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

[2023] SGHC 76

Suit No 419 of 2020

Between

(1) 3N Investments Group Ltd
(2) Chia Kuan Wee

… *Plaintiffs*

And

(1) Lim Boon Chye Victor
(2) Murugesan Srinivasan
(3) Rotating Offshore Solutions Pte Ltd

… *Defendants*

JUDGMENT

[Contract — Breach]
[Damages — Compensation and damages]
[Damages — Remoteness]
[Damages — Mitigation — Contract]

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v
Lim Boon Chye Victor and others

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31 March 2023 Judgment reserved.

S Mohan J:

Introduction

1 In this action, the plaintiffs claim damages for breach of contract arising out of the defendants' failure to effect a transfer of shares by the contractually stipulated deadline. The defendants deny that they have breached the contract and also mount several arguments as to why the plaintiffs' damages should in any case be limited.

Facts

Background to the dispute

2 The present dispute arises out of a falling-out between three business partners-turned-adversaries – Mr Chia Kuan Wee ("Mr Chia") on one side, and on the other Mr Lim Boon Chye Victor ("Mr Lim") and Mr Murugesan

Srinivasan ("Mr Srinivasan"). Mr Chia is the second plaintiff in this action, while Mr Lim and Mr Srinivasan are the first and second defendants respectively. All three men were directors in the third defendant, Rotating Offshore Solutions Pte Ltd ("ROS"), a Singapore-incorporated company carrying on the business of manufacturing and repairing oil rigs and ocean-going vessels. Individually, they also indirectly held (and continue to hold, in the cases of Mr Lim and Mr Srinivasan) shares in ROS through companies incorporated in the British Virgin Islands ("BVI"). Mr Chia's company, 3N Investments Group Limited ("3N") (of which Mr Chia is the sole shareholder and director) is the first plaintiff.

3 Through their respective BVI companies, Mr Chia, Mr Lim and Mr Srinivasan were equal shareholders in ROS. From 2015 until November 2019, there was a fourth shareholder in ROS – Ezion Holdings Ltd ("Ezion"), a Singapore-incorporated company listed on the Singapore Stock Exchange.[1] Ezion's Chief Risk Officer and Chief Strategy Officer, Mr Cheah Boon Pin ("Mr Cheah"), was a non-executive director of ROS from 1 March 2019 to 30 July 2019.[2] Mr Cheah attempted to play a mediating role between the parties when the disputes arose, albeit unsuccessfully as events (which I shall detail below) unfolded.

4 The last key figure for present purposes is Mr Michael Wong, the Financial Controller of ROS.[3] Owing to the breakdown in relations between Mr Chia on the one hand and Mr Lim and Mr Srinivasan on the other, Mr Wong

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1 Affidavit of Evidence-in-Chief ("AEIC") of Chia Kuan Wee dated 5 January 2022 at paras 17–19 (1BA at pp 9, 10).

2 AEIC of Chia Kuan Wee dated 5 January 2022 at paras 18, 20(b) (1BA at pp 10–11).

3 AEIC of Chia Kuan Wee dated 5 January 2022 at para 20(a) (1BA at p 10).

became the primary point of contact representing the latter two during the relevant period.

5 In or around September 2019, tensions arose between the three directors in relation to the management of ROS. They attempted to resolve their dispute by entering into a settlement agreement on 12 September 2019 (the "12 September Agreement"). This agreement generally delineated the terms of Mr Chia's exit from ROS as a director, employee and shareholder.[4] This attempt ultimately proved to be unsuccessful, and served only to breed further disputes which culminated in the plaintiffs commencing HC/S 1050/2019 against the defendants for minority oppression (the "Minority Oppression Suit").[5] This caused a fracture in the relationship between the directors to the point where Mr Chia was no longer on speaking terms with Mr Lim and Mr Srinivasan.[6]

The Sale and Purchase Agreements

6 After the commencement of the Minority Oppression Suit, the parties embarked on a second attempt to resolve their dispute through negotiations, which culminated in a number of agreements concluded on 15 November 2019 (the "15 November Agreements"). These agreements were (a) a Deed of Settlement providing for full and final settlement of all the parties' disputes, including the Minority Oppression Suit; (b) a Deed of Cessation of Employment; (c) two Sale and Purchase Agreements (the "SPAs"); and (d) a

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4 AEIC of Chia Kuan Wee dated 5 January 2022 at paras 31–32 (1BA at pp 15–16); AEIC of Wong Kong Chen dated 5 January 2022 at paras 46–47 (10BA at pp 5232–5233).

5 AEIC of Chia Kuan Wee dated 5 January 2022 at para 40 (1BA at p 19); AEIC of Wong Kong Chen dated 5 January 2022 at para 56 (10BA at p 5235).

6 AEIC of Chia Kuan Wee dated 5 January 2022 at para 41 (1BA at pp 19–20).

Share Transfer Agreement between ROS and Mr Chia.[7] Pursuant to these agreements, Mr Chia would resign his directorship and employment in ROS and sell his shares in ROS (the "ROS Shares") (held through the first plaintiff) to Mr Lim and Mr Srinivasan.

7 It is apt to note at this point that the 15 November Agreements were expressed to supersede all other agreements including, specifically, the 12 September Agreement.[8] Thus, this court should not have regard to the 12 September Agreement as forming any part of the relevant context within which to interpret any of the 15 November Agreements.

8 The present dispute centres around the two SPAs – the first provided for 3N to sell half its ROS Shares to Mr Lim (the "D1 SPA"), and the second provided for 3N to sell the other half of its ROS Shares to Mr Srinivasan (the "D2 SPA"). All three directors, as well as 3N and ROS, were parties to both the D1 SPA and D2 SPA. The terms of both SPAs were materially identical and each provided for 3N to transfer a specified lot of ROS Shares to the respective purchaser (*ie*, Mr Lim and Mr Srinivasan respectively). As consideration, *each* purchaser was to pay:

(a) S$1,012,500 in cash payable in several tranches (pursuant to cll 3, 4.4(a) and 4.4(c) of each SPA); and

(b) a further S$1,524,072 to be satisfied by the transfer of 5,000,000 shares in Uzma Berhad, a company listed on the Malaysian stock

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7 AEIC of Chia Kuan Wee dated 5 January 2022 at para 52 (1BA at pp 23–24).

8 AEIC of Chia Kuan Wee dated 5 January 2022, Tab CKW-12 at pp 349, 406, 420 (1BA at pp 372, 409, 423).

> exchange (the "Uzma Shares"). The Uzma Shares were to be transferred from the respective purchaser's securities account to Mr Chia's securities account (pursuant to cl 4.4(b) of each SPA).[9]

Thus, pursuant to the D1 SPA and D2 SPA, a total of 10,000,000 Uzma Shares were to be transferred to Mr Chia.

9 As cl 4.4(b) represents the core of the parties' disputes in this case, it is apposite that I set it out in full here:[10]

> (b) an amount of S$1,524,072, to be fully satisfied by the Purchaser transferring the Uzma Shares to CKW [*ie*, Mr Chia]. The Parties shall on the Completion Date, or as soon as practicable thereafter, *take all necessary steps and do all such acts and things to effect the transfer of the Uzma Shares from the securities account of the Purchaser to the securities account of CKW [ie, Mr Chia], by way of an off-market transfer or by such other methods as reasonably practicable, time being of the essence, by 31 December 2019*. The Purchaser will be liable for the share transfer fee of the UZMA shares. ROS hereby agrees and undertakes to do all that is necessary to transfer the Uzma Shares to the Purchaser to enable the Purchaser to comply with his obligations herein; …
>
> [emphasis added]

10 Furthermore, under cl 7 of each SPA, Mr Lim and Mr Srinivasan undertook mutually to procure each other's performance of the other's obligations. ROS also undertook to procure the performance of both SPAs by Mr Lim and Mr Srinivasan respectively. Clause 7 of the D1 SPA is reproduced here; the wording of the D2 SPA is identical except that references to "Victor"

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9 AEIC of Chia Kuan Wee dated 5 January 2022 at paras 59–60 (1BA at pp 26–27); AEIC of Wong Kong Chen dated 5 January 2022 at para 71 (10BA at pp 5241–5243).

10 AEIC of Chia Kuan Wee dated 5 January 2022, Tab 12, at pp 401, 415 (1BA at pp 404, 418).

(the first defendant) are to be substituted with "Srini" (the second defendant), and references to "Srini" are to be similarly substituted with "Victor":[11]

> **7. VICTOR AND ROS TO WARRANT FULL AND DUE PERFORMANCE OF THIS AGREEMENT**
>
> Subject to the Vendor performing all of its obligations under Clause 4.3 of this Agreement, Victor and ROS each hereby agrees, warrants, covenants and undertakes, jointly and severally, to ensure and procure Srini's due and complete performance of Srini's obligations under this Agreement and to fully indemnify and hold the CKW Parties harmless from and against any claims, damages, deficiencies, losses, costs, liabilities and expenses (including legal fees and disbursements on a full indemnity basis) ("Losses") directly or indirectly caused to the CKW Parties resulting directly or indirectly from or arising out of the failure by each of them to ensure and/or procure the same. For the avoidance of doubt, the obligation and/or liability under this clause herein is joint and several. [emphasis in original omitted]

11 As far as the performance of contractual obligations is concerned, it is undisputed that Mr Chia fulfilled his obligations by resigning his employment and directorship in ROS on 15 November 2019, and transferring his ROS shares held through 3N to Mr Lim and Mr Srinivasan on 18 November 2019.[12] It is also not in dispute that the cash component of the consideration under both SPAs was furnished on time by Mr Lim and Mr Srinivasan.[13] What remained was for the Uzma Shares to be transferred to Mr Chia by 31 December 2019 – it was this step which proved to be the stumbling block to closure, both for the deal and for the parties, and which eventually led to the commencement of this action.

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11 AEIC of Chia Kuan Wee dated 5 January 2022, Tab 12, at p 418 (1BA at p 421).

12 AEIC of Chia Kuan Wee dated 5 January 2022 at para 68 (1BA at pp 30–31).

13 Plaintiffs' Closing Submissions ("PCS") at para 18.

The delayed share transfer

12 Some background context to the share transfer process is necessary for a better understanding of the factual topography of this case. Shares in Uzma are listed on the Malaysian stock exchange, known as Bursa Malaysia Securities Berhad ("Bursa"), and are typically transferred within Bursa's automated and computerised securities trading system.[14] However, the case at hand involved a transaction exclusively between the parties (as opposed to one with the market at large) which had to be effected through other methods.

13 There are several such other methods, depending on whether the transfer is pursuant to a trade by private treaty. If it is, then the transaction is done on the exchange by way of a direct business transaction ("DBT"). On the other hand, transfers not pursuant to a trade by private treaty are effected off-market, through the central depository (*ie*, without the involvement of the exchange), by Bursa Malaysia Depository Sdn Bhd ("Bursa Depository"), and may only be done pursuant to certain approved reasons.[15]

14 To carry out the share transfer, the defendants engaged Maybank Investment Bank Berhad ("Maybank IB") to advise and assist them.[16] Maybank IB proposed several methods: (a) a B5 transfer (B5 being a reference to one of the approved reasons for a transaction effected through the central depository, which would be subject to Bursa Depository's approval); (b) a direct business transaction ("DBT") transfer without financial consideration (which would be

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14 AEIC of Adrian Chee dated 5 January 2022, Tab A at p 13, para 15 (12BA at p 6677).

15 AEIC of Adrian Chee dated 5 January 2022, Tab A at pp 12–13, paras 8, 16 (12BA at pp 6676–6677).

16 Defendants' Closing Submissions dated 3 October 2022 ("DCS") at para 11(e); AEIC of Wong Kong Chen dated 5 January 2022 at para 91 (10BA at pp 5249–5250).

subject to Bursa's approval); and (c) a normal DBT transfer with financial consideration.[17]

15 The parties originally intended to use the option of a DBT transfer without financial consideration, to be executed by ROS' securities broker, Maybank Kim Eng.[18] However, Maybank Kim Eng declined to assist with the transaction because ROS was involved in ongoing litigation unrelated to the present dispute.[19]

16 The defendants then decided to attempt a B5 transfer.[20] To effect a B5 transfer, an application form must be submitted to the Bursa Depository, and the reason for the transfer must fall within a prescribed list of approved reasons (which I elaborate on below).[21] Due to several delays which the parties now blame each other for, the B5 transfer application was only submitted on 30 December 2019 (*ie*, one day before the contractual deadline). This application was rejected by Bursa Depository on the same day, on the ground that the reason provided for in the application did not fall within the approved reasons for a B5 transfer.[22]

17 In the wake of the failed B5 transfer, the parties were now beyond the contractually stipulated deadline of 31 Dec 2019, with the Uzma Shares still in

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17 AEIC of Wong Kong Chen dated 5 January 2022, Tab 20 at p 359 (10BA at p 5581).

18 AEIC of Wong Kong Chen dated 5 January 2022 at paras 94, 96 (10BA at pp 5250–5251).

19 AEIC of Wong Kong Chen dated 5 January 2022 at para 104 (10BA at p 5252).

20 AEIC of Wong Kong Chen dated 5 January 2022, Tab 20 at p 357 (10BA at p 5579).

21 AEIC of Adrian Koh dated 5 January 2022, Tab AK-1 at p 10, para 3.1(b) (7BA at p 3858).

22 AEIC of Chia Kuan Wee dated 5 January 2022 at paras 102–103 (1BA at pp 45–46).

ROS' hands. The defendants next attempted a DBT transfer without financial consideration, this time to be executed by Maybank IB.[23] This process was again delayed for several months due to many disagreements between the parties over various matters, as well as the imposition of Movement Control Orders ("MCOs") by the Malaysian Government to prevent the spread of COVID-19 in Malaysia, starting in March 2020. The Uzma Shares were finally transferred to Mr Chia's share trading account on 29 July 2020 (*ie*, close to seven months late),[24] by which time their market value had diminished significantly.[25]

The parties' cases

18 The plaintiffs contend that the defendants breached their absolute obligation under cl 4.4(b) of the SPAs to transfer the Uzma Shares to Mr Chia by 31 December 2019.[26] They argue that even on the defendants' case that the obligation under cl 4.4(b) was only one of reasonable endeavours, the defendants nonetheless failed to exercise reasonable endeavours on account of their acts and omissions leading to the delay in the share transfer.[27]

19 The plaintiffs seek damages assessed with reference to the difference between the market value of the Uzma Shares on the original contractual deadline of 31 December 2019 (when the share price was RM0.97), and the actual transfer date of 29 July 2020 (when the share price was RM0.58). This

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23 AEIC of Wong Kong Chen dated 5 January 2022 at paras 145–153 (10BA at pp 5261–5264).

24 AEIC of Chia Kuan Wee dated 5 January 2022 at para 194 (1BA at p 91).

25 AEIC of Chia Kuan Wee dated 5 January 2022 at paras 196–197 (1BA at p 91–92).

26 PCS at paras 52–53.

27 Plaintiffs' Reply Closing Submissions ("PRCS") at para 11.

amounts to a difference of S$1,295,840.[28] Alternatively, they propose to substitute the value ascribed to the Uzma Shares in the SPAs in place of the market value on 31 December 2019 – by this measure, the damages would amount to S$1,167,204.[29]

20 The defendants deny that they have breached cl 4.4(b) (and cl 7) of the SPAs. They contend that their obligation was only to exercise reasonable endeavours to effect the transfer of the Uzma Shares by 31 December 2019, and that they had in fact done everything reasonable and necessary, and in good faith, to achieve that outcome.[30] Conversely, they say it is the plaintiffs who obstructed the process of effecting the transfer.[31] The defendants further contend that even if they were in breach of the SPAs, any such breaches were waived by the plaintiffs when they granted the defendants multiple extensions of time.[32]

21 In the alternative, the defendants argue that the plaintiffs are not entitled to damages for the diminution in value of the Uzma Shares. The defendants contend that the plaintiffs had in effect obtained specific performance of the share transfer, and should not, through an award of damages, be placed in a better position than they would have been had the shares been transferred by the original deadline of 31 December 2019.[33] They make further arguments to the effect that (a) there was no causal link between their breaches and the plaintiffs'

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28 AEIC of Chia Kuan Wee dated 5 January 2022 at para 198 (1BA at p 92).

29 AEIC of Chia Kuan Wee dated 5 January 2022 at para 200 (1BA at p 93).

30 DCS at para 11(a).

31 DCS at para 11(b).

32 DCS at para 11(i).

33 DCS at paras 10(c)(i), 16(c), 16(d).

alleged loss; (b) the plaintiffs' alleged loss was too remote; and (c) the plaintiffs did not take reasonable steps to mitigate their alleged loss.[34]

Issues to be determined

22 The following issues arise for my determination:

(a) whether the defendants were in breach of the SPAs in failing to transfer or procure the transfer of the Uzma Shares by the contractually stipulated deadline; and

(b) if the defendants were in breach of the SPAs:

(i) whether the plaintiffs are entitled to claim damages measured by the diminution in the value of the Uzma Shares;

(ii) whether the plaintiffs' loss was caused by the defendants' breach;

(iii) whether the plaintiffs' loss was too remote; and

(iv) whether the plaintiffs took reasonable steps to mitigate their loss.

Issue 1: Were the defendants in breach of the SPAs?

Preliminary issue: the structure of the transaction

23 Before discussing the issue of breach proper, I first address the defendant's argument that the allegedly complicated structure of the sale transaction contributed to the delay. The defendants argue that they initially

[34] DCS at paras 10(c)(ii), 10(c)(iii), 16(g), 16(h).

proposed a simple structure of a share buyback in consideration for a transfer of the Uzma Shares to 3N,[35] but that Mr Chia, for "personal tax planning reasons", insisted that the sale be structured such that the shares would be transferred from ROS to himself for no consideration.[36] They argue that this allegedly complex structure was, in effect, the original sin which led to the complications and delays in the transfer of the Uzma Shares.[37]

24 On balance, I do not accept the defendants' arguments. Firstly, I do not find the defendants' version of events to be supported by the contemporaneous evidence. The defendants rely on an email sent by Mr Cheah Boon Pin to Mr Chia on 20 December 2019 to corroborate their case:[38]

> As mentioned in my previous email, we ended up with this structure was due to the simple agreement that all parties signed on 9 Sept. I attached the agreement again for your easy reference. I had proposed to transfer the share *directly to you* from ROS as employment settlement but you rejected due to personal tax issue. [emphasis added]

However, there are several difficulties with this email. For one, the email is dated 20 December 2019, well after the 15 November Agreements were signed. At trial, Mr Wong was also not able to point to any other emails to corroborate this.[39] Although I do not place much weight on this, I note also that Mr Cheah was never called by the defendants as a witness at the trial, and consequently the veracity (and meaning) of his assertions in this email could not be tested.

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35 DCS at para 21; Defence (Amendment No. 3) at para 15A.

36 DCS at paras 22, 24–32.

37 DCS at paras 37–39.

38 DCS at para 30; AEIC of Wong Kong Chen dated 5 January 2022, Tab 8 at p 138 (10BA at p 5360).

39 Certified Transcript (3 Mar 2022) at p 80, lines 1–6.

Moreover, the email itself does not make much sense because it refers to a proposed transfer from ROS "directly to you" (*ie,* to Mr Chia directly). This seems to be at odds with the defendants' alleged original proposal, which was for ROS to transfer the Uzma Shares to *3N*. In fact, the email appears more consistent with the plaintiffs' case that the structure eventually agreed upon was the defendants' creation.

25 The rest of the evidence also suggests that it was the defendants who had proposed the eventual agreed structure. This is evident from the email correspondence between Mr Wong, Mr Chia and Mr Cheah between 2 and 4 November 2019. Mr Wong initially sent an email to Mr Chia (copying Mr Cheah as well) on 2 November 2019 containing proposed terms of settlement and a series of draft documents.[40] Two days later, on 4 November 2019, Mr Wong sent another email containing agreements for a revised transaction structure,[41] and this structure formed the basis for the 15 November Agreements.[42] There was no evidence adduced by the defendants of any other emails in this period that would shed light on the reason for this revision. In his testimony, Mr Wong sought to explain away this gap, on the ground that the three directors' relationship was fractured to the extent that communications about the structure had to be done through phone calls with himself and employees of Ezion.[43] I do not find this to be a sufficient explanation. If relationships were indeed so broken and fractured that parties were no longer on talking terms, then one would expect, to the contrary, that they would want

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40 AEIC of Chia Kuan Wee dated 5 January 2022, Tab CKW-10 at pp 193–194 (1BA at pp 196–197).

41 AEIC of Chia Kuan Wee dated 5 January 2022, Tab CKW-11 at p 311 (1BA at p 314).

42 Certified Transcript (3 Mar 2022) at p 104, lines 13–19.

43 Certified Transcript (3 Mar 2022) at p 111, line 10 – p 112, line 4.

to put their communications down in writing for the record, especially given the fact that the parties were at this point in active litigation against each other in the Minority Oppression Suit.

26 In this regard, Mr Chia has also offered a separate explanation for why the Uzma Shares should have been transferred to him and not 3N, which is that 3N was a company incorporated merely to hold Mr Chia's ROS Shares, and it bears emphasis here that ROS was itself a privately held company. Further, 3N did not have a bank account or a securities trading account.[44] I find this to be a plausible explanation for the structure eventually agreed upon.

27 Therefore, I find that the evidence does not support the defendants' case that the structure eventually agreed was one insisted upon by the plaintiffs. The evidence in fact suggests that it was the defendants themselves who proposed this structure.

28 Secondly, putting aside the question of who proposed the eventual structure, I am not persuaded by the defendants' case that this structure was significantly more complicated than what they had initially proposed. I note first that the defendants' pleadings on this issue appear to be internally contradictory and somewhat confusing. In para 15A of their Defence, the defendants referred to their original proposed structure as one under which the Uzma Shares were to be transferred from ROS to 3N.[45] However, this "straightforward" original structure was subsequently described (at para 31 of their Defence) as having been a direct transfer from ROS *to Mr Chia* (not 3N) as a settlement under his

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44 AEIC of Chia Kuan Wee dated 5 January 2022 at para 62 (1BA at p 28).

45 Defence (Amendment No. 3) at para 15A.

Employment Agreement[46] – this appears to be what Mr Cheah was referring to in his email as set out above at [24], but, more importantly, it is an entirely different structure. At para 33 of their Defence, the defendants then claimed that Mr Chia unilaterally demanded an allegedly complicated structure involving a direct transfer of the Uzma Shares from ROS *to himself* without financial consideration.[47] This again is contradictory, because the "straightforward" structure the defendants had earlier described (at para 31 of their Defence) also involved this same direct transfer without financial consideration. Thus, on their pleadings alone, it appears to me that the defendants have been playing somewhat fast and loose with what they consider complicated, picking and choosing the parts they wish to rely on to make up their case on this allegedly complicated structure.

29 Furthermore, in my view, the available evidence does not support the defendants' case that this element of a share transfer without financial consideration rendered the transaction significantly more complicated than their alleged original proposed structure. Bursa clearly had experience in dealing with such transactions: the presence of established application routes such as the B5 transfer and DBT transfer speaks to this, as do the parties' Malaysian law experts' testimonies of their own individual experience in dealing with such transactions in their respective practices.[48] Neither expert opined that these would have been considered complicated transactions under Malaysian law or practice. Although the defendants' expert, Mr Adrian Chee, took the view that there was uncertainty as to whether Bursa as the regulator would approve an

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46 Defence (Amendment No. 3) at para 31.

47 Defence (Amendment No. 3) at para 33.

48 Certified Transcript (10 March 2022) at p 9, lines 3–22.

application for a particular transaction,[49] this uncertainty in outcome does not of itself mean that the transaction was complicated.

30 Ultimately, however, this argument is, in my view, a red herring and a distraction from the real issue at hand – *viz*, did the defendants breach the SPAs? Even if I accept that the eventual agreed structure of the transaction was something insisted upon by the plaintiffs, and that it was unduly complicated, that does not change the fact that the defendants had *voluntarily* agreed to this structure, with their eyes wide open. It affords no defence at all for the defendants, in the wake of their failure to transfer the shares by 31 December 2019, to point fingers at the plaintiffs and *in effect* complain that they should never have agreed to the structure in the SPAs in the first place. Unfortunately, that ship has sailed for the defendants.

31 Having disposed of the defendants' arguments on this ultimately inconsequential issue, I move on to address the core questions relating to breach.

The defendants had an absolute obligation to transfer the Uzma Shares by 31 Dec 2019

32 The first question to be answered is the nature of the defendants' obligations under cl 4.4(b) and cl 7 of the SPAs. The defendants submit that the SPAs did not impose on them an absolute duty to effect the transfer of the Uzma Shares by 31 December 2019. Instead, they say that their duty was one of reasonable endeavours: to take all reasonable steps in good faith to procure the transfer.[50] They argue that, in the circumstances, they have discharged this duty.

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49 AEIC of Adrian Chee dated 5 January 2022, Tab A at p 15, para 23 (12BA at p 6679).

50 DCS at paras 40–48.

33 Before I deal with the merits of the defendants' contention, there is firstly a procedural hurdle to be addressed, which is that the defendants' case on the requirement of cl 4.4(b) was not properly pleaded. Parties must set out in their pleadings the relevant facts, or allegations of fact, and the applicable points of law in support of their respective claims, counterclaims, defences and replies: *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*V Nithia*") at [34]. Having set out its case in the pleadings, a party is generally bound by those pleadings: *V Nithia* at [38]. If a party seeks to change its case, then the pleadings must accordingly be amended to give fair notice to the other parties in the litigation.

34 In my judgment, the defendants here have not abided by these rules of engagement. In their Defence, the defendants' pleaded case was only that they had taken "all necessary steps to discharge their obligations" pursuant to cl 4.4(b).[51] No reference was made in the Defence to the defendants having done "everything reasonable and necessary, in good faith", or that cl 4.4(b) only required that of them. Nor could such a case be implied from the pleadings, given that that was not the language of the clause.[52] If the defendants seek to rely on this interpretation of cl 4.4(b) and argue that they were only required to undertake reasonable endeavours to transfer the Uzma Shares by 31 December 2019, then they should have made this case clearly and unambiguously in their pleadings.

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51 Defence (Amendment No. 3) at paras 22(e), 25, 26(c).

52 PRCS at para 8.

35 In any case, I find the defendants' interpretation of cl 4.4(b) as encompassing a duty of reasonable endeavours to be without merit. In support of their submission, the defendants rely on *Lim Sze Eng v Lin Choo Mee* [2019] 1 SLR 414 ("*Lim Sze Eng*"), which they say stands for the proposition that an obligation to "do all that may be necessary" in effect imposes only a duty to take all reasonable endeavours or best endeavours to discharge one's contractual obligations. They further rely on *Travista Development Pte Ltd v Tan Kim Swee Augustine* [2008] 2 SLR(R) 474 ("*Travista*") as authority to the effect that this duty is discharged upon their doing everything reasonable in good faith with a view to obtaining the required result within the time allowed.[53]

36 In my view, the defendants have taken both cases out of context. In *Lim Sze Eng*, both parties had pleaded that the settlement agreement in that case contained an implied term that the parties "shall take reasonable endeavours and/or do all that may be necessary to give effect to the spirit and intent of the [settlement agreement] and to implement the terms of the [settlement agreement]" (*Lim Sze Eng* at [23]). It was in that context that the court made the remarks which the defendants now rely on. *Travista*, on the other hand, concerned the interpretation of a clause which expressly provided that the purchaser of property was to use his best endeavours to obtain regulatory approval for the transaction (*Travista* at [3] and [12]). However, the case at hand is different because cl 4.4(b) stipulates that parties were to "take all necessary steps and do all such acts and things" to effect the transfer of the Uzma Shares – *time being of the essence* – by 31 December 2019 (see [9] above). The wording of the clause points clearly towards the defendants' obligation being absolute.

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53 DCS at paras 42–45.

37 Furthermore, the background context to the conclusion of the SPAs in this case cannot be ignored. The SPAs were entered into on the back of a fractured relationship, between parties who were already engaged in litigation. The transfer of the ROS Shares from Mr Chia to Mr Lim and Mr Srinivasan and the corresponding payment of the price (including the transfer of the Uzma Shares) would achieve closure for the parties and draw a line under their fractious relationship. The steps were to be taken quickly, hence the emphasis on time being of the essence in cl 4.4(b) itself. Furthermore, the SPAs were drafted with the benefit of legal advice.[54] If the parties intended the obligation to be only one of reasonable or best endeavours, then one would have, in these circumstances, expected express language to that effect in the SPAs.

38 In my judgment, all of these indicia and the express language of cl 4.4(b) point irresistibly to the conclusion that the defendants were under an absolute obligation to effect the transfer of the Uzma Shares by 31 December 2019, and I so find.

39 Accordingly, the defendants were, in my judgment, in breach of their obligations under cl 4.4(b) of the SPAs in failing to effect the transfer of the Uzma Shares to Mr Chia by 31 December 2019.

Even if the defendants only had an obligation of reasonable endeavours, they have breached that obligation

40 As I have found that the defendants were in breach of their absolute obligation under the SPAs as of 31 December 2019, it is strictly unnecessary for me to go further into subsequent events for the purposes of this issue. However,

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[54] Certified Transcript (3 Mar 2022) at p 111, lines 19–25; p 112, lines 1–4.

as the defendants have based their arguments substantially on their conduct during this entire period, I shall nonetheless give my views on them.

41 The defendants' arguments in the main can be reduced to two key propositions: first, that it was reasonable for them to follow the advice of Maybank IB throughout the entire transaction process, and second, that the plaintiffs had on multiple occasions caused delay by their own obstructive behaviour. I will address these propositions in relation to each phase of the transaction process.

42 The starting point is the appointment of Maybank IB itself. As mentioned above (at [14]), the defendants first engaged Maybank IB to advise on and assist with the transaction. The defendants argue that Mr Chia never objected to this appointment, and that the plaintiffs never pleaded that Maybank IB was unreliable or incapable. They contend that this was in fact a *joint* appointment of Maybank IB to act on behalf of all parties.[55]

43 On this last contention, I find that the defendants have not proven on the balance of probabilities that Maybank IB was acting jointly for the plaintiffs as well. Looking at the structure of the transaction as agreed in the SPAs, the plaintiffs had already completed their obligations by 18 November 2019, when the ROS Shares were transferred to Mr Lim and Mr Srinivasan. The remaining obligations requiring active steps (*ie*, making the cash payments and transferring the Uzma Shares) were solely the defendants'. As such, the plaintiffs would have nothing to gain from or any reason to agree to a joint appointment of Maybank IB. Furthermore, no representative of Maybank IB was called to give

[55] DCS at paras 49–56.

evidence at trial, nor were any documents tendered by the defendants to show that Maybank IB had been appointed by and acted for both the defendants and plaintiffs. I therefore disagree with the defendants' contention that Maybank IB had been appointed jointly by and acted for all parties, as the evidence does not bear this out.

44 I move on to examine the key question – was it reasonable for the defendants to follow the advice of Maybank IB throughout the entire process? In answering this question, I bear in mind the context behind this transaction. Both sides wanted to close the deal by 31 December 2019, draw a line under their disputes and move on with their lives. It was Mr Chia's evidence that he wanted to sell the Uzma Shares as soon as possible to raise cash to compete with ROS after his exit.[56] The parties further agreed in cl 4.4(b) that time was of the essence. Given this context, was it reasonable for the defendants to simply appoint Maybank IB and leave the entire transfer process to them?

The B5 transfer

45 In answering this question, I begin with the first stage in the sequence of events – the failed B5 transfer (see [14] above). Some explanation of the B5 transfer application is necessary. The reasons under the B5 category have been helpfully set out by the plaintiffs' expert, Mr Adrian Koh, as follows:[57]

> … Pursuant to Appendix 67 of the CDS Manual for ADA, the following reasons for transfers are classified under the B5 Category:
>
> (i) Corporate activities which arise in circumstances including, but not limited to, (A) transfers approved pursuant to Part

56 Certified Transcript (1 Mar 2022) at p 101, lines 16–23.

57 AEIC of Adrian Koh dated 5 January 2022, Tab AK-1 at pp 10–11, para 3.1.1(d) (7BA at pp 3858–3859).

> IV of the Capital Markets and Services Act 2007, (B) acquisition of securities by way of share swap, (C) allocation of securities approved by the Ministry of Trade and Industry or Ministry of Finance or Economic Planning Unit of the Prime Minister's Department, (D) mergers of companies and (E) to effect payment of dividends by way of distribution of securities of companies listed on a stock exchange.
>
> (ii) Death, bankruptcy, winding-up or de-registration of a depositor.
>
> (iii) Pursuant to any provisions of any written law or order of courts of competent jurisdictions.
>
> (iv) Rectification of error as permitted by Bursa Depository.
>
> (v) Other reasons which do not fall under the subparagraphs (i) – (iv) above provided that such reasons do not fall within the reasons stipulated under Annexure III of Appendix 67.

For present purposes, only the first and fifth categories are relevant. I refer to these as the "Other corporate activities" category and the "Others" category respectively.

46 After being engaged by the defendants, Maybank IB advised on various options for the intended transfer and, as the defendants point out, advised that a B5 transfer be attempted first.[58] The defendants followed this advice and accordingly proceeded with a B5 transfer application to obtain the requisite approval from Bursa Depository. The stipulated reason (to be precise, the box checked off in the B5 transfer application form, presumably on Maybank IB's advice), was "Other corporate activities". In the box titled "Description of Transfer Request", the explanation given was: "To effect payment of dividends by way of distribution of securities of companies listed on a stock exchange

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[58] DCS at para 69; 15AB at p 10149 (Transcript of tele-conference call between, among others, Maybank IB, Michael Wong and Cheah Boon Pin).

(dividend in specie)".[59] The defendants say that there was no reason to doubt Maybank IB's advice at the time, and that the plaintiffs again raised no objection to the advice given.[60] As stated above (at [16]), the B5 transfer application was rejected by Bursa Depository.

47 The defendants seek to further justify their initial decision to proceed with a B5 transfer application in two ways. Firstly, they rely on Mr Adrian Chee's expert evidence that (a) a B5 transfer application could have succeeded if it was made under the "Others" category instead of the "Other corporate activities" category which was in fact selected;[61] and (b) the B5 transfer application under the "Other corporate activities" category could possibly have succeeded had Bursa not taken a "very plain view" that the recipient of the Uzma Shares (*ie*, Mr Chia), was not at the time of the application a shareholder of ROS anymore.[62] Second, the defendants argue that there is some uncertainty as to whether the erroneous choice of "Other corporate activities" was the principal reason for Bursa's rejection of the application.[63]

48 In my view, none of these arguments assists the defendants. First, in relation to the defendants' argument that the B5 transfer application could have succeeded if it was made under the "Others" category, I agree with the plaintiffs' submission that this was irrelevant and speculative – "Others" was *not* the category specified in the actual application, nor was it the category that Maybank IB had advised the parties to use. Mr Chee's opinion that the

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59 7AB at pp 4485–4486.

60 DCS at paras 70–71.

61 DCS at para 71(b); Certified Transcript (10 Mar 2022) at p 53, lines 11–15.

62 DCS at para 74.

63 DCS at para 75.

application under the "Other corporate activities" category could have worked but for the regulator's "very plain view" was equally speculative, and accordingly I place no weight on it.

49 Secondly, contrary to what the defendants contend, I find on balance that the erroneous choice of the "Other corporate activities" category was likely to have been the reason why the B5 transfer application was rejected by Bursa. This comports with the reason given by Bursa, as communicated to the parties by Maybank IB:[64]

> We have reviewed the documents you provided us and we regret to inform that the application is not within the Approved Reason for Transfer – B5.

50 Both the plaintiffs' and defendants' Malaysian law experts were in agreement that a B5 transfer application under the "Other corporate activities" category was generally not the appropriate method to adopt.[65] This alone suggests that either Maybank IB or the particular officers acting for the defendants were either inexperienced in such off-market transactions or had in this instance given the wrong advice on a fairly fundamental point.

51 Whatever the case may be, when the B5 transfer application was rejected on 30 December 2019 (the very same day it was submitted to Bursa for approval), this should have raised alarm bells for the defendants, especially given that time was of the essence. If that was not enough, alarm bells should undoubtedly have rung on 3 January 2020, when the plaintiffs, through their lawyers, sent a letter of demand to the defendants – it would have been clear to

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64 AEIC of Wong Kong Chen dated 5 January 2022, Tab 27 at p 529 (10BA at p 5751).

65 Joint List of Experts' Agreements & Disagreements at S/N 1(a); DCS at para 73.

the defendants then that Mr Chia was taking the deadline seriously and there was every danger of the dispute escalating again.[66] At that point, it should have dawned on the defendants that they might have needed further help – and by this, I mean help beyond Maybank IB's capabilities – in order to complete the transaction quickly. For example, they should have taken steps to get a second opinion on Maybank IB's advice or instruct Malaysian lawyers to advise them on the next steps and the options to get the Uzma Shares transferred to Mr Chia. The value of such advice is clear enough – on the evidence of the plaintiffs' Malaysian law expert, Mr Adrian Koh, a DBT transfer was the appropriate method to effect the transfer.[67] Further, both parties' experts did not express any view that a DBT transfer was a very complicated option. While Mr Chee opined that there was some "regulatory uncertainty" with this method, that uncertainty (which pertained to the *outcome*) does not mean that the *process* was complicated.[68] In my judgment, the DBT was clearly the appropriate route to take from the beginning – it was in fact the transfer method that was eventually approved by Bursa on 22 July 2020.[69] Had the defendants obtained proper advice on this, it would likely have saved the parties a considerable amount of time and trouble.

52 I note that the defendants did subsequently engage Malaysian lawyers from Shearn Delamore & Co to assist with the transaction, but even then it was only for the limited purpose of preparing a letter to Bursa detailing the sequence

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66 AEIC of Wong Kong Chen dated 5 January 2022 at para 156 (10BA at pp 5264–5265, 5817–5818).

67 AEIC of Adrian Koh dated 5 January 2022, Tab AK-1 at p 13, para 4.1(d) (7BA at p 3861).

68 AEIC of Adrian Chee dated 5 January 2022, Tab A at p 15, para 23 (12BA at pp 6678–6679).

69 AEIC of Wong Kong Chen dated 5 January 2022 at para 175(f) (10BA at p 5276).

of events.[70] This aside, the defendants continued to be content with following Maybank IB's lead throughout the entire process.

53 Therefore, even if I agree with the defendants that their initial reliance on Maybank IB was justified and reasonable, I find their decision to continue relying almost entirely on them – against the backdrop of the parties' fraught relationship, time being of the essence, and Bursa's prompt rejection of the B5 transfer application the very same day it was submitted – to be unreasonable. Thus, even on a reasonable endeavours basis, the defendants have not satisfied me, on the balance of probabilities, that they fulfilled their obligations.

54 Separately, I note the defendants' argument that the B5 transfer application process was delayed by Mr Chia's obstructive conduct. The defendants contend that on or around 11 December 2019, they sent Mr Chia a "revised Sale and Purchase Agreement" to execute for purposes of the transfer. This was apparently done on the advice of Maybank IB that the signed SPAs which formed part of the 15 November Agreements might have been inadequate.[71] However, Mr Chia refused to do so and instead allegedly nit-picked at the draft and accused the defendants of being sloppy with the documentation.[72] The defendants say that this impeded the transfer process.[73]

55 I do not find Mr Chia's conduct to be unreasonable at all in the circumstances. Mr Wong's evidence is that he had sent the Share Transfer

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70 AEIC of Wong Kong Chen dated 5 January 2022 at para 162 (10BA at p 5266).

71 AEIC of Wong Kong Chen dated 5 January 2022 at paras 121–128 (10BA at pp 5255–5256).

72 DCS at para 95; AEIC of Wong Kong Chen dated 5 January 2022 at paras 127–141 (10BA at pp 5256–5260).

73 DCS at para 96(c).

Agreement (which was a single-page document) to Maybank IB for review on 15 November 2019, and it was this document which Maybank IB advised was inadequate for the purposes of the B5 transfer application.[74] At this point, the defendants had not shared the executed SPAs with Maybank IB.[75] However, instead of then sending the executed SPAs to Maybank IB, they opted simply to leave them aside and instead ask Mr Chia to sign a completely different contract, which was not a document drafted with the benefit of legal advice like the SPAs, but a template downloaded from the internet.[76] The defendants say that they had only done so in accordance with Maybank IB's advice, but in my view they are not entitled to raise that as a shield, given that they had failed to even apprise Maybank IB of the full picture. Given that the 15 November Agreements were already in place, I do not find it unreasonable at all that Mr Chia chose to act with caution to protect his legal interests. Further, all this ultimately amounted to nothing, since the template agreement was never used.[77]

56 The defendants also raised the fact that Mr Chia had caused delay by failing to send copies of the SPAs signed in his personal capacity (which he only sent on 7 February 2020).[78] This was an issue originally highlighted to Mr Chia by the defendants in an email dated 27 December 2019.[79] However, I agree with Mr Chia's evidence that this email contained no request for him to send the

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74 AEIC of Wong Kong Chen dated 5 January 2022 at paras 102, 123 (10BA at pp 5252, 5255).

75 AEIC of Chia Kuan Wee dated 5 January 2022 at paras 95–96 (1BA at p 43).

76 AEIC of Wong Kong Chen dated 5 January 2022, Tab 25 at p 459 (10BA at p 5681).

77 AEIC of Chia Kuan Wee dated 5 January 2022 at para 97 (1BA at pp 43–44).

78 AEIC of Wong Kong Chen dated 5 January 2022 at para 165, s/n (n) (10BA at p 5269).

79 AEIC of Chia Kuan Wee dated 5 January 2022, Tab CKW-118 at p 3456 (6BA at p 3459).

signed SPAs.[80] Thus, I do not find this to be an act of obstruction on the part of Mr Chia.

The DBT transfer

57 I now move on to the second stage in the sequence of events – the DBT transfer. The defendants argue that after the rejection of the B5 transfer application, they immediately arranged a conference call with Maybank IB to discuss the next steps, heeded Maybank IB's advice to proceed with a DBT transfer without financial consideration, and took active steps to prepare the required supporting documents. This included Maybank IB's advice to defer making the application from April 2020 (at which time MCOs had been imposed in Malaysia) until such time a physical meeting with Bursa officials could be held.[81] The defendants point out, on the other hand, that the plaintiffs were obstructive throughout the process. They allege, amongst other things, that the plaintiffs had through their lawyers sent multiple letters of demand which distracted the defendants from working on the DBT application, and that Mr Chia refused to sign the required documents and instead made incessant queries about them (either by himself or through his Malaysian lawyer at the time, Ms Bhuvaneswary Supramaniam ("Ms Bhuvaneswary").[82]

58 I first address the arguments in respect of the preparation of the required documents. Having reviewed the evidence, including the correspondence between the parties during this period, it is clear to me that *all parties* must share

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80 AEIC of Chia Kuan Wee dated 5 January 2022 at para 204 (1BA at p 95).

81 DCS at paras 79–93; AEIC of Wong Kong Chen dated 5 January 2022 at paras 147–155 (10BA at pp 5262–5264).

82 DCS at paras 95(c)–(d); AEIC of Wong Kong Chen dated 5 January 2022 at para 165 (10BA at pp 5267–5273).

some blame in so far as communications became argumentative and terse – it was clear that tensions between both camps was still high. However, taking a step back, the parties were at this time dealing with *legal documents* to be submitted to Bursa for regulatory approval. These included documents which would directly affect their legal rights and obligations – for example, Mr Chia was required to execute a letter of undertaking and indemnity in favour of Bursa.[83] Naturally, one would expect some amount of discussion back and forth between the parties on the purpose and content of such documents for the purpose of protecting their legal and commercial interests. It was therefore not unreasonable or obstructive for Mr Chia and/or his Malaysian lawyer to make queries and/or to comment on the documents sent by the defendants and Maybank IB. The defendants, for their part, had on some, albeit not all, occasions either refused to address those queries directly or simply deflected them to Maybank IB instead.[84] In my view, the bickering and hostilities that ensued in this process could have been mitigated at least partially, if not substantially, had the defendants engaged lawyers in Malaysia to advise them on the transaction and handle it on their behalf.

59 As for the defendants' complaint about the letters of demand sent by the plaintiffs, any delay occasioned by the defendants having to respond to them would, in my view, be inconsequential in the overall scheme, especially in comparison to the almost seven months of delay which ultimately occurred. In any case, it was well within Mr Chia's legal rights to instruct his lawyers to send letters of demand to state his position for the record or simply to preserve his rights – I will come back to this again when I address the issue of waiver.

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83 AEIC of Chia Kuan Wee dated 5 January 2022 at para 105(d) (1BA at p 48).

84 AEIC of Wong Kong Chen dated 5 January 2022, Tab 33I at p 851 (11BA at p 6073).

60 Turning back to the DBT application, the more significant delay to this process arose from the decision taken by the defendants – in accordance with Maybank IB's advice – to delay the application to Bursa in light of the imposition of MCOs in Malaysia. On the defendants' case, Maybank IB had advised them that in view of the complicated structure of the transaction, it was necessary to have a physical face-to-face meeting with Bursa's representatives to explain the circumstances of the transaction. The defendants contend that because of the MCOs imposed by the Malaysian Government, Maybank IB was unable to meet with Bursa on their behalf. Accordingly, the defendants decided to postpone making the DBT application until such a physical meeting could be conducted.[85] That meeting only occurred on 22 July 2020, almost seven months after the contractual deadline.[86] The defendants insist that this was a reasonable course of action to take given Maybank IB's advice that Bursa would not likely consider re-submissions if the application was unsuccessful on the first attempt.[87]

61 I do not accept that the MCOs posed any real obstacles to the defendants obtaining Bursa's approval for the DBT transfer. The defendants' case, as pleaded in their Defence, hinges on their assertion that Maybank IB officers were unable to meet Bursa representatives due to the MCOs.[88] They rely on an email from a representative of Maybank IB to support their case:[89]

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85 AEIC of Wong Kong Chen dated 5 January 2022 at paras 170–175 (10BA at pp 5274–5276).

86 AEIC of Wong Kong Chen dated 5 January 2022 at para 175(f) (10BA at p 5276).

87 DCS at paras 90, 92; AEIC of Wong Kong Chen dated 5 January 2022, Tab 35 at p 1278 (12BA at p 6500).

88 Defence (Amendment No. 3) at para 45.

89 AEIC of Wong Kong Chen dated 5 January 2022, Tab 35 at p 1278 (12BA at p 6500).

> … I've spoken to my head of operation which both of us would recommend the submission to be done after the MCO is uplifted as this would allow me the opportunity to explain to the approving parties personally where it is natural bias to reject request that have a certain complexity. Resubmission on the same terms are also highly discouraged by the regulators.

62 In my judgment, the defendants have not made out, on a balance of probabilities, that a meeting with Bursa representatives was entirely impossible. First, the Maybank IB officer who authored the email quoted above was not called to give evidence, nor was any other representative of Maybank IB. Thus, the assertions in this email could not be tested at trial to determine the basis on which they were made. On the face of this email, it appears to me that Maybank IB's insistence on a physical meeting was borne out of an abundance of caution, especially since the B5 transfer application that they had recommended in December 2019 had already been rejected by Bursa. However, Maybank IB did not appear to have even considered or advised the defendants on the possibility of arranging virtual meetings or tele-conferencing with Bursa representatives.

63 It is certainly not the case that such remote meetings with Bursa were not possible during the currency of the MCOs. It was the consistent evidence of both parties' Malaysian law experts that firstly, Bursa was operating as normal notwithstanding the MCOs,[90] and secondly, that Bursa did *not* require or mandate that meetings be conducted face-to-face.[91] This was also corroborated by Ms Bhuvaneswary (who was called by the plaintiffs as a witness of fact) in so far as she had obtained confirmation during a telephone call with a Bursa official that Bursa had been encouraging parties to meet via video conferencing

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90 Certified Transcript (10 Mar 2022) at p 117, lines 7–8; p 120, lines 13–17.

91 Certified Transcript (10 Mar 2022) at p 106, lines 24–25; p 107, lines 1–11; p 111, lines 2–9; p 113, lines 17–22.

rather than physically especially whilst the MCOs were in force.[92] I note that Ms Bhuvaneswary's evidence on this point is hearsay evidence, but I nonetheless admit it under s 32(1)(*j*)(iii) of the Evidence Act 1893 (2020 Rev Ed) on the ground that Bursa had indicated that it would not permit its representatives (who were based in Malaysia) to give evidence at the trial.[93] While I have not accorded full weight to Ms Bhuvaneswary's evidence on account of it being hearsay, I have no reason to disbelieve it, and it is nonetheless consistent with the evidence given by the Malaysian law experts.

64 Therefore, I find that the defendants have not proven on a balance of probabilities that the MCOs prevented Maybank IB's representatives from meeting with Bursa officials, *whether physically or otherwise*. It is more likely than not that the insistence on a physical meeting with Bursa was a matter of preference on the part of Maybank IB's representatives. Bearing in mind the circumstances here, and in particular that time was of the essence, I find that it was unreasonable for the defendants to simply follow Maybank IB's advice and delay their submission of the DBT application for a further three months.

65 In summary, even if I accept the defendants' case that they were only obliged to use reasonable endeavours to transfer the Uzma Shares, I find that, on the evidence as discussed above, the defendants' conduct demonstrated that they did not in fact use such reasonable endeavours. Thus, even on the defendant's case, I would find the defendants to be in breach of cl 4.4 of the SPAs.

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92 AEIC of Bhuvaneswary Supramaniam dated 28 December 2021 at para 35 (7BA at p 3787).

93 PCS at paras 37–38; Supplementary AEIC of Chia Kuan Wee dated 18 February 2022 at para 5.

There was no waiver of breach by the plaintiffs

66 Lastly, I note that the defendants have pleaded that the plaintiffs had waived any breaches by the defendants by granting various extensions of time for the transfer of the Uzma Shares. The defendants pleaded four occasions where extensions were granted by the plaintiffs through their solicitors: (a) on 3 January 2020, granting an extension until 10 January 2020; (b) on 6 January 2020, granting an extension until 14 January 2020; (c) on 16 January 2020, granting an extension until 24 January 2020; and (d) on 29 March 2020, granting an extension until 6 April 2020.[94] The defendants, in their closing submissions, made brief mention of this and did not appear to be pursuing this line of argument seriously. However, I will address this point for completeness.

67 While this argument was not made clearly in closing submissions, the defendants appear to rely on a waiver by estoppel, which refers to the doctrine of promissory estoppel. That is, the plaintiffs, in granting multiple extensions of time, had in effect represented that they would not be insisting upon their legal right to timely delivery of the Uzma Shares against the defendants, and the defendants had relied upon these representations such that it would be inequitable for the plaintiffs to resile on them. However, the law is clear that an *unequivocal* representation is required: *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [57]. In this case, each and every extension agreed to by the plaintiffs was made *expressly* without prejudice to their rights to claim diminution in the value of the shares.[95] On this basis alone,

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94 Defence (Amendment No. 3) at paras 40(q2), 40(r), 40(t), 40(aa), 42.

95 AEIC of Chia Kuan Wee dated 5 January 2022, Tab CKW-49 at p 1801 (4BA at p 1804); Tab CKW-50 at pp 1804–1805 (4BA at pp 1807–1808); Tab CKW-56 at p 1905 (4BA at p 1908); Tab CKW-85 at p 2649 (5BA at p 2652).

I find that there was no unequivocal representation by the plaintiffs that they were giving up or waiving their claims to damages (if any) for the defendants' breach.

Conclusion on breach

68 For the foregoing reasons, I find that the defendants breached the SPAs when they failed to transfer the Uzma Shares on 31 December 2019. This breach was not waived by the plaintiffs granting the defendants extensions of time to complete the transfer.

Issue 2: Can the plaintiffs claim for loss by reference to diminution in share value?

69 The defendants' breach of the SPAs having been established, I turn to the question of what, if any, damages ought to be awarded to the plaintiffs. As I have stated above at [19], the plaintiffs claim for the diminution in the value of the Uzma Shares between the original contractual transfer date of 31 December 2019 and the actual transfer date of 29 July 2020.

70 The defendants contend that an award of damages for diminution in share value will place the plaintiffs in a better position than they would be if the contract was performed. In other words, they argue that the plaintiffs would be getting a windfall.[96]

Preliminary point – the value of the Uzma Shares

71 As a preliminary point, I will first address two assertions made by the defendants in the course of their arguments, which I set out here:

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[96] DCS at paras 99–111.

(a) the value ascribed to the Uzma Shares in the SPAs was only a "notional" or "nominal" figure inserted as a matter of formality;[97] and

(b) the plaintiffs were never interested in the value of the Uzma Shares but only in possessing the shares themselves for Mr Chia's commercial benefit.[98]

72 In my judgment, the first assertion holds no water. First, the defendants do not contend that the Uzma Shares carry no value at all. The SPAs were structured such that Mr Chia would transfer his ROS Shares (held through 3N) to Mr Lim and Mr Srinivasan, in return for consideration which was *partly in cash and partly in kind*. The value ascribed to the Uzma Shares represented the balance of the consideration to be "paid" by Mr Lim and Mr Srinivasan after taking into account the cash components – that is the plain and clear meaning of cl 2.2, cl 3 and cl 4.4 of each SPA, the material parts of which I set out below:[99]

> **2. SALE AND PURCHASE**
>
> …
>
> 2.2 The purchase consideration for the Sale Shares shall be *an aggregate amount of S$2,536,572*, to be paid in accordance with the terms and conditions of this Agreement.
>
> **3. PAYMENT AT THE TIME OF EXECUTION OF THIS AGREEMENT**
>
> The Purchaser shall make *payment of the sum of S$112,500 to CKW* [*ie*, Mr Chia] *within 10 Business Days by*

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97 Defence (Amendment No. 3) at paras 19–21; Defendants' Opening Statement at para 4.

98 DCS at para 105; Defence (Amendment No. 3) at para 21A.

99 AEIC of Chia Kuan Wee dated 5 January 2022, Tab CKW-12 at pp 400–401, 414–415 (1BA at pp 403–404, 417–418).

> *way of Cheque* naming CKW [*ie*, Mr Chia] as the payee thereof from the date of the execution of this agreement. …
>
> **4. COMPLETION**
>
> …
>
> 4.4 Further to the payment set out in Clause 3 above, *the Purchaser shall pay to the Vendor*:
>
> (a) *an amount of S$500,000 within 10 Business Days from the date of the execution of this agreement, by way of cheque* naming CKW [*ie*, Mr Chia] as the payee thereof. …
>
> (b) *an amount of S$1,524,072, to be fully satisfied by the Purchaser transferring the Uzma Shares to CKW [ie, Mr Chia].* The Parties shall on the Completion Date, or as soon as practicable thereafter, take all necessary steps and do all such acts and things to effect the transfer of the Uzma Shares from the securities account of the Purchaser to the securities account of CKW [ie, Mr Chia], by way of an off-market transfer or by such other methods as reasonably practicable, time being of the essence, by 31 December 2019. The Purchaser will be liable for the share transfer fee of the UZMA shares. ROS hereby agrees and undertakes to do all that is necessary to transfer the Uzma Shares to the Purchaser to enable the Purchaser to comply with his obligations herein; and
>
> (c) *an amount of S$400,000, to be satisfied by way of 8 monthly instalments of S$50,000 each…*
>
> [emphasis added]

73 It is clear from cl 4.4(b) as quoted above that the sum of S$1,524,072 was to be paid by way of a transfer of the Uzma Shares from Mr Lim and Mr Srinivasan. This value was not notional or nominal. The defendants rely on the fact that the value ascribed to the Uzma Shares in cl 4.4(b) was the book value of the shares as recorded in ROS' audited accounts as at 31 March 2019, as opposed to the market value of the shares as at the date of the SPAs.[100] However, Mr Chia's evidence was that the combined value of the Uzma Shares

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100 Defence (Amendment No. 3) at para 18(b).

at book value and the agreed cash components would be roughly equivalent to the total compensation package he had claimed under the settlement – including the divesting of his ROS shares. The use of the book value would obviate the need to account for market fluctuations in the price of the shares. Thus, Mr Chia was prepared to go with this payment structure.[101] While the defendants utilise this payment structure as a point to make their second assertion as to Mr Chia's interest in the value of the shares (which I discuss below), they do not dispute Mr Chia's evidence in so far as it relates to the use of the book value of the ROS Shares to arrive at the sale price.

74 Mr Chia's explanation of the payment being partly in cash and partly in kind also accords with the commercial sensibilities of the transaction. It was Mr Chia's evidence that Mr Lim and Mr Srinivasan did not have sufficient cash to purchase the ROS Shares at his valuation.[102] This was not disputed by the defendants at trial. It would likely also have impacted ROS' cashflow if Mr Lim and Mr Srinivasan used ROS' cash assets to make up for the shortfall. This would also explain the final agreed transaction structure, *ie*, for ROS to transfer the Uzma Shares to Mr Lim and Mr Srinivasan *in specie*, followed by a transfer from them to Mr Chia. All of this undermines the defendants' assertion that the value ascribed to the Uzma Shares was merely notional or nominal. Instead, it represented the closest monetary equivalent to the payment of the balance of the sale price under the SPAs, after accounting for the cash components.

75 Thus, I disagree with the defendants to the extent that they seek to assert that the valuation of the shares in the SPAs was nothing more than a notional or

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101 AEIC of Chia Kuan Wee dated 5 January 2022 at paras 48–49, 61 (1BA at pp 22–23, 27–28); PRCS at para 47.

102 AEIC of Chia Kuan Wee dated 5 January 2022 at para 34 (1BA at pp 16–17).

nominal figure. I am satisfied that Mr Chia has provided a logical explanation for the use of the book value of the ROS Shares, and this explanation was not undermined by the defendants at trial.

76 As for the defendants' second assertion that Mr Chia was only interested in the Uzma Shares themselves and not their value, I find this difficult to understand. First, Mr Chia may have wanted the Uzma Shares, but that did not mean he could not convert them to cash as and when required. Again, the defendants do not contend that the shares had no value. Second, the defendants' assertion is also contradicted by the evidence. Mr Chia gave evidence at trial that he had intended to sell the Uzma Shares for cash as soon as possible.[103] This is consistent with his subsequent conduct: he had in fact sold some of his Uzma Shares in several tranches from August 2020 to April 2022.[104] If Mr Chia was only interested in possessing the Uzma Shares in themselves, then he would not have sold them at all.

77 Having dealt with the assertions at [71], I come back to consider the question of whether the plaintiffs are entitled to claim for a diminution in the value of the shares.

The plaintiffs are entitled to claim for diminution in share value

The defendants' arguments

78 The basic principle for recovery of damages for a breach of contract is compensation. The claimant is, as far as money can do it, to be placed in the same position as if the contract had been performed: *Chitty on Contracts*

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103 Certified Transcript (1 Mar 2022) at p 93, lines 6–10.

104 Affidavit of Chia Kuan Wee dated 29 April 2022, Tab CKW-1 at p 8.

(Hugh G Beale gen ed) (Sweet & Maxwell, 34th ed, 2021) ("*Chitty*") at para 29–001.

79 In the present context of a delayed transfer of shares, the usual position is set out in James Edelman, *McGregor on Damages* (Sweet & Maxwell, 21st ed, 2021) ("*McGregor*") at para 4–008:

> Where the breach concerned is a delayed transfer of property, *the normal loss recoverable is the market value at the date of due delivery less the market value at the date of actual delivery.* The prime example is once again the sale of goods, and again will apply to hire and hire-purchase of goods, to *sale of stocks and shares*, and today to all sales and leases of land.
>
> [emphasis added]

80 However, the defendants contend that an award of damages for diminution in share value here would give the plaintiffs a windfall, and would contradict the basic compensatory principle.

81 On the defendants' case, the plaintiffs have already received specific performance of the contract since the Uzma Shares had ultimately been transferred to Mr Chia on 29 July 2020.[105] Consequently, the plaintiffs are entitled only to damages for any dividends declared by Uzma between the agreed and actual date of delivery. In support of this argument, the defendants rely on the following passage from *Chitty* at para 29–202:

> In an action for a seller's failure to transfer shares, the buyer may recover the market price of shares on the day fixed for completion, less the contract price, since *the principles of law governing damages in the sale of goods are applied by analogy.* A buyer who obtains a *decree of specific performance* for the delivery of shares may also recover damages equal to the

105 DCS at paras 110–111.

> dividends declared by the company between the agreed date of delivery and the actual date (and interest thereon).
>
> [emphasis added]

They further rely on the following paragraph from the older 19th edition of *McGregor*, as well as the case of *Sri Lanka Omnibus Co v Perera* [1952] 1 AC 76 cited therein (at para 27–007):

> The nearest approach to delayed delivery comes in the cases **where the buyer forces delivery on an unwilling seller by successfully suing for specific performance**. **If the market value has fallen he would be wise not to pursue this remedy, and if the market value has risen or remained unaltered the normal measure of market price at due delivery less market price at actual delivery will yield only nominal damages**. However the buyer who has been awarded a decree of specific performance can recover as damages the equivalent of the dividends at the rates declared by the company between the date when the shares should have been delivered or allotted and the date of actual delivery or allotment together with interest on the dividends during non-payment. This result was reached in *Sri Lanka Omnibus v Perera.*
>
> [emphasis in original in italics; emphasis added in bold]

82 In *Sri Lanka Omnibus Co v Perera* [1952] 1 AC 76 ("*Sri Lanka Omnibus*"), the respondent brought an action against the appellant company for breach of contract, on the ground that the company had failed to perform its obligations to allot shares to the respondent. The respondent obtained an order for specific performance which was complied with. The only question remaining was the measure of damages the respondent was additionally entitled to. The Privy Council held (at p 81) that the respondent could only claim for a sum equivalent to the dividends he would have received had the contract been duly performed, along with interest:

> The party complaining of a breach of contract is not entitled to be put in a better position than he would have enjoyed if the contract had been performed according to its terms. When the contract is a contract to allot shares, the aggrieved party's

> position is fully restored when the shares have been allotted to him *under an order for specific performance* and he has received the equivalent of the dividends he would have received if the contract had been duly performed, with interest during non-payment.
>
> [emphasis added]

Analysis and Decision

83 The commentaries cited by the defendants (see [77] above) usefully set out the general rule concerning damages for breach of a share sale contract. The starting point is that the principles governing damages in the law of sale of goods are applied by analogy where a case involves a sale of shares. It follows that a buyer of shares can, as a matter of law, recover market damages in the event of a non-delivery or late delivery of shares. By "market damages", I refer to damages assessed by the reference to the market value of the shares.

84 This general approach was applied by the Court of Appeal in *City Securities Pte Ltd (in liquidation) v Associated Management Services Pte Ltd* [1996] 1 SLR(R) 410, albeit in the context of non-acceptance of shares by a buyer. In that case, the appellant stockbroker had purchased 880,000 shares in a company, by order and for the account of the respondent, at S$3.75 per share on 24 January 1986. The respondent was to pay the total sum of S$3,336,400 (inclusive of brokerage and stamp fees) on the date of fulfilment, which was 31 January 1986. It was found by the assistant registrar at first instance that the contract was essentially a contract of sale between the appellant, as seller, and the respondent, as buyer, at the stipulated price of S$3.75 per share. The respondent failed to pay the sum due on 31 January 1986. The open market price of the shares at that time was S$2.60 per share. The Court of Appeal held that the appellant could recover the difference between the contract price and the market price of the shares at the date of breach (at [18]):

> 18 In a contract for the sale of shares the measure of damages upon a breach by the purchaser is the difference between the contract price and the market price at the date of the breach, with an obligation on the part of the seller to mitigate the damages by getting the best price he can upon that date: *A K A S Jamal v Moolla Dawood, Sons & Co* [1916] 1 AC 175 at 179. At the date of breach, *ie* 31 January 1986, the market price of MTP shares was $2.60 per share. In the premises, the damages should be awarded on the basis of the difference between the contract price of $3.75 per share and the market price of $2.60 per share, amounting in total to $1,012,000 for 880,000 MTP shares.

85 However, in so far as the defendants seek to rely on these authorities to argue that the plaintiffs have obtained specific performance and are therefore no longer entitled to claim for diminution in the value of the shares, I find that the authorities do not assist them. The extracts cited by the defendants envisage a situation where the innocent party has sought and obtained *an order* for specific performance. That was not the case here. The present facts arise not out of any court order, but by the defendants' own actions, *ie*, transferring the Uzma Shares to Mr Chia more than seven months after the contractual date of delivery, even after he had refused consent for the transfer. I note that the plaintiffs did initially seek an order for specific performance when this suit was first commenced, but subsequently amended their claim to one for damages only because of the defendants' actions.[106] The plaintiffs were right to do so, given that the situation had changed from one of non-delivery to one of late delivery. Nonetheless, it does not amount to the plaintiffs having obtained an order for specific performance. If that can be characterised as specific performance, there would be nothing to stop any seller in a late delivery scenario from seeking to escape liability to pay damages on the ground that the buyer had obtained the goods (or shares) anyway.

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106 Statement of Claim (Amendment No. 1) at pp 6–8.

86 *Sri Lanka Omnibus* is also distinguishable from the present case. In that case, there was no allegation or evidence that the value of the shares in the company had dropped after the breach date. Hence, it does not appear that the respondent in that case would have been able to mount any claim for diminution in share value anyway, since applying the normal measure in such a claim would result in only nominal damages being awarded. As much as the defendants urge me to, I do not read *Sri Lanka Omnibus* as standing for any general proposition that a buyer of shares who receives the shares contracted for late is entitled *only* to damages representing any dividends declared by the company in the interim period and nothing else.

87 For the reasons above, I disagree that the plaintiffs have obtained an order for specific performance and are thereby limited to a claim for dividends declared in the interim period. I see no reason why the general rule on the measure of damages should not apply in this case. As the plaintiffs submit, on 31 December 2019, when the contract was to be fulfilled, they were entitled to the Uzma Shares and the value those shares held on that date – or in this case, the value the parties had agreed upon in the SPAs. Since the value of the Uzma Shares had dropped by the time the plaintiffs actually received the Uzma Shares, they are entitled to claim damages for the diminution in value from the defendants. In my view, this is a fair and principled approach to adopt in order to determine the damages to be awarded. If the situation were otherwise and the share price had in fact appreciated by the time of actual delivery on 29 July 2020, then there would be no loss that the plaintiffs could claim to have suffered by reason of the breach, and they would then only be entitled to nominal damages at best.

88 I turn now to address another point which the defendants pleaded in their Defence. The defendants contend that the plaintiffs are not entitled to claim for the diminution of share value because it was not a term of the SPAs that the defendants would have to compensate the plaintiffs for a reduction in value of the Uzma Shares prior to the transfer.[107] I respectfully disagree.

89 A right to claim for damages for diminution in share value arises from the general law of contract, and not from the terms of any particular contract. The absence of a provision in the SPAs stating that a party can claim damages for diminution in share value in the event of delayed performance does not mean that such a claim is excluded. Furthermore, there is nothing in the SPAs in the nature of an exclusion clause which excludes such a claim being made. In contrast, cl 7 of the SPAs, pursuant to which each defendant warranted the performance by the other defendants and agreed to indemnify the plaintiffs for, *inter alia*, "damages" and "losses" *directly or indirectly* caused to Mr Chia, suggests that the parties did contemplate that any loss by reason of late delivery could be recovered:[108]

> Subject to the Vendor performing all of its obligations under Clause 4.3 of this Agreement, [Mr Lim / Mr Srinivasan] and ROS each hereby agrees, warrants, covenants and undertakes, jointly and severally, to ensure and procure [Mr Srinivasan's / Mr Lim's] due and complete performance of [Mr Srinivasan's / Mr Lim's] obligations under this Agreement and to fully indemnify and hold [the plaintiffs] harmless from and against any claims, damages, deficiencies, losses, costs, liabilities and expenses (including legal fees and disbursements on a full indemnity basis) ("Losses") directly or indirectly caused to [the plaintiffs] resulting directly or indirectly from or arising out of the failure by each of them to ensure and/or procure the same. For the avoidance of doubt, the obligation and/or liability under

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107 Defence (Amendment No. 3) at para 61.

108 AEIC of Chia Kuan Wee dated 5 January 2022, Tab CKW-12 at p 418 (1BA at p 421).

> this clause herein is joint and several. [emphasis in original omitted]

90 In my judgment, the plaintiffs are entitled to claim damages for a diminution in the value of the Uzma Shares between 31 December 2019 and 29 July 2020. What remains to be addressed is whether the damages recoverable are limited by factors such as causation, remoteness and mitigation. It is to these issues that I now turn.

Issue 3: Was the plaintiffs' loss caused by the defendants' breach?

91 I start with the issue of causation. It is trite that there must be a causal connection between the defendants' breach of contract and the plaintiffs' loss. The breach of contract must amount to an effective cause of the loss, and this inquiry is divided into two questions – causation in fact and causation in law (see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd ed, 2022) at para 22.024). Causation in fact is concerned with establishing the *physical connection* between the defendant's wrong and the plaintiffs' loss, and the starting point is whether "but-for" causation can be proved: *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 ("*Sunny Metal*") at [52]. Causation in law, on the other hand, is concerned with the question of whether there are any intervening events which are so significant as to have broken the chain of causation: *Sunny Metal* at [54].

92 The defendants' contentions relate to causation in fact. They argue that there is no causal link between their breach, in failing to transfer the Uzma Shares by 31 December 2019, and the diminution in value of the shares. This is because the Uzma Shares, which are publicly traded, would have declined in

value even if the shares were delivered on time.[109] In support of their arguments on causation, as well as remoteness (which I discuss below), the defendants rely on Sir Bernard Eder IJ's decision in *Judah Value Activist Fund v Open Faith Investment Ltd* [2021] SGHC(I) 7 (*"Judah Value Activist*"). The defendants submit that in *Judah Value Activist*, the Singapore International Commercial Court found no causal link between the defendants' "failure to transfer the [company's] shares by the contractually stipulated deadline and the decline in the [company's] share value".[110] However, a close look at the facts and the court's reasoning reveals that the defendants' reliance on this case is misplaced.

Judah Value Activist

93 *Judah Value Activist* involved a subscription agreement under which the defendant would subscribe for shares in the plaintiff hedge fund, providing consideration by way of a transfer of shares in Agritrade Resources Limited (a Hong Kong-listed company) ("Agritrade") into the plaintiff's fund. The defendant, in breach of the contract, failed to transfer the shares by the contractually stipulated deadline. At this point in time, the plaintiff had entered into a margin loan facility with its stockbroker, under which the plaintiff was required to maintain a Loan-to-Value Ratio below 70%, failing which there would be a margin call which, if unsatisfied, would entitle the broker to sell *any* securities held in the plaintiff's account. This included Agritrade shares which the plaintiff already owned as part of its portfolio. The plaintiff claimed that, as a result of the defendant's failure to transfer its Agritrade shares by the contractual deadline, the plaintiff's Loan-to-Value Ratio exceeded 70%, triggering a margin call which led to the broker forcing the sale of the plaintiff's

109 DCS at para 115.

110 DCS at para 119.

entire portfolio of Agritrade shares in three tranches over a period of four days. This resulted in a loss of more than S$5 million to the plaintiffs' fund.

94 The defendant disputed causation and argued that the declining share price of Agritrade over the four-day period would have resulted in the plaintiff's Loan-to-Value Ratio exceeding the limit anyway, thus leading to the same outcome (*ie*, a forced sale of its portfolio by the broker). In other words, the defendant contended that the loss would have occurred *even if* the shares were transferred on time.

95 The court divided its analysis between the initial forced sale of shares by the broker and the subsequent two tranches of forced sales. The court agreed with the plaintiff that the initial forced sale of Agritrade shares had been caused by the defendant's breach (*Judah Value Activist* at [164]). However, the court found that the plaintiff could not prove any loss in respect of this first forced sale because it *had* obtained the market price for the shares at the time of sale (*Judah Value Activist* at [165]). The court further found that the subsequent two tranches of forced sales by the broker were justified in view of falling Agritrade share prices. The question then was whether this drop in share price was caused by the initial forced sale and, by extension, the defendant's breach. In answer to this question, the court found that, on the evidence, the plaintiff could not establish on a balance of probabilities that the first forced sale had caused the drop in Agritrade share prices (*Judah Value Activist* at [174]–[176]).

Analysis and Decision

96 While *Judah Value Activist*, like the present case, did involve a breach of a contractual obligation to transfer shares and a drop in the market value of the target shares, it is clear that the claim for loss there was made in a very

different factual context. In substance, the claim there was that the defendant's breach in failing to transfer Agritrade shares by the contractually stipulated deadline caused the plaintiff's broker (a third party) to sell *other* Agritrade shares owned by the plaintiff, which in turn created downward pressure on the Agritrade share price and which triggered two further forced sales of the plaintiff's own shares. It was in that context that the court found that the plaintiff could not establish "but-for" causation on the evidence.

97 In fact, Eder IJ explicitly stated that the plaintiff there was not to be regarded as a buyer who had lost the market value of the shares (*Judah Value Activist* at [136]). *Judah Value Activist* is thus distinguishable from the present case, which *does* concern a buyer who lost the market value of shares. The causal link here is a much more direct one. Here, the defendants' failure to transfer a particular lot of Uzma Shares by the contractual deadline resulted in the plaintiffs coming into ownership of those shares only at a much later time, when they were worth significantly less. On this basis, I find that "but-for" causation has been established by the plaintiffs.

98 Returning to the overall question of whether the defendants' breach is an effective cause, which requires the establishment of both causation in fact and causation in law, I note that the defendants do not contest causation in law – there was no averment that any intervening cause or event capable of breaking the chain of causation did so break that chain. Therefore, I am satisfied that the plaintiffs have established causation both in fact and in law *ie*, that the defendants' breach was an effective cause of the plaintiffs' loss.

Issue 4: Is the plaintiffs' loss too remote?

99 I turn next to the question of whether the plaintiffs' loss is too remote. The governing principles here, which the parties do not dispute, are the two limbs of the rule in *Hadley v Baxendale* (1854) 9 Exch 341, which was accepted by the Court of Appeal in *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 ("*Out of the Box*"). Damages may be recovered under the first limb of the rule for "consequences that arise naturally according to the usual course of things or flowing from what may reasonably be supposed to be in the contemplation of both parties when they contracted": *Out of the Box* at [17]. Under the second limb, damages may also be recovered for consequences that are foreseeable as not unlikely, given the defendant's knowledge of special facts and circumstances (which a reasonable person would not be taken to know): *Out of the Box* at [18].

100 The defendants contend that neither limb of the rule in *Hadley v Baxendale* has been made out. I discuss each limb in turn.

101 Addressing the first limb, the defendants contend that the plaintiffs' loss does not flow naturally from the defendants' breach because there was a common understanding between the parties that Mr Chia only sought to possess the Uzma Shares and was not interested in their market value. I have summarised my findings at [71]–[77] above on why I disagree with this assertion and take the view that the monetary value attached to the Uzma Shares in the SPAs was not a notional or nominal figure.

102 I therefore find that the plaintiffs' loss in this case falls within the first limb of *Hadley v Baxendale*. The SPAs required the defendants to effect transfer of the Uzma Shares by 31 December 2019, with time being of the essence. The

Uzma Shares were publicly traded, and ROS itself held shares in Uzma and could thus be presumed to have been aware of the share price on any given day. Mr Chia, Mr Lim and Mr Srinivasan, as directors of ROS, could also be presumed to have been aware of the same. Thus, on the date the SPAs were concluded*, ie* 15 November 2019, both parties (and the defendants in particular) would have reasonably been aware that any delay in the transfer of the Uzma Shares *could* result in loss to the plaintiffs if the share price dropped during the period of delay. The fact that this very sort of loss is recognised in the textbook commentaries (see [79] above) to be the normal measure of loss is also a factor in the plaintiffs' favour. Plainly, the damages sought here are not something out of the ordinary or unusual. I also repeat my finding above (at [89]) that nothing in the SPAs excludes recovery for such a loss such that this could be regarded as falling outside of the parties' reasonable contemplation.

103 The reasoning in *Judah Value Activist* in relation to remoteness is also distinguishable. In that case, the court found that, absent special knowledge, it would not be within the reasonable contemplation of an ordinary investor, such as the defendant, that a breach of the subscription agreement would trigger a margin call on the investee fund, resulting in the fund's broker forcing a sale of other shares in the fund. Thus, damages were not recoverable there under the first limb of *Hadley v Baxendale*. Those are not the facts here. In fact, it is difficult to imagine that the loss suffered here would be anything other than the usual sort of loss flowing naturally from the defendants' breach.

104 As for the second limb of *Hadley v Baxendale*, I agree with the defendants that this limb would not apply in this case. Such a claim would need to be specifically pleaded, and the plaintiffs have not done so.[111]

105 Nonetheless, given that the first limb of the rule has been established, I find that the plaintiffs' claimed loss is not too remote.

Issue 5: Did the plaintiffs take reasonable steps to mitigate their loss?

106 The last issue to be addressed is whether the plaintiffs took reasonable steps to mitigate their loss. The basic principles here are well-established. A party must take all reasonable steps to mitigate its losses consequent on the defaulting party's breach. If it fails to take such steps, then it cannot recover for any loss which could have been avoided but for its own unreasonable action or inaction. It is for the defaulting party to prove that the innocent party claiming damages has failed to mitigate (*The "Asia Star"* [2010] 2 SLR 1154 at [24]). Lastly, the inquiry as to whether the actions or omissions of the innocent party were reasonable is necessarily fact-sensitive.

107 The duty to mitigate may in certain cases require an innocent party to accept an offer by the breaching party. Thus, it has been observed by the authors of *The Law of Contract in Singapore* (at para 22.147) that:

> … a refusal to entertain an offer by the promisor-in-breach to render substitute performance which would actually have a mitigatory effect could constitute an *unreasonable* course of conduct as amounting to a failure to mitigate.

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111 DCS at para 138.

108 The defendants contend that the plaintiffs failed to mitigate because they unreasonably refused to accept the defendants' offers to sell the Uzma Shares in the open market and transfer the sale proceeds to the plaintiffs.[112] The defendants aver that they made three such offers on:[113]

(a) 26 December 2019, when the Uzma share price was RM 1.00;

(b) 7 January 2020, when the Uzma share price was RM 0.98; and

(c) 28 January 2020, when the Uzma share price was RM 0.915.

109 The first offer can be swiftly disposed of. It is simply irrelevant in so far as the issue of mitigation is concerned because it was made *before* the plaintiffs were even under any obligation to mitigate. The duty to mitigate arises only *from the date of breach* (*The Asia Star* at [24]). At the point this offer was made on 26 December 2019, no breach had occurred, because the latest deadline for performance under the SPAs was 31 December 2019. It was also neither pleaded nor contended by any party that the defendants were in anticipatory breach of the SPAs by then. Since there is no question of the defendants being in breach of the SPAs at that point in time, there can equally be no question of the plaintiffs being under any duty to mitigate loss then.

110 As such, only the second and third offers on 7 January and 28 January 2020 respectively warrant consideration. I analyse these two offers together since the terms of both were materially the same.[114]

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112 DCS at paras 143, 144.

113 DCS at para 145.

114 AEIC of Wong Kong Chen dated 5 January 2022 at paras 191(b), 192 (10BA at p 5284).

111 In brief, I disagree with the defendants that the plaintiffs acted unreasonably in refusing to accept these offers. I come to this conclusion for several reasons. Firstly, there is an element of inconsistency in the defendants' arguments here. The defendants contend vigorously that Mr Chia only wanted to possess the Uzma Shares for his own commercial reasons and was never interested in their monetary value (see [71(b)] above). Despite that, they now seek to blame Mr Chia for refusing an offer to take what was effectively the monetary value of those shares.

112 Secondly, while innocent parties may in certain circumstances be required to mitigate by accepting offers by defaulting parties, it cannot be the case that they must do so for any and every offer made. The content of the offer matters, particularly in relation to whether it amounts to a significant variation of the contract.

113 Two cases illustrate this point. In *Payzu v Saunders* [1918–19] All ER Rep 219 ("*Payzu*"), the defendant seller had agreed to sell silk to the buyer on credit, with the silk to be delivered in multiple instalments and corresponding payments for each instalment to be paid within one month. The buyer was late in paying the first instalment, leading the seller to refuse to deliver the goods on the agreed credit terms. The seller was held to be in breach of the contract. However, the English Court of Appeal held that it was unreasonable for the buyer to refuse the seller's offer to supply the silk on cash on delivery terms, as opposed to credit terms. The offer, which was adjudged to be reasonable, was one for delivery of the exact goods bargained for, and at the same price, the only difference being the mode of payment. This is to be contrasted against *Strutt v Whitnell* [1975] 1 WLR 870 ("*Strutt*"). That case involved a contract for the sale of a house with vacant possession. The vendor,

in breach of contract, was unable to deliver the house with vacant possession because it was occupied by a protected tenant. The vendor offered instead to repurchase the house. It was held that the buyer did not act unreasonably in refusing this offer. Clearly, the buyer was not expected to give up his claim to the property bargained for in the name of mitigation.

114 In the case before me, what the parties had agreed to was that "on the Completion Date, or as soon as practicable thereafter", the defendants were to take steps to "effect the transfer of the Uzma Shares…to the securities account of [Mr Chia] *by way of an off-market transfer or by such other methods as reasonably practicable*" [emphasis added].[115] The mode of performance envisaged in the defendants' offers was clearly significantly different from that which was originally bargained for by the plaintiffs. It did not involve any "such other method" of *transferring* the shares. Indeed, it did not contemplate *any* transfer at all. This amounted, in substance, not just to a different mode of performance but a significant variation of the SPAs, which would have changed the fundamental obligation of the defendants completely. Had Mr Chia accepted the offers, he would have received a completely different asset (*ie,* cash) from what he was promised under the contract (*ie,* the Uzma Shares). In my view, this was more akin to the offer made in *Strutt* rather than *Payzu*. In the circumstances, I find that it was not unreasonable for Mr Chia to reject the second and third offers. Innocent parties are only expected to take reasonable steps to mitigate their loss. In my judgment, it is quite unreasonable for the defendants, whose breach had caused the loss in the first place, to then require the plaintiffs to accept a variation of the contract that would effectively have transformed the transaction into a completely different bargain. I do not agree

115 AEIC of Chia Kuan Wee dated 5 January 2022, Tab CKW-12 at p 401 (1BA at p 404).

that the principles on mitigation of loss would place such a burden on the plaintiffs.

115 Thirdly, on the facts, I do not find that these offers could realistically have been carried out by the defendants, even if the plaintiffs had accepted them. A course of action cannot be reasonable if it is not even realistic. It falls on the defendants to show that the offers, if accepted by the plaintiffs, could have been carried out by them, and carried out promptly, bearing in mind that time was of the essence.

116 The undisputed facts are that (a) the Uzma Shares were held in ROS' securities account with its broker, Maybank Kim Eng; and (b) the parties were informed on 25 November 2019 that Maybank Kim Eng was unwilling to assist with the transfer of the Uzma Shares directly to Mr Chia due to ROS' involvement in ongoing litigation. Thus, any transfer of the Uzma Shares would not have been possible until ROS opened an account with Maybank IB. It appears, on the evidence, that this account was only opened on 13 February 2020, well after the purported offers in mitigation made by the defendants.[116]

117 Maybank Kim Eng's unwillingness to assist was a point which surfaced in Mr Chia's cross-examination:[117]

> Q. So if that open offer was available to you, why did you agree to extensions of time up to April 2020 in order to take possession of the shares?
>
> A. Because ROS cannot sell the Uzma shares.
>
> Q. I don't understand. You want to clarify that?

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116 AEIC of Chia Kuan Wee dated 5 January 2022 at para 141 (1BA at pp 68–69); AEIC of Wong Kong Chen dated 5 January 2022 at p 48 (10BA at p 5270).

117 Certified Transcript (3 Mar 2022) at pp 8–9.

> …
>
> A. … So Vincent from Maybank Kim Eng told me that I cannot buy or sell the Uzma shares, or rather that we cannot buy or sell Uzma shares. The intention of Maybank Kim Eng is to transfer the Uzma shares from Maybank Kim Eng to MIB, because the management is already aware of the transactions that we have, they are in possession of all the documents, they have gone through the compliance, the compliance, okay, have checked through, they are uncomfortable with the transaction, so their intention is just to transfer the Uzma shares to MIB, and let MIB handle everything. …

The defendants submit that Mr Chia's explanation is contradicted by evidence that a Maybank IB representative had, in a 7 January 2020 phone call with the parties, suggested selling the Uzma Shares in the open market and transferring the sale proceeds to Mr Chia. This was put to Mr Chia in the following exchange:[118]

> A: Yes, Alex as at 45:40 said:
>
> "Why can't you just put the shares in an open market and have it, and transfer the cash?"
>
> Q: Correct. Isn't that in complete contradiction to what you just told us just now, that Maybank, whether it's Kim Eng or MIB, will not sell the shares on the open market?
>
> A: Just now, I say that Maybank Kim Eng will not allow us to sell Uzma shares.
>
> …
>
> Q: So do you acknowledge, then, at the very least, as of 7 January, there is very clear suggestion from MIB, 'Go ahead and sell the shares in the open market and transfer the cash to Mr Chia.' Isn't that so?
>
> A: I agree, and I assume, okay, that Alex is saying, okay, sell the Uzma shares *on MIB platform*.
>
> [emphasis added]

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118 Certified Transcript (3 Mar 2022) at p 12, lines 4–23.

118 The point the defendants appear to be making is that the Uzma Shares could have been sold on the open market through Maybank IB even if Maybank Kim Eng was unwilling to assist. However, I find the evidence to be inconclusive on this point. Firstly, as mentioned above, ROS' account with Maybank IB was only opened on 13 February 2020, *after* the offers were made by the defendants.[119] Secondly, even if I assume that the defendants could have opened this account sooner, I must also be satisfied that Maybank IB was in fact willing to facilitate this open market sale. The evidence on this point is quite unsatisfactory and I bear in mind that the burden lies on the defendants to prove their case on the plaintiffs' failure to mitigate loss ([106] above). The exchanges relied upon by the defendants only show *Mr Chia's* understanding or assumption that the Maybank IB representative suggested that the shares could be sold on the open market through the Maybank IB platform. However, Mr Chia's assumptions as to what the Maybank IB representative might have meant or had in mind are hardly probative of whether Maybank IB was *in fact* willing to facilitate a sale of the Uzma Shares on the open market using its platform. Nor is it sufficient for the defendants to rely on what appears to be a single line from an extended telephone conference call, especially when the Maybank IB representative who made that statement did not give evidence at the trial.

119 Further, Mr Chia's evidence was that any negotiations following from his acceptance of the defendants' offers would have required new agreements to be executed by the parties, which would result in further delays.[120] I find that this explanation is not illogical and is in fact quite believable.

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119 AEIC of Wong Kong Chen dated 5 January 2022 at p 48 (10BA at p 5270).

120 AEIC of Chia Kuan Wee dated 5 January 2022 at para 230 (1BA at pp 104–105).

120 Given the state of the evidence adduced at the trial, I return again to the premise that the burden of proof falls on the defendants, as the defaulting parties, to demonstrate that the plaintiffs failed to mitigate their loss (see [106]). In relation to the second and third offers specifically, it is also for the defendants to prove that their offers could realistically have been carried out. However, the defendants did not adduce any evidence of any confirmation from Maybank IB that it would have permitted, and would be able to promptly facilitate, an open market sale of the Uzma Shares on its platform once an account had been opened with it by ROS. Thus, I find that the defendants have not established on a balance of probabilities that the Uzma Shares could have been sold on the open market (whether by Maybank IB or Maybank Kim Eng), such that their second and third offers were indeed reasonable offers that the plaintiffs should have accepted.

121 Before dealing with the defendants' last argument on mitigation, I make one observation on the pleaded defence. The defendants had pleaded (at para 63 of their Defence) that the plaintiffs would not have suffered any losses if they had accepted the defendants' proposals, *inter alia*, for a direct share transfer to Mr Chia.[121] This is yet another contradiction in the defendants' case, given their earlier pleading that such a direct transfer was what necessitated the "complicated structure" leading to the delays in the first place (see [23]).

122 Lastly, the defendants suggest that the plaintiffs should have mitigated their loss by waiting until February–March 2021 to sell the Uzma Shares (*ie*, when the price of shares in Uzma was on an upward trajectory).[122] The

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121 Defence (Amendment No. 3) at para 63.

122 DCS at para 154.

defendants cite no authorities to support their somewhat bold proposition that a buyer of shares who received late delivery is under an obligation to mitigate by holding on to the shares until a time when the share prices increase in value. In my view, this is not a reasonable burden to place on the plaintiffs, who had in the first place been put in this position by the defendants' breach. The defendants' submission reeks of opportunism. With the benefit of hindsight and historical information (which was available at trial) on how the shares in Uzma performed on Bursa after 29 July 2020 through 2021, the defendants have, in my view, cherry-picked a point in time when the share price of Uzma had risen and now seek to persuade me that the Uzma Shares should have been sold at that point. Taken to its logical conclusion, if the share price in Uzma had instead dropped steadily for years following the defendants' breach, the defendants would be able to argue that Mr Chia was obliged by law to hold on to the Uzma Shares in the hope that the share price might increase at some indeterminate point in time in the future. In fact, in such a scenario, the defendants might perhaps argue the converse – that Mr Chia failed to sell the shares soon enough. The absurdity that would result in the scenarios described above demonstrates the fallacy in the defendants' submission, which, as I mentioned above, is also not supported by any authority. I have little hesitation rejecting it. I reiterate that all that the law requires of an innocent party is to take *reasonable* steps in mitigation. It is not reasonable to require the innocent party to speculate on the market for an indefinite period, at the whim and fancy of the defendant, who then takes all the benefits of the upside and none of the consequences of the downside.

123 For the foregoing reasons, I do not find Mr Chia's conduct subsequent to the receipt of the Uzma Shares on 29 July 2020 to be unreasonable. His

evidence was that he sold the Uzma Shares in several batches as and when he needed the money.[123] In my judgment, he was entitled to do so.

Conclusion

124 For the reasons detailed in this judgment, I find and hold that the plaintiffs succeed in their claim against the defendants. The plaintiffs are awarded damages on the basis of the value of the Uzma Shares on 31 December 2019 (the original due date for transfer) and their market value on 29 July 2020 (the actual date of transfer). Whilst the normal measure is to use the market value of the shares on the original due date for performance, the parties have in this case ascribed a specific monetary value to the Uzma Shares in the SPAs. Consequently, I find that it is fair to use that valuation as a starting point to be assessed against the market value of the Uzma Shares on 29 July 2020 – this method of assessment is in line with the plaintiffs' alternative damages pleading in their Statement of Claim (see [19]). Thus, the plaintiffs are entitled to damages in the sum of S$1,167,204.

125 Pursuant to cl 7 of the SPAs, the defendants' liability is joint and several and each is liable for the performance of the others. Accordingly, judgment is granted for the plaintiffs against the defendants jointly and severally in the sum of S$1,167,204, together with interest thereon at 5.33% per annum from the date of the writ of summons to the date of this judgment.

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123 Certified Transcript (2 Mar 2022) at p 9, lines 2–19.

126 I will hear the parties on costs separately, including on the questions of (a) whether the plaintiffs are entitled to costs from the defendants on a full indemnity basis under cl 8 of the SPAs, and (b) the quantum of costs.

S Mohan
Judge of the High Court

Loong Tse Chuan, Ong Chin Kiat and Wee Su-Ann (Allen & Gledhill LLP) for the first and second plaintiffs;
Ramachandran Doraisamy Raghunath, Mato Kotwani and Chua Ze Xuan (PDLegal LLC) for the first, second and third defendants.