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

[2024] SGHC 255

Originating Claim No 140 of 2022

Between

AI MTBL SPV, LLC

…*Claimant*

And

(1) MTBL Global Fund
(2) China Capital Impetus Asset Management

… *Defendants*

JUDGMENT

[Contract] — [Breach]
[Contract] — [Contractual terms] — [Implied terms]
[Contract] — [Discharge]
[Contract] — [Frustration]

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v
MTBL Global Fund and another

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25 September, 10, 21–24, 27 November 2023, 5 February, 21 March, 31 July 2024

22 October 2024 Judgment reserved.

Andre Maniam J:

Introduction

1 This dispute concerns the redemption of the claimant's investment in the first defendant (the "Fund"). The Fund was deregistered before the trial and did not participate in it, but the second defendant (the "Fund Manager") did.

Background

The Framework Agreement and Arena's investment in the Fund

2 In May 2021, the claimant ("Arena") invested some US$20m in the Fund. The Fund's main asset is its shareholding in a company then known as AEI Corporation Ltd ("AEI"), now known as Ascent Bridge Limited ("ABL"). In respect of its investment, Arena signed a Subscription Agreement dated 6

May 2021 as well as two side letters: the "First Side Letter" dated 6 May 2021, and the "Second Side Letter" dated 25 May 2021.[1]

3 Certain issues arose in relation to the redemption of Arena's investment, and on 23 December 2021 a Framework Agreement was entered into, setting out "a framework for a full and final settlement, and the discharge and satisfaction of all claims that Arena has and/or may have against the Fund and/or the Principal [*ie*, the Fund Manager's CEO, Mr Sun Quan ("Mr Sun")] arising out of and/or in connection with (i) the Subscription Agreement (ii) any undertaking given by the Principal in respect of the Fund's obligations under the Subscription Agreement [*ie*, under the side letters]; and/or (iii) a disputed settlement agreement dated 3 December 2021 allegedly entered into between the Fund, the Principal and Arena, referenced in the Statutory Demand ('**Previous Agreements**')" [emphasis in original] (per Recital F of the Framework Agreement).[2] The parties to the Framework Agreement were Arena, the Fund, Mr Sun, and Lecca Group Pte Ltd ("Lecca").[3]

4 Clause 1.1 provides as follows:[4]

> 1.1 **Settlement Amount**
>
> (a) This settlement is conditional upon Arena submitting to the Fund a redemption form for all its outstanding Units.
>
> (b) The Parties acknowledge and agree that this Agreement sets out a framework for the repayment of a total fixed sum of US$24 million.

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1 Claimant's Bundle of Documents (Vol 1) dated 1 November 2023 ("1CB") at pp 285–302; Claimant's Bundle of Documents (Vol 2) dated 1 November 2023 ("2CB") at pp 303–306, 328–359.

2 2CB at p 438.

3 2CB at pp 447–450.

4 ` 2CB at p 439.

> For the avoidance of doubt, this amount represents US$25 million net of the US$1 million which the Fund had paid to Arena on or about 19 October 2021.
>
> (c) For purposes of determining the US$ equivalent of monies received and the remaining outstanding indebtedness, any payment received by Arena in S$ shall be converted into US$ using the exchange rate of the date preceding the date payment was made, as published on the website of the Monetary Authority of Singapore.

5 Clause 1.8(b) of the Framework Agreement provides that "completion of all the transactions set out in Clauses 1.3, 1.4 and 1.5 of the Framework Agreement shall represent a full and final settlement of all indebtedness owed by the Fund and/or the Principal to Arena under this Agreement and the Previous Agreements".[5]

6 By virtue of cl 1.11(a) and (b) of the Framework Agreement, Arena could not pursue claims against the Fund and/or the Principal (and, by extension, the Fund Manager) while the Framework Agreement was being implemented:[6]

> 1.11 **Arena's legal proceedings against the Fund and/or the Principal**
>
> (a) Upon signing of this Agreement, Arena agrees to stay all legal proceedings against the Fund and/or the Principal…in connection with the Previous Agreements until all the definitive documentation herein contemplated is entered into.
>
> (b) Upon entry into such definitive documentation and subject to the Fund's compliance thereto, Arena agrees that it shall refrain and forbear from pursuing any and all legal proceedings

5 2CB at p 442.

6 2CB at p 443.

> against the Fund and/or the Principal arising out of or in connection with the Previous Agreements…

7 Clause 1.11(c) then provides that upon Arena's receipt of all monies and/or AEI shares set out in cll 1.3, 1.4 and 1.5, Arena shall fully and unconditionally release and discharge (inter alia) the Fund and the Principal from any and all claims against them.[7]

8 Pursuant to cll 1.3, 1.4 and 1.5, Arena was to receive the following:[8]

(a) under cl 1.3(b), S$5m in cash (to come from Lecca for the purchase of some of the Fund's AEI shares);

(b) under cl 1.3(c) (alternatively under cl 1.4(a)), S$10m in cash;

(c) under cl 1.4(b), S$5m in cash (to come from Lecca for the purchase of some of the Fund's AEI shares);

(d) under cl 1.4(c), AEI shares amounting to the balance indebtedness (US$24m less the US dollar equivalent of payments received by Arena in Singapore dollars);

(e) under cl 1.5(a), a bonus payment of US$1.5m in AEI shares as compensation for the Fund's late payment of redemption proceeds to Arena;

(f) under cl 1.5(b), another bonus payment of US$4.5m worth of AEI shares under a call option ("Call Option").

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7 2CB at pp 443–444.

8 2CB at pp 439–442.

9 Under cl 1.3(a)(i) of the Framework Agreement, the Fund was to appoint Zico Insights Law LLC ("ZICO") to hold all of the Fund's ordinary AEI shares as bare trustee and on behalf of the Fund.[9]

10 To facilitate Arena's receipt of the monies under the Framework Agreement, the Framework Agreement details various transactions, including the Fund selling 5,617,978 of its AEI shares to Lecca for S$5m, with ZICO again acting as escrow agent and bare trustee: ZICO was to receive the shares, and hold them for Lecca; and to receive the purchase consideration of S$5m, and hold that for Arena (see cl 1.3(b)(i), (iii) of the Framework Agreement).[10]

11 Clause 1.3(b)(i) of the Framework Agreement provides that the definitive documentation for the Fund's sale of shares to Lecca "shall be entered into within ten (10) business days from this date of this Agreement". Clause 1.10 provides that the parties " shall use best endeavours to, within ten business days from the date of this Agreement (or such other date as the Parties may mutually agree in writing), enter into definitive documentation to set out timing and logistics of the above transactions set out in Clauses 1.3, 1.4 and 1.5…".[11]

12 From 23 December 2021, the Fund sought to transfer the AEI shares held in its OCBC Securities Private Limited ("OCBC") account to ZICO's escrow account; however, OCBC refused to effect the transfer as it took the view that the transfer would involve a change in beneficiary.[12]

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9 2CB at pp 439–440.

10 2CB at p 440.

11 2CB at pp 440 and 443.

12 Claimant's Bundle of Documents (Vol 3) dated 1 November 2023 ("3CB") at pp 652 and 880.

13 On 19 January 2022, the Fund, Arena and ZICO entered into an escrow agreement for ZICO to hold the Fund's AEI shares as bare trustee. On 21 January 2022, a second escrow agreement was entered into which Lecca was also a party to.[13]

14 From 24 January 2022, the Fund sought to transfer the AEI shares in its DBS Bank Ltd ("DBS") account to ZICO's escrow account. However, DBS too refused to effect the transfer as it took the view that the transfer would involve a change in beneficiary.[14]

Parties' positions

15 Arena claims against the Fund under the Subscription Agreement, and against both the Fund and the Fund Manager under the Second Side Letter.

16 Arena's position is that cl 1.11 of the Framework Agreement does not preclude its claims as:

(a) the Fund has committed repudiatory breaches of the Framework Agreement, which Arena was entitled to, and did, accept as terminating the Framework Agreement;[15]

(b) the Framework Agreement was subject to an implied condition "that the Fund would be able to transfer all of its ABL shares to ZICO to hold as its escrow agent and custodian pursuant to clause 1.3(a)(i) in

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13 2CB at pp 451–460, 463–474.

14 Claimant's Bundle of Documents (Vol 4) dated 1 November 2023 ("4CB") at pp 992, 1002–1003.

15 Statement of Claim (Amendment No. 2) dated 6 February 2024 ("SOC") at paras 34–35.

order for the Designated Mechanism (as defined at clause 1.3(b)) to operate" ("Implied Condition"), which implied condition has not been fulfilled;[16] and/or

(c) the Framework Agreement has been frustrated such that it has become impossible to perform.[17]

17 The Fund Manager disputes the alleged breaches, says that any such breaches are not repudiatory, and contends that Arena has affirmed the Framework Agreement. The Fund Manager also disputes Arena's case on non-fulfilment of an implied condition, and frustration.[18]

18 The Fund filed a defence but did not participate in the trial, as it had been struck off the Cayman Islands' Register of Companies for its failure to maintain a registered office. However, Arena tendered a memo dated 5 November 2023 from Cayman Islands lawyers stating that any judgment made in respect of the Fund during the time it was struck off would be binding on the Fund when it is restored to the register, for it would be deemed to have continued in existence as if it had not been struck off.[19] This was not disputed by the Fund Manager.

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16 SOC at paras 22A and 39A.

17 SOC at paras 39A and 40A.

18 Defence of the Second Defendant (Amendment No. 3) dated 8 February 2024 ("Defence") at paras 40, 46 and 53A.

19 Notes of Evidence ("NE") dated 6 November 2023 at p 10 lines 20–28.

19 Liquidators were subsequently appointed in respect of the Fund. They wrote to court on 12 July 2024 to say that the court is free to render its judgment in this matter in respect of all parties in the action.[20]

20 After Arena had closed its case at trial, the Fund Manager made a submission of "no case to answer", contending that on the pleadings and evidence before the court, Arena had not made out its claims.[21]

21 I now address, in turn:

(a) whether the Framework Agreement has validly been terminated by Arena for repudiatory breach;

(b) whether the Framework Agreement was discharged because it was subject to an implied condition that has not been fulfilled;

(c) whether the Framework Agreement was discharged by frustration; and

(d) what relief (if any) Arena is entitled to.

Has the Framework Agreement been terminated for repudiatory breach?

First alleged breach: In respect of cl 1.3(b)(i) of the Framework Agreement

22 Clause 1.3(b)(i) of the Framework Agreement provides that, for the Fund's sale to Lecca of 5,617,978 AEI Shares for an aggregate consideration of S$5m, the definitive documentation shall be entered into within ten business

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20 Letter to Court dated 12 July 2024 at para 7.

21 NE dated 21 March 2024 at p 3 lines 18–19.

days from the date of the Framework Agreement (*ie*, 23 December 2021).[22] In similar vein, cl 1.10 – titled "Definitive Documentation" – provides that:[23]

> The Parties shall use best endeavours to, within ten business days from the date of this Agreement (or such other date as the Parties may mutually agree in writing), enter into definitive documentation to set out timing and logistics of the above transactions set out in Clauses 1.3, 1.4 and 1.5, without prejudice to all the legally binding obligations of the respective Parties under this Agreement which remain in full force and effect.

23 Pursuant to cl 1.3(b)(i), definitive documentation should have been entered into by the first week of January 2022, but no definitive documentation was ever entered into between the Fund and Lecca. It thus appears that cl 1.3(b)(i) was breached. Arena says this is a repudiatory breach entitling it to terminate the Framework Agreement; the Fund Manager disputes that.[24]

The Fund Manager's contentions about Arena's standing and Lecca dispensing with definitive documentation

24 The Fund Manager objects that Arena has no standing to claim for a breach of cl 1.3(b)(i) because the Fund's obligation to enter into definitive documentation for the sale of shares was owed only to Lecca.[25] I do not accept this.

25 First, Arena has an obvious interest in having the transaction described in cl 1.3 carried out. One objective of the transaction was for Arena to receive

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22 2CB at p 440.

23 2CB at p 443.

24 Claimant's Written Submissions dated 15 March 2024 ("CWS") at paras 205, 216–217; Second Defendant's Written Submissions dated 15 March 2024 ("2DWS") at paras 33–41.

25 2DWS at para 36.

the purchase consideration of S$5m from ZICO acting as escrow agent – that is stated in cl 1.3(b)(ii), and cl 1.3(b)(i) itself states that the purchase consideration was to be used in full by the Fund "to pay monies owing to Arena and/or redeem Arena's outstanding Units".[26]

26 Second, as a general proposition, Arena as a party to the Framework Agreement has standing to complain about the breach of any of its provisions, absent any contrary stipulation in the Framework Agreement (and there is none). Clause 1.3(b)(i) does not say that the Fund's obligation to enter into definitive documentation was an obligation owed only to Lecca. It simply says that the definitive documentation for that transaction shall be entered into within ten business days. That may be contrasted with the wording of cl 1.3(a)(i) on the transfer of the Fund's shares from its depository agents (*ie*, OCBC and DBS) to ZICO, which reads: "The Fund *undertakes to Lecca* to use reasonable endeavors to submit, within five (5) business days from entry into the escrow agreement, an official request to its existing depository agent requesting for the transfer of all the Fund's AEI Shares from its depository agent to ZICO" [emphasis added].[27] I will address cl 1.3(a) more fully below at [52]–[56].

27 The Fund Manager also pleads that there was an understanding between the Fund and Lecca that there was no need for definitive documentation. However, there is no evidence to support this contention, whereas there is correspondence from Lecca dated 9 June 2022 which goes against it:[28]

> We wish to inform MTBL and you that Lecca has always been ready and willing to arrange for the purchase of the 5,617,978 AEI shares at S$5.0 million pursuant to the terms of the

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26 2CB at p 440.

27 2CB at pp 439–440.

28 4CB at 966–967.

> Framework Agreement *subject to entry of the definitive documentation referred to in Clause 1.10 of the Framework Agreement*, which we have not been provided."
>
> [emphasis added]

28 This point was not pursued by the Fund Manager in submissions, and in any event I do not accept that there was an understanding between Lecca and the Fund that there was no need for definitive documentation.

Was the alleged breach of cl 1.3(b)(i) a repudiatory breach?

29 Unless the contract expressly stipulates that if certain event(s) occur the innocent party is entitled to terminate the contract (and the present case does not involve such a stipulation), the innocent party may terminate for repudiatory breach in three situations (see *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC*") at [93]–[113]):

> (a) a renunciation of the contract, where it is clearly conveyed to the innocent party that the contract-breaker will not perform its contractual obligations at all;
>
> (b) a breach of a condition, *ie*, a term that the parties have designated as one that was so important that its breach would entitle the innocent party to terminate the contract; or
>
> (c) a breach of a term which is not a condition, if the consequences will deprive the innocent party of substantially the whole benefit which it was intended that the innocent party should obtain from the contract.

(1) Was cl 1.3(b)(i) a condition of the Framework Agreement?.

30 Arena says that cl 1.3(b)(i) is a condition, and so upon its breach Arena was entitled to terminate the Framework Agreement. Clause 1.12(d) provides

that "…any time, date or period originally stated in this Agreement or any time, date or period so extended in accordance with the terms of this Agreement, *time shall be of the essence*" [emphasis added].[29] As noted in *Max Media FZ LLC v Nimbus Media Pte Ltd* [2010] 2 SLR 677, "the courts have consistently interpreted stipulations that 'time is of the essence' to mean that parties have agreed that a failure by one party to perform within the stipulated time would entitle the other party to terminate the contract" (at [40]).

31 As I noted above (see [23]), however, pursuant to cl 1.3(b)(i) the Fund and Lecca were to have entered into definitive documentation by the first week of 2022, but when there was still no definitive documentation after that time, Arena did not promptly indicate that it was terminating the Framework Agreement. It was only on 2 June 2022, some five months after definitive documentation should have been entered into by the Fund and Lecca, that Arena's lawyers wrote purporting to terminate the Framework Agreement.[30]

32 Prior to Arena's purported termination of the Framework Agreement:

(a) from 23 December 2021, the Fund sought to have OCBC transfer its holdings of the Fund's AEI shares to ZICO;

(b) on 19 January 2022, the Fund, Arena and ZICO entered into an escrow agreement for ZICO to hold the Fund's AEI shares as bare trustee;

(c) on 21 January 2022, a second escrow agreement was entered into, this time with Lecca also a party;

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29 2CB at p 444.

30 4CB at pp 956–958.

(d) from 24 January 2022, the Fund sought to have DBS transfer its holdings of the Fund's AEI shares to ZICO;

(e) on 7 February 2022, Arena requested to exercise the Call Option under cl 1.5(b)(i) of the Framework Agreement to purchase US$500,000 worth of AEI shares from the Fund, and this request was reiterated by Arena on 26 April 2022;[31]

(f) on 23 March 2022, the Fund made payment of S$10m (the equivalent of US$7,366,483.32) to Arena pursuant to cl 1.3(c) of the Framework Agreement;

(g) on 19 May 2022, Arena submitted a redemption request form ("Redemption Request") to redeem all its remaining outstanding subscription shares in the Fund, *ie*, 90.0928 units for US$16,633,540.66.[32]

33 In the Redemption Request, Arena referred to the Framework Agreement as an agreement that remained in force. Arena began by stating that the request "is being submitted by us in connection with, and in satisfaction of, the condition set out in Clause 1.1(a) of the Framework Agreement" (see para 2(b) of the Redemption Request). Arena also stated that "in accordance with Clause 1.1(b) of the Framework Agreement, the cash proceeds owing to us as a result of the redemption price payable to us by you pursuant to the Redemption Request is US$16,633,540.66" (see para 2(c) of the Redemption Request).[33]

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31 4CB at pp 899–900.

32 4CB at pp 935–939.

33 4CB at p 935.

34 Thus, despite the Fund and Lecca not having entered into definitive documentation by the first week of January 2022 pursuant to cl 1.3(b), Arena continued to treat the Framework Agreement as subsisting, through its submission of the Redemption Request on 19 May 2022.

35 On 24 May 2022, Arena's lawyers wrote to complain about breaches of the Framework Agreement, including the failure to enter into definitive documentation pursuant to cl 1.3(b). Even so, Arena still did not purport to terminate the Framework Agreement. Instead, it said it was prepared to make one final attempt to work with the Fund to resolve the existing issues, and it put forward (as demands) ways to give effect to the transactions contemplated in the Framework Agreement. The letter concluded by saying that if Arena's demands were not complied with, Arena's lawyers were "instructed to take all necessary steps to enforce our client's rights without further reference to you, including but not limited to the ***termination of the Framework Agreement*** on account of your ***repudiatory breaches of the Framework Agreement***…" [emphasis in original].[34]

36 On 2 June 2022, Arena finally purported to terminate the Framework Agreement,[35] and on 19 July 2022 Arena commenced these legal proceedings on the premise that the Framework Agreement had been terminated.[36]

37 In relation to the breach of cl 1.3(b), Arena's conduct after the deadline for definitive documentation had passed amounted to an affirmation of the Framework Agreement (subject to the analysis below at [138]–[144] on whether

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34 Claimant's Bundle of Documents (Vol 6) dated 21 November 2023 ("6CB") at pp 1412–1414.

35 6CB at pp 1474–1476.

36 Originating Claim dated 19 July 2022.

the Framework Agreement could be affirmed if its remaining commercial purpose had been frustrated).

38 What then follows in relation to a term like cl 1.3(b) where the stipulated time for performance has passed, is that time is set at large and the term is no longer a condition; however, the innocent party is entitled thereafter to make time of the essence again by giving notice to the other side of a reasonable time in all the circumstances to comply with the obligation (see *National Skin Centre (Singapore) Pte Ltd v Eutech Cybernetics Pte Ltd* [2001] 3 SLR(R) 801 ("*National Skin Centre*") at [60]).

39 In the present case, Arena never gave notice to the Fund to specify a new deadline for the Fund and Lecca to enter into definitive documentation pursuant to cl 1.3(b), in order to proceed with the transaction described in cl 1.3 (which would involve ZICO as escrow agent (a) receiving the Fund's AEI shares and releasing them to Lecca, and (b) receiving the S$5m consideration from Arena and releasing it to Arena). Clause 1.3(b)(iii) referred to that arrangement as the "Designated Mechanism":[37]

> For purposes of this Agreement, the arrangement in this Clause 1.3(b) describing the sale and purchase of any AEI Shares referred to in this Agreement by Lecca from the Fund, the payment of any consideration by Lecca to ZICO (as escrow agent for the Fund) and the payment of any consideration received by ZICO to Arena for and on behalf [*sic*] the Fund to offset any indebtedness owing by the Fund to Arena shall be referred [*sic*] as the "**Designated Mechanism**".
>
> [emphasis in original]

40 Instead, Arena's lawyers' letter of 24 May 2022 asserted that "the escrow agent has not been able to play its role because the Fund has not used its

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[37] 2CB at p 440.

'best endeavours' to procure the approval of its broker… for the transfer of its AEI Shares to ZICO as escrow agent".[38] Thus, Arena demanded that the Fund bypass ZICO and have the AEI shares transferred directly from the Fund to Lecca, with Lecca then to pay Arena directly. This was not a demand for definitive documentation under cl 1.3(b) for the transaction described in cl 1.3, it was a demand that something different be done instead.

41 In the circumstances, Arena did not validly terminate the Framework Agreement as it had purported to do on 2 June 2022 on the basis that the failure to enter into definitive documentation pursuant to cl 1.3(b) was a condition: given Arena's conduct in affirming the Framework Agreement, that clause was no longer a condition by that time.

(2) Was the lack of definitive documentation a renunciation by the Fund Manager of all its obligations under the Framework Agreement, or a breach that deprived Arena of substantially the whole benefit which it was intended that Arena should obtain under the contract?

42 Although Arena's submissions focus on cl 1.3(b) being a condition, for completeness I do not consider the lack of definitive documentation to be either a renunciation by the Fund Manager of all its obligations under the Framework Agreement or a breach that deprived Arena of substantially the whole benefit which it was intended that Arena should obtain under the contract.

43 For the Fund not to have entered into definitive documentation within the prescribed time, was not a renunciation of all of its obligations under the Framework Agreement. Before the deadline for definitive documentation had passed, the Fund had already requested OCBC to transfer its holding of the

[38] 4CB at p 941.

Fund's AEI shares to ZICO. After the deadline for definitive documentation had passed, the Fund continued to perform other obligations under the Framework Agreement, including appointing ZICO as an escrow agent, requesting that DBS transfer its holding of the Fund's AEI shares to ZICO, and paying Arena S$10m pursuant to cl 1.3(c) of the Framework Agreement.

44 Nor did the failure to enter into definitive documentation deprive Arena of substantially the whole benefit which it was intended that Arena should obtain from the contract. At most, cl 1.3(b) only affected S$5m out of the US$24m settlement amount (some S$32m at an exchange rate of US$1 to S$1.33), *ie*, under 16% of the settlement amount; and after the deadline for definitive documentation had passed, the Fund paid Arena S$10m. Even if the financial consequence of all the alleged breaches were aggregated, the fact remains that the Fund paid Arena S$10m (the equivalent of US$7,366,483.32) pursuant to cl 1.3(c) of the Framework Agreement. I thus cannot say that the alleged breaches deprived Arena of substantially the whole benefit which it was intended that Arena should obtain from the Framework Agreement.

45 I reach this conclusion although a full and final settlement on the terms of the Framework Agreement would only be achieved upon completion of the transactions set out in cll 1.3, 1.4 and 1.5 of the Framework Agreement, and so if the Fund's breach caused any of those transactions not to be completed there would be no settlement. In that event, Arena could sue the Fund for breach, and seek to recover damages to place itself in a position as if the Framework Agreement had been performed (see *RDC* at [114]).

46 Moreover, the transaction under cl 1.3(b) did not proceed because the Fund's depository agents refused to transfer the Fund's AEI shares to ZICO, and consequently the Designated Mechanism under cl 1.3 could not operate.

Whether or not the Fund and Lecca had entered into definitive documentation, the transaction could not proceed in accordance with the Designated Mechanism without the shares being transferred to ZICO (and they never were). If the shares had been transferred to ZICO, the Fund and Lecca could then have entered into definitive documentation and proceeded with the transaction – indeed, Lecca's correspondence of 9 June 2022 (after Arena had purported to terminate the Framework Agreement on 2 June 2022) stated that Lecca was still prepared to proceed with the transaction subject to definitive documentation.. I cannot conclude that the Fund would have refused to enter into definitive documentation with Lecca if the Fund's shares had been transferred to ZICO. In principle, it was also open to the Fund and Lecca to have proceeded with the transaction without definitive documentation since the price and number of shares had already been agreed and stated in the Framework Agreement. Nevertheless, whether the Fund and Lecca chose to proceed with or without definitive documentation, the transaction could not have been implemented without the Fund's depository agents transferring the Fund's AEI shares to ZICO, and that never happened.

47 As I noted above (at [40]), Arena itself acknowledged in its lawyers' letter of 24 May 2022 that ZICO was not able to play its role as escrow agent because the Fund's shares were not transferred from its depository agents to ZICO. Indeed, Arena blamed this on the Fund breaching an obligation to use "best endeavours" to procure the transfer of the AEI shares to ZICO.

48 In the circumstances, the Fund not entering into definitive documentation with Lecca within ten business days (as stipulated in cl 1.3(b)(i) of the Framework Agreement) was not a repudiatory breach that Arena could use to justify terminating the Framework Agreement, as it purported to do on 2 June 2022.

Second alleged breach: In respect of cll 1.3(b)(iii), 1.12(b), and 1.12(d) of the Framework Agreement

49 Two different breaches are alleged here: one in respect of cl 1.3(b)(iii) read with cl 1.12(b), and the other in respect of cl 1.12(b) read with cl 1.12(d). I will address them in turn.

Alleged breach of cl 1.3(b)(iii) read with cl 1.12(b)

50 Arena's case is that the Fund breached a "best endeavours" obligation, in that the Fund failed to use its "best endeavours" to procure the approval of OCBC and DBS to transfer the Fund's AEI shares to Zico. Arena pleads that the Fund did not adequately convey to OCBC and DBS that ZICO would only be a bare trustee, and that was why the intended transfer to ZICO did not take place.[39]

51 I agree with the Fund Manager that cl 1.3(b)(iii) read with cl 1.12(b) does not impose on the Fund a "best endeavours" obligation.

52 There is no express term imposing an obligation on the Fund to use "best endeavours" to get OCBC and DBS to transfer the Fund's shares to ZICO. Clause 1.3(a) provides that the Fund "undertakes to Lecca to use reasonable endeavors to submit, within five (5) business days from entry into the escrow agreement, an official request to its existing depository agent requesting for the transfer of all the Fund's AEI shares from its depository agent to ZICO".[40] That was done, albeit not within five business days, and Arena does not assert that this was a repudiatory breach.

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39 CWS at para 48; SOC at para 26.

40 2CB at pp 439–440.

53 Instead, Arena relies on cl 1.3(b)(iii) read with cl 1.12(b). Those clauses (together with cl 1.12(a) and (d) for context), provide as follows:[41]

> 1.3 **Before Completion of Octopus Acquisition**
>
> …
>
> (b) S$5 million in cash
>
> …
>
> (iii) ZICO shall hold as bare trustee (A) in respect of 5,617,978 AEI Shares, for Lecca; and (B) in respect of S$5 million, for Arena. Subject to receipt of 5,617,978 AEI Shares, ZICO shall release the S$5 million to Arena upon receipt of written instructions from Arena. Subject to receipt of S$5 million, ZICO shall release 5,617,978 AEI Shares to Lecca (and/or its nominees) upon receipt of written instructions from Lecca.
>
> ……
>
> 1.12 **Timing**
>
> (a) The Parties acknowledge and agree that completion of each transaction set out in the definitive documentation will be subject to the approval and/or processes of one or more third parties including The Central Depository (Pte) Limited, depository agents and/or fund administrator which is beyond the control of the Parties.
>
> (b) As a result, the Parties agree that as long as the Parties have used their best endeavors to procure the approval of such third-party approval, they shall not be held liable or responsible for any delay in completion of the transactions caused by such third-parties.
>
> …

[41] 2CB at pp 439–440, 444

> (d) Save as provided above, any time, date or period originally stated in this Agreement or any time, date or period so extended in accordance with the terms of this Agreement, time shall be of the essence.

54 Clause 1.3(b)(iii) of the Framework Agreement does not say that the Fund was under any obligation (let alone a "best endeavours" obligation) to get OCBC and DBS to transfer the Fund's shares to ZICO. As for cl 1.12(b), that provides that "as long as the Parties have used their best endeavours to procure the approval of such third-party approval, they shall not be held liable or responsible for any delay in completion of the transactions caused by such third-parties".[42] Clause 1.12(b) provides that the parties would not be liable or responsible for delay caused by third parties (in relation to third party approvals), if the parties ***had*** *used their best endeavours* to procure such approvals. That does not mean that if the parties ***had not*** *used their best endeavours* to procure third party approvals, they would then be liable or responsible for such delay caused by third parties.

55 Moreover, given that the obligation under cl 1.3(a) to submit an official request to OCBC and DBS requesting the transfer of the Fund's shares to ZICO was one to "use reasonable endeavours", reading a "best endeavours" obligation into cl 1.3(b)(iii) read with cl 1.12(b) would be incongruent – it would place on the Fund a more onerous "best endeavours" obligation than the express "reasonable endeavours" obligation in cl 1.3(a).

56 It does not seem to me, however, that the Fund's only obligation (in relation to getting OCBC and DBS to transfer its shares to ZICO) was to use reasonable endeavours to submit an official request to them within the time

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42 2CB at p 444.

stipulated in cl 1.3(a), and nothing more. An argument could be made that there is an implied term for the Fund to use reasonable endeavours to get OCBC and DBS to transfer its shares to ZICO. But that was not the case run by Arena. Instead, Arena contended for a more onerous "best endeavours" obligation that was based on cl 1.3(b)(iii) and cl 1.12(b), rather than for an implied term requiring "reasonable endeavours". I could not from cl 1.3(b)(iii) and cl 1.12(b) glean any such "best endeavours" obligation.

57 In any event, I agree with the Fund Manager that if there were a "best endeavours" obligation on the Fund, that has not been breached as alleged by Arena. It necessarily follows that if the relevant obligation were a lower "reasonable endeavours" obligation, that would not have been breached either.

58 The breach as pleaded by Arena is as follows:[43]

> In breach of Clause 1.3(b)(iii) read with Clause 1.12(b) of the Framework Agreement, the Fund has failed to use its "best endeavours" to procure the approval of its brokers, OCBC Securities and DBS Limited, for the transfer of its [AEI] shares to ZICO as bare trustee.

59 That pleading is then particularised as follows:

> (a) ZICO was only intended under the Framework Agreement to be a bare trustee of the Fund's shares in [AEI] (see Clause 1.3(b)(iii) of the Framework Agreement).
>
> (b) The Fund did not adequately convey this to OCBC Securities and DBS Limited, resulting in their misunderstanding that there was a change in beneficial ownership arising from the transfer to ZICO.
>
> (c) The Fund claims that on or about 21 March 2022, it applied to open an account with The Central Depository (Pte) Limited ("CDP"). Yet, as at 13 June 2022, the Fund's opening of its CDP account "*remain*[ed] *in progress*", for no apparent reason.

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43 SOC at para 26.

60 Particular (c) is not actually a particular of the pleading that the Fund failed to use its "best endeavours" to procure the approval of OCBC and DBS for the transfer of the Fund's shares to ZICO (see [58] above). Rather, particular (c) relates to *another way* of getting the Fund's shares to ZICO *without having to procure the approval of OCBC and DBS for the transfer of the shares to ZICO*. I will deal with this when I consider Arena's contention that the Fund breached cl 1.12(b) read with cl 1.12(d) of the Framework Agreement by "failing and/or refusing to consider ***any*** other workable alternative mechanism and/or solution to give effect to the transactions set out at Clauses 1.3(b)(i), Clauses 1.4(b) and 1.4(c) of the Framework Agreement" [emphasis in original][44] (see [64]–[68] below).

61 I agree with the Fund Manager that the Fund *had* adequately conveyed to OCBC and DBS that ZICO was only intended under the Framework Agreement to be a bare trustee of the Fund's shares in AEI. It follows that, on Arena's case as pleaded and particularised, there was no breach of the "best endeavours" obligation asserted by Arena. In this regard, I accept that:

(a) both depository agents were sent copies of the Framework Agreement which provides that ZICO was to be a bare trustee of the Fund's shares;

(b) both depository agents were sent copies of the first Escrow Agreement which refers to ZICO as a bare trustee;

(c) as Arena's Mr Richard Andrew Smith ("Mr Smith") confirmed in cross-examination, in the Fund's dealings with the depository agents

[44] SOC at para 27.

> it was made amply clear that ZICO was only to hold the shares as bare trustee and there would be no change of beneficial ownership.45

62 Even if there had been a breach of a "best endeavours" obligation as alleged by Arena, it would not have been a repudiatory breach. As cl 1.3(b)(iii) read with cl 1.12(b) does not state a specific time within which the Fund was to use "best endeavours" to procure the transfer from its depository agents to ZICO, cl 1.12(d) on time being of the essence does not apply – there being no "time, date or period" stated in the Framework Agreement. The alleged breach would thus not be a breach of a condition. Nor would the breach be repudiatory (as a repudiation, or on account of its consequences), for the same reasons set out above in relation to the first alleged breach.

63 Further, as I have found above (at [37]–[41]), Arena's conduct through its lawyers' letter on 24 May 2022 affirmed the subsistence of the Framework Agreement. By analogy with the proposition in *National Skin Centre*, if after 24 May 2022 (when it was still affirming the Framework Agreement) Arena wished to terminate the agreement for breach of the alleged "best endeavours" obligation, Arena had to give notice to the Fund requiring the Fund to perform that obligation within a reasonable time (but not necessarily stipulating a specific deadline, since cl 1.3(b) did not stipulate a specific deadline in the first place). Arena, however, did not do so. Instead of asking the Fund to procure its depository agents to transfer the shares to ZICO within a reasonable time, Arena demanded that the Fund do something else, namely, to effect the transaction by bypassing ZICO. In the circumstances, Arena was not entitled to terminate the Framework Agreement on account of breach of the alleged "best endeavours" obligation, when Arena purported to terminate the agreement on 2 June 2022.

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45 Transcript, 22 November 2023, at 53:15 to 53:19.

Alleged breach of cl 1.12(b) read with cl 1.12(d)

64 Further or in the alternative to the alleged breach of cl 1.1(b)(iii) read with cl 1.12(b), Arena pleads that the Fund breached cl 1.12(b) read with cl 1.12(d) "by failing and/or refusing to consider ***any*** other workable alternative mechanism and/or solution to give effect to the transactions set out at Clauses 1.3(b)(i), Clauses 1.4(b) and 1.4(c) of the Framework Agreement" [emphasis in original].[46]

65 Although Arena initially said that it would not pursue this alternative case,[47] Arena nevertheless pursued the alleged breach that the Fund failed to take all reasonable steps to open up its own CDP account (so that the Fund's depository agents could transfer the Fund's shares to the Fund, and the Fund could then transfer the shares to ZICO; rather than the Fund procuring its depository agents to make that transfer directly to ZICO).[48] As I stated above (at [60]), this is an alternative breach rather than a particularisation of the alleged breach that the Fund failed to use "best endeavours" to procure the approval of its brokers, OCBC and DBS, for the transfer of its ABL shares to ZICO as bare trustee.

66 Indeed, while the "Designated Mechanism" mentioned in cl 1.3(b) involved ZICO (as escrow agent for the Fund) receiving the payment consideration for the shares and ZICO paying that to Arena, the breach alleged by Arena is of an alleged obligation to consider another mechanism for the transfer of the shares. Arena specifically argues that when the Fund's depository agents refused the Fund's request (under cl 1.3(a) of the Framework Agreement)

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46 SOC at para 27.

47 CWS at para 42.

48 CWS at paras 106–128.

to transfer the shares to ZICO, the Fund was under an obligation to consider some other way of getting the shares to ZICO or effecting the sale and purchase transaction without involving ZICO.

67 There is, however, nothing in cl 1.12(b) read with cl 1.12(d) that obliges the Fund to consider any other mechanism; indeed, those provisions do not impose any positive obligation on the Fund. The Framework Agreement itself does not provide for an alternative mechanism, nor does it oblige the Fund to consider alternatives. Thus, the breach alleged by Arena in relation to Clause 1.12(b) read with Clause 1.12(d) is not made out.

68 Moreover, in a similar vein to the alleged breaches analysed above, this alleged breach would not have been a repudiatory breach, and on account of Arena's conduct affirming the Framework Agreement it was not open to Arena to terminate it for repudiatory breach on 2 June 2022.

Third alleged breach: In respect of cl 1.5(a) of the Framework Agreement

69 Arena pleads that "[i]n breach of clause 1.5(a) of the Framework agreement, the Fund has refused to transfer any [AEI] shares to Arena's securities account in Singapore".[49]

70 Clause 1.5 of the Framework Agreement provides as follows:[50]

> 1.5 **Bonus payments**
>
> Subject to the terms and conditions of this Agreement, the Fund agrees to the following as compensation to Arena for the Fund's late payment of redemption proceeds following the First Redemption.

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49 SOC at para 28.

50 2CB at pp 441–442.

> (a) US$1.5 million in AEI Shares
>
> The Fund shall pay Arena US$1.5 million by instructing ZICO to transfer such number of AEI Shares amounting to US$1.5 million, at a sale price of S$1.00 per AEI Share and at the prevailing exchange rate, to Arena's securities account in Singapore.
>
> (b) Call Option for US$4.5 million of AEI Shares
>
> (i) Subject to sub-clause (ii) below, the Fund shall grant Arena a call option ("**Call Option**") to purchase US$4.5 million worth of AEI Shares at a sale price equivalent to 0.8 multiplied by the 30 Day VWAP and at the prevailing exchange rate ("**Option Sale Price**"). The Call Option may be exercisable in full or in part (subject to a minimum of US$1 million per exercise of the Call Option) before 31 March 2023, after which the Call Option shall be null and void.
>
> For purposes of this Agreement, "**30 Day VWAP**" means the volume weighted average price of the AEI Shares traded on the Singapore Exchange during the 30 calendar day period prior to the date Arena exercises the Call Option in writing.
>
> …
>
> [emphasis in original]

71 I agree with the Fund Manager that cl 1.5(a) of the Framework Agreement (whether by itself, or read with cl 1.10 on definitive documentation) does not oblige the Fund to transfer shares to Arena's securities account in Singapore. Rather, cl 1.5(a) obliges the Fund to instruct ZICO to transfer shares to Arena's securities account in Singapore. That was premised on all of the Fund's AEI shares having first been transferred to ZICO as the Fund's escrow agent and custodian, as Arena's witnesses Mr Smith and Mr Andrew John Bruce

accepted.[51] ZICO could not be expected to transfer to Arena AEI shares that ZICO did not have. I regard the Fund's obligation to instruct ZICO to transfer shares to Arena as being subject to an implied condition that ZICO had to have had the shares in the first place, an implied condition that was not fulfilled.

72 Clause 1.5(a) does not provide for the Fund to pay Arena US$1.5m other than in AEI shares. Further, cl 1.5(a) is couched in terms of the Fund instructing ZICO to transfer shares to Arena. The parties did not stipulate that the shares should be transferred directly from the Fund's depository agents to Arena. Instead, all of the Fund's AEI shares were to go to ZICO first, pursuant to cl 1.3(a). I will analyse later the implications of the Fund's depository agents' refusal to transfer the shares to ZICO, but for present purposes Arena has not made out the alleged breach of cl 1.5(a).

73 In any event, for reasons given earlier I would not consider this alleged breach to be a repudiatory breach, nor would Arena have been entitled to terminate the Framework Agreement on account of this breach.

Fourth alleged breach: In respect of cl 1.5(b) of the Framework Agreement

74 Arena asserts that the Fund breached cl 1.5(b) of the Framework Agreement by refusing to comply with it.[52]

75 Clause 1.5(b) has been set out earlier (see [70] above). Arena was granted a Call Option to purchase US$4.5m worth of AEI shares based on a prescribed pricing formula. Clause 1.5(b)(i) provided that the "Call Option may

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51 First Affidavit of Evidence-in-Chief of Richard Andrew Smith dated 23 February 2023 at para 54; First Affidavit of Evidence-in-Chief of Andrew John Bruce dated 23 February 2023 at para 46..

52 SOC at paras 30–31.

be exercisable in full or in part (subject to a minimum of US$1 million per exercise of the Call Option) before 31 March 2023, after which the Call Option shall be null and void".[53]

76 Arena submitted a 26 April 2022 Call Exercise Notice purporting to exercise the Call Option for US$500,000 worth of shares.[54] The Fund Manager contends that the 26 April 2022 Call Exercise Notice is not a valid notice.[55] Indeed, the 26 April 2022 Call Exercise Notice was for less than the prescribed minimum of US$1m per exercise of the Call Option, as required in cl 1.5(b).

77 In response to that, Arena contends that there was an agreement in principle, or simply waiver, waiving the requirement that the exercise not be less than US$1m.[56]

78 Regarding waiver, cl 6 of the Framework Agreement provides as follows:[57]

> **6. Waiver**
>
> No failure or delay by a Party to exercise any right or remedy provided under this Agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it preclude or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall preclude or restrict the further exercise of that or any other right or remedy.

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53 2CB at p 442.

54 4CB at p 917.

55 Defence at paras 42–43.

56 CWS at paras 173–194, particularly at [184]; Reply to the Second Defendant's Defence dated 20 February 2024 ("Reply") at paras 12–13.

57 2CB at p 445.

79 Arena contends that that clause does not apply, for:[58]

(a) the stipulated minimum sum of US$1m per exercise was drafted for Arena's benefit and Arena was free to elect to exercise the Call Option for a lesser sum;

(b) alternatively, there was an agreement in principle between Arena and the Fund on or about 28 February 2022 to allow the exercise of US$500,000 of its options and this agreement continued during the exercise of the Call Option in April 2022;

(c) the minimum of US$1m per exercise of the Call Option was not a right or remedy available to the Fund and the Fund Manager under the Framework Agreement; and

(d) further or in the alternative, the minimum of US$1m per exercise of the Call Option was only a right or remedy available to the Fund and not the Fund Manager under the Framework Agreement.

80 I address the arguments at [79(a)], [79(c)] and [79(d)] first.

81 On Arena's first argument (at [79(a)] above), I do not accept that the stipulated minimum of US$1m per exercise was drafted for Arena's benefit. It would instead have been to Arena's benefit for there to be *no stipulated minimum* – in that case Arena would have been free to exercise the Call Option for any amount it wished. As drafted, cl 1.5(b) of the Framework Agreement stipulates that the Call Option was exercisable "*subject to* a minimum of US$1m per exercise of the Call Option" [emphasis added]. As the exercise of the Call

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58 Reply at para 13.

Option was expressly *subject to* the stipulated minimum sum, the Call Option was not exercisable unless the stipulated minimum sum was met.

82 On Arena's third argument (at [79(c)] above), as a party to the Framework Agreement the Fund had the right to require that its terms be complied with, including that any purported exercise of the Call Option under cl 1.5(b) should meet the stipulated minimum sum. Clause 6 was thus fully applicable, such that no failure or delay by the Fund to exercise its right of requiring compliance with cl 1.5(b) would constitute a waiver of that right.

83 On Arena's fourth argument (at [79(d)] above), Arena's claims against the Fund Manager are premised on the Fund having committed repudiatory breaches of the Framework Agreement (including a breach of cl 1.5(b)). In that regard, the burden rests on Arena to establish such repudiatory breaches (and consequently it is for Arena to prove that in relation to cl 1.5(b) there was some agreement in principle or waiver such that Arena did not need to comply with the stipulated minimum sum in cl 1.5(b)). In defending itself, the Fund Manager was entitled to contend that Arena had not made out its case against the Fund. Arena's contention that cl 1.5(b) did not confer a right or remedy on the Fund Manager is beside the point – the Fund Manager did not need any such rights or remedies to defend itself against Arena's claims.

84 For the above reasons, I agree with the Fund Manager that cl 6 of the Framework Agreement precludes Arena from relying on any failure or delay on the part of the Fund in requiring that cl 1.5(a) be complied with by Arena, as a waiver of the Fund's right to require such compliance.

85 Returning to Arena's second argument (see [79(b)] above) that there was allegedly an agreement in principle between Arena and the Fund to allow the

exercise of US$500,000 of its options (notwithstanding the stipulated minimum of US$1m), this is strictly speaking not a waiver argument. Rather, Arena's contention is that Arena and the Fund had agreed to do something different from what they had earlier agreed as set out in cl 1.5(b).

86 I agree with the Fund Manager that there was no such agreement.

87 Arena's contention is that the alleged agreement in principle was reached on or about 28 February 2022 and continued during the 26 April 2022 exercise of the Call Option. The agreement in principle alleged by Arena was in relation to an earlier Call Exercise Notice dated 7 February 2022, which Arena cancelled on 1 March 2022.[59]

88 Arena recognises that the Fund had replied to the 7 February 2022 Call Exercise Notice on 8 February 2022 to say there were a few "inconsistencies / deviations" from the Framework Agreement's requirements, such as, *eg*, the requirement of a minimum of US$1m per exercise.[60]

89 The Fund sent a further email on 8 February 2022 raising the issue that there was a "trading blackout period" for AEI shares at the time, and Arena sent a further email to say that it was choosing to exercise only US$500,000 of its options at that time.[61]

90 As Arena recognises, the Fund then replied (also on 8 February 2022) asking that Arena exercise the Call Option "after the blackout period" and

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59 4CB at pp 894, 899–900.

60 Reply at para 12(b); 4CB at pp 897–898.

61 4CB at pp 895–897.

ensure that the "terms [were] consistent with what [had] been mutually agreed and signed in the Framework Agreement".[62]

91 Thus, on 8 February 2022, just one day after Arena's 7 February 2022 Call Exercise Notice, the Fund responded to say that the Call Exercise Notice was inconsistent with cl 1.5(b), and to ask Arena to ensure that its exercise of the Call Option "after the blackout period" be consistent with what had been agreed, as stated in the Framework Agreement.

92 Up to that point, there was clearly no agreement in principle that Arena could exercise the Call Option for US$500,000 worth of shares, contrary to the stipulated minimum sum of US$1m in cl 1.5(b).

93 Arena then relies on *its* email of 28 February 2022 to the Fund stating that Arena understood that its exercise of US$500,000 options had "now been permitted" and indicated that it was again electing to exercise its option as the "blackout period" had passed. Arena says that the Fund did not dispute that Arena's exercise of US$500,000 in options was being permitted. What Arena relies on is (a) *its own assertion* that its exercise of options had "now be[en] permitted", rather than any communication from the Fund to that effect; and (b) *the Fund's silence* in response to Arena's 28 February 2022 email, in the time between that and Arena's email the next day, 1 March 2022, cancelling the purported exercise.

94 Arena's assertion in its 28 February 2022 email that it understood its exercise of the Call Option had "now been permitted", appears to relate to the blackout period being over, rather than the Fund being amenable to Arena only

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62 4CB at p 895.

exercising the US$500,000 Call Option, despite the Fund's emails to the contrary on 8 February 2022.

95 In any event, I cannot infer from the Fund's non-response between that email and Arena's email the next day, 1 March 2022, cancelling the exercise, that the Fund had changed its mind about Arena having to comply with cl 1.5(b) of the Framework Agreement, which the Fund had required in its 8 February 2022 emails.

96 I thus find that there was no agreement in principle reached on about 28 February 2022 (as contended for by Arena) that Arena could exercise US$500,000 worth of options notwithstanding that cl 1.5(b) stipulated a minimum sum of US$1m, which the Fund had on 8 February 2022 asked Arena to comply with. It follows that Arena's contention that this agreement in principle *continued* during its next purported call option exercise in April 2022 fails as well.

97 For good order, I find that there was *at no time* an agreement in principle between the Fund and Arena that Arena would not have to comply with the stipulated minimum sum of $1m in cl 1.5(b).

98 Arena refers to correspondence subsequent to its email of 28 February 2022, to the effect that in relation to its 26 April 2022 Call Exercise Notice the Fund had only raised issues of a "blackout period" and concerns with "insider trading", and not also Arena's failure to comply with the stipulated minimum sum under cl 1.5(b).

99 In cross-examination, Arena's Mr Smith agreed that, from the correspondence:[63]

(a) the Fund did not say that it would effect the Call Option;

(b) the Fund did not commit to effecting the Call Option;

(c) the Fund did not say that it could accept an exercise of a call option for only US$500,000 although it should have been for US$1m; and

(d) neither the Fund nor the Fund Manager waived any of the formal requirements stated in cl 1.5(b).

100 At its highest, Arena's contention is that although the Fund had by its emails of 8 February 2022 required Arena to comply with cl 1.5(b) in relation to the 7 February 2022 Call Exercise Notice, the Fund did not repeat the same point in relation to the 26 April 2022 Call Exercise Notice. The short answer is: having already raised the point in its emails of 8 February 2022, there was no need for the Fund to repeat the point again.

101 The fact that the Fund did not reiterate that Arena had to comply with cl 1.5(b) does not establish any agreement in principle that Arena did not need to comply with that clause.

102 Where a claim may be resisted on multiple grounds, the fact that the defendant only relies on *some* grounds at first does not preclude the defendant from relying on *other* grounds thereafter. In *Diab v Regent Insurance Co Ltd* [2007] 1 WLR 797 ("*Diab*"), the insurance policy contained "condition 11"

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63 Transcript, 22 November 2023, at 62:3 to 64:7.

which required that a claim in writing be submitted within 15 days after the damage in question, accompanied by a particularised account of all property damaged and the amount of damage (see [3]). The appellant did not submit any such written claim or account within the stipulated period. The respondent defended the appellant's claim on the basis that the appellant had failed to comply with Condition 11. The appellant contended that compliance with Condition 11 had been waived by the respondent, when the respondent had rejected the appellant's claim only on the ground that the fire had been started deliberately (and the respondent had not then relied on Condition 11). The Privy Council held that although the respondent had (on other grounds) earlier tried to persuade the appellant not to pursue a claim under the policy, it had not indicated that it would not expect the appellant to comply with "condition 11" if the appellant did pursue a claim (at [25]).

103 In the present case, Arena's case is even weaker than that of the appellant in *Diab*, for the Fund had in its emails of 8 February 2022 – in response to Arena's earlier Call Exercise Notice dated 7 February 2022 – stated that Arena was to comply with the stipulated minimum sum in cl 1.5(b). The fact that the Fund did not repeat that point specifically in relation to Arena's later Call Exercise Notice dated 26 April 2022 was not an indication that the Fund had changed its mind about Arena having to comply with cl 1.5(b), nor did the Fund lose its right to rely on cl 1.5(b) to resist Arena's claim on the 26 April 2022 Call Exercise Notice. This is reinforced by cl 6 of the Framework Agreement on waiver (see above at [78]–[84]).

104 For completeness, Clause 5 of the Framework Agreement on "variation" provided as follows:[64]

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64 2CB at pp 444–445.

> **5. Variation**
>
> No variation of this Agreement shall be effective unless made in writing and signed by the Parties. Unless expressly agreed, no variation shall constitute a general waiver of any provisions of this Agreement, nor shall it affect any rights, obligations or liabilities under or pursuant to this Agreement which have already accrued up to the date of variation, and the rights and obligations of the Parties under or pursuant to this Agreement shall remain in full force and effect, except and only to the extent that they are so varied.

105 The agreement in principle which Arena contends for, purports to vary the Framework Agreement, but it is not in writing and signed by the Parties. On the terms of cl 5, the agreement in principle would have been ineffective to vary the Framework Agreement and cl 1.5(b) would have continued to apply according to its terms.

106 In *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979, however, the Court of Appeal observed that under English law "a term of a contract which states that the contract can only be varied in writing will not prevent there being an oral variation; instead, the effect of such a term is at best to raise a rebuttable presumption that, in the absence of writing, there has been no variation" (at [90]). On this basis, even if cl 5 of the Framework Agreement did not prevent an agreement in principle that was not "in writing and signed by the Parties" from varying the Agreement, there would first be a rebuttable presumption that, in the absence of writing, there was no such variation. It would be even more of an uphill task for Arena to establish a variation.

107 In the present case, however, the parties did not address the effect of cl 5 of the Framework Agreement. The Fund Manager was content to submit that

on the evidence there was no agreement in principle, and I agreed with this. The Fund Manager did not rely on cl 5 and neither did I.

108 In any event, for reasons given earlier I would not consider this alleged breach a repudiatory breach, nor would Arena have been entitled to terminate the Framework Agreement on account of this breach.

Fifth alleged breach: In respect of clause 1.1(a) of the Framework Agreement

109 Clause 1.1 of the Framework Agreement[65] has been set out at [4] above:

110 Arena contends that the Fund committed a repudiatory breach of cl 1.1(a) in that:[66]

(a) on 20 May 2022, Arena submitted a Redemption Request to redeem all outstanding Units then held by Arena (being 90.0928 Units), for the sum of US$16,633,540.66; and

(b) the Fund took no steps to honour the redemption.

111 However, this alleged fifth breach was not addressed in Arena's written submissions, Arena only addressed the other four alleged breaches.[67] In any event, I agree with the Fund Manager that Arena's allegation that cl 1.1(a) of the Framework Agreement had been breached is unsound.

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65 2CB at p 439.

66 SOC at paras 32–34.

67 CWS at paras 41 and 215.

112 Clause 1.1(a) does not oblige the Fund to pay Arena the sum of US$16,633,540.66 upon Arena submitting a Redemption Request for its outstanding Units. Rather, cl 1.1(a) simply states that the settlement set out in the Framework Agreement is conditional upon Arena submitting such a Redemption Request. If Arena did so (as it did on 20 May 2022), that condition would be fulfilled, paving the way for the contemplated settlement to be achieved. Indeed, Arena's Mr Smith agreed in cross-examination that cl 1.1(a) does not impose an obligation on the Fund to immediately pay Arena, the Fund had not breached cl 1.1(a) and cl 1.1(a) itself never envisioned an immediate redemption of Arena's Units.[68]

113 As noted above (see [5]), cl 1.8(b) of the Framework Agreement provides that the contemplated full and final settlement between the parties was to be achieved by the completion of the transactions set out in cll 1.3, 1.4 and 1.5 of the Framework Agreement. The submission of a Redemption Request by Arena pursuant to cl 1.1(a) did not give Arena a right to payment of the sum of US$16,633,540.66, independent of the other terms of the Framework Agreement. Instead, payment to Arena would be by way of the transactions in cll 1.3, 1.4 and 1.5 of the Framework Agreement. That is reinforced by cl 1.1(b) of the Framework Agreement, which provides that the Agreement "sets out a framework for the repayment of a total fixed sum of US$24 million".[69]

114 For the above reasons, I find that Arena has failed to prove that the Fund breached the Framework Agreement in any of the five ways alleged by Arena. Even if any of those breaches were established, they would not be repudiatory breaches, nor would Arena be entitled to terminate the Framework Agreement

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68 Transcript, 23 November 2023, at 56:18 to 57:3, 58:3 to 58:6; 2DWS at para 90.

69 2CB at p 439.

on account of those breaches because of Arena's conduct in affirming the Agreement.

Was the Framework Agreement subject to an implied condition that has not been fulfilled?

115 In the alternative to its case on repudiatory breach, Arena contends that the parties were discharged from further performance of the Framework Agreement (and so Arena could sue on the Subscription Agreement and side letters) because the Implied Condition was not fulfilled.[70] To recap, that Implied Condition is: "that the Fund would be able to transfer all of its [AEI] shares to ZICO to hold as its escrow agent and custodian pursuant to clause 1.3(a)(i) in order for the Designated Mechanism (as defined at clause 1.3(b)) to operate".[71]

116 Arena points out that the performance of the transactions set out in cll 1.3(b) and 1.4 of the Framework Agreement, was contingent on the Fund being able to transfer all of its AEI shares to ZICO.[72] The performance of the transaction at cl 1.5(a) of the Framework Agreement too was contingent on the Fund being to transfer its AEI shares to ZICO – as noted above (at [69]–[73]), the Fund's obligation under cl 1.5(a) was to instruct ZICO to transfer AEI Shares worth US$1.5m to Arena, which in turn is premised on ZICO holding the Fund's AEI shares.

117 The Fund Manager contends that the Implied Condition should not be implied, because:[73]

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70 SOC at paras 22A, 22B and 39A.

71 SOC at para 22A.

72 SOC at para 22B.

73 Defence at para 28A; 2DWS at paras 108–112.

(a) the parties did not leave a "gap" in the Framework Agreement; and

(b) even if there were a "gap" and a term is to be implied, the Implied Condition is uncertain, in that there is no clear timeframe for fulfilling it.

118 The Fund Manager also contends that further performance of the Framework Agreement had *not* become impossible, in that it was still possible to get OCBC and DBS to transfer the Fund's AEI shares to ZICO. On this basis, even if the Implied Condition were to be implied, it would not allow Arena to regard the Framework Agreement as having been terminated for impossibility under cl 1.12.[74]

119 At the outset, to the extent that the Fund Manager suggests that cl 1.12(b) covers impossibility of performance,[75] cl 1.12(b) does not do so – it only addresses *delay*. It provides that "as long as the Parties have used their best endeavours to procure the approval of such third-party approval, they shall not be held liable or responsible for any delay in completion of the transactions caused by such third-parties". It appears from cl 1.12(b) that parties recognised that transactions might be *delayed* because of the need for third party approval (and if there were such delay a party who had used best endeavours to procure such approval would not be liable or responsible for such delay). But the parties said nothing in cl 1.12(b) about any of the transactions being *impossible to perform* due to third party involvement.

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74 2DWS at paras 118–119.

75 2DWS at para 120.

120 The following three-step process is employed in determining if a term should be implied into a contract (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [101] ("*Sembcorp Marine*"), *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2021] 1 SLR 631 at [198]):

(a) The court will examine whether the parties contemplated the gap in the contract, with implication only being considered if the parties did not contemplate that gap.

(b) The court next considers whether it is necessary – in the business or commercial sense – to imply the term so as to give the contract efficacy (the "business efficacy test").

(c) Finally, the court ascertains whether, had the specific term been proposed to the parties at the time of the contract, the parties would have testily responded with a "Oh, of course!" (the "officious bystander test").

121 I now turn to consider whether the parties left a "gap" in the Framework Agreement.

Did the parties leave a "gap" in the Framework Agreement because they did not contemplate the "gap"?

122 The Fund Manager contends that the Framework Agreement had envisaged the possibility of delays in the transfer of the Fund's AEI shares to ZICO and/or that the Designated Mechanism could not operate until the transfer of those shares was contemplated – the Fund Manager cites cl 1.12 in this

regard.[76] From this, the Fund Manager submits that the parties did contemplate "the issue of the transfer of [AEI] shares to ZICO's escrow account not happening or being delayed for whatever reason".[77] The Fund Manager points to cl 1.12(a) where the parties acknowledged that the completion of each transaction will be subject to the approval and/or processes of one or more third-parties (including depository agents) "which is beyond the control of the Parties".[78] The Fund Manager contends that the parties thus contemplated that any transaction subject to third party approval and/or processes might fail due to the conduct of a third party that was beyond the parties' control.[79]

123 Did the parties contemplate this, but decide not to make express provision for it? They did not. The fact that they only addressed delay (and not impossibility of performance) in cl 1.12(b) (see [119] above) itself suggests that they expected the transaction to be capable of performance, whilst recognising that performance might be delayed. The evidence is to the same effect.

124 The Fund Manager cites the evidence of Arena's Mr Smith that Arena "had always anticipated that *it would take more time*…they referred to other third parties being involved, et cetera", and that they "knew that maybe some of these *depository agents may take convincing* because they have their own processes" [emphasis added].[80] That evidence, however, does not support the Fund Manager's contention that the parties contemplated that the transactions might *fail* because of third parties, and chose not to address it expressly in the

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76 Defence at para 28A.

77 2DWS at para 103.

78 2CB at p 444.

79 Defence at para 28A.

80 Transcript, 22 November 2023, 24:21 to 25:3.

Framework Agreement (other than to excuse any party who had used best endeavours of liability or responsibility for *delay*). Rather, the tenor of Mr Smith's evidence is that there might be *delay* because of the involvement of third parties, but that the parties expected the transactions to be completed nevertheless.

125 To similar effect is the evidence of the discussions about the escrow arrangement. Mr Ronnie Tan, who acted for Arena in the negotiations of the Framework Agreement, said that at a meeting on 23 December 2021 (when the Framework Agreement was signed), there was discussion of whether the mechanism was doable, in particular, whether ZICO could be escrow agent for the AEI shares. The issue was laid to rest after Mr Sun Quan and ZICO gave the assurance that the escrow arrangement had been done before.[81] That evidence too points to the parties contemplating that the transactions would not fail due to the involvement of third parties, and in particular that the Fund could get its depository agents to transfer the Fund's AEI shares to ZICO.

126 I thus find that there is a "gap" in the Framework Agreement, in that the agreement does not expressly say what happens if one or more of the transactions fails due to third party conduct, beyond the general stipulation in cl 1.8 that a full and final settlement between the Fund and/or the Principal and Arena would not have been achieved. It would follow that under cl 1.8(b) there would not be a full and final settlement as between the Fund and/or the Principal and Arena (which would only be achieved with the completion of *all* the transactions), but the Framework Agreement does not say what would happen

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[81] Transcript, 24 November 2023, at 15:6 to 15:22 and 61:3 to 63:3; 20:7 to 20:22, 23:5 to 24:2, 63:25 to 64:15 and 71:22 to 72:5.

then. In particular, the Framework Agreement does not say what would happen to the stay of proceedings under cl 1.11.

127 In the circumstances, there is a gap in the Framework Agreement arising because the parties did not contemplate that gap. As such, it is permissible for a term to be implied to fill that gap.

Should the Implied Condition be implied?

128 I do not agree with the Fund Manager that Arena's proposed implied term, *ie*, the Implied Condition, is too uncertain to be implied in that there is no clear timeframe for fulfilling it. The proposed Implied Condition relates to a scenario where the Fund was *unable* to transfer its AEI shares to ZICO so as to complete the transactions dependent on that transfer. Of its nature, a case of *inability* to perform is not dependent on a particular time for performance; it is not about failing to meet a deadline, but rather about not being able *ever* to complete the transaction(s). There is no lack of certainty in the Implied Condition – either the Fund was able to get its depository agents to transfer its AEI Shares to ZICO, or it was not.

129 I agree with Arena that it is necessary as a matter of business efficacy to imply into the Framework Agreement a mechanism to deal with the situation where the Fund is unable to transfer its AEI shares to ZICO. The stated objective of the Framework Agreement was: to achieve a full and final settlement between the Fund and/or the Principal, and Arena, through the completion of all of the transactions in cll 1.3, 1.4 and 1.5 (as stated in cl 1.8(b)). If the Fund were unable to get its depository agents to transfer its AEI Shares to ZICO, the transactions dependent on ZICO holding the Fund's AEI Shares as escrow agent could not be completed, and the full and final settlement envisaged in cl 1.8 could not be

achieved. Arena might still receive *some* of the benefits it was envisaged it would get under the Framework Agreement, through transactions that were not affected by the ZICO escrow arrangement, such as the payment of S$10m (the equivalent of US$7,366,483.32) which Arena received pursuant to cl 1.3(c) of the Framework Agreement. But, pursuant to cl 1.8(b), a full and final settlement could not be achieved unless *all* of the transactions in cll 1.3, 1.4 and 1.5 were completed, and that would never happen if some of the transactions were incapable of performance because the Fund was incapable of getting its depository agents to transfer its AEI shares to ZICO.

130 Further, in view of cl 1.11, Arena could not pursue claims against the Fund and/or the Principal pending completion of the transactions in the Framework Agreement, but that was to be a temporary state of affairs; when all the transactions were completed, there would be a full and final settlement of Arena's claims. It would be perverse if Arena's claims were *stayed* forever, pending completion of transactions that could never be completed, awaiting a full and final settlement that could never be achieved. In that scenario, Arena could never pursue its claims, yet Arena would never receive all the benefits it was contemplated that it would receive under the Framework Agreement. This was not the outcome that the parties had agreed upon, nor is it the consequence of a gap in the agreement that they contemplated but chose to leave. Thus, as a matter of business and commercial sense, it is necessary to imply a term into the Framework Agreement to fill this gap. The business efficacy test set out in *Sembcorp Marine* is satisfied.

131 The officious bystander test is satisfied too. Had this term been proposed to the parties at the time of the contract, they would have responded, "Oh, of course!". Thus, if the transactions dependent on ZICO holding the Fund's AEI shares could not be completed because of the Fund's inability to get its

depository agents to transfer the shares to ZICO, the parties would be discharged from further performance of the Framework Agreement, and Arena would be free to pursue its claims against the Fund, the Principal, and the Fund Manager (giving due credit for any benefits that Arena might have received under the Framework Agreement).

Has the Implied Condition been fulfilled?

132 Arena contends that the Implied Condition was not fulfilled, in that the Fund was unable to transfer its ABL shares to ZICO pursuant to cl 1.3(a)(i), *ie*, by requesting its depository agents to make that transfer (see [115] above).

133 The Fund Manager disputes this, contending that it was not impossible for the Fund to get its depository agents to effect the transfer "with further discussions with and/or provision of further documents to OCBC and DBS".[82] That submission is ironic, for the Fund Manager also contends that the Fund had used its best endeavours to procure the approval of OCBC and DBS for the transfer of the Fund's AEI shares to ZICO,[83] and yet OCBC and DBS refused to effect the transfer. The Fund Manager criticises Arena for not saying what more could be done to show that ZICO would hold the ABL shares as bare trustee,[84] but the Fund Manager similarly does not say what "further discussions… and/or provision of further documents" could have persuaded the depository agents to make the transfer, when the Fund's best endeavours had failed to do so.

134 The evidence shows that the Fund's efforts culminated in OCBC saying on 28 February 2022 that it was "unable to assist with this share transfer

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82 2DWS at para 118.

83 2DWS at para 49.

84 2DWS at para 52.

request",[85] and DBS saying on 9 February 2022 that it was "unable to further proceed with the transfer".[86] It does not appear that the Fund made any further efforts thereafter to persuade OCBC or DBS to transfer the Fund's AEI shares that they held, to ZICO.

135 The Fund Manager contends, and I accept, that the Fund used its best endeavours to get the depository agents to transfer its AEI shares to ZICO – as such there was no breach of any "best endeavours" obligation on the Fund. Despite the Fund's best endeavours, it was unable to get its depository agents to transfer its AEI shares to ZICO pursuant to cl 1.3(a)(i), and the Implied Condition was thus not fulfilled.

136 I thus find, in favour of Arena:

(a) that the Implied Condition should be implied;

(b) that the Implied Condition has not been fulfilled in that the Fund was unable to get its depository agents to transfer its AEI shares to ZICO; and

(c) the parties were discharged from further performance of the Framework Agreement.

137 That discharge from further performance of the Framework Agreement includes Arena no longer being obliged to "refrain and forbear from pursuing any and all legal proceedings against the Fund and/or the Principal" under

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85 3CB at p 890.

86 6CB at p 1385.

cl 1.11(b).[87] Thus, Arena was free to assert claims against the Fund and Fund Manager under the Subscription Agreement and side letters (as the case may be).

If the Implied Condition had not been fulfilled, had Arena nevertheless affirmed the Framework Agreement?

138 The Fund Manager, however, contends that Arena had affirmed the Framework Agreement and so the agreement remains in force.[88] That argument was initially raised in response to Arena's case on breach of the Framework Agreement – the Fund Manager says "the said affirmations relate to any and all purported breaches of the Framework Agreement alleged in the Statement of Claim".[89] But the Fund Manager also raises affirmation in response to Arena's case on non-fulfilment of the Implied Condition,[90] as well as on the issue of frustration.[91]

139 After the parties had made their written and oral submissions, the court drew their attention to the English Court of Appeal's decision in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2017] 1 All ER (Comm) 483 ("*MSC Mediterranean*"), which decided that a contract cannot be affirmed when the remaining commercial purpose of the adventure had been frustrated, *ie*, the performance of the contract had become radically different from that which the parties had envisaged when they had entered into the contract. In that case, that had been caused by a continuing repudiatory breach of contract on the

87 2CB at p 443.

88 Defence at para 40.

89 Defence at para 40.

90 Defence at paras 51A read with 40.

91 Defence at paras 53A read with 40.

part of the shipper. The parties were invited to make further submissions on this, and they did so in writing.

140 The Fund Manager contended that the case of *MSC Mediterranean* did not assist the court: it was distinguishable in that Arena was no longer pursuing its case on frustration, and was relying instead on non-fulfilment of an Implied Condition.

141 I will deal with the issue of frustration later (at [145]–[153]). For present purposes, I do not agree that *MSC Mediterranean* can be distinguished as suggested by the Fund Manager. In *MSC Mediterranean*, although the court spoke about the remaining commercial purpose of the adventure having been frustrated, it was a continuing *repudiatory breach of contract* on the part of one of the parties that had made further performance of the contract radically different from what the parties had envisaged at the time of contracting (at [36], [41]–[43], [52], [65]). It was a case of repudiatory breach, rather than one in which the doctrine of frustration applied, *ie*, where, *without fault of the parties*, a supervening event had occurred rendering the parties' contractual obligations radically or fundamentally different from what had been agreed (see *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] 3 SLR 857 ("*Alliance Concrete*") at [33]).

142 The proposition in *MSC Mediterranean* thus cannot be confined to cases where the doctrine of frustration applies – it also applies to cases of repudiatory breach (as was the case in *MSC Mediterranean*), and in principle it would also apply to cases where because an implied condition has not been fulfilled, further performance of the contract would be radically different from what the parties had envisaged at the time of contracting. That was the case here: because of the Fund's inability to get its depository agents to transfer its AEI shares to ZICO,

all the transactions in the Framework Agreement that were dependent on that mechanism could not be completed, and consequently the full and final settlement which was the objective of the Framework Agreement could not be achieved.

143 Thus, although I had in my analysis of Arena's case of breach observed that Arena had affirmed the Framework Agreement despite the alleged repudiatory breaches that had already taken place, such affirmation would be ineffective if the parties' contractual obligations had already become radically or fundamentally different from what had been agreed (which I find is the case). That happened when the Fund had used its best endeavours to get its depository agents to transfer the Fund's AEI shares to ZICO, but its depository agents refused to do so.

144 I thus find that the non-fulfilment of the Implied Condition discharged the parties from further performance of the Framework Agreement, and that Arena's conduct affirming the Framework Agreement prior to it purporting to terminate the same on 2 June 2022 did not keep the Framework Agreement in force.

Was the Framework Agreement frustrated?

145 My conclusion above on the non-fulfilment of the Implied Condition discharging the parties from further performance of the Framework Agreement is sufficient for Arena to pursue its claims against the Fund and the Fund Manager under the Subscription Agreement and side letters (as the case may be).

146 Arena also pleaded the doctrine of frustration as a further or alternative basis for this outcome.[92] However, in its written submissions Arena contended that for "the sake of brevity, Arena will not be pursuing its claim in frustration and will focus on its alternative case of non-fulfilment of an implied condition subsequent."[93] The Fund Manager's counsel thus did not address the issue of frustration at the hearing of oral submissions.

147 When the parties made further submissions on *MSC Mediterranean*, however, Arena said this:[94]

> … Arena did not elaborate on and pursue its claim in frustration for the sake of brevity as the law on frustration is trite and Arena's arguments on frustration are obvious from its pleadings. It bears noting that Arena had not abandoned its claim in frustration.

148 The Fund Manager objected to what it regarded as a change in position on Arena's behalf. Its lawyers said in a letter dated 6 August 2024:[95]

> … Arena did abandon its claim seeking a declaration that the Framework Agreement was frustrated. This was why no reply submissions were made in that respect at the hearing before the Court on 21 March 2024. It is our client's position that it does not accept Arena's attempt to backtrack on the position taken in its Submissions on No Case to Answer.

149 I agree with the Fund Manager that Arena had, by its written submissions, abandoned its case on frustration. That is what Arena conveyed when its lawyers said that "for the sake of brevity, Arena will not be pursuing

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92 SOC at para 40A and Relief 2.

93 CWS at para 232.

94 Claimant's Further Written Submissions dated 31 July 2024 ("CFWS") at para 18.

95 Letter to Court dated 6 August 2024 at para 7.

its claim in frustration".[96] Both the Fund Manager and the court understood from that that Arena was no longer taking the point. It is noteworthy that Arena said that it "will not be pursuing its claim for frustration" in a section captioned, "Further or in the alternative, the Framework Agreement has been discharged by reason of non-fulfilment of the implied condition".[97] That reinforced what was being conveyed: that Arena had abandoned its case on frustration, and was only relying on non-fulfilment of the implied condition, as an alternative to its case on repudiatory breach. Furthermore, when addressing the relief that Arena was seeking, Arena's written submissions on Relief 2 simply sought: "Alternatively, a declaration that the Framework Agreement has been discharged by reason of non-fulfilment of the Implied Condition Subsequent".[98] Arena said nothing there about a declaration that the Framework Agreement had been frustrated, in contrast with Relief 2 as pleaded: "In the alternative to Relief 1A, a declaration that the Framework Agreement *has been discharged by frustration* or by reason of non-fulfilment of the Implied Condition…" [emphasis added].[99]

150 The same language (*ie*, of a matter not being "pursued") was used in relation to Arena's alternative case on the second breach arising from its lawyers' letter of 24 May 2022: "For the sake of brevity, Arena will not pursue its alternative case on the 2nd breach arising from D&N's letter dated 24 May 2022"[100] (see [64]–[68] for a fuller discussion). Arena has not suggested that that merely meant it was not elaborating on that point; it had abandoned that

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96 CWS at para 232.

97 CWS at p 61.

98 CWS at para 260.

99 SOC at p 23.

100 CWS at para 42.

alternative case. In a similar vein, Arena said "Arena is no longer pursing Reliefs 1A(iii) and 2(iii) as the Fund has been struck off the Register",[101] and Arena accordingly omitted those reliefs from what it asked the court to grant.[102]

151 As the parties' written submissions had been filed simultaneously, however, the Fund Manager did address the point of frustration in its written submissions.[103] The Fund Manager did not make *reply* submissions orally, but given that Arena did not address the point about frustration in its written submissions, there was nothing for the Fund Manager to reply to. In the circumstances, I allow Arena to take the point about frustration, as it did in its further written submissions.[104]

152 I find that if the Framework Agreement had not been discharged due to non-fulfilment of the Implied Condition, it would have been discharged by the doctrine of frustration. In view of the Fund's inability to get its depository agents to transfer the Fund's AEI shares to ZICO, all of the transactions in the Framework Agreement that were premised on that transfer could not be completed; and without those transactions being completed, there would not be a full and final settlement between the Fund and/or the Principal, and Arena, on the terms of the Framework Agreement. The depository agents' refusal to transfer the Fund's AEI Shares to ZICO had made further performance of the Framework Agreement "radically or fundamentally different" from what the parties had envisaged at the time they entered into the Framework Agreement.

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101 CWS at footnote 297.

102 CWS at para 260.

103 2DWS at paras 114–121.

104 CFWS at paras 18–33.

Accordingly, the Framework Agreement would be discharged by frustration, if it were not discharged by the non-fulfilment of the Implied Condition.

153 Insofar as the Fund Manager relies on affirmation to meet Arena's case on frustration,[105] the principle in *MSC Mediterranean* applies to defeat the Fund Manager's argument: when a contract has been frustrated, it cannot be affirmed (see [138]–[144] above).

Relief

154 Based on my findings above:

(a) Arena has not established a case for terminating the Framework Agreement for repudiatory breach by the Fund;

(b) the Framework Agreement has, however, been discharged by non-fulfilment of the Implied Condition; and

(c) alternatively, the Framework Agreement has been discharged by frustration.

155 Arena was, accordingly, free to pursue its claims against the Fund and the Fund Manager, under the Subscription Agreement and side letters (as the case may be).

156 Arena claims the principal sum of US$16,633,540.66 under Relief 1A(i) (if the Framework Agreement were terminated for breach) and in the alternative, under Relief 2(i) (if the Framework Agreement were discharged for non-fulfilment of the Implied Condition, or frustration). The claim for the sum of

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105 2DWS at para 53A read with 40.

US$16,633,540.66 is brought pursuant to cl 4.1(l) of the second side letter, which provides as follows:[106]

> **4 Undertakings**
>
> 4.1 The Fund and Investment Manager [*ie*, the Fund Manager] jointly and severally agree and undertake, and shall procure, that during the Relevant Period:
>
> …
>
> (l) the Fund will effect a redemption of all the Subscription Shares held by the Investor [*ie*, Arena] and pay redemption proceeds amounting to the Return Amount (less any amounts received in respect of the Tranche A Distribution) ("***Redemption***") to the Investor:
>
> (i) immediately (and in any event no later than two (2) Business Days) after an Event of Default has occurred…; or
>
> (ii) before the first anniversary of the Effective Date [*ie*, before 25 May 2022)].
>
> [emphasis in original]

157 In relation to Arena, the Return Amount was US$25m, as defined in cl 1.5 of the Second Side Letter.[107] It is common ground that prior to the Framework Agreement the Fund had paid Arena US$999,976.02 in redemption proceeds.[108] That figure was rounded up to US$1m in cl 1.1 of the Framework Agreement (see [4] above), which states that Arena had received US$1m prior to the Framework Agreement and that the Framework Agreement sets out a framework for the repayment of a total fixed sum of US$24m. On 23 March 2022, the Fund paid Arena a further S$10m (the equivalent of US$7,366,483.32) pursuant to cl 1.3(c) of the Framework Agreement.

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106 2CB at p 341.

107 2CB at p 332.

108 SOC at para 13; Defence at para 14.

Deducting those two payments from the Return Amount of US$25m leaves the balance of US$16,633,540.66 which Arena claims.[109]

158 Under Relief 1A(ii) and alternatively, Relief 2(ii), Arena seeks an order that the Fund forthwith pay Arena the sum of US$1.5m.[110] This claim is premised on the Fund being in breach of cl 1.5(a) in relation to the transfer of US$1.5m in AEI shares to Arena; I have found, however, that the Fund did not breach that clause.

159 Further or in the alternative to Reliefs 1A and 2, under Relief 3, Arena seeks damages to be assessed for the Fund's and/or Fund Manager's breaches of undertakings under cl 4.1(l) of the Second Side Letter, which obliged the Fund Manager to procure the Fund to pay, and the Fund was due to pay, the sum of US$16,633,540.66 to Arena by 25 May 2022.[111]

160 At the hearing of oral submissions, counsel for Arena submitted that the quantum of those damages would be the sum of US$16,633,540.66.[112] The Fund Manager responded to that in subsequent correspondence. In the Fund Manager's lawyers' letter dated 1 April 2024, they said that in "respect of Relief (3), in the event that the Fund and the Fund Manager are found to be in breach of Clause 4.1(l) of the Second Side Letter, the Fund Manager does not dispute Arena's position that the Fund and the Fund Manager are to be held jointly and severally liable".[113]

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109 SOC at para 41.

110 CWS at para 260(e).

111 CWS at para 260(f).

112 Transcript, 21 March 2024, at 120:3 to 120:5.

113 Letter to Court dated 1 April 2024 at para 5.

161 However, they went on to say that the obligation under cl 4.1(l) of the Second Side Letter was for the Fund to effect a redemption of all the Subscription Shares held by the Investor, and the requirement to pay the consequential redemption proceeds to Arena did not arise unless and until the redemption was effected. Accordingly, the Fund Manager also disputed Arena's claim under Relief 4 for interest pursuant to Clause 7.3 of the Second Side Letter.[114]

162 Clause 4.1(l) of the Second Side Letter has been set out above at [156]. Clause 7.3 of the Second Side Letter provides as follows:[115]

> If the Fund and/or the Investment Manager default in the payment of any sum payable to the Investor under this letter, its liability shall be increased to include interest on such sum from the date on which such payment is due until the date of actual payment (after as well as before judgment) at a rate of 25% per annum. Such interest shall accrue from day to day and shall be compounded monthly.

163 I do not accept the Fund Manager's argument that:

(a) any default under cl 4.1(l) of the Second Side Letter was only in relation to effecting a redemption of Arena's Subscription Shares;

(b) there was no default in payment of redemption proceeds, as that requirement would only arise if the redemption were effected; and

(c) interest under cl 7.3 of the Second Side Letter does not apply, as there is no default in payment.

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114 Letter to Court dated 1 April 2024 at paras 9–10.

115 2CB at p 350.

164 Clause 4.1(l) of the Second Side Letter simply provides that the Fund "will effect a redemption of all the Subscription Shares held by the Investor and pay redemption proceeds".[116] There are two obligations there: (a) to effect a redemption; and (b) to pay redemption proceeds. Both obligations were breached when the Fund did not effect a redemption of Arena's Subscription Shares, and the Fund did not pay the redemption proceeds. It would be wholly uncommercial to say that cl 7.3 of the Second Side Letter does not apply to compensate the Investor(s) for late payment of what was to be paid under cl 4.1(l), on the basis that the only default was in relation to effecting redemption, and not also in relation to payment of redemption proceeds.

165 Under Relief 4, Arena claims interest at a rate of 25% per annum from 26 May 2022 until the date of payment by the Fund, pursuant to cl 7.3.[117] For the above reasons, this is a good claim.

166 Additionally, Arena seeks declarations as to the status of the Agreement to Subscribe, comprising the Subscription Agreement and the side letters (under Relief 1) and the Framework Agreement (under Relief 1A and Relief 2).

Conclusion

167 For the above reasons, my decision on the relief sought by Arena is as follows:

(a) Relief 1: I grant a declaration that the Agreement to Subscribe (comprising the Subscription Agreement and the side letters) is valid and subsisting;

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116 2CB at p 341.

117 CWS at para 260(g).

(b) Relief 1A: I do not grant a declaration that Arena had validly terminated the Framework Agreement on 2 June 2022 (for repudiatory breach by the Fund);

(c) Relief 2: I grant a declaration that the Framework Agreement has been discharged by reason of non-fulfilment of the Implied Condition or alternatively, by reason of frustration;

(d) Relief 1A(i) / Relief 2(i): pursuant to Relief 2(i) (not Relief 1A(i)), I grant an order that the Fund shall pay to Arena the sum of US$16,633,540.66 forthwith;

(e) Relief 1A(ii) / Relief 2(ii): I do not grant an order that the Fund shall forthwith pay Arena the sum of US$1.5m pursuant to cl 1.5(a) of the Framework Agreement – I have found that the Fund did not breach cl 1.5(a);

(f) Relief 3: in the alternative to the order for payment by the Fund of US$16,633,540.66, I award damages against the Fund in the same sum; and I also award damages against the Fund Manager in the same sum.

(g) Relief 4: I award interest on the sum of US$16,633,540.66 against both the Fund and the Fund Manager from 26 May 2022 until the date of actual payment of that sum to Arena, pursuant to cl 7.3 of the Second Side Letter.

168 Unless the parties can agree on costs by 1 November 2024, they are to file their costs submissions, limited to 10 pages (excluding any schedule of disbursements), by 8 November 2024.

Andre Maniam
Judge of the High Court

Jimmy Yim Wing Kuen, SC, Chloe Sobhana Ajit, Joel Leow Wei Xiang and Samuel Wittberger (Drew & Napier LLC) for the claimant;
The first defendant unrepresented and absent;
Daniel Chia Hsiung Wen and Charlene Wee Swee Ting (Prolegis LLC) for the second defendant.