the evidence, a significant issue in this Suit was the nature of the subdivision of the Sembulan Land. The court now considers the evidence relating to this issue in particular. The relevant documents for this court's purposes start with the letter dated 15 July 1999 from the Kota Kinabalu Municipal Council[127] to architects Arkitek Billing Leong & Tan Sdn Bhd granting planning approval for the development of SH Resort on Sembulan Land. On 2 August 1999,[128] SHGCC applied for subdivision of the Sembulan Land into five individual titles.

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124 At 1AB1725-1751

125 At transcripts p 417 on 24 July 2019

126 See transcripts at p 1018 on 30 July 2019

127 At 1AB745

128 At 1AB748

199 By its letter dated 29 October 2004[129] ("LSDS's 2004 Letter of Offer") to SHGCC, the LSDS agreed to allow conversion/subdivision of the Sembulan Land in return for payment of a premium of RM3m and other conditions, one being that the demised land was expressly and only for the purpose of erecting thereon an electricity substation by SESB.

200 SHGCC appealed for a reduction in the proposed premium of RM3m by its letter to LSDS dated 12 January 2005.[130] By LSDS's 2007 Letter of Offer (see [65] above),[131] LSDS agreed to a reduced premium of RM4,000 for the subdivision and conversion exercise with the same condition as set out in LSDS's 2004 Letter of Offer stated at [199] above, as well as the following conditions:

> Subdivision of this title is prohibited.
>
> Transfer and sublease of this title is prohibited except to [SESB] or the title may be surrendered to State Government.

201 The subdivision survey was approved on or about 12 October 2011.[132] By a circular resolution of the board of directors of SHGCC dated 20 September 2012,[133] the subdivision/conversion application was approved and JK&C were authorised as the solicitors of MTB to make the submission on behalf of SHGCC's bondholders. After subdivision, the subsidiary titles were to be returned to the custody of MTB. The Defendant and Zarazilah were two of the four signatories of the resolution.

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129 At 1AB1975

130 At 1AB1980

131 At 1AB1983

132 See 1AB1988

133 At 1AB3382

202 On 28 January 2014,[134] the Defendant on behalf of SHGCC wrote to LSDS in regards to the 2007 Letter of Offer at [200], pointing out that it did not address the terms of subdivision for the site of the Co-Gen Facility as an individual lot approximating 1.5 acres. LSDS was requested to amend the 2007 Letter of Offer. After being pressed during cross-examination,[135] the Defendant finally admitted his intention was to remove the restriction on transfer of the substations' land only to SESB.

203 In its reply to SHGCC's letter referred to in [202] on 1 October 2014, *ie* LSDS's 2014 Letter of Offer (see also [66] above),[136] LSDS removed the two restrictions in its previous two letters of offer namely, that the subdivision was only for the purpose of erecting an electricity substation by SESB and that transfer and/or sublease was prohibited except to SESB. The only condition that remained was that the subdivision of title was prohibited except with written permission from the Director of Lands and Surveys. LSDS also converted the use of the Subject Land to "Industrial (Co-Gen Plant)".

204 The endorsement of receipt by LSDS showed that SHGCC's letter was only hand-delivered to LSDS on 12 February 2014, which was one day *after* GSH deposited RM70m with MTB as a precondition for the adjournment of the winding up hearing against SH Holdings, which had been fixed for 12 February 2014. It was the Plaintiff's case that the Defendant deliberately held back SHGCC's said letter until he was sure GSH had paid the RM70m to MTB and the winding up petition against SH Holdings did not proceed. Additionally, the Plaintiff was not informed about the said letter.

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134 At 1AB2501

135 At transcripts pp 814-815 of 29 July 2019

136 At 1AB2550

205 Gilbert (with the Plaintiff's director Francis Lee) had testified that he signed to accept, on behalf of SHGCC, the revised offer contained in LSDS's 2014 Letter of Offer because he understood it related to an application for subdivision of part of the Sembulan Land, and the purpose was to change the use of the Subject Land from "tourist complex" to "electricity generation". It was not his understanding that the subdivision of the Sembulan Land was to eventually transfer the Subject Land from SHGCC to any other party.

The submissions

206 The court will refer briefly to the parties' closing submissions before making its findings.

The Plaintiff's submissions

207 The Plaintiff's submissions were lengthy. The Plaintiff referred to the evidence adduced in court, both documentary and oral, as well as from the Defendant and WLK, and submitted it supported the various limbs of its claim. The Plaintiff then dealt with the defences pleaded by the Defendant and submitted that none of them were sustainable, relying in large part on the Defendant's own evidence in support of its arguments and quoting the Defendant's testimony extensively.

208 The Plaintiff cited a number of authorities to support its submission that no issue estoppel (as alleged in the Defendant's opening statement) arose in this case. The Plaintiff set out the differences between the Malaysian Suit and this Suit to make good its submission. Lastly, the Plaintiff submitted that the Defendant's counterclaim should be dismissed.

209 The court will revisit some of the Plaintiff's arguments on issue estoppel when it addresses the topic separately below at [258]–[265].

The Defendant's submissions

210 The court will only address the more salient aspects of the Defendant's lengthy submissions which exceeded 200 pages. The Defendant relied heavily on issue estoppel for its submission that the judgment of the Malaysian court was good against the world.

211 The Defendant termed the warranties in para 18.2 of Schedule 2 (see [40] above) and in Schedule 4 (see [41] above) as "Land Warranties". Paragraph 4.1(g) of Schedule 2 (see [38] above) was termed "disposal of assets warranty" while para 11.1 of the same Schedule (see [39] above) was described by him as "arm's length warranty". The Defendant denied breaching any of the named warranties, relying on the Malaysian Judgment which extracts he quoted *in extenso* and on the findings of the Malaysian court pertaining to the Common Expectation between SHGCC and PHSB.

212 The Defendant's submissions set out what he said were the undisputed facts that supported his defence as follows:

(a) The Co-Gen Facility did not form part of the acquisition of the Sutera Target Group under the SA.

(b) The Defendant/WLK had extended a copy of the Valuation Report to GSH's representatives at the October 2013 meeting at GSH's Changi office, which showed that the area of the Sembulan Land belonging to SHGCC excluded the Subject Land.

(c) Neither PHSB nor OBSB formed part of the Sutera Target Group.

(d) The injection of RM700m by GSH into the Sutera Target Group to settle all its debts did not include settling the debts owed by PHSB to Maybank under the facility agreement dated 15 June 1999[137] for the loan of RM118,250,000, nor was it used to redeem the securities thereunder.

(e) The Plaintiff only discovered the tenancy agreements and the ASA after the discovery of the S&P, pursuant to the investigations it conducted in or around September 2015.

213 The Defendant submitted that he did not breach the Land Warranty as the Plaintiff knew or ought to have known that the Subject Land (which he alleged belonged to OBSB) did not form part of the Plaintiff's acquisition because this had been brought to the Plaintiff's attention in the following ways:

(a) at the initial discussions and negotiations between the parties on the acquisition;

(b) in the handing over of the Valuation Report, which was adopted in the audited accounts of SHGCC for 2014 and 2015;

(c) in the information provided by the Defendant's representative (who, conveniently, was not named) in the course of the Plaintiff's due diligence exercise in the acquisition of the SH Group;

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137 At 1AB446i

(d) when the Plaintiff came to know of the subdivision exercise to carve out and transfer the Subject Land on which the SESB substations and Co-Gen Facility are located; and

(e) by the structure of the SA whereby the Plaintiff/GSH acquired the Sutera Target Group by paying RM700m to discharge and settle all its liabilities but not the liabilities of PHSB or redemption of the charges and securities over the Subject Land.

214 The Defendant asserted that the Plaintiff's attempt to distance itself from the Valuation Report was an afterthought. He submitted that the Plaintiff then purported to rely on the tenancy agreements between SHGCC and PHSB and later with OBSB as well as the ASA and SHGCC's prospectuses, which he said was wholly misconceived.

215 In regard to [213(c)] above, the Defendant relied on the fact that Madeline had sight of the Letter of Disclaimer[138] (see [81] above) which MTB issued to PHSB dated 29 January 2002 which disclaimed *"its rights, interest and benefit over the Excluded Area (the Subject Land)"* in relation to the SHGCC charges, except for SHGCC's third charge in favour of Maybank relating to the RM118.5m loan. According to the Defendant, the different treatment of SHGCC's third charge would have told the Plaintiff that the third charge involved PHSB and that although SHGCC owns the Sembulan Land, it could not give a third party charge of the Subject Land as security insofar as the other transactions did not involve PHSB.

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138 1AB805

216 The Defendant then addressed Madeline's testimony (see [82] above) that PHSB was only an "occupier" of the Subject Land at the material time. He submitted that if PHSB only had the status of a "tenant", there would have been no need for MTB to give an undertaking to disclaim all of its "rights, interest and benefits" over the Subject Land and MTB would not have required PHSB's agreement to present and register the SHGCC charges on behalf of SH Resort and SH Holdings. It would also not have been necessary for MTB to issue the Letter of Disclaimer to PHSB if SHGCC owned the Subject Land. Further, the Plaintiff and M&A/Madeline knew that PHSB's interest in the Co-Gen Facility was not that of a tenant or occupier only – it was its owner and operator. The Defendant relied on Madeline's answer under cross-examination when she was referred to SHGCC's letter to LSDS dated 28 January 2014:[139]

> Q: And … then you are also aware, by virtue of the security sharing agreement and the letter of disclaimer, that PHSB has an interest in the co-gen land and in the plant; correct?
>
> A: As occupier, yes.
>
> Q; And, here, it is telling you that the co-gen plant has a different ownership and operating model, and you know that PHSB is that owner and operator of the co-gen plant; correct?
>
> A: Yeah, the plant, yes.

217 The Defendant dwelt at length on Madeline's testimony to support his submission in [213] that the Plaintiff had knowledge or imputed knowledge of PHSB's interest in the Subject Land. He relied in this regard on, *inter alia*, documentary evidence which included (i) Maybank's Letter of Exclusivity to Bank Islam dated 16 June 1999;[140] (ii) Bank Islam's caveat over the Subject

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139 Transcripts at p 191 on 23 July 2019 & see 1AB2501

140 At 1AB 689

Land dated 6 December 2010;[141] (iii) Bank Islam's letter of release to SHGCC dated 30 January 2002;[142] and (iv) PHSB's letter of assignment dated 30 January 2002 to Bank Islam,[143] under which PHSB assigned to Bank Islam the Letter of Disclaimer of MTB.[144]

218 Additionally, the Defendant (at paras 54 and 369–416 of his submissions) dwelt on issue estoppel as well as abuse of process. Further, he raised (at paras 417–420) the issue of international comity and why a Singapore court must respect the Malaysian Judgment. The court will return to these issues in the course of its findings.

219 In the Defendant's 223-page submissions, however, he completely failed to address Madeline's evidence in regard to WLK's untruthful answers to the due diligence questions posed in M&A's DD Checklist, set out at [73]–[75] above. Even if this court accepts the Defendant's submission[145] that he had made general disclosure by way of the Disclosure Letter or that it was deemed disclosure that sufficed (relying on the UK case of *Infiniteland Ltd and another v Artisan Contracting Ltd and another* [2006] 1 BCLC 632 ("*Infiniteland*")), the court cannot see how such a submission can overcome the hurdle of the untruthful answers that WLK furnished on his behalf. To recapitulate, WLK answered "N/A" meaning "not applicable" to the following very pertinent requests for disclosure:

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141 DD checklist at 1AB3000

142 At 1AB815

143 At 1AB 810

144 See [210] *infra.*

145 At para 103

(a) the request for any contracts whose existence ought to be disclosed; and

(b) the request for details of any subsisting agreements or arrangements with any of the Sutera Target Group companies in which any director, a member of his family or any entity associated with them are interested, including details of the amounts of any outstanding loans granted or other amounts payable by any of the Sutera Target Group companies for the benefit of any such person.

The response to these requests clearly should have been to disclose the existence of the S&P and the Transaction. Given the misleading responses, how could deemed disclosure help the Defendant? By 30 November 2013 when the due diligence exercise commenced until its conclusion on 13 March 2014, all the documents regarding the subdivision exercise (referred to at [198]–[201] above) and regarding PHSB (referred to at [191] above) were in existence (save for LSDS's letter to SHGCC dated 1 October 2014) but these documents were withheld by WLK.

220 The Defendant described the Plaintiff's allegation that OBSB did not pay the settlement sum of RM33.6m to Bank Islam (see [157]–[162] above) as a red herring, unfounded and irrelevant to the issues in this case. The court, however, rejects this submission as the evidence adduced in court did prove that OBSB did not pay the consideration under the ASA, and this was a relevant factor in considering the Common Expectation alleged.

221 The Defendant added that the Plaintiff's accusations that he had (i) lied to banks in Malaysia, (ii) fabricated documents, and (iii) misled the Malaysian court were not pleaded. However, these allegations did not need to be pleaded

as the first allegation related to the Plaintiff's complaint of the Defendant's many non-disclosures and touched on his credibility, while the allegations of fabricated documents and misleading the Malaysian court related to the Plaintiff's contention that the Malaysian court arrived at its decision without knowing many relevant factors which the Defendant had withheld.

222 The Defendant submitted[146] that the court should not grant a mandatory injunction as it would have no practical effect. Citing the judgment in the Malaysian Suit, the Defendant repeated his defence that the S&P was a mere formality as the proprietary interest in the Subject Land already vested in PHSB (which argument this court rejects for the reasons set out at [241]–[244] below). He argued it would be an abuse of process to grant an injunction as it would be tantamount to the Plaintiff circumventing the judgment in the Malaysian Suit. The court does not accept this argument for the reasons set out at [258]–[265] below.

The issues

223 The issues that arise for determination in this case are:

(a) Did the Defendant withhold the existence of the S&P from the Plaintiff?

(b) Was there a Common Expectation between SHGCC and PHSB as the Defendant alleged in his Defence, so as to entitle the Defendant to the declaration prayed for in his Counterclaim?

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146 At paras 407-412 of his closing submissions

(c) Did PHSB have proprietary interest in the Subject Land which it then conveyed to OBSB?

(d) Was the Malaysian court misled by the Defendant in the Malaysian Suit? As a corollary, does the judgment in the Malaysian Suit give rise to issue estoppel against the Plaintiff and is this Suit is an abuse of process as the Defendant contends?

(e) Did the Defendant breach any or all of the warranties pleaded in the Plaintiff's Statement of Claim and set out at [37] to [41] above?

The findings

224 Before turning to the specific findings in this case, the court considers the credibility of the witnesses. Unlike the Plaintiff's four witnesses who testified in a forthright manner without hesitation, the Defendant's stock answers during cross-examination when he found himself in difficulties – "I can't remember", "I don't know", "It was my mistake" and "I overlooked" – did not persuade the court he was a truthful witness. On her part, WLK would seek to excuse herself whenever she declined to answer counsel's questions, when those answers would have incriminated her, by stating "I can't remember". The court was not impressed with her veracity either. Chong, the valuer, was the Defendant's only truthful witness.

225 It can be seen from Annexure A that the Defendant had a penchant for using BVI companies to hide his shareholdings in his stable of Malaysian companies. One example would be Investasia. That company is wholly owned by Asia Impel (now known as Xing Asia Impel Sdn Bhd) which in turn is a wholly owned subsidiary of Mainfield Holdings Ltd, a BVI company. As for OBSB, OBSB's shareholder is yet another BVI company, MDS International

Limited. When cross-examined by Ms Teh as to why he used so many BVI companies for his businesses, the Defendant gave the incredible answer, "I don't know really",[147] an answer with which the court took issue.

226 Questioned by Ms Teh if his usage of BVI companies was because it would make it very difficult, if not impossible, for anyone to find out who controls the companies and are the shareholders, the Defendant replied, "I'm not sure". This was yet another answer that the court had equally great difficulty accepting or believing.[148] There is no doubt that the Defendant used BVI companies to hide his shareholdings in his numerous companies.

227 As for WLK, she was the Defendant's Girl Friday. She was loyal to a fault as far as the Defendant was concerned. She did his bidding and discharged her duties as the CFO of his myriad companies efficiently. WLK took care of all office, financial and administrative work and even drafted letters for the Defendant. She freed him so that he could devote his time to finding ways and means to resolve his mountain of debts owed to financial institutions in 2012–2013.

228 Despite her claim (see [189]–[191] above) that she never intended to deliberately withhold information and documents from the due diligence team and Madeline in particular, it is the finding of this court that WLK was as culpable as the Defendant in deliberate non-disclosures. A prime example of such reprehensible conduct on WLK's part can be seen in connection with an email inquiry raised by Madeline's colleague Yap Ee Ling ("Ms Yap") from

147 See transcripts at p 665 on 26 July 2019

148 See transcripts at p 665 on 26 July 2019

M&A. In her email to WLK dated 6 January 2014,[149] Ms Yap raised the following queries and WLK appended her initial responses on 7 February 2014 (emphasised in bold below):

> 1. Whether all the conditions referred to in [Bank Islam's] letter dated 21 March 2013 have been fulfilled (in particular items 2, 3 and 4) **We have settled the total of RM34,438,000 comprised RM33,600,000 + RM250,000 (item 2; legal fees) + RM588,000 Liquidators' fee). Refer attached [Bank Islam] letter above.**
>
> 2. We note that the Sabah Development Bank made the payment of the sum of RM34,438,000 to [Bank Islam] in settlement of the loan made by Bank Islam to PHSB. Can you please let us know on whose instruction the payment was made and also the source of these funds. **The fund was from SDB Term Loan account.**
>
> 3 Also, based on the description of the securities provided to [Bank Islam] for the said loan, there were undertakings given by [Linyi] and [Investasia] as well, which was not referred to in the release letter provided by [Bank Islam]. Please provide the documentation evidencing the release of these undertakings in view of the settlement of the [Bank Islam] loan. **Based on our understand [*sic*], there wasn't any undertaking given by [Linyi] and [Investasia] to [Bank Islam], so no such release is necessary.**
>
> [emphasis added in bold]

229 WLK's response to the third query, however, was clearly incorrect, as undertakings had been given to Bank Islam. Pressed by Mr Yeo, WLK finally admitted her above answer was wrong – indeed the court views it as an outright lie.

230 It is telling that WLK's withholding of documents from Madeline/M&A were related primarily to two categories of documents:

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149 At 1AB2496

(a) those relating to subdivision of the Subject Land listed in [198] above; and

(b) those relating to PHSB's banking facilities with Bank Islam or Maybank or both as listed in [191] above.

231 Coupled with her untruthful answers to the questions posed in the DD Checklist set out in [73]–[75] above, WLK's conduct was egregious to say the least. It was done to hide from the Plaintiff the true intent of the subdivision exercise for the Sembulan Land and to prevent the Plaintiff from finding out the extent to which the Defendant was making use of the assets of the companies in the Sutera Target Group and SHGCC in particular to procure banking facilities and assume liabilities on behalf of PHSB.

232 One of the documents WLK withheld during the due diligence exercise was Maybank's letter of offer to PHSB dated 8 April 1997 (see [191(a)] above) which would have been of interest to the Plaintiff – it was pursuant to that letter of offer that SHGCC was required to and did furnish a letter of undertaking to Maybank[150] ("SHGCC's Letter of Undertaking") to make a capital contribution of RM4.73m due to PHSB directly to Maybank (see [142] above). SHGCC's Letter of Undertaking and capital contribution related to the RM118.25m loan to PHSB under Maybank's facility letter dated 15 June 1999.[151] It demonstrated that PHSB itself was never expected to repay the loan to Maybank, but that other companies would make payments on its behalf.

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150 At 1AB345

151 At 1AB446

233 Maybank's subsequent letter dated 5 March 2014 had alluded to the fact that it had obtained judgment against OCK Investment on 9 June 2005 and wound up PHSB on 11 January 2012. In WLK's cross-examination,[152] her attention was drawn to that judgment[153] obtained on 23 February 2005 in the Malaysian High Court against PHSB and OCK Investment as the first and second defendants respectively, for*, inter alia*, the principal sum of RM153,880,280.46 excluding interest. Maybank's aforesaid letter stated it was agreeable to accepting sum of RM41m from the four addressee companies by 31 March 2014, in exchange for the release from their liabilities. That became the compromise sum (see [146] above).

234 The third party charge provided by SHGCC, SHGCC's Letter of Undertaking, and SHGCC's capital contribution on behalf of PHSB effectively demolishes the Defendant's argument at [212(d)] that GSH's injection of RM700m into the Sutera Target Group did not include settling the debts owed by PHSB to Maybank. That was the reason Maybank's letter dated 5 March 2014[154] was addressed to, *inter alia*, SHGCC in regards to the compromise sum.[155]

235 In fact, it was Maybank's acceptance of the compromise sum that prompted the letter dated 11 March 2014[156] from Ocean View to the Defendant referred to earlier at [146]. Under the terms of that letter, it was ultimately GSH which funded the payment of the whole of the compromise sum.

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152 At transcripts p 891 on 30 July 2019

153 At 1AB891-982

154 At 1AB1142

155 At [147].

156 At 1AB1156

236 There was also the Sutera Letter of Undertaking (see [85] above) provided by SHGCC to Bank Islam pursuant to Bank Islam's Debenture for the US$24m loan extended to PHSB. Under the Sutera Letter of Undertaking, SHGCC agreed, *inter alia*, to execute a charge in favour of Bank Islam over the Subject Land after subdivision (see [150] above). It therefore does not lie in the Defendant's mouth to contend that the Plaintiff had no part in repaying PHSB's debts when he made full use of a company in the Sutera Target Group, namely SHGCC, to either provide collateral or to make payment to Maybank (and Bank Islam) to discharge PHSB's liabilities. The Defendant conveniently overlooked the fact that SHGCC had to bear RM6m of the RM41m compromise sum paid to Maybank and to provide security for PHSB's loans, which ultimately came at the expense of GSH and the Plaintiff.

The S&P

237 The evidence adduced by the Plaintiff revealed the following:

(a) the surreptitious manner in which the Defendant arranged through WLK for the signing of the S&P and for it to backdated to a date before the signing of the SA;

(b) the Defendant's omission to deliver a stamped copy of the S&P to the Plaintiff or SHGCC (as vendor) in accordance with JK&C's letter dated 26 March 2014[157] and that WLK's intention in handing the copy directly to SHGCC's finance manager, Joanne, was to bypass Dickson, because he was the person in charge of accounts (see [95] above);

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157 At 1AB2549

(c) that WLK gave false answers to the questions in the DD Checklist posed by M&A set out in [73]–[75] above; and

(d) that WLK did not provide Madeline with statements of accounts relating to the Bank Islam and Maybank loans using the excuse (which the court considers untrue) that the documents were with the Liquidators (see [79] above).

238 The above incidents (which are not exhaustive) reinforce the court's view that the Defendant was dishonest and he was aided and abetted in such conduct by WLK. It further showed the great lengths that Defendant and/or WLK went to in order to hide the execution and the existence of the S&P from the Plaintiff, who discovered the document by chance in the records of SH Resort when E&Y reviewed the accounts of SHGCC (see [94] above). It was therefore clear that the Defendant had hidden the existence of the S&P from the Plaintiff.

239 Despite his denials, the court has no doubt that the Defendant's instructions to JK&C in April 2013 to prepare a sale and purchase agreement were prompted by the fact that he was meeting prospective investors. If those investors had invested in SHGCC, he wanted to carve out the Subject Land and transfer it out to either PHSB or OBSB. As nothing resulted from the discussions with those prospective investors, the Defendant put the intended transfer on hold and did not chase JK&C since there was no urgency.

240 The urgency resurfaced when the Plaintiff/GSH executed the Term Sheet on 18 October 2013 followed by the SA on 30 December 2013. The Defendant was then galvanised into action to get the S&P signed and the Subject

Land transferred out of SHGCC's ownership before completion of the SA on 26 March 2014, and which he did surreptitiously on 24 March 2014.

The proprietary interest of PHSB in the Subject Land

241 The court finds that PHSB did not have a proprietary interest in the Subject Land. The Defendant had alleged that the Liquidators knew of PHSB's alleged proprietary interest in the Subject Land at the time the ASA was executed and had advised him to have a separate sale and purchase agreement to formalise that interest (see [107] above). In the first place, this did not make sense – if the Liquidators knew that PHSB had a propriety interest in the Subject Land, a sale and purchase agreement involving only SHGCC and OBSB would not have been the appropriate means of vesting that interest in OBSB. In any case, the Defendant's evidence is undermined by his own letter dated 26 March 2013 addressed to the Liquidators.[158] In paragraph 6 of that letter, the Defendant wrote:

> The offer [to purchase] excludes the land where the Sutera Harbour Cogeneration Facility is situated. A separate agreement will be entered into between Omega Brilliance with the landowner thereof, Sutera Harbour Golf & Country Club Berhad … For avoidance of doubt, the sale of the Land is independent from the sale of the assets…

242 The court does not believe the Defendant's explanation that he inserted the above paragraph on the advice of the Liquidators. The court's view is reinforced by the Liquidators' reply dated 27 March 2013[159] to the Defendant's above letter wherein the Liquidators accepted the offer subject to, *inter alia*, the condition that:

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158 At 1AB1122

159 At 1AB1125

> (iv) the sale does not include the land or any fixtures or fittings forming part of the land in which the assets are situated on;…

If the Liquidators had been informed that PHSB had a proprietary interest in the Subject Land, the Liquidators would have recorded that in their reply. Indeed, the Defendant himself would have said so in his letter to the Liquidators of 26 March 2013. As the correspondence stood, it suggested that the Liquidators did not know that PHSB had a proprietary interest in the Subject Land, since the Subject Land was being excluded from the ASA on the basis that the transaction had to occur between SHGCC and OBSB, *without the participation of PHSB*.

243 I should add that in the Malaysian Suit,[160] the Defendant's version of his discussion with the Liquidators was that he told them it would be best for OBSB to do a separate sale and purchase agreement with SHGCC for the Subject Land. This was another inconsistency in the Defendant's evidence.

244 Nothing in the evidence adduced before this court supports the allegation that PHSB had any proprietary interest in the Subject Land. This can be seen from the following facts:

(a) Apart from the Defendant's claim, not a single document presented in court pointed to PHSB having any proprietary interest in the Subject Land.

(b) On the contrary, the exchange of correspondence between SHGCC and LSDS points to SHGCC and SHGCC *only* as being the owner of the Subject Land.

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160 See the notes of evidence at 1AB4315

(c) The Statement of Affairs filed by the Defendant jointly with Foo after the liquidation of PHSB on 11 May 2012 did not state that PHSB had a proprietary interest in the Subject Land, which if true, would have been a valuable asset for the Liquidators to realise.

(d) If PHSH had a proprietary interest in the Subject Land, it would not have paid rent for leasing the Subject Land from SHGCC over the years before the purported sale to OBSB.

(e) The fact that rent was paid did not admit of any other reasonable explanation. WLK had tried to suggest that the rent was introduced to avoid issues with taxation, but as she also conceded, if PHSB truly had a proprietary interest in the Subject Land, then not paying rent for the land would have been acceptable.[161] WLK also suggested that the rent would have been tax-deductible, but this was undermined by her concession during cross-examination that PHSB had been incurring massive losses annually in the millions since 2008 with the result that it never paid income tax.

The defence of Common Expectation

245 Relatedly, PHSB could not possibly have had the Common Expectation the Defendant claimed as it would be absurd for him to do so as a person wearing both the hats of SHGCC and PHSB. As the Defendant conceded in cross-examination, the so-called "Common Expectation" was in fact simply a plan that he had hatched and then sought to implement through his various companies (see [135] above).

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[161] At p 1414 of transcripts on 31 July 2019

246 It follows from the above finding that the Defendant's defence (see [47(f)] above) that OBSB would suffer a detriment if the Common Expectation is dishonoured or denied or reneged upon is unsustainable and unfounded. Indeed, it is absurd as the Defendant would be making the representation on behalf of himself as SGHCC and to himself again on behalf of PHSB/OBSB.

247 In any case, there could not have been the Common Expectation alleged as PHSB never paid the construction loan used to build the Co-Gen Facility, which was an essential element of PHSB's alleged reliance on that Common Expectation. Neither did OBSB pay the consideration of RM33.6m to the Liquidators of PHSB under the ASA as the sum was paid by Asia Impel from a loan advanced by the SD Bank who was misled as to the purpose of the loan (see [159] above). Hence, OBSB as well had not relied on the Common Expectation to its detriment at all.

248 The Defendant had pleaded in his (amended) Defence and Counterclaim (at paras 9(3) and 10) that:

> It was then understood between SHGCC and PHSB that the latter would develop and operate the Co-Generation Facility on the Subject Land to supply all the power that the [SH Resort] required…
>
> …
>
> In reasonable reliance on the Common Expectation, OBSB – with the knowledge, acquiescence and/or encouragement of SHGCC – planned, decided and then carried out various actions that are required …

However, PHSB could not have placed reliance on the "knowledge, acquiescence and/or encouragement of SHGCC" in any case because in his own AEIC at para 26, the Defendant deposed as follows:

> The development of the Co-Generation Facility on the Subject Land proceeded with the common expectation and assurance

> between SHGCC and PHSB, that the entity that developed the Subject Land with the Co-Generation Facility would occupy and own it. *At the material time, both SHGCC and PHSB were under my directorship and general management.* [emphasis added]

Again the Defendant was wearing two hats at one and the same time and the understanding was with himself.

249 In his Defence, the Defendant also dwelt at great length[162] on the alleged reliance by OBSB on what it was led to believe by SHGCC, highlighting how the Co-Gen Facility came to be constructed by PHSB, explaining the attendant approval(s) and/or requisite licence(s) from the relevant government authorities, the financing from banks and SHGCC's involvement in the financing arrangements (by providing SGHCC's Letter of Undertaking and giving a third-party charge). However, none of those facts actually involved OBSB. Indeed, they could not have involved OBSB because the company only came into existence on 7 February 2013, when it was incorporated (see [10] above). As noted above at [137], the Defendant repeatedly claimed that OBSB had stepped into PHSB's shoes, but this argument was lacking in specificity and without substance. The Defendant's broad references to OBSB purchasing PHSB's rights also did not make sense given the scope of the ASA.

250 The Defendant relied on Madeline's evidence set out at [81]–[82] and [216] above for his submission that she acknowledged PHSB's ownership of the Subject Land. That is a misreading of her testimony. Madeline consistently maintained that whatever documents she saw described PHSB was an "occupier" not "owner" of the Subject Land.

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162 At para 10(1) to (22) and see [47] above

251 In the court's judgment, the Defendant did not inform the Plaintiff of the alleged Common Expectation between PHSB and SHGCC because it never existed. It was his contrived defence in the Malaysian Suit. It was undoubtedly concocted well after the Defendant's letter dated 6 October 2015[163] to Goi (in response to the Plaintiff's solicitors' letter dated 25 September 2015[164] alleging the Defendant had breached the SA) where he said nothing about any Common Expectation even though he referred in that same letter to the S&P and the subdivision of the Sembulan Land. Neither did his solicitor WA raise that issue in its reply dated 22 October 2015[165] to the Plaintiff's solicitors' letter.

252 It is telling that, during cross-examination,[166] the Defendant admitted that he did not even apprise WA, his own solicitor, of the Common Expectation that had apparently existed in his mind for 15 years.

253 The Defendant's reliance on Goi's testimony to support his claim that the sale to the Plaintiff under the SA did not include the Subject Land is equally misconceived. Goi's testimony (which the Defendant appeared to accept and rely upon) was that he understood and accepted that the *business* of the Co-Gen Facility was not included in the sale, but nothing was said about the *land* upon which the Co-Gen Facility was located.

254 The court finds it strange that the banking institutions from whom the Defendant borrowed enormous sums were so trusting that they accepted his word that PHSB owned the Subject Land without requiring any proof. That

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163 At 1AB2572

164 At 1AB2566

165 At 1AB2589

166 At transcripts p 885-886 on 29 July 2019

comment applies equally to Chong and the valuer(s) from Azmi & Co who were prepared to accept at face value the Defendant's statement that SHGCC's Sembulan Land had an area of 94.90 and not 95.58 hectares without verifying the information themselves. Regardless, these aspects of the evidence did not suggest that the Defendant's allegations had any merit.

255 Therefore, the court finds that there was no Common Expectation as alleged by the Defendant. It follows that the court does not believe the Defendant's various arguments concerning his intention not to include the Subject Land in the acquisition under the SA. As a result, the Defendant's counterclaim for rectification should be dismissed.

Was the court misled by the Defendant in the Malaysian Suit?

256 As set out earlier, the Defendant did not disclose to the Malaysian court the following pertinent facts:

(a) that PHSB did not fully repay the RM118.25m loan given by Maybank, but that it was partly repaid by three companies in the Sutera Target Group (see [142] above);

(b) that the US$24m loan was not used by PHSB to build the Co-Gen Facility but as working capital (see [149] above);

(c) that the Defendant owned Perbinaan OCK, the company that was paid RM115m to construct the Co-Gen Facility (see [148] and [166] above);

(d) that he owned OBSB, which was his nominee to buy the assets of PHSB under the ASA;

(e) that OBSB did not pay the consideration under the ASA, *ie* the settlement sum, to Bank Islam, as the money came from a loan extended by SD Bank, and the settlement sum also served to release the Defendant from a personal guarantee (see [158]–[161] above);

(f) that the Defendant, in the words of Ms Teh, "repeatedly inflicted financial obligations on SHGCC … to enable PHSB to obtain loans from Bank Islam and Maybank"[167] (see [152] above); and

(g) that SH Resort paid for electricity supplied by PHSB, which stopped supplying electricity to it in 2002 after just three years of operation, that SESB took over thereafter, until OBSB began operating the Co-Gen Facility and provided electricity for SESB (and through SESB, to the SH Resort), which it did so for only one year, ceasing in 2015, and that the Co-Gen Facility then remained dormant since then (see [155] above).

257 The entire *ratio decidendi* of the Malaysian judgment was based on the Common Expectation that the Defendant pleaded existed between SHGCC and PHSB.[168] However, it has already been shown at [135]–[136] above that there could not have been such a Common Expectation because it was simply a unilateral expectation on the part of the Defendant wearing the hats first of SHGCC and PHSB and later of SHGCC and OBSB, at one and the same time. It is the court's view that the Malaysian court was indeed misled by the Defendant due to the Defendant's withholding of the facts stated at [256] above.

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167 Quoting counsel for the Plaintiff from transcripts at p 601 on 25 July 2019.

168 See the extract at 1AB6002 from the Malaysian judgment

Does the judgment in the Malaysian Suit give rise to issue estoppel against the Plaintiff and is this Suit an abuse of process?

258 As stated earlier, the gravamen of the Defendant's defence was his contention that the Malaysian Judgment was good against the world on the basis of *res judicata* and that the international comity of nations requires this court to give it due recognition. To determine this issue, the court turn to consider some of the authorities cited by the parties.

259 In the first place, as the Defendant is pleading *res judicata* arising out of a foreign judgment, the court first considers whether the foreign judgment ought to be recognised. In *Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v PT Humpuss Intermoda Transportasi TBK and another* [2016] 5 SLR 1322 ("*Humpuss*"), the court held at [65]–[67] that recognition of a foreign judgment is a necessary prerequisite for it to give rise to *res judicata* before our courts either through cause of action or issue estoppel or the so-called "extended doctrine of *res judicata*" by virtue of the rule in *Henderson v Henderson* (1843) 3 Hare 100 ("*Henderson*").

260 According to *Humpuss* at [67], under the common law, a foreign judgment will be recognised if: (i) it is a final and conclusive judgment of a court which, (ii) according to the private international law of Singapore, had jurisdiction to grant the judgment and (iii) if there is no defence to its recognition. Granted requirements (i) and (ii) are satisfied here, but it is the court's view that requirement (iii) is not. As noted in *Humpuss* at [73], quoting from *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2016 Reissue) at para 75.209, one ground for not giving effect to a foreign judgment under requirement (iii) is "if the foreign judgment had been obtained by fraud or in breach of principles of natural justice". In this case, the Malaysian court was deceived because of the fraudulent conduct of the Defendant encapsulated in

his transferring the Subject Land (worth at least RM250,000 at market value according to the Plaintiff) to OBSB for a nominal RM1,000, and in then withholding key facts from the Malaysian court (see [256]–[257] above) which would have been detrimental to his defence in the Malaysian Suit. This is sufficient to dispose of the Defendant's arguments on estoppel and *res judicata*.

261 Even if the Malaysian Judgment should be recognised, no issue estoppel would arise. It should first be noted that the issues litigated before the Malaysian court and in this court are different. As set out above at [28], SHGCC had disputed OBSB's ownership of the Subject Land in the Malaysian Suit and the reliefs that it claimed included a declaration that the S&P was null and void and SHGCC remained the owner of the Subject Land. In this Suit, the Plaintiff's (not SHGCC's) claim against the Defendant is for breach of various warranties that he provided in the SA.

262 For issue estoppel to apply on the basis that litigants should not be twice vexed in the same matter, the law requires the following four conditions to be satisfied (see *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157 at [14]–[15]):

(a) there is a final and conclusive judgment on the merits;

(b) the judgment was given by a court of competent jurisdiction;

(c) there is an identity of parties; and

(d) there is identity of subject matter in the two proceedings.

In this case criteria (c) and (d) are missing as the plaintiffs and the disputes in the two sets of proceedings are different, notwithstanding that the Defendant is

the common defendant in both suits. In this connection, the court accepts paras 324–327 of the Plaintiff's closing submissions.

263 The court rejects the Defendant's submission[169] that SHGCC would be regarded as a privy of the Plaintiff merely because it is the latter's subsidiary. As stated in the Plaintiff's reply submissions[170], no authorities were cited for this proposition. In any case, according to *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510 at 514–515, a person who litigates for different rights is in law separate persons.

264 Would the extended doctrine of *res judicata* (which originated in *Henderson* ([259] *supra*) apply as the Defendant submitted? The extended doctrine of *res judicata* would preclude the Plaintiff from raising issues here that ought properly to have been raised and argued in the Malaysian Suit, and for this doctrine, there is no requirement of the identity of parties in the two suits (*Humpuss* ([259] *supra*) at [61]).

265 This court is of the view that the Plaintiff would not be prevented from bringing this Suit under the extended doctrine of *res judicata,* primarily because it could not have been joined as a co-plaintiff to SHGCC's claim in the Malaysian Suit. The Plaintiff's claim is based on enforcing its rights under the SA which is subject to Singapore law (per cl 12.15(a) of the SA).[171] In the Malaysian Suit, SHGCC's cause of action against the Defendant was, *inter alia*, for breach of the fiduciary duties he owed to SHGCC as its director while OBSB was joined as his co-defendant on the basis it was privy to such breach. The

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169 At para 335 of his submissions

170 At para 143

171 At 1AB217

dispute related to the Defendant's conduct in effecting a transfer of the Subject Land to OBSB by SHGCC. In addition, the doctrine of *lex situs* in conflict of laws states that the law governing the transfer of title to immoveable property is dependent upon the location of the property. In the present case, even where it touches upon the Subject Land, the Plaintiff's rights against the Defendant are personal to it, since they are contractual rights that govern the Defendant's conduct *vis-à-vis* the Plaintiff. Therefore, the Defendant has not in fact been sued twice over on the same issues.

Did the Defendant breach all or any of the warranties pleaded in the Plaintiff's Statement of Claim?

266 Without a doubt, in the light of the court's many findings set out earlier, the Defendant did indeed breach the warranties pleaded by the Plaintiff and set out at [37] to [42] above. To reiterate, under cl 6.1 of the SA, the Defendant had provided the warranties under Schedule 2, and these warranties were to be true and accurate at the date of the SA and at the date of completion of the SA, as if they were given afresh on such later date. In this case, the S&P for the transfer of the Subject Land to OBSB was signed on 21 March 2014 and backdated to 1 March 2014, while completion of the SA was on 26 March 2014. The court has already found that PHSB did not have a proprietary interest in the subject land, and therefore, the Subject Land was part of the acquisition under the SA and the S&P was a disposition of SHGCC's land. On the basis of the findings of fact above, the court finds that the Defendant has breached cl 6.1 of the SA by reason of the following breaches of warranties:

(a) The Defendant had breached paras 4.1(c) and 4.1(g) of Schedule 2 by disposing of the Subject Land under the S&P to OBSB.

(b) The Defendant had breached paras 6.6(b), 11.1, and 11.2(a) of Schedule 2 by disposing of the Subject Land at a price lower than its market value, and certainly not on an arm's length basis as the Defendant was also a director of OBSB.

(c) The Defendant had breached para 18.2 of Schedule 2 (read with Schedule 4) as OBSB had obtained an interest in the Subject Land under the S&P, and therefore, the statement in Schedule 2 that SHGCC was the sole legal and beneficial owner of the Sembulan Land (which includes the Subject Land) was false at the time of completion.

It is worth noting that of these warranties, only para 11.1 of Schedule 2 makes express reference to disclosure. The crux of the case concerning disclosure has to do with the limitation of liability clause in the SA. For the reasons that will be discussed in relation to that clause, the court finds that the Defendant cannot rely on that proviso in relation to para 11.1.

267 The Defendant claimed that he was entitled to rely on the limitation of liability clause under cl 8A.1(c)(i) of the SA, such that he would not be liable for any claim by the Plaintiff. In order to establish this, he had to show that:

> the fact, matter, event or circumstance giving rise to such Claim … had been disclosed to the Investors in the Disclosure Letter as a potential liability of or loss to any of the companies in the Sutera Target Group …

268 The Disclosure Letter did not make express reference to the S&P or Transaction. Further, the court has found the Plaintiff would not have known about the S&P or Transaction. Given the finding that PHSB never had a proprietary interest in the Subject Land, it also followed that this could not have been disclosed. Therefore, in order to rely on the limitation of liability clause, the Defendant had to show that the Disclosure Letter was somehow sufficient

to disclose the existence of the S&P. Earlier at [219] above, I had alluded to the Defendant's reliance on *Infiniteland* ([219] *supra*) for his submission that general disclosure by the Defendant sufficed. Not surprisingly, the Plaintiff in its reply submissions[172] disagreed, pointing out that the reliance on that case was misplaced.

269 It would be appropriate therefore for the court at this juncture to look at *Infiniteland* which also involved a share sale transaction for which the defendant gave Infiniteland Ltd ("Infiniteland"), the buyer, certain warranties as well as a disclosure letter.

270 In its reply submissions, the Plaintiff argued that the case does not support the Defendant's submission that a general disclosure clause in a disclosure letter would constitute adequate disclosure for the purpose of avoiding or escaping liability for a claim for breach of warranties. The Plaintiff pointed out that in that case, the English Court of Appeal (which dismissed the buyer's appeal) distinguished the earlier case of *New Hearts Ltd v Cosmopolitan Investments Ltd* [1997] 2 BCLC 249 ("*New Hearts*").

271 The facts in *Infiniteland* are as follows:

(a) Mea Corporation Limited ("Mea") as purchaser and Artisan Contracting Ltd ("Artisan") as vendor entered into the share sale agreement on 24 May 2001. Mea's rights and obligations under the share sale agreement were assigned to Infiniteland, who became the purchaser. The target companies were three companies, the most relevant being Bickerton Construction Ltd ("Bickerton").

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172 At paras 1 to 17

(b) Clause 7.1.8 of the share sale agreement stated:-

> The Warrantors warrant to the Purchaser that … save as set out in the Disclosure Letter, the Warranties in Schedule 3 are true and accurate in all respects; …

(c) Paragraph 1.1.2 in Schedule 3 stated a warranty that:-

> The principal accounts (a) give a true and fair view of the assets and liabilities of each Group Company at the Last Accounts Date and its profits for the financial period ended on that date; …

(d) Paragraph 3.1.1 in Schedule 3 provided a warranty that all payments which should have been made in respect of taxation had been made.

(e) Clause 7.1.9 of the share sale agreement warranted that the contents of the disclosure letter and of all accompanying documents were true and accurate in all respects and fully, clearly and accurately disclosed every matter to which they related: *Infiniteland* at [7].

(f) The disclosure letter was dated the same day as the share sale agreement and was addressed to Mea by Artisan (and a related company, which, for present purposes, is irrelevant): *Infiniteland* at [9]. The disclosure letter contained *general* disclosures as follows (*Infiniteland* at [10]):

> This letter shall be deemed to include, and there are hereby incorporated into it by reference and generally disclosed, the following matters: …
>
> 4. all matters from the documents and written information supplied by us to your reporting accountants, Pridie Brewster;
>
> 5. all matters contained or referred to in the following documents supplied by us to you in the green level arch files … (b) Bickerton—board meeting packs for 30 January 2001, 27 February 2001 and 27 March 2001

> … and from the board meeting pack[s] for Bickerton for 30 April 2001 …
>
> 7. all matters contained or referred to in the documents contained in the Disclosure Bundles, a list of which documents is attached to this letter.

(g) The disclosure letter also contained specific disclosures stating, *inter alia* (*Infiniteland* at [11]):

> 1.1.2 In the year ended 31 March 2001, a management charge paid by Bickerton was reversed …
>
> 3.1.1 In the year ending 31 March 2001, Bickerton and Driver made no payments on account of corporation tax because they were not expected to show a profit, but management charges were credited by Artisan, so showing a profit …

The specific disclosures were made in relation to the specific paragraphs in Schedule 3 of the share sale agreement, *ie* the specific disclosure in paragraph 1.1.2 in the disclosure letter corresponded to paragraph 1.1.2 of Schedule 3 in the share sale agreement, and so on.

(h) It was common ground that the principal accounts of Bickerton did not show "a true and fair view" of Bickerton's profits for the year ending 31 March 2001. The issue arose because the "Costs of Sales" (which was deducted from the turnover to give the gross profit) had had a sum of £1,081,000 offset against it. It was not disputed that it was not appropriate to deduct the sum of £1,081,000 from the "Costs of Sales" in the profit and loss account: *Infiniteland* at [15]. It had the effect of artificially reducing the costs of sales which resulted in showing that an operating profit of about £500,000 was made. If this sum was not deducted from the costs of sales, the accounts would have instead shown an operating loss of about £500,000.

(i) Infiniteland claimed that the warranty in paragraph 1.1.2 of Schedule 3 of the share sale agreement was breached, in that the accounts did not give a true and fair view of Bickerton's profits for the relevant financial year.

272 Park J, who heard the case in the first instance, held that the disclosure letter did not make adequate disclosure of the £1,081,000 and by reason of the £1,081,000, the profit and loss account did not give a true and fair view of the relevant company's profit for the relevant year: *Infiniteland* ([219] *supra*) at [65]. He held that there was a breach of the warranty contained in para 1.1.2 in Schedule 3. While the decision raised other issues, it is sufficient to constrain the analysis of *Infiniteland* to this issue for present purposes.

273 On appeal, in holding that there was adequate disclosure in the disclosure letter by way of the general disclosure clause, the English Court of Appeal found that Park J had *wrongly read* into cl 7.1.8 of the share sale agreement the words of cl 7.1.9 of the share sale agreement and *then applied* the observations of Lord Penrose in *New Hearts* to this erroneous reading of cl 7.1.8. Taken on its own terms, cl 7.1.8 of the share sale agreement allowed for disclosure by way of disclosure letter, and there was no warrant to import the requirement stated in *New Hearts*. As Chadwick LJ held in *Infiniteland* at [70]:

> It would have been open to the purchase to refuse to accept disclosure made in general terms by reference to what had been supplied to its reporting accountants; and to insist that it would only accept disclosure which was specific to each individual warranty. *But the purchase did not choose to take that course.* It was content to rely on its reporting accountants to identify from the documents supplied to them – and to report on – the matters about which it needed to be informed. *That is the effect of the terms in which disclosure was made under the disclosure letter; and, for whatever reason, those were the terms upon which the purchase was content to accept disclosure.* ***In those circumstances***, as it seems to me, ***the disclosure requirement was satisfied in relation to such matters as***

> ***might fairly be expected to come to the knowledge of the reporting accountants from an examination (in the ordinary course of carrying out the due diligence exercise for which they were engaged) of the documents and written information supplied to them (including board meeting packs and the contents of the disclosure bundle).***
> [emphasis added in italics and bold italics]

274 The emphasis in that decision, therefore, was that the adequacy of disclosure in a disclosure letter had to be assessed according to the terms of the specific agreement containing the warranties: *Infiniteland* at [69]. In arriving at his decision, Park J had relied on the certain observations of Lord Penrose in *New Hearts* ([270] *supra*), which are set out below, when it was inappropriate to do so given the terms of the share sale agreement in that case.

275 The Plaintiff submitted that this court should instead follow the decision in *New Hearts* as the decision in *Infiniteland* turned on the specific facts and wording of the extent of the ambit of the clauses and disclosure letters there. I should add that in that case, the accountant who conducted the due diligence exercise was fully aware of the incorrect treatment in the accounts of the sum of £1,081,000.

276 For the purposes of this case, the salient facts in *New Hearts* are as follows:

(a) The plaintiff entered into an agreement with the defendant to purchase all the issued share capital in P Ltd which held 50.05% of the entire issued share capital of HM Ltd.

(b) Under the agreement, the defendant gave certain warranties including a warranty that the last audited accounts of the group of which HM Ltd was the parent ("the group") showed a true and fair view of the group's assets and liabilities.

(c) Clause 7.7 of the agreement stated:

> It is hereby agreed and acknowledged by the parties that the Warranties … are given by the [defendant] subject to matters fairly disclosed (with sufficient details to identify the nature and scope of the matter disclosed) in the Disclosure Letter in respect of which matters the [defendant] shall have no liability to the [plaintiff].

(d) At completion of the sale, the defendant delivered a disclosure letter which reads as follows:

> All matters disclosed, noted or referred to or for which provision is expressly made in the Management Accounts … are hereby disclosed. This letter shall be deemed to disclose and there is hereby incorporated by reference into this letter the following matters: (2) All matters and information set out or referred to in the last accounts … (3) All matters and information set out or referred to Management accounts … and all matters which are disclosed by an inspection of the Last Accounts are hereby disclosed.

(e) The plaintiff brought an action against the defendant for breach of warranty, on the basis that the group's principal asset, a football stadium, was materially overvalued in the group's audited accounts.

277 In ruling in favour of the plaintiff, Lord Penrose held that the warranties were subject to matters disclosed only where the disclosure was fair; the deemed disclosure of all matters referred to in the group's accounts was insufficient to satisfy this criterion. His Lordship then added in *New Hearts* at 259 (which passage was quoted by Park J in *Infiniteland* ([219] *supra*)):

> Mere reference to a source of information, which is in itself a complex document, within which the diligent enquirer might find relevant information will not satisfy the requirements of a clause providing for fair disclosure with sufficient details to identity the nature and scope of the matter disclosed.

278 At the risk of repetition, the evidence presented by the Plaintiff clearly showed that the Defendant and WLK suppressed information on the subdivision

exercise of the Subject Land as well as the existence of S&P. As WLK herself testified, she never "volunteered" information to Madeline and not once did she inform Madeline (and the Plaintiff for that matter) that one of the reasons for the subdivision of the Sembulan Land was to carve out the Subject Land, not to transfer to SESB but to PHSB. Even if *Infiniteland* applies, the point to note is the Disclosure Letter (see [16] above) would not benefit the Defendant when there was no disclosure in the first place but instead suppression of the relevant information. The general disclosure clauses in the Disclosure Letter certainly did not cover the subdivision, S&P and the Transaction. The documents pertaining to these issues were never disclosed (see [192] above). The Defendant, therefore, could not rely on disclosure to avoid breaches of the warranties or to avoid liability under the limitation of liability clause. It is unnecessary to refer to the numerous other authorities cited by the parties as those cases add nothing to those already referred to earlier.

279 Therefore, the Defendant could not rely on the limitation of liability clause in cl 8A.1(c)(i) of the SA (see [44] above). To take advantage of that clause, the Defendant must have given full disclosure to the Plaintiff of any potential liability or loss to any of the Sutera Target Group companies, which the Defendant failed to do. He was responsible for divesting the Subject Land from SHGCC's ownership as well as for foisting onto SHGCC the encumbrances and/or liabilities referred earlier at [144]–[146] and [150]–[151].

Relief

280 The Plaintiff sought an injunction against the Defendant to restrain OBSB from completing the Transaction and/or from enforcing the S&P, as well as a mandatory injunction that the Defendant procure OBSB to discharge/terminate the S&P. As the former was in effect a prohibitory

injunction against the Defendant in order to give effect to the warranties under the SA, the court sees no objection to granting the injunction to restrain the Defendant.

281 Turning to the question of the mandatory injunction, the court is satisfied that such an injunction would lead to a "fair result", considering the benefit to the Plaintiff and cost to the Defendant: *Tay Tuan Kiat and another v Pritnam Singh Brar* [1985-1986] SLR(R) 763 at [9]–[10]. First, as the Plaintiff argued, the Subject Land, being a part of the Sembulan Land, had a unique value to the Plaintiff. Second, the Transaction was significantly at undervalue and, given that it has not been completed, would not cost the Defendant anything to undo in any case. As the Subject Land was properly a part of the acquisition under the SA, the Defendant would not be prejudiced under the mandatory injunction. He has already been adequately compensated under the SA for the acquisition of the Sutera Target Companies, including SHGCC which owned the Subject Land.

282 In addition, the Plaintiff is entitled to damages for the breaches of warranty and/or indemnity against its losses due to those breaches under cl 8 of the SA. As the quantum of damages was not a matter to be determined at this trial, the court will direct the assessment of damages to be determined by the Registrar.

Conclusion

283 Consequently, the court awards judgment to the Plaintiff on its claim (see [46] above) by granting:

(a) an injunction to restrain the Defendant from completing the Transaction and/or from enforcing the S&P;

(b) a mandatory injunction that the Defendant procure OBSB to discharge/terminate the S&P forthwith;

(c) an award of damages, with an order that an inquiry be held before the Registrar to assess the damages due to the Plaintiff for the losses that it suffered as a result of the Defendant's breaches of the warranties; and

(d) costs in favour of the Plaintiff, to be taxed on a standard basis which shall include $1,000 for the Defendant's late filing of the supplementary affidavit of WLK.

284 Finally, the Defendant's counterclaim against the Plaintiff is dismissed with costs.

Lai Siu Chiu
Senior Judge

Teh Guek Ngor Engelin SC, Yeo Yian Hui Mark, Lim Xiao Wei Charmaine and Bryan Hew Jianrong (Engelin Teh Practice LLC) for the plaintiff;
Lem Jit Min Andy, Selvaratnam Sharmini Sharon, Poon Pui Yee and Zhuang Changzhong (Eversheds Harry Elias LLP) for the defendant.

Annex A

Flow of money from Sabah Development Bank