IN THE GENERAL DIVISION OF THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 137

Suit No 298 of 2019

Between

Fu Hao

… *Plaintiff*

And

(1) Evancarl Limited
(2) Zheng Jiabin

… *Defendants*

JUDGMENT

[Contract] — [Breach]
[Contract] — [Formation]
[Contract] — [Illegality and public policy] — [Statutory illegality]
[Contract] — [Illegality and public policy] — [Common law]
[Deeds And Other Instruments] — [Deeds] — [Execution]

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Fu Hao
v
Evancarl Ltd and another

[2021] SGHC 137

General Division of the High Court — Suit No 298 of 2019
Lee Seiu Kin J
24–26 February, 2–3 March, 17 March 2021

7 June 2021 Judgment reserved.

Lee Seiu Kin J:

Introduction

1 This is an action by Fu Hao ("the Plaintiff") against Evancarl Limited ("Evancarl") and Zheng Jiabin ("Zheng") (collectively "the Defendants") for breach of contract.

2 The Plaintiff alleges that there were five written agreements (the "Written Agreements") concluded pursuant to an overarching agreement (the "Alleged Overarching Agreement"). The Alleged Overarching Agreement was for the Plaintiff to sell 90,000,000 shares in Sincap Group Limited ("SGL"), which was a majority and controlling stake, to Zheng and his company, Evancarl, so that Zheng can execute a reverse takeover (the "RTO") of SGL. After this RTO has been executed, the Defendants were to procure the transfer of SGL's shares in two of its subsidiaries, Beijing Sino-Lonther International

Trading Co Ltd ("SL") and Shandong Luneng Taishan Mining Co Ltd ("LTM"), to the Plaintiff. Zheng was also to procure the transfer of 12,226,500 SGL shares to the Plaintiff, in order for the Plaintiff to hold 50,000,000 SGL shares ultimately. The Plaintiff contends that these obligations were reduced to writing in two sale and purchase agreements, two procurement agreements, and a deed in which Zheng personally guaranteed Evancarl's procurement obligations. The subject matter of the dispute concerns the obligations under the two procurement agreements and the deed (collectively "the Disputed Written Agreements").

3 Subsequently, the Plaintiff transferred his entire shareholding in a company he controlled, which owned 45,999,900 SGL shares, to one Simson Kwok. The Plaintiff also transferred 44,000,100 SGL shares to one Joseph Yeo. The Plaintiff claims that this was in performance of the two sale and purchase agreements. Accordingly, the Plaintiff claims that Simson Kwok and Joseph Yeo are Zheng's nominees.

4 Because the Defendants allegedly did not perform their alleged obligations under the Disputed Written Agreements, the Plaintiff commenced this action against them for breach of contract and claims, *inter alia*, damages arising therefrom.

5 Zheng denies the existence of the Alleged Overarching Agreement. He only accepts that there was a sale and purchase agreement for 45,000,000 SGL shares between him and the Plaintiff, and Simson Kwok was indeed his nominee. Zheng claims that he purchased SGL shares merely because he thought that their value would rise over time. He claims that Joseph Yeo is not his nominee. Zheng argues that, although he did sign the Disputed Written Agreements, he did so merely as a favour to the Plaintiff; the Disputed Written

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Agreements were thus not intended to be performed. Zheng also argues that the Disputed Written Agreements were illegal and thus void and unenforceable.

Facts

The parties

6 The Plaintiff is a businessman.[1] In or around 2005, he incorporated SL in the People's Republic of China ("PRC"), which was a company in the business of trading alumina, aluminium products, and bauxite.[2] In or around 2008, he acquired a majority stake in LTM, also a company incorporated in the PRC, which was in the business of mining, processing, and supplying gypsum.[3] As the Plaintiff wanted to grow SL's and LTM's businesses by seeking investors from Singapore, he incorporated SGL on 10 March 2010 to be the holding company of, amongst other companies, SL and LTM (the "PRC Subsidiaries").[4] He successfully listed SGL on the Catalist board of the Singapore Exchange Securities Trading Limited ("SGX-ST") in July 2012.[5] After the successful listing, the Plaintiff remained the beneficial owner of 78.2% of the ordinary shares in SGL.[6] The Plaintiff was the Executive Chairman and Executive Director of SGL till 25 April 2014 and 11 July 2014 respectively.[7]

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1 Plaintiff's AEIC dated 20 November 2020 ("PAEIC") at para 8.

2 PAIEC at para 15.

3 PAEIC at para 14.

4 PAEIC at para 16.

5 PAEIC at paras 16 and 17.

6 Plaintiff's Closing Submissions dated 3 March 2021 ("PCS") at para 3.

7 PCS at para 57.

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7 Zheng is also a businessman.[8] He is the sole director and shareholder of Evancarl,[9] a company incorporated in the British Virgin Islands.[10]

The Written Agreements

8 It is undisputed that in or around late January 2014, the Written Agreements were *signed* by the following parties (although the Defendants deny the legal effect of the last three agreements in this list):[11]

(a) A sale and purchase agreement between the Plaintiff and Evancarl for the sale of 45,000,000 SGL shares by the Plaintiff to Evancarl at a cash consideration of S$2,500,000 (the "1st SPA").

(b) A sale and purchase agreement between the Plaintiff and one Joseph Yeo for the sale of 45,000,000 SGL shares by the Plaintiff to Joseph Yeo at a cash consideration of S$2,500,000 (the "2nd SPA").

(c) An agreement between the Plaintiff and Evancarl for the latter to procure the transfer of all of SGL's shares in SL and LTM (the "Subsidiary Shares") to the Plaintiff in consideration of the Plaintiff entering into the 1st SPA with Evancarl (the "1st Procurement Agreement").

(d) An agreement between the Plaintiff and Zheng for the latter to procure the transfer for 12,226,500 SGL shares to the Plaintiff in

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8 Transcript dated 25 February 2021 at p 6, ln 3 to 8; PCS at para 5.

9 Defendants' AEIC dated 27 November 2020 ("DAEIC") at para 1.

10 PCS at para 4.

11 Defendants' Closing Submissions dated 3 March 2021 ("DCS") at para 3; DAEIC at para 14; PCS at paras 6 and 43.

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consideration of the Plaintiff entering into the 1st SPA with Evancarl (the "2nd Procurement Agreement").

(e) A deed of guarantee and indemnity between the Plaintiff and Zheng for Zheng to personally guarantee Evancarl's obligations under the 1st Procurement Agreement (the "Deed").

9 Importantly, the 1st Procurement Agreement was to be performed by 30 April 2015 and contained, *inter alia*, a liquidated damages clause that would apply upon non-performance by 30 April 2016 (the "LD clause"). I reproduce the material provisions of the 1st Procurement Agreement below:[12]

> (D) [Evancarl] entered into the [1st SPA] … with [the Plaintiff] for the purchase of Forty Five Million (45,000,000) ordinary shares in the capital of SGL (hereinafter the "Sale Shares") from FH for a consideration of Singapore Dollars Two Million Five Hundred Thousand (S$2,500,000.00) only;
>
> (E) In consideration of [the Plaintiff] agreeing to enter into the [1st SPA] to divest the Sale Shares, [Evancarl] hereby agrees to procure and [the Plaintiff] hereby agrees to receive the transfer of all of SGL's equity interest/shares in SL and LTM (hereinafter the "Subsidiary Shares") subject to the terms and conditions hereinafter appearing.
>
> …
>
> **2. <u>Transfer of Shares</u>**
>
> Unless otherwise agreed in writing and subject to the terms and conditions herein, [Evancarl] agrees to procure the transfer of the Subsidiary Shares to [the Plaintiff] free from all claims, charges, liens and encumbrances together with the rights and advantages attaching thereto as at the date of completion of the transfer.
>
> **3. <u>Completion of Transfer formalities</u>**
>
> 3.1 [Evancarl] shall procure the transfer of the Subsidiary Shares to [the Plaintiff] and shall use all reasonable endeavours to take all actions for completion of all transfer formalities in a

[12] 1AB at p 28 to 32.

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speedy and effective manner. Such actions shall include but not be limited to discussions and negotiations and approvals with concerned stakeholders, procuring the due execution of share transfers to [the Plaintiff] together with the relevant share certificates, obtaining any waiver, consent, resolution, resignation, acknowledgment, authorization, approval, or other act or documents as may be required to give good title to the Subsidiary Shares and to enable [the Plaintiff] to become the registered and beneficial owner of the Subsidiary Shares, putting [the Plaintiff] in all requisite and/or necessary funds, obtaining any required waiver, consent, acknowledgment, authorization, approval, order, license, certificate or permit or act of or from or declaration or filing with the Relevant Authority, for the performance of this Agreement or any of the other agreements instruments, and documents being or to be executed and delivered hereunder or in connection herewith or for the consummation of the transactions contemplated hereby.

3.2 The said transfer of the Subsidiary Shares, including all transfer formalities, shall be *completed on or before 30 April 2015*.

3.3. In the event that the said transfer of the Subsidiary Shares and/or the transfer formalities are not completed by 30 April 2015 for reasons whatsoever, [Evancarl] hereby covenants to [the Plaintiff] that from 1 May 2015 till completion of the transfer of Subsidiary Shares and transfer formalities or 30 April 2016, whichever earlier, [Evancarl] will use all reasonable endeavours to ensure that the business of SL and LTM are conducted only in the ordinary and usual course and in trust to the best interests of SL and LTM and will accordingly pay [the Plaintiff] *a sum representing an amount equivalent to the audited profits after tax of SL and LTM on a pro-rated basis for each calendar month of delay after 30 April 2015*.

…

5. <u>Damages for Breach of Obligations</u>

Unless otherwise agreed in writing, in the event that [Evancarl] fails to procure the transfer of the Subsidiary Shares by *30 April 2016*, the agreed liquidated damages payable by [Evancarl] to [the Plaintiff] shall be the sum of *Singapore Dollars Six Million (S$6,000,000.00)*, being the agreed valuation of the Subsidiary Shares.

…

[emphasis added]

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10 The 2nd Procurement Agreement was also to be performed by 30 April 2015, and contained a clause governing the measure of damages applicable in the event of Zheng's repudiatory breach. I reproduce the material clauses of the 2nd Procurement Agreement below:[13]

> 1. In consideration of [the Plaintiff] entering into the [1st SPA], [Zheng] shall procure the transfer of Twelve Million Two Hundred and Twenty-Six Thousand Five Hundred (12,226,500) ordinary SGL shares (hereinafter "the said Shares") to [the Plaintiff] on the terms and conditions contained in this Agreement.
>
> 2. The said Shares shall be transferred to [the Plaintiff] free from all claims, charges, liens and encumbrances together with the rights and advantages attaching thereto as at the date of completion of the transfer.
>
> …
>
> 5. The said transfer of the said Shares, including all transfer formalities, shall be completed *on or before 30 April 2015*.
>
> 6. Time is of the essence in this Agreement.
>
> 7. In the event that the said transfer of the said Shares and/or the transfer formalities are not completed by 30 April 2015 for any reason, [Zheng] shall be in repudiatory breach of this Agreement.
>
> 8. For the avoidance of doubt, the measure of damages [the Plaintiff] would be entitled to in the event of repudiatory breach by [Zheng], *includes (but is not limited to) the actual cost of [the Plaintiff] acquiring the said Shares in the shortest possible time from the market (with time being of the essence)*.
>
> …
>
> [emphasis added]

11 I also reproduce the material clauses of the Deed:[14]

> 1. The Guarantor [*ie* Zheng] hereby unconditionally and irrevocably undertakes, as a continuing obligation and as sole, original and independent obligor, as follows:

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13 1AB at p 36-37.

14 1AB at p 40.

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> (i) To personally guarantee the performance by [Evancarl] of [Evancarl]'s obligations under the said Agreement [*ie* 1st Procurement Agreement] between [Evancarl] and the Beneficiary [*ie* the Plaintiff], to the Beneficiary; and
>
> (ii) To indemnify the Beneficiary from and against any costs, expenses, loss or damages incurred by the Beneficiary, including (without limitation) any losses, damages, indemnities, legal costs, costs and expenses arising out of or in connection with the breach of the said Agreement by [Evancarl].
>
> 2. The obligations of the Guarantor shall be unconditional and the Guarantor shall be relieved or released from its obligations hereunder only upon the performance of by [Evancarl] of [Evancarl]'s obligations under the [1st Procurement Agreement].
>
> 3. The Guarantor's liability under this Deed will be joint and several with [Evancarl] which means that each will be responsible for complying with [Evancarl]'s obligations under the [1st Procurement Agreement] both as individuals and together. The Beneficiary may seek to enforce the obligations of [Evancarl] in the said Agreement and claim damages against [Evancarl], the Guarantor, or both of them under the said Agreement and this Deed.
>
> …

12 Parties vigorously dispute the motive behind the signing of the Written Agreements and its surrounding circumstances.

Alleged Overarching Agreement

13 The Plaintiff contends that the Written Agreements were concluded pursuant to an overarching agreement for Zheng to acquire a majority and controlling stake in SGL from the Plaintiff in contemplation of executing a RTO using SGL.[15] I refer to this as the Alleged Overarching Agreement. It is important to note that the Plaintiff describes the Alleged Overarching Agreement as "the backdrop leading to the five Written Agreements" and *not* a

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15 PCS at para 18.

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separate agreement; he is thus suing the Defendants "on the clear terms under the 1st and 2nd Procurement Agreements and the Deed".[16]

14 The Plaintiff claims that around the end of 2013, he considered having SGL exit the Singapore market.[17] This consideration was motivated by several factors. First, the trading volume of SGL's shares was low, and the share price was unsatisfactory. Next, the PRC Subsidiaries were also performing poorly in business and it was costly to sustain SGL's operations as a publicly listed company. Also, Ng Hong Whee ("Ng"), who was the Executive Director and Chief Executive Officer ("CEO") of SGL[18] at that time, expressed his unwillingness to continue running SGL.

15 The Plaintiff said that sometime in 2013, Ng informed him that Zheng was looking to purchase a publicly listed shell entity and was thus interested to purchase a majority and controlling stake in SGL from the Plaintiff.[19] Ng also said that Zheng's intention was to carry out an RTO involving SGL.

16 The Plaintiff claims that he was willing to sell his majority and controlling stake in SGL to Zheng on the condition that Zheng procures the Subsidiary Shares to be returned to the Plaintiff (in the course of executing the RTO), as the Plaintiff intended to continue to run the business operations of LTM and SL in the PRC.[20]

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16 PCS at para 130.

17 PCS at para 14; PAEIC at para 18.

18 Agreed Bundle of Documents Volume 2 dated 15 Feb 2021 ("2AB") at p 305.

19 PCS at para 15.

20 PCS at para 15.

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17 During this early stage of negotiations between the Plaintiff and Zheng, Ng acted as an intermediary through whom the Plaintiff and Zheng structured the Alleged Overarching Agreement between themselves. The Alleged Overarching Agreement purportedly contained the following terms:[21]

(a) From the Plaintiff's then shareholding of 127,773,500 SGL shares (out of the total issued share capital of 175,500,000 SGL shares at that time), he would sell 90,000,000 SGL shares (constituting around 51% of SGL's issued share capital) to Zheng through corporate entities and/or persons controlled or directed by Zheng, *viz*, Evancarl and Joseph Yeo. This arrangement would grant Zheng control of SGL and leave the Plaintiff with a balance of 37,773,500 SGL shares.

(b) In consideration of the said sale of 90,000,000 SGL shares, the Plaintiff would receive S$5,000,000 in cash and Zheng would also procure the transfer of all of SGL's shares in the PRC Subsidiaries to the Plaintiff within about a year or so as Zheng was confident of completing the purported RTO by then. Through this arrangement, Zheng would ultimately receive control of SGL as a publicly listed shell company which then had cash reserves of about S$1,800,000.

(c) Zheng also agreed to further procure the transfer of 12,226,500 SGL shares back to the Plaintiff within the same aforesaid period of time, as the Plaintiff wanted to retain a total of 50,000,000 SGL shares eventually.

18 From the above terms, the Alleged Overarching Agreement was meant to allow Zheng to gain a majority and controlling stake in SGL, through

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21 PCS at paras 18 and 19.

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nominees such as Joseph Yeo, such that Zheng can implement the RTO within a year, and thereafter procure the transfer of the Subsidiary Shares and the 12,226,500 SGL shares to the Plaintiff.[22]

19 Zheng denies the existence of the Alleged Overarching Agreement.

20 Contrary to the Plaintiff's claim that Zheng intended to effect an RTO involving SGL, Zheng claims that he wanted to purchase 45,000,000 SGL shares pursuant to the 1st SPA because he thought that these shares would increase in value.[23] According to Zheng, a few months before January 2014, Ng told him that the Plaintiff was looking to sell a substantial portion of his shares in SGL.[24] Ng allegedly recommended Zheng to buy these shares as he opined that they had a good potential for capital appreciation.[25] According to Zheng, SGL shares were trading at S$0.03 per share at that time, and Ng told him that they were worth S$0.12 to S$0.15 per share.[26] Zheng also claims that Ng assured him that the Plaintiff would arrange for SGL to appoint him as a director of SGL so that he could participate in managing SGL.[27] Accordingly, Zheng saw the purchase of the Plaintiff's shares in SGL as a good investment opportunity.[28]

21 Zheng further claims that, because he was only willing to purchase 45,000,000 SGL shares (*ie*, half of what the Plaintiff wanted to sell), he told Ng that he would arrange to find a purchaser through his father, who is a broker.

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22 Transcript dated 25 February 2021 at p 51, ln 18 to p 52, ln 20.

23 DCS at para 1; DAEIC at paras 8, 10 and 13.

24 DAEIC at para 7.

25 DAEIC at para 8.

26 DAEIC at para 8.

27 DAEIC at para 9.

28 DAEIC at para 10.

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Zheng avers that his father subsequently arranged for Joseph Yeo to purchase the other 45,000,000 SGL shares, which is the subject of the 2nd SPA.[29]

22 Importantly, Zheng asserts that Joseph Yeo was not his nominee and that they did not share a prior personal relationship.[30] This agreement, being unconnected to Zheng, cannot form part of the Alleged Overarching Agreement with him.[31]

23 As for the 1st Procurement Agreement, the 2nd Procurement Agreement, and the Deed (collectively referred to at [2] as the "Disputed Written Agreements"), the Defendants claim that they were sham agreements that were never meant to be performed.[32] These Disputed Written Agreements were only used to be shown to the Plaintiff's creditors.[33] I pause to note here that Zheng has proffered a few explanations as to why the Disputed Written Agreements are shams, and the Plaintiff submits that they are inconsistent. I elaborate on this point in my analysis below at [63].

Drafting and execution of the Written Agreements

24 According to the Plaintiff, after the parties agreed on the Alleged Overarching Agreement, the Plaintiff engaged a lawyer, Mr Looi Wan Hui ("Looi"), on 3 January 2014 to draft the Written Agreements.[34] The Plaintiff claims that after Looi was engaged, Looi communicated directly with Zheng

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29 DAEIC at para 11.

30 DCS at paras 6 and 11.

31 DCS at para 6.

32 DCS at para 19(iv).

33 DCS at para 19(iv).

34 PCS at paras 18 and 19.

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regarding the Written Agreements while including Ng in the communications. The Plaintiff also asserts that Ng's role was diminished after Looi's engagement, and Zheng directly negotiated the terms of the Written Agreements with Looi.[35]

25 Zheng agrees that he and the Plaintiff never negotiated directly. However, although he admits to having communicated with Looi in the course of negotiating the Written Agreements,[36] he appears to suggest that Ng played a substantial role in these negotiations.[37]

26 On the Plaintiff's case, after Looi drafted the final versions of the draft Written Agreements, Ng brought the agreements to Zheng and Joseph Yeo to execute them first.[38] The partially executed Written Agreements were then brought back to Looi and he witnessed their execution by the Plaintiff. Copies of all the fully executed Written Agreements were then delivered to Ng who received them on behalf of Zheng. According to Looi, the Written Agreements were not dated with any specific date, as they were signed separately on different dates by the Plaintiff, Zheng, and Joseph Yeo. Nevertheless, the Plaintiff and Looi, who was called as a witness, insist that all five Written Agreements were fully executed at or around the same time, which was no later than 27 January 2014.[39]

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35 PCS at para 18(d).

36 DAEIC at paras 12 and 15.

37 DCS at para 62; DAEIC at paras 11 to 17.

38 Looi's AEIC at para 16.

39 PCS at para 8(b); Looi's AEIC at para 16.

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27 Subsequently, the 1st and 2nd SPA were performed in a manner that was different than that stipulated under its terms.[40] The Plaintiff owned a company he controlled called Estelle Success Corp ("Estelle"), which owned 45,999,900 SGL shares.[41] In performance of the 1st SPA, the Plaintiff procured the transfer of his entire shareholding of Estelle to Zheng's nominee, Simson Kwok, at a price of S$2,555,550.[42] This arrangement granted Zheng the beneficial ownership of 45,999,900 SGL shares. In performance of the 2nd SPA, the Plaintiff transferred the remainder of the 90,000,000 SGL shares, *ie*, 44,000,100 SGL shares, to Joseph Yeo at a pro-rated price of S$2,444,450.[43] These arrangements deviated from the transfer of 45,000,000 SGL shares stipulated under each agreement.[44]

Alleged implementation of the purported RTO

28 The Plaintiff claims that after Zheng secured a majority and controlling stake in SGL, Zheng began to orchestrate a series of major transactions to execute his intended RTO.[45] Essentially, major steps were taken to change SGL's business to that of property development in Australia.[46] SGL was not previously involved in property development.

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40 PCS at paras 46 and 47.

41 Agreed Bundle of Documents Volume 1 dated 15 Feb 2021 ("1AB") at p 13; DAEIC at para 18.

42 DAEIC at para 18; 1AB at p 398.

43 DAEIC at para 19; 1AB at p 398.

44 PCS at para 47; 1AB at p 13 and 20.

45 PCS at para 57.

46 PCS at para 45(a); Plaintiff's Opening Statement dated 16 February 2021 ("POS") at para 7.

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29 Firstly, SGL took steps to acquire a land and building located at 581 Murray Street, Perth, Australia (the "Murray Street Property"):

(a) On 19 February 2014, SGL incorporated Sincap Australia Pte Ltd, a wholly owned subsidiary in Singapore.[47]

(b) From May to June 2014, SGL obtained shareholders' approval for the expansion of its core business to include property development and property investment (which SGL had no prior experience in) and for the placement of 175,500,000 new ordinary shares in the capital of SGL. This move doubled the share capital of SGL from 175,500,000 shares to 351,000,000 shares.[48]

(c) Subsequently, Sincap Australia Pte Ltd incorporated a wholly owned subsidiary in Western Australia on 2 July 2014, Sincap Land (Aus) Pty Ltd, which in turn incorporated a wholly owned subsidiary in Western Australia on 7 July 2014, SCL Murray Pty Ltd ("SCL Murray").[49]

(d) In the middle of July 2014, through SCL Murray, SGL acquired the Murray Street Property. The acquisition was funded by, *inter alia*, the full net proceeds of S$11,854,000 from the placement of 175,500,000 new ordinary SGL shares (stated above at [(b)]).[50]

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47 POS at para 7; 1AB at p 398.

48 POS at para 7; 1AB at p 607.

49 POS at para 7; 1AB at p 411,

50 POS at para 7; 2AB at p 638.

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30 Secondly, SGL attempted to acquire LTN Land Pte Ltd ("LTN"), which owned land for development at Richardson Street, South Perth, Western Australia (the "Richardson Street Property"):

(a) On 11 August 2014, SGL entered into a term sheet to acquire all issued shares in the capital of LTN from its existing shareholders. LTN was described as an investment holding and building and construction company incorporated in Singapore, which owned the Richardson Street Property.[51]

(b) On 13 November 2014, SGL entered into a conditional sale and purchase agreement for the acquisition of LTN. The consideration for the acquisition of LTN by SGL was to be satisfied by the allotment and issuance to LTN's existing shareholders an aggregate of 260,000,000 new SGL shares.[52]

(c) On January 2015, SGL took steps to place up to 351,000,000 new shares to fund the acquisition of LTN.[53]

(d) On 1 April 2015, SGL's proposed acquisition of LTN was abruptly terminated and it instead entered into a non-binding memorandum of understanding to acquire Orion Energy Resources Pte Ltd, a Singapore-incorporated company in the business of mineral trading and logistics management.[54]

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51 POS at para 7; Looi Wan Hui's AEIC dated 20 November 2020 ("Looi's AEIC) at p 170.

52 POS at para 7; Looi's AEIC at p 175 to 176; 1AB at p 447.

53 POS at para 7; Looi's AEIC at p 195.

54 POS at para 7; Looi's AEIC at p 224.

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Subsequent events

31 The Plaintiff claims that by 30 April 2015, the Defendants failed to fulfil the following obligations under the Disputed Written Agreements due on that date:[55]

(a) Procuring the transfer of the Subsidiary Shares to the Plaintiff, as agreed by Evancarl under the 1st Procurement Agreement, and which performance was personally guaranteed by Zheng under the Deed.

(b) Procuring the transfer of 12,226,500 shares in SGL to the Plaintiff, as agreed by Zheng under the 2nd Procurement Agreement.

32 The Plaintiff alleges that Zheng acknowledged the Defendants' failure to fulfil the above obligations and requested for more time to do so, which the Plaintiff agreed on a without prejudice basis.[56]

33 However, because the Defendants allegedly did not fulfil the above obligations by October 2015, the Plaintiff instructed Looi to issue a letter of demand dated 19 October 2015 to Zheng.[57]

34 According to the Plaintiff, there were: (a) meetings on or about 20 October 2015 (which was attended by the Plaintiff, Zheng, Ng, and Looi) and on or about 2 November 2015 (which was attended by Zheng and Looi), as well as (b) email correspondence between Zheng and Looi in or around that

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55 PAEIC at para 41.

56 PAEIC at para 42.

57 PAIEC at para 43; PCS at para 62; 1AB at p 75.

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period of time, in which Zheng purportedly made the following representations:[58]

(a) The Defendants sincerely intended to fulfil their obligations under the 1st and 2nd Procurement Agreements and the Deed, but were prevented from doing so by a group of third parties ("TPs") including one Jennifer Bay, resulting in Zheng losing control of SGL to the TPs.

(b) Zheng had formulated some plans to wrest back control of SGL from the TPs, but needed the Plaintiff's support, as he was then still a substantial shareholder of SGL.

(c) After Zheng regained control of SGL, he would ensure that the Defendants fulfil their obligations to the Plaintiff under the 1st and 2nd Procurement Agreements and the Deed.

35 As the Defendants still did not fulfil their above obligations by around early 2017, the Plaintiff instructed Looi to serve a second letter of demand dated 1 February 2017 on Zheng.[59] By this time, the LD clause in the 1st Procurement Agreement was applicable (see [9] above).[60]

36 Subsequently, in 2017, SGL disposed of Beijing Raffles Investment Advisory Co Ltd ("BR"). BR was SGL's wholly owned subsidiary that in turn owned, *inter alia*, 98.69% of LTM and 100% of SL.[61]

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58 PAEIC at para 44; PCS at paras 62 to 63.

59 PAEIC at para 48; PCS at para 68; 1AB at p 159.

60 1AB at p 159.

61 PAEIC at para 49; PAEIC at p 471; 1AB at p 826, 917, and 944.

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The Plaintiff's case

37 The Plaintiff's case is that the Disputed Written Agreements are valid and binding on Zheng. The Disputed Written Agreements were also concluded pursuant to the Alleged Overarching Agreement, which the Plaintiff claims exists.

38 As stated above at [31], the Plaintiff claims that by 30 April 2015, the Defendants have failed to fulfil the following obligations under the agreements, which were due by that date:[62]

(a) Procuring the transfer of the Subsidiary Shares to the Plaintiff, as agreed by the Evancarl under the 1st Procurement Agreement, and which performance was personally guaranteed by Zheng under the Deed.

(b) Procuring the transfer of 12,226,500 SGL shares to the Plaintiff, as agreed by Zheng under the 2nd Procurement Agreement.

39 Accordingly, the Plaintiff claims:

(a) In respect of the 1st Procurement Agreement, breach of cll 2, 3.1, 3.2, 3.3, and 5 (see [9] above) by Evancarl.[63]

(b) In respect of the 2nd Procurement Agreement, breach of cll 1, 2, 5, 6, 7, and 8 (see [10] above) by Zheng.[64]

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62 Set Down Bundle dated 8 January 2021 ("SB") at para 43.

63 PCS at para 69.

64 PCS at para 169.

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(c) In respect of the Deed, breach of cll 1, 2, and 3 (see [11] above) by Zheng.[65]

40 Pursuant to the above alleged breach of cl 3.3 of the 1st Procurement Agreement and the clauses under the Deed, the Plaintiff claims that Evancarl and Zheng are liable to pay a sum representing an amount equivalent to the audited profits after tax of the PRC Subsidiaries on a pro-rated basis for each calendar month of delay from 1 May 2015 to 30 April 2016. According to the Plaintiff, this sum is S$416,589.[66]

41 Additionally, as stated above, the Plaintiff contends that cl 5 of the 1st Procurement Agreement, *ie*, the LD clause, is breached. This breach results from Evancarl's failure to transfer the Subsidiary Shares to the Plaintiff by 30 April 2016. Hence, the Plaintiff claims that both Evancarl and Zheng (because of the breaches of the clauses under the Deed) are liable to pay the sum of S$6,000,000.00 to the Plaintiff, being the agreed valuation of the Subsidiary Shares.[67]

42 The Plaintiff also claims that cl 8 of the 2nd Procurement Agreement is breached. Accordingly, the Plaintiff claims that the measure of damages he is entitled to "includes (but is not limited to) the actual cost of [the Plaintiff] acquiring the said Shares in the shortest possible time from the market (with time being of the essence". He submits that the shortest possible time that the Plaintiff could have purchased SGL shares from the market after the date of

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65 PCS at para 157.

66 PCS at paras 77 and 178(a).

67 PCS at para 178(a).

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breach, *ie*, 30 April 2015, is 4 May 2015.[68] Computing using the market price of SGL shares on that day yields the sum of S$806,949.[69]

43 The Plaintiff also submits that, even if cl 8 is *not* applicable, the default or normal measure of damages would apply, which is computed using the market price of 12,226,500 SGL shares *at the date of the breach*.[70] Again, the Plaintiff could not do so on the date of the breach, 30 April 2015; he could only do so on the next trading day, *ie*, 4 May 2015.[71] The manner of computation is thus unchanged and the Plaintiff claims the same sum of S$806,949.

The Defendants' case

44 The Defendants' primary case is that the Disputed Written Agreements are sham agreements that were not meant to be performed.[72] They were meant to be shown to the Plaintiff's Chinese creditors. Zheng also claims that he purchased 45,000,000 SGL shares from the Plaintiff as an investment, because he thought that they would increase in value. Zheng also disagrees that Joseph Yeo is the Defendants' nominee. Hence, contrary to what the Plaintiff claims, the Alleged Overarching Agreement does not exist.

45 Consistent with this case theory, the Defendants allege a host of issues relating to formation and compliance with formalities.

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68 POS at para 28.

69 PCS at para 176.

70 Plaintiff's Additional Written Submissions dated 17 March 2021 ("PAS") at paras 2 and 8.

71 PAS at para 8.

72 DCS at para 19(iv).

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46 Firstly, the Defendants argue that in signing the Disputed Written Agreements, there was no intention to create legal relations, and these Agreements are therefore invalid.[73]

47 Secondly, the Defendants also contend that the Disputed Written Agreements are invalid for want of consideration.[74]

48 Thirdly, in respect of the Deed, the Defendants contend that the Deed was signed but was neither sealed nor delivered.[75] While the Defendants did not elaborate further in their closing submissions,[76] their case at trial was that the Deed therefore had no legal effect.[77]

49 Lastly, the Defendants argue that cl 8 of the 2nd Procurement Agreement is unenforceable for want of certainty.[78]

50 The Defendants' secondary case is that the Alleged Overarching Agreement is illegal and is therefore unenforceable and/or void.[79] They contend that (a) the Catalist Rules[80] and/or s 160(1) of the Companies Act (Cap 50, 2006 Rev Ed)[81] prohibit Alleged Overarching Agreement and (b) the Alleged

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73 DCS at para 38 to 40.

74 DCS at para 32.

75 DCS at para 41.

76 DCS at paras 41 to 43.

77 Transcript dated 25 February 2021 at p 14, ln 11 to 15.

78 DCS at paras 44 to 48.

79 DCS at para 49.

80 DCS at para 50.

81 DCS at para 57; Defendants' Opening Statement dated 16 February 2021 ("DOS") at para 17.

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Overarching Agreement was illegal at common law as it was entered into with the object of committing an unlawful act, *ie*, breaching the Catalist Rules.[82]

51 For completeness, I note that the Defendants have abandoned various defences concerning implied terms in fact,[83] frustration,[84] uncertainty of contractual terms[85] (save one;[86] see [132] below), and penalty clauses.[87]

Issues to be determined

52 The issues and sub-issues to be determined are as follows:

(a) whether the Alleged Overarching Agreement exists;

(b) whether the Disputed Written Agreements are valid and enforceable;

(i) whether the Disputed Written Agreements were validly executed; and

(ii) whether the formalities in respect of the Deed are complied with.

(c) whether the Disputed Written Agreements are prohibited by statute or illegal at common law;

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82 DCS at paras 52 and 55.

83 SB at p 30 to 31, para 10.

84 SB at p 31, para 14.

85 SB at p 29, para 9(e), p 31, para 15(d), p 33, para 19(b).

86 SB at para 33, para 19A.

87 SB at p 30, para 11.

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(d) whether the Defendants breached any or all of the Disputed Written Agreements; and

(e) if the Defendants had committed such a breach, the quantum of damages that the Plaintiff is entitled to.

(i) whether cl 8 of the 2nd Procurement Agreement is enforceable.

My decision

The Alleged Overarching Agreement exists

53 I first address the preliminary factual issue of whether the Alleged Overarching Agreement exists. I find it apposite to deal with this issue at the beginning, especially since both parties allege that each side's failure to call Ng as a witness to testify on this issue was necessarily fatal to its case.[88]

54 To recapitulate, the Plaintiff's case is that there was an overarching agreement concluded between the parties because: (a) Zheng allegedly wanted to purchase a majority and controlling stake in a publicly listed shell entity, *ie*, SGL, so as to execute an RTO, and (b) the Plaintiff ultimately wanted (i) to retain ownership of the PRC Subsidiaries and (ii) to retain a total of 50,000,000 SGL shares.

55 The Defendants' case is that: (a) Zheng bought the 45,000,000 SGL shares as an investment as he thought that they would increase in value, (b) the Disputed Written Agreements are sham agreements that were never meant to be

[88] PCS at para 134; DCS at para 63.

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performed, and (c) Joseph Yeo was not the Defendants' nominee. The Alleged Overarching Agreement therefore does not exist.

The parties did contemplate an RTO

56 The evidence show that the parties contemplated that an RTO would be implemented by Zheng using SGL at the time of entering into the Written Agreements.

57 At trial, counsel for the Defendants conceded that an RTO was initially contemplated.[89] In the course of effecting the proposed acquisition of LTN, SGL's board of directors issued an announcement dated 18 November 2014 that SGL had entered into a conditional sale and purchase agreement to acquire all of the issued shares in LTN (the "1st Announcement").[90] The 1st Announcement shows that SGL had then contemplated issuing shares to the vendors of LTN as consideration. I reproduce the material clauses below:[91]

> 4. **CONSIDERATION**
>
> 4.1 The aggregate consideration ("**Consideration**") payable by the Company to the Vendors shall be approximately S$38,500,000 (or AUD33,100,000 based on the agreed exchange rate of AUD1:S$1.163). …
>
> 4.2 The Consideration shall be satisfied by the *allotment and issue of an aggregate 260,000,000 new shares* ("**Consideration Shares**", and each a "**Consideration Share**") in the capital of the Company at an issue price per Consideration Share of S$0.148 (the "**Issue Price**"). The Issue Price represents a premium of approximately 27.8% to the volume weighted average price ("**VWAP**") of the Shares traded on the SGX-ST on 12 November 2014, being the preceding market day on which the Sale and Purchase Agreement was signed.

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89 Transcript dated 3 March 2021 at p 45, ln 25 to 26.

90 2AB at p 455 to 465.

91 2AB at p 456.

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…

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

Subsequently, SGL's board of directors issued a second announcement dated 26 January 2015 (the "2nd Announcement") stating, *inter alia*, that the consideration for the sale and purchase of LTN shares was to be satisfied by the "full payment in cash … on completion, and not by the allotment of the Consideration Shares as originally contemplated".[92] SGL proposed the placement of 351,000,000 new ordinary shares to raise the required funds.[93] Counsel for the Defendants submits that in a typical RTO situation, shareholders in the entity to be acquired will acquire shares in the publicly listed entity.[94] Accordingly, counsel conceded at trial that what was contemplated under the 1st Announcement comports with the execution of an RTO, but not what was contemplated under the 2nd Announcement.[95] Nevertheless, it is clear that an RTO was contemplated at the time of entering into the Written Agreements, even though it was not carried out successfully.

58 Moreover, I find that Zheng would benefit from SGL's acquisition of LTN, if it were successful. Zheng has an indirect interest in LTN:[96] Hartajia Limited, a company wholly owned by Zheng's wife, had a 34% shareholding in LTN at the material time.[97] Yet, despite acknowledging this fact, the Defendants insist that the alleged RTO is of little benefit to Zheng, without much

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92 2AB at p 469.

93 PCS at para 172(b); 2AB at p 475 to 481.

94 Transcript dated 3 March 2021 at p 42, ln 22 to 27.

95 Transcript dated 3 March 2021 at p 45, ln 25 to 26 and p 42, ln 27 to 28.

96 PCS at para 50.

97 Transcript dated 25 February 2021 at p 39, ln 1 to 16.

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explanation on this specific point.[98] Since Zheng's wife owned such a substantial stake in LTN, Zheng would clearly benefit from LTN's acquisition by SGL. Zheng was therefore incentivised to contemplate an RTO at the time of entering into the Written Agreements and would have likely done so.

59 Indeed, Zheng's testimony at trial also indicates that he had intended to effect an RTO through SGL. Firstly, he admitted that in the course of the formation of the Written Agreements, "there may have been a reference to a word 'reverse takeover'" by him to Looi.[99] Secondly, Zheng stated that he purchased SGL shares because he was hoping to be "a little bit active" with SGL.[100] According to Zheng, this meant that he could "help management with some business growth", and was thinking of "introducing mergers, maybe introducing acquisitions, and also looking at other forms of business that could be introduced to the company".[101] This position is plainly contrary to Zheng's earlier position that he had bought SGL shares merely as an investment, despite his insistence otherwise.[102] Considering the substance of his testimony and his shift in position at trial, I am inclined to find that he had indeed contemplated effecting an RTO through SGL.

60 Furthermore, the acquisition of the Murray Street Property and the attempted acquisition of the Richardson Street Property (through LTN) show an attempt at radically changing SGL's business from that of trading alumina, aluminium products, and bauxite (see [6] above) to that of property

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98 DCS at para 13.

99 PCS at para 50; Transcript dated 25 February 2021 at p 35, ln 16 to 22.

100 PCS at para 49; Transcript dated 25 February 2021 at p 11, ln 25 to p 12, ln 11.

101 PCS at para 49; Transcript dated 25 February 2021 at p 12, ln 20 to p 13, ln 4.

102 Transcript dated 25 February 2021 at p 12, ln 12 to 22.

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development. I find that these facts are well supported by documentary evidence, *eg*, by SGL's Annual Reports, and are consistent with an attempted implementation of an RTO. Given that these actions were taken following the conclusion of the Written Agreements, they are indicative of Zheng's intention to execute an RTO at the time of contracting.

61 I pause to note that the Defendants submit generally that post-contractual conduct is only of relevance where it provides cogent evidence of parties' agreement at the time when the contract was concluded (*Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd and others and another appeal* [2018] 1 SLR 180 at [50]).[103] It is clear from my reasoning above, which focuses on the parties' agreement at the time of contracting, that there is no issue arising from this point.

62 I therefore find that the parties contemplated that Zheng would implement an RTO using SGL at the time of entering into the Written Agreements.

The Disputed Written Agreements were not sham agreements

63 Moreover, the Defendants' case that the Disputed Written Agreements were sham agreements is untenable.

64 As I have alluded to above at [23], the Plaintiff submits that the Defendants' explanation for this arrangement is inconsistent.[104]

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103 DCS at para 70.

104 PCS at para 131.

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65 Initially, the Defendants aver that Ng said that *the Plaintiff* required Zheng to sign the Disputed Written Agreements as a favour.[105] Ng allegedly told Zheng that the Plaintiff had borrowed money from various "Chinese backers" who were based in China when subscribing for shares in SGL during its initial public offering in Singapore in 2010. These purported creditors were worried that the Plaintiff would sell his SGL shares and leave China for good without repaying them. Hence, the Disputed Written Agreements were to be signed "as a comfort to these Chinese backers". Ng also allegedly told Zheng that documents constituting the Disputed Written Agreements "would have no legal effect, that they would be undated, and that he would keep them after they were shown to the Chinese backers". Zheng avers that he signed the Disputed Written Agreements based on these assurances by Ng.

66 However, Zheng changed his position at trial. He claimed that he signed the Disputed Written Agreements as a favour to *Ng* and *not* the Plaintiff.[106] Zheng testified that Ng asked him for this favour because both Ng and the Plaintiff were receiving pressure from a "Chinese behind-the-scenes business partner". He claimed that this business partner would "create trouble" for Ng and the Plaintiff if the Plaintiff's SGL shares were to drop in value and because of this business partner's political connections and connections with the underworld, the Plaintiff could return to China.[107]

67 To begin with, the Defendants' narrative above relies heavily on what Ng allegedly told Zheng. Yet, they did not call Ng as a witness in these

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105 PCS at para 131; DAEIC at para 17.

106 PCS at para 131; Transcript dated 25 February 2021 at p 29, ln 14 to 19.

107 PCS at para 131; Transcript dated 25 February 2021 at p 132, ln 14 to p 131, ln 13.

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proceedings. I therefore agree with the Plaintiff that this narrative is constructed on inadmissible hearsay.[108]

68 Nevertheless, even if the above evidence is admitted, I place no weight on them for two reasons.

69 First of all, it is immediately apparent that the Defendants have inverted their narrative from that of *Chinese creditors being worried* that the Plaintiff would *leave China* without paying them, to that of *the Plaintiff being worried* that he cannot *return to China* if he does not repay these Chinese creditors. Each of the two narratives, considered alone, is already far-fetched. Such an inconsistency *a fortiori* weighs heavily against finding in favour of the Defendants.

70 Moreover, if the Disputed Written Agreements were indeed sham agreements, it is patently odd that Zheng, by his own admission, did not react to the letter of demand dated 19 October 2015 upon receiving it (see [33] above).[109] Even more strangely, when questioned about his lack of reaction, Zheng's response was that he felt that he did not need to react to it and that he did not think that the Plaintiff would dare to initiate a lawsuit. Legal proceedings are serious and expensive matters, and one would expect anyone to react to receiving a letter of demand. If Zheng had indeed done the Plaintiff a favour in signing these sham agreements, one would have expected that he would have reacted strongly to such a brazen betrayal.

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108 PCS at para 131.

109 PCS at para 62; Transcript dated 25 February 2021 at p 77, ln 14 to 25.

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71 For the above reasons, I am not convinced that the Disputed Written Agreements were sham agreements.

Whether Joseph Yeo was the Defendants' nominee

72 The issue of whether Joseph Yeo was the Defendants' nominee affects whether the 2nd SPA is indeed part of the five Written Agreements constituting the Alleged Overarching Agreement. If the Plaintiff fails to prove that Joseph Yeo was the Defendants' nominee, the 2nd SPA would therefore be unconnected to the matters involving the Plaintiff and the Defendants.

73 I agree with the Defendants that the legal burden is on the Plaintiff to prove that Joseph Yeo is the Defendants' nominee,[110] but I find that the plaintiff has discharged this burden on the facts.

74 To begin with, I have found above at [62] that the parties contemplated that Zheng would implement an RTO using SGL at the time of entering into the Written Agreements. It follows that Zheng would require a majority and controlling stake in SGL to do so. The 1st SPA alone would not grant Zheng sufficient shares in this regard. Hence, it is likely that Joseph Yeo was Zheng's nominee, such that the 2nd SPA would grant Zheng sufficient shares to constitute a majority and controlling stake.

75 For the avoidance of doubt, my reasoning in the preceding paragraph does not put the cart before the horse. I am alive to the possibility that, conversely, finding that Joseph Yeo was Zheng's nominee could support finding that the parties had contemplated an RTO when entering into the Written Agreements. However, I arrived at my finding at [62] without having to

110 DCS at para 6(v).

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consider whether Joseph Yeo was Zheng's nominee, as the extant evidence was already sufficient. Having made this finding, it follows that it is likely that Joseph Yeo was Zheng's nominee.

76 I am fortified, in my view, by the manner in which the 1st and 2nd SPA were performed. As the Plaintiff submits, the number of SGL shares actually transferred to Simson Kwok and Joseph Yeo of 45,999,900 and 44,000,100 respectively did not correspond with the 1st and 2nd SPA which each contemplated the sale of 45,000,000 shares.[111] Nevertheless, the two amounts of shares actually transferred add up neatly to 90,000,000 shares. The Plaintiff submits that this manner of transfer evidences that Zheng, being the ultimate buyer of the 90,000,000 shares, had the freedom to decide how he wanted to allocate the shares among his nominees. I agree with this submission. It could be said, to Zheng's benefit, that *both parties* wanted the transfer of the specific number of 45,999,900 SGL shares simply because it was expedient to procure the transfer of the entire shareholding of Estelle to Zheng's nominee, Simson Kwok, such that Zheng would receive the beneficial interest of the same (see [27] above). This is consistent with Zheng's explanation for having received this specific number of shares.[112] However, one should crucially note that 44,000,100 shares neatly make up the remainder of the 90,000,000 shares. It is therefore very likely that *Zheng* wanted the transfer of this specific number of shares to Joseph Yeo in the capacity of Zheng's nominee.

77 Also, at trial, Zheng stated that the cashier's order for S$2,444,500 in satisfaction of the consideration for the 2nd SPA was procured by Joseph Yeo,

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111 PCS at para 47.

112 DAEIC at para 27.

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and that Zheng had picked it up from his father.[113] This cashier's order was issued by one Chua Sock Yong, Amy.[114] Contrary to Zheng's testimony, the Plaintiff submits that the use of a cashier's order indicates that it was likely that it was *Zheng* who had procured the cashier's order. I find that there is some force to the Plaintiff's submission. If Joseph Yeo was indeed purchasing SGL shares for his own use, it would be most convenient to make his payment using a cheque. However, if he was purchasing these shares to hold it for Zheng's benefit, it is plausible that Zheng or someone under Zheng's control would have purchased a cashier's order to ensure that the monies are ultimately transferred to the Plaintiff. A cashier's order would prevent situations where Joseph Yeo could have made off with the monies after Zheng has transferred them to him. For example, after Zheng has transferred the sum to him, Joseph Yeo could issue a cheque to the Plaintiff, but withdraw the sum before the cheque is cleared. Hence, I find that the use of a cashier's order does support the Plaintiff's case. I also note that the discrepancy of S$50 between the amount stated in the cashier's order (S$2,444,500) and the amount that Zheng alleged (S$2,444,450)[115] (see [27] above) is *de minimis*.

78 On this issue, I note that the Defendants submit that counsel for the Plaintiff did not put to Zheng that this sum ultimately flowed from Zheng in payment of Joseph Yeo's shares in cross-examination, and that this omission was fatal to the Plaintiff's case.[116] Presumably, the Defendants are implying that if the Plaintiff submits on this point, that would be a breach of the rule in *Browne v Dunn* (1893) 6 R 67. I disagree with this submission.

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113 PCS at para 54; Transcript dated 25 February 2021 at p 42, ln 3 to p 44, ln 18.

114 2AB at p 694.

115 DAEIC at para 19; 1AB at p 398.

116 DCS at para 7.

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79 In *Asnah bte Ab Rahman v Li Jianlin* [2016] 2 SLR 944 ("*Asnah*"), the Court of Appeal, citing *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR(R) 292 at [42], stated at [115] that:

> The rule in *Browne v Dunn* is not a rigid, technical rule; it is not meant to be applied mechanically as to require every single point to be put to the witness. In deciding what questions to put to the witness, one must bear in mind the rationale of the rule, which is to give him an opportunity to respond to allegations made and to explain himself.

On the facts of *Asnah*, the court held that the appellant's failure to put her case to the respondent did not violate the mischief targeted by the rule. This was because: (a) the appellant's case was made abundantly clear not only in her pleadings but also her affidavit of evidence-in-chief ("AEIC"), (b) the respondent had already given his answer to the appellant's case in his AEIC, and (c) even if the appellant had questioned the respondent on the issue in question, the respondent would have given an answer that would have served no meaningful purpose (at [115]).

80 Similarly, on the present facts, the Plaintiff's case that Joseph Yeo was controlled or directed by Zheng was made very clear in his pleadings[117] and his AEIC.[118] In Zheng's AEIC, he stated that he "did not have control of Joseph Yeo, nor did have any control of his shareholdings in SGL at any time",[119] which is clearly an answer to the Plaintiff's case. In the circumstances, even if the Plaintiff's counsel had questioned Zheng on the source of unds for the cashier's order, Zheng would probably have simply denied knowledge or said that it came from Joseph Yeo. This answer would have served no meaningful purpose.

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117 SB at p 8.

118 PAEIC at para 24(a).

119 DAEIC at para 25.

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Hence, I am satisfied that, on a proper understanding of the *Browne v Dunn* rule, this rule is not breached.

81 In any case, even without the application of *Asnah*, I am satisfied that the Plaintiff's counsel did implicitly put to Zheng that the source of the funds was from him:[120]

> [Plaintiff's counsel]: All right. We look at the other cashier's order, page 694. Who procured this cashier's order?
>
> [Zheng]: This was from Joseph Yeo, I believe.
>
> [Plaintiff's counsel]: Yes, but who procured this? Was it given by Joseph Yeo or you arranged for this?
>
> [Zheng]: I picked this up from my father.
>
> …
>
> [Plaintiff's counsel]: Right. Can you confirm that Joseph Yeo was procured by you through your father?
>
> [Zheng]: My father arranged for Joseph Yeo to be an investor, yes.
>
> [Plaintiff's counsel]: Yes, but obviously it has to be *for your benefit* because otherwise why would your father be involved, isn't it, it's your deal?
>
> [Zheng]: No. We believed that the shares would have gone up in value.
>
> …
>
> [Plaintiff's counsel]: Right. But, essentially, it is *your side who procured, Joseph Yeo*, "your side", meaning your father?
>
> [Zheng]: Yes, we introduced Joseph Yeo to the purchaser of the shares.
>
> [Plaintiff's counsel]: It is my client's position, and *I put it to you, that Joseph Yeo was your nominee.*
>
> [Zheng]: I disagree.
>
> …
>
> [emphasis added]

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120 Transcript dated 25 February 2021 at p 44, ln 19 to p 47, ln 19.

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Since the Plaintiff's counsel put it to Zheng that Joseph Yeo was his nominee in the context of cross-examining Zheng on the cashier's order, it is implicit that counsel was putting to Zheng that he was the source of the funds. It follows that, strictly speaking, no issue regarding the *Brown v Dunn* rule arises. I therefore disagree with the Defendants' submission on this point.

82 Having considered the evidence on this point, I find that Joseph Yeo was the Defendants' nominee.

The Defendants' other arguments are unmeritorious

83 The Defendants mounts several other unmeritorious arguments.

84 Firstly, they argue that the Alleged Overarching Agreement is not commercially viable. In their view, it would be cheaper for the Defendants to refuse to procure the transfer for the PRC Subsidiaries and to trigger the LD clause of the 1st Procurement Agreement (see [9] above).[121] This is because the Plaintiff has acknowledged that the PRC Subsidiaries were worth about S$10,000,000, which is more than the S$6,000,000 stipulated under the LD clause, which the Defendants were liable to pay on breach.[122] It therefore follows that 1st Procurement Agreement was not meant to be performed. I do not see the merit in this argument. The Plaintiff may have valued the PRC Subsidiaries at S$10,000,000 but the parties have agreed that the quantum of the liquidated damages should be set at S$6,000,000, which is a sum that is not unreasonable in the circumstances.

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121 DCS at para 19(i).

122 DCS at para 19; PCS at para 87.

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85 Secondly, the Defendants argue that since the Written Agreements were negotiated through Ng, Ng's testimony is needed for the Plaintiff to prove his case.[123] The Defendants also argue that Ng, having a 18% stake in LTN, could have "orchestrated the agreements for his own selfish benefit".[124] However, the Plaintiff's case is that Ng was involved in the *early stages* of the negotiation, and his role was diminished after Looi was engaged.[125] In contrast, Zheng alleged that Ng informed him that SGL shares had the potential for capital appreciation.[126] It is thus clear that the Defendants rely on Ng's testimony more heavily than the Plaintiff.

86 Thirdly, the Defendants submit that the 1st SPA, the 2nd SPA, and the 1st Procurement Agreement contain entire agreement clauses and these clauses effectively erase any legal consequences that might have ensued from prior discussions or negotiations and signify that the contractual relationship between parties is now circumscribed by the signed agreements and those alone (*Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 at [28]). Accordingly, pre-contractual negotiations cannot be referred to and no party can rely on any term not contained within these agreements. In my view, this submission is irrelevant. The Plaintiff's case is that the Alleged Overarching Agreement was "the backdrop leading to the five Written Agreements, and the Plaintiff is suing the Defendants on the clear terms under the 1st and 2nd Procurement Agreements and the Deed".[127] Since the

123 DCS at paras 62 to 64.

124 DCS at paras 65 to 66.

125 PCS at para 18

126 DCS at para 1; DAEIC at para 8.

127 PCS at para 130.

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Plaintiff is not seeking to rely on any terms that are not within the Written Agreements, this issue is a non-starter.

87 In light of my findings above, I find that the Alleged Overarching Agreement exists. Perhaps the only argument in favour of the Defendants is that the Plaintiff did not explain why he wanted to retain the specific number of 50,000,000 SGL shares ultimately.[128] Nevertheless, even if I find in favour of the Defendants on this point, on balance, the weight of evidence is clearly in favour of the Plaintiff's case.

88 For completeness, I also note that the Defendants further submit that, due to the Plaintiff's actions and subsequent events, the Plaintiff could not obtain 50,000,000 SGL shares even if Zheng had performed the 2nd Procurement Agreement.[129] This submission is irrelevant as the material issue is whether the Plaintiff had intended *at the time of contracting* to retain those number of shares, and not whether he could have ultimately done so.

The Disputed Written Agreements are valid and enforceable

89 The Defendants submit that the Disputed Written Agreements are invalid and therefore not binding on them due to a host of issues relating to formation and, in respect of the Deed, due to a failure to comply with the requisite formalities of delivery and sealing.

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128 DCS at para 21.

129 Defendants' Submissions on Damages dated 17 March 2021 ("DAS") at para 11.

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Valid formation

(1) Intention to create legal relations

90 The Defendants argue that in signing the Disputed Written Agreements, there was no intention to create legal relations, and these Agreements are therefore invalid.[130]

91 Having found above that the Alleged Overarching Agreement exists and specifically that the Disputed Written Agreements were not sham agreements, it follows that the parties did enter into the Disputed Written Agreements with the intention to be bound by them.

92 The Defendants submit that there is no evidence that the documents pertaining to the Disputed Written Agreements were returned to Zheng after he had signed them before the Plaintiff did so, especially since the Plaintiff does not know what Ng or Looi did with these documents.[131]

93 This submission is irrelevant. In respect of the 1st and 2nd Procurement Agreements, as a matter of trite law, they were valid and binding once both parties have signed it. They therefore do not have to be returned to Zheng thereafter. This is also the case for the Deed, which I address below at [104]–[112].

130 DCS at para 38 to 40.

131 DCS at para 39.

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(2) Consideration

94 The Defendants also argue that the Disputed Written Agreements are invalid for want of consideration.[132]

95 While the Defendants did not elaborate clearly on this point, I understand their case to be as follows.[133] Firstly, the Defendants entered into the 1st and 2nd Procurement Agreements in consideration of the Plaintiff entering into the 1st SPA with Evancarl. By extension, the Deed, having as its subject matter Zheng's personal guarantee of Evancarl's obligations under the 1st Procurement Agreement, is premised on that same consideration. Secondly, in the Defendants' view, the 1st SPA was signed *before* the rest of the agreements were concluded. Accordingly, a situation of past consideration arises, which as a matter of trite law, is generally not valid consideration.

96 The Defendants appear to rely heavily on the fact that the parties did not sign the Disputed Written Agreements *at the same time*. That much is undisputed on this level of specificity, given that Ng was acting as an intermediary (see [26] above). However, this misses the point. No issue of past consideration arises where the agreements were entered into *contemporaneously*, *ie*, at or *around* the same time.

97 In *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*"), the Court of Appeal stated at [83] as follows:

> It should also be noted that an absence of linkage between the parties can also occur if the consideration is *past* – hence, the oft-cited principle that "past consideration is no consideration". However, the courts *look to the substance rather than the form*.

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132 DCS at para 32.

133 DCS at paras 32 to 37.

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> Hence, *what looks at first blush like past consideration will still pass legal muster if there is, in effect, a single (contemporaneous) transaction (the common understanding of the parties being that consideration would indeed be furnished at the time the promisor made his or her promise to the promisee)*.
>
> …
>
> [emphasis in italics in original, emphasis in italics underline added]

In that case (at [77] and [88]), the court held that no issue of past consideration arose in respect of a Points of Agreement ("POA") and a waiver letter sent by the plaintiff to the defendant ("Waiver Letter") that were executed contemporaneously on the same day, as they were clearly intended to constitute a contemporaneous compromise agreement. The series of correspondence leading up to the signing of the POA and the Waiver Letter between the plaintiff and the defendant demonstrated that both parties had originally been locked in a dispute, but subsequently wished to work out an amicable solution on the basis of a friendship that they once enjoyed. The result of their intention to reconcile matters amicably rather than to litigate them was the POA and the Waiver Letter.

98 On the present facts, the Written Agreements was executed as a result of the parties having agreed to the Alleged Overarching Agreement, which I have found exists. This shows that the parties clearly *intended* for the Written Agreements, which includes the Disputed Written Agreements, to constitute a contemporaneous agreement.

99 I also am satisfied by the evidence before me that the Written Agreements were indeed entered into contemporaneously.

100 First of all, an email dated 3 January 2014 shows that Zheng had requested for the 1st and 2nd SPA to be drafted separately, and thus being part of

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a contemporaneous agreement. The email correspondence between Zheng and Looi refers to the proposed sale and purchase of 90,000,000 SGL shares.[134] The correspondence indicates that Zheng had requested for two sale and purchase agreements for 45,000,000 shares to be drafted separately, which Zheng confirmed at trial that they refer to the 1st and 2nd SPA.[135] In an email dated 3 January 2014 from Zheng to Looi, Zheng wrote as follows:[136]

> Looi,
>
> Please help ensure each agreement for myself and HW's uncle is *separate*.
>
> Also in consult to Hw, this is the breakdown.
>
> - Evancarl Limited will purchase 45m shares at 5.5c
>
> -HW uncle will purchase 45m shares at 5.5c
>
> - Propose total of 90m share for sale at 5.5c
>
> And
>
> - 50k deposit on signing
>
> Thanks, N
>
> [emphasis added]

I agree with the Plaintiff that but for Zheng's request, Looi would have drafted only one sale and purchase agreement instead of two. "HW uncle" here refers to one Lim Chuan Lam,[137] who is the subject of further correspondence referred to below.[138]

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134 PCS at para 35; 1AB at p 45.

135 Transcript dated 25 February 2021 at p 21, ln 15 to 20.

136 1AB at p 45.

137 DAEIC at para 12.

138 PCS at para 37.

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101 Next, there is an email dated 6 January 2014 from one Shalini D/O Mogan, Looi's associate, sent on behalf of Looi to Zheng and Ng, which attached the drafts of the 1st SPA, 2nd SPA, and the 1st Procurement Agreement,[139] and also clearly mentions the PRC Subsidiaries in the context of finalising the execution of the 1st and 2nd SPA:[140]

> Dear [Zheng] and [Ng],
>
> We *enclose herewith the draft copies of the Sale and Purchase Agreements and the Transfer of Shares Agreement* for your information and comments (if any).
>
> Kindly clarify and/or confirm the following:
>
> - Whether you are able to provide the registration numbers of *Sino-Lonther* and *Luneng Taishan Mining*;
>
> - (if you are unable to provide the registration numbers, we will omit this detail in the finalized draft)
>
> - The date that parties want to execute both the agreements and the completion date for the completion of the *sale and purchase of the Sincap shares*;
>
> - (if you are unable to confirm the date, we will leave it blank for parties to manually fill in upon execution);
>
> - Please confirm the venue in which parties intend to have completion of the *sale and purchase of the Sincap shares*;
>
> - (we have currently stated as the offices of Sincap)
>
> - Please confirm that the dates appearing at clauses 3.2 and 3.3 of the Transfer of Shares Agreement are what parties will be agreeing to (ie 31 December 2014 & 31 December 2015).
>
> …
>
> [emphasis added]

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139 PCS at para 39.

140 1AB at p 48.

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102 Subsequently, Zheng replied to this email on 7 January 2014 and stated that he did "not agree to complete the Transfer of Share Agreement", *ie*, the 1st Procurement Agreement, and that he "[w]ill ring Mr Looi to explain [his] concerns".[141] At trial, counsel for the Plaintiff put to Zheng that he declined to complete the 1st Procurement Agreement as he wanted to amend a few areas of that draft sent to him: (a) remove Lim Chuan Lam as a party to the agreement and (b) change the first deadline for the transfer of the PRC Subsidiaries from 31 December 2014 to 30 April 2015 and the second deadline from 31 December 2015 to 30 April 2016.[142] Subsequently, Lim Chuan Lam was also removed as a party to the 2nd SPA.[143] The documentary evidence supports this narrative.[144] Since Zheng clearly negotiated the agreements as a set, I find that it indicates that when the Written Agreements were ultimately executed, they were done so contemporaneously.

103 I therefore find that no issue of past consideration arises.

Alleged non-delivery and non-sealing of the Deed

104 For a deed to be valid as such, it must be signed, sealed, and delivered: *Kuek Siew Chew v Kuek Siang Wei and another* [2015] 1 SLR 396 at [30]. The Defendants contend that while the Deed was signed, it was neither sealed nor delivered.

105 I deal with the issue of sealing first.

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141 1AB at p 74.

142 Transcript dated 25 February 2021 at p 32, ln 6 to p 33, ln 11.

143 Transcript dated 25 February 2021 at p 38, ln 18 to 23.

144 1AB at p 19 to 35, p 57 to 72.

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106 I agree with the Plaintiff's argument that the Defendants are precluded from arguing that the Deed was not sealed.[145] The Defendants did not plead this point in their Defence or in the list of agreed and non-agreed issues in their Lead Counsel Statement.[146] In their Defence, the only point pleaded regarding compliance with formalities was that "the Deed is undated and was never delivered by [Zheng] to the Plaintiff".[147] Hence, the Defendants' omission alone would make this issue on sealing a non-starter.

107 Nevertheless, I pause to observe a point on estoppel raised by parties at trial, and the Plaintiff in his closing submissions.[148] In *Lim Zhipeng v Seow Suat Thin and another matter* [2020] 2 SLR 1151 ("*Lim Zhipeng*") at [45], the Court of Appeal stated the following:

> It would appear to be fairly settled law, therefore, that *a person who has executed a document that states it has been "signed sealed and delivered" would, in the usual course, be estopped from denying the sealing if he has delivered the document to the other party knowing that the latter will rely on the document and that party did indeed rely on it to its detriment.* In this case it would have been open to the Appellant to plead estoppel and to prove his reliance which would not have been hard to do since he did stop pursuing the Debtor for payment while awaiting receipt of the instalment payments set out in the Guarantee. Unfortunately for the Appellant, *estoppel was not pleaded by him and thus cannot be relied on in this case.*
>
> [emphasis added]

At trial, the Defendants argued that because the Plaintiff did not plead estoppel, he cannot then argue that the Defendants are estopped from denying the sealing

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145 PCS at para 163.

146 Defendants' Lead Counsel Statement dated 4 January 2021.

147 SB at p 31, para 15(a).

148 PCS at para 164; Transcript dated 3 March 2021 at p 77 ln 1 to p 79 ln 16.

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of the Deed.[149] Following what is set out above in *Lim Zhipeng*, this is correct as a matter of principle. However, as I have noted in the preceding paragraph, the Defendants themselves did not plead that the Deed was not sealed. Without first putting the Deed's sealing in issue, the Plaintiff cannot be expected to plead estoppel in response. Hence, the Defendants' argument fails.

108 I move on to the issue of delivery.

109 The Defendants contend that after the Deed was executed by Zheng and brought to the Plaintiff to execute through Ng and Looi, which the Plaintiff did so subsequently, the Deed was not delivered back to Zheng.[150] Accordingly, they argue that the requirement of delivery was not satisfied.

110 In *Unitrack Building Construction Pte Ltd v GHL Pte Ltd* [1999] 1 SLR(R) 967, the High Court canvassed the law on delivery of deeds at [18]–[21] and approved of the position set out in English textbooks and decisions:

> 18 GHL wrote in for further arguments and I heard parties again on 23 February 1999. The thrust of the submission by GHL's counsel this time was on the aspect of "delivery". Citing passages from textbooks and a number of decisions from England, counsel argued that it was not necessary that the deed be actually delivered to the ***intended beneficiary***. The learning referred to me included a passage from para 1329 of *Halsbury's Laws of England* vol 12 (Butterworths, 4th Ed) which reads:
>
> > In order to be effective a deed must be delivered as the act and deed of the party expressed to be bound by it, as well as sealed. *No special form or observance is necessary for the delivery of a deed, and it may be made in words or by conduct. The usual form of delivering a deed by words is for the* ***executing party*** *to say, while putting his finger on the seal, 'I deliver this as my act and deed'.* It is *not necessary, however, to follow this form of*

149 Transcript dated 3 March 2021 at p 77, ln 14 to 16.

150 DCS at para 43; Transcript dated 24 February at p 39, ln 14 to p 41, ln 15.

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> *execution*; *nor is it necessary that the deed should actually be delivered over into the possession or custody either of the* ***person intended to take the benefit of the deed****, or to a* ***third person to the use of the party taking the benefit of the deed***; though if the party to be bound so hands over the deed, that is sufficient delivery without any words.
>
> What is essential to delivery of the document as a deed is that *the party whose deed the document is expressed to be (having first sealed it) shall by words or conduct expressly or impliedly acknowledge his intention to be immediately and unconditionally bound by the provisions contained in it.* Thus, where a deed has been executed by an attorney in excess of his power, a subsequent acknowledgement by the principal, whether oral or in writing, that the deed expresses his intentions amounts to a delivery or re-delivery of the deed.

19 Similarly in *Chitty on Contracts* (27th Ed) para 1-031, it is stated:

> 'Where a contract is to be by deed, there must be a delivery to perfect it.' 'Delivered,' however, in this connection does not mean 'handed over' to the other party. It means *delivered in the old legal sense*, namely, *an act done so as to evince an intention to be bound*. Any act of the party which shows that he intended to deliver the deed as an instrument binding on him is enough. He must make it his deed and recognise it as presently binding on him. *Delivery is effective even though the grantor retains the deed in his own possession.* There need be no actual transfer of possession to the other party: 'the efficacy of a deed depends on its being *sealed and delivered* ***by the maker of it****, not on his ceasing to retain possession of it.*' Where a solicitor or licensed conveyancer in the course of a transaction involving the disposition or creation of an interest in land, purports to deliver an instrument as a deed on behalf of a party to the instrument, it shall be conclusively presumed in favour of a purchaser that he is authorised so to deliver the instrument.

20 In *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609 at 619, CA, a case concerning a lease document, Lord Denning MR observed:

> The law as to 'delivery' of a deed is of ancient date. But it is reasonably clear. A deed is very different from a contract. On a contract for the sale of land, the contract is not binding on the parties until they have exchanged

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> their parts. But with a deed it is different. *A deed is binding on the maker of it, even though the parts have not been exchanged, as long as it has been signed, sealed and delivered. 'Delivery' in this connection does not mean 'handed over' to the other side. It means delivered in the old legal sense, namely, an act done so as to evince an intention to be bound. Even though the deed remains in the possession of the maker, or of his solicitor, he is bound by it if he has done some act evincing an intention to be bound, as by saying: 'I deliver this my act and deed.'* He may, however, make the 'delivery' conditional: in which case the deed is called an 'escrow' which becomes binding when the condition is fulfilled.
>
> 21 The authorities referred to above cannot be second-guessed. …
>
> [emphasis added in bold italics and in italics]

From the above extract, it is apparent that: (a) the onus is on the executing party to procure delivery to the intended beneficiary and (b) delivery simply requires an act done so as to evince an intention to be bound, so delivery can be effected even if the deed remains in the possession of the executing party.

111 Given that the Deed is Zheng's personal guarantee of Evancarl's obligations to the Plaintiff, the onus is on *Zheng* as the executing party to deliver the Deed to *the Plaintiff*, the intended beneficiary. This obligation is satisfied by Zheng's physical delivery of the Deed to the Plaintiff, through Ng and Looi.

112 In any case, even if the onus were on the Plaintiff to deliver the Deed, I can infer from the circumstances that the Plaintiff executed the Deed with an act to be bound. In light of my finding that the Alleged Overarching Agreement exists (see [87] above), I am persuaded that after the Plaintiff executed the Deed, a copy of it was then delivered to Ng who received them on behalf of Zheng (see [26] above), and this constitutes the requisite act to be bound.

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The Alleged Overarching Agreement is not illegal

113 The Defendants submit that the Alleged Overarching Agreement is illegal and is therefore unenforceable and/or void.[151] They contend that: (a) the Catalist Rules[152] and/or s 160(1) of the Companies Act (Cap 50, 2006 Rev Ed)[153] prohibit Alleged Overarching Agreement; and (b) the Alleged Overarching Agreement was illegal at common law as it was entered into with the object of committing an unlawful act, *ie*, breaching the Catalist Rules.[154]

114 The law on the doctrine of illegality and public policy is set out in the seminal cases of *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 ("*Ting Siew May*") and *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 ("*Ochroid*"). I briefly summarise the legal position below:

(a) The first stage of the inquiry is to ascertain whether the contract was prohibited either pursuant to a statute (expressly or impliedly) and/or an established head of common law public policy. If the contract is thus prohibited, there could be no recovery pursuant to the illegal contract.

(b) This strict position at the first stage of the inquiry is subject to an important caveat that was elucidated in *Ting Siew May*. In *Ting Siew May*, it was recognised that there was a broad and general category of contracts illegal at common law comprising contracts which were not

151 DCS at para 49.

152 DCS at para 50.

153 DCS at para 57; Defendants' Opening Statement dated 16 February 2021 ("DOS") at para 17.

154 DCS at paras 52 and 55.

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unlawful *per se* but entered into with the object of committing an illegal act.

(i) Whether a contract falls under this category depends on the intention of one or both of the contracting parties to break the law at the time the contract was made. It includes:

(A) contracts entered into with the object of using the subject matter of the contract for an illegal purpose;

(B) contracts entered into with the intention of using the contractual documentation for an illegal purpose;

(C) contracts which were intended to be performed in an illegal manner; and

(D) contracts entered into with the intention of contravening a statutory provision, although not prohibited by that provision *per se*.

(ii) It is only in this category that the principle of proportionality applies to determine if the contract was enforceable. In other words, the principle of proportionality does not apply where there was statutory illegality that prohibited the contract concerned and/or a situation under common law illegality where the contract was prohibited under any of the established heads of common law public policy.

(c) At the second stage of the inquiry, a party who had transferred benefits pursuant to the illegal contract might be able to recover those benefits on a restitutionary basis (as opposed to recovery of full contractual damages). There were three possible legal avenues for such

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recovery: (a) not *in pari delicto*, (b) *locus poenitentiae*, and (c) independent cause of action.

Section 160(1) of the Companies Act

115 I deal with s 160(1) of the Companies Act first.

116 Section 160 of the Companies Act states:

> 160.—(1) Notwithstanding anything in a company's constitution, the directors shall not carry into effect any proposals for disposing of the whole or substantially the whole of the company's undertaking or property unless those proposals have been approved by the company in general meeting.

117 Citing *KJ Kim Company (Pte) Ltd v Buck & Company (Pte) Ltd* [1997] SGHC 166, the Defendants argue that s 160(1) of the Companies Act "was directly intended to target situations such as the present, where parties would agree to the disposal of a company's assets to an extent that would prevent it from carrying on its business".[155] Presumably the Defendants are referring to the 1st Procurement Agreement in which the PRC Subsidiaries are to be transferred to the Plaintiff.

118 The Alleged Overarching Agreement, specifically the 1st Procurement Agreement, obliges Evancarl to procure the transfer of the shares in the PRC Subsidiaries to the Plaintiff. Zheng would have to perform this obligation as Evancarl's sole director. However, the 1st Procurement Agreement does not oblige Evancarl and by extension, Zheng, to do so without complying with the relevant law. It is up to Zheng to fulfil this obligation in full compliance with any regulatory or legal requirement. So, if it is necessary to get the approval of

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155 DCS at para 57.

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the company in a general meeting under s 160(1) of the Companies Act, it is for Zheng to secure such approval. Indeed, cl 3.1 of the 1st Procurement Agreement requires Evancarl to obtain the approval of concerned stakeholders and to obtain any consent required for that purpose.[156] Furthermore, that agreement contains an LD clause in contemplation of the possibility that Evancarl may not be able to procure the transfer of the shares.[157] It is thus clear that parties anticipated and provided for the situation where Zheng failed to discharge this share transfer obligation by, *inter alia*, failing to fulfil the relevant legal or regulatory requirements. Therefore, there is nothing illegal in the Alleged Overarching Agreement by requiring Zheng to procure the transfer of those shares.

The Catalist Rules

119 As stated above at [6], SGL is a company listed on the Catalist board of SGX. The Defendants allege that: (a) the Catalist Rules prohibit the Alleged Overarching Agreement[158] and (b) entered into with the object of committing an unlawful act, *ie*, breaching the Catalist Rules.[159] The former concerns statutory illegality while the latter concerns common law illegality.

120 Even if the Catalist Rules are applicable, for the same reason given in [118], the Defendants are to ensure that they fulfil their obligations under the Alleged Overarching Agreement in full compliance with any regulatory or legal requirement. Hence, even if the Catalist Rules are applicable, there is no illegality.

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156 1AB at p 30.

157 1AB at p 31 to 32.

158 DCS at para 50.

159 DCS at paras 52 and 55.

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Breach of the Disputed Written Agreements

121 From the above analysis, it is clear that the Alleged Overarching Agreement exists, and the Disputed Written Agreements are valid and enforceable.

122 Since Evancarl did not procure the transfer of the Subsidiary Shares to the Plaintiff by both 30 April 2015 and 30 April 2016, I find that it is breach of cll 2, 3.1, 3.2, 3.3 and 5 of the 1st Procurement Agreement (see [9] above). As a corollary, I find that Zheng is in breach of cll 1, 2, and 3 of the Deed (see [11] above).

123 Since Zheng did not procure the transfer of 12,226,500 SGL shares to the Plaintiff by 30 April 2015, I find that Zheng is in breach of cll 1, 2, 5, 6, and 7 of the 2nd Procurement Agreement (see [10] above). An issue arises to the applicability of cl 8, which I will address below.

Damages

The 1st Procurement Agreement and the Deed

124 There are two applicable clauses governing the quantum of damages under the 1st Procurement Agreement: cll 3.3 and 5.

125 At the outset, I note that in their opening statement and closing submissions, the Defendants have abandoned their defence that cll 3.3 and 5 are unenforceable on the ground that they each constitute a penalty clause (as stated briefly at [51] above).[160] Hence, the Defendants do not dispute the enforceability of these clauses upon breach of the 1st Procurement Agreement.

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160 SB at p 30, para 11.

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126 First of all, cll 3.3 is applicable since Evancarl did not procure the transfer of the Subsidiary Shares to the Plaintiff by 30 April 2015, and provides that Evancarl will pay the Plaintiff "a sum representing an amount equivalent to the audited profits after tax of SL and LTM on a pro-rated basis for each calendar month of delay after 30 April 2015".

127 The Plaintiff submits that this sum is S$416,589, and provides the following breakdown from SGL's 2016 Annual Report:[161]

FY 2015 (Figures in RMB unless stated otherwise)	
LTM's operating results before interests, income taxes, and other unallocated items ("ORBIT")	658,000
LTM's ORBIT after interest, income, and finance costs	658,000 + 60,000 = 718,000
SL's ORBIT	11,676,000
SL's ORBIT after interests, income, and finance costs	11,676,000 + 426,000 – 34,000 = 12,068,000
Total of LTM's and SL's ORBIT after interests, income, and finance costs	718,000 + 12,068,000 = 12,786,000
Tax expense[162]	5,844,000
LTM's and SL's audited profits after tax for the full year of 2015	12,786,000 – 5,844,000

161 PCS at para 77; 1AB at p 728 to 729.

162 PCS at para 77, footnote 108: "For convenience, the tax expense figure for the whole SGL group is utilised, even though this would be more disadvantageous to the Plaintiff."

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	= 6,942,000[163]
LTM's and SL's average audited profits after tax for the 8 months from May to December 2015	6,942,000 x 8/12 = 4,628,000 **= S$1,008,904**[164]
FY 2016 (figures in RMB unless stated otherwise)	
LTM's operating results before interests, income taxes, and other unallocated items ("ORBIT")	346,000
LTM's ORBIT after interest, income, and finance costs	346,000 – 70,000 = 276,000
SL's ORBIT	– 4,761,000
SL's ORBIT after interests, income, and finance costs	– 4,761,000 + 131,000 = – 4,630,000
Total of LTM's and SL's ORBIT after interests, income, and finance costs	276,000 – 4,630,000 = – 4,354,000
Tax expense[165]	4,189,000
LTM's and SL's audited profits/loss after tax for the full year of 2016	– 4,354,000 – 4,189,000 = – 8,543,000[166]

163 PCS at para 77, footnote 109: "The unallocated corporate expenses for the whole SGL group should not be taken into account in calculating LTM and SL's profits."

164 PCS at para 77, footnote 110: "Based on the exchange rate of RMB 1 to S$0.218 as at 31 December 2015"

165 PCS at para 77, footnote 111: "For convenience, the tax expense figure for the whole SGL group is utilised, even though this would be more disadvantageous to the Plaintiff."

166 PCS at para 77, footnote 112: "The unallocated corporate expenses for the whole SGL group should not be taken into account in calculating LTM and SL's profits."

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LTM's and SL's average audited profits/loss after tax for the 4 months from January to April 2016	– 8,543,000 x 4/12 = – 2,847,677 = **– S$592,315**[167]
LTM's and SL's audited profits after tax from 1 May 2015 to 30 April 2016	S$1,008,904 – S$592,315 = S$416,589

128 The Defendants do not dispute the above calculations and I do not see any reason to doubt the Plaintiff's figures. I therefore find that the Defendants are liable to pay the sum of S$416,589 to the Plaintiff.

129 Next, cl 5, *ie*, the LD clause, is applicable since Evancarl did not procure the transfer of the Subsidiary Shares to the Plaintiff by 30 April 2016, and provides that Evancarl will pay the Plaintiff the sum of S$6,000,000, being the agreed valuation of the Subsidiary Shares. I am satisfied that this sum is due and payable.

The 2nd Procurement Agreement

130 The applicable clause governing damages in the 2nd Procurement Agreement is cl 8. Clause 8 provides that "the measure of damages [the Plaintiff] will be entitled to in the event of repudiatory breach by [Zheng], includes (but is not limited to) the actual cost of [the Plaintiff] acquiring the [12,226,500 SGL shares] in the shortest possible time from the market (with time being of the essence).[168]

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167 PCS at para 77, footnote 113: "Based on the exchange rate of RMB 1 to S$0.218 as at 31 December 2016."

168 1AB at p 37.

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131 The Plaintiff submits that the shortest possible time that he could have purchased SGL shares from the market after the date of breach, *ie*, 30 April 2015, is 4 May 2015.[169] Documentary evidence shows that the market price of SGL shares on that day was $0.066 per share.[170] Computing using this price (12,226,500 x S$0.066) yields the sum of S$806,949.[171]

132 In response, Zheng submits that cl 8 is unenforceable because it is not sufficiently certain.[172] He submits that there is no "actual cost" of the Plaintiff acquiring the 12,226,500 SGL shares because the Plaintiff never actually went into the market to acquire any such shares following the breach of the 2nd Procurement Agreement.[173] Zheng also submits that where one purchases a significant number of shares, one cannot use the individual share price, *eg*, $0.066 per share to calculate the total share price.[174] Presumably, this is because a premium would apply to such a significant block of shares.[175]

133 I requested counsel to tender further submissions on the applicable measure of damages if cl 8 is inapplicable.

134 The Plaintiff submits that in such a situation, the default or normal measure of damages would apply, which is computed using the market price of 12,226,500 SGL shares *at the date of the breach* (the "market price rule").[176]

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169 POS at para 28.

170 2AB at p 727.

171 PCS at para 176.

172 DCS at para 44.

173 DCS at para 45.

174 DCS at para 46.

175 Transcript dated 24 February 2021 at p 47, ln 14-22; PAS at para 11.

176 PAS at paras 2 and 8.

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135 The market price rule is set out in the Court of Appeal case of *Auston International Group Ltd and another v Ng Swee Hua* [2009] 4 SLR(R) 628 ("*Ng Swee Hua*").

136 In that case, the first appellant was a company listed on the Singapore Exchange, while the second appellant was its wholly-owned subsidiary. By an investment agreement dated 15 December 2005, the appellants agreed to issue to the respondent convertible bonds of an aggregate principal of S$200,000 which were convertible into shares of the first or second appellants or a combination of both. The investment agreement also provided that the respondent's existing loan of $200,000 to the first appellant would be utilised as consideration for the bonds. On 3 November 2006, the respondent sent a conversion notice to the appellants directing them to procure the issuance of 5,000,000 ordinary shares of the first appellant to a securities account designated by the respondent. The first appellant failed to issue the shares to the respondent, and the respondent sued the appellants for breach of the investment agreement.

137 The Court of Appeal affirmed the trial judge's finding that the appellants had breached their obligation under the investment agreement in failing to issue the shares to the respondent (at [37]). However, the Court of Appeal did not agree with the trial judge's decision that damages be assessed on the basis of the loss of chance. Instead, the Court of Appeal held (at [39] and [42]–[43]) that this was an ordinary case of breach of contract for failing to deliver shares, and the normal measure of damages would be based on the market price of the shares at the contractual time for delivery:

> 39 In the present case, the respondent's loss as a result of his being deprived of his conversion was due to a *breach of contract by the appellants*: it had nothing to do with the hypothetical action of a third party. This is an *ordinary case of*

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> *breach of contract for failing to deliver shares*. The respondent did not lose any chance to acquire the Conversion Shares and thereafter sell them at a higher price at a later date because he could have gone into the market upon breach to purchase the equivalent 5m Auston shares. His loss, if any, would be the difference between the total cost of purchasing 5m Auston shares in the market and $200,000. The issue the court will have to decide is the relevant date on which the respondent should have gone into the market to buy 5m Auston shares.
>
> …
>
> 42 The general principles applicable in determining damages on the seller's failure to deliver securities are set out in *McGregor* where the point is made (at para 24-003) that *"[t]he normal measure of damages is the market price of the shares at the contractual time for delivery less the contract price"*. *This would represent the amount that the buyer must obtain to put himself in the position he would have been in had the contract been performed, since to do so he must purchase equivalent shares in the market* (at para 24-003). It is also observed that the cases that have been adjudicated upon "indicate an application of [such] common principles while at the same time bringing out small differences" (*McGregor* at para 24-005). Thus, *the date of breach may be postponed if the seller had sought more time to issue the shares and the buyer was willing to grant such indulgence, and the market price on the postponed date will therefore be the relevant one* (*at para 24-005*, citing *Wilson v London and Globe Finance Corp* (1897) 14 TLR 15). ***Whether these principles apply depend on the facts of the cases on which they were based***. …
>
> 43 *What this date is depends on the facts*. In the present case, there appears to be some evidence on record indicating that the appellants had asked the respondent for time to sort out the problem of getting shareholders' approval, which the respondent appeared to have agreed to, although it led to nothing. Nevertheless, the period of indulgence given by the respondent ***may*** have to be factored into determining the relevant date for the respondent to go into the market to purchase the shares (see *McGregor* at para 24-005).
>
> …
>
> [emphasis added in bold italics and in italics]

The above extracts further elucidate that: (a) the market price of the shares is determined using the time at which the plaintiff could have himself bought the shares from the market and (b) depending on the facts at hand, the date of the

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defendant's breach can be postponed by a period of indulgence, *ie*, where the defendant sought more time to procure the shares and the plaintiff was willing to grant such time.

138 Three issues arise from the foregoing.

139 The first issue is: is the market price rule applicable? Zheng clearly disagrees as he submits that the Plaintiff is merely entitled to nominal damages since the Plaintiff allegedly has not proven damage at all.[177] Zheng makes multiple submissions in support.

140 Zheng submits that the Plaintiff has adduced no evidence as to the position he would hypothetically have been placed had Zheng not breached the 2nd Procurement Agreement.[178]

141 Zheng further submits that the individual share price, *ie*, the market price of an SGL share, cannot be used because either a premium or discount might apply on the facts.[179] On the one hand, when considering a holding of publicly traded stock where the block is so large relative to normal trading volume that either an instant sale would be at a discounted price compared to the prevailing market or else it would take a long time to sell, a *blockage discount* would be applied to reflect the decrease in the per share value of the block: see *Oei Hong Leong another v Chew Hua Seng* [2020] SGHC 39 ("*Oei Hong Leong*") at [78]. On the other hand, a *control premium* may be applied if the said block of shares would give the buyer the ability to affect (or extract) value from the company

177 DAS at para 2.

178 DAS at para 24.

179 DAS at paras 15 to 22.

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in one way or another: *Oei Hong Leong* at [84]. In this regard, expert evidence is required but has not been adduced.

142 Zheng also oddly submits that, because Zheng paid S$5,000,000 for 90,000,000 SGL shares, the shares are valued at S$0.055 per share (calculated by straightforward division using the two figures).[180] It is unclear what the significance of this alleged share price is, but Zheng concludes that it supports the understanding that the Plaintiff's case is really that these shares were sold to Zheng outright, with the proviso that Zheng would ensure that the Plaintiff will receive the shares for free by 30 April 2015.[181]

143 In my judgment, the above submissions are without merit.

144 To begin with, it follows from my finding that the Alleged Overarching Agreement exists that the Plaintiff does not strictly receive the 12,226,500 SGL shares *for free* under the 2nd Procurement Agreement. It has to be borne in mind that the 2nd Procurement Agreement was entered into in consideration of the Plaintiff entering into the 1st SPA with Evancarl.

145 Next, the Plaintiff's submissions on the market price rule squarely address the issue of his expectation loss, since it "represent[s] the amount that the buyer must obtain to put himself in the position he would have been in had the contract been performed, since to do so he must purchase equivalent shares in the market" (*Ng Swee Hua* at [42]). Furthermore, *Ng Swee Hua* concerns the defendant's failure to procure the issuing of shares by a stipulated date; I find these facts are analogous to the present case, which concerns the failure to

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180 DAS at paras 3(iii) and 7.

181 DAS at para 8.

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procure the transfer of shares by a stipulated date. Hence, *prima facie*, the market price rule is applicable on the facts.

146 I turn to consider whether a control premium or block discount on the share price is applicable. The Plaintiff concedes that in the absence of expert evidence, he should not claim a large amount than that computed using the market price of S$0.066.[182] I accept this submission, which is against his interests. As for a block discount, Zheng argues that the situation here is that of a sale of shares (as opposed to a purchase of shares), because "the Plaintiff is seeking a money sum to place him in the position he would have been in if the agreement had not been breached". Thus, Zheng submits that the relevant question is: what would the Plaintiff have been able to *sell* the shares for had Zheng performed the 2nd Procurement Agreement? This submission is wrong. The Plaintiff's case is that he wanted to eventually *retain* 50,000,000 SGL shares ultimately,[183] which the transfer of 12,226,500 SGL shares would achieve. Hence, as he rightly submits, the situation here involves the situation of a *purchase* of a block of shares (as opposed to a *sale*), and the question is whether a premium ought to be applied.[184] As stated above, this issue has been resolved against his interests. I am thus satisfied that the market price rule should be applied.

147 Next, the second issue is: having determined that the market price should be used, what is the date at which the market price should be determined? Here, the Plaintiff could not have bought SGL shares on the date of Zheng's breach,

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182 PAS at para 11.

183 PCS at para 140.

184 PAS at para 11.

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30 April 2015. He could only do so on the next trading day, *ie*, 4 May 2015.[185] The manner of computation is thus unchanged from that stated above at [131] and the Plaintiff claims the same sum of S$806,949.

148 The last issue is: is there a need to factor in a period of indulgence? The Plaintiff acknowledges that he had given the Zheng time to comply with his obligation under the 2nd Procurement Agreement. However, he argues that there is no need to factor this period in to postpone the date at which the market price should be determined, because these indulgences were extended on a without prejudice basis, in his letter of demand to Zheng dated 19 October 2015.[186] I agree with this submission. The letter of demand states at [3]:

> We are instructed that despite the said breach of the said Agreement, discussions have been ongoing between you and our client about this issue since April 2015. In these talks, our client [*ie*, the Plaintiff] had, at your request, agreed on a *without prejudice* basis to give you more time to fulfil your obligations under the said Agreement [*ie*, the 2nd Procurement Agreement].
>
> [emphasis added]

I am thus satisfied that the Plaintiff has reserved his right to argue that the date of breach is the relevant date for determining the market price of the SGL shares when giving Zheng more time to fulfil his obligations under the 2nd Procurement Agreement. I also note that in the Defendants' submissions, while they dispute the applicability of the market price rule, they did not submit on this specific point in the event that the market price rule applies. I therefore do not find it appropriate to deviate from the Plaintiff's computation using the market price of S$0.066 per share on 4 May 2015.

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185 PAS at para 8.

186 PAS at para 9; 1AB at p 7.

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149 From the above analysis, I am satisfied that, regardless of whether cl 8 of the 2nd Procurement Agreement applies, the Plaintiff is entitled to S$806,949 in damages as a result of Zheng's breach of the 2nd Procurement Agreement.

Conclusion

150 For the reasons above, I allow the Plaintiff's claim. The Defendants are to pay the Plaintiff the sum of S$6,416,589, being the quantum of damages flowing from Evancarl's breach of the 1st Procurement Agreement, with Zheng being jointly and severally liable under the Deed. Zheng is to pay the Plaintiff the sum of S$806,949 in damages from his breach of the 2nd Procurement Agreement. I also order the Defendants to pay interest on the respective sums, at 5.33% per annum from 19 March 2019, the date on which the writ was filed.

151 I will hear counsel on the issue of costs.

Lee Seiu Kin
Judge of the High Court

Tay Wei Loong Julian, Wong Wai Keong Anthony and Loh Kah Yunn (Lee & Lee) for the plaintiff;
Eugene Singarajah Thuraisingam, Chooi Jing Yen and Hamza Zafar Malik (Eugene Thuraisingam LLP) for the defendants.

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