Ng Swee Hua *v* Auston International Group Ltd and another
[2010] SGHC 362

Case Number	: Suit No 129 of 2007 (Registrar's Appeal No 309 of 2010)
Decision Date	: 15 December 2010
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Francis Xavier, SC and Alina Chia (Rajah & Tann LLP) for the plaintiff; N Sreenivasan and Valerie Ang (Straits Law Practice LLC) for the defendants.
Parties	: Ng Swee Hua — Auston International Group Ltd and another

Damages

15 December 2010

Tay Yong Kwang J:

Introduction

1 This was the defendants' appeal against the assessment of damages conducted by an Assistant Registrar ("AR"). I dismissed the appeal and ordered the defendants to pay the plaintiff costs of the appeal to be taxed or agreed. The defendants have now appealed to the Court of Appeal. This is their second appeal to the Court of Appeal in this action.

Background to the assessment of damages

2 The first defendant is a Singapore listed company. The second defendant is its wholly owned subsidiary. The plaintiff was a director of both defendants between 2 May 2006 and 4 January 2007 and also the managing director of the second defendant between 3 January 2006 and 13 September 2006.

3 By an investment agreement dated 15 December 2005 made between the plaintiff and the defendants, it was agreed that in consideration of the plaintiff's existing loan of $200,000 to the defendants, the plaintiff would subscribe for Convertible Bonds of an aggregate principal of $200,000. The bonds were convertible into shares of the first or the second defendants or a combination of both. The plaintiff also had the option of subscribing to an additional $400,000 worth of bonds within six months from completion of the said investment agreement. The investment agreement was varied by a supplemental investment agreement dated 14 June 2006 (dated wrongly as 14 June 2005).

4 On 3 November 2006, the plaintiff issued the conversion notice to the defendants indicating his intention to convert the loan into 5 million ordinary shares of the first defendant at the agreed price of 4 cents per share. The first defendant did not act on the conversion notice but instructed its then solicitors to draft a shareholders' circular to seek its shareholders' approval to issue the conversion shares on the basis that such approval was necessary as the plaintiff was then a director of the company. The draft circular was never finalized. On 4 January 2007, the plaintiff resigned from his directorship in both companies. On 1 March 2007, he commenced this action claiming specific performance for the issuance of the conversion shares or, alternatively, damages.

5 The trial judge held that the defendants were in breach of the investment agreement and that damages ought to be assessed on the basis of the loss of chance to convert the Convertible Bonds into shares. She also held that the Convertible Bonds had been issued on or about 19 December 2005 and that the conditions precedent in clause 3.4 (added by the supplemental investment agreement) had no application to the Convertible Bonds.

6 The defendants appealed to the Court of Appeal. The Court of Appeal dismissed their appeal (see *Auston International Group Ltd and anor v Ng Swee Hua* [2009] 4 SLR(R) 628). The Court of Appeal held at [37] that the defendants were in breach of their obligation in failing to issue and credit the conversion shares into the securities account designated by the plaintiff pursuant to the investment agreement. The Court of Appeal also directed at [44] that damages be assessed before the registrar.

7 The Court of Appeal said the following in relation to the issue of damages (with the plaintiff referred to as the respondent and the defendants referred to as the appellants):

> ***Damages***
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> 38 The remaining issue we have to decide is how damages should be assessed. Having found that the Convertible Bonds were issued, the Judge decided the issue of liability against the appellants and also that damages be assessed on the basis of the loss of chance to convert the Convertible Bonds into the Conversion Shares. We do not agree with this basis for assessment. The doctrine of "loss of chance" was recently revisited by this court *in JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm*) [2007] 4 SLR 460 at [147]-[156], wherein the principles laid down in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 ("*Allied Maples*") were re-endorsed. In essence, where the loss of chance caused by the defendant's default is dependent upon the action of an independent third party, a plaintiff might not be required to show on a balance of probabilities that the chance would have come to fruition. Damages would be assessed so long as the chance is a real or substantial one, as opposed to a speculative one. On the other hand, if no third party is involved, a plaintiff must prove what he would have done if there had been no breach on a balance of probabilities. The distinction is evident from the following extract from *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) ("*McGregor*"), at paras 8-034 – 8-037:
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> > In his judgment [in *Allied Maples*] Stuart-Smith LJ distinguished between three types of situation or categories. In his first category fall cases in which the defendant's negligence consists in some positive act of misfeasance and the question of causation is one of historical fact; this is of course the situation to which Lord Reid averted in *Davies v Taylor* and proof on the balance of probabilities prevail here. In the second category fall cases in which the defendant's negligence consists of an omission where causation depends not upon a question of historical fact but upon the answer to the hypothetical question what would the claimant have done if there had been no negligence; how the claimant would have reacted is again subject to proof on the balance of probabilities. In the third category fall cases in which the claimant's loss depends upon the hypothetical action of a third party, whether in addition to action by the claimant or independently of it; here the claimant need only show that he had a substantial chance of the third party acting in such a way as to benefit him.
> >
> > …
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> > From the above it can be seen that what is required to bring loss of a chance into play is the

hypothetical action of a third party.

…

… there is undoubtedly today an unfortunate tendency to argue loss of a chance in situations where it can have no conceivable application. The temptation is of course great; if total success cannot be achieved, aiming for a percentage success is attractive.

39 In the present case, the respondent's loss as a result of his being deprived of his conversion was due to a breach of contract by the appellants: it had nothing to do with the hypothetical action of a third party. This is an ordinary case of breach of contract for failing to deliver shares. The respondent did not lose any chance to acquire the Conversion Shares and thereafter sell them at a higher price at a later date because he could have gone into the market upon breach to purchase the equivalent 5m Auston shares. His loss, if any, would be the difference between the total cost of purchasing 5m Auston shares in the market and $200,000. The issue the court will have to decide is the relevant date on which the respondent should have gone into the market to buy 5m Auston shares.

40 Before us, counsel for the respondent contended that the earliest possible date to issue the Conversion Shares was 4 January 2007 and damages should be assessed on that date. This contention is based on the appellants' position that shareholders' approval to issue the Conversion Shares was required, and 4 January 2007 would, reasonably, be the earliest date to obtain such approval. On the other hand, counsel for the appellants argued that damages should be for failure to issue the Convertible Bonds and for assessment purposes, the court should take the price of Auston shares on 22 December 2005, that being the contemplated date for completion under the Investment Agreement.

41 We do not accept both arguments. The respondent's contention that 4 January 2007 was the relevant date for assessment is premised on the belief that shareholders' approval was required, while the appellants' contention of 22 December 2005 was premised on the Convertible Bonds not having been issued. Both are wrong.

42 The general principles applicable in determining damages on the seller's failure to deliver securities are set out in *McGregor* where the point is made (at para 24-003) that "[t]he normal measure of damages is the market price of the shares at the contractual time for delivery less the contract price." This would represent the amount that the buyer must obtain to put himself in the position he would have been in had the contract been performed, since to do so he must purchase equivalent shares in the market (*ibid*). It is also observed that the cases that have been adjudicated upon "indicate an application of [such] common principles while at the same time bringing out small differences" (*McGregor* at para 24-005). Thus, the date of breach may be postponed if the seller had sought more time to issue the shares and the buyer was willing to grant such indulgence, and the market price on the postponed date will therefore be the relevant one (*ibid*, citing *Wilson v London and Globe Finance Corp* (1897) 14 TLR 15). Whether these principles apply depend on the facts of the cases on which they were based. With reference to the present case, it will be necessary for the assessor to take into account the system of share trading on a scripless basis in the SGX. This means that the Conversion Shares, upon their issue, have to be transferred and registered in the name of the Central Depository (Pte) Limited ("CDP") to be held by the CDP for the account of the respondent before they can be traded in the SGX. Therefore the appropriate date for determining the measure of damages should be the date on which the Conversion Shares become listed on the SGX for trading.

43 What this date is depends on the facts. In the present case, there appears to be some evidence on record indicating that the appellants had asked the respondent for time to sort out the problem of getting shareholders' approval, which the respondent appeared to have agreed to, although it led to nothing. Nevertheless, the period of indulgence given by the respondent may have to be factored into determining the relevant date for the respondent to go into the market to purchase the shares (see *McGregor* at para 24-005).

The AR's findings at the assessment of damages

8 On 28 July 2010, the AR ruled as follows:

Based on the unchallenged evidence of the plaintiff, the plaintiff had granted the defendants an indulgence on 17 November 2010 [*sic - it should have been 2006]* to "draft various documents and to convene an [EGM] to obtain shareholders' and SGX's approval for the issuance of the Shares, after which [he] would receive the Shares" (AEIC of Ng Swee Hua at para 31). The plaintiff's evidence, in other words, was that he had granted an indulgence to the defendants to do all things necessary to effect the transfer of the Shares to him – this including obtaining shareholders' approval. This was the indulgence requested by the defendants, according to the plaintiff, and this was the indulgence he granted. Subsequent correspondences in the evidence do not establish that any other indulgence – this requiring, according to the defendants in their written submissions at para 14, a clear request for an indulgence by a seller – was present, or indicate that the afore-mentioned indulgence was in any way affected or altered. In this connection, it may be observed that the plaintiff, in a letter dated 5 January 2007, demanded the Shares to be issued by 15 January 2007; but the significance of this need not be considered, in light of the conclusion that I will come to later.

That said, the indulgence by the plaintiff was to end when all things necessary to effect the transfer of the Shares to him – this including obtaining shareholders' approval – was done; this, it follows, was the relevant period by which the Shares should have been issued to the plaintiff and/or listed on the SGX. In determining the period of the indulgence, the time taken for "conven[ing] an EGM to obtain shareholders' and SGX's approval for the issuance of the Shares" should be included. The defendants argue that the CA had indicated at [41] of its judgment that the determination of the relevant period must not take into account the time required for shareholders' approval. In my view, this was not expressly stated by the CA. In any event, the CA's main observations on the lack of necessity for shareholders' approval was for the key purpose of clarifying a point that "may have significance for investors generally" (see the CA's judgment at [31]), and therefore, this court is not precluded from finding that the period of the indulgence must take the time for obtaining shareholders' approval into account. Moreover, the CA's observations at [41] of its judgment was in regard to a bare contention by the plaintiff – which was unsurprisingly dismissed having regard to the fact that the CA had just held that shareholders' approval was not necessary – and not one rendered after a deliberation on the full evidence on the indulgence granted by the plaintiff. The full evidence on the indulgence granted, it seems, was not placed before the CA (but it has now been placed before this court), and there is nothing on the face of the CA's judgment that indicates that the CA had the benefit of the unchallenged evidence of the plaintiff, *viz*, that he had granted an indulgence to "draft various documents and to convene an [EGM] to obtain shareholders' and SGX's approval for the issuance of the Shares, after which [he] would receive the Shares".

There was no evidence led of the scenario(s) in which the defendants might not or would not have convened the EGM, steps had been taken to effect the transfer of the Shares. There was also no evidence led that the defendants would, somehow, in the course of taking steps to transfer the Shares, have come to the realisation that shareholders' approval was not actually needed to do so. As counsel for the defendants submitted, the defendants' "position had never changed, in that [it was] always of the view that shareholders' approval was required at the material time" (see the defendants' written submissions at para 27). On the evidence, if the defendants had taken steps to effect the transfer of the Shares, they would, on a balance of probabilities, have gone the whole hog – including obtaining shareholders' approval, unnecessary though it may have been – and therefore there is no reason why the time taken for shareholders' approval should not be taken into account.

From the evidence of Ong, the plaintiff's expert, (at para 15 of his report that was attached to his AEIC and reaffirmed in his testimony), the typical timeline for the entire process (including obtaining shareholders' approval) to be completed will typically be "about 10 to 11 weeks". I find no reason to reject the evidence of Ong, save for certain aspects, such as item (ii) at para 15, for which he conceded during cross-examination that it could be done within a week if the lawyers are "effective and efficient" and that the law firm used by the defendants – Stamford Law – "is one of the top firms in Singapore in this area [of law]". The evidence of the defendants' witness, Wong, was not helpful; it could be added that the examples he gave had surrounding factors and circumstances that differed from that in the present case. That said, taking into account Ong's concession, the estimated timeline would be eight to nine weeks (as compared to the 10 to 11 weeks that Ong had proposed). In my view, however, eight weeks would be a fairer and more appropriate figure to accept; in this regard, I would add that the maximum number of days that would have elapsed for the entire process – based on the times set out under the "Time Required" column at para 15 of Ong's report – is 59 days or eight weeks and three days. Eight weeks from 17 November 2006 would be 12 January 2007.

The actual quantum of damages due to the plaintiff, in my view, is to be calculated based on the volume weighted average price of the first defendant's shares on 12 January 2007. This would be $1,482,500. There will be no deduction of $200,000 from this figure, as agreed upon by the parties. In my view, the plaintiff is also entitled to pre-judgment interest at the rate of 5.33% per annum from the date of the last amendment of the Statement of Claim (*i.e.*, 13 February 2008) and post-judgment interest at the rate of 5.33% per annum.

As for contractual interest on the sum of $200,000, I would like parties to elaborate on their submissions now.

"Ong" referred to by the AR was Ong Hwee Li, chief executive officer of SAC Capital Private Limited, a boutique corporate finance firm specialising in equity fundraising and providing corporate finance advice. "Wong" was Keith Wong Kuan Kit, the executive director of the first defendant. No expert witness was called by the defendants at the assessment.

9 Counsel for the plaintiff then informed the AR that the plaintiff was claiming interest of $6,197.26 from 15 December 2005 to 31 December 2006, stating that interest was payable annually on 31 December. This figure apparently included interest up to 12 January 2007 – see [22] below. Reliance was placed on clause 4 of Schedule 1 to the investment agreement (see also [15] below). There appeared to have been some confusion before the AR as to the correct version of the said clause 4 and the hearing was stood down for the parties to try to sort this out. After a while, counsel for the defendants stated that if the agreement was as presented by the plaintiff, he would not have any views on the matter. He needed some time to look at what the discrepancy was and asked for leave to write to the AR after the assessment. Counsel for the plaintiff then suggested that they proceed on the basis of the plaintiff's figure with liberty to the defendant to ask for further arguments if necessary. Counsel for the defendants agreed and stated that if the agreement was as the plaintiff

said, he had no issue with the amount claimed. The AR awarded $6,197.26 to the plaintiff as contractual interest and gave leave to the defendants to ask for further arguments if necessary. He also granted the plaintiff the costs of the assessment to be agreed or taxed.

The defendants' arguments on appeal

10 The defendants submitted that the AR was wrong in taking into consideration the timeframe for obtaining shareholders' approval and in his award of interest. The defendants did not dispute the AR's finding that the plaintiff granted an indulgence up to 17 November 2006. They contended, however, that the Court of Appeal had made it clear that the time required for obtaining shareholders' approval need not be taken into account in determining the "relevant date" (see [41] and [43] of the Court of Appeal's judgment set out above). While the Court of Appeal acknowledged that there was a period of indulgence given by the plaintiff, this had to be taken in the light of the Court of Appeal's earlier statement that it did not accept the plaintiff's position that 4 January 2007 was the relevant date. The defendants therefore argued that the relevant time to be determined at the assessment of damages would be the actual number of days required for the issuance of the shares without the need for shareholders' approval.

11 The defendants provided three actual examples of the timeframe within which the first defendant had obtained SGX's approval for the issuance of shares while the plaintiff's expert did not provide any. Further, the plaintiff knew that shareholders' approval was not required and he had independent friendly legal advice on this in October 2006 before he issued the conversion notice. The plaintiff's letters after 17 November 2006 also showed that he held the view that shareholders' approval was not needed and this culminated in his resignation as a director of the first defendant on the basis that shareholders' approval would not be required if he were no longer a director. The plaintiff had clearly wanted the shares to be issued to him without the need for such approval.

12 The plaintiff's expert's evidence regarding the period of 10 to 11 weeks from the issuance of the conversion notice (which would have brought the relevant date to sometime between 24 and 26 January 2007) could not be sustained under cross-examination. The present situation was a simple one of conversion of an existing bond and was far more straightforward than the usual placement of new shares. The plaintiff had sought to confuse matters by introducing the issue of the timing required to draft the circular, the notice period for the EGM and the actual holding of the EGM.

13 The defendants submitted that since shareholders' approval was not needed, it would have been a straightforward application (additional listing application) to SGX and the approval in principle would usually be granted within 7 to 14 days unless the SGX had some queries or decided to impose conditions. Subsequent to such approval, the listed company would issue the share certificates and dispatch them to the shareholder and the CDP, after which a return of allotment would be duly filed with the Accounting and Corporate Regulatory Authority. The shares would be available for trading within less than 48 hours (one day to issue, another day to ensure crediting to the CDP). The relevant date (from 17 November 2006) would therefore have been 24 November 2006 (if SGX approved in 7 days) or 1 December 2006 (if SGX approved in 14 days). The transacted prices of the first defendant's shares on the following dates were:

4 December 2006 (Monday)	$0.070
5 December 2006 (Tuesday)	$0.060
6 December 2006 (Wednesday)	$0.060.

The plaintiff's 5 million shares would have cost him $350,000, $300,000 and $300,000 respectively on the above stated dates.

14 The defendants argued that using the basis set out by the Court of Appeal, the relevant date on which the plaintiff should have gone into the market to buy the 5 million shares should have been the lowest possible price during the period 24 November 2006 to 30 November 2006. The average of the lowest prices during this period was $0.062. Accordingly, the plaintiff's loss was $310,000.

15 On the issue of contractual interest, the defendants referred to clause 4 of Schedule 1 of the investment agreement. Clause 4.1 provided that the Convertible Bonds shall bear interest from the respective dates on which they are issued and registered at the rate of 3% per annum, payable bi-annually on 30 June and 31 December of each year. Clause 4.2 provided that the Convertible Bonds shall cease to bear interest upon conversion to shares and that all interest accrued on such Convertible Bonds from the last interest payment date would be forfeited upon conversion. The Court of Appeal stated at [28] of its judgment that the first tranche of $200,000 worth of Convertible Bonds was issued on or around 19 December 2005. Pursuant to clause 4.2, the plaintiff should be entitled to contractual interest up to the date of conversion (which should be 1 December 2006). However, as all interest accrued from the last interest payment date would be forfeited upon conversion, the total interest payable from 19 December 2005 to 30 June 2006 (193 days) on the amount of $200,000 would be $3,150.50 (and not the $6,197.26 awarded by the AR).

16 In respect of pre-judgment interest under section 12 of the Civil Law Act (Cap 43), the defendants submitted that such interest was discretionary and relied on *Nirumalan v Kanapathi Pillay v Teo Eng Chuan* [2003] 3 SLR 601 at [46] for the proposition that the basis of an award of interest is that the defendant has kept the plaintiff out of his money and has had the use of the money himself. They argued that the plaintiff's case shifted constantly with amendments to the Statement of Claim being made just before and during trial, changing the entire claim from general damages for breach of contract and specific performance to a claim for loss of opportunity. As found by the Court of Appeal, the plaintiff did not lose any chance to acquire the conversion shares and thereafter sell them at a higher price at a later date. The defendants had therefore not kept the plaintiff out of his money or had use of it. In any event, the rate of interest ought to be the contractual 3% per annum (and not the 5.33% as claimed by the plaintiff and awarded by the AR).

17 The defendants accepted that interest would be payable under O 42 r 12 (interest on judgment debts) of the Rules of Court (Cap 322, R5 - 2006 Ed) but contended that such interest should be based on the amount assessed at this appeal and that the rate of interest ought to be 3% per annum as contractually provided as the trial judge had held that the plaintiff was entitled to interest at the contractual rate (see [10] of the Court of Appeal's judgment).

18 Accordingly, the defendants submitted that damages should be assessed at $310,000, that contractual interest of $3,150.50 should be awarded and that the pre-judgment and post-judgment interest rates on the judgment amount of $310,000 ought to be 3% per annum.

The plaintiff's submissions on appeal

19 The plaintiff submitted that if the defendants had not asked for time to obtain shareholders' approval, he could have received the conversion shares within three and a half to four weeks from the issuance of the conversion notice. Because of the defendants' request on 17 November 2006 for time, he agreed to wait until after the convening of an EGM and after SGX's approval before taking delivery of the conversion shares. The AR accepted that the period of indulgence granted by the plaintiff was some eight to nine weeks because the plaintiff's expert had conceded that it was

possible to draft and submit the necessary documents to SGX within a week instead of the projected three weeks stated in his report. The AR's finding was said to be generous to the defendants as the first defendant's share price was on a rising trend from 12 January 2007 ($0.2965) to 19 January 2007 ($0.3831).

20 The terms on which the indulgence was granted were not challenged by the defendants. Time was given to the defendants to draft various documents, to convene an EGM and to obtain SGX's approval. The defendants had always maintained the position that shareholders' approval was required for the issuance of the conversion shares. Although the Court of Appeal at [41] of its judgment rejected the plaintiff's proposal of 4 January 2007 as the relevant date, this did not meant that the time required to obtain shareholders' approval was not to be taken into consideration. The Court of Appeal made that clear at [43] when it envisaged that the time granted to obtain shareholders' approval might have to be factored in at the assessment of damages.

21 The plaintiff's expert in his report stated that it would be impossible to determine the exact timing when the plaintiff would purchase the 5 million shares in the market. He therefore opined that the volume-weighted average price on the relevant day could be considered a reasonable estimate for the purchase price of the 5 million shares and prepared a table on the price for the first defendant's shares for the period 1 January 2007 to 28 February 2007. The plaintiff argued that the AR was correct in accepting that the volume-weighted average of the share price (which was $0.2965 on 12 January 2007) represented a fair valuation of the conversion shares. Courts in other jurisdictions have used this method to value shares (see for example, *Russell et al v K2 Energy Corp* [2002] ABQB 118 at [49], a decision of the Alberta Court of Queen's Bench, Judicial District of Calgary).

22 The plaintiff maintained that he was entitled to contractual interest of $6,197.26 on the Convertible Bonds under the said clause 4 (see [9] and [15] above). The amount was calculated on the basis that the relevant date was 12 January 2007 (3% x $200,000 x 377 over 365).

23 In respect of pre-judgment interest, the plaintiff argued that interest would be awarded on damages from the date of accrual of loss unless the plaintiff brought proceedings after unwarranted delay. He submitted that interest should run from 12 January 2007 (and not from 13 February 2008 as ordered by the AR), the date when the conversion shares ought to have been listed on the SGX, which was the date the loss occurred. The present action was commenced slightly more than a month after the loss. There was therefore no delay on the plaintiff's part. Although the Statement of Claim was amended in February 2008, that did not delay the trial. It was the defendants' breach of contract in not delivering the conversion shares which kept the plaintiff out of his money and caused his loss. The plaintiff's claim for loss of chance did not alter this fact.

24 Where post-judgment interest was concerned, the plaintiff pointed out that Supreme Court Practice Direction No. 1 of 2007 ("PD 1 of 2007") prescribed the default rate of interest on judgments as 5.33% per annum with effect from 1 April 2007. The parties did not agree to fix the judgment interest at 3%. The defendants appeared to have confused the contractual interest on the Convertible Bonds with judgment interest.

The decision of the court

25 In my view, the AR was correct in his decision to include the projected period for obtaining shareholders' approval in the equation when assessing damages. This was clearly contemplated by the Court of Appeal at [43] of its judgment when it considered the issue of damages. While shareholders' approval was not necessary as a matter of law (see [41] of that judgment), the parties did proceed in the belief that it was required, as a matter of fact (again at [43]). The evidence led by the plaintiff

was cogent and the timeframe proposed was reasonable. The plaintiff's expert was candid enough to acknowledge that things could move faster with "effective and efficient" legal advisors and the AR has fairly taken the shorter timeframe in his computation of the relevant date. The defendants' insistence that shareholders' approval was not required and therefore should not be factored in ignored the reality that the defendants had asked for indulgence of time for such approval to be obtained and the plaintiff had acceded to their request even if there was, as found by the Court of Appeal, a misunderstanding by one or both of the parties as to the legal requirements for the share issue.

26 On the issue of contractual interest, I assumed that no interest was paid by the defendants on 30 June 2006 although interest was supposed to be paid bi-annually on 30 June and 31 December each year (see [15] above). This was because of what had transpired as spelt out at [9] above and in the light of the defendants' submissions at [15] that the total interest payable from 19 December 2005 to 30 June 2006 (193 days) on the amount of $200,000 would be $3,150.50 (and not the $6,197.26 awarded by the AR). The defendants' arguments at [15] were premised on their contention that 1 December 2006 was the relevant date. As indicated earlier, I agreed with the AR that it ought to be 12 January 2007. The defendants were therefore not correct in saying that interest after 30 June 2006 had been forfeited. As provided in the said clause 4.2, interest after 31 December 2006 would be forfeited. However, the plaintiff appeared to have included in his claim for interest the 12 days after 31 December 2006 (see [22] above). If this is so, then to this extent, the computation of $6,197.26 was incorrect and ought to be reduced by $197.26 for the period from 1 to 12 January 2007. If, however, the 12 days were for the period between 19 and 31 December 2005 (for which period the defendants appeared to concede at [15] above that interest had not been paid on 31 December 2005), then no deduction should be made from the plaintiff's computation. In any event, the defendants' figure of $3,150.50 for 193 days does not appear to be correct arithmetically.

27 As for the arguments pertaining to pre-judgment and post-judgment interest, I agreed with the plaintiff that the defendants' reliance on the 3% rate provided in the investment agreement was misplaced. That was the rate payable on the Convertible Bonds. After the breach of contract by the defendants, the plaintiff's claim was not for interest on those bonds but interest on the damages that should be awarded to him and which represented his loss occasioned by the said breach. The pre-judgment rate of interest under section 12 of the Civil Law Act is discretionary and, as highlighted in paragraph 5 of PD 1 of 2007, "the Court retains the overriding discretion to depart from the default rate of interest in individual cases" under the said section 12. The AR chose the default rate of interest as he was entitled to. In relation to post-judgment interest, no valid reason was given to fault the AR in his decision to apply the default rate of 5.33%.

Conclusion

28 For these reasons, the defendants' appeal was dismissed with the defendants to bear the costs of the appeal which are to be taxed or agreed between the parties.